



# The Application of the Visa Attractiva Concursus Principle



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## in the Saudi Bankruptcy Legal Framework

### Introduction

The *vis attractiva concursus* principle or the attracting force of the bankruptcy proceeding is a principle that implies that all ancillary proceedings may be attracted to and brought before the *forum concursus*. In other words, the court that has opened insolvency proceedings claims sole jurisdiction to deal with the claims of creditors and any incidental disputes arising from the debtor's insolvency.

The practical importance of considering the extent to which this principle is applicable raises several questions. how can the efficiency and effectiveness of bankruptcy procedures be reconciled with the parties' rights to due process? how is this principle applied in the various ancillary proceedings, particularly when there is an arbitration agreement? finally is this principle applicable in the context of cross-border insolvencies?

This article will explore how this principle is applied in Continental Europe, The United States and Saudi Arabia.

### Europe

#### Efficiciency and due process: are they at odds in bankruptcy proceedings?

The application of the *Vis Attractiva Concursus* Principle raises concerns about its consistency with the parties' due process rights. This principle shifts the case from the forum designated by procedural law to the bankruptcy courts. Such an exception may surprise the parties, and, thus affect their due process rights. This issue has been examined by the European Court of Justice

(The ECJ). The ECJ concluded that concentrating all the actions directly related to the insolvency of an undertaking before the courts of the Member State with jurisdiction to open the insolvency proceedings also appears consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings. The ECJ also found it necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)<sup>1</sup>.

## Scope of the principle and the different types of ancillary proceedings

The new European Union Regulations on Insolvency Proceedings provided that the courts of the member state within the territory of which insolvency proceedings have been opened shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions<sup>2</sup>.

To determine whether an action derives directly from insolvency proceedings, The decisive criterion adopted by the ECJ to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings<sup>3</sup>.

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<sup>1</sup> ECJ judgement of 12 February 2009, Christopher Seagon v Deko Marty Belgium NV., Case C-339/07, European Court Reports 2009 1-00767.

<sup>2</sup> Article (6), Paragraph (1) of the European Union Regulations on Insolvency Proceedings of 20 May 2015.

<sup>3</sup> ECJ judgment of 4 September 2014, Nickel & Goeldner Spedition v Kintra UAB, Case C-157/13.

In another case, the ECJ limited the application of the principle of *vis attractiva concursus*. The Court ruled that an action for damages for unfair competition, in which the assignee of part of a business acquired during insolvency proceedings is accused of misrepresenting itself as the exclusive distributor of products manufactured by the debtor, does not fall within the jurisdiction of the court that opened the insolvency proceeding<sup>4</sup>.

## United States

The principle of *vis attractiva concursus* is a concept from civil law systems where the initiation of insolvency proceedings centralizes all related legal actions and claims to the court handling the insolvency case. This means that all matters pertaining to the debtor's estate are drawn into the jurisdiction of the insolvency court. In the context of the United States, which operates under a common law system, the principle as it is traditionally understood in civil law jurisdictions does not apply. However, the U.S. Bankruptcy Code does embody a similar centralizing principle to some extent. Here are the relevant aspects of how this works in the U.S.:

### Automatic Stay

When a bankruptcy petition is filed, an automatic stay immediately takes effect, halting most actions by creditors against the debtor or the debtor's property. This stay aims to preserve the estate and ensure that it can be distributed equitably among creditors through the bankruptcy proceedings. Prohibited collection actions are listed in Bankruptcy Code §362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing

<sup>4</sup> ECJ judgement of 9 November 2017, Tünkers France, Tünkers Maschinenbau GmbH, Case C-641/16.

or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.

## Jurisdiction of Bankruptcy Courts

U.S. bankruptcy courts have comprehensive jurisdiction over matters involving the debtor's estate. This includes the power to hear and determine all cases under the Bankruptcy Code. Additionally, bankruptcy courts have jurisdiction over all property, wherever located, of the debtor's estate. The bankruptcy court considered whether foreign creditors could be held accountable for violating the automatic stay as a result of the creditors procuring the arrest of one of the debtor's vessels in a Belgian court in order to compel payment of pre-petition claims owed by the debtor to the foreign creditors. In considering the question, the bankruptcy court began its analysis with a discussion of whether it could exercise *in personam* jurisdiction over the foreign creditors. With respect to one of the creditors, Andrea Shipping (PTH) Ltd., the court stated that it clearly has personal jurisdiction over Andrea Shipping because Andrea filed a proof of claim and has therefore consented to the jurisdiction of the United States Bankruptcy Court<sup>5</sup>.

## Centralization of Disputes

Much like *vis attractiva concursus*, U.S. bankruptcy law aims to centralize disputes related to the bankruptcy estate to streamline the process and ensure consistent adjudication. This centralization helps in managing the debtor's estate effectively and efficiently. The Seventh Amendment to the United States Constitution provides that parties litigating in federal court have

<sup>5</sup> United States Bankruptcy Court, M.D. Florida, Bankruptcy No. 95-10453-8P1. Adv. No. 97-365, March 12, 1997.

the right to a trial by jury in civil cases. This right to a jury trial is subject to being waived and, in the context of a bankruptcy case, may be waived unintentionally as a result of filing a proof of claim<sup>6</sup>

In conclusion, while the U.S. does not explicitly adopt the *vis attractiva concursus* principle, the Bankruptcy Code incorporates mechanisms that achieve a similar effect. These mechanisms centralize the handling of the debtor's financial matters and disputes within the bankruptcy court system. Key features include the automatic stay, which halts most creditor actions against the debtor's estate upon the filing of a bankruptcy petition, and the comprehensive jurisdiction of bankruptcy courts over all matters related to the debtor's estate. This centralization ensures efficient and consistent adjudication of claims and disputes, mirroring the intent of *vis attractiva concursus* in civil law jurisdictions.

## Saudi Arabia

The principle of *vis attractiva concursus* is not explicitly provided for in the Saudi Bankruptcy legal system. However, some procedures within the system have equivalent effects. These include the moratorium, which suspend all actions and enforcement procedures against the debtor or the debtor's estate. Additionally, Saudi law grants comprehensive jurisdiction to commercial courts handling bankruptcy cases, allowing them to decide on creditors' claims regardless of their origin.

## Mortorium

<sup>6</sup> Richard E. Lear, proof of claim: To File, or Not to File..., Holland & Knight Newsletter, February 2009.

The Saudi Bankruptcy Law incorporates a moratorium period in both financial reorganization and liquidation processes. Under the financial reorganization procedure, the moratorium spans 180 days from the filing date, with the provision for a potential extension of another 180 days at the discretion of the court. This moratorium commences upon filing but can be terminated prematurely if the court approves the financial reorganization proposal or decides to conclude the financial reorganization proceedings. In the liquidation procedure, the moratorium starts upon filing and remains in effect until the liquidation process is terminated.

During the moratorium period, no action, claim, or enforcement procedure can be initiated or continued against the debtor, the estate, or any debtor guarantor. This restriction applies across all jurisdictions with the authority to hear such claims or actions. The moratorium thus constitutes a legally binding suspension of the right to pursue debts from the debtor or the estate. Any action or enforcement procedure undertaken during the moratorium is deemed null and void. Furthermore, the commercial court retains the authority to reclaim any assets disposed of in contravention of the moratorium restrictions.

## Jurisdiction of Commercial Courts

In Saudi bankruptcy law, for both financial reorganization and liquidation procedures, creditors whose debts predate the commencement of the procedure need to file their claims with the bankruptcy trustee. After receiving and considering proofs of claims, the trustee will then create a list of creditors, which must be submitted to the court for approval.

Under Saudi bankruptcy law, the commercial court maintains jurisdiction over claims that might originally fall under different court domains. This means a labor claim, originally under the jurisdiction of the labor court, an alimony claim originally under the jurisdiction of the personal

status court, or a banking claim originally under the jurisdiction of the banking dispute committee, can all come under the jurisdiction of the commercial court in a bankruptcy case. Moreover, this principle applies even when an arbitration clause is in place. When submitting a claim to the commercial court under bankruptcy procedure, the creditor is considered as waiving the previously agreed upon arbitration clause.

If a creditor chooses not to submit his claim to the commercial court, but instead waits to file a claim in the appropriate forum after the moratorium, there could be several repercussions:

1. In the financial reorganization processes, the creditor would be ineligible to vote on the proposal. This means they would forfeit any say in shaping the proposal, including any debt impairment where they do not bear any voting rights. Moreover, the creditor might no longer have the right to challenge the proposal's ratification by the court.
2. As for liquidation processes, the creditor might risk missing out on their rightful share when the estate's liquidated assets get distributed.

## Centralization of Disputes

There are some other examples of the centralized approach of the Saudi Bankruptcy law which include:

1. The law suggests that any request to initiate a bankruptcy procedure relevant to a regulated entity must be preceded by an approval decision from the competent regulatory authority responsible for overseeing and supervising the entity's activities. The law, interestingly, grants the commercial court the jurisdiction to handle disputes arising from these competent authority decisions. This is true even if the authority is an administrative body, which traditionally would fall under the jurisdiction of the board of grievances.

2. Article 6 of the law confers jurisdiction upon the commercial court to oversee the enforcement of its decisions and judgments, as well as to address any disputes arising from such enforcement.
3. Article 208 of the law grants the commercial court criminal jurisdiction to adjudicate cases related to bankruptcy and levy penalties.
4. Article 3 of the Rules Governing Bankruptcy Procedures in Commercial Courts empowers the commercial court to adjudicate debtor claims against third parties arising from bankruptcy procedures.

## Conclusion

The attracting force of bankruptcy court jurisdiction is crucial for successfully resolving insolvencies. A centralized approach to managing bankruptcy-related claims fosters efficient administration of justice, prevents forum shopping and abuse of the process, and equips bankruptcy proceedings with the necessary tools for effective financial reorganization or liquidation.

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