

Vis attractiva concursus in the European Union: its development by the European Court of Justice

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*Abstract**

Contrary to both Preliminary Convention Drafts on insolvency proceedings, the Insolvency Regulation does not set out a specific rule on vis attractiva concursus. This silence is surprising given the fact that the ECJ had already held in the leading case Gourdain vs. Nadler that decisions deriving directly from insolvency proceedings, and closely connected with them, are not included within the scope of the Brussels Convention. The Regulation's silence and the fact that these claims were excluded from the Brussels Convention, now the Brussels I Regulation, had given rise to different interpretations, to which the ECJ has now put an end by stating in Seagon vs. Deko Marty Belgium that Article 3 of the Insolvency Regulation sets out the vis attractiva concursus principle. Moreover, this case has been immediately followed by SCT Industri vs. Alpenblume, and German Graphics vs. A. van der Schee, both cases with the same background, i.e. to determine which claims are within the scope of the Insolvency Regulation and, therefore, they have to be brought before the forum concursus. This paper tackles this background and the state of the question after Seagon vs. Deko Marty Belgium: the list of claims attracted by the forum concursus, deliberately not laid down by the Insolvency Regulation, is now to be compiled by the ECJ.

A diferencia de los dos precedentes proyectos de Convención sobre procedimientos de insolvencia, el Reglamento (CE) núm. 1346/2000 no establece una regla específica sobre vis attractiva concursus; y ello a pesar de que el Tribunal de Justicia de las Comunidades Europeas ya había sostenido en el caso Gourdain c. Nadler que las acciones que derivan directamente de la insolvencia y guardan una inmediata relación con el concurso no están incluidas en el ámbito de aplicación de la Convención de Bruselas. El silencio del Reglamento de insolvencia y el hecho de que las acciones mencionadas estuvieran excluidas de la Convención de Bruselas, ahora Reglamento Bruselas I, motivaron diversas interpretaciones, a las que ahora ha puesto término el Alto Tribunal al establecer en Seagon c. Deko Marty Belgium que el artículo 3 del Reglamento de insolvencia contiene el principio de vis attractiva. Ahondando en esta dirección, esta decisión ha ido inmediatamente seguida por otras dos, SCT Industri c. Alpenblume, y German Graphics c. A. van der Schee, con el mismo telón de fondo, esto es, determinar qué acciones están incluidas en el ámbito de aplicación del Reglamento núm. 1346/2000 y, por tanto, han de ser atraídas ante el forum concursus. Este trabajo aborda esta problemática y el estado de la cuestión después de Seagon c. Deko Marty Belgium, puesto que la relación de acciones comprendidas en el foro concursal, omitida deliberadamente por el legislador comunitario en la redacción del Reglamento de insolvencia, ha de ser realizada ahora por el Tribunal de Justicia.

Título: La vis attractiva concursus en la Unión Europea: su construcción por el Tribunal de Justicia de las Comunidades Europeas

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Palabras clave: vis attractiva concursus, forum concursus, acciones de reintegración de la masa, acción pauliana, procedimientos de insolvencia, competencia judicial internacional

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1. Introduction

Regulation (EC) Nr. 1346/2000, of 29th May, on insolvency proceedings, is a main achievement of the European Union as the increasing of judicial cooperation in cross-border insolvencies illustrates. Such a success has been nevertheless accompanied by some pitfalls in the application of this Regulation, having some of them already reached the European Court of Justice (hereinafter, ECJ). Now it is the turn of the *vis attractiva concursus* principle, that is to say, to decide whether ancillary proceedings may be attracted to, and brought before, the *forum concursus*. This issue is not directly addressed by the Insolvency Regulation, although it was taken into account by the European legislator, as the Preliminary Convention Drafts on insolvency proceedings acknowledged. The idea of issuing a Convention on insolvency proceedings was already present in the Community while issuing the Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgments in civil and commercial matters (hereinafter, Brussels Convention). This is why 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' are not included in the Brussels Convention.¹ And it is also the starting point for a debate on how cross-border insolvencies should be regulated in the Community. Two Preliminary Drafts were produced regarding this debate, both of them containing rules on a weakened version of the *vis attractiva concursus* principle, which detailed in which cases the attraction to *forum concursus* is allowed.² Meanwhile, the ECJ had to decide with the leading case *Gourdain vs. Nadler*³ whether a French *action en comblement du passif*, namely a liability claim similar to the English claim on wrongful trading, was to be considered a bankruptcy matter and, therefore, excluded from the Brussels Convention. Article 1(2)(2) of the Brussels Convention did not mention claims related to the insolvency, but the ECJ held that such actions 'must be considered as given in the context of bankruptcy' and, therefore, excluded from the Brussels Convention.

Once stated that neither insolvency proceedings nor claims arising from them were included in the Brussels Convention, the next step was to issue a European instrument on insolvency proceedings. That instrument, and the compromise that it involved, was achieved in 1995, when the Brussels Convention on insolvency proceedings was issued; it never came into force until it turned into the Insolvency Regulation, which only lays down jurisdiction rules on the opening of insolvency proceedings, either universal or territorial, ignoring other claims. Moreover, the 1995 Brussels Convention was accompanied by an Explanatory Report, which pointed out that, unlike the 1982 Community Draft Convention which set out a rule on *vis attractiva concursus*, 'neither this precept nor this philosophy has been adopted in this Convention. There is no provision in

¹Article 1(II)(2) of the Brussels Convention.

²See on the history of the Insolvency Regulation FLETCHER (2005, paras. 7.03-23).

³ECJ 22nd February 1979, Case 133/78, *Gourdain c. Nadler*, Rec. 1979, pp. 733-756

Article 3 of the Convention addressing this problem'.⁴ Nevertheless, this Report acknowledged that the Insolvency Convention, and thus the Insolvency Regulation, contains in Article 25 the doctrine set up by *Gourdain vs. Nadler*, so that claims 'deriving directly from the insolvency proceedings and which are closely linked with them' are excluded from the Brussels Convention, but included in the Insolvency Convention. As the Report said, 'logically, to avoid unjustifiable loopholes between the two Conventions, these actions are now subject to the Convention on insolvency proceedings and to the rules of jurisdiction'.⁵

The exclusion of claims arising out of insolvency proceedings from the Brussels Convention, now the Brussels I Regulation,⁶ the Insolvency Regulation's silence on the matter and the contradictory statements of the aforementioned Explanatory Report have resulted in a lively debate, where three different interpretations have been proposed in order to solve the enigma, as explained in the second part of this paper. These interpretations have threatened the uniform application of European Regulations and led to a gridlock, making it necessary for the Community to intervene. This has taken place at the hands of the ECJ, in the case *Seagon vs. Deko Marty Belgium*.⁷ The third part of this paper examines the background of this case as well as its ruling stating that Article 3 of the Insolvency Regulation acknowledges the *vis attractiva concursus* principle.

The main reason to back such an interpretation is, of course, that Article 25 of the Insolvency Regulation takes for granted *Gourdain vs. Nadler* and, as expected, the ECJ has remained faithful to its own doctrine.⁸ But it does not end the debate. Further development is still required in order to establish which claims are comprehended by the *vis attractiva concursus*, an issue which is tackled in the fourth part of this paper. It seems that the list of claims, deliberately not laid down by the Insolvency Regulation, has to be compiled by the ECJ, which has already released two more judgments with this background, *SCT Industri vs. Alpenblume*,⁹ and *German Graphics vs. A. van der Schee*.¹⁰ Eventually and given the fact that the Insolvency Regulation only sets out international jurisdiction rules, some words must be said on *vis attractiva concursus* as territorial

⁴See VIRGOS, SCHMIT Report, para. 77.

⁵See VIRGOS, SCHMIT Report, para. 77.

⁶Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁷ECJ 12th February 2009, Case C 339/07, *Christopher Seagon vs. Deko Marty Belgium NV*.

⁸See CARBALLO PIÑEIRO (2008, pp. 185-202).

⁹ECJ 2nd July 2009, Case C-111/08, *SCT Industri AB I likvidation vs. Alpenblume AB*

¹⁰ECJ 10th September 2009, C-292/08, *German Graphics Graphische Maschinen GmbH vs. A. van der Schee, acting as liquidator of Holland Binding BV*.

jurisdiction criterion. All in all, it seems that eight years after the introduction of the Insolvency Regulation it might be time to reform some issues that the abundant jurisprudence has disclosed, especially in order to clarify the issue at hand.

2. *The Silence of the Insolvency Regulation on the Vis attractiva concursus Principle*

The only rule on international jurisdiction laid down by the Insolvency Regulation regards the opening of insolvency proceedings, either universal or territorial.¹¹ But it does not mention jurisdiction on claims related to the bankruptcy, and closely connected with such proceedings, as was expected since the ECJ had stated that such decisions are outside the scope of the Brussels Convention, now the Brussels I Regulation.¹² The immediate conclusion to be drawn from this silence is that the issue has been laid aside from the Insolvency Regulation as well, to be decided by national laws:¹³ Member states have different approaches to *vis attractiva concursus* – some of them, like Spain, applying for a quasi-absolute attraction to the *forum concursus*, others, like Germany, holding its lack of conformity with due process rights – and this background seems to have been the reason why it was impossible to reach an agreement regarding the scope of *vis attractiva concursus* in the former Preliminary Drafts;¹⁴ consequently, the European legislator decided not to tackle the issue just for the sake of delivering an instrument on insolvency proceedings, thus submitting the controversy to national laws.

But this approach poses many problems. First of all, it challenges the fact that both Regulations were conceived so as not to leave room for loopholes.¹⁵ In fact, there is an apparent contradiction in the Insolvency Regulation between rules on international jurisdiction and on recognition and enforcement of judgments; Article 25(1) does not ignore ancillary proceedings and lays down that decisions rendered in such proceedings shall be enforced according to the *exequatur* established by the Brussels Convention (literal reference, which nowadays has to be read as saying the Brussels I Regulation) with the exception of Articles 27 and 28 (Articles 34 and 35 of the Brussels I Regulation); both Articles set out the non recognition causes, restricted by the Insolvency Regulation to only one, the *ordre public* clause.¹⁶ This lack of correspondence between jurisdiction

¹¹See Article 3 of the Insolvency Regulation.

¹²See *Gourdain vs. Nadler*, para. 4.

¹³See CALVO CARAVACA and CARRASCOSA GONZÁLEZ (2004, pp. 97-100); DE CESARI (2003, pp. 68-70); CORSINI (2008, pp. 429-446); DORDI (1997, pp. 348-351); GARCIMARTÍN ALFÉREZ (2001, pp. 265); HERCHEN (2000, pp. 228-229); KROPHOLLER (2005, pp. 82-88); OBERHAMMER (2002, p. 707); PUNZI (2003, p. 1020, n 50); SCHACK (2002, p. 450); SCHOLLMAYER (1998, p. 34); TRUNK (1999-2000 ed., pp. 839-840).

¹⁴See on problems to reach a compromise JAHR (1988, pp. 305-317).

¹⁵See VIRGOS, SCHMIT Report, para. 77.

¹⁶See Article 26 of the Insolvency Regulation.

and enforcement is surprising; the simplification, and even elimination, of controls on *exequatur* is acceptable when accompanied by the harmonization of rules, such as those on international jurisdiction. But this does not seem the case in the Insolvency Regulation. Consequently, when national laws are applicable, any decision may be rendered on the grounds of exorbitant jurisdiction criteria and, nevertheless, it would have to be enforced by the special proceeding set up by the Brussels I Regulation.¹⁷

Even when applicable national laws do not set out exorbitant criteria, their application poses problems due to differences among them, which lead to positive and negative conflicts of jurisdiction. The perfect example is the case which has triggered the direct intervention of the ECJ on the matter, *Seagon vs. Deko Marty Belgium*: the defendant is a Belgian society, to whom the debtor, a German society, transferred money to pay a debt the day before filling a petition in order to be declared insolvent.¹⁸ According to German law, avoidance proceedings have to be commenced before the courts of the defendant's domicile, in this case Belgium; according to Belgian law, this proceeding falls within the attraction of insolvency court, in this case Germany. Belgian courts rejected the proceeding started by the German administrator, who eventually brought the matter before German courts, the ones who raised the question to the ECJ.

The application of national laws to this issue is then unsatisfactory. Therefore, it is necessary to go back to the beginning, to both European Regulations, in order to search for alternatives. One option could be that the legislative silence on the Insolvency Regulation includes those proceedings within the scope of the Brussels I Regulation, meaning that the doctrine set out by *Gourdain vs. Nadler* has to be surpassed;¹⁹ thus, Article 1(2)(b) of the Brussels I Regulation only would exclude insolvency proceedings as mentioned in Annexes A and B of the Insolvency

¹⁷See LEIPOLD (2001, pp. 223-224, pp. 228-229); LÜKE (1999, p. 483); OBERHAMMER (2002, p. 706). For some scholars this contradiction is only apparent, because Article 4 of the Brussels I Regulation leads to the same situation. See BARIATTI (2009, pp. 653-654).

¹⁸On 14th March 2002 the debtor transfers 50,000 € to a defendant's bank account via the KBC Bank, in Düsseldorf. On 15th March 2002 the debtor applies for the opening of the insolvency proceeding, which is finally done by the Marburg *Amtsgericht* on 1st June 2002. The liquidator brings the avoidance proceeding before the Marburg *Landsgericht*, which dismissed having international jurisdiction. This decision is held by the Court of Appeals (see OLG Frankfurt, 26.1.2006, 15 U 200/05, ZIP 2006, p. 769-772, commented by HINKEL, FLITSCH (2006, pp. 237-238), and by THOLE (2006, pp. 1383-1387). The Insolvency Regulation came into force on 31st May 2002 (Article 47), but Article 43 sets out that it must be applicable only to proceedings opened after the aforementioned date, which is the case in *Seagon v. Deko Marty Belgium*. The same article further states that 'Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable at the time they were done'; thus, the Insolvency Regulation might be applicable to determine the international jurisdiction, but not the law applicable to avoidance proceedings.

¹⁹This is the interpretation chosen by the Court of Appeals in the case at hand, OLG Frankfurt, ZIP 2006, pp. 770-772. See BERNER, KLÖHN (2007, p. 110); GEIMER (2005, para. 3561); KLÖHN, BERNER (2007, p. 1418); LÜKE (1999, pp. 481-482); LÜKE (1998, pp. 292-295); REINHART (2003, p. 873); THOLE (2006, pp. 1386-1387).

Regulation, because the jurisdiction to open such proceedings is established by this instrument.²⁰

Notwithstanding, this interpretation has its own problems, especially the fact that the Insolvency Regulation takes *Gourdain vs. Nadler* for granted, i.e. the aforementioned Article 25 of the Insolvency Regulation submits the enforcement of judgments deriving directly from the insolvency proceedings to the Brussels I Regulation, comprehending these proceedings within its scope of application, albeit to submit the issue to another legal instrument. Besides, Article 25 clearly reproduces the terms employed by the ECJ to delimit the scope of the Brussels Convention,²¹ terms which are also to be found in Recital 6 of the same Regulation: 'In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings'.

The acceptance of *Gourdain vs. Nadler* leads to the inclusion of ancillary proceedings within the scope of the Insolvency Regulation; and, as this Regulation only lays down one rule on international jurisdiction, to determine the criteria for the opening of insolvency proceedings, it leads to the establishment of the principle of *vis attractiva concursus* in the area of justice as well.²² As mentioned above, the Insolvency Regulation does not directly address the issue, but this conclusion is based on the fact that it takes for granted the doctrine of *Gourdain vs. Nadler*, and that another interpretation does not avoid loopholes in the area of justice, which is the objective of the Community.²³ Recital 4 of the Insolvency Regulation reinforces and justifies this last argument by highlighting the need to overcome forum shopping in the internal market; it can be achieved by harmonizing rules on this matter and, hence, there must be no room left for the application of national laws.

Nevertheless, the enigma remained open and all three interpretations were feasible, which brought about the need for the intervention of the Community. *Seagon vs. Deko Marty Belgium* is the answer to this need; it does not solve all the problems that the Regulation's silence poses, but one thing is clear from now on, that Article 3 establishes the *vis attractiva concursus* principle.

²⁰See LÜKE (1999, p. 483).

²¹Articles 25 and 26 of the Insolvency Regulation improve the relationship to the Brussels I Regulation, which was also established by the Preliminary Drafts, but without stating the non recognition causes. See SPELLENBERG (1988, pp. 391-401). Contrary to the application of the Brussels I Regulation to ancillary proceedings to the insolvency are HAUBOLD (2002, p. 160), and VIRGÓS SORIANO, GARCIMARTÍN ALFÉREZ (2003, pp. 61-63).

²²See CAMPUZANO DÍAZ (2004, pp. 136-138); CARBALLO PIÑEIRO (2005, pp. 166-167); DUURSMMA-KEPPLINGER (2002, pp. 419-445); ESPINIELLA MENÉNDEZ (2006, pp. 70-78); HAUBOLD (2002, p. 162); LEIPOLD (2001, pp. 231-234); LORENZ (2005, pp. 114-120); VIRGÓS SORIANO (1995, pp. 51-69); VIRGÓS SORIANO (1998, pp. 14-15); VIRGÓS SORIANO, GARCIMARTÍN ALFÉREZ (2003, pp. 61-71); WILLEMER (2006, pp. 57-59); WELLER (2004, p. 415).

²³See VIRGÓS, SCHMIT Report, para. 77.

3. The End of the Uncertainty: *Seagon vs. Deko Marty Belgium*

3.1. Preliminaries

The fact that the German courts submitted this issue to the ECJ did not come as a surprise. German law casts doubts on the accordance of the *vis attractiva concursus* with due process rights, since it means that the case is no longer brought before the courts designated by ordinary jurisdiction criteria, but before the *forum concursus*; such an exception may surprise the defendant and, thus, compromise his or her due process rights. In 2001 the German legislator modified international jurisdiction rules on the opening of an insolvency proceeding and on corresponding ancillary proceedings, introducing for the first time a limited *vis attractiva concursus*. But the aforementioned doubts determined the scope of the legal reform: only claims against the liquidator may be brought before the *forum concursus*, but not if the insolvency administrator is the plaintiff.²⁴

Avoidance proceedings clearly exemplify these doubts on the *vis attractiva concursus*' compliance with due process rights: characterized as ancillary to insolvency proceedings, they are attracted by insolvency courts where *vis attractiva* is accepted; on the contrary, in Germany, defendants' interests come to the forefront and the action must be brought before his or her domicile court, without regarding the effectiveness of the insolvency proceeding. This issue is well exemplified by a case brought before the German *Bundesgerichtshof* in 2003, before the Insolvency Regulation came into force; it decided on an avoidance proceeding concerning the sale of an immovable located in Spain celebrated between the German debtor and a third person with domicile in Thailand. The issue to be solved by the German High Court was the attraction of the claim to the German insolvency court by interpreting the criteria set out in 2001 as laying down a limited *vis attractiva concursus* comprehending avoidance proceedings as well. But the *Bundesgerichtshof* decided that the applicable jurisdiction criterion submitted the matter to defendant's domicile courts, in this case Thailand, highlighting that his or her due process rights were at stake.²⁵

With the Insolvency Regulation in force, *Seagon vs. Deko Marty Belgium* has brought about the chance to raise the issue before the ECJ: in this case there are two opposing interpretations of the *vis attractiva concursus*, the Belgian point of view accepts it and the German does not, resulting in a negative conflict of jurisdiction. Both courts applied their own rules on international jurisdiction, in accordance with the first aforementioned interpretation of the Insolvency Regulation's silence on the matter. The prejudicial question was posed by the German courts: once the Belgian courts rejected the action because they do not have international jurisdiction,

²⁴See § 19a ZPO, reformed on 27th of June 2001. See on the former situation GRASMANN (1990, pp. 175-176).

²⁵BGH of 27th May 2003, IX ZR 203/02, commented by MÖRSDORF-SCHULTE (2004, pp. 31-40).

although they were the defendant's domicile courts, the German administrator only had one option, to bring the proceeding before the German courts, although according to their own rules they do not have jurisdiction either. With such a deadlock it is possible to identify a case for a *forum necessitatis*: a plaintiff's due process rights demand a court to bring his or her case, and not finding it within the legal system, it is necessary to provide him or her with one. This was the opinion of the German liquidator, who brought the avoidance proceedings before the Marburg *Landesgerichtshof*, instead of the Marburg *Amtsgerichtshof*, which was dealing with the insolvency proceeding, because German territorial jurisdiction rules do not allow the *vis attractiva concursus* either. Eventually, the debate around the silence of the Regulation leads the *Bundesgerichtshof* to the ECJ.

The first prejudicial question posed by the *Bundesgerichtshof* tackles the quid of the debate, if decisions deriving directly from the bankruptcy, and closely connected with such proceedings, are within the scope of the Insolvency Regulation, and, therefore, if Article 3 of the same Regulation is applicable to internationally allocate an avoidance proceeding. If the ECJ's reply were negative, the German High Court posed a second prejudicial question, i.e. if such proceedings are not within the scope of the Insolvency Regulation, would they be within the scope of the Brussels I Regulation? A negative answer to this question would make the ECJ change its own doctrine as stated in *Gourdain vs. Nadler*, leading us to the present situation, when national law is applicable with all the aforementioned problems and in the need to establish a *forum necessitatis*.

3.2.The ruling

a. Some Ancillary Claims Are Within the Insolvency Regulation

Seagon vs. Deko Marty Belgium is in tune with *Gourdain vs. Nadler*, but the ECJ goes one step further by allocating claims deriving directly from insolvency proceedings within the scope of the Insolvency Regulation, calling on the *effect utile* it must accomplish.²⁶ The whole problem is posed as a matter of dialectics between the Brussels I Regulation and the Insolvency Regulation; in fact, the decision neither addresses the problem of defendant's due process rights behind the German international jurisdiction criteria, nor deepens the approach taken in *Gourdain vs. Nadler* in order to decide which claims are included within the scope of the *vis attractiva concursus*, an issue which is discussed below. But it clearly states that Article 3 of the Insolvency Regulation is the rule to apply in order to determine the international jurisdiction on claims deriving from insolvency proceedings. According to the ECJ, the legislative silence results in the provision on the *vis attractiva concursus*, on the grounds that it meets the objectives of insolvency proceedings and avoids forum shopping, and due to the wording employed by Recital 6 and Article 25.1,II of the Insolvency Regulation. All of these arguments are already familiar and, therefore, welcome, although they still leave room for doubt.

²⁶See *Deko Marty Belgium*, para. 21.

The first reason regards the basis of the *vis attractiva concursus* principle, namely the efficiency and effectiveness of insolvency proceedings.²⁷ This relationship is essential to state that the Regulation lays down the *vis attractiva concursus*, inasmuch as it is the grounds of the teleological interpretation made by the ECJ.²⁸ But this is not a decisive reason when interpreting Article 3 of the Insolvency Regulation, first of all because there are different means to achieve these objectives and *vis attractiva concursus* in particular could have been set aside by the Community (as seems to be the case) for the sake of other objectives, such as preserving defendants' due process rights;²⁹ secondly, because improving the efficiency of *vis attractiva* would lead to bringing any claim concerning a debtor's estate before the insolvency court, which is clearly not the intention of the Insolvency Regulation. Anyway, this connection among the objectives behind the Insolvency Regulation and the *vis attractiva concursus* principle is the starting point to find other supporting reasons for this interpretation.

The submission of avoidance proceedings to the *forum concursus* is seen by the ECJ as a way of avoiding forum shopping.³⁰ But this reason is not totally convincing. The Insolvency Regulation has harmonized the conflict rules and thus the risk of forum shopping has been so far neutralized: it does not matter which courts the avoidance proceedings are brought before, either those of the defendant's domicile or the insolvency court, because they have to apply the same law, the one determined by Articles 4.2,m) and 13 of the Insolvency Regulation.³¹ In this context, forum shopping may arise from the establishment of *vis attractiva concursus* in the Insolvency Regulation, in so far as avoidance proceedings are submitted to the *lex fori concursus* and the debtor may try to change his or her centre of main interests in order to find a more 'generous' law with acts that are detrimental to creditors.³²

²⁷See Recitals 2 and 8 of the Insolvency Regulation. See commenting *Deko Marty Belgium* CAMPUZANO DÍAZ (2009, p. 99).

²⁸See *Deko Marty Belgium*, para. 22.

²⁹The fact that a strict universalism model has not been adopted, but a modified universalism one instead, perfectly exemplifies that efficiency and effectiveness of insolvency proceedings may step back when it comes to protecting other interests. See FEHRENBACH (2009, p. 494).

³⁰See *Deko Marty Belgium*, para. 23-24.

³¹They are not universal, but it does not matter in order to highlight how weak is the argument used by the ECJ, because other cases fall outside the objectives of the Community.

³²See this reason in THOLE (2006, p. 1419). The legislative option for a material concept makes it possible to avoid these problems and confirms that the *lex fori concursus* is the proper law applicable to avoidance proceedings; it is much more difficult to manipulate, which may easily happen with the law applicable to the challenged act. See on these problems, CARBALLO PIÑEIRO (2005, pp. 181-291).

The wording of Recital 6 and Article 25 of the Insolvency Regulation following *Gourdain vs. Nadler* is, of course, central to tip the balance in favour of the *vis attractiva concursus*. But Article 25(1)(2) regards ‘judgments deriving directly from the insolvency proceedings and which are closely linked with them, *even if they were handed down by another court*’,³³ meaning a court different from the insolvency court. This statement is incongruent with the idea that the Insolvency Regulation determines the international jurisdiction of those decisions by accepting the *vis attractiva concursus*. This point does not mean that these claims are not included within the scope of the Regulation, but it casts doubts on the determination of their international jurisdiction by this legal instrument.³⁴

These doubts are worked out by the ECJ without much attention, and it even avoids mentioning Article 18.2 of the Insolvency Regulation, which allows the liquidator in a territorial insolvency proceeding to bring ‘any action to set aside which is in the interest of the creditors’ before the courts of a different Member State from the one opening the insolvency proceeding. The Advocate General did regard this power of the liquidator,³⁵ but the ECJ has ignored this Article, maybe for the sake of clarity when drawing a conclusion from this case: avoidance proceedings are included within the scope of the Insolvency Regulation, and their international jurisdiction is determined by its Article 3.³⁶

b. Does Article 3 set out an exclusive forum?

Articles 18.2 and 25(1)(II) of the Insolvency Regulation support the interpretation that the *vis attractiva concursus* is not established by this instrument, because both take into account claims submitted to courts which are not the insolvency court.³⁷ A slightly different interpretation of these Articles holds that *the vis attractiva concursus* must not be treated as an exclusive forum, so that the claim may be brought not only before the *forum concursus*, but also before any other competent court according to the ordinary jurisdiction criteria.³⁸ As the General Advocate points out,³⁹ flexibility on international jurisdiction serves the efficiency and effectiveness in which *vis*

³³Italics are mine.

³⁴As defended by BARIATTI (2009, pp. 23-38).

³⁵See Advocate General’s Opinion, para. 66.

³⁶Unless the ECJ has not taken into account Article 18.2 of the Insolvency Regulation because it deals with the powers of a liquidator named in a territorial insolvency proceeding and not in a universal one, as in *Seagon vs. Deko Marty Belgium*. See CORSINI (2008, p. 435). Nevertheless, this interpretation is incompatible with the approach of the ECJ, specifying the scope of both European Regulations.

³⁷See FEHRENBACH (2009, p. 495).

³⁸See HAU (2008, pp. 78-125).

³⁹See Advocate General’s Opinion, rec. 68.

attractiva concursus and insolvency proceedings are based, to the extent that it allows the plaintiff, usually the liquidator, to decide where to bring the claim in accordance with the interests of the insolvency proceeding, which do not always lead to the *forum concursus*. For instance, this may happen when the decision rendered by the insolvency court has to be enforced in another country; consequently, bringing the claim directly to the State where it has to be enforced may not only save costs, but may also make the enforcement feasible if the decision rendered by the insolvency court is not recognized on the grounds of the exorbitance of the *vis attractiva concursus*.

This last objection can no longer work within the European Union, as the decisions of the ECJ are binding on all Member States and *Seagon vs. Deko Marty Belgium* clearly stands for the *vis attractiva concursus*.⁴⁰ Moreover, according to it, the reference of Article 25(1)(2) to ‘another court’ is interpreted as regarding a matter of territorial jurisdiction, and not of international jurisdiction.⁴¹ Nevertheless, the convenience of the flexibility granted to the liquidator while lodging a claim still raises some thoughts on the character of the international jurisdiction criterion. Its exclusiveness within the Community is granted by being the *only* available forum, but this character should not be projected on the recognition of decisions coming from third countries; exclusive criteria are difficult to justify nowadays,⁴² but especially when the same reasons grounding a jurisdiction criterion advise to bring the claim before other courts.

So far, *Seagon vs. Deko Marty Belgium* does not end the debate, from now on focused on determining which are the claims deriving from the insolvency proceedings and closely linked with them. The fact that the ECJ will fill this loophole does not mean that this leaking method deserves the utmost critique.

4. Vis attractiva concursus as International Jurisdiction Criterion

4.1. In General

Rules on international jurisdiction usually have a well defined scope of application in so far as the subject matter is thoroughly analyzed in order to accomplish the interests at stake and to ensure that there are minimum contacts between their scope and the selected jurisdiction. On the contrary, *vis attractiva concursus* takes into account many different legal situations, which render this analysis more complicated. In fact, the involvement of so many legal situations, all of them affected by the debtor’s insolvency, poses a previous question of distinguishing among substantive and procedural issues; in order to avoid this issue, the solution is provided by the

⁴⁰See ESPINIELLA MENÉNDEZ (2009, pp. 191-192); MANKOWSKI, WILLEMER (2009, p. 675).

⁴¹See *Deko Marty Belgium*, para. 27.

⁴²See critical FERNÁNDEZ ARROYO (2006, pp. 80-126).

applicable law, the *lex fori concursus*, which deals not only with substantive issues, but also with procedural ones. Thus, *vis attractiva concursus* is a jurisdiction criterion, a *forum connexitatis*, but it is set out by the applicable insolvency law, due to the fact that it aims to simplify the insolvency proceeding by not distinguishing substantive from procedural law issues.

The problems of distinguishing substantive from procedural issues in Insolvency laws are behind the proposal to always determine international jurisdiction according to the applicable *lex concursus*, i.e. it does not matter that the action has been brought before the courts of a different State from the one where the insolvency proceeding has been opened, because the international jurisdiction of the first court is also determined according to the *lex concursus*.⁴³ This proposal has the advantage of avoiding negative jurisdiction conflicts, but it disregards that the *vis attractiva concursus* is a rule on jurisdiction and as such determined by the *lex fori processus*, the procedural law of the seized court.

The establishment of this jurisdiction criterion is based on the objectives that insolvency proceedings should achieve, i.e. efficiency and effectiveness. In order to meet them, it is not necessary to bring all the actions on the debtor's estate before the same court, but there is no doubt that concentrating all the proceedings before the insolvency court not only saves costs to the insolvency estate, but it also benefits from its knowledge and familiarity with the debtor's matters.⁴⁴ Theoretically, the more actions are brought before the insolvency court, the more efficient and effective an insolvency proceeding is. But this concentration means that ordinary jurisdiction criteria are substituted in some cases by the *forum concursus*, putting at risk defendants' due process rights; consequently, some claims must be set aside. In fact, legal differences on this jurisdiction criterion basically arise from which actions are attracted to the *forum concursus*, so that *vis attractiva concursus* can be absolute or restricted, depending on how wide this attraction is.

As a territorial jurisdiction criterion, *vis attractiva concursus* is in accordance with due process rights, even when it is absolute because these rights are fulfilled by providing a court within the State. Things are different when insolvency is cross-border. In cases with international contacts, due process rights are only satisfied if international jurisdiction rules provide, on the one hand, that the plaintiff has a forum to attend his or her case, and, on the other hand, that the defendant has minimum contacts with the determined forum.⁴⁵ Beyond both parameters, international jurisdiction rules may be deemed exorbitant. Taking into account these limits, an absolute *vis*

⁴³See this approach in the sentence rendered by *Oberlandesgericht Wien*, 17th October 2003 (3 R 151/03). See also CONSALVI (2006, Nr. 4).

⁴⁴See PASTOR RIDRUEJO (1971, pp. 135-221). See recently and critically with these arguments, especially the one concerning the effectiveness to be achieved by the *vis attractiva* principle, ALONSO-CUEVILLAS SAYROL (2007, pp. 73-82).

⁴⁵See FERNÁNDEZ ARROYO (2006, pp. 36-79).

attractiva on international jurisdiction is unacceptable, because it surprises the defendant. So far, only a restricted *vis attractiva* is internationally acceptable, and the question posed is which actions may be attracted before the *forum concursus* without infringing defendants' due process rights.

The most coherent rule on the *vis attractiva concursus* lists which actions are within its scope, thus providing juridical security to the system. This system was chosen by the Preliminary Drafts for an Insolvency Convention, but abandoned by lack of agreement. This enumeration poses some problems when they are determined by national law as well: each insolvency law has its own characteristics and, hence, its own actions, so that a list based on the own Insolvency law risks being incomplete. Moreover, the same rule may act as an indirect jurisdiction rule in order to determine whether to recognize a decision rendered by a foreign court with a different point of view on the claims absorbed by the *forum concursus*. This objection can be disregarded in so far as *forum concursus* is not deemed an exclusive criteria and, thus, it does not veto decisions coming from foreign courts different from the insolvency court. This can be complemented by a generic definition of claims included within the scope of *vis attractiva concursus* like the one stated by *Gourdain vs. Nadler*, in order to test the exorbitance of the *vis attractiva concursus* exercised by the foreign insolvency court.

4.2. In the European Area of Justice: Meaning of Claims Deriving from the Insolvency proceedings and Closely Linked with Them

After *Seagon vs. Deko Marty Belgium* and in the area of justice, the issue is which claims derive directly from the insolvency proceedings and are closely connected to them, therefore it is necessary to look deeper into *Gourdain vs. Nadler*. The case regarded a liability action against the de facto administrator of an insolvent society, who may have delayed the opening of the insolvency proceeding. The ECJ makes a characterization *in casu* taking into account that ordinary rules on legal standing, period of limitations, burden of proof and insolvency, are modified by the French Insolvency law: legal standing is granted only to the *syndic*, the period of limitations begins to run within the insolvency proceeding, the general manager is presumed to be liable, imposing on him or her the burden of proving that he or she acted with diligence, the recovery benefits all creditors of the insolvent society if the action succeeds; and it may imply the automatic opening of an insolvency proceeding regarding the manager's estate. All in all, the ECJ held this liability action as deriving directly from the insolvency proceeding and closely linked with it.

Nevertheless, this approach reveals its weakness when later French law modifies the *action en comblement du passif*, and its characterization as 'insolvency matter' is brought into question.⁴⁶ In fact, *Gourdain vs. Nadler* has been strongly criticized as being based on apparent connections between the claim at hand and the insolvency proceeding; these are either met by most claims, once the insolvency proceeding is open, like the standing of the liquidator or the destination of

⁴⁶See EBENROTH, KIESER (1988, pp. 19-48).

the recovery to satisfy all creditors; or they simply do not help to characterize the claim as being closely related to the insolvency proceeding, like the rule on burden of proof which is established in other liability actions as well.

Shedding some light on the meaning of the aforementioned definition means going back to the origin of this issue, the specifying of the scope of the Brussels Convention, which makes the *vis attractiva concursus* a question of characterization, i.e. it boils down to qualifying claims as 'insolvency matter'. Article 4 of the Insolvency Regulation may help, to the extent that it enumerates some issues as governed by the *lex fori concursus*. Nevertheless, the interests involved in the determination of the applicable law are different from the ones involved in the determination of the international jurisdiction; in other words, the scope of the *vis attractiva concursus* does not depend on the conflict rules laid down by the Insolvency Regulation, but on the definition set out by Article 25 of the same Regulation, which is more restrictive because it is the result of specifying the scope of the Brussels Convention. *Seagon vs. Deko Marty Belgium* confirms that they are independent rules, to the extent that Article 4(2)(m) lays down the application of the *lex fori concursus* to 'the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors', but the ECJ does not even mention it while defending the attraction of these claims by the *forum concursus*.

The ECJ is even clearer on the distinction among jurisdiction and conflict rules in *German Graphics*.⁴⁷ The claim at hand, brought by the seller, regarded a reservation of title on an asset located within the State where the insolvency proceeding had been opened; hence, it may involve the application of Articles 4.2(b) and 7(1) of the Insolvency Regulation, both on the applicable law to the effects of an insolvency proceedings.⁴⁸ But the ECJ clarifies that Article 4(2)(b) 'only constitutes a rule intended to prevent conflicts of law' and 'has no effect on the scope of application of Regulation Nr. 44/2001',⁴⁹ namely it does not determine which are the claims related to the bankruptcy excluded from the Regulation Brussels I.

So far and in order to determine which claims are related to insolvency proceedings and, thus, excluded from the Brussels Regulation, the approach taken by the ECJ in *Gourdain vs. Nadler* seems the only available. And it must be complemented by taking into account, firstly, that

⁴⁷See ECJ 10th of September 2009, C-292/08, *German Graphics Graphische Maschinen GmbH vs. A. van der Schee, acting as liquidator of Holland Binding BV*.

⁴⁸The case at hand did not fall within the scope of Article 7(1) of the Insolvency Regulation, which states that the seller's rights based on the reservation of title clause shall not be affected by the opening of the proceedings if the asset in question is at that time located within the territory of a Member State other than the State of opening, i.e. these rights are immune to the insolvency proceeding. On the contrary, if the asset in question is located in the State of opening, the seller's rights may be determined by the *lex concursus*.

⁴⁹See *German Graphics*, para. 37.

exclusions from the Brussels Regulation are to be restrictively interpreted⁵⁰, and the scope of application of the Insolvency Regulation should not be broadly interpreted;⁵¹ and, secondly, that *vis attractiva concursus* is a jurisdiction criterion, governed thus by due process rights. Consequently, the answer to which international proceedings may be attracted to the *forum concursus* must also take into account if the parties to the proceeding could have advanced that the *forum concursus* was among the possible courts to decide on their conflict. This understood, the definition stated by Article 25(1)(2) of the Insolvency Regulation sets out the minimum contacts principle.⁵² Following these parameters, next paragraphs try to advance which is the scope of the international *vis attractiva* according to the ECJ.

There should be beyond doubt that the *forum concursus* is the only court to bring claims concerning the opening of insolvency proceedings, their conduct and their closure, the ranking of creditors, or the lodging of claims against the debtor's estate after the opening of the insolvency proceedings. The conduct of the insolvency proceeding includes any enforcement or provisional measure to be taken on the debtor's assets, since the objective is either to liquidate or to reorganize it, being it recently remembered by the ECJ in *MG Probud*.⁵³ As a matter of fact, these issues are the insolvency proceedings and, thus, they can only be brought before the insolvency court.

On the contrary, contractual, non contractual and *in rem* claims concerning debtor's estate are not covered by the *vis attractiva concursus*, since they may be lodged regardless of insolvency proceedings.⁵⁴ But if the opening of insolvency proceeding determines a modification of these matters, so that it gives rise to claims that only may be lodged after its commencement and in order to achieve its objectives, they should be held within the scope of the Insolvency Regulation. That is the case of claims arising from current contracts to which the debtor is a party at the opening of the insolvency proceeding, dealing with the liquidator's powers to unilaterally decide on their confirmation or termination. Since these powers are granted to the liquidator only

⁵⁰See JENARD Report, p. 131.

⁵¹See *German Graphics*, para 25.

⁵²See CARBALLO PIÑEIRO (2009, pp. 26-32).

⁵³See ECJ 21st of January 2010, Case C-444/07, *MG Probud Gdynia sp. z.o.o.*, commented by ESPINIELLA MENÉNDEZ (2010).

⁵⁴See VIRGOS, SCHMIT Report, para. 196. The ECJ has already deemed that these claims are not insolvency matter to the extent that the Brussels Convention/Brussels I Regulation is applied in the following cases: ECJ 15th November 1983, Case C 288/82, *F. Duijnste vs. L. Goderbauer*, on an action brought by the liquidator in order to recover an asset for the estate; 29th April 1999, Case C-267/97, *Éric Coursier vs. Fortis Bank SA and M. Bellami*, on the enforcement of a judgement ordering the payment of money after the closure of the insolvency proceeding; 14th May 2009, Case C-180/06, *R. Ilsinger vs. M. Dreschers, acting as administrator in the insolvency of Schlank & Schick GmbH*, on the consumer nature of the relationship between the plaintiff and the defendant.

because of the opening of the proceeding, such claims should be allocated within the scope of Article 3 of the Insolvency Regulation.

The same has been held by the ECJ in *SCT Industri vs. Alpenblumen*.⁵⁵ This case is about a decision denying the registration of ownership of shares in a company seated in a Member State, transferred by the liquidator to a company seated in another Member State, on the grounds that the liquidator's powers have not been recognized. The company to which ownership was denied brought an *in rem* action against the company which transferred the shares via the liquidator appointed when it was insolvent. The prejudicial question posed to the ECJ regards the scope of Brussels I Regulation, to the extent that the insolvency proceeding at issue is already closed and the Insolvency Regulation is only applicable to those opened after its entry into force. So far, the issue regards the recognition of a decision rendered in a Member State on the grounds that the transfer of ownership is void because this State neither recognizes an insolvency proceeding opened in another Member State nor the appointment of a liquidator. Consequently, the claim arises from the modification on the debtor's powers and the corresponding transfer to a liquidator due to the opening of an insolvency proceeding.⁵⁶ *SCT Industri vs. Alpenblumen* decided on the non applicability of Brussels I Regulation, which after *Seagon vs. Deko Marty Belgium* means that claims arising from the effects of insolvency proceedings are within the scope of the Insolvency Regulation, but only when they are the cause of action.⁵⁷

All in all, problems should arise only from a small number of claims, which compose a sort of grey area. That seems to be the case of avoidance proceedings, as the German legislation exemplifies. There are already national decisions on the matter, excluding avoidance proceedings from the scope of the Brussels Convention,⁵⁸ whose interpretation is now confirmed by the ECJ.⁵⁹ But an even more restrictive interpretation of Article 1(2)(b) of the Brussels Convention has been

⁵⁵See C-111/08, *SCT Industri Aktiebolag I likvidation vs. Alpenblumen Aktiebolag*.

⁵⁶See *SCT Industri vs. Alpenblumen*, para. 27.

⁵⁷That is not the case in *German Graphics*, in which the ECJ states that the claim 'brought by German Graphics sought only to ensure the application of the reservation of title clause in its own favour' (see para. 31), i.e. it does not involve any insolvency effect.

⁵⁸Of this opinion see *Tribunale di Torino*, 22.12.1987, *Riv.dir.int.pr.proc.* 1989, p. 659-666; Italian *Corte di Cassazione*, 21.4.1989, Nr. 1905, *Riv.dir.int.pri.proc.* 1990, p. 396-400); German *Bundesgerichtshof*, 11.1.1990, *NJW* 1990, pp. 990-992, *IPRax* 1991, pp. 183-185, commented by FLESSNER, SCHULZ (1991, pp. 162-166), and WENNER (1990, pp. 429-436); *Bundesgerichtshof*, 21.11.1996, *RIW* 1997, p. 428; *Oberlandesgerichtshof Köln*, 6.6.1997 (http://www.justiz.nrw.de/RB/nrwe/olgs/koeln/j1997/3_U_139_96.html). See also DUURSMA-KEPPLINGER (2002, p. 441); GEIMER, SCHÜTZE (1997, p. 57); HAAS (1999, p. 1152); HAUBOLD (2002, p. 158, 162); KAYE (1987, p. 131); SCHLOSSER (1975, p. 407); TRUNK (1998, p. 185).

⁵⁹See *Seagon vs. Deko Marty Belgium*, para. 28.

proposed, in order to understand avoidance proceedings within its scope as well.⁶⁰ The main argument stands on the connection between avoidance proceedings and fraudulent transactions, the civil *actio pauliana*, which sets acts that are detrimental to creditors aside as well, but regardless of insolvency proceedings.

The ECJ does not pay any attention to this connection, but instead to the link between avoidance and insolvency proceedings, highlighting that the action to set a transaction aside is governed by German Insolvency law. Specifically, it may only be brought by the liquidator 'in the event of insolvency with the sole purpose of protecting the interests of the general body of creditors'.⁶¹ Besides, it is intended 'to increase the assets of the undertaking which is the subject of insolvency proceedings'.⁶² These remarks underline the close link of this claim with the objectives of insolvency proceedings,⁶³ especially with the *par condicio creditorum*. Avoidance proceedings aim at avoiding variations on the ranking of creditors as predetermined by the legal system, in order to dilute the debtor's insolvency among all creditors and not to compromise the economic system;⁶⁴ thus, they cannot be lodged without the opening of an insolvency proceeding.⁶⁵

On the contrary, the civil *actio pauliana* is not governed by the Insolvency law, although this law may acknowledge it by entitling the liquidator to bring it on behalf of all creditors, as a complement to avoidance proceedings.⁶⁶ Neither this taking it into account by the *lex concursus* nor the standing of the liquidator should be enough to allocate this claim within the scope of Article 3 of the Insolvency Regulation, so that it must be included within the scope of the Brussels I Regulation.⁶⁷ But the fact that it is brought on behalf of all creditors may change this conclusion

⁶⁰Contrary to this doctrine, HONORATI (1989, pp. 595-616); and with some nuances SCHMIDT (1990, p. 220).

⁶¹See *Deko Marty Belgium*, para. 16.

⁶²See *Deko Marty Belgium*, para. 17.

⁶³Already highlighted by MERSCH (1983, p. 632); WESTBROOK (1991, pp. 500, 508-510).

⁶⁴See MANGANO (2004, *passim*); TERRANOVA (1982, *passim*).

⁶⁵As mentioned in text, the protection of the defendant comes to the forefront in German law while allocating international jurisdiction to decide on avoidance proceedings, so that they are excluded from the *vis attractiva concursus*. This forum places the defendant either before the courts of the debtor's center of main interest or before a debtor's establishment, instead of his or her domicile. The issue is then if *forum concursus* may surprise the defendant, which seems doubtful in so far as he or she could have advanced its jurisdiction as both places have to be familiar to him or her while dealing with the debtor. See CARBALLO PIÑEIRO (2005, pp. 141-146).

⁶⁶As it is the case of the Spanish Insolvency Law, Article 71(6), or the German one, Articles 133 and 134, which have the same wording as Articles 3 and 4 of the *Anfechtungsgesetz* or German Fraudulent Transactions Act.

⁶⁷See ECJ 10th of January 1990, Case C 115-88, *Reichert c. Dresdner Bank*, Rec. 1990, pp. 27-43.

by stating that it aims to protect the *par condicio creditorum* as well.⁶⁸ Consequently, international jurisdiction on this claim should be determined either by the Brussels I Regulation, or by the Insolvency Regulation, depending on the assignment of the recovery, either to satisfy the creditor who lodges it, or to increase the debtor's estate. However, this approach does not agree with the established dialectics between both Regulation, so that its inclusion in the Brussels I Regulation means its exclusion from the other instrument.

The intrinsic connection to insolvency proceedings can also be found in the case of liability claims against liquidators, because these claims have their cause of action in the appointment of the liquidator in order to manage the insolvency proceeding and, thus, to meet its objectives; consequently, they may only be lodged once the insolvency proceeding has been opened.⁶⁹ These liability claims may arise from the general management of the liquidator damaging all creditors, but also from individual acts, i.e. because of the infringement of a duty which has damaged a creditor or a third person. In the first case, apart from deciding on their liability, the insolvency court must appoint a substitute, which makes it clear that there is an intrinsic link between this claim and the insolvency proceeding. But the same should be held regarding individual liability claims, because they arise from powers conferred to the liquidator by the opening of the insolvency proceeding.

Paradoxically, the most complicated claim to be qualified is the one addressed by the ECJ in *Gourdain vs. Nadler*, a liability action arising from the insolvency of a company against its directors because they have not opened the proceeding in time, or have delayed its opening. Although some scholars follow the policy set up by the ECJ,⁷⁰ others have put this allocation into question,⁷¹ not only because they hold that the ECJ's analysis was superficial, but also because these claims are part of the Company law rules aiming at protecting creditors: they are coordinated with preventive measures such as the minimum capital necessary to set up a company, which are within the scope of the Brussels I Regulation, making it advisable not to split both measures by submitting liability claims to the *lex concursus*. But the precedent set up by *Gourdain vs. Nadler*, the fact that this action aims to avoid a bigger loss and, thus, to increase the debtor's assets, and that it may be lodged only after the opening of the insolvency proceeding, seem to indicate that it is going to be deemed an insolvency matter as well.⁷²

⁶⁸See of this opinion CARBALLO PIÑEIRO (2005, p. 169-172). Contrary to it see ESPINIELLA MENÉNDEZ (2004, p. 341).

⁶⁹See, ESPINIELLA MENÉNDEZ (2004, p. 343); WILLEMER (2006, pp. 380-393).

⁷⁰See BERMEJO GUTIÉRREZ, RODRÍGUEZ PINEAU (2006, pp. 1-41); ESPINIELLA MENÉNDEZ, (2004, pp. 341-342).

⁷¹See WILLEMER (2006, pp. 212-312).

⁷²On the contrary, other liability actions against managers brought by the company or by individual creditors are not deemed within the scope of the *vis attractiva* principle, because they may be lodged regardless of the insolvency proceeding. See ESPINIELLA MENÉNDEZ, (2004, pp. 346-347); BERMEJO GUTIÉRREZ, RODRÍGUEZ PINEAU (2006, pp. 12-18); WILLEMER (2006, pp. 212-312).

5. *Vis attractiva concursus as Territorial Jurisdiction Criterion*

The result of the ECJ's interpretation is that Article 3 of the Insolvency Regulation sets out the *vis attractiva concursus* principle, but only regarding claims closely connected with the insolvency proceeding. It states an international jurisdiction criterion, which poses a problem of coordination with territorial jurisdiction rules. On the one hand, there are legal systems, like the German one, taking a reserved stance on it, so that there is no territorial jurisdiction according to national law, although having international jurisdiction according to Article 3. On the other hand, legal systems accepting a broad interpretation of the aforementioned principle, like the Spanish one, must deal with a territorial jurisdiction criterion broader in its scope than the international one.

The first case has been addressed by the German *Bundesgerichtshof* immediately after the issuing of the ECJ's decision on *Seagon vs. Deko Marty Belgium*; as results from this decision, the German insolvency court in the case at hand has international jurisdiction on the claim to set an act detrimental to creditors aside, but the German insolvency law does not contain a provision granting territorial jurisdiction to that court. In fact, this lack of coordination has been pointed out against the provision of the *vis attractiva concursus* principle as an international jurisdiction criterion; this principle aims at improving the efficiency of insolvency proceedings by concentrating all claims related to the bankruptcy before the court which supposedly has more information and knowledge on the debtor's estate, that is to say, the court dealing with the insolvency. Contrary to this efficiency, German law points out that, even if *vis attractiva* were internationally accepted, such an efficiency would be lost at the level of territorial jurisdiction, where *vis attractiva concursus* is not implemented either⁷³. But the loophole created by the ECJ's decision has been closed by the German Supreme Court, by interpreting the German insolvency law as having a provision allocating the claim at hand before the insolvency courts.⁷⁴ This interpretation is discussed,⁷⁵ but it seems the path to follow taking into account the inadmissible gap.

On the other hand, international *vis attractiva* may have a restricted scope of application than territorial *vis attractiva*. As mentioned, the Insolvency Regulation does not lay down territorial jurisdiction rules, submitting it to national laws. On the contrary, the Brussels I Regulation lays down international as well as territorial jurisdiction in some claims and in others territorial jurisdiction depends on national laws. Thus, when territorial jurisdiction is not determined by this Regulation, territorial *vis attractiva concursus* may bring the claim before the insolvency court,

⁷³See KLÖHN, BERNER (2007, p. 1419).

⁷⁴After ECJ's decision and in order to close the gap, the BGH has issued a judgment pointing out that Article 102 § 1 *InsO* must be employed to determine territorial jurisdiction as well. See BGH 19.5.2009, IX ZR 39/06, *NJW*, 2009, pp. 2215-2217.

⁷⁵See FEHRENBACH (2009, pp. 497-498).

although its international jurisdiction is determined by the Brussels I Regulation and it is thus not included within the international *vis attractiva*.

6. Final Remarks

The silence of the Insolvency Regulation on the *vis attractiva concursus* principle led to contradictory interpretations, to which the ECJ has put an end by deciding that Article 3 sets up a limited *vis attractiva concursus*. This conclusion is based on the objectives of the Regulation, namely to improve the efficiency and effectiveness of insolvency proceedings in cross-border cases, and on the wording of Recital 6 and Article 25(1)(2) of the Insolvency Regulation transcribing the definition given in *Gourdain vs. Nadler* while stating which claims are excluded from the Brussels Convention, i.e. 'claims deriving directly from the insolvency proceedings, and closely linked with them'. Although the decision of the ECJ has to be welcomed, it is not completely satisfactory to the extent that it opens Pandora's box. From now on the debate focuses on allocating claims between the Brussels I and the Insolvency Regulations, at the risk of making ECJ intervention necessary whenever an insolvency proceeding is open and for any kind of claim. Fifteen years after the 1995 Brussels Convention was negotiated and taking into account the new legal situation, the European legislator should take the opportunity presented by the ECJ to reform the Regulation in order to clarify issues like the one here discussed.

The European legislator should change Article 3 of the Insolvency Regulation to specify that it also addresses claims deriving from insolvency proceedings, and closely linked with them. Following this statement, the new paragraph should enumerate which claims are included, as Article 4 does for the applicable law. The already well-known definition stated by *Gourdain vs. Nadler* arises from the objective of the Regulation Brussels I as to comprehend all civil and commercial matters, which advises a restrictive interpretation of matters excluded from its scope of application. The conflicts of the *vis attractiva concursus* principle with due process rights make it even clearer that these claims have to match the objectives of the insolvency proceeding and they may be brought only as part of this proceeding.

Apart from the opening, the conduct and the closure of insolvency proceedings, the ranking of creditors, or the lodging of claims against the debtor's estate after the opening of the insolvency proceedings, which can only be decided by the insolvency court, the list should include claims arising from the effects of insolvency proceedings on the debtor's powers, like the liquidator's powers to terminate a contract to which the debtor is a party at the time of the opening of the proceeding, as well as liability claims against the liquidator, and avoidance proceedings. Eventually, the claims on wrongful trading against managers of the insolvent company are certainly controversial: on the one hand, they are closely related to the Company law rules aiming at protecting creditors; on the other hand, the ECJ has already allocated them outside the scope of the Brussels Convention and *Seagon vs. Deko Marty Belgium* does not change this outcome. Thus, they already are within the scope of the *vis attractiva concursus*; besides, compelling managers to take into account the interest of creditors, which is to open the

proceeding as soon as an insolvency situation is clear, accomplishes insolvency proceedings objectives as well. The many interests involved in these relationships could make this list change provided that the European legislator decides to intervene to assess the interests at hand. Meanwhile, the delimitation criterion set up by the ECJ excludes from the Insolvency Regulation only actions which may be lodged regardless of the opening of an insolvency proceeding.

7. Table of cases

European Court of Justice Decisions

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1st Section, 2.7. 2009	C-111/08	TJCE 2009/211	<i>SCT Industri AB I likvidation vs. Alpenblume AB</i>
1st Section, 21.1.2010	C-444/07	TJCE 2010/19	<i>MG Probud Gdynia sp. z o.o.</i>

8. References

Jaume ALONSO-CUEVILLAS SAYROL (2007), *La 'vis atractiva' del proceso concursal*, Thomson-Civitas, Madrid.

Stefania BARIATTI (2009a), "Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 73, pp. 629-659.

--- (2009b), "Filling in the Gaps of EC Conflicts of Laws Instruments: The Case of Jurisdiction over Actions Related to Insolvency Proceedings", in Gabriela VENTURINI, Stefania BARIATTI (editors), *Liber Fausto Pocar*, Giuffrè, Milano, pp. 23-38.

Nuria BERMEJO GUTIÉRREZ, Elena RODRÍGUEZ PINEAU (2006), "Normas de protección de acreedores: entre el derecho de sociedades y el derecho concursal", *InDret*, 4, pp. 1-41.

O. BERNER, L. KLÖHN (2007), "Insolvenzantragspflicht, Qualifikation und Niederlassungsfreiheit", *Zeitschrift Für Wirtschaftsrecht*, pp. 106-114.

Alfonso Luis CALVO CARAVACA, Javier CARRASCOSA GONZÁLEZ (2004), *Derecho concursal internacional*, Colex, Madrid, pp. 97-100.

Beatriz CAMPUZANO DÍAZ (2004), *Aspectos internacionales del Derecho Concursal*, Laborum, Murcia.

--- (2009), "La posición del TJCE con respecto a los problemas interpretativos que plantea el reglamento 1346/2000 en materia de insolvencia", *DeCITA. Derecho del comercio internacional: Insolvencia internacional*, 11, p. 80-103.

Laura CARBALLO PIÑEIRO (2005), *Acciones de reintegración de la masa y Derecho concursal internacional*, Colección *De Conflictu Legum*, Santiago de Compostela.

--- (2008), "*Vis atractiva concursus* y Reglamento (CE) núm. 1346/2000: de la necesaria intervención del Tribunal de Justicia de las Comunidades Europeas", *Anuario de Derecho Concursal*, 12, pp. 185-202.

--- (2009), "Procedimientos concursales y competencia judicial internacional: análisis de dos conceptos clave", *DeCITA. Derecho del comercio internacional: Insolvencia internacional*, 11, p. 9-33.

Patricia DE CESARI (2003), "Giurisdizione, riconoscimento ed esecuzione delle decisioni nel Regolamento comunitario relativo alle procedure di insolvenza", *Rivista de Diritto Internazionale Privato e Processuale*, pp. 55-84.

Ettore CONSALVI (2006), "Brevi considerazioni in materia di giurisdizione e legge applicabile alla revocatoria fallimentare intracomunitaria", www.judicium.it.

Filippo CORSINI (2008), "Revocatoria fallimentare e giurisdizione nelle fonti comunitarie: la parola passa alla Corte di Giustizia", *Rivista de Diritto Internazionale Privato e Processuale*, 44-2, pp. 429-446.

C. DORDI (1997), "La Convenzione dell'Unione Europea sulle procedure di insolvenza", *Rivista de Diritto Internazionale Privato e Processuale*, pp. 333-366.

Henriette Christine DUURSMA-KEPPLINGER (2002), "Art. 25", in Henriette Christine DUURSMA-KEPPLINGER, Dieter DUURSMA, Ernst CHALUPSKY, *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien, New York, pp. 419-445.

Carsten Thomas EBENROTH, Markus KIESER (1988), "Die Qualifikation der 'action en comblement du passif' nach Art. 180 des neuen französischen Insolvenzrechts", *Zeitschrift für Konkurs, Treuhand und Schiedsgerichtswesen*, pp. 19-48.

Ángel ESPINIELLA MENÉNDEZ (2004), "Artículo 11", in Juan SÁNCHEZ-CALERO, Vicente GUILARTE GUTIÉRREZ (directors), *Comentarios a la Legislación Concursal*, Lex Nova, Valladolid, 1, pp. 329-351.

--- (2006), *Procedimientos de insolvencia y grupos multinacionales de sociedades*, Cizur Menor, Navarra.

--- (2009), "Nota a STJCE de 12 de febrero de 2009", *Revista de Derecho Informático*, LXI, pp. 190-192.

--- (2010), "Procedimientos 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*, Nr. 7373, Sección Tribunal, 31 Mar. 2010, Año XXXI, Ref. D-111.

Markus FEHRENBACH (2009), "Die Zuständigkeit für insolvenzrechtliche Annexverfahren", *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 492-498.

Diego P. FERNANDEZ ARROYO (2006), "Compétence exclusive at compétence exorbitante dans les relations privées internationales", *Recueil des Courts*, 323, pp. 13-259.

Ian F. FLETCHER (2005), *Insolvency in Private International Law*, Oxford University Press, 2nd ed.

Axel FLESSNER, M. SCHULZ (1991), "Zusammenhänge zwischen Konkurs, Arrest und internationaler Zuständigkeit", *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 162-166.

Francisco Javier GARCIMARTÍN ALFÉREZ (2001), "El Reglamento de insolvencia: una aproximación general", in Alegría BORRÁS (editor), *Cooperación jurídica internacional en materia civil. El Convenio de Bruselas. Cuadernos de Derecho Judicial*, Cuadernos del Poder Judicial, Madrid, pp. 229-352.

Reinhold GEIMER (2005), *Internationales Zivilprozeßrecht*, O. Schmidt, Köln, 5th ed.

--- (1997), *Europäisches Zivilverfahrensrecht*, Beck, München.

G. GRASMANN (1990), "Inlandswirkungen des Auslandskonkurses über das Vermögen eines im Konkursöffnungsstaat ansässigen Gemeinschuldners", *Zeitschrift für Konkurs, Treuhand und Schiedsgerichtswesen*, pp. 157-181.

Wolfgang HAU (2008), "Massenanreicherung und Gläubigerschutz im Europäischen Insolvenzrecht. Anfechtung, Eigenkapitalersatz und Durchgriffshaftung", in Peter GOTTWALD (editor), *Europäisches Insolvenzrecht-Kollektiver Rechtsschutz*, Gieseking, Bielefeld, pp. 78-125.

Jens HAUBOLD (2002), "Europäisches Zivilverfahrensrecht und Ansprüche im Zusammenhang mit Insolvenzverfahren", *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 157-163.

Ulrich HAAS (1999), "Insolvenzverwalterklagen und EuGVÜ", *Neue Zeitschrift für Gesellschaftsrecht*, pp. 1148-1153.

Axel HERCHEN (2000), *Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.1995*, Ergon, Würzburg, pp. 228-229.

L. HINKEL, M. FLITSCH (2006), *Entscheidungen zum Wirtschaftsrecht*, pp. 237-238.

Costanza HONORATI (1989), "Revocatoria fallimentare e Convenzione di Bruxelles del 27 settembre 1968", *Rivista de Diritto Internazionale Privato e Processuale*, pp. 595-616.

Günther JAHR (1988), "Vis attractiva concursus. Stellungnahme zu den Artt. 15 und 16 des Entwurfs von 1980", in Gerhard KEGEL/Jürgen THIEME (directors), *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens*, Mohr, Tübingen, pp. 305-317.

Peter KAYE (1987), *Civil Jurisdiction and enforcement of foreign judgments*, Professional Books, Abingdon.

L. KLÖHN, O. BERNER (2007), *Zeitschrift für Wirtschaftsrecht*, pp. 1418.

Jan KROPHOLLER (2005), *Europäisches Zivilprozessrecht, Recht und Wirtschaft*, Frankfurt am Main, 8th ed.

Dieter LEIPOLD (2001), "Zuständigkeitslücken im neuen Europäischen Insolvenzrecht", in Gerhard Lüke/Takehiko Mikami/Hanns Prütting, *Festschrift für A. Ishikawa*, de Gruyter, Berlin-New York, 2001, pp. 221-239.

Verena LORENZ (2005), *Annexverfahren bei Internationalen Insolvenzen*, Mohr, Tübingen.

Wolfgang LÜKE (1998), "Das europäische internationale Insolvenzrecht", *Zeitschrift für Zivilprozess*, pp. 275-314.

--- (1999), "Europäisches Zivilverfahrensrecht –das Problem der Abstimmung zwischen EuInsÜ und EuGVÜ", in Reinhold GEIMER (editor), *Wege zur Globalisierung des Rechts. Festschrift für Rolf A. Schütze zum 65. Geburtstag*, Beck, München, pp. 467-483.

Renato MANGANO (2004), *La revocatoria fallimentare delle attribuzioni indirette*, Giappicelli, Torino.

Peter MANKOWSKI, Charlotte WILLEMER (2009), "Die internationale Zuständigkeit für Insolvenzanfechtungsklagen", *Recht der Internationalen Wirtschaft*, 10, pp. 669-679.

M. MERSCH (1983), "La période suspecte", *Les créanciers et le droit de la faillite*, Bruylant, Bruxelles, pp. 632-657.

Juliana MÖRSDORF-SCHULTE (2004), "Internationaler Gerichtsstand für Insolvenzanfechtungsklagen im Spannungsfeld von EuInsVO, EuGVÜ/O und autonomem Recht und seine Überprüfbarkeit durch den BGH", *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 31-40.

Paul OBERHAMMER (2002), "Das Europäische Insolvenzrecht und Österreich: Grundstrukturen und ausgewählte Probleme", *Österreichisches Bankarchiv*, pp. 698-708.

José Antonio PASTOR RIDRUEJO (1971), "La faillite en droit international privé", *Recueil des Courts*, 133, pp. 135-221.

Carmine PUNZI (2003), "Le procedure d'insolvenza transfrontaliere nell'Unione Europea", *Rivista di Diritto Processuale*, pp. 997-1037.

Stefan REINHART (2003), "Art. 3 EuInsVo", in Hans Peter KIRCHHOF, Hans Jürgen LWOWSKI, Rolf STÜRNER, *Münchener Kommentar zur Insolvenzordnung*, Beck, München, 3, pp. 871-876.

Haimo SCHACK (2002), *Internationales Zivilverfahrensrecht*, Beck, München, 3rd ed.

Peter SCHLOSSER (1975), "Konkurs- und konkursähnliche Verfahren im geltenden Europarecht", *Festschrift für F. Weber*, Berlin-New-York, pp. 395-412.

Eberhard SCHOLLMAYER (1998), "Die *vis attractiva concursus* im deutsch-österreichischen Konkursvertrag", *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 29-35.

H. SCHMIDT (1990), "Anfechtungsklage des Konkursverwalters und Anwendbarkeit des EuGVÜ", *Europäische Zeitschrift für Wirtschaftsrecht*, pp. 219-220.

Ulrich SPELLENBERG (1988), "Das Verhältnis eines EG-Konkursübereinkommens zum GVÜ und zu anderen Staatsverträgen", in Gerhard KEGEL/Jürgen THIEME (directors), *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens*, Mohr, Tübingen, pp. 391-401.

Giusseppe TERRANOVA (1982), *Conti correnti bancari e revocatoria fallimentare*, Milano.

Christian THOLE (2006), "Die internationale Zuständigkeit für insolvenzrechtliche Anfechtungsklagen", *Zeitschrift für Wirtschaftsrecht*, pp. 1383-1387.

Alexander TRUNK (1998), *Internationales Insolvenzrecht. Systematische Darstellung des deutschen Rechts mit rechtsvergleichenden Bezügen*, Tübingen, Mohr.

--- (1999-2000), "The European Insolvency Convention: A Critical Appraisal", in W. L., jr. Norton (Editor), *Annual Survey of Bankruptcy Law*, s.l., pp. 827-842.

Miguel VIRGÓS SORIANO, Francisco Javier GARCIMARTÍN ALFÉREZ (2003), *Comentario al Reglamento europeo de insolvencia*, Civitas, Madrid.

--- (1995), "The interaction between national law and European integration law: The future EC Bankruptcy Convention", in Peter HOMMELHOFF, Erik JAYME, Werner Mangold, (editors.), *Europäischer Binnenmarkt IPR und Rechtsangleichung*, Müller, Heidelberg, pp. 51-69.

--- (1998), "The 1995 European Community Convention on Insolvency Proceedings: an Insider's View", *Forum Internationale*, 25, pp. 1-40.

Marc Philippe WELLER (2004), "Forum Shopping im Internationalen Insolvenzrecht?", *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 412-417.

Christian WENNER (1990), "Ausländisches Sanierungsverfahren, Inlandsarrest und § 238 ZPO", *Zeitschrift für Konkurs, Treuhand und Schiedsgerichtswesen*, pp. 429-436.

Jay Lee WESTBROOK (1991), "Choice of avoidance law in global insolvencies", *Brooklyn Journal of International Law*, 17, pp. 499-538.

Charlotte WILLEMER (2006), *Vis attractiva concursus und die Europäische Insolvenzverordnung*, Mohr Siebeck, Tübingen.