Transaction avoidance law and third countries. The case for a set of European private international law rules

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Abstract:

This paper critically examines the need for a uniform set of European private international law rules governing transaction avoidance in cross-border insolvency, particularly when detrimental transactions involve third countries, and in the light of the contemporary trends of 'group' and 'rescue culture'. The question of the legal basis for EU legislative intervention in the field is first examined. The study dissects the key challenges in determining jurisdiction, selecting the applicable law, and ensuring the recognition and enforcement of judgments rendered in avoidance actions. It argues that the existing EU framework—namely, articles 6(2) and 15 EIR— falls short in addressing cases that cross the EU's external borders. The paper proposes an opt-out model based onwider possibilities to derogate from vis attractiva concursus for jurisdiction, recommends a referral solely to the lex fori concursus for applicable law, and advocates for a partial adoption of the 2018 UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). Additionally, it suggests extending these proposals to cover actio pauliana, thereby enhancing creditor protection in multinational insolvency proceedings.

Keywords: European insolvency law; transaction avoidance; cross-border insolvency; private international law; lex fori concursus; vis attractiva concursus; MLIJ; actio pauliana.

A. Introduction

I. Scenarios and questions

Regulation (EU) 2015/848 ('EIR') provides a set of uniform rules on jurisdiction, applicable law, recognition and enforcement concerning 'the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors' which have a cross-border connection with at least one Member State, with the exception of Denmark, this state not being subjected to the EIR[1]. By contrast, there is no parallel European regulation concerning those detrimental acts that have a connection with both a Member State and a third country, *i.e.* either with a non-Member State or with the State of Denmark. Nor has the European Union accessed an international convention that provides such a legal framework. For an explicit choice of policy, the Convention of the Hague Conference on Private International Law of 2 July 2019 on 'The Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters', which was accessed by the European Union on 12th July 2022, 'shall not apply to …(e) insolvency, composition, resolution of financial institutions, and analogous matters.'[2]

In the field of detrimental acts with third countries, two scenarios are relevant, namely a) an outbound scenario; and b) an inbound scenario.

a) The outbound scenario can be exemplified as follows. The Court of Rome opens insolvency proceedings with regard to Company A, which has its COMI (centre of main interests) in Italy. Immediately before the opening of insolvency proceedings, Company A made a payment to its Creditor X, who is domiciled in Abu Dhabi, in order to perform a contract concluded under English law. The insolvency practitioner who has been appointed to the proceedings in Rome has the feeling

1 The territorial scope of EIR of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJEU L 141, 5.6.2015, p. 19–72, is determined by its Art. 3 and Recital 88, respectively. The sentence which is written in inverted commas partially reproduces the contents of Art. 7.2.m. EIR.

2 Council Decision (EU) 2022/1206 of 12 July 2022 concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, OJEU L 187, 14.7.2022, p. 1–3. The text of the Convention of the Hague Conference on Private International Law of 2 July 2019 on 'The Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' is available to download at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (last accessed: 28.02.2024).

that that payment is detrimental to Company A's creditors and, hence, is voidable. Therefore, the Italian practitioner asks the following questions: 1) What law is relevant in establishing whether that payment is voidable? Is it Italian law (*i.e.* the *lex fori concursus*); the law of the United Arab Emirates (*i.e.* Creditor X's *lex domicilii*); English law (*i.e.* the *lex causae*); or, perhaps, another law or even a combination of two different laws? 2) What court is internationally competent? Is it the court that opened the insolvency proceeding or, at least, an Italian court? Or is this court a court of the Emirates? Or is it a different court again? 3) And, if the competent court is in Italy – which, in principle, appears to be preferable for the whole administration of the proceedings – how is it possible for the insolvency practitioner to have the Italian judgment recognized and enforced in the Emirates, so that an Emirates bailiff can compel Creditor X to give the payment back to the Italian insolvency practitioner?

b) The inbound scenario can be exemplified as follows. The Court of Abu Dhabi opens insolvency proceedings with regard to Company B, which has its COMI (centre of main interests) in the United Arab Emirates. Immediately before the opening of insolvency proceedings, Company B made a payment to its Creditor Y, who is domiciled in Rome, in order to perform a contract concluded under English law. The Emirates insolvency practitioner who has been appointed to the proceedings has the feeling that this payment is detrimental to Company B's creditors and, hence, is voidable. Therefore, the Emirates practitioner asks the following questions: 1) What law is relevant in establishing whether that payment is voidable? Is it the law of the United Arab Emirates (*i.e.* the *lex fori concursus*); Italian law (*i.e.* Creditor Y's *lex domicilii*); English law (*i.e.* the *lex causae*); or, perhaps, another law or even a combination of two different laws? 2) What court is internationally competent? Is it the court that opened the insolvency proceeding or, at least, a Court in the Emirates? Or is this court an Italian Court? Or is a different court again? 3) And, if the competent court is in the Emirates – which, in principle, appears preferable for the entire administration of insolvency proceedings – how is it possible for the insolvency practitioner to have the Emirates judgment recognized and enforced in Italy, so that an

Italian bailiff can compel Creditor Y to give the payment back to the Emirates insolvency practitioner?[3]

In point of fact, some Member States have already provided in their national laws the answers to these questions. For example, this is the case of Germany, where the Insolvency Statute also contains private international law prescriptions for cross-border law cases that have a connection with both Germany and a third-country[4]. And the same situation occurs in other Member States, even though these rules very often vary from jurisdiction to jurisdiction[5].

In the past, this national choice of policy was quite understandable because, at that time, insolvency law aimed primarily at liquidating distressed companies, and – even within multinational groups of companies – avoidance laws were employed in accordance with an entity law approach. However, today the setting has changed dramatically. In fact, in the last few years the European Union has embraced both a rescue culture and a group culture and, very often, the insolvency practitioners appointed to companies belonging to the same multinational group apply avoidance laws as a part of their holistic strategy in order to restructure the group as a whole. For example, insolvency practitioners collaborate in evaluating whether a transaction that has undermined a single company could be regarded as advantageous for the group as a whole and, consequently,

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3 Sometimes, this picture might be even more complex. Since almost all regulations on cross-border insolvency law, including EIR, adopt a concept of 'modified universality', it is possible for each of the above-mentioned scenarios to have a sub-scenario according to which there are at least two sets of insolvency proceedings, namely, one set of main insolvency proceedings in the country where the debtor has the COMI, and one or more sets of secondary insolvency proceedings in the countries with which the debtor has a connection that is considered as relevant for the opening of secondary proceedings. Varying from jurisdiction to jurisdiction (here, the term 'jurisdiction' also includes the European Union) this connection may consist either in a pool of assets or in an establishment. However, this complication in the scenario does not add further complications to the topic at issue. In effect, if the *lex fori concursus principalii* lays down that the payment must be challenged by the practitioner appointed to the main proceedings, this must answer the same questions as in the above-mentioned scenario. By contrast, if the *lex fori concursus secondarii* lays down that the payment must be challenged by the practitioner appointed to the secondary proceedings, this does not face cross-border law questions, because secondary proceedings are territorial only. As a result, this paper will only concentrate on the two scenarios described in the text.

4 § 335 et seqq. *Insolvenzordnung* (*InsO*).

5 For example, see: as regards Austria, § 217 et seqq. *Insolvenzordnung* (*IO*); and, as regards Spain, Art. 721 et seqq. *Ley Concursal*.

could be considered worth being preserved from the avoidance effects; and, vice-versa, they collaborate in evaluating how a transaction that is neutral, or even advantageous for a single company, could be considered as disadvantageous for the group as a whole, and how they can make this transaction ineffective – actually, in Europe this is still a moot point[6]. As a result, avoidance law must be as much standardized as possible in order to facilitate comparisons between vulnerable transactions, not only with regard to those acts that fall within the scope of the EIR, but also as regards those acts which have connections with both a Member State and a third state.

This paper will take into account the emergence of both rescue culture and group culture and will focus on the impact that these two game-changers have on designing a better avoidance law system concerning detrimental transactions with third countries. In particular, the paper will highlight that these two game-changers give rise to three questions which, for the sake of simplicity, could be labelled: the 'If question'; the 'What question' and the 'How question', respectively. These questions could be formulated as follows:

The 'If question'– does Art. 5 TEU prevent the European Union from introducing a set of uniform private international law rules on detrimental transactions with third countries, or – on the contrary – does the same Article suggest that today this action would be better achieved at Union level? And, if this question is given a positive answer,

The 'What question' – what set of uniform private international law rules on detrimental transactions with third countries ought to be proposed? And, finally,

The 'How question' – how ought the European Union to introduce these rules? Ought this action to be performed through a mere regulation, a directive or a non-binding act of the European Union? Or ought this action

6 In Europe, both at Member State level and at Union level, the legislation on group insolvencies is mainly based on the 'entity law approach.' This claims that the insolvency of each company belonging to a group must be treated as if this company were a standing-alone company. However, scholars pinpoint the limits of this approach and suggests that courts and lawmaker should adopt – even though under certain conditions – an 'enterprise law approach' that takes into account the fact that all the companies belonging to a group run the same enterprise. For this approach and its caveats see, especially, Mevorach, p. 32 et seqq., and with specific reference to transaction avoidances, p. 286 et seqq. On the latter topic, see also Mevorach ECFR 2011, p. 235 et seqq.

to be performed through a multilateral treaty binding the European Union, on the one hand, and the signatory third countries, on the other?

This paper will also endeavour to answer both the 'If' and the 'What' questions. However, it will refrain from providing any answer to the 'How question', first, because the proposal for a set of uniform private international law rules on detrimental transactions with third countries is part of a more comprehensive project which goes beyond the scope of this article; secondly, because the topic concerning how the European Union ought to introduce these rules is by its very nature more political than academic.[7]

B. The '*If question*'

I. After Maastricht: The new terms of the dilemma 'centralization vs decentralization' and the logic and limits of the principle of subsidiarity; the insufficiency test and the added-value test

Consider, first, the 'If question.'

It is well-know that the European Union is a supranational organization and that, since the enactment of the Treaty of Maastricht, there has been a presumption according to which – in principle – Member States are competent to regulate issues which fall into the areas of shared competence. This is the case as regards insolvency law. However, it is equally well-known that this presumption is rebuttable, albeit under certain conditions. The new version of Art. 5 TEU (which takes into account both the Treaty of Maastricht and that of Lisbon), on the one hand, lays down that 'the use of Union competences is governed by the principles of subsidiarity', and, on the other hand, lays down that 'under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

Scholars unceasingly highlight that the wording of Art. 5 TEU is the outcome of a miserable compromise reached in Maastricht between the German Delegation, which wanted the European Union to intervene whenever

7 On this point, see also the observations by Trunk, in Trunk/Hatzimihail (eds.), p. 37 (45 et seqq.).

its intervention was expected to increase efficiency, and the UK Delegation, which intended to restrict European interventions to cases where such interventions were considered as necessary.[8] As a result, writers maintain that subsidiarity is one of the vaguest concepts of Union law; the Protocols that aim at shedding light on the way it functions are not particularly helpful;[9] and, last but not least, the Court of Justice of the European Union (CJEU) has intervened only to a minimum extent to clarify whether the European Union may regulate a matter which does not belong to its exclusive competence and, vice-versa, whether the single Member States are competent.[10]

In principle, scholars nevertheless converge in recognizing that Art. 5 allows the European Union to take action in the area of shared competence, wherever:

- the objectives of the proposed action cannot be sufficiently achieved by the Member States (insufficiency test); and – the proposed action can be better achieved at Union level (added-value test)[11].

II. From the law in the book to the law in action. Regulation (EU) 2015/848 on European cross-border insolvency law

Scholars also agree as regards the functioning of the 'insufficiency test.' In particular, they agree that Member States must refrain from regulating topics that produce spillover effects on other Member States.[12] This is because, if a Member State regulated a topic of this kind, this regulation would improperly affect the sovereignty of other Member States.

European legislation provides many examples where the existence of spillover effects is regarded as decisive for the 'insufficiency test' to be passed. These include *inter alia* regulations on insolvency law matters which have connections with more than one Member State. Consider, for example, the first sentence of Recital 4 EIR. This reads: 'The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law.' Even though this recital does

8 Begg et al. 1993, p. 20.
9 *Wyatt and Dashwood's European Union Law*, 6th ed., Oxford/Portland 2011, p. 114 et seqq.
10 Marauhn/Mengeler, in Walzenbach/Alleweldt (eds.), p. 35.
11 *Wyatt and Dashwood's European Union Law*, cit., p. 116 and, more recently, Marauhn/Mengeler, in Walzenbach/Alleweldt (eds.), p. 34.
12 Begg et al., p. 36.

not explicitly refer to the concept of spillovers, it makes it clear that by definition Member States are not in the best position to manage European cross-border cases and that the European Union must intervene here in a centralised way.

Scholars, moreover, agree that the prerequisite for passing the added-value test is met whenever an action aims at protecting the Common Market and other values that are placed at the core of the European Union[13].

In this respect, the EIR is again illuminating. Consider, for example, its Recitals 3 to 5. These read: '(3) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty. (4) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law. The insolvency of such undertakings also affects the proper functioning of the internal market, and there is a need for a Union act requiring coordination of the measures to be taken regarding an insolvent debtor's assets. (5) It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).'

III. From the law in the book to the law in action. Directive (EU) 2019/1043 on preventive restructuring

In 2021, Günter Walzenbach and Ralf Alleweldt published a book titled *Varieties of European Subsidiary – A Multidisciplinary Approach*, where these and other scholars point out that the recent application of the principle of subsidiarity is evolving to a great extent. In particular, in the Introduction Walzenbach and Alleweldt write: 'The question of how powers should be

13 Walzenbach/Alleweldt, in Walzenbach/Alleweldt (eds.), p. 7–8, who state that 'Typically, the critique [against the European Union] .... has identified a step-by-step depletion of member state competences due to the EU's overarching goal to establish and maintain a common market. Potentially, almost any member state norm or domestic piece of legislation can be interpreted as constituting a barrier to free market forces.'

distributed between the EU and the member states is not, or only to a minimal extent, answered by Article 5 (3) TEU. This question is mainly decided in negotiations between member states on treaty amendments and in legislative deliberations between member states' governments in the Council. It is obviously an eminently political question that depends on regular feedback from local, regional and national actors. Fundamentally, it cannot be answered by applying legal rules alone. Instead, it requires an empirical investigation into the practice application of subsidiarity from the perspective of multiple disciplines.'[14]

These statements are very provocative and, frankly speaking, we do not know whether they hold true also as regards the field of insolvency law – *Varieties of European Subsidiary* covers many subjects, such as environmental law and migration law but, unfortunately, it does not cover the field of insolvency law. Nevertheless, it is clear that the economic and social context where the concept of subsidiarity is applied in insolvency law has evolved, so that even the existence of a situation of merely domestic insolvency has been regarded as decisive in rebutting the presumption laid down by Art. 5 TEU and justifying an intervention of the European Union aimed at harmonising national insolvency laws.

Consider Recitals 7 and 8 of Directive (EU) 2019/1043. These read: 'Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies. Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based.... (8) The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital

14 Walzenbach/Alleweldt, in Walzenbach/Alleweldt (eds.), p. 14.

Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs.'

Unlike the EIR, which refers to cross-border insolvency involving more than one Member State, Directive (EU) 2019/1043 deals with the restructuring of cases that usually have a domestic relevance. Nevertheless, Recital 7 of Directive (EU) 2019/1043 points out that, from the proactive perspective of restructuring law, even domestic cases can have a European dimension in terms of the spillover effects of both the issues in question and the future impact of the envisaged regulation. In effect, this recital highlights that distressed companies very often belong to multinational groups. Moreover, Recitals 8 of Directive (EU) 2019/1043 points out that even a situation of merely domestic insolvency may require a centralised intervention of the Union aiming at protecting the Common Market, the Capital Markets Union and other European law values, such as the resilience of Member States' economies and the preservation and creation of jobs.

IV. Conclusion. Arguably, a proposal for a European regulation on detrimental acts with third countries would easily pass both the insufficiency test and the added-value test

The above observations refer to both the EIR and Directive (EU) 2019/1043. Arguably, these hold true also as regards a proposal for a European regulation on detrimental acts with third countries, which could easily pass both the insufficiency test and the added-value test.

Consider, first, the example we gave as regards outbound actions.

'The Court of Rome opens insolvency proceedings with regard to Company A, which has its COMI (centre of main interests) in Italy. Immediately before the opening of insolvency proceedings, Company A made a payment to its Creditor X, who is resident in Abu Dhabi, in order to perform a contract concluded under English law.'

In the past, a climate of liquidation culture did not stimulate insolvency practitioners to ask whether Company A belonged to a group of companies and who Creditor X was. Both questions were irrelevant. However, the situation has changed; the European Union has adopted both the rescue culture and the group culture, and this new legal context requires the insolvency practitioner appointed to the proceedings concerning Company A to ask whether Company A belongs to a group of companies and who Creditor X is. In fact, if Company A belongs to a group of companies and Creditor X is a company which belongs to the same group, the insolvency practitioner who has been appointed to the insolvency proceedings concerning Company A must ensure that the avoidance action should be in line with the strategy of rescuing the whole group or part of it.

As a result, in the past, it made sense that single Member States should enact their own private international law rules concerning detrimental acts with third states. But, today, Art. 5 TEU suggests that this law-making should be done at European level. In fact, if Company A belongs to a group of companies based in Europe – which is very probable in the case of outbound actions – the regulation on transaction avoidances can spill over onto the other companies which are based in Europe and interfere with the Common Market, the Capital Markets Union and other European law values, such as the resilience of Member States' economies and the preservation and creation of jobs.

The same holds true as regards inbound actions, which were exemplified by the following example: 'The Court of Abu Dhabi opens insolvency proceedings with regard to Company B, which has its COMI (centre of main interests) in the United Arab Emirates. Immediately before the opening of insolvency proceedings, Company B made a payment to its Creditor Y, who is resident in Rome, in order to perform a contract concluded under English law.' In fact, if Company B belongs to a group of companies which is based in Europe, the recognition and enforcement of the action brought by the Emirates insolvency practitioner can spill over onto the other companies which are based in Europe and interfere with the Common Market, the Capital Markets Union and other European law relevant values.

To conclude, these observations imply that a proposal for a European regulation on detrimental acts with third countries would easily pass both the insufficiency test and the added-value test and that this proposal would find its legal basis in Arts. 81 and 114 TFEU. Art. 81.1 TFEU lays down: 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.' Art. 114.1 TFEU *inter alia* lays down: '...The European Parliament and the Council shall ... adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

C. The 'What question'

I. The sources of inspiration

Consider, now, the 'What question', which reads as follows: 'what set of uniform private international law rules on detrimental transactions with third countries ought to be proposed?'

Certainly, the EIR provides an important source of inspiration for the lawmakers, since this regulation contains a complete legal framework that allows cross-border detrimental acts to be challenged, albeit this is applicable only within the European Union (with the exception of Denmark). Moreover, during the years when, first, Regulation (EC) 1346/2000, and, subsequently, the EIR were applied, the CJEU produced a wealth of case law which clarifies and supplements the relevant prescriptions[15].

Nevertheless, the exemplar of the EIR must not be overestimated if a legal framework is to be designed concerning detrimental acts with third countries.

First, the EIR and the related case law contain a system of avoidance law that is much more complex than expected, so that the idea of using it as a pattern to develop further regulation would not be a 'copy and paste' task but would imply a choice between different alternatives. The EIR provides both a default model and an opt-in model. Moreover, after the CJEU's judgments in the *F-Tex* and *Feniks* cases, case law on the EIR has envisaged a third model which refers to cases where the avoidance actions are brought, not by the relevant insolvency practitioners, but either by a person who bought the action from the insolvency practitioner or by one of the debtor's creditors[16] – accordingly, these actions will have to be brought under 'Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' (Brussels Ia). As a result, nowadays the legal framework provides as many as three models that could be summarised as follows.

15 Mangano, in Bork/Mangano, paras 3.98 – 3.100.

16 CJEU 19.4.2012 – case C-213/10, ECLI:EU:C:2012:215- F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'; and CJEU 4.10.2018 – case C-337/17, ECLI:EU:C:2018:487- Feniks Sp. z o.o. v. Azteca Products & Services SL.

The by-default model

Jurisdiction The State of the Opening (Art. 6(1) EIR) – as an exclusive forum
Applicable Law *Lex Fori* (Art. 7(2.m) EIR) + *Lex Causae* as a veto (Art. 16 EIR)
Recognition and Enforcement Automatic (Art. 32(1) EIR)

The opt-in model

Jurisdiction The State where a connected action has been brought (Art. 6(2) EIR) – as an optional forum
Applicable Law *Lex Fori* (Art. 7(2.m) EIR) + *Lex Causae* as a veto (Art. 16 EIR)
Recognition and Enforcement Automatic (Art. 32(1) EIR)

The model based on Regulation (EU) 1215/2012 (Brussels Ia)

Jurisdiction The State of the defendant's domicile or, if chosen by the claimant, the State of the performance of the obligation (Art. 4 or Art. 7.1(a) Regulation (EU) 1215/2012)
Applicable Law *Lex Fori* (Art. 7(2.m) EIR) + *Lex Causae* as a veto (Art. 16 EIR)
Recognition and Enforcement Automatic (Art. 32(1) EIR)

Secondly, and more importantly, the EIR is a supranational piece of legislation that imposes prescriptions on States that are Members of the European Union and that, as such, have accepted the supremacy of European law over their own national laws. By contrast, if the European Union intends to design a set of uniform private international law rules concerning detrimental acts with third countries, it must be aware that it cannot interfere with the tradition and values of the third countries. Otherwise, there is the risk that, in outbound affairs, the European insolvency practitioners that have obtained a judgment in a Member State will have difficulty in having this judgment recognized and enforced in a third country where the court or some other competent authority can raise the nasty 'ordre public' exception.

Alternative or complementary to the EIR, other important sources of inspiration are: the 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' (MLCBI) with Guide to Enactment and Interpretation (2013)';[17] and the 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)' (MLIJ).[18]

MLCBI plays a role of paramount importance in the approximation of insolvency laws around the globe by facilitating the recognition and enforcement of insolvency proceedings abroad. Moreover, some Member States that have enacted their own autonomous private international law rules on cross-border insolvency matters have transposed – entirely or partially – the MLCBI. This, of course, determines a climate of convergence regarding national rules on private international laws. Nevertheless, this exemplar is not a panacea either: first, because the MLCBI refers mainly to the recognition and enforcement of insolvency proceedings, so that there are no rules on jurisdiction and applicable law; secondly, because it is controversial whether the rules on the recognition and enforcement of insolvency proceedings also refer to the recognition and enforcement of avoidance actions.

In this respect, the MLIJ is, certainly, more helpful. In effect, it is true that this Model Law refers to recognition and enforcement only, but it is equally true that it provides an explicit solution for the recognition and enforcement of avoidance actions. Rather, it is questionable whether this solution fits well with the project at issue (→ section 12).

Of course, this variety of sources (of inspiration) will affect what is to be argued in the following sections. As a result, *a priori* no model will be considered as better than any other, and the analysis will focus on the

17 UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf≥ (last accessed: 28.02.2024).

18 UNCITRAL, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf> (last accessed: 28.02.2024).

topics at issue in the following sequence: Jurisdiction, Applicable law, and Recognition and Enforcement.[19]

II. Jurisdiction. In favour of an opt-out rule vis attractiva concursus

The first issue to deal with concerns jurisdiction.

This question basically consists in deciding whether the insolvency practitioner appointed to the insolvency proceedings who intends to bring an avoidance action ought to apply to a court of the country where insolvency proceedings have been opened, in accordance with a concept of international law *vis attractiva concursus*, or to another court in accordance with the usual rules on competence for civil and commercial judgments. These usually lay down that the action must be brought before the court of the country where the opponent is domiciled.

The first solution has great appeal. First, it was adopted by Art. 6.1 EIR, which lays down: 'the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions'. Secondly, this choice of policy is less costly, because the insolvency practitioner does not need any cooperation with a foreign professional, at least in order to bring the action. Thirdly, the court that has the control of the case can easily have also the control of the proceedings concerning the avoidance action, since these are administered in the same jurisdiction. Moreover, these two latter advantages are even enhanced whenever the domestic law of the country where insolvency proceedings have been opened adopts a concept of national law *vis attractiva concursus*. This happens in many jurisdictions around the globe, for example, in Italy,[20] Spain,[21] and the USA.[22] In effect, if this is the case, the combination of the international law *vis attractiva concursus* with the national law *vis attractiva concursus* will allow the insolvency practitioner to bring avoidance actions, not only before a court of the same country where insolvency proceedings have been

19 For a similar approach, Trunk, in K.Pannen/S.Riedemann/M. Zeuner (eds.), p. 453 seqq., especially at p. 465.

20 Art. 32 of *Codice della crisi d'impresa e dell'insolvenza*.

21 Art. 55 of *Ley Concursal*.

22 Art. 157(b), Title 28, of *United States Code*.

opened, but before the very same court that has opened the insolvency proceedings.[23]

This choice of policy, too, has some drawbacks. Some scholars highlight that the idea of bringing avoidance actions in the same country where insolvency proceedings have been opened is neither appropriate nor efficient. In particular, one might maintain that the international law *vis attractiva* is not appropriate because it derogates from the usual competence for civil and commercial judgments and, consequently, violates a principle of natural law according to which every citizen has a right to be judged by the court that is pre-established by law – in some countries, this principle is protected at a constitutional level.[24] Some scholars, moreover, argue that the international law *vis attractiva* is not efficient either, because, if a cross-border avoidance action is brought in the country where insolvency proceedings have been opened, the insolvency practitioner could face severe problems in having the related judgment recognized and enforced in the country where the opponent is domiciled.[25] Finally, some writers observe that the fact that the insolvency practitioner may bring avoidance actions in the same country where insolvency proceedings have been opened does not necessarily imply that this court will be competent to hear an avoidance action – in fact, the international law *vis attractiva* does not necessarily imply a domestic law *vis attractiva*.[26]

Arguably, as regards Art. 6.1 EIR these criticisms are excessive for a number of reasons. First, the EIR is an instrument of supranational law, which, as such, prevails over national laws, including constitutional ones. Secondly, within the scope of application of the EIR the recognition and enforcement of foreign judgments are particularly easy (even though, after the *Schmid-Hertel* case, it is possible for the place of recognition and enforcement to fall

23 For a recent and detailed description of the pros of an international law *vis attractiva concursus,* see Ringe, in Bork/van Zwieten (eds.) 2022, paras 6.10 – 6.13. However, at para 6.14 this author also maintains that the *vis attractiva concursus* must be the outcome of a free choice of the insolvency practitioner and not the result of a legal command. As regards the pros of an international law *vis attractiva concursus* see also Grompe, p. 73 et seqq.

24 For a USA-German comparison, see Habscheid, p. 74 seqq. Moreover, for an approach to international jurisdiction that takes into account also constitutional law values, see Pfeiffer, especially at p. 288 et seqq.

25 For example, Ringe, in Bork/van Zwieten (eds.), para 6.61. This author maintains that, despite the wording of Art. 6.1 of EIR, this prescription would provide for a form of optional jurisdiction.

26 For example, Ringe, in Bork/van Zwieten (eds.), para 6.54.

outside the scope of application of the EIR).[27] Thirdly, within the European Union some countries also adopt a domestic law *vis attractiva,* so that the court that has opened insolvency proceedings could be also competent to hear the proceedings concerning avoidance actions[28]. Fourthly, when this is not the case, the fact that the court that has opened insolvency proceedings and the court that is competent to hear the related avoidance action do not coincide does not rule out that the international law *vis attractiva* is equally a facilitation. It is reasonable to expect that cooperation between two courts that employ the same language and the same law will prove to be smoother than cooperation between two courts that employ different languages and different laws. However, these criticisms must be taken seriously if one intends to design a set of European rules on detrimental acts with third countries. In fact, if the European Union interferes with the legal traditions and values of the third countries – especially when these have a constitutional rank – there is a high risk that the courts or corresponding authorities of the third countries will raise against European insolvency practitioners the 'ordre public' exception and recognize no judgment that they have obtained in Europe.

In effect, even the EIR does not contain a mandatory rule concerning jurisdiction for related actions, including avoidances. In fact, it is true that Art. 6.1 EIR lays down: 'The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.' However, it is equally true that Art. 6.2 of the same Regulation lays down: 'Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.'

The idea of introducing the *vis attractiva concursus* by means of an opt-out rule is appealing, not only because this choice of policy gives

27 CJEU 16.1.2014 – case C-328/12, ECLI:EU:C:2014:6, ruling – Ralph Schmid v Lilly Hertel.

28 For example, this is the case of Italy and Spain.

insolvency practitioners some latitude of discretion (and, consequently, a greater chance of having the expected judgment enforced), but also because, especially in group insolvencies, this proposal could allow insolvency practitioners to put the decision whether or not to adopt the *vis attractiva concursus* at the core of the negotiations that are usually carried out with the other insolvency practitioners.[29] Suppose that there is a group that consists of Company A, Company B and Company C. Suppose that all three companies are in distress and that one set of insolvency proceedings has been opened for each company and one insolvency practitioner has been appointed for each set of insolvency proceedings. If the insolvency practitioner that has been appointed for Company A intends to challenge a payment that Company A made to Company B, the insolvency practitioner for Company A (the plaintiff) might promise the insolvency practitioner for Company B (the defendant) to give up his or her right to the *vis attractiva* in exchange for an undertaking of the insolvency practitioner for Company B to cooperate in rescuing the group as a whole. This shifting of the forum, from the State of the opening to the State of the defendant's domicile, should be advantageous for the insolvency practitioner for Company B since it reduces the litigation costs that the insolvency practitioner for Company B will have to bear in order to face the threatened challenge.

As was previously said, Art. 6.2 EIR allows the *vis attractiva councursus* to be waived. However, it was also said that under Art. 6.2 EIR the conditions under which an insolvency practitioner can derogate from the rules on international jurisdiction for related actions, including avoidances, are very strict. As a result, in this respect (*i.e.* as regards the conditions for waiving), Art. 6.2 EIR cannot serve as a model.

Of course, this statement does not mean that the insolvency practitioner ought to be able to waive the rules on jurisdiction for related actions without any limits, because an international principle on jurisdiction, which is incorporated in many jurisdictions and also in Recital 15 of Regulation (EU) 2015/2012, reads: 'The rules of jurisdiction should be highly predictable'.[30] Nevertheless, the same Recital 15 of Regulation (EU) 2015/2012 adds that 'jurisdiction is generally based on the defendant's domicile', while

29 Ayres/Gertner Yale L.J. 1989, p. 97 ss., where the authors refer to the so-called penalty default rules, which, 'by definition, give at least one party to the contract an incentive to contract around the default.'

30 Lazić/Mankowski, para. 1.187.

Recital 19 of Regulation (EU) 2015/2012 concludes that, if there is an agreement between the relevant parties, it should be respected.

As a result, concerning jurisdiction for avoidance actions the European Union should introduce an opt-out *vis attractiva concursus* that may be waived in favour of the forum of the defendant's domicile and, in case of an agreement between the relevant parties, in favour of the forum that both parties have considered as the most convenient. This hierarchy of criteria might be clearly depicted through the following chart.

Hierarchy of Criteria for Jurisdiction

1st	**The by-default model** The State of the opening of insolvency proceedings
2nd	**The opt-in model based upon a choice of the insolvency practitioner** The State of the defendant's domicile
3rd	**The opt-in model based upon an agreement between the insolvency practitioner and the opponent** The State that is considered, by both the insolvency practitioner and the defendant, as the most convenient

III. Applicable law. The most common solutions outside and inside the European Union

The second issue to deal with concerns applicable law.

It is well-known that, at least outside Europe, the law applicable to transaction avoidances is usually the *lex fori concursus*.[31] This choice of policy is sensible whenever the legal framework prescribes the *vis attractiva concursus*. If this is the case, *forum* and *ius* coincide perfectly, which – it goes without saying – is most desirable. At any rate, the idea that the law applicable to transaction avoidances should be the *lex fori concursus* seems

31 See Westbrook Tex. Int'l L.J. 2006–2007, p. 903; and again Westbrook Brook. J. Int'l L. 1991, p. 499 et seqq. This author pinpoints the fact that transaction avoidances are closely related to the distribution of the debtor's assets. However, in theory other laws could be applicable. For a list of possible alternatives to the *lex fori concursus*, see again Westbrook, Fordham L. Rev. 1996, p. 2534. For an in-depth analysis of German scholars' thoughts concerning the law applicable to transaction avoidances see Garašić, p. 335 et seqq. of the manuscript.

to be reasonable even when the legal framework does not prescribe the *vis attractiva* and the court that is competent for transaction avoidances is located in the country where the opponent is resident. In the first place, this choice of policy corresponds to the aim of 'modified universality', according to which the general rule is that the law applicable to cross-border insolvency matters consists in the *lex fori*, while the other options must be considered as derogations from the general rule that cannot be justified by simply quoting the aspiration of any legal system to have *forum* and *ius* coincide. Secondly, this choice of policy corresponds to the nature of transaction avoidances, which are universally considered as actions that are closely related to the debtor's insolvency and, especially, as actions that are closely related to the distribution of the debtor's assets. Thirdly, this choice of policy facilitates the business of the insolvency practitioners who are usually engaged in challenging many acts that the same debtor performed for the benefit of various people or entities that are resident in various countries. To sum up: whenever no *vis attactiva* applies and the insolvency practitioners must apply to various courts in various jurisdictions, it is highly desirable that they should be at least able to apply the same law.

However, it is equally well-known that, within European legal culture, the situation is different since most regulations in Europe incorporate a combination of *lex fori* and *lex causae* that is usually called the 'veto solution', according to which the insolvency practitioner who intends to challenge the debtor's detrimental acts applies the *lex fori corcursus*, but the opponent may successfully object to the practitioner that the *lex causae* is different from the *lex fori* and – which is crucial – that the *lex causae* does not consider that act as a detrimental one.

This situation for example occurs under the EIR. On the one hand, Art. 7.2.(m) EIR lays down: 'The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine .... the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors'. On the other hand, Art. 16 EIR lays down: 'Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case.' This is the case also in some Member States that regulate cross-border insolvency cases that have a connection with a third State. Consider, for example, the case of Germany. On the one hand, Section 335 *Insolvenzordnung* (InsO) lays down: 'Unless otherwise provided, the insolvency proceedings and their effects are subject to the law of the state in which the proceedings have been opened'; and, on the other hand, Section 339 *InsO* lays down: 'A transaction may be contested if the conditions for contesting insolvency are met under the law of the state in which proceedings were opened, unless the opponent of the contest demonstrates that the law of another state is relevant to the transaction and the transaction is by no means contestable in accordance with this law.'

IV. More on applicable law. The logic of the veto solution

Certainly, the veto solution is inefficient from an insolvency practitioner's point of view. Cunning debtors tend to exploit the diversity of legal systems and perform their acts under the law of a country which has a lenient regulation on transaction avoidance. As a result, when these debtors are subjected to insolvency proceedings, it is highly probable that the claims of the insolvency practitioners appointed to these proceedings will be successfully opposed by the opponent, which in effect is what happens in the real world.

Nevertheless, the veto solution has great appeal. In effect, as regards Art. 13 of Regulation (EC) 1346/2000, which is the ancestor of Art. 16 EIR, the Virgos-Schmit Report clearly states: 'The aim of Article 13 is to uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against interference from a different 'lex concursus.'[32] However, it is questionable what this statement really means and, more specifically, how national insolvency laws protect the 'legitimate expectations of creditors or third parties' and, consequently, whether the European Union that adopts the veto solution would be compliant with Art. 5 TEU, where this establishes the principle of proportionality. Art. 5 TUE *inter alia* lays down: 'The use of Union competences is governed by the principle [...] of proportionality' and, again, 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

32 Virgos-Schmit Report, para 138. Moss/Fletcher/Isaacs in Moss/Isaacs (eds), *The EU Regulation on Insolvency Proceedings*, para 138.

In principle, the passage of the Virgos-Schmit Report is open to two alternative interpretations.

The first interpretation refers to what Ehrenberg – in an old, but still topical, seminal paper – called 'Rechtssicherheit' (certainty about the existence of a law, a right or a claim), *i.e.* 'legal certainty.' Ehrenberg writes that 'legal certainty' refers to that feature of each legal system according to which the existence and contents of a law, a right or a claim cannot be put in doubt.[33] If one adopts this interpretation, the Virgos-Schmit passage could be rewritten as follows: 'The aim of Article 13 is to ensure legal certainty regarding the validity of the act in accordance with the normally applicable national law, against interference from a different 'lex concursus'.

This interpretation is, however, implausible for two reasons. First, this reading would mean that, since national laws are certain, private international law would have to introduce conflict rules which do not infringe this national law climate of legal certainty. This is correct, but redundant. Secondly, the need to protect legal certainty in cross-border regulations does not refer to avoidance law only, but is a general stance referring to any field of law[34]. Therefore, if such an interpretation were embraced, it would be inexplicable why the European Union should provide so special a protection in the field of avoidance law only.

The second interpretation refers to what Ehrenberg called 'Verkehrssicherheit' (textually, certainty about the circulation of either a right or a claim), *i.e.* 'the relevance of a state of good faith in the circulation of either a right or a claim.' Ehrenberg writes that 'relevance of a state of good faith in the circulation of either a right or a claim' refers to that feature of each legal system according to which a person who has achieved a right or a claim intentionally or who has been discharged from a previous duty with consent should not experience the negative consequences of

33 Ehrenberg, p. 273 seqq., especially at p. 274 of the reprinted edition (1968). Actually, at p. 279 of the reprinted edition, Ehrenberg adds that the concept of 'legal certainty' can be understood in a narrower sense and that this second meaning refers to that feature of each legal system according to which a person who is entitled to a right or a claim must not experience any change in his or her legal position without his or her consent. However, it is self-explanatory that paragraph 138 of the Virgos-Schmit Report cannot refer to this narrower meaning of 'legal certainty.' In fact, avoidance laws do not grant any protection to the consent of creditors or third parties who – on the contrary and because of a designed choice of policy – are obliged to experience a modification in their position without their own consent.

34 Fuller, p. 38–39, who considers the absence of legal certainty, which Fuller exemplifies in 8 types of malfunctions, as a failure in lawmaking.

those adverse circumstances that prevent him or her from enjoying the new position, *unless he or she was previously aware of the existence of those circumstances*. Consequently, if this interpretation is adopted, the Virgos-Schmit passage could be rewritten as follows: 'The aim of Article 13 is to ensure the relevance of the state of good faith of those creditors or third parties who have relied on the validity of the act in accordance with the normally applicable national law, against interference from a different 'lex concursus».'

This interpretation is certainly plausible because many avoidance rules contain a reference to the mental state of the creditors or third parties in their position as beneficiaries of the debtor's transactions. It is, moreover, attractive, since it is based on the assumption that avoidance laws are designed to ensure protection to beneficiaries who are in good faith.

V. More on applicable law. The limits of the veto solution: the veto solution is based on a misunderstanding according to which avoidance laws ensure protection to beneficiaries in good faith

In Europe, the idea that avoidance laws ensure protection for beneficiaries in good faith is very popular and is based on the observation that, for the success of the action, many jurisdictions require that the opponent should be aware either of the debtor's insolvency or of the existence of a similar circumstance. For example, this observation holds true as regards German law, where Section 130.1 *InsO* lays down: 'A transaction granting or facilitating for an insolvency creditor a security or satisfaction may be contested …if it was made during the last three months prior to the request to open insolvency proceedings, if the debtor was illiquid on the date of the transaction, *and if the creditor was aware of the insolvency on this date*' (emphasis added). The same observation can be made as regards other Member states, such as Austria,[35] France[36] and Italy.[37]

However, we cannot be sure that this assumption is entirely correct. In fact, against the assumption that avoidance law would ensure protection for beneficiaries in good faith one can make the following observations.

35 § 31 *Insolvenzordnung* (*IO*).
36 Art. L632–2 *Code de commerce.*
37 Art. 166 *Codice della crisi d'impresa e dell'insolvenza*.

First, modern avoidance law has its roots in one or more of the remedies that already existed at the time of Roman law and that – among non-specialist in Roman law – are generically unified under the umbrella of *Actio Pauliana* – apparently, at that time the *Actio Pauliana* was only one of the many remedies of this kind.[38] In particular, in this respect the Digest of Justinian reports that, when debtors had fraudulently divested themselves of their assets in order to appear unable to pay their creditors, the judge (*praetor*) granted either the liquidator of the debtors' assets (*curator bonorum*), or the debtors' creditors a remedy that aimed at reversing the effect of this divestment and at giving the liquidator or the debtors' creditors the possibility of foreclosing the assets of their debtors.[39]

Scholars are not sure about the number and contents of these remedies and, in the 19th century, the authors who studied the relevant fragments from an historical point of view were even unsure whether these texts were genuine or had been manipulated. Case by case these scholars regarded with suspicion either those who had compiled the Digest, or those who had handed the Digest down to modern times, or both. More specifically, these scholars thought that some of the relevant fragments might have been changed in order to accommodate the thoughts of Ulpian (who was active between 211 and 222 AD) and Paulus (who was active late 2nd to early 3rd century AD) to the new times, *i.e.* to Justinian's time (who was emperor

38 See what will be said later on, in this section, text and footnotes. After what has been said, it should be clear to the reader that, here, the term *Actio Pauliana* refers to one of the various remedies employed in Roman law, and not to some forms of avoidance actions that are currently in force in many jurisdictions and will be deal with in section 13. For the sake of clarity, the former is called *Actio Pauliana*, while the latter will be called *actio pauliana*.

39 D. 42.8.1 pr. (where 'pr.' stands for 'principium', *i.e.* beginning). This fragment, in a translation by Scott, no page number, reads: 'The Praetor says: 'I will grant an action to the curator of property, or to anyone else to whom it is necessary to grant one, in a case of this kind, within the year in which he has a right to institute such a proceeding, where any act has been committed for the purpose of fraud with anyone who was not ignorant of said fraud, and I will also maintain this right of action against it."(*Ait praetor: 'Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo*"). The Digest was a compendium of Roman law that was drawn up under the Emperor of the Eastern Roman Empire, Justinian I. Nowadays, the Digest is one of the most important sources of Roman law.

from 527 to 565 BC), or/and to the time of the Middle Ages.[40] Nevertheless, these historians had no doubts that, despite the difficulty in dating the suspected manipulations, those fragments register a development in the law of avoidance and trace the evolution from the relevance to the non-relevance of the mental state of the beneficiary of the debtor's transaction. In fact, while in D. 42, 8, 1 pr. the judge is reported to grant the remedy under the condition that the beneficiary of the fraudulent transaction was a person who was not ignorant of the debtor's fraud (*qui fraudem non ignoraverit*), in D. 2. 8. 10. pr. the judge is reported to have granted the same remedy even if such an awareness did not exist (*et si scientia non sit*).[41]

Secondly, it is well known that these fragments had a huge influence on modern codifications, which case by case incorporated either the principle according to which the bringing of avoidance actions *does* require the beneficiary to be aware of the debtor's insolvency, or the opposite, and stricter, principle according to which the bringing of avoidance actions does not require the beneficiary to be aware of the debtor's insolvency.

Generally speaking, the regulation on the avoidance actions which the cheated creditors may bring outside insolvency proceedings has incorporated the principle according to which the avoidance action *does* require the beneficiary to be aware of the debtor's insolvency. For example, this is the case in Austria[42], Germany[43] and Italy.[44]

By contrast, it appears that, depending on the prescription at issue, insolvency law regulations have incorporated both the principle according to which the bringing of avoidance actions *does* require the beneficiary to

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40 Lenel, p. 5 et seqq.; Solazzi, p. 11 et seqq.; and Piano Mortari, p. 5 et seqq. and, with specific reference to the Middle Ages, p. 13 et seqq. and p. 152 et seqq.

41 D. 42. 8. 10. pr. This fragment, in a translation by Scott, no page number, reads: 'The Praetor says: 'Where Lucius Titius, with your privity and to your advantage, has disposed of any property for the purpose of defrauding his creditors, so that an action under my Edict will lie against him for the property in question, when no more than a year has elapsed, as an action with reference to said property can be brought, you must grant restitution, after proper cause has been shown; and even if you were not aware of the fact, I will grant an action in factum."(Ait praetor: 'Quae Lucius Titius fraudandi causa sciente te in bonis, quibus de ea re agitur, fecit: ea illis, si eo nomine, quo de agitur, actio ei ex edicto meo competere esseve oportet, ei, si non plus quam annus est, cum de ea re, qua de agitur, experiundi potestas est, restituas. Interdum causa cognita et si scientia non sit, in factum actionem permittam").

42 § 2 *Anfechtungsordnung*.

43 § 3 *Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens* (AnfG).

44 Art. 2091 *Codice civile*.

be aware of the debtor's insolvency, and the principle according to which the avoidance actions do not. For example, this is the case of Germany where, in addition to prescriptions that require the beneficiary's awareness, Section 134 *InsO* lays down: 'A gratuitous benefit granted by a debtor may be contested unless it was made more than four years prior to the request to open insolvency proceedings'. This is also the case in France[45] and Italy.[46]

Moreover, as regards the above-mentioned jurisdictions (*i.e.* those jurisdictions where some insolvency law prescriptions *do* require the beneficiary to be aware of the debtor's insolvency and other insolvency law prescriptions do not), no one has objected that these legal frameworks prove to be discriminatory. Rather, some years ago a Dutch scholar suggested that the European Union should replace national avoidance laws with a harmonized European Union legal framework that did not contain any reference to the beneficiary's awareness.[47] This double-track regulation confirms that, at least in modern law, proof of the beneficiary's mental state has nothing to do with the protection of the beneficiary's good faith and does not aim at protecting his or her legitimate expectations.

Thirdly, in Germany some prescriptions contain presumptions – albeit rebuttable – according to which the subjective status of the beneficiary's awareness is inferred from another fact, such as the awareness of the disadvantage to the insolvency creditors or the fact that the opponent has a close relationship with the debtor. Consider, for example, Section 131 *InsO*. This long and complex prescription lays down: '(1) A transaction granting or facilitating for an insolvency creditor a security or satisfaction without that creditor's entitlement to such security or satisfaction, or to the kind or date of such security or satisfaction, may be contested if such transaction was made 1. during the last month prior to the request to open insolvency proceedings or after such request; 2. within the second or third month prior to the request to open insolvency proceedings, and the debtor was illiquid on the date of the transaction; 3. within the second or third month prior to the request to open insolvency proceedings, and the creditor was aware of the disadvantage to the insolvency creditors arising from such transaction on its date. (2) For subsection (1) no. 3 to apply, awareness of circumstances necessarily indicating the disadvantage is considered equivalent to awareness of the disadvantage to the insolvency creditors. *A person with a close*

45 Art. L632–1 *Code de commerce*.
46 Art. 163 *Codice della crisi d'impresa e dell'insolvenza*.
47 De Weijs, Int. Insol. Rev. 2011, p. 219 et seqq.

relationship to the debtor on the date of such transaction (section 138) is presumed to have been aware of the disadvantage to the insolvency creditors' (emphasis added).

There is no doubt that this prescription is part of the policy that subordinates the success of avoidance actions to the proof of the beneficiary's mental state. However, if one thought that the proof of the beneficiary's mental state was a device to protect the beneficiary's good faith, this prescription would have to be considered as contradictory. In fact, it alleviates the burden of proof for the insolvency practitioner and, consequently, it proves to be against the interests of the beneficiary.[48] To sum up, this observation confirms again that, at least in modern law, proof of the beneficiary's mental state has nothing to do with the protection of the beneficiary's good faith and does not aim at protecting his or her legitimate expectations.

Fourthly, it is well known that in 1978 the US Congress enacted a new regulation on insolvency law (*The Bankruptcy Reform Act of 1978*) including a regulation on preferences that no longer contained any reference to the beneficiary's mental state (§ 547 *US Bankruptcy Code*).[49] As a result, nowadays insolvency practitioners (bankruptcy trustees) can recover payments and other transfers of property made by the debtor on the eve of the filing for the opening of insolvency proceedings by only proving that these acts have produced an advantage for some creditors at the expenses of others. However, the *travaux préparatoires* to the above-mentioned reform clearly demonstrate that this change in the choice of policy has been well received and no one has observed that it would impair the beneficiaries' legitimate expectations. For example, a distinguished scholar that thoroughly reported this moment of history wrote: 'The draftsmen of the Bankruptcy Reform Act of 1978 addressed the difference in treatment of the two kinds

48 In this respect, see also some observations by Terranova, pp. 4–5.

49 Actually, as regards avoidance actions Continental law is different from US law since the US insolvency practitioners have various avoidance powers depending on the nature of the relevant transactions. Nevertheless, Continental laws and US law seem functionally comparable, and this feature indeed justifies a comparison between the Continental law regulations on avoidance actions and the US regulation on preferences. The previous regulation was laid down by s. 60 of the US *Bankruptcy Act of 1898*. Actually, the *Bankruptcy Reform Act of 1978* kept the reference to the beneficiary's mental state when the beneficiary was an insider-creditor. However, a 1984 amendment eliminated even this reference. The *Bankruptcy Reform Act of 1978* completely replaced the former *Bankruptcy Act of 1898* (Nelson Act). In its turn, the *Bankruptcy Act of 1898,* including the regulation on preferences, was amended many times.

of preferential transfers by almost entirely eliminating any requirement that the creditor have reasonable cause to believe the debtor insolvent. … The Commission proposed a new preference section, which eliminated the requirement that the creditor have reasonable cause to believe the debtor insolvent.' In conclusion he says: 'During congressional hearings on the Commission proposals, no one stated opposition, and for that reason, the proposals received little attention. The National Bankruptcy Conference fully endorsed the proposals.'[50]

VI. More on applicable law. In favour of a referral to the lex fori concursus only

We are aware that this topic would deserve an analysis that delved in greater depth than we were able to do through the above observations.[51] Nevertheless, these comments demonstrate with sufficient clarity that the prerequisite that the beneficiary must have been aware of the debtor's insolvency is not a device to ensure protection to beneficiaries in good faith – otherwise, it would be strange and inconsistent that the German lawmaker and other lawmakers across Europe should have provided for this device for some acts only and even that these lawmakers should have provided some 'in malam partem' presumptions (although rebuttable) according to which the status of awareness can be inferred from other facts. Rather, the above observations demonstrate that the prerequisite that the opponent must have been aware of the debtor's insolvency is not a device to ensure protection to beneficiaries in good faith but, on the contrary, an instrument to make it easier for claimants to prove the opponents' fraudulent behaviour and their role of 'accomplices' of the debtor in the commitment of acts that later on would prove detrimental to the debtor's creditors.

This statement is crucial in setting up European law. It demonstrates that national avoidance laws do not ensure protection to beneficiaries in good faith and, consequently, there is no need for the European Union to 'uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against inter-

50 Countryman, Vanderbilt Law Review 1985, p. 713 et seqq., and, more specifically, at pp. 726–727.

51 But, for a more in-depth analysis, see Mangano, 'Against the veto solution', p. 364 et seqq.

ference from a different 'lex concursus».' Indeed, it is arguable that such a protection granted by the European Union might even infringe Art. 5 TEU, which *inter alia* lays down: 'The use of Union competences is governed by the principle [...] of proportionality' and, again, '*Under the principle of proportionality*, *the content* and form *of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*' (emphasis added). In fact, it could be argued that such a special protection goes beyond the goal of Art. 81 of the Treaty on the Functioning of the European Union (TFEU), which only lays down that 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.'

It is not meant by this that Art. 16 EIR infringes the principle of proportionality. This point would deserve further investigation. However, we do suggest that, if the European Union intends to enact some rules on detrimental acts with third countries, the law that ought to be applicable to these proceedings should be not a combination between the *lex fori concursus* and the *lex causae*, even in the mild form of the veto solution, but the *lex fori concursus* only.[52]

52 On this point, see also Carballo Piñeiro, p. 32 et seqq., who dealt with the topic at issue in Spain. This scholar maintained that Spanish avoidance law did not ensure protection to beneficiaries in good faith, so that a proposal for Spanish international private law rules on detrimental acts with third countries ought to refrain from adopting the veto solution. The coincidence between our position and the position of Laura Carballo Piñeiro is not fortuitous, but is the outcome of a long-lasting and fruitful academic dialogue. In 2004, I published *La revocatoria fallimentare delle attibuzioni indirette*, Torino 2004, where I maintained that Italian avoidance law and other corresponding foreign laws did not ensure protection to beneficiaries in good faith (p. 75 et seqq.) – this volume was reprinted with the same contents in 2005. In 2005, Carballo Piñeiro published *Acciones de reintegración de la masa y derecho concursal internacional*, where she developed the same argument as regards Spanish law and transposed it to the field of private international law (p. 32 et seqq.); in the present paper, I have further developed the achievements of both. I thank Laura for her contribution to our common idea and I add that any error in the present paper is mine.

VII. Recognition and enforcement. In favour of a partial adoption of the MLIJ

The third and last issue to deal with concerns the recognition and enforcement of the judgments issued within the proceedings regarding avoidance law. This issue also includes the recognition and enforcement of those court orders that impose preventative measures aiming at ensuring that their future judgments will be successfully enforced (provisional reliefs).

Basically, three options are available.

The first option consists in adopting a discretionary system of recognition and enforcement according to which the local court or the corresponding local authority that has been requested for recognition and enforcement has discretion to grant assistance to the foreign insolvency practitioner making the request.

Such a system, which is based on the interpretation that the UK courts made of the MLCBI, is particularly respectful of the country where the avoidance judgments must be enforced.[53] However, for this very reason, it does not facilitate the solution of cross-border cases. In fact, from an *ex ante* perspective, it is easy to observe that this system does not create an environment of legal certainty – the insolvency practitioner who intends to bring a cross-border avoidance action cannot have an *ex ante* certainty that the judgment will be recognized and enforced in the relevant jurisdiction. Moreover, evaluated from an *ex post* perspective, this system does not appear to be focussed on maximising the debtor's assets – if the local authorities refuse recognition and enforcement, this refusal is detrimental to the administration of insolvency proceedings.

The second option consists in adopting the MLIJ, which in principle ensures that – if the required conditions are met – the 'insolvency-related judgment shall be recognized and enforced' (Art. 13).[54]

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53 *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236; and *In re OJSC International Bank of Azerbaijan, Bakhshiyeva v. Sberbank of Russia et al [2018] EWHC 792 (Ch)*. For this trend, and the relation that it has with the so-called 'Gibbs-rule' according to which English Courts refuse to enforce foreign judgments that rule modification of, or even discharge from, obligations contracted under English law, see Mevorach, in EBOR 2021, p. 291.

54 UNCITRAL, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments
with Guide to Enactment <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf> (last accessed: 28.10.2022).

This system is certainly much more desirable than that provided by the MLCBI since, under certain conditions, neither the local court nor the corresponding authority has full discretion in cooperation. Nevertheless, the MLIJ also has its limits, since this lays down that the local courts/authorities may refuse to satisfy the request of the foreign insolvency practitioner by raising not only the usual public policy exception – which here also includes the infringements of 'fundamental principles of procedural fairness' – but also an exception grounded on a long and omni-comprehensive list provided by Art. 14 MLIJ. This article lays down: 'In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if: (a) The party against whom the proceeding giving rise to the judgment was instituted: (i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or (ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents; (b) The judgment was obtained by fraud; (c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties; (d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State; (e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State; (f) The judgment: (i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and (ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued; (g) The originating court did not satisfy one of the following conditions: (i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued; (ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law; (iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or (iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State; [States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h).] (h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless: (i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and (ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.'

Lack of space precludes any analysis of this list, which – on the whole – may appear quite understandable within a system of approximation of jurisdictions that does not contain any suggestions regarding applicable law. This is the case of the system set up by the UNCITRAL, since this Commission focussed primarily on the topics of recognition and enforcement.[55] At any rate, this quotation of the full list laid down by Art. 14 MLIJ makes it sufficiently clear that option b) gives the foreign insolvency practitioners less certainty that it promises.

The third option consists in adopting the MLIJ partially and, more specifically, in suggesting that the local court/authority should be able to refuse recognition and cooperation only by raising against the foreign insolvency practitioner the public policy exception in the expanded terms that have been formulated by Art. 7 MLIJ. This article reads: 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.'

Arguably, this option would suit the case well if the European Union intends to set up a legal framework on detrimental acts with third countries.

55 Mevorach EBOR 2021, p. 312–313.

Although this system reduces the guaranties for local courts/authorities, one should bear in mind that the context for which the UNCITRAL issued the MLIJ is partially different from the context for which we are suggesting 'the third option.' In fact, while the former is a context for which the UNCITRAL has not yet suggested any choice-of-law rules, the latter is a context for which we have made such suggestions (→ sections 8 to 11).

VIII. A coda. Extending the above proposals to the 'actio pauliana', provided that this action is brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors

It is arguable that the suggestions that we have put forward as regards insolvency avoidances should be extended to the many forms *actio pauliana* that exist around the world – provided that, of course, the *actio pauliana* is brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors.[56] In many jurisdictions, both outside and inside Europe, insolvency practitioners may bring some actions that derive from the *Actio Pauliana,* which is reported in the Digest of Justinian,[57] and are still known under the label 'actio pauliana'. Under these current laws a creditor or, when insolvency proceedings have been opened, an insolvency practitioner appointed to the already opened insolvency proceedings, may recover those assets that a distressed debtor who/which is not yet technically insolvent has fraudulently transferred to a third party.

At a first glance, the question appears extremely challenging since around the world there are as many *actiones paulianae* as there are jurisdictions that have decided to introduce them into their legal framework. As a result, it might seem that any attempt to answer this question would imply a research study on comparative law of immense scope.

However, if one studies this topic in greater depth, one can realise that this question is easier than expected and, especially, that the rulings of the CJEU play a crucial role in this respect. First, in many cases the CJEU has

56 For example, this choice occurs when the limitation period for the insolvency avoidance has already expired, while the *actio pauliana* is still available.

57 D. 22.1.38.4, which states: '…*Pauliana, per quam (actionem) quae in fraude creditorum alienata sunt revocantur…*'.

ruled – even though implicitly – that the concept of actions concerning 'the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors' must be interpreted in functional terms, having regard more to the purpose of the action than to its nature[58]. Secondly, in the *Feniks* case the CJEU considered an *actio pauliana* under Polish law as an action that, in principle, is included in the concept of those actions concerning 'the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors' and which, in that particular case, could not be included in that list since it was brought by a single creditor in his or her own interests and not by an insolvency practitioner in the interests of the general body of creditors[59].

We are aware that these rulings refer to the topic of *vis attractiva concursus*. Nevertheless, we are convinced that the functional approach adopted by the CJEU provides us with important guidance: the suggestions that we have made in the previous sections as regards avoidance actions may be extended also to the many forms of *actio pauliana* that still exist, provided that these actions are brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors.

D. Conclusions – Our proposal in a nutshell

This paper has tried to demonstrate that the European Union ought to enact a set of uniform private international law rules on detrimental acts that have a connection with third countries and that this regulation is not only desirable but also compliant with the interpretation of Art. 5 TEU that was placed at the basis of both the EIR and Directive (EU) 2019/1043. By contrast, this paper has not dealt with the question of whether the European Union should introduce these rules by means of a regulation, a directive or a non-binding act of Union law. This choice was thought to be more political than academic and, in any case, as a question to be decided as regards all the topics covered by the Project.

This paper has, moreover, tried to demonstrate how these rules ought to be drawn up and, as a result, the following suggestions have been made.

58 CJEU 4.12.2019 – case C-493/18, ECLI:EU:C:2019:1046 paras 22–32 -UB v VA, Tiger SCI, WZ, acting as UB's trustee in bankruptcy, Banque patrimoine et immobilier SA.

59 CJEU 4.10.2018 – case C-337/17, ECLI:EU:C:2018:487- Feniks Sp. z o.o. v. Azteca Products & Services SL.

- The rules on jurisdiction should provide for an opt-out rule imposing the *vis attractiva concursus* that may be waived in favour of the forum of the defendant's domicile and, in case of an agreement between the relevant parties, in favour of the forum that both parties consider as the most convenient. This choice of policy allows the insolvency practitioner who intends to bring an avoidance action to evaluate whether or not it is more appropriate to have this action concentrated in the *forum* of the insolvency proceedings. Especially in group insolvencies, this discretionary space could allow insolvency practitioners to put the decision whether or not to adopt the *vis attractiva* at the core of the negotiations that are usually carried out with the other insolvency practitioners.
- The rules on applicable law should provide for a referral to the *lex fori concursus* only, first because the veto solution reduces the chances of success of avoidance actions; secondly, and especially, because in our opinion this choice of policy is based on the misunderstanding that avoidance actions ensure protection to beneficiaries in good faith.
- The rules on recognition and enforcement should partially adopt the MLIJ. In fact, the paper suggests that a country can refuse the recognition of a foreign judgment simply by raising the public policy exception in the expanded terms that have been formulated by Art. 7 MLIJ. This article reads: 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.'
- The proposed rules on detrimental acts with third countries should be extended to the many forms of *actio pauliana* that exist around the world, provided that these actions are brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors.

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