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DIRECTORS' LIABILITY FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW

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INTRODUCTION

1. The significance of corporate governance and directors' liability from the juridical perspective

Corporate governance is traditionally defined as the system by which the companies are directed and controlled, and good corporate governance is the heart of a successful business and contributes to the company's competitiveness. Within the corporate governance, the governance structure specifies the distribution of rights and responsibilities among different participants in the company. It also includes a set of relationships between a company's management, its board, its shareholders and creditors[1]. In these relationships, everyone is connected with the company, whether as member, employee, supplier, customer or director. All of them want the company to be well managed or at least managed for their own benefit. However, among these people, the only group that is in the position to ensure that the company is well managed is the group of directors[2]. In this sense, directors or officers should be considered as the key parties in corporate governance.

Since a company as an artificial person cannot perform its own acts and it needs real people to represent it and act on its behalf, apparently the company's success greatly depends on whether directors or officers act with good faith and in the interests of the company. In fact, the profits of a business should reward those who undertake the entrepreneurial functions (i.e., directors), rather than the shareholders who passively contribute capital[3]. Under this circumstance, directors are not only expected to monitor the organizational strategic decisions and performance of the company, but also to contribute

[1] European Commission, *Green paper on the EU corporate governance framework*, COM (2011) 164 final, p. 3.

[2] Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, *Mayson, French & Ryon on Company Law (2011-2012 Edition),* Oxford, Oxford University Press, p. 432.

[3] Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, *Mayson, French & Ryon…, op. cit.*, pp. 431-432.

to wealth creation and to ensure accountability to investors and authorities[4]. Therefore, it is indispensable for a company law to establish an appropriate mechanism to regulate directors' duties and responsibilities in managing the corporate affairs. The perfection of a company law in the area of corporate governance and directors' liability will not only help directors in avoiding risks during the fulfilment of their corporate obligations, but also advise directors of their rights and responsibilities and help them in finding answers to practical problems. Besides, a good company law should also be able to achieve balance between the managerial incentives of directors and the protection of corporate interests. This is because, on one hand, if the company law adopts too rigid attitudes towards directors, it will undoubtedly weaken the directors' enthusiasm in acting as an effective executor under the pressure of liabilities. On the other hand, if the company law adopts too flexible approaches in the regime of directors' liability, it may indirectly encourage the directors to take up high-risky business while it will definitely affect the interests of the other parties within the company[5].

From this perspective, company law rules play an important role in the achievement of good corporate governance. And one of the central issues for a company law should be on how to mediate different kinds of potential conflicts in the company: between directors and the company; between the company and its shareholders or creditors; between directors and shareholders or creditors; between majority shareholders and minority shareholders[6]. Therefore, in this dissertation, the first emphasis will be on the analysis of the substantive rules in this aspect so as to reveal different interests within a company in which directors may be involved.

2. The articulation between international law and national law from the perspective of directors' liability

[4] Gregory Francesco MAASSEN, *An International Comparison of Corporate Governance Models*, Amsterdam, PhD Series in General Management, 2002, p. 16.

[5] Cándido PAZ-ARES, *Responsabilidad de los administradores y gobierno corporativo*, Madrid, Fundación Registral, 2007, pp. 18 and ss.

[6] Jean Jacques DU PLESSIS, Anil HARGOVAN, Mirko BAGARIC, *Principles of Contemporary Corporate Governance (Second Edition)*, Cambridge, Cambridge University Press, 2011, p. 36.

After decades of globalization, nowadays it is very common for a company to be set up in a state while carrying out its activities in another state. As we have mentioned, corporate governance plays a very important role in a company, thus inevitably the corporate governance of a multinational company will also include many cross-boarder elements. Under this circumstance, national law will be very limited to solve the dispute arising out of an international situation; therefore, it is worthwhile to further investigate the application of international law in such a case.

In regard of the regime of directors' liability that we discuss in this dissertation, since it only concerns the dispute between private parties, private international law (PIL) will mainly serve to solve the difficulties deriving from such a dispute. Normally PIL does not deal with the material law issues but addresses the question on how to determine competent jurisdiction and designate applicable material law rules through its own mechanism. In this way, the main objective of PIL is to establish an effective and uniform system and to ensure that courts will not assume jurisdictions where they have contracted to exclude it or on grounds which are uncertain; that irrespective of where litigation takes place, the private parties will enjoy the due process rights; and that the law chosen to govern the legal transactions of the private parties will be respected in all jurisdictions[7].

However, the fact that different states adopt different approaches and follow different connecting factors in establishing its own PIL rules impedes the development of international civil and commercial relations. Therefore, the most common way is to establish international conventions or treaties in order to harmonize the difficulties arising out of a special area at an international dimension. In this regard, international conventions concerning PIL issues will serve to promote the harmonization or approximation on conflict of laws deriving from different legal traditions. Within the EU, Brussels Convention [8] and Rome Convention [9] used to be the most important Community

[7] Richard Frimpong OPPONG, "The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation", *Yearbook of Private International Law*, Vol. VIII, 2006, pp. 189-212, p. 190, in this article the author explained the functions of Private International Law in a cross-boarder situation.

[8] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

[9] Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.

instruments while they were later replaced by and integrated into Brussels I Regulation[10] and Rome I Regulation[11] respectively. Brussels I Regulation deals with the issues in relation to jurisdiction and enforcement of judgments in civil and commercial matters while Rome I Regulations deal with the issues in relation to the law applicable to contractual obligations. Besides, the EU legislators have also established Rome II Regulation[12] so as to deal with the issues in relation to the law applicable to non-contractual obligations. The promulgation of these regulations binds on all the Member states and provides them with more structured EU institutions that become immediately enforceable and directly applicable within their territories[13]. Under this circumstance, these regulations override all national laws dealing with the same subject matter and subsequent national legislation must also be consistent with these regulations and be made in the light of them, which has been commonly accepted as the primacy principle[14].

Since directors' liability also refers to a civil and commercial matter, it is relevant for us to bring further consideration and examination on how the EU regulations apply in such an issue. In this case, it must be noticed that directors' liability is a regime that is basically ruled by substantive laws. However, the mentioned regulations do not directly solve a substantive question, but they only refer to PIL rules that serve to designate the applicable national substantive rules to apply in dealing with a dispute arising out of directors' liability that involves cross-boarder elements. Brussels and Rome Regulations contain a variety of civil and commercial matters, the scope of which is obviously greater than that of directors' liability, which makes them less likely to draw special statement to the regime of directors' liability. Under this circumstance, in a cross-boarder situation that makes relevant the determination of competent court and applicable law to the regime of directors' liability, it is possible that some aspects in this regime cannot be clearly regulated by these EU regulations and need further interpretation by referring to ECJ's decisions.

[10] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[11] Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
[12] Council Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2008 on the law applicable to non-contractual obligations.
[13] Cedric GUYOT, Benjamin SIMONIS, "Europe" in Shelby R. GRUBBS, *International Civil Procedure*, The Hague, Kluwer Law International, 2003, pp. 201-212, p. 202.
[14] In this sense, see Roman KWIECIEŃ, "The Primacy of European Union Law over National Law Under the Constitutional Treaty", *German Law Journal*, Vol. 6, No. 11, 2005, pp. 1479-1496, pp. 1479 and ss. Also see Christine JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford, Oxford University Press, 2013, pp. 272 and ss.

Nevertheless, in the case where the EU law remains silent in certain aspect of directors' liability, it should give room to national PIL rules to make a further interpretation so as to determine a competent court as well as applicable substantive rules[15]. Besides, the initiative of the EU legislators to promulgate these regulations is mainly to eliminate obstacles to the functioning of the internal market that may derive from disparities between national legislations. However, it does not mean that the application of the mentioned EU Regulations is only confined to intra-EU disputes[16]. In fact, the ECJ's decision in *Owusu*[17] has revealed that Brussels I Regulations could also be applicable in a case involving a third state element. And Rome I and Rome II Regulations also indicate that a law specified by these Regulations shall apply whether or not it is a law of a Member state[18]. However, the EU regulations remain very unclear on the regime of directors' liability that involves a sole Member state and a third state but not with another Member state, thus it should leave for national PIL rules to give further inspection on this aspect. Therefore, the second emphasis in this dissertation will be on the analysis of the PIL rules so as to reveal the interaction between the EU law and national law, and the influence on directors' liability that involves a cross-boarder situation.

The EU regulations as far as we have mentioned solely deal with a situation falling outside the scope of insolvency. However, directors' liability is not a pure corporate issue, but directors could also be required to assume liabilities even after the commencement of the insolvency proceedings. Under this circumstance, neither Brussels nor Rome Regulations will serve in a cross-boarder insolvency circumstance. The EU legislators have promulgated a special Insolvency Regulation and have established a set of conflict-of-jurisdiction and conflict-of-law rules in this regulation with the objective to deal with cross-boarder insolvency situations within the EU. However, there still exist some unclearness between Insolvency Regulation and other EU regulations such as Brussels I Regulation. Therefore, the third emphasis in this dissertation will be on the finding out of

[15] Rafael ARENAS GARCÍA, *El control de oficio de la competencia judicial internacional,* Madrid, Eurolex, 1996, p. 44.

[16] See Opinion 1/03, Opinion pursuant to Article 300 (6) EC, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, paragraph 143.

[17] See Judgment of the Court of 1 March 2005, Case C-281/02, *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas", Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd.*

[18] See Article 2 of Rome I Regulation and Article 3 of Rome II Regulation.

the boundary between these Regulations and on how Insolvency Regulation applies in the directors' liability that involves a cross-boarder situation.

Nowadays, on one hand, since the EU treaty has recognized the freedom of establishment within the EU territory, ECJ has accumulated abundant case law resources in developing the EU PIL rules as regards companies. Nevertheless, the EU legislators believe that the dispersion in the case law of the PIL rules in relation to companies will impede the harmonization in this aspect to a further extent, thus the unification and codification of the PIL rules including applicable law relating to companies is already on their agenda[19]. On the other hand, since PIL rules do not actually solve the substantive problems, the EU legislators have also tried to unify and harmonize the rules in the aspect of substantive company law rules in order to encourage companies to conduct business across Member state boundaries better. In this area, the movement of unification and harmonization by means of a set of draft directives in 1990s turned out to be a failure. The common view is that the failure derived from that pubic-interest-minded EU legislators attempted to improve the fairness and efficiency of corporate law within the EU while the Member states were more captive to the interests of national business and thus blocked or watered down the EU's proposals[20]. Therefore, if the EU legislators intend to establish a uniform EU rule on corporate governance and directors' liability in the future, they should become more mature to find a way that the interests between the EU and its Member states could be reconciled and thus make a proposal to the harmonization of the EU company law in this area which could not only take into account the well-functioning of the single market but also be accepted by all the Member states.

3. The structure of this dissertation

In the topic that we are dealing with in this dissertation, we believe that it merits two considerations respectively based on substantive law and PIL rules. Therefore, in the first chapter, we would like to give a general introduction to the regime of directors' liability

[19] See the EU Commission's Timetable for 2010-2014, http://conflictoflaws.net/2010/commissions-timetable-for-2010-2014/.

[20] Luca ENRIQUES, "EC Company Law Directives and Regulations: How Trivial Are They?", *U. Pa. J. Int'l Econ. L.*, Vol. 27:1, 2006, p. 62.

from a substantive and comparative perspective. Within the EU Member states, we select four legal systems to carry out our further discussion, i.e. France, UK, Germany and Spain. In this case, French law and German law inherit many traditions from the continental law systems, while the abundant case law resources in British law could enable us to understand better the directors' liability from the perspective of common law jurisdictions. Besides, in Spanish law, the liability regime presents its own features that cannot be found in other legal systems, and it could also provide us with more alternatives to solve the difficulties deriving from a case that involves cross-boarder elements in this area. By such an introductory and comparative analysis, we could have a general understanding on the development of the regime of directors' liability within the EU Member states.

Besides, apart from intra-European activities, a company incorporated in the EU will also expand its business in a third state, which makes corporate governance internationally relevant. In a case of directors' liability involving a Member state and a third state, we select the Chinese liability regime to be our third state model since China's powerful economic achievement has been widely recognized. Meanwhile, the EU has become one of China's biggest economic partners, which makes the discussion of corporate governance and directors' liability within the two world's biggest economies very meaningful.

After the analysis of the substantive rules, in the second chapter, we will focus on the examination on how the PIL rules will be correctly applied to designate a competent court in order to establish jurisdiction to a substantive issue. In this case, on one hand, as the most fundamental PIL rule within the EU, we will turn to Brussels I Regulation and examine the applicability of this regulation in directors' liability. The discussion will concern the connecting factors such as the defendant's domicile, exclusive jurisdiction, party autonomy, and contractual and non-contractual backgrounds. Besides, as we have mentioned, since directors may also be forced to assume liabilities after the company's insolvency is triggered, it is also relevant for us to draw the boundary between these two EU regulations and then examine how the Insolvency Regulation will be applied in a cross-boarder dispute regarding directors' liability. Meanwhile, it is also possible for a dispute arising out of directors' liability to be submitted to arbitration. Since arbitration is a dispute resolution mechanism that provides an alternative for the parties beyond judicial litigation, it will be relevant for us to have a further examination on the relations between

arbitration and judicial litigation, and on how a dispute in this aspect will be effectively resolved by an arbitral tribunal. Furthermore, our discussion will also be extended to an issue involving a sole Member state and a third state but not with another Member state so as to find out how the EU Member states and third states will designate a competent court to deal with a dispute in respect of directors' liability from an international perspective.

PIL still merits further consideration on how an applicable law will be correctly designated by conflict-of-law rules in order to solve a substantive issue. Therefore, in the third chapter, since Rome I and Rome II Regulations are the two most fundamental PIL rules in the area of applicable law within the EU, we will firstly examine whether or not the two regulations serve in the regime of directors' liability. If they turn to be applicable, it is also relevant for us to know how to find an applicable national law by following the criteria in these regulations. Besides, we will also concentrate on the discussion of how the principle of freedom of establishment ensured by the EU law will affect directors' liability and the function that ECJ performs in deciding an applicable law in this field. Meanwhile, if a company encounters insolvency, inevitably we will have to refer to Insolvency Regulation again so as to make it clear how the criterion of conflict-of-law rules in this regulation affects the regime of directors' liability. Furthermore, our discussion will also be extended to an issue involving a sole Member state and a third state but not with another Member state so as to find out how the EU Member states and third states will decide an applicable substantive law to deal with a dispute arising out of directors' liability from an international perspective.

CHAPTER I

DIRECTORS' LIABILITY FROM THE PERSPECTIVE OF COMPARATIVE LAW

Since recent decades, the EU has tried to maintain the well functioning of the internal market and improve the business environment in Europe, in which the improvement of corporate governance within the EU territory were also highly valued by the EU legislators. Under this circumstance, the EU company law and corporate governance rules should foster efficiency and competitiveness for the companies, and provide equivalent protection for shareholders and other parties concerned with companies so as to be adapted to the needs of these objectives[21]. In the aspect of corporate governance, directors' liability is an important and effective compliance and risk-allocation mechanism, and it constitutes a necessary corollary to control issues within a company[22]. The regime of directors' liability include the determination of specific duties of directors, the limits of management behaviour and the alternatives left for shareholders or creditors which provide them with legislative protection against management misconducts when dealing with the company[23]. In this sense, a good liability regime in this area should reach balance between the stimulation of directors during the exercise of their functions and the protection of the interests of the company, shareholders or creditors.

Since the mobility of companies is ensured by the freedom of establishment, nowadays a company within the EU territory is more likely to be incorporated in a Member state while developing its business in another Member state. Under this circumstance, judicial conflict may often arise due to the cross-boarder movement. However, the EU legislators still have not established uniform EU PIL rules in relation to companies and the corporate governance. Therefore, as the first step, we should analyze the differences in the legal landscape governing directors' duties and liability in the Member states, while it should greatly depend on the substantive rules of the Member states since there exists a significant degree of variation between the company laws of the Member states.

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[21] See European Commission, "Commission plans to modernize European company law and corporate governance", this article is available on the website: http://europa.eu/rapid/press-release_IP-12-1340_en.htm.

[22] Carsten GERNER-BEUERLE, Philipp PAECH, Edmund Philipp SCHUSTER, "Study on Directors' Duties and Liability", pp. 1-427, p. 7. this article is available on the website: http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf.

[23] Carsten GERNER-BEUERLE, Philipp PAECH, Edmund Philipp SCHUSTER, "Study on Directors'…", *loc. cit.*, p. 7.

In this chapter, we will develop our discussion by following such a line: firstly, we will introduce the organization and structure of boards in the four Member states that we select (i.e., France, the UK, Germany and Spain), which could cover the choice between one-tier or two-tier board system, we will refer to the substantive provisions in the company laws in order to find out the delimitation of directors' duties in these Member states. Secondly, we will focus on the liability regimes which enable the company, shareholders or creditors to seek compensation from directors, and to find out under which circumstance a corporate action, a derivative action or a personal action will be possible. Thirdly, we will also talk about directors' duties at the vicinity of insolvency, particularly to petition for the opening of the insolvency proceedings. In this case, we will find out how a Member state defines such kind of liability so as to help localize the right connecting factors in such a liability and decide a competent court or an applicable law in the next chapters. Fourthly, apart from civil liability, we will also examine whether possible criminal or administrative liability will be imposed onto directors in these Member states.

In a case of directors' liability involving a Member state and a third state, it is not similar to the case of the EU in which the EU legislators could stimulate a legal proximity through the promotion of cooperation between the companies and the harmonization of company law within the Member states, a case involving third state element will definitely be more complicated. In this case, we select the Chinese liability regime to be the example as a third state in our discussion since China has drawn worldwide attention with its remarkable economic achievement during the recent decades, and the number of Chinese and foreign companies are growing very fast in Chinese market. On this background, it calls for new development in company law and corporate governance so as to achieve better enforcement of liability against disqualified directors of Chinese or foreign-incorporated companies. Meanwhile, since the EU remains China's one of the biggest economic partners, a high-level cooperation in the area of company law and corporate governance will be a positive reciprocity to both the parties. Therefore, from a comparative-analytical perspective, we will try to find out the similarities and differences between Chinese law and the rules of the Member states in respect of directors' liability, and we will also carry out a further discussion on how to harmonize the international corporate governance from a PIL perspective in the next chapters.

1. The regime of Directors' liability in EU Member States

1.1. Directors' liability in French law

French Law can be seen as a representative in the continental law system, in which French Law inherits many continental law traditions. Meanwhile, in French regime, abundant case law and doctrine resources have prospered this aspect and are worth a further discussion as well.

1.1.1. The identity of directors in French law

In French Law, directors are not only those directors *de jure* who are formally and legally appointed or elected as directors in accordance with the corporate regulations or the articles of associations, but also include those directors *de facto* (shadow directors) who in fact exert influence in the administration or management of the company. By virtue of *Code de Commerce* (French Commercial Code), a director *de facto* is defined as a person who has run, administered or managed a company directly or through an intermediary[24]. The French Supreme Court has also developed the definition of "director *de facto*" and has held that a director *de facto* is an individual or a legal entity that intervenes with the management, administration or direction of a company and performs positive acts of management or leadership in the company with all sovereignty and independence[25].

Generally speaking, in the aspect of criminal liability towards the company, and in the regime of *action en comblement du passif* in which liability is imposed onto directors for the insufficiency of corporate assets, the treatment between directors *de jure* and directors *de facto* does not have so much difference[26]. However, in the area of civil liability, liability of directors *de facto* is not classified as governed by the provisions of *Code de Commerce* but are classified as governed by the general provisions of tort law in *Code Civil* (French Civil Code) since they do not formally become directors of the company[27]. On this basis,

[24] See Articles L. 241-9 and L. 245-16 of *Code de commerce*.
[25] See *Cass. com. 25 janvier 1994*. Also see Yvon DREANO, Vincent NETTER, "France", in Alessandro VARRENTI, Fernando DE LAS CUEVAS (General Editors), *Company Directors (First edition),* London, Sweet & Maxwell, 2012, pp. 169-182, p. 179. Also see Nuria LATORRE CHINER, *El administrador de hecho (director de facto) en las sociedades de capital*, Granada, Editorial Comares, 2003, p. 33, in which the author has also inserted an introduction to the "shadow directors" in French law.
[26] See Article L. 654-1 2° of *Code de commerce*.
[27] See Articles 1382 and 1382 of *Code Civil*.

liability will be imposed onto directors *de facto* when they committed a fault that has caused certain damage to the company, while the existence of causation between the fault and the damage should be proved[28].

1.1.2. Directors' liability towards a company *in bonis* and a corporate action

Undoubtedly, directors owe fiduciary duties to the company in which they are in charge of. In this position, directors should act with diligence and loyalty to the company. The fiduciary duties in French regime are mainly developed by case law rather than by directly enacting the provisions in *Code de Commerce*. When directors act in breach of their duties, they should be held liable for the damage sustained by the company. In accordance with Article L. 225-251 of *Code de Commerce*, directors and managers should be liable towards the company for the breach of their duties or obligations imposed by relevant laws, regulations or company constitution[29]. In this sense, directors should assume civil liability due to their unlawful acts or gross omission that are contrary to the statutory or regulatory provisions, or the articles of bylaws[30].

In order to incur civil liability to directors, three elements should be evidenced: the fault, the damage suffered by the company, and the casual link between the wrongful act of directors and the loss suffered by the company[31]. Under French regime, the examination on whether directors have breached the duty of care and the duty of loyalty should be determined by whether they have acted in conformity with the interests of the company. If directors have acted in contrary to the interests of the company, they are usually considered to have breached their fiduciary duties. The breach of duties does not need to be very severe, but a simple management fault is enough to establish civil liability to directors[32].

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[28] Yvon DREANO, Vincent NETTER, "France", *loc. cit.,* p. 179. The reason may be that directors *de facto* are formally appointed by the company, so an issue deriving from their misconducts is not covered by company law rules but by the general tort principle of *"alterum non laedere"*.

[29] See Article L. 225-251 of *Code de commerce*. Also see Maurice COZIAN, Alain VIANDIER, Florence DEBOISSY, *Droit des sociétés (18e édition)*, Paris, LexisNexis/Litec, 2005, p. 265.

[30] See Debevoise & Plimpton LLP, "You're not in Delaware: Directors' Liability in Major European Countries", *Debevoise & Plimpton Private Equity Report*, Volume 3, Number 2, 2003, pp. 3-4. This article is available on the website: http://www.debevoise.com/files/Publication/5d82e764-1e6d-4420-94ae-2c607629a4ec/Presentation/PublicationAttachment/f5e041e2-dad2-48cf-9918-30cd9b4917b0/You%27re%20Not%20in%20Delaware_Winter2003.pdf

[31] Institut Français des Administrateurs, *La gouvernance des associations et fondations*, Paris, EYROLLES/IFA, 2009, pp. 87-88.

[32] Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants dans les sociétés anonymes en Droit français et Droit allemand*, Paris, L.G.D.J/Lextenso éditions, 2010, p. 65-70.

In French law, directors and the company are often bound up with by a contract of *mandat*[33]. Therefore, the requirement of the demonstration of the casual link between the misconducts of directors and the loss of the company could not be considered as that their relationship is non-contractual. On the contrary, it refers to a requirement for the company to bear the burden of proof in order to establish liability to directors[34]. Meanwhile, directors should prove that they have not participated in the adoption of a wrongful decision, or they have clearly objected to such a decision so as to get relieved. In this case, the relationship between directors and the company should be considered as contractual.

Besides, directors may also be forced to assume criminal liability as well as civil liability. Under French regime, in a case where directors have conducted some special behaviours, for example, the abuse of corporate assets[35], the distribution of fictitious dividends[36], the presentation of inaccurate accounts, or the failure to produce accounts[37], they should assume criminal as well as civil liability. For example, if directors misuse the corporate assets for personal interest, they will get pay a penalty of 375,000 euros as well as an imprisonment for 5 years[38]. However, this kind of criminal liability presents punitive rather than compensatory natures, and it will not be covered by the so-called "Director's Insurance" since it may be contrary to public order[39].

In French regime, sometimes the civil and criminal liability systems may present great proximity because some torts would also be regarded as criminal behaviours. However, a criminal liability regime should be based on the civil regime[40]. An action to incur civil or

[33] In French regime, a director in a public or private liability company usually exercises his functions on the basis of a *"contrat de mandat"*. See Yves DE CORDIT, *Le statut du dirigeant d'entreprise*, Bruxelles/Louvain-La-Neuve/Paris, Larcier, 2009, pp. 56 and ss. Also see Franck LUDWICZAK, Sophie MOREIL, *La rénumération des dirigeants*, Paris, L'Harmattan, 2013, pp. 28-29.

[34] Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…, op. cit.*, p. 80. Also see Yves GUYON, *Droit des affaires, Tome I*: *Droit commercial général et sociétés (10ème édition)*, Paris, Economica, 1998, p. 461. Also see Cristina MAURO, "France", in Helen ANDERSON, *Directors' Personal Liability for Corporate Fault: A Comparative Analysis*, The Hague, Kluwer Law International, 2008, pp. 139-158, p. 142.

[35] See Article L. 241-3-4 and L. 242-6-3 of *Code de commerce*.

[36] See Article L. 241-3-2 of *Code de commerce*.

[37] See Article L. 241-3-3 and L. 241-4 of *Code de commerce*.

[38] Pierre CABANE, *Manuel de Gouvernance d'Entreprise (Missions et fonctionnement des conseils, Meilleures pratiques de gouvernance, Rôle des administrateurs)*, Paris, EYROLLES, 2013, pp. 163-164.

[39] Virginie BOZONNET, Philippe DELECLUSE, Romain SCHULZ, Sarah XERRI-HANOTE, "France", *loc. cit.*, p. 169.

[40] Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…, op. cit.*, pp. 152-153.

criminal liabilities could be brought either before civil judges or criminal judges. If a criminal judge hears a liability claim, he could decide the civil affairs. The criminal judge could calculate the amount of the loss suffered by the company and impose compensation onto directors. Conversely, if a civil judge hears a liability claim, he has to wait until a criminal judge has made a decision regarding the criminal liability of directors[41].

1.1.3. A derivative action filed by minority shareholders on behalf of the company

Generally, a corporate action is filed by the actual legal representative of the company (action *ut universi*)[42]. However, if the legal representative of the company turns out to be the director at issue, it may not be appropriate for him to file a claim against himself. In French Law, a group of minority shareholders or even a single shareholder are also conferred the right to bring a derivate action on behalf of the company when the company or its organs fail to do so (action *ut singuli*). If the legal representative has already commenced an action against directors while he neglected to carry on the proceedings, minority shareholders could also be able to bring a derivate action as a replacement[43].

In accordance with Article L.225-252 of *Code de commerce*, an action *ut singuli* can be brought collectively by shareholders who hold 10% of shares in a limited liability company (*société à responsabilité limitée*); or 5% of shares in a public limited company (*société anonyme*)[44], while this threshold will be less if the company owns a capital higher than 750,000 euros[45]. However, in a listed company (*société cotée en bourse*), the conditions to bring a derivative action are stricter because only the shareholders who have been listed on the registration book with their own names for at least two years and have held at least 5% of the voting rights can bring such an action, and a copy of company constitution has to be sent to the Financial Markets Authority[46]. Such practice aims at avoiding possible abusive derivative claims that will disturb the well functioning of securities market. Meanwhile, an

[41] Virginie BOZONNET, Philippe DELECLUSE, Romain SCHULZ, Sarah XERRI-HANOTE, "France", *loc. cit.,* p.160.
[42] Stéphane GUÉRARD (dir.), *Regards croisés sur l'économie mixte: Approche pluridisciplinaire Droit public et droit privé*, Paris, L'Harmattan, 2006, p. 335.
[43] Raymonde VATINET, "La réparation du préjudice causé par la faute des dirigeants sociaux, devant les juridictions civiles", *Revue des sociétés,* N°2/2003, pp. 247-260, pp. 251-252.
[44] Dominique VIDAL, *Droit des sociétés (5e édition)*, Paris, L.G.D.J, 2006, p. 225.
[45] See Article L. 225-120 of *Code de commerce*.
[46] See Article L 225-120 of *Code de commerce*. Also see Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…*, *op. cit.*, pp. 244-245.

individual shareholder can also bring a derivative action *ut singuli* no matter how much shareholding he owns[47], such an action is considered as a rescue for individual shareholders if neither the company nor a group of minority shareholders have asserted a claim against the director at issue[48].

1.1.4. A personal action filed by individual shareholders

Shareholders should have the right to bring an action not only in the interests of the company, but also for their own sake. Generally speaking, directors' liability derives from the misconducts they have made as being directors. However, under French Law, a personal action brought by shareholders against directors for a personal loss is only admissible if such an action is to establish liability to directors for their wrongful acts or negligence which are separable from the directors' functions (*"faute séparable des fonctions"*) (i.e. wilful misconduct that is particularly serious and incompatible with the normal exercise of their duties)[49]. In this sense, a personal claim aiming at incurring liability to directors for the misconducts that occurs during their normal exercise of corporate functions is inadmissible[50].

As we have mentioned, directors are bound up with the company contractually. However, in regard of shareholders, their relationship with directors is non-contractual since the company itself is an independent entity. French case law has been slow to recognize the existence of a direct and personal loss or damage to a shareholder, since the French legislators believed that it is the company rather than a single shareholder that will suffer damage from directors' mismanagement, so a single shareholder cannot sue a director through a personal action for the loss of the value of his stock as a result of a wrongful act committed by the director[51]. Besides, the French legislators also believe that it is very difficult for the shareholders to demonstrate the fault of a director and the causation

[47] See Article L 225-252 of *Code de commerce*.

[48] Alexis CONSTANTIN, "Nature et régime de l'action sociale ut singuli. Articulation avec l'action sociale ut universi: Note sous Cour de cassation (crim.), 12 décembre 2000", *Revue des sociétés,* N° 2/2001, pp. 323-336, p. 333.

[49] Paul DAVIES, Klaus J. HOPT, Richard NOWAK, Gerard VAN SOLINGE, *Corporate Boards in Law and Practice: A Comparative Analysis in Europe*, Oxford, Oxford University Press, 2013, pp. 234-235.

[50] Eric DEZEUZE, "La réparation du préjudice devant la juridiction pénale", *Revue des sociétés,* N°2/2003, pp. 261-283, p. 269.

[51] Virginie BOZONNET, Philippe DELECLUSE, Romain SCHULZ, Sarah XERRI-HANOTE, "France", *loc. cit.,* p. 168.

between the fault and a personal loss, thus it may be easier for the shareholders to sue the company in order to seek compensation for a personal loss, and the company to sue its directors for their misconducts through a corporate action[52].

However, it is possible that shareholders may also suffer a personal loss apart from that of the company. In this case, French case law requires that it should distinguish between the damage suffered by shareholders and by the company[53], and French law also provides that a personal claim is only admissible when shareholders intends to sue directors for an intentional act that goes beyond the normal exercise of their functions. If it were so, maybe it could be understood as that the term "functions" only refers to the behaviours that are compatible with the interests of the company[54], but are not necessarily compatible with the interests of individual shareholders. Therefore, in this case, a personal claim is only admissible on the grounds of general tort law liability, in which directors are not necessarily regarded as directors.

Nevertheless, under exceptional circumstances, directors may be held liable directly for shareholders. For example, French case law holds that directors owe a special duty of loyalty vis-à-vis shareholders in the case of the publication of crucial corporate information[55]. If directors have presented or published inaccurate accounts, they may be held liable to indemnify the individual shareholders for the loss suffered in the fall in value of their shares due to the accounting fraud[56]. In conclusion, under general circumstances, individual shareholders cannot bring an action against directors in order to seek compensation for their misconducts during the normal exercise of functions. Instead, they may sue the company for a personal loss deriving from the exercise of functions while the company may sue directors in order to recover the compensation that it has paid to the shareholders in advance.

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[52] Jacque BUHART, Alain DE FOUCAUD, "France", in Alexander LOOS, *Directors' Liability: A Worldwide Review,* The Hague, Kluwer Law International, 2006, pp. 269-320, p. 272.

[53] Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…, op. cit.*, p. 145.

[54] Aline ATIBACK, *L'abus de biens sociaux dans le groupe de sociétés*, Paris, L'Harmattan, 2007, pp. 18-19.

[55] See *Cass. com. 27 février 1996*. Also see Monique AIMÉE MONTHIEU, *L'intérêt social en droit des sociétés*, Paris, L'Harmattan, 2009, p. 115.

[56] See *Cour d'appel de Paris, 14 Septembre 2007*. Also see Virginie BOZONNET, Philippe DELECLUSE, Romain SCHULZ, Sarah XERRI-HANOTE, "France", *loc. cit.,* pp. 170-171.

1.1.5. A personal action filed by creditors

Since the board is regarded as an organ of the company, the company should assume liability vis-à-vis creditors for the damage deriving from directors' mismanagement. Similar to a personal action filed by individual shareholders, a creditor's personal claim is only admissible to establish liability to directors in a case where a director's fault is separable from the exercise of functions. However, the concept of *"faute séparable des fonctions"* still remains very unclear in French Law. As we have mentioned, only an act going beyond the normal exercise of management could be regarded as a fault separable from the directors' functions. In this case, such an act should be committed intentionally and personally by the directors, which is of particular gravity and goes beyond their normal practice of their corporate functions so as to establish liability on the basis of the tort law grounds[57].

However, different from a personal claim filed by individual shareholders, the French Supreme Court seems to start recognizing directors' liability towards the third parties. In recent case law, it was held that a fault committed by a director during the exercise of functions may nevertheless constitute a fault separable from his functions[58] when the fault is proved to have been committed intentionally and has sufficient gravity as is incompatible with the normal exercise of directors' corporate duties[59]. The extension of the interpretation of *"faute séparable des fonctions"* shows that French Supreme Court tends to provide a stronger protection to creditors. In fact, although it is very positive for the French legislators to take the first step, it still needs further observation on the development of the French regime. We believe that such a protection should be provided to shareholders as well as to creditors to seek remedy from directors for a personal loss under the corporate framework.

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[57] See Bernard SAINTOURENS, "Note sous Cour de cassation (com.) 28 avril 1998", *Revue des sociétés*, N°4/1998, pp. 767-770 (pp. 767 and ss). Also see Jean-F.BARBIÈRI, "Responsabilité civile des personnes morales et de leurs dirigeants: precisions sur les contours de la « faute séparable », Note sous Cour de Cassation (Ch. com.) 20 mai 2003", *Revue des sociétés*, N°3/2003, pp. 479-488 (pp. 479 and ss). Also see Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…, op. cit.*, pp. 90-95.

[58] See *Cass. com. 10 février 2009*, also see J.-F.BARBIERI, "Faute séparable des fonctions: exclusion ou cumul de la responsabilité des dirigeants et de celle de la société? Note sous Cour de Cassation (com.) 10 février 2009", *Revue des sociétés,* N° 2/2009, pp. 328-334, pp. 332 and ss.

[59] Benoit LE BRAS, "La faute détachable peut être commise dans l'exercice des fonctions sociales", this article is available on the website: http://larevue.ssd.com/La-faute-detachable-peut-etre-commise-dans-l-exercice-des-fonctions-sociales_a986.html. Also see Virginie BOZONNET, Philippe DELECLUSE, Romain SCHULZ, Sarah XERRI-HANOTE, "France", *loc. cit.,* p. 169.

1.1.6. Directors' liability in the insolvency proceedings

In French Law, if directors' wrongful acts or negligence have led to the shortfall of the company's assets, they may be forced to make contribution to the corporate assets[60]. Actually, the 2005 Law and the 2008 Ordinance have made several changes to the actions in which directors' liability is incurred during the insolvency proceedings. The 2005 Law reshaped the types of actions by introducing two parallel actions, respectively the action for insufficiency of corporate assets (*"action en responsabilité pour l'insuffisance d'actif"*), and the action of obligations for corporate debts (*"obligation aux dettes sociales"*)[61], which were designed to replace the old system of "extension of penalties"[62]. However, in practice, the action of obligations for corporate debts shows very similar functions to the action for insufficiency of corporate assets. If there are two repetitive actions to incur directors' liability for the same cause, it will disturb the well functioning of such a regime[63]. Under this circumstance, the action of obligations for corporate debts was abolished by the 2008 Ordinance, and the action for insufficiency of corporate assets was also included in Article L. 653-4 of *Code de commerce* concerning the personal bankruptcy proceedings[64]. In this case, if directors do not fulfil the obligations in the insolvency proceedings, they may be declared personal insolvency as well.

Pursuant to Article L. 651-2 of *Code de commerce*, directors will be held liable for the insufficiency of corporate assets if such insufficiency derives from directors' misconducts[65]. In this case, in order to establish liability, three conditions should be satisfied: over-indebtedness of the company, defendant of the claim (director *de jure* or director *de facto*), and proof of a managerial error[66]. In this sense, it may be relevant to

[60] Jacque BUHART, Alain DE FOUCAUD, "France", *loc. cit.*, p. 278.
[61] Before the reform of the Law of 1985, this concept was well known as "*action en comblement du passif*" in French Law, since the modification of Law in 2005, this concept has been detailed as the two actions, while the latter one was abrogated by the Ordinance of 2008.
[62] Paul LE CANNU, "La responsabilité civile des dirigeants de personne morale après la loi de sauvegarde des entreprises du 26 juillet 2005", *Revue des sociétés,* N° 4/2005, pp. 743-758, pp. 743-744.
[63] Philippe Roussel GALLE, "Le dirigeant de société et le "nouveau" droit des entreprises en difficulties issu de la réforme du 18 décembre 2008", *Revue des sociétés*, N° 2/2009, pp. 249-272, pp. 262-263.
[64] Florence GRILLIER-ROUSSEAU, "Réforme du droit des entreprises en difficulté", *Stricto Sensu (La lettre de la Société d'Avocats TAJ)*, Mars 2009, N° 38, pp. 2-3, p. 2.
[65] See Art. L. 651-2 of *Code de commerce*.
[66] Hanno MERKT, Gerald SPINDLER, "Direct Liability of Controlling Parties (Piercing the Corporate Veil) and Related Legal Constellations", in Marcus LUTTER (Ed.), *Legal Capital in Europe*, Göttingen, European Company and Financial Law Review (Special Volume), De gruyter, 2006, pp. 166-231, pp. 180-181.

examine whether such a liability is based on general tort law or contract law grounds, or it refers to an *"ex lege"* liability under French regime.

In the first place, it is clear that the action to incur director's liability for the insufficiency of corporate assets does not aim at recovering the creditors' loss. Instead, it is in favour of the company and facilitates to seek remedy for its financial insufficiency so as to have sufficient assets to pay for creditors in the insolvency proceedings. In this sense, it is a measure that aims at recovering the company's loss and keeping the integrity of the corporate assets in the case of over-indebtedness[67]. Therefore, directors' liability in this case does not refer to a non-contractual liability.

In the second place, the French regime to incur directors' liability for insufficiency of corporate assets applies when directors have not fulfilled their obligations of filing for the opening of the insolvency proceedings within a certain span of time, and the delay of the commencement of the insolvency proceedings has brought a loss to the corporate assets. In this case, it seems that directors are blamed for their failure to accomplish the contractual obligations owed to the company. If it were so, directors should be forced to pay a certain amount for the company's loss corresponding to their managerial errors. However, the French Supreme Court holds that "directors could also be forced to pay the whole amount of the corporate debts even if their managerial errors may not be the only reason to the company's insolvency"[68]. In a case law made by the French Supreme Court in 2005, the judges held that "a director of a company may be held liable for part of or the whole corporate debt in accordance with Article L. 624-3 of *Code de Commerce*, even if the managerial fault that he has committed only forms part of the reasons which cause the company's over-indebtedness"[69]. In this sense, an action for insufficiency of corporate assets is not an action simply to incur contractual liability since it has reparative, punitive and mandatory effects[70].

[67] In this sense, see Michael BODE, *Le groupe international de sociétés: le système de conflit de lois en droit comparé français et allemand*, Bern, Peter Lang, 2010, p. 588.
[68] See *Cass. com. 30 novembre 1993*, also see Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…, op. cit.*, p.178.
[69] See *Cass. com. 21 juin 2005*.
[70] Fédéric COLASSON, *Le patrimoine professionnel*, Limoges, Pulim, 2006, p. 303. Also see Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección de acreedores: entre el derecho de sociedades y el derecho concursal", *InDret*, 4/2006, pp. 1-41, p. 9.

In the third place, under French Law, the 1985 Law has abolished the traditional requirement of a causal link between the managerial error and the damage suffered in an action to establish directors' liability in the insolvency proceedings. Instead, it is sufficient to prove that directors' managerial errors have "contributed" to the over-indebtedness[71]. The traditional causation requires the connection between a concrete tort and a concrete loss caused only by this act. However, in an action for insufficiency of corporate assets, it is less relevant to demonstrate the existence of a casual link in a traditional sense. As we have mentioned, directors could be forced to make the whole part of contribution to the corporate assets even if they have only partially caused or aggravated the company's over-indebtedness. It seems that as long as directors' misconducts constitute one of the reasons of company's over-indebtedness, a decision of liability could be directly made by a judge at his discretion in accordance with the national rules, regardless of whether such an act has exerted slight or huge influence to company's insolvency. Such a treatment shows some similarities with an *"ex lege"* liability, which refers to a liability directly provided by the law once the fault is evidenced. In this case, it is not a contractual liability towards the company, nor a non-contractual liability towards creditors, but it refers a liability towards the corporate assets. Therefore, it seems more appropriate to define such an action with *"ex lege"* natures.

1.2. Directors' liability in British Law

British Law is the representative of the Anglo-Saxon legal system, which inherits many case law traditions. The common law jurisdictions demonstrate the regime of directors' liability from a different perspective. In this part, we will carry on a discussion on the regime of directors' liability in British Law.

1.2.1. Directors' fiduciary duties in British Law

Before the promulgation of *Companies Act 2006*, directors' duties in British system were mainly developed by the principles of equitable law and the judicial interpretation of case law made by the courts[72]. *Companies Act 2006* includes the first ever statement in statute

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[71] Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants..., op. cit.*, pp. 177-179. Also see María José VERDÚ CAÑETE, *La responsabilidad civil del administrador de sociedad de capital en el concurso de acreedores*, Madrid, La Ley/Wolters Kluwer, 2008, p. 62.

[72] Paul L. DAVIES, *Gower and Davies' Principles of Modern Company Law (Seventh Edition)*, London, Thomson (Sweet & Maxwell), 2003, p. 380.

of directors' duties in respect of the environmental and social impacts of their companies' business, which enables them to get a reference of their responsible behaviours in dealing with the corporate business[73]. In order to give a definition more clearly upon the general duties of directors, *Companies Act 2006* sets out a list of directors' duties in a very strict and systematical way, which begins with a general introduction to the scope and nature of duties, and followed by seven concrete duties in different aspects. Pursuant to the statutory provisions in *Companies Act 2006*, directors owe fiduciary duties to the company but not to individual shareholders or individual creditors[74]. And directors' fiduciary duties require them to act within their powers; to promote the success of the company; to exercise independent judgment; to exercise reasonable care, skill and diligence; to avoid conflicts of interest; to avoid accepting benefits from third parties; and to declare interest in proposed transaction or arrangement[75].

Although the directors' general duties have been codified, the interpretation to the duties made by common law rules or equitable principles continues to be applicable[76]. In this sense, the seven duties listed in *Companies Act 2006* can still be divided into two types by following the common law traditions, i.e. the duty of care and the duty of loyalty. The duty of care requires directors to act with skills and demonstrate care in the conduct of company's business[77]. On one hand, in accordance with Section 174, directors are obliged to exercise reasonable care, skill and diligence[78]. The special background, qualification and management responsibility of a particular director are taken into account in the formulation of Section 174[79]. Under this circumstance, the duty of care includes the examination on a director's general knowledge, actual skills, professional experience, and the ability to exercise independent judgment in order to decide whether the director is qualified or not. However, such a criterion is not the same as the "business judgment rule" which is applied

[73] David CHIVERS QC, "The Companies Act 2006: Directors' Duties Guidance", *The Corporate Responsibility (CORE) Coalition*, October 2007, pp. 1-26, p.6. This article is available on the website: http://corporate-responsibility.org/wp-content/uploads/2013/11/directors_guidance_final.pdf.
[74] See Section 170 (1) of *Companies Act 2006*, also see Tristan HALL, Sarah HILLS, "United Kingdom", in Edward SMERDON, *Directors' liability and Indemnification (Second Edition)*, London, Global law and Business, 2011, pp. 545-565, pp. 548-549.
[75] See Sections 171-177 of *Companies Act 2006*.
[76] See Section 170 (4) of *Companies Act 2006*.
[77] Ulf BERNITZ, Wolf-Georg RINGE (Editors), *Company Law and Economic Protectionism: New Challenges to European Integration*, Oxford, Oxford University Press, 2010, p.320.
[78] See Section 174 of *Companies Act 2006*.
[79] Rt HON, "Companies Act 2006 (UK): A new approach to directors' duties", *LawBook Co., 81 ALJ 162 (2007)*, pp. 162-179, p. 169.

in the United States or some Commonwealth jurisdictions. The American "business judgment rule" presumes that a business decision made by a director is reasonable and so liability will not be imposed on him or her if the plaintiff cannot demonstrate the existence of a contrary fact[80], thus it provides a safe harbour for directors who make decisions in good faith and for a legitimate purpose, and have properly informed themselves of the matter in advance and have rationally believed that the transaction is in the corporation's best interests[81]. However, this may not be the case in Section 174. The traditional duty of care in British law derives form the law of negligence[82], which tends to treat a director as presumptively negligent as he is unable to fulfil his obligations[83]. In this way, in order to get relieved from liability, a director needs to pass two tests. A court will inspect the actual knowledge, skills and experience of a particular director and the fact that the director considers to have acted in the best interests of the company (a subjective test)[84], as well as whether the care, skill and diligence would be exercised by a reasonably diligent person who carries out the same functions in relation to the company (an objective test)[85].

On the other hand, the duty of loyalty can be described as an obligation imposing directors to act within their powers. Directors must act in accordance with the company's constitution and exercise powers within the interests of the company only[86]. Meanwhile, they must promote the success of the company as well. Such success derives from the director's judgment in good faith and the fulfilment in making business decisions[87]. In order to achieve the success of the company, directors should consider the long-term

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[80] David CABRELLI, "Presentation for Universita' Bocconi on the Reform of the Law of Directors' Duties in UK Company Law", pp. 1-57, pp. 27-28. This article is available on the website: http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXJsPWh0dHAlM0ElMkYlMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxvYWQlMkZwdWJsaWNhdGlvbnMlMkYxXzQ4NV90aGVyZWZvcm1vZnRoZWxhd29mZGlyZWN0b3JzZHV0aWVzaW51a2NvLnBkZiZhbGw9MQ%3D%3D.

[81] Rt HON, "Companies Act 2006 (UK)…", *loc. cit.*, p. 169.

[82] Melvin A. EISENBERG, "The Duty of Care of Corporate Directors and Officers", HeinOnline, *51 U. Pitt. L. Rev. 1989*, pp. 945-972, p. 945.

[83] David CABRELLI, "Presentation for Universita' Bocconi…", *loc. cit.*, p. 28.

[84] Lucie JONES, *Introduction to Business Law (Second Edition)*, Oxford, Oxford University Press, 2013, p. 572.

[85] Saleem SHEIKH, *A Guide to the Companies Act 2006*, Oxon, Routedge Cavendish, 2008, p. 418.

[86] See Section 171 of *Companies Act 2006*.

[87] Andrew KEAY, "The duty to promote the success of the company: Is it fit for purpose?", University of Leeds School of Law*, Center for Business Law and Practice Working Paper,* August 20, 2010, pp. 1-36, pp. 13-15. Available on: http://www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf.

consequences of any decision-making, and the benefit of the corporate members by enhancing the interests of shareholders as a whole.

Meanwhile, directors must not place themselves at a position where there is a conflict between the interests of the company and their personal interests[88]. Such prohibition has been introduced into *Companies Act 2006*, in which it states that directors shall avoid a situation in which he could have a direct or indirect interest that clashes with the interest of the company[89]. And if a director has a direct or indirect interest in a proposed transaction or arrangement with the company, he is required to make disclosure of the nature and the extent of the conflict to other directors[90]. Besides, a director must not accept a benefit from a third party by the reason that he is at the position of director[91]. He must be incorruptible while dealing with other third parties.

The codification of directors' duties has undoutedly improved the corporate governance. When directors have breached their statutory obligations due to their misconducts such as wilful acts, negligence, breach of duty or breach of trust, the company could decide whether or not to bring an action against them. British law considers the relationship between a director and the company as "trustee-beneficiary" in some cases, while "fiduciary agents" in other cases[92]. And the traditional principles of equitable law consider the directors' duties as a device deployed to control liability for negligently caused damage and have tortious natures[93]. In this case, British law does not have a unified definition to the relationship between directors and the company. Although directors may not conclude a written contract with the company since the acceptance of the appointment by shareholders' meeting in accordance with the rules in corporate statutes may be regarded as achieving consensus, it cannot exclude that the two parties will conclude such a contract

[88] Paul L. DAVIES, *Gower and Davies' Principles…, op. cit.*, pp. 391-392.
[89] See Section 175 of *Companies Act 2006*.
[90] See Section 177 of *Companies Act 2006*.
[91] See Section 176 of *Companies Act 2006*.
[92] In this case, see Graham MOFFAT, *Trusts Law (Fifth Edition)*, Oxford, Oxford University Press, 2009, p. 436. Also see Sarah WILSON, *Todd & Wilson's Textbook on Trust (Eleventh Edition)*, Oxford, Oxford University Press, 2013, p. 319. Also see Saleem SHEIKH, *A Guide to the Companies Act 2006, op. cit.*, p. 401. However, there is no uniform definition to the relationship between directors and the company in UK law.
[93] Andrew DICKINSON, *The Rome II Regulation: The Law applicable to non-contractual obligations*, Oxford, Oxford University Press, 2008, p. 208. Also see Richard PLENDER, Michael WILDERSPIN, *The European Private International Law of Obligations (Third Edition)*, London, Sweet & Maxwell, 2009, p. 118.

in order to clarify the directors' rights, obligations and remuneration. In this situation, their relationship should be regarded as contractual.

In British Law, since the British companies follow a unitary system, if a company intends to file an action against its directors, it must get supported from the majority of shareholders, and such an action should be carried out by directors[94]. In this case, innocent directors may file a claim in order to incur liability to the directors who are guilty, while it is unlikely for the guilty directors to bring an action against themselves[95]. Therefore, a corporate action cannot perform its functions in all the situations, and it leaves room for the British legislators to seek alternatives in order to establish liability to directors. In this situation, a derivative action may be considered.

1.2.2. A derivate action filed by minority shareholders

Before the promulgation of *Companies Act 2006*, whether minority shareholders could bring a derivate action mainly relied on case law. Since *Companies Act 2006* has enacted the liability regime of derivative action, such an action could be admissible at a boarder extent. In conformity with Section 260, a derivative action may be brought against a director in respect of a cause of action arising from his actual or proposed act or omission involving negligence, default, breach of duty or breach of trust[96], or be brought against majority shareholders by an order of the court in the unfair prejudice procedure[97]. Besides, the plaintiff does not need to demonstrate a "wrongdoer control" any more, which means that it is no longer necessary for the shareholder to show that the directors who carried out the wrongdoing are also the controller of the majority of the company's shares[98].

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[94] See Section 239 of *Companies Act 2006*. Also see Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, *Mayson, French & Ryon…, op. cit.*, p. 561-562.

[95] Tristan HALL, Sarah HILLS, "United Kingdom", *loc. cit.*, p. 549.

[96] See Section 260 (3) of *Companies Act 2006*.

[97] See Section 260 (2) (b) of *Companies Act 2006*. Also see Len SEALY, Sarah WORTHINGTON, *Sealy & Worthington's Case and Materials in Company Law (Tenth Edition),* Oxford, Oxford University, 2013, p. 682. Also see Ann RIDLEY, *Company Law (4th Edition),* Oxon/New York, Routledge, 2013, p. 122.

[98] Arad REISBERG, "Derivative Claims Under the Companies Act 2006: Much Ado About Nothing?", in J. Armour, J. Payne (eds.), *Rationality in Company Law: Essays in Honour of D. D. Prentice*, Oxford, Hart Publishing, 2008, pp. 1-53 (pp. 10 and ss), the article is available on http://ssrn.com/abstract=1092629. Also see Emma CAMERON, "Recent cases on derivative actions under the Companies Act 2006: are fears of "activist shareholders" unfounded?", available on: http://www.mablaw.com/2010/01/recent-cases-on-derivative-actions-under-the-companies-act-2006-are-fears-of-activist-shareholders-unfounded/.

Although now minority shareholders can act on behalf of the company in order to seek a remedy under *Companies Act 2006*[99], it seems that the codification of derivate claim does not make such an action more accessible for minority shareholders. In fact, they have to satisfy certain conditions so as to obtain permission from the court to file a derivative claim. For example, from the perspective of the courts, in purpose of a derivative claim to be admissible, minority shareholders should act in good faith and involve no personal interests[100]. Besides, minority shareholders must show that the company has decided not to pursue a corporate action, or a directors' conduct (which may be a misconduct from the perspectives of minority shareholders) has been ratified by the company[101]. Furthermore, the court should also examine whether or not a derivative claim would promote the company's success if it were admissible[102].

Generally, whether a derivative action could be brought or not should depend on the formal requirements such as the number of the shareholding owned by a minority shareholder or the period of shareholding. However, in British law, it seems that the court owns a significant discretion in deciding a derivative action. With the reference to the recent cases, we can find that very few derivative actions were in fact permitted by the English courts. In two relevant cases *Franbar Holdings Ltd v. Patel and others*[103] and *Stimpson and others v. Southern Private Landlords Association and others*[104], the court rejected the petition through the application of a "hypothetical director test". In this test, it should presume whether a person who acts in the interests of the company would file a derivative action. Besides, the test should also consider other elements such as the prospect of success of such a claim, the ability of the company to make a recovery on any award of damage, the possible influence on the well functioning of the company after such a claim is commenced, and the costs during the proceedings[105]. Furthermore, the court may reject a petition of a derivative claim for the consideration that minority shareholders often file a derivative action because the misconducts of the majority shareholders have caused

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[99] See Section 260 (1) of *Companies Act 2006*.

[100] See Sections 263 (3)(a) and 264 of *Companies Act 2006*.

[101] See Section 263 (3)(d) and (e) of *Companies Act 2006*.

[102] Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, 2011, *Mayson, French & Ryon…, op. cit.*, p. 564.

[103] See the English case law *Franbar Holdings Ltd. v Patel & Ors* [2008] EWHC 1534 (Ch) (02 July 2008).

[104] See the English case law *Stimpson & Ors v Southern Private Landlords' Association & Ors* [2009] EWHC 2072 (Ch) (21 May 2009).

[105] See paragraph 36 of the case *Franbar Holdings Ltd v. Patel and others,* and paragraph 28 of the case *Stimpson and others v. Southern Private Landlords Association and others.*

damage to the company, in which they may be indirectly affected. However, there is an alternative for minority shareholders to file a personal claim on the basis of the "unfair prejudice" principle, which seems better for them because minority shareholders could directly ask for compensation from directors if they are also the majority shareholders[106].

The strict control on the application of a derivative action indicates the courts' traditional reluctance between managerial freedom and investor protection. In so far, the court seems to take sides with managerial freedom[107]. However, the court should realize that the over-high requirements on the admission of a derivative action would render the minority shareholders to abandon such a liability regime, which is not in the interests of the company either.

1.2.3. A personal action filed by individual shareholders

Similar to the legal systems of other Member states, directors owe their duties to the company but not to the shareholders under English law. Therefore, normally individual shareholders cannot bring an action directly against directors for the breach of fiduciary duties. As we have mentioned, since the over-high requirements to authorize a derivative claim may weaken the protection of minority shareholders and the company, these shareholders should look for another alternatives. In accordance with Section 994 of *Companies Act 2006*, minority shareholders could file a personal claim in the court if they have been unfairly prejudiced.

The regime of unfair prejudice is properly regarded as a remedy to minority shareholders[108], because it aims at providing a remedy for them in the situations where no specific duty owed by directors to the company had been breached and a derivative action was therefore not available[109]. In *Companies Act 2006*, a wide-range power was given to

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[106] See paragraph 53 of the case *Franbar Holdings Ltd v. Patel and others.* Also see Emma CAMERON, "Recent cases on…", *loc. cit.*

[107] In this sense, see Arad REISBERG, "Derivative Claims…", *loc. cit.*, pp. 52-53. Also see John SYKES, Lynne GREGORY, "Shareholder actions in England & Wales, New rules but little action", *Charles Russell LLP*, 18 May 2009, pp. 1-6 (p. 6). This article is available on the website: http://www.charlesrussell.co.uk/UserFiles/file/pdf/Commercial%20Dispute%20Resolution/Briefing_note%20_Shareholder_actions_in_England_and_Wales.pdf.

[108] A. J. BOYLE, *Minority Shareholders' Remedies*, Cambridge, Cambridge University Press, 2004, p. 112.

[109] Matthew BERKAHN, "Unfair prejudice: Who has it right, economically speaking?", *Journal of the Australian Law Teachers Association*, 2008, p. 55.

remedy a conduct that is unfairly prejudicial to the interests of some of the members of the company[110]. In order to pass a statutory test regarding unfair prejudice, it must show that the interests of these members (probably individual minority shareholders) have been prejudiced unfairly[111].

The ambit of application of the principle of "unfairly prejudice" should be extensive in order to meet the circumstances in very particular cases[112]. In this regard, the courts also have a great discretion in deciding the admission of a petition[113]. In case law, a case regarding "unfair prejudice" often occurs when the value of shareholding owned by minority shareholders has been seriously diminished, or when their financial benefits are taken by majority shareholders, or when their interests have been seriously jeopardized as being excluded from the participation in corporate affairs[114]. Under general circumstances, such an action is brought against the majority shareholders or the controller of the company, while directors may also find themselves as a party to such an action if they are majority shareholders or the officers of the company.

A claim regarding "unfair prejudice" is a claim deriving from a tort because the shareholders are contractually bound up with the company but they are non-contractually bound up with each other. However, such a claim is designed to incur liability to majority shareholders rather than directors. In this sense, normally a personal action directly against directors is not admissible. However, under exceptional circumstances, directors should be held liable for causing direct damage to individual shareholders[115]. For example, damage deriving from the fraudulent information published by directors to convene a meeting[116], or

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[110] Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, 2011, *Mayson, French & Ryon…, op. cit.*, p. 578.
[111] See Section 994 (1) (a) of *Companies Act 2006*, also see Robin HOLLINGTON, *Minority Shareholders' Rights (Second Edition)*, London, Sweet & Maxwell, 1994, pp. 60 and ss.
[112] See paragraph 30 of the case *Re Saul D Harrison and Sons plc* [1995] 1 BCLC 14.
[113] See Section 996 of *Companies Act 2006*.
[114] Janet DINE, Marios KOUTSIAS, *The Nature of Corporate Governance*, Glos/Northampton, Edward Elgar Publishing, 2013, p. 192. Also see Jonathan FISHER QC, Jane BEWSEY, Malcolm WATERS QC, Elizabeth OVEY, *The Law of Investor Protection (2nd Edition)*, London, Sweet & Maxwell, 2003, p. 525. Also see the English case law *Re Bovey Hotel Ventures Ltd* (unreported but quoted and followed in *RA Nobel & Sons Clothing Ltd* [1983] BCLC 273 at 290), *Re London School of Electronics Ltd* [1986] Ch 211; *O'Neil v. Phillips* [1999] 1 WLR 1092.
[115] See Paul L. DAVIES, *Gower and Davies' Principles…, op. cit.*, p. 452. Also see Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, 2011, *Mayson, French & Ryon…, op. cit.*, pp. 572-573.
[116] See the English case law *Prudential Assurance Co Ltd v. Newman Industries Ltd (No.2)* [1982] Ch 204.

from misleading information or insider dealing[117]. However, this kind of liability has mandatory effects for the objective to keep the well functioning of securities market and should not be generalized.

1.2.4. A personal action filed by creditors

As we mentioned above, directors only owe fiduciary duties to the company but not to the shareholders or creditors of the company. In the case where the company is financially sound, the most significant interests of the company are to pursue the ultimate profit, thus the interests of the creditors should yield to the interests of the company. Normally, creditors cannot bring a personal action against directors for the breach of fiduciary duties. Since the company is regarded as an independent legal person, creditors should sue the company rather than its directors for a financial loss. However, under exceptional circumstance, directors may be held liable for a direct loss sustained by creditors. Such an action is not derived from the directors' acting as director but it is a normal tort liability deriving from the application of special rules of the common law and equitable principles[118].

In accordance with Section 1270 of *Companies Act 2006*, a civil liability system could be available for creditors who have made investment based upon reliance of certain false or misleading statement or non-disclosure by its directors. However, in this case, the company rather than its directors should be liable vis-à-vis creditors. Nevertheless, pursuant to Section 463 of *Companies Act 2006*, directors are required to make compensation for the company for any loss deriving from their untrue or misleading statement after the company has made compensation for the creditors[119]. Therefore, to some extent, directors could be indirectly liable towards creditors for the publication of false information.

[117] Christopher RYAN, *Company Directors' Liability, Rights and Duties (Third Edition)*, London, CCH Editions Limited, 1990, pp. 220-221.
[118] Robert R. PENNINGTON, *Directors' Personal Liability*, Oxford, BSP Professional Books, 1989, p. 153.
[119] See Sections 463 and 1270 of *Companies Act 2006*. Also see Tristan HALL, Sarah HILLS, "United Kingdom", *loc. cit.*, p. 553; Also see John BIRDS, Nigel BOARDMAN, Robert HILDYARD QC, Robert MILES QC (Editors), *Annotated Companies Legislation*, Oxford, Oxford University Press, 2013, p. 528. Also see Saleem SHEIKH, *A Guide to the Companies Act 2006, op. cit.*, pp. 1205-1206.

1.2.5. Liability regime of *"wrongful trading"* in British law

The main interests should be shifted to creditors in the insolvency proceedings[120]. In order to minimize a potential loss that would be sustained by creditors, directors of a company should file for the opening of the insolvency proceedings without any delay. The British legislators have established specific provisions imposing liability upon directors in connection with the insolvency proceedings. In accordance with Section 214 of *Insolvency Act 1986*, a wrongful trading liability may be founded on the verge of winding up, while directors knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvency but did not take any step in order to minimize the potential loss of the corporate assets[121]. In this case, if directors are proved to have delayed or failed to commence the winding up of the company, they will be held liable to make contribution to the company's assets[122].

The court could take into account whether the director's conduct derived from a failure to appreciate rather than from a deliberate course of wrongdoing, and whether there was any misappropriation of assets by the directors for their own benefit may also be taken into account in order to decide a liability under Section 214 of *Insolvency Act 1986*[123]. In fact, the actual "wrongful trading" regime originates from the regime of "fraudulent trading". However, the difference between the two regimes is that the "fraudulent trading" shows more criminal liability natures while the "wrongful trading" shows more civil liability natures[124]. Besides, the regime of "wrongful trading" aims at establishing liability to directors for their negligence rather than for a fraudulent conduct[125].

The British legislators believe that it is more proper to hold directors personally liable to make contributions to the company's assets rather than directly increase their duties

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[120] Andrew KEAY, "Formulating a framework for directors' duties to creditors: an entity maximization approach", *Cambridge Law Journal*, 64(3), November 2005, pp. 614-646, p. 620.

[121] See Section 214 (2) (3) of *Insolvency Act 1986*. Also see Paul J. OMAR, "The European Initiative on Wrongful Trading", *The Academic Froum Collection of The International Insolvency Institute,* 2003, pp. 1-18, p. 9. Available on: http://www.iiiglobal.org/component/jdownloads/finish/668/6064.html.

[122] See Section 214 (1) of *Insolvency Act 1986*.

[123] Vanessa FINCH, *Corporate Insolvency Law: Perspectives and Principles*, Cambridge, Cambridge University Press, 2002, p. 514.

[124] Len SEALY, David MILMAN, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2012, Vol. 2 (15th Edition)*, London, Sweet & Maxwell, 2012, p. 208.

[125] Ben PETTET, *Company Law (Second Edition)*, London, Pearson Education Limited, 2005, p. 33.

towards creditors, it seems that the regime of wrongful trading sits more comfortably with a "pro-enterprise" stance rather than a "pro-creditor" position[126]. In this regard, the liability regime of wrongful trading does not have a tortious nature. In fact, it is doubtful whether in English regime directors should owe special duty to creditors at the vicinity of company's insolvency. In mainstream doctrines, such a duty is not recognized[127], while some recent doctrines also tend to recognize a special duty of directors towards creditors at the vicinity of company's insolvency[128].

Both the British and the French regimes impose directors to make contribution to the corporate assets in the insolvency proceedings. However, these two regimes still have some differences. In French regime, directors are held liable for their misconducts that have contributed to the company's insolvency, therefore directors could be forced to make contribution to part of or the whole loss sustained by the corporate assets even though their misconducts have little significance in causing or aggravating the company's insolvency. However, in British regime, directors' liability could be established as long as the fact that they knew or ought to have known the company's insolvency is evidenced, regardless of whether such negligence has in fact led to or aggravated the company's insolvency[129].

In these two liability regimes, directors' liability lies in the completion of corporate assets. Since it is a "pro-company" liability rather than "pro-creditors", it is doubtful whether a liability deriving from wrongful trading refers to a contractual liability incurred by the company for directors' breach of fiduciary duties. In fact, when the company comes to the verge of insolvency, directors may often undertake risky ventures to maximize the company's profit. If directors prove that they have acted as a reasonably diligent person

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[126] Vanessa FINCH, *Corporate Insolvency Law…, op. cit.,* pp. 513-514.

[127] In British, the Company Law Review Steering Group founded in 1998 for the purpose to reform the British Company Law has promoted a special duty of directors towards creditors in its Final Report (published in July 2001), pointing out that this duty was "more likely than not" when the company is incapable to meet its obligations. However, this proposition was not accepted by the Government in its Company Law Reform White Paper (published in March 2005). See Margarita VIÑUELAS SANZ, "Insolvencia de sociedad y responsabilidad de sus administradores en derecho inglés: wrongful trading", *Revista de Derecho Mercantil,* Nº 255, 2005 (Enero-Marzo), pp. 299-318, pp. 312-313. Also see Andrew KEAY, "Directors' taking into account creditor interests", *The Company Lawyer*, vol. 24, No. 10, 2003, pp. 300-306, pp. 305-306.

[128] See Andrew KEAY, "Formulating a framework…"*, loc. cit.*, p. 619. Also see Andrew KEAY, "Directors' taking into…", *loc. cit.*, p. 306. Also see Delphine BRUNET, "La protección de los administradores y la responsabilidad de los administradores en el Derecho ingles", *Derechos de los Negocios*, Nº 250, Julio-Agosto 2011, La Ley, pp. 1-28, pp. 16-17.

[129] María José VERDÚ CAÑETE, *La responsabilidad civil…, op. cit.,* p. 62.

under the same functions, however they failed to save the company, directors may be considered as not having breached the fiduciary duties at all since they have acted in the interest of the company. In this sense, the liability of wrongful trading should not be considered as a contractual liability towards the company.

As we have mentioned, since it is irrelevant to prove the existence of a casual link between the directors' wrongful trading and the company's loss, such a liability should classified as not based on tort law[130]. On the contrary, in order to establish such a liability to directors, the company's liquidator should show the reduction sustained by the corporate assets in order for the court to determine the quantum that directors should make contribution. Such a reduction would be the difference between the recovery rate that they could have obtained in the case of timely filing and the actual rate[131]. In this case, the appropriate amount that a director is liable to contribute is the amount by which the company's assets have been depleted by his conduct[132]. However, such a practice should not be regarded as requiring a casual link between the directors' managerial errors and the loss of corporate assets, but it is just a way to decide the quantum that directors should contribute to the corporate assets. Therefore, it is better to define such a liability as an *"ex lege"* liability imposed upon directors towards the corporate assets.

Sometimes, creditors who enter into new transactions with the company at the vicinity of company's insolvency may suffer a substantial reliance loss that goes beyond the reduction

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[130] See the English case law *Re Simmon Box (Diamonds) Ltd* [2000] BBC 275 and *Cohen v. Selby* [2001] 1 BCLC 176. Also see Andrew KEAY, "Directors' taking into…", *loc. cit.*, p. 310. Also see Thomas BACHNER, *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse*, Cambridge, Cambridge University Press, 2009, p. 233. Also see Margarita VINÑUELAS SANZ, "Insolvencia de sociedad…", *loc. cit.*, pp. 304-305. Also see Ian F. FLETCHER, *The Law of Insolvency (3rd edition)*, London, Sweet & Maxwell, 2002, p. 707. However, subsequent case law may have brought an argument upon this idea, in *Re Continental Assurance Company of London plc* [2001] BPIR, the Judge Park J. held that it was necessary to establish some connections between the wrongfulness of the directors' conducts with the company's loss. However, such a statement seems doubtful since Judge Park J. himself also admitted that there were other more important elements to be evidenced than a mere nexus between an incorrect decision to carry on trading and a particular loss sustained by the company. In this sense, see Andrew KEAY, *Company Directors' Responsibilities to Creditors*, Oxon/New York, Routledge-Cavendish, 2007, p. 100. However, in my opinion, the nexus as we have mentioned above should be considered as a way to determine the quantum that a director should contribute to the corporate assets. In admitting such an action, the court should take other elements into consideration, for example, whether a director has complied with his duties, or whether the winding up of the company is inevitable.

[131] Andrew KEAY, *Company Directors' Responsibilities…, op. cit.,* 2007, p. 101. Also see Brenda HANNIGAN, *Company Law (Third Edition)*, Oxford, Oxford University Press, 2012, p. 656.

[132] Thomas BACHNER, *Creditor Protection in…, op. cit.*, p. 233.

of the dividend payable to all creditors alike[133], and these creditors are so-called "new creditors". In such a case, the "new creditors" cannot invoke the application of Section 213 of *Insolvency Act 1986* regarding "fraudulent trading" since this provision is only applicable during the winding up of a company to a case where the company's business has been carried on with the intention to defraud the creditors[134]. However, the loss sustained by the "new creditors" arises earlier before the commencement of the company's winding up proceedings. In the case *Re Purpoint Ltd*[135], the court explicitly rejected the liquidator's contention that creditors whose claims were founded after the time when the directors ought to have known about the insolvency should be paid in full, for the consideration that, the payment in full would not be the same as, and may exceed the reliance loss[136]. In this sense, it is not relevant to distinguish the "new" and "old" creditors from the perspectives of the English judges. As a possible solution, it may increase the amount that directors are due to make for the contribution to the corporate assets and intensify the accountability of directors for the sake of the corporate assets as well as for the general body of the creditors indirectly.

1.3. Directors' liability in German Law

In accordance with German law, the German companies follow the two-tier corporate system, in which managing board and supervisory board are two independent organs. The directors of the managing board are appointed by the supervisory board in stock corporations (*Aktiengesellschaft/AG*), and by the shareholders in limited liability companies (*Gesellschaft mit beschränkter Haftung/GmbH*)[137]. In German law, the supervisory board serves to control and supervise the management, and to represent the company to deal with the directors of the management board in a dispute. Thus it plays a very significant role in the regime of directors' liability.

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[133] Thomas BACHNER, "Wrongful trading before the English High Court Re Continental Assurance Company of London plc (Singer v. Beckett)", *European Business Organization Law Review*, 5 (2004), p. 199.
[134] See Section 213 (1) of *Insolvency Act 1986*.
[135] See the English case law *Re Purpoint Ltd* [1991] BCC 121.
[136] See Thomas BACHNER, *Creditor Protection in…, op. cit.*, pp. 197-198.
[137] Katharina Haehing VON LANZENAUER, Oliver SIEG, "Germany", in Edward SMERDON, *Directors' liability and Indemnification (Second Edition)*, London, Global law and Business, 2011, pp. 181-196, p. 181.

1.3.1. Directors' duties in German law

Similarly as in other legal systems, directors must manage the company in its best interests and with diligence. The managing directors owe the duty of care and other fiduciary duties to the company, and they will be held liable for any violation of their duties. In regard of the duty of care, a director should exercise this duty as a diligent and conscientious manager, but the duty of care will vary with the different levels of skill, knowledge and experience that each director has[138]. Under German Law, the regime of directors' liability is also applicable to those directors *de facto* (shadow directors), which refers to the persons who undertake the functions as directors without being formally appointed as such[139].

The German "Business Judgment Rule" was codified in 2005 for the members of the management board and also has relevance for the supervisory directors. It requires that directors should act in an informed basis, and in the honest belief that the action taken was in the best interests of the company[140]. The rule stipulates that there is no breach of duty if a director makes a business decision and could reasonably believe that he is acting on an informed basis and in the best interests of the company[141]. In conformity with §93 (1) of *AktG* (German Stock Corporation Act), managing directors should have good reasons to assume that they were acting on the basis of adequate information for the benefit of the company at the time of taking the entrepreneurial decisions[142]. It requires that the managing directors focus on pursuing the increase of the corporate value and profit, and improving the competitiveness of the company, while they will be considered as breaching their duties if they have incorrectly assessed a risk in making an entrepreneurial decision and thereby have acted irresponsibly[143]. Meanwhile, in accordance with §116 of *AktG*, the standard of duty of care established in §93 of *AktG* will apply analogously to the

[138] See §93 (1) of *AktG.* Also see Andreas CAHN, David C. DONALD, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, Cambridge, Cambridge University Press, 2010, pp. 369-370.

[139] Dr Christoph SCHOTTE, "Germany", in J. WILLIAM BOONE, Alston & Bird LLP (Eds.), *International Insolvency: Jurisdictional comparisons (Third edition)*, London, European Lawyer Reference Series, 2012, pp. 183-203, p. 192.

[140] In this sense, see Andreas CAHN, David C. DONALD, *Comparative Company Law…, op. cit.*, p. 392.

[141] Paul DAVIES, Klaus J. HOPT, Richard NOWAK, Gerard VAN SOLINGE (Editors), *Corporate Boards in Law and Practice: A Comparative Analysis in Europe, op. cit.*, p. 321.

[142] See §93 (1) of *AktG.*

[143] Katharina Haehing VON LANZENAUER, Oliver SIEG, "Germany", *loc. cit.*, pp. 185-186. Also see Mads Tønnesson ANDENÆS, *European Comparative Law*, Cambridge, Cambridge University Press, 2009, p. 271.

supervisory directors in order to examine whether supervisory directors have acted in conformity with their competence or not. As we have mentioned, the main duty of supervisory directors lies in supervising the management of the company, thus the duty of care requires them to examine the accounting books and the records, as well as the corporate assets[144]. They should keep informed whether the company's crucial information is real and whether the corporate capital or other assets are well maintained.

Meanwhile, in German Law, the managing directors owe duty of loyalty to the company as well. The loyalty obligations derive from the provisions of good faith in *BGB* (German Civil Code) and serve as a basis for dealing with the conflict of interests between directors and the company[145]. The duty of loyalty is a duty to safeguard the interests of the company, thus managing directors are subject to strict non-compete covenants during and after the employment. The duty of loyalty obliges managing directors to give priority to the potential benefits of the company and avoid abusing the corporate opportunities for personal benefits[146]. Besides, managing directors are also required to avoid illicit disbursement from the company's assets. Such a case often occurs when indirect refund and distribution of hidden dividends are made to shareholders[147]. Moreover, in the aspect of accounting, the loyalty obligations require the managing directors to ensure that the accounting books are well kept while supervisory director should examine whether the content of these documents is real[148].

Under particular circumstances, the supervisory directors also owe the duty of loyalty to the company. For example, the management board should maintain confidentiality of crucial business matters, trade-related secrets or other proprietary information that belong to the company[149], while these obligations apply analogously to supervisory directors[150].

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[144] See §111 of *AktG.*
[145] International Business Publications, *German Company Laws and Regulations Handbook: Strategic Information and Basic Regulations (Volume I)*, Washington, International Business Publications, 2012, p. 39.
[146] See §§ 112 and 113 of *HGB (Handelsgesetzbuch, German Commercial Code)*. Also see §88 of *AktG*,
[147] See §93(3) of *AktG* and §43(3) of *GmbHG.* Also see Alexander LOOS, "Germany", in Alexander LOOS (Editor), *Directors' Liability: A Worldwide Review*, The Hague, Kluwer Law International, 2010, pp. 379-388, pp. 381-384.
[148] See §91 of *AktG,* and §41 of *GmbHG.* Also see Frank DORNSEIFER, "Germany", in Frank DORNSEIFER (Ed.), *Corporate Business Forms in Europe: A Compendium of Public and Limited Companies in Europe*, München, Sellier/European Law Publishers, 2005, pp. 211-294, pp. 252-253.
[149] See §93(1)(3) of *AktG*, and §85 of *GmbHG,* also see Karin MADISSON, "Duties and liability of company directors under German and Estonian Law: a comparative analysis", *RGSL Research papers*, No. 7, 2012, pp. 1-80, p. 21.

Besides, the duty of loyalty also requires them to decide a remuneration of managing directors correctly and in conformity with their competence, otherwise supervisory directors would also be held liable for the damages deriving from the breach of duty of loyalty[151].

The duty of care and the duty of loyalty constitute the basic fiduciary duties of directors towards the company in German law. Therefore, the members of the managing or supervisory board should be held jointly and severally liable if they have acted in violation of their fiduciary duties[152]. In French Law, the company that challenges the conduct of a director should demonstrate that the company has suffered certain damage from directors' misconducts. Conversely, in German law, directors should prove that they have acted with the diligence of a prudent businessman and that the damage suffered by the company is not derived from their managerial acts in order to get relieved[153].

Since the German Law adopts a two-tier board system, a corporate action could be brought through two mechanisms. On one hand, a corporate action could be carried out by the supervisory directors against the members of managing board for their misconducts[154]. On the other hand, a corporate action filed against the unlawful members of the supervisory board could be commenced by the managing directors as well[155].

1.3.2. A derivative action filed by minority shareholders or creditors

In a case where neither the managing nor supervisory board has filed a corporate action, shareholders may assert a derivative claim on behalf of the company. In an AG, a single shareholder does not have the right to bring an action against the managing or supervisory directors on behalf of the company[156]. In accordance with §147 of *AktG*, a minority of shareholders together hold least 10% of the company's capital or a total amount of 1

[150] See §116 (2) of *AktG.*
[151] See §116 (3) of *AktG.*
[152] See §117 (2)(1) of *AktG.*
[153] See §117 (2)(1) of *AktG*, also see Theodor BAUMS, "Personal Liability of Company Directors in German Law", pp. 1-20, p. 11. The article is available on the website: http://www.jura.uni-frankfurt.de/43029388/paper35.pdf.
[154] See §112 of *AktG.* Also see Petri MÄNTYSAARI, *Comparative Corporate Governance: Shareholders as Rule-maker*, Berlin/Heidelberg/New York, Springer, 2005, p. 321.
[155] See §§ 77 and 78(1) of *AktG.*
[156] See Theodor BAUMS, "Personal Liability of…", *loc. cit.*, p. 12.

million euros may appoint certain representatives for the assertion of such a claim[157]. However, if the company loses the lawsuit, these minority shareholders should reimburse the company and bear the cost. Therefore, in order to avoid a potential risk, such a provision is hardly invoked by minority shareholders in legal practice[158].

Unlike §147 of *AktG* that minority shareholders should appoint a representative to assert a claim against directors, §148 of *AktG* introduced by the German legislators in the 2005 reform to *AktG* enables minority shareholders to bring a derivative claim directly by themselves against directors. Minority shareholders whose aggregate holdings at the time of filing the petition equal or exceed 1% of the share capital or amount to at least 100,000 euros may assert a claim on behalf of the company for the damage suffered[159]. In order to ensure appropriate claims and avoid discretional lawsuits by minority shareholders, the German legislators also enable the court to examine whether or not to admit such a derivative claim. Under this circumstance, the elements such as a preceding acquisition of shares prior to the alleged breaches of duty, a loss suffered as a result of improprieties or gross breaches of law or bylaws, and no overriding interests of the company should be evidenced in order for a derivative claim to be admissible before this court[160].

Pursuant to §93(5) of *AktG*, in the case where the assets in a stock company are insufficient to pay for all the debts, creditors are also able to assert a claim against directors for their breach of duty[161]. It should be noticed that a derivative claim in such a case is not aiming at providing a liability regime for creditors directly against directors, but is to recover the loss sustained by the company[162]. The compensation is made to the company rather than creditors, though creditors could indirectly get compensation in the insolvency proceedings.

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[157] See §147(1) and §147(2) of *AktG*, also see A. J. BOYLE, *Minority Shareholders' Remedies*, *op. cit.*, p. 47.
[158] Hans C. HIRT, *The Enforcement of Directors' Duties in Britain and Germany –A Comparative Study with Particular Reference to Large Companies*, Bern, Peter Lang, 2004, p. 302. Also see Xiaoning LI, "On the Recent Reform of the German Stock Companies Act Concerning the Shareholders' Derivative Action", *Journal of Hunan University (Social Science)*, Vol. 23, No. 3, 2009, pp. 136-141, p. 138.
[159] See §148(1) of *AktG.*
[160] See §148(1) of *AktG.* Also see Katharina Haehing VON LANZENAUER, Oliver SIEG, "Germany", *loc. cit.*, pp. 187-188.
[161] See §93 (5)(1) *AktG.* Also see Thomas STOHLMEIER, *German Public Takeover Law: Bilingual Edition with an Introduction to the Law*, The Hague, Kluwer Law International, 2002, p. 15.
[162] Jean J. DU PLESSIS, Bernhard GROßFELD, Claus LUTTERMANN, Ingo SAENGER, Otto SANDROCK, Matthias CASPER, *German Corporate Governance in International and European Context (Second Edition)*, Berlin/Heidelberg/New York, Springer, 2012, p. 84.

1.3.3. A personal action filed by individual shareholders

In German law, since the directors only owe fiduciary duties to the company, shareholders themselves cannot assert a claim against directors deriving from their capacity as director. Therefore, normally a personal claim is not admissible under company law rules. Nevertheless, in accordance with §§823 (1) (2) and §826 of *BGB*, general tort law provides a liability regime for individual shareholders against directors based on the infringement of a specific protective statute and allows compensation for pure economic loss[163]. However, this kind of claims is only available when managing directors commit a tortious act that is not derived from their capacity as directors, and exert direct influence on individual shareholders. Under this circumstance, an assertion of claim for indirect damage that stems from the depreciation of shares will not be admitted[164].

Nevertheless, under exceptional circumstances, individual shareholders are allowed to assert a direct claim against managing directors[165]. For example, §31 (6) of *GmbHG* provides that managing directors who have acted culpably with regard to such repayment should be jointly and severally liable to the shareholders for the refund of such repayment[166]. Besides, according to the §117 (1) (2) and §117 (2) of *AktG*, an individual shareholder is entitled to compensation for loss in a case where other shareholders or third parties have wilfully caused directors to act in contrary to the general standard of board members' duty of care and cause damage to the company. In this case, the individual shareholder may sue both the board members and the person or persons who have influenced them[167].

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[163] See §§ 823 (1) (2) and § 826 of *BGB*. In this sense, also see Katharina Haehing VON LANZENAUER, Oliver SIEG, "Germany", *loc. cit.*, p. 184.

[164] Fernando Marín DE LA BÁRCENA, *La acción individual de responsabilidad frente a los administradores de sociedades de capital (art. 135* LSA*)*, Madrid, Marcial Pons, 2005, p. 55. In this book, the author focus on the analysis of the regime of a personal action in Spanish law while also introduces the German regime from on a comparative perspective.

[165] Frank MONTAG, Klaus HEINEMANN, "The European Community", in Christian CAMPBELL (Editor), *International Liablity of Corporate Directors [2007]II*, New York, Yorkhill Law Publishing, 2007, pp. 339-360, p. 353.

[166] See §31 (6) of *GmbhG*. Also see Frank MONTAG, Klaus HEINEMANN, "The European Community", *loc. cit.*, p. 353. Also see Fernando Marín DE LA BÁRCENA, *La acción individual…, op. cit.*, p. 54.

[167] See §117 (1)(2) and §117 (2)(3) of *AktG.* Also see Petri Mäntysaari, *Comparative Corporate Governance…, op. cit.,* p. 324.

Furthermore, in accordance with some special rules in relation to securities market, directors may be held liable for a loss sustained by individual shareholders. For example, the failure to release *ad hoc* notices[168], or the publication of false information on the current financial status of the company will be one of the reasons for the shareholders to incur liability to directors[169].

1.3.4. A personal action filed by creditors or other third parties

Similar to the relationship between directors and shareholders, directors are non-contractually bound up with creditors and other third parties as well. Under general circumstance, creditors or other third parties cannot bring a personal action directly against directors for their misconducts. Instead, creditors should seek remedy from the company. Nevertheless, §§823 (1) (2) and §826 of *BGB* enable creditors to sue directors for claims based on external liability. Directors could be held liable if they have committed a tortious act that is not derived from their capacity as director. In order to file a claim deriving from a tort, such a "tort" should include three elements: intentional wrongful injury, breach of an explicit statutory provisions the violation of which entitles to damages, and wilful or negligent violations of certain defined rights or protected interests such as life, health or property[170]. However, damage suffered by creditors or other third parties do not often arise until when the company becomes insolvent[171].

Under very rare circumstances, managing directors could be held directly liable to the creditors in a GmbH. In accordance with §311 (2) of *BGB*, the managing director is liable to a contractual partner of the GmbH on the basis of the breach of a *"culpa in contrahendo"* obligation if the partner relied on the special knowledge and trustworthiness of the managing director, or if the managing director had a direct economic interest in the transaction in question[172]. Meanwhile, the breach of a *"culpa in contrahendo"* obligation could also occur in the case where directors have delayed the petition of company's

[168] See Julia REDENIUS-HOEVERMANN, *La responsabilité des dirigeants…, op. cit.*, pp. 102-112.
[169] See Theodor BAUMS, "Personal Liability of…", *loc. cit.*, p. 15.
[170] See Theodor BAUMS, "Personal Liability of…", *loc. cit.*, p. 14.
[171] Katharina HaehLing VON LANZENAUER, Oliver SIEG, "Germany", *loc. cit.,* p. 188.
[172] Frank MONTAG, Klaus HEINEMANN, "The European Community", *loc. cit.*, p. 353. Also see Fernando Marín DE LA BÁRCENA, *La acción individual…, op. cit.*, p. 313. Also see Jesús Alfaro ÁGULA-REAL, "La llamada acción individual de responsabilidad o responsabilidad 'externa' de los administradores sociales", *Indret,* 1/2007, pp. 1-18, pp. 14-15.

insolvency, and continue to let the company conclude new contract with creditors (the so-called "new creditors")[173]. We will carry on this discussion in the next part.

1.3.5. Directors' liability in the insolvency proceedings

In a solvent company, directors must act in the best interests of the company and the general body of shareholders. However, when a company goes bankruptcy, the main objective of the insolvency proceedings is to distribute the rest corporate assets to creditors and to bring the company to an end. Therefore, the interests of shareholders should be switched to creditors in the insolvency proceedings. In accordance with §42 (2) of *BGB*, in a case where a company is insolvent or over-indebted, directors should make a petition for the opening of the insolvency proceedings. If directors have delayed or failed to file for the company's insolvency, they should be held jointly liable for the damage suffered by the company's creditors[174]. As we have known, a director has the duty to check constantly whether his company is insolvent or not. In this regard, if a managing director does not immediately take all necessary steps either to rehabilitate or to liquidate the company, he would be liable for the infringement of obligations[175]. And such an obligation is not only imposed upon the directors formally appointed but also upon directors *de facto*[176].

In German law, the obligation of an insolvency petition constitutes a protective law issue covered by §823 (2) of *BGB*[177]. Besides, pursuant to §15 (a) of *InsO* (German Insolvency Statute), the obligation to file for the insolvency proceedings should be met by the members of directors within three weeks after the insolvency or over-indebtedness arises[178],

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[173]Jesús Alfaro ÁGULA-REAL, "La llamada acción individual de responsabilidad contra los administradores sociales", pp. 1-54, p. 54, this article is available on the website: http://www.estig.ipbeja.pt/~ac_direito/individual.pdf. In this article, the author focus on the analysis of the regime of a personal action in Spanish law while also introduces the German regime from on a comparative perspective.

[174] See § 42 (2) of *BGB*, also see Rafael ARENAS GARCÍA, "Suing directors in international litigation", in S. GRUNDMANN, *Unternehmen, Markt und Verantwortung*, Berlin/New York, Walter de Gruyter, 2010, t. I, pp. 321-335 (p. 331).

[175] Ulrich HUBER, Mathias HABERSACK, "Special Rules for Shareholder Loans: Which Consequences Would Arise For Shareholder Loans if the System of Legal Capital Should be Abolished?", in Marcus LUTTER (Ed.), *Legal Capital in Europe,* Göttingen, European Company and Financial Law Review (Special Volume), De gruyter, 2006, pp. 308-324, p. 323.

[176] Dr Christoph SCHOTTE, "Germany", *loc. cit*., p. 192.

[177] Mattias CASPER, "Liability of the Managing Director and the Shareholder in the GmbH (Private Limited Company) in Crisis", *German Law Journal*, Vol. 9, No. 9, 2008, pp. 1125-1140, p. 1137.

[178] See § 15 (a) (1) of *InsO*.

and directors should assume civil as well as criminal liability in they breach the duty[179]. Moreover, by virtue of §92 (2) of *AktG*, §64 (1) of *GmbHG* and §823 (2) of *BGB*, directors may not only be held liable for the delay or the non-petition for the opening of insolvency proceedings, but also for the payment unlawfully made by the company to other third parties if the corporate assets have turned to be unable to meet the debts[180]. In this case, directors are obliged to assume liability to reimburse the company for any payments unlawfully made to shareholders after the company has become illiquid or after its over-indebtedness has been evidenced[181].

However, the main feature of the liability regime in German law is that directors are jointly held liable for the damage sustained by creditors due to the delay or failure to file for the opening of the insolvency proceedings[182]. In this case, it is not the company to be jointly held liable with the directors, but the members of board (directors) should be held liable as a whole. Under this circumstance, creditors are limited to recover the loss suffered because of the delay in filing, and the loss would be the difference between the recovery rate that they could have obtained in the case of timely filing and the actual rate (so-called "rate reduction loss")[183]. Therefore, it is necessary to demonstrate the existence of causation between the directors' misconducts and the reduction of corporate assets due to the delay or failure of the commencement of the insolvency proceedings.

As we have mentioned, the objective of such a liability is to make compensation for the damage suffered by creditors due to the directors' misconducts[184], which enables creditors to bring an action based on the directors' breach of a non-contractual obligation. However, in accordance with §92 of *InsO*, a claim to seek reimburse for damage sustained by creditors due to the depreciation of the corporate estate before or after the opening of the

[179] See § 15 (a) (4) of *InsO*. Manuel LADIGES, "Criminal liability of directors of a private limited company seated in Germany", *Criminal Law Forum* (2013) 24, pp. 87-111, p. 98.
[180] See § 92 (2) of *AktG*, § 64 (1) of *GmbHG,* and § 823 (2) of *BGB.*
[181] See § 93 (3) (6) *AktG*, Martin SCHULZ, Oliver WASMEIER, *The Law of Business Organization: A Concise Overview of German Corporate Law*, Berlin/Heidelberg/New York, Springer, 2012, p. 33.
[182] See §42 (2) of *BGB*, also see Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 331.
[183] See §823 (2) of *BGB.* Also see Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation: Friction between Company and Insolvency Law in the Single Market", *LSE Legal Studies Working Paper*, No. 6/2014, pp. 1-44, p. 26.
[184] See Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 332.

insolvency proceedings can only be filed by the insolvency administrators during the insolvency proceedings[185], but it does not change the tortious nature of such a claim.

In German doctrine, interestingly, the issue regarding the "new creditors" is also widely mentioned. As we have mentioned, the so-called "new creditors" refer to the group of creditors who have unwittingly extended fresh credit to the company after the point of time at which insolvency proceedings should have been triggered. Had they known of the insolvency, these creditors would not have entered into a transaction with the company at all[186]. And as we have explained, German case law recognized a *"culpa in contrahendo"* obligation owed by directors towards the "new creditors" in such a case. The *Bundesgerichtshof* (BGH, Federal Court of Justice of Germany) held that the "new" and "old" creditors should be treated differently, because such a distinction was required by the general principles on damage and causation[187]. In this sense, "new creditors" can assert a claim directly against the directors for the loss of reliance interests, and such a claim can be brought beyond the insolvency proceedings. In contrast, "old creditors" can only bring a claim via insolvency administrators in the insolvency proceedings for the estate in insolvency as total losses[188].

1.4. Directors' liability in Spanish Law

The recent revision of the Spanish company law has integrated the two separated corporate Acts: the Act of Public Limited Companies (*Ley de Sociedades Anónimas, LSA*) and the Act of the Limited Liability Companies (*Ley de Sociedades de Responsabilidad Limitada, LSRL*) into the new 2010 Corporate Enterprises Act (*Ley de Sociedades Capitales, LSC*). It is of great importance to improve the corporate governance in Spanish law. In this part, we will insert a discussion on the regime of directors' liability in Spanish law.

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[185] See §92 of *InsO.*

[186] Thomas BACHNER, "Wrongful Trading: A New European Model for Creditor Protection?", *European Business Organization Review,* 5 (2004), pp. 293-319, p. 316.

[187] See *BGH* 6 June 1994, II ZR 292/91. Also see Thomas BACHNER, "Wrongful Trading…", *loc. cit.,* p. 317, and also see Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección de acreedores…"*, loc. cit.,* p. 15.

[188] Alexander SCHORK, SCHULTZE & BRAUN, "Directors' liability: Germany", this article is available on the website: www.insol-europe.org/download/file/660.

1.4.1. Directors' fiduciary duties towards the company

As have been established in *LSC*, directors' fiduciary duties consist of duty of diligence and duty of loyalty[189]. In accordance with Article 225 of *LSC*, the duty of diligence includes the duty of care and the duty to keep well informed. On one hand, the duty of care requires directors to perform the duties with the diligence of an orderly businessman. Directors must apply the same level of care, dedication, prudence, professionalism and ability that are applied by any normal businessman under similar circumstances[190]. On the other hand, directors should diligently be aware of the functioning of the company. Directors must dedicate their time and efforts into the management of the company and must acquire a certain level of professionalism so as to maximize the company's profits[191].

The duty of diligence aims at avoiding possible harmful events deriving from the negligence of directors[192]. Such a duty is the most fundamental and provides a guidance for directors to act properly as director, and it could also be further developed in the contract concluded by the director and the company so as to adapt to different circumstances[193]. Therefore, based on such a contract, directors should exercise their functions and carry out the corporate business in a way that can promote the success of the company[194]. In the case where directors act in contrary to the duty of diligence, they should assume contractual liability under such a contract.

Meanwhile, Article 226 of *LSC* provides that directors shall act as a loyal representative with good faith and in the interests of the company. In this situation, directors should draw a clear line between the personal interests and the interests of the company, and avoid

[189] See Articles 225 and 226 of *LSC*.
[190] Ingacio FIGUEROL, "Spain", in Edward SMERDON, *Directors' liability and Indemnification (Second Edition)*, London, Global law and Business, 2011, p. 475.
[191] Sigfrido GROSS-BROWN, "Deberes de administradores en el derecho comparado: El deber de diligencia y el business judgment rule", *Revista de Derecho de Sociedades*, Nº 37, Año 2011-2, pp. 307-320, p. 310.
[192] José Luis MANZANARES SAMANIEGO, *Delitos societarios y conductas afines: La responsabilidad penal y civil de la sociedad, sus socios y administradores*, Las Rozas (Madrid), Editorial La Ley, 2006, p. 604.
[193] José ORIOL LLEBOT, "Los deberes y la responsabilidad de los administradores", in Ángel ROJO, Emilio BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles (4ª ed.)*, València, Tirant Lo Blanch, 2011, pp. 1-58, pp. 31-32. And also see Vincenç RIVAS FERRER, "Deberes de los administradores en la Ley de Sociedades de Capital", *Revista de Derecho de Sociedades*, Nº 38, Año 2012-1, pp. 73-153, p. 76.
[194] Elena F. PÉREZ CARRILLO, "El deber de diligencia de los administradores de sociedades", *Revista de Derecho de Sociedades*, Nº 14, Año 2000-1, pp. 275-323, p. 280.

possible conflicts that may occur between personal and corporate interests. Besides, in order to comply with the obligations imposed by the duty of loyalty, directors should not use the name of the company or invoke their capacity as directors in order to carry out any transaction for their own sake[195], and they are not allowed to take advantage of the company's business opportunities for their own benefit[196]. Moreover, directors are required to avoid competition with the company as well. They cannot engage in a business that is the same or similar to the business in which the company engages[197]. In this sense, the essence of the duty of loyalty is the obligation requiring directors not to involve personal interests in pursue of the corporate interests. However, if such a situation inevitably arises, directors should report to the board and also refrain themselves from taking part in making decisions on such a matter[198].

Furthermore, the duty of confidentiality is also enacted in *LSC*, in which directors are required to maintain secrecy and should not disclose any information of the company. Even after the employment, directors must not disclose any details, reports or facts that may be detrimental to the interests of the company[199]. Such a duty may be considered as a duty of diligence or a duty of loyalty according to different legal systems, but in some doctrines it is also considered as a general obligation that should be imposed onto directors[200]. In this case, Spanish doctrines regard such a duty as a duty of fidelity, which is independent from the other duties since it plays a crucial role in protecting the corporate security [201].

The fiduciary duties provide guidance for directors to comply with. In the case where directors have breached the general or specific aspects of fiduciary duties, they may cause

[195] See Article 227 of *LSC*.
[196] See Article 228 of *LSC*.
[197] See Article 230 of *LSC*.
[198] See Article 229 of *LSC*. Also see Alberto EMPARANZA, "Los conflictos de interés de los administradores en la gestión de las sociedades de capital", *Revista de Derecho Mercantil*, Nº 281, 2011 (Julio-Septiembre), pp. 5-45, p. 20.
[199] See Article 232 of *LSC*.
[200] For example, in German Law it is included in the scope of duty of diligence, while in the US regime it is considered to be an aspect of duty of loyalty. In this sense, see Mª José CASTELLANO RAMÍREZ, "El deber de secreto de los administradores a la luz de la Ley de Transparencia", *Revista de Derecho de Sociedades*, Nº 23, Año 2004-2, pp. 117-144, p. 122.
[201] Jesús QUIJANO GONZÁLEZ, "Deber de secreto", in C. ALONSO LEDESMA (dir.), *Diccionario de derecho de sociedades*, Madrid, Iustel, 2006, pp. 432-436, p. 432. Also see G. GUERRA MARTÍN, *El gobierno de las sociedades cotizadas estadounidenses: su influencia en el movimiento de reforma del Derecho europeo*, Navarra, Aranzadi, 2003, pp. 443 and ss.

damage to the company. Under this circumstance, the company could incur liability to directors for their misconducts through a corporate action.

1.4.2. A corporate action under Spanish law

As we have mentioned, a corporate action aims at protecting the corporate assets. In accordance with Article 238 (1) of *LSC*, a corporate action shall be decided by a resolution of the general meeting of shareholders[202]. Since Spanish law follows the unitary corporate structure, the general meeting is the only competent organ to determine the crucial corporate affairs, and to supervise and control the company's directors[203]. In this situation, a corporate action filed against directors for their bad faith or gross negligence during the exercise of functions should be approved by the majority of shareholders via a resolution[204]. If the discussion on whether to bring a corporate action is not included in the schedule of the general meeting, any individual shareholder could make petition for a corporate action as well[205].

In fact, majority shareholders may reach different kinds of agreements at the general meeting before such an action against directors could finally be carried out[206]. Firstly, they may come to an agreement either to support or to oppose the commencement of a corporate action. Secondly, they may make an agreement to give up filing a corporate claim. Thirdly, they may achieve a settlement with directors on the compensation for the corporate loss. However, they may also close the meeting without obtaining any agreement[207]. In the case where majority shareholders decide to give up filing a corporate

[202] See Article 238 (1) of *LSC*. Also see Rafael LARA, "La acción social de responsabilidad: ejercicio por la sociedad", in Ángel ROJO, Emilio BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles (4ª ed.)*, València, Tirant Lo Blanch, 2011, pp. 59-93, p. 98.

[203] Juan SÁNCHEZ-CALERO GUILARTE, "La acción social de responsabilidad (Algunas cuestiones pendientes)", *Revista de Derecho Mercantil,* Nº 281, 2011 (Julio-Septembre), pp. 95-123, p. 101.

[204] Ignacio FIGUEROL, "Spain", *loc. cit.*, pp. 476-477.

[205] See Article 238 (1) of *LSC*. Also see Javier JUSTE, "La legitimación subsidiaria para el ejercicio de la acción social", in Ángel ROJO, Emilio BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles (4ª ed.), op. cit.*, pp. 129-168, pp. 143-144.

[206] See Article 198 of *LSC*.

[207] Rafael LARA, "La acción social de responsabilidad: ejercicio por la sociedad", in Ángel ROJO, Emilio BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles (4ª ed.), op. cit.*, pp. 97-128, p. 103, also see Gaudencio ESTEBAN VELASCO, "La acción social y la acción individual de responsabilidad contra los administradores de las sociedades de capital", in Juan BOLAS ALFONSO (dir.), *La responsabilidad de los administradores de sociedades de capital*, Consejo General Poder Judicial, Estudio de Derecho Judicial, Nº 24, 1999, pp. 57-130, pp. 67-68.

claim against directors or making compromise with them, shareholders representing 5% of the capital could object to such a resolution[208].

The objective of a corporate action is to establish liability to directors for their misconducts and recover the loss sustained by the company due to these unlawful behaviours[209]. Besides, directors will be dismissed automatically and immediately when general meeting agrees to bring this action or to compromise with directors[210]. In this sense, a corporate action presents compensatory as well as punitive natures[211]. When the directors at issue are dismissed, such a corporate action should be commenced by other directors or by a person specifically appointed to carry out the proceedings[212]. Under general circumstances, all the members of the managing board who have adopted a detrimental decision or have conducted wrongful acts should be jointly held liable to the company, unless some of the members could prove that they had not participated in the adoption of such a decision, or were not aware of the existence of such adoption, or had taken measures to opposed to the adoption of the decision, or had tried to prevent causing possible damages[213]. A corporate action is applicable to a director *de jure* as well as a director *de facto*, which refers to a group of actual managers of the company who has not been formally nominated by the general meetings, as we have mentioned[214]. In this sense, a director *de facto* should also assume liability when he breaches the fiduciary duties that are normally imposed onto a director *de jure*.

1.4.3. A derivative claim filed by minority shareholders or creditors

Since liability may be incurred to directors for the breach of fiduciary duties, it is very likely that they would not convene the general meeting of shareholders for the fear that a

[208] See Article 238 (2) of *LSC*.
[209] Fernando SÁNCHEZ CALERO, *Los administradores en las sociedades de capital (Segunda edición)*, Navarra, Thomson/Civitas, 2007, p. 367. Also see Juan SÁNCHEZ-CALERO GUILARTE, "La acción social de responsabilidad (Algunas cuestiones pendientes)"*, loc. cit.,* p. 108.
[210] See Article 238 (3) of *LSC*.
[211] Fernando RODRÍGUEZ ARTIGAS, Fernando MARÍN DE LA BÁRCENA, "La acción social de responsabilidad", in Guillermo GUERRA MARTÍN (coord.), *La responsabilidad de los administradores de sociedades de capital*, Madrid, Editorial La Ley, 2011, pp. 153-194, p. 167.
[212] Ana Isabel BERROCAL LANZAROT, *La responsabilidad civil de los administradores sociales*, Actualidad Civil, Nº 16, Sección Informe de Jurisprudencia, Tomo II, Madrid, Editorial La Ley, 2010, pp. 1932 y ss.
[213] See Article 237 of *LSC*.
[214] See Article 236 of *LSC*. Also see Nuria LATORRE CHINER, "El concepto de administrador de hecho en el nuevo artículo 133.2 LSA", *Revista de Derecho Mercantil,* Nº 253, 2004 (Julio-Septiembre), pp. 853-899, p. 866.

resolution approving a corporate claim may be made by the general meeting. If directors have not convened the general meeting of shareholders, a minority of shareholders representing at least 5% of company's capital could directly file a derivative claim on behalf of the company[215].

However, if directors have convened the general meeting, and majority shareholders have reached an agreement to file a corporate action against directors, while directors or a special personnel appointed by the company failed to carry out such an action against the directors at issue within one month from when the agreement is made, minority shareholders would be entitled to act on behalf of the company through a derivative action[216]. In this case, the period of one month is not a period for minority shareholders to wait until their rights are expired, but it refers to a period for them to wait until they are legitimate to exercise the right[217].

Besides, if the general meeting has decided not to file a corporate action, minority shareholders who do not agree with such a decision for the concern that their personal interests may be indirectly affected by the directors' misconducts, could act in the interests of the company[218]. In this case, minority shareholders are entitled to initiate this action on behalf of the company as long as the minimum requirement of shareholding is fulfilled, and do not need to wait until one month has passed[219].

Moreover, as we have mentioned above, *LSC* also enables minority shareholder to oppose to a general meeting's decision when majority shareholders have agreed to give up filing a corporate action, or have achieved a settlement with the directors on the compensation for the corporate loss. In Spanish law, since directors are nominated by the general meeting, major shareholders will often choose these directors who they could have reliance on them. Under this circumstance, even though sometimes directors may have misconducts, majority shareholders would be tolerant and give up filing a corporate action against

[215] See Article 239 (1) of *LSC*.
[216] See Article 239 (2) of *LSC*.
[217] Fernando RODRÍGUEZ ARTIGAS, Fernando MARÍN DE LA BÁRCENA, *La acción individual…, op. cit.,* p. 183.
[218] See Article 239 (2) of *LSC*.
[219] Rocío MARTÍ LACALLE, *El ejercicio de los Derechos de Minoría en la Sociedad Anónima Cotizada*, Navarra, Thomson/Aranzadi, 2003, p. 241.

them[220]. In this case, it is reasonable for minority shareholders to be able to bring such a derivative action for the sake of the interests of the company. However, in an extreme case 95 % of the majority shareholders have agreed to give up filing a corporate claim or to make compromise with directors, while only 5 % of the shareholders have opposed to such an agreement[221], it seems unreasonable to ignore the general meeting's decision but to unconditionally support minority shareholders in bringing a derivative claim. Although a derivative action is for the company's sake, an excessive permission may encourage the minority shareholders to abusively file a derivative claim and disturb the normal functioning of the company, while it is contrary to the interests of the company.

It is worth mentioning that *LSC* allows creditors to bring a derivative action as well as minority shareholders. Unlike shareholders, creditors do not have the right to vote in a general meeting in order to decide the corporate affairs, so in a solvent company, their interests are usually subordinate to those of the company and the general body of shareholders. Nevertheless, they are legitimate to file a derivative claim when the company's assets are insufficient to recover the debts[222]. The insufficiency of corporate assets should not be understood as insolvency in this case, because the objective to enable creditors to file a derivative claim is to demand compensation from the directors on behalf of the company. By doing so, the company may be able to continue to carry on its business and avoid insolvency, and the interests of creditors may be indirectly protected since they do not have to worry about whether they could get complete compensation in the insolvency proceedings[223]. Besides, once the corporate assets are insufficient to recover the corporate debts, the interests of the shareholders will be shifted to those of the creditors, and it may make minority shareholders lose interest to file a claim since they would not get any payment at all. In this situation, the liability regime also provides a rescue for creditors when neither the company nor the shareholders have filed an action against directors.

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[220] Rocío MARTÍ LACALLE, *El ejercicio de…, op. cit.*, pp. 248-249.

[221] Javier JUSTE, Javier JUSTE, "La legitimación subsidiaria…", *loc. cit.*, pp. 146-147.

[222] Jesús QUIJANO GONZÁLEZ, "Responsabilidad societaria y concursal de administradores: De nuevo sobre la coordinación y el marco de relaciones", *Revista de Derecho Concursal y Paraconcursal*, Nº 10, Editorial La Ley, 2009, pp. 1-32 (p. 22). Also see Javier JUSTE, "La legitimación subsidiaria…", *loc. cit.*, p. 163.

[223] Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, pp. 403-404.

However, since Spanish law has provided a strong protection to the interests of creditors and enable them to bring an personal action (Article 241 of *LSC*), or to establish liability to directors for the failure to file for the opening of the insolvency proceedings (Article 367 of *LSC*), it is doubtful whether it is necessary to enable creditors to file a derivative action as well. Firstly, directors may cause a direct loss to creditors apart from a general loss to the corporate assets. Therefore, a personal action filed by creditors aims at recovering a personal loss sustained by an individual creditor rather than a loss sustained by the company. Secondly, directors' failure to file for the opening of the insolvency proceedings will cause direct damage to corporate assets but not to creditors. However, directors are jointly held liable for corporate debts in this case, which means that the liability regime imposes a special liability on directors towards creditors and shows a punitive nature[224]. In contrast, a derivative claim aims at holding directors liable for damage sustained by the company and shows a compensatory nature[225]. Therefore, these actions have different concerns and present different objectives, which make a creditor's derivative claim logical in Spanish law.

1.4.4. A personal action filed by shareholders or creditors

In addition, shareholders may also be entitled to establish liability to directors through a personal action. In accordance with Article 241 of *LSC*, a personal action may be brought against directors to hold them liable for their misconducts which have caused direct damage to the interests of shareholders and creditors[226]. In this case, Article 241 of *LSC* should only be applicable to the wrongful acts or negligence conducted by directors during the exercise of functions[227].

Unlike a derivative action, shareholders and creditors file a personal claim not for the interests of the company but for their own sake. Since shareholders and creditors are non-contractually bound up with directors, a personal claim is considered as based on the

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[224]Margarita VIÑUELAS SANZ, "Reflexiones críticas sobre la naturaleza sancionadora de la responsabilidad concursal", *Anuario Facultad de Derecho*, Universidad de Alcalá, 2008, pp. 393-405, p. 394.
[225] Javier JUSTE, "La legitimación subsidiaria…", *loc. cit.*, p. 163.
[226] See Article 241 of *LSC*.
[227] See Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 324. Also see Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, pp. 412-413.

principle of *"alterum non laedere"*[228]. This kind of tort law liability stems from Article 1902 of *Código Civil* (Spanish Civil Code), by virtue of which directors shall be held liable for shareholders and creditors for their tortious behaviours as other wrongdoers[229]. Under very exceptional circumstances, it is not impossible that directors may conclude a contract with shareholders and creditors in order to deal with some special affairs, in which the relationship between them could be contractual[230]. In this case, Article 241 of *LSC* provides an alternative to shareholders and creditors in order for establish liability against directors when they cannot assert a contractual claim.

As we have mentioned, directors should be held liable in a personal claim for their intentional or negligent behaviours that have caused a direct loss to shareholders. For example, directors may prevent shareholders from participating or voting in the general meetings[231]. Besides, they may not have convened a general meeting when the company releases new shares so that the shareholders cannot exercise their priority to purchase the new shares[232]. Moreover, directors may also keep shareholders from participating in the distribution of dividends deriving from the increase of value of the shares, or in the distribution of a solvent company's assets in the dissolution proceedings[233]. Under these circumstances, shareholders may be entitled to assert a personal claim. Since it is a tortious claim, shareholders should prove the existence of a causal link between the directors' misconducts and the loss they have suffered from directors' misconducts[234].

Generally, if the company's creditors suffer a financial loss from the directors' misconducts, they should sue the company rather than its directors for the breach of

[228] Rafael ARENAS GARCÍA, "La responsabilidad de administradores sociales desde la perspectiva del Derecho Internacional Privado", in Rafael ARENAS GARCÍA/Carlos GÓRRIZ LÓPEZ/Jorge MIQUEL RODRÍGUEZ, *La internacionalización del Derecho de sociedades*, Barcelona, Atelier, 2010, pp. 157-200, p. 188.
[229] Gaudencio ESTABAN VELASCO, "La acción individual de responsabilidad", in Ángel ROJO, Emilio BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles (4ª ed.), op. cit.*, pp. 169-254 (p. 176). Also see Fernando Marín DE LA BÁRCENA, *La acción individual..., op. cit.*, pp. 105 and ss.
[230] Fernando L. DE LA VEGA GARCÍA, "Responsabilidad civil de administradores y daños derivados de ilícitos concurrenciales", *Revista de Derecho Mercantil*, Nº 246, 2002 (Octubre-Diciembre), pp. 1755-1792, p. 1765.
[231] See Fernando Marín DE LA BÁRCENA, *La acción individual..., op. cit.*, pp. 282-283.
[232] See Articles 107 (2) and 308 of *LSC*.
[233] Antonio RONCERO SÁNCHEZ, "La acción individual de responsabilidad", in Guillermo GUERRA MARTÍN (coord.), *La responsabilidad de los administradores de sociedades de capital, op. cit.,* pp. 197-222, p. 200.
[234] Gaudencio ESTABAN VELASCO, "La acción individual…", *loc. cit.*, pp. 188-190.

contractual obligations, since the company is an independent entity[235]. However, the Spanish legislators also provide a liability regime for creditors and other third parties, for the consideration that sometimes creditors may have special reliance on directors, or a loss sustained by creditors or other third parties stemming from a directors' misconduct that is not necessarily connected with the company. For example, directors may intervene in a contract between creditors and the company and play a crucial role during the conclusion of such a contract. In such a case, it is possible that creditors are willing to conclude the contract with the company only because of a special director, maybe for his reputation or promise, or for personal reliance that creditors have on him[236]. If it were so, directors should be held liable for a loss of reliance interests. Besides, directors may have not informed creditors of the real financial situation of the company on the verge of insolvency, and continue to carry on the company's business and conclude new contracts with them. In this case, directors should also be held personally liable for the creditors' loss deriving from the conclusion of such a contract[237]. Moreover, in financial markets, directors may be held liable for the release of fraudulent or misleading information as well[238]. Under these circumstances, creditors or other third parties should also be entitled to file a personal action against directors if they have suffered a personal loss directly from directors' misconducts.

1.4.5. Directors' liability for the corporate debts in the insolvency proceedings

Article 367 of *LSC* provides a liability regime to incur directors' liability in the case where they have delayed for failed to file for the company's dissolution, or in the case of insolvency, they have not filed for the opening of the insolvency proceedings[239]. Under these circumstances, directors will be held jointly liable with the company for the debts owed to the creditors.

[235] Fernando MARÍN DE LA BÁRCENA, *La acción individual..., op. cit.,* p. 120.
[236] See Jesús ALFARO ÁGULA-REAL, "La llamada acción…", *loc. cit.*, pp. 14 and ss.
[237] Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección de acreedores…", *loc. cit.,* p. 15. Also see Gaudencio ESTABAN VELASCO, "La acción individual…", *loc. cit.*, pp. 204-206. Also see Fernando Marín DE LA BÁRCENA, *La acción individual..., op. cit.*, pp. 349 and ss.
[238] Roger FREIXES PORTES, Gerard CORREIG FERRÉ, "Análisis en material de Mercado de valores en relación con la inexactitude de la información financier regulada", *Revista de Derecho de Mercado de valores,* Nº 10, Editorial La Ley, pp. 1-18, p. 5.
[239] See Article 367 of *LSC*.

In the case of company's dissolution, directors' failure to file for the dissolution should be regarded as breach of their fiduciary duties that are owed to the company. In this case, if the company is still solvent, creditors will not have to worry about whether they could get complete compensation or not. Therefore, directors' misconducts do not directly affect creditors, and creditors cannot bring a claim based on tort law. Nevertheless, *LSC* enables creditors to assert a claim and to establish liability to directors for the corporate debts as well. Under this circumstance, it is irrelevant to demonstrate the existence of a casual link between the financial loss sustained by the company and directors' misconducts[240]. As long as directors have breached the duties for not filing for the company's dissolution within a reasonable time when the legal reasons arise, liability could be incurred to them.

Since it is not necessary to demonstrate a casual link between the financial loss sustained by the company and the directors' misconducts, such a liability may be regarded as an *"ex lege"* liability that is directly imposed by the special provisions of law[241]. However, if *LSC* states that directors should be jointly liable with the company for the corporate debts owed to creditors, and since the company and its creditors are normally bound by a contract, it seems doubtful whether such a statement would render directors to be contractually bound up with creditors.

A contract liability arises when either party who has entered into a contract fails to fulfil the obligations deriving from such a contract, and he should make compensation for the other party due to the breach of contractual obligations. However, Article 367 of *LSC* is not aiming at imposing directors to repair the financial loss that they have caused, but is a punishment mechanism which forces directors to repay the corporate debts together with the company for the breach of fiduciary duties[242]. Therefore, directors' liability for the failure to file for the company's dissolution is not derived from the breach of contractual

[240] Miguel RUIZ MUÑOZ, "Fundamento y naturaleza jurídica de la responsabilidad de los administradores del artículo 262.5 LSA (art. 105. LSRL): análisis contractual representativo", *Revista de Derecho Mercantil,* Nº 244, 2002 (Abril-Junio), pp. 469-568, p. 485. Also see María de los Ángeles MARTÍN REYES, "La insolvencia de las sociedades de capital y la exigencia de responsabilidad a sus administradores", *Revista de Derecho Mercantil*, Nº 277, 2010 (Julio-Septiembre), pp. 853-898, p. 856.

[241] Miguel RUIZ MUÑOZ, "Fundamento y naturaleza…", *loc. cit.,* pp. 514-515. Also see Antonio MOYA JIMÉNEZ, *La responsabilidad de los administradores de empresas insolventes (7ª Edición)*, Barcelona, Bosch, 2011, p. 353.

[242] María de los Ángeles MARTÍN REYES, "La insolvencia de…", *loc. cit.*, pp. 856-857.

obligations, but derives from a special duty required by mandatory provisions which push them to assume liability for part of or the whole corporate debts[243].

Meanwhile, Article 367 of *LSC* applies as well in a case where directors have delayed or failed to file for the opening of the insolvency proceedings. Such a liability deriving from directors' breach of duties to file for insolvency is also an *"ex lege"* liability as in the case of dissolution. Besides, Article 172 *bis* of *LC* also provides a liability regime to establish liability to directors in the case where the insolvency proceedings have been declared fraudulent by the court[244]. In such a case, if directors' intentional misconducts or gross negligence have led to or aggravated insolvency, the insolvency proceedings will be declared fraudulent by the court[245].

Article 367 of *LSC* and Article 172 *bis* of *LC* may share some similarities. However, the two regimes should be applied in different contexts and with different objectives. Article 367 of *LSC* applies as long as directors fail to fulfil the duties to petition for the opening of the insolvency proceedings, such a liability regime is based on "pre-insolvency" grounds, in a moment where company law rules are still applicable[246]. When the insolvency proceedings are commenced, the tools in insolvency law should replace those in company law in order to establish liability to directors. In this case, Article 172 *bis* of *LC* applies when the insolvency liquidation begins[247], and the company's liquidator could assert a claim against directors under this Article after the court has evaluated the directors' work

[243] María de los Ángeles MARTÍN REYES, "La insolvencia de…", *loc. cit.*, p. 885.
[244] See Article 172 *bis* of *LC*.
[245] Alberto ALONSO UREBA, "La responsabilidad concursal de los administradores de una sociedad de capital en situación concursal: el art. 172(3) de la LC y sus relaciones con las acciones societarias de responsabilidad", in Alberto ALONSO UREBA, Rafael GARCÍA VILLAVERDE, Juana PULGAR EZQUERRA (aut.), *Derecho concursal: estudio sistemático de la Ley 22/2003 y de la Ley 8/2003 para la reforma concursal*, Madrid, Dilex, 2003, pp. 505-576, pp. 533-534.
[246] Jesús QUIJANO GONZÁLEZ, "Responsabilidad societaria y concursal…", *loc. cit.*, pp. 21-22. Also see Jesús QUIJANO GONZÁLEZ, "La responsabilidad de los administradores por la no disolución de la sociedad y las causas de exoneración", *Revista de Derecho de Sociedades*, Nº 19, Año 2002-2, pp. 73-87, p. 85.
[247] María de los Ángeles MARTÍN REYES, "La insolvencia de…", *loc. cit.*, p. 886.

and has decided to declare the insolvency proceedings as fraudulent[248]. Therefore, Article 367 of *LSC* may have little significance during the insolvency proceedings[249].

In this regard, the Spanish legislators also tend to establish a boundary between company law and insolvency law. In accordance with Article 51 *bis* of *LC* introduced by the new Act 38/2011, the liability regime under Article 367 of *LSC* should be suspended during the insolvency proceedings[250]. As is known, the insolvency proceedings should be carried out on the basis of the principle of *"par condition creditorum"*, therefore a claim under Article 172 *bis* of *LC* should be brought by the insolvency liquidators who represent the general body of creditors. In contrast, Article 367 of *LSC* allows individual creditors to bring an action against directors even after the insolvency proceedings, which could be considered as providing a rescue to those unsecured creditors, and it does not fall within the scope of *"par condition creditorum"*[251].

Besides, as we have mentioned, the liability regime under Article 367 of *LSC* is with a punitive nature to establish liability to directors for the breach of fiduciary duties owed to the company. In contrast, pursuant to Article 164 of *LC*, in order for the insolvency proceedings to be declared as fraudulent, the court should take into account not only the directors' breach of fiduciary duties, but also the consequence that their misconducts have caused or aggravated the company's insolvency. In this case, it is relevant to demonstrate a casual link between the misconducts and the damage[252]. However, under Article 172 *bis* of *LC*, as long as the insolvency proceedings are declared fraudulent by the court, directors

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[248] Margarita VIÑUELAS SANZ, "La modificación del ámbito objetivo de la responsabilidad de los administradores por las deudas sociales", *Revista de Derecho Mercantil*, Nº 266, 2007 (Octubre-Diciembre), pp. 995-1036, pp. 1025-1026.

[249] Emilio BELTRÁN, "En torno a la «naturaleza» de la responsabilidad concursal (comentario de la sentencia de la Sección 28ª de la Audiencia Provincial de Madrid de 5 de febrero de 2008)", *Anuario de Derecho Concursal*, 2008-2, pp. 329-372, p. 350.

[250] See Article 51 *bis* of *LC*. Also see José Antonio GARCÍA-CRUCES, "Ejercicio de las acciones de responsabilidad frente a los administradores de la sociedad concursada", in José Antonio GARCÍA-CRUCES (Dir.), *Insolvencia y Responsabilidad*, Navarra, Thomson Reuters/Civitas, 2012, pp. 247-297, pp. 283 and ss. Also see Fernando GÓMEZ MARTÍN, *Comentarios a la Propuesta de Reforma de la Ley Concursal*, Navarra, Aranzadi/Thomson Reuters, 2010, p. 104.

[251] Benjamín SALDAÑA VILLOLDO, "La acción individual de responsabilidad en el marco de la crisis disolutoria y concursal de la sociedad de capital. Especial referencia al cierre de hecho", *Revista de Derecho Mercantil,* Nº 274, 2009 (Octubre-Diciembre), pp. 1329-1369, pp. 1335-1339. Also see María José VERDÚ CAÑETE, *La responsabilidad civil…, op. cit.,* p. 393.

[252] José ANTONIO GARCÍA-CRUCES, "La responsabilidad concursal", in Ángel ROJO, Emilio BELTRÁN, *La responsabilidad de los administradores de las sociedades mercantiles (4ª ed.), op. cit.*, pp. 305-365, p. 331.

could be forced to make up for the deficit of the corporate assets[253]. In this case, it is not necessary to demonstrate the existence of a casual link between the directors' misconducts and the deficit of the corporate assets[254]. Therefore, a liability under Article 172 *bis* of *LC* is also a liability with punitive objective and should also be considered as an *"ex lege"* liability[255].

Furthermore, in accordance with Article 48 *quáter* of *LC*, a corporate action is admissible during the insolvency proceedings. However, it should be the company's liquidator to file such an action exclusively[256]. Besides, although the new Act 38/2011 does not clearly state that a personal action is also admissible, it is doctrinally suggested that a personal action based on company law could also be permissible during the insolvency proceedings[257]. In fact, the liability regime under Article 241 of *LSC* aims at providing individual creditors an opportunity to seek remedy for a direct loss caused by directors[258], while the liability regime under Article 172 *bis* of *LC* aims at establishing liability to directors for the breach of fiduciary duties that have caused or aggravated the company's insolvency. Since a personal claim derives from a directors' misconduct based on a background that is different from a misconduct committed during the insolvency proceedings[259], it should be not suspended during the insolvency proceedings.

1.5. Conclusion

In the first place, all the four EU Member states that we have mentioned above, i. e., France, the UK, Germany and Spain, have imposed fiduciary duties onto directors towards the company. In British law, on one hand, its common law traditions have provided an abundant case law in order to give a well-developed interpretation to the directors'

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[253] See Article 172 *bis* of *LC*.

[254] Daniel Rodríguez RUIZ DE VILLA, "Primeros pronunciamientos del Tribunal Supremo sobre la naturaleza jurídica de la responsabilidad concursal de los administradores sociales (arts. 172.3 LC, originario, y 172 bis LC, reformado)", in José Antonio GARCÍA-CRUCES (Dir.), *Insolvencia y Responsabilidad, op. cit.*, pp. 401-420, p. 418. Also see Emilio BELTRÁN, "En torno a la…", *loc. cit.,* p. 355.

[255] Daniel Rodríguez RUIZ DE VILLA, "Primeros pronunciamientos del…", *loc. cit.,* p. 420. Also see Emilio BELTRÁN, "En torno a la…", *loc. cit.,* p. 354. Also see José ANTONIO GARCÍA-CRUCES, "La responsabilidad concursal", *loc. cit.*, p. 331.

[256] See Article 48 *quáter* of *LC*. Also see Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, p. 426.

[257] Alberto ALONSO UREBA, "La responsabilidad concursal…", *loc. cit.,* pp. 561-562.

[258] José ANTONIO GARCÍA-CRUCES, "Ejercicio de las…", *loc. cit.*, pp. 249-253.

[259] Jesús QUIJANO GONZÁLEZ, "La responsabilidad societaria en el seno del concurso: Marco de relaciones con la responsabilidad concursal", in Guillermo GUERRA MARTÍN (coord.), *La responsabilidad de los administradores de sociedades de capital, op. cit.*, pp. 339-442, pp. 412 and ss.

fiduciary duties. On the other hand, the recent codification of the general duties also provides guidance for directors to act in company with the rules. Meanwhile, in the Member states that follow civil law system, the fiduciary duties are usually codified in their company law, and are often presented as the duty of diligence and the duty of loyalty.

In the second place, when directors act in contrary to their fiduciary duties, the company could file a corporate action in order to establish liability to directors. In the Member states that follow two-tier board system (Germany), such an action is usually carried out by the supervisory or managing board, while in the Member states that follow one-tier board system (the UK and Spain), whether to file such an action should be determined by the general meeting of shareholders. Under general circumstances, directors usually should assume civil liability towards the company for the breach of fiduciary duties. However, in French law, directors may be forced to assume both civil and criminal liabilities.

In the third place, the legislators in these Member states adopt a very different attitude towards a derivative claim. For example, in the French regime, a group of minority shareholders or even a single shareholder could file a derivative claim. In contrast, in the Spanish and German regimes, a single shareholder cannot institute a derivative action. Only a minority of shareholders satisfying the minimum capital requirement could file such a claim. Meanwhile, the Spanish and German legislators also provide a liability regime for creditors to file a derivative claim in the case where the corporate assets are not insufficient, in such a way they tend to provide a stronger protection to the company's creditors. However, in British regime, in order to carry out a derivative claim, minority shareholders should obtain the permission from the court, while the conditions to admit a derivative claim are very strict for them. Under this circumstance, a derivative claim is hardly applied by minority shareholders.

In the fourth place, normally shareholders and creditors are not allowed to bring a personal claim directly against directors. Nevertheless, in British law, shareholders can institute a personal action against majority shareholders based on the principle of "unfairly prejudice". If the directors are majority shareholders or the controllers of the company, such a liability claim could be filed against them. However, it is not a liability regime against directors in strict senses. In German law, under exceptional circumstances, creditors are entitled to file

a personal claim against directors for a loss deriving from special reliance. Meanwhile, the "new creditors" could also file a personal claim against directors for their misconducts at the vicinity of the company's insolvency. However, in German law, directors' liability towards creditors is not considered as a tortious liability, but is based on the breach of a "*culpa in contrahendo*" obligation. In Spanish Law, both shareholders and creditors could file a personal claim against directors for a direct loss caused by directors' misconducts. In this case, such a liability regime aims at recovering a loss sustained by shareholders and creditors and is based on tort law ground.

In the fifth place, in regard of the insolvency proceedings, all the four Member states have enacted the liability regime which could establish liability to directors when they have delayed or failed to petition for the opening of insolvency proceedings. In British and French laws, directors are required to make contribution to the corporate assets and such a liability is considered as an *"ex lege"* liability towards the corporate assets. In contrast, in German law, directors should be held liable for the damage sustained by the company's creditors and such a liability is regarded as a liability based on tort law grounds. However, individual creditors cannot directly file such a claim against directors to ask for personal compensation. On the contrary, such a claim should be brought by the company's liquidator during the insolvency proceedings. In Spanish law, on one hand, the company law provides a liability regime in order to establish liability to directors for their delay or failure to file for the company's dissolution or insolvency. Such a liability is an *"ex lege"* liability since liability could be incurred as long as directors have breached their duties. In this case, directors should be held liable for the corporate debts jointly with the company, and it allows individual creditors to bring such an action as well. On the other hand, the insolvency law also provides a liability regime in order to establish liability to directors in a case where their misconducts have caused or aggravated the company's insolvency. And such a liability is also an *"ex lege"* liability since liability could be incurred as long as the insolvency proceedings have been declared fraudulent by the court. In order not to confuse the application of the two liability regimes, the Spanish legislators hold that the liability regime in company law should be suspended during the insolvency proceedings, and the liability regime in insolvency law should be brought by the company's liquidator rather than individual creditors, and should be for the sake of the general body of creditors.

Besides, a corporate action and a personal action may also be admissible during the insolvency proceedings.

2. Directors' liability in Chinese Law

Although Chinese legal system mainly follows the civil law system, the area of company law lacked systematical development during a long time due to the planned market economy. Nevertheless, since recent decades, the Chinese legislators have realized the importance to keep pace with the globalization and the need to introduce the free market economy in China. And they were also urged to introduce a revision to Chinese company law since the number of companies keeps exploding after the liberalization of the market and severe problems have emerged in the field of corporate governance. Under this circumstance, *Chinese Company Act* was finally promulgated in 2005 and was again revised in 2014[260]. In this part, we will discuss the rules regarding the directors' liability in Chinese company law from a comparative perspective.

2.1. Directors' liability in Chinese legal system

2.1.1. Directors' duties in *Chinese Company Act*

The corporate structure in *Chinese Company Act* follows the two-tier board system, since the German regime has exerted great influence on the development of Chinese commercial law. According to *Chinese Company Act*, the public limited companies are obliged to establish both the managing and supervisory boards[261]. Conversely, it is not necessary for the private limited companies to establish both the managing and supervisory board, they are only required to keep at least one director in each board[262].

Pursuant to Article 148 of *Chinese Company Act*, directors' duties towards the company consist of duty of loyalty and duty of diligence[263]. It was the first time that the system of directors' duties was enacted by *Chinese company Act*. In terms of the duty of loyalty,

[260] The most recent *Chinese Company Act* came into force on 1 March 2014.
[261] See Articles 109 and 118 of *Chinese Company Act*. The number of the managing board shall range from 5 to 19 persons, and that of supervisory board shall be at least 3 persons.
[262] See Articles 51 and 52 of *Chinese Company Act*.
[263] See Article 148 of *Chinese Company Act*.

Chinese Company Act provides several examples in order to facilitate the application of the provision. The duty of loyalty requires a director to exercise his functions faithfully, to act affirmatively in order to protect the interests of the company, and to refrain from doing anything that would injure the corporate interest[264]. Concretely, directors should not misappropriate corporate funds for personal use, or deposit corporate assets into an account that does not belong to the company itself, or loan corporate funds to other people, or give corporate assets as security for the debt of any other individual without the approval of the general meeting of shareholders[265]. Meanwhile, corporate interests should always take precedence over directors' personal interests. And directors are obliged not to take the business opportunities belonging to the company or to engage in the same business as the company does. Normally, directors' self-dealing transactions with the company should not be allowed unless they could obtain the approval of the general meeting of shareholders, and they cannot accept benefits from third parties or possess the commissions paid by the third parties for transactions conducted with the company[266]. Moreover, the duty of confidentiality is also included in the duty of loyalty, which imposes director not to release any crucial information regarding company's secrets without authorization[267]. In this sense, in a case where directors have pursued unlawful interests with intentional acts that are contrary to the interests of the company, they would be considered to have breached the fiduciary duties owed to the company[268].

Under general circumstances, the duty of loyalty requires directors not to carry out certain conducts while they have breached the rules. In contrast, the duty of diligence requires directors to act in accordance with the rules while directors have failed to do so. In this sense, the breach of duty of diligence does not necessarily have to stem from directors' intentional acts, while negligence or omission may also be a reason to hold them liable. In regard of the duty of diligence, *Chinese Company Act* only states that directors shall owe the duty of diligence to the company without providing a further interpretation. According to some doctrines, the duty of diligence is considered to have inherited from the duty of

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[264] Huaiyong WANG, "The study of directors' duties from a perspective of comparative law", *Special Zone Economy*, 2009/03, pp.121-123, p. 122.
[265] See Article 149 (1)-(3) of *Chinese Company Act*.
[266] See Article 149 (4)-(6) of *Chinese Company Act*.
[267] See Article 149 (7) of *Chinese Company Act*.
[268] Jieqiong YU, "The study on directors' duty of loyalty and their liability", *Legal & Economy,* 2013/01, pp. 106-107, p. 106.

care in American law while it remains its own features in Chinese Law[269]. This is because, firstly, the application of duty of care in the American regime is often accompanied by the application of the "Business Judgment Rule". However, the "Business Judgment Rule" has not been formally introduced in Chinese regime. Since the fiduciary duties in Anglo-Saxon law system was greatly developed by case law, it may still be immature to introduce this rule in Chinese regime due to the lack of legal practice (since the duty of care was firstly indicated in *2005 Chinese Company Act*). Secondly, as we have mentioned above, the "Business Judgment Rule" presumes that a business decision made by a director was reasonable, so liability will not be imposed upon them if claimants cannot demonstrate the existence of contrary facts[270]. However, Chinese judges tend to presume that directors should be guilty for having not accomplished their duties that they ought to, unless they can prove that they have reasonably exercised their functions and have believed that they acted for the company's interests[271]. Thirdly, although *Chinese Company Act* has not inserted a detailed interpretation on the application of the duty of diligence[272], some special legislations, for example the *Guidance for the Articles of Listed Company* published by the *China Securities Regulatory Commission (CSRC)*, have given some basic interpretation to this duty. Article 98 of the *Guidance* provides that directors shall exercise cautiously, seriously and diligently the rights conferred by the company, treat all the shareholders fairly and be aware of the company's financial status. Besides, they shall ensure that the information released by the company is real, precise and complete, and they shall report the information to the supervisory board without interfering their exercises of powers[273]. However, such interpretation cannot be generalized as covering the whole content of the duty of diligence. Therefore, in order to establish a Chinese criterion on the duty of diligence, maybe it could establish a similar "subjective" and "objective" test as in British regime (whereas it is not the same as the one in British regime). From the Chinese perspective, on one hand, the "objective" test should examine the directors' functions by making comparison to a normal person at the same position (it is similar to the standard

[269] For example, see Daofei YIN, "The study on the directors' duty of diligence", *Legal System and Society*, 2009/01(1), pp. 335-336, p. 335.
[270] Jun ZHAO, "The study on directors' duty of diligence: From the foreign theories to the Chinese practice: from the perspective of behavioral economics", *Zhejiang Academic Journal*, 2013/02, pp. 135-144, p. 139.
[271] Hong ZHANG, Yifeng SHI, "The judicial criteria on the directors' duty of diligence in listed companies", *Oriental Law,* 2013/01, pp. 112-126, p. 123.
[272] Only Article 151 of *Chinese Company Act* provides that directors shall attend the general meeting of shareholders and answer their inquiries, and shall not interfere with the exercises of supervisory board, however this is only part of the duty of diligence.
[273] See Article 98 of the *Guidance for the Articles of Listed Company*.

adopted in many EU countries), if directors have failed to exercise or have not exercised reasonably their functions due to their wilful acts or gross negligence, they may be considered to breach the duty of diligence. On the other hand, if only the directors with special professional skills are qualified for a job, directors should prove that they have actually dedicated all their knowledge in the exercise of the functions so as to pass the "subjective" test[274].

2.1.2. A corporate action filed against directors

As we have mentioned, directors owe duty of loyalty and duty of diligence to the company. And directors' liability may be incurred when they breach their fiduciary duties in carrying out the functions and cause a financial loss to the company[275]. A corporate action aims at recovering the financial loss sustained by the company due to directors' misconducts that are contrary to the obligations established in statutory or regulatory provisions, or the articles of bylaws. In this sense, as long as the directors' misconducts and the casual link between the fault and the loss are evidenced, they could be forced to assume liability towards the company[276]. Since *Chinese Company Act* follows the two-tier board system, the proper organ to carry out this action is the supervisory board rather than the general meeting of shareholders[277]. The supervisory board has the power to sue directors through a corporate action, and to put forward proposals to the dismissal of directors. However, in a case where the supervisory board fails to exercise the power, minority shareholders may be legitimate to act on behalf of the company through a derivative action.

Generally, the civil liability imposed onto directors should be established in the case of a fault, and only those individual directors who have acted in breach of their duties should be held liable. However, if a financial loss of the company derives from a resolution of the managing board, directors should be jointly held liable for the loss suffered by the company, unless they can prove that they have expressed the objection in the voting and

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[274] In this sense, see Hongtao SUN, *The study on Directors' and Officers' Liability Insurance Contract*, Beijing, China Legal Publishing House, 2011, pp. 53-54.

[275] See Article 150 of *Chinese Company Act*.

[276] Liying ZHENG, *The Study of Directors' Personal Liability*, PhD Dissertation of Jilin University, 2009, pp. 19-20. Also see Zhiling YANG, "The study on directors' obligations and the liability for the compensation – from the comparative perspective of Chinese and Japanese Law", *The South of China Today*, 2009/05, pp. 157-162, p. 157.

[277] See Articles 54 (6) and 119 of *Chinese Company Act*. Also see Linqing WANG, *The theories of Securities Law and its legal application,* Beijing, China Law Press, 2008, p. 523.

such an objection has been indicated in the records of the meeting[278]. In a corporate action, directors are obliged to make compensation for the company's loss, and they should also return the unlawful income that should have belonged to the company if they have possessed it dishonestly[279].

2.1.3. A derivative action filed by minority shareholders

As we have mentioned, normally it is the supervisory board to carry out a corporate action on behalf of the company against directors in accordance with the provisions in *Chinese Company Act*. However, under certain circumstances, the supervisory board may ignore or refuse to sue managing directors directly for the consideration of their own interests[280]. If it were so, minority shareholders should be legitimate to act on behalf of the company in order to protect its assets. The derivative action originates from Anglo-Saxon legal system and was introduced into *2005 Chinese Company Act*. In this aspect, *Chinese Company Act* applies different criteria between public limited company and private limited company.

Under Article 152 of the *Chinese Company Act*, a shareholder of a private limited company, or shareholders in a public limited company who hold 1% separately or aggregately or more of the total shares of the company for 180 consecutive days are legitimate to request the supervisory board to initiate a corporate action against directors. If the supervisory board refuses to take measures or fails to institute such a lawsuit within 30 days, or in a case where an urgent circumstance arises and requires an immediate reaction because the failure to institute such lawsuit will lead to irremediable damage to the interests of the company, minority shareholders could exercise the right to institute directly a derivative actions against directors on behalf of the company[281]. In this sense, in order to bring a derivative action, minority shareholders should normally run out all the intra corporate remedies so as to assert such a claim.

[278] See Article 113 of *Chinese Company Act*.
[279] See Articles 149 of *Chinese Company Act*. Also see Yan LI, *The study on directors' civil liability*, Master Thesis of Shandong University, 2006, pp. 47-49. Also see Chun CHU, *The improvement of the regime of directors' duty in Chinese Company Law*, Master Thesis of China University of Political Science and Law, 2010, p. 20.
[280] Jian FAN, *Report on Commercial Law (Tome I)*, Beijing, Citic Publishing House, 2004, p. 150.
[281] See Article 152 of *Chinese Company Act*.

The different criteria of minimum shareholding requirements applied to a public limited company and a private limited company are based on the different natures and different requirements of minimum capital to set up a company between the two kinds of companies[282]. It used to be logical in order to keep balance between the protection of the interests of minority shareholders and the prevention of abuse of derivative actions[283]. However, 2014 Company Act has reformed the registered capital registration system and has cancelled the minimum capital requirement in setting up a company[284]. As a replacement, the Chinese legislators have established a system of annual inspection in order to make sure the transparency of company's information on financial state[285]. In this sense, it is also necessary to introduce a new liability regime regarding a derivative action so as to avoid the minority shareholders' excessive or abusive derivative claims.

In the first place, a revision to the period of shareholding may be important. In accordance with the current provisions, as long as minority shareholders have held consecutively the shares during the period of 180 days in the moment when they assert a derivative claim, such a claim will be permitted[286]. Although it may prevent an excessive amount of derivative claims, the period of 180 days seems to be too long that the minority shareholders cannot wait to file such a claim until then. This is because in China, minority shareholders are usually the group of shareholders who subscribe for the shares at a lower price and resell them at a higher price in order to gain from the price difference rather than

[282] According to 2005 *Chinese Company Act*, the threshold of minimum capital imposed on private limited company shall be RMB 30, 000 yuan (nearly 3,600 euros), while the one on the public limited company shall be RMB 5 million yuan (nearly 600,000 euros). Besides, the numbers of shareholders cannot be more than 50 in a private limited company while in a public limited company it doesn't have a limit. See Articles 24, 26, 81 of *Chinese Company Act*. This minimum capital requirement has been cancelled in the new *2014 Chinese Company Act*.

[283] Kaixiang LIU, "The application and improvement of minority shareholders' derivative actions: focusing on the interpretation of the Article 152 of the Chinese Company Law", *China Legal Science*, 2008/04, pp. 157-166, p. 157.

[284] See Articles 23, 26, 77 and 80 of the new *2014 Chinese Company Act*.

[285] It can be found on the website: http://economists-pick-research.hktdc.com/business-news/article/Business-Alert-China/China-scraps-minimum-capital-requirements-for-companies/bacn/en/1/1X000000/1X09V43L.htm.

[286] See Article 4 of the *First Judicial Interpretation on the application of Chinese Company Act* made by the Supreme Court of China. In Chinese legal system, the Judicial Interpretation do not confine themselves to clarifying and explaining existing rules, but actually supplement and improve those rules in light of practical experience and scholarly contributions. In this sense, see Pietro FRANZINA, Renzo CAVALIERI, "The 2012 'Interpretation' of the Supreme People's Court of China Regarding the 2010 Act on Private International Law", *Diritto del commercio internazionale,* Anno XXVII, Fasc. 4-2013, pp. 891-915, p. 892.

to keep the shares for dividends[287]. In this sense, if Company Act fixes the period for 180 days, most minority shareholders may be unable to act for the interests of the company[288]. Besides, it is also doubtful whether the calculating of the period should be started from 180 days before a derivative action is brought. Due to the fact that shares may have been transferred more easily between the minority shareholders, the minority shareholders at the moment when the damage occurs ("old minority shareholders") and those at the moment when a derivative claim is commenced ("new minority shareholders") may not be the same. In fact, it makes more interests for the old minority shareholders to act in the interests of the company than the new minority shareholders since they were already shareholders at the moment that directors committed misconducts. Therefore, it may be more logical to start counting such a period from when the unlawful acts occur. And the period should be less than 180 days before the damage occurs due to the fluidity of the shares. However, if minority shareholders intend to act on behalf of the company, they should continue to hold the shares until the court makes a decision onto the claim[289]. Following this way, minority shareholders who were indirectly affected by the misconducts of directors are encouraged to bring a claim for the interests of the company. And if they want to bring such an action, they should reserve the shares until the judgment is made, which could also control the possible excessive derivative claims.

Secondly, in most Chinese companies, since the managing board could decide most of the corporate affairs, the supervisory board could hardly exercise the functions of supervising effectively because its power could probably be restrained by the managing board[290]. If it were so, the supervisory board is unlikely to institute a claim against the managing directors by whom they are controlled. Instead, they may arrive at a compromise. In this case, it seems better to confer the rights to independent directors or other innocent directors

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[287] Qi WANG, *The Study on Shareholder's Representative Litigation of Different Jurisdictions: Search for the Balance of Encouragement to Just Litigation and Suppression to Malicious Litigation*, Master Thesis of East China University of Political Science and Law, 2012, pp. 15-16.

[288] The period may be too long and strict for minority shareholders to bring derivative actions, in this sense, see Flora Xiao HUANG, Horace YEUNG, *Chinese Companies and the Hong Kong Stock Market*, Oxon/New York, Routledge, 2014, p. 66.

[289] In this sense, see Bin HU, Shunming CAO, "The reasonable basis and the system design of derivative actions", *Chinese Journal of Law,* 2004/04, this article is available on the website: http://www.civillaw.com.cn/article/default.asp?id=33497. Also see Baoshu WANG, *The Revision to the Company Law (Opinion Soliciting Draft)*, Beijing, Social Sciences Academic Press, 2004, p. 333.

[290] Xiaolin LI, Qing LI, "The comparison of Corporate Governance Pattern and the innovation of supervising responsibility system", The paper of the 3rd International Seminar on Corporate Governance, 2005, pp. 1-11, pp. 1 and ss.

in order to carry out the claims against the wrongful directors instead of supervisory board. This is because in Chinese companies, there are some commissions in the managing board regarding the audit, the remuneration, etc., which are formed by independent directors, and it may also be possible to form a commission regarding litigation as well[291].

Thirdly, after the cancellation of the minimum capital requirement, it may be relevant for the court to play a more important role in a derivative claim. If the minority shareholders who contribute little registered capital could also bring a derivative action similarly as those with a considerable number of capitals, a derivative action would lose its significance. Furthermore, the regime of derivative action should take into consideration the internal relationship and external business affairs of the company, in which different relations and interests of the company, shareholders, creditors and other third parties would be included[292]. Therefore, the court should have a greater discretion in intervening in a derivative action, especially after the minimum capital requirement is cancelled. For example, the court could decide whether or not to request the plaintiff to deposit a guarantee if directors can prove that minority shareholders have abusive intentions to bring such a claim[293].

2.1.4. A personal action filed by individual shareholders

In a derivative action, shareholders may act in their names but on behalf of the company, and the compensation made by directors should be paid to the company rather than to shareholders themselves. In this regard, *Chinese Company Act* also allows shareholders to bring a personal action directly against directors in the case where directors have acted in violation of statutory or regulatory provisions or the articles of bylaws, and have caused damage directly to individual shareholders' interests[294].

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[291] Yikun ZHU, *Reconstructing the Standards of Director's Accountability*, Beijing, Peking University Press, 2011, pp. 257-258.

[292] Yikui HU, *The Study on Company's Participation in Shareholder's Derivate Action*, PhD Dissertation of Nanjing University, 2011, pp. 169-170.

[293] See Article 53 of *Fourth Judicial Interpretation on the application of Chinese Company Act* (Opinion Soliciting Draft).

[294] See Article 153 of *Chinese Company Act*.

It is suggested that shareholders be entitled to bring a personal action when their rights conferred by the company law rules have been violated by directors[295]. For example, in accordance with *Chinese Company Act*, shareholders have the right to enjoy the distribution of dividends, to participate in making crucial decisions and to choose a manager for the company[296]. Meanwhile, they also have the right to transfer their shares or to ask the company to repurchase their shares under some conditions[297]. Furthermore, they can also look up to the records of the meetings, the resolutions of the board, the reports of directors, and the company's accounting book and to make some suggestions to the company[298]. In this sense, managing directors may refrain shareholders from assisting in the general meetings of shareholders, or release fraudulent information about the financial status of the company in order not to distribute the dividends that should have belonged to shareholders, or to make excuses to prevent shareholders from getting access to the information concerning the company's management. Under these circumstances, shareholders should be able to carry out a personal action in conformity with Article 153 of the Company Law.

Article 153 provides that directors shall be held liable towards shareholders if they act in breach of statutory or regulatory provisions, or the articles of bylaws. In some Chinese doctrines, some scholars tend to define this liability as "*ex lege*" rather than "non-contractual"[299]. In this case, an "*ex lege*" liability refers to a special statutory liability imposed by company law. And directors should be held liable as long as they act in contrary to the law while it is less relevant to have further examination on their intentions of doing so. However, a direct claim is an action with reparative nature that enables shareholders to demand compensation from directors for a financial loss caused by their misconducts. In order to incur such liability to directors, shareholders should prove their personal loss, and demonstrate the existence of the causation between the loss and the

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[295] Tao ZENG, "The study on the types of the shareholders' direct lawsuits", *Journal of Chongqing Jiaotong University (Social Sciences Edition)*, Vol. 9, 2009/04, pp. 38-42, p. 39.

[296] See Article 4 of *Chinese Company Act*.

[297] See Articles 72, 75, 138 of *Chinese Company Act*, also see Jianlu YUAN, "The study of the shareholders' direct lawsuits", 24/10/2013, this Article is available on the website: http://dtzy.chinacourt.org/article/detail/2013/10/id/1112203.shtml.

[298] See Articles 34 and 98 of *Chinese Company Act*.

[299] In this sense, see Takahiro SATOU, "The directors' liability towards third parties –from the perspective of comparative law and the whole social interest", *Hebei Law Science,* Vol. 31, No. 3, 2013/05, pp. 117-124, p. 118. Also see Shenshi MEI, *Structure of the power of mechanism of modern company*, Beijing, Chinese University of Political Science and Law Press, 2000, pp. 541 and ss.

directors' misconducts[300]. In this sense, it seems more logical to consider this kind of liability as based on the tort law grounds.

2.1.5. A personal action filed by creditors or other third parties

Normally, only the shareholders can bring a personal action against directors. Since the company is an independent entity, creditors should carry out a similar claim directly against the company instead of its directors in order to seek compensation. In the recent *third Judicial Interpretation on the application of Chinese Company Act*, it is indicated that during the increasing of the company's capital, if some of the shareholders fail to provide the due proportion of funds to the capital, creditors can sue directors in order to establish liabilities to them if they have breached the fiduciary duties in accordance with Article 148 of *Chinese Company Act*[301]. To some extent, this provision extends the directors' liability to creditors with the objective to protect the creditors' interests by imposing directors to play a more important role in the maintenance of company's capital[302]. In this case, the Chinese legislators seem to make reference to the legal experience of some Anglo-Saxon countries, in which directors are required to have a special duty of care towards the creditors when carrying out the company's business[303]. However, some scholars have a negative attitude to this extension of liability, because they believe that the excessive protection of shareholders, creditors and other third parties would make directors more precautious and less dynamic when carrying out their functions, and it would render a company less competitive[304]. We think it may be relevant to introduce a directors' liability towards creditors in *Chinese Company Act*. Firstly, creditors cannot bring an action against directors since traditional company law rules regard directors as an organ of the company without independence, while such a treatment may be contrary to the interests of the company. If a company is forced to make compensation for

[300] Jianwei ZHOU, "The judicial criteria on the shareholders' direct lawsuits", in Chinese Lawyer Council (Civil Law Commission), *The Lawyer's practice on Company Law and Contract Law,* Beijing, Chinese Legal Press, 2008. This Article is also available on the website: http://www.chinaguquanlaw.com/ShowArticle.shtml?ID=201182621464858500.htm.

[301] See Article 13 of *Third Judicial Interpretation on the application of Chinese Company Act*.

[302] Quan WANG, "The study on the protection of the interests of creditors of the company: from the perspective of directors' liability", *Legality Vision,* 2013/02 (2), pp. 247-248, p. 247.

[303] In this sense, see Quan WANG, "The study on…", *loc. cit.*, p. 248. Also see Haiou LIU, "The study on the joint liability of directors towards creditors in a listed company", *The Theory and Practice of Finance and Economics,* 2007/03, pp. 124-128, p. 125.

[304] Guo FENG, Ruijuan CHAI, "The Study of directors' liability towards the creditors of the company", *Journal of National Prosecutors' College*, 2007/01, http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=40381.

some individual creditors, it is in fact the general body of shareholders, creditors and other third parties that pick up the bill for directors. Secondly, the Chinese legislators only predict that directors may cause certain damage to shareholders during the exercise of functions because the participation in the corporate affairs will make shareholders easier to suffer from a loss. In contrast, creditors may encounter a higher degree of risk because they usually do not participate in the internal corporate affairs. Because of this, they will be stuck at a less favourable position than shareholders and they need more protection. If company law enables shareholders to sue directors for a personal loss, it is unreasonable to set creditors aside in similar situations[305].

Meanwhile, in accordance with *Chinese Securities Act*, directors should also be held liable for creditors under certain circumstances. In a securities market, directors of a listed company should guarantee the authenticity, accuracy and integrity of the information as disclosed by the company. In this regard, any false record, misleading statement or major omission should be forbidden. If investors suffer a financial loss deriving from such fraudulent information or misleading statement, directors should make compensation jointly with the company[306]. Furthermore, insider trading or insider dealing which occurs when company's officers and directors get access to non-public information of the company and take advantage of this information to make unlawful benefice is completely forbidden as well[307]. If a director is a possible insider, he cannot purchase or sell the securities of the company, or diffuse related information to any other person, or advise them to purchase or sell these securities. Otherwise, he would be imposed to make compensation for the investors if they suffer a loss in an insider trading[308]. This kind of liability may have criminal, administrative and civil natures. In the aspect of civil liability, creditors will be required to demonstrate the causation between the damage and the directors' misconduct in order to establish liability to directors[309].

[305] In this sense, see Takahiro SATOU, "*The directors' liability…", loc. cit.*, pp. 118 and ss.
[306] See Articles 63, 68, 69 of *Chinese Securities Act*.
[307] Hongtao SUN, *The study on…, op. cit*., pp. 63-64.
[308] See Article 76 of *Chinese Securities Act*.
[309] In this sense, see Wenzhe XIE, "The criminal and administrative liability are preferred in insider trading", published on 25/12/2012, this article is available on the website: http://www.shfinancialnews.com/xww/2009jrb/node5019/node5036/fz/userobject1ai105189.html.

2.1.6. Directors' liability in the dissolution proceedings and in the insolvency or insolvency-related proceedings

In accordance with *Chinese Company Act*, once the legal reason for dissolution has arisen, a liquidation group should be formed in order to deal with the corporate affairs in the dissolution proceedings. In a public limited company, a liquidation group consists of directors and other persons determined by the general meeting of shareholders[310]. If the liquidation group has not been formed in conformity with the requirement of legal provisions, and has caused depreciation, loss, damage or disappearance of the corporate assets, directors who are the members of the liquidation group should be held jointly liable for the corporate debt within the damage sustained by the creditors[311]. *Second Judicial Interpretation on the application of Chinese Company Act* states that if directors are idle to exercise their due functions, when their behaviours have led to the disappearance of the main corporate assets and the loss of the crucial documents such as accounting books, and have made the liquidation unable to be carried out, they will be held liable. In this case, the part of directors' compensation for the corporate debt should be corresponding to the damage sustained by creditors. Furthermore, subjectively, in order to incur liability, directors should have unlawful intentions or gross negligence. In this case, such a directors' liability does not refer to an "*ex lege*" liability. Firstly, directors will not assume liability as long as they have breached the duty to form the liquidation group, only when a financial loss is sustained by the company and its creditors will they assume liability. Secondly, in order to prove that the damage derives from directors' wrongful behaviours, creditors should demonstrate the existence of a casual link between the loss of corporate assets or the paralysis of liquidation proceeding and the directors' misconducts. Thirdly, instead of making contribution to the company for the purpose that the company could obtain enough assets for the compensation for creditors, the Chinese legislators highlight the "financial loss of creditors", and require that directors make part of or the whole compensation for creditors. Therefore, directors' liability for the failure to commence the dissolution liquidations should be a special liability based on the tort law grounds rather than an *"ex lege"* liability directly imposed by the provisions.

[310] See Article 184 of *Chinese Company Act*.
[311] See Article 18 of *Second Judicial Interpretation on the application of Chinese Company Act*.

Meanwhile, directors should be held liable for their fraudulent behaviours under certain circumstances. For example, if they dispose the corporate assets with abusive intention, or fail to initiate a liquidation proceeding and cheat the company registration organ to deregister the legal person by means of a fraudulent liquidation report, or deregister the company with an unlawful liquidation, they should pay for the corporate debts towards creditors jointly with the company[312]. In this case, directors' fraudulent intention should be evidenced in order to establish liability to them.

In accordance with *Chinese Enterprises Bankruptcy Act*, firstly, the liquidation group (where directors are included) has a duty to petition for liquidation proceedings in the case where the company has been insolvent and the liquidation group has found that the company was dissolved without a legal liquidation proceeding[313]. In this case, the liquidation group should petition to the court in order to commence company's liquidation in the insolvency proceedings, otherwise the members of the liquidation group will assume civil liability.

Secondly, under general circumstance, if a director acts in contrary to his duty of loyalty and duty of diligence and has led to the company's insolvency, the director would be imposed to assume civil liability[314]. When exercising the functions in the company, directors should act for the interests of the company, while the interests of creditors are indirectly concerned as a whole. In this sense, directors should exercise their duties with care, skill and diligence. If they breach the duties and lead to the company's insolvency, they should assume liability for the company's loss. In this case, the directors' civil liability in causing the company's insolvency may indirectly imply a directors' duty of diligence on the verge of company's insolvency. If the company has been financial unsound, directors may still take up some highly risky business in order to seek for a slight chance of generating income large enough to cover the company's debt. It may be doubtful because if directors are trying to save the company from the financial difficulty, they may not be considered to breach their fiduciary duties since such an act is not contrary to the

[312] See Articles 19 and 20 of *Second Judicial Interpretation on the application of Chinese Company Act*. Also Tingting CHEN, *The study of directors' duties in the company's dissolution proceedings*, Master Thesis of China University of Political Science and Law, 2008, p. 32.
[313] See Article 7 of *Chinese Enterprise Bankruptcy Act*.
[314] See Article 125 of *Chinese Enterprise Bankruptcy Act*. Also see Guangtai MA, *The System of Director's Responsibility*, Beijing, China Law Press, 2009, pp. 239-240.

interests of the company. Nevertheless, in such a situation, the fiduciary duties of directors have been changed from "keeping the increasing of corporate assets" to "reserving the actual value of the corporate assets in order to be repaid to the creditors appropriately"[315]. Therefore, creditors' interests should be taken into account as well. After all, directors' liability for causing company's insolvency derives from their failure to reserve the corporate assets appropriately in this case. Therefore, it refers to the kind of liability towards the company rather than towards creditors.

Thirdly, directors' fraudulent behaviours may occur long before the company's insolvency. For example, directors may transfer the property gratis, or trade at an obviously unreasonable price, or provide property guaranty to unsecured debts, or pay off debts not due, or abandon claims to its debts within one year in the court accepts the application for insolvency. Such misconducts may probably cause damage to the corporate assets and make creditors unable to recover the debts owed by the company[316]. Besides, directors may conceal or transfer the corporate assets, or fabricate unreal debts in order to avoid payment of debts[317]. Under these circumstances, directors should also be held liable towards creditors for their fraudulent acts[318].

In this case, Enterprise Bankruptcy Act provides both a liability regime for the company and a liability regime for creditors. Directors' liability for causing company's insolvency may derive from their intentional acts or gross omission. Conversely, directors' liability for the unlawful dispose of the corporate assets completely derives from their wilful acts. Therefore, directors' causing the company's insolvency should be considered as a breach of contractual obligations that are owed to the company, while the directors' unlawful dispose of the corporate assets at the vicinity of insolvency should be regarded as a breach of non-contractual obligations towards creditors[319].

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[315] See Qian SU, *Director's Duties and Responsibilities to Creditors when the Company is on the brink of Bankruptcy*, Master Thesis of Shanghai Jiaotong University, 2011, p. 8. In this sense, also see the American doctrine, Ross GRANTHAM, "The Judicial Extension of Directors' Duties to Creditors", *Journal of Buisness Law*, 1991, pp. 1-18, pp. 1 and ss.
[316] See Articles 31 of *Chinese Enterprise Bankruptcy Act*.
[317] See Articles 33 of *Chinese Enterprise Bankruptcy Act*.
[318] See Article 128 of *Chinese Enterprise Bankruptcy Act*.
[319] See Shunming CAO, *The study on the directors' liability in public limited company*, Beijing, China Legal Publishing House, 2005, p. 165. Also see Weifeng LIU, *On Civil Liability of the Director Owing to the Creditor of Corporation*, Master Thesis of East China University of Political Science and Law, 2012, pp. 25-26.

Fourthly, in the recent-published *Second Judicial Interpretation on the application of Enterprise Bankruptcy Act*, liquidators may bring an action in the insolvency proceedings against directors for the fact that directors have not incurred some shareholders' liability for the defect of contribution to the corporate capital[320]. In this case, individual creditors can also file a claim against directors for their own interests under company law rules, but as long as the insolvency proceedings commerce such a claim should be suspended[321]. In this sense, the Chinese legislators seem to clarify that only the actions for the general body of creditors can be admitted in the insolvency proceedings.

2.1.7. Directors' criminal and administrative liabilities

The development of Chinese penal system was greatly influenced by the ex-Soviet legal system. The *Chinese Penal Law* emphasizes on introducing the crimes committed by legal person as well as those committed by its officers. Therefore, apart from imposing the economic criminal liability on the company, the person in charge (usually directors) should jointly assume criminal liability[322].

In *Chinese Penal Law*, the provisions regarding directors' liability can mostly be found in the part regarding the economic activities. In accordance with these provisions, directors are considered to breach the duty of loyalty in a case where, for example, they use false documents to register the company, or to turn a blind eye to the shareholders' fraudulent behaviours such as fraudulent contribution to the corporate capital or drawing out the capital illegally, or to hide the crucial information of the company, or to publish fraudulent information, or to misappropriate the corporate assets for their own use or lending to other third parties, or to receive unlawful benefit from other third parties by misusing their position as directors, or to transfer the corporate assets and evade the repayment to creditors in insolvency proceedings by making false documents[323]. Under these circumstances, apart from civil liability, directors are forced to burden criminal liability jointly with the company as well. Besides, with regard to the directors of a state-owned company, they usually have to assume liability more severe than those directors in a non-

[320] See Article 20 of *Second Judicial Interpretation on the application of Chinese Enterprise Bankruptcy Act*.
[321] See Article 21 of *Second Judicial Interpretation on the application of Chinese Enterprise Bankruptcy Act*.
[322] See Article 31 of *Chinese Penal Law*.
[323] See Articles 158 to 163 of *Chinese Penal Law*.

state owned company. For example, they may be sentenced to have more years of imprisonment and more penalties in comparison with the directors in a non-state owned company[324].

In China, the provisions regarding directors' administrative liability are dispersed in different legislations. Firstly, directors may make fraudulent registration with false documents, or unlawful transfer the corporate assets in order to evade the corporate debts, or dispose the corporate assets without authorization after the company is dissolved, or fail to make announcement and apply for registration in the case where the company undergoes a changer or terminates. In accordance with the *General Principles of Civil Law*, if directors' misconducts have caused a heavy loss to any interested party (shareholders, creditors or other third parties), apart from assuming civil and criminal liabilities, they would be forced to assume administrative liability as well[325]. This kind of administrative liability is repeated in the specific *Regulation of Controlling the Registration of Enterprises as Legal Persons*[326]. Secondly, in accordance with *Chinese Company Act*, administrative liability will be imposed on directors in a case where the financial and accounting reports presented by a company to the competent authorities contain false information or conceal material facts (a fine of between 30,000 and 300,000 RMB will be required), or the company conceals its assets in the liquidation proceedings, or the company presents balance sheets or a list of assets which contain false information, or the company allocates the assets of the company before the full settlement of its debts (a fine of between 10,000 and 100,000 RMB will be required by the Companies Registration Office)[327]. Thirdly, pursuant to *Chinese Enterprise Bankruptcy Act*, as we have mentioned, directors should assume administrative liability apart from civil liability if they have breached their fiduciary duties and have caused the company's insolvency. In such a case, they will be forbidden to take the charge as director in any company for three years after the termination of the insolvency proceedings[328]. Fourthly, directors' administrative liability is also mentioned in the provisions concerning the well functioning of the financial

[324] See Articles 165 to 169 of *Chinese Penal Law*.
[325] See Article 49 of *General Principles of Civil Law*.
[326] See Article 30 of *Regulation of Controlling the Registration of Enterprises as Legal Persons*.
[327] See Articles 203 and 205 of *Chinese Company Act*, also see Carolyn DONG, Zaichi HU, "China", in Edward SMERDON, Edward SMERDON, *Directors' liability and Indemnification (Second Edition)*, London, Global law and Business, 2011, pp. 105-118, pp. 110-111.
[328] See Article 125 of *Chinese Enterprise Bankruptcy Act*.

market. For example, in a listed company, a fine between 30,000 and 300,000 RMB will be imposed onto directors if the report or disclose information of the company contains misrepresentation, misleading statement or material omission[329]. Besides, in a securities company, if directors have breached their fiduciary duties and incur any major irregularity or rule-breaking act or major risk to the company, their qualification will be revoked by the *China Securities Regulatory Commission*, and the Commission may also order the company to remove its directors. If a securities company is ordered to suspend its business, or is designated for trusteeship, directors of the company may be forbidden to exit the Chinese territory and their personal assets may also be frozen as well[330].

2.2. Conclusion

In the first place, in Chinese law, directors owe duty of care and duty of loyalty to the company. In breach of such duties, a corporate action may be brought by supervisory board against managing directors as well as by managing board against supervisory directors. In the case where the supervisory or managing boards fail to file a corporate claim for the interests of the company, minority shareholders can bring a derivative claim on behalf of the company. *2014 Chinese Company Act* has cancelled the minimum capital requirements to set up a company. Accordingly, the provisions regarding the formality of a derivative action also need revising. In order to do so, measures such as the introduction of a shorter period regarding shareholding requirement, the encouragement of independent directors to participate in a derivative action, and the requirement of the court to play a more important role should be taken into consideration.

In the second place, when directors conduct an unlawful act and cause damage to shareholders, shareholders of the company can directly bring a personal claim against directors. However, *Chinese Company Act* does not confer similar rights to creditors. On the contrary, creditors are only able to sue directors exceptionally. For example, in securities market, directors should be held liable for creditors if they have breached their duties and published fraudulent information, or have misconducted in insider trading. Under these circumstances, it is relevant for creditors to prove that the damage sustained

[329] See Article 193 of *Chinese Securities Act*.
[330] See the Articles 152 to 154 of *Chinese Securities Act*.

by them is the result of directors' unlawful behaviours in order to establish liability to directors.

In the third place, on one hand, in accordance with *Chinese Company Act*, if the legal reasons to file for company's dissolution arise, directors should commerce the dissolution proceedings. If the directors' misconducts have led to the disappearance of the main corporate assets and the loss of the crucial documents such as accounting books, and have made the liquidation unable to be carried out, creditors could seek compensation from directors. On the other hand, in accordance with *Chinese Enterprise Bankruptcy Act*, directors have the duty to petition for liquidation proceedings since they are members of liquidation group. If directors fail to fulfil the obligations imposed by these rules and cause the company's insolvency, they will be considered to have breached the fiduciary duties owed to the company and will be imposed to assume civil as well as administrative liabilities towards the company. Besides, they should be held liable for creditors as a general body in the insolvency proceedings if they have unlawfully transferred or disposed the corporate assets that have caused the company's insolvency.

In this case, the directors' liability for the reduction of the corporate assets shows certain similarities between the company law and the insolvency law. However, an action under the company law could be brought by individual creditors, while an action under the insolvency law should be brought by the company's liquidator representing the general body of creditors. It seems that the Chinese legislators do not make a clear delimitation between company law and insolvency law, because it does not make great interests for them to separate the insolvency proceedings from other civil and commercial proceedings as what the EU legislators do. Normally, *Chinese Company Act* and *Chinese Enterprises Bankruptcy Act* only apply in a domestic situation. If the liability regimes in both the two Acts are available for creditors to incur directors' liability, it may be less relevant to draw a line between the two Acts.

In the fourth place, apart from civil liability, directors should also assume criminal and administrative liabilities. In terms of directors' criminal liability, if the company has committed a crime, its directors may often be held jointly liable as well. In regard of directors' administrative liability, this kind of liability still remains uncertain in current

Chinese law since they are dispersed in different rules. Nevertheless, administrative liability is often imposed onto directors when they have failed to fulfill the requirement of registration, or have misused the corporate assets, or have breached the obligations in the securities market.

CHAPTER II

APPLICATION OF CONFLICT-OF-JURISDICTION RULES IN THE REGIME OF DIRECTORS' LIABILITY

The development of the European law on international civil procedure started with Brussels Convention in 1968, and this treaty was amended on several occasions and has now been replaced by Brussels I Regulation (Regulation 44/2001, RBI). Differences between national laws on jurisdiction and recognition of judgments and different procedural formalities will apparently impede the judicial cooperation within the Member states and hamper thereby considerably the sound operation of the internal market. Therefore, one of the objectives of RBI is to remove these differences and difficulties, and attempts to enable and ensure the free movement of judgments[331]. Besides, through the establishment of easier and more uniform rules and faster and simpler procedures for civil cross-border litigation in RBI, it will secure the legal certainty and strengthen the mutual trust within the Member states[332].

RBI covers a great variety of civil and commercial matters, in which the issues relating to company law and corporate governance are also included. Therefore, in order to solve the difficulties in the regime of directors' liability deriving from the company's cross-boarder activities, we should rely on the interpretation of the provisions in RBI. RBI confers jurisdiction to the competent courts on the basis of uniform and fair connecting factors, and the defendant must defend himself only at places to which the dispute is sufficiently related and which are highly predictable for him. Therefore, in this chapter, we should firstly examine the applicability of the general provision regarding the domicile of the defendant, or the domicile of one of the codefendants. Besides, since RBI enacts a special provision conferring exclusive jurisdiction to the court in the place where the company has its seat to deal with the issues concerning the decisions of the company's organs and the dissolution, it is also relevant to insert a further discussion on whether such a rule is applicable to directors' liability. Meanwhile, RBI also acknowledges the parties' autonomy to select the internationally competent forum and it also merits a discussion on the applicability of this provision in directors' liability when directors have concluded a jurisdiction clause with the company, shareholders or creditors. Furthermore, in the absence of exclusive matters or party autonomy, RBI also confers jurisdiction in matters

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[331] Ulrich MAGNUS, "Introduction", in Ulrich MAGNUS, Peter MANKOWSKI (Editors), *Brussels I Regulation: European Commentaries on Private International Law (Second Edition)*, München, Sellier European Law publishers, 2012, pp. 1-46, pp. 7-8.

[332] Ulrich MAGNUS, "Introduction", *loc. cit.*, p. 8.

relating to contractual or non-contractual obligations to the other courts than those of the state where the defendant has his domicile. In this case, under general circumstances, since the relationship between directors and the company is defined as contractual, and the relationship between directors and shareholders or creditors is regarded as non-contractual, it is definitely of great importance to examine whether directors' liability falls within the scope of the provisions concerning contractual and non-contractual obligations in RBI as well.

However, RBI has clearly precluded its application from the insolvency proceedings. The intention of the EU legislators was to leave the insolvency proceedings decided by the special EU regulation in the aspect of insolvency law. Therefore, after the promulgation of Insolvency Regulation (Regulation 1346/2000, RI), the matters relating to the insolvency proceedings are naturally included in this Regulation. In this sense, RBI and RI should be interpreted in the meaning that a proceeding should fall within one or the other but not both, and the interpretation should not leave any gap between them[333]. However, in the regime of directors' liability, as we have mentioned, there are some issues which are insolvency-related but may not show very strong connections with them. In this case, the silence of RBI and RI will undoubtedly create certain difficulties to characterize these issues. Therefore, in this chapter, we will try to eliminate the grey zone existing between RBI and RI by relying on the analysis of ECJ's decisions in this area, and also try to find a competent court to deal with directors' liability in the insolvency-related proceedings.

Apart from the determination of a competent court to deal with directors' liability within the Member states, it is also worth a further discussion from an international perspective because corporate governance has become a global subject. Since RBI is not a worldwide regulation, a similar case between a Member state and a third state should rely on the national rules of these states. In this case, we will take the example of Spain and China in order to bring up a possible solution in determining a competent court to deal with directors' liability between a Member state and a third state.

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[333] Pippa ROGERSON, "Article 1", in Ulrich MAGNUS, Peter MANKOWSKI, *Brussels I Regulation: European Commentaries on Private International Law (Second edition)*, *op. cit.*, pp. 46-75, p. 63.

1. Examination on the applicability of RBI in the regime of directors' liability between the Member states

1.1. Application of general provisions of "domicile" in the regime of directors' liability

1.1.1. Examination on the applicability of Article 2 of RBI

"Domicile" may be the oldest traditional criterion of PIL. It can date back to the era of ancient Roman law[334], in which such a principle is named as *"actor sequitur forum rei"*. Because of the high predictability and foreseeability, jurisdiction is generally based on the defendant's domicile[335]. In the proposal to the amendment of RBI, the EU legislators would like to extend the scope of application even to the defendants who are domiciled in the third states[336]. Article 4 of the proposal provides for the same assimilation regarding the application of exorbitant rules of jurisdiction against defendants domiciled beyond the territory of the Member states[337]. However, such a proposal was not finally adopted in Regulation 1215/2012 (RBI*bis*), because the EU legislators impose a minimum connection between a proceeding and the EU territory on the test of the application of EU regulations under general circumstances[338]. In this case, undoubtedly, establishing jurisdiction on defendant's domicile seems to provide a basic guarantee for the defendant because the defendant can most easily conduct his defence[339]. However, if the defendant voluntarily turns to another court rather than his domicile by concluding a choice of forum agreement with the plaintiff, or if an issue concerns exclusive jurisdiction, or if it is necessary to provide a stronger protection for the weaker parties (for example, consumers and employees), the connecting factor of domicile may become subordinate since the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. The EU legislators have also taken these aspects into consideration. Therefore, the two parties in a dispute may choose a court in a Member state to deal with their dispute

[334] *P. R. BEAUMONT, P. E. McELEAVY, A. E. ANTON, Private International Law (Third Edition), Oxford, Hart Publishing, 2011*, p 150.
[335] See Recital 15 of RBI*bis*.
[336] See European Parliament, *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, COM (2010) 748 final, p. 23.
[337] See Article 4 of the proposal. Also see Paul VLAS, "Article 2", in Ulrich MAGNUS, Peter MANKOWSKI (Editors), *Brussels I Regulation: European Commentaries on Private International Law (Second Edition)*, *op. cit.*, pp. 76-82, pp. 81-82.
[338] See Recital 13 of the RBI*bis.*
[339] Indira CARR, *International Trade Law (Fifth Edition)*, Oxon/New York, Routledge, 2014, p. 487.

regardless of domicile[340]. In this case, RBI*bis* allows a court of a Member state to establish jurisdiction deriving from a choice of forum agreement, though the defendant is not domiciled in a Member state. And RBI*bis* also leaves for each Member state to determine whether such an agreement is valid in accordance with their national rules[341].

However, neither RBI nor RBI*bis* has established an autonomous concept to the notion of "domicile" with regard to natural persons. Instead, it should *"renvoi"* to national laws in order to determine whether a party is domiciled in a Member state[342]. In contrast, Brussels Regulations establish an autonomous definition of "domicile" for legal persons, in which they provide a list enabling the Member states to choose one among company's statutory seat, or central administration, or principal place of business to be its domicile for the purpose of the application of Brussels Regulations[343].

In the case *Owusu*, ECJ held that a court of a Member State cannot deny jurisdiction established on the basis of defendant's domicile in a Member state on the ground that a proceedings shows more connecting factors with a third state[344]. In this case, it is held that the doctrine of *"forum non conveniens"* is incompatible with RBI, and Article 2 of RBI should have mandatory effect of application, and a court of a Member state cannot invoke the doctrine of *"forum non conveniens"* to stay its proceeding in favour of a third state and preclude the application of Article 2[345]. In this regard, if a Spanish director works for a Chinese company through Internet and has his domicile in the Spanish territory, while all the significant connecting factors are situated in China, Article 2 should also be operable if a plaintiff files a claim before a Spanish court. However, such a treatment may involve the concern of excessive jurisdiction, since it is possible that a substantial connection between the events giving rise to the claim and the territory of the court seized cannot be found[346].

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[340] See Article 25 of RBI*bis*.
[341] See Article 6 of RBI*bis*.
[342] See Article 59 of the RBI and Article 62 of RBI*bis.*
[343] See Article 60 of the RBI and Article 63 of RBI*bis.*
[344] See paragraph 20 of Case C-281/02. Also see Paul VLAS, "Article 2", *loc. cit.*, p. 80.
[345] Guillermo PALAO MORENO, "El forum non conveniens es incompatible con el Convenio de Bruselas (Comentario a la STJCE, de 1 de marzo de 2005, en el asunto C-281/02, Owusu)", *La Ley*, Nº4, 2005, pp. 1425-1432, pp. 1425 and ss. In regard of the doctrine of *"forum non conveniens"*, see Hélène GAUDEMET-TALLON, "Le « *forum non conveniens* », une menace pour la convention de Bruxelles? À propos de trois arrêts anglais récents", *Revue critique de Droit international privé*, Tome 80, 1991 (3), pp. 491-524, pp. 491 and ss.
[346] Peter STONE, *EU Private International Law*, Glos/Northampton, Edward Elgar Publishing, 2010, p. 61.

A solution based on the case *Owusu* may be criticized as being excessively Eurocentric[347]. The EU legislators also take this concern into account, and in RBI*bis*, they allow the courts of the Member states to determine a stay of proceedings under certain conditions, though the defendant is domiciled in a Member state[348]. While such a statement has to some extent overturned the decisions of *Owusu*, it is still at the first step of development and remains to be further clarified by future ECJ cases or EU regulations[349]. For the moment, we should admit that a decision of a stay of proceedings in favour of a third state still relies greatly on the discretion of the judges of the Member states in legal practice.

In conclusion, since RBI and RBI*bis* deals with the choice of conflict-of-jurisdiction rules in civil and commercial matters between the Member states, and Brussels Regulations do not preclude their applications from the aspect of company law as Rome Regulations, Article 2 should have a general effect of application to the regime of directors' liability. A director could be sued in the court of a Member state in which he has his domicile and he could defend himself in that court as well. In regard of directors' domicile, since RBI does not establish an autonomous concept to the "domicile" of natural persons, the determination of a director's domicile should rely on the interpretation of the national rules of the Member states unless that director is a legal person[350].

1.1.2. Examination on the applicability of Article 6 (1) of RBI

In the case where there are several directors in a proceeding, it is relevant to examine whether Article 6 (1) will be applicable to such an issue. Article 6 (1) states that where there are a number of defendants domiciled in the Member states, they may be sued in the court of the place of the domicile of one of co-defendants[351]. However, a court originally seized can solely extend its jurisdiction to other closely related claims by virtue of the

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[347] Peter MANKOWSKI, "Article 19", in Ulrich MAGNUS, Peter MANKOWSKI (Editors), *Brussels II* bis *Regulation: European Commentaries on Private International Law*, München, Sellier European Law publishers, 2012, pp. 220-246, p. 226.
[348] See Article 33 of RBI*bis*.
[349] In this sense, see Arnaud NUYTS, "Le refonte du règlement Bruxelles I", *Revue critique de droit international privé*, Tome 102, 2013 (1), pp. 1-63, pp. 8-9.
[350] Esperanza CASTELLANOS RUIZ, "International Jurisdiction in Damages Actions for Breach of Antitrust Law", in Luis Antonio VELASCO SAN PEDRO, Carmen ALONSO LEDESMA, Joseba A. ECHEBARRÍA SÁENZ, Carmen HERRERO SUÁREZ, Javier GUTIÉRREZ GILSANZ (Editors), *Private Enforcement of Competition Law*, Valladolid, LEX NOVA, 2011, pp. 603-634, p. 623.
[351] See Article 6 (1) of RBI.

connections between them[352]. In the case *Kalfelis*[353], ECJ held that Articles 6 (1) applies where the actions brought against the various defendants are related, and where it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings[354], and it is for national court to verify in each individual case whether that condition is satisfied[355]. However, in the case *Réunion européenne SA*[356], ECJ ruled that two claims brought respectively in contract and in tort cannot be regarded as having sufficient connections between them, thus these claims cannot be joined together but have to be brought separately before different courts[357].

Nevertheless, in the case *Freeport plc v. Olle Arnoldsson*[358], ECJ stated that if there exists a risk of irreconcilable judgments when several claims are to be determined separately, claims brought against a number of defendants having different legal bases would not preclude the application of Article 6 (1)[359]. In this sense, it is possible that two claims in one action directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict could be regarded as connected[360]. Such a case is different from the case *Réunion européenne SA*. In the case *Réunion européenne SA*, the main proceeding was commenced in the court dealing with an action in tort or delict on the basis of Article 5 (3), while none of the defendant was domiciled in the place of the court. In this case, if the judges join two claims respectively in contract and in tort together, it would be unpredictable and unforeseeable for the defendants. Nevertheless, in the case *Freeport plc*, the main proceeding was commenced on the basis of Article 2 in the court of the place of one defendant's domicile. Under this circumstance, it did not exclude the operation of Article 6 (1) so as to join two claims potentially with different legal bases in the courts of the domicile of one of the defendants[361].

[352] Horatia Muir WATT, "Article 6", in Ulrich MAGNUS, Peter MANKOWSKI (Editors), *Brussels I Regulation: European Commentaries on Private International Law (Second Edition)*, *op. cit.*, pp. 294-329, p. 297.
[353] See Judgment of the Court of 27 September 1988, Case 189/87, *Athanasios Kalfelis v. Bankhaus Schröder Münchmeyer Hengst and Co. and others.*
[354] See paragraph 13 of Case 189/87.
[355] See paragraphs 12 of Case 189/87.
[356] See Judgment of the Court of 27 October 1998, Case C-51/97, *Réunion européenne SA and others v. Spliethoff's Bevrachtingskantoor BV, and the Master of the vessel Alblasgracht V002.*
[357] See paragraph 50 of Case C-51/97.
[358] See Judgment of the Court of 11 October 2007, Case C-98/06, *Freeport plc v. Olle Arnoldsson.*
[359] See paragraphs 41 and 47 of Case C-98/06.
[360] See paragraph 45 Case C-98/06.
[361] Horatia Muir WATT, "Article 6", *loc. cit.,* p. 304.

As is indicated in the case *Kalfelis*, ECJ left for national courts to examine the "connection" between the anchor proceeding and the other proceedings brought against other co-defendants, and national courts could also assess whether there would be a risk of irreconcilable judgments if all the proceedings are not concentrated in one court[362]. It should be clear that national laws could examine whether the connection between these proceedings are sufficient so as to decide whether the court could establish jurisdiction by virtue of Article 6 (1), whereas national laws cannot reject the application of Article 6 (1) due to the fact that an action is inadmissible under the national rules by the time it is brought[363]. As we have mentioned, a court of a Member state could establish jurisdiction pursuant to Article 6 (1) because of the existence of the connecting factor of "domicile" in this place, while such jurisdiction cannot stem from other connecting factors as those in the case *Réunion européenne SA*. Besides, jurisdiction of the court of the place of defendant's domicile has mandatory effects even if other connecting factors are not within this place[364]. In this way, the court of the place of the domicile of one of the co-defendants should have the competence by virtue of Article 6 (1), while after the jurisdiction is established, judges of this court could determine whether they would hear or not such an action. However, ECJ's decision in this case still needs further consideration. If the purpose of Article 6 (1) is to promote procedural expediency and avoid irreconcilable judgments, neither of those objectives will be promoted in a case where the initial claim cannot go ahead because it is not admissible under national rules[365].

However, ECJ also concerns that Article 6 (1) may be used by the plaintiff with abusive or fraudulent intentions. In the case *Reisch Montage AG v. Kiesel Baumaschinen Handels GhmbH*[366], ECJ held that Article 6 (1) should adopt a strict interpretation and avoid that a plaintiff make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member states in which that defendant is

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[362] See paragraph 41 of Case C-98/06.
[363] See paragraphs 27-30 of Case C-103/05. Also see Étienne PATAUT, "Note sous Cour de justice des Communautés européennes 13 juillet 2006 (aff. C-103/05)", *Revue critique de Droit international privé*, Tome 96, 2007 (1), pp. 181-186, pp. 184-185.
[364] See conclusion of Case C-281/02.
[365] Horatia Muir WATT, "Article 6", *loc. cit.,* p. 315.
[366] See Judgment of the Court of 13 July 2006, Case C-103/05, *Reisch Montage AG v. Kiesel Baumaschinen Handels GhmbH*.

domiciled[367]. The objective of Article 6 (1) is to minimize the risk deriving from the different treatments that a plaintiff may obtain in the courts of different Member States, but not to enable the sophisticated plaintiffs to unlawfully invoke this rule when there is no material link between the claims, or perform abusive strategies of *"forum shopping"* in order to fraudulently find a more favourable condition in litigation. Therefore, the abusive invoking of Article 6 (1) should be prohibited because it may otherwise violate the due process interests of the defendants[368].

In regard of directors' liability, it is relevant to mention that sometimes creditors may bring an action both against the company to incur a contractual liability and against its directors to incur a non-contractual liability. For example, at the vicinity of insolvency, if directors conceal the real financial information of the company and continue to conclude new contracts with creditors, these so-called "new creditors" may both suffer a loss from such a contract with the company and a tort caused by its directors. In some Member states, for example, German law imposes a special liability onto directors in such a case. §823 (2) of *BGB* gives a plaintiff the opportunity to bring a tort action based on the infringement of a specific protective statute and allows compensation for pure economic loss[369]. However, the concurrence or accumulation of claims is not allowed in German law, because it provides for certain liability privileges and the application of tort law would have to frustrate the purpose of a contract law norm, and the tortious liability would come into play under general circumstances[370]. In this case, German law imposes a *"culpa in contrahendo"* liability upon directors, such a kind of pre-contractual liability seems to be a mix of a contractual liability of the company and a non-contractual liability of the directors, and the German legislators include the two liabilities into one and oblige directors to assume this liability when such an event occurs. If it were so, the "new creditors" cannot bring another claim against the company for the same cause.

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[367] See paragraph 32 of Case C-103/05. Also see Rafael ARENAS GARCÍA, "El foro de la pluralidad de demandados ante el TJCE: Comentario a la STJCE (Sala Tercera) de 11 de Octubre de 2007", *Anuario español de Derecho internacional privado*, t. VII, 2007, pp. 627-642, p. 638.

[368] In this sense, see Miguel VIRGÓS SORIANO, Francisco J. GARCIMARTÍN ALFÉREZ, *Derecho procesal civil internacional: Litigación internacional (Segunda edición)*, Navarra, Thomson/Civitas, 2007, p. 215. Also see Marie-Laure NIBOYET, Géraud De GEOUFFRE DE LA PRADELLE, *Droit international privé (3e édition)*, Paris, L.G.D.J, 2011, p. 439.

[369] Harald KOCH, "The Law of Torts", in J. ZEKOLL, M. REIMANN (Editors), *Introduction to German Law (Second Edition)*, The Hague, Kluwer Law International, 2005, pp. 205-226, p. 213.

[370] Christian VON BAR, Ulrich DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe: A comparative Study*, München, Sellier European Law Publishers, 2004, p. 201.

Similarly, in French or Belgium law, legislators also insist on the principle of non-cumul principle and regulate that liability in damages cannot be contractual and tortious at the same time[371]. However, the concurrence of claims remains uncertain in Spanish law. The current legal practice is that shareholders or creditors could assert both a claim against the company for the breach of contractual obligations and a claim against its directors for the breach of non-contractual obligations. However, such an accumulation is not aiming at enabling the injured party to benefit from a double compensation, but to provide them two liability regimes in order for them to get enough protection[372]. In fact, although the injured party is allowed to assert both liability regimes alternatively or subsidiarily, the court dealing with such an issue may often apply the liability regime that is more favourable to the injured party in the interest of him[373]. It shows that most Member states do not recognize the accumulation of a contractual claim and a non-contractual claim deriving from the same cause. Pursuant to ECJ's decision in the case *Reisch Montage AG v. Kiesel Baumaschinen Handels GhmbH*, a court of a Member state in which one of the defendants is domiciled should have competence to deal with such an issue by virtue of Article 6 (1) even if an action is inadmissible under the national rules by the time it is brought before. However, although the court hears such an action, it should be clear that it is very likely that judges would reject the creditors' demand to incur liability to both the company and its directors deriving from the same cause.

Another case is that directors as the members of the board may be sued jointly by shareholders or creditors. Since a decision is usually made by the managing board of the company, directors in the board should be held jointly liable for their decision unless they can prove that they are not aware of it or have opposed to such a decision. In this regard, it is not impossible that directors may be domiciled in different Member states. Under this circumstance, it is undoubtedly that it would be very inconvenient for the injured party to bring several claims before different Member states for the damage deriving from the decision because such a decision jointly made by the members of the board can prove the strong connections between these claims. Therefore, Article 6 (1) may be operable if

[371] Christian VON BAR, Ulrich DROBNIG, *The Interaction of Contract…, op. cit.*, pp. 198-199.
[372] Gaudencio ESTABAN VELASCO, "La acción individual…", *loc. cit.,* p. 247.
[373] Christian VON BAR, Ulrich DROBNIG, *The Interaction of Contract…, op. cit.*, p. 200.

shareholders bring a personal claim in the court of the place of the domicile of one of the defendants.

However, the issue regarding creditors needs further consideration. In a personal action brought by individual creditors against several directors, as we have explained that not all the Member states admit such a liability regime in the national rules. However, individual creditors may sue these directors in the court of the place of one of the defendants' domicile since ECJ has clearly indicated that the application of Article 6 (1) cannot be precluded only because such an action is inadmissible at the time when it is brought under national law. In fact, individual creditors could select a court in a Member state in which national rules enable them to act against directors in order to avoid that they may not get compensation through such a liability regime in another Member state. In this case, Article 6 (1) only impedes the plaintiff to abusively invoke this rule for the sole purpose of removing all the other defendants from other courts, but does not prevent them from obtaining the due process rights conferred by this Article in one Member state.

In the case similar to the liability regime under Article 367 of *LSC* in Spanish law, in which directors are jointly held liable for the corporate debts due to the failure to open the dissolution or insolvency proceedings[374], it is doubtful whether creditors could invoke Article 6 (1) and join all the claims in the court of the place of one of these directors' domicile. In this case, in the first place, it should be clear that the liability of the company for its debts is with contractual nature, while the directors' liability is an *"ex lege"* liability under Spanish law. Normally, an action against the company and an action against its directors are not commenced at the same time. Creditors often incur directors' liability after they cannot be completely satisfied in an action to incur the contractual liability of the company, or after they have not got enough compensation from the distribution of corporate assets during the insolvency proceedings[375]. Therefore, Article 6 (1) should not apply in order to accumulate an action against the company and an action against its directors for an issue under Article 367 of *LSC*. Instead, the defendant under Article 367 of *LSC* often refers to directors rather than the company, so Article 6 (1) would be applicable

[374] See Article 367 of *LSC*.

[375] See Article 51 *bis* of *LC*. Spanish law enables creditors to bring an action under Article 367 after the insolvency proceedings if certain creditors, for example, the unsecured creditors have not got enough compensation from the distribution of corporate assets during the insolvency proceedings.

if creditors would bring claims against several directors who are not domiciled in the same Member state. In this case, the connection between these claims is strong enough since the sole purpose is to incur directors' liability for the same cause (for the failure to file on company's dissolution or insolvency proceedings), and creditors could select a court in one of the places in which the directors at issue are domiciled to assert such a claim against them.

1.2. Examination on the applicability of Article 22 in the regime of directors' liability

1.2.1. The validity of the decisions of organs and the regime of directors' liability

Article 22 (2) of RBI confers exclusive jurisdiction to the courts of the Member States where the company has its seat in the matters of the validity of the constitution, the nullity, or the dissolution of the company, or the validity of the decisions of the organs of company[376]. The decisions of the managing board are also regarded as the decisions of the company's organs, and managing board's decisions play a crucial role in determining many corporate affairs. Therefore, if a decision made by the board is proved to be null or void, directors may be forced to assume liability as a consequence. In this part, we will carry out a discussion on the connection between nullity of a board's decision and directors' liability, and examine whether Article 22 (2) is applicable to deal with a dispute deriving from such a matter.

RBI*bis* does not make any change to the statement of Article 22 (2). Therefore, in this part, the discussion on Article 22 (2) of RBI could be considered the same as Article 24 (2) of RBI*bis*. As the first step, it is relevant to mention the statement in this Article, in which it provides that in order to determine the seat of the company, the court shall apply its own rules of PIL. However, different Member states adopt different criteria of the company's seat, some of them consider the seat as "statutory seat" while the others regard "real seat" as company's seat. In this case, although Article 60 of RBI has already made an autonomous definition to the company's domicile, it seems that Article 22 (2) is no longer in line with the definition to the company's seat under Article 60[377]. However, in this case, in order to keep the whole text of Brussels Regulation congruent, the determination of

[376] See Article 22 (2) of RBI.
[377] See Burkhard HESS, "Report on the application of Regulation Brussels I in Member States (Study JLS/C4/2005/03)", *Rupercht-Karls-Universität Heidelberg*, 2005, pp. 1-365, pp. 157-158.

"seat" by every Member to the company's seat should not go beyond the alternatives provided in Article 60.

The interpretation of Article 22 (2) was developed by the courts of the Member states earlier than in ECJ. In an English case *Grupo Torras, S.A v. Sheikh Fahad Mohammed al Sabah and others*[378], the English court heard an action brought by a Spanish company and its English subsidiary in order to seek relief from damage caused by directors' breach of fiduciary duties. In this case, the English judge rejected the application of Article 22 (2) since he drew a distinction between the *"validity"* and *"propriety"* of a decision made by an officer, and held that a claim to examine whether directors' behaviours have exceeded the authority was within Article 22 (2) while a claim in relation to the breach of duty was not[379]. Meanwhile, he indicated that the term of *"validity"* should be narrowly construed so as to exclude the application of Article 22 (2) from the claims deriving from the effects of a decision made by the company's organ[380]. In fact, the objective of Article 22 (2) is to confer exclusive competence to decide questions with regard to the constitution and internal management of a company on the courts of the Member states in which the company has its seat, since it is generally accepted that the law of the seat determines such matters as the capacity of a company, the composition and powers of its various organs and the formalities and procedures laid down for them[381].

In some other cases, English case law also recognized that Article 22 does not apply where an issue governed by company law arises incidentally, by way of defence to a claim based on an ordinary contract[382]. The English High Court held that Article 22 (2) does not apply to an action seeking the enforcement of a commercial contract, even if one of the issues in dispute relates to the power of the defendant company to enter into a transaction of the

[378] *Grupo Torras, S.A v. Sheikh Fahad Mohammed al Sabah and others* (No.1) [1996] 1 Lloyd's Rep. 7.
[379] *P. R. BEAUMONT, P. E. McELEAVY, A. E. ANTON, Private International Law…, op. cit.*, p. 232.
[380] See [1996] 1 Lloyd's Rep. 7. Also see Francisco J. GARCIMARTÍN ALFÉREZ, "La competencia judicial internacional en los litigios societarios en aplicación del Convenio de Bruselas: A propósito del "caso Torras" ante los tribunales españoles", *Gaceta Jurídica de la Unión Europea y de la competencia*, 1999 OCT-NOV (203), pp. 19-30, pp. 19 and ss. Also see Rafael ARENAS GARCÍA, "El reglamento 44/2001 y las cuestiones incidentales: Dar vueltas para (casi) volver al mismo sitio (comentario a la STJUE de 12 mayo de 2011, As. C-144/10)", *Diario La Ley*, Nº 7684, Año XXXII, 29 Jul. 2011, Ref. D-320, Editorial La Ley, pp. 1-17, p. 11-12.
[381] See [1996] 1 Lloyd's Rep. 7. Also see Peter STONE, *EU Private International Law…, op. cit.*, p. 150.
[382] Peter STONE, *EU Private International Law…, op. cit.*, p. 150.

relevant kind, or to the authority of an officer of the defendant company under its corporate constitution to enter into the contract[383].

Such a treatment was also adopted by ECJ in the case *Nicoles Hassett v. South Eastern Health Board and Cheryl Doherty v. North Western Health Board*[384], in which an action was brought by the members of a company to challenge a decision of the corporate board as infringing the member's rights under the corporate constitution on the ground that, in reaching the decision, the board had failed properly to consider a request in favour of the members of the company[385]. In this case, although the board could exercise with its discretion in deciding a pecuniary assistance by virtue of the corporate constitution, the decision made by the board declining brutally and untimely an assistance request to its members has turned out to be a serious disturb to the members' rights conferred by the company[386]. However, on one hand, the plaintiffs did not ever question whether the board has the power to make such a decision on the basis of the corporate constitution. On the contrary, the plaintiffs have believed that such a decision made by the board was valid and caused certain damage to them, and on this basis the plaintiffs intended to ask for compensation. On the other hand, the company did not examine whether a decision made by its organ was valid or not but rejected the demand of assistance immediately[387]. Based on the facts, it seems that such an action was not aiming at nullifying a decision made by the managing board of a company but was to establish liabilities to the board for making such a decision. Therefore, ECJ rejected the application of Article 22 (2) and explained that Article 22 (2) is confined to disputes in which a party is challenging the validity of a decision of an organ of a company, while challenging the decision of the board to refuse indemnities is not of that nature[388]. In fact, if all the disputes involving a decision by an organ of a company have to be treated as coming within the scope of Article 22 (2), all the actions brought against a company would be concentrated in the court of the place where

[383] See English cases, for example, *JP Morgan Chase Bank v. Berliner Verkehrsbetriebe* [2009] EWHC 1627; *Calyon v. Wytwornia Sprzetu Komunikacynego PZL Swidnik* [2009] EWHC 1914. Also see Peter STONE, *EU Private International Law…, op. cit.*, p. 150.

[384] See Judgment of the court of 2 October 2008, Case C-372/07, *Nicole Hassett v. South Eastern Health Board and Cheryl Doherty v. North Western Health Board*. Also see IDOT Laurence, "De la portée de la compétence exclusive des jurisdictions du siège social en matière de groupements", *Europe*, Nº 12, 2008, p.28.

[385] Peter STONE, *EU Private International Law…*, *op. cit.*, p. 150.

[386] Bertrand ANCEL, "Note sous la Cour de justice des Communautés européennes 2 octobre 2008 (aff. C-372/07)", *Revue critique de droit international privé*, Tome 98, 2009 (1), pp. 76-80, p. 77.

[387] See paragraphs 28-29 of Case C-372/07.

[388] Peter STONE, *EU Private International Law…*, *op. cit.*, p. 150.

the company has its seat by invoking the application of Article 22 (2), regardless of the fact that such an action shows more connections with contractual or non-contractual obligations[389].

On the basis of ECJ's interpretation, the application of Article 22 (2) is only confined to the claims in which the focus is on the examination of a matter with constitutive natures. For example, if a claim is not aiming at challenging the validity of a decision made by the board, but only seeks a pecuniary remedy against its officers for any type of misconduct in the exercise of their powers, such an action does not show *erga omnes* natures. As a contrary, it only has effects *inter partes*[390]. Therefore, an incidental occurrence of a constitutive problem cannot justify the application of exclusive jurisdiction rules into such an action.

In the case *Berliner Verkehrsbetriebe (BVG) v. JPMorgan Chase Bank NA, Frankfurt Branch*[391], a German company concluded a contract with an American company that owned subsidiaries in Europe. The contract contained a choice of court clause that conferred jurisdiction to an English court. On the basis of this choice of forum agreement, the German company asserted a claim before the mentioned English court for the fact that the American company have breached contractual obligations. However, the defendant put forward another arguments in this case, submitting that the contract was not valid because its organ had acted *ultra vires* in concluding the contract[392]. In this sense, the defendant invoked the application of Article 22 (2) in order to challenge the jurisdiction of the English court while it was rejected by ECJ. In this case, ECJ also concerned that a broad interpretation will go beyond the legal objective pursued by this Article and will lead to a result that even a proceeding which only has incidental significance with the validity of a board's decision will also be covered by this Article. Therefore, if a contractual dispute does not necessarily involve the examination on the validity of a decision of board, it

[389] See paragraph 23 of Case C-372/07.

[390] Racío CARO GÁNDARA, "Acciones impugnatorias de acuerdos sociales versus acciones resarcitorias por incumplimiento del contrato de sociedad: análisis del terreno fronterizo con ocasión de la sentencia del TJCE de 2 de octubre de 2008 en el asunto C-372/07, sobre el artículo 22 (2) del Reglamento (CE) 44/2001", *Diario La Ley*, Nº 7146, Año XXX, Ref. D-107, Editorial LA LEY, pp. 1-16, pp. 3 and ss. Also see Rafael ARENAS GARCÍA, "El reglamento 44/2001…", *loc. cit.*, p. 16.

[391] See Judgment of the court of 12 May 2011, Case C-144/10, *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichenRechts v. JPMorgan Chase Bank NA, Frankfurt Brach*.

[392] See paragraphs 14-18 of Case C-144/10.

cannot be considered as a matter falling within the scope of exclusive jurisdiction[393]. And in this case, since the rules of exclusive jurisdiction could not apply, the party autonomy should be respected.

Therefore, the EU legislators adopt a restrictive criterion on the interpretation of Article 22 (2). Nevertheless, in Spanish text of RBI, the statement of Article 22 (2) is presented as "*en materia de validez de las decisions de sus órganos*" (in the matter of the valididy of its organs), this statement can also be seen in the French, Portuguese texts of RBI. It seems that as long as a case involves the validity of the decisions made by the company's organs, it will be covered by Article 22 (2). However, in English text, the statement is presented as "*in proceedings which as their object the validity of the decisions of organs*". In this sense, a case only involving the validity of a decision made by the organs cannot fall within the scope of Article 22 (2). Only an action the main objective of which is to challenge the validity of a decision made by the organs will be covered by Article 22 (2). Different statements deriving from the linguistic divergence may unconsciously widen or narrow the scope of Article 22 (2), However, ECJ has clarified in the case law that Article 22 (2) is only confined to a claim the objective of which is to challenge the validity of a decisions of organs.

In the case *Gesellschaft für Antriebstechnik mbH & Co.KG v. Lamellen und Kupplungsbau Besteiliguns KG (GAT v. LuK)*[394], ECJ held that all the proceedings in relation to a registration or validity of a patent, irrespective of whether the claim is brought by the way of an action or a plea in objection, should fall within Article 22 (4) so as to establish its exclusive jurisdiction[395]. Unlike the case *BVG v. JPM*, this case leads to a possibility that even an action showing incidental significance with the validity of patent could be covered by Article 22 (4) of RBI[396]. In this sense, it is doubtful whether it was appropriate for ECJ to make a different treatment to the exclusive jurisdiction between the area of corporate affairs and that of intellectual property.

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[393] See paragraph 39 of Case C-144/10. Also see Edouard TREPPOZ, "Note sous Cour de justice de l'Union européenne (aff. C-144/10) 12 mai 2011", *Revue critique de droit international privé*, Tome 100, 2011 (4), pp. 932-937, p. 935.

[394]See Judgment of the court of 13 July 2006, Case C-4/03, *Gesellschaft für Antriebstechnik mbH & Co.KG v. Lamellen und Kupplungsbau Besteiliguns KG*.

[395] See the conclusion of the Case C-4/03. Also see Laurence IDOT, "Compétence exclusive en matière de sociétés", *Europe*, Nº 7, 2011, p. 39.

[396] Rafael ARENAS GARCÍA, "El reglamento 44/2001…", *loc. cit.*, pp. 4 and ss.

Unlike the issue in relation to companies, in a claim concerning intellectual property, the examination on the validity of a patent is an indispensable step to determine whether a patent is a pirate or not. Therefore, it should clarify the validity of a patent in order to examine whether the rights conferred by such a patent are violated or not in the proceedings followed[397]. However, in an issue regarding corporate affairs, it is not necessary to prove the validity of the decision of board in order to establish liability to directors. Under general circumstances, the plaintiff may assert a claim to incur liability to directors for any type of misconduct in the exercise of their powers through challenging the validity of the board's decision, if such a strategy to invoke the application of the rules of exclusive jurisdiction is allowed, it may be abusively applied as a tool to facilitate the demonstration of the board's fault so as to establish liability.

Nevertheless, under exceptional circumstances, it is possible that the examination on the validity of a board's decision is indispensable in order to determine whether directors have breached the fiduciary duties owed to the company. In this case, the EU legislators have construed Article 22 (2) in a strict sense and impose a close connection between a claim and the examination on the validity of a board's decision in order to justify the application of Article 22 (2)[398]. Therefore, of a claim does not have sufficient connections with the examination on the validity of a board's decision, such a claim should be brought independently before another court rather than the court establishing exclusive jurisdiction pursuant to Article 22 (2).

In this case, on one hand, the connection between the validity of the board's decision and directors' liability seems to be insufficient. For example, in Spanish law, in order to ensure the legal certainty of the agreements or decisions made by the board and to avoid negative effects that may arise during the execution of a void or annullable decision[399], the Spanish legislators enable directors, shareholders and certain creditors whose interests are injured by such a decision to bring an action in order to challenge a board's decision[400]. And such

[397] Edouard TREPPOZ, Edouard TREPPOZ, "Note sous Cour…", *loc. cit.*, pp. 935-936.
[398] Francisco J. GARCIMARTÍN ALFÉREZ, "La competencia judicial…", *loc. cit.*, pp. 28 and ss.
[399] Javier García DE ENTERRÍA, "Los efectos de la declaración de nulidad de los acuerdos sociales", *Revista de Derecho Mercantil*, No. 290, 2013 (Octubre-Diciembre), pp. 141-169, p. 150.
[400] See Articles 206 and 251 of *LSC*. Also see Fernando PRESENCIA CREPSO, "Legitimación activa y pasiva para el ejercicio de la acción de impugnación: El proceso de impugnación de acuerdos sociales", in

an action should be filed against the company rather than its directors[401]. However, an action to establish liability could be brought by the company, shareholders, creditors, or other third parties directly against directors. Under this circumstance, the difference between the two actions is that in a decision made by the board, directors as the members of the board are collectively regarded as the organ of the company. Since the company is an independent entity, it should assume liability since its organ has made a void or annullable decision[402]. It is possible that some Member states will hold the directors jointly liable for a decision of a board rather than the company. However, in this case, all the directors rather than the particular directors should assume liability. Conversely, an action against directors is not aiming at incurring all the directors' liabilities, but only those guilty directors whose behaviours are in contrary to their fiduciary duties.

Since the Spanish regime imposes liability on the company rather than its directors in the case where a decision of the board is null or void, the plaintiff cannot establish liability directly to directors through challenging the validity of a board's decision. Even if the company could file a corporate action against directors after it has made compensation for the plaintiff, it could not demonstrate the connections between the validity of a board's decision and the regime of directors' liability because they are two separate claims respectively brought before two courts at different moments. If some Member states require that directors should be jointly held liable for a board's decision, and the plaintiff may use it as a tool to incur directors' liability, such a connection could not be considered as sufficient to justify the application of Article 22 (2) either. In this case, ECJ have held that an action the main objective of which is not challenging the validity of a board's decision could not fall within the scope of Article 22 (2).

On the other hand, it is possible that some other corporate affairs may present a significant connection with the examination on the validity of a board's decision. In a case where sufficient connections have been evidenced, it is relevant to clarify which court will be appropriate to deal with these actions. In this case, firstly, it is suggested that since the courts in the place of the company's seat shows more advantages in dealing with the

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Estudios de Derecho Judicial, *La impugnación de acuerdos sociales y del consejo de administración: Actuación en nombre de otro*, Madrid, Consejo General del Poder Judicial, 2007, pp. 13-51, pp. 33 and ss.

[401] See Article 206 (3) of LSC.

[402] See Article 209 of *LSC.*

corporate affairs, and defendants (here the members of the board) could also enjoy the due process interests even they are not domiciled in the place where the company has its seat, it should leave for this court to determine the validity of a board's decision, and such a treatment also follows the lines in Article 22 (2). Meanwhile, a court dealing with a claim to incur liability to directors based on the breach of fiduciary duties, for example, the abuse of authority or fraudulent misappropriation of corporate assets for their own benefit should stay its proceedings until a court which has exclusive competence determines whether such a board's decision is valid or not[403]. Secondly, it is also suggested that the court dealing with the claim to incur liability for the breach of fiduciary duties also has competence to examine the validity of the board's decision. However, such a solution may be less persuasive. Since the company law rules vary from one Member State to another, a decision may be valid in accordance with the national rules in one Member state while it may turn to be void in another Member state. If it were so, it is probable that different judgments will be made by the courts of different Member states. In this case, RBI has considered the Member State where the company has its seat more appropriate to deal with the constitutive issues of a company. Therefore, it may be contrary to RBI if it leaves for another court to examine the validity of a board's decision. Besides, from ECJ's decisions and from the statement of RBI, we can find that even a choice of forum agreement cannot prevail and derogate from the mandatory effects of Article 22 (2)[404]. RBI does not recognize a court's jurisdiction conferred by party autonomy when an issue is covered by the scope of exclusive jurisdiction. In this sense, the mandatory effect of the rules of exclusive jurisdiction may render it less possible for a court dealing with normal contractual or non-contractual obligations to deal with an issue falling within the scope of exclusive jurisdiction. Therefore, it seems unreasonable for the court dealing with a contractual or non-contractual dispute to establish jurisdiction to examine the validity of a board's decision.

In this case, in the first place, if there exists a choice of forum agreement and a matter that is covered by exclusive jurisdiction, a jurisdiction conferred by the party autonomy should

[403] Francisco J. GARCINMARTÍN ALFÉREZ, "La competencia judicial…", *loc. cit.*, pp. 22 and 26.
[404] See Article 23 (5) of RBI and Article 25 (4) of RBI*bis*. Also see paragraph 32 of Case C-144/10.

not take precedence over the exclusive jurisdiction[405]. In the second place, since ECJ adopts a restrictive interpretation to Article 22 (2)[406], the application of Article 22 (2) should only be confined to a claim mainly concerning the decisions made by the corporate organs. If the main objective of a claim is to establish liability to officers for the fraud in procuring such decisions, the application of Article 22 (2) should not be justified[407]. In the third place, in the cases where the examination on the validity of a decision becomes indispensable in order to solve the issues in the actions followed, a sufficient connection between these actions should be evidenced. And it should adopt a EU autonomous definition into the interpretation of such a "connection"[408]. In this case, in order to ensure a proper administration of justice, the court dealing with a claim which aims at incurring liability to directors should stay the proceedings until the court owing exclusive competence determines whether a decision made by the organ is valid or not.

In conclusion, Article 22 (2) concerning the validity of a decision of organs is not applicable to a claim aiming to seek remedy from directors for any type of misconducts in the exercise of their functions.

1.2.2. The dissolution proceedings and the regime of directors' liability

If a company is dissolved because of insolvency, the dissolution proceedings should be governed by RI. On the contrary, when a solvent company is dissolved owing to other reasons, the dissolution proceedings are not covered by RI but should fall within the scope of RBI. In this case, Article 22 (2) also confers exclusive jurisdiction to the court of the place where the company has its seat to deal with the dissolution proceedings when the company is solvent. The Report *Schlosser* held that the term "dissolution" should not be interpreted in the restrictive technical sense while it should also embrace the issues relating to the liquidation after the "dissolution" of the company, in which the disputes regarding the distribution of assets to shareholders are also included[409].

[405] Grégory MINNE, "Arrêt BVG: la Cour de justice de l'Union européenne précise la portée de l'article 22 point 2 du Règlement Bruxelles I sur la compétence en matière de sociétés et de personnes morales", *Bulletin Droit et Banque*, nº 49, 2012, pp. 38-46, p. 45.
[406] Racío CARO GÁNDARA, "Acciones impugnatorias de…", *loc. cit.*, p. 3.
[407] Peter STONE, *EU Private International Law…*, *op. cit.*, p. 151.
[408] Francisco J. GARCINMARTÍN ALFÉREZ, "La competencia judicial…"*, loc. cit.*, p. 30.
[409] Peter SCHLOSSER, *Report on the Convention*, OJ 1979 C 59/71, paragraph 58. Also see Luís DE LIMA PINHEIRO, "Article 22", in Ulrich MAGNUS, Peter MANKOWSKI (Editors), *Brussels I Regulation: European Commentaries on Private International Law (Second Edition), op. cit.,* pp. 413-436, p. 427.

In Spanish law, if the legal reason of dissolution arises in a solvent company, directors should file for the opening of dissolution proceedings. If directors have not fulfilled the duties to file for the company's dissolution, they will be held jointly liable for the corporate debts[410]. In such a case, if the dissolution is due but directors have not filed for the opening of dissolution proceedings or have not informed creditors, creditors may continue their contracts with the company while they may suffer a great loss. Besides, the delay or failure of the commencement of dissolution proceedings may cause depreciation or loss to the corporate assets. Although in a solvent company, creditors do not have to worry that the corporate assets will be insufficient to pay for the debts, Article 367 of *LSC* enables creditors to hold directors jointly liable for the corporate debts. Under this circumstance, creditors could seek remedy from the company as well as its directors. However, such a claim aims at establishing liability, while liability usually has been confirmed during the dissolution proceedings or the proceedings aiming at execution and distribution of corporate assets. Therefore, Article 22 (2) cannot be operable since the action intending to establish liability to directors does not fall within the objectives of the dissolution proceedings usually, or it may only have incidental significance with company's dissolution.

Meanwhile, as we have mentioned, the Report *Schlosser* held that an action regarding the distribution of assets to shareholders could fall within Article 22 (2). In a solvent company, the corporate assets are normally sufficient to be distributed to its shareholders and creditors. However, taking the example of Spanish law, under Article 367 of *LSC*, directors are only held liable towards creditors rather than shareholders if they have not properly filed for the opening of the dissolution proceedings in a solvent company. In this case, shareholders cannot file a claim against directors, but they could request the general meeting of shareholders to approve a resolution to file a corporate action against directors for their breach of fiduciary duties. However, normally a corporate action does not show close connections with an action regarding the distribution of assets to shareholders in the dissolution proceedings because a dispute regarding the distribution of assets to shareholders often occurs when shareholder cannot achieve consensus to the method of distribution of corporate assets in the dissolution proceedings, while a corporate action is

[410] See Article 367 of *LSC*.

to incur liability to directors and to recovery the loss sustained by the corporate assets so as to increase distributable assets in the dissolution proceedings. Therefore, a corporate action in order to incur directors' liability cannot be covered by Article 22 (2) either.

In conclusion, the regime of directors' liability do not show close connections neither with the matters of the validity of a board's decision nor with the dissolution proceedings. Therefore, Article 22 (2) cannot be applicable to the regime of directors' liability.

1.3. Examination on the applicability of Article 23 in the regime of directors' liability

1.3.1. A choice of forum clause in the company's statute

It is possible that a director concludes a choice of forum agreement with the company in which he works in order to select a court to deal with their disputes. This kind of clause could either be included into an independent contract between directors and the company, or be inserted into the company's statute while the director' acceptance of nomination may be considered as accepting the obligations as well as the choice of forum clause provided by the statute. In the case *Powell Duffryn*[411], a German company inserted a choice of forum clause in its company statute stating that "by subscribing for or acquiring shares or interim certificates, the shareholders submit to the jurisdiction of the court competent to entertain suits concerning the company, in respect of all disputes with the company or its organs"[412]. An English company subscribed for registered shares of a German company the capital of which was on successive increase and also received dividends from this company, while the German company was later declared insolvent. Under this circumstance, the liquidator of the German company invoked the choice of forum clause and brought a claim against its shareholder (here the English company) for its failure to fulfil the obligations to make due payment when subscribing for shares. In this case, it is relevant to investigate on whether a choice of forum clause in the company's statute also falls within the scope of Article 17 of Brussels Convention (now Article 23 of RBI and Article 25 of RBI*bis*).

In accordance with Article 23 of RBI, two parties may agree that a court of a Member state establishes jurisdiction to settle their dispute in connection with a particular legal

[411] See Judgment of the court of 10 March 1992, Case C-214/89, *Powell Duffryn PLC v. Wolfgang Petereit*.
[412] See paragraph 2 of Case C-214/89.

relationship, and a valid choice of forum agreement could be evidenced if it is in writing or evidence in writing; or if it meets the practices between the parties; or if there is a usage of trade or commerce[413]. Therefore, in the case *Powell Duffryn*, ECJ held that as the first step, it should verify whether the two parties have achieved real consensus in such a choice of forum clause in the company's statute[414]. Normally, the memorandum and the articles of association are the most important sources of internal rules in a company and the contents of articles are to a large extent at the company's discretion[415], and they constitute the basic instrument governing the relationship between the company and its shareholders[416]. If a person intends to become the company's shareholder, or if a shareholder intends to remain his identity in the company, he should accept the contents of the company's statute[417]. Sometimes, shareholders may be able to vote against a decision made by the company's board, or challenge the validity of the decision. If a shareholder does not agree with the management philosophy of the company, it is possible for him to sell his shares and quit the company[418]. However, that is not for sure in all the situations. If there is no remedy for a shareholder when he does not agree with the company's business, the only way left for him is to bear with it.

ECJ's attitude towards this kind of clause as contractual can also be seen in the national laws of most Member States but not in all[419]. If a person subscribes for or acquires the company's shares and becomes a shareholder of the company, he should accept the contents of the company's statutes and the choice of forum clause as well, and becomes contractually bound with the company. However, ECJ's decision is only applicable to a case where a shareholder becomes a member of the company after the articles of association have been established. If a shareholder is also a founder member of the company, or if there was no such a choice of forum clause in the company's statute but was subsequently asserted in the statute through a modification of articles, it is doubtful

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[413] See Article 23(1) of RBI.
[414] See paragraph 7 of Case C-214/89.
[415]Petri Mäntysaari, *Comparative Corporate Governance…, op. cit*, p. 407.
[416] See paragraph 26 of Case C-214/89.
[417] See Conor QUIGLEY, *European Community Contract Law: EC Legislation*, Vol. 2, London, Kluwer Law International, 1997, p. 406. Also see Maurice V. POLAK, "Comment to Case C-214/89", *Common Market Law Review, No. 30, Issue 2, 1993, pp. 406-419, p. 410.*
[418] *Hélène GAUDEMET-TALLON,* "Note sous la Cour de justice des Communautés européennes (5e Ch.) 10 mars 1992 (Aff. C-214/89)", *Revue critique de droit international privé, Tome 81,1992(3), pp. 535-540, p. 539.*
[419] *Trevor C. HARTLEY, International Commercial Litigation: Text, Cases and Materials on Private International Law, Cambridge, Cambridge University Press, 2009, p. 173.*

whether a choice of forum clause in the statute would bind on this shareholder and fall within the scope of Article 23. In the first place, a shareholder may also turn out to be the founder member of the company. Under general circumstance, since the articles of association are normally established by the company's founders, there is no reason why the shareholder (founder) will oppose to such a choice of forum clause he has agreed to. Therefore, such a choice of court agreement should have binding effects upon him. In the second place, a person may also become the member of the company after it has already been formally founded. In a case where the articles of association are amended and a choice of forum clause is inserted in the statute, if a shareholder does not agree with the content of the articles of association, sometimes he is allowed to give up his identity as a company's member. If he does not oppose to the introduction of a choice of forum clause in the statute, such a clause could also have binding effects upon him as well as upon other shareholders. In this case, a clause included in the company's statute constitutes an agreement between the company and its shareholders, and falls within the scope of Article 23. However, in order to protect the fundamental rights of the shareholders, ECJ held that at least it should ensure that the shareholders are aware of the existence of such a clause. Hence, in a listed company, an individual shareholder often acquires the company's shares at a low price and resells them at a higher price in order to gain a profit from the price difference, while he may not really be interested in the company's business. Therefore, it is very likely that he would not read the company's statutes article by article. In this case, at least it is relevant for the company to lodge the company's statute that contains such an agreement in a place where all the shareholders could get access to this document, or to contain such an agreement in public register[420]. If such a document is proved to be available for all the shareholders, an individual shareholder cannot plead on the ground of ignorance. Otherwise, it will not exert any effect upon the shareholders.

In regard of directors, normally an effective company's statutes include the provisions in relation to the appointment of directors, their duties, rights, obligations and remuneration[421]. Similar to the case of shareholders, if a director does not conclude a

[420] See paragraph 28 of Case C-214/89. Also see Ulrich MAGNUS, "Article 23", in Ulrich MAGNUS, Peter MANKOWSKI, *Brussels I Regulation: European Commentaries on Private International Law (Second Edition), op. cit.*, pp. 436-514, p. 498.

[421] See Paul L. DAVIES, Sarah Worthington, *Gower and Davies…, op. cit.*, pp. 307 and ss. Also see Dominique VIDAL, *Droit des sociétés…, op. cit.*, pp. 203 ss. Also see Luis Fernández DE LA GÁNDARA, *Derecho de sociedades*, Vol. I, València, Tirant lo Blanch, 2010, pp. 690 and ss.

contract with the company but directly accepts the nomination, he is also considered to accept the conditions indicated in the company's statute as being a director, in which a jurisdiction clause may also be included. In the case *Peters v. ZNAV*[422], ECJ held that the obligations provided by the articles of association aiming at imposing a person in his capacity as member of an association were to be considered to be contractual obligations, which is comparable to those of contracting parties[423]. Even though there does not exist a written contract, the relationship between the company and its directors is regarded as contractual as well. Therefore, it may not be necessary for directors to conclude a written contract of employment with the company since their duties, rights, obligations and remunerations may have been well indicated in the company's statute[424]. When the membership of an association is created between a director and the company, the close links of this membership is considered the same as the one created between the parties in a contract[425], and the articles of the association should have binding effects on its members. Therefore, a director should also be subject to the articles in the company's statute.

However, it is also possible that a director is the founder member of the company, or the articles of company's statute are modified and a choice of forum clause is asserted into the statute after a person has become director of the company. Under these circumstances, it is doubtful whether this director would be bound by such a clause. In this case, in the first place, if a director were also the founder member of the company, he would be bound to such a clause during the exercise of functions since the articles of association are normally established by the company's founders. In the second place, in a case where a director has already been director before a clause is asserted into the articles of association, if the director does not agree with the company, he could propose to the company to conclude a new choice of forum clause in order to deal with a special dispute between them. On the contrary, if the director have not opposed to the introduction of such a clause, it could be understood as that he has accepted to submit to a court designated by such a clause. However, although it must ensure that directors are aware of the existence of such a choice of forum clause in order to establish real consensus between the company and them, it is very rare that a director as the members of the board is unaware of the amendment to the

[422] See Judgment of the court of 22 March 1983, Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging.*
[423] See paragraph 13 of Case 34/82. Also see paragraph 15 of Case C-214/89.
[424] Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, pp. 95 and ss.
[425] See paragraph 15 of Case C-214/89.

company's statute. In this case, unlike an individual shareholder, an issue concerning the amendment of company's statute is often proposed by the board and is approved by the general meeting of shareholders. If such a clause has been approved but a director is ignorant of it, this director could be considered to breach his fiduciary duties since he has not carefully read the company's statute and has not kept well informed of the corporate affairs. Therefore, normally a director cannot plead on the ground of ignorance as an individual shareholder.

1.3.2. A choice of forum clause in a contract concluded by a director and the company

As we have mentioned, in French law, directors and the company are usually bound up with by a *"contrat de mandat"*[426]. And in German and Spanish law, directors represent the company to deal with the corporate affairs[427]. In English law, there is no uniform definition to the relationship between directors and the company, and their relationship may be regarded either as "trustee-beneficiary" or "fiduciary agents" based on different grounds[428]. Therefore, although it is not necessary for a director to conclude a written contract with the company in all the situations, it is also possible that the two parties may enter into a written contract in order to clarify the duties, rights, obligations and remuneration in a specific contract. It is doctrinally suggested that the special relationship between directors and the company will make a service contract of directorship different from a normal contract of employment[429]. In this sense, the provisions in RBI regarding a contract of employment may not be applicable to directors since such provisions aim at providing a stronger protection to a weaker party in the contract, and obviously it does not refer to the case of directors. Instead, such a service contract of directorship should be governed by Article 5 of RBI. However, if there exists a choice of court agreement in this contract, the application of Article 23 will derogate from that of Article 5.

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[426] Yves DE CORDIT, *Le statut du…, op. cit.*, pp. 56 and ss.

[427] See § 78 of *AktG* and Article 233 of *LSC*.

[428] Graham MOFFAT, *Trusts Law…, op. cit.,* p. 436. Also see Sarah WILSON, *Todd & Wilson's…, op. cit.,* p. 319. Also see Saleem SHEIKH, *A Guide to the Companies…, op. cit.*, p. 401.

[429] See Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.,* pp. 104 and 107. Also see The City Law School, *Company Law in Practice (7th Edition)*, Oxford, Oxford University Press, 2008, p. 88. In this book the author also held that it should give a special treatment to the directors' service contract with the company and must keep available for inspection of these contracts at the company's registered office in order to avoid that a director may conclude a service contract with the company (usually the board) which turns out to be unfair for the company. In French law, since the directors are bound with the company on the basis of a *"contrat de mandat"*, it is obvious that such a contract is different from a normal contract of employment.

In the case where a choice of forum clause forms part of the contract, ECJ held that the validity or invalidity of the substantive contract is irrelevant to the application of Article 23 of RBI[430]. The new RBI*bis* also adopts such a criterion and Article 25 (5) of RBI*bis* states that a choice of forum agreement is independent from the other terms of a contract in which it is included, and the invalidity of a contract does not necessarily lead to the invalidity of such an agreement[431]. Besides, before the revision of RBI, if a choice of forum clause complies with the formalities of Article 23 while it fails to comply with national law, such a jurisdiction clause should be considered as valid since the objective pursued by Article 23 is to ensure that the parties have achieved real consensus, and thus such a clause should have overriding effects[432]. In this case, ECJ intended to establish an autonomous formal requirement in order to examine whether the parties have reached a real consensus under Article 23 of RBI. However, it was doctrinally suggested that a jurisdiction agreement should be both formally and substantively valid. The formal requirement cannot only deal with the issue of consent, but it should also include the issue of validity, both formal and substantive[433]. In this case, a French judgment has deprived the effect of a jurisdiction clause which is compliant with the formal requirements of Article 23 but is not compliant with the national rules[434], and it is also regrettable that RBI*bis* abandons a clear, sensible and workable autonomous interpretation to the validity of a choice of forum agreement in accordance with Article 23 (now Article 25). The new RBI*bis* states that an issue concerning whether a choice of forum clause is valid, null or void should be governed by the national rules of the Member state court named in this jurisdiction clause[435]. Under this circumstance, it seems that both the formal and substantive validity of a jurisdiction clause should refer to the law of the designated court

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[430] Adrian BRIGGS, *The Conflict of Laws (Third Edition)*, Oxford, Oxford University Press, 2013, p. 78.

[431] See Article 25 (5) of RBI*bis*. Also see Pedro Alberto DE MIGUEL ASENSIO, "El nuevo Reglamento sobre competencia judicial y reconocimiento y ejecución de resoluciones", *La Ley*, Año XXXIV, Número 8013, 31 de enero de 2013, pp. 1-19, p. 11.

[432] Richard FENTIMAN, *International Commercial Litigation*, Oxford, Oxford University Press, 2010, p. 63.

[433] In this sense, see *P. R. BEAUMONT, P. E. McELEAVY, A. E. ANTON, Private International Law…, op. cit., pp. 251-252. Also see Paul BEAUMONT, Burcu YÜKSEL, "The Reform of the Brussels I Regulation on Choice of Court Agreements and the Preparation for the European Union's Ratification of the Hague Choice of Court Agreements Convention", Anuario Español de Derecho Internacional Privado, t. IX, 2009, pp. 129-159, pp. 144-145 and ss. Also see* Maurice V. POLAK, *"*Comment to Case C-214/89", *loc. cit., p. 410.*

[434] See Arrêt n° 983 du 26 september 2012 de la Cour de cassation (Première chambre civile), *La société Banque privée Edmond de Rothschild Europe v. X.* Also see Adrian BRIGGS, *The Conflict of Laws…, op. cit.*, p. 77. Also see Zheng Sophia TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, Oxon/New York, Routledge, 2014, p. 12.

[435] See Article 25 (1) of RBIbis. Also see Sarah GARVEY, "Reform of the Brussels Regulation: are we nearly there yet?", this article is available on the website: http://www.allenovery.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx.

to determine the validity[436], while it is possible that the governing law of the clause of forum is different from *lex contractus*[437]. This practice may require a court, which tries to determine whether its jurisdiction is affected by an exclusive choice of court agreement, to undertake investigations into foreign law including conflict-of-laws rules[438], though it is unclear how this rule will operate where two courts are specified in a jurisdiction clause, for example, a dual Spanish and English jurisdiction clause[439].

1.3.3. The choice of forum agreement in a derivative action

In a derivative action, minority shareholders act in the names of themselves but for the interests of the company. And minority shareholders only enjoy the right of litigation for the enforcement of corporate obligations but do not succeed to the contractual rights and obligations of the company against directors. On the contrary, it is the company to get compensation for a loss deriving from directors' breach of contractual obligations.

It is apparently that minority shareholders could conclude a choice of forum clause with the directors at issue in order to designate a court to deal with such a derivative action. However, if directors and the company have concluded a choice of forum agreement in the contract, it is doubtful whether the jurisdiction clause binds on the minority shareholders as well. In the case *Till Russ*[440] and *Coreck Maritime*[441], ECJ held that if the third party has succeeded to the rights and obligations of a contract, he could also be bound to a choice of forum clause if the party he has validly succeeded to had validly agreed to such a clause in the contract[442]. In this sense, it seems that minority shareholders will not be bound to such a choice of forum agreement because they do not succeed to the contractual rights and obligations of the company, but they only represent the company to make a demand to directors.

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[436] Adrian BRIGGS, *The Conflict of Laws…*, *op. cit.*, p. 78.
[437] Sarah GARVEY, *"Reform of the Brussels Regulation: are we nearly there yet?", op. cit.*
[438] Adrian BRIGGS, *The Conflict of Laws…*, *op. cit.*, p. 78.
[439] Sarah GARVEY, *"Reform of the Brussels Regulation: are we nearly there yet?", op. cit.*
[440] See Judgment of the Court of 19 June 1984, Case 71/83, *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout.*
[441] See Judgment of the Court of 9 November 2000, Case C-387/98, *Coreck Maritime GmbH V Handelsveem BV and Others*.
[442] See paragraphs 24 and ss. of Case 71/83. Also see paragraph 23 of Case C-387/98. Also see Ulrich MAGNUS, "Article 23", *loc. cit.*, pp. 499-500. Also see Nicolas DORANDEU, "La transmission des clauses attributives de compétence en droit international privé", *Journal du droit international*, Tome 129, 2002 (4), pp. 1001-1016, pp. 1007 and ss.

However, it is worth a further consideration in such a case. As we have mentioned, minority shareholders could exercise their litigation rights and act in the interests of the company, while the litigation rights may include the right to select a court to deal with the dispute at issue. Since shareholders are conferred litigation rights by the company, shareholders should respect the company's decision of having voluntarily submitted to a court to deal with the dispute at issue. In this case, the respect to such a choice of court agreement made by the company is compatible with the interests of the company, and an arbitrary modification by minority shareholders to such an agreement is considered as contrary to the company's interests. Besides, such a choice of court agreement is also foreseeable for both minority shareholders and directors. In this sense, the effect of a choice of forum clause made by the company and its directors could bind on the minority shareholders in a derivative action as well.

It may also be possible that such a jurisdiction clause is not in a contract concluded by directors and the company but is in the company's statute. The articles of the statute may designate a special court to deal with a corporate action filed by the company against its directors for their breach of contractual obligations. In this case, similarly, since minority shareholders represent the company to exercise the due process rights in a derivative claim, they should respect the voluntary choice made by the company. However, it should be noticed that in a case where a derivative action turns out to be necessary, this company may have been completely controlled by directors while the normal functioning of the general meeting of shareholders or the supervisory board have been disabled. In such a company, it is also very likely that the controllers insert a very unfair choice of forum clause in the statute and designate a court that does not show any connection with the company. Under this circumstance, a derivative claim may be paralyzed if minority shareholders assert such a claim in the chosen court. Therefore, we believe that it is necessary for a designated court to take into account whether there are significant connections between a dispute and the selected court, whether there exist abusive strategies of *"forum shopping"* in such a jurisdiction clause, and whether the protection of the interests of the weaker party could be ensured in the selected court during the determination of the validity of such a choice of forum clause before establishing jurisdiction to such an issue.

1.3.4. A choice of forum agreement made by directors and shareholders or creditors or other third parties

In jurisdiction agreements, the common practice is that the parties are permitted to choose a competent court in almost all civil and commercial matters except for those that are subject to exclusive jurisdiction. In RBI, these choice of forum agreements do not only cover claims arising out of a contract, they can also extend to the claims relating to tort as well[443]. In this case, if the company asserts a choice of forum clause in the company's statute which designates a court to deal with all the corporate affairs including a personal claim filed by shareholders, creditors or other third parties, it is relevant to examine whether this kind of jurisdiction clause could have binding effects on shareholders, creditors and other third parties. In regard of shareholders, as we have explained, if a person would like to become shareholder of the company, he should accept the membership of association created between the company and him, and accept the articles of association which include the jurisdiction clause. Therefore, a personal claim could be subject to this clause as well, unless there exist abusive intentions of *"forum shopping"* or it is impossible for shareholders to be aware of the existence of such a clause. In the case of creditors or other third parties, the situation may be more complicated. Generally, creditors do not have a long-term relationship with the company, but occasionally enter into a contract with the company. Even if creditors may lend a long-term loan to the company, it is not necessary for them to know the articles of association well since normally creditors are not subject to the membership of association and they do not participate into the internal management of the company as shareholders either. Therefore, it may be difficult for creditors to exactly be aware of the existence of a jurisdiction clause in the company's statute. Even if they know it, such a jurisdiction clause does not automatically bind on creditors, since they are not members of the company and it is not necessary for them to accept the contents of the company's statute in a way as shareholders. Therefore, creditors do not establish real consensus with the company in such a choice of forum clause but such a clause is considered as a unilateral statement made the company.

[443] Zheng Sophia TANG, *Jurisdiction and Arbitration…, op. cit.*, p. 61. Also see Stefan LUGINBUEHL, *European Patent Law: Towards a Uniform Interpretation*, Cheltenham/Northampton, Edward Elgar Publishing, 2011, p. 43. Also see Philippe SANDS, Jacqueline PEEL, Adriana FABRA, Ruth MACKENZIE, *Principles of International Environmental Law*, Cambridge, Cambridge University Press, 2012, p. 157.

However, as we have mentioned, since a personal claim filed by shareholders or creditors against directors is admissible in some Member states while it may not be allowed in other Member states, directors and shareholders or creditors may conclude a choice of forum clause after the damage occurs and select a court of a Member state in which a personal claim is admissible in order to deal with their dispute. The effect of a jurisdiction clause regarding a tortious claim does not show many differences from that of a contractual claim, as long as the parties have achieved real consensus in such an agreement. Besides, in German law, as we have mentioned, under exceptional circumstance, creditors could bring a personal claim against directors on the basis of their breach of *"culpa in contrahendo"* obligations if creditors relied on the special knowledge and trustworthiness of the managing director, or if the managing director had a direct economic interest in the transaction in question[444]. In this case, since Article 23 of RBI and Article 25 of RBI*bis* have confirmed that a jurisdiction clause could be applied in a dispute which has arisen or may arise in connection with a particular legal relationship, a choice of forum clause could be available in contractual or tortious claims as well as other extra-contractual claims, for example, a *"culpa in contrahendo"* claim which is considered to be connected with a special contractual relationship[445].

1.3.5. The new criterion of "domicile" in a choice of forum clause in RBI*bis*

In comparison to Article 23 of RBI, Article 25 of RBI*bis* has removed the requirement that an agreement needs at least one party to be domiciled in a Member state[446]. In accordance with the new Article, two parties who are not domiciled in the Member states could also select a court of a Member state to deal with their disputes[447]. Since the development of cross-boarder business, it is very likely that the plaintiff or the defendant, or both of them are domiciled in a third state. Therefore, the application of Brussels Regulation may inevitably include the consideration on the relations with the third states. In this case, the absence of the EU common rules determining jurisdiction against third state defendants

[444] Frank Montag, Klaus Heinemann, "The European Community", *loc. cit.*, p. 353. Also see Fernando Marín DE LA BÁRCENA, *La acción individual…, op. cit.*, p. 313.
[445] Ulrich MAGNUS, "Article 23", *loc. cit.*, p. 505.
[446] Johannes WEBER, "Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation", Max Planck Private Law Research Paper, *Rabels Bd. 75 (2011)*, pp. 619-644, p. 627.
[447] See Article 25 of RBI*bis.*

may jeopardize the application of mandatory EU legislations[448]. For example, a shareholder and a director of a Spanish company are both domiciled beyond the EU territory while they may conclude a choice of forum agreement to designate a Spanish court to deal with their disputes. Since the most significant connections are located within the EU territory, it may be unreasonable to decline the jurisdiction of the Spanish court only because Brussels Regulation does not include a provision concerning third state elements. Under this consideration, the EU legislators tends to believe that in a choice of forum agreement, the party autonomy is more important that the domicile of the parties and should make it easier to establish whether Brussels Regulation is applicable in the first place by avoiding the need for a detailed investigation into the domicile of parties[449]. Therefore, as the first step, they allow two parties domiciled in third states to achieve a consensus on jurisdiction under Article 25 of RBI*bis*, while the validity of such a jurisdiction agreement could be determined by the national rules of the Member states.

In contrast, it remains uncertain in RBI*bis* if two parties who are both domiciled in a Member state conclude a choice of forum clause in favour of a court in a third state. It seems unreasonable that Article 25 tends to include third state citizens into its application but excludes its application when the choice of forum refers to a court in third states. Under this circumstance, Article 23 is not applicable and it should leave for the law of the selected court in the third state to decide whether or to establish jurisdiction[450]. However, in a case where a court of a Member state is also seized to deal with such a dispute, ECJ has already indirectly admitted a discretionary power of the court of the Member state to evaluate the choice of forum agreement in favour of the third state in accordance with its national law in the case *Coreck Maritime GmbH v. Handelsveem BV*[451], though ECJ did not confer a great discretion to the court of the Member states to decide such a matter. In the case *Owusu*, ECJ held that if the defendant is domiciled in the Member States, a court

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[448] Commission of the European Communities, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (2009) 174 final, p. 5.

[449] Sarah GARVEY, *"Reform of the Brussels Regulation: are we nearly there yet?", op. cit.*

[450] See paragraphs 176 and 177 of Report *Schlosser*. Also see Ulrich MAGNUS, "Article 23", *loc. cit.*, p. 458.

[451] See paragraph 19 of Case C-387/98. Also see Francesca C. VILLATA, "Choice-of-court agreements in favour of third states in light of the suggestions by members of the European Parliament", in Fausto POCAR, Llaria VIARENGO, Francesca C. VILLATA (eds.), *Recasting Brussels I*, Cedam, 2012, pp. 219-233, p. 221. Also see Florence BERNARD-FERTIER, "Note sous la Cour de justice des Communautés européennes (5e Ch.) 9 novembre 2000 (Aff. C-387/98)", *Revue critique de droit international privé*, Tome 90, 2001 (2), pp. 367-375, p. 371.

of a Member State cannot deny jurisdiction on the ground that the proceedings have more connecting factors to a third state since Article 2 of RBI has mandatory effects[452]. Therefore, in a case where Article 23 cannot apply due to the fact that the connecting factors under Article 23 are situated in a third state, Article 2 should apply if one of the parties is domiciled in a Member state, though such a dispute shows no significant connections with the Member state in which the party is domiciled[453].

Such a decision was highly criticized since the previous Member state case law has held that the sole fact that the defendant is domiciled in a Member state cannot be the reason to forbid the parties to designate a court of a third state[454]. Article 2 should not become a provision of "privilege" for the purpose to decline the party autonomy of the parties[455]. Although the general provision of Article 2 aims at providing a protection to the interests of the defendant, if the defendant has voluntarily enters into a jurisdiction agreement selecting a court in a place rather than his domicile, the mandatory application of Article 2 is in fact contrary to the interests of the defendant as well[456]. In this case, the mandatory intervention of the court of the place of the defendant's domicile may make its judgment declined by a due third state court and the two parties may suffer a bigger loss due to the legal uncertainty. The EU legislators have also realized this risk and to some extent overturned the conclusion of *Owusu* in RBI*bis*. In accordance with Article 33 of RBI*bis*, a court of a Member state the jurisdiction of which is based on the defendant' domicile could have a limited discretion to stay its proceedings in favour of a court of a third state before

[452] See paragraph 19 of Case C-281/02. Also see Paul VLAS, "Article 2", *loc. cit.*, p. 80.

[453] In this sense, see Commission of the European Communities, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (2009) 174 final, p. 5. Also see Dominique BUREAU, Horatia Muir WATT, *Droit international privé (2e édition): Tome II (partie spéciale)*, Paris, Presses Universitaires de France, 2010, pp. 274-275.

[454] Hélène GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe: Règlement 44/2001, Convention de Bruxelles et de Lugano)*, Paris, L.G.D.J., 2010, p. 122. The author mentioned a French case (Cass. com. 19 décembre 1978) in which a German company and a French company have concluded a choice of forum agreement and select a court in Zurich. However, the German company brought an action before the French court since the defendant, here the French company, was domiciled in France. In this case, the French court held that it was reasonable to stay the proceeding in favour of the Swiss court, since the effect of a jurisdiction clause choosing a non-Member state court cannot be derogated from only because the defendant was domiciled in a Member state.

[455] Hélène GAUDEMET-TALLON, "Note sous Cour d'appel de Versailles (1re Ch. A.) 26 septembre 1991", *Revue critique de droit international privé*, Tome 81, 1992 (2), pp. 336-340, pp. 336-337.

[456] Horatia Muir WATT, "Note sous High Court of Justice, Queen's Bench Div. (Commercial Court) (Angleterre et Galles) 10 mai 2005", *Revue critique de droit international privé*, Tome 94, 2005 (4), pp. 725-731, pp. 729-731.

which the proceedings are pending if such a stay is necessary for the proper administration of justice[457].

In a case where a director of a third state company who is domiciled in a Member state has concluded a choice of forum agreement with an individual shareholder or creditor, and the two parties have selected a court of the third state in which the company is domiciled to deal with a personal claim while the individual shareholder or creditor asserts such a claim in the court of the place of the director's domicile, the Member state court could examine the validity of such agreement in accordance with its national rules. If the jurisdiction agreement is invalid in accordance with the national law of the Member state court, this court could establish jurisdiction to deal with this claim. On the contrary, if such an agreement is valid, the Member state court could decide whether to stay the proceedings in favour of a third state court through a limit discretion conferred by RBI*bis*. However, it is possible that the director and the individual shareholder have previously concluded a choice of forum clause in order to deal with a possible dispute, and have agreed to submit to the court *"in the place where the damage occurs"*, while such a place occasionally turns to be a third state. In this situation, the two parties may not have intended to select a non-Member state court while the damage happens to take place in a third state. In this case, if the two parties would not like to submit their dispute before a third state court, they may achieve consensus to abandon this old agreement and designate a Member state court to deal with their dispute in a new agreement.

1.4. Examination on the applicability of Article 5 (1) regarding contractual matters in the regime of directors' liability

Since we have mentioned that Article 22 (2) regarding the exclusive jurisdiction is not applicable to the regime of directors' liability, if a director and his company have not asserted a choice of forum clause in the contract, the court in the place of the defendant's domicile should apply in accordance with Article 2. Besides, it is also relevant to examine whether Article 5 (1) regarding a contractual matter could also apply.

[457] See Article 33 of RBI*bis*.

1.4.1. Examination on the applicability of Article 5 (1) in a corporate action

As we have mentioned, directors play a crucial role in the management of the corporate affairs[458], and they should exercise the functions properly and diligently and in the best interests of the company. In French law, directors and the company are usually bound by a *"contrat de mandat"*[459]. In German and Spanish law, directors represent the company to deal with the corporate affairs[460], while it is also possible that this kind of relationship is established by a contract. In English law, there is no uniform definition to the relationship between directors and the company, and their relationship may be regarded either as "trustee-beneficiary" or "fiduciary agents" based on different grounds[461]. However, in order to establish such a relationship, it is also very likely that directors would conclude a contract with the company in order to clarify the matters such as their functions, duties, responsibilities or remuneration.

Under certain circumstances, if the directors' powers and duties have been provided in the company constitution, it may not be necessary for directors to conclude a contract with the company. On the contrary, directors' acceptance of the nomination could be regarded as that they have agreed to the duties and obligations imposed by the company constitution[462]. Therefore, it is not relevant for directors and the company to conclude a written contract in every case. Since the two elements of a contract are "offer" and "acceptance", if the company nominates a director and he accepts this appointment, the two parties are considered to have voluntarily entered into an agreement that creates legal rights and obligations between them. Thus, their relationship is also regarded as contractual. Under this circumstance, the director knows that he owes fiduciary duties to the company, and he will be forced to make compensation for the company's loss if he breaches the duties provided by the provisions in the company constitution or other laws. Therefore, it is worth a further examination on the applicability of Article 5 (1) of RBI.

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[458] Paul L. DAVIES, *Gower and Davies'…, op. cit.,* p. 294.
[459] Yves DE CORDIT, *Le statut du…, op. cit.*, pp. 56 and ss.
[460] See § 78 of *AktG* and Article 233 of *LSC*.
[461] Graham MOFFAT, *Trusts Law…, op. cit.*, p. 436. Also see Sarah WILSON, *Todd & Wilson's…, op. cit.*, p. 319. Also see Saleem SHEIKH, *A Guide to the Companies Act 2006, op. cit.*, p. 401.
[462] Fernando SÁNCHEZ CALERO, *Los administradores en…*, p. 95.

However, since Article 5 (1) of RBI is applicable to deal with both the general contractual obligations under Article 5 (1) (a), and a special contract concerning the performance of service under Article 5 (1) (b), it may be doubtful whether a contract between directors and the company should be subject to Article 5 (1) (a) or Article 5 (1) (b). In order to solve this problem, we may have to examine the definition of "service" in accordance with the EU law.

In this case, since one of the RBI's objectives is to unify the conflict-of-jurisdiction rules and avoid the legal divergence deriving from the national rules of the Member states, it is relevant to establish an autonomous definition to the term of "service" in Article 5 (1) (b)[463]. In this case, Article 50 of TEC (now Article 57 of TFEU) provides an autonomous concept to the term of "service"[464], and it was doubtful whether the term of "service" in Article 5 (1) (b) should also be interpreted within the meaning of Article 50 of TEC. However, ECJ declined such an idea in the case *Falco Privatstiftung and Thomas Rabitsch v. Gisela Weller-Lindhorst*[465], holding that, on one hand, the concept of "service" in Article 5 (1) (b) should have a broader sense than that of Article 50 of TEC in order to ensure as many economic activities as possible that do not fall within the scope of Article 50 of TEC[466]. One the other hand, under the framework of RBI, since Article 5 is a special provision, it should adopt a more narrow or restrictive interpretation so as to derogate from the application of Article 2[467]. And according to ECJ, a "contract of service" implies, at least, that the party who provides services carries out a particular activity, and in return for remuneration[468].

463 Hélène GAUDEMET-TALLON, *Compétence et execution…, op. cit.*, p. 188. Also see David SINDRES, "Note sous Cour de cassation (1re ch. civ.) 9 juillet 2008", *Revue critique de droit international privé*, Tome 97, 2008 (4), pp. 864-871, pp. 869-871.
464 See Article 50 of TEC (now Article 57 of TFEU).
465 See Judgment of the Court of 23 April 2009, Case C-533/07, *Falco Privatstiftung and Thomas Rabitsch v. Gisela Weller-Lindhorst.*
466 See paragraph 35 of Case C-533/07.
467 See Paragraph 34 and 37 of the Case C-533/07 (2009), *Falco Privatstiftung and Thomas Rabitsch v. Gisela Weller-Lindhorst.* Also see Alexander MITTMANN, "Difficultés d'une interprétation autonome de l'article 5, 1 b) du règlement CE n°44/2001 du 22 décembre 2000", *Gazette du Palais*, N° 118-119, 2010, pp. 6-9, p. 6. Also see Stéphanie FRANCQ, Eduardo ÁLVAREZ ARMAS, Marie DECHAMPS, "L'actualité de l'article 5.1 du Règlement Bruxelles I : Evaluation des premiers arrêts interprétatifs portant sur la disposition relative à la compétence judiciaire internationale en matière contractuelle", *Cahiers du CeDIE working paper*, Université catholique de Louvain, n° 2011/02, pp. 1-32, pp. 5 and ss.
468 Peter MANKOWSKI, "Article 5", in Ulrich MAGNUS, Peter MANKOWSKI, *Brussels I Regulation: European Commentaries on Private International Law (Second Edition), op. cit.*, pp. 88-294, p. 155.

Therefore, in a contract of service, a party performs a particular activity while the other party benefits from such an activity and pays for it. It often occurs in a case where one party asks for the other party to carry out some special activities that only those who own a certain level of aptitude could fulfil it. For example, a lawyer argues a case before a court on behalf of his clients could be considered as one kind of "service" covered by Article 5 (1) (b)[469]. In this regard, it is doubtful whether directors' behaviours could be included in this kind of particular activities since directors should dedicate their intelligence and diligence to the company during the exercise of their functions.

It is suggested that a particular activity falling within the scope of "service" should be carried out independently[470]. Under general circumstance, only the professionals such as doctor, educator, scientist or lawyer who could undertake very special tasks and complete them independently could perform a contract of service[471], but directors cannot be considered as one of them. This is because, in the first place, the complexity of the company's business makes directors difficult to undertake a task independently, but they should often rely on the company's resources in order to complete it. In the second place, if a competent director could undertake a task independently, he cannot act at his complete discretion but has to comply with the duty of care and the duty of loyalty in the interests of the company. In this sense, an individual director cannot execute a corporate matter in a way that he considers better but has to follow the decision made by the board or the general meeting of shareholders. If the director who personally does not agree with such a decision is appointed to execute it, he still has to exercise his functions by following this decision. In this sense, he is considered to be an organ of the company in which his personality is absorbed by the company. Therefore, the directors' activities show many differences with those covered by the scope of "service", and the contract between directors and the company is not a contract of service but should refer to a contract in which the obligation is freely assumed by directors towards the company, which should be covered by Article 5 (1) (a)[472].

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[469] In this sense, see Pierre BERLIOW, "La notion de fourniture de services au sens de l'article 5-1 b) du règlement « Bruxelles I » ", *Journal du Droit International*, Tome 135, 2008 (3), pp. 675-717, pp. 684 and 689.
[470] Pierre BERLIOW, "La notion de fourniture…", *loc. cit.*, pp. 686-687.
[471] In this sense, see Miguel VIRGÓS SORIANO, Francisco J. GARCIMARTÍN ALFÉREZ, *Derecho procesal civil internacional…, op. cit.*, p. 114.
[472] See Peter MANKOWSKI, "Article 5", *loc. cit.*, p.194.

In accordance with Article 5 (1) (a), the court dealing with a matter in relation to a contract shall be the court in the place where the obligation in question is performed[473]. In the regime of directors' liability, if directors breach their contractual obligations owed to the company, the company could file a corporate action. And the competent court to deal with such a corporate action should be the court of the place where directors should exercise the functions and fulfil the fiduciary duties. Under general circumstances, such a place often turns out to be the place where the company has its main centre of administration. And in fact, the place of company's main centre of administration or interests could show its high degree of predictability for both the plaintiff and the defendant. Nevertheless, if the place of performance does not coincide with the place of main centre of administration, it is also possible for a corporate action to be dealt with by the court of the place of performance of the obligations.

However, Article 5 only applies in a case where the defendant has his domicile in a Member state[474]. In this case, if a director at issue is domiciled in a Member state, while this place does not coincide with the place in which he performs the obligations, the special provision of Article 5 (1) (a) will derogate from the application of Article 2. In contrast, if a director at issue is not domiciled in a Member state, while he performs the contractual obligations in a Member state, Article 5 (1) (a) will not apply. Instead, it should refer to the national PIL rules in order to decide the competent court.

1.4.2. Examination of the applicability of Article 5 (1) in a derivative action

If the company fails to file a personal action against directors for the loss deriving from their misconducts, it leaves for the minority shareholders to carry out a derivative action on behalf of the company since they may be indirectly affected by the company's loss. Most of the Member states have established a liability regime that enables minority shareholders to assert a claim in the names of themselves but for the interests of the company[475]. In such a case, the contractual relationship still exists between the director and the company. The minority shareholders only act on behalf of the company but do not replace the company in

[473] See Article 5 (1) (a) of RBI (Article 7 (1) (a) of RBI*bis*).
[474] François RIGAUX, Marc FALLON, *Droit International privé (Troisième Édition)*, Paris, Larcier, 2005, p. 768. Also see Peter MANKOWSKI, "Article 5", *loc. cit.*, p. 112.
[475] Luis Fernández DE LA GÁNDARA, *Derecho de sociedades, op. cit.*, p. 759.

such a contract. Therefore, it is relevant to discuss whether the contractual effect will extend to the minority shareholders and whether Article 5 (1) (a) would be applicable to a derivative claim.

In a derivative action, minority shareholders act in the names of themselves but for the interests of the company. And the minority shareholders only enjoy the litigation rights for the enforcement of corporate obligations but do not succeed to the contractual rights and obligations of the company. On the contrary, it is the company to get compensation for a loss deriving from directors' breach of contractual obligations. As we have explained, if directors and the company have concluded a choice of forum agreement in the contract, such a jurisdiction clause could bind on the minority shareholders as well. However, if there is no choice of forum agreement in a contract concluded by directors and the company, we should also examine which court could have competence to deal with a derivative claim. In this case, it is doubtful whether the triple relationship among the three parties may be considered as a chain of contracts since the relationship between the minority shareholders and the company often turns out to be contractual, and the relationship between the company and its directors is contractual as well. And it is also worth a further examination on the applicability of Article 5 (1) in a situation concerning chain of contracts. In the case *Jakob Handte*[476], ECJ did not definitely exclude the application of Article 5 (1) to a chain of contracts. Instead, ECJ only held that Article 5 (1) does not apply to a chain of contracts between a sub-buyer of goods and the manufacturer, because no contractual relationship between the sub-buyer and the manufacturer exists and the latter has not undertaken any contractual obligation towards the former[477]. Besides, ECJ also held even in a chain of contracts, the parties have different contractual rights and obligations in different contracts[478]. The application of Article 5 (1) aims at strengthening the protection to the parties in a contract, while the application of this Article in an action

[476] See Judgment of the court of 17 June 1992, Case C-26/91, *Jakob Handte & co. GmbH. v. Traitements Mécano-chimiques des surfaces SA*.

[477] See paragraph 16 of Case C-26/91. Also see Peter MANKOWSKI, "Article 5", *loc. cit.*, p. 123. Also see Enrique FERNANDEZ MASÍA, "Convención de Bruselas. Interpretación del artículo 5.1. Acción en responsabilidad del subadquiriente contra el fabricante. Competencia en materia extracontractual. (Sentencia del Tribunal de Justicia de las Comunidades Europeas de 17 de junio de 1992. *Jakob Handte y Cie GmbH c/ Traitements mécano-chimiques des surfaces*. Asunto C-26/91)", *Revista general de derecho*, Num. 586-587, Año 1993, pp. 7129-7135, pp. 7129 and ss. Also see Hélène GAUDEMET-TALLON, "Note sous Cour de justice des Communautés européennes 17 juin 1992 (aff. C-26/91)", *Revue critique de droit international privé*, Tome 8, 1992 (4), pp. 730-738, pp. 730 and ss.

[478] See paragraph 17 of Case C-26/91.

brought by a sub-buyer against the manufacturer cannot achieve this objective because it is not foreseeable for the manufacturer in such a case[479].

In the case of derivative action, firstly, even if a contract between the directors and the company and a contract between the company and its shareholders are considered as a chain of contracts, Article 5 (1) cannot apply because the contractual rights and obligations are based on completely different contexts in the two contracts. Secondly, if the two contracts are not considered as a chain of contract, Article 5 (1) cannot apply either, because this Article is available to a "matter relating to a contract". It refers to an obligation freely assumed by one party towards the other[480], and a relationship freely entered into between the parties[481]. However, as we have mentioned, minority shareholders do not succeed to the contractual rights and obligations of the company in a derivative claim. On this basis, no obligation is freely assumed by directors towards minority shareholders and no relationship is freely entered into between directors and minority shareholders. In this sense, a derivative claim is different from a corporate claim since in a corporate claim the plaintiff is the company, while in a derivative claim the plaintiffs are the minority shareholders. Therefore, a derivative claim is an action brought by minority shareholders against directors for the interests of the company. Since no contractual relationship is evidenced between the plaintiff and the defendant, Article 5 (1) cannot apply to such a claim. Instead, minority shareholders should submit to the court of the place where directors have the domicile in accordance with Article 2.

1.4.3. Directors' fictive contractual liability towards creditors

Under general circumstance, no contractual relationship based on voluntary commitment exists between directors and creditors[482]. However, as we have mentioned, in German law, under very rare circumstances, managing directors could be held directly liable towards the creditors on the basis of breach of a *"culpa in contrahendo"* obligation if the creditors have relied on the special knowledge and trustworthiness of the managing director in

[479] See paragraph 19 of Case C-26/91.
[480] See paragraph 15 of Case C-26/91. Bénédice FAUVARQUE-COSSON, Denis MAZEAUD (Editors), *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, München, Sellier European Law Publishers, 2008, p. 15.
[481] See paragraph 18 of Case C-51/97.
[482] In this sense, see Gaudencio ESTEBAN VELASCO, "La acción individual…", *loc. cit.*, pp. 183-184 and ss.

concluding a contract with the company, or if the managing director has had a direct economic interest in the transaction[483]. This also appears in other German-speaking countries. For example, in Swiss case law, the Swiss judges also made a similar decision. In a BGE (Swiss Federal Court) judgment *Wibru Holding AG v Swissair Beteiligungen AG*[484], a Swissair's subsidiary reused its logo in order to benefit from the reputation of the parent company (in fact it is also the controller of the subsidiary since it owns a majority of the shares of the latter). Since the parent company allowed its subsidiary to do so and has created legitimate expectations for creditors of the subsidiary, the parent company was also considered to breach the trust and confidence placed on it[485]. Under this circumstance, the parent company was required to assume the liability of *Konzernvertrauen*, which has a sub-feature of *"culpa in contrahendo"* and is characterized as contractual under Swiss Law[486].

Such a case may occur when the controlling shareholders of the company act as shadow or *de facto* directors and abuse the legal personality of the company. Since the company has in fact lost its independence and is only used as a tool by the controllers to defraud the creditors, creditors could directly sue the directors *de facto* based on the principle of "piercing the corporate veil" and establish liability directly to the real controllers of the company[487], and the controllers (probably the directors *de facto*) should be forced to assume contractual liability or quasi-contractual liability towards the creditors by the court by virtue of national rules. However, such a liability regime relies too much on national laws of the Member states, and it is unlikely for Article 5 (1) to enter into application because no obligation is freely assumed by directors *de facto* towards creditors and no relationship is freely entered into between directors *de facto* and creditors.

In Spanish Law, in a solvent company, directors may be held jointly liable with the company for the corporate debts if they have not filed for the opening of dissolution proceedings within a period of two months after the legal reason of dissolution arises[488]. In

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[483] Frank MONTAG, Klaus HEINEMANN, "The European Community", *loc. cit.*, p. 353.
[484] See BGE 120 II 331.
[485] Petri MÄNTYSAARI, *Comparative Corporate Governance…, op. cit.*, p. 386.
[486] See Peter MANKOWSKI, "Article 5", *loc. cit.*, p. 136.
[487] In this case, see Petri MÄNTYSAARI, *The Law of Corporate Finance: General Principles and EU Law (Volume I: Cash Flow, Risk, Agency, Information)*, Berlin/Heidelberg/New York, Springer, 2010, pp. 75-77.
[488] See Article 367 of *LSC*.

a Spanish judgment *Audiencia Provincial de León (Sección 3ª) de 7 de Mayo de 2008*[489], a Portuguese company failed to pay a sum of money that it should have to the creditors in the Spanish territory. In this case, creditors filed an action against the company for the breach of contractual obligations, and also against its directors for the failure to file for the company's dissolution. It is doubtful whether Article 5 (1) could apply to an action aiming at incurring directors' joint liabilities for the corporate debts since the liability regime rendered the directors to be jointly liable for the contractual obligations of the company.

Based on this consideration, it is relevant to examine whether the contractual liability has been extended to directors and whether an action against the director has the same contractual nature as an action against the company[490]. However, the Spanish court held that the relationship between directors and creditors of the company could not be regarded as contractual since no obligation was freely assumed by directors towards creditors and no relationship was freely entered into between directors and creditors, as we have mentioned. Therefore, directors could only be sued in the courts of the place where they are domiciled[491]. Besides, the regime of directors' liability for corporate debts is an issue covered by *lex societatis*. Since the company is domiciled in Portugal, such an issue should be governed by Portuguese law. Therefore, the Spanish law is inapplicable and the Spanish courts are incompetent[492].

Such an attitude was supported by ECJ. In the case *OTP Bank v. Hochtief*[493], a German company acquired more than 75% of the shareholders of a Hungarian company. In accordance with Hungarian law, a shareholder who has acquired a sum of shares that enable him to control the company should fulfil the formal requirements of publication of this information. If he has not fulfilled the mentioned obligation, he should assume unlimited liability towards creditors of the company in the case where the corporate assets

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[489] Rocío CARO GÁNDARA, "Acciones de responsabilidad que se ejercitan contra los administradores de la sociedad", *Anuario español de Derecho Internacional Privado*, t. VIII, 2008, pp. 897-901, pp. 896-897.

[490] Rafael ARENAS GARCÍA, "Responsabilidad de los administradores. Commentario a la Sentencia de la Audiencia Provincial de León (Sección 3ª) de 7 de Mayo de 2008", *Revista Español de Derecho Internacional*, vol. LX, nº 2, 2008, pp. 582-584, pp. 583-584. Also see Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 330.

[491] Rafael ARENAS GARCÍA, "Responsabilidad de los administradores…", *loc. cit.*, p. 582. Also see Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 330.

[492] Rocío CARO GÁNDARA, "Acciones de responsabilidad…", *loc. cit.* , pp. 897-898.

[493] See Judgment of the court of 17 October 2013, Case C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság v. Hochtief Solution AG.*

are insufficient to repay the debts. In this case, it is doubtful whether the court under Article 5 (1) should apply since the controller should be held liable for the corporate obligations. ECJ denied the application of Article 5 (1) in this case, holding that the controller was not a party to the contract concluded between the company and the creditor, but he was held liable owing to the violation of a legal provision that imposes a special obligation onto him[494]. Since no freely obligations were assumed by the controller towards the creditor and no relationship was freely entered into between the two parties, such an issue will not fall within the scope of Article 5 (1) relating to a contract[495].

Similarly, in the mentioned Spanish liability regime, directors will not become contractually bound up with creditors when they are required to pay for the corporate debts together with the company. It is not a contractual liability but refers to an *"ex lege"* liability for the violation of a special provision of law[496]. In the case *ÖFAB*[497], a similar action was brought by creditors in order to hold directors of a company liable for corporate debts due to their failure to complete certain formalities intended to monitor the financial situation of the company and the application of Article 5 (1) was also declined by ECJ. In this case, ECJ insisted on its strict and narrow interpretation to Article 5 (1) and held that only a legal obligation freely consented to by one party towards the other and on which the plaintiff's action is based could be covered by this Article[498].

In conclusion, the term of "contract" in the Regulation 44/2001 should be interpreted autonomously, independently and uniformly[499]. And ECJ's autonomous interpretation of Article 5 (1) should be retaken by the national courts of the Member States and should be applied in similar cases[500]. As we have mentioned, the existence of a real and mutual

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[494] See paragraph 24 of Case C-519/12.
[495] See paragraph 23 of Case C-519/12.
[496] Miguel RUIZ MUÑOZ, "Fundamento y naturaleza…", *loc. cit.,* pp. 514-515. Also see Antonio MOYA JIMÉNEZ, *La responsabilidad de…, op. cit.*, p. 353.
[497] See Judgment of the court of 18 July 2013, Case C-147/12, *ÖFAB, Östergötlands Fastigheter AB v. Frank Koot, Evergreen Investments BV*.
[498] See paragraph 33 of Case C-147/12.
[499] Vincent HEUZÉ, "De quelques infimités congénitales du droit uniforme: l'exemple de l'article 5.1 de la Convention de Bruxelles du 27 septembre 1968", *Revue critique de droit international privé*, Tome 89, 2000 (4), pp. 595-639, pp. 604 and ss. Also see Mathias AUDIT, "L'interprétation autonome du droit international privé communautaire", *Journal du Droit International*, Tome 131, 2004 (3), pp. 789-816, pp. 806-807 and ss.
[500] Mathias AUDIT, "L'interprétation autonome…", *loc. cit.*, p. 805.

consent binding upon all the parties under which each party has to perform obligations[501] is the only condition to legitimate the application of Article 5 (1). However, in the Spanish liability regime that we have just mentioned, directors are forced to make payment to creditors even if no obligation is freely assumed by directors towards creditors and no relationship is freely entered into between directors and creditors. On this basis, ECJ held that such an issue should refer to Article 5 (3) or Article 2 of RBI in the case *ÖFAB*[502], while we will carry on this discussion in the next part.

1.5. Examination on the applicability of Article 5 (3) regarding non-contractual matters in the regime of directors' liability

As we have mentioned, by virtue of the national rules of many Member states, individual shareholders and creditors are not allowed to assert a personal claim directly against directors. Instead, if the directors have committed a misconduct that causes damage to individual shareholders or creditors, they should bring an action against the company for the breach of contractual obligations. Nevertheless, such a personal action could be admissible in some Member states. For example, Spanish law provides a liability regime for individual shareholders and creditors to assert a personal claim against directors for a direct loss caused by them[503]. In a case where it involves a cross-boarder element, it will be relevant to examine the applicability of Article 5 (3) of RBI (now Article 7 (3) of RBI*bis*).

1.5.1. A personal action filed by individual shareholders

As we have mentioned, generally directors do not owe fiduciary duties to shareholders and are not contractually bound up with them. However, the intentional behaviours or negligence of directors could cause a direct loss to individual shareholders. For example, directors may impede individual shareholders to participate or vote in the general meetings of shareholders[504]. Besides, directors may also keep shareholders from participating in the distribution of dividends stemming from the increase of value of the shares, or in the

[501] In this sense, see Case C-26/91. Also see Case C-51/97. Also see Judgment of the court of 17 September 2002, Case C-334/00, *Fonderie Officine Meccaniche Tacconi Spa v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*. Also see Judgment of the court of 1 October 2002, Case C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel.* Also see Judgment of the court of 5 February 2004, Case C-265/02, *Frahuil SA c. Assitalia ApA*. Also see Judgment of the court of 20 January 2005, Case C-27/02, *Petra Engler v. Janus Versand GmbH*.
[502] See conclusion of Case C-147/12, *ÖFAB*.
[503] See Article 241 of *LSC*.
[504] See Fernando Marín DE LA BÁRCENA, *La acción individual…, op. cit.*, pp. 282-283.

distribution of a solvent company's assets in the dissolution proceedings[505]. Moreover, directors may release false information on the current financial situation of the company and lead the individual shareholders to make a wrong decision[506]. Under these circumstances, apart from bringing an action against the company for the breach of contractual obligations, shareholders may also be entitled to assert a personal claim by virtue of the national rules in some Member states. A personal claim for a direct loss should be based on tort law grounds, and individual shareholders should demonstrate the causation between the directors' misconducts and the damage that they have suffered from the misconducts[507].

In the Case *Kalfelis*, ECJ held that it is also necessary to establish an autonomous interpretation to Article 5 (3), and the concept of "*matters relating to tort, delict or quasi-delict*" must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5 (1)[508]. However, in this sense, a matter falling within Article 5 (3) does not necessarily mean that the matter is one relating to tort, delict, or quasi delict. Instead, Article 5 (3) is a residual category with the view to Article 5 (1)[509]. Threfore, in order to establish jurisdiction in accordance with Article 5 (3), it is irrelevant for a national court to make a characterization to a matter and examine whether it is related to tort, but the national court should decide whether such a matter relates to contract and therefore decide whether Article 5 (3) could be applicable[510].

Therefore, since there is no obligation freely assumed by directors towards individual shareholders and no relationship is freely entered into between directors and individual shareholders, a personal claim will not be covered by Article 5 (1) of RBI. Instead, Article 5 (3) should be applicable to deal with such an issue.

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[505] Antonio RONCERO SÁNCHEZ, "La acción individual…", *loc. cit.,* p. 200.
[506] Fernando BÁRCENA GARCIMARTÍN, *La Acción individual…, op. cit.*, pp. 265 and ss.
[507] Gaudencio ESTABAN VELASCO, "La acción individual…", *loc. cit.*, pp. 188-190.
[508] See paragraphs 17 and 18 of Case 189/87.
[509] James J. FAWCETT, Paul TORREMANS, *Intellectual Property and Private International Law (Second Edition)*, Oxford, Oxford University Press, 2011, p. 517.
[510] Thomas COTTIER, Pierre VÉRON, *Concise International and European IP Law: TRIPS, Paris Convention, European Enforcement and Transfer of Technology online*, The Hague, Kluwer Law International, 2011, p. 307.

1.5.2. A personal action filed by the third parties who are not contractually bound up with the company

In regard of the third parties who are not contractually bound up with the company, directors may be held liable for the loss of the injured party under certain circumstances. For example, although the directors should take care of the corporate assets, in the case where the roof of the building of the company falls and injures a passer-by, the passer-by should sue the company based on tort law grounds, and directors will not assume a personal liability to such damage. Nevertheless, a director may drive the company's car in order to rush to a company's meeting, while he hit a passer-by on the way. In this case, even though the director was in fact exercising the corporate functions, it may not be appropriate for the passer-by to sue the company to demand compensation because such a tort was not committed by the company. Instead, directors should be held personally liable for the damage that he has caused on the basis of the principle *"neminem laedere"*[511]. And Article 5 (3) is applicable to such a case if it refers to a cross-boarder situation. However, since a case does not show strong links with the directors' capacity as directors, it may be irrelevant for us to carry on this discussion.

1.5.3. A personal action filed by creditors or other third parties who are contractually bound up with the company

The case concerning the creditors who are contractually bound up with the company may be more complicated. As we have mentioned, in some Member states, creditors are not allowed to assert a claim against directors for a direct loss, due to the fact that the company is an independent entity[512]. Nevertheless, in some Member states, directors could be held liable for creditors under circumstances. For example, in German law, as we have mentioned, if creditors agree to contract with the company only because a director owns special reputation or has made a personal promise, or if a director has acted collusively in joint concern with the company, it may create personal reliance interests of the creditors

[511] Jesús ALFARO ÁGULA-REAL, "La llamada acción individual…", *loc. cit.,* pp. 39 and ss. Also see Jesús ALFARO ÁGULA-REAL, "La llamada acción…", *loc. cit.*, pp. 9 and ss.

[512] For example, English law declines creditors to file a personal action against directors under general circumstances. See Reiner R. KRAAKMAN, Paul DAVIES, Henry HANSMANN, *The Anatomy of Corporate Law (A comparative and functional approach)*, Oxford, Oxford University Press, 2009, pp. 89 and ss. Also see R. GRANTHAM, "Company Directors and Tortious Liability", *Cambridge Law Journal*, 1997(07), pp. 259-262, pp. 259 and ss.

towards such a director. Under this circumstance, this director could be held liable for the breach of a "*culpa in contrahendo"* obligation[513]. Since such a matter goes beyond the scope of Article 5 (1) because no obligation is freely assumed by directors towards the creditors of the company and no relationship is freely entered into between directors and creditors, and Article 5 (3) could be applicable in conformity with ECJ's decisions.

Besides, directors' intentional behaviours or negligence may lead to a direct loss of creditors. For example, as we have mentioned, directors disclose the confidential information of a contract of technology transfer concluded by the creditor and the company. Similar to the case of shareholders, creditors may choose to assert a claim against the company for the breach of contractual obligations, or directly against the directors based on tort law grounds. If creditors seek remedy from directors, Article 5 (3) should be applicable since it does not refer to a matter relates to "contract" in accordance with ECJ's decisions.

Furthermore, in Spanish law, directors may be held liable for the corporate debts for not filing for the opening of the dissolution proceedings[514]. In the ECJ's case *ÖFAB*, as we have mentioned, a similar action was brought by creditors to hold directors liable for corporate debts due to their failure to complete certain formalities intended to monitor the financial situation of the company. In this case, since directors and creditors are not contractually bound up with each other, this issue does not fall within the scope of Article 5 (1). It is the exclusion of such an issue from Article 5 (1) that legitimates the application of Article 5 (3). In this situation, the application of Article 5 (3) is not based on the existence of a tort while the connections between a fault and a loss should be evidenced, but stems from the absence of a contractual relationship. Such an idea was supported by ECJ that precluded the determination of the jurisdiction of a court being dependent on the nature of the debts of the company concerned[515]. In the case *OTP Bank v. Hochtief*, ECJ also held that the controller was held liable for the corporate debts due to the violation of a legal provision and legitimated the application of Article 5 (3) by holding that the defendant could be sued in the court of the place where the plaintiff has suffered or risk

[513] Frank MONTAG, Klaus HEINEMANN, "The European Community", *loc. cit.*, p. 353. Also see Jesús ALFARO ÁGULA-REAL, "La llamada acción…", *loc. cit.,* p. 4.
[514] See Article 367 of *LSC*.
[515] See paragraph 41 of C-147/12.

suffering a loss[516]. By giving such statement, ECJ carefully avoided giving an impression that the application of Article 5 (3) stems from the existence of a tortious liability. Instead, Article 5 (3) plays a residual role and deals with all the liabilities that are not regarded as contractual within the meaning of Article 5 (1)[517].

In a case where a personal claim is admissible under the national rules of a Member state, but shareholders or creditors of this Member state assert such a claim in the court of another Member state by virtue of Article 5 (3), it is possible the Member state in which a personal claim is brought does not admit it. In this case, if the national rules of that Member state do not allow shareholders or creditors to file such a claim against directors, the court may decline the demand of the plaintiffs. In this case, we believe that the conflict-of-jurisdiction rules may have different approaches with the conflict-of-law rules. When a personal claim is brought before a court of a Member state, the judges may characterize that issue in accordance with the conflict-of-law rules and reject such a claim. However, the conflict-of-jurisdiction rules do not solve a problem regarding whether such an issue is admissible or not by applying a law. On the contrary, the objective of the conflict-of-jurisdiction rules is to designate a competent court to deal with a special matter by following their own criteria. Under this circumstance, even if a personal claim is not admissible pursuant to *lex fori* or *lex causae*, it does not impede a court to establish jurisdiction and hear such a claim, while the court could decide whether to continue or reject such a claim in the proceedings.

1.5.4. The criterion to determine the place where a *"tort, delict or quasi-delict"* occurs

If Article 5 (3) turns out to be applicable to deal with a personal claim filed by individual shareholders or creditors against the company's directors, it is still relevant to determine the place where a *"tort, delict or quasi-delict"* occurs. In accordance with Article 5 (3), a matter relating to *"tort, delict or quasi-delict"* should be dealt with by the court of the place where the harmful event occurred or may occur[518]. Following the criterion of ECJ, such a place could be understood as the place where the harmful event gives rise to the

[516] See paragraph 26 of Case C-519/12.
[517] See paragraph 26 of Case C-519/12.
[518] See Article 5 (3) of RBI.

damage occurred, or the place where the damage occurred[519]. Both the two places are in principle equivalent and on equal footing, and the plaintiff could select a court in one of the two places to deal with a dispute[520]. The multiple development of international business makes it possible that the place where directors have committed misconducts is different from the place where shareholders and creditors have suffered a loss. Based on this consideration, a directors' misconduct may also cause damage to a group of creditors who are not domiciled in the same Member state, and it may be relevant to determine the place under Article 5 (3) in order to confer jurisdiction to a competent court.

For example, a group of creditors who are not domiciled in the same Member state have concluded a contract on the exchange of business secrets with the company, while directors' negligence has led to the diffusion of the core confidential information. Following the criterion of Article 5 (3), both the court in the Member State in which directors have committed the misconduct and the court in the Member state in which creditors have suffered a loss could establish jurisdiction. In this case, if the court of the place in which the creditors have suffered a loss could establish jurisdiction, it is very likely that a group of courts would be declared competent. However, it may be unreasonable because the damage occurred in a Member State only exerted limited effect, and none of these courts is appropriate to extend its jurisdiction to damage occurred in another Member state. Under this circumstance, it is suggested that each court only deals with the damage occurred in its territory and does not extend its jurisdiction to the damage occurred in another Member state[521]. However, it may not be a good solution in the regime of directors' liability, because firstly, *"dépeçage"* of the same cause (here the directors' misconducts) in a lawsuit will be too expensive and costly, and it will bring more inconvenience to both the parties since it is necessary to collect part of damage in every Member state concerned deriving from the same cause in order to establish liability[522]. Secondly, the court of the place where the damage occurred often turns out to be *forum actoris*. In this case, ECJ considered that it is inappropriate to give too much weight to the

[519] Peter MANKOWSKI, "Article 5", *loc. cit.,* p. 239.
[520] See paragraphs 24 and 25 of Case 21/76.
[521] See paragraph 40 of Judgment of the court of 7 March 1995, Case C-68/93, *Fiona Shevill v. Presse Alliance*. This doctrine was called "mosaic principle". Also see Peter MANKOWSKI, "Article 5", *loc. cit.*, p. 241.
[522] Hélène GAUDEMET-TALLON, *Compétence et execution…, op. cit.*, p. 231. Also see Peter MANKOWSKI, "Article 5", *loc. cit.*, p. 242.

plaintiff's domicile since it is likely that the defendants will get a less favourable treatment in a proceeding before *forum actoris*, and their due process interests may not be ensured in that court either[523].

Therefore, the application of *forum actoris* needs further justification. If the only connecting factor between the damage and the court is the domicile of plaintiff, the court may have to decline the jurisdiction since it is contrary to the principle of "*actor sequitur forum rei"*, and is not foreseeable for the defendant either[524]. Therefore, it is suggested that an issue should be dealt with by a court showing a particularly close connecting factor with it for the need of a sound administration of justice and an efficacious conduct of proceedings[525]. In the case concerning a personal claim against directors, since it is disadvantageous to have different courts ruling on various aspects of the same dispute, it may be more appropriate for shareholders or creditors to assert such a claim in the court of the place of the directors' domicile or the court of the place where directors have committed the misconducts at issue[526].

In an action aiming at incurring liability to directors for the corporate debts for the delay or failure to file for the dissolution proceedings, it is clear that this action could be brought in the court of a Member state in which the directors are domiciled. Besides, as we have mentioned, Article 5 (3) may also be applicable to determine a competent court. In the case *ÖFAB*, ECJ held that the information on the financial situation and activities of that company necessary to fulfil the management obligations by directors show more connections with the place in which the activities are carried out by the company and the financial situation relates to those activities are connected to[527]. Under this circumstance, it is likely that the creditors domiciled in different Member states may be gathered in the court where the company has its main centre of administration (probably the company's

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[523] See paragraphs 17 and ss of Judgment of the court of 19 September 1995, Case C-364/93, *Antonio Marinari v. Lloyd's Bank plc and Zubaidi Trading Co.* Also see paragraph 21 of Judgment of the court of 10 June 2004, Case C-168/02, *Rudolf Kronhofer v. Marianne Maier*.

[524] J.P. VERHEUL, "The forum actoris and international law", in T. M. C Asser Institute, *Essays on International & Comparative Law: In Honour of Judge Erades), Netherlands International Law Review*, 1983, pp. 196-209, p. 197.

[525] See paragraph 17 of Judgment of the court of 11 January 1990, Case C-220/88, *Dumez France SA and Tracoba SARL v. Hessische Landesbank and others*. In this sense, also see Pierre BOUREL, "Du rattachement de quelques spéciaux en Droit international privé", *Recueil des cours*, Vol. 214, 1989 II, pp. 251-399, pp. 363 and ss.

[526] In this sense, see paragraph 32 of Case C-68/93.

[527] See paragraphs 54 and 55 of Case C-147/12.

seat). In fact, the company's seat shows more significant connections with a dispute in relation to internal management of the company and other corporate affairs, and could avoid the proliferation of competent courts resulting from RBI's system of alternative jurisdictions[528]. By making such a decision, ECJ avoided that an action to hold directors liable for the corporate obligations deriving from the failure to file for the company's dissolution was dealt with by different courts in different Member states in which the loss is evidenced, and tended to render the court of the place where the company has its seat competent to deal with such an action.

Furthermore, it may also be possible that directors, as the members of the board, are domiciled in different Member states. Nowadays, the development of telecommunication science allows that a board's meeting to be held online, though directors are domiciled in different Member states. A decision jointly made by directors through such a means could also cause direct damage to shareholders and creditors as well. For example, the company's directors exercise the functions in different Member states while none of them has filed for the opening of dissolution proceedings. In this case, if we follow the traditional definition to "the place where harmful event giving rise to the damage occurred", or "the place where the damage occurred", it may be very difficult to determine a competent court to deal with such an issue. Similarly, in this case, in accordance with ECJ's decisions, the court in the place of company's seat may also be considered. However, ECJ has not decided whether a court in the place of company's seat could also be competent to deal with other kinds of a personal claim, for example, a decision jointly made by the directors who are domiciled in different Member states prevents several individual shareholders to participate into the distribution of corporate dividends. In this case, as we have mentioned, since the connection between these claims is strong enough and the sole purpose is to establish liability to directors for the same cause (here a harmful decision collectively made by directors of the board caused damage to a group of shareholders), Article 6 (1) could be applicable and shareholders (or creditors) could select the court of one of the directors' domiciles to assert such a claim.

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[528] Maurice V. POLAK, "Comment to Case C-214/89", *loc. cit., pp. 414-417.*

1.6. Conclusion

In the first place, since RBI does not preclude its application from the company law issues, the general provision of Article 2 is also applicable to the regime of directors' liability as other civil and commercial issues. In a case regarding directors' liability, if a director is domiciled in a Member state, he could be sued in the court of that Member state unless there are other special connecting factors that derogate from the general application of Article 2. In a corporate action, if there are a group of directors to be sued, the company could assert such a claim in the court of the place of one of the co-defendants' domicile by virtue of Article 6 (1). In a personal action brought by individual shareholders or creditors, if individual shareholders or creditors bring such a claim in the court in the place of one of the co-defendants' domicile, Article 6 (1) could be invoked even if a personal claim is not admissible in accordance with the national law of that Member state. However, if an individual shareholder or creditor intends to join a claim against the company and a claim against directors in the court of the place of one of their domiciles by virtue of Article 6 (1), it is not admissible since most of the Member states do not allow a cumul of liabilities in such a case. In this sense, the application of Article 6 (1) should avoid that the plaintiff make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction.

In the second place, the regime of directors' liability does not fall within the scope of Article 22 (2) of RBI. Since the application of Article 22 (2) is only confined to the claims which focus on a matter with constitutive natures, for example, a claim mainly concerning the challenge to the validity of a board's decision, or a claim regarding the distribution of corporate assets in the dissolution proceedings, it is not applicable to a claim the objective of which is to establish liability to directors and seek remedy from them. Even if sometimes it is indispensable to examine the validity of the decisions made by the board in a claim, Article 22 (2) cannot apply because the examination of the validity is only used as a tool to establish liability in the following proceedings.

In the third place, if a director and the company have achieved real consensus and have concluded a choice of forum clause in their contract that is not contrary to the mandatory provisions of exclusive jurisdiction, Article 23 of RBI could apply. However, since

directors' duties, rights, obligations and remuneration of directors may be indicated in the company's statute, it may not be necessary for a director to conclude a contract with his company in each case, but a simple acceptance of the nomination could be regarded as agreement to the contents of the statute. In the case where company's statute also includes a choice of forum concerning directors, and the director is aware of such a clause but does not oppose to it, his acceptance of appointment could also be regarded as voluntarily entering into the jurisdiction clause. Besides, in a derivative action, a choice of forum clause made by the company and its directors could also have binding effects on minority shareholders since they succeed to the company's litigation rights.

Article 23 does not only allow a choice of forum agreement to cover claims arising out of a contract, but also extend to the claims relating to tort or other non-contractual matters as well. Under this circumstance, on one hand, the company could assert a jurisdiction clause in the company's statute and select a court to deal with all the corporate affairs including a personal action of individual shareholders or creditors. In regard of shareholders, if they accept the membership of the company, they should be subject to the articles of the company's statute and submit to a court designated by such a clause. However, it should ensure that such a clause is not introduced into the statute with abusive intentions of *"forum shopping"* and that the statute is accessible for the shareholders. Otherwise, the jurisdiction clause should not have binding effects on shareholders. In regard of creditors, since they do not actually participate into the internal management of the company, it is very common that they do not know well the company's statute and such a clause should not exert binding effects on them. On the other hand, individual shareholders and creditors can also conclude a jurisdiction clause with directors to deal with their disputes. In accordance with Article 25 of RBI*bis*, the two parties could select a court of a Member state even if neither of them is domiciled in a Member state. If they choose a third state court and the defendant is domiciled in a Member state, the court of the place in which the defendant is domiciled should have mandatory jurisdiction to deal with such a case in conformity with ECJ's decisions in the case *Owusu*. Nevertheless, when a claim is brought in the court of the place of the defendant's domicile, the new RBI*bis* also enables the court to determine whether or not to stay the proceedings in favour for the third state court by following several conditions.

In the fourth place, if a claim regarding directors' liability does not fall within the scope of the exclusive jurisdiction, nor have the two parties concluded a choice of forum agreement, Article 5 of RBI could be available if the defendant is domiciled in a Member state. In a corporate action, such a claim should be commenced in the court in which a director performs his obligations in accordance with Article 5 (1) (a) since director's directorship is not a kind of "service" covered by Article 5 (1) (b). However, in a derivative action, since the plaintiffs are the minority shareholders and they do not succeed to the contractual rights or obligations of the company but are only conferred the litigation rights, Article 5 (1) (a) cannot apply since no obligation is freely assumed by directors towards minority shareholders and no relationship is freely entered into between directors and minority shareholders. Instead, Article 2 should apply. Furthermore, under exceptional circumstances, a director may be held jointly liable with the company for the corporate obligations. In this case, such a director is not considered contractually liable towards creditors since no obligation is freely assumed by the director towards creditors and no relationship is freely entered into between the two parties. Therefore, Article 5 (1) (a) cannot be operable but such an issue should be referred to Article 5 (3) or Article 2.

In the fifth place, in a personal claim brought by individual shareholders or creditors against directors for a direct loss, Article 5 (3) could apply and a competent court could establish jurisdiction to hear such a claim even if judges may reject the plaintiffs' demand in the latter proceedings because such a personal claim is not admissible under the national rules of that court. Following the criterion of Article 5 (3), both the court in the Member State in which directors have committed the misconduct and the court in the Member state in which individual shareholders or creditors have suffered a loss could establish jurisdiction. However, such a place should be foreseeable and predictable for the defendant, for this reason ECJ often avoids *forum actoris* in order to ensure the due process interests of the defendant. Besides, in a case regarding directors' liability for the corporate debt towards the creditors in a solvent company, ECJ has confirmed that Article 5 (3) could apply in determining a competent court. Since the information on the financial situation and the directors' management obligations show more connections with the place in which the activities are carried out by the company and the financial situation relates to those activities, ECJ held that such a case should be dealt with by a court in such a place, while

this place usually turns to be the company's main centre of administration or main centre of business or even its seat.

2. Analysis to the grey zone existing between RBI and RI

As has been indicated by the Report *Jenard*[529], insolvency law should be independent and be ruled by a special regulation rather than falling within RBI (it was Brussels Convention earlier)[530]. In fact, during the development of the EU law, a special system that aims at dealing with the insolvency proceedings was always on the agenda. In this part we will try to find the difficulties existing in the application of RBI and RI, and combine our analysis with the recent ECJ's case law for the purpose to find the boundary between the two Regulations and the influence on the regime of directors' liability.

2.1. Finding of the grey zone: "vis attractiva concursus"

2.1.1. Introduction to the doctrine of *"vis attractiva concursus"*

Article 1 (2) (b) of RBI states that "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" are excluded by the scope of this Regulation[531]. After RI came into force, the issues excluded by RBI will naturally be included into RI. However, if a case is connected with the insolvency proceedings only in some aspects, it will be unclear whether RI should apply or whether we should return to RBI.

It is doctrinally suggested that the ancillary proceedings may be attracted to, or be brought in *forum concursus*[532]. This principle allows the court, in which the insolvency proceedings are opened, to establish jurisdiction over a wide series of more or less related matters, even though that court could have lacked jurisdiction outside the insolvency proceedings[533]. In this sense, jurisdiction regarding the insolvency proceedings opened in a Member State

[529] P. JENARD*, Report on the Convention,* DO 1979, C59.
[530] See paragraphs 55-59 of Report *Jenard*.
[531] See Article 1(2)(b) of RBI.
[532] Laura CARBALLO PIÑEIRO, "*Vis attractiva concursus* in the European Union: its development by the European Court of Justice", *InDret*, 3/2010, pp. 1-29, p. 4.
[533] See Jona ISRAËL, *European Cross-border Insolvency Regulation: A Study of RI on Insolvency Proceedings in the light of a Paradigm of Co-operation and a Comitas Europaea*, Antwerpen/Oxford, Intersentia, 2005, p. 269.

will attract the proceedings regarding the assets of the debtor commenced in another Member state to this jurisdiction[534]. There are some Member States recognizing the principle of *"vis attractiva concursus"* in their national laws, and a court of these Member states in which the insolvency proceedings are opened will have jurisdiction on the insolvency proceedings as well as all the other actions deriving from the insolvency. For example, *LC* (Spanish Insolvency Act) admits the principle of *"vis attractiva concursus"* in some areas and states that judges of a court before which the insolvency proceedings are opened could have jurisdiction to deal with all the claims in which the debtors (here the company) are involved[535]. Because of the universal nature of insolvency, the claims that directly or indirectly affect the distribution of corporate assets should be joined or included in the insolvency proceedings. And *forum concursus* will have more significant connections with all the actions more or less linked to insolvency on the basis of the principle of "*par condictio creditorum*"[536].

However, some Member states such as Germany insist that it may also be relevant to separate the claims that do not have enough connections with the insolvency proceedings from the scope of insolvency. If all these claims are required to surrender to *forum concursus*, defendants who should have surrendered to another court may suffer unfair treatment because their due process rights may not be ensured[537]. In this sense, it is suggested that *"vis attractiva concursus"* should be interpreted *de sensus stricto*[538].

Neither RBI nor RI has clearly admitted this principle. However, Report *Virgós/Schmit*[539] states with authority *"although the Insolvency Convention does not enshrine the procedure*

[534] Laura CARBALLO PIÑEIRO, "Procedimientos concursales y competencia judicial internacional: análisis de dos conceptos clave", *DeCITA*, Tome. 11, 2009, pp. 9-33, pp. 26-33.

[535] See Article 51 (1) and Article 53 (1) of *LC*. Also see Jaume ALONSO-CUEVILLAS SAYROL, *La* "vis attractiva" *del proceso concursal*, Madrid, Thomas-Civitas, 2007, pp. 47 and ss, Also see Laura CARBALLO PIÑEIRO, "*Vis attractiva concursus*…", *loc. cit.,* p. 6. Also see Mª Elisa ESCOLÀ BESORA, "Problemas de la vis attractiva del proceso concursal y posibles soluciones", this article is available on the website: http://www.jausaslegal.com/resources/doc/090701-problemas-de-la-vis-attractiva-iuris07-08-09-35096.pdf.

[536] Jaume ALONSO-CUEVILLAS SAYROL, *La* "vis attractiva" *del…, op. cit.*, pp. 63 and ss.

[537] In this sense, see Laura CARBALLO PIÑEIRO, "*Vis attractiva concursus*…", *loc. cit.,* p. 6.

[538] Laura CARBALLO PIÑEIRO, "Procedimientos concursales y…", *loc. cit,* pp. 29 and ss, in which the author asserts that *"la fuerza atractiva menoscabará el derecho de defensa del demandado, si la existencia del litigio no tiene relación alguna con la apertura de un procedimiento de insolvencia sobre el deudor o, en otras palabras, su existencia o inexistencia no viene condicionada por el concurso, y además, no guarda inmediata relación con la insolvencia. La cuestión pasa a ser, entonces, qué litigios son estos"*.

[539] Miguel VIRGOS, Etienne SCHMIT, *Report on the Convention on Insolvency Proceedings*, Council Doc 6500/96, DRS 8(CFC).

principle of 'vis attractiva concursus'*, it does partially address that principle"* [540]. Besides, the Report also asserts that in the case *Gourdain v. Nadler*[541], there is indeed *"an element of attraction when 'actions are directly derived from insolvency and in close connection with the insolvency proceedings'"*[542]. In conclusion, the Report states *"logically, to avoid unjustifiable loopholes between Brussels Convention and Insolvency Convention, these actions are now subject to Insolvency Convention on the insolvency proceedings and to its rules of jurisdiction"* [543].

2.1.2. *"Vis attractiva concursus"* in the EU law

In the case *Gourdain v. Nadler*, ECJ held that a decision made by a French court in order to order the managers of a company to pay a certain sum into the assets of a company must be considered as given in the context of bankruptcy[544]. In this sense, the French regime of *"liquidation des biens"* or *"action en responsabilité pour insuffissance d'actif"* which requires a *de facto* manager of an insolvent company to contribute to the company's assets is within the insolvency exclusion[545]. Under the French regime, directors are required to make contribution to the corporate assets in order that the company could reimburse the general body of creditors in the insolvency proceedings. Besides, only the *"syndic"* of the company in the insolvency proceedings can make the order on behalf and in the interests of the general body of creditors[546]. Therefore, such an action should be brought by liquidators on the basis of the principle of *"par condictio creditorum"* and for the purpose to recover the assets of the company and protect the interests of the creditors as a whole. In this case, the doctrine of *"vis attractiva concursus"* should apply because such an action directly derives from the bankruptcy or winding up and is closely connected with it. Therefore, such an action should be excluded from RBI and fall within the scope of insolvency law.

From the case *Gourdain v. Nadler*, ECJ has concluded that an action that is to be excluded by RBI should derive directly from the bankruptcy or winding-up, and should be closely

[540] See paragraph 77 of Report *Virgós/Schmit*.
[541] See Judgment of the court of 22 February 1979, Case 133/78, *Henri Gourdain v. Franz Nadler*.
[542] See paragraph 77 of Report *Virgós/Schmit*.
[543] See paragraph 77 of Report *Virgós/Schmit*. Also see paragraph 38 of the Opinion of Advocate General of Case C-339/07.
[544] See paragraph 6 of Case 133/78.
[545] See paragraph 3 of Case 133/78. Also see Pippa ROGERSON, "Article 1", *loc. cit.*, pp. 64-65.
[546] See paragraph 5 of Case 133/78.

connected with the insolvency proceedings[547]. This conclusion was considered as a basic principle and was followed by ECJ's case law so as to examine a claim on whether it should be included into RI. In the case *Seagon v. Deko*[548], a German company had transferred a sum of money to a Belgian company *Deko* and was declared insolvent later. The German liquidator *Seagon* challenged the company's behaviour of making such a transfer by pursuing an action in Germany in order to set aside this transaction. ECJ held that such an action aimed at increasing the company's assets in the insolvency proceedings and should be included in the scope of RI since it derived directly from the bankruptcy or winding-up and was closely connected with the proceedings[549].

In the case *SCT Industri AB i likvidation v Alpenblume AB*[550], an Austrian court did not recognize the power of a liquidator appointed in Sweden to dispose of the assets situated in Austria. The court held that the original transfer of shares by the liquidator was invalid and ordered him to re-transfer the shares. In order to resolve the dispute, it is relevant to examine whether such a case falls within the scope of RBI[551]. This is because that RI was not promulgated when this matter arose, in fact the test of exclusion from RBI should be considered equal to the test of inclusion into RI[552].

As has been indicated in this case, the actions concerning the transfer of shares and the restitution of title are intimately linked with the conduct of the insolvency proceedings, and this link is not weakened due to the fact that the insolvency proceedings has been closed[553]. As a result, an *in rem* claim aiming at deciding the destiny of the corporate assets cannot be independent from the insolvency proceedings even if they are closed already, because the insolvency proceedings will be greatly affected after such an *in rem* claim is commenced. In this sense, we can see that under general circumstances, an *in rem* claim concerning debtor's estate may not be covered by *"vis attractiva concursus"*. However, in

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[547] See conclusion of Case 133/78.

[548] See Judgment of the court of 12 February 2009, Case C-339/07, *Rechtsanwalt Christopher Seagon als Insolvenzverwalter über der Frick Teppichboden Supermärkte GmbH v. Deko Marty Belgium NV.*

[549] See paragraphs 17-21 of Case C-339/07.

[550] See Judgment of the court of 2 July 2009, Case C-111/08, *SCT Industri AB i likvidation v Alpenblume AB*.

[551] As a fact that to this case as the insolvency proceedings were opened before the entry into force of RI, it must be determined only whether a judgment of this case in the main proceedings falls within RBI, see paragraphs 18-19 of the case C-111/08.

[552] Elena ZABALO ESCUDERO, "Artículo 11. Alcance internacional de la jurisdicción", in Faustino CORDÓN MORENO (Director), *Comentarios a la Ley Concursal (2ª ed.)*, Tome I, Navarra, Aranzadi Thomson Reuters, 2010, pp. 227-232, p. 229.

[553] See paragraphs 28-30 of Case C-111/08.

a case where such a claim can affect the insolvency proceedings to a great extent and it is filed to achieve the objective of the insolvency proceedings, it may also be covered by the scope of RI even if it is lodged after the opening of the insolvency proceedings[554]. We consider that this principle may also be applicable to contractual and non-contractual claims as well. Even though a contractual or non-contractual claim is not covered by *"vis attractiva concursus"* normally, in a case where it is for the purpose to achieve the objectives of the insolvency proceedings and has significant connections with them, they could probably go within the scope of *"vis attractiva concursus"* as well[555].

In terms of a contractual claim, in the case *German Graphics Graphische Maschinen GmbH v. Alice van de Schee*[556], a Dutch liquidator of a Dutch company that was declared insolvent challenged the enforcement of a reservation of title clause in a contract excluded by the Dutch company and a German seller. However, this clause of reservation of title was regarded as independent because the creditor of the company could also bring this claim beyond the insolvency proceedings[557]. ECJ held that the mere fact that the liquidator was a party in such a claim is not sufficient to classify such an action as being strongly connected with the insolvency proceedings because it is a claim brought by an individual creditor for his own interests[558].

Following this line, in the case *ÖFAB,* an action was brought by creditors to hold directors of a company liable for the corporate debts due to their failure to complete certain formalities intended to monitor the financial situation of the company which no longer has sufficient funds. ECJ rejected this kind of action to be subject to insolvency law because such an action does not necessarily have to be brought by a liquidator in the insolvency proceedings but individual creditors may also file such a claim for their own interests[559]. Besides, the main proceedings do not constitute insolvency proceedings but were brought after a company reconstruction order was made[560]. As is known, the debt restructuring may help the company remodel its financial and organizational structure so as to permit the

[554] Laura CARBALLO PIÑEIRO, "*Vis attractiva concursus*…", *loc. cit.*, p. 17.
[555] Laura CARBALLO PIÑEIRO, "*Vis attractiva concursus*…", *loc. cit.*, p. 18.
[556] See Judgment of the court of 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van de Schee*.
[557] See paragraph 32 of Case C-292/08.
[558] See paragraphs 31 and 33 of Case C-292/08.
[559] See paragraph 25 of Case C-147/12.
[560] See paragraphs 25 and ss. of Case C-147/12.

rehabilitation and continuation of its business. It is probable that a company does not necessarily have to fall into the liquidation and distribute dividends to its creditors. Therefore, it does not necessarily derive from the insolvency and will not be subject to the "insolvency law exception".

From these cases above, we could find some standard followed by ECJ to decide whether an action derives from the insolvency proceedings and has strong connections with them. Firstly, it should be taken into account whether such an action is brought by the liquidators of the company for the interests of the creditors as a whole. If a claim could be filed by individual creditors who do not strictly follow the formal requirements of insolvency proceedings and is for their own interests, such a claim does not necessarily fall within the scope of insolvency law. Secondly, it should be taken into account whether such an action is to achieve the objectives of the insolvency proceedings. It is possible that a claim is covered by the context of insolvency, but it occurs only if such a claim derives from the effects of insolvency proceedings and has great influence on them. For example, under Spanish law, in a claim where directors are held liable for the corporate debts due to his failure to file on the insolvency proceedings, since individual creditors could file such a claim to seek relief before or after the insolvency proceedings, this claim does not completely aim at reimbursing the general body of creditors and does not definitely meet the objectives of the insolvency proceedings. Therefore, it will fall outside the context of insolvency.

A classification to such an action should be made from both substantive and procedural perspectives[561]. From ECJ's case law, we can find that ECJ has taken into account both national and EU insolvency rules. In order to decide whether an action falls within the scope of *"vis attractiva concursus"*, as the first step, ECJ refers to national laws to have an examination on its rules and on a claim brought by virtue of these rules from a substantive perspective. As the second step, ECJ decides whether a matter is within the "insolvency law exception" by establishing its own principle that only an action that derives from the insolvency proceedings and has strong connections with them falls within the insolvency law. Finally, the EU legislators try to introduce this principle into RI that allows them to

[561] Ángel ESPINIELLA MENÉDEZ, "Cesión internacional de acciones por la administración concursal (Comentario a la Sentencia del Tribunal de Justicia de la Unión Europea de 19 de abril de 2012, Asunto C-213/10, *F-Tex SIA c. Jadecloud Vilma*)", *Diario La Ley*, Nr. 7891, Año XXXIII, Ref. D-259, pp. 1-10, p. 2.

make a characterization based on both national and European perspectives in the latter cases.

Recital 6 of RI also follows ECJ's conclusions and states that *"the judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings should be confined in the scope of the Regulation"*. Besides, Article 25 (1) II states that the EU-wide recognition of a judgement regarding the insolvency proceedings opened in a Member state shall be extended to judgments deriving directly from the insolvency proceedings and which are closely linked with them[562]. In this way, RI will apply to those decisions that are not included in the scope of Article 1 (2) (b) of RBI[563]. In the recent proposal to the revision of RI[564], the EU legislators proposed a revision to Recital 6 as well as Article 25 (1) II by stating that *"the Regulation should encompass provisions governing jurisdiction for opening insolvency proceedings and proceedings which derive directly from the insolvency proceedings and are closely connected with them. And this Regulation should also contain provisions regarding the recognition and enforcement of judgments issued in such proceedings and provisions regarding the law applicable to insolvency proceedings"*[565]. In this sense, Article 25 (1) II has two functions. On one hand, it is designed to avoid the gaps between RBI and RI[566]. On the other hand, by making such a statement, the EU legislators try to establish a uniform Regulation similar to RBI which contains provisions governing jurisdiction, applicable law, recognition and enforcement of foreign judgments, and they tend to adopt the same criterion on jurisdiction, applicable law, recognition and enforcement of judgments.

Furthermore, pursuant to ECJ's case law, Article 3 (1) must be interpreted that it confers international jurisdiction to a Member state in which the insolvency proceedings are opened, to determine actions which derive directly from those proceedings and which are closely connected with them[567]. In the proposal that we just mentioned, the EU legislators

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[562] See Article 25 (1) II of RI.

[563] Miguel VIRGÓS, Francisco J. GARCIMARTÍN ALFÉREZ, *The European Insolvency Regulation: Law and Practice*, The Hague, Kluwer Law International, 2004, p. 207.

[564] European Commission, *Proposal for a Regulation of the European Parliament and of the Council: amending Council Regulation (EC) No 1346/2000 on insolvency proceedings*, COM (2012) 744 final.

[565] See Proposal of amendment to RI, p. 14.

[566] Miguel VIRGÓS, Francisco J. GARCIMARTÍN ALFÉREZ, *The European Insolvency Regulation…, op. cit.,* p. 208.

[567] See paragraph 21 of Case C-339/07.

codified the ECJ's case law by inserting a new Article 3a (1), stating that the courts opening insolvency proceedings also have jurisdiction for actions which derive directly from insolvency proceedings or are closely linked with them[568]. It shows the EU legislators' ambition to establish its autonomous principle of *"vis attractiva concursus"* in Insolvency Regulation, though the decisions made by ECJ in the case law will still serves to interpret this principle.

Nevertheless, it may also be possible for the EU legislators to give a concrete delimitation to the scope of the principle of *"vis attractiva concursus"* at a EU dimension. On one hand, it is doubtful whether the EU legislators should insist on a strict interpretation to the principle of *"vis attractiva concursus"*. In this case, if the scope of the principle of *"vis attractiva concursus"* is too broad, it will lead to a result that any claim concerning a debtor's estate would be brought in the court before which the insolvency proceedings are opened[569]. Meanwhile, as we have mentioned, if general jurisdiction can deal with these proceedings but they are required to be brought in the court dealing with the insolvency proceedings, the second court may not be able to ensure the defendants' due process right as the first court[570]. Conversely, the inclusion of *"vis attractiva concursus"* into the RI may be a good method to avoid some of the parties to transfer assets from one Member State to another by means of *"forum shopping"*[571]. On the other hand, if the interpretation turns out to be too strict, ECJ may bring any reason to refuse to join any action into the insolvency proceedings, while it is also contrary to the objectives of the establishment of a uniform regulation in the area of insolvency.

As is known, when a company is insolvent it will not have sufficient assets to repay all the due debts. Thus the insolvency proceedings should be brought collectively for the purpose to satisfy all the creditors as much as possible, and it may make interests for creditors if the insolvency court joins some strong connected actions in the insolvency proceedings. In this case, we also propose a list of actions that should fall within the scope of the *"vis*

[568] See proposal of amendment to Regulation 1346/2000, pp. 7 and 22.
[569] This is similar to the situation in Article 22 of RBI. In this sense, see Luís DE LIMA PINHEIRO, "Article 22", *loc. cit.*, pp. 428 and ss.
[570] Laura CARBALLO PIÑEIRO, "*Vis attractiva concursus*…", *loc. cit*, pp. 14 and ss.
[571] Ángel ESPINIELLA MENÉDEZ, "Nota a STJCE de 12 de febrero de 2009, Asunto C-339/07, *C. Seagon c. Deko Marty Belgium*", *Revista Española de Derecho Internacional*, Vol. LXI, 2009, pp. 190-192, pp. 190 and ss.

attractiva concursus" and should be governed by Article 3(1) of RI[572]: (1) the opening and closure of the insolvency proceedings, the ranking of creditors; (2) the nomination of liquidators, the determination of the powers of liquidators and the supervision to their functions; (3) the actions for liquidators to incur liability on directors (*de iure* or *de facto*) in the insolvency proceedings[573]; (4) the contractual, non-contractual or *in rem* actions which have a direct influence on the corporate assets in the insolvency proceedings (for example, they should be brought by the liquidator and for the sake of the creditors as a whole). However it needs further examination on each individual case because sometimes these actions may be brought regardless of the opening or closure of insolvency proceedings[574].

2.1.3. Should Article 3(1) be an exclusive jurisdiction rule?

If an issue falling within the scope of *"vis attractiva concursus"* should be governed by the court of a Member state in which the insolvency proceedings are opened, it may be doubtful whether such a court should have exclusive jurisdiction rule to any *"vis attractiva concursus"* issues. In this case *Seagon v. Deko*, it was mentioned in the Advocate General's opinion that *"provisions of the Insolvency Regulation provide for exclusive jurisdiction for the opening, conduct and termination of the proceedings, and for actions deriving directly from those proceedings"*[575]. They suggest that Article 3 (1) should confer jurisdiction to the court before which the insolvency proceedings are opened. However, ECJ did not completely adopt this idea, for the fear that since the parties can choose the court to open the insolvency proceedings, they may transfer their assets from one Member

[572] It is inspired by a list given in Miguel VIRGÓS, Francisco J. GARCIMARTÍN ALFÉREZ, *Comentario al Reglamento Europeo de Insolvencia*, Navarra, Thomson/Reuters, 2004, p. 67. Also see Miguel VIRGÓS, Francisco J. GARCIMARTÍN, "Artículo 11. Alcance internacional de la jurisdicción", in Ángel Rojo, Emilio BELTRÁN, *Comentario de la Ley Concursal*, Tomo I, Navarra, Thomson/Civitas, 2004, pp. 344-350, pp. 349-350.

[573] This is the conclusion in *Gourdain v. Nadler*, but it only referred to the French regime. Thus, it needs further examination if the similar regimes in other Member states may also fall within the "insolvency exception". We will continue this discussion in the next part.

[574] If such an action is brought without the context of insolvency, it should be regarded as having no close link with the insolvency proceedings since it could be brought before or after the insolvency proceedings. See Group for international & European Studies of Barcelona, "Proposal on the Reform of the Council Regulation on Insolvency Proceedings Amsterdam", *International Insolvency Law Review*, 3/2011, pp. 336-350, pp. 336 and ss.

[575] See paragraph 64 of the Advocate General's opinion of Case C-339/07.

State to another and abusively use the *"forum shopping"* strategy to select a more favourable insolvency forum[576].

In accordance with Article 25 (1) II, as we have just mentioned, the judgments which are to be recognized in a Member state should include the ones deriving directly from the insolvency proceedings and which are closely linked with them, *"even if they were handed down by another court"*[577]. As we have explained that the EU legislators tend to adopt a similar criterion between jurisdiction and recognition rules, it may be relevant to know why they extend the competence of recognition to a judgment made by "another court" rather than conferring exclusive competence to the court in which the insolvency proceedings are opened. In this case, ECJ held that the interpretation of Article 3(1) should be supported by Article 25(1), which means that the interpretation to the two provisions should keep in harmony[578]. From ECJ's perspective, this "another court" should be a court in the same Member state as the court in which the insolvency proceedings are opened[579]. The jurisdiction of this "another court" could determine the territorial and substantive affairs that does not necessarily have to be dealt with by the court in which the insolvency proceedings are opened[580]. In this sense, it seems that the EU legislators do not want to give an impression that the court under Article 3 (1) owns exclusive jurisdiction on the insolvency proceedings as well as the actions deriving from its effects. Meanwhile, in the proposal of amendment, it is suggested that in a case where an action deriving from insolvency is related to another action against the same defendant that is based on general civil and commercial law, the liquidator could bring both actions in the courts of the defendant's domicile under Article 2 of RBI (Article 4 of RBI*bis*). In accordance with the proposal, a liquidator is able to bring an action against a director based on insolvency law together with an action against the same director based on tort law or company law in a court of the place of this director's domicile on the bais of Article 2 of RBI[581]. In conclusion, we believe that the intention of the EU legislators is not to confer the exclusive jurisdiction to a court under Article 3 (1) of RI to deal with an issue falling within the

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[576] See Recital 4 of RI. Also see Ángel ESPINIELLA MENÉDEZ, "Nota a STJCE…", *loc. cit.,* pp. 190 and ss. Also see Look Chan HO, *"Perfecting the Union, Perfecting Universalism"*, Corporate Rescue and Insolvency, Vol. 2, 2009, p. 71-76, p. 71.
[577] See Article 25 (1) II of RI.
[578] See paragraph 25 of the Case C-339/07.
[579] Ángel ESPINIELLA MENÉDEZ, "Nota a STJCE…", *loc. cit.,* pp. 190 and ss.
[580] See paragraph 27 of Case C-339/07.
[581] See Proposal of amendment to RI, p. 7.

scope of *"vis attractiva concursus"*, but is to improve the effectiveness and efficiency of insolvency-related proceedings through a multiple mechanism.

2.2. Conflict-of-jurisdictions rules in the regime of directors' liability in the insolvency or insolvency-related proceedings

2.2.1. National approaches to conflict-of-jurisdictions rules in the regime of directors' liability in the insolvency or insolvency-related proceedings

As we have explained, an action to incur directors' liability is also possible to have strong connections with the insolvency proceedings, though it is worth a further examination from a comparative perspective. In order to have an appropriate delimitation to such a claim, we should firstly clarify that an action deriving directly from the insolvency proceedings and is closely linked with them falls within the scope of RI. Secondly, we should follow the principle made by ECJ to decide whether directors' liability in the insolvency or insolvency-related proceedings in national rules fall within the "insolvency law exception". Thirdly, after the first two examinations are completed, we should decide whether such a claim should surrender to a jurisdiction established by virtue of RI or RBI.

As we have mentioned above, in the case *Gourdain v. Nadler*, ECJ has clearly indicated that an *"action en comblement du passif"* or *"liquidation des biens"* which directly derives from bankruptcy or winding up and is closely connected with the insolvency proceedings should be subject to the court dealing with bankruptcy or winding up[582]. The British regime of *"wrongful trading"* also shows many similarities with the French regime. For example, directors should make contribution to corporate assets for having not properly commenced the winding up of the company, and the legitimate party to file for a claim of wrongful trading is the liquidator[583]. Besides, such a liability regime applies when the company is already in the insolvent liquidation proceedings, which means that such a claim should be brought in the context that the company's assets are insufficient for the payment of its liability at the time of liquidation[584]. By doing so, the liquidator's purpose is to make sure that all the creditors could get reimbursed as much as possible. In this sense,

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[582] See paragraph 4 of Case 133/78. Also see Article L. 651-2 of *Code de Commerce*.
[583] See Section 214 of *Insolvency Act 1986*.
[584] Fiona TOLMIE, *Corporate and Personal Insolvency Law (Second Edition)*, Oxon, Cavendish Publishing, 2013, p. 365.

the regime of *"wrongful trading"* in British law also derives from the insolvency proceedings and is closely linked with them, and it should fall within the scope of RI.

In German Law, as we have mentioned, there is a similar regime that enables creditors to incur directors' liability. In accordance with § 64 (1) *GmbHG* and § 92 (2) *AktG*, directors are required to file for formal insolvency proceedings without undue delay as soon as the company is insolvent[585]. Meanwhile, pursuant to § 42 (2) *BGB*, directors will be held jointly liable for the damage suffered by the creditors of the company when they fail to open the insolvency proceeding, which indicates that this kind of directors' liability is based on tort law context[586]. However, § 92 of *InsO* states that such a claim filed against directors can only be commenced by the insolvency administrator during the insolvency proceedings[587]. In this sense, on one hand, such a claim aims at providing a protective mechanism for all the creditors in addition to the insolvency proceedings from which creditors could be reimbursed by the distribution of company's dividends. It should be brought by an insolvency administrator for the sake of all the creditors in the insolvency proceedings, which indicates that such a claim has strong connections with the insolvency proceedings and it is for the purpose to achieve the objectives of the insolvency proceedings. Therefore, it is based on tort law as well as insolvency law context. If it were so, Article 3 (1) of RI may be able to confer jurisdiction to the court before which the insolvency proceedings are opened to deal with this insolvency-related claim. On the other hand, as we have mentioned above, the proposal to the amendment of RI also gives us an alternative to solve this problem because it suggests that if an action to incur a director's liability is related to another action against the same defendant (for example, corporate actions or personal actions which are based on company law or tort law), such an action to incur directors' liability for the failure to open the insolvency proceedings may surrender to the court of the place where the defendant is domiciled pursuant to Article 2 of RBI.

Nonetheless, the issue in Spanish law seems to be more complicated. In accordance with Article 241 of *LSC*, creditors can file a personal claim against directors for having suffered

[585] See § 64 (1) of *GmbHG* and § 92 (2) of *AktG,* Also see Susanne KALSS, Nikolaus ADENSAMER, Janine OELKERS, "Directors' Duties in the Vicinity of Insolvency: A comparative analysis with reports from Germany, Austria, Belgium, Denmark, England, Finland, France, Italy, The Hague, Norway, Spain and Sweden", in Marcus LUTTER (Ed.), *Legal Capital in Europe*, *op. cit.*, pp. 112-143, p. 115.
[586] See § 42 (2) *BGB*, also see Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 331.
[587] See § 92 of *InsO.*

a loss directly caused by directors[588]. Such a claim is on the basis of both company law and tort law and it is for the interests of these individual creditors. Meanwhile, by virtue of Article 367 of *LSC*, directors are held jointly liable for corporate debts if they fail to commence the company's insolvency proceedings within two months after the company has gone insolvent[589]. Furthermore, pursuant to Article 172 *bis* of *LC*, directors shall be liable for having led to or aggravated the company's insolvency when the insolvency proceedings have been declared fraudulent by the court[590]. Spanish law seems to provide a multiple mechanism for creditors so as to enable them to seek relief from directors through many mechanisms. As we have mentioned above, although all of these provisions enable creditors to incur directors' liability, they do have different functions. Thus it may need a mechanism to avoid possible conflicts between the actions provided by company law and those provided by insolvency law.

In conformity with Article 51 *bis* of *LC*, actions aiming at incurring directors' liability for the failure to fulfil the duties in the occurrence of company's dissolution or insolvency under Article 367 of *LSC* shall be suspended during the insolvency proceedings[591]. This is because Article 367 of *LSC* may have some similar functions with Article 172 *bis* of *LC* in some aspects. Spanish legislators fear that if some "more diligent" individual creditors bring such an action under Article 367 of *LSC* before or during the insolvency proceedings, it would affect directors' ability to pay for the corporate obligations in the insolvency proceedings, which would be unfair to other creditors. But when the insolvency proceedings are concluded, the Spanish legislators do not prohibit that individual creditors seek another rescue if they have not got enough compensation from the insolvency proceedings[592]. In this regard, judges dealing with the insolvency proceedings will not have the competence to recognize an action under Article 367 of *LSC* since it does not aim at achieving the objectives of the insolvency proceedings. Therefore, such an action should be excluded from *"vis attractiva concursus"* and falls within the scope of RBI[593].

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[588] See Article 241 of *LSC*.
[589] See Article 367 of *LSC*.
[590] See Article 172 *bis* of *LC*.
[591] See Article 51 *bis* of *LC*.
[592] In this sense Antonio PERDICES HUETO, "La responsablidad de los administradores por deudas sociales a la luz de la ley concursal", *InDret*, 3/2005, pp. 1-12, pp. 8 and ss. Also see Alberto ALONSO UREBA, "La responsabilidad concursal…", *loc. cit.*, pp. 569 and ss.
[593] See Article 50 (2) of *LC*.

Nevertheless, Article 48 *quáter* of *LC* confers exclusive competence to the insolvency administrators and enable them to bring a corporate action against directors of the company[594]. As we have mentioned, a corporate action is to incur liabilities to directors for the breach of duties that are owed to the company. If the company get compensation from directors, the compensation should be regarded as a part of corporate assets and will be joined to other assets so as to make as much repayment as possible to all the creditors in the insolvency proceedings. In this sense, judges of the court in which the insolvency proceedings are opened should have the competence to deal with such an action. Although a corporate action is normally filed by virtue of the company law rules, things are different when taking into account the company's insolvency. In the insolvency proceedings, since creditors' interests are predominant, when insolvency administrators find that the corporate assets are less than they have expected, it will be likely for them to file a corporate action wherever it is possible for the purpose to seek remedy from directors and to increase the corporate assets so as to make all the creditors get compensation as much as possible. Such an action is based on the insolvency context and is to achieve the objective of insolvency proceedings. It derives from the company's insolvency and is closely linked with the insolvency proceedings, and thus should fall within the scope of *"vis attactiva concursus"* and be subject to RI. Nevertheless, since the proposal of recast to RI has indicated that a liquidator can bring an action for directors' liability based on insolvency law together with an action against that director based on company law in the same court, such an action could be subject to Article 2 of RBI (now Article 4 of RBI*bis*) as well.

In terms of creditors' personal actions against directors, it remains unclear in Spanish law. However, we believe that an action brought under Action 241 of *LSC* should not be affected by the commencement of insolvency proceedings. Firstly, such an action is brought against the directors at issue, rather than against the company that goes insolvency. If directors have sufficient assets to satisfy the mentioned individual creditors in a personal action as well as all the creditors in the insolvency proceedings, it will be rare for us to forbid these individual creditors to file such a personal claim since it may not affect the functioning of the insolvency proceedings[595]. Secondly, an insolvency administrator can

[594] See Article 48 *quáter* of *LC*.

[595] In this sense, see Olga Maria FRADEJAS RUEDA, "La acción individual de responsabilidad en el seno del concurso de acreedores: viabilidad y consecuencias", *Documentos de Trabajo del Departamento de Derecho Mercantil de Universidad de Complutense de Madrid*, 2013/71, pp. 1-8, pp. 4-5. The article is

initiate an action against directors under Article 172 *bis* of *LC*. Such an action is based on the fact that the court has evaluated the directors' work and has decided to declare the insolvency proceedings as fraudulent. In this regard, it refers to direct damage to the company while the damage of creditors is indirect and collective[596]. However, an action under Article 241 of *LSC* is filed by an individual creditor rather than an insolvency administrator, and an individual creditor can only file such a personal claim when he suffers direct and individual damage. Thirdly, in some cases, it may be concerned that if directors are required to pay to the individual creditors, their ability to make compensation in the insolvency proceedings will be affected. However, it should be noticed that these two liabilities are based on two different backgrounds. Despite that directors may become bankrupt after making payment to the insolvency proceedings and individual creditors may only get partly recovered from this payment, directors' liability will not disappear only because they do not have enough assets for compensation. Therefore, an action under Article 241 of *LSC* should be independent from the insolvency proceedings. Judges who deal with the insolvency proceedings will not have the competence to a personal claim under Article 241 of *LSC*[597]. Instead, it should fall within the scope of RBI.

2.2.2. Possible solutions to the choice of conflict-of-jurisdiction rules between the Member states

Due to the absence of the materialization of the EU company law, there is no uniform EU rule dealing with directors' liability in the insolvency or insolvency-related proceedings. Meanwhile, as we have mentioned, directors' liability for not filing for the opening of the insolvency proceedings presents different natures in different national laws, and it can be governed either by insolvency law or company law depending on national provisions.

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available on the website: http://eprints.ucm.es/18132/1/LA_ACCION_INDIVIDUAL_DE_RESPONSABILIDAD____cmunicacion_olga_fradejas_%281%29.pdf.

[596] Julio César VIEITEZ MARTÍN, Trepat GARCIA I GALLOSTRA, "Las acciones de responsabilidad frente a los administradores de las sociedades de capital tras la nueva reforma concursal (Incluye modelo)", this article is available on the website: http://m.informativojuridico.com/las-acciones-de-responsabilidad-frente-los-administradores-de-las-sociedades-de-capital-tras-la.

[597] Manuel GARCÍA-VILLARRUBIA, "Las acciones de responsabilidad de administradores de sociedades en concurso. El problema de su coordinación con el proceso concursal y la calificación concursal. Evolución normativa", pp. 1-13, p. 10. This article is available on the website: http://www.uria.com/documentos/publicaciones/3121/documento/mgv8911x.PDF?id=2842.

Therefore, there may be two options available for us. The first choice is that judges in each Member state characterize such an action by following its national laws and decides whether it derives from the insolvency proceedings and is closely linked with them. By following the lines of ECJ's principle and *lex fori*, national judges may decide whether the claim should surrender to the court together with the insolvency proceedings by virtue of RI. Otherwise, such a claim should be brought in another court by virtue of RBI.

However, different national approaches towards the characterization may create considerable legal uncertainty[598]. Due to the fact that different Member states adopt different criteria to "insolvency", a regime may be classified as based on company law in one Member state while as based on insolvency law in another Member state. Therefore, we may have to seek a second choice. It is also possible that when such an action is brought in a court in the Member state, a judge of this Member state could refer to the law of the state in which the company is incorporated and make a characterization of this regime on the basis of this law. If this action is considered to derive from insolvency and have strong connections with the insolvency proceedings in that law, the court in which the insolvency proceedings are opened could establish jurisdiction to deal with such an action as well. If this action is classified as based on the company law grounds in that Member state, the court in which the insolvency proceedings are opened should not have competence to it. In this way, since it is an issue in relation to the company and its directors, maybe we can ensure a minimum uniform treatment by referring to the law of incorporation and reduce the litigation risk stemming from the legal divergence existing between the Member states. Otherwise, the only option left for us is to refer to ECJ every time such a similar issue arises.

2.3. Problems relating to the so-called "new creditors" in the pre-insolvency context

As we have mentioned, insolvency can do curious things to incentives, exposing creditors to risks of opportunistic behaviours and creating complexities for directors[599]. The managerial opportunism is likely to shift the high risk from company and shareholders to

[598] Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation: Friction between Company and Insolvency Law in the Single Market", *LSE Law, Society and Economy Working Papers*, 6/2014, pp. 1-44, p. 33

[599] Stephen M. BAINBRIDGE, "Much ado about little? Directors' fiduciary duties in the vicinity of insolvency", *Journal of Business and Technology Law*, 335 (2007), pp. 1-38, p. 26. Available on: http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1009&context=blc_2005.

the new creditors. Once the directors have found that the company is unable to repay the debts, they would take an unreasonable gamble with the money. And they would cause the corporation to engage in particularly high-risk ventures that would consequently be the creditors to burden the probable suffer. To this point, shareholders may take the side with directors since the company is on the edge of insolvency and they know they will end up with nothing. If it were so, they would rather take a gamble with the money of creditors because they may perhaps get return with high profit.

In this way, the so-called "new creditors" are those creditors who have not been informed that the company has already been insolvent or will inevitably go insolvency but conclude contracts with the company[600]. On one hand, as we have mentioned, when the company comes to the verge of insolvency, directors should have commenced insolvency proceedings in order not to diminish the corporate assets. However, sometimes, directors would rather take on high risky business or conceal the real financial situation of the company and conclude new contracts with new creditors so that the company could possibly get rid of the financial difficulty. Their intention may be good, but if the company finally turns to be insolvent, these new creditors may sustain a more serious loss than the old creditors. Meanwhile, if directors do not act in good faith, the new creditors will not make a correct judgment while their reliance on the conclusion of such a contract may be impaired. In this regard, if directors of the company have known or ought to have found that the company has lost its ability to continue its business and repay its debts but they have not commenced the insolvency proceedings, they will be held liable for these creditors in some national rules[601].

In this case, the new creditors may often sustain a more serious loss than the old creditors because they unwittingly extend fresh credit to the company after the point in time at which insolvency proceedings should have been triggered, had they known of the insolvency, these creditors would not have entered into a transaction with the company at all[602]. In the case where the corporate assets have nearly run out, the assets of the new creditors will be distributed to all the creditors in the insolvency proceedings. In this sense, by means of concluding new contracts with the new creditors, the real intention of

[600] Susanne KALSS, Nikolaus ADENSAMER, Janine OELKERS, "Directors' Duties in…", *loc. cit.*, p. 140.
[601] Benjamín SALDAÑA VILLOLDO, "La acción individual…", *loc. cit.,* pp. 1358 and ss.
[602] Thomas BACHNER, "Wrongful trading…", *loc. cit.*, p. 316.

directors is to make payment to the old creditors by sacrificing the new creditors. Nevertheless, in the case where it is impossible for directors to know that the corporate assets are insufficient to make payment to corporate debts, or in the case where directors have realized the situation and have informed the creditors of the risk but the new creditors still insist on concluding such a contract, directors will not be responsible because a causality between the damage caused by the directors and that suffered by the creditors cannot be proved[603].

Some national laws have established certain rules to deal with such a case. For example, in German Law, the issue regarding new creditors can be found in the interpretation to § 92 (2) of *AktG* and § 64 (1) of *GmbHG*[604]. According to the previous German doctrine, as we have mentioned above, the German legislators tended to equal the protection between the new creditors and the old ones, regardless of the fact whether a creditor becomes creditor before or after the company's insolvency. However, a decision made by BGH (Federal Court of Justice of Germany) has overturned this interpretation, in which it is held that it should give different treatment to the new creditors and the old ones[605]. In this case, directors' special role requires them to act in good faith. If they have concealed the real purpose to conclude such a contract, or have not informed the new creditors of the real financial state of the company, or have delayed the commencement of the insolvency proceedings, they will be held liable for the failure to act in good faith. In this sense, it should give a special treatment to the new creditors when they suffer personal damage.

Following this new interpretation, the new creditors can bring a personal action against directors for the reliance loss caused by these directors due to their unlawful continuation of the corporate business. In German law, such a personal claim is on the basis of *"culpa in contrahendo"* under §823(2) *BGB* in which German law recognizes a pre-contractual relationship between the representative of the company (directors) and the new creditors[606]. The German legislators consider this regime to be independent from the insolvency proceedings since BGH confirmed that liquidators do not have the power to deal with such

[603] Benjamín SALDAÑA VILLOLDO, "La acción individual…", *loc. cit.*, pp. 1363-1364.
[604] Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección…", *loc. cit.*, pp. 9 and ss.
[605] See BGH 6 Juin 1994, II ZR 292/91.
[606] Also see Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección…", *loc. cit.*, p. 15.

an action of the new creditors since it is a personal claim, and normally whether the new creditors will bring it or not would not affect the corporate assets in the insolvency proceedings[607].

In Spanish Law, it is suggested that such a case can be subject to Article 241 of *LSC*[608]. As we have mentioned, the commencement of the insolvency proceedings do not prevent an individual creditor to file a personal claim against directors for a direct loss caused by them. And directors' liability towards the new creditors will not disappear even after directors have made payment to all the creditors in the insolvency proceedings. This is because all the creditors can be reimbursed in the insolvency proceedings for the reason that they are creditors of the company. However, the additional liability of directors derives from the fact they have caused an additional and direct loss to the new creditors, while this kind of liability is different from directors' liability in the insolvency law. Based on this consideration, the new creditors can still file a personal action against directors even beyond the insolvency proceedings[609].

In order to examine whether an action brought by the new creditors fall within the scope of *"vis attractiva concursus"*, we may rely on ECJ's principles as well. Firstly, we cannot deny that to some extent such an action is connected with the insolvency proceedings. This is because, in accordance with Article 3 (1) of RI, the foreign new creditors can also participate in the insolvency proceedings opened in the Member state in which the company has its main centre of interests together with the old creditors. In this way, the new creditors can also get recovered as well. However, if it were so, it may be irrelevant to distinguish the new creditors from the old ones, because the main objective of the insolvency proceedings does not lie in knowing why a creditor becomes creditor, but in knowing how many corporate assets may a creditor get. In this sense, an action filed by these new credtiors is not derived from insolvency but is based on a non-contractual context.

[607] In this sense, see Fernando MARÍN DE LA BÁRCENA, *La acción individual..., op. cit.*, p. 379. Also see BGH 30 May 1998, NJW 1998, 2667.
[608] Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección…", *loc. cit.*, p. 15.
[609] See Alberto ALSONSO UREBA, "La responsabilidad concursal…", *loc. cit.,* pp. 561-562.

Secondly, in accordance with the German doctrine, it is also possible for the new creditors to bring a personal action in order to seek relief directly from directors. This kind of actions can brought by the new creditors themselves rather than collectively by liquidators in the insolvency proceedings. And the regime of personal action is not a mechanism to obtain the repayment of the debt from the company, but to demand compensation for a direct loss caused by directors[610]. In this sense, a personal claim initiated by the new creditors against directors is independent from the insolvency proceedings since they are based on two completely different grounds. Such a personal claim is for the personal interests of the new creditors rather than for the collective interests of all the creditors. Therefore, it does not show enough connections with the insolvency proceedings and should not fall within the RI. Instead, it should be governed by RBI.

2.4. Conclusion

RBI has clearly precluded its application from the insolvency proceedings in order to leave them governed by RI. However, in the insolvency-related cases, ECJ has establish a EU criterion of *"vis attractiva concursus"*, based on which only the claims which derive directly from the insolvency proceedings and are closely linked with them could fall within the scope of *"vis attractiva concursus"* and be covered by RI. Since the insolvency proceedings should be commenced in the court of a Member state within its territory the company has its main centre of interests in accordance with Article 3 of RI, the proposal to the amendment of RI also suggested that the court having competence under Article 3 could also establish jurisdiction to determine the actions which derive directly from the insolvency proceedings and which are closely connected with them. However, owing to the fact that the Member states establish different substantive criteria in respect to the insolvency-related proceedings, a similar regime may get different treatment in different Member states by following the EU's criterion to examine whether such a regime falls within the scope of *"vis attractive concursus"*. Under this circumstance, in order to improve the effectiveness and efficiency of the insolvency-related proceedings through a multiple mechanism, where such an action is related to another action against the same defendant which is based on general civil and commercial law, the proposal gives the liquidator the possibility to bring both actions in the courts of the defendant's domicile by

[610] Jesús QUIJANO GONZÁLEZ, "Responsabilidad societaria y…", *loc. cit.*, pp. 2-3.

virtue of Article 2 as well. This rule would allow a liquidator to bring, for example, an action for directors' liability based on insolvency law together with an action against that director based on tort law or company law in the same court[611].

An action filed against directors for their delay or failure to file for the company's insolvency is also considered as an insolvency-related claim. ECJ has confirmed that the French regime falls within the scope of *"vis attractiva concursus"* and could be governed by RI. Besides, based on the analysis of the German regime, we could conclude that it falls within the scope of *"vis attractiva concursus"* as well. However, in Spain, since both company law and insolvency law enable creditors to bring a similar action against directors, the examination on the Spanish rules is more complicated. On one hand, the action in Article 172 bis of *LC* undoubtedly falls within the scope of *"vis attractiva concursus"* since it should be brought by the company's liquidator and is for the interests of the general body of creditors. On the other hand, the action in Article 367 of *LSC* could be brought by individual creditors before or after the insolvency proceedings for their own interests, and it should be suspended during the insolvency proceedings. In this sense, the action in *LSC* goes beyond the scope of *"vis attractiva concursus"* and is not covered by RI.

In this sense, as we have mentioned, if it leaves for each Member state to decide whether a matter falls within the scope of RI by applying the EU criterion of *"vis attractiva concursus"*, it may cause more difficulties to the application of RI. Therefore, it should give the court in which the insolvency proceedings are opened the possibility to characterize the mentioned matter by following both the EU criterion of *"vis attractiva concursus"* and *lex fori* in order to decide whether such a regime is governed by RI. However, different approaches towards the characterization in the courts of different Member states could not absolutely eliminate the potential legal uncertainty. Under this circumstance, it should give the court in which the insolvency proceedings are opened the possibility to make a characterization by following both the EU criterion of *"vis attractiva concursus"* and *lex societatis*. If it were so, although such an action may be dealt with by different courts, national judges could obtain a similar conclusion by referring to *lex societatis*, irrespective of where the insolvency proceeding are opened. In this way, at least

[611] See Proposal of amendment to RI, p. 7.

we could uniformly leave this matter to be decided under the same legal framework (*lex societatis*) and reduce the litigation risk stemming from the legal divergence existing between the Member states.

Furthermore, since directors' misconducts on the verge of the company's insolvency may lead some creditors who are not well informed to continue to enter into a contract with the company, some Member states also enable these so-called "new creditors" to seek remedy from directors based on non-contractual grounds. A claim brought by these new creditors should be independent from the insolvency proceedings since it is relevant to distinguish the "new creditors" from the "old creditors" and the particular cause of action should also enable the "new creditors" to file a special claim beyond the insolvency proceedings. Therefore, such a claim should not be governed by RI but be subject to RBI.

3. Arbitration and directors' liability

In accordance with Article 1 (2) of RBI, the issues relating to arbitration are excluded by the Regulation, and court jurisdiction can be avoided by arbitration clauses and thus exclude the provisions of RBI[612]. In spite of the exclusion, arbitration agreement is as important as the choice of forum agreement in the regime of directors' liability. If directors could conclude a choice of forum clause with the company or shareholders or creditors, they could conclude an arbitration agreement to deal with their dispute as well since arbitration allows a more rapid resolution than classical litigation. Thus it is relevant for us to insert a further discussion on the relationship between jurisdiction and arbitration clauses as the first step, and then we will focus on the arbitrability of directors' liability.

2.3.1. Arbitration and judicial litigation

3.1.1. Arbitration and court intervention

The intention of the EU legislators was to exclude arbitration matters entirely and leave them to be decided by the special international agreements since there were many international agreements on arbitration to which the Member states were parties[613]. In the

[612] See Article 1 (2) of RBI.
[613] Pippa ROGERSON, "Article 1", *loc. cit.*, p. 68.

aspect of international commercial arbitration, although the 1958 New York Convention is the most important international treaty dealing with the recognition and enforcement of foreign arbitration awards, it does not have an effect on the harmonization of the arbitration laws of different countries[614]. In this regard, UNCITRAL has introduced an effective Model Law on arbitration on which national legislation of many countries is based, which goes through the arbitral process from beginning to end[615]. Its simple and readily understandable form makes any state proposing to adopt a modern law of arbitration regard this law as a base line[616].

Generally, arbitration is characterized by its mandatory, binding and final nature, which makes arbitration popular because of its business efficacy and certainty[617]. In accordance with Article 5 of the Model Law, no court shall intervene except where so provided in this Law[618]. Meanwhile, by virtue of Article 8 of the Model Law, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration if a party so requests not later than when submitting his first statement on the substance[619]. On this basis, it seems that arbitral activities are essentially jurisdictional, and they allow arbitrators to create and perpetuate the basis for their own jurisdiction without review by the courts[620]. Under this circumstance, arbitration clauses seek to remove any dispute from the courts and instead to have the issue decided by arbitration[621]. However, it does not mean that arbitration and the courts are antagonists or competitors. Instead, the basic idea lies in the balance of party autonomy and judicial intervention. In this sense, arbitration and the courts are complementary legal processes, and arbitrators and judges are partners in a system of international commercial justice[622].

[614] Alan REDFERN, Martin HUNTER, *Law and Practice of International Commercial Arbitration (Fourth Edition)*, London, Thomson/Sweet & Maxwell, 2004, pp. 69-70.
[615] Hannu HONKA, "Jurisdiction and EC Law: Loss or Damage to Goods", in Martin DAVIES (Editor), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, The Hague, Kluwer Law International, 2005, pp. 265-282, p. 270.
[616] Alan REDFERN, Martin HUNTER, *Law and Practice…, op. cit.*, pp. 70-71.
[617] Zheng Sophia TANG, *Jurisdiction and Arbitration…, op. cit.*, p. 12.
[618] See Article 5 of UNCITRAL Model Law on International Commercial Arbitration.
[619] See Article 8 (1) of UNCITRAL Model Law on International Commercial Arbitration.
[620] Klaus Peter BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (Volume II: Handbook),* The Hague, Kluwer Law International, 2006, p. 398.
[621] J. G. COLLIER, *Conflict of Law (Third Edition)*, Cambridge, Cambridge University Press, 2001, p. 96.
[622] Ljiljana BIUKOVIC, *Court Intervention in Arbitral Proceedings in Countries adopting the UNCITRAL Model Law on International Commercial Arbitration: An Impact of Legal Culture on Reception (Cases Studies of Canada, Hong Kong and Russia),* PhD Dissertation of the University of British Columbia, October 1999, pp. 54-55.

From this perspective, on one hand, the principle of "non-intervention" should be understood as where an arbitration agreement is validly made by the parties, the courts should respect the party autonomy and refrain from intervening into arbitration; on the other hand, the principle of "non-intervention" does not mean that the court will definitely lose its competence to deal with a matter subjecting to arbitration. On the contrary, the court intervention plays a role in assisting and supporting the arbitration in a case where arbitration is beyond expectation so as to ensure the due process interests of the parties[623].

Within the Member states, for example, in France, in conformity with Article 1448 of *Code de procédure civile* (*CPC*, French Civil Procedural Code), a court should decline jurisdiction when a dispute subject to an arbitration agreement is brought before it, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. Under this circumstance, a court may not decline jurisdiction at its own motion[624]. The French legislators have held that jurisdictional challenges are only permissible in a narrow set of circumstances while a valid arbitration agreement could exclude the intervention of court generally[625]. Meanwhile, in Spain, by virtue of Article 7 and Article 11 (1) of *Ley de Arbitraje* (Spanish Arbitration Act), the Spanish courts shall not intervene in the issues that are governed by this Act[626]. And the arbitration agreement binds and prevents the courts from ruling on the matters submitted to arbitration, providing that the party concerned invokes the arbitration agreement by raising the declinatory exception[627]. However, such a statement does not mean that the submission of a dispute to arbitration will make all the courts incompetent to deal with such a dispute[628]. In this case, it is not the existence of an arbitration agreement that makes the courts incompetent, but the courts refrain themselves from intervening into the dispute which the parties have voluntarily and properly submitted to arbitration[629]. In this sense, if the defendant does not challenge the jurisdiction of a court within a

[623] José Carlos FERNÁNDEZ ROZAS, "Le rôle des juridictions étatiques devant l'arbitrage commercial international", *Recueil des cours*, Vol. 290, 2001, pp. 9-224, pp. 38 and ss.
[624] See Article 1448 of *CPC* (2011 New Decree).
[625] Ozlem SUSLER, *Jurisdiction of Arbitration Tribunals: A Comparative Study*, PhD Dissertation of La Trobe University (Australia), 2012, p. 3.
[626] See Article 7 of *Ley de Arbitraje*.
[627] See Article 11 (1) of *Ley de Arbitraje*. Also see Calvin A. HAMILTON, Luis CAPIEL, "Madrid Update: Foreign Arbitral Award: Parallel Evaluation Of The Validity Of An Arbitral Clause By The Court Of Exequatur And By An Ordinary Court In The Same Jurisdiction", *Mealey's International Arbitration Report*, Vol. 24, No. 1, January 2009, pp. 1-3, p. 2.
[628] Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, p. 245.
[629] Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, p. 245.

reasonable time, he could be considered to have given up insisting on the arbitration agreement[630]. Besides, it seems that *ZPO* (German Code of Civil Procedure) also follows the same criterion. By virtue of Sections 1026, 1030 and 1032 (1), any claim involving an economic interest can be the subject of an arbitration agreement[631], and no court shall intervene except those provided in this Law[632]. In the case where an action or application concerning a matter that is the subject of an arbitration agreement is brought before a court, the court could reject the action inadmissible if the defendant raises an object within a certain period of time[633]. The German provisions model on Articles 5 and 8 of Model Law, and provide for additional types of court intervention at a very limited extent[634]. Therefore, the Model law should, in principle, serve to guide the interpretation of the provisions of German Arbitration Law[635]. As we have mentioned, the basic principle in the Model law is that arbitrators have the power to rule on their own jurisdiction[636]. However, the Model law does not give all the powers to arbitrators but allows additional court proceedings under certain circumstances. In this sense, it could be understood that in German law, the arbitration agreement will not automatically make the courts incompetent, but the court refrain from intervening into arbitration in order to respect the party autonomy and support the arbitration proceedings. Furthermore, in British law, *Arbitration Act 1996* is also consistent with the objective of the Model Law, since it has also confirmed the principle of non-intervention of the court into arbitration[637]. In a case where a matter is subject to arbitration is brought before a court by a party, the other party could seek help from the court and make application to stay the proceedings[638]. Under this circumstance, it also

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[630] Miguel Ángel FERNÁNDEZ-BALLESTEROS, "Artículo 11: Convenio arbitral y demanda en cuanto al fondo ante un Tribunal", in Julio GONZALÉZ SORIA (Coord.), *Comentarios a la nueva ley de Arbitraje: Ley 60/2003, de 23 de diciembre (2ª edición),* Navarra Arzandi/Thomson Reuters, 2011, pp. 147-168, pp. 153-154.

[631] See Section 1030 (1) of *ZPO*. The Tenth Book of *ZPO* was replaced by the German arbitration law 1998 based on the Model Law. See Sandra SYNKOVÁ, *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A comparative Analysis of the English, German and Swiss Legal Order*, Heidelberg/New York, Springer, 2013, p. 197.

[632] See Section 1026 of *ZPO*.

[633] See Section 1032 (1) of *ZPO*.

[634] Julian D. M. LEW, Loukas A. MISTELIS, Stefan Michael KRÖLL, *Comparative International Commercial Arbitration*, The Hague, Kluwer Law International, 2003, p. 358.

[635] Sandra SYNKOVÁ, *Courts' Inquiry into…, op. cit.,* p. 198.

[636] Ljiljana BIUKOVIC, *Court Intervention in…, op. cit.,* p. 68.

[637] See Section 1 (c) of *Arbitration Act 1996*.

[638] See Section 9 (1) of *Arbitration Act 1996*.

seems that the minimum intervention of the court is to support rather than to displace or usurp the arbitration proceedings[639].

Therefore, on one hand, it is commonly accepted that arbitration and judicial litigation are two parallel proceedings in which one supports the other, and a valid arbitration agreement provides an exception for the court to refrain from exerting a judicial intervention to arbitration[640]. Under this circumstance, the court has no discretion but must recognize the derogation power of a valid arbitration clause. On the other hand, the courts' stay of proceedings in favour of arbitration will not make them lose the competence definitely. On the contrary, the parties' right to submit a dispute to a court cannot be deprived by an arbitration agreement. Any arbitration agreement in which the parties agree to forbid submitting their dispute to a court should be regarded as null or void[641]. When an arbitral tribunal cannot rule on its jurisdiction, a court could act in support of arbitration in order to ensure that the parties are not without recourse.

3.1.2. Arbitration and exclusive jurisdiction

To some extent, it seems that there is no big difference between an arbitration agreement and a choice of forum agreement, since both of them could derogate from the jurisdiction of a court by following certain formal requirements. In respect of a jurisdiction clause, under the framework of RBI, a choice of court agreement can fix the jurisdiction of the chosen court and oust the jurisdiction of the otherwise competent court[642]. However, a jurisdiction clause has no legal force if it seeks to evade the exclusive jurisdiction by virtue of Article 22 of RBI[643], and a particular court under Article 22 of RBI will often have exclusive jurisdiction that cannot be ousted by means of a jurisdiction clause. Conversely, in respect of an arbitration clause, the two parties could agree to submit their dispute to an arbitral tribunal so as to exclude the intervention of court into such a matter, even though it could be a subject matter falling within the scope of exclusive jurisdiction[644]. It is the biggest difference existing between the two kinds of agreements. It is logical since an

[639] Robert MERKIN, Louis FLANNERY, *Arbitration Act 1996 (Fifth Edition)*, Oxon/New York, Informa Law from Routledge, 2014, pp. 9-10.
[640] Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, pp. 248-249.
[641] Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, p. 243.
[642] Ulrich MAGNUS, "Article 23", *loc. cit.*, p. 455.
[643] *Trevor C. HARTLEY, International Commercial Litigation…, op. cit., p. 166.*
[644] Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, p. 250.

arbitration clause submitting a dispute to an arbitral tribunal relies on an independent arbitral mechanism that is different from the jurisdictional mechanism. However, a jurisdiction clause conferring jurisdiction to a court goes within the jurisdictional mechanism in which it refers to the distribution of jurisdiction between different courts. Within the jurisdictional mechanism, different levels of jurisdiction have different judicial powers and legal authority. Under this circumstance, a choice of forum agreement should respect this rule so as to be able to derogate from the jurisdictional authority owned by another court. In this sense, even if Article 23 of RBI applies, the parties cannot totally eliminate the originally existing jurisdiction by a choice of forum agreement, while it is possible if they exclude the jurisdiction of all competent courts through an arbitration agreement[645].

In conclusion, Article 22 of RBI only decides that a Spanish court cannot deal with the proceedings mainly concerning the matters such as the rights *in rem* of an immovable property situated in France or the validity of the patent registered in Germany, but does not forbid an arbitration concerning the same matters to take place in a Spanish arbitral tribunal[646]. The main concern of Article 22 is how to achieve reasonable distribution of exclusive jurisdiction to the judges of the Member states while it has nothing to do with the submission to arbitration of the subject matters which are enumerated in this Article[647], thus the infraction of the exclusive jurisdiction cannot become a reason for the court to decline a foreign arbitral judgment[648].

3.2. An arbitration agreement concerning directors' liability in a company in bonis

As we have explained, a court cannot establish jurisdiction under Article 22 (2) if the main objective in this case is not the examination on the validity of the board's decision but is to seek compensation from directors. Nevertheless, derived from what we have just concluded above, shareholders or creditors may submit a subject matter such as the validity of the decisions of the company's board or the dissolution of the company to arbitration. Therefore, in a case where a Member state provides a liability regime for

[645] Ulrich MAGNUS, "Article 23", *loc. cit.*, p. 459.
[646] Miguel Ángel FERNÁNDEZ-BALLESTEROS, "Artículo 11…", *loc. cit.*, pp. 167-168.
[647] Miguel Ángel FERNÁNDEZ-BALLESTEROS, "Artículo 11…", *loc. cit.*, pp. 168.
[648] Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, p. 250.

shareholders or creditors to challenge the validity of a decision made by the managing board, they could submit such an action to arbitration.

In Spanish law, a company could be held liable if a decision made by its board is declared void or annullable[649]. In accordance with Article 11*bis* (3) of *Ley de Arbitraje*, a corporate statute could establish an arbitration clause and designate an arbitral tribunal to deal with an action aiming at challenging the validity of a board's decision[650]. Under this circumstance, shareholders or creditors could invoke such a clause and submit such an action to the arbitral tribunal. In a case where a corporate statute does not include such an arbitration clause, shareholders or creditors could also conclude such a clause directly with the company and designate an arbitral tribunal to deal with their dispute. However, in a Member state in which directors rather than the company should be held liable in a case where a decision made by the managing board is void or annullable, and it brings damage to shareholders or creditors, it is apparently that the two parties could also designate an arbitral tribunal in order to determine the validity of the decision at issue. When an arbitral judgment is made, shareholders or creditors could assert a claim before a court to establish liabilities to directors based on the arbitral judgment. Besides, undoubtedly shareholders or creditors could also conclude an arbitration agreement with directors and submit all the disputes concerning the validity of decision and directors' liability to an arbitral tribunal without having to resort to a court subsequently.

In a corporate action, since directors could conclude a choice of forum with the company and designate a court to deal with their dispute, undoubtedly the two parties could submit their dispute to arbitration as well. Such an arbitration agreement may be included into the contract which has been previously concluded by directors and the company, or the two parties may independently conclude an *ex post* agreement after directors have caused damage to the company. Meanwhile, in some Member states, an arbitration agreement contained in the article of association or the statutes of companies could also be recognized as a valid and binding agreement[651]. For example, the Spanish legislators have realized the

[649] See Article 206 (3) of *LSC*.
[650] See Article 11*bis* (3) of *Ley de Arbitraje*.
[651] Albert J. VAN DEN BERG, *International Commercial Arbitration: Important Contemporary Questions*, The Hague, Kluwer Law International, 2003, p. 60.

importance to include the corporate affairs into the scope of arbitration[652]. In accordance with Article 11*bis* (1) of *Ley de Arbitraje*, companies could submit the corporate affairs to arbitration through an agreement, while such an agreement could be inserted into the articles of association or the corporate statutes[653].

As is known to all, the articles of association or corporate statutes are usually agreed and made by the founders of the company. Even in the case of a one-person company in which the establishment of corporate statute refers to a unilateral act of a sole shareholder, this shareholder could also insert an arbitration clause to deal with a dispute within the company (here referring to a dispute between the company and its organs)[654]. When the company is validly constituted, the corporate statute will have binding effects not only on the founders who have concluded such a corporate convention, but also on the parties who will be affected by this convention, in which the organs and the members of the company will be included[655]. In the case of shareholders, similar to the case concerning a jurisdiction clause in the corporate statute, such an arbitration clause could only bind on the persons who become shareholders subsequently when it is indicated in the public register[656]. In the case of directors, we also believe that it makes no big difference between the case concerning a choice of forum clause and that of an arbitration clause. If the director is also one of the founders of the company, there is no reason why he opposes to an arbitration clause that he has agreed when establishing the corporate convention. If a person subsequently becomes director of the company, it may be doubtful whether he should be bound by such an arbitration clause. Under this circumstance, if a person intends to become a director, usually he is supposed to read carefully the corporate statute since his duties and obligations may be clearly indicated in the statute and he does not need to conclude a contract with the company specially. As long as he decides to accept the nomination, if he does not oppose to the arbitration clause previously contained in the corporate statute, he is considered to accept the content of the corporate statute in which the arbitration clause is included. However, if he opposes to the arbitration clause, he could

[652] Gorgonio MARTÍNEZ ATIENZA, *Comentarios a la Ley de Arbitraje (2011)*, Barcelona, Editorial vLex, 2011, pp. 76-78.
[653] Manuel OLIVENCIA RUIZ, "Artículo 11 *bis*: Arbitraje estatutario", in Julio GONZALÉZ SORIA (Coord.), *Comentarios a la…, op. cit.*, pp. 169-179, p. 173.
[654] Manuel OLIVENCIA RUIZ, "Artículo 11 *bis*: Arbitraje estatutario", *loc. cit.*, p. 174.
[655] Manuel OLIVENCIA RUIZ, "Artículo 11 *bis*: Arbitraje estatutario", *loc. cit.*, p. 175. Also see Also see Ulrich MAGNUS, "Article 23", *loc. cit.*, p. 498.
[656] Manuel OLIVENCIA RUIZ, "Artículo 11 *bis*: Arbitraje estatutario", *loc. cit.*, p. 175.

choose to give up the acceptance of the nomination or he may ask the company to conclude a new arbitration agreement with him so as to deal with their special dispute as well.

In a case where an arbitration clause is not in the pre-existing corporate statute but is subsequently included into the corporate statute that constitutes a modification, Spanish law could give us some reference. *Ley de Arbitraje* requires that the introduction of an arbitration clause should be supported by the shareholders representing two-thirds of the share capitals[657]. Such a statement has provoked some arguments, in which some scholars believe that such an arbitration agreement should be supported unanimously during the voting, otherwise imposing arbitration on shareholders that have not given their consent will imply the infringement of their rights as being freely subject to arbitration since freedom and willingness are basic principles of arbitration[658]. Conversely, other scholars tend to believe that the required two-thirds majority is appropriate since it is nearly impossible to achieve unanimity in the voting of shareholders under general circumstances[659]. If a law imposes a level of consensus that is extremely high, an arbitration clause will never be approved and introduced into the corporate statute. In this case, we also believe that the calculation of two-third majority seems to be more logical. As we have explained, the unanimity seems difficult to achieve, and a simple majority seems to be less persuasive. In a voting of shareholders concerning the introduction of an arbitration clause where nearly half of the shareholders oppose to such a clause, the arbitration clause cannot be regarded as a real consensus of shareholders, and the imposition of this clause will clearly be contrary to the interests of a great number of

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[657] See Article 11*bis* (2) of *Ley de Arbitraje*.

[658] Clifford J. HENDEL, Elena SEVILA, “Developments in Spanish Company Arbitration”, *Arbitration News*, Vol. 18, No. 12, September 2012, pp. 46-48, p. 47. Also see Manuel OLIVENCIA RUIZ, “El arbitraje en España: impacto de la Ley 11/2001, de reforma de la Ley 60/2003”, *Revista Jurídica de Catalunya*, Nº 4/2012, pp. 1-49, pp. 20 and ss. This article is available on the website: http://www.cuatrecasas.com/media_repository/docs/esp/el_arbitraje_en_espana._impacto_de_la_ley_11_2011,_de_reforma_de_la_ley_60_2003._revista_juridica_de_catalunya,_n_4_2012._653.pdf.

[659] Clifford J. HENDEL, Elena SEVILA, “Developments in Spanish…”, *loc. cit.*, p. 47. Also see José Fernando MERINO MERCHÁN, “Configuración del arbitraje intra-societario en la Ley 11/2011”, *Revista jurídica de Castilla y León*, Núm. 29, Enero de 2013, pp. 1-37, pp. 25-26. Available on: http://www.jcyl.es/web/jcyl/binarios/202/167/6.-%20Arbitraje%20intrasocietario%20-%20Digital.pdf?blobheader=application%2Fpdf%3Bcharset%3DUTF-8&blobheadername1=Cache-Control&blobheadername2=Expires&blobheadername3=Site&blobheadervalue1=no-store%2Cno-.
Also see Miguel VICENTE-ALMAZÁN PÉREZ, “La reforma de la ley de arbitraje: aspectos notariales y registrales”, El Notario del siglo XXI, Nº 38, 4 July 2011. This article is available on the website: http://www.elnotario.es/index.php/101-hemeroteca/revistas/revista-38/762-la-reforma-de-la-ley-de-arbitraje-aspectos-notariales-y-registrales-0-8653792942551704.

shareholders. Therefore, the criterion of two-thirds majority is more logical since it will only affect a few shareholders who vote against the introduction of such a clause. As we have mentioned, if the shareholders who oppose to an arbitration clause intend to remain the membership in the company, they should respect the consent achieved by nearly 70% or more of the shareholders. If submitting a corporate dispute in which these shareholders are one of the parties to arbitration really goes beyond their willingness, they could feel free to give up their membership and quit the company. In this sense, such an arbitration clause does not infringe their freedom of membership in the company.

In a derivative action, minority shareholders could also conclude an arbitration agreement with directors in order to deal with a corporate dispute. And similar to the case concerning a choice of forum clause in the corporate statute that we have mentioned above, if the company has previously established an arbitration clause in the statute, this clause should also be followed by minority shareholders and directors. However, it should be noticed that sometimes the minority shareholders among whom a shareholders' agreement may be concluded, and they may agree to submit a derivative action to arbitration. It remains unclear whether directors will be bound by such an agreement. In this case, we believe that the shareholders' agreement does not have binding effects on directors, since directors are not a contracting party to the shareholders' agreement. Unlike the articles of association or the corporate statutes which are the most important source of internal rules as regards the governance and could generally bind on all the members of the company including directors, a shareholders' agreement is only limited to the shareholders who have contracted such an agreement. However, a derivative action is not a dispute between the shareholders of the company but refers to an action raised by the minority to redress wrongs of directors committed against the company. Under this circumstance, the derivative action should not fall within the ambit of the arbitral clause that is contained in a shareholders' agreement[660].

In a personal action in which shareholders or creditors intend to establish liabilities to directors for a personal and direct loss caused by them, we believe that there is no big difference between a choice of forum agreement and an arbitration agreement. In fact, an

[660] Such a conclusion is inspired by a Cypriot doctrine, see Soteris PITTAS, "Cyprus: Arbitration and Derivative Actions", this article is available on the website: http://www.mondaq.com/x/162796/Arbitration+Dispute+Resolution/Arbitration+And+Derivative+Actions.

arbitration agreement could enable the two parties to designate an arbitral tribunal in a Member state in which a personal action is admissible so as to deal with their dispute. Besides, as we have mentioned, an action with the main objective of the dissolution of a company that falls within Article 22 (2) of RBI could also be submitted to arbitration. And the Report *Schlosser* held that the dissolution proceedings could embrace the disputes regarding the distribution of assets to shareholders are also included[661]. Under this circumstance, in a case where directors make an unfair plan of distribution of the corporate assets by which some shareholders could be affected, shareholders could submit such a matter to an arbitral tribunal. If the arbitral tribunal determines that such a distribution plan is manifestly unjust and should be void, shareholders could subsequently bring an action in the court in order to establish liabilities to the directors at issue. Nevertheless, shareholders and directors could also designate an arbitral tribunal to deal with all the disputes regarding directors' liability as well.

3.3. Arbitration and directors' liability in the insolvency or insolvency-related proceedings

3.3.1. The effects of insolvency on arbitration

It is possible that the insolvent debtors will conclude an arbitration agreement with the creditors before or after the commencement of the insolvency proceedings. Therefore, it is also relevant to assert a further discussion on how the insolvency proceedings affect the arbitration agreement. As we have mentioned, a valid arbitration agreement could impede the intervention of courts. However, the insolvency proceedings that are opened up in a court usually have a universal nature that could imply the unity of administration, unity of procedure, unity of distribution of the assets and proceeds and unity of the applicable law. And the universality of the main insolvency proceedings prohibits any individual creditor to steal a march on his competitors[662]. In this sense, it ensures equality for all the creditors and allows all the creditors to participate into the debt-enforcement through the representation of the insolvency administrators[663]. The advantages of the universal insolvency proceedings could "attract" all the disputes arising from the insolvency to the

[661] Peter SCHLOSSER, *Report on the Convention*, OJ 1979 C 59/71, paragraph 58. Also see Luís DE LIMA PINHEIRO, "Article 22", *loc. cit.,* p. 427.
[662] Roy GOODE, *Principles of Corporate Insolvency Law (Fourth Edition)*, London, Sweet & Maxwell, 2011, p. 571.
[663] Rosalind MASON, "Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet", in Paul J. OMAR (Editor), *International Insolvency Law: Themes and Perspectives*, pp. 27-60, p. 47.

insolvency court and leaves the non-insolvent issues to be resolved in other courts (this is what we call *"vis attractiva concursus"*). It makes the insolvency law form a legal area of its own and definitely distinct from other areas[664]. From this perspective, it should be the insolvency law that decides which group falls within the scope of insolvency proceedings and which group does not show close connections with insolvency law, in which the examination on whether the arbitration should surrender to the insolvency proceedings is also included[665].

Insolvency proceedings are proceedings for the collection and distribution of the assets of a debtor in financial difficulties for the benefit of all the creditors who are involved in, or proceedings providing for reorganization and rehabilitation of the debtor's business in such situation[666]. In order to guarantee the equal treatment of all the creditors, it seems more appropriate for the insolvency court to determine the "pure" or "core" insolvent issues. For example, the insolvency court decides the initiation and termination of the insolvency proceedings; the appointment of insolvency administrators; the verification and admission of claims; the distribution of the assets of the debtor, etc.[667] Under this circumstance, "core" insolvency proceedings do not primarily concern disputes, but rather are proceedings for the execution of the insolvent party's assets[668]. On the contrary, arbitration is a method of settlement of disputes normally between two parties, which is solely based on those parties' autonomy and privity[669]. From this perspective, "core" insolvency and arbitration proceedings are entirely different proceedings with distinct purposes and characteristics, and the "core" insolvency matters are almost universally considered as not arbitrable since they may greatly affect the public order[670].

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[664] Jay Lawrence WESTBROOK, Charles D. BOOTH, Christoph G. PAULUS, Harry RAJAK, *A Global View of Business Insolvency Systems*, Leiden, Martinus Nijhoff Publishers, 2010, p. 206.

[665] Miguel GÓMEZ JENE, "Concurso y arbitraje internacional", *Cuadernos de Derecho Transnacional*, Octubre 2010, Vol. 2, Nº 2, pp. 92-103, p. 94.

[666] Christoph LIEBSCHER, "Insolvency and Arbitrability", in Loukas A. MISTELIS, Stravros L. BREKOULAKIS (Eds.), *Arbitrability: International & Comparative Perspectives*, The Hague, Kluwer Law International, 2009, pp. 165-178, p. 166.

[667] Iván HEREDIA CERVANTES, *Arbitraje y concurso internacional*, Navarra, Thomson/Civitas, 2008, p. 36.

[668] Zheng Sophia TANG, *Jurisdiction and Arbitration…, op. cit.*, p. 98.

[669] Christoph LIEBSCHER, "Insolvency and Arbitrability", *loc. cit.*, p. 166.

[670] Robert B. KOVACS, "A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration", *2012 Gold Medal Winning Article of the III Prize in International Insolvency*, pp. 1-117, p. 57. This article is available on the website: http://www.iiiglobal.org/component/jdownloads/finish/391/5914.html. Also see Christoph LIEBSCHER, "Insolvency and Arbitrability", *loc. cit.*, p. 166. Also see Mauro RUBINO-SAMMARTANO, *International Arbitration: Law and Practice (Third Edition)*, New York, JurisNet, 2014, p. 178. Also see Julian D. M.

However, those issues that do not present "pure" or "core" insolvent natures may be arbitrable. According to ECJ's decisions, we could find that the principle of *"vis attractiva concursus"* aims at attracting all the disputes that derive directly from the insolvency and have close connections with insolvency proceeding to the insolvency court. The intention of this principle is to divide the courts into two types: the courts that are competent to establish jurisdiction on insolvency or insolvency-related matters, and the courts dealing with non-insolvent matters. Under this principle, the insolvency courts are conferred the exclusive jurisdiction to deal with the insolvency-related matters[671]. However, the insolvency courts only show the exclusive characteristics with respect to jurisdiction, which means that *"vis attractiva concursus"* only deals with the distribution of jurisdiction between the courts and gives priority to the insolvency courts in the area of the insolvency-related matters, while it does not apparently exclude the intervention of arbitration in such a case. As we have mentioned, a valid arbitration agreement could survive the exclusive jurisdiction of a court. Besides, in an insolvency-related action which may help increase the available assets for distribution, it makes no big difference whether such a matter is dealt with by an arbitral tribunal or a competent insolvency court since the interests of the general body of creditors will not be altered only because of picking up different mechanisms of dispute resolution. In fact, arbitration may be more cost-effective and achieve greater efficiency than judicial litigation to some extent. If it were so, we could hardly find any adverse influence of arbitration to the insolvency proceedings in this case. However, in a case referring to an arbitration agreement that only benefits some creditors in an insolvency-related matter but could greatly affect the corporate assets, arbitration may only represent the individual interests of a group of creditors but do not cover the general body of creditors[672]. In this case, these creditors could submit to an arbitral court and proceed to the debt-enforcement previously than other creditors. If it allows the arbitration proceedings to be independent from the insolvency proceedings, the previous repayment to these creditors diminish the corporate assets that are available for the insolvency distribution, and will be detrimental to the rest of the creditors. Under this

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LEW, Loukas A. MISTELIS, Stefan Michael KRÖLL, *Comparative International Commercial…, op. cit.*, p. 208. In regard of "arbitrability" and "public order", see José Carlos FERNÁNDEZ ROZAS, "Le rôle des juridictions…", *loc. cit.*, pp. 110 and ss.

[671] Faustino CORDÓN, "Concurso y convenios arbitrales (a propósito de la pretendida reforma del art. 52.1 LC)", *Anuario de derecho concursal*, Nº 23, 2011, pp. 163-175, p. 166.

[672] Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, p. 14.

circumstance, the private nature of arbitration and the public policy driven by collective procedures under national insolvency laws can be seen to conflict and a collision between the two proceedings may occur[673]. Even though the arbitration agreement may not definitely lose its effects since it does not deal with a "core" insolvency issue, the effect of such an arbitration agreement should be decided by the insolvency law rules[674].

3.3.2. When arbitration agreement is concluded before the commencement of the insolvency proceedings

In the case where an arbitration agreement is concluded before the declaration of insolvency for dispute resolution, the commencement of insolvency proceedings does not, in principle, prevent a foreign arbitral tribunal from deciding issues with respect to the non-performance of contractual or non-contractual obligations[675]. In the arbitration agreement in which the debtor is a party, arbitration agreement does not automatically lose its effects only because the debtor encounters financial difficulties. If the debtor's assets are not altered and the general interests of the creditors are not impaired by the arbitration proceedings, such an arbitration agreement may continue to be valid. Besides, in a case where the debtor is not a party but arbitration may have strong connections with the debtor, for example, directors' liability to make up the corporate assets of an insolvent company, if the arbitration proceedings could help increase the available assets for distribution, we could hardly tell why insolvency proceedings should suspend the arbitration proceedings.

RI does not clearly indicate the effects of the insolvency proceedings on the concluded arbitration agreements the proceedings of which have not been commenced yet. In accordance with Article 4 (2) (e), *lex concursus* decides the effects of insolvency proceedings on current contracts to which the debtor is party. In this case, the arbitration agreement could be considered as a contract since it is based on the party autonomy of the two parties, and the formal requirements of such an agreement are similar to those in a contract as well[676]. Although an arbitral agreement mainly concerns procedural matters

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[673] Klaus SACHS, "Insolvency Proceedings and International Arbitration", *Collected Courses of the International Academy for Arbitration Law*, Year 2011, Volume 1, at 1 (2013), pp. 1-46, p. 16.

[674] Miguel GÓMEZ JENE, "Concurso y arbitraje internacional", *loc. cit*, p. 94. Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, p. 19.

[675] Robert B. KOVACS, "A Transnational Approach to…", *loc. cit.*, p. 54.

[676] Miguel VIRGÓS SORIANO, Francisco J. GARCIMARTÍN ALFÉREZ, *Derecho procesal civil internacional…, op. cit.*, pp. 311-312.

while a normal contract mainly concerns substantive disputes[677], the different approaches in the contention does not impede an arbitral agreement to be regarded as contractual in essence[678], for the fact that it reflects the real consensus of the two parties who voluntarily assume procedural obligations to each other. Therefore, an arbitration agreement in this case could be subject to Article 4 (2) (e)[679].

Under this circumstance, the law of court in the place where the insolvency proceedings are opened up could decide the effects of insolvency on the arbitration agreement concerning "non-core" insolvent matters. The *International Working Group on European Insolvency Law* has concluded that the essence of insolvency proceedings in Europe reflects the common characteristics of the insolvency laws of the European Member states[680]. In this case, most of the Member states recognize that the arbitration agreement survives the declaration of insolvency and remains valid[681]. For example, in France, an arbitration agreement continues to be binding in spite of the declaration of insolvency[682]. Besides, in Germany, the validity of an arbitration agreement remains unaffected by insolvency as well[683]. Meanwhile, in the UK, the insolvency of a party does not render the arbitration agreement invalid, given that there is no provision under English law annulling the arbitration agreement on the basis of insolvency[684]. However, there are Member states that render the arbitration agreement null and void. For example, in Poland, Articles 142 of *Polish Bankruptcy and Reorganization Law* provides that any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any arbitration proceedings shall be discontinued[685]. In the case of Spain, Article 52 (1) of the

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[677] Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, pp. 84 and ss.

[678] Pilar PERALES VISCASILLAS, "Los efectos del concurso sobre los convenios arbitrales en la Ley Concursal 22/2003", *Diario La Ley*, Nº 6035, Año XXV, Ref. D-129, 2004, pp. 1-39, p. 8.

[679] Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, pp. 91-92.

[680] Bob WESSELS, "Principles of European Insolvency Law", *International Insolvency Institute*, pp. 1-8, p. 2. This article is available on: http://www.iiiglobal.org/component/jdownloads/finish/39/405.html.

[681] Klaus SACHS, "Insolvency Proceedings and…", *loc. cit.*, pp. 17 and ss.

[682] See Cass. com. 10 janvier 1984 and Cass. com. 12 février 1985. Also see Klaus SACHS, "Insolvency Proceedings and…", *loc. cit.*, p. 17. Also see Alexis MOURRE, "Arbitraje y Derecho concursal: Reflexiones sobre el papel del juez y del árbitro", *Revista de la Corte Española de Arbitraje*, Nº 2007, 2007, pp. 227-240, p. 230.

[683] See BGH 20 Nov. 2003, II ZB 24/03; BGH 17 Jan. 2008, III ZB 11/07. Also see Klaus SACHS, "Insolvency Proceedings and…", *loc. cit.*, p. 18.

[684] See *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ. 677, para. 13. Also see Stefan KRÖLL, "Arbitration and Insolvency: Selected conflict of laws problems", in Franco FERRARI, Stefan KRÖLL (Eds.), *Conflict of Laws in International Arbitration*, München, Sellier/European Law Publishers, 2011, pp. 211-256, pp. 223-224.

[685] See *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ. 677, para. 4.

old *LC* held that the arbitration agreement entered into by the debtor would not be enforced after the declaration of insolvency[686]. Nevertheless, the reform to *LC* in 2011 has modified the old Article 52 (1) with the objective to adapt to the European standards and removes the incoherence existing to date between the two sections of article 52[687]. The Reform intends to maintain the validity of the arbitration agreement entered into by the debtor as it relates to civil actions that, despite the fact they could affect the debtor's assets, could have been initiated independently of the declaration of insolvency[688]. However, it also provides that the competent court may suspend the arbitration agreements previously signed if they decide that these agreements may bring adverse effects to the conduct of the insolvency proceedings[689]. It seems that an arbitration agreement in which the debtor is a party only survives the declaration of insolvency but is not definitely immune to the insolvency proceedings, the insolvency court could annul such an agreement in a case it believes to be necessary. Meanwhile, Article 52 (1) of *LC* states that its application cannot affect the international treaties on arbitration. In this case, it is relevant to mention a Spanish judgment in which the judge held that Article 52 (1) of *LC* could not apply to international arbitration but such a case should refer to the 1958 New York Convention or the European Convention on International Commercial Arbitration[690]. However, such a decision seems to be doubtful. Firstly, Article 52 (1) of *LC* does not clearly exclude its application from the international arbitration but only provides that its application cannot affect the current international treaties that Spain has become a contracting state. Under this circumstance, Article 52 (1) of *LC* still reserves it availability to an international arbitration agreement as long as it does not go beyond the rules in those international treaties. Secondly, the focus on this judgment was incorrect since it did not lie in the examination of the effects of insolvency on the concluded arbitration agreement but the judgment was concentrated on the examination on the validity of such agreement. As is known to all, the validity of an arbitration agreement in a non-insolvency situation should refer to those normal rules that

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[686] See Article 52 (1) of LC (Ley 22/2003). Also see Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, pp. 86 and ss. Also see Manuel Jesús MARÍN LÓPEZ, "Comentario al artículo 52", in Rodrigo BERCOVITZ RODRÍGUEZ-CANO (Dir.), *Comentarios a la Ley Concursal*, Vol. 1, Madrid, Tecnos, 2004, pp. 526-542, pp. 534 and ss.

[687] See Preamble of Ley 11/2011 (Section IV, Paragraph II). Also see Rafael HINOJOSA SEGOVIA, "La Nueva Ley de Arbitraje", *Economist & Jurist*, Vol. 19, Nº 152, 2011, pp. 16-27, p. 27.

[688] See Article 52 (1) of LC (Ley 11/2011). Also see Calvin A. HAMILTON, José ÁNGEL FABRE, "Spanish Arbitration Law Reform In Relation With Insolvency Act", *MEAKEY'S International Arbitration Report*, Vol. 26, No. 2, February 2011, pp. 3-5, p. 4.

[689] See Article 52 (1) of LC (Ley 11/2011).

[690] See sentencia de la Audiencia Provincial de Barcelona (Sección 15ª) de 29 de Abril de 2009, JUR\2009\472969.

are not based on insolvency considerations (i.e., *lex arbitri* or *lex societatis* which could decide the capacity of a company to become a party in arbitration)[691]. On the contrary, the consequences that a valid arbitration agreement will meet on the declaration of insolvency should exclusively be determined by internal or international insolvency law rules[692].

However, the fact that neither of the two mentioned international conventions contains provisions regarding the effects of insolvency proceedings on arbitration agreements makes the two conventions irrelevant in solving such difficulties. Therefore, we could only refer to RI within the EU territory in such a case[693]. Following the line of Article 4 (2) (e) of RI, as we have mentioned, if the insolvency proceedings are opened up in the Spanish territory, Spanish law could decide the effects of the insolvency proceedings on a current arbitration agreement. Under this circumstance, apparently Article 52 (1) of *LC* could be referred to in order to decide the effect of an arbitration agreement designating a foreign arbitral tribunal[694].

Therefore, the main approach followed by the insolvency law rules of the EU Member states accepts that the arbitration agreements continue to be valid after the declaration of insolvency. It may be relevant for us to examine whether such a conclusion applies to directors' liability deriving from the delay or failure to petition for the insolvency proceedings. As we have mentioned, under French and English laws, directors will be forced to make contribution to the corporate assets for the breach of obligations to file for insolvency. It is doubtful whether the company (the debtor) could previously conclude an arbitration clause with its directors in order to submit such a dispute to an arbitral agreement when it occurs. On one hand, in accordance with Article L. 651-2 of French *Code de commerce*, it seems that only the court could have the competence to decide directors' liability (individually or jointly) and the quantum that directors should contribute

[691] Iván HEREDIA CERVANTES, "Tratamiento concursal del convenio arbitral: la modificación del artículo 52.1 de la Ley Concursal", *Diario La Ley*, Nº 7576, Año XXXII, Ref. D-87, 2011, pp. 1-12, p. 5. Also see Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, pp. 19 and ss.

[692] Iván HEREDIA CERVANTES, "Tratamiento concursal del…", *loc. cit.*, p. 5.

[693] David GARCÍA BARTOLOMÉ, "Los efectos del concurso sobre el arbitraje tras la Ley 11/2011", in Juan DAMIÁN MORENO (dir.), *La reforma de la ley de arbitraje de 2011: comentarios a la Ley 11/2011, de 20 de mayo*, La Ley, 2011, pp. 211-289, pp. 244 and ss.

[694] Miguel GÓMEZ JENE, "El nuevo artículo 52.1 de la Ley Concursal", *Diario la Ley*, Año XXXII, Ref. D-373, 2011, pp. 1-11, pp. 8-9.

to the corporate assets[695]. Similarly, Section 214 of *Insolvency Act 1986* also states that the court declares a director to be liable to make contribution to the corporate assets as it thinks proper[696]. On this basis, the competence to decide directors' liability for not filing for insolvency only belongs to the insolvency court during the insolvency proceedings, and such an issue should not be arbitrable. On the other hand, let us imagine that the company could previously conclude an arbitration agreement with its directors to solve a dispute for directors' delay or failure to file for the insolvency. Under the pressure of such an agreement, directors would be compelled to file for the opening of the insolvency proceedings so as to avoid liabilities. If it were so, it is obvious that the conclusion of an arbitration agreement is meaningless except for giving a deterrent effect upon directors.

Under German law, directors will be held jointly liable for creditors for the delay or failure to petition for the commencement of the insolvency proceedings when they are due, while such an action to establish liability should be brought by the insolvent administrator during the insolvency proceedings[697]. Although it does not refer to a dispute in which the insolvent company (the debtor) is a party, the submission to arbitration is not permitted since such an issue should be dealt with by the insolvency court during the insolvency proceedings.

Under Spanish law, on one hand, directors could be held liable by individual creditors due to the failure to file for the insolvency proceedings[698]. As we have explained, such an issue does not fall within the scope of *"vis attractiva concursus"*. Therefore, in theory, directors and individual creditors could submit their dispute to arbitration. In this case, Article 4 (2) (f) of RI has clearly states that *lex fori concursus* decides the effects of the insolvency proceedings on proceedings brought by individual creditors, except for lawsuit pending[699]. In this way, if the insolvency proceedings are commenced in Spain, Spanish law should be applicable to deal with such an issue. However, in accordance with Article 51 *bis* of *LC*, such a liability regime should be suspended during the insolvency proceedings[700], which means that even if the two parties have concluded an arbitration agreement to deal with

[695] See Art. L. 651-2 of *Code de commerce*.
[696] See Section 214 (1) of *Insolvency Act 1986*.
[697] See §92 of *InsO*.
[698] See Article 367 of *LSC*.
[699] See Article 4 (2) (f) of RI.
[700] See Article 51 *bis* of *LC*.

their dispute, the arbitration agreement will lose its effects during the insolvency proceedings. Under this circumstance, such an arbitration agreement could only be valid before or after the insolvency proceedings. On the other hand, insolvency administrators could assert a liability claim against directors for causing or aggravating the company's insolvency during the insolvency proceedings[701]. In this case, since directors' liability can only be established as long as the insolvency proceedings are declared fraudulent by the court, it seems that only the insolvency court has the exclusive powers to examine the directors' behaviours, to declare the insolvency proceedings as fraudulent and to hold directors liable during the insolvency proceedings. In this way, such an issue cannot be submitted to an arbitral tribunal either.

Nevertheless, in Spanish law, a corporate action and an individual action could be brought during the insolvency proceedings as well. In regard of a corporate action, since Article 8 (7) of *LC* clearly indicates that the insolvency court owns exclusive jurisdiction on the determination of directors' liability in a corporate action deriving from a loss caused to the company before or after the declaration of insolvency, it seems that such an issue is not arbitral[702]. In regard of a individual action, although an individual action could be brought against directors independently of insolvency and such an action is clearly arbitral, it should be noticed that such a dispute resolution through arbitration cannot have adverse effects on the corporate assets during the insolvency proceedings (for example, directors have been required to make compensation for individual creditors in a personal action while they do not have any other asset to make compensation for the company for breach of duties)[703].

3.3.3. When the arbitration proceedings are pending on the declaration of insolvency

It is also possible that the arbitration proceedings have been commenced before the opening of the insolvency proceedings. Under this circumstance, it is doubtful whether arbitration proceedings should stay in favour of the insolvency proceedings. Article 15 of RI provides that the effects of insolvency proceedings on a lawsuit pending affecting the

[701] See Article 172 *bis* of *LC*.
[702] See Article 8 (7) of *LC*.
[703] In this sense, see Sergio SÁNCHEZ GIMENO, "Las acciones de responsabilidad de los administradores previstas por la normativa societaria en el concurso de acreedores", *Homenaje al Profesor D. Juan Luis Iglesias Prada*, Extraordinario-2011, pp. 187-193, pp. 188 and ss.

rights or the assets of the debtor should be determined by the law of the Member state in which the lawsuit is pending[704]. In the *Vivendi/Elekrim* dispute as we have mentioned, the English High Court rejected Elektrim's efforts to classify the arbitration agreement as a "current contract" in the sense of Article 4 (2) (e) of RI and confirmed that the term "lawsuit pending" included pending arbitral proceedings, and therefore pending arbitration proceedings are covered by Article 15 of RI[705]. As under the law of the place in which the lawsuit is pending (here the English law), the insolvency of a party does not render the arbitration agreement invalid and the arbitral tribunal was correct in dealing with the parties' dispute[706].

In Article 15 of the proposal to the revision of RI, the EU legislators also supported the conclusions in the *Vivendi/Elekrim* dispute, and confirmed that the effects of the insolvency proceedings on pending arbitral proceedings should be governed solely by the law of the Member state in which the arbitral proceedings have their seat[707]. Under this circumstance, there is still no main approach within the EU but the national rules of the Member states show different attitudes to such an issue. For example, under Polish law any pending arbitration proceedings shall be discontinued[708], while the German law rules do not expressly provide for the interruption of arbitration proceedings upon the filing of insolvency proceedings[709]. Nevertheless, under Spanish law, Article 52 (2) of *LC* provides that "arbitration proceedings pending at the time of the declaration of insolvency will continue to a final award"[710]. We also believe that the declaration of insolvency should not affect the arbitration proceedings that are on course. As an alternative of dispute resolution,

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[704] See Article 15 of RI.

[705] See *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ. 677, para. 18. Also see Klaus SACHS, "Insolvency Proceedings and…", *loc. cit.*, p. 14. Also see Stavros L. BREKOULAKIS, "Law Applicable to Arbitrability: Revisiting the Revisited *Lex Fori*", in Loukas A. MISTELIS, Stravros L. BREKOULAKIS (Eds.), *Arbitrability: International & Comparative Perspectives, op. cit.*, pp. 99-120, pp. 117 and ss.

[706] Franco FERRARI, Stefan KRÖLL (Eds.), *Conflict of Laws…, op. cit.*, pp. 227-228. Domitille BAIZEAU, "Compétence de l'arbitre et faillite à la luminère des arrêts anglais et suisse dans l'affaire *Vivendi c/ Electrim*", *Gazette du palais*, N° 298 à 300, 2009, pp. 5-10, p. 7.

[707] See Article 15 of proposal to the revision of RI.

[708] See *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ. 677, para. 4. Also see Alexander J. BĚLOHLÁVEK, "Impact of insolvency of a party on pending arbitration proceedings in Czech Republic, England and Switzerland and other countries", *Yearbook on International arbitration*, 2010, pp. 145-166, pp. 161 and ss.

[709] Klaus SACHS, "Insolvency Proceedings and…", *loc. cit.*, pp. 26.

[710] See Article 52 (2) of *LC*. Also see Nuria BERMEJO GUTIÉRREZ, "Los efectos del concurso sobre los créditos", *Revista Jurídica de la Universidad Autónoma de Madrid* (Versión actualizada publicada en el Boletín del Ilustre Colegio de Abogados de Madrid (La nueva Ley Concursal I)), Nº 11, 2004, pp. 11-46, p. 17.

if the debtor agreed to submit disputes to arbitration when it has not gone bankruptcy yet, there is no legitimate reason to introduce a different treatment between insolvency and non-insolvency of the debtor[711]. In the case where the debtor is defendant, it will be very unreasonable to derogate from the current arbitration proceedings and force the plaintiff to make claims of credit in the insolvency proceedings only because an arbitral judgment cannot be made before the declaration of insolvency. Conversely, in the case where the debtor is plaintiff, we believe that no big difference will be evidenced between arbitration and judicial litigation since it only refers to dispute resolution. And it would be rare for us to abandon the arbitration proceedings and attract the issue to the insolvency proceedings so as to wait for a similar result to be made by the insolvency court. Such a treatment will definitely become a waste of judicial resources. However, in the case where the current arbitration proceedings could greatly influence the debtor's assets and have serious adverse effects to the general body of creditors in the insolvency proceedings, we believe that the insolvency court could remain limited discretion to suspend the arbitration proceedings.

In the regime of directors' liability in the insolvency-related matters, under English and French laws, as we have mentioned, only the insolvency court has the exclusive power to decide the liability of directors and to impose them to make contribution to the corporate assets. From this perspective, it seems that there does not exist an arbitration proceeding commenced before the declaration of insolvency which aims to establish liability to directors. Under German law, an action to establish directors' liability in such a case should be brought by the insolvent administrator during the insolvency proceedings. Therefore, it is impossible to have initiated an arbitration proceeding in order to deal with such a dispute before the commencement of the insolvency proceedings either. Similarly, under Spanish law, the powers to determine directors' liability for causing or aggravating the company's insolvency belongs to the insolvency court, thus no pending arbitration proceeding will exist before the opening of the insolvency proceedings. On the contrary, an action to incur liability to directors for the delay or failure to file for the company's insolvency may be initiated before or after the insolvency proceedings by individual creditors. Beyond the insolvency proceedings, such a dispute could be freely submitted to arbitration based on the party autonomy of the two parties. However, even though the arbitration proceedings have been commenced before the opening of the insolvency

[711] Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, p. 110.

proceedings, they cannot survive the insolvency proceedings by subjecting to Article 52 (2) of *LC* but have to stay in favour of the insolvency proceedings in accordance with Article 51 *bis* of *LC* since the Spanish rules have clearly required an action under Article 367 of *LSC* to be suspended during the insolvency proceedings. Besides, in regard of a corporate action, since Article 8 (7) of *LC* implies that the insolvency court only deals with a corporate action that has not yet been commenced but aims to establish liability to directors for the loss caused to the company before or after the declaration of the insolvency, it seems that a corporate action submitted to arbitration which has been commenced could continue the proceedings despite the declaration of insolvency. Such a treatment is reasonable since a corporate action intends to seek compensation from directors and could usually increase the corporate assets. Under this circumstance, it makes no sense to suspend such proceedings and recommence them before the insolvency court since the court will make a similar judgment as well. In regard of an individual action, we also believe that a pending individual action submitted to arbitration will not be affected by the commencement of the insolvency proceedings as long as it does not have adverse effects on the corporate assets for distribution in the insolvency proceedings.

3.3.4. When an arbitration agreement is concluded after the commencement of the insolvency proceedings

It is also possible that an arbitration agreement will be concluded by the debtor and the other party, or by the insolvency administrator and the other party after the declaration of insolvency. Both RI and most of the national rules of the Member states still remain silent on such an issue. In this case, the examination on how the insolvency proceedings affect the arbitration agreement subsequently concluded should be based on two considerations. On one hand, it should be noticed that whether the insolvent debtor (here the company) could have the capacity to conclude an arbitration agreement after the declaration of insolvency, or whether the insolvency administrator could have the capacity to represent the company to conclude an arbitration agreement will undoubtedly affect the validity of this agreement. And the applicable law to determine the capacity of the company or its insolvent administrator to become a party of an arbitration agreement should be *lex*

societatis rather than *lex concursus*[712]. On the other hand, even though the debtor owns the ability to conclude an arbitration agreement for the dispute resolution after the declaration of insolvency, it should not be at the debtor's discretion to conclude such an agreement for the fear that the debtor may fraudulently pick up a foreign arbitral tribunal in order to evade the application of the national insolvency law rules and to obtain a more favourable treatment in this arbitral tribunal. Under this circumstance, we believe that the insolvency court should still owns certain discretion to suspend an arbitration agreement concluded after the declaration of insolvency in accordance with *lex concursus* so as to avoid that the debtors' assets for distribution will be seriously affected by an arbitration judgment[713].

In regard of directors' liability in the insolvency-related matters, as we have mentioned, under English and French laws, since directors' liability to make contribution to the corporate assets refers to an *"ex lege"* liability and only the insolvency courts owns the exclusive competence to decide the liability of directors, such an issue is not arbitral. Under German law, although insolvency liquidators could represent all the creditors to file an action against directors for not filing for the company's insolvency, such an action is only admitted by the insolvency court during the insolvency proceedings, and it does not give any room for the insolvency liquidators to conclude an arbitral agreement with directors so as to submit such a dispute to arbitration. Under Spanish law, similarly, since liability under Article 172 *bis* of *LC* refers to an *"ex lege"* liability that only the insolvency court could hold directors liable for causing or aggravating the company's insolvency, it is impossible for the insolvency administrators and directors to submit such an issue to arbitration. Besides, since an action under Article 367 of *LSC* is not admissible during the insolvency proceedings, individual creditors and directors cannot designate an arbitral court to deal with such a dispute either. Furthermore, as we have mentioned, since the insolvency court owns the exclusive jurisdiction to decide directors' liability for a loss caused to the company before or after the declaration of insolvency, the company and its directors cannot submit a corporate action to arbitration. On the contrary, since a personal

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[712] Domitille BAIZEAU, "Arbitration and Insolvency: Issues of Applicable Law", in Christophe MÜLLER, Antonio RIGOZZI (Editors), *New Developments in International Commercial Arbitration 2009*, Zurich, Schulthess, 2009, pp. 97-120, p. 113. Also see Domitille BAIZEAU, "Compétence de l'arbitre…", *loc. cit.*, p. 9. Also see Alexis MOURRE, "Arbitraje y Derecho…", *loc. cit.*, p. 231. Also see Julian D. M. LEW, Loukas A. MISTELIS, Stefan Michael KRÖLL, *Comparative International Commercial…, op. cit.*, p. 117. Also see Iván HEREDIA CERVANTES, *Arbitraje y concurso…, op. cit.*, p. 107.

[713] In this sense, see Calvin A. HAMILTON, José ÁNGEL FABRE, "Spanish Arbitration Law…", *loc. cit.*, p. 5.

action may be brought independently of the insolvency proceedings, a personal action may be arbitral even after the commencement of the company's insolvency, while it should not have any adverse effect on the patrimony of the company which is prepared for distribution in the insolvency proceedings.

3.4. Conclusion

In the first place, arbitration and judicial litigation are not competitors but are two parallel proceedings in which one supports the other. Even though a valid arbitration agreement provides an exception for the court to refrain from exerting a judicial intervention to arbitration, it does not mean that the competent court automatically lose its jurisdiction but the court refrains from intervening into arbitration in order to respect the party autonomy and support the arbitration proceedings. When an arbitral tribunal cannot rule on its jurisdiction, a court could act in support of arbitration in order to ensure that the parties are not without recourse.

In the second place, a valid arbitration agreement is in fact similar to a choice of forum agreement, the biggest difference between them lies in that a jurisdiction clause under the framework of RBI cannot evade the exclusive jurisdiction provided by Article 22 of RBI, while an arbitration agreement can derogate from the effect of exclusive jurisdiction under Article 22 of RBI. This is because the submission of a dispute to an arbitral tribunal relies on an independent arbitral mechanism that is different from the jurisdictional mechanism.

In the third place, in a company *in bonis*, since the European law remains silent in the aspect of arbitrability of directors' liability, such an issue should be interpreted autonomously by the Member states. After the analysis of the Spanish model, we can see that a corporate action against directors is arbitrable normally. Similar to a choice of forum clause in the corporate statute, an arbitration agreement contained in the corporate statute could also be recognized as a valid and binding agreement. If such an arbitration agreement is included in the corporate statute during the formation of the company, directors of the company are regarded as bound by such an arbitration agreement if they accept the appointment. If such the company intends to introduce an arbitration agreement into the corporate statute, it may be necessary for such an introduction to get support from a certain number of shareholders. Besides, in the case of a derivative action, it is possible

for minority shareholders to conclude an arbitration agreement with directors in order to deal with a corporate dispute. If the company has previously established an arbitration clause in the corporate statute, minority shareholders and directors may have to follow this clause. However, a consensus simply achieved among the shareholders in a shareholders' agreement should not have binding effects on a director at issue since he is not a contracting party in this agreement. Furthermore, a personal action is also arbitrable generally while directors and shareholders or creditors could submit their disputes to arbitration as well.

In the forth place, arbitration also shows very subtle relationship with insolvency. For the moment, the European law still remains unclear in this area. In regard of the "pure" or "core" insolvency matters, since they do not primarily concern disputes but rather are proceedings for the execution of the insolvent party's assets, they are usually considered as not arbitrable. In regard of those "non-core" insolvency matters, ECJ has established its own principle of *"vis attractiva concursus"* which attracts all the disputes that derive directly from the insolvency and have close connections with insolvency proceeding to the insolvency court. However, *"vis attractiva concursus"* only deals with the distribution of jurisdiction between the courts and gives priority to the insolvency courts in the area of the insolvency-related matters, while it does not definitely exclude the intervention of arbitration in such a case. Therefore, it is possible that "non-core" insolvency matters may be submitted to arbitration exceptionally, while the effects of the arbitration proceedings should be determined by the insolvency law rules so as to ensure the public policy driven by the collective insolvency proceedings.

In the fifth place, in a case where arbitration agreement is concluded before the commencement of the insolvency proceedings, though RI does not clearly indicate the effects of the insolvency proceedings on the concluded arbitration agreements, we believe that Article 4 (2) (e) of RI is applicable to such a case since an arbitration agreement is a contract in essence. Article 4 (2) (e) leaves for *lex concursus* to decide the effects of insolvency proceedings on current contracts and we also find that most of the Member states continue to recognize the validity of a concluded arbitration agreement after the declaration of insolvency. However, such a conclusion cannot apply in the regime of directors' liability for not filing for the company's insolvency, since most of the Member

states admit that only the insolvency court has exclusive powers to decide the liability of directors deriving from such an issue during the insolvency proceedings. In this sense, an arbitral tribunal cannot decide the liability of directors and any arbitration agreement previously concluded by directors and the company concerning such an issue will have no effect as regards insolvency.

In the sixth place, in a case where the arbitration proceedings are pending on the declaration of insolvency, such an issue should be determined by Article 15 of RI. The proposal to the revision of RI has clearly indicated that the effects of the pending arbitral proceedings should be governed by the law of the Member state in which the arbitral proceedings have their seat. In this case, we believe that the pending arbitration proceedings should not lose the effects due to the declaration of insolvency and stay in favour of the insolvency proceedings. However, such a conclusion is irrelevant in the regime of directors' liability for the delay or failure to file for the company's insolvency. As we have mentioned, directors cannot previously conclude an arbitration agreement with the company and submit a dispute regarding such an issue to an arbitral tribunal because the powers to decide the liability of directors exclusively belong to the insolvency court. Therefore, it is impossible to have pending arbitration proceedings concerning such an issue on the declaration of insolvency.

In the seventh place, in a case where an arbitration agreement is concluded after the commencement of the insolvency proceedings, it should be *lex societatis* rather than *lex concursus* to decide the capacity of the insolvent company and its insolvency administrators to conclude an arbitration agreement with the other party. Even though they are allowed to conclude an arbitration agreement under that law, the insolvency court should still owns certain discretion to suspend such an arbitration agreement in accordance with *lex concursus* so as to avoid that the debtors' assets for distribution will be seriously affected by an arbitration judgment. However, such a conclusion cannot apply in the regime of directors' liability for the failure to file for the company's insolvency either. As we have mentioned, most of the Member state recognize that the powers to decide the liability of directors exclusively belong to the insolvency court, and the determination of the liability should be within the insolvency proceedings. Under this circumstance, a dispute concerning directors' delay or failure to petition for the commencement of the

insolvency cannot be arbitral and independent arbitration proceedings dealing with such a dispute will not be admissible as regards the insolvency proceedings.

4. The choice of conflict-of-jurisdiction rules in the regime of directors' liability involving a Member state and a third state (Example of Spain v. China)

The establishment of Brussels Regulation is based on the conviction that differences between national laws on jurisdiction and recognition of judgments and differing procedural formalities may impede the judicial cooperation within the internal market[714]. Such a Regulation aims at promoting easier and more uniform rules as well as faster and simpler procedures for civil cross-border litigation within the EU[715]. However, the initiave of Brussels Regulation is to deal with the relationship within the Member states. When it refers to itigation involivng a Member state and a third state, it is possible that Brussels Regulation remains silent to such an issue, and it should give room to national laws.

4.1. The Spanish perspective

Frist of all, Article 22 (1) of *LOPJ* (Spanish Organic Law of Judicial Power) follows the line of RBI and states that Spanish courts have exclusive jurisdiction to *"the proceedings which have as their object the validity of the constitution, the nullity or the dissolution of a company which has its domicile in the Spanish territory, or the validity of the decisions of the organs of such a company"*[716]. As we have explained that Article 22 (2) of RBI is not applicable to directors' liability, there is no special reason why we should make different interpretation in *LOPJ*. Therefore, similarly, Article 22 (1) is not operable in directors' liability, and it is relevant for us to turn to other provisions in *LOPJ* in order to decide a competent court for the regime of directors' liability.

Pursuant to Article 4 of RBI*bis*, a Spanish court shall have jurisdiction if the defendant is domiciled in Spain[717]. However, with the exception of a rather wide definition of domicile of the legal person in Brussels Regulation, there is no universally accepted definition of

[714] Ulrich MAGNUS, "Introduction", *loc. cit.,* pp. 7-8.
[715] In this sense, see Recitals 1 and 2 of RBI*bis*.
[716] See Article 22 (1) of *LOPJ*.
[717] Article 4 states that "subject to this Regulation, persons domiciled in a Member state shall, whatever their nationality, be sued in the courts of that Member state".

domicile of natural persons and thus the various definitions under the national laws of the Member states should apply[718]. In this case, it may leave for Spanish law to decide the connecting factor of "domicile". Article 22 (2) of *LOPJ* also attributes international jurisdiction to the Spanish courts when the defendant is domiciled in Spain[719]. Besides, in accordance with *Código Civil* (Spanish Civil Code), the domicile of a natural person is the place where he has its habitual residence[720]. Therefore, in the regime of directors' liability, based on general considerations, as long as the directors have their habitual residence in Spain, Spanish court should have the competence to deal with such an action.

Although there is an argument on whether the doctrine of *"effet réflexe"* should be permitted in Article 22 in order to extend its scope to third states[721], since we have explained that Article 22 of Regulation 44/2001 is not applicable to directors' liability, we will not investigate this doctrine in this part. However, it is not impossible that directors, as the defendant, would conclude a choice of forum clause with the plaintiff, which is either the company or shareholders or creditors. By virtue of Article 25 of RBI*bis*, the new Regulation has cancelled the requirement of "domicile" in a choice of forum clause[722], which means that even if the two parties are domiciled in China, as long as they choose a Spanish court to handle their dispute, that Spanish court could establish jurisdiction under this Article. In this case, Spanish law follows the lines of RBI*bis*. In conformity of Article 22 (2) of *LOPJ*, a Spanish court will have jurisdiction if the parties have expressly selected such a Spanish court to deal with their disputes[723]. When the defendant does not appear in that court, the jurisdiction of the Spanish court will not be affected if the defendant is domiciled in Spanish territory[724]. Therefore, if a company and its defendant agree to have

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[718] See Article 62 of RBI*bis*. Also see Elena JÚDOVÁ, "The Habitual Residence in Slovakian Private International Law", *Yearbook of Private International Law*, Vol. IX, 2007, pp. 471-480, p. 475.

[719] See Article 22 (2) of *LOPJ*.

[720] See Article 40 of *Código Civil*. Also see Yolanda DUTREY GUANTES, "Aplicación práctiva del Reglamento (CE) 44/2001", in Ilustre Colegio de abogados de Madrid, *Cuadernos de los grupos de trabajo procesal*, 2008, pp. 6-62, p. 7. This article is available on the website: http://www.icam.es/docs/ficheros/200802200001_6_1.pdf.

[721] On the doctrine of *"effet rélexe"*, with particular to Article 22 of RBI, see Rafael ARENAS GARCÍA, *El control de oficio…, op. cit.*, pp. 117-119. Also see Christelle CHALAS, "L'affaire *Ferrexpo*: baptême anglais pour l'effet réflexe des articles 22, 27 et 28 du règlement Bruxelles I", *Revue critique de droit international privé*, Tome 102, 2013 (2), pp. 359-393, pp. 364 and ss.

[722] See Article 25 of RBI*bis*.

[723] See Article 22.2 of *LOPJ*.

[724] See Article 39 of Spanish Civil Procedural Act (*LEC*). Also see Esperanza CASTELLANOS RUIZ, Juliana RODRÍGUEZ RODRIGO, "Comentarios a la Ley de Enjuiciamiento Civil: De la extensión y límites de la jurisdicción de los tribunales civiles (arts. 36 a 39 LEC)", *InDret*, 3/2006, pp. 1-22, p. 19.

their dispute dealt with by a Spanish court, or if the shareholder or creditors of the company and its directors conclude a choice of forum agreement to confer jurisdiction to a court in Spain, the Spanish court will have jurisdiction regardless of the domicile of the parties.

In a case where a company file a corporate action against its directors who are not domiciled in a Member state, if directors have not concluded a choice of forum agreement either, RBI will not apply in this case. On the contrary, such an issue should be determined by the Spanish national rules[725]. In accordance with Article 22 (3) of *LOPJ*, when the infringement of a right represents a breach of a contractual obligation, the jurisdiction of the Spanish courts extends to all those cases in which the obligation arises or should be performed in Spain[726]. In order to establish jurisdiction to deal with such litigation, "reasonable proximity" (*"proximidad razonable"*) should be evidenced, which means that there should exist sufficient material proximity to justify the court's competence[727]. In this case, on one hand, the place where the obligation arises may be understood as where a contract is entered into (*"lugar de celebración"*) so as to ensure a minimum contact between the court and the contract; on the other hand, the place where the obligations should be performed (*"lugar de ejecución"*) may be interpreted as the place where the principal contractual obligation is performed so as to have the maximum proximity with the court[728]. Therefore, if the company has concluded such a contract with directors in the Spanish territory, or if directors have to fulfil the contractual obligations in the Spanish territory, Spanish courts should be able to establish jurisdiction to such a corporate action. However, we believe that Article 22 (3) of *LOPJ* is inapplicable to a derivative action involving a third state element because minority shareholders do not succeed to the contractual rights and obligations of the company. In this case, such a derivative claim should refer to Article 22 (2) of *LOPJ*.

[725] Pilar BLANCO-MORALES LIMONES, Javier CARRASCOSA GONZÁLEZ, "Responsabilidad de los administradores sociales. Aspectos de Derecho internacional privado", in Guillermo GUERRA MARTÍN (Coord.), *La responsabilidad de los administradores de sociedades de capital*, *op. cit.,* pp. 1007-1061, p. 1025.

[726] See Article 22 (3) of *LOPJ*. Also see Antonio VIÑAL, "Spain", in Christian CAMPBELL (Editor), *International Civil Procedure [2007] II*, New York, Yorkhill Law Publishing, 2007, pp. 159-212, p. 162.

[727] Miguel VIRGÓS SORIANO, *Lugar de celebración y de ejecución en la contratación internacional*, Madrid, Tecnos, 1989, p. 83.

[728] Miguel VIRGÓS SORIANO, *Lugar de celebración y…, op. cit.*, pp. 80 and pp. 138-139.

In the case where shareholders or creditors file a personal claim to incur non-contractual liability of directors who are not domiciled in a Member state, such a personal action will be ruled directly by Spanish domestic provisions rather than RBI[729]. Under Article 22 (3) of *LOPJ*, in claims for damages where an action is filed to obtain fulfilment of an non-contractual obligation, Spanish courts will have jurisdiction when the fact from which the harm arises has occurred in Spain, or when both the author of the harm and the victim have habitual residence in Spanish territory[730]. In this way, Spanish courts will have jurisdiction in two cases: firstly, directors and the victims have habitual residence in Spain. For example, a claim brought by Spanish local shareholders or creditors against a Chinese director of a Spanish company who owns a habitual residence in Spain should be governed by a Spanish court. Secondly, there is no reason why *"the harm arises has occurred in Spain"* should be interpreted in a way different from Article 5 (3) of RBI[731]. In this way, Spanish courts will have jurisdiction to deal with such a claim either the harmful event giving rise to the damage occurred or the damage occurred is within the Spanish territory.

In the case regarding directors' liability for the failure to file for the opening of the insolvency proceedings that involves third state elements, neither RI nor RBI would apply under general circumstances. In this case, an action to incur directors' liability for the corporate debts is classified as ruled by company law and it is independent from an action to incur directors' liability for causing or aggravating the company's insolvency under insolvency law. The Spanish legislators also decide that an action under Article 367 of *LSC* should be suspended during the insolvency proceedings, and such an action should not surrender to the court in which the insolvency proceedings are opened. Besides, as we have mentioned, such a liability is with "*ex lege*" nature rather than with contractual or non-contractual natures. Under this circumstance, Article 22 (3) of *LOPJ* will not apply. Instead, Spanish court will only have competence to deal with an action under Article 367 of *LSC* if the director at issue is domiciled in the Spanish territory in accordance with Article 22 (2) of *LOPJ*.

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[729] Pilar BLANCO-MORALES LIMONES, Javier CARRASCOSA GONZÁLEZ, "Responsabilidad de los…", *loc. cit.,* p. 1026.
[730] See Article 22 (3) of *LOPJ*. Also see Antonio VIÑAL, "Spain", *loc. cit.*, p. 162.
[731] Miguel VIRGÓS SORIANO, Francisco J. GARCIMARTÍN ALFÉREZ, *Derecho procesal civil…, op. cit.*, p. 198.

In contrast, if an action is brought by liquidators to incur directors' liability for causing or aggravating the company's insolvency when the insolvency proceedings has been declared as fraudulent, such an action is within the insolvency proceedings and should be governed by the court in which the insolvency proceedings are opened. By virtue of Article 86 *ter* of *LOPJ*, commercial court judges have exclusive jurisdiction to hear the insolvency or insolvency-related matters[732]. Meanwhile, pursuant to Article 10 of *LC*, the court in the place where the debtor (here the company) has its centre of main interests will have competence to deal with the insolvency proceedings[733]. And since the insolvency court owns exclusive jurisdiction on the determination of directors' liability in a corporate action deriving from a loss caused to the company before or after the declaration of insolvency[734], such an action should also surrender to the insolvency court rather than a court the jurisdiction of which is established under Article 22 of *LOPJ*.

4.2. The Chinese perspective

Before the revision of *Chinese Civil Procedural Law* in 2012, there was a special chapter with several provisions regulating the conflict-of-jurisdiction rules concerning foreign affairs, however only two provisions remained in this chapter after the revision. The Chinese legislators tended to equal the treatment of international litigation with national litigation, thus they have abolished most of the conflict of jurisdiction rules in *Chinese Civil Procedural Law* and have only left a provision to deal with international dispute regarding contract or property[735]. In accordance with Article 259 of *Chinese Civil Procedural Law*, in a case where civil litigation involving foreign elements is not covered by the provisions regarding international litigation, it shall refer to the provisions that apply to national litigation[736].

However, such a treatment seems to be problematic because there exist significant differences respecting international and national litigations. National litigation does not affect the applicable procedural and substantive law, what is principally at stake is where

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[732] See Article 86 *ter* of *LOPJ*.
[733] See Article 10 of *LC*.
[734] See Article 8 (7) of *LC*.
[735] See Article 265 of *2012 Chinese Civil Procedural Law*. Also see Jing LI, "The study on the improvement of conflict of jurisdiction rules concerning foreign affairs in China", *Politic Science and Law Review*, 2013(08), pp. 139-145, pp. 141 and ss.
[736] See Article 259 of *2012 Chinese Civil Procedural Law*.

the litigation proceeds at a national dimension. Conversely, international litigation determines which court will be more appropriate to deal with the controversy, and the application of both the procedural and substantive law can be affected in fundamental ways by the choice of conflict-of-jurisdiction rules[737]. Before the Chinese legislators propose a new revision to Civil Procedure Law, it may leave us the only choice to follow the current criteria in order to clarify the conflict-of-jurisdiction rules in directors' liability.

In a claim filed against a director, normally the court of the place where a director has his domicile should have competence to deal with such an issue. Pursuant to Article 21 of *Chinese Civil Procedural Law*, if the place of domicile does not coincide with the place of habitual residence, the court of the place where the habitual residence is located rather than the place of domicile shall establish jurisdiction[738].

The conflict-of-jurisdiction rule with the connecting factor of domicile is regarded as the most fundamental provision in PIL in China as well as in most countries. When there exist another special connecting factors, a rule concerning these special connecting factors should prevail. In the 2012 revision of *Chinees Civil Procedural Law*, the Chinese legislators have introduced a provision conferring special jurisdiction to the court of the place of domicile of a company to deal with some aspects of the corporate affairs[739]. In conformity with Article 26 of 2012 *Chinese Civil Procedural Law*, if a lawsuit concerns the corporate matters such as incorporation of a company, or confirmation of shareholders' qualification, or distribution of profit, or dissolution of a company, the court of the place where the company has its domicile will have competence upon these affairs[740]. Meanwhile, pursuant to Article 39 of *General Principles of Civil Law*, the Chinese criterion attaches the "domicile" of a company to the place where its main administrative office is located[741].

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[737] Regarding the distinction between international and national litigations, see Arthur Taylor VON MEHREN, "Theory and practice of adjudicatory authority in private international law: a comparative study of the doctrine, policies and practices of common- and civil-law systems: general course on private international law (1996)", *Recueil des Cours*, Vol. 295, 2002, pp. 9-431, pp. 173 and ss.
[738] See Article 21 of *2012 Chinese Civil Procedural Law*.
[739] Ming SHAO, "On Revising China's Foreign-related Civil Procedure", *Journal of Renmin University of China*, No. 4, 2012, pp. 31-39, p. 36.
[740] See Article 26 of 2012 *Chinese Civil Procedural Law*.
[741] See Article 39 of *General Principles of Civil Law*.

Article 26 of *Chinese Civil Procedural Law* sets out a non-exhaustive list of the matters that should be dealt with by the court of the place where the company has its centre of main administration. In regard of directors' liability, although Article 26 of *Chinese Civil Procedural Law* does not clearly indicate that it applies to this regime, it can be understood that in a case of "distribution of profit", shareholders are likely to bring an action against directors for the financial loss caused by these directors in determining the ways of distribution or the amount received by each shareholder. The Chinese legislators have also considered that since it refers to a corporate affair, in a case where a director is not domiciled in the place of company's main centre of administration, it may be less convenient for the shareholders to sue such a director in a court of a place different from the place of company's main office since it may not be foreseeable for the shareholders. Therefore, it is logical that a shareholders' personal action is covered by Article 26 of *Chinese Civil Procedural Law* as well[742].

Besides, in the *Notice of the Supreme People's Court on Issuing the Decision on Amending the Provisions on the Cause of Action of Civil Cases*, the Chinese Supreme court has made a list of actions classified as the cases in relation to companies[743]. In accordance with this classification, a dispute between the company and its directors deriving from the damage sustained by the company; and a dispute between shareholders and directors of the company for the damage sustained by these shareholders should be considered as issues in relation to companies. In this sense, Article 26 of *Chinese Civil Procedural Law* should apply and the jurisdiction of a court of the place where the company has its domicile could be established in order to deal with a corporate action brought by the company against its directors, or a derivative action brought by the shareholders on behalf of the company, or a personal action brought by individual shareholders[744].

The idea is that a corporate affair should be dealt by the court of the place where the company has its domicile. According to Article 259 of Chinese Civil Procedural Law, if

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[742] Hao LI, "Recent Advance of Jurisdiction System in Civil Procedure: Commentary and Research on the Modification of Jurisdiction", *The Jurists*, No. 4, 2012, pp. 146-158, p. 149.

[743] See *Fa [2011] No. 41*. The relationship between the Chinese Supreme Court and its subordinate courts is to lead and to be led, thus a notice made by the Supreme Court binds all the courts in China.

[744] A derivative action should be brought in the court of the place where the company has its domicile, this idea is also supported by Article 48 of *Fourth Judicial Interpretation on the application of Chinese Company Act* (Opinion Soliciting Draft).

the provisions concerning international litigation keep silent to a foreign-related civil action, the provisions concerning national litigation could apply instead[745]. However, in the part of international litigation, *Chinese Civil Procedural law* only establishes provisions concerning contractual dispute or any other property right or interest dispute[746]. As we have explained, in the regime of directors' liability, a corporate action could present both corporate and contractual natures, while the Chinese legislators have not clear indicated that Article 26 of *Chinese Civil Procedural Law* could exclusively apply to a national as well as a foreign-related corporate action. Therefore, in this case, we believe that Article 265 of *Chinese Civil Procedural Law* concerning a foreign-related contractual or property dispute could also be applicable in a corporate action. In accordance with Article 265 of *Chinese Civil Procedural Law*, if a contract is signed or performed in China, or the object of a lawsuit is in China, or the defendant has detainable property in the Chinese territory, Chinese courts shall have competence to deal with such an issue[747]. In this sense, if a director has concluded a contract with his company concerning his functions, duties, obligations or remuneration, when such a contract is signed or the director has exercised most of his functions in China, Chinese court could be able to deal with a dispute deriving from directors' breach of contractual obligations. However, for example, if a Japanese director and a Spanish company happen to sign a contract of employment in China and a Chinese court establishes jurisdiction under this Article, it will be very doubtful since such a case does not have any other significant connection with the Chinese court. In national litigation, a court only has jurisdiction if the contractual obligations are mainly performed in such a place. Conversely, in international litigation, the Chinese legislators try to confer jurisdiction to both the court of the place of conclusion and the court of the place of performance of a contract, while a treatment may be regarded as an indirect expansion of Chinese jurisdiction and a judgment made by such a court may encounter some difficulties in the subsequent processes of recognition or execution in a foreign state court[748].

Meanwhile, although a personal action is not based on contractual grounds, it could derive from a dispute to special property. In a personal action filed by shareholders against

[745] See Article 259 of *2012 Chinese Civil Procedural Law*.
[746] See Article 265 of *2012 Chinese Civil Procedural Law*.
[747] See Article 265 of *2012 Chinese Civil Procedural Law*. Also see Shuangyuan LI, *Private International Law (Third Edition)*, Beijing, Peking University Press, 2011, p. 364.
[748] Faqiang YUAN, "Weighing Considerations to Establish Jurisdiction over Foreign Related Matters in China", *Legal Science Monthly*, No. 12, 2006, pp. 115-123, p. 122.

directors involing a foreign element, following the lines of Article 265 of *Chinese Civil Procedural Law*, if shareholders bring an action directly against directors owing to the fact that special property unlawfully taken by directors and the property is located in China, or aiming at seeking compensation when directors have detainable propery in the Chinese territory, Chinese court could also be able to establish jurisdiction to deal with this action. However, it should be noticed that such a conclusion does not apply in all the situations. If the conditions in Article 265 of *Chinese Civil Procedural Law* relating to property do not meet, Article 26 of *Chinese Civil Procedural Law* should apply in dealing with this action.

However, if a personal action by creditors or other third parties against directors is brought before a Chinese court, such a claim may not be admitted normally. Therefore, creditors should sue the company for damage caused by its organs. Nevertheless, when a personal claim filed by creditors against directors aims at recovering special property unlawfully taken by directors, or aim at demanding compensation if directors have detainable assets in the Chinese territory. In this sense, it may be doubtful whether such a claim may be interpreted as a dispute regarding property so as to invoke the application of Article 265 of *Chinese Civil Procedural Law*. In this case, we believe that Chinese judges should not apply this Article in order to establish jurisdiction for a personal claim, because it may in fact allow creditors to sue directors directly, which is not compatible with *Chinese Company Act*. Instead, in such a case, creditors or third parties may be advised to sue the company rather than its directors, or to bring such a personal action in a foreign court which recognizes creditors' right by applying its own rules.

Furthermore, in regard of directors' liability in the dissolution and liquidation proceedings, as we have mentioned, directors may be held liable for having caused depreciation, loss, damage or disappearance to the corporate assets; or for having been idle to exercise their due functions which has led to the disappearance of the main part of corporate assets and the loss of the crucial documents; or for having conducted other fraudulent behaviours[749]. Under these circumstances, directors' misconducts may make normal dissolution and liquidation proceedings unable to be commenced, and creditors may suffer a great loss from directors' fault. In this case, Chinese law provides a special liability regime for creditors and enables them to incur directors' liability for the breach of non-contractual

[749] See Articles 18 to 20 of *Second Judicial Interpretation on the application of Chinese Company Act*.

obligations. However, in accordance with Article 2 of *Chinese Company Act*, the "company" as mentioned in this Act only refers to the company incorporated within the Chinese territory[750], which means that *Chinese Company Act* is normally applicable to national companies. Therefore, in a case where creditors of a foreign company brings an action against directors before a Chinese court in the mentioned situations, Chinese judges have to refer to a similar regime in *lex societatis* in order to decide whether the demand of the plaintiff could be supported or not under that foreign law.

Nevertheless, in regard of a branch of a foreign company in China, in accordance with the provisions in *Chinese Company Act*, a foreign company should fulfil the requirements of registration so as to establish a branch in China. Articles 196 and 197 of *Chinese Company Act* states that foreign company braches shall not act in contrary to Chinese law nor injure the social public interests of China when carrying out their business activities within the Chinese territory, and the foreign company should assume civil liability for the operation undertaken by its branch[751]. Besides, in regard of liquidation proceedings, in accordance with Article 198 of *Chinese Company Act*, the rules concerning the liquidation proceedings in Chinese law will also apply to the branch of a foreign company when the foreign company intends to close the branch and quit the Chinese territory. If a foreign company carries out its main business through a branch in China, Chinese judges could have competence to deal with a claim filed by Chinese creditors against directors of the company for the mentioned misconducts committed during the liquidation proceedings.

Similarly, *Chinese Securities Act* also provides a protective mechanism for the creditors of the company, and directors may be held jointly liable with the company for false information or misleading statement or major omission[752]. In accordance with Article 2 of *Chinese Securities Act*, this Article is applicable to the issuing and trading of corporate bonds within the territory of China[753]. Following such a statement, *Chinese Securities Act* could apply to a foreign company that issues corporate bonds in China[754]. In directors'

[750] See Article 2 of *Chinese Company Act*.
[751] See Articles 196 and 197 of *Chinese Company Act*.
[752] See Article 69 of *Chinese Securities Act*.
[753] See Article 2 of *Chinese Securities Act*.
[754] On 14 March 2014, German luxury carmaker Daimler AG sold a 500 millions renminbi (58.1 million euros) bond to Chinese investors and became the first foreign bond issued in China's domestic market. The news can be found on the website: http://www.reuters.com/article/2014/03/14/daimler-china-bonds-idUSWEB00K8820140314.

liability deriving from fraudulent information or insider trading, as we have explained, the relationship between creditors and directors are non-contractual, therefore it may be possible that a court dealing with an issue in relation to tort or delict hears such an issue. In accordance with Article 28 of *Chinese Civil Procedural Law*, a tort or a delict shall be under the jurisdiction of the court in the place of infringement[755]. Meanwhile, the place of infringement could be interpreted as the place where a tort is committed and the place where the result of a tort took place under Chinese law[756]. In this case, for example, Chinese creditors of a Spanish company brings a personal claim against directors for the damage stemming from insider trading before a Chinese court if creditors have suffered a loss within the Chinese territory, Chinese judges should make a characterization by virtue of national law and find that such a liability is a non-contractual liability in conformity with Chinese criteria, and the jurisdiction of this court should be justified since it is in the place where the result of a tort took place.

Furthermore, *Chinese Enterprise Bankruptcy Act* provides that if a director acts in contrary to his duty of loyalty and duty of diligence, and if his breach of duties has led to the company's insolvency, directors shall assume civil liability[757]. And in the insolvency proceedings, it is commonly accepted that the company's liquidators who represent the general body of creditors have the power to establish liabilities to directors. In accordance with Article 3 of *Chinese Enterprise Bankruptcy Act*, the court of the place where the company is domiciled shall have the competence to deal with a case regarding the insolvency proceedings[758]. As we have mentioned, Chinese law regards the place of main administrative centre as the company's domicile under general circumstance[759]. Since *Chinese Enterprises Bankruptcy Act* does not clearly exclude its application from foreign companies, if a foreign company sets up its main administrative centre in China, Chinese courts should have competence to deal with the insolvency proceedings and an action to incur directors' liability for the breach of duties owed to the company in these proceedings.

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[755] See Article 28 of *2012 Chinese Civil Procedural Law*.

[756] See Point 187 of *Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law* [1988].

[757] See Article 125 of *Chinese Enterprise Bankruptcy Act*. Also see Guangtai MA, *The System of Director's Responsibility*, Beijing, China Law Press, 2009, pp. 239-240.

[758] See Article 3 of *Chinese Enterprise Bankruptcy Act*.

[759] See Article 39 of *General Principles of Civil Law*.

4.3. Conclusion

On the basis of the respective analysis of the conflict-of-jurisdiction rules in Spanish law and Chinese law, we have found that both the two legal systems have confirmed the general effect of the connecting factor of "domicile" (of both the company and its directors) in a foreign-related case, and have also established the rules relating to contract or tort, which could cover the relationships between directors and the company, directors and shareholders or creditors. Besides, *Chinese Civil Procedural Law* also enacts a provision especially regarding the corporate affairs, which indirectly enables a corporate action, a derivative action and a shareholders' personal action to be dealt with by the court in the place of company's domicile. However, the multiple mechanisms provided by the Chinese law on the choice of conflict-of-jurisdiction rules to a corporate action or a personal action filed by shareholders may cause concern on possible excessive jurisdiction of Chinese courts. If a corporate action regarding a contractual liability of a director towards his company is commenced in a Spanish court because the contractual obligations are mainly performed in Spain, Chinese court may also declare its jurisdiction by invoking Article 265 of *Chinese Civil Procedural Law* that such a contract is concluded by the director and his company in China. Under this circumstance, it is likely to result in parallel proceedings. In this case, on one hand, such a problem could be solved through the existing bilateral conventions. In fact, there exists a bilateral convention between China and Spain in this area[760]. According to the provisions of this convention[761], if China is the state before which a Spanish judgment is asked for recognition, the Chinese judge may reject it if a judgment with the same parties and the same cause of action has been rendered by a Chinese court or a proceeding is pending before a Chinese court, and vice versa. However, such a treatment will lead to unreasonable *"forum shopping"* because a Chinese court may reject the stay of proceeding in favour of a Spanish court without examining whether the Spanish court is first or second seized. Following the legal trend in RBI*bis*, it seems more logical for Chinese judges to take into consideration the initiative of the claimant and the convenience of the defendant; the significant connection in an issue with another court; the efficiency of the court dealing with the dispute; and the possibility of the recognition of its judgment

[760] See *Bilateral Treaty between China and Spain on the judicial assistance in civil and commercial matters* [1993].

[761] See Article 22(6) of *Bilateral Treaty between China and Spain on the judicial assistance in civil and commercial matters* [1993].

before another court; the requirement of public order and the need of proper administration of justice before making a decision to the stay of proceedings[762]. If these conditions are met in a dispute, a Chinese judge may decline its jurisdiction in favour of a Spanish court. On the other hand, it is also suggested that the Chinese legislators do not expand excessively the jurisdiction of Chinese courts by providing different alternatives. The current problem comes from the fact that the Chinese legislators do not make a distinction between rules applied to national litigation and those applied to foreign-related litigation, while such a treatment also needs revising. In this sense, unlike national rules, the establishment of PIL rules should be based on international comity, mutual respect and recognition of civil justice systems of foreign states, and it is also relevant for Chinese legislators to take these aspects into account in the next revision to *Chinese Civil Procedural Law*.

Another difference existing in Chinese law and Spanish law is that Spanish law enables creditors to bring an action against directors for a direct loss, while Chinese law does not recognize a personal claim of creditors under general circumstances. Such a claim could neither be dealt with by the court of the place of company's domicile, nor the court of the place where a tort occurs, because when such an action is brought before a Chinese court that should have jurisdiction under Chinese conflict-of-jurisdiction rules, Chinese judges will make chracterization to this action. Since judges are required to make a characterization in accordance with Chinese rules, they may decline the plaintiff's demand because such an action is not admissible under Chinese law. In this case, the plaintiff may be advised to sue the company rather than its directors, or to bring such an action before a foreign court in which a personal claim is admissible. Nevertheless, Chinese legislators should consider introducing a liability regime that enables creditors to assert a claim against directors for a direct loss. If it were so, a Chinese court could establish jurisdiction to deal with a personal claim filed by Chinese creditors of a Spanish company because Chinese judges could make a characterization to such an issue in accordance with national rules and therefore legitimate the Chinese jurisdiction.

In the insolvency proceedings, *Chinese Enterprises Bankruptcy Act* follows the criterion of "domicile", i.e., the insolvency proceedings should be opened in the place of company's

[762] See Article 33 of RBI*bis*.

domicile. In this case, the Chinese legislators consider the "main administrative centre" to be the "domicile", and the Chinese criterion is in fact similar to that of RI as well as Spanish law. Based on this legal proximity, a judgment made by a Chinese court may be more likely to get recognized in a Member state.

CHAPTER III

APPLICATION OF CONFLICT-OF-LAW RULES IN THE REGIME OF DIRECTORS' LIABILITY

As well as the establishment of uniform conflict-of-jurisdiction rules, the EU legislators also acknowledged the importance of harmonized conflict-of-law rules in the implementation of the mutual recognition principle for decisions in civil and commercial matters. In this area, the Rome Convention firstly established uniform rules concerning the law applicable to contractual obligations in the EU, while it has been reformed and replaced by Rome I Regulation (RRI). Besides, the EU legislators also created a harmonized set of rules in Rome II Regulation (RRII) to govern the matters concerning non-contractual obligations. After the promulgation of Rome Regulations, their uniform rules can directly apply to Member states and replace their domestic law, and they also cover certain types of contractual, non-contractual, and pre-contractual obligations. Since it is relevant to analyze the various contractual or non-contractual relationships in the regime of directors' liability, it is worthwhile to further investigate the examination of the applicability of Rome Regulations could be applicable in directors' liability.

Unfortunately, it seems that Rome Regulations exclude their applications from the issues relating to company law. Such a treatment does not mean that the issues of company law are not important but the initiative of the EU legislators is to distinguish the company law issues from the general civil and commercial matters and establish a uniform set of conflict-of-law rules in the aspect of company law, and now it is on agenda[763]. Therefore, before such a PIL instrument is finally established, we should still decide the applicable law to a company by referring to national rules. In this aspect, since different Member states follow different criteria on the determination of applicable law to a company (theory of incorporation and theory of real seat), ECJ has shown its attitude towards the determination of applicable law to a company in order to ensure the exercise of freedom of establishment within the EU territory. Under general circumstances, the national rules cannot be contrary to the ECJ's decisions and the freedom of establishment unless a measure adopted by the national legislators could be justified. Since the regime of directors' liability should greatly depend on the company law rules, we will also develop our discussion following the lines of ECJ's decisions.

[763] See the EU Commission's Timetable for 2010-2014, http://conflictoflaws.net/2010/commissions-timetable-for-2010-2014/.

As is known, the issues concerning the personal liability of directors for the corporate obligations have been clearly excluded by Rome Regulations. We believe that the EU legislators' intention is to leave such issues ruled by other special EU regulations (possibly Insolvency Regulation). In this case, the EU legislators have established uniform conflict-of-law rules in Insolvency Regulation. However, the provisions in RI regarding the conflict-of-law keep silent on whether directors' liability for the corporate obligations could fall within its scope when directors are held liable in the insolvency or insolvency-related proceedings, and this lacuna will leave us a big difficulty to overcome in this dissertation. Therefore, in this chapter, we will focus on the discussion on how the Member states characterize such a matter and also try to find a solution on how to establish a uniform conflict-of-law rule in order to harmonize this liability regime within the Member states.

Apart from the determination of applicable law to deal with directors' liability within the Member states, it is also worth a further discussion from an international perspective in the last part. In this case, we will also take the example of Spain and China in order to bring up a possible solution in determining the applicable rules to deal with directors' liability concerning solely a Member state and a third state but not with another Member state.

1. Application of the EU's conflict of law rules in the regime of directors' liability

1.1. Examination on the applicability of Rome Regulations to the regime of directors' liability

1.1.1. Exclusion of Rome I Regulation from the regime of directors' liability

The collaboration of RRI and RRII has been so far the most successful movement in the development of the EU PIL in the aspect of conflict-of-law. RRI and RRII represent an integral part of an ever-growing initiative on the part of the EU to create a harmonized system of conflict of law rules on contractual and non-contractual obligations, in which directors' liability were supposed to be affected. However, regrettably, RRI regarding the

contractual matters excludes its application from the "questions governed by the law of companies"[764].

The *Giulano-Lagarde* Report on Rome Convention explained that this exclusion in no way implies that this aspect was considered unimportant in the economic life of the Member states. As a contrary, the aspect of company law appears to have the strongest possible reason for harmonization in order to enforce the economic relations between the Member states, while the exclusion of the company law from Rome Regulations also shows that the EU is establishing a separate framework of unification of conflict law rules on the issues relating to companies[765].

Although RRI regarding contractual matters declares the exclusion of "questions governed by the law of companies", it has not yet given a clearer interpretation on how such questions are to be solved[766]. Under this circumstance, RRI gives room to each Member state to have autonomous interpretation to determine the delimitation of the "company law inclusion" in accordance with their national provisions. However, a bigger lacuna may emerge owing to the legal divergence in different national laws. If it were so, it would go beyond the objectives of RRI. On this ground, albeit the EU legislators did not want to bring the debate of company law into RRI, they tried to reconcile this issue by giving an illustrative and non-exhaustive list of such questions[767].

In terms of directors' liability, RRI is not applicable in the issues relating to "the personal liability of officers as such for the obligations of the company". In this sense, RRI only excludes its application from the case where directors are required to be liable for the corporate debts. However, this interpretation is far away enough to be persuasive and it still merits a further discussion in order to clarify the boundary between RRI and the regime of directors' liability.

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[764] See Article 1 (2) (f) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[765] See Mario GIULIANO, Paul LAGARDE, *The Council Report on the Convention on the law applicable to contractual obligations*, 31/10/1980, No C 282/1, p. 12.

[766] Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, p. 117.

[767] Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, p. 118.

As we have mentioned, directors owe fiduciary duties to the company. In English law, there is no uniform definition to the relationship between directors and the company, and their relationship may be regarded either as "trustee-beneficiary" or "fiduciary agents" based on different grounds[768]. In French law, this kind of relationship may derive from a *"contrat de mandat social"*, in which the company confers the power for the director to manage the corporate affairs in its name and for its interests[769]. And in German and Spanish law, directors represent the company to deal with the corporate affairs[770]. Under this circumstance, although it is not necessary for a director to conclude a written contract with the company in all the situations, it is common that the two parties enter into a written contract in order to clarify the duties, rights, obligations and remuneration in a specific contract. In this case, the contractual relationship deriving from a written contract could be governed by *lex contractus* at national dimension. However, it is doctrinally suggested that the special relationship between directors and the company will make a service contract of directorship different from a normal contract of employment[771]. Therefore, it may remain uncertain to which extent *lex contractus* could rule a contract between a director and his company. In fact, since directors' powers and obligations are inextricably bound up with the internal management of the company[772], its intimate connections with the internal organization of the company decide that it is more appropriate to be linked to *lex societatis*[773]. Besides, directors and the company could only agree to modify the duties of directors when such a modification is not contrary to the mandatory rules in *lex societatis*[774]. In this way, it seems better for RRI to stay out of the issue regarding the contractual relationship between directors and the company and leave it governed by *lex societatis*[775].

Sometimes, a director of a company does not necessarily have to sign a written contract with the company since his rights and obligations may have already been indicated in the

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[768] Graham Moffat, *Trusts Law…, op. cit.*, p. 436. Also see Sarah Wilson, *Todd & Wilson's Textbook…, op. cit.*, 2013, p. 319. Also see Saleem SHEIKH, *A Guide to…, op. cit.*, p. 401.

[769] France GUIRAMAND, Alain HERAUD, *DCG 2- Droit des sociétés (Manuel et applications), 2013-2014*, Paris, Editions Francis Lefebvre, 2013, p. 86.

[770] See § 78 of *AktG* and Article 233 of *LSC*.

[771] See Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, pp. 104 and 107. Also see The City Law School, *Company Law in Practice…, op. cit.*, p. 88.

[772] See *Base Metal Trading Ltd v Shamurin* [2004] EWCA 1316.

[773] Andrew DICKINSON, *The Regulation Rome II…, op. cit.*, pp. 208-209.

[774] *P. R. BEAUMONT, P. E. McELEAVY, A. E. ANTON, Private International Law…, op. cit.,* p. 440.

[775] Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, p. 482.

corporate statutes or bylaws, and the acceptance of appointment may be considered as achieving real consensus between the company and the director[776]. This consensus may lead the director to enter into a contractual relationship with the company even if there was no express contract between them. Similar to the case concerning the choice of forum clause, if the company has inserted a choice of law clause in the statute, such a choice of law clause could only have binding effects on that director if it is not contrary to the mandatory application of *lex societatis*. However, if there is no choice of law clause in the company constitution, *lex societatis* may be more appropriate to deal with this issue than other laws, since the provisions in the corporate statutes cannot go beyond the formal requirements provided by *lex societatis*.

Under exceptional circumstances, directors may conclude contracts with shareholders, creditors or other third parties as well. Normally, directors act as an organ of the company thus it should be the company to be consequently liable for such a contract. In this case, firstly, those contracts concluded by directors with creditors on behalf of the company could fall within in the scope of RRI, since external corporate business may not show so much connection with company law but are simply commercial affairs in most cases. Secondly, in those contracts concluded by directors with third parties on behalf of the company, such as a contract regarding an agreement on employees' annual paid time off, it should also be the company to assume the contractual liability to the third party as well, and such a contract may also be subject to RRI, or to other national rules in a case where there exists a need to protect public interests. Thirdly, however, those contracts with the shareholders may worth a further examination.

As we have mentioned, generally the relationship between directors and shareholders is non-contractual. Nevertheless, if they conclude a contract that may affect the shareholders' membership of the company, for example, a contract concluded by directors and shareholders to solve the problems deriving from the distribution of dividends or participation of general meeting, it is possible that their relationship will become contractual since there are obligations freely assumed by directors towards shareholders[777]. In this case, on one hand, if directors have breached their obligations in such a contract, in

[776] In this sense, see Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, pp. 95 and ss.
[777] In this sense, see Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, p. 186.

theory, it is possible to refer to *lex contractus* at the national dimension. However, we should find that even directors have breached their obligations imposed by this contract, their misconducts often occur during the exercise of corporate functions, which show a strong connection with the internal management of the company. In this sense, the mentioned contract cannot even be independent from an integrated corporate framework and it seems better to leave such a dispute governed by *lex societatis*. On the other hand, at the EU dimension, RRI tends to avoid extending its application to directors' liability, especially to the cases in which directors' obligations are related to their functions[778]. In fact, even if there is a contract between directors and shareholders regarding the shareholders' membership in the company, in a case where the membership of shareholders is affected, shareholders could also seek remedy from the company as well. When the company is to be held liable, the rules in *lex societatis* will inevitably be referred to.

If shareholders' membership in a company is not affected by a contract concluded between directors and them, for example, in order to attract further investment, directors of a company may conclude a contract with shareholders and promise that such an investment will make them earn a big benefit, otherwise directors will personally make compensation. In this case, although directors' behaviours are in the interests of the company, it is not necessary for them to give personal and additional promise to these shareholders when exercising their functions. When such a promise is made, directors will be considered as voluntarily enter into a relationship with these shareholders and assume external obligations to them, while such a case does not show strong connections with the internal management of the company. Therefore, since such a contract is no more than a normal commercial contract and could be governed by *lex contractus*, it could exceptionally refer to RRI in order to determine *lex contractus*.

Sometimes directors may have exercised their due functions *"ultra vires"* when concluding a contract with shareholders, creditors or other third parties[779]. In this case, if national company law enables the company to recognize the *"ultra vires"* behaviours of its

[778] See Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, pp. 186-187.

[779] Rafael ARENAS GARCÍA, "*Lex societatis* y derecho de establecimiento", in Rafael ARENAS GARCÍA, Carlos GÓRRIZ LÓPEZ, Jorge MIQUEL RODRÍGUEZ (Coord.), *Autonomía de la voluntad y exigencias imperativas en el derecho internacional de sociedades y otras personas jurídicas*, Barcelona, Atelier, 2014, pp. 127-169, p. 155.

directors, the company should burden the contractual liability in accordance with *lex societatis*. If national company law does not allow the company to admit directors' *"ultra vires"* behaviours, maybe shareholders, creditors or other third parties may seek relief by bringing an action against directors in accordance with *lex loci delicti* as well. We will extend this discussion in the next part. After all, whether directors have *"ultra vires"* greatly relies on the rules of *lex societatis*. Even though sometimes the company may be contractually bound up with shareholders, creditors or other third parties due to these *"ultra vires"* actions, it should not be generalized, and the strong connections of such a matter with *lex societatis* could preclude the application of RRI.

In conclusion, firstly, the relationship between directors and the company is inevitably linked with *lex societais*. Even though *lex contractus* may be referred to in a case where there is a contract between directors and the company, it still seems more appropriate to apply *lex societatis* in the case regarding directors' fiduciary duties and contractual obligations towards the company, thus RRI is not applicable. When directors breach their fiduciary duties or contractual obligations towards the company, they may be sued by the company through a corporate claim, or by the minority shareholders through a derivative claim if the company fails to do so, and these claims should be governed by *lex societatis* normally. However, a derivative claim may include a series of procedural requirements. If a derivative claim is commenced in a court of a Member state by local minority shareholders of a foreign company, sometimes *lex fori* may intervene in such a claim. We will carry on this discussion in the next part. Secondly, sometimes directors may conclude a contract with shareholders, creditors or other third parties. On one hand, in regard of creditors or other third parties, RRI may exceptionally apply if such a contract does not show enough connections with company law. On the other hand, in regard of shareholders, if a contract does not affect the shareholders' membership in the company and has no sufficient connection with the internal management of the company, RRI could apply. However, if the membership of the shareholders is affected by such a contract, RRI will not be operable due to its strong connections with company law.

1.1.2. Exceptional applicability of Rome II Regulation to the regime of directors' liability

A company will be held liable for its shareholders and creditors if it has breach the contractual obligations when carrying out the activities. The company law rules of some

Member states may force directors to pay the corporate obligations instead of the company if they have made misconducts during the management. In this case, directors are required to assume liability for the fault of the company towards shareholders or creditors. As well as RRI, RRII regarding the non-contractual matters is also inapplicable to the questions governed by company law such as the personal liability of officers for the obligations of the company[780]. Under this circumstance, such an issue should be excluded from RRII due to its close relations with the internal management of the company. However, we have mentioned the relationship between directors and shareholders or creditors is non-contractual. When directors commit a fault during the exercise of function that causes a direct loss to shareholders or creditors, the company law rules in some Member states recognize a direct and external liability of directors for their own fault. In this case, the company will not be held liable for the fault of directors though it is the contracting party with shareholders or creditors, but directors should make compensation for shareholders and creditors directly. Such a direct and external liability does not fall within the *"liability for the obligations of the company"* but it refers to a liability for directors themselves in order to restore the external relationship with shareholders or creditors. Therefore, it may be possible that RRII is exceptionally applicable in the cases where directors are obliged to assume direct liabilities towards shareholders or creditors, since such an issue does not show significant connections with the internal functioning of the company.

1.1.2.1. A direct loss suffered by shareholders due to directors

In the regime of directors' liability, directors' misconducts should be linked with directors' functions as directors. Similarly as the last part, we will distinguish a case where the membership of shareholders is not affected from a case where their membership is affected[781]. In respect of the case where the shareholders' membership is not affected, for example, if directors have concealed the crucial information on the financial status of the company to creditors while the concealment was published by the newspaper later, the price of the corporate shares may severely decrease due to this scandal[782]. In this case, minority shareholders may sustain a loss but their membership as shareholders is not impaired. Meanwhile, directors may collaborate with majority shareholders to make a

[780] See Article 1 (2) (d) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2008 on the law applicable to non-contractual obligations (Rome II).
[781] Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, p. 186.
[782] In this sense, see Jesús Alfaro ÁGUILA-REAL, "La llamada acción…", *loc. cit.*, p. 54.

harmful decision to minority shareholders without affecting their condition as shareholder. For example, in a general meeting, both majority and minority shareholders are able to vote in order to decide a corporate affair. However, this decision will always be made in accordance with the will of majority shareholders and it is very likely that such a contract is contrary to the interests of minority shareholders. In this regard, even though the membership of minority shareholders is not disturbed, these shareholders may suffer a great loss from directors' unlawful actions.

It is relevant to examine whether such a case should be governed by *lex societatis* under the corporate framework or could also fall within the scope of RRII. As we have mentioned, directors' liability towards shareholders in a personal action should relate to their capacity as directors in the company. Thus, this kind of damage only occurs in a case where directors exercise their functions and manage the corporate affairs. Besides, since directors' obligations are so intimately linked to the legal and regulatory framework of companies, maybe such a case should be governed by *lex societatis*[783]. However, the answer to whether a personal claim filed by shareholders against directors is admissible varies from state to state (for example it is admissible in Spain and Italy but is not allowed in Germany and France under general circumstances). In the company law rules of some Member states, individual shareholders cannot sue directors directly. Instead, they should assert a claim against the company for the breach of contractual obligations while the company brings a corporate action against the directors at issue in the following proceedings. However, if a personal action is inadmissible under *lex societatis* and the majority shareholders do not agree to carry out such a corporate action either, the due interests of individual shareholders may be highly threatened.

Let us imagine that a director in a Spanish company has caused a direct loss to an Italian shareholder in such a case, while a proceeding is commenced in Italy in accordance with RBI. An Italian judge could apply *lex societatis* (in this case *LSC*) and recognize such a personal action directly against directors. However, if it were a French company, since a personal action is not allowed in French law, the Italian judge would reject a personal action because *lex societatis* does not provide such a mechanism. In this case, it is doubtful whether the Italian judge would apply *lex societatis* if a local individual Italian shareholder

[783] See Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, p. 482.

of a foreign company cannot bring a personal claim as the shareholders of a national company. The Italian judge may characterize such a claim and find that it refers to a tort in essence. And on the basis of the principle of *"alterum non laedere"*[784], the judge may allow the intervention of *lex loci delicti* in this case for the purpose to safeguard the local interests if it is not contrary to the freedom of establishment[785].

Generally, the place where the claimants (in this case the individual shareholders) have their habitual residence often coincides with the place where a damage occurs, thus shareholders will resort to local courts because of convenience. However, ECJ always tried to avoid the application of *forum actoris* in its decisions since the defendant may be stuck in a disadvantageous place which is unpredictable for them. Therefore, it seems better to submit to the court of the place where the damage occurred or where the defendant is domiciled[786]. However, rules regarding conflict-of-jurisdiction and conflict-of-law have different approaches and include different interests[787]. The judges cannot reject the intervention of *lex loci delicti* by holding that it is unpredictable for the defendant because the objective of RRII lies in unifying the conflict-of-law rules throughout the EU in order to designate the same law irrespective of the country under whose courts an action is brought[788], meanwhile choice of law through a mutual consensus is also admitted in RRII for the purpose to enhance the legal certainty[789].

In accordance with Article 4 of RRII, *lex loci delicti* is the law where the damage occurred, irrespective of the countries in which the indirect consequences occurred, unless it is evident that the subject matters are manifestly more closely connected to another Member

[784] Francisco J. GARCIMARTÍN ALFÉREZ, "La unificación del derecho conflictual en Europa: el Reglamento sobre la ley aplicable a las obligaciones extracontractuales (Roma II)", *La Ley*, 2007, pp. 1-24, p. 6.
[785] In this sense, see Daniel COHEN, "La responsabilité civile des dirigeants sociaux en droit international privé", *Revue critique de droit international privé*, Tome 92, 2003 (4), pp. 585-624, pp. 606 and ss.
[786] Hélène GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe (Règlement 44/2001, Convention de Bruxelles et de Lugano)*, Paris, L.G.D.J., 2010, p. 232.
[787] The European harmonization appears to disregard the approach of making forum and jus coincide in order to assure the coherence of the system and the predictability of its solutions, and rather to opt for a solution based on uniform conflict of law rules, while preserving a plurality of competent for a for the same legal situation. See Fausto POCAR, "Relationship between the Rome I and the Brussels I Regulations", in Franco FERRARI, Stefan LEIBLE (Eds.), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, München, Sellier European Law Publishers, 2009, pp. 343-348, pp. 344-345.
[788] Georgina GARRIGA, "Relationships between 'Rome II' and other international instruments: A commentary on Article 28 of the Rome II Regulation", *Yearbook of Private International Law*, Vol. IX, 2007, pp. 137-148, p. 142.
[789] See Recital 31 of RRII.

state[790]. More concretely, Recital 17 of RRII also indicates that in the cases of a personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively[791]. Besides, the parties can choose the applicable law to their disputes through an agreement before or after the damage occurs[792], while they cannot evade the application of overriding mandatory rules through the mechanism of choice of law[793].

However, some difficulties may still arise from the interpretation of Article 4 of RRII. For example, if a director has caused damage to the shareholders in different Member states, individual shareholders may sue the director in the court in the place where the director is domiciled (in accordance with Article 4 of the RBI*bis*). The judge of this court may exceptionally apply *lex loci delicti* if a personal action is not available by virtue of *lex societatis*. In this case, if the personal actions are brought respectively by different individual shareholders in different Member states, it may not be difficult to determine *lex loci delicti* because each of the personal action is independent from the other. However, usually the judge of this court may join all these litigations involving the same cause of personal action into one in order to improve the judicial efficiency. Under this circumstance, it may be difficult to decide *lex loci delicti* in conformity with Article 4 (1) of RRII because it is possible that the victims suffer the damages in different Member states. In this sense, the application of the law of the place with the most significant relationship may apply by virtue of Article 4 (3) of RRII. For example, a director in a French company has committed an illicit act to several individual shareholders. Most of them have suffered damage in Spain, it is evident that Spanish law presents more connection with this proceeding and shall be applicable. However, if a director in a French company has committed an illicit act to several individual shareholders who have suffered the damages respectively in Spain, Italy or Germany, the solution should rely firstly on the choice of law by the parties. If they fail to reach an agreement, and the distributive application of the laws of the various countries of damage proves to be impracticable or

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[790] See Article 4(1) and (3) of RRII.

[791] See Recital 17 of RRII.

[792] See Article 14 of RRII. In this case, shareholders and directors are entitled to choose the law to deal with their disputes before the damage occurs because it refers to "a commercial activity" between them, and it is consistent with Article 14 (1)(b).

[793] Peter HUBER (ed.), *Rome II Regulation: Pocket Commentary*, München, Sellier European Law Publishers, 2011, p. 357.

leads to arbitrary results, the law of the place where the director has committed this damage may show more connections with the subject matters. In this sense, Article 4 (3) has the function to enable the judges to estimate the necessity under exceptional circumstances and decide the conflict-of-law rules that have the most connections with the subject matter in order to ensure the juridical security[794]. Nevertheless, if a court fails to apply a foreign law, or if the forum law impose some additional procedural requirements, the court may apply *lex fori* as well[795].

It is also relevant to examine the case where the membership of shareholders is affected. For example, directors hinder shareholders from taking part in the general meetings and voting, or prevent them to participate in the distribution of dividends, or even forget to put the shareholders' names in the registration book of shareholders[796]. Since the condition of shareholders is significantly linked with the membership of the company and the internal organization of the company, it should fall within the "company law exception".

However, sometimes we may find that national company law will not allow the individual shareholders to file a personal claim directly against directors only because their membership as shareholders in the company is affected. For example, individual shareholders may suffer a direct loss because directors prevent them from participating in the distribution of dividends. Unlike the former case where shareholders' membership in the company is not affected, the intimate relationship of the shareholder's condition with the international organization of company law is sufficient to exclude the application of RRII. Therefore, if individual shareholders suffer personal damage from these acts, it may be more appropriate for them to sue the company rather than directors, for the reason that the company has breached its contractual obligations towards its members. However, this case will still fall within the scope of *lex societatis* because it refers to internal membership of a company[797] (It should be noticed that, if the defendant is the company, the jurisdiction cannot be established by virtue of Article 5 (3) of the RBI but should be subject to Article 5 (1) of the RBI, since it deals with a contractual obligation between the company and its members).

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[794] Dominique BUREAU, Horatia Muir WATT, *Droit International Privé…, op. cit.*, p. 414.

[795] See Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, pp. 508-509.

[796] Fernando Marín DE LA BÁRCENA, *La acción individual…, op. cit.*, pp. 280 and ss.

[797] In this sense, see Stephen GRIFFIN, *Company Law: Fundamental Principles (4th Edition)*, London, Pearson Education Limited, 2006, p. 73.

1.1.2.2. A direct loss suffered by creditors and other third parties due to directors

Since the company itself is an independent entity, the company rather than directors should be contractually linked with creditors or other third parties. Under general circumstances, directors and creditors or other third parties are not contractually bound up with each other since no relationship freely entered into between directors and creditors or other third parties, thus RRI is not applicable. However, it still needs further examination on the applicability of RRII.

It is clear that RRII excludes its application from the case where directors are held liable for the corporate debts. However, under some circumstances, apart from a loss sustained by creditors due to the reduction of the company's assets, creditors could also suffer a direct loss from the directors' personal acts in managing the corporate affairs. For example, directors unlawfully disclose the confidential information of a contract of technology transfer concluded by a creditor and the company, or directors of a consulting company negligently give wrong advices to its clients (here the creditor) and cause a severe loss to the investment made by the creditor following the advices, etc.[798] In this case, on one hand, the creditor may assert a claim against the company for the breach of contractual obligations, while it should refer to RRI in order to decide *lex contractus*[799]. On the other hand, if the creditor does not want to file an action against the company but intends to sue its directors directly, he should refer to *lex societatis* in order to examine whether such an issue is admissible in that law. In this case, since directors' misconducts to creditors normally occur during the exercise of the corporate functions, and the national rules of the company law play a significant rule to determine whether a personal claim is admissible in that Member state, it seems to be more appropriate to have such a claim ruled by *lex societatis* than *lex loci delicti*.

However, such a conclusion is not applicable in all the situations. Similar to the case of shareholders, when a personal claim filed by creditors is not admissible in accordance with the rules of *lex societatis*, national judges may exceptionally allow the intervention of *lex*

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[798] See Fernando Marín DE LA BÁRCENA, *La acción individual…, op. cit.*, p. 306.
[799] In this sense, see Francisco J. GARCIMARTÍN ALFÉREZ, "Company Restructuring and Universal Transfers of Assets: A proposal to deal with the Conflict-of-Laws Problems", pp. 1-11, p.6. Available on: http://ec.europa.eu/internal_market/consultations/2012/company_law/additional-information/prof-garcimartin-additional-comments_en.pdf.

loci delicti or *lex fori* into such a case in order to protect the interests of the local creditors of a foreign company. Besides, sometimes a personal claim filed by creditors against directors may not show significant connections with the internal management of the company. For example, creditors have decided to conclude a contract with the company because directors in the company promised that by concluding such a contract creditors would gain huge profit, while it turned out to be completely wrong and creditors suffer a great financial loss due to their reliance to directors. In this case, directors have externally participated into the contract concluded by the company and creditors, and their normal management of corporate affairs does not require them to give personal promise to creditors. Therefore, such a case does not show strong connections with the company law rules and is not necessarily governed by *lex societatis.* Instead, it could be based on general non-contractual ground. As we have mentioned, some German doctrines consider that directors should be held directly liable to the creditors due to the breach of a special *"culpa in contrahendo"* obligation if creditors have relied on the special knowledge and trustworthiness of the managing directors, or if the managing directors have direct economic interest in the transaction in question[800]. Thus RRII may be referred to in order to decide the applicable law.

In regard of the third parties, they may not be contractually bound up with the company, for example, directors hit a passer-by when driving the car to attend a board's meeting, or directors cause defamation to the competitors of the company[801]. In this case, although directors' behaviours are related to their functions as directors, these third parties do not have a contractual relationship with the company and thus it is not possible to refer to *lex contractus*. Meanwhile, the application of *lex societatis* seem to be not sufficiently persuasive because this kind of issues often occurs in a very fortuitous occasion and is not based on an integrated corporate framework background. In this case, directors may personally assume external responsibilities towards these third parties on the basis of the principle of *"neminem laedere"*[802]. It is not for the sake of the company but it is for their own fault. Therefore, such an issue should be governed by *lex loci delicti* and it should refer to RRII in order to determine the applicable law.

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[800] Frank MONTAG, Klaus HEINEMANN, "The European Community", *loc. cit.*, p. 353.
[801] Jesús Alfaro ÁGULA-REAL, "La llamada acción…", *loc. cit.,* p. 9.
[802] Jesús Alfaro ÁGULA-REAL, "La llamada acción…", *loc. cit.*, p. 9.

It is also relevant to continue the discussion of directors' *"ultra vires"* behaviours that we have just mentioned in the last part. In this case, if a resolution to the nomination of directors is invalid while "directors" continue to exercise their corporate functions, the activities that they have carried out cannot be regarded as invalid in all the situations. If these "directors" have represented the company to conclude a contract with creditors, such a contract could still have binding effects on the company if the creditors have acted with good faith[803]. Besides, directors may also previously conclude a contract with creditors in the name of the company, while such a contract is declared void by the meeting of the board or the general meeting of shareholders since it is contrary to the interests of the company. In this sense, directors are also considered to have acted *"ultra vires"* in managing the corporate affairs. In accordance with the national rules of some Member states such as the UK, the company should enter into an *"ultra vires"* act even if its directors have exceeded their authority[804]. Section 40 of *Companies Act 2006* validates the act of directors by allowing an outsider (here the creditor) to enforce the contract against the company even though directors have exceeded their powers by taking the company into an *"ultra vires"* transaction[805]. Meanwhile, in Spanish Law, Articles 233 and 234 of *LSC* also state that the directors' representation of the company shall extend to all their acts included in the corporate purpose described in statutes or bylaws. Any limitation to the directors' representative powers, even has been registered in the Registry of Commerce, shall be null and void to the third parties if they have acted in *bona fide*. And the company shall be bound up with creditors in such a transaction carried out by directors even if it is not within the corporate purpose[806]. In this situation, since *lex societatis* decides the directors' representative powers as well as the capacity of a company to enter into any transaction, whether directors have acted *"ultra vires"* or not should refer to *lex societatis* as well[807]. Meanwhile, *lex societatis* could also determine whether it is the company to assume the liability deriving from directors' *"ultra vires"* behaviours, or directors should be held personally liable for their behaviours which have exceeded their due powers.

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[803] Javier García DE ENTERRÍA, "Los efectos de la declaración de nulidad de los acuerdos sociales", *Revista de Derecho Mercantil*, No. 290, 2013 (Octubre-Diciembre), pp. 141-169, p. 158.
[804] Stephen GRIFFIN, "The Rise and Fall of the *ultra vires* Rule in Corporate Law", Mountbatten Journal of Legal Studies, June 1998, 2 (1), pp. 5-31, pp. 5 and ss.
[805] See Section 40 of Companies Act 2006, also see David SAGAR, Larry MEAD, Kevin BAMPTON, *C5: Fundamentals of Ethics, Corporate Governance and Business Law*, ELSEVIER, 2008, pp. 191-192.
[806] See Articles 233 and 234 of *LSC*.
[807] In this sense, see Stephan RAMMELOO, *Corporations in Private International Law: A European Perspective*, Oxford, Oxford University Press, 2001, pp. 136-137.

Therefore, whether creditors could assert a personal claim directly against directors for their *"ultra vires"* behaviours should highly depend on *lex societatis*.

However, in some Member states, there is no doctrine of *"ultra vires"* in company law (for example Germany), their company laws provide an unlimited authority power for the executive body of the company and admit that directors have the power to make commitment for the company even outside its field of business or activity since the articles limiting the managing directors' authority are only internally valid[808]. In this sense, it is irrelevant to have further discussion since directors are legitimate to carry out this kind of transactions with creditors, no liability will be established because no *"ultra vires"* behaviour exists.

It is possible that in some Member states, an *"ultra vires"* transaction may be considered to be void and the company will not enter into any contractual obligations with the creditors. In this case, creditors may suffer a financial loss due to the directors' previous negotiating behaviours, and directors may have to assume non-contractual liability towards creditors. The German doctrine of *"culpa in contrahendo"* may give some reference. In this case, the company is represented by the managing directors in concluding a contract. During the negotiations of the contract, the managing directors may personally make promise to creditors and ensure them that there will be no problem in performing such a contract, while such a promise may make creditors place special reliance on them. However, if the company fails to fulfil the contractual obligations, the managing directors should be held liable for the so-called "reliance damages" towards creditors[809]. In this case, it could refer to RRII in order to determine of the applicable rules.

1.1.2.3. A possible product liability

Sometimes, the third parties who sustain a loss arising out of defective products will assert a claim against the company for the breach of contractual obligations, meanwhile they will also try to seek compensation by bringing a personal claim against directors due to their wilful acts or gross negligence during the process of manufacture, distribution or

[808] Florian WOLFF, Dietmar VOELKER, Kristofer BOTT, *German Tax and Business Law*, London, Sweet & Maxwell, 2005, p. 7/058.
[809] Martin SCHULZ, Oliver WASMEIER, *The Law of Business…, op. cit.*, p. 100.

supervision of the productions[810]. For example, class action litigants in products liability cases may claim that the directors' failure to supervise and manage the products' quality has led to their injuries[811]. In some national laws, a direct claim of these third parties against directors for the damage caused by defective product is allowed, for example, British *Consumer Protection Act 1987* imposes liability upon directors for the defective products[812]. In accordance with this provision, directors and officers of the company may face considerable risks of personal liability for their fault during the supervision and management of the products. In order to decide *lex loci delicti*, the application of both the Hague Convention on the law applicable to products liability and RRII should be considered.

Until now, the Hague Convention has been ratified by seven Member states[813]. And in accordance with Article 28 (1) of RRII, the application of the Hague Convention will take precedence over RRII in these Member states[814]. Therefore, before a Spanish court, the judges will firstly refer to the Hague Convention in order to decide *lex loci delicti*. In accordance with Article 3 of the Hague Convention, the liability arising out of defective product is also extended to the persons taking part in the commercial chain of preparation and distribution, while the agents and employees of the company shall be included[815]. In this sense, directors may be considered as an agent or a special employee of the company, and personal liability may also be imposed upon them[816].

In conformity with Article 4 of the Hague Convention, the applicable law shall be the internal law of the State of the place of injury shall apply if the place coincides with that of the habitual residence of the injured; or with the principal place of the business of the

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[810] Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, p. 191.
[811] Martin PETRIN, "The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law", *American University Law Review*, Volume 59, Issue 6, pp. 1661-1711, pp. 1663-1664.
[812] Helen ANDERSON, *Directors' Personal Liability for Corporate Fault: A Comparative Analysis*, The Hague, Kluwer Law International, 2008, p. 170.
[813] Croatia, Finland, France, Luxembourg, Netherlands, Slovenia and Spain.
[814] See Article 28 (1) of RRII. Also see Peter HUBER (ed.), *Regulation Rome II…, op. cit.*, p. 127.
[815] See Article 3 of the Hague Convention on the law applicable to products liability.
[816] In this case, the company should assume a breach of contractual obligations as well as non-contractual obligations towards the injured third parties, while the directors may also be required to assume personal liability for their wrongful behaviors. Therefore, the non-contractual obligations of the company and of the directors should be distinguished, and third parties should decide that they would bring an action against the company or the directors.

defendant; or with the place where the product was acquired[817]. However, if the place of the habitual residence of the injured coincides with the principal place of the business of the defendant or with the place where the product was acquired, the law of the state in which the injured has habitual residence shall apply than the law of the place of injury[818]. Moreover, in accordance with Articles 6 and 7, under some exceptional circumstances, for example, if the law of the states fixed by Articles 4 and 5 turns out to be inapplicable, or if the directors can prove that they cannot reasonably have predicted that the product would be available through commercial channels in other state, the law applicable shall only be the law of the place where the defendant has his principal place of the business[819].

However, this solution may be problematic. Unlike the company, if directors are not legal persons, they will not have a principle place for business because they act as agent or employee in the place of the company. If *lex loci commissi* or the place of the habitual residence of the injured cannot apply, there will be no appropriate law to deal with this issue. In this case, it may be the best choice to apply the law of the place where the company has its principle place, especially in the principle place where the directors exercise the corporate functions in order to ensure sufficient connections with the issue, and the injured should indicate in the claim that he intends to seek compensation from directors rather than the company so as to make clear the focus of the dispute[820].

It is suggested that insofar as any issue not covered by the Hague Convention is within the scope of RRII[821]. In the case where RRII turns out to be applicable, it should refer to the special provision dealing with the product liability in order to determine the applicable law. RRII also adopts its own criterion and states that the applicable law is the law where the injured has habitual residence if the product was marketed in that country; or failing that, the law of the country in which the product was acquired if the product was marketed in that country; or failing that the law of the country in which the damage occurred if the

[817] See Article 4 of the Hague Convention on the law applicable to products liability. Also see José Carlos FERNÁNDEZ ROZAS, Sixto SÁNCHEZ LORENZO, *Derecho Internacional Privado (7ª Edición)*, Navarra, Civitas/Thomas Reuters, 2013, p. 624.
[818] See Article 5 of the Hague Convention on the law applicable to products liability.
[819] See Articles 6 and 7 of the Hague Convention on the law applicable to products liability.
[820] In this sense, see Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, pp. 192-193.
[821] Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, p. 563. However the continuing existence of two separates applicable law regimes for product liability cases within the Member states is undoubtedly unsatisfactory, while it still leaves for the EU to solve this divergence. In this sense, see Andrew Dickinson, *The Regulation Rome II…, op. cit.*, p. 389.

product were marketed in that country[822]. However, there may still exist some difficulties. If the judges have determined the applicable law in accordance with the Hague Convention or RRII, but it turns out to be that no provision is available in this law that could legitimate the injured to bring such an action against directors, the injured would not seek compensation by filing such a claim. Under this circumstance, the possible absence in a foreign law may give room to *lex fori* to act as a subsidiary rule or allow an interpretation of the foreign law rules on the basis of the solution admitted in similar cases or on the basis of the solution adopted in other law systems pertaining to the same legal family[823].

1.2. Lex societatis *and the principle of freedom of establishment*

Lex societatis is the law dealing with the matters such as legal status, formation, raising and maintenance of the capital, organization of corporate bodies, including rights, duties and liabilities of the members and its officers towards the company, representation of the company towards third parties, membership, dissolution, etc.[824] The precise scope of *lex societatis* may vary from state to state, but most of the jurisdictions generally consider these mentioned elements as governed by *lex societatis*. Generally, the applicable law dealing with the issue relating to the breach of directors' fiduciary duties should be *lex societatis*. However, in European law, until now, there still do not exist uniform conflict-of-law rules in the field of companies. The judicial lacuna in this aspect thus gives room for every Member state to decide the connecting factor that is required for a company in accordance with its national rules[825]. Since directors' liability can be greatly affected by *lex societatis* while *lex societatis* is greatly affected by the freedom of establishment in the EU law, it is relevant for us to carry out a further discussion on the examination of the relation between directors' liability and the freedom of establishment so as to determine the applicable rules to directors' liability within the Member states.

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[822] See Articles 5 of RRII.

[823] Michael TRAEST, "Belgium", in Carlos ESPLUGUES, José LUIS IGLESIAS, Guillermo PALAO (eds.), *Application of Foreign Law*, München, Sellier European Law Publishers, 2011, pp. 129-144, p. 136. Also see K. LIPSTEIN, "Inherent Limitations in Statutes and the Conflict of Laws", in British Institute of International and Comparative Law, *Contemporary Problems in the Conflict of Laws: Essays in Honor of JOHN HUMPHREY CARLILE MORRIS*, London, Sijthoff, 1978, pp. 184-202, p. 186.

[824] Susanne KALSS, "Conflict of Law Rules on Companies in the EU", in Guglielmo MAISTO, *Residence of Companies Under Tax Treaties and EC Law*, EC and International Tax Law Series, Volume 5, IBFD, 2009, pp. 29-60, p. 40.

[825] In this sense, see Alfonso-Luis CALVO CARVACA, Javier CARRASCOSA GONZÁLEZ, "Sociedades mercantiles: Libertad de establecimiento y conflicto de leyes en la Unión Europea", *Revista de Derecho de Sociedades*, No. 28, Año 2007-1, pp. 59-100, p. 70.

1.2.1. The lacuna in the EU's company law

With regard to the legislations of EU Member states, there are two predominant theories in respect of the determination of the *lex societatis*, i.e., the theory of incorporation and theory of real seat[826]. The theory of incorporation (which is adopted in jurisdictions of, for example, UK, Netherland, Denmark) considers that the legal personality of a company is determined by the law of the place of incorporation (the place where it acquired its legal personality) or registered office (the place where its registered seat is located)[827]. In contrast, the theory of real seat (which is adopted in jurisdictions of, for example, France, Germany, Belgium) treats the law of the country where the company has its top management, centre administration or principal place of business[828], or where the corporate bodies and directors are located, or where the shareholders' meetings take place and the main contracts are discussed as the law applicable to company[829].

The European legislators have excluded the application of Rome Regulations from the aspects of company law in order to establish a uniform company law at the EU level. They have shown the ambition to achieve their plan not only through a private international law instrument, but also through the establishment of a substantive law mechanism[830], in which we can observe that they have established a series of directives in specific circumstances[831]. However, the difficulties deriving from the intrinsic divergence in different national company laws have made the substantive law mechanism turns out to be unlikely to achieve within a short time[832], thus the EU has returned back to start from harmonization of private international law rules in the aspect of company law. In accordance with the EU

[826] Diana SANCHO VILLA, *La transferencia internacional de la sede social en el espacio Europeo,* Madrid, Editorial Eurolex, 2001, pp. 82 and ss.
[827] Didier MARTIN, Didier PORACCHIA, "Company mobility through cross-border transfers of registered offices within the European Union: A new challenge for French law", *Journal de Droit international*, Tome 137, 2010 (2), pp. 347-397, p. 348.
[828] Stephan RAMMELOO, *Corporations in Private…, op. cit.*, p. 11.
[829] Didier MARTIN, Didier PORACCHIA, Didier MARTIN, Didier PORACCHIA, "Company mobility through…", *op. cit.*, p. 348.
[830] In this sense, see Rafael ARENAS GARCÍA, "El Derecho Internacional Privado de sociedades como Reflejo del Derecho material de sociedades", in J.FORNER DELAYGUA/C. Gonzalez Beilfuss/R. VIÑAS FARRE (coords.), *Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado*. Madrid/Barcelona/Buenos Aires/Sao Paulo, Liber Amicorum Alegría Borrás, Marcial Pons, 2013, pp. 133-146, pp. 133 and ss.
[831] Justin BORG-BARTHET, *The Governing Law of Companies in EU Law*, Oxford, Hart Publishing, 2012, p. 3.
[832] In this sense, see Gert-Jan VOSSESTEIN, *Modernization of European Company Law and Corporate Governance: Some Considerations on its Legal Limits*, The Hague, Kluwer Law International, 2010, pp. 31-32.

Commission timetable, the Commission will release a *Green Paper on private international law aspects including applicable law, relating to companies, associations and other legal persons* in 2014[833], while it is still absent now. Therefore, in this part, we will still follow ECJ's decisions in the case law and investigate on the EU's criterion on *lex societatis* in the case involving a cross-boarder element.

1.2.2. ECJ's case law regarding the principle of freedom of establishment and *lex societatis*

TFEU provides that the creation of a single market should be based primarily on four fundamental freedoms, among which there is the freedom of establishment[834]. The principle of freedom of establishment enables an economic operator (here we shall refer to company) to carry on an economic activity in a stable and continuous way in one or more Member states[835]. In accordance with Article 54 of TFEU, if a company is formed pursuant to the law of a Member state while having its registered office, central administration or principle place of business within the EU, it shall in principle benefit from the freedom of establishment[836]. And in accordance with Article 49 of TFEU, the freedom of establishment allows the company to pursue its activities in another Member states through an agency, branch or subsidiary[837]. In this sense, the mutual recognition of companies or firms between the Member states should enable a company formed in accordance with the law of a Member state to install its primary or secondary establishment in another Member state without losing its legal personality[838].

However, different criteria followed by the theory of incorporation and the theory of real seat may bring obstacles to the interpretation on these Articles. For example, if a company is constituted in accordance with the law of a Member state adopting the theory of incorporation, it is sufficient that it has the registered office (statutory seat) within the

[833] See the EU Commission's Timetable for 2010-2014, http://conflictoflaws.net/2010/commissions-timetable-for-2010-2014/.
[834] Paschalis PASCHALIDIS, *Freedom of Establishment and Private International Law for Corporations*, Oxford, Oxford University Press, 2012, num. 3.01.
[835] See the Introduction to the General Principles of the Freedom of Establishment on the website of the European Commission concerning the EU Single Market, http://ec.europa.eu/internal_market/services/principles_en.htm.
[836] See Article 54 of TFEU.
[837] See Article 49 of TFEU.
[838] Justin BORG-BARTHET, *The Governing Law…, op. cit.*, p. 106.

territory of this state, regardless where the company's business is conducted or managed[839]. Meanwhile, if a company is constituted in accordance with the law of a Member state adopting the theory of real seat, for the fear of fraud or fictitious seat, this state may impose the company to have a more substantive connection with the place of its real seat and may only invoke the existence of such real seat against the statutory seat, and the law of the place where the real seat is located will be applicable to that company under this theory[840].

In this regard, since the EU Member states vacillate between the two theories, interpretation to the application of freedom of establishment should rely on ECJ to a great extent. And the determination of *lex societatis* may be influenced by the interpretation made by ECJ as well.

1.2.2.1. From the perspective of state of emigration: Exercise of freedom of movement will make the company lose its legal personality?

If a company is incorporated in a Member state, the Member state may have the power to decide whether the company is formed validly and whether it has legal personality in accordance with its national law. However, after the incorporation, sometimes a company may intend to change its real seat to another Member state. In this case, it may be relevant to examine whether there will be a change of *lex societatis*.

Pursuant to the decisions of ECJ in the case *Daily Mail*[841], the state of emigration could determine the connecting factors with its national companies[842]. It seems that at that time, Articles 49 and 54 of TFEU were interpreted as conferring no right on a company incorporated under the legislation of a Member state to exercise the freedom of establishment, the ECJ's initiative was not to refuse the possibility of companies' cross-boarder mobility, but to respect the legal divergence of the Member states on the lack of

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[839] Silvia FAZIO, *The Harmonization of International Commercial Law*, The Hague, Kluwer International Law, 2007, p. 85.
[840] Didier MARTIN, Didier PORACCHIA, Didier MARTIN, Didier PORACCHIA, "Company mobility through…", *op. cit.*, pp. 348-349. Also see Mattias DAHLBERG, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, The Hague, Kluwer Law International, 2005, p. 145.
[841] See Judgment of the Court of 27 September 1988, Case 81/87, *The Queen/Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*.
[842] See paragraphs 20 and ss of Case 81/87.

harmonization on tax law[843]. However, the complete refusal of the companies' mobility through the cross-border transfer has turned out to be contrary to the principle of freedom of establishment. Even though it is necessary to ensure the balanced allocation of powers of national taxation between the Member states, the objective cannot be achieved at the cost of sacrificing the freedom of establishment that companies are supposed to enjoy under Articles 49 and 54 of TFEU.

If a Member state allows its national companies to be incorporated within its territory while having the real seat in another Member state, on the basis of the principle of freedom of establishment, this Member state will continue to recognize the legal personality of the company even if it only reserves the registered office within its territory. In this sense, *lex societatis* should continue to be the law of the place of incorporation. This conclusion was confirmed by the ECJ's decision in *National Grid Indus*[844]. In this case, it was clearly established that the legal personality of a company conferred by the law of a Member state in which it is incorporated would not be affected on the occasion of exercising the freedom of establishment[845].

Sometimes, the state of emigration may impose an exit tax for the sake of guaranteeing its own tax competence, while such taxation may constitute a restriction on the exercise of freedom of establishment. A restriction on the company's mobility can only be justified by providing that it satisfies the requirement of proportionality[846]. After all, the question asked was whether an exit tax imposed by a Member state was acceptable under the right of establishment, while the recognition and retention of legal personality of a company was no problem[847]. From the perspective of the state of emigration, if a company is incorporated in accordance with the law of a Member state and has its registered office in that Member state, it will be subject to the law of that Member state and will not lose its legal personality even if it decides to develop all its main activities in another Member state.

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[843] Silvia FAZIO, *The Harmonization of..., op. cit.*, pp. 86-87.
[844] See Judgment of the Court of 29 November 2011, Case C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*.
[845] See paragraphs 33 and ss of Case C-371/10.
[846] See David HUGHES, *Corporate Residence*, London, Bloomsbury Professional, 2013, p. 16.
[847] Ben J. M. TERRA, Peter J. WATTEL, *European Tax Law (Fourth Edition)*, The Hague, Kluwer Law International, 2008, p. 116.

Nonetheless, *lex societatis* may be affected if a company incorporated in a Member state decides to change its statutory seat to another Member state. Under traditional theory of incorporation, if a company wishes to change its statutory seat to another Member state, this company has to be dissolved while re-incorporated in the Member state that it is planning to move in. The exercise of movement may cause the company to dissociate with its original *lex societatis*[848]. However, in the case *Cartesio*[849], the ECJ held that a company would not lose its legal personality while exercising the movement, which means that the state of emigration should not oblige its national companies to dissolve and re-establish *ex novo*[850], but should allow the company to voluntarily become a foreign company by changing its statutory seat.

In this case, on one hand, as we have explained, if a company formed in one Member state tries to change its statutory seat to another Member state, it does not need to be dissolved in the state of departure and get reincorporated in the state of arrival. As a contrary, this company can directly convert into a foreign company by exercising the freedom of movement, because its legal personality will not be deprived by the original state[851]. In this sense, ECJ respected a company's autonomy to convert into a foreign company and apply the law of that Member state. On the other hand, the retention of the legal personality does not mean that the company can continue to apply its old *lex societatis*, because ECJ also concluded that the Member states have the power to decide the connecting factors that are required for a company to be established and to continue to exist under their laws[852]. Although the freedom of establishment obliges the Member states to allow a company to break its connection with the original state and convert itself into a foreign state without reincorporation, in a case where the company wishes to become a foreign company while maintaining the connection with the old Member state and continue to be subject to the law of that Member state, it is not allowed by ECJ since the freedom of establishment cannot spoil a national company to that extent and an excessive protection may however lead to

[848] In this sense, see Alberto SANTA MARIA, *European Economic Law (Second Edition)*, The Hague, Kluwer Law International, 2009, p. 57.
[849] See Judgment of the Court of 16 December 2008, Case C-210/06, *Cartesio Oktató és Szolgáltató bt*.
[850] See paragraph 107 of Case C-210/06. Also see Christiana Hji PANAYI, "Corporate Mobility in Private International Law and European Community: Debunking Some Myths", *Yearbook of European Law*, Vol. 28, 2009, pp. 123-176, p. 165.
[851] In this sense, see paragraph 111 of Case C-210/06.
[852] Justin BORG-BARTHET, *The Governing Law…, op. cit.*, p. 133.

the emergence of possible fraud[853]. This restriction is not contrary to the principle of the freedom of movement, because *lex societatis* can give birth to a company (the creation) as well as bringing it to the end (the extinction)[854].

1.2.2.2. From the perspective of state of immigration: Is it necessary to recognize a foreign company?

The freedom of movement should not only impose obligations on the state of emigration, but also oblige the state of immigration not to set unnecessary restrictions that may affect the company's mobility ensured by the principle of freedom of movement[855]. In this sense, it may be relevant to bring a discussion to what extent will a foreign company be recognized and will the law of incorporation continues to apply.

In accordance with ECJ's decisions in the case *Centros*[856], a company formed under the law of a Member state has the right to set up branches and exercise its main activities through such branches in other Member states, the fact that a company has been set up with the sole purpose to carry out business in another Member state is not sufficient to amount to an abuse of rights[857]. Therefore, it is consistent with the principle of freedom of establishment that a company only has its registered office in a Member state and pursues its main activities in another Member state[858]. The case *Überseering*[859] also follows the line set up by the case *Centros*. In this case, a company incorporated in the Netherlands

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[853] P.N. RODAS PAREDES, "Alcance del derecho de establecimiento primario en la Unión Europea (Comentario a la STJUE de 16 de diciembre de 2008, C-210/06, Cartesio)", *Revista de Derecho mercantil*, No. 271, 2009 (Enero-Marzo), pp. 261-281, pp. 264 and ss. Also see C. KLEINER, "Le transfert de siège social en droit international privé", *Journal du droit international*, Tome 137, 2010 (2), pp. 315-345, pp. 336-337.

[854] F. MARTÍNEZ RIVAS, "Traslado internacional de sede social en la Unión Europea: Del Caso Daily Mail al Caso Cartesio. Veinte años no son nada", Madrid, *Cuadernos de Derecho Transnacional,* Vol. 1, Nº 1, 2009, pp. 132-142, p. 139.

[855] Rafael ARENAS GARCÍA, "Transferencia intraeuropea de la sede de dirección de la empresa: Derecho privado, Fiscalidad y Libertad de establecimiento [Comentario a la STJUE (Gran Sala) de 29 de noviembre de 2011, As. C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*]", *Diario La Ley*, Nº 7848, pp. 1-15. pp. 7 and ss.

[856] See Judgment of the Court of 9 March 1999, Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*.

[857] Mathias SIEMS, "Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century", *European Law Review,* No. 27, 2002, pp. 47-59, p. 50. Also see Mattias DAHLBERG, *Direct Taxation in…, op. cit.*, p. 133.

[858] In this sense, see Tito BALLARINO, "From *Centros* to *Überseering* –EC Rights of Establishment and the Conflict of Laws", *Yearbook of Private International Law*, Volume IV, 2002, pp. 203-216, pp. 206 and ss.

[859] See Judgment of the Court of 5 November 2002, Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*.

intended to have its centre of administration in Germany without losing its status in accordance with the law of the first state. However, according to German rules, foreign companies with their real seat in Germany were not allowed to be a party to legal proceedings unless they reincorporated in such a way as to acquire legal capacity under German Law[860]. This treatment was rejected by ECJ, holding that no justification exists for a Member state's complete denial of the legal capacity of a foreign company that was validly incorporated by virtue of the law of incorporation[861].

In this sense, ECJ obliges the state of immigration to recognize a foreign company who only intends to carry out its main business in that Member state and has its centre of administration within its territory. By forbidding the Member state to deny the legal capacity and the capacity to be a party to legal proceedings of a company incorporated in another Member state, ECJ confirmed that such a refusal of recognition of the legal capacity of a foreign company is contrary to the freedom of establishment. A Member state may impose sanctions on a foreign company for not satisfying the imperative requirements when setting up an establishment within its territory, however in no case could the refusal of legal capacity of the foreign company be considered as legitimate only for the fact that the foreign company does not coincide the place of incorporation with the place where its real seat is located[862].

Therefore, if the restriction on the exercise of the right of establishment is not justified, a company incorporated in accordance with the law of a Member state should be able to exercise the right of establishment without losing its legal capacity. ECJ held that the legal capacity of a company formed in accordance with the law of a Member state in which it has its registered office and which exercises its freedom of establishment in another Member state has to be recognized all over the EU[863]. In this way, the law of incorporation

[860] Gijsbert Karel FIBBE, *EC Law Aspects of Hybrid Entities*, The Hague, Doctoral Series/Academic Council, 2009, p. 68.
[861] Nicole ROTHE, "Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the *Überseering* case", *American University Law Review*, Volume 53, Issue 5, 2004, pp. 1103-1141, p. 1130.
[862] Rafael ARENAS GARCÍA, "*Lex societatis* y…", *loc. cit.*, pp. 140-141.
[863] K. F. STURMFELS, "'Pseudo-Foreign Companies' in Germany: The *Centros*, *Überseering* and *Inspire Art* Decisions of the European Court of Justice", in Michael WENDLER, Bernd TREMML, Bernard BUECKER (Eds.), *Key Aspects of German Business Law: A practical manuel (Fourth Edition),* Berlin/Heidelberg/New York, Springer, 2008, pp. 59-64, p. 61.

will continue to apply to determine the issues relating to the company's legal capacity and the capacity to be a party to legal proceedings.

Deriving from the ECJ's decisions, *lex societais* is the law of the place of incorporation in accordance with the principles of freedom of establishment[864]. In this case, we can find that ECJ favours the theory of incorporation rather than the theory of real seat. However, ECJ never stated that the theory of real seat is contrary to the freedom of establishment. It only held that a restriction on the exercise of a fundamental freedom must fulfil the imperative requirements and the need of the protection of the general interests so as to be justified[865]. ECJ did not directly touch upon the existence of real seat theory, but indirectly affects it[866]. In this sense, the theory of real seat is not definitely incompatible with the freedom of establishment, while it is only inapplicable in the case where its restrictive measures are contrary to the principles of freedom of establishment[867]. In a subsequent case *Inspire Art*[868], the court clearly held four conditions to justify the restrictions on the exercise of freedom of movement: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it[869].

1.2.3. Should *lex societatis* become the unique connection with the regime of directors' liability towards the company?

As we have mentioned, normally the law applicable to the issue concerning directors' liability towards the company is *lex societatis*. However, since the company mobility is a

[864] Mathieu ISENBAERT, *EC Law and the Sovereignty of the Member states in Direct Taxation*, The Hague, IBFD Doctoral Series, 2010, p. 297.
[865] In this sense, see Otto SANDROCK, Jean J. DU PLESSIS, "The Impact of European Developments on German Codetermination and German Corporate Law", in Jean J. DU PLESSIS, Bernhard GROßFELD, Claus LUTTERMANN, Ingo SAENGER, Otto SANDROCK, Matthias CASPER, *German Corporate Governance in International and European Context (Second Edition)*, Berlin/Heidelberg/New York, Springer, 2012, pp. 197-273, pp. 206-207.
[866] Britta KÜGLER, *The aftermath of Inspire Art –Applicability of the real seat theory and grounds for justification*, Master Thesis of the University of Lund, 2004, p. 23. This thesis is available on: http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1554814&fileOId=1563452.
[867] In this sense, see Sergi PRATS JANÉ, *Evolución del derecho societario europeo—situación actual y análisis jurisprudencial desde el punto de vista del derecho internacional privado*, Badajoz, Editorial @becedario, 2007, pp. 107-108.
[868] See Judgment of the Court of 30 September 2003, Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*.
[869] See paragraph 133 of Case C-167/01.

common phenomenon within the Member states, it is crucial to determine *lex societatis* of the company as the first step to deal with directors' obligations towards the company. When *lex societatis* is determined, we could also take into account whether or not *lex societatis* is the only relevant rule that could be applied to deal with the directors' contractual obligations towards the company.

First of all, it is relevant to repeat ECJ's decisions in the case *Inspire Art* since directors' liability was clearly mentioned in this case. A company incorporated under the English law set up a secondary establishment and developed all its commercial activities in the Netherlands. As the host state, the Netherlands obliged the English company to act in accordance with *WFBV* (Law on Formally Foreign Companies), especially with the rules concerning minimum capital and directors' liability. By virtue of this legislation, the fact that the company is formally foreign must be clearly indicated in the formal documents. And directors should be held liable for the obligations of the company if any damage has been caused by the failure to fulfil the requirements of registration[870]. Although directors' liability in this case specifically referred to directors' personal liability for the debts of the company, the ECJ's decision will equally apply to directors' liability towards the company since the ECJ's decision is regarded as a general rule on determining the applicable law to the regime of directors' liability[871].

The Netherlands, as the host state, held that due to the absence of the harmonization measures in the EU law, the Member states should enjoy a wide margin of discretion in determining a sanction to directors for their inappropriate conducts during the management of the corporate affairs[872]. However, ECJ overturned the opinion of the host state, and stated that by imposing this obligation it may constitute a restriction to the freedom of establishment, while the restriction on grounds of the protection of creditors manifested in the form of minimum capital requirements, the prevention of an improper recourse to the

[870] See paragraphs 24 and 25 of Case C-167/01. Also see Gijsbert Karel FIBBE, *EC Law Aspects…, op. cit.*, p. 70.

[871] Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, p. 182. It should be noticed that the aspect of directors' personal liability for the debts of the company may fall within *lex societatis* or *lex concursus*, which vary from state to state. In this case, the Dutch law considers it as an issue within the scope of *lex societatis*. Since the applicable law to the directors' obligations for the company is also *lex societatis*, and the focus of the issue here is the determination of *lex societatis*, the ECJ's decision in *Inspire Art* should equally apply in this aspect. In this sense, it can be regarded as a general rule to determine *lex societatis* for the regime of directors' liability.

[872] See paragraphs 111 and 112 of Case C-167/01.

freedom of establishment, the enforcement of fairness in business dealings or efficiency of tax inspections cannot be justified as an imperative requirement in the public interest[873]. Therefore, excessive restrictive measures in the law of the host state turns out to be a failure to comply with the principles of the freedom of establishment[874].

In this case, on one hand, if a Member state intends to impose a restriction on a foreign company when it exercises the right of establishment, these restrictive measures on the right of establishment should satisfy the criteria established by the EU law: required efficiency, proportionality and non-discrimination. More excessively, sometimes, national laws may impose a foreign company to coincide the statutory seat with the real seat within its territory, which is considered as a condition to recognize the foreign company's right of establishment by some national legislators[875]. If a company formed in accordance with the law of a Member state is required to have both its statutory seat and real seat within the territory of that Member state, the law of incorporation is not contrary to the freedom of establishment because ECJ has confirmed that every Member state has the autonomy to decide its own connecting factors with its national companies[876], though it cannot prevent its national company from convert into a foreign company[877]. In contrast, when it refers to a foreign company, it is contrary to the freedom of establishment if a Member state refuses to recognize the legal personality of this company only due to the dissociation between its statutory seat and real seat[878]. If a company is incorporated in another Member state, it is the law of incorporation that decides the formal requirements of constitution, the legal capacity of that company, the registration, and the minimum capital imposition. In this case, the national rule's denial to the legal capacity of a foreign company due to the dissociation of statutory seat and real seat may not be contrary to the principle of non-discrimination since both national and foreign companies should follow the requirements

[873] See paragraph 142 of Case C-167/01. Also see Christian KERSTING, Clemens Philipp SCHINDLER, "The ECJ's Inspire Art Decision of 30 September 2003 and its Effects on Practice", *German Law Journal*, Vol. 04, No. 12, pp. 1277-1291, p. 1281. For example, the ECJ held that if the creditors choose to loan money or to do business with a company of a capitalization different than that to which they are accustomed, they should take on that risk knowingly because they can easily find out they are dealing with foreign companies to which domestic protection standards may not apply. See Patrick S. RYAN, "Will There Ever Be A 'Delaware of Europe?' (Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*)", *Columbia Journal of European Law*, Vol. 11:2, 2004, pp. 187-200, p. 197.

[874] Also see Patrick S. RYAN, "Will There Ever…", *loc. cit.*, p. 197.

[875] Rafael ARENAS GARCÍA, "*Lex societatis* y…", *loc. cit.*, pp. 140-141.

[876] See the conclusions of Case 81/87, Case C-210/06 and Case C-371/10.

[877] See the conclusions of Case C-210/06.

[878] Rafael ARENAS GARCÍA, "*Lex societatis* y…", *loc. cit.*, p. 141.

imposed by that rule. However, the national rule may breach the principle of proportionality since it makes the exercise of the rights of establishment excessively difficult[879].

On the other hand, however, ECJ's intention is also considered as to ensure that a foreign company gets an equal treatment as a national company in a Member state. In the Case *VALE Építési kft*[880]*,* ECJ held that it did not require a Member state to treat a foreign company more favourable than a national company, but at least national rules cannot make a foreign company enjoy the rights of establishment in a way less favourable than a national company If a Member state would give a more favourable treatment to a foreign company than a national company, it is also relevant to examine whether it is contrary to the principle of freedom of establishment. In the Case *Impacto Azul Lda*[881], Portugal did not apply the national rules regarding joint and several liabilities of parent companies for the debts of their Portuguese subsidiaries to those foreign parent companies[882]. In accordance with these rules, more severe liabilities are imposed upon national companies than foreign companies. However, since national companies and foreign companies cannot obtain equal treatment, it may be doubtful whether such a treatment is contrary to the principle of non-discrimination. In this case, firstly, as we have mentioned, a company is the creature of national laws and only exists when it is recognized by the law under which it is formed. The EU law does not create nor recognize a company but it is the national law that determines the incorporation and functioning of a company[883]. In this sense, it is legitimate for national law to decide the obligations of a parent company towards its subsidiaries for the protection of creditors. Secondly, a Member state can only apply restrictive measures to a foreign company by following very strict conditions. However, if a Member state does not apply the national restrictive rules to this foreign company, it does not set any obstacle on the exercise of the right of establishment of the foreign company and therefore it is in no way contrary to the freedom of establishment. Thirdly, the term of

[879] Francisco J. GARCIMARTÍN ALFÉREZ, "El cambio de *lex societatis*: una forma especial de transformación societaria. Comentario a la sentencia del TJUE (as. *Vale Éspitési kft*)", *La Ley*, Nº 7992, Ref. D-459, 2012, pp. 1-9, p. 7.

[880] See Judgment of the court of 12 July 2012, Case C-378/10, *VALE Építési kft.*

[881] See Judgment of the court of 20 June 2013, Case C-186/12, *Impacto Azul Lda v. BPSA 9 –Promoção e Desenvolvimento de Investimentos Imobiliários SA, Bouygues Imobiliária – SGPS Lda, Bouygues Immobilier SA, Aniceto Fernandes Viegas, Óscar Cabanez Rodriguez.*

[882] See paragraph 34 of Case C-186/12.

[883] Also see paragraph 27 of Case C-378/10. Also see Francisco J. GARCIMARTÍN ALFÉREZ, "El cambio de…"*, op. cit.,* p. 4.

"discrimination" is used when a foreign company is stuck in an unfavourable situation in comparison to a national company. If a foreign company accepts even a more favourable treatment in a Member state, no "discrimination" will be evidenced in this case.

In this sense, *lex societatis* offers a minimum protection to a company formed under it[884]. As we have mentioned, *lex societatis* shows the most significant connection with a company, especially in the aspects of whether a company is incorporated or constituted validly so as to obtain its legal capacity. If a company is not formed validly in accordance with the law of incorporation, then the company will have no legal personality and it will not even exist legally. If a company does not exist in accordance with the law of incorporation, other Member states will not recognize this foreign company[885]. On the contrary, if a company is formed validly in accordance with the law of incorporation, the EU law imposes all the Member states to recognize the legal personality of this company[886]. However, in this case, we do not deny the importance of the law of incorporation in governing the matters relating to a company, but we try to examine whether other national rules will apply exceptionally as well. It is because that directors' liability is not an issue relating to the incorporation of a company but to the functioning of a company. The regime of directors' liability as a matter relating to the corporate governance plays a crucial role in enabling the well functioning of a company. Therefore, under general circumstances, the issues concerning the duties of directors, managers and controlling shareholders and the rights of shareholders, especially minority shareholders should be governed by *lex societatis*[887].

In the case *Inspire Art*, we have known that by imposing a more severe liability on directors, it may constitute a restriction on the exercise of the right of establishment, while it can only be justified under strict conditions. ECJ is unwilling to see that a Member state provides a more rigid liability to the directors of a foreign company. In contrast, in the Case *Impacto Azul Lda*, as we have mentioned, it is not contrary to the freedom of establishment if another Member state voluntarily provides a more favourable treatment to the directors of a foreign company. ECJ does not forbid that a Member state gives a more

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[884] Rafael ARENAS GARCÍA, "*Lex societatis* y…", *loc. cit.*, p. 161.
[885] Rafael ARENAS GARCÍA, "*Lex societatis* y…", *loc. cit.*, pp. 144 and ss.
[886] Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.* p. 182.
[887] Francisco J. GARCIMARTÍN ALFÉREZ, "Cross-border Listed Companies", *Recueil des Cours*, Vol. 328, 2007, pp. 9-173, pp. 68-69.

lenient treatment to the directors of a foreign company by virtue of its national law[888]. If a company formed under the law of a Member state carries out its main activities in another Member state through an establishment, directors could also be subject to the national rules of the second Member state.

Therefore, on one hand, normally it is better to retain the application of the law of incorporation to a company when the law of another Member state imposes an unfair restriction to the company. However, if such a restriction is for the purpose to provide local creditors in a foreign company with enough protection and is compatible with the imperative requirements held by ECJ, the national rules of a Member state rather than the law of incorporation may also apply. On the other hand, if a Member state decides to give a more favourable treatment to a foreign company than a national company, such a treatment is not contrary to the EU law. In this case, the national rules of that Member state may also apply rather than the law of incorporation. In this sense, we should not regard the law of incorporation as the unique connection with the company[889].

Currently, the EU is examining the possibility of a uniform applicable law on companies. The initial stages of harmonization on the aspects of EU company law were achieved by creating a series of directives to provide minimum standards for the companies across the EU. In the case *Inspire Art*, ECJ also referred to the eleventh directive 89/666/CEE in order to examine whether the requirements of publication to foreign companies in a Member state goes beyond what is necessary[890]. However, no actual substantive achievement is made in the EU law due to the trend of declining the harmonization in the 1990s[891]. Nowadays, the EU has picked up this discussion again between its Member states, especially in the aspect of corporate governance. The EU legislators consider that an effective corporate governance framework is of crucial importance because well-run

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[888] In this sense, see paragraphs 38 and 39 of Case C-186/12.

[889] In this sense, see Hans Jürgen SONNENBERGER, "Etat de droit, construction européenne et droit des sociétés", *Revue critique de droit international privé*, Tome 102, 2013 (1), pp. 101-112, p. 109, in which the author mentioned "la nécessité d'abandonner le rattachement uniforme du *statutum societatis* selon qu'il est l'Etat de la constitution ou de l'accueil d'une société".

[890] Rafael ARENAS GARCÍA, "Lex societatis y…", *loc. cit.*, p. 146.

[891] Shuangge WEN, *Shareholder Primacy and Corporate Governance: Legal Aspects, Practices and Future Directions*, Oxon/New York, Routledge, 2013, p. 121.

companies are more likely to be competitive and sustainable in the long term[892], while in the proposal of the EU Commission the corporate governance is more focused on the protection of shareholders and the improvement of cross-boarder merger mechanism. We think that directors' liability is also a crucial subject in the next years, because this regime constitutes an indispensable step to control the other issues within a company. As we have mentioned, the basis of the applicable law to the directors' liability should be the law of incorporation, however, this rule does not have an exclusive effect if other laws provides a stronger protection to shareholders or creditors, or if other laws will give a more favourable treatment to a foreign company than a national company. Therefore, on one hand, the requirements of the right of establishment should be respected. On the other hand, the future EU PIL should also provide a multiple mechanism in determining the applicable law to the companies that carry out cross-boarder activities so as to eliminate the diversities among national company laws.

1.3. Intervention of lex fori *in the derivative actions and the principle of freedom of establishment*

1.3.1. Application of *lex societatis* in a derivative actions under general circumstances

As we have mentioned, normally *lex societatis* can decide the issues in relation to the incorporation or functioning of a company, in which a derivative action may also be included. A derivative action is usually filed by shareholders or even creditors against directors on behalf of the company and is for the purpose to seek redress for directors' breach of fiduciary duties and mismanagement. Normally, it concerns the internal affairs of a company and deals with the relationships between the members of the company[893]. Therefore, the strong proximity with *lex societatis* makes a derivative claim governed by the law of the place where the company is incorporated in accordance with ECJ's decisions.

Since the cross-boarder commerce has been greatly developed during the last decades, it is now very common that a company is incorporated in a Member state while its shareholders

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[892] See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (Action Plan: European company law and corporate governance –a modern legal framework for more engaged shareholders and sustainable companies)*, COM (2012) 740 final.
[893] Ralph C. FERRARA, Kevin T. ABIKOFF, Laura LEEDY GANSLER, *Shareholder derivative litigation: besieging the board*, New York, ALM Media Properties, 2005, num. 3-20.

are domiciled in another Member state. In this case, if minority shareholders will act on behalf of a foreign company against its director, they may initiate the litigations in a particular forum that is the most convenient for them. Once the jurisdiction is established, judges should take into account the application of conflict-of-law rules.

From a substantive perspective, *lex societatis* shows the most significant connections with a derivative action, since company law often indicates the conditions to initiate a derivative claim, for example, the legitimate parties to bring this claim, the threshold of shareholding and the minimum shareholding period requirements. Meanwhile, company law may also impose some procedural requirements such as the prerequisite condition (exhaustion of intra-corporate remedies), the showing of causation and the security posted by the plaintiff. This may suggest that the law of incorporation may not be applied to all aspects of a derivative action involving a foreign company, because the matters in relation to procedures may often involves the application of the forum law[894]. This doctrine is supported by some British case law, in which it is held that since there is a distinction between the substantive and procedural matters, it will not be all aspects of the derivative action that are subject to the law of the place of incorporation, while *lex societatis* should be confined to determine a director' duties, to decide whether a plaintiff has the right to bring a derivative action, and the scope of such a right[895].

1.3.2. Justification of the intervention of *lex fori* and its compatibility with the principle of freedom of establishment

The first consideration is for the minority shareholders. Although *lex societatis* may decide whether the minority shareholders have the right to file a derivative claim, the judge of the court before which the jurisdiction is established should estimate that whether a derivative action filed by virtue of *lex societatis* is acceptable in that state. Besides, it is also relevant for the judges to examine the possibility of coexistence between *lex societatis* and *lex fori*[896]. For example, in French jurisdiction, *Code de commerce* enables a single shareholder to bring an action *ut singuli* without imposing any minimum shareholding

[894] Richard GARNETT, *Substance and Procedural in Private International Law*, Oxford, Oxford University Press, 2012, nums. 5.35-5.39.
[895] See for example, *Heyting v. Dupont* [1964] 1 WLR 843*, Base Metal Trading Ltd. v Shamurin* [2005] 1 WLR 1157*, Harding v. Wealands* [2006] UKHL 32. Also see Richard GARNETT, *Substance and Procedural..., op. cit.*, num. 5.35-5.39.
[896] Daniel COHEN, "La responsabilité civile…", *loc. cit.,* pp. 603-604.

requirements[897]. If a French shareholder of a foreign company cannot enjoy this right to file a derivative claim before French courts, it may be likely that the French judges make a characterization *ex lege fori* and enable this French shareholder to carry on such a claim in conformity with the domestic solution as a rescue.

Besides, *lex fori* may impose some formal requirements that minority shareholders have to satisfy in order to be able to initiate this claim before that court. Some jurisdictions such as UK give their courts an extensive discretion to decide a grant of permission for minority shareholders to proceed with the derivative actions. In this sense, if the minority shareholders of a foreign company have the right to file a derivative claim by virtue of *lex societatis*, they may have to follow the requirements imposed by *lex fori* in order to obtain the permission of the court so as to continue the proceedings.

Meanwhile, the intervention of *lex fori* is not only justified by the mandatory application of the procedural requirements such as showing of causation, or security provided by the claimant, but is also required by the need to protect the public interests since a derivative claim against the director of a multinational company may exert a great influence within the territory of a Member state. In this sense, even though the minority shareholders may be able to file a derivative claim pursuant to the law of incorporation, the forum law may often impose some restrictions in order to prevent minority shareholders' abuse of the derivative action for a favourable private settlement. For example, in British jurisdiction, before granting a permission of derivative action, the court has to take into consideration the intention of the minority shareholders and examine whether it involves an abusive use of a derivative claim and whether such a claim would be contrary to the interests of the company[898].

The second consideration is for creditors. In some very rare case, some national rules also enable creditors to bring a derivative action against directors. For example, in Spanish jurisdiction, creditors can file such a claim if the corporate assets have been insufficient to repay to all the creditors while neither the company nor minority shareholders have

[897] See Article L. 225-252 of *Code de commerce*.
[898] See Sections 263 (3)(a) and 264 of the Companies Act 2006. Also see Derek FRENCH, Stephen W. MAYSON, Christopher L. RYAN, 2011, *Mayson, French & Ryon…, op. cit.*, p. 564.

commenced it within a certain period of time[899]. If the Spanish creditors of a national company can file a derivative action before a Spanish court, it will be very unreasonable that the Spanish creditors of a foreign company cannot file such a claim under the same circumstance. In this case, the Spanish judges will be criticized for not providing enough protection for the national creditors, and the litigants would also argue that applying *lex societatis* is inconsistent with the forum's public interests and thus intend to seek alternatives from *lex fori*[900]. In this case, the only way left for the forum is to permit the intervention of *lex fori* and enable the creditors to rely on its own derivative action mechanism, which means that the application of *LSC* into the derivative action on behalf of a foreign company should be allowed. Otherwise, the goals to ensure the social justice and to provide equal protection to the national creditors of a foreign company cannot be achieved[901].

However, some arguments may emerge on whether such a treatment would be incompatible with the requirements imposed by the principle of freedom of establishment. In this case, it is worth a reconsideration of the conclusions established in the case *Inspire Art*. In accordance with ECJ's decision, the protection of creditors is recognized as being a "mandatory reason of public interest", but in the case *Inspire Art* the issue of creditor protection manifested in the form of minimum capital requirements cannot be justified as imperative in the public interest[902]. From ECJ's perspective, such a protection should be justified on the basis of the requirement of necessity, and for the purpose to justify the restriction on the exercise of freedom of establishment. And it should fulfil four conditions: it must be applied in a non-discriminatory manner; it must be justified by imperative requirements in the public interest; it must be suitable for securing the attainment of the objective which they pursue, and it must not go beyond what is necessary in order to attain it[903].

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[899] See Article 240 of *LSC*. Also see Fernando SÁNCHEZ CALERO, *Los administradores en…, op. cit.*, p. 398.

[900] In this case the public policy doctrine will apply to prevent the application of foreign law for the consideration that it is inconsistent with what the forum considers to be "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition". See Yaad ROTEM, "The Law Applicable to a Derivative Action on Behalf of a Foreign Corporation: Corporate Law in Conflict", *Cornell International Law Journal*, Vol. 46, 2013, pp. 321-360, pp. 341 and ss.

[901] Yaad ROTEM, "The Law Applicable…", *loc. cit.*, p. 353.

[902] Klaus PANNEN, *European Insolvency Regulation: Commentary*, Berlin, Walter de Gruyter, 2007, p. 213. Also see Paschalis PASCHALIDIS, *Freedom of Establishment…, op. cit.*, nums. 3.65.

[903] See paragraph 133 of Case C-167/01.

However, in this case, the application of *lex fori* can fulfil the imperative requirements. Firstly, in accordance with *LSC*, creditors are able to carry out a derivative claim on behalf of the company when the company and its shareholders fail to do so. In this regard, the measures taken by the Spanish courts are to protect its local creditors of a foreign company and enable them to obtain an equal treatment as the creditors in a normal Spanish company. Therefore, it cannot be regarded as a discriminative measure to a foreign company. Secondly, creditors are legitimate to file such a derivative claim only when the company's assets are insufficient to recover the credits. Creditors' intention in such a derivative claim is to request directors to make compensation for the loss of the corporate assets and to avoid the company's insolvency. When directors are imposed to make compensation for the company, the company at issue could continue to carry on its business and the interests of the creditors could also be ensured indirectly. Therefore, it aims at protecting the creditors as well. Thirdly, unlike the case *Inspire Art* in which the minimum capital requirements or the directors' obligations of registration are imposed by the law of a Member state and is contrary to the freedom of establishment, Spanish judges do not impose any formal requirements upon a foreign company during the exercise of the right of establishment. As a contrary, the measures to enable creditors to file a derivative claim are to fill up the lacuna in *lex societatis*, and are consistent with the need to protect the public interests of a Member state. In this sense, it also falls within the scope of the principle of proportionality. Therefore, the intervention of *lex fori* is not contrary to the principle of freedom of establishment in this case.

1.3.3. Fear of possible *"forum shopping"*

It is reasonable to worry about that once allowing the application of *lex fori* in a derivative action, it may cause unnecessary abuse of *"forum shopping"*[904]. For example, minority shareholders and creditors may look for a jurisdiction with a law that is more favourable or a judge more likely to rule for them in a derivative claim. However, this fear may be irrelevant, because firstly, the application of *lex fori*, as we have mentioned above, is for the purpose to provide enough protection for the local minority shareholders or creditors. It

[904] In this sense, see Raluca IONESCU, "La Cour de Justice des Communautés Européennes et les principes généraux du droit communautaire: L'exemple du principe général d'interdiction de l'abus de droit", in F. SNYDER/I. MAHER (Dir.), *The evolution of the European Courts: Institutional change and continuity*, Brussels, Bruylant, 2009, pp. 125-156, pp. 129 and ss.

may only occur where the domestic minority shareholders or creditors of a foreign company cannot obtain equitable treatment as those of a national company and thus submit to a national court. Therefore, if local minority shareholders or creditors of a foreign company select a forum of a third Member state (a forum which is neither situated in the place where the minority shareholders or creditors are domiciled, nor in the place of incorporation of the company), judges of that Member state may be unlikely to apply its own forum law because *lex fori* may not show the most significant connections with the dispute of the parties. Besides, it makes no interests for the court to apply *lex fori* for the protection of public interests in such a case either. In this way, the judges may probably apply *lex societatis* directly, or may invoke the doctrine of *"forum non conveniens"* in favour of another court[905].

Secondly, in some cases, a company may insert in its company statute or bylaws a choice of forum clause and select a court to deal with derivative claims. Besides, minority shareholders or creditors would conclude a jurisdiction clause with directors in order to avoid that their dispute is resorted to a court beyond the expectation of one of the parties. In this case, the party autonomy could effectively avoid possible *"forum shopping"* strategies since a court is designated by both the parties, and the parties will normally select the court in the place where the company is incorporated to deal with their dispute since it shows the most significant connection with the dispute and the judges could adopt a more neutral attitude towards this issue as well.

1.4. Application of conflict-of-law rules in the regime of directors' liability in the insolvency proceedings

1.4.1. ECJ's attitude to the regime of directors' liability for the failure to file for the insolvency proceedings

RRI and RRII have clearly excluded their applications from the "personal liability of directors for the obligations of the company". As we have mentioned above, in some national rules, directors may be held liable for the corporate debt if they have not commenced the insolvency proceedings properly. However, due to the fact that different

[905] Matthias HERDEGEN, *Principles of International Economic Law*, Oxford University Press, 2013, p. 163. Also see Russell J. WEINTRAUB, "Introduction to Symposium on International Forum Shopping", *Texas International Law Journal*, Vol. 37, 2002, pp. 463-466, pp. 465-466.

Member states adopt different criteria to "insolvency", for example, in Germany law, the "over-indebtedness" is a cause of the commencement of insolvency proceedings while in Spain it is not[906], it is very likely that directors' liability falls within the scope of company law in a Member state while it falls within the scope of insolvency law in another Member state. In this case, it will bring more difficulties to have a uniform characterization on this regime all over the EU. For example, if directors fail to petition for the company's insolvency when the company is over-indebted, such an issue will be regarded as an insolvency law matter in Germany while in other Member state it only refers to a matter based on company law.

From the perspective of PIL rules, when a court in a Member state considers that it is appropriate for *lex societatis* to deal with this matter, national judges will apply the law of incorporation of the company (*lex societatis constitutionis*). Conversely, when a court in a Member state considers *lex concursus* to deal with this matter, national judges will refer to RI in order to decide *lex concursus*. In accordance with Article 4 of this Regulation, the law applicable to the insolvency proceedings shall be the law of the state in which these proceedings are commenced, and these proceedings shall be commenced in the place where the company's centre of main interests is situated. Under this circumstance, the Member state following the criterion of *lex societatis* will apply the law of "incorporation" while the Member state following the criterion of *lex concursus* will apply the law of "real seat". If it were so, it is possible that one of the parties in such a claim may selecting a more favourable court to deal with their disputes so as to evade the application of a more severe law, and it will lead to abusive *"forum shopping"*. Since RI has not yet touched upon this regime, a harmonization on this aspect at the EU dimension may be quite necessary in order to eliminate obstacles deriving from disparities that exist in different Member states.

In this case, ECJ has made its decisions in some of its case law in order to establish an autonomous interpretation to the cases that should be excluded from RBI and be included

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[906] In this sense, see Section 19 of *InsO* and Article 2 (3) (4) of *LC*. Also see Rafael ARENAS GARCÍA, "Capítulo 8: Procedimientos concursales", in José Carlos FERNÁNDEZ ROZAS, Rafael ARENAS GARCÍA, Pedro Alberto DE MIGUEL ASENSIO, *Derecho de los negocios internacionales (Cuarta Edición)*, Madrid, Iustel, 2013, pp. 569-637, pp. 574-575.

in RI, which is known as the doctrine of *"vis attractiva concursus"*[907]. Although the doctrine of *"vis attractiva concursus"* only applies in determining the jurisdiction of a Member state, the applicable law generally follows the rules of international jurisdiction in RI[908]. Since Article 4 always goes with Article 3, the court in which the insolvency proceedings are opened will apply its *lex fori* as *lex concursus* in order to determine the conditions for the opening of the proceedings, their conduct, closure and effects[909]. Therefore, we may follow the ECJ's criterion of characterization to examine whether an issue is related to insolvency or not. If it were so, such an issue should be subject to *lex concursus*. Otherwise, *lex societatis* or other laws may also be available. This solution may give us a clearer idea on determining the conflict-of-law rules in the regime of directors' liability in the insolvency proceedings.

As we have mentioned, in accordance with the case *Gourdain v. Nadler*, a French court ordering directors *de facto* to make contribution to the assets of a company must be considered as an issue excluded by the Brussels Convention[910]. Even though a uniform EU Regulation on insolvency was absent then, we can conclude that ECJ's intention was to put this case within the "bankruptcy law exception" and to have all the proceedings concentrated in the state where the insolvency proceedings are opened[911]. This is because

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[907] As we have mentioned above, the doctrine of *"vis attractiva concursus"* applies when some the Member states would enact extensive national laws on jurisdiction for insolvency-related proceedings. See Klaus PANNEN, *European Insolvency Regulation*, *op. cit.*, p. 123.

[908] Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation…", *loc. cit.,* p. 22.

[909] See Article 4 of RI. Here it is relevant to make a difference between Article 4 and Article 15. Article 15 states that "*the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending"*. It may cause some uncertainty with regard to Article 4. In this sense, we should refer to a British case *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ 677, in which the Court of Appeal held that the particular provision should prevail over the general provision, and a distinction must be made between the *proceedings by way of execution* and the *proceedings (lawsuits) to establish liability*. Besides, it was also held that in relation to an execution "the creditor satisfies their interest directly", while in those cases to establish liability, the creditor "obtains a decision on the merits that does no more than allow them to join the body of creditors with an established claim". Therefore, Article 15 would only be applicable to the *proceedings to establish liability* which may have been commenced before insolvency proceedings are opened. As a contrary, Article 4 would be applicable to those cases regarding an execution or future lawsuits to establish liability. In this sense, see Holman Fenwick WILLAN, "European cross-border insolvency: an overview and update", the article is available on the website: http://www.inhouselawyer.co.uk/index.php/insolvency-and-corporate-restructuring/7986-european-cross-border-insolvency-an-overview-and-update. Also see Miguel VIRGÓS, Francisco J. GARCIMARTÍN ALFÉREZ, *Comentario al Reglamento…, op. cit.*, pp. 81-82.

[910] See paragraph 3 of Case 133/78, also see Mikael BERGLUND, *Cross-border Enforcement of Claims in the EU: History, Present Time and Future*, The Hague, Kluwer Law International, 2009, pp.144-145.

[911] Harry Duintjer TEBBENS, "Judicial Interpretation of the 1988 Lugano Convention on Jurisdiction and Judgments in the Light of its Brussels Matrix: the Convergence Confirmed", *Yearbook of Private International Law*, Vol. III, 2001, pp. 1-25, p. 19.

the strong connections of such an issue with the bankruptcy or winding up proceedings will render a court to make decisions based on insolvency law. Therefore, ECJ considered that the French regime of *"action en comblement du passif"* or *"liquidation des biens"* (now *"action en responsabilité pour insuffissance d'actif"*) should be subject to the law regulating the bankruptcy or winding up. Therefore, when such proceedings are commenced in a court of a Member state, the court should apply *lex fori concursus* in accordance with Article 4 of this Regulation. And the law applicable to insolvency proceedings and their effects shall be the law of the Member state in which insolvency proceedings are opened[912].

In a recent case *ÖFAB*, ECJ ruled that an action filed by creditors to incur directors' liability for corporate debts due to their failure to complete certain formalities intended to monitor the financial situation of the company that no longer has sufficient funds should be subject to a company reconstruction order[913]. ECJ held that such an action does not concern the exclusive prerogative of the liquidator to be exercised in the interests of the general body of creditors, but confers rights to an individual creditor in order that he is free to exercise in their own interests[914]. In this sense, even though the company was undercapitalized and was forced to go into liquidation, such an action was interpreted as is not directly derived from bankruptcy or winding up and is not closely connected with it. Therefore, such an action does not fall within the "insolvency law exception" and RI will not apply.

From the two cases, we can find that ECJ adopts a very narrow scope to the "insolvency law exception". Only an action that derives directly from insolvency proceedings and is closely connected with them is covered by the exception[915]. In the proposal to the amendment of RI, the EU legislators tried to codify this principle in the new version of Insolvency Regulation. However, they did not elaborate a further autonomous definition to this principle. Therefore, it may be relevant for us to return to analyse the national liability

[912] See Article 4 of RI.
[913] See paragraph 36 of Case C-147/12.
[914] GAVC LAW, "Christmas crums part II: *ÖFAB* confirms narrow scope of the insolvency exception and clarifies 'place whre the harmful event occurred' in case of tort by omission", this article is available on the website: http://gavclaw.com/2014/01/09/christmas-crums-part-ii-ofab-confirms-narrow-scope-of-the-insolvency-exception-and-clarifies-place-where-the-harmful-event-occurred-in-case-of-tort-by-omission/.
[915] GAVC LAW, "Christmas crums part II…", *loc. cit.*

regimes of different Member states by relying on the ECJ's principle in order to see which law should apply when a jurisdiction is established.

1.4.2. Conflict-of-law rules from national perspectives of the Member states

As we have explained above, the directors' liability for the corporate obligations in French or British legal system turns out to be an *"ex lege"* liability. The two legal systems regarding this regime share many similarities while still have some slight difference. In France, directors are held liable for not properly filing for the opening of the insolvency proceedings and causing the company's over-indebtedness[916]. Directors should make compensation for the insufficiency of corporate assets under this circumstance. In the UK, it is less restrictive to establish liability to directors. As long as if directors knew or ought to have known the company's insolvency, they would be held liable while it does not necessarily require the filing for insolvency proceedings at the moment[917]. In these two regimes, directors are imposed to make contribution to the corporate assets in order that the company could make repayment to the creditors as much as possible in the insolvency proceedings[918]. However, in French regime, directors could be held for part or the whole of the contribution[919], while in English regime the contribution will be measured by the diminution of the company's assets as compared to timely winding up[920]. Under these circumstances, it should be noticed that it is the company rather than directors that make compensation for creditors *vis-à-vis*.

Since this kind of liability is characterized as "*ex lege*" which refers to a kind of obligations that are directly imposed by the law rather than deriving from a tort or contract, there is no doubt that tort law rules will not apply since it is not a liability towards creditors. In this case, firstly, both the French and British legislators consider this regime as being subject to national insolvency law rules. In France, it is included in the *"Droit des*

[916] See Article L. 651-2 of *Code de Commerce*.
[917] See Section 214 of *Insolvency Act 1986*. Also see Sebastian MOCK, "Insolvency of the European Private Company (SPE)", in Heribert HIRTE, Christoph TEICHMANN (Eds.), *The European Private Company: Societas Privata Europaea (SPE),* ECFR Special Volume 3, Berlin/New York, De Gruyter, 2013, pp. 349-374, p. 354.
[918] In this sense, see Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.,* p. 331.
[919] See *Cass. com. 21 juin 2005*.
[920] Alexander SCHALL, "The UK limited Company Abroad: How Foreign Creditors are Protected after Inspire Art (Including a Comparison of UK and German Creditor Protection Rules)", *European Business Law Review*, 2005, pp. 1534-1554, p. 1540.

difficultés des entreprises"; while in the UK, it is included in the *"Insolvency Act"*. This kind of arrangement shows us the national legislators' tendency to include the regime into insolvency law rather than company law. Besides, ECJ also supported this characterization. In the case *Gourdain v. Nadler*, as we have mentioned, ECJ held that the liability regime under French law was to be classified as governed by insolvency law because it *"derogates from the general rules of the law of liability"* (here the rules on civil liability of directors in company law or other laws)[921]. The ECJ's analysis to the French regime could also apply to characterize the English regime because of the similarities shared by the two regimes. Therefore, the regime of "*action en comblement du passif"* or "*wrongful trading"* should fall into the scope of RI.

Nonetheless, in German law, this kind of directors' liability is considered as deriving from breach of non-contractual obligations and is based on tort law context. As we have mentioned above, directors are required to file for formal insolvency proceedings without undue delay as soon as the company is insolvent[922]. If they fail to commence such proceedings, they will be held jointly liable for the damage suffered by the creditors of the company[923]. Creditors can only recover the loss deriving from the delay in filing, and the loss will be the difference between the recovery rate that they could have obtained in the case of timely filing and the actual rate (so-called "rate reduction loss")[924]. In this case, it is not the company to be jointly liable with the directors, but the members of the board (directors) should be held liable as a whole. However, § 92 of *InsO* states that such a claim filed against directors can only be brought by the insolvency administrator during the insolvency proceedings[925]. It clearly indicates that such a claim can only be asserted during the insolvency proceedings and it is for the sake of the general body of the creditors. Therefore, it will have a strong relation with the insolvency proceedings and should fall within the scope of *"vis attractiva concursus"*. Although such an action should be attracted to the same court dealing with the insolvency proceedings, the law governing this

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[921] See paragraph 5 of Case 133/78. Also see Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation…", *loc. cit.*, p. 22.
[922] See §64 (1) of *GmbHG* and §92 (2) of *AktG.* Also see Susanne KALSS, Nikolaus ADENSAMER, Janine OELKERS, "Directors' Duties in…", *loc. cit.*, p. 115.
[923] See §42 (2) of *BGB*, also see Rafael ARENAS GARCÍA, "Suing directors in…", *loc. cit.*, p. 331.
[924] See §823 (2) of *BGB.* Also see Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation…", *loc. cit.*, p. 25.
[925] See § 92 of *InsO.*

action should be determined independently in accordance with its own connecting factors[926]. From the German perspective, tort law should be applicable in this case.

The regime of directors' liability in Spanish law may be more complicated than those regimes mentioned above. In Spanish law, directors' liability towards the obligations of the company for not filing for the opening of the insolvency proceedings also turns out to be an *"ex lege"* liability. In accordance with Article 367 of *LSC*, directors shall be jointly held liable for the corporate debts if they have not properly commenced the dissolution or liquidation proceedings[927]. Meanwhile, in accordance with Article 172 *bis* of *LC*, directors could be liable for having caused or aggravated the company's insolvency when the insolvency proceedings have been declared fraudulent by the court[928]. Both Article 367 of *LSC* and Article 172 *bis* of *LC* tend to held directors liable for the corporate debt, and in some aspects they may show many similarities. For example, this kind of liability is different with the one in French or British law, because directors are not required to make contribution to the corporate assets in order that the company could be able to satisfy creditors as much as possible. Under the French or British regime, the company rather than directors should be held liable towards the creditors. In this case, directors' liability lies in the obligations to make up the company's financial insufficiency. However, in accordance with Spanish law, directors should be held liable jointly with the company *vis-à-vis* creditors, which means that directors should be required to pay the corporate debts together with the company. This kind of liability is not derived from directors' breach of contractual or non-contractual obligations towards the creditors but is directly imposed by the law.

However, the two provisions in Spanish law may still have different functions. On one hand, an action under Article 172 *bis* of *LC* should follow the principle of *"par condition creditorum"*, and this claim should be brought by the liquidators who represent the creditors as a whole. In this sense, an action under Article 172 *bis* of *LC* aims at incurring directors' liability for their wilful acts or negligence in the insolvency proceedings. Therefore, it is logical that directors' liability arising out of such a case is governed by insolvency law. On the other hand, however, an action under Article 367 of *LSC* aims at

[926] Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation…", *loc. cit.*, p. 22.
[927] See Article 367 of *LSC*.
[928] See Article 172 *bis* of *LC*. In Spanish law, such insolvency proceedings can be declared "accidental" or "fraudulent", depending on the examination of directors' behaviors.

incurring directors' liability for the failure to comply with the obligation of moving to wind up the company after the legal grounds for winding-up arise[929]. Article 51 *bis* of *LC* states that a claim aims at incurring directors' liability for the failure to file for the opening of the insolvency proceedings shall be suspended during the insolvency proceedings[930], which means that Article 367 of *LSC* will not apply in the insolvency proceedings. Spanish legislators worry that directors may run off all their personal assets for having previously made compensation for individual creditors in such a claim. If it were so, directors may not have additional assets to make compensation for the general body of creditors in the insolvency proceedings[931]. The Spanish legislators tend to treat such an action as playing a subordinate function beyond the general insolvency proceedings. Therefore, such an action goes beyond the principle of *"par condition creditorum"*[932], and should not be governed by insolvency law but by company law. This is because normally company law rules could determine directors' duty to commence company's dissolution and liquidation at a due time. Besides, the classification of this regime into company law also reflects that the legislators believe that this relevant duty of directors towards the company arises prior to the onset of material insolvency[933].

In accordance with Article 48 *quáter* of *LC*, during the insolvency proceedings, a corporate action under Article 238 of *LSC* shall be exclusively brought by the liquidators together with the insolvency proceedings[934]. From the perspective of conflict-of-jurisdiction rules, *lex fori concursus* could determine the effects of the insolvency proceedings on a corporate action. However, we believe that *lex societatis* could still have its functions on determining the substantives issues in such an action. Unlike a corporate action, a personal action could also be brought independently by individual creditors during the insolvency proceedings. Article 4 of RI provides that *lex fori concursus* can determine the effects of the insolvency

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[929] Andrés RECALDE CASTELLS, Francisco LEÓN SANZ, Nuria LATORRE CHINER, "Corporate Boards in Spain", in Paul DAVIES, Klaus HOPT, Richard NOWARD, Gerard VAN SOLINGE, *Corporate Boards in European Law: A Comparative Analysis*, Oxford, Oxford University Press, 2013, pp. 549-616, p. 606.

[930] See Article 51 *bis* of *LC*. Also see Alberto ARRIBAS HERNÁNDEZ, *Derecho concursal: El Concurso tras la reforma operada por la Ley 38/2011*, Madrid, Ediciones Francis Lefebvre, 2012, p. 178.

[931] In this sense, see Sergio SÁNCHEZ GIMENO, "Las acciones de responsabilidad de los administradores previstas por la normativa societaria en el concurso de acreedores", *Homenaje al profesor D. Juan Luis Iglesias Prada/Extraordinario*, 2011, pp. 187-193, p. 192.

[932] Benjamín SALDAÑA VILLOLDO, "La acción individual de…", *loc. cit.,* pp. 1335-1339.

[933] In this sense, see Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, p. 196. Also see Thomas BACHNER, "Wrongful Trading: A…", *loc. cit.*, p. 296.

[934] See Article 48 *quáter* of *LC* and Article 238 of *LSC*.

proceedings on proceedings brought by individual creditors[935]. However, we also believe that as long as a personal action is brought during the insolvency proceedings, the applicable law to such an action should still depend on its proper connecting factors. In this case, *lex societatis* will be more appropriate to deal with such an action than other laws.

In conclusion, on one hand, if an action is not derived from the company's insolvency or winding-up, for example, individual creditors are free to bring such an action in their own interests, it may not show so many connections with the insolvency proceedings. In this case, the court dealing with the insolvency proceedings will not have the competence to deal with such an action. It goes beyond the scope of *"vis attractiva concursus"* and will definitely not be governed by *lex fori concursus* in accordance with RI. On the other hand, if an action shows significant connections with the insolvency proceedings and is covered by the scope of *"vis attractiva concursus"*, the court in which the insolvency proceedings are opened should also have the competence to deal with such an action. Normally, such an action should be governed by *lex fori concursus* but it is not absolute in all the situations. However, under exceptional circumstances, the insolvency court should decide the applicable law to this action by following the connecting factors of such an action, and it is possible that a law different from *lex concursus*, for example, *lex societatis* or *lex loci delictli* may also apply.

1.4.3. Possible solutions to the choice of conflict-of-law rules in the regime of directors' liability on the verge of insolvency between the Member states

When the jurisdiction of a court is established to deal with an action filed against directors for not petitioning for the opening of the insolvency proceedings by virtue of RBI, such an action may be governed by *lex societatis* or *lex loci delicti* from the perspectives of some Member states[936]. When the jurisdiction of a court is established by virtue of RI, the application of *lex fori concursus* seems to be more complicated. In conformity with Article 4 of RI, *lex fori concursus* can determine the effects of the insolvency proceedings on proceedings brought by individual creditors[937]. For example, *lex fori concursus* can decide the effect of a personal claim brought by individual creditors against directors for a

[935] See Article 4 (2) (f) of RI.
[936] In this sense, see Rafael ARENAS GARCÍA, "Capítulo 8: Procedimientos…", *loc. cit.*, pp. 610-611.
[937] See Article 4 (2) (f) of RI.

personal loss, or a claim brought by individual creditors to incur directors' liability for not filing for the opening of the insolvency proceedings. However, it still remains unclear to which extent should *lex fori concursus* determine the effects of the insolvency proceedings on the claims brought by individual creditors[938].

There are two different approaches upon the interpretation of Article 4. On one hand, it is suggested that Article 4 should be interpreted as only dealing with matters peculiar to insolvency law, and does not affect issues that can arise even in the absence of insolvency[939]. In this sense, it is suggested that Article 4 should take a "substantive" approach. On the other hand, it is held that RI does not contain provisions explicitly excluding *"renvoi"*, and the Report *Virgós/Schmit* also indicates that the reference by Article 4 of most issues to the *lex fori concursus* should be read as referring to its internal law, including the law of other aspects[940]. In this sense, it is suggested that Article 4 should take a "conflict-of-law" approach. Following this approach, *lex fori concursus* is a concept in PIL. It is not equal to the substantive insolvency rules, while the court in the Member state in which the insolvency proceedings are opened may also apply its company law or other rules in deciding such an issue.

Once jurisdiction is established in a Member state, the forum court must characterize the cause of action and assign the set of facts to the appropriate legal category so as to determine the appropriate choice of law rule to apply[941]. In this sense, within the Member states, there may exist two different approaches, i.e., the "conflict-of-law" approach and the "substantive" approach. The judges who follow the "conflict-of-law" approach will characterize an issue by taking into account the national substantive law and then find the appropriate PIL rules to deal with such an issue. Conversely, the judges who follow the "substantive" approach will not only take into account the national substantive law that judges are familiar with, but also the foreign substantive law.

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[938] Ángel ESPINIELLA MENÉNDEZ, "Procedimiento de insolvencia y embargos preventivos de bienes en la Unión Europea (Comentario a la sentencia del Tribunal de Justicia de 21 de enero de 2010, Asunto C-444/07, *MG Probud*)", Diario La Ley, Nº 7373, Año XXXI, Ref. D-111, 2010, pp. 1-14, p. 2.

[939] Peter STONE, *EU Private International Law…, op. cit.*, p. 530.

[940] See paragraph 87 of Report *Virgos/Schmit*, also see Peter STONE, *EU Private International Law…, op. cit.*, p. 530.

[941] Richard GARNETT, *Substance and Procedure…, op. cit.*, num. 3.02.

For the moment, most of the Member states designate the applicable substantive law by referring to their own PIL rules directly. In this case, for example, if an English company has its centre of main interests in Spain and an action is filed against directors of this company for the failure to open the insolvency proceedings properly in a Spanish court, the qualification of such an action as based on company law will make the Spanish judge to refer to *lex societatis*. Normally, the Spanish judge will refer to English law and apply *Insolvency Act 1986* directly. However, such a treatment is mainly based on national PIL rules of each Member state, it may cause a bigger conflict of interests between the Member states since the initiative of the Spanish judge is to leave such an issue governed by the law applicable to companies since it refers to a company law issue, while it turns out to be the insolvency law rules to be applicable. Therefore, it is worthwile to find out another solutions to deal with such an issue.

In the first place, let us imagine a hypothetical case in which all the Member states follow the "conflict-of-law" approach. If an English company has its centre of main interests in Spain and an action is filed against directors of this company for the failure to open the insolvency proceedings properly in a Spanish court, the qualification of such an action as based on company law will make the Spanish judge refer to *lex societatis*. From the Spanish perspective, *lex societatis*, i.e., English law should apply. From perspective of the English law, however, such an action should be governed by *lex concursus*. Therefore, *lex concursus*, i.e., Spanish law should apply. If it were so, based on the global concern of this issue, we believe that Spanish judges could also apply *lex concursus*, i.e., the national law rules so as to avoid further toing and froing[942] and to achieve harmony between the two PIL systems.

Therefore, it is also possible that *lex concursus* will apply in ruling such an action. However, it is relevant to examine whether the application of *lex concursus* will impair the company's right of establishment ensured by the EU law. As we have mentioned, ECJ does not prohibit a Member state to provide a more favourable treatment to a foreign company than a national company[943]. However, in regard of provisions establishing obligations that are more severe to a foreign company than to a national company, these

[942] John O'BRIEN, *Conflict of Laws (Second Edition)*, London, Cavendish Publishing Limited, 1999, p. 137.
[943] In this sense, see paragraphs 38 and 39 of Case C-186/12.

restrictive measures upon the right of establishment should fulfil the imperative requirements established by the EU law: required efficiency; proportionality and non-discrimination[944]. Return to the case *Inspire Art*, in which the Dutch law required an English company that set up an establishment in the Netherlands to follow the formal obligations of capital maintanance imposed upon the pseudo-foreign companies. If the capital maintanance obligations are not fulfilled, directors should be jointly and severally liable with the company for the legal acts carried out in the name of the company during their directorship[945]. However, the restrictive measures in *Inspire Art* did not meet the imperative requirements provided by ECJ, thus *lex societatis* will continue to apply to these pseudo-foreign companies[946].

However, the requirement of capital maintanance is not linked to a state of insolvency[947]. When the company approaches insolvency or financial distress, the shareholder-centric interests are moved to a more creditor-regarding set of objectives[948]. Once shareholders' investment has been wiped out, the creditors will replace the shareholders as the residual risk-takers[949]. At this point, directors should have some kind of organized response to protect the intersest of the creditors. If they fail to take appropriate steps, further and more specific creditor-regarding responsabilities could be imposed on them during the insolvency proceedings owing to tht fact that creditors are likely to suffer harm from the unwareness of the company's precarious state of affairs[950]. In this situation, we believe that the protection of the creditors has specific interests and is compatible with the imperative requirements imposed by the EU law. Therefore, the law where the insolvency proceedings are opened (*lex concursus*) could also be applicable. In fact, the uniform application of *lex concursus* may be quite necessary since the universal character of the insolvency proceedings will allow all the creditors, regardless of national or foreign creditors, to collectively participate in the insolvency proceedings. In the insolvency proceedings, the necessity to protect the creditors of the company and the requirement of subjecting all the

[944] See paragraph 133 of Case C-167/01 and paragraph 34 of Case C-212/97.
[945] See paragraph 25 of Case C-167/01.
[946] Fernando Esteban DE LA ROSA, "Vía libre a la movilidad de las sociedades en la Unión Europea: La sentencia TJCE de 30 de Septiembre de 2003 (Asunto C-167/01: *Inspire Art*)", *Diario La Ley*, Nº 5924, Año XXIV, Ref. D-295, 2003, pp. 1-18, pp. 7 and ss.
[947] Thomas BACHNER, *Creditor Protection in…, op. cit.*, p. 180.
[948] Carsten GERNER-BEUERLE, Edmund SCHUSTER, "The Costs of Separation…", *loc. cit.*, p. 17.
[949] Thomas BACHNER, *Creditor Protection in…, op. cit.*, p. 180.
[950] Thomas BACHNER, *Creditor Protection in…, op. cit.*, p. 180.

actions to a uniform *lex concursus* may be legitimate to provide a safe haven to prevent the application of *lex concursus* from the examination by ECJ[951]. However, it should also take into account whether or not the application of *lex concursus* will always encourage the judges of *forum concursus* to apply their familiar domestic law to foreign companies. If it were so, the judges will hardly take into account the application of *lex societatis*[952].

In the second place, let us imagine a hypothetical case in which all the Member states follow the "substantive" approach. In this case, the "substantive" approach encourages judges of the Member states to take into account not only the national substantive law that they are familiar with, but also the foreign substantive law before characterizing an issue. For example, an English company has its centre of main interets in Spain, while an action filed against directors of this company for the failure to open the insolvency proceedings is commenced in a Spanish court. Spanish judges may make a characterization by virtue of its national rules, and decide this action to be governed by company law (in this case, *LSC* will apply). Similarly, in a case where a Spanish company has its centre of main activities in England, while an action filed against directors of this company for their misconducts on the verge of insolvency is commenced in an English court, English judges may characterize such a claim as governed by insolvency law (in this case, *Insolvency Act 1986* will apply). Our idea to solve this legal difficulty by following the "substantive" approach is that when characterization is made, judges of the court in which such an action is brought could make a comparison between the rules of the state in which the company is incorporated and its own national rules. For example, it may be relevant for a Spanish judge to make a comparison between *LSC* and *Insolvency Act 1986*. As we have explained, the protection of the creditors on the verge of the company's insolvency and the obligations imposed upon directors meet the imperative requirements provided by the EU law. Even though the substantive rules in a law rather than the law of incorporation should apply after making such a comparison, we believe that this treatment is not contrary to the freedom of establishment.

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[951] Luca ENRIQUES, Martin GELTER, "How the old world encountered the new one: Regulatory competition and cooperation in European Corporate and Bankruptcy Law", Harvard John M. Olin Center for Law, Economics and Business Fellows' Discussion Paper Series No. 19, 7/2008, pp. 1-65, p. 60.

[952] Alexander SCHALL, "The UK limited Company…", *loc. cit.*, p. 1549.

In fact, the "substantive" approach may be more adaptive to different national classification on such an action. Firstly, it respects a diversity of connecting factors existing in different Member states and also takes into account the national concerns in such an action. Secondly, by making a comparison with the rules of the state in which the company is incorporated, at least the judges may avoid criticism from ECJ for the special interests of protecting the creditors in the insolvency or insolvency-related proceedings. By means of such a comparison, if judges find that the law applicable to such a foreign company may provide a stronger protection to national creditors of a foreign company, they may refer to the foreign rules. As a contrary, if they find that national law may provide a stronger protection to national creditors of a foreign company, national rules could apply as well. In this way, we could avoid directly putting a label on such an action and decide whether such an action falls within the scope of *lex societatis* or *lex concursus*.

However, there may be a concern that some Member states may re-characterize some rules of company law as rules of insolvency law[953]. In this case, we do not agree with the relabeling of company law provisions as insolvency law to a general extent, because it may provoke an indirect and uncertain impact upon the exercise of freedom of establishment, and general *"insolvencification"* may offer a safe haven for national rules against the freedom of establishment[954]. Nowadays, even the EU legislators prefer not to touch the delicate relations between RI and RBI, because a uniform private international law as regards the companies is still on the agenda. Thus in the proposal to the recast of RI, they carefully indicate that an action which derives directly from insolvency proceedings or is closely linked with them could be brought in the court dealing with the insolvency proceedings pursuant to RI as well as in the court of the defendant's domicile pursuant to RBI[955]. In this sense, the EU legislators seem to make a compromise and allow the intervention of both RI and RBI in such an issue.

In the third place, we must admit that in some aspects, conflict-of-law rules and conflict-of-jurisdiction rules have different functions and different interests. The objective of establishing a uniform conflict-of-law rule at the EU dimension is to ensure that an

[953] Koen GEENS, Klaus J. HOPT (Editors), *The European Company Law Action Plan Revisited: Reassessment of the 2003 priorities of the European Commission*, Leuven, Leuven University Press, 2010, p. 342.
[954] Luca ENRIQUES, Martin GELTER, "How the old world…", *loc. cit.*, p. 62.
[955] Georgina GARRIGA, "Relationships between 'Rome II'…", *loc. cit.*, p. 142.

applicable law could be correctly applied by a court no matter where a claim is filed. Therefore, if we take into account the protection of creditors, some instruments would traditionally be seen as belonging to the field of insolvency law[956], and the rules regarding the directors' liability for not filing for the opening of the insolvency proceedings would be one of them. In this regard, we do not propose an *"insolvencification"* to a general extent, but at least the introduction into the insolvency law the rules that are functionally equivalent or similar to rules previously found in company law may be workable (for example the directors' liability on the verge of the company's insolvency)[957]. As we have mentioned above, though directors' registration obligations to a pseudo-foreign company are regarded as contrary to the freedom of establishment in the case *Inspire Art*, ECJ recognizes that the "protection of creditors" is an "mandatory reason of public interest"[958], and the liability regime to incur directors' liability for the failure to file for insolvency meets this reason and serves a direct insolvency-political purpose in several Member states (for example, France and Britain, as indicated in the case *Gourdain v. Nadler*). In this sense, maybe we could encourage all the Member states to follow the trend of *"insolvencification"* to directors' liability deriving from the breach of insolvency filing obligations since some of them have already followed this trend. Through such a unification, firstly, if all the Member states could achieve consensus that directors' liability for the delay of insolvency filing is an issue governed by insolvency law, they would not have to worry about whether the creditor protection would be effected through mechanisms of company law or insolvency law, but they could rely on the uniform application of *lex fori concursus* to deal with such an action. Secondly, as we have recommended in the conflict-of-jurisdiction rules that judges of the court in which the insolvency proceedings are opened may determine whether an action falls within the scope of *"vis attractive concursus"* by referring to *lex societatis*, if all the Member states adopt the same criterion on this issue, the law of incorporation may also regard the directors' liability deriving from the failure in insolvency filing as an insolvency law matter and thus attach such an action to the insolvency proceedings. In this sense, judges dealing with the insolvency proceedings may be able to apply the national rules in such an action, and there will be no conflict between *lex societatis* and *lex concursus* because such an action is classified as an insolvency law issue within all the Member states.

[956] Thomas BACHNER, *Creditor Protection in…, op. cit.*, p. 12.
[957] Luca ENRIQUES, Martin GELTER, "How the old world…", *loc. cit.*, p. 62.
[958] Klaus PANNEN (Ed.), *European Insolvency Regulation…, op. cit.*, pp. 212-213.

1.4.4. Problems relating to the so-called "new creditors" in the pre-insolvency context

As we have explained above, "new creditors" can sue directors for the complete damage since directors should not have engaged in additional contracts after they knew that the company would be unable to fulfil its obligations of repayment[959]. Such an action may be brought individually by a "new creditor" and is for his personal interests rather than for the general body of creditors. Therefore, such an issue is not derived from insolvency and is not closely connected with the insolvency proceedings. In this way, it should not be classified as an insolvency law issue, and should be excluded by RI.

In Germany, BGH made a separation between "old" and "new" creditors, and enabled the "new" or involuntary creditors to incur directors' liability for the losses deriving from creditors' reliance on the continued solvency of the debtor[960]. BGB held that the relationship between the "new creditors" and directors is considered as *"culpa in contrahendo"*. In this regard, RRII may apply since it does not refer to an action to incur directors' liability for the obligations of the company but for the damage directly stemming from directors' misconducts. And RRII also establishes a conflict-of-law rule for actions of *"culpa in contrahendo"*, which provides that the law applies to the contract will be applicable, regardless of whether or not the contract is actually concluded[961]. However, in Spain, it is suggested that an action of "new creditor" should be brought under Article 241 of *LSC*[962], and it is regarded as a personal claim deriving from the breach of non-contractual obligations. In this case, as we have explained, RRII could serve to determine *lex loci delictli* as well.

Nevertheless, we have to see that the regime of "new creditors" only exists in some Member states, while in other Member states they do not actually distinguish between "old" and "new" creditors. Such a liability regime relies too much on national rules of the Member states, while there is still no uniform approach at the EU dimension. Therefore, it

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[959] Renate EICHIN, *Freedom of Establishment versus Creditor Risk in Germany: A Clash of Principles?*, Hamburg, Druck Diplomica, 2007, p. 60.
[960] Thomas BACHNER, *Creditor Protection in…, op. cit.*, pp. 198 and ss.
[961] See Article 12 of Regulation Rome II.
[962] Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU, "Normas de protección…", *loc. cit.*, p. 15.

seems better to leave for every Member state to make its own classification and determines the conflict-of-law rules to apply in such an action for the moment.

1.5. Conclusion

In the first place, normally the regime of directors' liability is governed by *lex societatis*. In accordance with ECJ's decisions, *lex societatis* is the law of the Member state in which a company is incorporated. Since a company incorporated within the territory of the Member states owns the right of establishment, a foreign company should get an equal treatment as a national company within the Member states. In this sense, if the rules of a Member state tend to impose a restriction on a foreign company, especially in the aspect of directors' liability, they should satisfy the criteria established by the EU law: required efficiency; proportionality and non-discrimination. Otherwise, the rules in *lex societatis* should continue to be applicable to this company. On the contrary, in the aspect of directors' liability, it is not contrary to the EU law that the rules of a Member state provide a more favourable treatment to a foreign company than a national company. In this case, the national law of that Member state may apply as well.

In the second place, since RRI precludes its application from the matters in relation to company law, the regime of directors' liability does not fall within the scope of RRI under general circumstances. In a corporate action, if directors have concluded a contract with the company, in theory, such an issue could be governed by *lex contractus* at national dimension. However, since directors' breach of fiduciary duties should be evidenced in order to establish their liabilities in a corporate action, while the intimate connections with the internal management of the company will make *lex societatis* more appropriate to deal with such an issue. In a case where directors have not concluded a contract with the company, they may also be considered as entering into a contractual relationship with the company if they have read the company's statute in which their duties and obligations are clearly indicated and have accepted the nomination. Nevertheless, directors may also conclude a contract with shareholders. In the case where such a contract could affect the shareholders' membership in the company, it seems more appropriate to refer to *lex societatis* since such a contract is based on the corporate framework and has strong connections with the internal management of the company. In contrast, if such a contract

does not affect the shareholders' membership in the company, it may be governed by *lex contractus* if it does not show sufficient connections with company law rules.

In the third place, generally a derivative claim should also be ruled by *lex societatis*. However, since a derivative claim includes many procedural issues, and sometimes *lex fori* may impose additional formal requirements that minority shareholders have to satisfy to be able to assert such a claim in this court. In this situation, the formal requirements imposed by *lex fori* may be followed in order that the court could admit such a derivative claim, though these requirements cannot be contrary to the principle of freedom of establishment ensured by the EU law.

In the fourth place, RRII also precludes its application from the matters in relation to company law, especially from the directors' personal liability for the corporate obligations. However, RRII does not clearly deny its applicability to a direct loss suffered by individual shareholders or creditors since it is possible that such a matter goes beyond the "company law exception". In regard of shareholders, in a personal claim which is not aiming at establishing liability to directors for the violation of shareholders' membership, since it may not show significant connections with the internal management of the company, it does not necessary has to fall within the scope of *lex societatis*. On the contrary, such an issue could also be governed by *lex loci delicti*. In a personal claim concerning the violation of shareholders' membership, such an issue should be governed by *lex societatis* because of its strong relations with the internal functioning of the company. However, since a personal claim may not be admissible in accordance with the national rules of some Member states, the intervention of *lex loci delicti* may be justified on the basis of the principle of *"neminem laedere"* exceptionally. In this case, RRII serves to decide *lex loci delicti*. Besides, in regard of creditors, under general circumstances, whether creditors could file a personal claim against directors should be determined by *lex societatis*. However, if a personal claim is not admissible in accordance with the rules of *lex societatis*, judges may exceptionally apply the rules of *lex loci delicti* or *lex fori* in order to provide protection to the interests of the local creditors of a foreign company. Meanwhile, sometimes a personal claim filed by creditors against directors may not show significant connections with the internal management of the company, thus it could be governed by *lex loci delicti* as well. Moreover, directors may also be held liable for a product liability.

In this case, RRII or the Hague Convention could be referred to in order to determine *lex loci delicti*.

In the fifth place, both RRI and RRII clearly preclude their applications from the directors' personal liability for corporate obligations. As we have mentioned, only an issue deriving directly from insolvency proceedings and is closely connected with them falls within the scope of "insolvency law exception" and could be governed by the law of the place in which the insolvency proceedings are opened (*lex fori concursus*) in accordance with RI. In this case, directors' liability for not filing for the opening of the insolvency proceedings could be classified as based on company law, tor law or insolvency law owing to the different criteria adopted by different Member states. And several solutions could be taken into account for the purpose to eliminate the disparities existing in the national rules and to achieve proximity to the application the conflict-of-law rules within the Member states. Firstly, judges of the Member states could follow the "conflict-of-law" approach and characterize such an action by taking into account the national substantive law that they are familiar with. However, such a treatment may lead to legal uncertainty since an issue is governed by *lex societatis* in a Member state, while it may be considered as governed by *lex concursus* when referring to *lex societatis*, vice versa. Secondly, in order to avoid directly putting a label on such an action and decide whether it falls within the scope of *lex societatis* or *lex concursus*, judges of the Member states could follow the "substantive" approach and characterize such an action by taking into account the national substantive law as well as a foreign substantive law (in this case it is the law of the Member states in which the company is incorporated). Since the protection of creditors is proved to be compatible with the freedom of establishment when it is linked to insolvency, it allows the judges of the insolvency court to make a comparison between national law and foreign law so as to determine which law could provide the creditors with stronger protection in such a case. This treatment respects a diversity of connecting factors existing in different Member states and takes into account the national concerns of each Member state involved in such an issue. Thirdly, since ECJ has admitted that the French regime falls within the scope of "insolvency law exception" in the case *Gourdain v. Nadler*, the EU legislators seem to accept the idea that the action filed to incur directors' liability due to the failure to file for the company's insolvency meets this reason and serves a direct insolvency-political purpose. Therefore, it is possible for all the Member states to follow the trend of

"insolvencification" on this regime. By following this trend, such an action could be uniformly governed by *lex fori concursus* and avoid legal divergence deriving from the different criteria adopted by different Member states.

2. The choice of conflict-of-law rules in the regime of directors' liability involving a Member state and a third state (Example of Spain v. China)

As long as the jurisdiction of a court is established, judges of this court should identify which law will be applicable to the parties' dispute. A court hearing an action does not necessarily apply its national law to settle the dispute, while the law that is actually applicable should be determined by the conflict-of-law rules. In litigation regarding directors' liability between a Spanish party and a Chinese party, it may be relevant for us to carry on a discussion respectively from Spanish and Chinese perspectives.

2.1. The Spanish perspective

Pursuant to Article 9 (11) of *Código Civil* (Spanish Civil Code), the personal law for legal persons is determined by their nationality and shall govern all aspects for their capacity, incorporation, representation, operation, transformation, dissolution and extinction[963]. Under general circumstance, directors' liability is also an issue covered by *lex societatis*. Therefore, in order to determine the applicable law in the regime of directors' liability, as a first step, it may be relevant to clarify *lex societatis* of a company. Article 9 (11) does not indicated clearly which company has Spanish nationality and which does not, in this case, we should refer to *LSC* in order to identify under which circumstance could a company be conferred the Spanish nationality. In conformity with Article 8 of *LSC*, *LSC* grants Spanish nationality to the companies that have their registered office in Spain, regardless of the place where they have been incorporated[964]. Meanwhile, in accordance with Article 9 of *LSC*, companies that have the main business establishment or carry out main administrative or management activities in Spain shall have a registered office in Spain, and they shall establish their registered office in the place where they have the main

[963] See Article 9 (11) of *Código Civil*. Also see Luis A. MARTINEZ GINER, "Chapter 20: Spain", in Guglielmo MAISTO (Editor), *Residence of Companies under Tax Treaties and EC Law, op. cit.*, pp. 753-794, p. 753.

[964] See Article 8 of *LSC*.

business establishment or where they carry out main administrative or management activities in the territory of Spain[965].

In combination of Article 8 and Article 9 of *LSC*, we may conclude that the Spanish criterion on a company's nationality depends on the location of the "domicile" (registered office) of the company, and the location of "domicile" is determined by that of the company's main centre of activities. Such a criterion seems to be contrary to the freedom of establishment, so it should not apply to a company that is incorporated in a Member state and carries out its main activities in the territory of Spain[966]. However, Chinese companies cannot enjoy the right ensured by the freedom of establishment. In accordance with this criterion, if a Chinese company intends to carry out its main business or other principal activities in Spain, it should convert into a Spanish company and prove that it meets the capital requirements imposed by Spanish law[967]. Conversely, if a Chinese company only wishes to have part of its business in Spain it would not be imposed to become a Spanish company.

As we have mentioned, directors' duties and obligations are bound up with the internal management of the company, and its intimate connections with the internal organization of the company should decide that it is more appropriate to be linked to *lex societatis* from the perspective of PIL[968]. Besides, directors and the company could only agree to modify the duties of directors when such a modification is not contrary to the mandatory rules provided by *lex societatis*[969]. It is possible that a director and his company conclude a contract inserting a special duty. Though such a duty is not clearly indicated in *lex societatis*, there is no clear evidence that such a duty is incompatible with *lex societatis*. In this case, it is doubtful whether the breach of such a special duty could be governed by *lex contractus* in accordance with Article 10 (5) of *Código Civil*. We believe that such an issue should still be governed by *lex societatis* rather than *lex contractus*. This is not because no connecting factor is evidenced between *lex contratus* and such an issue, but because *lex*

[965] See Article 9 of *LSC*.
[966] Manuel SÁNCHEZ ÁLVAREZ, "Traslado a España de sociedad extranjera. Traslado al extranjero de sociedad española. Proyecto de traslado. Informe de los administradores. Depósito del proyecto", in Fernando RODRIGUEZ ARTIGAS (Coord.), *Modificaciones estructurales de las sociedades mercantiles*, Tomo II, Navarra, Editorial Aranzadi, 2009, pp. 51-84, pp. 70-71 and ss.
[967] See Article 94 of Ley 3/2009.
[968] Andrew Dickinson, *The Regulation Rome II…, op. cit.*, pp. 208-209.
[969] P.R. BEAUMONT, P.E. MCELEAVY, *Private International Law…, op. cit.*, p. 440.

societatis presents very special interests in ruling the corporate affairs, in which directors' duties and liabilities are also included. In this case, it should be noticed that conflict-of-jurisdiction has different consideration as regrads conflict-of-law. In *LOPJ*, the Spanish legislators do not confer exclusive jurisdiction to a court to deal with corporate affair. Instead, since the relationship between directors and the company is regarded as contractual, the court competent to deal with a contractual obligation could also establish jurisdiction in such an issue. However, in regard of conflict-of-law rules, the existence of *lex societatis* and its special interests in ruling the corporate affairs make it the first option to be considered in such an issue rather than *lex contractus*. However, as we have mentioned, *lex societatis* is only a concept of PIL. The application of *lex societatis* does not mean that only the substantive company law rules in *lex soceitatis* are available to determine directors' duties and liabilities[970]. On the contrary, we believe that the other rules in the applicable law designated by 9 (11) of *Código Civil* could also be referred to determine directors' duties and liabilities as well as the articulation between the company law rules and contract law rules[971]. Besides, from the Spanish perspective, *lex contractus* is related to the law of the place where the two contracting parties have chosen clearly[972]; or the law of the state where the two parties have the same nationality; or the law of the state where the two parties have their habitual residence[973]; or the law of the place where the contract was entered into (*"lugar de celebración"*)[974]. In respect of directors' duties, the multiple criteria adopted by Spanish law to determine the law applicable to a contractual obligation show less stability to the sole criterion adopted by *lex societatis*. And the application of *lex contractus* seems to be less persuasive, especially in a case where a contract is accidently concluded by a director and his company in a state, while there is no more significant connection with that state[975]. In this case, we believe that the application of *lex societatis* is more appropriate than that of *lex contractus* in determining directors' duties and liabilities.

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[970] Rafael Arenas García, "La responsabilidad de…", *loc. cit.*, p. 187.
[971] Rafael Arenas García, "La responsabilidad de…", *loc. cit.*, p. 187.
[972] See Article 10 (5) of *Código Civil*. Also see Michele GRAZIADEL, Ugo MATTEI, Lionel SMITH, *Commercial Trusts in European Private Law*, Cambridge, Cambridge University Press, 2005, p. 427.
[973] See Article 10 (5) of *Código Civil*.
[974] Fernando M. MAIÑO MENÉNDEZ (direc.), "Spanish Judicial Decisions in Private International Law", *Spanish Yearbook of International Law*, Vol. V, 1997, pp. 311-354, p. 321.
[975] In this sense, see Miguel VIRGÓS SORIANO, *Lugar de celebración y de ejecución en la contratación internacional*, Tecnos, 1989, pp. 57 and ss.

Therefore, generally a corporate action filed against directors for their breach of duties and for damage sustained by the company should be governed by *lex societatis*. Meanwhile, *lex societatis* also determines the capacity of shareholders or creditors to file a personal claim against directors, since a loss sustained by shareholders or creditors is often caused by directors' misconducts under the corporate framework. Although some states enable shareholders and creditors to bring a personal claim against directors, it is also possible that a personal claim is inadmissible in other states. Besides, as we have mentioned, sometimes directors' liability is not derived from a fact that shows strong connections with the internal management of the company[976]. In this case, we believe that the intervention of *lex loci delicti* may exceptionally be allowed since the relationship between directors and shareholders or creditors are considered as non-contractual from the Spanish perspective.

In conformity with Article 10 (9) of *Código Civil*, non-contractual obligations should be governed by the law of the place where the event from which they derive has occurred[977]. In this case, similar to what we have explained, there is no reason why the Spanish rule should be interpreted as adopting a different criterion as in RRII. Therefore, it may be logical for us to decide the criterion of "place where the event from which they derive has occurred" by following the statement of Article 4 of RRII, in which it adopts the criterion of the "place in which the event giving rise to the damage occurred" in order to decide *lex loci delicti*. However, it should be noticed that the application of *lex loci delicti* could not be justified in all the situations. Any measure adopted by a court of a Member state must be necessary for the proper functioning of the internal market[978]. For example, in a case where a director of a Chinese company exercises all his functions in China and cause a direct loss to Spanish creditors, and the Spanish creditors assert a claim in a Spanish court, if the Spanish judge applies *lex societatis* or *lex loci delicti*, he may find that both lex societatis and *lex loci delicti* turn to be the Chinese law. Under this circumstance, the application of Chinese law may disable a personal claim of creditors that they could have exercised in accordance with Spanish law, and local creditors of the Chinese company will get a less favourable treatment in comparison with those of a Spanish company. In this

[976] Daniel COHEN, "La responsabilité civile…", *loc. cit.*, pp. 597-598.
[977] In this sense, see Article 10.9 of *Código Civil*. Also see M. VIRGÓS SORIANO, Francisco J. GARCIMARTÍN ALFÉREZ, L. GARCÍA GUTIÉRREZ, "Spanish Judicial Decisions in Private International Law, 1995 and 1996", *Spanish Yearbook of International Law*, Vol. IV, 1995-1996, pp. 433-494, p. 434.
[978] Richard PLENDER, Michael WILDERSPIN, *The European Private…, op. cit.*, p. 465.

case, it may bring an obstacle to the well functioning of the EU internal market by applying Chinese law. If it were so, the Spanish judges could return to the examination of the applicability of *lex fori*, which plays a subsidiary role so as to provide the local shareholders and creditors with stronger protection.

In the case regarding insolvency or insolvency-related matters, firstly, Spanish company law provides that directors should be jointly held liable for the corporate debts if they have not fulfilled their duties to file for the opening of the insolvency proceedings. Since it is an issue classified as based on company law from the Spanish perspective, a Spanish judge would apply *lex societatis* to decide such a matter. The similar problem may arise if an action aims at incurring liability to a director of a Chinese company. In this case, since Chinese law has not yet established a system as Spanish law in which individual creditors could file a claim against directors, it should return to Spanish law if the provisions of an applicable foreign law could not provide enough protection to the local creditors. This is similar to the case *Inspire Art*, in which the Dutch legislators have established a special rule for the pseudo-foreign companies. In accordance with this national rule, directors of these companies shall be held liable for the corporate debt if they have not fulfilled certain requirements[979]. Although Dutch law cannot apply because of the incompatibility with the freedom of establishment, it is different in a case where the Spanish legislators impose similar obligations to a Chinese company and its directors because Chinese companies do not enjoy the rights of establishment with the EU territory. In this situation, it is likely that a Spanish judge will take in account the elements of public order and the necessity to protect local creditors so as to invoke the provisions in *LSC* and apply them to the Chinese company and its directors.

Secondly, if a director is sued in a Spanish court by a liquidator for causing or aggravating the company's insolvency, such an action should be classified as based on insolvency law from the Spanish perspective, and Spanish judges will apply *lex concursus* in order to deal with such an action. In accordance with Articles 199 and 200 of *LC*, the application of Spanish insolvency law shall not exert any adverse influence to RI and Spanish law shall determine the conditions for the opening of the insolvency proceedings in Spain, the effects of these proceedings (e.g., on contracts, creditors, on-going proceedings, etc.) and

[979] See Case C-167/01.

their closure[980]. Therefore, if a liquidator commences the insolvency proceedings in a Spanish court, he would have taken all the circumstances into account and have found that it may be more favourable for these proceedings to be governed by Spanish law. In this sense, he would also bring an action under Article 172 *bis* of *LC* before the same court, because it makes no interest for him to bring such an action before a foreign court. However, we also have to admit that sometimes the application of *lex concursus* to such an action may lead to some unlawful *"forum shopping"* which sophisticated litigants may explore and perform it with abusive strategies[981].

Thirdly, in accordance with Article 8 (7) of *LC*, the Spanish insolvency court owns exclusive jurisdiction on the determination of directors' liability in a corporate action deriving from a loss caused to the company before or after the declaration of insolvency[982]. From the perspective of conflict-of-jurisdiction rules, a corporate action falls within the scope of *"vis attractiva concursus"* and surrender to the court of the place in which the insolvency proceedings are opened. However, even though an action enacted by insolvency law and an action enacted by company law may be concentrated in the same court, the two actions should be determined respectively in accordance with their own connections factors, i.e., the procedural requirements of a corporate action should refer to *lex societatis* rather than *lex concursus*. Therefore, if a corporate action is brought by a liquidator against directors during the insolvency proceedings before a Spanish court, Spanish judges should apply *lex societatis* in order to determine the procedural or substantive questions of such an action. Nevertheless, Spanish judges could also apply *lex concursus* in order to determine the effects of insolvency proceedings on such an action, as is indicated by Article 200 of *LC*.

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[980] Ángel ESPINIELLA MENÉNDEZ, *Procedimiento de insolvencia y grupos multinacionales de sociedades*, Thomson/Civitas, 2006, p. 142. Also see Rafael ARENAS GARCÍA, "La responsabilidad de…", *loc. cit.*, p. 197. Also see Uría MENÉNDEZ, "Maritime, Transport & Logistics: Ship Finance and Cross-border Insolvency", this article is available on the website: http://www.uria.com/documentos/circulares/552/documento/4633/025_Transporte_ESP_Abril_2013.htm?id=4633.

[981] Julia EISENGRAEBER, "*Lis alibli pendens* under the Brussels I Regulation: How to minimize 'Torpedo litigation' and other unwanted effects of the 'first-come, first-served' rule", *Exeter Papers in European Law*, No. 16, pp. 1-63, pp. 43 and ss. This Article is available on the website: http://law.exeter.ac.uk/cels/documents/papepr_llm_03_04_dissertation_Eisengraeber_001.pdf. Also see Pietro FRANZINA, "*Lis pendens* involving a third country under the recast Brussels I Regulation: an overview", *Rivista di diritto internazionale privato e processuale*, 2014, nums. 1-7, num. 4.

[982] See Article 8 (7) of *LC*.

2.2. The Chinese perspective

When a Chinese court establishes its jurisdiction to deal with a case regarding directors' liability, it is also worthwhile further investigate on the choice of conflict-of-law rules from the perspective of the Chinese judges. Before the promulgation of *Law Applicable to Foreign-Related Civil Relations of the PRC* in 2010 (*2010 CPIL Act*), the legal rules to foreign-related civil relations were not systematic and were scattered in different civil laws and regulations. Sometimes, the different criteria adopted by different civil laws may lead to different qualification or characterization made by the judges, thus it is necessary to introduce an integrated, consolidate and unified rules in terms of PIL[983]. On 28 October 2010, *CPIL Act* was finally adopted by the *Standing Committee of the National People's Congress*, and this law is the culmination of efforts made by many concerned parties over the last decade and the first legislation ever in the history of China systematically dealing with conflict-of-law issues[984].

In accordance with Article 14 of *2010 CPIL Act*, *lex societatis* is the law of the place in which registered office is located[985]. If the place of registered office is different from the place of main business, the law of the place of company's main business can also be applicable[986]. Following this criterion, normally *lex societatis* is the law where the company has its statutory seat. However, due to the absence of a special provision dealing with the international corporate mobility in Chinese law, it is in fact not prohibited by Chinese law that a company sets up either its statutory seat or real seat in China while having the other seat in a foreign country. Therefore, in order to avoid that a company abusively evades the application of Chinese law by setting up its statutory seat in a foreign seat while developing its main activities in China, the law of the place where the company has its main business may supplementary apply. In the recent published *First Judicial Interpretation on the application of 2010 CPIL Act* made by Chinese Supreme Court, the Chinese legislators clarify the criterion of *lex societatis* again. In accordance with Article 16 of the *First Judicial Interpretation*, if the place of a company's statutory seat is

[983] In this sense, see Jin HUANG, "Creation and Perfection of China's Law Applicable to Foreign-Related Civil Relations", *Yearbook of Private International Law*, Vol. XIV, 2012/2013, pp. 269-288, p. 279.
[984] Guangjian TU, "The Codification of Conflict of Law in China: What has/hasn't yet been done for cross-boarder torts?", *Yearbook of Private International Law*, Vol. XIV, 2012/2013, pp. 341-352, p. 341.
[985] See Article 14 of *2010 CPIL Act*.
[986] See Article 14 of *2010 CPIL Act*.

different from the place of incorporation, Chinese judges shall identify the law of the place of incorporation as the law applicable to the company[987].

From the Chinese perspective, *lex societatis* determines the issues such as civil capacity, civil competence, structure of corporate organs, and rights of shareholders[988]. Similar to *Chinese Civil Procedural Law*, the Chinese legislators also set out a non-exhaustive list of the matters that should be governed by *lex societatis*. We consider that the classification made in the *Notice of the Supreme People's Court on Issuing the Decision on Amending the Provisions on the Cause of Action of Civil Cases* can also apply in characterizing a matter concerning conflict of law. In accordance with the *Notice*, a dispute between the company and its directors deriving from the damage sustained by the company and a dispute between shareholders and directors of the company for the damage sustained by these shareholders should be considered as an issue in relation to company law.

In the regime of directors' liability, judges should have to refer to *lex societatis* in order to decide whether directors have acted in contrary to the duties that are owed to the company. In this sense, *lex societatis* could be applicable to a corporate action and a derivative action. Although the Chinese legislators also establish a set of rules concerning *lex concursus*, we believe that that *lex societatis* has special interests in dealing with the corporate affairs, and should prevail over *lex concursus* in this aspect. Therefore, generally a corporate action and a derivative action should be governed by *lex societatis* from the Chinese perspective.

Besides, in accordance with Article 153 of *Chinese Company Act*, individual shareholders could assert a personal claim based on both company law and tort law grounds. Normally, such a claim should be governed by *lex societatis*. Therefore, in a case where Chinese shareholders of a foreign company suffers a direct loss and brings a personal action in a Chinese court, Chinese judge will refer to *lex societatis* while he may find that a personal action is inadmissible in that law. Considering the interests of national cizitens, he may apply *lex loci delicti* exceptionally. Generally, *2010 CPIL Act* regards the law of the place of infringement as *lex loci delicti*[989], and the place of infringement includes the place

[987] See Article 16 of *First Interpretation on the application of 2010 CPIL Act [2012]*. Also see Pietro FRANZINA, Renzo CAVALIERI, "The 2012 'Interpretation'…", *loc. cit.*, p. 909.
[988] See Article 14 of *2010 CPIL Act*.
[989] See Article 44 of *2010 CPIL Act*.

where the infringement took place and the place where the consequences of the infringement occurred. If the two laws differ, the Chinese judge could pick up any of them to apply in such a case[990]. In this case, we believe that *lex loci delicti* may usually turn to be Chinese law. By applying Chinese law, the Chinese judge could be able to ensure the protection of national citizens.

As a contrary, whether a creditor could bring a personal action against a director of the company should highly rely on the applicable rules of company law. Generally, such an issue should be determined by *lex societatis*. However, in accordance with Article 8 of *2010 CPIL Act*, Chinese judges shall make a characterization in conformity with *lex fori* (here the Chinese law) as the first step[991]. In this case, since *Chinese Company Act* does not enact a liability regime that enables creditors to file a personal claim against directors, the legal lacuna makes Chinese judges impossible to verify such an action as governed by company law or by tort law. Instead, judges may deny such a claim due to the absence of an appropriate classification in Chinese law. In fact, although Spanish law may establish a regime for creditors to sue directors for a direct loss, if an action is commenced by a creditor before a Chinese court against a director of a Spanish company, Spanish law (*lex societatis*) will not apply automatically. *2010 CIPL Act* does not consider the application of foreign law as a prerequisite, but the application of foreign law should be made in an appropriate way and be justified[992]. Since we have explained that judges should make a characterization by virtue of Chinese rules as the first step, it is very likely that they will reject such a personal claim directly.

As we have mentioned, *Chinese Securities Act* provides a protective rule to creditors and states that directors should be held liable for creditors for publication of false information in securities market, or for conducting wilful acts in insider trading. Some Chinese scholars believe that this kind of protective private law also presents internationally mandatory

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[990] See Point 187 of the *Opinion of the Supreme People's Court on questions concerning the implementations of the General Principles of Civil Law.* Also see Weizuo CHEN, "La nouvelle codification du droit international privé chinois", *Recueil des Cours*, Vol. 359, 2013, pp. 87-284, p. 236. Also see Donggen XU, "Le droit international privé en Chine: une perspective comparative", *Recueil des cours*, Vol. 270, 1997, pp. 107-235, pp. 149-154.

[991] See Article 8 of *2010 CPIL Act*.

[992] Weizuo CHEN, Lyvia BERTRAND, "La nouvelle loi chinoise de droit international privé du 28 octobre 2010: contexte législatif, principales nouveautés et critiques", *Journal du droit international*, Tome 138, 2011 (2), pp. 375-394, p. 383.

features since it may affect national economy order and the well functioning of securities market, and they exclude the supposedly applicable foreign law[993]. In fact, international mandatory rules are defined as *"those rules concerning social and public interests or security, from which parties cannot derogated by stipulation, and which can claim direct application without being referred to by conflict rules"*[994]. And in accordance with Article 4 of *2010 CPIL Act*, Chinese overriding mandatory rules shall have direct effect and they shall be immediately applied by Chinese organs exercising international jurisdiction due to their special objectives[995]. In this case, if an action is brought by creditors in a Chinese court because of the mentioned reasons, Chinese judges may not need to refer to *lex societatis* but directly apply Chinese law to a foreign company in order to establish directors' liability. It makes sense, for example, if directors of a foreign company can get relief from being sued in an insider trading because no specific rules are enacted in a foreign law, it would affect a great number of national investors, and the normal functioning of securities market will be disturbed as well.

In regard of directors' liability in the insolvency proceedings, as we have mentioned, liquidators can incur directors' liability under *Chinese Enterprise Bankruptcy Act* if directors have breached the duties and have caused the company's insolvency. However, current Chinese law remains very unclear in the area of international insolvency. In accordance with Article 5 of *Chinese Enterprise Bankruptcy Act*, Chinese judges shall apply the *Chinese Enterprise Bankruptcy Act* to decide an insolvency matter if such insolvency proceedings are commenced by virtue of this Act (according to this Act, the insolvency proceedings shall be commenced in the place where the company is domiciled, while the Chinese criterion on "docimile" is attached to the main administrative officer of the company), and extend the effects of the insolvency proceedings to the debtor's assets located in other foreign countries as well[996]. In this sense, it seems that *lex concursus* is in fact *lex fori* from Chinese perspectives, and *lex fori concursus* is the law of the place of

[993] In this sense, see Yong GAN, "Mandatory Rules in Private International Law in the People's Republic of China", *Yearbook of Private International Law*, Vol. XIV, 2010, pp. 305-322, p. 313. Also see Deipei HAN, "The Trends of Development of Private International Law in Recent Decades", *Chinese Yearbook of International Law*, 1988, pp. 3-23, pp. 14-15. Also see Renshan LIU, "The Issues Regarding the Theory and Practice of Directly Applicable Law, with Comments on Article 4 of The Act on Law Applicable to Foreign-Related Civil Relationships", *Chinese Yearbook of International Law*, 2011, pp. 410-440, p. 439.
[994] Yong GAN, "Mandatory Rules in…", *loc. cit.* p. 315.
[995] See Article 4 of *2010 CPIL Act*. Also see Weizuo CHEN, "Chinese Private International Law Statute of 28 October 2010", *Yearbook of Private International Law*, Vol. XII, 2010, pp. 27-41, p. 36.
[996] See Articles 3 and 5 of *Chinese Enterprise Bankruptcy Act*.

company's domicile. However, such a provision cannot be considered as a conflict-of-law rule, and it still remains doubtful whether this Article could apply to foreign-related insolvency proceedings. It is suggested in the *Model Law of Private International Law of China* [2000] made by the *Chinese Association of PIL* that the company's insolvency shall be governed by the law of the place where the company's principal business establishment is located or where the company's assets are located, and the liquidation in the insolvency proceedings shall be governed by *lex fori*[997]. The simple existence of corporate assets in a place is not sufficient to confer jurisdiction to a court in this place[998]. Thus, it seems better to open the insolvency proceedings in the place of company's main administration centre. This suggestion presents certain approach with the criterion set up in RI, because *lex concursus* is *lex fori*, and *lex fori* is the law of the place where the company has its centre of main interests. In fact, the criterion of "centre of main interests" reflects "the focal point of the economic life of the debtor" and presupposes a degree of "institutionalised presence" in the forum[999], and it has already been adopted by both UNCITRAL and RI. Besides, the success of EU practices in adopting the criterion of "centre of main business" could prove the feasibility of such a criterion in dealing with cross-boarder insolvency. In this sense, if Chinese legislators adopt the criterion of "centre of main interests", a judgment made by a court could be more likely to get recognized and executed in a foreign state as well[1000].

2.3. Conclusion

On the basis of the respective analysis of the conflict-of-law rules in Spanish law and Chinese law, we have found that there exist certain similarities in Spanish and Chinese PIL in regard of directors' liability. It is accepted that a corporate action brought by the company, a derivative action filed by minority shareholders on behalf of the company and a personal claim brought by individual shareholders should be governed by *lex societatis* in both Spanish and Chinese PIL. Besides, regarding the criterion of *lex societatis*, both the

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[997] See Articles 148 and 150 of *Model Law of Private International Law of China* [2000]. This Model Law was made by the *Chinese Association of PIL*, which is an academic association consisting of famous Chinese PIL scholars. And this Model Law is only academic in nature and intends to be served for legislative reference or legal science research.

[998] Zhengshan XIE, *The research on the legislation of cross-boarder insolvency and judicial practices: from the perspective of the USA and Europe*, Beijing, China Law Press, 2011, p. 110.

[999] Bob WESSELS, "The Place of the Registered Office of a Company: a Cornerstone in the Application of the EC Insolvency Regulation", *European Company Law*, Volume 3, Issue 4, 2006, pp. 183-190, p. 183.

[1000] Xiaoqiong WANG, *The Research on the Legal Conflicts in the Cross-boarder Insolvency*, Beijing, Peking University Press, 2008, p. 273.

Spanish and Chinese legislators take statutory seat as well as real seat into account, for the concern that the application of national rules may be evaded by constituting a company in a foreign state while developing all its main business in the national territory. In this case, since the principle of freedom of establishment based on mutual trust of Member states is not applicable in the case in which third state elements are involved, national legislators will be more precautious in such a case for the purpose to avoid fraudulent establishment at an international dimension.

The greatest difference exists in the case of a personal action brought by individual creditors. In this case, Spanish law enables individual creditors to file a claim directly against directors for a loss caused by their misconducts, while in Chinese law, normally creditors are not allowed to assert such a claim. In such a case, if Chinese creditors of a Spanish company intend to bring a personal action before a Chinese court against the company's directors, Spanish law (*lex societatis*) will not be referred to because the Chinese court has to characterize such an issue by virtue of Chinese rules. Since no liability regime could be found in Chinese law in order to support such a claim, it is very likely that Chinese judges will reject such a claim directly. Under this circumstance, local creditors of a foreign company should assert a personal claim in a foreign court in order to seek relief from its directors, while it is very unreasonable for the protection of national creditors. Therefore, it is suggested that the Chinese legislators should introduce a liability regime regarding individual creditors' personal action against directors as well. It would be a win-win solution because, firstly, if a Chinese court is seized to deal with such an issue, Chinese judges could also characterize such a claim by virtue of Chinese law, and decide whether a foreign law (possibly *lex societatis* or *lex loci delicti*) could apply in this case. Secondly, foreign creditors of a Chinese company could also incur directors' liability through a personal claim by virtue of Chinese rules, and Chinese courts could have competence to deal with such an issue as well.

Furthermore, in securities market, the Chinese legislators provide a liability regime for creditors to blame directors for the misconducts in publication of information or insider trading. If such an action were brought before a Chinese court, Chinese rules (*lex fori*) would have mandatory effect for the consideration of the public interests. In this case, since China just opens its securities market to foreign companies, it is reasonable that the

Chinese legislators adopt a very cautious attitude towards the issuing of corporate bonds by a foreign company in China. Therefore, for the purpose to ensure the reasons and the objectives on which the national rules stand, the Chinese legislators will insist the mandatory application of Chinese law.

However, until now, there is still no conflict-of-law rule in Chinese PIL regarding cross-boarder insolvency. In this case, Chinese PIL scholars have recommended that the insolvency proceeding be governed by *lex fori* while *lex fori* should adopt the criterion of "principle business establishment". Such a criterion is very similar to that of "centre of main interests" adopted in both UNCITRAL and RI. It is workable and worth a further consideration by the Chinese legislators in the next revision of PIL, because the criterion of "centre of main interests" has become the international trend in dealing with cross-boarder insolvency, and adopting a similar criterion could enhance the cross-boarder insolvency cooperation between China and the EU. We also believe that if a Chinese judge follow this criterion to make a judgment, such a judgment may be easier to get recognized and executed in a foreign state.

CONCLUSION

1

1. In a company, the relationship between the directors of the board and the company varies from state to state. Some states consider that directors represent the company to carry out its business. Some states consider that directors represent or act on behalf of the company through a written authorization. Some states even consider that directors become the trustee or agent of the company through an agreement of appointment. As long as a person becomes a director of the company, he should act for the interests of the company diligently and loyally. Although the delimitation of directors' fiduciary duties has slight differences, the states that we have mentioned in this thesis (France, Germany, UK, Spain and China) agree that directors should exercise their functions with reasonable care, skill and diligence that they should have, and avoid conflicts between personal and corporate interests. Besides, although it is not clearly indicated in the provisions of company law, most of the doctrines of these states support that the requirements of the fiduciary duties apply to the directors who are formally appointed as well as those directors *de facto*. In this case, if directors breach their fiduciary duties that are owed to the company, they should assume liability to the company. Normally, this kind of liability is with civil natures in order to force directors to make compensation for the company's loss. Nevertheless, some states consider that the directors' misconducts still deserve a more severe punishment. Therefore, as well as civil liability, directors may also be obliged to assume criminal and administrative liabilities.

2. When directors' wilful acts or gross negligence have caused damage to the company, the company may seek compensation through a corporate action. In some states, since their companies follow a one-tier board structure, a resolution to bring a corporate action should be made by the general meeting of shareholders. In contrast, in other states, since their companies follow a two-tier board structure, it is important to achieve a balance between the managing and supervisory boards. Therefore, a corporate action is usually brought by the supervisory board against managing directors, or by the managing board against

supervisory directors. Sometimes, it is necessary for the company to demonstrate the causal link between the directors' fault and its loss. On the contrary, sometimes directors themselves should prove that they have not participated into making such a harmful decision in the board, or have already opposed to it and have made efforts to prevent possible damage so as to get relieved from the corporate action.

Since the breach of fiduciary duties are considered as breach of obligations that are freely assumed by directors to the company, even though directors may have not concluded a written contract with the company, their acceptance of nomination as directors could also be regarded as having voluntarily entered into an agreement which creates contractual rights and obligations between the company and them. In this case, since Article 22 (2) only confers exclusive jurisdiction to the court where the company has its seat to deal with the affairs with constitutive natures, it cannot apply to an action to establish directors' liability because it does not have very strong connections neither with an issue on the examination of validity of the board's decision nor with an issue concerning the distribution of assets in the dissolution proceedings. Meanwhile, since RBI does not preclude its application specifically from the issues relating to the companies, the regime of directors' liability should be treated as other civil or commercial affairs. Based on this consideration, the general provision of Article 2 could be applicable to a corporate action and such an action could be dealt with by the court of the Member state in which the defendant has his domicile. If there are a group of defendants to be sued, such a case could also be dealt with by the court of the Member state in which one of the defendants is domiciled by virtue of Article 6 (1). However, Article 6 (1) applies only when all the co-defendants are domiciled in the Member states and the claims against each defendant have strong connections to be joined before one court. Besides, apart from Article 2 and Article 6 (1), Article 5 (1) may also be operable to a corporate action since it applies to an obligation which is freely assumed by one party towards another party and a relationship which the two parties have freely entered into. In this case, the relationship between directors and the company meets the requirements imposed by Article 5 (1) and it could be referred to in order to decide a competent court. However, it should be noticed that a contract between directors and the company is not a contract of service under the contention of Article 5 (1) (b) but should be regarded as a contract under Article 5 (1) (a). Furthermore, it is also possible that directors and the company may conclude a choice of

forum clause for the purpose to deal with their dispute. Under this circumstance, the existence of such a jurisdiction clause may enable Article 23 to derogate from the application of Article 2, Article 6 (1) and Article 5 (1) (a). In accordance with the new statement of RBI*bis*, a Member state court could be competent even if none of the parties is domiciled within the EU territory. However, as long as the two parties have selected a Member state court to deal with their dispute, it leaves for the law of that Member state to determine the validity of the jurisdiction clause, and RBI*bis* also states that the validity of a jurisdiction clause will not be affected by the fact that a contract is void. Therefore, in a corporate action, the party autonomy should be respected and a choice of forum clause should be referred to Article 23. However, if such a jurisdiction clause is not in a contract but is introduced in the company's articles of association, directors' acceptance of appointment could be regarded as voluntarily assuming obligations towards the company and achieving a real consensus upon such a jurisdiction clause as well. ECJ has admitted in its decisions that Article 23 is also applicable in this case.

Similarly, in a company *in bonis*, a dispute concerning a corporate action can also be submitted to arbitration through an arbitration agreement that is based on the parties' autonomy and privity. Such an agreement could also exist in the corporate statute and it will have binding effects on directors as well.

3. When a competent court is seized to deal with a corporate action, judges should decide which law is applicable to such an action. Within the Member states, RRI cannot apply to a corporate action since it precludes its application from the issues governed by company law. In theory, a corporate action could be governed by *lex contractus* at a national dimension since the relationship between directors and the company is defined as contractual, but the significant connections between the directors' breach of fiduciary duties and the internal management of the company will make the application of *lex societatis* prevail over that of *lex contractus*. In this case, due to the fact that there is no uniform EU PIL rule in the aspect of company law, national judges should determine *lex societatis* in accordance with ECJ's previous decisions. TFEU provides that a company incorporated in a Member state has the right of establishment within the EU territory. And ECJ considers that the legal personality of a company will not be affected only because it is incorporated in a Member state and carries out all its activities in another Member state.

In this case, the legal personality is still subject to the law of incorporation and ECJ favours that *lex societatis* is the law of incorporation. If the national law of a Member state intends to impose more severe obligations to a foreign company and to restrict the company's exercise of freedom of establishment, it should satisfy several conditions: required efficiency; proportionality and non-discrimination. However, if the national law of a Member state provides fewer obligations to a foreign company than a national company, ECJ does not forbid that the measures in the national law of this Member state apply to the foreign company rather than *lex societatis*. Therefore, it is also possible that a corporate action is governed by a law different from the law of incorporation as long as it is compatible with the principle of freedom of establishment. Similarly, a Member state cannot impede its national companies to abandon its nationality and to convert into a foreign company, while *lex societatis* will also be changed if the company acquires the new nationality.

4. In order to solve the difficulties deriving from the determination of a competent court between a Member state and a third state in the regime of directors' liability, we take the example of Spain and China. In this case, generally RBI does not cover litigation only between a sole Member state and a third state but not with another Member state, thus a corporate action should be ruled by national laws. The Chinese legislators confer jurisdiction to the place where the company has its domicile to deal with a corporate action. In contrast, the Spanish legislators do not establish a similar provision and submit all the issues relating to the company to the court in the place that shows significant connections with the company. Since the relationship between directors and the company is defined as contractual, a corporation action could be dealt with by the court that is competent to deal with contractual obligations from the Spanish perspective. However, it is likely that in a third state like China, the legislators provides a multiple mechanism which enables the Chinese courts to have jurisdiction under many circumstances. Such a treatment will indirectly encourage their courts to insist on jurisdiction and will lead to unreasonable parallel proceedings as well. In this case, we suggest that the establishment of PIL rules should be based on international comity, mutual respect of the jurisdiction of foreign states, and the conflict of jurisdiction could be harmonized through the establishment of international conventions between the EU and a third state.

5. In deciding the applicable rules to a corporate action only involving relations between a sole Member state and a third state but not with another Member state, it is clear that the EU principle of freedom of establishment cannot apply. However, similar to a corporate action within the Member states, the inherent connecting factors decide that *lex societatis* is more appropriate to deal with a corporate action rather than *lex contractus*. However, sometimes if the application of *lex societatis* will inevitably exert adverse effects on the public policy of the place of the forum, judges could justify the application of the mandatory provisions of *lex fori* as well.

2

6. If a company does not file a corporate action against its directors for the breach of fiduciary duties, it leaves for a minority of shareholders to assert a derivative claim on behalf of the company. By defending the interests of the company, their personal interests could also be indirectly ensured. Some states impose minimum shareholding requirements so as to enable a group of minority shareholders to file such a claim. Some states also enable a single shareholder to file a derivative claim if neither the company nor a minority of shareholders have brought such an action. And some Member states even allow creditors to file a derivative claim against directors on behalf of the company if the corporate assets turn to be insufficient to repay the debts. Creditors could help increase the corporate assets through such a claim while their interests may also be indirectly protected.

In a derivative claim, minority shareholders act in their names and on behalf of the company to incur liability to directors for the breach of contractual obligations that are owed to the company. In this case, the contractual parties are the company and directors, and minority shareholders do not succeed to the contractual rights and obligations of the company but only exercise the litigious rights on behalf of the company. In this case, if directors lose the lawsuit, they should compensate for the company rather than minority shareholders. Therefore, minority shareholders and directors are not contractually bound by a derivative claim. Within the Member states, RBI could be referred to in order to decide a competent court. Apparently, the general provision of Article 2 could be applicable and a director could be sued in the court of the Member state in which he is domiciled. Article 6 (1) could also be available if minority shareholders intend to establish

liability to a group of directors who are domiciled in several Member states and for the same cause of action. Nevertheless, if the company and its directors have agreed to designate a court to deal with their dispute through a jurisdiction clause which could either exists in a contract or in the company constitution, their party autonomy should be respected and the application of Article 23 could derogate from that of Article 2 or Article 6 unless the company is controlled by directors and they have abusively concluded such a jurisdiction clause with the company in order to evade a more severe liability regime in a court of another Member state. Furthermore, it is also possible for the minority shareholders to conclude a choice of forum clause directly with directors and select a court to deal with such an issue. However, seeing that in a derivative action, the plaintiffs are the minority shareholders while the defendants are the directors at issue, Article 5 (1) cannot be applicable since there is no obligation freely assumed by the defendants towards the plaintiffs and no relationship freely entered into between the two parties.

Similar to a jurisdiction agreement, minority shareholders could also conclude an arbitration agreement with directors in order to submit a dispute concerning a derivative action to an arbitral tribunal. Meanwhile, they could also be bound by an arbitration clause previously contained in the corporate statute. However, an arbitration agreement simply concluded by the minority shareholders cannot have binding effects on directors since they are not a party in the shareholders' agreement.

7. When a competent court is seized to deal with a derivative action, judges of this court should decide which law is applicable to such an action. Within the Member states, it is suggested that a derivative claim should be governed by *lex societatis* since it presents very strong connections with the internal management of a company, and the formal requirements to assert such a claim are normally provided by company law as well. However, since a derivative claim may include a series of procedural requirements, if an action is commenced before a court of a Member state different from the court of the place where the company is incorporated, sometimes *lex fori* may intervene in such a claim and play a subsidiary role for the purpose to protect the local interests of the forum. However, it should be noticed that a more severe liability regime provided by *lex fori* could not be incompatible with the freedom of establishment ensured by the EU law.

8. In a derivative claim only involving relations between a sole Member state and a third state but not with another Member state, some states such as China may establish a special conflict-of-jurisdiction provision and confer jurisdiction to the court in the place of the company's domicile to deal with a corporate claim as well as a derivative claim. This is because those claims present very strong connections with the place where the directors exercise their functions and where the company carries out its main business. However, in a Member state such as Spain, legislators do not provide a special PIL rule to deal with a derivative action. In this case, it is certainly that the court in the place of the defendant's domicile could deal with such a claim as well. Besides, the two parties could also submit such a claim to a court through a choice of forum clause. In regard of conflict-of-law rules, it is commonly accepted that a derivative claim should be governed by *lex societatis*, but judges may exceptionally apply *lex fori* based on the consideration of public interests. Since the freedom of establishment is not applicable to a company incorporate in a third state like China, a Chinese judge should ensure that the application of the law of forum follow strict conditions, otherwise the intervention of *lex fori* may encourage the shareholders to strategically choose a third state court to asset a claim and inevitably lead to *"forum shopping"*, and a judgement made by this court may be hardly recognized in a Member state.

3

9. During the exercise of corporate functions, directors' wilful acts or negligence may not only incur losses to the company, but also bring direct adverse consequences to individual shareholders or creditors. Under this circumstance, some states may enable both shareholders and creditors to assert a personal claim directly against directors in order to seek remedy. Some states may only provide a liability regime for individual shareholders against directors since they are members of the company. In contrast, it is the company to assume the liability externally to creditors since directors are regarded as an organ of the company in this case. However, in some states, neither individual shareholders nor creditors could file a personal claim because the legislators in these states consider that the company is an independent entity and it could be held liable for the misconducts carried out by its organs.

Within the Member states, if a personal action is admissible, RBI could be referred to in order to decide a competent court. However, if a personal action is inadmissible under the national law of a Member state, a court could also establish its jurisdiction in accordance with the provisions of RBI and hear such a claim, while judges could decline the plaintiffs' demand in the later proceedings. It is undoubtedly that the general provision of Article 2 applies in this case as well. Article 6 (1) could apply if individual shareholders or creditors intend to incur liability to a group of directors for the same cause of action. As long as the claims against each director have enough connections between them, individual shareholders or creditors could invoke Article 6 (1) and join all the claims in the court of the place of one of the co-defendants' domicile, though a personal claim may not be admissible in that court. However, it is not possible for individual shareholders or creditors to seek remedy both from the company and its directors at the same time and invoke Article 6 (1) to join all the claims before one court. Besides, since the application of Article 23 is not particularly confined to a contractual relationship, individual shareholders and creditors could also achieve a consensus on the choice of forum with directors and select a court to deal with their dispute, even though they are not contractually bound up with each other. Furthermore, since Article 5 (3) is applicable to a relationship that is not considered as contractual under Article 5 (1), a personal action could also be dealt with by the court in the place where a tort, delict or quasi delict occurs. ECJ has admitted that such a place could be equally understood as the place where the harmful event giving rise to the damage occurred and the place where the damage occurred, but it always avoids the *forum actoris* for the purpose to ensure the due process interests of the defendants. However, sometimes it may be very difficult to clarify such a place due to a number of victims or tortfeasors dispersing in different Member states. If it were so, it may be more practical to return to the application of Article 2 or Article 6 (1).

Similar to a choice of forum agreement, a dispute concerning the matters deriving from a personal action is also arbitrable. In this case, directors can also conclude an arbitration agreement with individual shareholders or creditors so as to designate an arbitral tribunal to deal with their disputes.

10. As long as a court is seized to deal with a personal claim, judges should determine the applicable law by finding the connecting factors of such a claim. Generally, within the

Member states, since whether individual shareholders or creditors could file a personal action should greatly depend on *lex societatis*, RRII is not applicable because it clearly precludes the application from the matters relating to company law. On one hand, in regard of individual shareholders, if their membership of the company is affected by directors' misconducts and suffer a direct loss, such a case should be governed by *lex societatis* since the shareholders' membership shows very strong connections with the internal functioning of the company. However, if a shareholders' personal claim is not admissible under *lex societatis*, judges may exceptionally apply *lex loci delicti* or *lex fori* on the consideration of the relevance to protect the local and national interests, while such a treatment cannot be contrary to the freedom of establishment. Sometimes if the shareholders' loss is not derived from the fact that their membership is affected but from a fact which does not present significant connections with the internal management of the company, such a case may not necessarily be ruled by *lex societatis* but could also refer to *lex loci delicti* since the directors' misconducts constitute a tort to the individual shareholders in essence. Under this circumstance, RRII may exceptionally apply in order to determine the applicable rules. On the other hand, in regard of creditors, most of the states do not provide a liability regime for creditors since they consider that the legal independency of the company could sufficiently make it liable towards its creditors for the damage caused by its organs. In this case, the contractual binding between creditors and the company makes director' management external in such a relationship, and the external corporate business does not show sufficient links with the internal functioning of the company since creditors usually do not participate in the internal corporate activities. Therefore, apart from a company's contractual liability, directors could also be independently held liable due to the breach of the principle of *"neminem laedere"*, and such a matter concerning a directors' external liability towards creditors is not necessarily classified as falling within the scope of company law and is not governed by *lex societatis* in all situations. On the contrary, judges could also exceptionally refer to *lex loci delicti* or *lex fori* if *lex societatis* is not operable in such a personal claim, and RRII could be exceptionally referred to in order to determine the applicable rules. Furthermore, in some rare cases, directors may act *"ultra vires"* in managing the corporate affairs. Such a matter should be governed by *lex societatis* since it decides the directors' power in a company as well as their capacity to enter into a transaction for the interests of the company.

11. In a personal action only involving relations between a sole Member state and a third state but not with another Member state, we also take the example of Spain and China. In this situation, it is very likely that RBI remains silent to such an issue, while it gives room to Spanish or Chinese national laws for further interpretation. In regard of individual shareholders, both Spanish and Chinese law provide a liability regime for individual shareholders and enable them to seek compensation directly from directors. In this case, as we have mentioned, the Chinese legislators confer the jurisdiction to the court of the place of the company's domicile to deal with a matter relating to the companies, in which a personal claim is also included generally. However, Spanish legislators do not specifically provide a PIL rule in the same situation. If there is no special jurisdiction rule in regard of companies, such a personal action could be brought in the court of the place where the defendant is domiciled, or in the court of the place where the individual shareholders have sustained a loss or where the directors at issue have carried out the misconducts that are to be blamed. In contrast, in regard of creditors, as we have mentioned, even though Chinese law does not recognize a personal action filed by creditors directly against directors under general circumstance, a Chinese court could still hear such a claim while judges may reject the creditors' claim in the later proceedings. The essence of the conflict-of-jurisdiction rules lies in determining a competent court to hear an issue by following the connecting factors of this issue. Whether the court would admit the plaintiff's demand in the later proceedings does not constitute the major concerns of these rules. In this sense, such a claim could also be dealt with by the court in the place of the defendant's domicile or in the place where the damage occurs.

12. Generally, a personal action should refer to *lex societatis* so as to clarify whether it is admissible under that national law. From the Spanish perspective, since a company incorporated in a third state such as China does not enjoy the right of establishment, if *lex societatis* of this company cannot provide sufficient protection to the local individual shareholders or creditors, it is more likely that the Spanish judges will turn to *lex loci delicti* and *lex fori* for the purpose to ensure the interests of the forum. However, from the Chinese perspective, Chinese PIL rules mandatorily require that a judge should characterize a claim under Chinese rule. Therefore, a personal action filed by shareholders is admissible under Chinese law while a similar action filed by creditors will not be admitted. Under this circumstance, a personal claim brought by shareholders may similarly

be referred to *lex societatis*, or to *lex loci delicti* exceptionally. In contrast, a personal claim brought by creditors will be directly rejected by Chinese judges. Creditors should sue the company rather than its directors in order to seek compensation in such a case. Furthermore, if a personal claim is inadmissible both in a Member state and in a third state, shareholders and creditors should assert a claim against the company for the breach of contractual obligations instead of its directors as well.

4

13. Generally, directors' liability could also be established if they have failed or delayed to file for the company's dissolution or insolvency. On one hand, in a solvent company, if the members of the company agree to terminate the corporate business and bring the company to the end, or if the legal reasons of dissolution arise, directors should petition for the commencement of dissolution as soon as possible in order to avoid possible reduction of the corporate assets or possible loss of the corporate documents which are crucial for the dissolution proceedings. On the other hand, if a company has already been financially unsound or is at the vicinity of insolvency, directors should petition for the opening of the insolvency proceedings in order to avoid the diminution of the corporate assets as well. If they have failed or delayed to file for the company's insolvency and incur financial losses to the corporate assets, creditors will get less repayment from the distribution of the residual assets. Therefore, creditors will seek compensation from directors for a loss deriving from their wilful acts or negligence. Most of the states have provided a liability regime for creditors in the dissolution or the insolvency proceedings and enable them to establish liability to directors. Some states consider that it is a normal liability based on tort law and thus creditors should demonstrate the existence of a casual link between the loss they have sustained and the misconducts of directors. Some states regard such a liability as directly imposed by the rules and have statutory natures, so directors could be held liable as soon as their misconducts are evidenced or when the corporate assets have turned to be insufficient for the debts. In this case, a great legal divergence existing in the national rules of the states could bring more difficulties to the determination of a competent court and an applicable rule.

Within the Member states, RBI has clearly precluded its application from the insolvency proceedings, and ECJ also confirmed that the proceedings that directly derive from the insolvency proceedings and that have close relationship with them should also be excluded by RBI. The objective of the EU legislators was to disassociate the insolvency or insolvency-related proceedings from the legal framework of RBI and to establish a uniform EU regulation to deal with these proceedings. Therefore, after the promulgation of RI, these proceedings are naturally included into this Regulation, while ECJ's conclusion still applies in order to examine whether a proceeding shows close relationship with the insolvency proceedings and whether it could be covered by RI.

In the dissolution proceedings of a company that is still financially sound, it is obviously that RI is not applicable since the company has not gone insolvency. And a claim aiming at establishing liability to directors for the corporate debts thus falls within the scope of RBI. In this case, Article 2 applies apparently. Besides, ECJ has confirmed that Article 5 (3) could be referred to since the relationship between creditors and directors goes beyond the contractual relationship under Article 5 (1), and the court of the Member state in which the activities are carried out by the company and the financial situation relates to those activities are connected to show the most significant connections with this issue and could establish jurisdiction to deal with such a claim. However, in a case where directors are held jointly liable for the corporate debts due to the failure or delay to file for the company's insolvency, some Member states require that such a claim should be filed by the insolvency liquidator during the insolvency proceedings and for the interests of the general body of creditors, therefore its close links with the insolvency proceedings decide that such a claim could be dealt with by the court in which the insolvency proceedings are opened in accordance with RI. However, some Member states also enable the individual creditors to assert a claim against directors for the same cause of action, and such a claim could be brought within or outside the insolvency proceedings. Since it is not so intimately related with the insolvency proceedings, such a claim should go beyond the scope of RI and be governed by RBI instead.

In this case, different Member states adopt different criteria towards this issue. Seeing that there is still no uniform EU PIL rule in the area of company law, the EU legislators do not want to draw a clear line between company law and insolvency law for the moment.

Therefore, in order to keep in harmony with the functioning of RBI and RI, the new proposal to the revision of RI stats that a liquidator is able to bring an action against directors based on insolvency law together with an action against those directors based on tort law or company law in the court the jurisdiction of which is established by virtue of Article 2 of RBI. Besides, we also suggest that the court in which the insolvency proceedings are opened could refer to *lex societatis* in order to decide whether such a claim derives from the insolvency proceedings and whether it is closely linked with them. By referring to *lex societatis*, at least we could uniformly leave this matter to be decided under the same legal framework (*lex societatis*) and reduce the litigation risk stemming from the legal divergence existing in the national laws of the Member states. Furthermore, it should be noticed that the "new creditors" could arise on the verge of the company's insolvency if directors do not petition for the commencement of the insolvency proceedings when it is due and continue to carry out new transactions with creditors. As we have mentioned, in order to distinguish the "new creditors" from the "old creditors", they should be entitled to assert a claim against directors that is independent from the insolvency proceedings. In this sense, it should not be governed by RI but should be subject to RBI to determine a competent court.

It is commonly accepted that only the insolvency court has the exclusive competence to decide directors' liability for the delay or failure to file for the company's insolvency during the insolvency proceedings. Even if the national rules of some Member states do not consider such an issue as falling within the scope of *"vis attractiva concursus"*, in order to keep the well functioning of the insolvency proceedings, they also require that proceedings regarding directors' liability for such an issue should be suspended during the insolvency proceedings. Therefore, generally a dispute concerning directors' liability for not petitioning for the company's insolvency is not arbitrable. Even though such a dispute may be submitted to arbitration before or after the insolvency proceedings exceptionally, the arbitration proceedings should be suspended on the declaration of insolvency.

14. Within the Member states, when a competent court is seized to deal with the issue concerning directors' liability for the corporate debts, it is also relevant to determine the applicable rules to such a claim. RRI and RRII have clearly precluded their applications from a matter concerning directors' personal liability for the corporate obligations. And

ECJ has held that only an issue that derives directly from insolvency proceedings and is closely connected with them could be regarded as an issue falling within the scope of insolvency law. In this case, a Member state should follow the ECJ's criterion upon this issue to characterize such a liability regime, and to decide whether it is based on insolvency law, company law or tort law grounds. Nevertheless, in order to eliminate the legal dispartieies deriving from the application of the conflict-of-law rules in different Member states, we also propose several solutions. In the first place, judges of a Member state could follow the "conflict-of-law" approach and characterize an issue by taking into account the national substantive law that they are familiar with. However, such a treatment is mainly based on national concerns of that Member state and may lead to legal uncertainty since an issue is governed by *lex societatis* in a Member state, while it may be considered as governed by *lex concursus* when referring to *lex societatis*. Therefore, the "conflict-of-law" approach still remains very uncertain in solving such a legal problem. In the second place, judges of the Member states could follow the "substantive" approach and characterize such an action by taking into account the national substantive law as well as a foreign substantive law (in this case it is the law of the Member states in which the company is incorporated). Since the protection of creditors is proved to be compatible with the freedom of establishment when it is linked to insolvency, it allows the judges of the insolvency court to make a comparison between national law and foreign law so as to determine which law could provide the creditors with stronger protection in such a case. This treatment respects a diversity of connecting factors existing in different Member states and takes into account the national concerns of each Member state involved in such an issue. In the third place, we suggest that the Member states could follow the trend of *"insolvencification"* on this issue, since ECJ has admitted that this kind of liability regime does indeed derive directly from the insolvency proceedings and is strongly connected with them in some Member states. The EU legislators seem to accept the idea that the action to incur directors' liability for the failure to file for the company's insolvency meets this reason and serves a direct insolvency-political purpose and therefore it is possible for all the Member states to uniformly regard such an issue as based on insolvency law grounds. Via the *"insolvencification"*, such an action could be uniformly governed by *lex concursus*, and the law of the place where the insolvency proceedings are opened will apply by virtue of RI. It could thus avoid a legal divergence owing to the different criteria adopted by the Member states. Meanwhile, in the case concerning the "new creditors",

since such a phenomenon is only doctrinally mentioned in some Member states and is still not generalized all over the EU, it makes no interest for the EU legislators to establish a uniform liability regime on this issue within a short time. Therefore, such a case should leave to be determined by the national rules of each Member state for the moment.

15. A case concerning directors' liability for the corporate debts may also occur between a sole Member state and a third state but not with another Member state. Seeing that there has already existed a significant difference between the liability regimes within the Member states, it is not surprising that such a legal divergence will be even greater between a Member state and a third state. Therefore, it should leave for national PIL rules to decide this issue. In a Member state like Spain, its legislators provide two liability regimes for creditors respectively in company law and in insolvency law. And the insolvency court could only deal with an action brought under the insolvency law rules. In a third state like China, although the rules in company law and in insolvency law still need further improving, the legislators have become increasingly conscious of the importance to introduce a similar regime in Chinese law, and directors could also be imposed to assume civil liability during the insolvency proceedings for causing the company's insolvency. Both Spain and China have accepted that the insolvency proceedings should be commenced in the court in the place where the company has its main centre of interests. And Spanish legislators also follow the criterion of RI and declare that the insolvency proceedings should be governed by Spanish law (*lex fori concursus*) if they are opened in the Spanish territory. However, Chinese legislators have not yet established a real conflict-of-law rule concerning the international insolvency. In this case, we suggest that Chinese law should also follow the international approach of "main centre of interests" in its future conflict-of-law rule in order that a judgement made by a Chinese court to get recognized in a foreign state more easily, while we do not reject the idea that the solution could rely on the establishment of an international insolvency convention in the future as well.

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