Harmonising Transaction Avoidance inside and outside Corporate Insolvency Law in the European Union

Oriana Casasola

Submitted in accordance with the requirements for the degree of doctor of philosophy

The University of Leeds
Faculty of Social Science
School of Law

May, 2020

The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

Acknowledgements

Firstly, I would like to express my sincere gratitude to my supervisors Professor Gerard McCormack and Dr Zinian Zhang, for the gentle guidance and their insightful comments which made me consider my research from different perspectives.

My sincere thanks also go to my PhD colleagues and friends for the stimulating discussions, the laughter and tears shared in the past years. Last but not the least, I would like to thank my family, my friend Elisa and my fiancé Martin for their emotional support.

Abstract

The thesis addresses the topic of the harmonisation of transaction avoidance in the European Union (EU). In the light of the unsatisfactory transaction avoidance regimes in cross-border scenarios as provided by the European Insolvency Regulation recast and other EU regulations, this study aims to contribute to the formulation of harmonised avoidance rules for the EU. In particular, this study analyses the issues concerning the avoidance powers in insolvency proceedings and the transaction avoidance claims available in private law.

The study compares the avoidance actions within and outside insolvency proceedings in selected member states: England, Germany, and Italy. The work is organised into three parts. The first part provides a theoretical background to the thesis and it is organised into two chapters. After the introduction, the first chapter supplies the research with the definition of 'harmonisation' and 'transaction avoidance' in insolvency law and private law. Chapter three analyses the current EU regulations on the topic. It explains the problems emerging in the Private International Law approach adopted at the EU level and it illustrates the reasons why the current EU system of transaction avoidance is unsatisfactory.

The second part of the thesis analyses three legal systems: England, Germany, and Italy. This section is organised into three chapters; each chapter analyses the avoidance regimes adopted in each national legal system. Every chapter considers both insolvency and private law claims and it analyses how they interact within the national legal system.

Finally, the third part seeks to provide a solution to the problems illustrated in the second chapter. This part is divided into two chapters. One chapter provides a comparative analysis of the national legal systems. The last chapter designs guidelines for the further harmonisation of the transaction avoidance claims inside and outside insolvency law at the EU level, in order to improve the EU Insolvency system and strengthen the framework for credit enforcement across EU.

Table of Contents

List of Tables

List of Figures

Chapter 1
Introduction

1.1. The Background to the Study: The Unsatisfactory Transaction Avoidance Legal Regime in the Cross-border Scenario

The number of insolvency proceedings filed in the majority of the European Union (EU) member states has reached record peaks in the last years. It is estimated that an average of 200.000 firms is wound-up each year.[1] One out of four of these proceedings involves companies with cross-border elements.[2] Within the area of corporate insolvency law, one of the most debated issues is transaction avoidance, which refers to a set of rules that set aside transactions undertaken by a debtor at the eve of the insolvency and that might hinder the interests of the general body of creditors. [3]

The current European Union (EU) provisions on the subject provide an uncertain legal scenario, which is unsatisfactory for the legal standards of the EU. This brief introduction to the problem outlines the legal developments of the subject and the reasons why the current legal framework is unsatisfactory, which will be later analysed in more details in chapter three.

The umbrella of transaction avoidance encloses a broad range of legal claims both within insolvency law and under the general law. On the one hand, avoidance powers are granted to the insolvency practitioner in all the member states.[4] The powers granted to the insolvency practitioner allow them to set aside transactions concluded before the opening of the insolvency proceedings and that might be detrimental to the general body of creditors.[5]

---

1 Commission Staff Working Document, 'Impact Assessment accompanying Commission Recommendation on a New Approach to Business Failure and Insolvency' SWD (2014) 61 final, 2.

2 ibid.

3 INSOL Europe, 'Harmonization of Insolvency Law at EU Level' PE 419.633, April 2010 <https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-jurint2010419633en. pdf > accessed 21.07.2020

4 Gerard McCormack, Andrew Keay, Sarah Brown, *European Insolvency Law: Reform and Harmonisation* (Edward Elgar 2017) 130 ff.

5 ibid.

The concept of transaction avoidance is a cornerstone in the field of insolvency law. It permits the restoration of the insolvency estate's integrity, and it enhances two of the scopes of insolvency law: (i) the maximisation of the value of the estate; and (ii) the equalisation of the distribution among the creditors.[6] Indeed, transaction avoidance seeks to set aside transactions, which value would otherwise fall outside the statutory distribution scheme of the insolvency proceedings.

Notwithstanding the common recognition of the relevance of avoidance powers among the EU member states, the legal responses on transaction avoidance are diversified with regards to the procedure and the detailed rules.[7] In particular, there are diverse types of legal acts that can be detrimental to the insolvency estate, but their categorisation is not always precise.

At the EU level, substantive insolvency law is not harmonised. This means that the insolvency proceedings have different national procedural rules, and this can lead to different outcomes. However, the EU member states have reached an agreement on uniform rules of jurisdiction, recognition, and enforcement of insolvency proceedings having cross-border elements. The European Insolvency Regulation (now Recast) deals with the issues of private international law arising in cross-border insolvency proceedings that are left out of the Brussels I Regulation on jurisdiction and recognition and enforcement of judgements in civil and commercial matters.[8]

The European Insolvency Regulation Recast (EIR(R)) has been the product of numerous compromises. One of them is the regime of transaction avoidance. In principle, Article 7(m) of the EIR(R) sets that the *lex fori concursus* determines the rules relating to the voidness, voidability or unenforceability of legal acts that are detrimental to the general body of creditors.[9] However, the same regulation provides the person who benefits

---

6 Andrew Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79, 83.

7 Ibid; McCormack, Keay and Brown (n 4).

8 Gerard McCormack, 'Reconciling European Conflicts and Insolvency Law' (2014) 15(3) European Business Organization Law Review, 15(3), 309.

9 Regulation (EU) 2015/848 of The European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L141/19, Article 7.

from the detrimental act can prove that the act is subject to the law of a different member state and that such law does not allow the act to be challenged.[10]

The recent EU legislative developments have placed the issue of transaction avoidance in the limelight. Moreover, the EIR(R) has slightly modified the previous regime of avoidance actions. Chapter three of this thesis will examine the EIR, the developments of the Court of Justice of the European Union (CJEU) and the current EIR(R) framework concerning transaction avoidance actions in insolvency law.

Preliminarily, it can be said that there have been some studies on the topic of avoidance actions at the EU level. Many scholars questioned the exception set in Article 13 (now Article 16). It has been argued that this exception depletes the insolvency estate, and it undermines the principle of legal certainty, allowing the phenomenon of forum shopping.[11]

Indeed, the creditors who are not directly involved in the detrimental transaction are left without a valid claim when the parties of the transaction choose an applicable law that does not allow the act to be challenged. At the same time, other positions embrace the possibility of forum shopping granted by the provision as a mean for enhancing the restructuring possibilities of the company in distress.[12]

The complexity of transaction avoidance in cross-border insolvency and the unsatisfactory compromise embodied in the EIR(R) has encouraged both the European institutions and scholars to explore a different approach. In particular, in 2010, the INSOL EUROPE note on the Harmonisation of Insolvency Law at the EU level has listed avoidance actions among the most critical aspects of insolvency law to be considered for harmonisation.[13]

---

10 ibid, Article 16.

11 Laura Carballo Piñeiro, 'Towards the Reform of the European Insolvency Regulation: Codification Rather than Modification' (2014) 2 Nederland Internationaal Privaatrecht 207.

12 Oscar Couwernberg and Grietje T. de Jong, 'Redeeming Art. 13 of the European Insolvency Regulation: A Law and Economics Argument to Help Financially Distressed Companies to Restructure' (2014) 1 European Journal of Comparative Law and Governance 58, 59.

13 'Harmonization of Insolvency Law at EU Level' (n 3).

Following the note on harmonisation, some scholars have tried to propose an EU avoidance actions regime.[14] However, little has been done at the EU level from a legislative point of view. To date, while the harmonisation of transaction avoidance seems almost inevitable for the scholarship, the EU legislation has not attempted to deal with the issue yet.

At the same time, the general law of the EU member states provides the possibility for a creditor to require set aside debtor's transaction when this is detrimental to the creditor's interest outside the framework of insolvency law.[15] Most European legal systems present this type of claims outside insolvency law, and the regimes of such legal responses are largely diversified.[16] Such actions not only are not harmonised, but they are also poorly coordinated within the EU Private international law framework.[17]

In such a scenario, this research aims to contribute to the discourse on the harmonisation of transaction avoidance. The research seeks to analyse the current EU framework and conduct a comparative study on transaction avoidance actions available inside and outside insolvency law. Such comparison aims to support the assessment of the possibility of harmonising the subject and the elaboration of harmonised transaction avoidance rules.

1.2. Aims and Objectives

The thesis addresses the harmonisation of insolvency transaction avoidance, and transaction avoidance claims available under the general law that may be

---

[14] Roelf Jakob de Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) 20 International Insolvency Review 185; Andrew Keay, 'The Harmonisation of the Avoidance Rules in European Union Insolvency' (2016) International and Comparative Law Quarterly 79 (Keay I); Andrew Keay, 'Harmonisation of Avoidance Rules in European Union Insolvencies: the Critical Elements in Formulating a Scheme' (2018) Northern Ireland Legal 85 (Keay II). Moreover, Professor Reinhard Bork is currently working on the research project 'Harmonisation of Transactions Avoidance Laws ' at the Business & Law Research Centre at Radboud University.

[15] Kristin Van Zwieten, 'Related Party Transactions in Insolvency' (2018) 401 ECGI Working Paper Series in Law.

[16] Ibid.

[17] Laura Carballo Piñeiro, 'Acción Pauliana e Integración Europea: Una Propuesta de Ley Aplicable' (2012) 54 Revista Española de Derecho Internacional 43; Ilaria Pretelli, 'Cross-border Credit Protection against Fraudulent Transfer of Assets: Actio Pauliana in the Conflict of Laws' (2011) 13 Yearbook of Private International Law 589; Tuula Linna, 'Actio Pauliana 'Actio Europensis"? Some CrossBorder Insolvency Issues' (2015) 10 Journal of Private International Law 69.

of relevance within the insolvency proceedings. Ultimately, the study aims to contribute to the formulation of harmonised rules on transaction avoidance at the European Union level.

In order to achieve this overall aim, the first objective of the thesis is to analyse the current Private International Law regulations developed by the European Union. In particular, the analysis of this framework seeks to highlight the current issues concerning jurisdiction and applicable law that may be resolved by a harmonisation process.

In addition to the analysis of the EU rules, the study seeks to analyse the legal framework of three European Union countries: The United Kingdom, Germany, and Italy. Economic and legal reasons motivate the selection of these countries. From an economic point of view, the selected countries are among the four biggest economies in the EU.[18] From a legal point of view, their legal systems present different transaction avoidance regimes, which peculiarities require an in-depth analysis.

The selection considers the dichotomy between civil law and common law systems. The continental civil law systems share some similarities both concerning their legislative method and their historical development of transaction avoidance actions. Indeed, the civil law systems present a distinction between avoidance actions in insolvency and private law. These counties share the common root of the avoidance action in the Roman *actio pauliana.*[19] At the same time, they show different developments in the relationship between the actions available in insolvency proceedings and the claims available under the general law.

Among the continental civil law legal systems, the research focuses on Germany and Italy. Italy has been selected as an example of legislation based on the *code napoleòn*. The reasons behind this choice are not limited to the researcher's familiarity with the Italian legal system and the operational language. The selection of Italy is also motivated by the strong connection of

---

18 Eurostat Comparison GDP <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1?inheritRedirect=true> accessed 21.07.2020.

19 Ilaria Pretelli, *Garanzie del Credito e Conflitti di Leggi: Lo Statuto dell'Azione Revocatoria* (Editoriale Scientifica 2010) 95 and 104.

the Italian transaction avoidance with the original *actio pauliana* and the relevant scholarship on the topic. Moreover, Italy constitutes an interesting case study because of the recent legislative developments that introduced a new form of transaction avoidance just in 2015. [20]

In contrast, Germany has been chosen because of its detailed articulation of transaction avoidance claims both in insolvency law and general law. Germany presents a comprehensive regulation of transaction avoidance in insolvency law.[21] Also, it provides a specific legislative act that deals only with the regulation of transaction avoidance in private law.[22] Moreover, the German legal system provides rules of coordination between the claims of insolvency law and private law. Finally, this system offers rules of private international law specifically for the claims at stake.

Finally, England has been selected as its legal system stands out for at least two reasons. First, the English system provides for complex and detailed regulation of several hypotheses of detrimental acts within the insolvency framework.[23] Second, England presents a historical development of the transaction avoidance claims that is independent from Roman law. In England, the *actio pauliana* as such does not exist. Instead, there are insolvency provisions on detrimental transactions that are applicable outside the insolvency framework.[24]

The diversity of such a selection represents three different legal families in the European context.[25] The United Kingdom is a representative of the common-law tradition (Anglo-American Legal family), Germany represents the Germanic legal family, and Italy represents the Romanistic legal family.[26] The rationale behind this choice is that these three families present significant

---

20 Law Decree 27.05.2015 n 83.

21 Insolvency Order of 5 October 1994 (Federal Law Gazette I p. 2866), which was last amended by Article 24 (3) of the Act of 23 June 2017 (Federal Law Gazette I p. 1693) Sections 129-147.

22 Anfechtungsgesetz of 5 October 1994 (BGBl. I p. 2911), which was last amended by Article 3 of the Act of 29 March 2017 (BGBl. I p. 654).

23 Insolvency Act 1986, Sections 238-246 and 423 ff.

24 ibid, Section 423.

25 Mariana Pardgendler, 'The Rise and Decline of Legal Families' (2012) 60 The American Journal of Comparative Law 1043.

26 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998).

differences among each other, particularly in private law.[27] As the study seeks to bring convergence among the member states' legal regimes, the study selected the countries that *prima facie* appear more different. The underlining assumption is that different legal families may bring forward different legal responses, and that harmonisation is more easily achievable among member states belonging to the same legal families.[28]

A third objective of the thesis is to compare the previously analysed legal systems. The purpose of the comparative analysis is to evaluate the similarities and differences emerging among the selected countries and increase the understanding of transaction avoidance. Conversely, this is functional to the development of further integration of the transaction avoidance claims at the European Union level.

Finally, the last objective is to design the harmonised rules of transaction avoidance. Indeed, the study will propose a partial harmonisation of the transaction avoidance rules that fit within the current EU PIL overall framework. On the one side, the thesis suggests a new system of PIL rules to determine when to apply the proposed harmonised rules. One the other side, it provides detailed guidance on the content of the proposed harmonised substantive rules inside and outside insolvency law.

1.3. The Research Questions

The research addresses several different research questions. The main research question is: 'how to harmonise transaction avoidance in the European Union in insolvency law and private law?' In answering this question, the thesis seeks to respond to several sub-questions.

First, this introduction (chapter 1) seeks to provide what is the main object of the thesis and what is the approach to the research. Moreover, chapter two provides a preliminary study that attempts to define the most relevant concept of the thesis. In particular, it aims to answer the question: 'What do 'harmonisation' and 'transaction avoidance' mean?'.

---

27 Pardgendler (n 25).
28 Ibid, 1066 ff.

Chapter three seeks to discuss 'what is the EU regulation of transaction avoidance?'. In particular, it addresses how the EIR(R) works, and it analyses the issues concerning transaction avoidance in cross-border insolvency. At the same time, chapter two looks into how transaction avoidance outside insolvency law is regarded at the EU level.

Chapter four, five, and six analyse the national regulations of the selected member states. In particular, chapter four responds to the question of what the English regulation of transaction avoidance is. Similarly, chapter four answers to the question of what the German approach to transaction avoidance is. Likewise, chapter six looks into the Italian regulation of transaction avoidance.

Following the analysis of the individual legal systems, chapter seven compares the countries responses to transaction avoidance. In particular, the research objective of the chapter is to evaluate what are the differences and commonalities between the transaction avoidance regimes of the analysed legal systems.

Building upon the comparative knowledge of the previous chapters, chapter eight seeks to answer the question of 'how to harmonise transaction avoidance in the EU?'. Such a research question looks at both transaction avoidance in insolvency proceedings and under the general law.

1.4. The Structure of the Thesis and Outline of the Chapters

The harmonisation of substantive insolvency law at EU level could be seen as a controversial topic due to the various political interests involved in the insolvency of companies with significant dimensions and cross-border features.[29] The complete harmonisation of the field is unlikely to happen soon. However, stronger coordination in some aspects of cross-border insolvency could help to increase the efficiency of the insolvency proceedings and by improving legal certainty within the EU internal market.

This thesis addresses the topic of the harmonisation of transaction avoidance claims at the EU level, and its present and possible future developments. On

---

[29] Paul Omar, 'Genesis of the European Initiative in Insolvency Law' (2003) 12 International Insolvency Review 147,148.

the one side, it analyses transaction avoidance claims available in insolvency law. On the other side, it investigates the claims available in private law that are often intertwined with the insolvency proceedings. Ultimately, the purpose of the study is to contribute to the elaboration of harmonised transaction avoidance rules for the EU.

The study is organised into three parts. The first part examines the theoretical background of the study. The second part critically analyses of selected national legal systems. Finally, the last part provides a comparative analysis of the selected countries, and it seeks to elaborate guidelines for a further harmonisation on the topic.

The first part of the study is organised into two chapters. Chapter two elaborates a working definition of ‘transaction avoidance’ and ‘harmonisation’. Two separate definitions of transaction avoidance are provided: one for the claims available in insolvency law and one for transaction avoidance claims under the general law. Moreover, the chapter seeks to define the concept of ‘harmonisation’, focusing on the EU harmonisation process. In particular, it seeks to explain the different methods and types of harmonisation available within the EU.

Chapter three analyses the current EU regulation of the topic of transaction avoidance. In particular, due to the Private International Law (PIL) nature of the regulations adopted by the EU, the chapter provides a critical analysis of the issues of PIL arising within the European Union.

First, the chapter focuses on the European Union approach to cross-border insolvency. Second, it analyses the PIL issues emerging in the Insolvency Regulation (now Recast) concerning transaction avoidance claims. Third, the chapter addresses the general EU framework of Private International Law, and it seeks to analyse how transaction avoidance actions available under the general law are regulated at the EU level.

The second part of the research is divided into three chapters. This organisation reflects the content of the chapters. Every chapter deals with a national legal system, namely England, Germany, and Italy. These chapters are organised in a similar structure. A first substantive section explains the general structure of the insolvency law in the selected country. A second main section addresses the individual claims available in insolvency law under

separate headings. Finally, the third part analyses the transaction avoidance claims available outside the insolvency procedural framework.

The third part of the study is divided into two sections. The first section includes a comparative analysis of the selected national legal systems. It evaluates similarities and differences of the claims available in the chosen legal systems. First, it analyses whether there are substantial differences in the nature, scope, and effects of the claims among the legal systems. Second, it evaluates whether there are substantial differences between avoidance actions in insolvency and those in private law, considering the different scope of application of these branches of law. The analysis of the limits and tangling borders between these two branches of law seeks to create a harmonised avoidance action that is consistent not only with the insolvency law scope but also with private law.

The second section of the third part of the thesis is the concluding chapter. The chapter seeks to elaborate on the possible solutions to the unsatisfactory results of the current PIL regulation. In particular, it aims to address the harmonisation of the regime of transaction avoidance at the EU level. Moreover, the chapter suggests the possibility to harmonise the regime applicable to transaction avoidance actions available both in insolvency law and in private law.

Chapter eight proposes a partial harmonisation of transaction avoidance rules to fit within the current EU PIL framework. The chapter suggests a new system of PIL rules that seeks to determine when to apply the harmonised rules and how to implement the proposal at the EU level. The thesis proposes enacting a Regulation that partially harmonises transaction avoidance.

The study suggests that such regulation should be coordinated with the EIR(R) by private international law principles that delimit their scope of application. The final proposal is to apply substantively harmonised avoidance rules only to cross-border transactions, leaving to national legislation the regulation of purely domestic transaction avoidance disputes. The final chapter provides detailed guidance on when a transaction avoidance claim has a cross-border dimension, and on the content of the proposed harmonised substantive rules in insolvency and under general law.

1.5. The Methodology

The proposed research is a doctrinal study that focuses on transaction avoidance claims by examining approaches from different branches of law. The study addresses the topic of transaction avoidance claims in insolvency law and under the general law. Moreover, the research encompasses the study of EU law and the EU rules of Private International Law. Also, the thesis provides a comparative analysis of three national legal systems.

First, the study focuses on the EU legal framework, comprehensive of the EU legislation and the EU legal practice. In particular, the European Regulation on Insolvency Proceedings n. 1346/2000 (that applied until the 25th June 2017),[30] and to the recent European Regulation on Insolvency Proceedings n. 848/2015 (that has been approved on the 26th of June 2015 and entered into force on 26 June 2017) are subject of critical analysis.[31]

Moreover, the research considers other EU instruments of Private International Law (PIL), such as the Brussels I Regulation (recast),[32] Rome I and Rome II Regulations.[33] In the analysis of these EU regulations, attention is given to the nature of Private International Law. In particular, the scope of Private International Law is to coordinate legal systems and legal institutions.

Private International Law cannot be considered a self-sustaining law but, instead, it should be deemed a 'meta-law', as a branch of law that governs the relationship among different national laws.[34] Therefore, the research takes into account the limits of PIL in relation to the topic of the thesis, which involves not only different parties but also several contrasting values and principles.

---

30 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ L 160.

31 Regulation (EU) 2015/848 of The European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L141/19.

32 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (recast) [2012] OJ L351/1.

33 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2007] OJ L 199/40.

34 David Stewart, 'New Directions in Private International Law' (2009) 16 Agenda Internacional 255, 268.

Moreover, the study critically reviews the jurisprudence of the Court of Justice of the European Union and its recent developments. Also, the research considers the various reports dealing with the harmonisation of insolvency law and avoidance at the EU level. Furthermore, the doctrinal research is strengthened by the relevant legal literature on European harmonisation, insolvency law, and avoidance actions both in private law and in insolvency law.

Second, the study compares the national rules on transaction avoidance available both in the context of insolvency and private law. The countries subject to the comparative analysis are England, Germany, and Italy. In the contextualised analysis of these different legal systems, the research focuses on primary and secondary legal sources. National regulations are analysed, considering their legal framework of reference. In addition, the study of these legal systems encompasses the research of the case law and the analysis of the relevant jurisprudence on the topic of transaction avoidance.

The thesis offers two types of comparative studies. First, it analyses objectively and systematically the responses offered by the selected legal system to given legal problems. The identified issues are (i) transactions undertaken at the eve of insolvency that are detrimental to the general body of creditors; (ii) transactions that are detrimental to a creditor outside the framework of insolvency law. Chapter four, five and six respectively analyse how England, Germany and Italy modulate their legal response to these issues. Second, the thesis provides a comparison of the three selected legal systems. Specifically, chapter seven seeks to analyse the commonalities and differences among the responses provided by England, Germany, and Italy.

Different comparative methods support these comparative studies. In particular, the research encompasses the functional method, the analytical method, and the structural method. The functional method looks at the function of the legal institutions and compares legal institutions that are functionally equivalent.[35] In this sense, the research analyses equivalent responses to the issues identified above.

---

[35] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1, 9.

The functional method is supported by the structural method that requires the comparatist to look beyond the specific legal rules and assess the framework in which the rules sit.[36] Indeed, the research will provide a comprehensive but synthetic analysis of the national insolvency law frameworks where the claims take place.

In contrast, such a comprehensive analysis of the framework will not be given for the private law actions of transactions avoidance. Such analysis would require an immense effort in analysing the complex system of private law of England, Germany, and Italy. Nevertheless, particular attention has been reserved for some specific concepts of private law that are of relevance for the avoidance claim.

Moreover, the research is supported by the analytical method. In comparative law, the analytical method provides an abstraction of the legal concept that is subject of comparison (i.e. the ideal type).[37] Chapter two seeks to lay down an abstract definition of transaction avoidance that is disengaged from any particular legal system, that aims to clarify the subject of the research and the comparison.

In adopting a comparative approach, the researcher is aware of its limits and possible drawbacks. In particular, the analysis of the national legal system is going to be conducted with a third-party point of view. The researcher is aware of the limits of the research due to her externality from the legal systems analysed.

First, the comparative research can be to be intended as a translation of legal concepts.[38] This legal translation is informed by two contrasting principles: readability and authenticity.[39] It is acknowledged that at times the study will have to sacrifice readability in order to express the legal concepts in their authenticity. In contrast, at times, the translation of a legal concept may be slightly approximated in order to facilitate its understanding.

---

36 ibid, 11.
37 ibid, 15.
38 Simone Glanert, 'Method' in Pier Giuseppe Monateri (edn) *Methods of Comparative Law* (Edward Elgar 2012) 61, 66.
39 Ibid.

Second, other issues can arise in the comparative methodology and they relate to the risk of bias in the researcher.[40] It is acknowledged that when a comparative study is conducted with a goal of harmonisation, there is an inherent risk that the research will be more likely to focus on the commonalities and possible ways to minimise the differences.[41]

The present study seeks not to search for similarities of the transaction avoidance claims but rather analyse them as objectively as possible. In order to assure high standards of objectiveness of the research, periodical critical reviews of the work conducted have been put in place.

---

40 Ibid, 67.

41 Van Hoecke (n 35) 2.

Chapter 2
Definitions and Theoretical Framework of Transaction Avoidance and Harmonisation

2.1. Introduction

Transaction avoidance is an umbrella term that may encompass several types of claims. Additionally, from a comparative point of view, different legal systems may provide different types of claims under the concept of transaction avoidance. Therefore, the concept may appear vague. This chapter seeks to define and delimit the concept of transaction avoidance for the purposes of this study.

Moreover, transaction avoidance is generally addressed by insolvency law studies.[1] In contrast, the scholarship has often neglected to address the claims of transaction avoidance available in private law in comparative studies with a European dimension.[2] There are copious amounts of domestic literature on the so-called *actio pauliana* in some European legal systems. However, there is an identifiable gap in addressing transaction avoidance claims in a comprehensive comparative study.

---

1 Roelf Jakob de Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) 20 International Insolvency Review 185; Jay Lawrence Westbrook, 'Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases' (2007) 42 Texas International Law Journal 899; Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499; Andrew Keay, 'The Harmonisation of the Avoidance Rules in European Union Insolvency' (2016) International and Comparative Law Quarterly 79; Irit Mevorach, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) 8 European Company and Financial Law Review 235.

2 Ulf Göranson, 'Actio Pauliana outside Bankruptcy and the Brussels Convention" in M Sumampouw et al (eds*), Law and Reality. Essays on National and International Procedural Law* (Martinus Nijhoff Publishers 1992) 89; Joaquín J. Forner Delaygua (ed), *La protección del crédito en Europa: La acción Pauliana* (Bosh 2000); Ilaria Pretelli, 'Cross-border Credit Protection against Fraudulent Transfer of Assets: Actio Pauliana in the Conflict of Laws' (2011) 13 Yearbook of Private International Law 589; Tuula Linna, 'Actio Pauliana 'Actio Europensis"? Some CrossBorder Insolvency Issues' (2015) 10 Journal of Private International Law 69.

On the other hand, harmonisation is a word that is often used in the European Union discourse. However, it is an elusive term that may create false expectations of imposition of total legal uniformity within the European Union.[3]

This chapter seeks to clarify the taxonomy adopted in the thesis and delimit the focus of the research. The chapter is divided into three sections. The first section deals with the concept of transaction avoidance in insolvency law.

Also, the first part analyses the common elements of transaction avoidance actions available in insolvency law. The common elements are: (i) the insolvency proceedings; (ii) a transaction; (iii) the detriment for the body of creditors, and; (iv) various subjective and objective criteria.

The second section addresses the concept of transaction avoidance in private law. This section provides: (i) the critical aspects of transaction avoidance claims available in private law; (ii) the history and the structure of this type of claims, and; (iii) the nature, the scope, and the effects of transaction avoidance actions under private law.

These sections seek to identify the 'ideal type', meaning an abstract definition of transaction avoidance. The ideal type is disengaged from any particular legal system. Indeed, these sections refer not only to the United Kingdom, Germany, and Italy but also to other European countries such as France, Greece and others that bring forward examples of the core elements of the claims.

Finally, the third section seeks to define the concept of harmonisation, focusing on the different methods and types of harmonisation available within the EU. This final part also considers the possible alternative to harmonisation.

2.2. Transaction Avoidance in Insolvency Law

Transaction avoidance rules provide for a tool that allows the insolvency practitioner to set aside transactions that are detrimental to the general body

---

[3] Eva J. Lohse, 'The Meaning of Harmonisation in the context of the European Union: A Process in Need of Definition' in Mads Andenas and Camilla Baasch Andersen *Theory and Practice of Harmonisation* (Edward Elgar 2011) 282, 283.

of creditors.[4] Transaction avoidance is encompassed within a large number of insolvency systems worldwide.[5] Although with different approaches, all European Union (EU) member states have specific rules that address the validity of transactions entered by a debtor in the period immediately antecedent to the commencement of the insolvency proceeding.[6]

The claims of transaction avoidance serve different purposes of insolvency law. First, they are used to collect and maximise the value of the estate and to regularize the distribution of the insolvency's estate among the creditors.[7] The avoidance powers given to the insolvency practitioners seek to restore the estate to its fullest amount as if the transaction has never taken place. Moreover, transaction avoidance rules re-establish the fair distribution of the estate, since any amount recovered through the avoidance actions will fall under the statutory distribution scheme of the insolvency proceedings.

Second, transaction avoidance claims may contribute to preventing the dismemberment of the insolvency estate.[8] This is a secondary effect of transaction avoidance actions that can be connected with the 'rescuing scope' of insolvency proceedings.[9] This secondary effect relates to the scope of the collection of the assets belonging to the insolvency's estate. Where these claims seek to reconstruct the value of the insolvency's estate, they also prevent the premature parcelling of the assets of the company. In this sense, they prevent the loss of value caused by the dismemberment, and they enhance the business's chance to be rescued successfully as a going concern.[10]

---

4 INSOL International, 'Avoidance Provision in a Local and Cross-border Context: A Comparative Overview' 2008 Technical Series Issues No. 7, 1.

5 Westbrook, 'Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases' (n 1) 901; Rebecca Parry, 'Transaction Avoidance Provision in International Insolvencies' (2004)15 International Company and Commercial Law Review 46, 46.

6 Gerard McCormack, Andrew Keay, Sarah Brown, *European Insolvency Law* (Edward Elgar 2017) 130.

7 Directorate-General for Justice and Consumers, Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices, 137 <http://ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf> accessed 21.07.2020.

8 McCormack, Keay, and Brown (n 6) 132.

9 Ibid.

10 Ibid, 138.

It has been questioned whether transaction avoidance rules fulfil the rescuing scope of insolvency proceedings effectively.[11] These provisions do not constitute a guarantee that the dismemberment process will not start before the opening of the insolvency proceedings, as the avoidance rules do not address or sanction the parties involved in pre-insolvency transactions.[12] However, although the rules of transaction avoidance may not prevent the dismemberment, they can reverse the process once the insolvency proceedings start, when the dismemberment had occurred in violation of transaction avoidance rules.

The provisions on insolvency transaction avoidance vary to a great extent in their structure, suspected periods, rights of action, and effects among the EU member states.[13] The actions of transaction avoidance generally seek to reverse a great variety of opportunistic value-destroying behaviours of the insolvent debtor such as assets dilution or substitution and debt dilution.[14]

Nevertheless, the scholarship has identified a common core among the transaction avoidance provisions in preference and transactions detrimental to creditors.[15] For the purposes of this study, transaction avoidance claims are divided into three general categories: (i) preference; (ii) provisions targeting gratuitous acts or transactions at an undervalue; and (iii) transaction detrimental to creditors.

Provisions on preferences address the issue of a debtor paying one or more creditors immediately before the insolvency.[16] This type of payments disrupts the function of the insolvency proceedings to orderly distribute the insolvency estate among the general body of creditors.[17] In this sense, a creditor that has

---

11 Kaey (n 1) 85.

12 Ibid.

13 Harmonization of Insolvency Law at EU Level: Avoidance Actions and Rules on Contracts, Briefing Note, 2011, 12.

14 Aurelio Gurrea-Martinenz, 'The avoidance of Pre-Bankruptcy Transaction: an Economic and Comparative Approach'(2018) Chicago-Kent Law Review 711, 716.

15 Thomas H. Jackson, 'Avoiding Power in Bankruptcy' (1984) 36 Stanford Law Review 725,726; Andrew Keay, 'In Pursuit of the Rationale behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55, 59; de Weijs (n 1) 220-221.

16 Rebecca Parry (n 5) 47.

17 Jackson (n 15) 726.

been paid in advance sees their position potentially improved in comparison with the one they would have had in the insolvency distribution.[18]

This type of actions targets any pre-insolvency payment that gives precedence to any creditor over the others. In this sense, the scope of the claim is to provide a level playing field to all the creditors under the statutory distribution scheme.[19] Preference is available exclusively within insolvency law since their rationale of fair distribution among the creditors is connected to the nature of insolvency law.[20]

The second category refers to actions that target gratuitous acts or acts at an undervalue. In this category, the debtor's behaviour removes value from the estate reducing the amount available for distribution.[21] This type of claim receives different treatments and consideration in Europe. For instance, in England, the provision of transactions at an undervalue can be deemed related to transactions detrimental to creditors and sometimes the former category overlaps with the former.[22]

The third category, ‘transaction detrimental to creditors’, deals with the case in which the debtor’s behaviour diminishes the assets available for distribution.[23] In this situation, the transaction subject to the avoidance provisions may occur between a debtor and one of his creditors or with a party not involved in the insolvency proceedings.[24]

These rules are designed to override the debtor’s actions that hinder the payment of the creditors in insolvency proceedings.[25] In this case, the claim does not seek to preserve the fairness of the insolvency distribution system but rather to enhance the amount available for distribution, as the vulnerable

---

18 Parry (n 5) 47.
19 ibid.
20 Jackson (n 15) 726.
21 Gurrea Martinez (n 14) 716; McCormack, Keay, and Brown (n 6) 152.
22 Rebecca Parry, James Ayliffe QC and Sharif Shivji¸ *Transaction avoidance in Insolvencies* (Oxford, 2010), para 4.231.
23 de Wejis (n 1) 220.
24 Keay (n 15) 59-60.
25 INSOL International (n 4) 2.

transaction may involve one of the creditors but also a party external to the insolvency proceeding.[26]

2.3. The Common Elements of Transaction Avoidance in Insolvency Proceedings

Even if the rules of transaction avoidance in insolvency proceedings are provided in all EU member states, the specific regulations vary in their details.[27] However, with the due differences, the rules present some common elements: (i) the opening of insolvency proceedings; (ii) a transaction; (iii) the detriment for the general body of creditors; and (iv) some objective and subjective criteria that delimit the scope of application of the claims.[28]

2.3.1. The Insolvency Proceedings

In order to talk about transaction avoidance in insolvency law, the claims must take place within insolvency proceedings. It may seem tautological to say that the actions of insolvency transaction avoidance shall be invoked in insolvency proceedings. The opening of the insolvency proceedings, however, is pivotal for three reasons. First, the function and the scope of insolvency law changes the rules of the game for both the parties involved in the credit-debit relationship and those involved in the vulnerable transaction.[29] Second, the opening of insolvency proceedings determines who has the right of action and what the legal effects of the action are.[30] Third, the opening of the insolvency proceeding may also be relevant for the timeframe of applicability of the action.[31]

Generally speaking, the EU member states provide for specific rules of avoidance within their insolvency statutes.[32] However, the mere fact that the

---

26 ibid.

27 McCormack, Keay, and Brown (n 6) 143-151.

28 Ibid, 135-137.

29 Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) paras 2-14.

30 Thomas H. Jackson, 'Translating Assets and Liabilities to the Bankruptcy Forum' in Jagdeep S. Bhandari and Lawrence A. Weiss (eds) *Corporate Bankruptcy: Economic and Legal Perspectives* (1996) 58, 60-61.

31 McCormack, Keay, and Brown (n 6) 136.

32 For instance, English Insolvency Act 1986 Sections 238 ff; the Italian Insolvency Act Articles 64 ff; the Dutch Bankruptcy Act Articles 42 ff; the German Insolvency Code (InsO)

provisions are contained in the insolvency statutes is not necessarily qualifying. Indeed, in the case of the English Insolvency Act, the provision on transaction defrauding creditors can also be used outside the insolvency proceedings.[33] Therefore, the opening of the insolvency proceedings is a necessary element that qualifies transaction avoidance as claims relating to insolvency.

For the purposes of this study, within the concept of insolvency proceedings are included all those procedures that constitute a collective response to the impossibility of the debtor to pay their debts. This definition is quite broad. It includes traditional insolvency proceedings that aim at winding-up an insolvent company. It also encompasses those more recently developed procedures that seek to rescue the business or to restructure the company (so-called restructuring procedures).

At the same time, such definition does not take into consideration whether the opening of the insolvency proceedings requires a cash-flow test or a balance-sheet test. In other words, the insolvency proceedings may be opened because the debtor cannot pay its debts, as they fall due or because the company's liabilities exceed its assets.[34] The generality of this definition of insolvency proceedings can be justified on the basis that EU member states provide for a significant number of procedures that vary in scope and adopt different insolvency tests.[35]

Notwithstanding the peculiarities of the national insolvency systems, a common trait of the insolvency proceedings among the member states is the collective nature of those proceedings.[36] Indeed, this collective nature determines the change of the rules of the game for the parties. The 'collectivity

---

Sections 129 ff; the Greek Insolvency Code Sections 42 ff; the Spanish Insolvency Act Article 71 ff.

33 See Insolvency Act (n 32) Section 423 ff.

34 For instance, England and Germany adopt the cash flow test and the balance sheet test alternatively (see *Re Cheyne Finance plc* [2008] EWHC 2402 and *BNY Corporate Trustee Services Ltd v Eurosail* [2013] UKSC 28 for England and Wales and Federal Court of Justice-BGH IX ZR 133/14 for Germany). France and Spain apply only the cash flow test (See Articles L610-1 to L680-7 of the French *Code de Commerce* and Article 2, *Ley 22/2003, de 9 de julio, Concursal*). Italy applies only the balance sheet test (See Cassazione 08.02.1982 n. 795).

35 Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 28.

36 ibid.

principle' in insolvency provides that a procedure shall be open to collect the assets of a debtor and distribute them to the creditors.[37] It is complementary and functional to the principle that 'the debtor's assets are administered, and the creditors' claims processed without any regards for the chronological order in which the assets were acquired or debts created.'[38]

In addition, it derives from the collectivity principle that all creditors shall be treated equally according to the principle of *pari passu* (also called *par condicio creditorum* in continental Europe).[39] It has to be noted, however, that the principle of equal treatment is mitigated by the statutory rules of ranking within the insolvency distribution. In other words, the creditors are treated equally, but only within their ranks.[40]

In relation to transaction avoidance, the collective principle places the right of action into the hands of the person administering the assets. Generally, in the winding-up procedures, the insolvency practitioner has the right of action to challenge the vulnerable transaction.[41] In contrast, in the procedures that allow the debtor to remain in possession of their estate, transaction avoidance actions are available to any creditor who would exercise it for the benefit of the general body of creditors.[42]

The generalised effect of transaction avoidance claims towards the general body of creditors is a peculiarity that derives from the insolvency nature of the action.[43] The collective nature of the insolvency proceeding extends the benefits of the action to all creditors. As a result of the avoidance powers, the creditors will find themselves in a restored equal position.

In contrast, the effects of transaction avoidance in private law (which will be addressed later in this chapter) are limited to the creditor who brought the claim to court. Such a distinction of effects finds an exception in the English

---

37 Ian F. Fletcher, *The Law of Insolvency* (4th ed. Sweet & Maxwell 2009), para 1-008.

38 ibid.

39 Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspective and Principles* (Cambridge 2017) 511-513.

40 Fletcher (n 37).

41 For instance, InsO (n 32) Section 56; the Italian Insolvency Act Article 31; the Dutch Bankruptcy Act Article 25; Insolvency Act (n 32) Section 238(2).

42 Insolvency Act (n 32) Section 423(5). See also, McCormack, Keay, and Brown (n 6) 165.

43 Jackson (n 15) 728.

legal system, which provides for the applicability of insolvency transaction avoidance also outside the insolvency framework, and it extends its collectivism to private law situations.[44]

Finally, the opening of the insolvency proceedings often constitutes the starting point in considering the time in which a transaction may be vulnerable to the avoidance rules. [45] The majority of the EU member states for a 'suspect period' when the transaction must have occurred.[46] The suspect period can be established by counting back from the moment of the opening of the insolvency proceeding, or the moment in which the company become factually insolvent.[47]

2.3.2. A transaction

To talk of transaction avoidance, there needs to be a transaction. A transaction may be any legal act that takes place at the eve of the opening of the insolvency proceedings. Often, different claims target different types of transactions. For instance, with preferences, the transaction is generally the payment of a debt that is not yet due or the granting of security rights. On the other hand, in transactions detrimental to creditors, the types of vulnerable transactions are more varied and may take the form of any legal act that results to be detrimental for the general body of creditors

It has to be noted that a pre-insolvency transaction may violate more than one avoidance rule.[48] For instance, the same payment may constitute a transaction at an undervalue, and at the same time, a preference. Similarly, it often happens that a transaction at an undervalue could be challenged through provisions that target gratuitous acts or those covering transaction detrimental to the creditors.

In these cases, the transaction may be challenged by several actions, which may have different suspect periods and subjective criteria. The favour of the system towards the avoidance is evident as the insolvency practitioner or the

---

44 Insolvency Act (n 32) Section 423 ss.
45 McCormack, Keay, and Brown (n 6) 166
46 ibid.
47 ibid.
48 Andrew Keay and Peter Walton, *Insolvency law: Corporate and Personal* (Jordans 2008) para 38.01.

creditor bringing the action may choose the most suitable type of claim for the situation.[49]

2.3.3. The Detriment for the General Body of Creditors

The transactions that can be put aside in insolvency proceedings are those that disrupt the function of insolvency law to collect and distribute the debtor's estate. In other words, all those legal acts that are detrimental to the creditors' interests in being paid fairly are vulnerable to transaction avoidance claims.[50]

This detriment (or prejudice) can be qualified in different ways. On the one hand, it can be seen as a reduction in the capacity of the debtor's estates.[51] This happens when the debtor disposes of their asset and compromises the integrity of the estate. Transactions without consideration or at an undervalue are an example: when the debtor makes a gift or sells goods at a price considerably lower than the market price, the amount available for distribution to the creditors is unfairly reduced. On the other hand, in the case of preference, the estate is still reduced, since the debtor provides a payment to one of their creditors. However, there is an additional prejudice to the insolvency system: the disruption of its distributive function.[52]

In addition, within the insolvency proceedings, the detriment potentially affects all the creditors. Since the insolvency system creates a common pool of interests that differs from the autonomous claims that stand in a private law situation, the detrimental transaction displays its effects to all creditors.[53]

The intensity of the prejudice, however, varies among the rankings. The unsecured creditors are those that suffer the most. Indeed, the reduction of the capacity of the estate may affect all rankings, but since the insolvency system provides an order of payment of debts, the reduction of what can be distributed likely worsens the position of those who get paid for last.

2.3.4. The Subjective and Objective Criteria

---

49 Technical Manual <https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch25-36/Chapter31/part4B/part7/part_7.htm > accessed 21.07.2020.

50 McCormack, Keay, and Brown (n 6) 129-163.

51 Philip R. Wood, *Principles of International Insolvency* (2nd edn Sweet & Maxwell 2007) 475.

52 Gurrea Martinez (n 14) 726.

53 Fletcher (n 153).

The detriment caused to the creditors is not a sufficient ground for transaction avoidance. Generally speaking, the European legal systems combine additional requirements for challenging the transactions. These criteria can be categorised as either subjective or objective.[54] Subjective criteria are those related to the state of mind of the parties.[55] One the one side, this category encompasses the state of mind of the debtor. In particular, it includes the debtor's intention or desire to prejudice the rights of their creditors.

On the other side, subjective criteria might refer to the state of mind of the third party and specifically their knowledge or awareness of the debtor's intentions. The subjective criteria vary among member states. Chapters four, five, six and seven of this thesis will offer a detailed analysis and comparison of the different criteria adopted in England, Germany, and Italy.

In contrast, the objective criteria are those requirements that do not relate to the state of mind of the parties.[56] The timeframes for the action (so-called suspect periods) fall under this category. The suspect periods limit the availability of the actions to those transactions occurred in a set time before the opening of the insolvency proceedings. EU member states differ significantly in the determination of the suspect periods, and they even provide different timeframes for different types of claims.[57]

Additionally, some legal systems provide presumptions that assist the insolvency practitioners in proving the existence of the subjective criteria and therefore set aside the transaction.[58] An example of such elements is the presumption that connected parties or related persons knew or should have known the prejudice that the transaction causes to the general body of creditors.[59] Another example is the presumption that a transaction done close to the opening of the insolvency proceedings suggests the debtor's intention to remove their asset from the insolvency estate.[60] The existence of these

---

54 de Weijs (n 1) 219.
55 ibid.
56 ibid.
57 McCormack, Keay, and Brown (n 6) 136.
58 ibid, 135.
59 ibid, 137.
60 Nadja Hoffmann, 'La Actio Pauliana en Derecho Alemán: Impugnación de Los Acreedores Segun la Ley de la Impugnación e la Regulación Referente a la in Insolvencia' in Forner Delaygua (n 1) 26.

presumptions is due to the extreme difficulties in proving the subjective requirements.[61]

The reason behind all these criteria – whether subjective or objective - is to strike a balance between the insolvency interests and the legal certainty of the transactions.[62] While it is undebatable that the transaction avoidance rules serve the scope of insolvency, it is also fundamental that they do not disrupt the legal order provided by the common rules of private law. In addition, the criteria seek to balance the individual interests of the parties involved in the transaction and those of the insolvency.

There are three individual interests at stake. First, there are the interests of the creditors to see their credits fulfilled as completely and fairly as possible. Second, there is the interest of the third party not to be placed in a worse position than the one he would have been in, had the transaction not taken place. Third, there might be the interest of the debtor to reorganise their business.[63]

The claims of transaction avoidance, therefore, are a complex matter that serves multiple legal purposes and different individual interest. This complexity is mirrored by the difficulties faced at the EU level in providing a private international law framework to this type of claims. Such issues will be explored in chapter three. The complexity of the topic also reflects on the struggles in harmonising transaction avoidance at the EU level, which will be addressed in chapter eight.

2.4. What Falls under these Definitions?

The definitions given of the avoidance claims in insolvency proceedings have various names and forms in the national legal systems of the EU member states. This section provides a table of the relevant transaction avoidance claims selected for the study of the thesis. The actions are organised

---

61 McCormack, Keay, and Brown (n 6) 135.
62 de Weijs (n 1) 222.
63 ibid.

according to the categories above described of ‘Preference' and ‘Transactions Detrimental to Creditors’ and ‘Gratuitous Acts’.

Preference	**Transaction Detrimental to Creditors**	**Gratuitous Acts**
England		
Preferences (Section 239 Insolvency Act 1986) Avoidance of floating charges (Section 245 Insolvency Act 1986)	Transactions defrauding creditors (Section 423 Insolvency Act 1986)	Transaction at an undervalue (Section 238 Insolvency Act 1986)
Italy		
Payments (Article 65 Insolvency Act)	Insolvency Revocatory Action (Article 67 Insolvency Act) Ordinary Revocatory Action (Article 66 Insolvency Act)	Gratuitous acts (Article 64 Insolvency Act)
Germany		
Congruent Coverage (Section 130 InsO) Incongruent Coverage (Section 131 InsO) Loans replacing equity capital (Section 135 InsO) Repayment of capital of a silent partnership (Section 136 InsO).	Transactions Immediately Disadvantaging the Insolvency Creditors (Section 132 InsO) Wilful Disadvantage (Section 133 InsO)	Gratuitous Benefit (Section 134 InsO)

Table 2.1.

The focus of the research is purposely narrow to allow an in-depth comparison that will be carried out in chapter seven. Similarly, the specific focus should facilitate the proposal of a feasible harmonisation of the claims at the EU level. From the definition, there are excluded those retentive rules that seek to preserve the value of the estate rather than recovering it.[64] According to Anderson, these type of claims relate to the anti-deprivation rule and the *pari passu* principle, and include rules on post-commencement dispositions or liens on books and records.[65]

Similarly, there are excluded those actions that directly target the fraudulent behaviour of the debtor rather than the resulting transaction. In particular, there are not included in the scope of the research, liability actions of misconducting directors of companies as - for example - misfeasance or wrongful trading provisions. In these cases, the claims do not affect the transactions at stake; they impose personal liabilities on directors in breach of their duties.[66]

Excluded as well are those actions relating to the avoidance of extortionate credit transactions.[67] In this case, the transaction is voidable on the grounds of differential bargaining powers of the debtor and the counterparty of the transaction.[68] While the effects of the avoidance of extortionate credit transaction are similar to those of transaction avoidance actions as defined in this section, their nature and scope are different. In the case of avoidance of extortionate credit transaction, the cause of avoidance relates to the parties

---

64 Hamish Anderson, 'The Nature and Purpose of Transaction Avoidance in English Corporate Law' (2014) 2 Nottingham Insolvency and Business Law eJournal 12.

65 ibid, 10.

66 Thomas Bachner, 'Wrongful Trading- A New European Model for Creditor Protection?' (2004) 5 European Business Organisation Law Review 293, 300; Parry and others (n 22) para 19.01; Susannne Kalss, Nicolaus Adensamer and Jamime Oelkers, 'Director's Duties in the Vicinity of Insolvency – a Comparative Analysis with Reports from Germany, Austria, Belgium, Denmark, England, Finland, France, Italy, the Netherlands, Norway, Spain and Sweden' in Marcus Lutter (ed) *Legal Capital in Europe* (European Company and Financial Law Review – Special Volume, De Gruyter Recht 2012) 113; and Karsten Schmidt, 'Grounds for Insolvency and Liabilities for Delays in Filings for Insolvency Proceedings: Necessary Supplement to Capital Protection' in Lutter (ed) *Legal Capital in Europe* 145.

67 Insolvency Act (n 32) Section 244: the Italian Civil Code Articles 1447/48.

68 Rebecca Parry and others (n 22) para 6.01.

involved in the transaction,[69] while in 'transactions avoidance' - as defined in this chapter - the cause of avoidance is related to the prejudice caused to the creditors.

2.5. The Concept of Transaction Avoidance in Private Law

It is generally recognised that the first avoidance rules date back to Roman law, where the *actio pauliana* was available in credit enforcement procedures to nullify certain transactions that lessened the debtor's estate.[70] While it has been suggested that the name of the action has Byzantine origins,[71] the instrument was already well known in classical Roman law.[72] With the medieval introduction of bankruptcy[73], and the subsequent development of insolvency law as a separate branch of law,[74] a duplication of the action can be observed.[75] As a consequence, nowadays, in several EU member states, transaction avoidance actions are in insolvency law as well as available in private law.[76] The following sections will focus on the structure of the claim under private law and its critical aspects as well as consider the issues of nature, scope, and effects of the action.

2.5.1. The Critical Aspects of the Claim

As seen in the previous section, the claim is peculiar in its structure, and it is particularly intrusive on the third party's contractual autonomy. Based on the Roman law tradition, the action is generally made of three elements (i) the prejudice to the creditors; (ii) the prejudicial intention of the debtor and; (iii) the third party awareness of the prejudice.[77]

---

69 Insolvency Act (n 32) Section 244(3), Italian Civil Code Article 1448(1).

70 Louis Levinthal, 'The Early History of Bankruptcy Law' (1918) 66 University of Pennsylvania Law Review 223, 239.

71 Paul Collinet, 'L'Origine Byzantine du Nom de la Paulinne' (1919) Revue Historique de Droit Français et Étranger 187.

72 Dig. 42.8.0. Quae in fraudem creditorum facta sunt ut restituantur.

73 i.e. broken stand. In medieval times, business was conducted mainly in public markets behind stands (banco). When a merchant was not able to meet their obligation, the creditors would break the stand to prevent the merchant to continue the business. See etymological online dictionary < https://www.etimo.it/?term=bancarotta > accessed 21.07.2020.

74 Levinthal (n 70) 241.

75 S.H.A.M. Hendrix, *Transaction Avoidance in Insolvency Law: Past Present and Future of the Actio Pauliana* (Celsus 2019) 97.

76 Pretelli (n 2) 589.

77 Hendrix (n 75) 125.

These elements are not always present in all the legal systems in analysis. Indeed, the third element is not present in the modern English transaction defrauding creditors.[78] However, these elements provide a basic guideline for the analysis of the topic. In order to better understand the dimension of transaction avoidance in private law, the thesis will address which transactions are vulnerable under the action and in particular, what is the prejudice that triggers the action. Moreover, it will focus on the subjective elements, which are the intention of the debtor and the awareness of the third party.

2.5.2.1. Vulnerable Transactions

The transaction avoidance action of private law is available when the debtor's behaviour causes prejudice to the creditor's rights.[79] In this regard, it is necessary to define the two fundamental elements: the 'debtor's behaviour' and the 'prejudice'. Generally speaking, all human behaviours that encompass a will are subjected to the effects of the action at stake.

Potentially, the action can be invoked against any judicial act, regardless of the form of the transaction.[80] For instance, the creditor may request to set aside a donation, a gift, a contract with obligatory effects or a transfer of movable or immovable goods. Moreover, in some countries, the transaction can encompass either an action or an omission[81] - for instance, when the debtor fails to collect one of their own credits.

In order to constitute a vulnerable transaction, the behaviour of the debtor shall be detrimental to the creditor's rights.[82] This means that the debtor's action harms the possibility of the creditor to enforce their credit successfully.[83] This can happen when the debtor put their assets beyond the reach of the

---

78 Insolvency Act (n 32) Section 423.

79 French Civil Code Article 1167; Italian Civil Code Article 2901; Spanish Civil Code Article 1291(3); Portuguese Civil Code Article 610, German Anfechtungsgesetz (AnfG i.e. Law on the Contestation of Legal Acts of a Debtor Outside the Insolvency Proceedings) Article 1, Insolvency Act (n 32) Section 423.

80 Hoffmann (n 60) 24; Francisco Rivero, 'La Acción Pauliana en Derecho Español' in Forner Delaygua (n 1) 54; See Jean-Pascal Chazal (n 99) 78.

81 Hoffmann (n 60). 24

82 French Civil Code Article 1167; Italian Civil Code Article 2901; Spanish Civil Code Article 1291(3); Portuguese Civil Code Article 610, AnfG (n 79) Article 1, Insolvency Act (n 32) Section 423.

83 Case C-339/07 *Seagon v Deko Marty Belgium NV* ECLI:EU:C:2009:83 [2009] BCC 347 para 26.

creditor, or when the debtor contracts an obligation with a third party that cannot fulfil without prejudice for the creditor. Furthermore, the creditor's ability to realise their credit could be undermined even when the debtor grants extensions to their own debtors or gives securities for old credits.

Substantial prejudice is differently qualified in each legal system. In England, an essential element of prejudice is the disproportion between the performances of the transaction.[84] In France, it is sufficient that the transaction causes an estate's diminution.[85] Conversely, in Spain, the damage is more strictly qualified as the debtor's inability to pay their debt.[86] In Germany, the prejudice is categorised into three types: (i) financial loss; (ii) increase of debts; and (iii) others assets restructuring.[87]

These categorisations are very broad as they may include any adverse modification of the debtor asset. However, a stricter delimitation of the application of the action is derived from the requirements of a particular psychological element of the debtor's state of mind.

2.5.2. History and Structure of the Claim

Transaction avoidance claims in private law address the debtor's behaviour that is detrimental to their creditors outside the formal framework of insolvency. Within the European Union, many countries provide this type of claims.[88] Among the continental member states, the concept of avoidance of detrimental transaction outside the framework of insolvency law is similar.[89] In some of these countries, transaction avoidance finds its origins in the Roman *actio pauliana*.[90]

---

84 Insolvency Act (n 32) Section 423.

85 Chazal (n 99) 85.

86 Rivero (n 80) 57.

87 Hoffmann (n 60) 25.

88 For instance, Italian Civil Code Articles 2901-2904; Spanish Civil Code Article 1111; French, Belgian and Luxembourg Civil Codes Article 1167; Dutch BW Articles 45-48; Romanian Civil Code Articles 1562-64, Greek Civil code Article 933; Hungarian Civil Code Article 203; Polish Civil Code Articles 524-527; Portuguese Civil Code Article 610-618; as well as in the Austrian Anfecgtungsordnung and in the Anfechtungsgesetz.

89 *Seagon v Deko Marty Belgium NV* (n 83) para 26.

90 Hendrix (n 75) 66; Göranson (n 2) 90; Domenico Martinelli, 'El Papel del Elemento Subjectivo Del Acto Revocable Según la Doctrina Italiana y Española in Joaquín J. Forner Delaygua (ed.) (n 1) 115.

In contrast, the English system provides for the possibility to use Section 423 of the Insolvency Act 1986[91] on 'Transaction defrauding creditors' also outside insolvency proceedings.[92] The historical roots of the English claim differ from those of the other major European countries, as they can be traced back to the Elizabethan period.[93]

Nevertheless, the rationale of the institution is similar: to safeguard the creditor's rights against the detrimental behaviour of the debtor. The private law transaction avoidance is generally designed as a procedural remedy that empowers a creditor to request a Court to put aside a legal transaction undertaken by their debtor when the transaction is detrimental to the creditor's rights.[94]

The structure of the relations affected by the action is triangular. [95] On one side, there is a credit relationship between the debtor and the creditor. On another side, there is a relationship between the debtor and a third party. This relation may vary according to the type of transaction undertaken by the parties. It may comprise a mutual obligation or a unilateral onus on the debtor's part. At the same time, it may involve a transfer of property, or it may have an obligatory content. On the third side of the triangular structure, there is the relationship between the creditor and the third party. As it will be further explained later in this chapter, this is the most problematic aspect of the triangular structure of the claim, since the qualification of the relationship between the creditor and the third party is not clear.

---

91 Insolvency Act (n 32) Section 423.
92 ibid, Section 424.
93 Anderson (n 64) 3.
94 *Seagon v Deko Marty* (n 83).
95 Pretelli (n 2) 599.

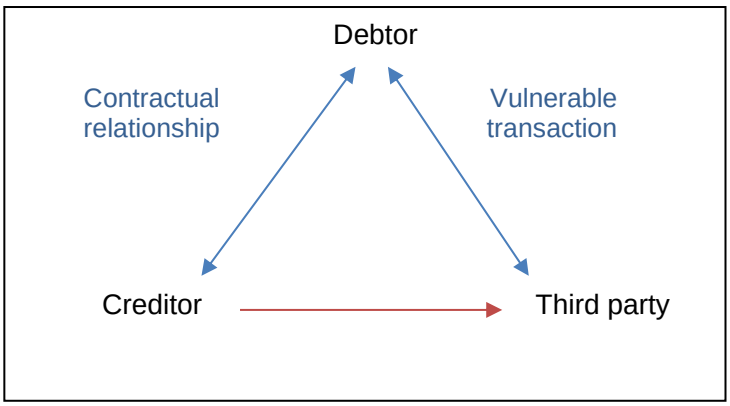

Figure 1.1.

The claim allows a person (i.e. the creditor) to interfere with a transaction concluded between the debtor and a third party.[96] In private law, this action is a strong deviation from the principle of legal certainty for the third party transaction.[97] The principle 'requires that all law [must] be sufficiently precise to allow a person (…) to foresee, to a degree that is reasonable in the circumstances the consequences which a given action may entail'.[98]

Indeed, the third party is undermined in their ability to foresee the consequences of the legal transaction concluded with the debtor, due to the interference of the creditor. Moreover, the claim is an exception to the universal principle of the relative effect of the contracts,[99] also known as 'Privity Rule' in common law.[100]

According to the privity rule, the contract produces effects only between the parties,[101] and – except for contracts in favour of third parties - a person who is not a party to a contract may not benefit from or suffer its legal

---

96 Ibid.

97 Laura Carballo Piñeiro, 'Acción Pauliana e Integración Europea: una Propuesta de Ley Applicable' (2012) 54 Revista Española de Derecho Internacional 43, 46.

98 *Khlaifia and Others v. Italy* Application no. 16483/12 European Court of Human (Rights 15 December 2016) para 92.

99 Jean Pascal Chazal, 'La Acción Pauliana en Derecho Francés' in Forner Delaygua (n 2) 75.

100 *Seagon v Deko Marty* (n 83) para 12. More generally on the privity rule, See Robert Merkin, *Privity of Contract: The Impact of Contracts (Rights of Third Parties) Act 1999* (Taylor & Francis 2000) 5.

101 Bénédicte Fauvarque-Cosson and Denis Mazeaud, *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Walter de Gruyter 2009) 440.

consequences.[102] With the action at stake, a creditor can claim the detrimental effects of a transaction that does not involve them.[103]

The power given to the creditor to interfere with his debtor's legal autonomy and freedom of contract is a controversial aspect in modern legal systems.[104] In civil law countries, the reason behind such an extraordinary power lies on the general principle that the estate of the debtor offers a general form of security.[105]

The debtor's estate ensures their creditors that the debtor will have the capacity to fulfil their obligations. Therefore, each creditor has the right to defend the debtor's assets from the debtor's actions, when these are prejudicial to their interest. Due to its peculiar scope, its intrusiveness to others' party autonomy, the private law claim has strict limits and boundaries, in particular considering the state of mind of the debtor.

2.5.2.2. The Subjective Elements

Several legal systems mention the concept of fraud as requisite of transaction avoidance in private law.[106] In particular, it is required that the debtor defrauded their creditor. At the same time, the knowledge of the other party involved in the detrimental transaction may be required.[107]

Concerning the debtor, the subjective element is of difficult qualification within different legal systems.[108] A categorisation that takes into account the differences among the EU member states seems even more challenging to achieve. It is possible to group some European countries according to the relevance their systems offer to the subjective element.[109]

---

102 The principle of relative effects of contracts is enshrined in the Latin phrase '*Res inter alios acta aliis neque nocere neque prodesse potest'.* This means that the acts done between some parties, cannot harm nor benefit others.

103 Pretelli (n 2) 601.

104 Piñeiro (n 97).

105 For instance, French Civil Code Article 2092; Italian Civil Code Article 2470, Spanish Civil Code Article 1191; Portuguese Civil Code Article 610.

106 For instance, English Insolvency Act (n 32) Section 423; French Civil Code Article 1167; Spanish Civil CodeArticle 1111; Dutch BW Article 3:45.

107 AnfG (n 79) Article 3; Italian Civil Code Article 2901(2); Spanish Civil Code Article 1295(2); Dutch BW Article 3:45(2); Portuguese Civil Code Article 612.

108 Martinelli (n 90), 113.

109 Piñeiro (n 97) 48.

Traditionally, countries like Germany, the Netherlands, Austria, Italy, and Portugal have a more objective approach to the action. This means that their laws provide for some presumptions that support the difficult task of proving the subjective elements.

In contrast, Spain and France adopt a more classical approach in the formulation of the subjective element. They stress the separation between the objective element of prejudice (i.e. *eventum damni*) and the subjective elements of prejudicial intention (i.e. *consilium fraudis*) and the third party awareness (*i.e. scientia fraudis*).[110]

Lastly, the English system has had its independent development disengaged from the Roman law tradition.[111] Nevertheless, also the English claim requires the prejudice (as qualified in the previous section) and a particular state of mind of the debtor. Indeed, the debtor behaviour needs to be motivated by the intention to put assets beyond the reach of the creditors or otherwise prejudice them.[112]

The main issue regarding the subjective element is the fact that - in general terms - the concept of fraud refers to an act of deception.[113] However, in the context of transaction avoidance, the subjective element – even when explicitly called fraud – includes different degrees of intentionality. These go from wilful misconduct to the pure consciousness of the detrimental effects of the transaction on the creditor's rights.

It is generally thought that the creditor may call a debtor's transaction into question when the debtor wants to cause the prejudice to their creditor.[114] However, national judges have adopted a more lax approach.[115] Even when a literal interpretation of the existing law would lead towards an understanding

---

110 ibid.

111 Pretelli (n 2) 594 ff.

112 Insolvency Act (n 32) Section 423.

113 Barbara Biscotti, 'Debtor's fraud in Roman Law. An opportunity for Some Brief Remarks on the Concept of Fraud' (2011) 17 Fundamina 1.

114 For instance, Article 3 AnfG uses the word 'Vorsatz', meaning intention; Section 423 of the Insolvency Act 1986 requires the purpose of the debtor; article 2901 of the Italian Civil Code says 'che l'atto fosse dolosamente preordinato al fine di' meaning that the act must be maliciously intended to (cause prejudice).

115 Martinelli (n 90) 128.

of the concept of fraud as the intention to harm (i.e. *animus nocendi*)[116] the highest courts of the major European continental countries have provided a more flexible interpretation.[117] As a consequence of such jurisprudential developments, it is more common to consider the debtor's knowledge of possible harm to the creditor rights as a sufficient ground for the applicability of the action.[118]

In particular, the French 'Court de Cassassion' assimilates the concept of fraud to the mere debtor's knowledge of causing prejudice to their creditor.[119] Similarly, the Spanish 'Tribunal Supremo' identifies the fraudulent intention with the debtor's knowledge that the effects of the transaction will leave insufficient assets to cover their debts.[120] In England, the subjective element of the purpose of the debtor's action[121] has been recently interpreted as having a broader meaning.[122] In particular, the intention of the debtor to defraud their creditor does not need to be the sole purpose of the action, but it is sufficient that the debtor has a 'substantial purpose' of defrauding the creditors.[123]

Concerning the third party's state of mind, the action may require that the third party knew or should have known of the potential prejudicial effects of the transaction or the financial difficulties of the debtor.[124] The consideration given to the third party's state of mind reflects a balancing act between the protection of the creditor's rights and the safeguard of the legal certainty of the vulnerable

---

116 i.e. the will to harm.

117 The Netherlands, Italy, Germany, and Portugal provide for the mere knowledge as sufficient ground in their statutes. See Dutch BW Article 3:45; Italian Civil Code Article 2901; German AnfG Article 3; Portuguese Civil Code Article 612(2). While France has a consolidated interpretation in this sense. See Cassassion Sala Civil 18.12.1983 DP 1984 I 263; Cassassion Sala Civil 26.10.1942 JPC 1943 2131; Cassassion Sala Civil, 17.10.1979 JCP 1981 II 19627; Cassassion, Sala Civil 1a, 25.02.1981, JCP 1981 II 19628; Cassassion Sala Civil 1a 17.06.1986 JPC 1987 II 208816.

118 Ibid.

119 Cassation, 17.10.1979 JCP 1981 II 19627.

120 Tribunal Supremo (Sala de lo Civil) 13.02.1992 RJ\1992\844.

121 Insolvency Act 1986 Section 423,

122 *IRC v Hashmi* [2002] 2 BCLC 11; *BTI 2014 LLC v Sequana SA* [2016] EWHC 1686 (Ch).

123 ibid.

124 Dutch BW Article 3:45; Italian Civil Code Article 2901; German AnfG Article 3; Portuguese Civil Code Article 612(2).

transactions.[125] Therefore, when the third party colludes with the debtor, the relevance of the certainty of the legal act subsides to the creditor's rights.

In addition, presumptions of knowledge exist for a transaction involving parties related to the debtor, such as family members or subsidiary companies. Indeed, their proximity suggests that they knew or should have known about the financial situation of the debtor.[126] Moreover, gratuitous acts are generally excluded from the subjective requirements of the third party.[127] This is because when the third party is involved in a transaction that is only beneficial to them and does not involve any obligation on their part, there is no need to protect the certainty of the transaction adding subjective requirements.[128]

These adjustments of the subjective element are due to the difficulties of proving the mental status of the debtor and the third party.[129] The burden of proof lies on the creditor, who has to prove their credit, the prejudice suffered, and the state of mind of the debtor and the third party if required.[130]

2.5.3. The Nature, Scope, and Legal Effects of Transaction Avoidance Actions under Private Law

Due to its exceptional nature of permitting the interference of the creditor with the debtor's legal autonomy, the action has been highly debated in relation to its nature and scope of application.[131] The qualification of the action has been discussed in several continental legal systems.[132] In particular, the main issue is whether the action at stake relates to tort law or contract law.[133] This qualification is not a mere question of taxonomy, but it is pivotal in cross-

---

125 Pretelli (n 2) 600.

126 Dutch BW Article 3:46 (3); Cassazione 08.08.2014 n 17821.

127 Italian Civil Code Article 2901(2), Dutch BW Article 3:45(3), Insolvency Act 1986 Section 425(2)(a); German AnfG Article 4; Spanish Civil Code Article 1297(1). At the same result but with a jurisprudential approach, France *Chambre Commerciale de la Cour de Cassation* (Cass com) 14.05.1996 n 94-11124; Court de Cassassion 1st Civ 17.02. 2004 n 01-15484; Cass com 24.01.2006 n 02-15295.

128 According to the Latin principle *nemo liberalis nisi liberatus,* which means that only the one that is free from debts can make valid gifts.

129 *Edgington v Fitzmaurice* [1885] 29 Ch D 459, 483.

130 See the common principle a*ffirmanti incubit probation.* I.e. The burden of proof lies on the claimant.

131 Piñeiro (n 97) 50.

132 Forner Delaygua (n 2).

133 Piñeiro (n 97) 52; Hoffmann (n 60) 27.

border scenarios for the application of conflicts of law rules as it will be further developed in chapter three.

According to the Tort Law theory, the detrimental behaviour of the debtor is a particular type of tort.[134] Consequently, the claim provides for compensation of the damage suffered by the creditor.[135] Instead, the contractual theory identifies the action as an individual category of unenforceability of the transaction. [136] Following this interpretation, the transaction is neither void nor voidable but 'ineffective or unopposable' vis-a-vis the creditor.[137]

Many EU member states consider private law transaction avoidance as a personal action.[138] This means that the right of action belongs to the creditor who suffers or may suffer from the detrimental effect of the transaction. Moreover, the effects of the action are limited to the creditor who brings the action to the court.[139]

The effects of the action are various. In England, significant discretion is given to the judge dealing with the claim.[140] In other countries, the effects of the action depend upon the type of transaction that is challenged. As a result of a successful claim, when the vulnerable transaction encompasses a transfer of property, the creditor will be able to consider the assets subject to the transaction as still being part of the debtor's estate.

Therefore, the creditor is entitled to enforce their rights on the debtor's estate, including the assets subject to the vulnerable transaction as if they have not been transferred. In contrast, when the vulnerable transaction has an obligatory content – for instance, the creation of a security right - the creditor may be allowed to disregard the obligation of their debtor and enforce their rights over the assets as if they were unencumbered.

---

134 Pierre Van Ommerslaghe, *Traité de Droit Civil Belge: Tome 2 Les obligationes* (vol 1-3, Bruylant 2013) para 1543. Hélène Sinay, 'Action Paulienne et Responsabilité Delictuelle a la Lumiére de la Jurisprudence Récent' (1948) 2 Revue Trimestrelle de Droit Civil 183.

135 ibid.

136 Luis Bustamante Salazar, 'La Tutela Aquiliana del Derecho de Crédito y la Revocación por Acción Pauliana' (2007) 3 Ars Boni et Aequi 165, 183.

137 In France and Spain, the act is unopposable to the creditor. In Italy, the act is 'partially and relatively ineffective'. See Salazar (n 137) 183.

138 Hoffmann (n 60) 23; Rivero (n 80) 47; Chazal (n 99) 76.

139 With the exception of the English legal system.

140 Insolvency Act (n) Section 424.

The scope of this type of action is to protect the ability of the creditors to enforce their rights over the debtor's estate.[141] EU member states reach this outcome in various ways. In Italy and France, the effect of the action is the revocation of the act, with limited effects to the three parties involved in the transaction avoidance proceeding. In England, the same results may be reached by the use of a constructive trust that allows the judges to create a separate estate to the benefit of the defrauded creditor.[142]

2.6. Harmonisation

In the 19th Century, the term 'harmonisation' has assumed great relevance, and examples of harmonisation can be found in different international contexts.[143] The harmonisation of laws is defined as the process that assimilates the regulatory requirements and governmental policies of different jurisdictions.[144] The harmonisation process aims to reduce the differences and discrepancies among different legal systems, driving them towards a similar or common regulatory framework.[145]

In general, harmonisation is a neutral process that involves an inter-jurisdictional element.[146] It is neutral, as it is instrumental to particular goals and objectives, and it cannot be evaluated in abstract, without reference to the specific objectives.[147] It involves an international element, as the concept of harmonisation of law is ontologically linked to increasing the convergence of more than one legal system.[148] Due to this international aspect, harmonisation

---

141 Piñeiro (n 97) 47.

142 ibid.

143 Examples of harmonisation of law can be found in international treaties among New Zealand and Australia (See Australia and New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) 1 January 1983); in Africa (See Organisation for the Harmonization of Business Law in Africa treaty 17 October 1993); in South America (See Mercosur).

144 David W. Lebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 Canadian Business Law Journal 63, 66.

145 ibid.

146 Martin Boodman, 'The Myth of Harmonisation of Law' (1991) 39 American Journal of Comparative Law 699, 702.

147 ibid.

148 ibid.

is generally pursued through international treaties and international organisations.[149]

The justification for the harmonisation of law is often based upon economic reasons.[150] With the globalisation of the economy, private and commercial transactions more often than not present cross-border elements. With the internationalisation of the trading system, contrasting rules on legal acts undermine the validity of the commercial transactions.[151]

Therefore, the harmonisation process permits the parties to rely on the effectiveness of the commercial transactions, even outside the borders of each legal system.[152] This is because the harmonised rules reduce the costs of the transactions, allowing participants from different countries to interact more efficiently.[153] Moreover, the process of harmonisation claims to increase fairness in trade competition.[154] It is often said that harmonisation creates a level playing field, as the participants to the game ought to play following the same rules, and the success of one of them will be determined by the market and by the participants' ability.[155]

The following sections explore the peculiarities of the harmonisation process within the European Union. First, the European harmonisation is presented in general terms. Second, the research addresses the methods of harmonisation adopted by the different institution of the EU. Third, it focuses on the different types of harmonisation of laws that occur in the EU. Finally, few considerations are reserved for possible alternatives to the harmonisation process.

---

149 Orkun Akseli, 'International Harmonisation of Credit and Security Laws' in Andenas and Baasch Andersen (n 3) 551.

150 Marcel Fontaine, 'Law Harmonization and Local Specificities - A Case Study: OHADA and the Law of Contracts' (2013) 18 Uniform Law Review 50, 50.

151 Milena Sterio, 'The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa' (2005) 13 Cardozo Journal of International and Comparative Law 161, 162.

152 Lebron (n 144) 67.

153 ibid.

154 Gerhard Wagner, 'The Economics of Harmonization: The Case of Contract law' (2002) 39 Common Market Law Review 995, 1014.

155 Lebron (n 144) 84.

2.7. The European Union Harmonisation

The concept of harmonisation is a key issue within the European Union. At its origins, the European Community was driven by the aspiration to create a single internal market that required a common regulatory framework.[156] In this regard, the EU harmonisation is a particular form of harmonisation because the European Union has its own institutional structure and its own legislative powers.[157] In particular, the European Union has the legislative and executive power to create a unified regulatory framework for its members.[158]

Notwithstanding the relevance of this process within the EU, neither the treaties nor any secondary legislation provides an official definition of 'harmonisation' or an explanation of what it entails for the European Union.[159] In this sense, the EU harmonisation process encompasses different meanings. It may include the concept of 'unification', which refers to the creation of the uniform legal rules for the whole territory of the European Union.[160] Alternatively, it may refer to the concept of 'convergence', which relates to a spontaneous mutual influence between the legal systems of the member states.[161] Moreover, the degree of integration of laws is not homogeneous, and it varies according to the subject matter and the interests involved.[162]

As already mentioned, the process of harmonisation of laws at the EU level has been seen as a mean for the establishment of the European single market.[163] This is the common space within the European without internal borders and regulatory obstacles to the free movement of persons, goods and services and capitals.[164] For the functioning of the market, it is pivotal that the rules applied within the European territory do not constitute obstacles to the

---

156 Andrew McGee and Stephen Weatherill, 'The Evolution of the Single Market: Harmonisation or Liberalisation' (1990) 53 The Modern Law Review 578.
157 Lohse (n 3) 286.
158 ibid
159 ibid 283.
160 ibid.
161 ibid.
162 Robert Schülze, *European Union Law* (CUP 2015) 550.
163 Isidora Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar Publishing 2013) 6.
164 The European Single Market <https://ec.europa.eu/growth/single-market_en> accessed 21.07.2020.

fundamental freedoms of the market.[165] In this sense, the harmonisation is instrumental to the creation or - at this point – enhancement of the single market.

The development of the European Union has slightly parted away from just an economic integration goal. With the evolution from the European Community to the European Union, the EU has broadened its objectives and strengthened its powers.[166] In particular, it has expanded its reach from economic competencies to a broader range of objectives that includes a stronger political and cultural integration.[167]

Nevertheless, the internal market as the legal framework where economic transactions take place is still at the core of the EU. As a result, currently, the internal market is the space that recognises the fundamental economic freedoms but also the social claims of modern democracies, such as labour protection, gender equality, environmental sustainability, and culture.[168]

The process of European harmonisation is a bargain between the European Union and its member states.[169] On one side, the European Union pushes towards the strengthening of the internal market, and consequently towards the closest possible uniformity of the rules within the borders of the market. On the other side, the member states often claim for autonomy in large sectors of legislative power. The balance between these polarising instances is drawn upon the division of the competencies between the EU and the member states, and the principles stated in the treaties for the correct functioning of these competencies.[170]

---

165 Paul Craig and Gráinne de Búrca, *EU Law: Text Cases and Materials* (6th edn, Oxford 2015) 607 ff.

166 Ibid, 632; Bruno de Witte, 'A Competence to Protect: The Pursuit of non-market aims through Internal Market Legislation' in Phil Syrpis ed, *The Judiciary, The Legislative and The EU Internal Market* (Cambridge University Press 2012) 25 ff.

167 Lohse (n 3) 289.

168 Giuseppe Tesauro, *Diritto dell' Unione Europea* (CEDAM 2012) 370.

169 Isodora Maletić, 'Theory and Practice of Harmonisation in the European Internal Market' in Andenas and Baasch Andersen (n 3) 314.

170 Treaty on the Functioning of the European Union (TFEU) Article 3: 'The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when

In particular, the EU has exclusive competence in a limited number of sectors.[171] Here, only the EU may enact binding legislative acts. However, the majority of the sectors are of shared competence between the EU and the member states.[172] It is in these sectors that the bargain between the EU and its member states take place. In an attempt to mitigate possible conflicts, the Treaty on the Functioning of the European Union (TFEU) provides the guiding principles of proportionality and subsidiarity.[173]

The principle of subsidiarity regulates the exercise of the competencies allocated between the EU and the member states.[174] In particular, it determines when it is appropriate for the EU institutions to take action instead of the member states. In this sense, Article 5 of the TFEU specifies:

> [T]he 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.[175]

On the other hand, the principle of proportionality regulates the exercise of power within the EU institutions.[176] Accordingly, under this principle, the EU action 'must be limited to what is necessary to achieve the objectives of the Treaties'.[177] Moreover, the measures adopted by the European Union must respond to the proportionality test, which verifies that the measures adopted

---

its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope' <http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=celex%3A12012E%2FTXT> accessed 21.07.2020.

171 ibid.

172 TFEU Article 4(2): 'Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty <http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=celex%3A12 012E%2FTXT> accessed 21.07.2020.

173 TFEU Article 5.

174 Craig and de Búrca (n 165) 95.

175 TFEU Article 5(3).

176 ibid para 3.

177 Principle of Proportionality <http://eur-lex.europa.eu/summary/glossary/proportionality.html> accessed 21.07.2020.

by the EU have a legitimate aim and that they are appropriate, necessary and reasonable.[178] Therefore, whereas the subsidiary principle regulates the amount of EU intervention, the proportionality principle governs its quality.[179]

2.8. Methods of Harmonisation

In the European Union, two different methods seek to enhance the integration among the different legal systems of the EU member states: (i) the so-called negative integration; and (ii) positive harmonisation.[180] Historically, negative integration is the first method of harmonisation adopted by the EU.[181] It is made of two elements: (i) the treaties and (ii) the role of the Court of Justice of the European Union (CJEU).[182]

On the one hand, the EU treaties impose prohibitions upon the member states in order to eliminate the barriers to the freedom of movement of persons, goods, services and capitals within the internal market.[183] On the other hand, negative integration involves the CJEU's interpretation of the EU treaties.[184] In particular, the CJEU suggest the member states to reform the national measures that are incompatible with the EU principles and constitute a barrier to free movement within the single market.[185]

This negative integration is based upon treaties' provisions that prohibit any restriction on the four freedoms of the market.[186] In this sense, with the procedures set in Articles 258-59 and 267 TFEU, the CJEU requires the member states to conform national rules to the EU principles and standards.[187] At the same time, the CJEU's work guarantees not only the

---

178 Craig and de Búrca (n 165) 551.
179 Damian Chalmers, Garreth Davies, Giorgio Monti, *European Union Law* (3rd edn, CUP 2014) 393.
180 Lohse (n 3) 286.
181 Maletić (n 163) 6.
182 ibid.
183 Bartolomiej Kurcz, 'Harmonisation by Means of Directive: Never-ending Story' (2001) 12 European Business Law Review 287, 287-288.
184 ibid.
185 Graig and de Búrca (n 178) 638.
186 Lohse (n 3) 293.
187 See Maletić (n 163) 8-12.

formal uniformity of the laws but also the consistent interpretation of the EU primary and secondary law within the territory of the European Union.[188]

The second method of harmonisation that takes place in the European Union is the so-called positive harmonisation.[189] This second approach involves the European legislative power, and it consists of the enactment of positive rules that are homogeneous for the whole territory.[190] Generally, the legal bases for the harmonisation process are to be found in the provisions that regulate the competences and the legislative powers of the EU.[191]

This is because, every time the European Union adopts an act, it is – at some degree – harmonising the laws on the subject.[192] Positive harmonisation may occur through Regulations, Directives, Recommendations, and Opinions of the Commission.[193] Even if these instruments have different binding force, they all can contribute to the harmonisation of laws in practice.[194]

The TFEU has specific provisions that constitute the legal basis for the harmonisation measures in Chapter three titled ‘Approximation of Law’.[195] In particular, Article 114 of the TFEU provides that the competent European Union institution, under the ordinary legislative procedure, adopts the measures for the harmonisation of the national provision that interact with the functioning of the internal market.[196]

Concerning the balance between the interests of the European Union and those of its member states, the harmonisation process should take into account the autonomy of the member states and their peculiarities.[197] Article 114(4) TFEU allows the member states to maintain national provisions that differ from the European standards.[198] The member states can justify their

---

188 See Tesauro (n 168) 293.
189 See Lohse (n 3) 286.
190 Kurcz (n 183) 288.
191 ibid 290.
192 Lohse (n 3) 291.
193 TFEU Article 3.
194 Lohse (n 3) 291.
195 TFEU Chapter 3; Maletić (n 163) 13. On the equivalence of the term ‘approximation’ and ‘harmonization’, see Lohse (n 3) 284.
196 TFEU Articles 36 and 114.
197 Maletić (n 163) 21.
198 TFEU Articles 114(4)

measures on the basis of (i) public morality, public policy or public security; (ii) protection of health and life of humans, animals or plants; (iii) the protection of national treasures possessing artistic, historical or archaeological value; (iv) the protection of industrial and commercial property; and (v) the protection of the environment.[199]

Nevertheless, the balance between the interests underpinning the harmonisation process and the particular values of the member states leans more favourably towards those of harmonisation.[200] Under Article 114 TFEU, the member states should notify the Commission the provisions they intend to maintain in divergence from the EU standards.[201] They also need to communicate the grounds on which these provisions are considered necessary.[202] The Commission approves or rejects the required exceptions from the application of the harmonised rules.

However, the Commission's approval is difficult to achieve.[203] In fact, the European Commission involved in the legislative process is already bound to take into consideration 'health, safety, environmental protection and consumer protection […] as a base a high level of protection'.[204] The consideration given to these interests implies that the derogation from the rules may not be easily achieved.[205]

2.9. Types of Harmonisation

The process of harmonisation might pursue different degrees of integration of the national legal systems.[206] Historically, the first type of harmonisation adopted by the EU was the total harmonisation. As the name suggests, it is the most invasive type of harmonisation, and it pursues 'an ideal of uniform laws for Europe'.[207] With this type of harmonisation, the European Union

---

199 TFEU Article 36.
200 Maletić (n 163) 21.
201 TFEU Article 114(4).
202 ibid.
203 Maletić (n 163) 21-23.
204 TFEU Article 114(3).
205 C-41/93 France *v Commission* ECLI:EU:C:1994:23 [1994] ECR I-01831, Opinion of AG Tesauro, para 4.
206 Schülze (n 162) 550.
207 Lohse (n 3) 286.

provides for a set of rules for the subject matter, and these are strictly implemented within the EU territory. Total or exhaustive harmonisation entails the replacement of national laws with EU rules.[208] In this case, the member states do not have any margin of deviation from the European standards, but they can only invoke safeguard clauses generally provided by the harmonising legislative act.[209]

By contrast, in recent years, the minimum harmonisation has become increasingly common.[210] The model of the minimum harmonisation is the legal expression of the power bargain between the EU central powers and the legal autonomy of the member states. With the minimum harmonisation process, the EU legal instruments - Regulations or more commonly Directives - set the minimum standards on a specific matter.[211] At the same time, the member states are allowed to introduce national regulations that protect or advance welfare or social interests.[212]

This type of process has been well-described with a metaphor. With the minimum harmonisation, the EU instrument sets the floor, the EU treaties set the ceiling, and the member states have the freedom to legislate within these boundaries.[213] However, recently, the CJEU evaluated the effectiveness of the minimum harmonisation process in eliminating barriers to trade.

In particular, the recent *Philip Morris* case[214] narrows the room for future use of the minimum harmonisation techniques, while reducing the space for national legislation in concurrent competences.[215] In the case recalled, the CJEU analyses the directive on 'the approximation of the laws, regulations and administrative provisions of the Member States concerning the

---

208 Ellen Vos, 'Differentiation, Harmonisation and Governance' in Bruno de Witte, Dominik Hanf, Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2011) 148.
209 Piet Jan Slot, 'Harmonisation' (1996) 21 European Law Review 378, 382.
210 Micheal Dougan, 'Minimum Harmonisation and the Internal Market' (2000) 37 Common Market Law Review 853, 855.
211 Kurcz (n 183) 296.
212 Dougan (n 210) 855.
213 ibid.
214 Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2014] EU:C:2016:325.
215 ibid paras 71-72.

manufacture, presentation and sale of tobacco and related products'.[216] The Court held that a literal interpretation of the wording of the directive as minimum harmonisation would be inconsistent with the aims of Article 114 TFUE.[217]

In particular, the CJEU rejected the idea that the directive put forward a minimum harmonisation of tobacco products.[218] In its reasoning, the Court suggested that allowing the member states to introduce stricter requirements in addition to those already provided by the directive would most likely constitute barriers to trade.[219] Instead, the interpretation of the court suggested that the type of harmonisation used in the Tobacco directive is the partial harmonisation.[220]

Partial harmonisation has two possible slightly different meanings.[221] On the one hand, with partial harmonisation, the EU regulates only some of the elements of a particular subject. At the same time, the member states have to provide the general regulatory framework on the topic and the details not covered by the EU legislative acts.[222] It is the primary tool of harmonisation for share competencies within the European Union, and it leaves the broadest legislative powers to the national systems.[223] On the other hand, partial harmonisation can also mean that the harmonised rules provided by the EU apply only to cross-border scenarios.[224]

Finally, the European Union can also put forward an optional harmonisation.[225] This type of harmonisation does not impact upon the

---

216 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L 127.

217 Case C-547/14 (n 214) paras 71-72.

218 ibid.

219 ibid 71.

220 ibid para 81.

221 Kurcz (n 183) 296.

222 Vos (n 208) 149.

223 Amandine Garde 'Partial Harmonisation and European Social Policy: A Case Study on Acquired Rights Directive' in John Bell, Alan Dashwood and Angela Ward (eds*), Cambridge Yearbook of European Legal Studies* vol. 5 (Hart Publishing 2004) 173.

224 Kurcz (n 183) 296.

225 Schülze (n 162) 551; Fernando Gomez and Juan Jose Ganuza, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional instrument?' (2011) 7 European Review of Contract Law 275; Salewudin Ibrahim and Richard

national legislation. Instead, it requires the participants of the market to decide whether to use the national rules or to opt for the European Union ones.[226]

2.10. Alternatives to the Harmonisation

Due to the tensions between the EU central powers and the instances of legislative autonomy from the member states, the process of harmonisation is not always possible.[227] The power bargain between the central and the peripheral instances pushes the EU to look for different paths towards the convergence of the legal systems of the member states.[228] One possible path is the use of the mutual recognition principle.[229] The other option is more ambitious, and it encompasses the creation of EU comprehensive codes.[230] These options are the two ends of a spectrum: one that gives up on formal harmonisation and hopes for spontaneous convergence; and the other that aims at total unification.

A first – more realistic – path towards integration is through the principle of mutual recognition. The CJEU has introduced this principle in the free movement of goods.[231] The principle seeks to guarantee the four freedoms of the internal market when there is no formal European standard to follow.[232] The principle refers to the duty of the member states to recognise and accept the policies and practices of other member states as valid as their own.[233] It introduces a presumption of equivalence between national practices, and it

---

Stone, 'Harmonisation of European Contract Law through an Optional Instrument: Principles and Practical Implications' (2015) 24 Nottingham Law Journal 19; See Rafał Mańko, 'EU Competence in Private Law' (2015) European Parliamentary Research Service, 7 <www.europarl.europa.eu/RegData/etudes/ IDAN/2015/545711/EPRS_IDA%282015%29545711_REV1_EN.pdf > accessed 21.07.2020.

226 Vos (n 46) 148.

227 Maletić (n 163) 21 ff.

228 Giandomenico Majone, 'Policy Harmonization: Limits and Alternatives' (2014)14 Journal of Comparative Policy Analysis 4, 5.

229 Marcus Klamert, 'What We Talk About When We Talk About Harmonisation' (2015) 17 Cambridge Yearbook of European Legal Studies 360, 371.

230 Hugh Collins, *The European Civil Code: The Way Forward* (CUP 2008).

231 Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) ECLI:EU:C:1979:42 [1979] ECR 649.

232 Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 406.

233 Adrienne Héritier, 'Mutual Recognition: Comparing Policy Areas' (2207) 14 Journal of European Public Policy 800, 801.

forbids the creation of restrictive measures based on the regulatory diversity of the member states.[234]

Member states may derogate this presumption of equivalence in individual cases.[235] However, the member state adopting restricting measures has to prove that the restriction is justified by either specific derogation provided in the treaties or overriding reasons of the public interest.[236] Moreover, the restriction must be proportionate to the aim that it pursues.[237]

The mutual recognition principle firstly laid down in economic and commercial practices has been later expanded to other areas of law, such as civil and criminal justice matters.[238] The principle of mutual recognition is based on the principle of mutual trust between the member states.[239] The principle allows a basic form of coordination of legal systems when a formal harmonisation is not possible.[240] The principle of mutual recognition can be seen as the beginning of the harmonisation process, as the first step towards a closer convergence. It is indeed something less than harmonisation. It allows different national rules, and it leaves to the member states to coordinate and cooperate.

An alternative – more ambitious - path towards integration is the creation of an EU legal instrument that substitutes the piece-meal regulations more exhaustively. Since 1970, it has been suggested that a European Civil Code could replace the national civil codes.[241] This idea, while widely discussed, has not taken place yet due to the difficulties faced in reaching an agreement on the content of the Code.[242] However, several studies have been conducted

---

234 Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) 11 ff.

235 Möstl (n 232) 411-412.

236 ibid.

237 ibid.

238 Nora Gevorgyan, 'The Role, Impact and Development of the Principle of Mutual Recognition in EU Law' (2014) 3 Banber - Bulletin of Yerevan University 67, 71.

239 Koen Lenaerts 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (2015) *The Fourth annual Sir Jeremy Lever lecture, All Souls College at the University of Oxford*, 4 < www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf > accessed 21.07.2020.

240 ibid.

241 Mańko (n 225) 15.

242 ibid.

on the topic of European Private Core Law,[243] Contract law,[244] and more recently, a European Code for Business Law.[245]

The present thesis addresses the topic of harmonisation in particular aspects of insolvency law and private law. In particular, chapter three will discuss the difficulties in harmonising insolvency law and the current compromise. It will also explore the limits of the current Private International Law approach. Moreover, chapter eight will put forward a proposal of harmonisation designed specifically for transaction avoidance claims.

2.11. Conclusion

The chapter sought to provide a theoretical background to the research of the thesis. The first section of the chapter analysed the concept of transaction avoidance in insolvency law. It highlighted the general features of the ideal type of transaction avoidance claims in insolvency proceedings. This part also identified which claims will be considered in this thesis.

Secondly, the chapter analysed the concept of transaction avoidance in private law. It considered the complexity of the claim at stake and highlighted the rationale of this type of claims outside the insolvency framework.

It can be concluded that while transaction avoidance claims fulfil different functions in insolvency law and private law, they serve a similar scope of protection of credit enforcement. In insolvency law, the claims serve the scopes of collection and distribution of the insolvency's estate and therefore enhance the creditors' possibility to recover their claims. In private law, the claim can be seen as an instrument that allows a creditor to protect their ability to enforce their credit over the debtor's assets.

The third part of the chapter has instead explained the concept of European harmonisation. It addressed the different methods of the harmonisation process and the different types of harmonisation available in the EU. Moreover, the section highlighted that harmonisation is a process that involves

---

[243] Ugo Mattei and Mauro Bussani, 'In Search of the Common Core of European Private Law' (1994) 2 European Review of Private Law 485.

[244] Ole Lando, 'The Common Core of European Private Law and the Principles of European Contract Law' (1998) 21 Hastings International and Comparative Law Review 809, 810.

[245] Juri Meeting Minutes of 12 October 2016 para 30 < http://www.emeeting.europarl.europa.eu/emeeting/committee/archives/JURI> accessed 21.07.2020.

a power bargain between the EU and the member states. From the treaties, it can be observed that such a bargain seems to lean in favour of the interest of European integration rather than the national instances.

Chapter 3
The European Union Approach to Cross-Border Insolvency and Avoidance Actions: Issues within the Current Framework

3.1. Introduction

In recent years, insolvency transaction avoidance has been in the limelight at the European Union (EU) level.[1] This chapter seeks to explore the treatment of transaction avoidance claims under the European Insolvency Regulation Recast - EIR(R). At the same time, the chapter seeks to provide an overview of the jurisprudential and doctrinal consideration given at the EU level to transaction avoidance actions available in private law.

This chapter aims to illustrate the European Union approach to transaction avoidance. The chapter is divided into three sections. The first section introduces the evolution of the EU insolvency system and its state of the art. The second section seeks to explain the regulation of the insolvency transaction avoidance claims within the European Insolvency framework. In this part, EU legislation and the case-law of the Court of Justice of the European Union (CJEU) are discussed to highlight the current issues on the topic. Finally, the third section discusses the EU approach to private law transaction avoidance and its current developments. Both the second and third section of the chapter deal with jurisdictional and applicable law issues.

---

1 See among others Jay Lawrence Westbrook, Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases (2006) 42 Texas International Law Review 899; INSOL International, 'Avoidance Provision in a Local and Cross-border Context: A Comparative Overview' 2008 Technical Series Issues No. 7; Marco Frigessi di Rattalma, 'Avoidance Actions under Article 13 EC Insolvency Regulation: An Italian View' (2009) 6 European Company Law 27; Roelf Jakob deWeijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies'(2011) 20 International Insolvency Review 219; Andrew Keay, 'The Harmonisation of the Avoidance Rules in European Union Insolvency' (2016) International and Comparative Law Quarterly 79.

3.2. Transaction Avoidance and European Insolvency Law

As explained in chapter two, transaction avoidance is a specific area of insolvency law.[2] It represents an example of the insolvency practitioner's powers to collect the assets of the insolvency's estate and maximise the value to distribute to the general body of creditors. In this sense, transaction avoidance can be said to contribute to the function of insolvency law.[3] Therefore, it would be impossible to understand the EU approach to transaction avoidance without a broader look at the EU insolvency system.

3.2.1. The Difficult Path towards the European Harmonization of Insolvency Law

From a legal-economic perspective, the traditional role of insolvency law in any legal system is to enforce the exit of inefficient companies from the market.[4] More recently, insolvency law has broadened its scope, including a new function: the rescuing and restructuring of companies that are in financial distress but still embody a viable business.[5] Nowadays, the role of insolvency law is to regulate the fate of a company in distress: either towards liquidation and the exit from the market or towards a second chance with the re-entry into the market with a restructured layout.[6]

The relationship between insolvency law and the market is strict. At the EU level, an efficient insolvency system is necessary for the functioning of the internal market.[7] In general, the implementation of the four freedoms of movement and the creation of the single market require a common system of dispute settlement and judgments enforcement.[8] The necessity of a common EU system is even stronger in relation to insolvency law as the latter

---

2 Andrew Keay, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55, 59.

3 ibid.

4 Manfred Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 American Bankruptcy Law Journal 485.

5 Bob Wessel, 'Business Rescue in Insolvency Law – Changing the Laws and Challenges for the Profession' (2015) 6 Tijdschrift voor Vennootschapsrecht, Rechtspersonenrecht en Ondernemingsbestuur 207.

6 ibid.

7 Council Regulation n. 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L160/1, Recitals 3 and 4.

8 Paul Omar, 'Genesis of the European Initiative in Insolvency Law' (2003) 12 International Insolvency Review 147,148.

constitutes a system that deals with the life and death of the companies that participate in the internal market.[9]

In the second part of the last century, there have been numerous attempts to create a common European insolvency framework.[10] The first efforts date back to the Sixties when the European Economic Community set up the first Insolvency Working Party to elaborate a European Convention on Insolvency based on Article 220 of the Treaty of Rome.[11] After this moment, the history of European insolvency law counts many failed steps in drafting a Convention on Insolvency Proceedings.[12]

The reasons behind the difficulties in reaching a cross-border agreement are various. They can be found in the very nature of insolvency law. Insolvency law is a particular branch of law where the interests of the State are prominent.[13] First, insolvency has a hybrid character: it is both procedural and substantive at the same time.[14] Traditionally, insolvency law comes into play in the form of procedural rules, but those rules have a substantive effect.[15] The rules of insolvency law affect the substance of the relations of the company in distress with creditors, debtors, employees, shareholders and even consumers.[16]

---

9 Balz (n 4) 490.

10 ibid and Omar (n 8) 150 ff.

11 ibid.

12 The first report of the working group dates back to 1970, and it was received with universal opposition. It was followed by the 1980 EEC Draft that was published in the Official Journal only in 1982. At last, an attempt took place in 1984 with a revision of the 1982 draft. Due to the difficulties in achieving the member states' consent on an instrument within the European Economic Community, a different path was undertaken within the Council of Europe. The Convention proposed by the Council of Europe is known as the 'Istanbul Convention'. It sought to provide an international instrument signed by the European member states but applicable independently from the ECC and beyond its borders. The Istanbul Convention should have dealt with issues of recognition of insolvency proceedings with a light approach, regulating few aspects of proceedings and allowing the signatories to provide divergent rules. Notwithstanding this lax approach, the Convention never entered into force. See Leslie Burton, 'Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty' (1999) 5 Annual Survey of International and Comparative Law 205; Balz (n 4); Omar (n 8).

13 Thomas M. Gaa, 'Harmonisation of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?' (1993) 27 The International Lawyer 881, 897.

14 Irit Haviv-Segal, 'Bankruptcy Law and Inefficient Entitlements' (2005) 2 Berkeley Business Law Journal 355, 366.

15 ibid.

16 Elizabeth Warren, 'Bankruptcy Policy' in Jagdeep S. Bhandari and Lawrence A. Weiss (eds) *Corporate Bankruptcy: Economic and Legal Perspectives* (1996) 73.

Second, the State has various interests involved in the matter. On the one hand, the State has a macro-economic interest in insolvency law.[17] Insolvency law resolves non-viable debts and imposes viable debts to be repaired.[18] In other words, it constitutes a system that shapes the debt relations that are at the base of the current economic system.[19] Moreover, insolvency rules may prevent a *domino effect* where a company's inability to repaid its debts triggers the failure of other companies that trade with it.[20] Therefore, it helps to safeguard the stability of the national market. At the same time, by ensuring the participation in the market only to viable companies, insolvency law may enhance the growth of the national economy.[21]

On the other hand, the State has micro-economic and social interests in insolvency.[22] They include the recovery of tax claims and the protection of weaker parties such as employees, minority shareholders and tort creditors.[23] Without debating whether insolvency law should deal with these mixed issues directly (communitarian theory)[24] or whether it should ideally only aim to collect and distribute the asset (collectivist theory),[25] it has to be noted that these issues are intertwined with the insolvency circumstances.[26]

Moreover, these intertwined issues are deeply connected with the culture permeating the national legal systems, with their societal values and public policies.[27] The diversity and uniqueness of the EU member states' approaches

---

17 Jean-Charles Bricongne and others, *Macroeconomic Relevance of Insolvency Frameworks in a High-debt Context: An EU Perspective*. (2016) Directorate General Economic and Financial Affairs (DG ECFIN) European Commission, 8 < https://ec.europa.eu/info/publications/macroeconomic-relevance-insolvency-frameworks-high-debt-context-eu-perspective_en> accessed 21.07.2020.

18 ibid.

19 ibid.

20 Royston Goode, *Principles of Corporate Insolvency Law* (Sweet&Maxwell 2011) 57.

21 Bricongne and others (n 17).

22 Balz (n 4) 486.

23 ibid.

24 Elizabeth Warren (n 16); Donald Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Columbia Law Review 717.

25 Thomas. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1950) 7 ff; Douglas Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 The University of Chicago Law Review 815; Thomas Jackson and Robert Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Virginia Law Review 155.

26 Balz (n 4) 486.

27 ibid.

to insolvency law may explain the difficulties in achieving an international consensus on the topic of insolvency law.[28]

3.2.2. The European Regulation on Insolvency

Notwithstanding the difficulties in harmonising the subject, the EU continued to strive for an internal instrument applicable to cross-border insolvency proceedings.[29] At last, given the expanded powers provided by the Treaty of Amsterdam,[30] the European Union opted for an internal instrument directly applicable to the member states:[31] the European Regulation on Insolvency Proceedings, commonly known as European Insolvency Regulation (EIR).[32] The EIR (regulation No 1346/2000) has been recently 'recasted' into regulation No 2015/848 (European Insolvency Regulation Recast – EIR(R)).[33]

The EIR(R) is directly applicable to the member states, and it grants an independent and homogeneous system for cross-border insolvency within the European Union.[34] Moreover, the use of a regulation as a legislative instrument ensures that the instrument is interpreted uniformly by the CJEU.[35]

Nonetheless, due to the difficulties mentioned above, the EIR(R) is a compromise under several aspects. The first compromise regards the approach adopted. The EIR(R) adopts a Private International Law (PIL) approach, and therefore, it does not harmonise substantive insolvency laws

---

28 Roland Lechner, 'Walking from the Jurisdictional Nightmare of the Multinational Default: The European Council Regulation on Insolvency Proceedings' (2002) 19 Arizona Journal of International and Comparative Law 975, 977.

29 In 1995, another convention was proposed: the Convention on Insolvency Proceedings of 23 November 1995, and after a long negotiation phase it was dismissed. See Report on the Convention on Insolvency Proceedings of 23 November 1995, 23 April 1999 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A 4-1999-0234+0+DOC+XML+V0//EN> accessed 21.07.2020.

30 Treaty of Amsterdam Amending the Treaty on European Union, Treaties Establishing the European Community and Certain Related Acts [1997] OJ C340/1.

31 With the exception of Denmark.

32 Regulation n 1346/2000 (n 7).

33 Regulation (EU) 2015/848 of The European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L141/19.

34 Lechner (n 28) 978.

35 Miguel Virgós Soriano and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 5.

among the EU member states.[36] The insolvency proceedings have different procedures in the member states, and they may carry different outcomes.[37]

The regulation provides a set of rules on jurisdiction, applicable law, recognition and enforcement of insolvency proceedings displaying cross-border elements.[38] In other words, the EIR(R) deals with those issues of international private law arising in cross-border insolvency proceedings that were left out of the Brussels Convention on jurisdiction and recognition and enforcement of judgements in civil and commercial matters.[39]

The Brussels Convention, now Brussels I Regulation (Recast),[40] explicitly excludes 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.[41] The Brussels I Regulation Recast and the EIR(R) are meant to be mutually exclusive instruments of PIL that operate harmoniously together. However, the practice shows that their relationship presents significant gaps and overlaps.[42] The relationship between the two tools has been particularly controversial concerning claims that are ancillary to the insolvency proceedings, as it will be later explained in relation to the topic of transaction avoidance.

The second compromise concerns the principles of PIL that the Regulation adopts on jurisdiction. In cross-border insolvency, the first issue is to determine which country has jurisdiction on the insolvent company. Traditionally the issue is solved referring to two approaches: either (i) the territorial approach or (ii) the universal approach.[43]

---

36 Regulation 1346/2000 (n 7) Recital 11; Regulation 2015/848 (Recast) (n 33) Recital 22.

37 ibid.

38 Regulation 2015/848 (Recast) (n 33) Recital 6.

39 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1972] OJ L299/32.

40 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (recast) [2012] OJ L351/1.

41 ibid Article 1.2(b).

42 Gerard McCormack, 'Reconciling European Conflicts and Insolvency Law' (2014) 15 European Business Organization Law Review 309.

43 Nigel John Howcroft, 'Universal vs Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails' (2007) 8 UC Davis Business Law Journal 366, 369.

The territorial approach is rooted in the concept of state sovereignty. It provides that the state has jurisdiction on the insolvency's estate if the assets of the company are located in its territory.[44] This approach entails that the insolvency decisions issued by foreign courts are not effective in a state that applies the territorial approach. At the same time, the decisions issued by a state that applies the territorial approach are not effective abroad.[45]

This means that the insolvency of a company might be handled by different national legislation according to where the company's assets are located.[46] The territorial approach produces the possibility of simultaneous and conflicting proceedings on the same business entity.[47] However, it has the advantage of proximity between the court and the assets. Therefore, the territorial approach should improve the efficiency of the individual proceedings.[48]

On the other hand, the universal approach provides that the insolvency proceedings affect the entire estate of a company regardless of the assets' location.[49] At the same time, the universal approach allows the recognition of non-conflicting foreign insolvency proceedings, whereas the territorial approach does not.[50] The universal approach seeks to create a single *forum* that deals with all the insolvency issues arising from the company's default.[51] However, the application of this approach lacks a real connection with the assets: even if the court has jurisdiction on the assets, they may be out of its actual reach.[52]

In relation to these cardinal approaches, the EIR adopted a third approach that is a compromise between those two regimes: the so-called 'modified universalism'. Under the modified universalism, there are at least two courts

---

44 Ian Fletcher, 'The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions' (1998) 33 Texas International Law Journal 119, 123.
45 ibid.
46 Jona Israël, European Cross-border Insolvency Regulation: A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitas Europaea (Intersentia 2005) 27.
47 ibid.
48 ibid.
49 Fletcher (n 44) 122.
50 Israël (n 46).
51 Fletcher (n 44)122.
52 Israël (n 44) 36.

involved in the insolvency: a primary court that has universal jurisdiction and a secondary court that has some connection with the assets involved in the primary proceeding and collaborates with the primary court.

The primary proceedings have universal effects as they involve all the assets of the insolvent company, regardless of where they are located.[53] However, in practice, it is not always either feasible or cost-effective to liquidate assets located abroad. Therefore, in support of the main proceedings, secondary ones can be opened. The secondary proceedings are carried out in parallel to the primary ones, and they affect only the assets located within the territory where the secondary proceedings pend.[54]

The EIR(R) adopts this type of double jurisdiction and provides for main and secondary proceedings. Under Article 3 of the EIR(R), the jurisdiction on the primary proceedings belongs to 'the courts of the Member State within the territory of which the centre of a debtor's main interests (COMI) is situated'.[55]

The COMI is the place of the company central administration.[56] It does not necessarily coincide with the company's registered office, but it has to be determined by objective factors ascertainable by third parties.[57] When the registered office and the place of administration coincide, that place is considered to be the centre of the main interest of the company.[58] On the other hand, when the registered office and the place of administration are located in different countries, the COMI has to be determined by taking into account the 'the company's actual centre of management and supervision and of the management of its interests'[59] that is ascertainable by third parties.[60]

---

53 Regulation n 2015/848 (n 33) Article 3.

54 ibid, Article 3(2).

55 Regulation 1346/2000 (n 7) Article 3.1; Regulation 2015/848 (n 33) Article 3.1.

56 Regulation 2015/848 (n 33) Recital 30.

57 Case C-341/04 *Eurofood IFSC Ltd* ECLI:EU:C:2006:281 [2006] ECR I-3854, para 33.

58 However, the EIR(R) introduced a limitation to this presumption if the company's registered office has been moved within three months before the request for the opening of the proceeding. See Regulation No 2015/848 (n 33) Article 3.1(2).

59 Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* ECLI:EU:C:2011:671 [2011] ECR I-09915, para 59.

60 ibid.

While the main proceedings have a universal nature and their outcomes should be recognised in all EU member states,[61] the secondary proceedings - in theory - have a territorial nature.[62] In this sense, the secondary proceedings may be opened in a member state where the company has an establishment, and the effects of this jurisdiction are limited to company's assets located in the state of establishment.[63]

The relationship between the primary and secondary proceeding is not unequivocal, as the courts of different member states may assume to have jurisdiction.[64] In this case, the first proceeding opened is the primary one. Indeed, it is the national court that determines whether the company has the COMI in its own territory and, consequently, the jurisdiction on the primary proceeding.[65] However, the EIR(R) provides now that the court shall specify the grounds on which the jurisdiction is based within the order of

opening of the proceeding and that the debtor or the creditors may challenge the decision.[66]

At the same time, the CJEU has recently ruled that the national courts have discretion on whether to open a secondary proceeding according to their national law.[67] In *Burgo Group v Illocroma SA (in liquidation)*, the CJEU held that a secondary proceeding might be opened in the state of the registered office when the COMI is situated in another member state.[68] The Court specified that the right to seek the opening of a secondary proceeding could not be limited to creditors that have the domicile or registered office in that

---

61 Regulation 1346/2000 (n 7) Article 16(1); Regulation 2015/848 (n 33) Article 29.

62 Federico M Mucciarelli, 'Private International Law Rules in the Insolvency Regulation Recast: a Reform or a Restatement of the Status Quo?' (2015) < https://dx.doi.org/10.2139/ssrn.2650414> accessed 21.07.2020.

63 Regulation No 1346/2000 (n 7) article 3(2) now Regulation No 2015/848 (n 33) article 3(2).

64 Bob Wessels, 'International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular against Groups of Companies < https://www.iiiglobal.org/sites/default/files/11-_InternJurisdictionCompanies.pdf > accessed 21.07.2020.

65 ibid.

66 Regulation No 2015/848 (n 33) Articles 4.1 and 5.

67 Case C-327/13 *Burgo group v Illochroma SA (in liquidation)* ECLI:EU:C:2014:2158 [2014] ECR 114.

68 ibid.

member state.[69] Moreover, the court held that the secondary proceeding, although lacking a universal nature, does not protect merely local interests. [70]

The third compromise of the EIR(R) concerns the principles of PIL adopted on conflicts of laws issues. Generally, the EIR(R) provides that the law applicable to the insolvency proceedings is the law of the member state that has jurisdiction (i.e. *lex fori concursus*).[71] The law of the member state that opens the proceedings determines the conditions required for opening the proceedings, their procedure, closure and effects.[72]

Notwithstanding this general principle, the EIR(R) provides several exceptions that undermine the predictability of the outcomes of the proceedings. The exceptions on the law applicable are contained in Articles 8-18 EIR(R). The articles encompass topics from 'Third parties' right in rem'[73] to 'the effects of the insolvency proceedings on pending lawsuits or arbitral proceedings'[74] in another member state.[75] Among the exceptions to the general principle on the applicable law, the EIR(R) provides the rules on law applicable to transaction avoidance.[76]

3.2.3. The Newest Developments: The Restructuring Directive.

After years of debate, the restructuring directive was approved the 20 June 2019 as a critical element of the EU Capital Markets Union Action Plan.[77] The Restructuring directive introduces minimum standards among the EU Member States for preventive restructuring frameworks and general measures to increase the efficiency of procedures aiming at restructuring.[78] With the term 'restructuring' is intended a modification of the debtor's assets and liabilities

---

69 ibid para 50.
70 ibid para 47.
71 Regulation 1346/2000 (n 7) Article 4.1;Regulation 2015/848 (n 33) Article 7.
72 ibid.
73 Regulation 1346/2000 (n 7) Article 5; Regulation 2015/848 (n 33) Article 8.
74 Regulation 1346/2000 (n 7) Article 15; Regulation 2015/848 (n 33) Article 18.
75 Regulation 1346/2000 (n 7) Articles 5-15; Regulation 2015/848 (n 33) Articles 8-18.
76 Regulation 1346/2000 (n 7) article 13; now Regulation 2015/848 (n 33) Article 16.
77 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)
78 Ibid.

composition aimed to allowing the prosecution of the whole or part of the business.[79]

The directive has three primary objectives. First, it seeks to ensure that viable businesses that are in financial distress get access to effective national procedures that support business restructuring.[80] The European intervention in laying down minimum standards for restructuring frameworks aims to support the prevention of

> job losses, the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole.[81]

Second, the directive seeks to provide basic standard rules concerning the discharge of the debts that the individuals have incurred in the course of their business.[82] This possibility has been introduced at EU level in order to lessen the consequences of insolvency for individual entrepreneurs.[83] The directive's objective is to reduce the social stigma related to insolvency and the difficulties arising from the continual inability to pay off debts arising from a liquidated business.[84] These factors constitute a disincentive to set a second business up and therefore, may hinder the full potential development of the internal market.

Third, the directive aims to enhance the effectiveness of the restructuring procedures of the member states and, in particular, to shorten their length.[85] Some member states present insolvency and restructuring procedures that are ineffective because of their length.[86] The excessive length of the procedures causes low recovery rates, and it deters ‘investors from carrying

---

[79] Ibid, Article 2(1).
[80] Ibid, Recital 2.
[81] Ibid.
[82] Ibid Recital 72.
[83] Ibid.
[84] Ibid.
[85] Ibid, Recital 1.
[86] Ibid, Recital 6.

out business in jurisdictions where procedures risk taking too long and being unduly costly'.[87]

The analysis of the new directive is deemed to be outside the scope of this research as the directive does not deal with the rules of transaction avoidance actions directly. However, the directive addresses transaction avoidance in relation to *new financing* and *interim* financing.[88] The phenomenon of new and *interim* financing is quite common in restructuring proceedings. Generally, it consists of an injection of funds from a bank to the restructuring company through a loan.[89]

Under the restructuring directive, new financing means 'any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan, and that is included in that restructuring plan'.[90] Also, '*interim* financing' is defined as:

> any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business.[91]

The draft makers of the directive recognised the relevance of this type of financial assistance for the success of the restructuring process.[92] Therefore, the directive seeks to provide common rules for the protection of the financing that is necessary for the success of the restructuring plan. One the one side, the directive aims to exclude new and interim financing from the application of avoidance transaction rules.[93] On the other side, it does not prejudice the application of national rules - other than transaction avoidance - that seek to declare 'new or interim financing void, voidable or unenforceable, or for

---

[87] Ibid.
[88] Ibid, Articles 17 ff.
[89] Mba Sanford, *New Financing for Distressed Businesses in the Context of Business Restructuring Law* (Springer 2019) 60.
[90] Directive on restructuring and insolvency (n 77) Article 2(7).
[91] Ibid, Article 2(8).
[92] Ibid, Recital 66.
[93] Ibid, Article 17 and 18.

triggering civil, criminal or administrative liability for providers of such financing'.[94]

Article 17 of the Directive requires the member states to introduce legislation that shields new financing and interim financing from the application of transaction avoidance rules.[95] Additionally, member states should exclude the grantors of these types of financing from civil, administrative or criminal liability.[96] At the same time, they may limit the safeguard of new financing only to the cases where a restructuring plan has been approved by the judicial or administrative authorities.[97]

Similarly, member states have the option to exclude *interim* financing from the application of transaction avoidance only after the financial aid had been subject to an *ex-ante* control by an insolvency practitioner, the creditor's committee or by a judicial or administrative authority.[98] Additionally, member states can still choose to make transaction avoidance rules applicable to *interim* financing granted after the debtor became factually insolvent.[99] Furthermore, Article 17 allows member states to grant priority to grantors of new or *interim* finance in their national distribution schemes.[100] The exclusion from liabilities and the granting of priority are intended to encourage new lenders to take the risk of investing in a business in financial distress.[101]

Article 18 of the directive requires, instead, to exclude from the application of transaction avoidance rules those 'transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan'.[102] As for the finance, member states may choose to exclude transaction avoidance rules only (i) where the judicial or administrative authorities have approved the restructuring plan, or; (ii) where the transaction had been subject to an *ex-ante* control by an insolvency practitioner, the creditor's committee or by a

---

[94] Ibid, Recital 67.
[95] Ibid, Article 17 (1)(a).
[96] Ibid, Article 17(1)(b).
[97] Ibid, Article 17(2).
[98] Ibid.
[99] Ibid, Article 17(3).
[100] Ibid, Article 17(4).
[101] Ibid, Recital 68.
[102] Ibid, Article 18(1).

judicial or administrative authority.[103] Moreover, the member states can still choose to make transaction avoidance rules applicable to transactions carried out after the debtor became factually insolvent.[104]

The directive spells out a minimum list of transactions that are deemed to be reasonable and immediately necessary for the negotiation of a restructuring plan. These are:

> '(a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;
>
> (b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;
>
> (c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;
>
> (d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c)'.[105]

These provisions are of relevance for the development of harmonised rules on transaction avoidance in insolvency proceedings (broadly intended). In an attempt to avoid conflict between the harmonised avoidance rules and the restructuring rules, the latter will be recalled in Chapter 8.

3.3. The Legal Treatment of Transaction Avoidance in the European Insolvency Regulation

The topic of transaction avoidance is a clear example of the compromises reached in the European Insolvency Regulation. Originally, the EIR dealt only with transaction avoidance on the topic of the applicable law. In particular, Article 4(m) of the EIR set that the law of the proceedings determines the rules relating to the 'voidness, voidability, or unenforceability'[106] of legal acts detrimental to the general body of creditors.

Moreover, Article 13 EIR (now Article 16 EIR(R)) provides an exception concerning the law applicable to the vulnerable transaction.[107] The provision grants the person, who benefits from the detrimental act, the right to prove that the act is subject to the law of a different member state and that such law

---

[103] Ibid, Article 18(2).
[104] Ibid, Article 18(3).
[105] Ibid, Article 18(4).
[106] ibid.
[107] ibid.

does not allow the act to be challenged. The regulation on transaction avoidance as formulated presented two types of problems: (i) jurisdictional issues; and (ii) applicable law issues.

The following sections seek to analyse the development of the CJEU case law on the topics of jurisdiction and applicable law regarding transaction avoidance. Furthermore, they seek to evaluate whether the recast regulation has solved the issues arising in the original EIR concerning transaction avoidance.

3.3.1. Jurisdictional Issues on Insolvency Transaction Avoidance

The original text of the Regulation did not provide for specific rules on jurisdiction for transaction avoidance claims, other than the general rules set in article 3 EIR. This regulatory gap concerning avoidance actions, the exclusion of the insolvency analogous proceedings from the scope of application of Brussels I, and the multinational dimension of the insolvency proceedings at stake created uncertainties on the international jurisdiction in relation to avoidance claims.

In particular, in *Seagon v Deko Marty* case,[108] a German court questioned whether an avoidance claim fell under the scope of the EIR or the Brussels I Regulation for civil and commercial matters. The CJEU held that an action to set aside, in the context of insolvency, falls within the insolvency jurisdiction even when the third party has its registered office in another member state.[109]

The first step in the interpretation of the applicability of Article 3 to transaction avoidance was understanding the purpose of the regulation.[110] The Court referred to Recital 6 EIR, which states that the regulation is limited – and therefore it applies - to claims that derived from insolvency and are closely connected with it (so-called 'ancillary claims' or '*Gourdain v Nadler* claims'[111]).

---

108 Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* ECLI:EU:C:2009:83 [2009] ECR I-791.

109 ibid para 28.

110 ibid para 18.

111 The concept of claims 'directly derived and closely connected with insolvency' was already brought to the attention of the court in the case *Gourdain v Nadler* (Case C-133/78 *Gourdain v Nadler* ECLI:EU:C:1979:49 [1979] ECR 073). In that case, the court was asked whether a director liability claim brought in insolvency fell under the Convention of Brussels I

The second step was considering if the transactional powers fell under the category of the ancillary claims. The Court held that the action to set aside the detrimental transaction of the case was inherent to insolvency law.[112] First, the avoidance claim was provided by the German Insolvency Code.[113] Second, the claim was available only to the insolvency practitioner. Third, the scope of the claim was instrumental to the collective nature of insolvency, and it serves the interests of the creditors.[114]

As a result of the judgement, Article 3 grants international jurisdiction on transaction avoidance claims to the court that opened the insolvency proceedings. In other words, the judgement clarified that article 3 establishes the *vis attractiva concursus* principle, according to which, the claims ancillary to the insolvency are attracted to the insolvency court.[115] This means that the domicile or the registered office of the defendant of the insolvency avoidance claim is irrelevant for the issue of jurisdiction on the claim.[116] It also means that third parties of the detrimental transaction must accept that the court of the primary proceeding is competent to decide on avoidance actions.[117]

The *Seagon v Deko Marty* case is a milestone on the topic of the jurisdiction of ancillary claims in insolvency. However, the reasoning of the court is open to criticism. The Court identified three factors to establish the derivation and connection of the claim to the insolvency. These factors are: (i) the inclusion of the provision in the insolvency act; (ii) the fact that the insolvency practitioner held the right of action; and (iii) the instrumental nature of the avoidance claim to the insolvency.

While the third reason should be enough to qualify a claim as 'directly derived and closely linked', the first two reasons seem to be arbitrary. First, the

---

(later transposed in the Brussels I Regulation). This type of claims was excluded from the application of the Convention due to the exclusion clause for the insolvency matter.

112 *Seagon v Deko* (n 108) para 21.

113 Insolvency Order of 5 October 1994 (Federal Law Gazette I p. 2866), which was last amended by Article 24 (3) of the Act of 23 June 2017 (Federal Law Gazette I p. 1693) (hereinafter InsO)Sections 129 ff.

114 *Seagon v Deko* (n 108) para 16.

115 Laura Carballo Piñeiro, '*Vis attractiva concursus* in the European Union: Its Development by the European Court of Justice' (2010) 3 InDret Revista para el Análisis del Derecho <www.indret.com/pdf/750_es.pdf > accessed 21.07.2020.

116 ibid, 9.

117 Tuula Linna, 'Actio Pauliana – Actio Europensis? Some Cross-Border Insolvency Issues' (2014) 10(1) Journal of Private International Law 69, 78.

position of a provision in a specific act of legislation can be useful to determine its scope, but it is not decisive. Second, the role of the insolvency practitioner should be irrelevant. It should be the nature of the claim and not the person entitled to bring the action to determine the issue.[118]

The weakness of the reasoning of the court emerged clearly in a later case of *F-Tex Sia v Lietuvos-Anglijos UAB "Jadecloud-Vilma*".[119] The CJEU decided against the insolvency jurisdiction for an avoidance claim brought by a creditor. In this case, the Court held that in order to determine the jurisdiction on the avoidance claim, it should be considered whether the avoidance action at stake fell under the category of claims "directly derived from insolvency proceedings and closely connected with them".[120] The court also highlighted that this link includes a dual criterion of 'direct derivation' and 'close connection'. These elements shall be analysed separately, but they must be met at the same time.[121]

In the opinion of the court, the avoidance claim at stake was not closely connected with the insolvency proceeding.[122] The claimant was a creditor granted with the right of action by the insolvency practitioner. According to the reasoning of the Court, the creditor acts in their own interest and for their own benefit; therefore, the claim is not connected with the collective insolvency proceeding.[123]

Having decided that there was no connection with the insolvency proceeding, the Court did not consider if the claim was directly deriving from insolvency. Moreover, while stating that the jurisdiction of the case fell under the Brussels I Regulation, it did not answer to the question of the exclusivity of the insolvency forum. Therefore, the case does not provide much guidance for future issues on the topic of transaction avoidance action as it seems closely

---

118 Paul Omar, 'The Insolvency Exception in the Brussels Convention and the Definition of "Analogous Proceedings" (2011) 5 International Company and Commercial Law Review 172, 173.

119 Case C-213/10 *F-Tex Sia v Lietuvos-Anglijos UAB "Jadecloud-Vilma*, Electronic Reports case (Court Reports – General) 19 April 2014 ECLI:EU:C:2012:215.

120 ibid para 29.

121 ibid para 30.

122 ibid para 41.

123 ibid.

confined to its own facts.[124] However, the case at stake clearly shows that the identification of the ancillary claims falling under the EIR was vague and unpredictable. Indeed, the case law has not provided precise criteria that allow for *a priori* determination of the jurisdiction on transaction avoidance action.

Notwithstanding the uncertainties left opened by the *T-Fex* case, as a result of the *Seagon v Deko Marty*, the principle of *vis attractiva concursus* has been enshrined in the insolvency regulation recast.[125] Article 6(1) EIR(R) deals expressly with the issue of 'Jurisdiction for actions deriving directly from insolvency proceeding and closely linked with them'.[126] The provision confirms the *Seagon v Deko Marty* jurisprudence, and it grants jurisdiction on ancillary claims to the courts of the member state where the insolvency proceedings have been opened in accordance with Article 3.[127]

At the same time, the provision attempts to introduce a degree of flexibility in the matter of jurisdiction if the defendant has their domicile or registered office in another member state.[128] Article 6(2) EIR(R) states that when the ancillary insolvency claim is also related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the court of the member state where the defendant is domiciled.[129] However, the possibility of combining the actions before a single court is based upon the condition that the court of the domicile has jurisdiction pursuant to the Brussels I Regulation Recast.[130]

The Recast might solve some problems of jurisdiction arisen under original EIR. In particular, it might lessen the concerns about the friction between the application of the EIR(R) and the Brussels I Regulation Recast. The impact of the reform is debatable, however, since there are still several uncertainties. First, the new provision does not present a definition of avoidance actions. Second, it does not provide for any clarification or criteria for the determination

---

124 McCormack (n 42) 317.
125 Linna (n 117) 78.
126 Regulation 2015/848 (n 33) Article 6.
127 ibid para 1.
128 Linna (n 117) 79.
129 Regulation 2015/848 (n 33) article 6 para 2.
130 ibid.

of the actions deriving directly from the insolvency proceeding and closely connected to them.

Article 6(1) EIR(R) explicitly refers to avoidance action among the claims that are attracted to the insolvency *forum*. However, the provision fails to provide any clarification of what “avoidance actions” mean in relation to the scope of application of the EIR(R). Therefore, it is left to the discretion of the courts – and ultimately of the CJEU – to identify when avoidance powers are directly derived from the insolvency proceeding and are closely connected with them.

In addition, no further guidance has been provided by the EIR(R) for the determination of ‘direct derivation’ and ‘close connection’.[131] This means that the issue of jurisdiction of the avoidance claims is still unclear under the current Insolvency Regulation. For instance, which jurisdiction applies if a creditor and not the insolvency practitioner brings the avoidance actions? Alternatively, which court has jurisdiction if the avoidance claims are applied in an insolvency context but provided outside the insolvency legislative framework?

The EIR(R) provides some useful guidance on the issue of jurisdiction for connected claims. As previously mentioned, when the claim linked to insolvency is also connected to another action, the insolvency practitioner may bring the actions before the same court. In particular, Article 6(3) EIR(R) establishes that an ancillary claim and an ordinary civil action are considered to be related when ‘they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgement resulting from separate proceedings’.[132]

For instance, the transaction may be subjected to an avoidance claim and at the same time to a civil action about its validity.[133] In such cases, the insolvency practitioner can lodge the two actions before the court of the member state where the defendant has their domicile.

---

131 McCormack (n 42) 333.

132 Regulation 2015/848 (n 33) Article 6 para 3.

133 Linna (n 117) 80.

This novelty introduces into the EIR(R) the 'relatively exclusive'[134] jurisdiction of the insolvency court on ancillary claims.[135] This means that the insolvency practitioner of the insolvency proceeding has the authority and discretion to choose before which forum to bring the avoidance action.[136] Such discretion is justified on the light that the insolvency practitioner should know which forum is the most suitable for protecting the interests of the insolvency estate.[137]

In comparison with the previous situation, the recast is undoubtedly an improvement. Previously, the practitioner should have brought the insolvency claim to the insolvency court and the civil claim to the court with jurisdiction under to Brussels I Regulation. The possibility to bright the related claims to the same court should reduce the costs and improve the efficiency of the system, avoiding conflicting judgments.[138]

3.3.2. Applicable Law Issues on Insolvency Transaction Avoidance

While in the recent EU legislative developments, the issue of jurisdiction related to transaction avoidance has been in the limelight, the EIR(R) has not addressed the issue of conflicts of law. Indeed, the EIR(R) submits the same rule-exception of Article 4(m) and 13 EIR in the new provisions.[139]

Article 7 EIR(R) establishes that the law applicable to the insolvency proceedings is the law of the state of the opening of the insolvency proceedings.[140] The law of the country where the proceeding has been opened determines the conditions for the opening of the proceedings, the methods by which the proceedings are administered, and the circumstances of their closure.[141]

---

134 Case C-339/07 *Seagon v Deko Marty* [2008] ECR I-769, Opinion of the AG Ruiz-Jarabo Colomer, para 65.
135 Linna (n 117) 81.
136 ibid.
137 Report on the Convention on Insolvency Proceedings (Virgós-Schmit Report) para 167 ff <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf > accessed 21.07.2020 and *Seagon v Deko Marty* Opinion of the AG (n 134) para 69.
138 McCormack (n 42) 334.
139 Keay (n 1) 86.
140 Regulation 2015/848 (n 33) Article 7.1.
141 ibid Article 7.2.

In particular, Article 7(m) provides that the law of the state of the opening of the proceedings defines the rules 'relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors'.[142] In other words, the court of the member state that has jurisdiction over the insolvency proceedings –whether main or secondary-,[143] will apply its own national law in relation to the insolvency transaction avoidance claims.

At the same time, Article 16 EIR(R) reiterates the exception contained in Article 13 EIR: the so-called 'veto right'[144] or 'safe harbour'.[145] The provision grants a defence against an avoidance claim to the counterparty of the detrimental transaction. Specifically, the person who benefits from the transaction may plead that the transaction is exempted from the application of the law of the insolvency proceedings.[146] In order to do so, the defendant has to prove that the transaction is subject to the law of another member state.[147] At the same time, they have to prove that the law governing the transaction does not allow the transaction to be challenged by any means in the relevant circumstances.[148]

According to the Virgós-Smith Report on the Convention on Insolvency Proceedings, the rationale behind the veto right is to uphold legitimate expectations of the counterparty of the detrimental transaction.[149] Generally speaking, the counterparty of the transaction expects that the law under which transaction is carried out would govern issues concerning the validity of the act.[150] As the opening of the insolvency proceedings may interfere with these expectations, the provision allows the parties of the transaction to rely on the normally applicable law for defences purposes.

---

142 ibid Article 7.2(m).

143 ibid Article 35. See also Virgós-Schmit Report (n 137) para 139.

144 Virgós-Schmit Report (n 137) para 136.

145 Jurai Alexander, 'Avoid the Choice or Choose to Avoid? The European Framework for Choice of Avoidance Law and the Quest to Make it Sensible' March 2009, 3 < https://www.semanticscholar.org/paper/Avoid-the-Choice-or-Choose-to-Avoid-The-European-of-Alexander/aa1ac46fa20672b51d82a844d5ad3f99cc01f269> accessed 21.07.2020.

146 Regulation 2015/848 (n 33) Article 16.

147 ibid Article 16(a).

148 ibid Article 16(b).

149 Virgós-Schmit Report (n 137) para 138.

150 ibid; See also Regulation 2015/848 (n 33) Recital 67.

The rule-exception mechanism set in the EIR(R) is a clear attempt to find a balance between the interests of the insolvency's estate and those of the parties involved in the transaction.[151] However, the exception on the applicable law raises relevant questions: (i) which is the normally applicable law; (ii) what 'any means' mean; and (iii) what 'relevant case' means.

First, issues of clarity have been raised in relation to the meaning of transaction subject to the law of another member state.[152] The expression indicates the law that 'is said to govern the transaction.'[153] However, the Regulation does not provide specific criteria to establish the connecting factors for the law that govern the transaction.[154]

According to general rules of private international law, the expression may refer to the law of the place where the contract was formed (i.e. *lex loci contractus*). Alternatively, it may refer to the national law of a different country from the place where the agreement was reached if the parties agree so by a choice-of-law clause. Additionally, it may refer to the place where the object of the transaction is located, if the transaction deals with rights in rem in immovable property (i.e. *lex rei sitae*). Unfortunately, the detrimental transaction may be subject to the laws of more than one country, and it may be challenging to identify which law is the one applicable to the whole legal act.[155]

Second, the counterparty of the transaction has to prove that the vulnerable act cannot be challenged 'by any means'.[156] In the recent *Lutz v Bäuerle* case,[157] the CJEU partially explained the meaning of the expression 'by any means'. The German Federal Court of Justice referred the case to the CJEU asking whether the defence under Article 13 EIR comprises the limitation periods of the avoidance actions provided by the law of the member state

---

151 Virgós-Schmit Report (n 137) para 138.

152 Jurai (n 145) 16; Jennifer Marshall, *European Cross Border Insolvency* (Sweet & Maxwell 2004), 1-48.

153 Keay (n 1) 85.

154 Jurai (n 145) 19.

155 ibid; See also Linna (n 117) 83.

156 Regulation 2015/848 (n 33) Article 16.

157 Case C-557/13 *Hermann Lutz v Elke Bäuerle* ECLI:EU:C:2015:227 [2015] Electronic Reports case (Court Reports – General) 16.04.2015.

governing the transaction (i.e. *lex causae*).[158] Moreover, it was asked whether the relevant procedural requirements for the exercise of an avoidance action are to be determined according to the law governing the transaction or the law of the insolvency proceedings.[159]

The Court held that the defence under Article 13 EIR also applies in regards to limitation periods set by the law governing the transaction.[160] The reason behind such a position is to be found in the silence of Article 13 (now Article 16) about the distinction between procedural and substantive limitation periods.[161] Due to the lack of distinction, it is left to the law governing the transaction to determine whether a limitation period is deemed a procedural requirement or a substantive rule.

The Court held that both aspects – substantive and procedural rules – fall under the scope of defence of the current Article 16.[162] Otherwise, if only the substantial limitation periods fell under the application of Article 16 EIR, there would be arbitrary discrimination caused by the different legal-theory models adopted by the member states.[163] Such a restrictive interpretation would ultimately lead to an inconsistent application of EIR(R).[164] Therefore, all aspects and requirements of the law governing the transaction subject to the avoidance claim shall be taken into consideration by the Court of the proceedings. Third, the defendant must prove that the law governing the transaction does not allow the transaction to be challenged by any means in the relevant case.[165]

In the judgment *Nike v Sportland*,[166] the CJEU explained the meaning of ‘relevant case’ and it further analyses the expression ‘any means’.

---

158 ibid para 22(2).
159 ibid para 22(3).
160 ibid para 49.
161 ibid para 47.
162 ibid para 48.
163 ibid.
164 ibid.
165 Regulation 1346/2000 (n 7) Article 13; Regulation 2015/848 (n 33) Article 16.
166 Case C-310/14 *Nike European Operations Netherlands BV v Sportland Oy* ECLI:EU:C:2015:690 [2015] OJ C 40.

First, the Court was asked to clarify the meaning of 'relevant case' in the wording of Article 13 EIR.[167] The Court highlighted that the wording of article 13 EIR (now Article 16) requires the circumstances of the case to be taken into account, in order to delimit the scope of application of the exception laid down in the provision. An interpretation of Article 16 EIR(R) that allows the parties to rely on an unchallengeable character of the act, abstractly provided by the law governing the transaction, would go beyond the scope of protecting the legitimate expectations of the parties involved in the transaction.[168]

Moreover, the Court was asked whether the claimant must plead the circumstances of the avoidance action or if it is the defendant that must prove that the circumstances of the action did not exist.[169] It was also questioned which the law determines the procedural aspects of the burden of proof.[170] In these regards, the Court stated that it is clear from the wording of the provision that the burden of proof lays on the defendant of the avoidance claim.[171]

On the one hand, the defendant must prove the facts under which the act is unchallengeable.[172] In other words, the defendant has to prove why the law governing the transaction would apply in lieu of the law of the insolvency proceedings. On the other hand, even when the law applicable to the transaction governs the claim, the procedural aspects of proof have to be determined by the law of the insolvency proceedings.[173] For instance, it is the latter that regulates the elicitation, the evaluation and the assessment of the evidence.[174]

However, in doing so, the law of the opening of the proceedings must respect the principle of equivalence and effectiveness. The procedural rules

---

167 ibid, para 15(1).

168 ibid para 21.

169 ibid para 15(2).

170 ibid para 15(3).

171 ibid para 23.

172 ibid.

173 See Case C- 54/16 *Vinyls Italia S.p.A. in fallimento v. Meditteranea di Navigazione S.p.A.* Opinion of the AG Maciej Szpunar 02 March 2017. The opinion of the Advocate General on the case suggested that the insolvency *forum* shall apply its own procedural rules in relation to the expiration period of the exercise of the procedural exception of article 13. The CJEU's judgment has confirmed the opinion of the Advocate General. See Case C-54/16 *Vinyls Italia S.p.A. in fallimento v. Mediteranea di Navigazione S.p.A*. ECLI:EU:C:2017:433 [2016] OJ C156, para 26-27.

174 ibid para 25.

established by the law of the insolvency proceedings on claims regulated by the law governing the transaction must not be less favourable than those governing similar domestic situations (principle of equivalence).[175] In addition, such procedural rules must not make it excessively difficult for the party to exercise the right provided by the law governing the transaction (principle of effectiveness).[176]

Furthermore, the Court further clarified the meaning of 'by any means'. The CJEU specified that the party who benefits from the detrimental transaction has to prove that the law governing the transaction does not allow the act to be challenged under either insolvency rules or general provision or principles of that law.[177] As the scope of the exception is to protect legitimate expectations created by the law governing the transaction, such expectation cannot be legitimate if the act may be challenged under general provisions or principles of said law.[178]

Lastly, the court stated that the defendant has to prove that the law governing the transaction taken as a whole does not allow the detrimental transaction to be challenged.[179] At the same time, the national law of the insolvency proceedings may allow the claimant to rebut the unchallengeable character of the transaction under that governs it. In doing so, the claimant must establish the existence of a provision or principle of the law governing the transaction that allows the act to be challenged.[180]

This case confirms the interpretation given by the European Free Trade Association (EFTA) Court in the *LBI hf v Merrill Lynch International Ltd* case.[181] In the latter case, the EFTA court provided an advisory opinion on the interpretation of Directive 2001/24/EC on the reorganisation and winding up of credit institutions.[182] In relation to transaction avoidance, the directive

---

175 ibid para 26.
176 ibid.
177 *Nike BV v Sportland Oy* (n 166) para 33.
178 ibid para 35
179 ibid para 44.
180 ibid para 45.
181 Case E-28/13 *LBI hf v Merrill Lynch Int Ltd* [2014] EFTA Rep 970.
182 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on The Reorganisation and Winding-up of Credit Institutions. The Directive is incorporated in the

proposes a rule-exception mechanism analogous to the one provided by the EIR.[183]

Anticipating the CJEU decision on the *Nike v Sportland* case, the EFTA Court suggested that the exception on the applicable law in relation to transaction avoidance encompasses substantive and procedural law and both rules of insolvency and general law. Moreover, it stated that said exception requires a concrete assessment of the case with standards of proof determined by the law of the insolvency proceedings.[184]

The judgment of the EFTA Court, whether not directly related to the interpretation and application of the EIR, provided useful insight for the *Nike v Sportland* case and future issues on a similar matter. Moreover, it shows that the application of PIL transaction avoidance rules is problematic in any instrument adopted.

3.3.3. Assessment of the Recent Developments of the European Insolvency Framework in relation to Transaction Avoidance.

It can be argued that the recent judiciary and legislative developments have increased the legal uncertainty on the topic of transaction avoidance in EU cross-border insolvencies. This can be sustained concerning both issues of jurisdiction and applicable law.

In relation to jurisdiction, the EIR(R) may have solved some problems about the double jurisdiction for ancillary insolvency claims and the civil actions related to them. The new Article 6 gives to the insolvency practitioner more room for manoeuvre and potentially cuts the costs of having separate judgments on connected legal issues.[185]

However, the reform adds options of applicable law. According to the circumstances, the insolvency practitioner may choose to bring the action to the court of the proceedings or the court having jurisdiction under the Brussels I Regulation.[186] However, unlike the EIR(R) which deals with jurisdiction,

---

European Economic Area Agreement at point 16c by Decision of the EEA Joint Committee no 167/2002. See OJ 2003 L 38 and EEA Supplement n. 9, 20.

183 Directive 2001/24/EC (n 182) article 10 and article 30.

184 *LBI hf v Merrill Lynch Int Ltd* (n 181) paras 74-80.

185 McCormack (n 42) 334.

186 Regulation 2015/848 (n 33) Article 6.

applicable law, recognition and enforcement of judgments, the Brussels I Regulation Recast only deals with jurisdiction, recognition and enforcement of judgments.[187] Therefore, the reference to Brussels I Recast is incomplete as it fails to address the issue of applicable law.

In the application of Article 6(2) EIR(R), two questions emerge (i) what law applies to the ancillary insolvency claim; and (ii) what law applies to the civil claim connected with the insolvency. Concerning the insolvency claim, the law applicable should be the one of the insolvency proceedings. The purpose of Article 6(2) EIR(R) is not to deprive the defendant of the civil claim of the *forum conveniens* of Brussels I.

The provision seeks to prevent and avoid conflict of judgments between the court of the insolvency proceedings and the court that looks into the civil claim.[188] Moreover, in providing the alternative forum of the defendant's domicile, the EIR(R) re-establishes the prevalence of Brussels I as the general tool for the determination of jurisdiction to which the EIR(R) is an exception.

However, the reform does not mean that the court of the defendant's domicile shall apply its national rule to the insolvency claim, nor should it apply other EU PIL rules to determine which law is applicable. In regard to which law applies to the insolvency claim, the answer should be found in the EIR(R). Recital 66 of the EIR(R) states that the Regulation 'set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law'.[189]

Moreover, Article 7 EIR(R) provides that unless otherwise specified, the law applicable to the insolvency proceeding and therefore to the insolvency claims is the law of the State opening the proceedings.[190] Specifically, Article 7(2)(m) states that the law of the State opening the proceedings determines the rules relating to 'voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors'.[191]

---

187 Regulation 1215/2012 (n 40).
188 Regulation 2015/848 (n 33) Article 6(3).
189 Regulation 2015/848 (n 33) Recital 66.
190 ibid Article 7.
191 ibid Article 7(2)(m).

Concerning the law applicable to the civil claim connected to the insolvency proceeding and brought to the forum of the defendant's domicile, the EIR(R) does not provide any guidance. Therefore, the question of law applicable should be resolved by looking at the PIL Regulations that provide for the most suitable connecting factors for civil and commercial matters. The connecting factors are various, and they depend on the nature of the claim.

As a general distinction, if the civil claim falls within the contractual matter (e.g. a civil action about the validity of the contract) Rome I is the regulation applicable for the contract concluded after the Regulation entered into force.[192] If the claim is related to a non-contractual matter, Rome II Regulation provides the rules concerning the applicable law.[193] However, there are additional issues of applicable law concerning the use of the civil *actio pauliana* in insolvency proceedings as a connected claim under Article 6(2) EIR(R). Such issues will be explained in detail in section 3.4.2.

Moreover, much more clarity is needed in the delimitation of transaction avoidance claims under the EIR(R). Understandably, a European legal definition of transaction avoidance claims is difficult to achieve due to the variety of the actions available in the national legal systems of the member states. Nevertheless, it is pivotal to have at least precise criteria to determine when a claim is directly derived from the insolvency proceedings and closely linked to them. Otherwise, the decision on which type of avoidance claims fall under the ancillary claim category would be discretional. Consequently, the consistent and homogeneous application of the EIR(R) would be compromised.

Concerning the applicable law, the exception set out in Article 16 EIR(R) is expressed in general terms, in particular concerning which law is the one that governs the transaction. The provision gives an opportunity for *forum* shopping. It has been argued that such an opportunity is a welcome

---

192 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6; Article 28, Rome I Regulation applies only to contracts concluded after 17 December 2009.

193 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2007] OJ L 199/40.

expression of contractual party autonomy, and it may help some restructuring purposes.[194]

However, it has to be pointed out that leaving the door opened for forum shopping does not serve the scope of the EIR(R). This is to provide an efficient and effective coordination system between the insolvency structures of the member states.[195] Indeed, the regulation itself highlights how avoiding *forum* shopping phenomena is necessary for the proper functioning of the internal market.[196]

Moreover, the CJEU case law demonstrates that the application of rule-exception mechanism is problematic.[197] In order to delimit the scope of application of the exception set out in Article 16 EIR(R) the Court imposed a heavy burden of proof onto the party that benefits from the transaction. In *Lutz v. Bäuerle* and in *Vinyls v. Mediterranea di Navigazione*, it has been held that the defendant has to prove that the transaction is unchallengeable both under insolvency law and the general law governing the transaction.[198]

This interpretation produces a paradox within the EIR(R). On the one hand, the avoidance claims deriving from ordinary law – e.g. civil *actio pauliana* - are generally excluded from the application of the insolvency jurisdiction.[199] On the other hand, those ordinary avoidance claims are included in the defence of Article 16 EIR(R) arising within the insolvency proceedings. In particular, the defendant has to prove that hypothetically these claims are not available for the transaction challenged in the insolvency proceedings. This lack of uniformity within the avoidance claims' regime creates legal uncertainty and

---

194 Oscar Couwernberg and Grietje T. de Jong, 'Redeeming Art. 13 of the European Insolvency Regulation: A Law and Economics Argument to Help Financially Distressed Companies to Restructure' (2014) 1 European Journal of Comparative Law and Governance 58.

195 Regulation 2015/848 (n 33) Recital 4.

196 ibid Recital 5.

197 Antonio Leandro, 'Harmonization and Avoidance Disputes Against the Background of the European Insolvency Regulation' in Jennifer L. L. Gant *Harmonisation of European Insolvency Law* (INSOL-Europe 2017) 71, 76.

198 Case C-557/13 *Hermann Lutz v Elke Bäuerle* (n 157) and Case C-54/16 *Vinyls Italia S.p.A. in fallimento v. Mediteranea di Navigazione S.p.A*. (n 173).

199 Regulation 2015/848 (n 33) Recital 7, Virgós-Schmit Report (n 137) para 196.

undermines the scope of the private international law rules adopted, which seek to contribute to the foreseeability of the outcome of legal disputes.[200]

Moreover, the defendants are asked to prove in negative terms that the transaction stands against any possible claim provided by the law governing the transaction.[201] The defendant is asked to provide the grounds against which the transaction has to stand. In the context of transaction avoidance, where there is often an element of deception within the parties' behaviour, this not only seems unreasonable and inefficient but also a waste of procedural resources.

In such circumstances, the defendants are likely to present to the court only those means of challenging the transaction that it is able to stand against. The court of the insolvency proceedings shall ensure then that effectively there is no means to challenge the transaction according to the law governing the transaction. While the insolvency practitioner should also have the interest to rebut, providing to the court additional means of challenge within the law governing the transaction.[202]

This constitutes a waste of procedural resources. It has to be noted that this exchange between the parties and the court has the only purpose of rejecting the application of that law of the proceedings. When the safe harbour does not stand, the transaction is subject to the avoidance regime of the law of the proceedings.[203] With the possibility to combine the insolvency claims with civil claims introduced by Article 6 EIR(R), the exception seems redundant. Indeed, when the insolvency practitioner brings a successful transactional civil claim, the exception in Article 16 EIR(R) should automatically cease to have an effect, and the transaction should be subjected to the law governing the insolvency proceedings.

---

200 Xandra E. Kramer, 'European Private International Law: The Way Forward' (September 8, 2014). In-depth analysis European Parliament (JURI Committee), in Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament Brussels 2014, p. 77-105 < https://ssrn.com/abstract=2502232> accessed 21.07.2020.

201 Regulation 2015/848 (n 33) Article 16.

202 Linna (n 117) 83.

203 Virgós-Schmit Report (n 137) para 136.

Such panorama constitutes a significant burden, in particular, for the insolvency practitioner.[204] For an effective exercise of the action, the insolvency practitioner is required to know and understand the law applicable to the transaction, which often involves the expensive and time-consuming opinions of experts of the foreign law.[205]

The result of the recast also aggravates the uncertainty for the parties involved in the insolvency proceedings who may see the transaction judged under the Brussels I Regulation. Likewise, this circumstance carries several issues that are later discussed on the topic of transaction avoidance of private law. Finally, the uncertainty of the provisions undermines the efficiency of the EU Insolvency System.

3.4. Transaction Avoidance in Private law

Although transaction avoidance claims available in private law are common among the EU member states, the topic is not substantively harmonised at the EU level.[206] Moreover, unlike the case of insolvency transaction avoidance, the private international law (PIL) aspects of private law avoidance claims are not regulated in a single EU instrument.[207] Nevertheless, in cross-border transactions within the EU single market, questions of jurisdiction, applicable law, recognition, and enforcement of transaction avoidance claims still emerge. The answer to these questions needs to be searched in a plethora of EU regulations and their interpretation by the CJEU. This section analyses the current European PIL framework applicable to transaction avoidance claims available in private law. In particular, it focuses on the issues of jurisdiction and applicable law.

3.4.1. Jurisdictional Issues on Transaction Avoidance

---

204 Heidelberg-Vienna Report (External Evaluation of Regulation No. 1346/200/EC on Insolvency Proceedings Just/2011/JCIV/PR/0049/A4) Annex I National Reports (in Tabular Form), Q24 Germany 259 and the U.K. 271.

205 ibid.

206 Ulf Göranson, 'Actio Pauliana outside Bankruptcy and the Brussels Convention" in M Sumampouw et al. (eds*), Law and Reality. Essays on National and International Procedural Law* (Martinus Nijhoff Publishers 1992) 89.

207 Ilaria Pretelli, 'Cross-border Credit Protection against Fraudulent Transfer of Assets: Actio Pauliana in the Conflict of Laws' (2011) 13 Yearbook of Private International Law 589, 629.

Within the PIL regulation on civil and commercial matters (Brussels I Regulation Recast),[208] there is no specific provision that deals with the matter of transaction avoidance actions available in private law. However, the answer to jurisdictional issues of transaction avoidance actions is undoubtedly covered by Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[209] This follows from the rationale of Brussels I Regulation and the case-law of CJEU.[210]

The Brussels I Regulation Recast seeks to enhance the sound functioning of the internal market, unifying the rules on conflict of jurisdiction and simplifying the formalities of recognition and enforcement of judgments of the member states.[211] The regulation applies to civil and commercial matters regardless of the nature of the court or tribunal.[212] The scope of application is broad, but some exceptions are provided. As highlighted in the previous section, the insolvency matter is excluded from the scope of application of Brussels I Regulation Recast.[213]

In addition, the regulation does not deal with judgments on 'the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship' and comparable relationship;[214] 'maintenance obligations arising from a family relationship, parentage, marriage or affinity';[215] and matters of wills and succession.[216] Finally, it does not apply to judicial cases on social security and to matters of arbitration.[217]

---

208 Regulation 1215/2012 (n 40).

209 Göranson **Error! Bookmark not defined.**(n 2) 93.

210 Case C-339/07 *Seagon v Deko Marty* [2008] ECR I-769, Opinion of the AG Ruiz-Jarabo Colomer, para 35.

211 Regulation 1215/2012 (n 40) Recitals 1-2.

212 ibid Article 1.

213 Regulation 1215/2012 (n 40) Article 2(b).

214 ibid Article 2(a).

215 ibid article 2(e). The subject is covered by Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II-bis) OJ L 338/1.

216 Regulation 1215/2012 (n 40) Article 2(f).

217 ibid Article 2(c) and (d). Matters of ADR are partially covered by the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136/3 that applies to cross-border mediation.

Except for the mentioned matters, the regulation is intended to apply to private law matters generally.[218] Admittedly, the transaction avoidance actions as a credit enforcement tool fall under the Brussels I Regulation Recast. However, since the Regulation sets out different rules on jurisdiction according to several variables, the determination of transaction avoidance jurisdiction is not straightforward.

Generally, the regulation adopts the principle of the defendant's domicile.[219] This means that the jurisdiction upon a civil and commercial matter belongs to the Court of the member state of the defendant's domicile. It also means that, in principle, the defendant may be sued only before the Courts of the member state where they are domiciled, or they have their registered office.[220]

However, Article 7 Brussels I Regulation (Recast) provides for alternative *fora*.[221] The defendant can always be sued in their domicile or registered office, but they can also be sued in another member state. For instance, when the dispute is related to a contractual obligation, the Court of the place of performance can have jurisdiction on the matter.[222]

The place of performance is understood as the place where – according to the contract – the goods are to be delivered or the services provided.[223] Different rules apply if the transaction at stake takes place in the form of trust.[224] In this case, the courts of the state where the trust is domiciled can have jurisdiction on a claim against any party of the trust, regardless of where they are domiciled.[225]

Also, the regulation provides that in matters relating to tort, delict, or quasi-delict, the action may be brought to the court of the place where 'the harmful

---

218 'A European Framework for private international law: current gaps and future perspectives' Directorate General for Internal Policies PE 462.487, 21 <http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf> accessed 21.07.2020.

219 Regulation 1215/2012 (n 40) Recital 15.

220 ibid Article 4.

221 ibid Article 7.

222 ibid Article 7(1)(a).

223 ibid Article 7(1)(b).

224 ibid Article 7(6).

225 ibid.

event occurred or may occur'.[226] When the defendants are more than one, the claimant may decide to sue them jointly in the *forum* where one of them is domiciled.[227] In order to do so, the claimant has to prove that the claims are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[228]

At the same time, the Brussels I Regulation (Recast) abandons the principle of the defendant's domicile when the dispute regards an immovable property. Embracing the prevailing principles of PIL, the Regulation states that in proceedings concerning rights *in rem* in immovable property, the courts of the member state in which the property is located have exclusive jurisdiction.[229]

In theory, all these provisions can be relevant in the context of transaction avoidance. Indeed, in determining the jurisdiction on the avoidance claim, the principle of defendant domicile applies.[230] At the same time, however, it needs to be determined whether alternative *fora* may apply as well.[231] The determination of which court has jurisdiction depends on the qualification of the avoidance claim. As discussed in chapter two, the qualification of the avoidance claims is widely discussed within the member states legal system, and it is not univocal within and among the member states.

This uncertain qualification within the national legal systems has translated into an uncertain application of PIL rules at EU level.[232] For a long time, the CJEU case law left the avoidance claims in a grey area that was neither contractual nor non-contractual matter.[233] In *Reichter II,*[234] the CJEU was asked to qualify the nature of the French *action paulienne* to determine the

---

226 Regulation 1215/2012 (n 40) Article 7(2).

227 ibid Article 8(1).

228 ibid.

229 ibid Article 24(1).

230 Göranson (n 2) 93.

231 ibid 94.

232 Laura Carballo Piñeiro, 'Acción Pauliana e Integración Europea: Una Propuesta de Ley Aplicable' (2012) 54 Revista Española de Derecho Internacional 43, 46.

233 See Joaquín J. Forner Delaygua, 'Derecho Europeo: La acción Pauliana bajo el TJCE(una opinion discrepante de *Reichert* II) in Forner Delaygua (ed), *La protección del crédito en Europa: La acción Pauliana* (Bosh 2000) 144.

234 Case C-261/90 *Reichert v Dresdner Bank* ECLI:EU:C:1992:149 [1992] (*Reichert II*) ECR I-2175.

competent court. In the case, the CJEU did not provide a specific answer over the nature of the claim, but it held that a transaction avoidance claim of private law could not be regarded as related to delict or quasi-delict liability.[235]

Such exclusion was based on the consideration that the action's scope is not to recover the damage caused by the transaction. On the contrary, the effect of the action is to make ineffective a disposition done to defraud the creditors. Moreover, it targets both third parties in bad and good faith if the transaction is undertaken without consideration.[236]

In the case, the court ruled out the possibility to qualify the avoidance actions under the category of non-contractual obligations. This category was previously defined negatively as comprising all the actions 'which seek to establish the liability of a defendant and which are not related to a contract'.[237] The scholarship has observed that in *Reichert II*, the Court put the avoidance claims of private law in a grey zone that is not related to contractual obligations or tort.[238]

The qualification of the avoidance claims as being neither a contractual nor a non-contractual matter produced problematic results in particular on the issues of applicable law. As a result, this type of actions was left outside the scope of the European PIL instruments on the applicable law as neither Rome I nor Rome II applied to the avoidance claims of private law.[239] Such a conclusion was not ideal as it undermined the scope of the Brussels I Regulation to unify the rules of conflict of jurisdiction in civil and commercial matters.[240]

More recently, this issue has been reconsidered in the case of *Feniks Sp. z o.o. v Azteca Products & Services SL,*[241] where the CJEU was directly asked if a transaction avoidance claim of private law could be a matter related to contract for the scope of application of the special rules on jurisdiction of

---

235 ibid para 14.
236 ibid para 19.
237 Case 189/87 *Kalfelis v Schröder* ECLI:EU:C:1988:459 [1987] I-5579, para 17.
238 Carballo Piñeiro (n 232); Forner Delaygua (n 233); Pretelli (n 207).
239 ibid.
240 Regulation 1215/2012 (n 40) Recital 4.
241 Case C‑337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* ECLI:EU:C:2018:805 [2018] Electronic Reports case (Court Reports – General) 04 October 2018.

Brussels I Regulation. Against the well-reasoned opinion of the Advocate General,[242] the Court characterised the claim as a matter related to contract because the cause of the claimant's action lies in the breach of the debtor's obligation towards the creditor.[243]

Although the vacuum of regulation concerning the jurisdiction over transaction avoidance in civil and commercial matters seems to be finally settled, the decision does not escape criticism. Indeed, due to the triangular nature of the relationships at the basis of the action,[244] issues of predictability of the *forum* may arise. As explained in chapter two, the action involves: (i) a relationship between the debtor and the creditor; (ii) a relationship between the debtor and the third party, and: (iii) the claim between the debtor and the third party.[245]

As a result of *Feniks*, the creditor is allowed to bring the action to the *forum* of performance of the contract concluded between the creditor and the debtor, according to Article 7 (1) Brussels I Regulation.[246] This is a special rule on jurisdiction in alternative to the general principle of the *forum* of the defendant's domicile encompassed in Article 3 Brussels I Regulation Recast.[247]

However, the third party – the defendant in the avoidance claim of private law – is external to the contractual relationship used to establish the alternative jurisdiction.[248] Therefore, they may not be able to predict in which *forum* they will be brought to, and they will lose the exclusivity of the *forum* convenient to them. The lack of predictability of the *forum* may negatively affect the third party's rights. More broadly, the perceived lack of predictability may

---

242 Case C‑337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* ECLI:EU:C:2018:487 [2018] Opinion of AG Bobek delivered on 21 June 2018.

243 Case C‑337/17 (n 241) para 43.

244 Pretelli (n 207) 599.

245 ibid.

246 Case C‑337/17 (n 241) para 46. Also confirmed by the recent case C-722/17 *Norbert Reitbauer and Others v Enrico Casamassima* ECLI:EU:C:2019:577 [2019] Electronic Reports case (Court Reports – General) 10 July 2019.

247 Regulation 1215/2012 (n 40) Article 7.

248 Case C‑337/17 Opinion of AG Bobek (n 242) para 65.

discourage people from concluding cross-border transactions and therefore undermine the internal market.[249]

3.4.2. Applicable Law Issues

Within the EU framework, there are several regulations dealing with conflicts of laws in relation to specific matters.[250] Concerning the topic of transaction avoidance, two regulation might be relevant: (i) the Rome I Regulation;[251] and (ii) the Rome II Regulation.[252] Their scope of application on the matter of conflicts of laws reflects the subjects covered by the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments.[253]

Rome I Regulation deals with issues of conflicts of laws arising in the contractual matter. The pivotal principle of the Rome I is the freedom of choice which allows the parties to choose the law applicable to the contract, as a whole or in part.[254] Alternatively, when the parties do not agree on a choice of law clause, the regulation provides for a set of rules of applicable law.[255]

In particular, the regulation provides for specific rules of applicable law in relation to several different types of contracts.[256] For instance, the law applicable to a sale of goods contract is the country of habitual residence of

---

249 Sophie Strecker, 'Jurisdiction in, and the Law Applicable to, Cross-Border Contractual Obligations: the Objectives and Impact of the EU's Legislative Journey' (PhD Thesis) 28 < http://irep.ntu.ac.uk/id/eprint/255/> accessed 21.07.2020.

250 For instance, Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations [2009] OJ L 7/1; Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation [2010] OJ L 343; the Insolvency Regulation; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims [2004] OJ L 143.

251 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6.

252 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2007] OJ L 199/40.

253 Rome I Regulation (n 251) Article 1 and Rome II Regulation (n 252) Article 1. In addition, the Regulations do not cover the matter of trust. This exclusion can be relevant on the issue of law applicable to transaction avoidance since the vulnerable transaction can take the form of a trust. The issue of conflict of laws concerning trusts is covered by the 1985 Hague Convention on the Law Applicable to Trusts. However, a limited number of EU Member States are part of it. See Report 'A European Framework for private international law: current gaps and future perspectives' (n 218) 28.

254 Rome I Regulation (n 251) Article 3.

255 ibid Article 4.

256 ibid.

the seller.[257] In another example, if the contract is related to the rights *in rem* in immovable property, the applicable law is the law of the country where the property is located.[258] The law applicable to the contract determines the rules relevant for its interpretation, its performance and the evaluation of the non-performance, the consequences of the breach of contract and the assessment of the damages, the extinguishing of the obligations and the consequences of the nullity of the contract.[259]

In contrast, Rome II Regulation deals with the law applicable to non-contractual obligations. As a general principle, it affirms that the law applicable to the tort matter is the law of the country where the damage occurs.[260] However, when the parties share the same country of residence, the law of that country is applicable regardless of the place where the damage had occurred.[261]

Moreover, when the liability is 'manifestly more closely connected'[262] with the law of another country, the latter should apply.[263] In addition to these general rules, the regulation supplies specific conflict of laws rules for product liability, unfair competition, environmental damage,[264] infringement of intellectual property rights, industrial action, unjust enrichment, *negotiorium gestio*,[265] and *culpa in contrahendo*.[266]

---

257 ibid Article 4(a).

258 ibid Article 4(c).

259 ibid Article 12.

260 See Rome II Regulation (n 252) Article 4(1).

261 ibid Article 4(2).

262 ibid Article 4(3).

263 ibid.

264 With the exception of nuclear damages. See Rome II Regulation (n 252) Article 1(f).

265 The expression describes the situation in which a person undertakes activities on behalf and for the benefit of another person without his consent. The inclusion of the *negotiorum gestio* among the subjects covered by Rome II Regulation is significant for the discourse on transaction avoidance. The *negotiorum gestio* is generally qualified as quasi-contract, but it is included in the matters of the Regulation on the applicable law to non-contractual obligations. See Duncan Sheehan, '*Negotiorum Gestio*: A Civilian Concept in the Common Law'(2006) 55 International and Comparative Law Quarterly 253; John Dawson*, 'Negotiorum Gestio:* The Altruistic Intermeddler' (1961) 74 Harvard Law Review 1073 and Göranson (n 171).

266 I.e. The pre-contractual liability arising from harmful conduct during the formation of a contract. See Najib Hage-Chahine, '*Culpa in Contrahendo* in European Private International Law: Another Look at Article 12 of the Rome II Regulation' (2012) 32 Northwestern Journal of International Law & Business 451. In relation to subjects included in the regulation, see Rome II Regulation (n 241) Articles 5-12.

Once identified, the applicable law governs all aspects of the tort claims. For instance, the applicable law governs the determination of the extent of the liability, the rules of its exceptions, the identification of the liable person and the person entitled to damages.[267]

The characterisation of the avoidance claims in the *Feniks* case has implications for the question of applicable law concerning the transaction avoidance claims of private law. It must be noted that the *Feniks* case answers only questions of jurisdiction. However, according to Recital 7 of the Rome I Regulation, the substantive scope of the Regulation on conflict of laws should be consistent with Brussels I.[268]

Therefore, the characterisation of the claim as a contractual matter related to the creditor's rights should mean that the law applicable to this type of claims should be the law applicable to the contract between the creditor and the debtor. The law applicable to the contract should be determined according to the rules set out in Rome I Regulation, which also grants the parties the freedom to choose the law applicable to the contract.[269]

The characterisation of the transaction avoidance claims of private law as a matter related to contract and in particular to the contract concluded between the creditor (i.e. the claimant), and the debtor is problematic.[270] First, the connection between the vulnerable transaction and the law governing the contract between the debtor and the creditor is ‘too tenuous and too remote’.[271] Indeed, there is no substantive relationship between the creditor and the third party (i.e. the defendant) before the claim.[272]

Second, the characterisation of the action as a matter related to the creditor's contract deprives the defendant of any predictability of the outcome of the dispute. Indeed, the defendant of the claim is extraneous to the contract concluded between the debtor and the creditor. Therefore, they cannot easily foresee the law applicable to the contract.

---

267 ibid Article 15.
268 Rome I Regulation (n 251) Recital 7.
269 Ibid Recital 11 and Article 3.
270 Carballo Piñeiro (n 232) 57.
271 Case C‑337/17 Opinion of AG Bobek (n 242) para 65.
272 ibid para 68.

Third, the results of *Feniks* are inconsistent with the EIR(R) approach. Concerning the conflicts of laws, the EIR(R) connects the insolvency transaction avoidance claims with either the law of the insolvency *forum* or the law governing the vulnerable transaction.[273] Instead, following the characterisation in the *Feniks* case, the transaction avoidance claim available in civil and commercial matters is connected to the law of the contract between the creditor and the debtor, which should not even come into consideration in the insolvency context.

Ultimately, the characterisation of the claim as a matter related to contract increases the uncertainty of the fate of transaction avoidance claims, and it frustrates the scope of the regulations to provide a coherent private international law system for cross-border insolvencies in the EU. Moreover, it introduces inconsistencies in the PIL approaches to transaction avoidance claims brought within or outside insolvency proceedings.

3.5. Conclusion

Insolvency law has proven to be a field of law where it is difficult to achieve international consent. The Regulation has been the product of a long international debate, which resulted in the Private International Law approach currently adopted. In contrast, the restructuring directive proposes a minimum harmonisation on the topic of insolvency, without, however, directly addressing transaction avoidance.

Consequently, at the EU level, transaction avoidance is not harmonised. In the case of insolvency, there is at least an attempt to provide a set of PIL rules designed specifically for transaction avoidance claims brought in insolvency proceedings. In contrast, the avoidance claims that may arise in civil proceedings are not covered by specific provisions. Moreover, the jurisprudential developments of the CJEU produce problematic results. The issues at stake relate both to the question of jurisdiction and of the conflict of law. However, significant problems arise about the issues of which law is the one applicable to the avoidance claims.

---

273 Rome I Regulation (n 251) Articles 7 and 16.

Regarding the jurisdiction issues, according to Article 6 of the EIR(R), the court of the insolvency proceedings has jurisdiction on the transaction avoidance claims. Moreover, the recent developments of the EIR introduced a new possibility for the *forum* of the insolvency avoidance claim. Article 6(2) EIR(R) provides that when an ancillary claim to insolvency is connected with a civil action, both claims can be brought to the court of the defendant's domicile, provided that the court has jurisdiction according to Brussels I Regulation.

In contrast, in civil and commercial matters, the court of the country where the defendant has their domicile or registered office has jurisdiction. Moreover, the recent developments of the CJEU had clarified a possible alternative *forum*. Creditors can now bring the private law claims of transaction avoidance to the court of execution of the contract concluded between the claimant and the debtor.

In regard to the law applicable to the avoidance claims, the uncertainties are more severe. In the insolvency context, the law applicable to the avoidance claim is, in principle, the one of the member states where the insolvency proceedings have been opened. However, the veto right provides that the parties that benefit from the transaction can prove that the act is subject to the law of another country and that under said law, the act is unchallengeable.

The matter is quite complicated. On one side, the court of the proceeding will apply its domestic procedural rules, in particular on the way it evaluates and accepts the evidence. On the other side, the defendant has to prove that under the law that governs the transaction, the act is safeguarded. This encompasses not only procedural and substantive aspects of insolvency law but includes all requirements of validity under civil and commercial matters.

Even more problematic is the question of the applicable law to the avoidance claims of private law. In this case, the issue of conflict of laws is not explicitly addressed under a specific regulation. The scenario is aggravated by the fact that the characterisation of transaction avoidance as a matter related to contracts. It follows that the law governing the claim is the law governing the contract between the debtor and the creditor. However, such interpretation leaves the defendant in a compromised position. Indeed, the defendant is

deprived of any predictability of the outcome of the dispute as it cannot easily foresee the law applicable to the claim.

All these uncertainties show how the EU regulatory framework is unsatisfactory for the topic of transaction avoidance. For the functioning of the internal market, it is necessary to strengthen the integration of the rules on transaction avoidance, providing for either more developed PIL rules on the topic or a fully harmonised regulation of transaction avoidance action of insolvency and private law.

Chapter 4
The English Approach to Transaction Avoidance

4.1. Introduction

Following the analysis of the European Union (EU) regime of transaction avoidance, this chapter explores the substantive aspects of transaction avoidance claims available in England.[1] In particular, it focuses on the claims provided by the English Corporate Insolvency Law and the claim of transactions defrauding creditors outside the insolvency framework.

The chapter is divided into three main sections. The first section provides an introductory overview of the English insolvency system (Section 4.2). It briefly illustrates the insolvency procedures available in England and Wales and their scopes. The second section addresses the claims of transaction avoidance included in the Insolvency Act 1986 (IA) (Section 4.3). Specifically, it analyses the claims of transactions at an undervalue (Section 238 IA); preferences (Section 239 IA); avoidance of floating charges (Section 245 IA) and; transactions defrauding creditors (Section 423 IA). The last section (Section 4.4) explores the use of Section 423 IA outside the framework of insolvency law, and it analyses its scope and rationale (Section 4).

4.2. An Overview of the English Insolvency System

This section seeks to provide an overview of the insolvency procedures available for companies in distress within the English legal system. In particular, the section seeks to describe the procedural context where insolvency transaction avoidance claims take place. In English corporate insolvency law, several procedures deal with companies in financial distress:[2] (i) Liquidation; (ii) Receivership;[3] (iii) Administration; and (iv) Company

---

1 The focus of the research is limited to the English corporate insolvency framework. While brief mentions to the Scottish insolvency system are provided in note, the chapter deals with the general procedures and specific claims available only in England and Wales.

2 Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (2nd edn Jordan Publishing Limited 2008), 41-42; Ian Fletcher, *The Law of Insolvency* (4th edn, Sweet and Maxwell 2009) 14-001 ff.; Ray Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet and Maxwell 2011) 1-31.

3 Receivership is an insolvency procedure where a receiver is appointed either by a creditor or a court to pay off secured creditors. Its scope is to introduce in the company's management

Voluntary Arrangement.[4] This section illustrates Administration and Liquidation as these two are the procedures where transaction avoidance claims may be invoked.[5]

Administration is a temporary procedure with a threefold purpose: (i) to rescue the company as a going concern; (ii) to achieve better results for the general body of creditors than those in liquidation; and (iii) to realise the value of the property to distribute to one or more preferential or secured creditors.[6] These purposes are hierarchically listed.[7] An administrator should aim to rescue the company first, through an agreement with the creditors on a plan of payments.[8]

When the financial conditions of the company render its rescuing unfeasible, the administrator may proceed to satisfy the general body of creditors without winding-up the company.[9] This generally involves a restructuring process and the sale as going concern of part of the business of the company.[10] Lastly, when both the rescue and the restructuring are not reasonably practicable, the administrator should seek to realise the value of the company's assets.[11]

Under the third scope of administration, the administrator is authorised to make distributions to the creditors with the prior consent of the court.[12] In a distributing administration, the administrator's duties are to gather and realize

---

a third person who realises the value of the secure property for the only benefit of one or more secured creditors. The most common receivership involves the creation of a fixed or floating charge over the company's assets and the appointment of an administrative receiver. See Keay and Walton (n 2) 49 ff.

4 The Company Voluntary Arrangement (CVA) is a procedure that allows the composition of debts between the company and its creditors. It seeks to enable the company to find an arrangement with its creditors by either paying a proportion of the debts or setting a schedule of payments, and therefore avoiding the company's winding-up. See Keay and Walton (n 2) 142 ff.

5 Keay (n 2) 120.

6 Insolvency Act 1986 Schedule B1, para 3(1).

7 Keay and Walton (n 2) 92; Fletcher (n 2) 16-022 ff; Sandra Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 The Modern Law Review 247; Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press 2017) 363 ff.

8 ibid.

9 ibid.

10 ibid.

11 ibid.

12 Insolvency Act (n 6) Schedule B1, paras 65-66.

the company's assets and pay off its liabilities.[13] In such circumstances, however, the value of the company might be enough to satisfy partially only secured creditors.[14]

In contrast, liquidation is the procedure that deals with terminal insolvency.[15] Its scope is to wind up the affairs of the company and to distribute the assets realised to pay off the creditors.[16] Under English law, both a 'cash flow test' and a 'balance sheet test' are adopted to establish whether a company is insolvent.[17] Section 123 (1) of the Insolvency Act establishes that a company is insolvent if it 'is unable to pay its debts as they fall due' (i.e. cash flow test).[18] At the same time, a company is insolvent if 'the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities'(i.e. balance sheet test).[19]

The process of liquidation can start either at the request of the company (*creditors' voluntary winding-up*) or due to an order of the court (*compulsory winding-up*).[20] In the creditors' voluntary winding-up, the directors of the company have to call a meeting of the members of the company in order to declare the insolvency status and resolve to wind up the company.[21] At this meeting, the members may appoint a liquidator who takes into custody or under his control the company's property with limited powers.[22] After the members' meeting, a creditors' meeting shall be summoned with official

---

13 *Lehman Brothers Ltd (In Administration), Re* [2017] UKSC 38, [2017] 2 W.L.R. 1497, para 16.

14 Keay and Walton (n 2) 95.

15 John Armour, Audrey Hsu, and Adrian Walters, 'Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002' (2008) 2 European Company and Financial Law Review 148, 153.

16 Keay and Walton (n 2) 223.

17 ibid 16 ff.

18 Insolvency Act (n 6) Section 123(1).

19 ibid, para 2.

20 Insolvency Act (n 6) Section 73. There is a third form of liquidation known as '*members' voluntary winding up*'. This procedure is put in place for reasons other than insolvency; therefore, it is not addressed in the chapter. The member's voluntary winding up takes place when the company is solvent, but its members desire to end the company's business. See Keay and Walton (n 2) 229 and Andrew Keay, *McPherson's Law of Company Liquidation* (3rd edn, Sweet and Maxwell 2013) para 2-007.

21 Insolvency Act (n 6) Section 98 ff.

22 After the members' meeting and before the creditors' meeting, the liquidator's powers are limited: without the court approval, the insolvency practitioner may dispose perishable goods and do what necessary to protect the company's assets. See Insolvency Act 1986 Section 166(2).

notice.[23] Here, the affairs of the company are examined, and the assets and liabilities verified.[24] At this stage, the creditors examine the statement of directors that holds for the winding up and nominate the liquidator.[25]

Under the compulsory winding-up, a petition to commence the liquidation proceedings is presented to the court.[26] Different actors can submit the petition.[27] Statistically, the large majority of petitions to wind up the company is presented by the creditors.[28] At the hearing, the court would decide whether to grant an order to wind up or dismiss it and in the former case, the Court would nominate a liquidator to manage the insolvency estate.

The scopes of English liquidation procedures are three: (i) to allow an 'equitable and fair distribution of the assets'[29] of the company to their creditors; (ii) to exit the market an inefficient company; and (iii) to investigate the company affairs and the conducts of its officers.[30] The claims of transaction avoidance are instrumental to the first and the third scope of insolvency.[31] The following section provides a thorough analysis of transaction avoidance claims that can be used in administration and liquidation.

4.3. Insolvency Transaction Avoidance

In the English system, several rules allow the insolvency practitioner to set aside transactions that are detrimental to the general body of creditors. As identified in chapter two, the claims of transactions at an undervalue (Section 238 IA); preferences (Section 239 IA); avoidance of floating charges (Section 245 IA) and; transactions defrauding creditors (Section 423 IA) fall within the

---

23 See Insolvency Act (n 6) Section 98.
24 ibid.
25 ibid Section 100(1). The person nominated as the liquidator may coincide with the person provisionally nominated by the member's meeting. In case of divergence, the nomination by the creditors prevails. See Insolvency Act 1986 Section 100 (2).
26 ibid Section 124.
27 The petition can be presented by (i) the company; (ii) the directors; (iii) any creditor of the company;(iv) contributory and contributories; (v) the insolvency practitioner of foreign cross-border insolvency proceedings under the European Insolvency Regulation; (vi) the clerk of a magistrate's court; (vii) the supervisor of a CVA; (viii) the administrative receiver of a company in receivership; (ix) the administrator of a company under administration. See Insolvency Act (n 6) Section 124.
28 Keay and Walton (n 2) 240.
29 ibid 225.
30 ibid.
31 Andrew Keay, 'In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions' (1996) 18 Sydney Law Review 55, 74.

scope of the research. Therefore, this section provides a critical analysis of the claim at stake and their essential elements. Moreover, the last part of this section (Section 4.3.5) is will address the relationship between these claims and their possible overlaps.

4.3.1. Transactions at an Undervalue

Among the claims available to adjust transactions concluded at the eve of insolvency, the first listed in the Insolvency Act is 'Transactions at an Undervalue'.[32] Section 238 IA provides that the insolvency practitioner may apply to the court for an order when 'the company has at the relevant time enter into a transaction at an undervalue'.[33]

In order to provide for a detailed analysis of the claim, the following issues will be considered: (i) what falls under the term 'transaction'; (ii) when a transaction is to be considered at an undervalue; (iii) what is the relevant time for the transaction to occur; and (iv) what are the effects of the court order and the possible defences.

4.3.1.1. What Falls under the Term 'Transaction'?

The term transaction is open to a broad interpretation.[34] According to Section 436 IA, the concept of a transaction includes a gift, an agreement or an arrangement.[35] The transaction under Section 238 IA does not have any formal requirements: it can be a formal or informal agreement, and it can take place either orally or in writing.[36] However, the transaction must involve some 'element of dealing between the parties'.[37] It entails that:

> this must require some engagement, or at least communication, between the two parties and not merely a disposition of money which

---

32 Insolvency Act (n 6) Section 238. In relation to Scotland, the matter is covered by Section 242 IA 'Gratuitous Alienations'.

33 ibid.

34 Rebecca Parry, James Ayliffe and Sharif Shivji, *Transaction Avoidance in Insolvencies* (Oxford University Press 2011) para 4.06.

35 Insolvency Act (n 6) Section 436.

36 *Secretary of State for the Environment, Food and Rural Affairs v Feakins* [2005] EWCA Civ 1513, [2007] B.C.C. 54, para 76.

37 *Knights v Seymour Pierce Ellis Ltd (formerly Ellis & Partners Ltd)* [2001] 2 B.C.L.C. 176, para 20.

> results in one party's money landing up in the bank account of the other without anything said or done by that other.[38]

Situations, where there has been no contact between the parties, have been excluded from the concept of transaction under Section 238 IA.[39] For instance, it does not constitute a transaction to send a cheque to a party in payment of a third party debt without a prior agreement between the drawer and the payee.[40]

This jurisprudential approach, while consistent, leads to problematic results.[41] Excluding payments that are not supported by prior agreements or arrangements limits the purpose of the Section,[42] which is to 'restore to a company for the benefit of its creditors money or other assets which ought not to have left the company'.[43] Notwithstanding the criticism, it has been suggested that in dealing with transactions at an undervalue, the emphasis of analysis should be placed on the consideration of the value rather than the concept of a transaction.[44]

4.3.1.2. When a Transaction is at an Undervalue

A transaction is at an undervalue when it is a gift, or it has no consideration.[45] Likewise, it is at un undervalue when the value of the consideration received, 'in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company'.[46] As mentioned above, the focal point in determining the application of Section 238 IA is the identification and evaluation of the consideration given in the transaction.[47]

---

38 *Hampton Capital Ltd, Re* [2015] EWHC 1905 (Ch); [2016] 1 B.C.L.C. 374, para 38.

39 *Knights v Seymour Pierce Ellis Ltd* (n 37).

40 ibid.

41 Rizwaan Jamel Mokal and Look Chan Ho, 'Consideration, Characterisation, Evaluation: Transactions at an Undervalue after *Phillips v Brewin Dolphin*' (2011) 1 Journal of Corporate Law Studies 359.

42 ibid, 362.

43 *Knights v Seymour Pierce Ellis Ltd* (n 37) para 16.

44 Parry (n 34) para 4.08.

45 Insolvency Act (n 6) Section 238(4).

46 ibid.

47 *Knights v Seymour Pierce Ellis Ltd* (n 37) and *Phillips and another v Brewin Dolphin Bell Lawrie Ltd and another* [2001] UKHL/2 [2001] 1 W.L.R. 143, para 20.

Within the Insolvency Act, there is no definition of the term consideration.[48] Its meaning must be borrowed from contract law, where consideration is the act (or forbearance) promised by one party in exchange for an act (or forbearance) performed by the counterparty.[49] In this regard, an insolvency practitioner must first identify the transfer made or the obligation undertaken by the insolvent company.[50] They have to establish the outflow of consideration in money's worth.[51] Second, they have to evaluate whether the company received an insufficient counter-value. In other words, they should determine whether the inflow of consideration in money's worth was considerably less than the outflow.[52]

The differential between the value of the consideration given and received has to be substantial.[53] The wording of Section 238 IA states that it must be 'significantly less'.[54] The expression has not been clarified explicitly by the jurisprudence, and this leads to uncertainties for its interpretation.[55] However, insolvency practitioners shall take into consideration the financial benefits exchanged by the parties.[56] In particular, they have to look at the value of the assets subject to the transaction.[57]

Moreover, the value of the consideration must be assessed from the point of view of the company[58] at the time of the transaction (*ex-ante)*.[59] Events that occurred after the transaction had been concluded may be taken into account

---

48 Parry (n 34) para 4.55.

49 ibid.

50 Mokal and Ho (n 41) 363.

51 ibid.

52 *MC Bacon Ltd (No.1), Re* [1990] B.C.C. 78, [1990] B.C.L.C. 324; *Phillips v Brewin Dolphin Bell Lawrie Ltd* (n 47) para 30; *Reid v Ramlort Ltd* [2004] EWCA Civ 800; [2005] 1 B.C.L.C. 331.

53 *MC Bacon Ltd (No.1)* (n 52) para 92.

54 Insolvency Act (n 6) Section 238.

55 Keay (n 20) para 11-035.

56 *Phillips v Brewin Dolphin Bell Lawrie Ltd* (n 47).

57 In *Phillips v Brewin Dolphin Bell Lawrie Ltd,* Lord Scott specified that 'The value of an asset that is being offered for sale is, prima facie, not less than the amount which a reasonably wee-informed purchaser is prepared, in arm length negotiations to pay for it' (n 47) para 30.

58 *MC Bacon Ltd (No.1), Re* (n 52) para 340.

59 *Phillips v Brewin Dolphin Bell Lawrie Ltd* (n 47) and Mokal and Ho (n 41) 368.

only in so far as they contribute to assessing the value of consideration attributed by the parties at the time of the transaction.[60]

Another aspect to be considered is the subject who provides for consideration. This comes into play in linked agreements, where the dealing between the parties take place in complex structures that involve separate agreements with multiple parties.[61] In these circumstances, the separate agreements are bound together under one relevant transaction by the considerations provided by the parties.[62]

As a result, the company can receive consideration by a party that was not the recipient of the company's consideration. Indeed, there is no restriction on the source that provides consideration to the insolvent company.[63] In such circumstances, the value of considerations exchanged in different agreements is measured under the umbrella of one transaction.[64]

4.3.1.3. What Is the Relevant Time for the Transaction to Occur?

The transaction must occur within a specific timeframe to be deemed vulnerable under Section 238 IA. According to Section 240 IA, the transaction has to take place within two years of the onset of insolvency.[65] Moreover, it is required that at the time of the transaction, the company was insolvent or became insolvent[66] as a result of the transaction.[67] In the case of administration, the same period applies.[68] The onset of insolvency, however, is considered to be the date in which the application for the administration is made or a copy of a notice of intention to appoint an administrator is filed.[69]

---

60 Mokal and Ho (n 41) 367-369.

61 Parry (n 34) para 4.09 and *Phillips v Brewin Dolphin Bell Lawrie Ltd* (n 47).

62 Mokal and Ho (n 41) 363.

63 ibid 364.

64 *Phillips v Brewin Dolphin Bell Lawrie Ltd* (n 47).

65 Insolvency Act (n 6) Section 240. In Scotland, the transaction must occur 5 years before the commencing of the winding-up or the entering in administration if the counterparty of the transaction is connected with the company. If the party is not connected, the relevant time is two years. See Insolvency Act (n 6) Section 242.

66 For the meaning of ‘insolvent’ see *supra* section 4.2.

67 Insolvency Act (n 6) Section 240(2)(a) and (b).

68 Parry (n 34) 5.18.

69 ibid Section 240(3).

In transactions at an undervalue, there is no distinction in the time-frame provided if the counterparty of the transaction is connected[70] with the company. The relevant time for the transaction to be voidable is the same whether the transaction is concluded with a connected party or not.[71] However, the fact that transaction occurs with a connected party can be relevant in transactions at an undervalue. Indeed, the conclusion of a transaction at an undervalue with a connected party provides a rebuttable presumption of the factual insolvency of the company. [72]

4.3.1.4. Effects of the Court's Order and Possible Defences

On application by the insolvency practitioner, the court ascertains that the conditions set in Section 238 IA are met and makes an order to restore the position the company would have been if the transaction had not occurred.[73] The restoration of the company's position can take different forms as the court has wide powers and discretion.[74] The court may order to vest the property subject of the transaction, or the proceeding of its sale, in the company.[75] The order may as well entail the release or discharge of any security granted at an undervalue.[76]

Additionally, the court may adjust the transaction by ordering the counterparty to pay the difference between the values of the considerations.[77] Likewise, it may revive surety obligations or guarantee and order to charge security rights on the transferred property.[78] Moreover, the court may order the counterparty to provide for the amount that they could prove in the debtor's insolvency proceedings.[79] Also, the wording of Section 238 IA provides that the court

---

70 A party is deemed to be connected to the company if it is its director or its shadow director, an associate of them, or an associate of the company. The category of 'associate' involves a familiar or working relationship. A list of associated persons is provided in section 435 IA.

71 See *further* section 4.3.2, a party's connection with the company causes different relevant times to apply in relation to preference.

72 Insolvency Act (n 6) Section 240(2); Parry (n 34) para 4.141.

73 Insolvency Act (n 6) Section 241 IA.

74 Parry (n 34) para 4.219.

75 Insolvency Act (n 6) Section 241(1)(a) and (b).

76 ibid (c).

77 ibid (d).

78 ibid (e)(f).

79 ibid (g).

> ‘shall (…) make such order as it thinks fit.’[80] Notwithstanding the use of the word ‘shall’, the discretion of the court has been interpreted as broadly as to include the possibility for the court not to make an order at all.[81]

Furthermore, the order of the court may affect the property or impose an obligation on any person directly or indirectly connected with the transaction.[82] However, the order does not affect a third party who entered the transaction in good faith and for value.[83] There would be a rebuttable presumption of bad faith if the third party had notice of: (i) the transaction being at an undervalue and; (ii) the insolvency proceedings against the debtor.[84] The same presumption applies if the third party was connected with, or was an associate of, either the insolvent company or the counterparty of the transaction at an undervalue.[85]

The primary goal of the court order is to restore the position of the company.[86] The position of the counterparty of the transaction is taken into consideration by the court. However, the order does not seek to restore the position of the counterparty in full as, in the balance of interests at stake, priority is given to the interests of the general body of creditors.[87]

Moreover, the claim is provided with statutory defences. The transaction is not to be put aside if the insolvent company proved that it entered the transaction in good faith and for the scope of continuing carrying out the business.[88] At the same time, the company has to prove that at the time of the transaction ‘there were reasonable grounds for believing that the transaction would benefit the company’.[89]

---

80 Insolvency Act (n 6) Section 238(3).
81 *In Re Paramount Airways Ltd. (In Administration)* [1993] Ch. 223, 239.
82 Insolvency Act (n 6) Section 241(2).
83 ibid.
84 ibid, para 3.
85 ibid, para 2A.
86 Keay and Walton (n 2) 553.
87 *Lord (Liquidator of Rosshill Properties Ltd) v Sinai Securities Ltd* [2004] B.C.C. 986, 991.
88 Insolvency Act (n 6) Section 238(5)(a).
89 ibid (b).

4.3.2. Preferences

Section 239 IA sanctions the company's favouritism towards a creditor over the others.[90] The provision defines preference as the circumstances where

> the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.91

The provision applies when the counterparty of the preferential transaction undertaken by the debtor is the debtor's creditor, a surety or a guarantor.[92] Unlike transaction at an undervalue, preference does not apply against third parties, but it requires a debtor-creditor relationship underpinning the vulnerable transaction.[93]

The scope of the provision is twofold. First, as transactions at an undervalue, the provision on preferences aims to restore the integrity of the company's assets.[94] Second, it seeks to ensure the respect of the *pari passu* principle, which prescribes that the value of the company's assets must be distributed fairly according to the statutory ranking system.[95] Indeed, as a result of the transaction, the counterparty must be placed in a better position than the one they would have been had the preference not been given.[96]

This improvement of the creditor's position should be weighed against what they would have received if, at the time of the transaction, the debtor were to be put into liquidation.[97] Although the preferential effects are assessed with reference to the time of the transaction, subsequent events can be taken into account.[98] The claim, therefore, seeks to safeguard and re-establish the fair

---

90 In Scotland, the matter is covered by Section 243 IA 'Unfair preferences'.
91 Insolvency Act (n 6) Section 239(4)(b).
92 ibid, Section 239(4)(a) IA.
93 Ibid; Keay (n 20) para 11-061.
94 Keay (n 31) 64.
95 ibid.
96 Keay and Walton (n 2) 560.
97 ibid; Parry (n 34) para 5.55 ff.
98 Parry (n 34) 5.62.

distribution of the insolvency's estate among all parties.[99] Moreover, it has been held that preferences seek to safeguard insolvency law by refusing to give effect to arrangements that would interfere with its purposes.[100]

The action is made of objective and subjective elements. As transactions at an undervalue, the provision on preferences applies only in administration and liquidation.[101] In contrast, the suspect period for preference differs from that of transactions at an undervalue. Moreover, Section 240 IA provides a distinction in the relevant time if the party is connected or not.[102] In preference, the relevant time for the transaction to occur is two years with a connected party, or six months of the onset of insolvency if the party is not connected with the debtor. [103]

Like for transactions at undervalue, Section 240(2) IA also requires the debtor to be insolvent at the time of the preferential transaction or to become insolvent as a consequence of it.[104] Similarly, the powers and discretion of the court in making the order are the same of transactions at undervalue.[105] In contrast, the subjective element is particular of preferences, and it is addressed in the following section.

4.3.2.1. The Subjective Element

Under Section 239 IA, the insolvent debtor is required to be influenced by the desire to prefer one creditor over the others.[106] The subjective element has been reformed with the enactment of the Insolvency Act in 1986.[107] In the previous version of the claim, the provision required that the insolvent debtor had the dominant intention to prefer the creditor.[108]

---

99 ibid, para 5.66.

100 *Skandinaviska Enskilda Banken AB v Conway* [2019] UKPC 36, para 101.

101 Insolvency Act 1986 (n 6) Section 239(1).

102 ibid, Section 240(a) and (b).

103 ibid. In relation to Scotland, such distinction of relevant time is not provided. See Insolvency Act (n 6) Section 243.

104 Insolvency Act (n 6) Section 240(2).

105 ibid, Section 241.

106 ibid, Section 239(5). Concerning the desire to prefer, see generally Parry (n 34) paras 5.92 ff. and Keay (n 20) paras 11-067 ff.

107 Bankruptcy Act 1914 Section 44(1).

108 ibid.

The change from ‘intention’ to ‘desire’ leads to an even more subjective approach to the issue of preferences.[109] Indeed, in the past, the intention could have been inferred from the consequences of the transaction.[110] Instead, it has emphasised that a person does not necessarily desire all the consequences of their actions.[111] Therefore, inferring the influence by the desire to prefer from the circumstances of the case can be problematic.[112]

In the corporate context, the subjective element relates to the state of mind of the person in control of the company’s management – generally the director or the board of directors.[113] This has to be proven by the insolvency practitioner that bring the claim to the court.[114] Due to the difficulties in proving the state of mind of the person in charge of the company, the Insolvency Act supplies the insolvency practitioners with rebuttable presumptions.

When the counterparty of a preferential transaction is an associate or connected party of the company,[115] the desire to prefer is presumed unless otherwise proved by the defendant.[116] In this circumstance, the company or the preferred creditor must prove that the transaction is supported by proper commercial reasons.[117]

In contrast, when the preferential transaction takes place with parties that are not connected with the company, the issue is to determine the meaning and the relevance of the desire to prefer in concluding the transaction.[118] Section 239 IA requires that the decision to undertake the preferential transaction is

---

109 *MC Bacon Ltd (No.1), Re* (n 52).

110 ibid, para 87.

111 ibid.

112 ibid.

113 The subjective element of the company mirrors the intention of those in control of it. Generally, it refers to the director or the boards of directors. It may also apply to shareholders with a certain degree of control of the company. See *Lennard's Carrying Company v Asiatic Petroleum Company* [1915] A.C. 705; *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 Q.B. 159; *El-Ajou v Dollar Land Holdings Plc* (No.1) [1994] 2 All E.R. 685; *KR & Ors v Royal & Sun Alliance Plc* [2006] EWCA Civ 1454; BAT Industries plc v Sequana SA [2019] 2 WLUK 53 para 494.

114 Insolvency Act (n 6) Section 239(2).

115 A definition is provided above (n 70).

116 Insolvency Act (n 6) Section 239(6).

117 *Fairway Magazines Ltd, Re* [1992] B.C.C. 924, 929; *Wills v Corfe Joinery Ltd* [1997] B.C.C. 511, 517.

118 In contrast, Section 243 IA (applicable only to Scotland) adopts a result rather than a purpose test.

influenced by the desire to improve the position of the creditor (in comparison to the position in which the creditor would be had the transaction not taken place).[119] The desire refers only to the insolvent debtor, while there is no subjective element to be proven for the preferred creditor.[120] In this regard, it is not sufficient to prove the desire to undertake the transaction; the insolvency practitioner must prove that the debtor was influenced by the desire to produce the preferential effect.[121]

It is not prescribed that this influence is exclusive or predominant.[122] In dealing, the debtor may be driven by multiple and diverse desires. The desire to prefer needs to be among the influential factors of the decision, but it does not need to be the only one nor the decisive one. [123] At the same time, the subjective element can be inferred from the circumstances. However, the debtor may have undertaken the transaction, appreciating the possible preferential effects without desiring them.[124] The insolvency practitioner has to prove that the company's director 'positively wished to improve the creditor position in the event of its own insolvent liquidation'.[125]

Since it relates to the state of mind of the party, the subjective element must exist at the time the decision to undertake the transaction was made.[126] If the transaction takes place later in the future, it is irrelevant whether the desire still subsists.[127] Moreover, it is not necessary that at the time the decision was taken, the director knew or believed that the company was insolvent. [128] It is sufficient that the transaction has potential preferential effects displayed only in the case of insolvency.[129] Additionally, the transaction must display a

---

119 Insolvency Act (n 6) Section 239.
120 *Stealth Construction Ltd, Re* [2011] EWHC 1305 (Ch) para 67.
121 *MC Bacon Ltd (No.1), Re* (n 52) at 87.
122 ibid, 88.
123 ibid, 87.
124 *Doyle v Saville* [2002] B.P.I.R. 947.
125 *MC Bacon Ltd (No.1), Re* (n 52) at 88.
126 ibid; *Stealth Construction Ltd*, *Re* (n 120) para 61 ff.
127 *MC Bacon Ltd (No.1), Re* (n 52) at 88.
128 *Exchange Travel (Holdings) Ltd (No.3), Re* [1996] B.C.C. 933, 947.
129 *Exchange Travel (Holdings) Ltd (No.4)* [1999] B.C.C. 291, 295.

'preference in fact'.[130] This means that the transaction factually improves the creditor's position in case of insolvency and diminishes the company's assets available for distribution.[131]

Notwithstanding the 1986 reform, and the presumptions available with connected parties, the subjective element still causes issues of application.[132] It has been stressed that Preferences is an anachronistic claim since it requires the inquiring of the debtor's motives.[133] Indeed, the difficulties in application lie on the burden for the insolvency practitioner to reconstruct *ex-post* the debtor's intention and to prove its substantial desire to prefer.

4.3.2.1. The Right of Action and the Court Order Effects

The right to apply for the order belongs exclusively to the insolvency practitioner.[134] In contrast, a creditor may provide for funding in support of the claim.[135] However, the funding does not change the control of the action that remains in the hands of the insolvency practitioner.[136] Likewise, the funding creditor does not have any claim or any priority on the property recovered through the claim. [137]

As in transactions at an undervalue, the court has wide discretion in deciding the content of the order that addresses the preferential transaction.[138] Moreover, it has been suggested that order should seek to neutralise the prejudicial effects of the preferential transaction, rather than set aside the transaction in full.[139]

The most common orders involve the restoration of the property or its value by the preferred creditor.[140] However, the destination of the proceeds

---

130 *Ledingham-Smith (A Bankrupt), Re* [1993] B.C.L.C. 635; *Lewis v Hyde* [1998] 1 W.L.R. 94, [1997] B.C.C. 976; *Wilson v Masters International Ltd* [2009] EWHC 1753 (Ch), [2010] B.C.C. 834.
131 ibid.
132 Keay (n 20) para 11-073.
133 ibid.
134 Insolvency Act (n 6) Section 239.
135 Parry (n 34) 5.21.
136 ibid. See also *Oasis Merchandising Services Ltd (in liquidation)* [1995] BCC 911.
137 ibid.
138 Insolvency Act (n 6) Section 241.
139 Parry (n 34) para 5.125.
140 ibid, paras 5.127 - 5.128.

collected through a claim in preference is peculiar.[141] In particular, the value recovered through Section 239 does not become part of the company estate.[142]

Consequently, the assets recovered do not fall under any floating charges imposed on the company. Rather, the recovered sum is set aside in a trust held by the insolvency practitioner for the benefit of the general body of creditors.[143] In contrast, it is unclear whether the proceeds recovered under transactions at an undervalue and transactions defrauding creditors would fall under the insolvency practitioner's trust or could feed into the debtor's estate.[144]

4.3.3. Avoidance of Certain Floating Charges

The third claim to be analysed in this chapter is 'Avoidance of Certain Floating Charges'.[145] This claim is peculiar of the English system, as it relates to a particular form of security available in the British financial system. A floating charge is a security interest in property that is continually changing in value and identity.[146] The assets subject to a floating charge may be present, or future assets and they may change during the ordinary course of the business (for instance, stock, book debts and work in progress).[147] It is a convenient form of security right as it places the proprietary interest on the grantee but allows the grantor to maintain control over the property until the grantee intervenes.[148]

Section 245 IA deals with floating charges created at the eve of the insolvency.[149] The provision prescribes that a floating charge is invalid if it was created in favour of a connected party within a period of two years on the

---

141 *In Re Yagerphone Limited* [1935] Ch. 392.
142 *Ex parte Cooper* [1875] L. R. 10 Ch. 510
143 ibid.
144 Parry (n 34) para 25.02.
145 Insolvency Act (n 6) Section 245.
146 Eilis Ferran, 'Floating Charges – The Nature of The Security' (1988) 47 Cambridge Law Journal 213, 214.
147 *Illingworth v Houldsworth* [1904] AC 355.
148 ibid; *Spectrum Plus Ltd, Re* [2005] UKHL 41[2005] 2 A.C. 680, 714.
149 It applies to England and Wales as well as to Scotland.

onset of the insolvency (the date of the commencement of the winding up).[150] Whereas the floating charge is created in favour of a non-connected party, the relevant time is shortened to twelve months.[151]

Besides, the floating charge with a non-connected party is invalid only if at the time it was granted the debtor was insolvent or became insolvent as a result of the granting of the charge.[152] The connection between the debtor and the grantee must be present at the time of granting of security, not at the time of winding-up. A subsequent change of status is irrelevant.[153]

The same periods apply in administration, where the concept of onset of the insolvency is interpreted in multiple way depending upon the circumstances.[154] When the administrator is appointed by court order, the onset of the insolvency corresponds to the date in which the application to appoint an administrator was made.[155] Similarly, when the administrator is appointed out of court, the onset of the insolvency is deemed to be the date of the filing of the copy of notice of intention to appoint the administrator.[156] Finally, in any other case of administration, the relevant date is when the appointment of the administrator takes effect.[157]

Under section 245 IA, regardless of the time of creation, the floating charge is not invalid to the extent that it provided a benefit to the debtor at the time the charge was granted.[158] When the debtor received new value either in goods or services, or discharge or a reduction of previous debts or interests payable for the new value, the floating charge is valid in relation to the new value.[159]

---

150 Insolvency Act (n 6) Section 245(3)(a) and Section 245(5)(d).
151 ibid Section 245(3)(b).
152 ibid Section 245 (4).
153 The Technical Manual 31.4B.46 <https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch25-36/Chapter31/part4 B/part3/part_3.htm> accessed 21.07.2020.
154 Parry (n 34) para 17.57
155 Insolvency Act (n 6) Section 245(5)(a).
156 Ibid, Section (b).
157 Ibid, Section (c).
158 Parry (n 34) para 7.08.
159 Insolvency Act (n 6) Section 245(2)(a), (b) and (c).

The new value must be provided at the time the charge is granted, a small delay between the two performances is allowed, but it must be insignificant.[160]

The provision seems straightforward. In practice, however, there are significant problems on the topic, in particular concerning the identification of the charge as floating or fixed charge.

5.3.1.1. The Floating Nature of the Charge

Section 245 IA requires the insolvency court to evaluate whether a floating charge created at the eve of insolvency stands the test on the 'brought new value' and the test on the relevant time of the transaction. However, the first aspect that the court has to examine is whether the charge is floating or fixed. The distinction between the two types of charges has been subject to conspicuous case law, but the issue has not come to a conclusive answer.[161]

As stated above, the floating charge is a security right that places the proprietary interest of changing assets on the grantee, allowing the grantor to maintain control over the property until the grantee intervenes.[162] Once the grantee intervenes, the floating charge crystalized in a fixed charge.[163] A fixed charge is security right on specific assets that restricts the grantor freedom to use and dispose of the assets.[164]

The distinction between the two types of security has not always been straightforward.[165] Past case law shows that parties may draw a debenture that imposes some restrictions on the grantor freedom to dispose of the assets but not the freedom to use them.[166] A clear example of the lack of distinction between fixed and floating charges can be found in the case of *National Westminster Bank plc v Spectrum Plus Ltd & Ors*.[167]

---

160 *Power v Sharp Investments Ltd* [1994] 1 BCLC 111, where it was upheld that a delay of more than a coffee break would be commercially significant.

161 Sarah Worthington, 'An Unsatisfactory Area of the Law: Fixed and Floating Charges yet again' (2004) 1(4) International Corporate Rescue 175.

162 *Illingworth v Houldsworth* (n 147).

163 *Spectrum Plus Ltd, Re* (n 148).

164 ibid.

165 Sarah Worthington (n 161).

166 *Siebe German & co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep. 142 (Ch D*); New Bullas Trading Ltd, Re* [1994] B.C.C. 36 (CA (Civ Div)); *Spectrum Plus Ltd, Re* (n 148).

167 *Spectrum Plus Ltd, Re* (n 148).

In the case, a specific charge over all present and future book debts and other debts issued to secure an account overdraft. The debenture imposed limitations to the freedom to charge and assign the debts, but it did not provide restrictions on the use of the account. The charge of the case was interpreted as fixed because it imposed limitations on the control over the proceeds of the debt.[168]

The distinction between the two types of charges is of great relevance in the topic of transaction avoidance because only floating charges are invalid under Section 245 IA.[169] In particular, the provision applies to charges that are drawn as floating charges at the beginning, while it is irrelevant if the charge gets crystalized in-between the creation of the charge and the opening of the insolvency proceedings.[170]

The lack of case law following the decision in *Spectrum Ltd* may suggest that the distinction between floating and fixed charges is settled in practice. However, a 2017 case demonstrates that the issue of identifying the nature of the charge as floating or fixed is still left to the courts. [171] Regardless of the qualification provided by the parties, the courts decide on a case by case basis if the limitations imposed on the grantor turn the charge into a fixed one.[172]

This result has been deemed unsatisfactory as it 'causes considerable uncertainty in the structuring of transactions'.[173] Therefore, a reform project on Secured Transactions Law proposes the replacement of the different types of security interest by a single concept of security interest or at least the abolition

---

168 ibid, para 86.

169 The issues are of relevance also for other aspects of insolvency law as, for instance, the ranking in the distribution scheme. See Insolvency Act 1986 Sections 175-176 and Schedule B1 paras 65 and 99.

170 Insolvency Act (n 6) Section 251; Louise Gullifer and Jennifer Payne, *Corporate Finance Law: Principles and Policy* (2 edn Bloomsbury 2015) 308.

171 *Peak Hotels and Resorts Ltd, Re* [2017] EWCH 1511 (Ch).

172 Sarah Paterson, 'The Insolvency Consequences of the Abolition of the Fixed/Floating Charge Distinction' STR Secured transactions Law Reform Project Discussion Paper Series January 2017 <https://stlrp.files.wordpress.com/2017/01/paterson-fixed-and-floating-charges.pdf> accessed 21.07.2020.

173 STR General Policy Paper April 2016 <https://stlrp.files.wordpress.com/2016/05/str-general-policy-paper-april-2016.pdf> accessed 21.07.2020.

of the ‘distinction between fixed and floating charges resting on the operation control’.[174]

4.3.4. Transactions Defrauding Creditors

The last claim to be examined in this chapter is transactions defrauding creditors. The rules on transactions defrauding creditors are provided in the Insolvency Act, but not in the part that is dedicated to the adjustment of prior transactions. Instead, the claim is regulated by a specific part of the Act entitled ‘Provisions against Debt Avoidance’.[175] *Prima facie*, the location of the provision reveals the peculiarity of the claim within the English transaction avoidance system. This section seeks to analyse the claim and highlight the relevant differences among transactions defrauding creditors and the other transaction avoidance claims examined in the chapter.

Section 423 IA on transactions defrauding creditors addresses transactions at an undervalue[176] undertaken by the debtor with the purpose of:

> putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make (...)[177]

In order to provide a comprehensive analysis of the claim, the following aspects are considered: (i) the transaction at an undervalue (ii) the subjective element; (iii) the right of action; (iv) the content and effect of the court order; and (iv) the relevant time.

4.3.4.1. The Transaction at an Undervalue

The definition of ‘transaction’ is the same as the one given for transactions at an undervalue:[178] one or more agreements between the company and a

---

174 Sarah Paterson (n 172).

175 See Insolvency Act 1(n 6) Part XVI.

176 I.e. gifts or transactions ‘for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided’ by the company. See Insolvency Act 1986 Section 423(1).

177 Insolvency Act (n 6)Section 423 (2).

178 See Sections 4.3.1.1 and Section 4.3.1.2 of the current chapter.

counterparty that reduce the company assets.[179] As under Section 238 IA, there are no formal requirements for the transaction and the meaning of the term is interpreted broadly. For instance, in the case *Concept Oil Services Ltd v En-Gin Group LLP*,[180] the Court held that even a corporate restructuring process that encompasses the transfer of the company's ownership might fall under the application of Section 423 IA.[181] Moreover, in *BAT Industries plc v Sequana SA*, it has been established that also the payment of dividends can be encompassed as a transaction under Section 423 IA.[182]

In contrast, the concept of 'transaction' has been limited in *Re Simon Carves Ltd.*[183] In this case, it has been established that comfort letters between parent and subsidiary companies do not constitute an agreement under section 423 IA if the parties did not intend to undertake any obligations with the letters.[184] While the concept of transactions at an undervalue is the same in Section 238 and 423 IA, the claims differ in other aspects. The main feature that distinguishes the claim of transactions defrauding creditors from transactions at an undervalue is the subjective element on the debtor's part.[185]

4.3.4.2. The Subjective Element

It should be noted that, although the heading of Section 423 IA refers to the debtor 'defrauding' creditors, the subjective element of the claim does not require a fraudulent intent.[186] Under Section 423 IA, it is required that the debtor acts with the 'purpose of putting the assets out of the reach of'[187] the creditors or otherwise prejudicing their interests.[188]

---

179 *Phillips v Brewin Dolphin Bell Lawrie Ltd* (n 47); *Secretary of State for the Environment, Food and Rural Affairs v Feakins* [2005] EWCA Civ 1513; *Dickinson v NAL Realisations (Staffordshire) Ltd* [2017] EWHC 28 (Ch).

180 [2013] EWHC 1897 (Comm).

181 ibid paras 79-82.

182 *BAT Industries plc v Sequana SA* (n 113) para 502.

183 See *Simon Carves Ltd, Re* [2013] EWHC 685 (Ch).

184 ibid at 35-37.

185 In contrast, Section 423 IA does not apply in Scotland. The only claim available is Section 242 IA on gratuitous alienations. See Parry (n 34) para 20.45.

186 See *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* (No.2) [1990] B.C.C. 636; *Treharne v Brabon* [2000] B.C.C. 1171; *National Westminster Bank plc v Jones* [2001] 1 BCLC 98.

187 Insolvency Act (n 2) (n 6) Section 423 (2).

188 Ibid. The creditor's interests should be interpreted with a broader meaning than strict legal rights. See Parry (n 34) para 10.31.

The concept of 'purpose' is not defined in the Insolvency Act, and it has been given several meanings,[189] which often causes problems of application.[190] In general terms, the purpose refers to the intentions behind the debtor's actions.[191] It relates to the state of mind of the debtor, but it can also be inferred from the circumstance.[192]

However, the debtor's purpose must not be confused with the results of his actions.[193] A transaction may have detrimental effects on the creditors' interests or put the debtor's assets out of the creditors' reach, without the debtor purposely seeking to do so.[194] Additionally, the debtor can have more than one reason to enter the transaction.[195]

The subjective element required in Section 423 IA does not need to be the sole purpose of the debtor's action nor the dominant one.[196] It is sufficient that it is 'substantial', meaning that the purpose substantially affected the debtor's decision.[197]

Eminent scholarship and jurisprudence have assessed that the adoption of the 'substantial purpose test' is problematic in practice.[198] First, it is difficult to distinguish a dominant purpose from a substantial one.[199] Second, it is hard to determine when a purpose become 'substantial' because it is difficult to ascertain the degree of purpose in a human act. [200]

As in preference, the subjective element in the corporate context must be ascertained with reference to the company's purpose. In dealing with the corporate subject, the company's state of mind mirrors the subjective

---

189 *Brady v Brady* [1989] A.C. 755, [1988] 2 W.L.R. 1308, 778.

190 *Royscot Spa Leasing Ltd v Lovett* [1995] B.C.C. 502.

191 Andrew Keay, 'Transactions Defrauding Creditors: The Problem of Purpose under Section 423 of the Insolvency Act' (2003) 7 Conveyancer and Property Lawyer 272, 274.

192 *Freeman v Pope* [1870] 5 Ch App 538; *Lloyd's Bank Ltd v Marcan* [1973] 2 All ER 359, 367; *Moon v Franklin* [1996] BPIR 196, 204; *Barnett v Semenyuk* [2008] EWHC 2939(Ch), para 28.

193 *Royscot Spa Leasing Ltd v Lovett* (n 190); *BAT Industries plc v Sequana SA* (n 113) para 500.

194 *Withers LLP v Harrison-Welch* [2012] EWHC 3077(QB); [2013] B.P.I.R. 145.

195 *Royscot Spa Leasing Ltd v Lovett* (n 190) [1995] B.C.C. 502; *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981.

196 *Royscot Spa Leasing Ltd v Lovett* (n 190) para 507.

197 *Inland Revenue Commissioners v Hashmi* (n 195) para 949.

198 Andrew Keay (n 20) paras 11-111/113.

199 *Treharne v Brabon* (n 186) at 1199.

200 Andrew Keay (n 20) paras 11-111/113.

disposition of the person with managerial control over the company that enters the transaction.[201]

Furthermore, the subjective element applies exclusively to the debtor. For the transaction to be vulnerable under Section 423 IA, the counterparty of the transaction does not need to be in any particular mindset nor to be aware of the debtor's detrimental intent.[202]

4.3.4.3. The Right of Action

Generally, in the adjustment actions of Section 238, 239 and 245 IA, the right to bring the claim to court is reserved to the insolvency practitioner, who retains control over the claim during litigation.[203] In contrast, under Section 423 IA, the right of action can be exercised by the insolvency practitioner as well as any creditor who is a victim of the detrimental transaction.[204]

If the insolvency practitioner restrains from exercising the action, the victim of the transaction is entitled to bring the claim to court. In this case, the claimant must seek leave from the moratorium, demonstrating a realistic prospect of applicability of Section 423 IA.[205] Moreover, they must provide valid reasons to overcome the insolvency practitioner's forbearing.[206]

In Section 423 IA, the 'victim' of the transaction is defined as the person that is prejudiced or may be prejudiced by the transaction.[207] This broad definition encompasses any person that is actually or potentially affected by the transaction. This includes persons that could - at some point in time - bring a claim against the debtor.[208] The concept of 'victim' is flexible, so to include a person that was a potential victim on a specific date, ceased to be a victim and became a victim again later in time.[209]

---

201 Directors with managerial powers and shareholders with control powers fit into this category. See *supra* n 113.

202 Keay (n 20) para 11-114. However, the mental state of the counterparty can be taken into account to decide the content and extent of the Court order. See *4Eng Ltd v Harper & Ors* [2009] EWHC 2633 (Ch).

203 *Oasis Merchandising Services Ltd (in liquidation)* [1995] BCC 911; See *Exchange Travel (Holdings) Ltd (No.3),* Re [1997] B.C.C. 784.

204 Insolvency Act (n 6) Section 424(1)(a).

205 Simon Carves Ltd, Re (n 183).

206 ibid.

207 Insolvency Act (n 6) Section 423(5).

208 *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542.

209 ibid, para 136.

Moreover, the term victim is not necessarily limited to the debtor's creditors.[210] The victim can be any person that at the time of the transaction was a creditor of the debtor. However, it can also be someone who – at the time of the transaction – was a future creditor of the debtor.[211] Indeed, it is not necessary that the claimant under Section 423 IA was within the contemplation of the debtor at the time of the transaction, neither as a creditor nor as a victim.

Specifically, the scholarship has emphasised that 'in order to be a victim, there is no requirement that a person must have been within the purpose of the debtor.'[212] In order to identify the victim, a result test is applied: any person who has been prejudiced by the debtor's action falls under the category of victim.[213] Moreover, the term victim can encompass persons with proprietary claims[214] as well as other types of claims.[215] Once established who is entitled to bring the action to court, it is appropriate to assess the content and the effects of the claim.

4.3.4.4. The Content and Effects of the Court Order

As in Sections 238 and 239 IA, under Section 423(2) IA the court has the power to make an order to restore - as far as possible - the position in which the company was before the transaction.[216] Additionally, the court can make an order to protect the interests of the victims of the transaction.[217] In this regard, the claim has a restitutory nature,[218] as courts must assess and restore the loss that the victim has sustained.[219]

---

210 ibid, para 101. See also *Clydesdale Financial Services Limited and others v Smailes and others* [2009] EWHC (Ch) 3190, para 73.

211 *Hill v Spread Trustee Co Ltd* (n 208) para 101; *Random House UK Ltd v Allason* [2008] EWHC 2854 (Ch) para 94.

212 Parry (n 34) para 10.59.

213 David Milman, 'Transactional Avoidance on Insolvency: an Update on Recent Developments' (2013) 26 Insolvency Intelligence 81, 83.

214 *Treasury Solicitor v Doveton* [2008] EWHC 2812 (Ch), [2009] B.P.I.R. 352.

215 For instance, an insurer that was not a creditor at the time of the transaction but who is affected by transaction could have a claim under Section 423 IA. See *Clydesdale Financial Services Limited and others v Smailes and others* (n 210). The category also includes litigants under other types of proceedings that have not yet come to a conclusion. *See Mercantile Group (Europe) AG v Aiyela* [1993] 20 FSR 745.

216 Insolvency Act (n 6) Section 423(2)*; Chohan v Sagor* [1992] B.C.C. 306.

217 ibid, Section 423(2) IA.

218 See Keay (n 20) para 11-124/125.

219 See *Chohan v Sagor* (n 195).

In addition, Section 425(1) IA sets out a list of powers the court can use in making an order under Section 423. The court has the discretion to decide which particular remedial order is the most appropriate to the case.[220] The court may order any person to (i) transfer the property- or the proceeds of the sale of the property- subjected to the vulnerable transaction to any person, either absolutely or for the benefit of the general body of creditors; (ii) release or discharge securities given by the debtor; (iii) pay a sum of money; (iv) provide a surety or guarantor for new or revived obligations (v) provide a security 'for the discharge of any obligation imposed by or arising under the order'.[221]

Because of the wide powers given to the courts, the court order may affect third parties. However, Section 425 IA protects the interests in property acquired by third parties in good faith, for value, and without notice of the relevant circumstances.[222] Moreover, the provision at stake safeguards persons that received an incidental benefit without being part of the transaction, if they received such a benefit in good faith, for value, and without notice of the relevant circumstances.[223]

In delivering the order, the court must perform a balancing act between the creditor's interests in the debtor's assets that are subject to the vulnerable transaction and the rights of third parties who are bona fide purchasers.[224] In particular, the protection of the interests of the latter category may even prevent the total restoration of the debtor's assets.[225]

4.3.4.5. The Relevant Time and Other Requirements

Unlike the adjustment actions, the provision on transactions defrauding creditors does not provide for a relevant time-frame in which the transaction has to occur.[226] Nevertheless, the application of the provision is bound by the

---

220 See *Eng Ltd v Harper* (n 202); *Watchorn v Jupiter Industries Ltd* [2014] EWHC 3003 (Ch).
221 See Insolvency Act (n 6) Section 425(1).
222 ibid, Section 425(2)(b).
223 ibid.
224 *Chohan v Sagor* (n 195).
225 ibid; *National Westminster Bank Plc v Jones* (n 186)**;** *Watchorn v Jupiter Industries Ltd* (n 220).
226 Kaey (n 20) para 11-110.

Limitation Act 1980.[227] The limitation period varies according to the content of the claim.[228] It can be either twelve years if the action is upon speciality,[229] or six years if the claim seeks to recover a sum of money.[230]

The limitation period begins to run from the moment the transaction displays its effects on the victim.[231] This means that the limitation period may start running long after the transaction took place. It also means that different victims may have to respect different limitation periods. Furthermore, the limitation period restarts at the time of appointment of the insolvency practitioner.[232]

Moreover, the application of Section 423 IA does not require that the company was insolvent at the time of the transaction nor that it became insolvent as a result of it.[233] This allows the provision to be used outside the insolvency procedures, as it will be discussed further in section 4.4.

4.3.5. Overlaps

In the insolvency framework, the application of the different avoidance actions may overlap. This means that the same transaction may fall under the application of more than one claim. It is of discretion of the insolvency practitioner to decide which claim is the most appropriate to bring to court.[234]

The most common overlap occurs between transactions at an undervalue and transactions defrauding creditors.[235] Both claims target gifts and transactions where the debtor has received significantly less consideration than the one they gave. However, the claims present peculiarities that may facilitate or obstruct the insolvency practitioner.

---

227 *Hill v Spread Trustee Co Ltd* (n 208). Similarly, the Limitation Act applies also to section 238 and 239 IA. See *Segal v Pasram* [2008] EWCH 3448 (Ch); *Priority Garage (Walthamstow) Ltd, Re* [2001] B.P.I.R. 144.
228 *Hill v Spread Trustee Co Ltd* (n 208) para 106 ff.
229 Limitation Act 1980 Section 8.
230 ibid Section 9.
231 *Hill v Spread Trustee Co Ltd* (n 208).
232 ibid, para 127.
233 Keay (n 20) para 11-110.
234 Parry (n 34) paras 4.227 and 5.149.
235 Keay (n 20) para 11-110.

On the one hand, in transactions at an undervalue, strict time requirements bind the insolvency practitioner. Indeed, the transaction must have occurred in the two years before the opening of the insolvency proceedings. On the other hand, while Section 423 IA does not have strict time limitations, nor it involves the debtor's insolvency, it requires the claimant to prove the substantial purpose of the debtor's actions.[236]

At the same time, overlaps may arise between preferences and transactions at an undervalue.[237] If a transaction at an undervalue occurs between the company and one of its creditors, and, as a result, the latter improves their position in terms of priority, then the transaction can be challenged both under Section 238 and 239 IA.[238]

Under both claims, the court order is the same, and it is regulated in Section 241 IA.[239] Among the two claims, Section 238 IA would be the most convenient to apply.[240] First, Section 238 IA has a longer relevant time for the transaction to occur.[241] Second, in Section 239 IA, the insolvency practitioner has to prove that the company was influenced by the desire to give a preference, while, in Section 238 IA, there are no subjective elements to be proven.[242]

4.4. Transactions Defrauding Creditors Outside Insolvency Proceedings

As mentioned in section 4.3.4., the claim provided by Section 423 IA can also be invoked outside the insolvency proceedings.[243] This possibility follows from the historical development of the action as a civil claim. Originally, the claim was provided by an enactment in 1376 under the reign of Edward III,[244] which

---

236 Insolvency Act 1986 Section 243.
237 Parry (n 34) 4.229.
238 ibid.
239 Insolvency Act (n 6) Section 421.
240 Parry (n 34) 4.230.
241 Insolvency Act 1986 Section 421.
242 ibid Section 239(5).
243 *Agricultural Mortgage Corp Plc v Woodward* [1994] B.C.C. 688; *Pinewood Joinery v Starelm Properties Ltd* [1994] B.C.C. 569; *Moon v Franklin* (n 192); *Jsyke Bank Ltd v Spieldnaes* [1999] 2 B.C.L.C. 101; *Giles v Rhind* [2009] Ch. 191.; *Trowbridge v Trowbridge* [2003] B.P.I.R. 258; *B v IB* [2013] EWHC 3755 (Fam); *Concept Oil Services Limited v EN-Gin Group LLP* [2013] EWCH 1987 (Comm).
244 Followed by 3 Henry VII c. 4 (1487) and 29 Elizabeth c. 5 (1587).

granted the creditors the possibility to enforce their credits on the property that the debtor fraudulently donated to third colluding parties.[245] In contrast, only in 1542, a primitive form of bankruptcy[246] was enacted under the reign of Henry VIII.[247]

The history of the action as a civil claim also continued in the reforms of the last century. The provision on transactions defrauding creditors was encompassed under Section 172 of the Law of Property Act 1925 that dealt with the voidable dispositions undertaken by a debtor to defraud creditors.[248] Only with the enactment of the Insolvency Act 1986, the provision has been placed within the insolvency law framework.[249]

Then and now, the rule provides a general safeguard to the creditor who sees their interests prejudiced by the debtor's actions.[250] The debtor's insolvency is not necessary, either as a procedural setting or as a factual requirement.[251] The creditor may set up civil proceedings to pursue the claim to set aside a transaction the debtor undertook with the purpose to put the assets out of reach of the creditor or prejudice their interests.[252] Moreover, the claimant does not need to prove that the debtor was insolvent at the time of the transaction or as a result of it,[253] as the claim is triggered by the existence of the debt, not by the existence of insolvency.[254]

The principles underpinning the provision are of moral nature.[255] In particular, the claim encompasses the debtor's moral duty to refrain from hindering the enforcement of valid obligations against themselves. This translates into two

---

245 Frederick Wait, *Fraudulent Conveyances and Creditor's bills* (1884, republished 2000 Beardbooks) 33.
246, i.e. insolvency for individuals rather than companies.
247 See 34 and 35 Henry VIII c 4 (1542).
248 Law of Property Act 1925 Section 172.
249 *B v IB* (n 243) para 37.
250 ibid.
251 ibid, para 50.
252 Insolvency Act (n 6) Section 424(1)(c).
253 ibid, Section 423.
254 *B v IB* (n 243) para 50.
255 Robert Clark, 'The Duties of the Corporate Debtor to its Creditors' (1977) 90 Harvard Law Review 505, 513; and Parry (n 34) para 2.10.

principles.[256] First, debtors are forbidden to represent their financial situation to the creditors in a way that would lead to the non-satisfaction of their claims.[257] Second, debtors should satisfy their legal obligations before their self-interests.[258] The mentioned principles safeguard the stability of the legal system based on obligations (whether contractual or tort).[259] In particular, it attempts to strike a balance between the debtor's freedom to contract and the conflicting interests of the creditors that rely on the possibility to satisfy their claims.

It has been held that Section 423 IA 'has inherent in it the assumption that following the transaction, the person does not have sufficient funds remaining with him to satisfy the actual or potential claim made against him'.[260] In practice, the claim provides the victim with a tool of individual debt collection, without needing to present a bankruptcy or winding-up petition.[261] The victim of the transaction can bring the claim against the debtor in any division of the High Court.[262] Even if the claim is provided by the Insolvency Act, the claim cannot be brought to the Company Court or Bankruptcy Court outside the insolvency procedural framework.[263]

When the claim is brought outside the insolvency context, the limitation period is the same that applies within the insolvency proceedings, and it is provided by the Limitation Act 1980.[264] The limitation period begins to run when the victim that brings the claim became affected by the transaction.[265] However, the period can also be extended under Section 32(2) of the Limitation Act.[266]

---

256 It has been argued that the relevant principles are three, the third being the prohibition to prefer one creditor over another. See Clark (n 255) 511. However, the prohibition of preferential transactions under general law is highly disputable in the English law system. See Parry (n 34) para 2.11.

257 Clark (n 255) 509.

258 ibid, 510.

259 Douglas Baird, 'Fraudulent Conveyance Law and its Proper Domain' (1985) 38 Vanderbilt Law Review 829, 833-836.

260 BAT Industries plc v Sequana SA (n 122) para 517.

261 Parry (n 34) para 2.09.

262 Keay (n 20) para 11-121.

263 *TBS Bank v Katz* [1997] B.P.I.R. 147.

264 *Giles v Rhind* (n 243).

265 ibid, para 56.

266 ibid, para 39.

With a broad interpretation of the concept of 'breach of duty',[267] the provision allows the court to extend the limitation period when the debtor concealed the facts of the transactions.[268] In these circumstances, the limitation period starts when the victim became aware of the facts.[269]

Moreover, it has been held that the provision of transactions defrauding creditors has extra-territorial effect.[270] Section 423 IA can be applied in civil cases with foreign elements.[271] The application of the Section in cross-border cases relies upon the discretion of the court, which has to take into consideration all the circumstances of the case to establish a sufficient connection with the English legal system. [272]

4.5. Conclusion

The chapter sought to examine the transaction avoidance claims available in the English legal system that have been identified in chapter two. First, the chapter has briefly addressed the procedural framework where these actions can take place. Second, the study analysed the content of the individual claims. In particular, it focused on the claims of transactions at an undervalue (Section 238 IA), preferences (Section 239 IA), avoidance of certain floating charges (Section 245 IA) and transaction defrauding creditors (Section 423 IA).

The research highlighted that within the English insolvency system, there are several possibilities for the general body of creditors to restore the debtor's assets. Moreover, the study points out that all the English avoidance claims analysed, except for transactions defrauding creditors, are controlled exclusively by the insolvency practitioner, who has the discretion to apply to the court for a restoration order.

Moreover, the research has illustrated that these claims do not constitute a perfect system: at times, they overlap with each other, while other times, they

---

267 ibid; see also Limitation Act 1980 Section 32(2).
268 *Giles v Rhind* (n 243) paras 39 ff.
269 ibid, para 56.
270 *Paramount Airways (No 2), Re* [1993] Ch 223, [1992] 3 W.L.R. at 239-240.
271 *Concept Oil Services Ltd v En-Gin Group* (n 180), para 77.
272 *Paramount Airways (No 2), Re* [1993] (n 270); *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14, para 113.

are impractical to apply. In particular, critical issues emerge in Section 239 IA and Section 423 IA concerning the subjective elements placed upon the debtor. Also, Section 245 IA display uncertainties of application due to the ambiguous distinction between fixed and floating charges.

Finally, the last section of the chapter addressed the use of Section 423 IA outside the insolvency procedural and factual framework. In particular, it highlighted the civil historical development and nature of transactions defrauding creditors as an individual credit enforcement tool.

Chapter 5
The German Approach to Transaction Avoidance

5.1. Introduction

The present chapter focuses on the German transaction avoidance regime. Germany provides a complete and coherently organised system of transaction avoidance, both within insolvency law and under the general law. All the provisions related to insolvency transaction avoidance are provided within Part 3, Chapter 3 of the German Insolvency Code.[1] While the regime of the general civil law, transaction avoidance claim is regulated in an *ad hoc* statute called *Anfechtungsgesetz*.[2]

The purpose of the chapter is to analyse how the regime of transaction avoidance works within the German corporate insolvency system and how the corresponding claims are regulated in civil law. The chapter is organised into three main sections. Section 5.2 seeks to provide a brief analysis of the German corporate insolvency system in order to contextualise where the insolvency transaction avoidance actions take place.

Section 5.3 addresses the transaction avoidance claims available within the insolvency framework. In particular, it investigates the actions of congruent and incongruent coverage and transactions directly detrimental to creditors (section 5.3.1), the claim of intentional disadvantage (section 5.3.2) and gratuitous performance (Section 5.3.3). Section 5.3.4 briefly focuses on the claims available against payment of loans replacing capital and repayments of silent partnerships.

Lastly, Section 5.3.5. analyses the Statute on the Pre-Insolvency Avoidance of Transactions by a Debtor (*Das Anfechtungsgesetz* – AnfG) which deals with the avoidance claims available to the creditors outside the insolvency procedural framework. The in-depth analysis of the claims at stake within the

---

1 Insolvency Order of 5 October 1994 (Federal Law Gazette I p. 2866), which was last amended by Article 24 (3) of the Act of 23 June 2017 (Federal Law Gazette I p. 1693) hereinafter InsO.

2 Anfechtungsgesetz of 5 October 1994 (BGBl. I p. 2911), which was last amended by Article 3 of the Act of 29 March 2017 (BGBl. I p. 654).

German legal system is instrumental to the comparison that will be conducted among the selected legal systems in Chapter 7. Furthermore, the analysis should support the evaluation of the difficulties posed to the harmonisation of the insolvency avoidance actions at the EU level and assist in overcoming them in Chapter 8.

5.2. Overview of the German Insolvency System

The German insolvency system is regulated entirely within the Insolvenzordung (InsO) enacted on 1st of January 1994.[3] The German Insolvency code is a modern act that substituted and unified the previous bankruptcy codes available in post-war Germany.[4] In the last 20 years, the code has been amended a few times. In particular, the Act for the Further Facilitation of the Restructuring of Companies (ESUG) which came into force the 1st of March 2012 modified the Insolvency Code to improve business restructuring.[5]

Section 1 InsO explicitly defines the objective of the insolvency proceedings under German law. First, as a general principle, the proceedings seek to satisfy the general body of creditors. This principle encompasses the collection and sale of the debtor's estate and the consequent distribution of the proceeds to the creditors under the principle of equal treatment of the creditors.[6]

Second, as an alternative, the proceedings are a tool for the reorganisation of the debtor's financial situation as they allow the debtor to reach an agreement on a repayment plan with the creditors. Third, the insolvency proceedings allow individuals to achieve the discharge of residual debts and therefore obtain a fresh start.[7] However, this opportunity is granted only to individuals

---

3 InsO (n 1).

4 Klaus Kamlah, 'The New German Insolvency Act: *Insolvenzordnung'* (1996) 70 American Bankruptcy Law Journal 417.

5 The Act for the Further Facilitation of the Restructuring of Companies of 7 December 2011 (Federal Law Gazette I, 66 p. 2582); Christoph Paulus, 'The New German System of Rescuing Banks' (2011) 6(1) Brooklyn Journal of Corporate, Financial & Commercial Law 171.

6 Kamlah (n 4) 423.

7 InsO (n 1) Section 1.

defined as consumers,[8] while it is not available for businesses – whether it be a company or individual enterprise. Therefore, the discharge of residual debts is not considered in this chapter as the research limits its focus to corporate insolvency law.

The German insolvency proceedings start with the application for opening the proceedings made by either the debtor or one or more creditors.[9] This opens a two-stage procedure. First, the application initiates a preliminary procedure where the court verifies the grounds of the insolvency.[10] Following a reform in 2014, German insolvency law adopts both the 'cash flow test' and the 'balance sheet test'.[11]

On the one hand, Section 17 InsO requires the debtor's inability to pay their debts as they fall due as a ground for applying for insolvency (i.e. cash flow test).[12] Moreover, the application for the opening of the proceeding may be made by the debtor on the likelihood that they will be unable to pay their future debts.[13] On the other hand, Section 19 InsO allows filing for insolvency on the grounds of over-indebtedness (*Die Überschuldung*), which is when the debtor's liabilities exceed the assets (i.e. balance sheet test).[14] At this stage, the court examines the matter and takes provisional measures to prevent detrimental alteration of the debtor's financial status.[15]

The second stage of the procedure starts with the opening of the insolvency proceedings by order of the court. Once the proceedings are opened, the court nominates the creditors' committee (*Der Gläubigerausschuss*) and appoints an insolvency administrator (*Der insolvenzverwalter*). With the appointment, the insolvency administrator is given the duty to manage and dispose of the

---

8 Susan Braun, 'German Insolvency Act: Special Provisions of Consumer Insolvency Proceedings and the Discharge of Residual Debts' (2006) 7 German Law Journal 59, 61.
9 InsO (n 1) Sections 13 and 14.
10 ibid Section 13.
11 ibid Sections 17 and 19.
12 ibid Section 17.
13 ibid Section 18.
14 ibid Section 19.
15 ibid Section 21.

assets.[16] At the same time, the creditors' committee assists and supervises the insolvency administrator in managing the estate.[17]

One peculiarity of the German insolvency system is that it provides for a 'single gateway' to insolvency, meaning that one procedure may lead towards either winding-up or rescuing results.[18] This twofold outcome is achievable through various options. On the one hand, the company's winding-up is achieved through the collection and liquidation of the assets either on a piecemeal basis or as a going concern. On the other hand, the rescuing of the company may be achieved through (i) the 'insolvency plan'; (ii) the self-administration or; (iii) the so-called 'protective shield proceedings'.[19]

The insolvency plan (*Das Planverfahren*) is an arrangement that seeks to achieve the composition of debts between the company and its creditors, allowing the business to continue as a going concern.[20] Either the debtor or the insolvency administrator can present the plan to the creditors' meeting for approval.[21] The vote of the creditors is organised in classes, and the procedure allows the cram-down of a class of creditors.[22] After the creditors' vote, the plan must be approved by the court.[23]

The self-administration (*Die Eigenverwaltung*) is a debtor-in-possession procedure where the debtor maintains the control and management of the business under the supervision of an insolvency trustee (*Der Sachwalter*).[24] The debtor has to explicitly opt for this procedure at the time of the insolvency

---

16 ibid Section 80.

17 ibid Section 69.

18 Cristian Bärenz and Ann Bach, 'Germany' in Christopher Mallon (ed) *The Restructuring Review* (10th edn, Law Business Research, 2017) 145, 147; Kamlah (n 4) 424.

19 Tsvetan Petrov, 'Harmonising Restructuring Law in Europe: A Comparative Analysis of the Legislative Impact of the Proposed Restructuring Directive on Insolvency Law in the UK and Germany' (2017) 3 Anglo-German Law Journal 129, 139.

20 InsO (n 1) Section 217.

21 ibid Section 218.

22 ibid Sections 245 246 and 246b.

23 ibid Section 248(1).

24 Petrov (n 19) 141.

petition.[25] In addition, the 2012 ESUG reform introduced the so-called 'protective shield proceedings' (*Das Schutzchirmverfarhren*).[26]

The latter is a type of self-administration procedure that can take place only if the insolvency petition is based on the balance sheet test or imminent factual insolvency.[27] In contrast, the procedure is not available in cases where the insolvency has been filed based on the impossibility to pay the debts as they fall due.[28]

The protective shield proceedings grant the debtor three months to design an insolvency plan, under the supervision of a trustee appointed by the debtor himself.[29] The procedure seeks to allow the debtor to restructure the company's financial situation. After the three months deadline or if in the meantime, the debtor becomes factually insolvent or the restructuring becomes impracticable, the trustee should inform the court that should consider reversing the procedure into liquidation.[30]

All these types of procedures permit the use of transaction avoidance claims provided in the InsO.[31] In contrast, when no formal insolvency proceedings are commenced, the creditors are entitled to bring a claim pursuant to the AnfG**.**[32]

5.3. Insolvency Transaction Avoidance

The enactment of the Insolvency code in 1994 led to the reform of the previous transaction avoidance regime as a strategic element to improve the effectiveness of the insolvency system.[33] The insolvency rules of transaction avoidance are encompassed in Sections 129-147 InsO. In particular, Section

---

25 InsO (n 1) Section 270.

26 Steffen Schneider, 'Is Germany about to Become the Most Attractive Place for Business Restructurings?' (2016) 10 Insolvency & Restructuring International 15.

27 InsO Section 270b.

28 Petrov (n 19) 141.

29 InsO (n 1) Sections 270b and 270c.

30 ibid.

31 Volker Beissenhirtz, 'Clawback of Transactions before Insolvency: Comparison of the German and English Provisions on Voidable Transactions' (2008) 5 International Corporate Rescue 360, 361.

32 AnfG (n 2).

33 Alexander Trunk, 'Avoidance of Transaction under the New German Insolvency Code' (2000) 9 International Insolvency Review 37.

129 InsO lays down the general policies underpinning the avoidance claims in the insolvency context.

First, Section 129 InsO empowers the insolvency administrator to challenge transactions that occurred before the opening of the proceedings and that objectively disadvantage the creditors.[34] An 'objective creditor's disadvantage' is found when the transaction increases the company's debts, diminishes its assets and, impedes or delays the creditors' access to the assets.[35] Second, the provision states that omissions are equivalent to 'active transactions'.[36]

Moreover, Section 129 InsO does not limit the scope of application of the avoidance claims to acts undertaken by the debtor.[37] Indeed, even acts undertaken by third parties that diminish the debtor's assets may be vulnerable.[38] These policy principles are axioms that underline all the insolvency avoidance claims.[39]

Under German law, there are several types of avoidance claims: (i) Congruent coverage (S. 130 InsO); (ii) Incongruent coverage (S. 131 InsO); (iii) Transaction immediately disadvantaging the insolvency creditors (S. 132 InsO); (iv) Intentional disadvantage (S. 133 InsO) and: (v) Gratuitous performance (S. 134 InsO). Also, the insolvency code provides rules of avoidance concerning loans replacing equity capital (s. 135 InsO) and repayment of capital of silent partnership (S. 136 InsO).

The following subsections are dedicated to the analysis of the individual claims. Sections 130-132 InsO will be dealt with together to highlight the differences and similarities between the claims. Likewise, sections 135-136 InsO will be analysed together due to their specific financial nature.

---

34 Federal Court of Justice (Bundesgerichtshof hereinafter BGH) judgment of 17.07.2014 IX ZR 240/13 *Schleswig-Holstein* (lexetius.com/ 2014, 2586) para 8.

35 ibid; BGH judgment of 19.12.2013 IX ZR 127/11 *Düsseldorf Higher Regional Court* (lexetius.com/2013, 5226) para 7; BGH judgment of 25.04.2013 IX ZR 235/12 *LG Stuttgart* (lexetius.com/2013, 1388) para 16.

36 InsO (n 1) Section 129(b).

37 Thomas Bachner *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse* (Cambridge University Press 2009) 57.

38 ibid.

39 Bachner (n 37) 55-56.

5.3.1. Special Avoidance of Insolvency

Under the German approach, Section 130, 131 are grouped within the category of 'special avoidance of insolvency'.[40] The sections provide the claims of congruent and incongruent coverage and transactions directly detrimental to the general body of creditors. These claims are exclusive to insolvency law as there is no parallel within the *Anfechtungsgesetz*.[41] This is because they serve the collective nature of the insolvency proceedings. In particular, they seek to protect the equal treatment of the creditors as they target transactions that advantage some creditors over others and allow them to escape the collective proceedings.[42] As a consequence, these claims are available only against creditors and not against third parties.[43]

Moreover, their regime is formulated with reference to the credit-debit relationship between the debtor and the preferred creditor.[44] According to Section 38 InsO, insolvency creditors are those creditors who have a claim against the debtor at the time of the opening proceedings.[45] This includes subordinate creditors since any debtor's transaction with their creditors diminishes the prospects of satisfaction of the general body of creditors.[46]

However, it is irrelevant whether the preferred creditor takes part in the insolvency proceedings or not.[47] This is because the transaction causes the disadvantage to the general body of creditors at the time it takes place, even if the detrimental effects to the equal treatment of creditors are displayed only within the insolvency proceedings.[48] The claims of Sections 130-131 InsO seek to protect the general body of creditors and their possibility to recover

---

40 ibid, 56.

41 Trunk (n 33) 38.

42 BGH judgment of 15.12.1994 IX ZR 24/94, para 14; Frankfurt am Main Higher Regional Court judgment of 13.04.2015 23 U 128/14 (openJur 2015, 8572) para 42;

43 BGH judgment of 29.11.2007 IX ZR 121/06 *OLG Rostock* (lexetius.com/2007, 3811) para 17.

44 Klaus Reischl, *Insolvencrecht* (4th edn C.F. Müller 2016) 334.

45 InsO (n 1) Section 38.

46 BGH judgment of 20.07.2006 IX ZR 44/05 *OLG Schleswig* (lexetius.com/2006, 1831) para 15.

47 ibid.

48 ibid.

their credits.[49] The provisions allow the challenge of any legal transaction that is detrimental to them.[50]

The prejudice caused by the transaction may be direct or indirect.[51] Direct disadvantage means that the prejudice to the general body of creditors is an immediate result of the transaction.[52] In contrast, the concept of indirect disadvantage takes into consideration circumstances beyond the act itself.[53] Even in cases of indirect disadvantage, there must be a causal link between the vulnerable transaction and the impairment of creditor's satisfaction.[54] It is sufficient, however, that these further circumstances that cause the prejudice to the creditors materialise after the contested transaction took place and before of the last oral hearing of the contestation.[55]

The debit-credit relationship at the basis of these claims also provides for a criterion to distinguish between the two main provisions (i.e. Section 130 and Section 131 InsO).[56] The fundamental distinction between congruent and incongruent coverage provision lays in the characterisation of the so-called 'coverage'.[57] This term refers to an evaluation of the relationship between the original credit and the payment made at the eve of the insolvency.[58] When the payment corresponds to the original credit (e.g. the sum of money and time of payment as previously agreed), then the coverage is considered congruent. When the detrimental transaction does not correspond to what initially promised by the debtor (e.g. undue payment), then the coverage offered by the transaction is incongruent.[59]

---

49 BGH judgment of 10.2.2005 IX ZR 211/02 *OLG Dresden* (lexetius.com/2005, 20, 204) para 20; BGH judgment of 19.03.2009 IX ZR 39/08 *OLG Koblenz* (lexetius.com/2009, 638) para 19.

50 IX ZR 211/02 (n 49).

51 Thomas Bachner (n 37) 67.

52 ibid.

53 BGH judgment of 09.12.1999 IX ZR 102/97 *OLG Munich* (lexetius.com/1999,338) para 26.

54 ibid.

55 ibid, para 27.

56 Reischl (n 44) 335.

57 InsO (n 1) Sections 130-131.

58 Nadja Hoffmann, 'La Acción Pauliana en Derecho Alemán: Impugnación de los Acreedores Según la Ley de Impugnación y la Regulación Referente a la Insolvencia' in Joaquín J. Forner Delaygua (ed) *La protección del Crédito en Europa: La Acción Pauliana* (Bosh 2000) 15, 33.

59 InsO (n 1) Section 131.

5.3.1.2. The Congruent Coverage of Section 130 InsO

Section 130 InsO provides that the insolvency administration may challenge a transaction that grants or facilitate security or the satisfaction of a credit to one of the debtor's creditors.[60] Regardless of the Section title 'congruent coverage', the provision does not mention any distinction in the coverage offered by the detrimental transaction.[61] Therefore, any legal act (*die Rechtshandlung*) that occurs in the suspect period is vulnerable under Section 130 InsO if the criteria of the provision are fulfilled.[62]

Under Section 130 InsO, the possibility to challenge the transaction is subject to two criteria, one objective and one subjective. First, the insolvency administrator may contest a transaction that has occurred in the three months before the application to open the proceedings.[63] Second, it is prescribed that the debtor should have been unable to pay its debt and that the creditor was aware of the debtor's insolvency at the time of the transaction.[64] Moreover, if the transaction occurs after the request of opening the proceedings, the creditor should be aware either of the factual insolvency or the petition for opening the insolvency proceedings.[65]

The subjective criteria are usually problematic in practice, as it is difficult to prove someone's state of mind.[66] The Insolvency Code provides some presumptions that help the courts deciding on the knowledge or awareness of the creditors involved in vulnerable transactions. Moreover, the jurisprudence of the Federal Court of Justice (*Bundesgerichtshof* - BGH) developed a comprehensive interpretation of this presumptions. Section 130(2) provides that:

---

60 The concept of security is broadly interpreted in German law. Under Section 130 InsO, security may be any transaction that facilitates future credit enforcement. See Gerard McCormack and Reinhard Bork, *Security Rights and the European Insolvency Regulation* (Intersenzia 2017) para 395-96.

61 Hoffmann (n 58) 34.

62 Florian Bartels, *Insolvenzanfechtung und Leistungen Dritten* (Mohr Siebeck 2015) 256.

63 InsO (n 1) Section 130(1)(1).

64 ibid.

65 ibid, para 2.

66 BGH judgment of 30.04.2015 IX ZR 149/14 *LG Bremen* (lexetius.com/2015, 1738) paras 11-12; BGH judgment of 16.06.2016 IX ZR 23/15 *OLG Munich* (lexetius.com/2016, 1688) paras 14-16.

> Awareness of the circumstances pointing directly to insolvency or to a request to open insolvency proceedings shall be considered equivalent to awareness of insolvency or of the request to open insolvency proceedings.[67]

The BGH had interpreted the provision, highlighting that the these circumstances have to be as such as to make it absolutely necessary for a creditor to conclude that the debtor was factually insolvent.[68] In other words, the factual insolvency of the debtor must be a necessary conclusion from the appraisal of the circumstances.[69] The standard applied to this test is the common knowledge of the internal circle of professionals and businesses surrounding the company.[70] The test is met if professionals and businesses would conclude from the facts that debtor would not be able to meet their due payments. For instance, a pointer to the insolvency is the declaration of the debtor that they are unable to pay the due debts or a general suspension of payments.[71]

However, the circumstances must be specific and allow the creditor to form a clear understanding of the financial situation of the debtor.[72] It has been established that a creditor cannot infer the factual insolvency of the debtor from the fact that their credit has not been satisfied.[73] Even if the claim is small and it has not been entirely repaid after several reminders, it cannot be held that the creditor was aware of the financial situation of the creditor.[74]

To reach such a conclusion on the debtor's factual insolvency, the creditor must have a complete overview of the debtor's financial situation and payment behaviour.[75] In practice, this test is not easily met by an occasional creditor,

---

67 InsO (n 1) Section 130(2).
68 BGH judgment of 19.02.2009 IX ZR 62/08 *LG Mulhouse* (lexetius.com/2009, 212) para 11.
69 ibid para 13-14.
70 ibid para 11.
71 ibid.
72 IX ZR 149/14 (n 66) para 12.
73 ibid para 13.
74 ibid.
75 BGH judgment of 08.01.2015 IX ZR 203/12 *OLG Celle* (lexetius.com/2015,139) paras 20-23; IX ZR 149/14 (n 66) para 14.

whether it is most appropriately applied to creditors who have a long-term business relationship with the debtor and connections with other creditors.

Moreover, Section 130 InsO gives a presumption of knowledge of the debtor's insolvency for connected parties.[76] Section 138 InsO specifies which parties are deemed to be in close relationship with the debtor. In regards to a business entity, there are deemed to be connected any members of the supervisory board (*Aufsichtsrat)* and of the management board *(Vorstand)* as well as any shareholders with more the ¼ capital share.[77] Furthermore, any person or business that interacts with the debtor through a contract of provision of services (or a comparable connection under company law) and has the opportunity to gain information concerning the debtor's financial situation is a connected party.[78]

In particular, the party is deemed connected if as a professional or commercial service provider, it receives all data relating to the financial situation of the company in distress, for example an outsourced accounting firm.[79] Lastly, the category of connected persons is broadly expanded by the last paragraph of section 138 InsO. Indeed, also spouses, civil partners, ascendants, descendants or persons cohabitating for at least one year with any members of the supervisory board, the management board or any shareholders with more the ¼ capital share are deemed connected persons. [80]

5.3.1.3. Incongruent Coverage

Section 131 InsO deals with payments not yet due or granting of securities by the debtor to one of their creditors at the eve of the insolvency proceedings.[81] As mentioned above, the peculiarity of Section 131 InsO is that it deals only with transactions that do not follow the terms of the original credit. The provision covers the payments and the securities given by the debtor in a different manner from what was originally agreed by the parties.[82] This

---

76 InsO (n 1) Section 130(3).
77 ibid, Section 138(2)(1).
78 ibid, Section 138(2)(2).
79 BGH judgment of 15.11.2012 IX ZR 205/11 *LG Wuppertal* (lexetius.com/2012, 5510) para 12.
80 InsO (n 1) Section 138(2)(3).
81 InsO (n 1) Section 131.
82 ibid.

typically covers the payments of undue debts or the granting of security for a larger amount than the original debt as the transaction diverges from the original obligation.[83]

Additionally, payments obtained by means of execution or by the threat to foreclose or to file an insolvency application are vulnerable under Section 131 InsO, even if the acts are undertaken by a third party.[84] Concerning the payment obtained by means execution, the incongruence stems from the fact that the individual credit enforcement is retroactively restricted by the application to open the insolvency proceedings.[85] In practice, Section 131 InsO suspends the principle of priority even before the opening of the insolvency proceedings, and it extends the principle of equal treatment of creditors to the three months antecedent the application.[86] The same principle applies if the payment is obtained by threating the debtor to foreclose secured assets.[87]

In contrast, concerning payments obtained by threatening to file for insolvency proceedings, the BGH elaborated a separate doctrine of incongruence. In the latter circumstances, the threat to file for insolvency proceedings would not disrupt the scopes of insolvency (e.g. the equal treatment of the creditors), but rather it would enhance them.[88] However, it would constitute a misuse of the application for insolvency proceedings as a mean of individual credit enforcement.[89] In this case, the incongruence stems from this misuse of the insolvency application as the creditor would receive a benefit that he would not receive without coercion.[90]

On the one hand, the payment obtained by individual credit enforcement is deemed incongruent coverage if the enforcement occurs within three months

---

83 Reischl (n 44) 336.

84 BGH judgment of 07.12.2006 IX ZR 157/05 *LG Heilbronn* (lexetius.com/2006, 3368) para 9.

85 ibid.

86 ibid; BGH judgment of 17.02.2004 IX ZR 318/01 OLG Brandenburg (lexetius.com/2004, 406) para 15.

87 BGH judgment of 20.01.2011 IX ZR 8/10 *OLG Dresden* (lexetius.com/2011, 237) para 9-11; BGH judgment of 18.12.2003 IX ZR 199/02 (lexetius.com/2003, 3310) para 14.

88 IX ZR 199/02 (n 87) para 16.

89 ibid, para 17.

90 ibid

before the petition.[91] On the other hand, a payment received by a creditor because of the threat to file a petition to open insolvency proceedings is always incongruent.[92] This is because 'the application for insolvency is never an appropriate mean to enforce claims outside of insolvency proceedings.'[93]

In addressing the incongruent coverage, the criteria of the action are stricter than those provide in Section 130 InsO. The claim of incongruent coverage is available if the detrimental transaction is undertaken in the month before the filing of the application to open the insolvency proceedings.[94] Within this timeframe, there are no additional subjective criteria for the action.[95] This is due to the proximity of the transaction to the filing for the proceedings.[96]

In addition, the Section provides for an extended suspect period of three months before the filing for insolvency proceedings.[97] However, if the transaction occurs within the second or third month prior to the insolvency, the provision requires the fulfilment of additional criteria.[98] It is required that the debtor was unable to pay their debts at the time of the transaction and that the creditor was aware of the disadvantage caused by the transaction to the other insolvency creditors.[99]

The provision specifies that the creditor must be aware of the disadvantage caused by the transaction to the general body of creditors.[100] This subjective criterion is different from the one established in Section 130 InsO. Under the Section 130 InsO, the creditor should be aware of the financial situation of the debtor. In Section 131 InsO, the creditor must be aware of the effects of the transaction to the general body of creditors.

The subjective criterion under section 131 InsO comprises two elements: (i) the awareness and (ii) the disadvantage. The concept of awareness is the

---

91 ibid.
92 ibid.
93 ibid.
94 InsO (n 1) Section 131(1).
95 ibid.
96 Hoffmann (n 58) 35.
97 InsO (n 1) Section 131(1)(2).
98 ibid.
99 ibid.
100 ibid.

same outlined for Section 130 InsO. It is the knowledge of the creditor that the transaction is detrimental to the creditor interests or the knowledge of the circumstances that point directly to the disadvantage.[101] Moreover, the same presumptions for connected persons apply according to Section 138 InsO.[102]

On the other hand, the concept of disadvantage in section 131 InsO recalls the general policy under Section 129 InsO. Indeed, the BGH emphasise that the disadvantage occurs when the satisfaction of the insolvency creditors is shortened, thwarted, aggravated, endangered or delayed.[103] In particular, it has to be clear beyond reasonable doubt that as a consequence of the transaction, the debtor will be unable to pay his debts and that it is foreseeable that his assets will not cover its liabilities.[104] Consequently, the creditor must be aware that the debtor's financial situation at the time of the transaction will leave some creditors empty-handed.[105]

According to the jurisprudence of the BGH, the incongruence of the coverage provides a strong presumption of the debtor's intention to prejudice the general body of creditors and the creditor's knowledge of this intention.[106] However, such presumption is not enough to fulfil the subjective criteria under Section 131 InsO. The knowledge of the disadvantage created by the transaction cannot be inferred from the incongruence alone. Indeed, the insolvency administrators need to prove that the creditor knew beyond reasonable doubt that the transaction would have prejudiced other creditors.[107]

From an English perspective, the need to prove the creditor's knowledge beyond reasonable doubt may seem a strict requirement, more adapt to criminal cases than civil ones. However, the wording of the BGH clearly refers to such standard of proof. Presumably, this high standard of proof has been

---

101 InsO (n 1) Section 131(2).

102 Manfred Obermüller and Harald Hesse, *InsO: Eine Systematische Darstellung des neuen Insolvenzrechts* (C.F. Müller 2003) 91.

103 BGH judgment of 09.10.2008 IX ZR 59/07 *OLG Rostock* (lexetius.com/2008, 2869) para 30.

104 IX ZR 199/02 (n 87) para 27.

105 ibid; BGH judgment of 21.01.1999 IX ZR 329/97 *OLG Brandenburg* (lexetius.com/ 1999, 680) para 22.

106 IX ZR 199/02 (n 87) para 30.

107 ibid, para 33.

adopted for the protection of *bona fides* parties in circumstances where the financial situation of the debtor is not clear cut.

5.3.2. Transactions Immediately Disadvantaging the Insolvency Creditors

The concept of creditor's disadvantage provided by Section 129 InsO and contemplated as requisite under Section 131 InsO, is also a fundamental element of Section 132 InsO. The latter provision is a residual clause to the provisions on congruent and incongruent coverage.[108] Section 132 InsO addresses any legal transaction undertaken by the debtor that constitute a direct disadvantage to the general body of creditors.[109]

As Sections 130 and 131 InsO, the claim is considered exclusive to the insolvency proceeding.[110] However, while Section 130 and 131 InsO deal with legal acts (*die Rechtshandlung*), Section 132 InsO is applicable to legal transactions (*das Rechtsgeschäft).*[111] *Rechtshandlung* is a general term that comprises any legal act that produces legal consequences.[112] In contrast, *Rechtsgeschäft* has the narrow definition of a legal transaction containing two reciprocal declarations of intention.[113] Therefore, Section 132 InsO has a narrower scope of application than the provisions on coverage.

However, Section 132(2) InsO extends the scope of application also to those legal acts (*die Rechtshandlung*) of the debtor by which the debtor loses or renounce a right or the ability to enforce the right.[114] It also extends its scope of application to those legal acts that establish a pecuniary claim against the debtor or render a pecuniary claim enforceable.[115]

---

108 Hoffmann (n 58) 36.

109 ibid, 37.

110 InsO (n 1) Section 132.

111 Bachner (n 37) 61.

112 Heidelberger Akademie der Wissenschaften, *Deutsches Rechtswörterbuch (DRW): Wörterbuch der älteren deutschen (westgermanischen) Rechtssprache* <www.deutsches-rechtswoerterbuch.de> accessed 21.07.2020.

113 In other words, the *Rechtsgeschäft* is the legal transaction that creates an obligation by means of contract (*Vertag*). See Basil Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 25.

114 InsO (n 1) Section 132(2).

115 ibid.

Section 132 InsO covers any legal transaction directly detrimental to the general body of creditors.[116] Therefore, the provision does not only deal with subsequent legal acts to previous agreements, but it may also cover new transactions concluded by the debtor with one or more creditors or third party.[117] Indeed, while Section 130 and 131 InsO are limited to transactions concluded with creditors, Section 132 extends its scope of application to transactions concluded with parties who are not insolvency creditors.[118] For the same reason, the section does not provide a distinction between congruent or incongruent coverage, since it encompasses cases where there is no coverage at all.[119]

The provision requires that the legal transaction is directly detrimental to the general body of creditors.[120] The disadvantage is direct if it is an immediate result of the legal transaction.[121] An example of a direct disadvantage is transactions at an undervalue. In these cases, the transactions diminish the assets available for liquidation and therefore put the creditors in a worse position than they were before the transaction.[122]

While the scope of application differs from Sections 130 and 131 InsO, the criteria of the action are the same as in Section 130 InsO. The transaction is vulnerable if it occurs three months before the request to open insolvency proceedings and the counterparty was aware of the debtor's incapacity to pay their due debts.[123] If the transaction occurs after the filing for the insolvency proceedings, the counterparty must be aware of the request.[124] Moreover, the same presumptions of Section 130 InsO concerning the creditor's knowledge of the debtor's financial situation apply.[125]

---

116 Obermüller and Hesse (n 102) 96.
117 OLG Hamm judgment of 21.08.2008 27 U 174/06 para 32 confirmed by BGH, Decision of 10.2.2011 IX ZR 177/08 *OLG Hamm* (lexetius.com/2011, 490).
118 Reischl (n 44) 346.
119 IX ZR 177/08 (n 117).
120 InsO (n 1) Section 132(1).
121 27 U 174/06 (n 117) para 42; Bachner (n 37) 67.
122 Bachner (n 37) 67.
123 InsO (n 1) Section 132(1)(1).
124 ibid, Section 132(1)(2).
125 ibid, Section 132(3).

5.3.3. Intentional Disadvantage

Section 133 InsO deals with legal acts (*Rechtshandlung*) undertaken by the debtor with the intention to prejudice their creditors.[126] These transactions are vulnerable under section 133 InsO if the counterparty of the transaction was aware of the debtor's prejudicial intention.[127]

The scope of application of the action is very broad. It covers almost every conscious act or omission of the debtor that cause an economic prejudice to the general body of creditors.[128] However, Section 133 InsO covers exclusively legal acts of the debtor – whether acts or omissions – undertaken with the intention to cause prejudice to the general body of creditors.[129] In contrast, Sections 130-132 InsO may also cover legal acts of a third party (for example a foreclosure undertaken by one of the creditors).[130]

Moreover, the suspect period provided by the section is extremely long (10 years – reduced to 4 in particular cases). Consequently, the subjective criteria play a crucial role in limiting the application of the action. These criteria are: (i) the prejudicial intention of the debtor; and (ii) the knowledge of the counterparty.[131]

The concept of intention (*Vorsatz or dolus*) is not specific to Section 133 InsO. It is encompassed under the general law, both in civil and criminal law.[132] It is a term almost impossible to translate into a single English word, as it means *the knowledge and will of the realisation of the facts that are consequences of the legal act*.[133] According to this definition, the intent encompasses two

---

126 ibid, Section 133.

127 ibid.

128 Christiane Kuehn, 'German Law to Contest Debtors' Transactions in Insolvency Proceedings under Critical Review' (2015) 1(1) Insolvency and Restructuring International 16, 17.

129 BGH judgment of 10.02.2005 IX ZR 211/02 *OLG Dresden* (lexetius.com/2005, 20, 204) para 17.

130 Ibid; see also Reischl (n 44) 348.

131 InsO (n 1) Section 133(1).

132 Bürgerliches Gesetzbuch (hereinafter BGB; i.e. Civil Code) in the version of the notice of 02.01.2002 (BGBl. I p. 42, p. 2909, 2003 p. 738) last amended by law of 31.01.2019 (BGBl. I p. 54) Section 276; Strafgesetzbuch (StGB; i.e. Criminal Code) in the version of the announcement of 13.11.1998 (BGBl. I p. 3322) last amended by law of 19.06.2019 (BGBl. I p. 844) Section 15.

133 Peter Schlechtriem and Martin Schmidt-Kessel, *Schuldrecht: Allgemeiner Teil* (Mohr Siebeck 2005) para 569.

elements: the knowledge and the will of the debtor. In the composition of the intention, the balance between these two elements is not always straightforward.

In particular, according to the established jurisprudence of the BGH, the so-called 'conditional intent' (*bendingter Vorsatz* or *dolus eventualis)* falls within the definition of intention.[134] The conditional intent refers to the situation where the debtor is only aware of the potential prejudice that the legal act may cause to the creditors. Such knowledge is not accompanied by the will to cause the prejudice, but rather the acceptance of any detrimental effects that may follow from the act.[135] Therefore, under the conditional intent doctrine, it is sufficient to prove that the debtor knew of potential detrimental effects of their conduct and nevertheless proceeded in undertaking the legal act, in order to establish the detrimental intent of Section 133 InsO.[136]

Moreover, the BGH's approach to the concept of intention is even more objective when dealing with an intentional disadvantage claim concerning payments.[137] It has been held that when a debtor had made payments when they were unable to pay their due debts, then the conditional intent can be presumed.[138]

Once the debtor proceeded with a payment notwithstanding their impending factual insolvency, then it is presumed that the debtor knew of the detrimental effects of the transaction and accepted its consequences.[139] This presumption can be rebutted only if the debtor can prove that they did not intend to cause any prejudice at the time of the transaction.[140] For instance, they can prove

---

134 Bachner (n 37) 69.

135 BGH judgment of 10.07.2014 IX ZR 280/13 *LG Ingolstadt* (lexetius.com/2014, 3197) para 18; BGH judgment of 22.06.2017 IX ZR 111/14 *OLG Dresden* (lexetius.com/2017, 1715) para 15.

136 IX ZR 111/14 (n 135) para 15; BGH, Judgment of 8.12.2005 - IX ZR 182/01; OLG Stuttgart (lexetius.com/2005, 3178) para 30.

137 Bachner (n 37) 70.

138 BGH judgment of 08.12.2005 IX ZR 182/01 *OLG Stuttgart* (lexetius.com/2005, 3178) para 37; also Reischl (n 44) 348.

139 Bachner (n 37) 71.

140 BGH judgment of 24. 5. 2005 - IX ZR 123/04; OLG Hamm (lexetius.com/2005, 1508) para 17; BGH, Judgment of 8.12.2005 - IX ZR 182/01; OLG Stuttgart (lexetius.com/2005, 3178) para 31; BGH judgment of 24.05.2007 IX ZR 97/06 *OLG Munich* (lexetius.com/ 2007, 1696) para 8.

that they were expecting to receive payments or lines of credits that would have allowed them to overcome the liquidity issue in a short period of time. [141]

Traditionally, Section 133 InsO does not distinguish between congruent and incongruent coverage.[142] The BGH jurisprudence, however, held that an incongruent coverage might provide a stronger presumption of the debtor's awareness of their impending insolvency and therefore of their conditional intent.[143] Moreover, it is irrelevant whether the intention of the debtor is directed against all or only individual creditors, against specific, indefinite or future creditors.[144] Even a legal act undertaken at a time when the debtor did not have any creditor may fall under Section 133 InsO as it is sufficient that the act may cause prejudice to future creditors.[145]

The second subjective criterion is the counterparty's knowledge. Section 133 InsO requires that the counterparty knew the intention of the debtor to discriminate against their creditors at the time of the vulnerable transaction.[146] The counterparty's awareness of the debtor's intention is presumed when the counterparty was aware of the debtor's impending insolvency and the potential detrimental effects of the transaction.[147]

The provision does not specify additional presumptions concerning the counterparty's knowledge. However, the BGH has adopted presumptions similar to those of Section 130(2) and 132(2) to the subjective criteria of Section 133 InsO.[148] Under Section 130(2), the awareness of the circumstances pointing directly to insolvency is deemed equivalent to the knowledge of insolvency.[149] Likewise, under Section 131(2), awareness of the

---

141 ibid.

142 Wolfram Henckel, *Anfechtung im Insolvenzrecht* (Walter de Gruyter 2009) 308.

143 BGH judgment of 30.09.1993 IX ZR 227/92, para 23; IX ZR 182/01 (n 140) para 31.

144 BGH judgment of 13.08.2009 IX ZR 159/06 *OLG Munich* (lexetius.com/2009, 2674) para 8.

145 ibid; InsO (n 1) Section 133 (1); Reischl (n 44) 350.

146 InsO (n 1) Section 133(1).

147 Kuehn (n 128) 17.

148 BGH judgment of 24.05.2007 IX ZR 97/06 OLG Munich (lexetius.com/2007, 1696) para 29; BAG judgment of 29.01.2014 6 AZR 345/12 (lexetius.com/2014, 646) para 61; BGH judgment of 20.11.2008 IX ZR 188/07 *Schleswig-Holstein* (lexetius.com/2008, 3632) para 16.

149 InsO (n 1) Section 130(2).

circumstances pointing directly to the disadvantage are deemed equivalent to the knowledge of the detrimental effect.[150]

Therefore, the counterparty's knowledge is satisfied when they knew that the debtor was insolvent at the time of the transaction and that consequently, the transaction would have prejudiced the creditors.[151] Furthermore, the knowledge of the debtor's insolvency can be inferred from the knowledge of the circumstances that indicate present or impending factual insolvency.[152]

The possibility of applying such presumptions derives from general procedural rules rather than presumptions provided in insolvency law.[153] According to Section 286 of the German Civil Procedural Code,[154] the issue of proof concerning the intention must take into consideration the circumstances of the facts under the judge's scrutiny.[155] Moreover, Section 133(3) InsO introduces a presumption of the counterparty's knowledge of the financial situation of the debtor if the counterparty is connected to the debtor according to Section 138 InsO at the time the transaction takes place.[156]

The jurisprudence of the BGH results in an objective approach that expands the scope of the subjective criteria. It has to be noted that the presumptions created by the BGH do not have the same legal value as the presumption provided by the Insolvency Code.[157] The provisions of the code have binding legal value, while the judgments of the BGH have only a guidance value to the lower courts.[158] However, the jurisprudence on the subjective criteria is quite uniform and well established; therefore, there is little room to manoeuvre outside the BGH guidance.

This jurisprudential expansion of the subjective criteria causes two issues: one merely doctrinal and one practical. From a doctrinal point of view, the BGH

---

150 ibid, Section 131(2).

151 ibid, Section 133(1); IX ZR 97/06 (n 148) para 29; 6 AZR 345/12 (n 148) para 61; IX ZR 188/07 (n 148) para 16.

152 IX ZR 97/06 (n 148) para 29; IX ZR 188/07 (n 148) para 61.

153 IX ZR 97/06 (n 148) para 31.

154 Code of Civil Procedure (Zivilprozessordnung –ZPO) as promulgated on 5 December 2005, last amended by the law of 18.07.2017 (BGBl. I p. 2745) Section 286.

155 6 AZR 345/12 (n 148) para 61.

156 InsO (n 1) Section 133(3).

157 Bachner (n 37) 71.

158 ibid.

approach undermines the distinction between Sections 130-132 and Section 133 InsO. The distinction amongst these provisions is pivotal.[159] On the one hand, the provisions on coverage protect the principle of equal treatment of the creditors, extending some of the rules of insolvency law to the period immediately antecedent to the opening of the insolvency proceedings.

On the other hand, Section 133 InsO seeks to challenge transactions that are intentionally detrimental, sanctioning fraudulent or deceiving behaviours of the debtor.[160] This distinction between the function of the claims is also reflected in their suspect periods. For Section 130 InsO, the suspect period is three months, while for intentional disadvantage, it is ten years.

From a more practical point of view, the expansion of the subjective criteria means that most of the transactions undertaken by the debtor when factually insolvent are vulnerable under Section 133 InsO. Indeed, according to the jurisprudence, it is sufficient that both the debtor and the creditor were aware if the debtor's impending insolvency.

For a big part, this overlaps with the application of the provisions on coverage (Sections 130-132 InsO), with the additional issue that the suspect period under section 133 InsO goes so far as ten years prior to the opening of the insolvency proceedings. The availability of an action that looks back into a remote past without any additional concrete criteria undermines the certainty of the legal transactions.

Given these emerging issues, the Parliament has recently addressed the provision at stake. On the 29th of March 2017, the Parliament enacted a reform of Section 133 InsO applicable from April 2017.[161] The reform shortened the suspect period from ten to four years for legal acts of the debtor by which he grants satisfaction or security to another party.[162]

Additionally, the reform provides a negative presumption in cases of detrimental transactions with congruent coverage.[163] In these situations, when

---

159 ibid.

160 Bachner (n 37) 70.

161 Law to improve legal certainty in case of challenges according to the Insolvency Code and according to the Anfechtungsgesetz (BGBl. I 2017 S. 654).

162 InsO (n 1) Section 133(2).

163 ibid, Section 133(3).

the debtor pays somebody a due sum or grants security that was already promised, it is presumed that the counterparty did not know of the debtor's insolvency at the time of the transaction.[164]

The reform leads to a reversal of the burden of proof. Before the reform, and now only for transactions with incongruent coverage, the insolvency administrator can infer the counterparty's knowledge of the debtor's intention from their current or impending insolvency. The counterparty is presumed to know about impending insolvency from the circumstances pointing at the insolvency.[165]

After the reform, the counterparty is presumed unaware unless the insolvency administrator proves that they knew of the debtor's inability to pay their debts at the time of the transaction.[166] In this way, the reform introduced some distinction between congruent and incongruent coverage within the scope of Section 133 InsO.

5.3.4. Gratuitous Performance

Moving from the complexity of Section 133, Section 134 InsO on gratuitous performance is a more straight-forward provision. The section seeks to protect creditors from the consequences of acts of a gratuitous nature undertaken by the debtor within a certain time before the insolvency.[167] The policy underpinning the provision is that due to the gratuitous nature of the transaction, the interests of the beneficiary should give way to the interests of the general body of creditors.[168] Section 134 InsO allows the insolvency administrator to challenge a gratuitous performance of the debtor occurred in the four years prior to the filing of the insolvency application.[169] Section 134(2)

---

164 ibid.
165 ibid, para 1; BGH judgment of 10.1.2013 IX ZR 13/12 *LG Munich I* (lexetius.com/2013, 24) para 31 ff.
166 InsO (n 1) Section 133(3).
167 ibid, Section 134(1).
168 Bachner (n 37) 79.
169 Inso (n 1) Section 134(1).

specifies that casual gifts of minor value are excluded from the application of the provision.[170]

In Section 134 InsO, it is important to delimit and define the concepts of 'performance' (i.e. *Leistung*) and 'gratuitous' (i.e. *unentgeltliche*) according to the German doctrine. On the one hand, the concept of *Leistung* can be translated as a benefit, performance, or a service.[171] Under the previous insolvency legislation, the provision dealt only with the disposition of assets, while the adoption of the concept of performance widened the scope of application of the provision.[172]

Moreover, according to German jurisprudence, it has been held that the concept of *Leistung* within the meaning of Section 134 InsO has to be understood broadly.[173] It encompasses every legal act (i.e. *Rechtshandlung*) intentionally carried out by the debtor that triggers legal effects that are detrimental to the creditors.[174] Section 134 InsO does not require any additional formal elements.[175] However, as in Section 133 InsO, only the acts of the debtor are vulnerable to a challenge under Section 134 InsO.[176]

On the other hand, the gratuitous nature of the act results when a performance is given free of charge.[177] A service is deemed gratuitous when the debtor performs a service in favour of another person, without being entitled to receive any consideration.[178] The provision does not require that the parties have agreed on the gratuitous nature of the act.[179] Indeed, Section

---

170 ibid, Section 134(2). Casual gifts are deemed of minor value if they do not exceed the value of 200 € for the particular occasion and 500 € in the calendar year. See BGH judgment of 04.02.2016 IX ZR 77/15 *LG Berlin* (lexetius.com/2016, 372) para 38.

171 Online dictionary < https://dict.leo.org/german-english/Leistung> accessed 21.07.2020.

172 Reinhard Bork, 'Transaction at an Undervalue: A comparison of English and German Law' (2014) 14 Journal of Corporate Law Studies 453, 456.

173 Frankfurt Higher Regional Court judgment of 18.11.2010 16 U 183/09 (openJur 2012, 33836) para 30.

174 ibid; BGH, Judgment of 09.07.2009 IX ZR 86/08 *LG Regensburg* (lexetius.com/2009, 2024) para 27.

175 Julia Held, *Die Anfechtung Unentgeltlicher Leistungen gem. § 134 InsO* (Mohr Siebeck 2017) 17.

176 Bork (n 172) 461; Hoffmann (n 58) 33.

177 InsO (n 1) Section 134(1).

178 BGH judgment of 05.03.2015 IX ZR 133/14 *Düsseldorf Higher Regional Court* (lexetius.com/2015, 477) para 56; BGH judgment of 20.04.2017 IX ZR 189/16 *LG Heilbronn* (lexetius.com/2017, 1544) para 7.

179 Bork (n 172) 461; Held (n 175) 19.

134 InsO may also cover acts that are formally onerous but gratuitous in practice.[180]

In particular, it has been held that even in cases where the counterparty has provided a counter value for the debtor's performance, the main and real purpose of the transaction must be examined.[181] The assessment of whether the beneficiary's counter value provides consideration for the debtor performance is objective.[182] The value of the consideration given by the counterparty must compensate or balance the value of the performance of the debtor.[183]

5.3.5. Loans Replacing Equity Capital and Repayment of Silent Partnership

In addition to the claims analysed so far, the Insolvency Code provides rules of avoidance dealing with particular financial circumstances such as shareholders loans (Section 135 InsO) and repayment of capital of silent partnership (Section 136 InsO). These provisions regulate the special relationship between the company and its partners or shareholders in the vulnerable period before the filing of the insolvency petition. The scope of the provisions is to ensure the equal treatment of the creditors against the debtor's behaviour with parties that enjoy a high degree of proximity to the insolvent company.[184]

Section 135 InsO addresses transactions between a company and its shareholders where a shareholder has a claim for the restitution of a loan given to the company to increase the equity capital.[185] According to Section 39 InsO, loans given by the partners to the company are ranked below other claims of insolvency creditors.[186] Section 135 InsO prevents the disruption of

---

180 BGH judgment of 03.03.2005 IX ZR 441/00 *OLG Dresden* (lexetius.com/2005, 525) para 17; IX ZR 133/14 (n 178).

181 IX ZR 441/00 (n 180); IX ZR 133/14 (n 178).

182 Bork (n172) 462; Held (n 175)19.

183 BGH judgment of 05.06.2008 IX ZR 17/07 *LG Würzburg* (lexetius.com/2008, 1515) para 15; BGH judgment of 26.04.2012 IX ZR 146/11 *OLG Brandenburg* (lexetius.com/2012, 2097) para 40; BGH judgment of 20.04.2017 IX ZR 252/16 (lexetius.com/2017, 1428) para 11.

184 BGH judgment of 21.02.2013 IX ZR 32/12 *OLG Stuttgart* (lexetius.com/2013, 493) para 21.

185 InsO (n 1) Section 135.

186 ibid, Section 39.

the ranking systems through transactions between the company and its shareholders.[187]

The provision targets transactions in which the company provides security or satisfaction to the lender. When the company provides security for a shareholder's loan, such transaction is vulnerable under section 135 InsO for ten years prior to the request to open the insolvency proceedings.[188] Instead, when the transaction constitutes repayment of a loan, the suspect period is that of one year prior to the request to open the proceedings. Likewise, the provision allows for challenging transactions by which the debtor repays a third party loan guaranteed by a shareholder in the year prior to the opening of the proceedings.[189]

Additionally, Section 136 InsO allows the contestation of transactions that constitute restitution or liquidation of a silent partnership.[190] Similarly, a transaction that waives the silent partner from losses of the shares is vulnerable to challenge.[191] The suspected period of the action is the year prior to the request to open the insolvency proceedings.[192]

5.4. Transaction Avoidance under the General Law: The *Anfechtungsgesetz*

The German legal system has the peculiarity to provide a series of detailed transaction avoidance claims of private law within an *ad hoc* legislative act. Historically, the German system has dealt with the claims of private law transaction avoidance in a separate legal act since 1879.[193] More recently, the claims are grouped within the *Anfechtungsgesetz* (AnfG) of 1994, which is a legislative act that regulates the conditions for challenging the legal acts of a

---

187 BGH judgment of 27.06.2019 IX ZR 167/18 (openJur 2019, 30030) para 37.
188 InsO (n 1) Section 135(1)(1).
189 ibid, Section 135(2).
190 ibid, Section 136.
191 ibid.
192 ibid.
193 Anfechtungsgesetz of 20 May 1879 (RGBI 277).

debtor that are prejudicial to their creditors.[194] The statute is a self-confined regulation that covers the procedural and substantial aspects of the claims.[195]

The claims available in the AnfG are similar to some insolvency avoidance actions (e.g. Intentional Disadvantage, Gratuitous Performance and Shareholder Loans).[196] The main difference between the insolvency claims and the AnfG claims lays on the effects of the actions.[197] On the one hand, the insolvency claims protect the collective interests, and their effects are displayed towards the general body of creditors.[198] On the other hand, the AnfG claims are available to individual creditors outside the insolvency framework, and they display their effects only towards the creditor that brought the claim to court.[199]

Section 1 AnfG establishes the policy principle underpinning the AnfG claims, stating that any legal act of the debtor that is prejudicial to their creditors may be challenged outside the insolvency proceedings.[200] As within the insolvency context, also within the AnfG, omissions are deemed equivalent to positive actions.[201] The action is available to creditors with enforceable debts, which are certain and undisputed.[202] The availability of the action, however, is limited to those creditors which claims have not been or are likely not to be satisfied through regular credit enforcement procedures, due to the debtor's financial situation.[203]

The provisions target a broad range of transactions (i.e. *Rechtshandlung*).[204] Indeed, 'any legal act of will that produces legal consequences' falls under the scope of application of the AnfG.[205] The scope of application of the statute is limited only by the condition that the debtor's act should be disadvantageous

---

194 AnfG (n 2).
195 Hoffmann (n 58) 27.
196 Reischl (n 44) 581.
197 ibid.
198 ibid, 20.
199 ibid.
200 AnfG (n 2) Section 1.
201 ibid, Section 1(2).
202 ibid, Section 2.
203 ibid.
204 AnfG (n 2) Section 1.
205 Bachner (n 32) 57.

for the creditors.[206] The concept of disadvantage has a similar meaning to the one examined in the insolvency context. In particular, the creditor's disadvantage or prejudice is the limitation of the creditor's ability to enforce their credit against the debtor's assets and therefore obtaining satisfaction.[207]

Moreover, the claims under the AnfG require a causal link between the debtor's act and the creditor's disadvantage.[208] This link is assessed by comparing the debtor's financial situation before and after the transaction.[209] If the act worsens the debtor's financial situation as it impedes or delays the creditor's access to the assets, then a causal link between the act and the disadvantage can be established.[210]

Section 1 AnfG provides the general framework of transaction avoidance claims in civil law. The Act groups several rules that allow challenging legal acts that are detrimental to the creditors. For instance, the act addresses separately intentional disadvantage (Section 3 AnfG); gratuitous acts (Section 4 AnfG); legal acts of the heir (Section 5 AnfG); shareholder loans (Section 6 AnfG) and special rules for secured loans (Section 6a AnfG). The present section focuses exclusively on intentional disadvantage and gratuitous acts.

Section 3 AnfG deals with intentional disadvantage, which may be seen as the civil counterpart of Section 133 InsO.[211] According to the general principle set out in Section 1 AnfG, the provision challenges any legal act of the debtor that causes prejudice to their creditors. The scope of application of the claim, however, is limited by two subjective criteria.[212] Section 3 AnfG requires: (i) the debtor's intention to disadvantage their creditors; and (ii) the counterparty's knowledge of the debtor's prejudicial intention.[213]

---

206 AnfG (n 2) Section 1.
207 BGH judgment of 17.12.1998 IX ZR 196/97 *OLG Zweibrücken* (lexetius.com/ 1998, 18) para 16.
208 Hoffmann (n 58) 25.
209 ibid.
210 ibid.
211 Bachner (n 37) 69.
212 AnfG (n 2) Section 3(1).
213 ibid.

The issues arising in regards to the subjective criteria under Section 3 AnfG are similar to those arising in Section 133 InsO.[214] On the one hand, it is sufficient that the debtor had a conditional intent to prejudice the creditors.[215] As in Section 133 InsO, this means that the debtor's subjective criterion is fulfilled if the debtor is aware that their action may cause some prejudice to the creditors and nevertheless undertakes the legal act.[216] The debtor's intention has to be proven by the claimant, but according to German procedural law rules,[217] it can be deduced indirectly from objective facts such as the discrepancy of the transaction in relation to the debtor's financial situation.[218]

On the other hand, the counterparty's knowledge of the debtor's prejudicial intention is supported by a presumption in Section 3 AnfG. The counterparty's knowledge is presumed when the creditor was aware of the debtor's impending insolvency and the possible detrimental effects of the act.[219] Moreover, Section 3(4) AnfG introduces a negative presumption for transactions that offer congruent coverage. If a legal act grants security or a payment that was due and of the same kind that was expected by the creditor, then it is presumed that the creditor did not know of the debtor's insolvency.[220]

The suspect period of the action is ten years.[221] The period starts running from the moment the legal act takes place.[222] Moreover, Section 8 AnfG specifies that a legal act is considered to take place when it displays its legal effects.[223]

The 2017 reform that modified the suspect period of Section 133 InsO also affected the suspect period in Section 3 AnfG.[224] Indeed, if the vulnerable act grants security or satisfaction of a debt, the suspect period is reduced to four

---

214 BFH judgment of 25.04.2017 VII R 31/15 (lexetius.com/2017, 2208) para 17.
215 OLG Brandenburg judgment of 13.09.2001 8 U 108/00, para 48.
216 BGH judgment of 10.07.2014 IX ZR 50/12 *OLG Celle* (lexetius.com/2014, 2595) para 10.
217 ZPO (n 154) Section 286.
218 IX ZR 50/12 (n 216) para 11; IX ZR 159/06 (n 144) para 11.
219 AnfG (n 2) Section 3(1).
220 ibid Section 3(4).
221 ibid Section 3(1).
222 ibid.
223 ibid Section 8(1).
224 Law to improve legal certainty in case of challenges (n 161).

years.[225] The suspect period is further reduced for contracts with reciprocal obligations concluded by the debtor with connected parties that directly prejudice the creditors.[226] These types of contracts can be challenged only for two years after they have been concluded, and only if the counterparty was not aware of the debtor's detrimental intentions.[227]

As Section 3 AnfG can be seen as the civil counterpart of Section 133 InsO, Section 4 AnfG corresponds to Section 134 InsO on Gratuitous performances. Section 4AnfG targets the debtor's gifts and transactions without a consideration given by the counterparty.[228] This type of transactions can be challenged for four years after the transaction took place.[229] However, if the act is a gift of little value, it cannot be challenged.[230]

The AnfG also regulates the legal consequences of civil avoidance actions. When the vulnerable transaction encompasses a transfer of goods, Section 11 AnfG dictates that the goods must be transferred to the prejudiced creditor to the extent is necessary to satisfy their credit.[231] Moreover, according to Section 11 AnfG, the doctrine of unjust enrichment applies.[232]

Under German law, unjust enrichment is regulated in Sections 812-822 of the Civil Code.[233] The claims provide that anyone who receives something from someone else without legal grounds is obliged to make restitution.[234] This is applicable also in the case where the legal grounds of the transaction cease to exist after the transaction took place.[235] The claim imposes the restitution

---

225 AnfG (n 2) Section 3(2).
226 The AnfG does not list the persons that are deemed to be connected. In contrast, it refers to Section 138 InsO.
227 AnfG (n 2) Section 3(4).
228 AnfG Section 4; BGH judgment of 8/12/2011 IX ZR 33/11 (lexetius.com/2011, 6690) para 11.
229 AnfG (n 2) Section 4(1).
230 ibid Section 4(2).
231 ibid Section 11.
232 ibid.
233 Bürgerliches Gesetzbuch (BGB) Sections 812-822.
234 ibid Section 812.
235 ibid.

in kind unless this is not possible.[236] In the latter case, the beneficiary of the unjust enrichment should reimburse the value of the good.[237]

Lastly, the AnfG provides for transitional rules for when insolvency proceedings are opened against the debtor.[238] The proceedings concerning the civil avoidance claim are interrupted by the opening of the insolvency proceedings.[239] The insolvency administrator can resume the claim according to the insolvency rules.[240] In the latter circumstances, if the insolvency administrator decides to pursue the claim in the insolvency framework, the effects of the claim would be displayed in favour of the general body of creditors.

Conversely, if the civil avoidance claim has already been judged in favour of the creditor, the insolvency administrator may challenge the payment obtained through the AnfG, according to Section 130 InsO.[241] This is because – for Sections 130-131 InsO, the opening of the insolvency proceedings enforces the principle of equal treatment of creditors also in the period antecedent the opening of the insolvency proceedings.[242]

5.5. Conclusion

The chapter examined the transaction avoidance claims available within the German corporate insolvency context and those available under general law that are regulated by Statute on the Pre-Insolvency Avoidance of Transactions by a Debtor (*Das Anfechtungsgesetz* – AnfG). First, the chapter highlighted the procedural insolvency framework in which these claims take place. Second, it analysed the content of the individual claims.

The chapter focused on the actions of congruent and incongruent coverage (Sections 130 and 131 InsO), transactions directly detrimental to creditors (Section 132InsO), intentional disadvantage (Section 133 InsO) and gratuitous performance (Section 134 InsO). Moreover, it briefly addressed the

---

236 ibid Section 818(1).
237 ibid Section 818(2).
238 AnfG (n 2) Section 16.
239 ibid Section 17(1).
240 ibid Section 17(2).
241 ibid Section 16(2).
242 IX ZR 318/01 (n 86).

claims against payment of loans replacing capital (Section 135 InsO) and repayments of silent partnerships (Section 136 InsO).

Two peculiarities characterise the German transaction avoidance system. On the one side, all insolvency rules of transaction avoidance fall within the policy principles of section 129 InsO. This characteristic seems to enhance the coherence of the transaction avoidance framework.

On the other side, the German system provides for the cardinal distinction between congruent and incongruent coverage. In other words, the German system distinguished between a payment that corresponds to what was originally promised and a payment that does not respect the terms originally agreed between the parties. Although this distinction is not exclusive of the German legal system, the distinction is a cardinal feature of the transaction avoidance framework.

As a result of the analysis, it can be concluded that the German insolvency system provides for a complex system of transaction avoidance that focuses primarily on the detriment caused to the general body of creditors. While coherent, the German system is yet not perfect. In particular, the chapter highlighted and analysed the issues arising in the application of the subjective criteria.

On the other hand, the *Anfechtungsgesetz* regulates similar circumstances in which the debtor behaviour is detrimental to his creditor's interests but outside the insolvency context. The AnfG provides for procedural rules that allow the creditors to reverse the prejudicial acts of the debtor. Moreover, the coexistence of these parallel claims – inside and outside insolvency law – is facilitated by transitional rules provided by the AnfG in case of an intervening insolvency petition.

Chapter 6
The Italian Approach to Transaction Avoidance

6.1. Introduction

This chapter aims to analyse how transaction avoidance claims are regulated within the Italian corporate insolvency law and under the general law. Such analysis is functional to the comparison of the English, German and Italian transaction avoidance rules that would be conducted in Chapter 7 of the thesis.

Furthermore, the individual study of the countries and the comparison of their approaches to transaction avoidance will guide the proposal of the harmonisation of these claims in Chapter 8. In particular, the present chapter seeks to highlight the peculiarities and complexity of the Italian system. These will be related to the difficulties in the harmonisation of the transaction avoidance claims in Chapter 8.

Italy is a civil law country with a strong roman tradition and a complex and piecemeal development of insolvency law. In order to provide a coherent understanding of the Italian regime, the chapter is divided into three main parts. The first part provides a brief explanation of the Italian insolvency system and explains the several procedures available for companies in distress.

The second part addresses the claims of transaction avoidance provided by Section III of the Italian Insolvency Statute (Legge fallimentare – hereinafter l.f.).[1] In particular, it focuses on the claims of: (i) Gratuitous acts (Section 6.2.1); (ii) Payments, that target payments of debts not yet due (Section 6.2.2) and; (iii) the so-called 'insolvency revocatory action', which targets onerous acts, payments and securities (Section 6.2.3).

The third part (Section 6.4) deals with the avoidance claims available under general law. In particular, it provides an in-depth analysis of the civil law

---

[1] Legge fallimentare, i.e. Insolvency Statute by Royal Decree 16.03.1942 n 267 reformed by law Statute 11.12.2016 n 232.

avoidance action called ordinary revocatory action,[2] and the simplified avoidance action introduced in 2015.[3]

These claims are laid down in the last section of the Italian Civil code, which regulates the 'means for the conservation of the guarantee over the estate'.[4] The concept of general guarantee over the debtor's estate is the backbone of the Italian credit system. The concept is pivotal for the understanding of the Italian credit system and the insolvency framework. Moreover, it is extremely relevant for the claims that are the subject of this chapter. To facilitate the reader throughout the chapter, a brief explanation is provided.

Under Article 2740 of the Italian Civil Code, 'the debtor is bound to perform their obligations with all their assets, present and future'.[5] In this sense, the debtor's assets constitute a guarantee that they will do what they had promised. Otherwise, the creditors will be entitled to enforce their claims towards the debtor's assets with credit enforcement procedures.[6] The 'general guarantee over the estate' is the principle that enshrines the debtor financial responsibility for the obligations they have undertaken. In general terms, it means the full range of the debtor's assets, including the future ones.[7]

6.2. The Italian Insolvency System

The Italian insolvency law was established by Royal Decree in 1942.[8] In recent years, this statute has been subject to numerous reforms.[9] As a result, the insolvency system is extremely fragmented, and the Insolvency Statute is far from being a comprehensive regulation. Indeed, some types of insolvency proceedings are regulated in separate statutes.[10]

---

2 i.e. Azione revocatoria ordinaria.

3 Law Decree 27.05.2015 n 83.

4 i.e. Mezzi di conservazione della garanzia patrimoniale.

5 Royal Decree 16.03.1942 n 262 (Civil Code) Article 2740.

6 Lelio Barbiera, *Il Codice Civile Commentato: Responsabilitá Patrimoniale. Articoli 2740-2744* (2dn edn Giuffré Editore 2010) 4.

7 Iacopo P. Cimino, *Manuale Operativo per la Tutela del Credito. Aggiornato alle modifiche de Codice di Rito* (Halley 2006) 243.

8 Legge fallimentare (n 1).

9 See among others Law Decree 14.03.2005 n 35 converted into Statute 14.05.2005 n 80; Legislative Decree 09.01.2006 n 5; Legislative Decree 12.09.2007 n 169; Law Decree 22.06. 2012 n 3 converted into Statute 07.08.2012 n 134.

10 Legislative Decree 30.07.1999 n 270 (Decreto Prodi-*bis*) reformed by Law Decree 23.12. 2003 n 347 converted into Statute 18.02.2004 n 39 (Decreto Marzano).

Moreover, in October 2017, the Parliament enacted a statute conferring the power to modify the insolvency system to a special commission.[11] The reform has been enacted the 12th of January 2019, and it will enter into force the 15th of August 2020.[12] This section focuses on the current insolvency system as updated to the 2016 reform. Also, the second part of this section will address the principles that shape the reform, without detailing the procedures that will be put in place from 2020.

The current Italian insolvency system has a pure corporate nature as natural persons, and small enterprises are not subject to insolvency law.[13] The insolvency system limits the access to insolvency proceedings to legal persons with specific characteristics that vary under the different procedures. The procedures available to companies in distress are: (i) Winding-up; (ii) Deed of arrangement;[14] (iii) Agreements of debt restructuring;[15] (iv) Extraordinary administration and; (v) Special extraordinary administration.

Transaction avoidance actions cannot be used either in the deed of arrangement procedure nor the agreements of debts restructuring.[16] Therefore the chapter will not analyse these two procedures in details. However, it must be noted that the outcomes of these procedures cannot be challenged by the ordinary revocatory action in subsequent winding-up procedures.[17]

Moreover, the Statute provides for an additional procedure called ‘forced liquidation’. The procedure is designed for investment and insurance firms and cooperatives.[18] Due to the peculiar nature of the subjects involved in the

---

11 Statute 19.10.2017 n 155.

12 Legislative Decree 12.01.2019 n 14 entitled ‘Code of business crisis and insolvency in the execution of the Statute 19.10. 2017 n 155'.

13 Legge fallimentare (n 1) Article 1(1).

14 The deed of arrangement is an insolvency procedure that seeks to design an repayment plan before the formal declaration of insolvency. See Legge fallimentare (n 1) Article 161 ff.

15 The agreement of debt restructuring is an out of court agreement involving the debtor and their creditors involving at least 60% of all claims. See Legge fallimentare (n 1) Article 182-bis ff.

16 Legge fallimentare (n 1) Article 168 and 182-bis.

17 ibid Article 67(3)(e).

18 ibid Article 2.

forced liquidation, the procedure is excluded from the chapter that seeks to provide an overview of the procedures available for companies in general.

6.2.1. The Winding-up Procedure

The winding-up (so-called *fallimento*) is a procedure that aims to liquidate insolvent companies.[19] The scope of application of the procedure is limited to business entities that undertake commercial activities.[20] The procedure can be used by sole traders, partnerships, and companies (both limited liability and public).[21] However, Article 1 requires additional criteria that further limit the availability of the procedure.[22]

The article specifies that the winding-up procedure does not apply to those business entities that show the following characteristics altogether:

(i) Their assets had not exceeded € 300.000 in the last three years before the application to open the insolvency proceedings;[23]
(ii) Their gross revenues had not exceeded € 200.000 in the last three years before the application to open the insolvency proceedings;[24]
(iii) Their liabilities do not exceed € 500.000.[25]

The threshold to apply for the winding-up procedure in Italy is particularly high. The business entities that do not meet such criteria cannot apply for the winding-up procedure. The bigger business entities, which liabilities exceed the threshold, can be subject to the extraordinary administration and special extraordinary administration (Section 6.2.3). In contrast, the smaller business entities are subject to the individual enforcement procedures, and the procedures for the composition of the over-indebtedness (Section 6.2.4).[26]

---

19 Niccoló Abriani, Lucia Calvosa, Giuseppe Ferri Jr and others, *Diritto Fallimentare: Manuale Breve* (Giuffré 2008) 76.
20 Legge fallimentare (n 1) Article 1(1).
21 With the exception of public bodies.
22 The same criteria apply for the Deed of Arrangement procedure.
23 Legge fallimentare (n 1) Article 1 (2)(a).
24 ibid Article 1(2)(b).
25 ibid Article 1(2)(c).
26 Statute 27.01.2012 n 3 and Statute 17.12.2012 n 221 converting the Law Decree 18.10.2012 n 179.

The insolvency application may be filed by the debtor, one or more creditors or exceptionally by the criminal prosecutor.[27] The procedure is based on the cash flow test,[28] it takes place in front of a collegial court, and it includes several phases. First, the court summons the debtor and the filing creditors to ascertain that the debtor's due debts amount to at least 30.000 €,[29] and if so, declares the debtor insolvent.[30]

In the second phase, the court nominates a delegated judge that supervises the procedure, and an insolvency practitioner,[31] who administers the insolvency's estate under the supervision of a creditors' committee.[32] At this stage, the debtor must release the company's books and the list of creditors.[33]

Once the second phase is opened, the delegated judge nominates the creditors' committee made out of 3 or 5 creditors.[34] These supervise the insolvency practitioner administration and authorise special acts.[35] Moreover, with the decree that declares the insolvency, the debtor loses control over the assets.[36]

Likewise, all the debtor's acts undertaken after the insolvency declaration are ineffective towards the creditors.[37] The declaration also sets up a moratorium on individual enforcement actions,[38] and it establishes the principle of collectivity.[39] According to this principle, every claim – whether secured or not – is subject to the scrutiny of the insolvency practitioner under the collective procedural rules.[40]

---

27 The prosecutor's involvement is limited to situations where the debtor's insolvency manifests during criminal or civil proceedings. See Legge fallimentare (n 1) Article 7.
28 Legge fallimentare (n 1) Article 5.
29 ibid Article 14.
30 ibid.
31 ibid Article 16.
32 ibid Articles 31 and 41
33 ibid Article 16.
34 ibid Article 40.
35 ibid Article 41.
36 ibid Article 42.
37 ibid Article 44.
38 ibid Article 51.
39 ibid Article 52.
40 ibid Article 52(2).

During this phase, the insolvency practitioner collects and verifies the claims and proceeds with the liquidation of the company, which may take place either with a piecemeal approach or as a going concern.[41] Alternatively, during the second phase, a restructuring plan may be put in place.[42] The proposal may be presented to the court by one or more creditors or by a third party not connected with the debtor.[43] In contrast, the debtor is allowed to propose a restructuring plan only one year after the insolvency declaration.[44] The plan is, first, subject to the scrutiny of the judge,[45] and then, approved by the majority of the creditors.[46]

Statistically, the winding-up procedure is the most frequently used insolvency procedure.[47] The Insolvency Statute regulates the claims of transaction avoidance within the regulation of the winding-up procedure, although they may be used in other procedures as well.[48] Furthermore, the procedure allows for exceptional use of the ordinary revocatory action that would be analysed later in the Chapter. [49]

6.2.2. The Extraordinary Administration and the Special Extraordinary Administration

The extraordinary administration is a collective procedure with rescuing purposes.[50] The application of the procedure is limited to large companies in distress. Large companies are defined as those companies that had at least 200 employees in the last year, and those liabilities are 2/3 of their assets (including the proceeds from sales, and other activities) in the last tax year.[51]

---

41 ibid Articles 104-ter(2)(c) and 105 ff.
42 ibid Articles 104-ter(2)(b) and 120 ff.
43 ibid Article 124.
44 ibid.
45 ibid Article 125.
46 ibid Article 128.
47 Report Cerved 'Osservatorio su Fallimenti, Procedure e Chiusure di Imprese' September 2016 Issue 28 <file:///C:/Users/lwoc/Downloads/Monitor_of_Bankruptcies_Insolvency_Proceedings_and_Business_Closures_-_Second_Quarter_2016.pdf> accessed 21.07.2020.
48 Legge fallimentare (n 1) Article 64 ff.
49 ibid Article 66.
50 Decreto Prodi-*bis* (n 10) Article 1.
51 ibid Article 2.

The extraordinary administration is divided into two phases. The first phase is similar to the first phase of the winding-up procedure. It can be started by the debtor, one or more creditors or exceptionally by the criminal prosecutor.[52] It involves the declaration of insolvency and the court's decision on whether the management of the company remains in the hands of the directors or should be assigned to a special commissioner.[53] For explicit reference to the Insolvency Statute, the declaration of the insolvent status has the same effects of the declaration given in the winding-up proceedings.[54]

The second phase distinguishes the extraordinary administration procedure from the winding-up proceedings. It is available only to those companies that show some likelihood to recover their financial situation and continue their business.[55] The likelihood is evaluated based on entrepreneurial, economic and financial considerations which also form the basis of the commissioner's recovery plan.[56] This recovery plan can encompass a sale of part of the company as a going concern or a restructuring plan.[57]

The procedure allows the commissioner to bring transaction avoidance actions to the court when the procedure involves a sale as going concern of part of the company.[58] In contrast, the avoidance actions are not available when the procedure results in a restructuring plan.[59] The reason behind this distinction lays on the concerns that the use of avoidance actions in a restructuring plan would benefit the company itself rather than its creditors.[60]

The use of transaction avoidance actions may impose sacrifice on the counterparty of the vulnerable transaction. In the insolvency context, this sacrifice is justified on the light of the collective interest.[61] In contrast, in the

---

52 ibid Article 3.
53 ibid Article 8.
54 ibid Article 18.
55 ibid Article 27.
56 Corte d'Appello Milano 09.09.2002 in *Fallimento* 2003, 442; Tribunale Pavia 25.0.2002 in *Fallimento* 445.
57 Decreto Prodi-*bis* (n 10) Article 27(2).
58 ibid Article 49.
59 ibid.
60 Cassazione 27.12.1996 n 11519.
61 Enrico Stasi, Vittorio Zanichelli, *Grandi Procedure non solo per le Grandi Imprese* (IPSOA 2010) 220. See Tribunale di Udine, 26.11.2013 n 2661/012.
61 ibid.

case of a restructuring plan, the use of avoidance actions is considered a coercive way of financing the business. Indeed, the proceeds of the action would facilitate the restructuring of the company but not necessarily improve the position of the general body of creditors.[62] However, the procedure may be converted into liquidation if, at any moment, there are no feasible prospects of a successful restructuring.[63] In the latter case, transaction avoidance actions will be fully available to the liquidator.[64]

The special extraordinary administration is a variation of the extraordinary administration procedure reserved to larger companies and group of companies.[65] The application of the special extraordinary administration procedure is limited to those companies that have at least 500 employees and at least € 300 millions of liabilities.[66] In these circumstances, only the company is entitled to file a petition for the special procedure.[67] It can choose whether applying for the extraordinary administration or the special one. In contrast, if the creditors want to initiate an insolvency procedure against this type of companies, they have to file a petition for the extraordinary administration.[68]

The peculiarity of the procedure is the involvement of the Ministry of Economic Development that directs the activity of a special commissioner who manages the company.[69] The involvement of political power that substitutes the judicial power seeks to save the so-call 'very large companies' in order to preserve the country economy and avoid dramatic domino effects.[70] Moreover, the procedure grants the special commissioner with the power to bring the

---

62 Stasi and Zanichelli (n 61) 220.

63 Decreto Prodi-*bis* (n 10) Article 11.

64 ibid Article 49.

65 Decreto Marzano (n 10); Corte Constituzionale 21.04.2006 n 172; Massimo Fabiani, Massimo Ferro, 'Dai Tribunali ai Ministeri: Prove Generali di Degiurisdizionalizzazione della Gestione della Crisi di Impresa' (2004) Il Fallimento e le Altre Procedure Concorsuali 132, 134. In contrast, some authors consider the procedure as a separate and distinct institution. See Lucio Ghia, Carlo Piccini and Fausto Severino, *Trattato delle Procedure Concorsuali Volume V: L'amministrazione Straordinaria e la Liquidazione Coatta Amministrativa* (UTET 2011) 193.

66 Decreto Marzano (n 10) Article 1.

67 ibid Article 2.

68 Luciano Panzani, *Il Fallimento e le Altre Procedure Conconsuali* III volume (2nd edn UTET 2014) 1377.

69 Fabiani and Ferro (n 65).

70 Panzani (n 68) 1379.

transaction avoidance actions even in the case of a restructuring plan if the actions are beneficial to the creditors.[71]

6.2.3. The Procedures for the Composition of Over-Indebtedness

The procedures for the composition of over-indebtedness are a set of procedures enacted in 2012.[72] The 2012 reform provides three procedures that are available to the subjects that are deemed too small to access the traditional insolvency proceedings (i.e. winding-up, deed of arrangement and agreements of debt restructuring).[73] The procedures target the over-indebtedness that is defined as the continuing imbalance between liabilities and liquid assets or the debtor's impossibility to meet their obligations regularly.[74]

The procedures are: (i) the consumer's plan; (ii) the debtor's agreement; (iii) the liquidation of assets. The consumer's plan is a repayment plan procedure that is limited to individuals that do not undertake a professional or business activity.[75] The debtor's agreement, instead, is a repayment plan procedure available to those business entities that do not meet the requirements set out by Article 1 l.f.[76]

The procedure seeks to establish an agreement between the debtor and their creditors (representing at least 60% of the credits).[77] The agreement can be facilitated by mediation bodies called 'Organs for the composition of the crisis – OCC).[78] The proposed agreement needs to be approved by the competent

---

71 Costanza Dalmasso di Garzegna, 'Il Concordato delle Societá' (2013) Il Caso.it 1, 39 <http://www.ilcaso.it/articoli/356.pdf> accessed 21.07.2020; Maurizio Cimetti, 'L'Amministrazione Straordinaria delle Grandi Imprese in Stato di Insolvenza' in Paolo Pototschnig, Fabio Marelli and Maurizio Cimetti (eds), *Fallimento e Altre Procedure Concorsuali* (IPSOA 2010) 922, 1061.

72 Statute n 3/2012 (n 26).

73 ibid Article 6(1).

74 ibid Article 6 (2)(a).

75 ibid Article 6(2)(b).

76 ibid Article 6(1).

77 ibid Article 11.

78 ibid Article 15.

court.[79] The court order renders the agreement binding for all the creditors who had had a claim before the procedure reached the court.[80]

The liquidation of assets is the third procedure of the 2012 reform, and it is available to small businesses that are insolvent (i.e. over-indebted) and cannot access the winding-up procedure.[81] The debtor or the creditors can request the liquidation in the judicial phase of the debt restructuring procedure.[82] The liquidation is similar to the winding-up procedure. It involves an insolvency practitioner that sells the company's assets by auction. The proceeds are, then, allocated to the creditors according to the ranking provided in the civil code.[83]

The 2012 reform sought to fill the gap concerning small business entities and consumers.[84] The exclusion of these categories from the scope of application of the Insolvency Statute allows them to avoid the stigma still connected with the insolvency. The reform perpetuated this exclusion, but at the same time, it sought to save the debtor from overwhelming numbers of individual credit enforcement actions that do not permit any debt discharge.

Indeed, the reform is also called 'avoid suicides' as it represents an attempt to reduce the number of suicides of small entrepreneurs who could not access procedures of debt management before.[85] However, the reform also adds procedures to the already chaotic Italian insolvency system. To sort such legislative mayhem, in October 2017, the Italian Parliament delegated a special parliamentary commission to enact comprehensive reform of the insolvency system.[86]

---

79 ibid Article 12.

80 ibid Article 12(3).

81 ibid Article 14-ter.

82 ibid Article 14-quater.

83 Civil Code (n 5) Article 2741 ff.

84 Simone Alecci, 'La Nuova Disciplina in Materia di Composizione della Crisi da Sovraindebitamento: Modifiche alla Legge 27 Gennaio 2012 n. 3' (2013) 11 Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente 1, 3.

85 Luciano Quattrocchio, Bianca M. Omegna, 'La Composizione delle Crisi da Sovraindebitamento: l'Accordo di Ristrutturazione dei Debiti e il Piano del Consumatore' (2018) 1 Diritto ed Economia dell'Impresa 154.

86 Statute 155/2017 (n 11).

6.3. The 2019 Reform

As mentioned above, in October 2017, the Italian Parliament started a process to reform the insolvency system.[87] The law that delegates the legislative power provided some guidelines to the special commission.[88] The reform has been enacted in January 2019 and will be in force eighteen months after its promulgation.[89]

The project aims to create a more modern approach to insolvency law, creating a system that provides tools of rescuing and restructuring.[90] First, the reform seeks to reduce the stigma surrounding the winding-up procedure. The law proposes to abandon the title of the procedure '*fallimento'* which means failure, in favour of the neutral title of 'judicial liquidation'.[91]

Second, the reform distinguishes between factual insolvency and financial distress as the likelihood of future insolvency.[92] The simple financial distress is characterised by reduced cash flow, indicating that the debtor is unlikely to meet their obligation in the future.[93] The reform has put in place procedures to tackle the possible insolvency at an early stage to enhance the probabilities to rescue the company.[94]

Third, the delegating law sought to enact a unified procedural model.[95] However, the reform keeps the distinction between insolvency and over-indebtedness (which is the insolvency or likelihood of future insolvency for small business entities and consumers).[96] The reform includes in the new code all categories of debtors (i.e. consumers, individual enterprises, small and large companies).[97] However, large and very large companies can still

---

87 Statute 155/2017 (n 11).
88 ibid Article 1.
89 Legislative Decree 14/2019 (n 12).
90 Statute 155/2017 (n 11) Article 1.
91 ibid Article 2(a); Legislative Decree 14/2019 (n 12) Article 32.
92 Statute 155/2017 (n 11) Article 2(c).
93 Legislative Decree 14/2019 (n 12) article 2(a) and (b).
94 ibid Article 12 ff.
95 Statute 155/2017 (n 11) Article 2(d).
96 Legislative Decree 14/2019 (n 12) Article 2.
97 ibid Article 1(1).

apply for the extraordinary administration and the special extraordinary administration that are regulated in the original statutes.[98]

Forth, the delegating law suggested that the reform should consider the winding-up as a last resort, which should be pursued only when another solution is not foreseeable.[99] It also requires the in-court insolvency procedures to be simplified and unified to lower the costs and reduce the procedural times.[100] The reform brought together the insolvency procedures and the procedures for the composition over-indebtedness, maintain the lexical distinction between insolvency and over-indebtedness.[101] Moreover, *prima facie*, the reform has not simplified the Italian insolvency system in any meaningful way. As a result, after the 15th of August 2020, the system will encompass the following procedures:

1) The early warning procedure;[102]
2) The certified plan of restructuring (an out of court procedure that is already available under the insolvency Statute);[103]
3) The agreement of debt restructuring;[104]
4) The agreement of debt restructuring for consumers;[105]
5) The minor deed of arrangement (available to professionals, start-ups, individual entrepreneurs, and farmers);[106]
6) The deed of arrangement;[107]
7) The judicial liquidation (that substitute the winding-up procedure and the liquidation of assets procedure);[108]
8) The forced liquidation (limited, as previously, to investment and insurance firms and cooperatives);[109]

---

98 ibid.
99 Statute 155/2017 (n 11) Article 2(g).
100 ibid Article 2(l).
101 Legislative Decree 14/2019 (n 12) Article 2.
102 ibid Article 12.
103 ibid Article 56.
104 ibid Article 57 ff.
105 ibid Article 67 ff.
106 ibid Article 74 ff.
107 ibid Article 84 ff.
108 ibid Article 121 ff.
109 ibid Article 293 ff.

9) The extraordinary administration;[110]
10) The special extraordinary administration.[111]

The Italian reform shows the intention to modernise the Italian insolvency system. It encompasses principles that are conceptually close to the guidelines of the Restructuring Directive.[112]

However, a first appraisal of the reform leads to conclude that the reform has not achieved a significant simplification of insolvency law. The reform is quite lengthy (391 articles) and excludes the extraordinary administration and the special extraordinary administration. The content of the articles is unnecessarily complicated, obscure, and not unequivocal.[113]

Moreover, the novelty of the warning system is undermined by the cumbersome nature of the procedure and the number of individuals involved in starting the procedure.[114] These are the debtor; or the company auditors; or the supervisory board if the structure of the company provides for them; the tax authority; the national insurance authority and the organs for the composition of the enterprise crisis.[115]

Furthermore, it has been noted that the procedures established by the reform are overly rigid and highly institutionalised.[116] As a consequence, it is foreseeable that the debtor will be forced into formal procedures without being able to restructure the company in distress in a more informal way that generally generates more favourable outcomes. [117]

---

110 Legislative Decree n 270/1999 (n 10).

111 Law Decree n 347/2003 (n 10).

112 Directive (EU) 2019/1023 of the European Parliament and of the Council on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures concerning Restructuring, Insolvency and Discharge of Debt, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency) OJ L172/19.

113 Giovanni Lo Cascio, 'Il Codice della Crisi di Impresa e dell'Insolvenza: Considerazioni a Prima Lettura' (2019) 3 Il Fallimento e le Altre Procedure Concorsuali 263.

114 ibid.

115 ibid.

116 ibid.

117 ibid.

6.4. Transaction Avoidance Regime within Insolvency Law

After having investigated the current and future Italian insolvency system, the present section moves into the more specific aspects of the research by looking into the Italian approach to transaction avoidance regime. The following sections seek to analyse the current regime of transaction avoidance as the 2019 reform has left the regime of transaction avoidance unaltered.[118]

The Italian insolvency transaction avoidance is regulated in articles 64-71 of the Insolvency Statute.[119] The claims make the debtor's act ineffective towards the general body of creditors.[120] The rationale of the insolvency avoidance claims is twofold. First, the claims seek to preserve the integrity of the estate, by revoking the debtor's acts that unlawfully diminish their assets.[121] Ultimately, the claims safeguard the interests of the creditors, who relied on the debtor's estate as a guarantee that the debtor will be able to perform the obligations. Second, the claims also seek to realise the equal treatment of the creditors, who will receive payment of their credits under the insolvency rules of equality and proportionality.[122]

Notwithstanding this commonality of rationale and effects, the Italian avoidance claims differ in nature and regulation. This Section will address the claims of Gratuitous acts (Section 6.4.1); Payments (Section 6.4.2) and the so-called revocatory action regulated by article 67 Insolvency Statute entitled 'Onerous acts, Payments and Guaranties' (Section 6.4.3).[123]

6.4.1. Gratuitous Acts

The avoidance claim that deals with acts of a gratuitous nature is the first provision of the specific section of the Insolvency Statute.[124] Article 64 l.f. states that the acts of a gratuitous nature undertaken by the debtor two years before the declaration of insolvency are ineffective.[125] The right of action

---

118 Legislative Decree 14/2019 (n 12) Article 163 ff.
119 Legge fallimentare (n 1) Article 64 ff.
120 ibid.
121 Pietro Pajardi, *Il Sistema Revocatorio Fallimentare* (Giuffré 1990) 127.
122 ibid.
123 i.e. Atti a titolo oneroso, pagamenti e garanzie.
124 Legge fallimentare (n 1) Article 64.
125 ibid.

belongs to the insolvency practitioner who needs to prove only the gratuitous nature of the debtor's act and the timing of the act within the suspect period.[126]

The claim does not require any particular subjective criteria either on the debtor's part or on the counterparty of the transaction. Likewise, it is not required that the debtor was insolvent at the time of the transaction.[127] The reason behind this strict approach lays on the gratuitous nature of the vulnerable acts as they impoverish the debtor's estate without any counter value.[128]

As a result of a 2015 reform,[129] the remedy granted with this claim is a Court order to report the declaration of the debtor's insolvency on the public registries of movable and immovable properties.[130] The transcription has the effect of reclaiming the property of the assets within the insolvency estate. The counterparty can appeal the transcription, pleading that the act does not fall within the scope of application of the provision.[131]

The scope of application of the provision, however, is quite wide. It encompasses any disposal of the debtor's assets without a counter consideration or a counter value.[132] It has to be noted that the concept of consideration includes, in this instance, any direct or indirect gain to the debtor's assets.[133] Therefore, all those acts that assign an advantage to a third party with a corresponding reduction of the value of the debtor's assets are challengeable under article 64 l.f.[134]

In contrast, Article 64 l.f. does not apply to gifts of small value, acts done in fulfilment of moral duties or for public utility, when the disposal is proportionate

---

126 Luciano Quattrocchio, 'Analisi del Novellato Art. 64 L.F.' (2016) 2 Diritto ed Economia dell'Impresa 392, 395.

127 Quattrocchio (n 126).

128 Cosimo D'Arrigo, 'Atti a Titolo Gratuito e Pagamento di Debiti Scaduti' in Giuseppe Fauceglia and Luciano Panzani (eds), *Fallimento e Altre Procedure Concorsuali* (Vol. I UTET 2009) 546.

129 Law Decree 83/2015 (n 3).

130 Legge Fallimentare (n 1) Article 64(2).

131 ibid.

132 Adriano Patti, 'Commento all' Art. 64. Atti a titolo Gratuito' in Alberto Jorio and Massimo Fabiani (eds), *Il Nuovo Diritto Fallimentare* (Vol 1 Zanichelli 2006) 874.

133 ibid.

134 ibid 875.

to the debtor's assets. [135] The exceptions are based on the policy principle of safeguard of the social utility of the act and economic considerations that the act is proportionate to the value of the debtor's estate.[136]

6.4.2. Payments

After dealing with the circumstances of gratuitous acts, the Insolvency Statute targets the payment of debts that are not yet due at the time of the opening of the insolvency proceedings. Article 65 l.f. addresses the payments of debts due the day of the insolvency declaration or afterwards, stating that they are ineffective towards the creditors when they take place two years before the opening of the insolvency proceedings.[137]

The provision is structured only with objective criteria.[138] First, it requires that the payment is due on an agreed date that coincides or follows the date of the opening of the proceedings.[139] Second, the payment is made before the due date.[140] Third, the payment must take place two years before the declaration of the insolvency.[141]

The provision is of extremely broad application. The text of the provision refers to 'payments'. However, the Court of Cassazione held that the provision is not limited to payments of a sum of money.[142] It targets every act that prematurely satisfied a creditor's claim (e.g. *datio in solutum*).[143]

Furthermore, the provision has been defined as 'inescapable'[144] as the objective criteria are sufficient for the success of the claim. The circumstances surrounding the premature payment are irrelevant, even if they render the payment performed before the insolvency convenient for the debtor's

---

135 Legge fallimentare (n 1) Article 64(1).

136 Cassazione 28.02.1980 n. 1400.

137 Legge fallimentare (n 1) Article 65.

138 Cassazione 08.08.2016 n 16618; Maria Rosaria Grossi, *La Riforma della Legge Fallimentare: Commento e Formule Della Nuova Disciplina Delle Procedure Concorsuali* (Giuffre 2008) 516.

139 Legge fallimentare (n 1) Article 65.

140 ibid.

141 Legge fallimentare (n 1) Article 65.

142 Cassazione 29.07.1972 n 349.

143 ibid.

144 Giuseppe Limitone, 'Atti a titolo gratuito' in Massimo Ferro (ed) *La Legge fallimentare. Commentario Teorico-Pratico* (CEDAM 2007) 436 ff.

estate.[145] Moreover, it is irrelevant whether the parties had contractually agreed on the possibility to pay before the due date at the time they established the obligation.[146] Anticipated payments are seen as an 'anomaly'[147] and violate the principle of equal treatment of creditors, advantaging one creditor over the others, thus, justifying this strict approach.[148]

6.4.3. Onerous acts, Payments and Guarantees

Article 67 l.f. entitled 'Onerous Acts, Payments and Guarantees' regulates the claim commonly known as the insolvency revocatory action. [149] As the name suggests, the claim empowers the liquidator to revoke the effects of the debtor's acts for the benefit of the creditors.[150] The outcome of the claim is to render an act ineffective towards the general body of creditors and order the beneficiary to return the goods or the value of the goods to the insolvency's estate.[151]

The provision regulates two sets of circumstances. The first category deals with acts that are deemed peculiar or abnormal acts that do not generally take place in the ordinary course of business. It includes: [152]

(i) Acts of the debtor undertaken for consideration (and therefore onerous), where the consideration given by the debtor exceed more than ¼ the value of the consideration received;
(ii) The payment of a due monetary debt done the year before the opening of the insolvency proceedings;
(iii) Certain security rights granted one year before the opening of the proceedings for pre-existing debts not yet due and six

---

145 Cassazione 29.07.2009 n 17552; Tribunale di Mantova 19.04.2013 in *Fallimento* 2013, 1001.
146 Cassazione 05.04.2002 n. 4842.
147 Massimo Fabiani, Giovanni B. Nardecchia, *Formulario Commentato della Legge fallimentare* (IPSOA 2008) 499.
148 ibid.
149 This is the insolvency correspondent to the civil revocatory action qualified as ordinary revocatory action.
150 Legge fallimentare (n 1) Article 67.
151 Pajardi (n 121).
152 Legge fallimentare (n 1) Article 67(1).

months before the opening of the proceedings for pre-existing debts already due.

These acts are revocable unless the counterparty proves that they were not aware of the insolvency of the debtor.[153] The abnormality of these types of these acts determines a presumption that the third party was aware of the debtor's insolvency at the time of the transaction.[154]

Instead, the second category encompasses those acts that generally take place in the ordinary course of business, and they are not necessarily indicative of the debtor's insolvency.[155] The category includes (i) payments of due and payable debts; (ii) all acts undertaken for consideration (i.e. onerous) and; (iii) acts that grant pre-emptive rights simultaneously with the creation of debt (also of a third party).[156] These acts may be challenged if the liquidator proves that the counterparty knew of the debtor's insolvency.[157] In these circumstances, the suspect period is limited to 6 months before the declaration of insolvency.[158]

The claim targets the debtor's acts, but it also covers coerced payments and acts of third parties.[159] Indeed, payments obtained by the creditors through credit enforcement procedures fall within the scope of application of the revocatory action.[160] Similarly, a third party payment may fall within the scope of application of article 67 l.f. when the payment takes place with the debtor's money or with a sum that the third party claims against the debtor's estate.[161] Generally, the claim can target any legal act that involves an asset disposition,

---

153 ibid.

154 Pajardi (n 121).

155 Barbara Francone, 'L'azione Revocatoria Fallimentare Art 67, 1º e 2º co., L. Fall.'in Vincenzo Vitalone, Ugo Patroni Griffi, Riccardo Riedi (eds) *Le azioni revocatorie: la disciplina, il processo (Modelli e tecniche dei processi civili)* (Utet 2014) loc 4257.

156 Legge fallimentare (n 1) Article 67(2).

157 ibid.

158 ibid.

159 Renato Mangano, *La Revocatoria Fallimentare delle Attribuzioni Indirette* (Giappichelli 2005) 8.

160 Tribunale di Milano 17.09.1984 in *Fallimento* 1985, 81; Corte d'Appello di Bologna 18.02.1995 in *Fallimento* 1995, 1227.

161 Cassazione 22.01.1999 n 570.

whether they consist of a transfer of property, a promise or even a resolution of a contract.[162]

The provision requires a subjective element only on the counterparty. It requires the counterparty's knowledge of the factual insolvency of the debtor. In contrast, the state of mind of the debtor is irrelevant. The focal point of the action is the knowledge of the third party.[163] The application of the subjective criterion shows some critical issues. The provision refers only to what the counterparty knew of the financial situation of the debtor.

The jurisprudence, however, expanded the subjective criterion to what the counterpart should have known.[164] As the knowledge can only be deduced from factual circumstances, when the court evaluates the circumstances positively,[165] the counterparty could not have been unaware of the debtor's insolvency. To mitigate this jurisprudential expansion, a more recent approach takes into consideration the characteristics of the counterparty itself.[166] Therefore from the same objective circumstances, different parties may be held to different standards of knowledge.[167]

In contrast to the civil revocatory action, the insolvency action does not require the proof that the act caused some prejudice to the creditors.[168] The difference between the claims was subject of a lively debate among the Italian scholarship. On the one hand, some authors suggested that prejudice is an essential element of the action.[169] This approach is free from the literal interpretation of article 67 l.f... This interpretation allows the counterparty to

---

162 Cassazione 25.03.1994 n. 2912.

163 Legge fallimentare (n 1) Article 67(2).

164 Tribunale di Catania 17.12.1985 in *Diritto Fallimentare* 1986, II, 453; Tribunale di Bologna 01.12.1987 in *Diritto Fallimentare* 1988, II, 1031; Corte d'Appello di Genova, 03.03.1990 in *Fallimento* 1990, 820.

165 E.g. protests, enforcements procedures, application for insolvency proceedings, post-dated cheques, closure of lines of credit, interruption of supplies and bad state of the company' books provide a presumption of the factual insolvency. In contrast, the mere circumstance that the debtor has not repaid their debt is not a sufficient presumption to establish that the counterparty knew of the insolvent status. See Geppino Rago, *Manuale della Revocatoria Fallimentare* (2nd edn CEDAM 2006) 76-77.

166 Corte d'Appello di Genova 11.02.2002 in *Fallimento* 2002, 1202.

167 Rago (n 165) 74.

168 Salvatore Parato, *La Nuova Revocatoria Fallimentare* (Giappichelli Editore 2006) 237 ff.

169 Francesco Ferrara, *Il fallimento* (Giuffré 1995) 412 ff.

defend the act pleading that it did not cause any prejudice to the general body of creditors.

On the other hand, some authors exclude the relevance of prejudice to the creditors.[170] The Court of Cassazione had the chance to clarify this pivotal aspect in 2006 when it stated that the prejudice is always implied in the insolvency revocatory action and it consists of the disruption of the principle of equal treatment of the creditors.[171]

Lastly, Article 67 l.f. also provides a detailed regulation of the categories of acts that fall outside the scope of application of the revocatory action.[172] These exceptions have been implemented by the 2003 reform of the insolvency system, whose rationale was to promote the rescuing of the company.

At the same time, the reform sought to safeguard the acts that are instrumental in overcoming financial distress.[173] These exceptions cannot be justified on the basis that the acts are not detrimental, or the counterparty could not have been aware of the debtor's situation. Instead, they have been put in place because these debtor’s acts are deemed of some social value.[174]

Specifically, Article 67 l.f. excludes from the application of the revocatory action:[175]

a) Payments undertaken under the ordinary course of business. This is limited only to those payments that are necessary for the continuation of the business;[176]
b) Money entered into the debtor's line of credit, either by the debtor or by a third party, when such entries are atypical for the debtor;

---

170 Rago (n 165) 45 ff; Angelo De Martini, *Il Patrimonio del Debitore nelle Procedure Concorsuali* (Giuffré 1956) 330; Alberto Maffei Alberti, *Il Danno nella Revocatoria* (CEDAM 1970) 141 ff.

171 Cassazione 28.03.2006 n 7028.

172 Legge fallimentare (n 1) Article 67(3).

173 Law Decree 13.03.2005 n 35 converted into Statute 14.03.2005 n 80.

174 Francone (n 155) loc 4422 ff.

175 Legge fallimentare (n 1) Article 67(3).

176 Gustavo Olivieri, ‘La Revocatoria dei Pagamenti’ (2007) 4 Banca Borsa e Titoli di Credito 527, 530.

c) Preliminary contracts of transfer of movable property when a final contract does not follow them within a year. This is limited to those contracts that contain a transfer of property for family use;
d) Acts or payments following an out-of-court restructuring plan or a repayment plan approved by a professional accountant;
e) Acts and payments undertaken according to a deed of arrangement approved by the Court;
f) Wages and remuneration for auxiliaries of the debtor, whether employees or not;
g) Payments of due and payable debts done to access services that lead to rescuing proceedings.

The 2003 reform sought to enhance the possibility for a company in distress to continue the business. However, part of the scholarship has criticised the reform. In particular, some authors have highlighted that, in practice, the reform benefits mostly banks and credit institutions.[177]

6.5. Transaction Avoidance under the General Law

The Italian system also provides rules of transaction avoidance within the civil code. These claims are the ordinary revocatory action and the recently introduced simplified revocatory action.[178] The claims of transaction avoidance are provided under the title 'Means of conservation of the general guarantee over the debtor's estate'. Indeed, the claims are considered a tool of protection of credit.[179]

The ordinary revocatory action is of significant relevance for the Italian credit system as the Italian law does not provide insolvency procedures for individuals.[180] Since the Italian legal system lacks a collective procedure for

---

[177] Fabrizio Pasi, 'La Revocatoria dei Pagamenti non Bancari' in Stefano Ambrosini (ed), *La Riforma della Legge Fallimentare: Profili della Nuova Disciplina* (Zanichelli 2006) 148 ff.; Concetto Costa, 'La Revocatoria Fallimentare delle Rimesse in Conto Corrente Bancario: Problemi Attuali' (2010) 5(1) Diritto Fallimentare e delle Società Commerciali 61; Francesca Angiolini, 'La "Nuova" Revocatoria Fallimentare' (2005) 5 Rivista del Notariato 993, 1003.

[178] Civil Code (n 5) Article 2901 and 2929 bis.

[179] Lina Bigliazzi Geri, Francesco Donato Busnelli and others (eds), *Della Tutela dei Diritti* (UTET 1980); Cristina Costantini, La Tutela del Credito: I Recenti Percorsi dell'Azione Revocatoria Ordinaria' (2004) 10 The Cardozo Electronic Law Bulletin <http://www.jus.unitn.it/cardozo/Review/2004/REVOCATORI A.pdf.> accessed 21.07.2020.

[180] At least until August 2020, when the 2019 reform will get into force and will provide insolvency proceedings also for consumers. See Legislative Decree 14/2019 (n 12).

individual debtors, it has developed a strong individual credit enforcement system. In this context, the creditors who see their rights prejudiced are granted the power to interfere with the debtor's actions.

The following sections will investigate the ordinary revocatory action and the so-called 'simplified revocatory action', which is not a procedural action. Moreover, it will address the use of the ordinary revocatory action in the insolvency proceedings and the relationship between the insolvency revocatory action and the ordinary one.

6.5.1. The Ordinary Revocatory Action

The ordinary revocatory action is regulated in articles 2901-2904 of the Italian civil code (hereinafter c.c.).[181] The action empowers the creditor to react to the debtor's behaviours that negatively affect the debtor's estate.[182] The rationale of this intrusive power granted to the individual creditor lays on the fact that the debtor's behaviour diminishes the assets.[183]

Under article 2740 c.c., the debtor's assets constitute a general guarantee that they will perform their obligations. Consequently, the creditor is allowed to attempt to reverse the debtor's acts and increase the possibility of success of a future credit enforcement procedure.[184]

The claim is made up of five elements: (i) a credit-debit relationship; (ii) an act of disposition; (iii) the prejudice caused the creditor; (iv) the debtor's knowledge of such prejudice; (v) the counterparty's knowledge of the prejudice.[185] The following sub-sections will address these cardinal elements of the action. Moreover, a residual sub-section will discuss the effects of the action.

6.5.1.1. Credit- Debit Relation

The existence of a credit-debit relationship between the creditor and the debtor is a procedural requirement that grants the creditor the right of action.

---

181 Civil Code (n 5) Articles 2901-04.

182 Vincenzo Vitalone, 'L'Azione Revocatoria Ordinaria' in Vitalone, Patroni Griffi, Riedi (eds) (n 155) loc 170.

183 ibid.

184 Bigliazzi Geri, Busnelli and others, (n 179) 137. Vincenzo Papagni, Le Azioni Revocatorie nelle Procedure Concorsuali (Giuffré 2013) 2.

185 Civil Code (n 5) Article 2901.

Potentially, any creditor is entitled to bring the claim to court even when the credit is not certain, yet due or payable.[186] Moreover, the action can be exercised even when the credit is under contestation in another procedure.[187] Indeed, for the creditor to be able to bring the claim to court, it is necessary and sufficient that the court deems the credit exists or is likely to exist even if not conclusively ascertained yet. [188]

In practice, the possibility to bring the claim to court is limited by the so-called 'interest to claim'.[189] This interest is a general procedural concept that allows claimants to bring a claim to court only when they can potentially receive a benefit from the judgment.[190] To have the interest to claim with the revocatory action, the creditor must clearly state how the debtor's act can prejudice their rights.[191] Only then, the court will judge on the merit of the claim. Therefore, not all creditors can use the ordinary revocatory action, but only those who may benefit from it. Significantly, this excludes secured creditors who have other and more powerful procedural tools to enforce their rights over the debtor's property.[192]

6.5.1.2. The Act of Disposition

Article 2901 c.c. provides that any disposition capable of affecting the debtor's estate negatively falls under the scope of application of the provision.[193] The content of the article is deliberately vague in order to encompass a wide range of acts. The Italian scholarship and jurisprudence do not attempt to delimit and define the category of 'disposition',[194] which can take place with unlimited types of transactions.[195]

---

186 Cassazione 15.02.2011 n 3676.
187 Cassazione 17.05.2010 n 12045.
188 Cassazione 18.07.2008 n 20002.
189 i.e. interesse ad agire.
190 Procedural Civil Code Royal Decree 28.10.1940 n 1443, Article 100.
191 Vincenzo Vitalone (n 182) loc 896.
192 ibid, loc 952.
193 Nunzio Santi di Paola, *La Revocatoria Ordinaria e Fallimentare nel Decreto sulla Competitivitá* (Halley 2006) 27.
194 A disposition is any act that diminishes the debtor's estate. See Domenico Barbero, *Il Sistema del Diritto Privato* (Utet 1993) 652.
195 Vitalone (n 182) loc 315.

In contrast, they focus on the categories of acts that are excluded from the application of the claim. For instance, the revocatory action does not apply to (i) payments of overdue debts; (ii) acts of a mandatary and; (iii) preliminary contracts.[196] The reasons behind the exclusion of these types of acts are different, but their rationale is straight forward.

First, payments of overdue debts are explicitly excluded from the application of the revocatory action by article 2901(3). The reason behind this exception lays on the fact that the payment – even if delayed – was due. In these instances, the debtor is performing an obligation, which cannot be sanctioned for the benefit of another creditor.[197]

Second, the acts of the mandatary are excluded for similar reasons. The acts of the mandatary are undertaken in the execution of a previous obligation towards the principal. As a general principle, it can be held that the revocatory action cannot target the fulfilment of a legal obligation.[198]

Third, the majority of preliminary contracts finalised by the debtor with a third party are excluded from the scope of application of the action.[199] This is because, under Italian law, the preliminary contract does not transfer the ownership of the goods.[200] Therefore, the prejudicial effect of the agreement may be displayed only following the final contract.[201] In contrast, those preliminary contracts that create pre-emptive rights or security rights over the assets fall under the application of the revocatory action.[202]

6.5.1.3. The prejudice

One of the essential elements of the ordinary revocatory action is the prejudice (so-called *eventus damni*[203]) caused to the creditor. The concept of prejudice

---

196 ibid.

197 Cassazione 13.05.2009 n 11051.

198 Vitalone (n 182) loc 512.

199 ibid, loc 349.

200 Vincenzo Roppo, *Il Contratto* (Giuffrè Editore 2011) 611; Francesco Caringella and Giuseppe De Marzo, *Manuale di Diritto Civile* (Volume 3 Giuffrè 2008) 535.

201 Cassazione 15.10.2004 n 20310; Cassazione16.04.2008 n 9970.

202 Vitalone (n 182) loc 343.

203 i.e. event of damage. The jurisprudential evolution of the *eventus damni* encompasses within the concept of the event also the concept of risk. Therefore, for the event of damage to occur, it is sufficient that there is a risk of the prejudicial event to occur.

is based on the concept of the general guarantee over the debtor's estate as it consists of the alteration of such a guarantee.[204] In particular, the prejudice consists of the risk that the debtor's estate will be no longer capable of fulfilling the debtor's obligation as a consequence of the act. [205]

The prejudice occurs when the act alters the debtor's estate in such a way that the general guarantee over the debtor's estate disappear or it is insufficient to meet the creditor's claim.[206] In other words, the prejudice takes place when the creditor's satisfaction is less likely or more difficultly achieved.[207] In this sense, the jurisprudence of the Court of Cassazione considers the prejudice as the increased difficulty or uncertainty of a possible future credit enforcement procedure.[208]

The evaluation of the prejudice is a two-steps process. First, the judge sizes the debtor's estate comprising of liabilities and securities granted by the debtor. Second, they asses how the debtor's act had modified the estate. In addressing the modifications of the estate, both quantitative and qualitative alterations are considered.[209]

Traditionally, the action can be exercised when the debtor modifies the estate from a quantitative point of view (for instance a reduction of the value of the estate as a consequence of a donation).[210] More recently, the jurisprudence includes qualitative modifications into the scope of the action (for instance, when the debtor exchanges or converts part of the estates into movable properties that can be more easily concealed from the creditors).[211]

---

204 Francesco Messineo, *Manuale di Diritto Civile e Commerciale* (vol III Giuffré 1959)193.
205 ibid.
206 Cassazione 08.11.1985 n 5451.
207 Cassazione 05.06.2000 n 7452; Cassazione 17.10.2001 n 12678; Cassazione 24.07.2003 n 11471; Cassazione 14.10.2005 n 19963.
208 Cassazione 16.03.1982 n 1700; Cassazione 17.01.1984 n 402; Cassazione 01.12.1989 n 8930.
209 Cassazione 06.05.1998 n 4578.
210 Paolo De Marco, 'Eventus Damni ed Onere della Prova nella Revocatoria Ordinaria, tra il Principio della Garanzia Patrimoniale e la Libertá di Iniziativa Economica del Debitore' (1999) 49 Giustizia Civile 1134.
211 Cassazione 4578/1998 (n 209); Cassazione 04.07.2006 n 15265; Cassazione 29.03.2007 n 7764; Cassazione 15.02.2007 n 3470; Cassazione 09.02.2012 n 1896.

The scholarship, however, highlights that the evaluation of the prejudice caused by qualitative alterations is problematic.[212] Indeed, if the prejudice is considered as the diminution of the general guarantee over the debtor's estate, the assessment of the prejudice should be essentially quantitative.[213] It has been emphasised that the relevance given to qualitative alterations poses methodological issues in the verification of the prejudice, which also includes the potential prejudice to the creditor's interests.[214]

Furthermore, taking into consideration qualitative modifications has been seen as an excessive limitation of the debtor's economic freedom.[215] Nevertheless, the qualitative approach has been adopted by the Supreme Court, which entrusts judges with the evaluation of both quantitative and qualitative alterations of the debtor's estate.[216]

The relevant moment for the assessment of the prejudice is the time the prejudicial act took place.[217] Moreover, the prejudicial effect must still be in place when the revocatory action is brought to court.[218] If the prejudicial effects displayed after the act took place, but they were not foreseeable at the time of the transaction, then the claim is not available.[219] This aspect of time is connected with the subjective criteria of the debtor, which is analysed in the following section.

6.5.1.4. The Debtor's Knowledge (Consilium Fraudis)

Another essential element of the revocatory action is the subjective criterion that focuses on the debtor's state of mind. Article 2901 c.c. requires that the debtor knew of the prejudice that the act would have caused to the creditor.[220] Moreover, it provides a different subjective criterion for when the act takes place before the establishment of the credit-debit relationship. In the latter

---

212 De Marco (n 210); Vitalone (n 182) loc 1046.
213 De Marco (n 210)
214 ibid 1137.
215 ibid 1139.
216 Cassazione 4578/1998 (n 209); Cassazione 15265/2006 (n 211); Cassazione 7764/ 2007 (n 211); Cassazione 3470/2007(n 211); Cassazione 1896/2012 (n 211).
217 Cassazione 14.11.2011 n 23743.
218 Maffei (n 170) 21.
219 Cassazione 08.03.1969 n 755.
220 Civil Code (n 5) Article 2901(1).

case, it requires that the act was maliciously undertaken with the aim to prejudice the creditor's rights.[221]

In the first set of circumstances, when the act takes place after the establishment of the debt, the debtor's intention is not under scrutiny. It is sufficient that the debtor was aware (or had foreseen) the prejudicial effects for the creditor (i.e. *consilium fraudis*).[222] In particular, it is sufficient that the debtor was aware that the act diminished their assets in such a way that the general guarantee over the estate was compromised.[223]

In the second set of circumstances, when the debtor's act takes place before the establishment of the credit-debit relationship, the subjective criterion of the provision is stricter. Article 2901 cc requires that the debtor undertook the act to reduce their assets in the view of undertaking obligations without the intention of fulfilling them.[224]

Traditionally, two considerations were necessary to fulfil this criterion: (i) the debtor was aware at the time of the transaction that they would contract an obligation in the future and; (ii) the debtor undertook an act with the final purpose to make it more difficult or impossible for future creditors to enforce their rights on the estate. [225]

The application of the criterion, however, has been loosened by the Court of Cassazione as far as almost losing the distinction between the two sets of circumstances.[226] Following a 2008 judgment, it is now sufficient that the creditor could foresee a prejudicial effect of their act without necessarily intending to cause prejudice.[227]

The proof of the subjective element can be inferred from presumptions, [228] such as the proximity between the disposition and the establishment of the debt, or the special relation between the debtor and the counterparty. The

---

221 ibid.

222 Cassazione 04.11.1995 n 11518; Cassazione 21.04.2006 n 9367.

223 Cassazione 03.05.1996 n 4077.

224 Civil Code (n 5) Article 2901(1).

225 Cassazione 27.02.1985 n 1716; Cassazione 27.10.2004 n 20813; Cassazione 19.03.1996 n 2303; Cassazione 06.08.2004 n 15257; Cassazione 23.03.2004 n 5741.

226 Cassazione 07.10.2008 n 24757.

227 Cassazione 15.10.2010 n 21338.

228 Cassazione 08.06.1983 n 3937.

issue of proof of the debtor's state of mind comes into consideration with the subjective element of the counterparty of the transaction, which will be analysed in the following section.

6.5.1.5. The Counterparty's Knowledge (*Scientia Damni* and *Partecipatio Fraudis*)

CivUnder article 2901 c.c., the revocatory action may require taking into consideration the state of mind of the counterparty of the act. The subjective element of the counterparty is an accidental criterion that is required only when the act is undertaken for a consideration.[229] In contrast, when the debtor's act is of a gratuitous nature, the subjective criterion does not apply to the counterparty.[230]

The rationale of this distinction is that with acts of a gratuitous nature, the counterparty receives an advantage that is not counterbalanced by a sacrifice.[231] Therefore, the counterparty's interests subside to the creditor's rights without any additional requirement. [232] In contrast, when the debtor's act is accompanied by a counter-consideration, the counterparty's interests must be balanced against the creditor's interests. In these circumstances, article 2901 c.c. requires that the third party was aware of the prejudicial effects of the act on the creditor.[233] Moreover, if the debtor's act took place before the claimant's debt was established, the counterparty must have been aware of the debtor's prejudicial intention.[234]

In particular, the subjective criterion requires that the counterparty knew that the act, from which they gain a benefit, has the potential to reduce the general guarantee of the debtor's estate. The evaluation of the subjective criterion takes into consideration how much the party knew of the debtor's financial situation and how the act altered the general guarantee.[235] The counterparty's awareness of the prejudice must be established looking at the moment the act

---

229 Civil Code (n 5) Article 2901(2).
230 ibid.
231 Vitalone (n 182) loc 1184.
232 Cassazione 12.04.2010 n 4642; Cassazione 17.05.2010 n 12045.
233 Civil Code (n 5) Article 2901(2).
234 Cassazione 21.09.2001 n 11916; Cassazione 09.05.2008 n 11577; Cassazione 05.03.2009 n 5359.
235 Cassazione 19.03.1996 n 2303; Cassazione 03.05.2010 n 10623.

took place. In contrast, the counterparty's state of mind and behaviour after the act took place are both irrelevant.[236]

The knowledge of the prejudice can be inferred from simple presumptions.[237] In the Italian legal system, simple presumptions are those deductions that the judge may draw from facts. They are not provided by the law, but they are left to the discretional appreciation of the judge.[238] Concerning the ordinary revocatory action, the knowledge must be proved by the creditor that can plead to court sets of circumstances from which the judge can deduce the knowledge of the parties.[239]

6.5.1.6. The Legal Effects of the Claim

According to article 2902 c.c., the revocatory action has two major effects. [240] First, a judgment on the ordinary revocatory action declares the act ineffective. Second, as a consequence of this declaration, the creditor is empowered to enforce their credit over the assets subject of the revocatory action.

The Italian scholarship highlights that the ineffectiveness of the act is relative under two aspects.[241] First, the ineffectiveness is relative because the effects of the action are limited to the creditor who used the revocatory action.[242] In contrast, the act remains valid and effective towards the other creditors, third parties and between the debtor and the counterparty.[243]

Second, the ineffectiveness is deemed relative as it does not affect the whole act but only those aspects that prevent the creditor from satisfying their credit

---

236 Cassazione 09.02.2012 n 1896.

237 Manocchi e Fioretti, 'La Tenuta della Presunzione nelle Revocatorie di Atti a Titolo Oneroso; Nota all'Ordinanza n 1404 del 26.01.2006 della Suprema Corte di Cassazione' < http://www.mflaw.it/media/Newsletter-MF-n.-04_2016-La-tenuta-della-presunzione-nelle-revocatorie-di-atti-a-titolo-oneroso.pd> accessed 21.07.2020.

238 Civil Code (n 5) Article 2729. For instance, knowledge can be inferred from the close relationship between debtor and counterparty. See Cassazione 06.06.2014 n 12836.

239 Cassazione 19.09.2015 n 18315.

240 Civil Code (n 5) Article 2902.

241 So-called 'double relativity of the revocatory ineffectiveness'. See Angelo Maierini, *Della Revoca degli Atti Fraudolenti Fatti dal Debitore in Pregiudizio dei Creditori* (Fratelli Cammelli 1912) 395; Bigliazzi Geri, Busnelli and others (n 179) 92; Paolo Cendon (ed), *Commentario al Codice Civile* (Giuffré 2009) 1221; Giuseppe Ferri, *Le Pretese del Terzo Revocato nel Fallimento* (Giuffré 2011) 53; Cassazione 10.02.1997 n 1227.

242 ibid.

243 ibid.

over the debtor's assets.[244] The action does not reverse the disposition of the assets, but it revokes the effects of the act for the creditor.[245] In practice, it allows the creditor to start a credit enforcement procedure over the assets owned by the counterparty as if the assets were still within the debtor's estate.[246]

Only the creditor who brought the revocatory claim to court can enforce their credit over the assets in possession of the counterparty.[247] On the one hand, the other creditors of the debtor cannot enforce their credit over the specific assets as they do not belong to the debtor anymore.[248]

On the other hand, the counterparty's creditors may enforce their credits over the assets with some limitations.[249] According to the Italian scholarship, the revocatory action creates an atypical security right over the assets subject to the revocatory action.[250] This atypical security confers pre-emptive rights to the revocatory creditor over the counterparty's creditors. It follows that the counterparty's creditors may enforce their credits over the assets, but their satisfaction will be limited to the amount exceeding the revocatory credit.

As a consequence of the revocatory action, the counterparty will be brought to court by the debtor's creditor with an enforcement procedure over the assets subject to the debtor's act.[251] The counterparty's defences are that: (i) the credit has already been satisfied after the judgment by other means or; (ii) the debtor's estate has been replenished, and therefore, the debtor's assets are now able to meet the creditor's claim.[252]

---

244 Maierini (n 241); Cristina Constantini, 'Gli Effetti dell'Azione Revocatoria' (2006) 12 The Cardozo Electronic Law Bulletin < http://www.jus.unitn.it/cardozo/Review/home. html> accessed 21.07.2020

245 Cassazione 18.01.1984 n 4221; Cassazione 15.02.2011 n 3676.

246 When the credit is not yet due or payable, the creditor may be allowed only to proceed with preventive measures (i.e. azioni cautelari) rather than a proper credit enforcement procedure. See Cassazione (ordinanza) 10.10.2008 n 24993.

247 Civil Code (n 5) Article 2902; Cassazione 14.06.2007 n 13972.

248 Cassazione 15.02.2011 n 3676.

249 Constantini (n 244); Michela Bailo Leucari, *L'Evoluzione Della Azione Revocatoria Oridinaria: La Tutela dei Creditori dei Fenomini di Separazione Patrimoniale*, 91 <http://www.ildirittodegliaffari.it/upload/ebook/20130329110008_tesi_dottorato_Michela[1].pdf>

250 Bigliazzi Geri (n 241)173; Leucari (n 249) 92.

251 Civil Procedural Code (n 190) Articles 602-04.

252 Constantini (244).

If these defences fail and the assets are successfully subjected to a credit enforcement procedure, the counterparty has the right to retain the residue of the sale if there is any.[253] Moreover, they can claim compensation against the debtor for their losses with a separate procedure.[254]

The revocatory action is available to the creditors for five years after the detrimental transaction took place.[255] In these five years, the assets may be transferred again. Therefore, the circumstances of the counterparty transferring the assets to a third party must be considered.

Article 2901(4) c.c. provides that the effects of the action do not prejudice the rights acquired by a third party in good faith and consideration, subject to the transcription of the claim on the registries of movables and immovable property.[256] The effects of the action towards third parties vary according to the timing of the act between the counterparty and the third party (i.e. a second transfer). When the second transfer occurs after the transcription of the claim into the registries, the effects of the action extend to the third parties regardless of the type of transfer and the third party's state of mind.

Instead, when the second transfer occurs before the transcription, the effects of the action depend on the nature of the act. If the transfer is an act of a gratuitous nature, the effects of the action extend to the third party. Consequently, the creditor will be able to enforce their credit over the assets owned by the third party but subject to the revocatory action.

In contrast, if the second transfer is an act for consideration, the effects of the action depend on the third-party's state of mind. If the third party is in good faith, the assets are out of reach of the revocatory creditor. Instead, if the third party is in bad faith, the creditor will be able to enforce their credit over the assets.

---

253 Cassazione 18.11.1961 n 2691.

254 Cassazione 23.02.1942 n 1515.

255 Civil Code (n 5) Article 2903.

256 ibid, Article 2901(4). In Italy, there are two main registries of properties: one for movables such as vehicles and one for immovable. The law requires to transcribe some acts, claims, judgments and security rights into the registries for publicity and transparency purposes. In the case of the transcription of claims, the annotation brings forwards the effects of the judgment to the moment the claim had been transcribed, even if not decided yet. See Civil Code (n 5) Articles 2643-2696.

The article neglects to address the case of unregistered movable property. The majority of the scholarship supports the idea that a third party buyer acquires the property under the rule 'possession equals title' of article 1153 c.c.[257] According to this general rule, a third party buyer acquires the property of goods sold by a someone who is not the owner when: (i) the buyer is in good faith at the moment of the transaction; (ii) the buyer comes into possession of the goods, (ii) the physical possession is achieved through an act that is suitable to transfer property.[258]

6.5.2. The Use of the Ordinary Revocatory Action in Insolvency Proceedings

One of the effects of the opening of the insolvency proceedings is the moratorium of all individual actions.[259] The stay includes the ordinary revocatory action.[260] However, under article 66 l.f., the insolvency practitioner can revive trials dealing with an ordinary revocatory action, previously initiated by individual creditors.[261] Additionally, the provision empowers the insolvency practitioner to use the revocatory action within the insolvency proceedings.[262] The following section investigated these two possibilities examining issues of coordination between the insolvency matter and the civil law nature of the ordinary revocatory action.

First, the insolvency practitioner can decide to revive the ordinary revocatory claim interrupted by the moratorium. In this case, the insolvency practitioner must continue the claim within the original court. The competent court is the court of the creditor's domicile.[263] In contrast, the insolvency *forum* is the court of the debtor's domicile.[264] The possibility to continue the claim, therefore, displays the drawback of having two distinct courts that deal with matters connected to the financial distress of the debtor. The presence of the insolvency practitioner in both procedures may limit the issues of coordination

---

257 Constantini (244).
258 Civil Code (n 5) Article 1153.
259 Legge Fallimentare (n 1) Article 51.
260 Cassazione 23.11.2018 n 30416.
261 Cassazione 28.05.2009 n 12513.
262 Legge Fallimentare (n 1) Article 66.
263 Civil Procedural Code (n 190) Article 20.
264 Legge Fallimentare (n 1) Article 9 and Article 66(2).

that may arise between the two courts. However, this possibility increases the costs of the procedure.[265]

Nevertheless, continuing the claim in the original court instead of starting a new one to the insolvency court has been deemed more convenient from a procedural point of view.[266] It saves the progress made by the first court in the inquiring process, and consequently, it should save time in reaching a judgment.[267]

In these circumstances, the insolvency practitioner substitutes the claimant in the civil procedure.[268] The creditor who initially brought the revocatory claim is excluded from the case in favour of the sole insolvency practitioner.[269] There is, however, a residual power to the creditor.[270] They are allowed to continue the claim when the insolvency practitioner cannot or does not want to intervene in the claim.[271]

Second, the insolvency practitioner can independently use the ordinary revocatory action.[272] In this case, the claim is lodged to the court of the insolvency proceedings.[273] For this use of the ordinary action in insolvency proceedings, it is useful to distinguish whether the claim deals with gratuitous acts or onerous ones.

Article 64 l.f. provides that acts of a gratuitous nature undertaken by the debtor two years prior to the insolvency declaration are ineffective.[274] Article 64 l.f. provides an easy burden of proof in comparison to the claim of article 2901 c.c.. The use of the revocatory action, however, is convenient because of the different limitation periods. In article 64 l.f., the limitation period is two years

---

265 Riccardo Riedi, 'L'azione Revocatoria Ordinaria nel fallimento. L'art. 66 L. Fall.' in Vitalone (n 155) loc 3050.

266 Cassazione 12513/2008 (n 261).

267 Riccardo Riedi (n 265) 3051.

268 Cassazione 19.05.2006 n 11763; Cassazione 12513/2008 (n 261).

269 Cassazione 17.12.2008 n 29420; Cassazione 17.12.2008 n 29421. However, Cassazione 11763/2006 (n 268) allows the creditor to be part of the case in support of the insolvency practitioner's claim.

270 Cassazione 28.02.2008 n 5272.

271 ibid.

272 Legge Fallimentare (n 1) Article 66.

273 ibid Article 66(2).

274 ibid Article 64.

before the opening of the insolvency proceedings, while in the ordinary revocatory action, it is five years before the use of the claim.[275]

Moreover, the insolvency practitioner can use the ordinary action against those acts for which a gratuitous nature is questionable.[276] The insolvency practitioner is allowed to bring both claims to court, with article 64 l.f. being the main claim and the ordinary action being a subordinate claim in case the first one fails.

In the case of acts for consideration, the insolvency practitioner can bring the ordinary action to court instead of the insolvency revocatory action. In this case, the different judicial setting slightly modifies the requisites of the ordinary action adapting it to the collective nature of insolvency law.[277] Regarding the prejudice, the insolvency practitioner must fulfil a three-stage test.[278] First, they must prove the existence of the claims of the creditors admitted to the insolvency proceedings. Second, they must establish that these claims are antecedent to the act. Third, they must prove that the qualitative or quantitative modification of the debtor's assets constitutes a prejudice for the general body of creditors.

The focal point that makes the use of the ordinary revocatory action in insolvency different from the civil law use is that, in insolvency, the ordinary action displays its effects against all creditors.[279] The prejudice, therefore, must be established against the general body of creditors.

There are few advantages in the possibility to use the ordinary revocatory action in place of the insolvency action. First, the ordinary action has a longer limitation period.[280] Second, under article 66 l.f., the insolvency practitioner does not need to prove that the debtor was insolvent at the time of the

---

275 ibid; Civil Code (n 5) Article 2902.

276 Riedi (n 265) loc 2988.

277 Nunzio Santi Di Paola, *La Revocatoria Ordinaria e Fallimentare nel Decreto sulla Competitività. Aggiornato alla Riforma del Diritto Fallimentare 2006* (Halley 2006) 109.

278 Cassazione 31.10.2008 n 26311.

279 Cassazione 06.10.2005 n 19443.

280 Civil Code (n 5) Article 2902.

transaction.[281] It is sufficient they prove that the debtor's act made it more difficult for the creditor to satisfy their claims.[282]

Moreover, the ordinary action can be used by the insolvency practitioner against third party buyers after the debtor's transactions have been made ineffective by the insolvency revocatory action.[283] Indeed, the insolvency revocatory action can be used only for the acts that directly affect the insolvency estate.

In contrast, the ordinary action is not limited by insolvency rules. Therefore, once the insolvency practitioner has used the insolvency action, but the assets have been transferred to a third party, the second transfer can be challenged only with the ordinary revocatory action. This is the so-call waterfall effect that allows the insolvency practitioner to trace the assets subjects to consequential transfers back to the insolvency estate.[284]

6.5.3. The Newest Developments: The Simplified Revocatory Action

With Law Decree entitled 'Urgent measures in insolvency, civil and procedural matters and (measures) of organisation and functioning of the judicial administration'[285], in 2015 the Italian parliament introduced a new claim of article 2929-bis c.c. called simplified revocatory action. Despite the informal name, the provision does not introduce an action but a procedural right.

The provision targets acts of a gratuitous nature outside the framework of insolvency law. The article provides that a creditor that has been prejudiced by a gratuitous act of the debtor can start an enforcement procedure against the assets in possession of the recipient of the debtor's act.[286] The vulnerable act must be undertaken by the debtor, and it must transfer or reserve the property of immovable or registered movable properties.[287] Moreover, the act must be gratuitous and undertaken after the establishment of the claimant's

---

281 Cassazione 07.05.2015 n 9170.
282 ibid.
283 ibid; Tribunale di Napoli 13.05.2013 in *Il Foro Napoletano* 2015, I, 119.
284 Cassazione 26311/2008 (n 278).
285 Law Decree 83/2015 (n 3).
286 Civil Code (n 5) Article 2929-bis (1).
287 ibid.

credit.[288] With these conditions, the creditor can seek an enforcement order against the creditor and proceed to seize the assets subject to the act against the counterparty of the debtor's transaction.[289]

The novelty of the provision is that it removes the necessity of a judgment that declares the transaction ineffective towards the creditor.[290] The provision is a response to the recent tendency of the debtors to undermine the general guarantee over the estate with the creation of a trust or equivalent acts.[291] These acts segregate some assets of the debtor into separate proprietary units. This separation allows the debtor to designate the assets to a specific scope. At the same time, the assets subject to these acts are taken away from the universality of the debtor's assets and do not fall within the general guarantee over the debtor's estate.[292]

In response to these legal phenomena, the provision seeks to reverse elusive behaviours of the debtor, allowing the creditor to overcome the separation created by the debtor. As the ordinary revocatory action, the rationale of the provision is to recreate the debtor's general security over the estate. The provision at stake, however, is more immediate than the traditional revocatory action. With article 2929-bis c.c., the creditor can skip the judicial phase that ascertains the prejudice caused to his interests and move straight to the enforcement procedure.[293]

The Italian enforcement procedure has a twofold structure that requires first an enforcement order that ascertains the existence of the credit, and secondly, a forced execution procedure. With article 2929-bis c.c., once a creditor has obtained an enforcement order against the debtor, they can enforce it on the debtor's assets that are transferred to a third party or are designated to a

---

288 ibid.

289 ibid.

290 ibid.

291 E.g. Italian Civil Code, Article 2965-ter.

292 Mirzia Bianca, 'Atti Negoziali di Destinazione e Separazione' (2007) 53 Rivista di Diritto Civile 197.

293 Stefano Pagliantini, 'Ancora sull'Artico 2929-bis C.C. (Nel Canone di Mauro Bove)' in Giuseppe Conte, Sara Landini (eds), *Principi, Regole, Interpretazione. Contratti e Obbligazioni, Famiglie e Successioni: Scritti in Onore di Giovanni Furgiuele* (Universitas Studiorum 2017) 209, 215.

particular scope.[294] This possibility is disengaged from any evaluation of the prejudice, the state of mind of the debtor or the counterparty.[295]

The availability of this procedural right, however, is limited by strict limitation periods.[296] The creditor can proceed against the assets transferred or designated to third parties under the condition that the execution is transcribed on the property register within one year from the registration of the vulnerable act.[297] Moreover, both the debtor and the third party can oppose the procedure with the defences usually available.[298] Additionally, the debtor can oppose the procedure, proving that he was not aware of the prejudice caused by the vulnerable act.[299]

6.6. Conclusion

The chapter examined how transaction avoidance is regulated in the Italian legal system. In particular, it focused on the claims available within the Italian corporate insolvency context and under general law. First, the chapter addressed the procedural insolvency framework in which the transaction avoidance actions take place. It highlighted that insolvency transaction avoidance actions are available in the (i) winding-up procedure; (ii) extraordinary administration, when the procedure involves a sale of the business as a going concern; and (iii) special extraordinary administration if the commissioner proves that the claim benefits the general body of creditors.

Second, the chapter analysed the content of the individual claims available in insolvency law. These are the provisions that target acts of gratuitous nature and payments of undue debts as well as the insolvency revocatory action, and the ordinary revocatory action used in the insolvency context. Third, the Chapter explored the transaction avoidance claims available in general law. In particular, it provided a detail analyses of the ordinary revocatory action, which constitute a cardinal claim in the Italian credit enforcement system.

---

294 Francesco Vigorito, *Le Procedure Esecutive Dopo la Riforma. L'esecuzione Forzata in Generale* (Giuffrè Editore 2006).
295 Civil Code (n 5) Article 2929-bis.
296 ibid.
297 ibid.
298 Civil Procedural Code (n **Error! Bookmark not defined.**) Title V Book III.
299 Civil Code (n 5) Article 2929-bis(3).

Overall, the analysis shows a system that is not entirely coherent, both regarding the general insolvency proceedings and concerning the specific claims of transaction avoidance. The insolvency framework provides different procedures according to the economic relevance of the company. Moreover, the use of the ordinary revocatory action in insolvency law, constitutes almost a duplicate of the insolvency action, with few alterations.

However, the country is striving for modernisation of insolvency law. In particular, the recent proposal to reform the Italian insolvency system will most probably impact the use of the ordinary revocatory action. As the reform seeks to extend the application of insolvency procedures to individuals and small enterprises as well as companies, the use of the credit enforcement proceedings should decrease as well as the use of tools of conservation of the general guarantee over the debtor's estate. Currently, the revocatory action is frequently used to preserve the assets of the debtor. The proposed reform may influence the use of the action as it will allow creditors to pursue the collection of the credit in collective proceedings rather than exclusively with individual efforts.

Chapter 7
A Comparative Analysis of Transaction Avoidance Between England, Germany and Italy

7.1. Introduction

In the previous chapters of the thesis (Chapters 4, 5, and 6), the research addressed the corporate insolvency systems, the insolvency transaction avoidance actions and the transaction avoidance claims available under the general law in England, Germany and Italy. The analysis of the individual systems and claims is the foundation of the present chapter, which seeks to critically assess the similarities and differences of transaction avoidance claims between the aforementioned legal systems.

In answering the research question, the chapter aims to address the different legal experiences, taking into consideration their distinct historical and cultural developments. The scope of the chapter is to evaluate differences and similarities among the claims provided by the national legal systems to understand transaction avoidance better. The enhanced understanding of the actions is functional to the development of further integration of the claims at the European Union level, which will be discussed in the next chapter (Chapter 8).

The chapter is divided into three parts. Part one (Section 7.2.) evaluates the similarities and differences between the insolvency systems of England, Germany and Italy. Part two (Section 7.3.) addresses the claims of transaction avoidance available within the insolvency systems. In particular, it seeks to evaluate the similarities and differences of the insolvency claims regarding their scope, rationale and effects among the selected legal systems. Finally, part three (Section 7.4) will compare the transaction avoidance claims available under general law in England, Germany and Italy.

7.2. Comparison between the Insolvency Systems

All legal systems in analysis present insolvency law as a separate branch of law. In England, the majority of the corporate insolvency regime is regulated

within the Insolvency Act 1986 (hereinafter IA).[1] Some aspects – mostly related to directors' duties – are provided by the Company Act 2006.[2] Similarly, corporate insolvency law is systematically organised in Germany. The German system regulates insolvency within the Insolvency Statute (hereinafter InsO), apart from directors' duties and liabilities in the case of corporate insolvency.[3] As in England, these aspects are regulated by company law (i.e. the German Limited Liability Companies Act and the Stock Corporation Act).[4]

In contrast, Italy fails to provide an organic insolvency system. Different pieces of legislation regulate various types of insolvency proceedings, often enacted by the Parliament as emergency measures.[5] The Italian Parliament has recently attempted to comprehensively reform the insolvency system, and bring together the current legislative patchwork into a coherent statute.[6] Still, some proceedings are left outside the insolvency statute, and the reform lacks the necessary level of coherence.[7]

All the insolvency systems in analysis provide for corporate winding-up procedures.[8] In England and Germany, the assessment of the insolvency is based alternatively on the cash-flow and balance sheet test.[9] In contrast, Italy allows a liquidation procedure based on the cash-flow test only.[10] In England,

---

1 Insolvency Act 1986.

2 Company Act 2006.

3 Insolvency Order of 05.10.1994 (Federal Law Gazette I p 2866), which was last amended by Article 24(3) of the Act of 23.06.2017 (Federal Law Gazette I p 1693).

4 Law on Limited Liability Companies in the adjusted version published in the Federal Law Gazette Part III, Section 4123-1, last amended by Article 10 of the Law of 17.07.2017 (Federal Law Gazette I p. 2446); Stock Corporation Act 06.09.1965 (BGBl. I p. 1089), which was last amended by Article 9 of the Law of 17.07.2017 (BGBl. I p. 2446).

5 Royal Decree 16.03.1942 n 267 reformed by law Statute 11 December 2016 n 232 (i.e. Legge Fallimentare); Law Decree 14.03.2005 n 35 converted into Statute 14.05.2005 n 80; Legislative Decree 09.01.2006 n 5; Legislative Decree 12.09.2007 n 169; Law Decree 22.06.2012 n 3 converted into Statute 07.08.2012 n 134. Also, Legislative Decree 08.07.1999 n 270 (Decreto Prodi-*bis*) reformed by Law Decree 23.12.2003 n 347 converted into Statute 18.02.2004 n 39 (Decreto Marzano); Statute 27.01.2012 n 3; Ministerial Decree 25.01.2012 n 30.

6 Statute 19.10.2017 n 155; Legislative Decree 12.01.2019 n 14 entitled 'Code of Business Crisis and Insolvency in the Execution of the Statute 19.10.2017 n 155'.

7 Giovanni Lo Cascio, 'Il Codice della Crisi di Impresa e dell'Insolvenza: Considerazioni a Prima Lettura' (2019) 3 Il Fallimento e le Altre Procedure Concorsuali 263.

8 Insolvency Act (n 1) Part IV; InsO (n 3) Section 1 ff.; Legge Fallimentare (n 5) Title II.

9 Insolvency Act (n 1) Section 123; InsO (n 3) Sections 17 and 19.

10 Legge Fallimentare (n 5) Article 5.

corporate winding-up is available to any company registered under the Company Act 2006.[11] A debt of 750 £ is deemed sufficient evidence of the debtor's inability to pay debts as they become due.[12]

Likewise, Germany allows the insolvency proceedings to be commenced against registered companies.[13] Additionally, they can be opened against different forms of unregistered entities.[14] Moreover, the German insolvency system does not require a minimum amount of debt to open the insolvency proceedings.

In contrast, Italy limits the access to corporate winding-up proceedings to registered companies with substantial assets (more than 300.000 €) substantial gross revenues (more than 200.000 €), and liabilities capped at 500.000 €.[15] Outside these parameters, Italy regulates the procedures for the composition of the over-indebtedness (which are not deemed of corporate nature) and the extraordinary administrations (which primary goal is the rescuing of the company).[16] Moreover, the liquidation procedure is opened only when the ascertained debts are more than 30.000 €.[17]

There is a substantial discrepancy between the Italian minimum requirements and the English and German approach. This difference is mainly due to historical and policy reasons. Both in Roman-medieval times and within the Napoleonic commercial code, insolvency was limited to merchants with specific characteristics.[18] Traditionally, it was considered beneficial to exclude small business entities from the application of insolvency law.[19] This exclusion would protect small business entities from the stigma associated with the

---

11 Insolvency Act (n 1) Section 73.

12 Insolvency Act (n 1) Section 123.

13 InsO (n 3) Section 11.

14 ibid.

15 Legge Fallimentare (n 5) Article 1.

16 Statute n 3/2012 (n 5) and Statute 17.12.2012 n 221 converting the Law Decree 18.10.2012 n 179 and Legislative Decree 270/1999 (n 5).

17 Legge Fallimentare (n 6) Article 15(9).

18 Umberto Santarelli, *Per la Storia del Fallimento nelle Legislazioni Italiane dell'Età Intermedia* (CEDAM 1964) 325 ff; Laura Moscati, 'Aspetti e Problemi del Fallimento tra Antico Regime e Codificazione Commerciale' in Alessia Legnani Annichini e Nicoletta Sarti (eds), *La Giurisdizione Fallimentare. Modelli Dottrinali e Prassi Locali tra Basso Medioevo ed Età Moderna* (Bononia University Press 2011) 79, 98.

19 Mario Notari, 'Ambito di Applicazione' in L Calvosa, G Gianelli and others (eds), *Diritto Fallimentare (Manuale Breve)* (3rd edn Giuffrè 2017) 81 ff.

insolvency and prevent the judicial system from being clogged up by insolvency proceedings.[20]

According to the World Bank Resolving Insolvency Ranking, the insolvency procedures are estimated to last one year in England, 1.2 years in Germany and 1.8 years in Italy.[21] In practice, the winding-up procedures differ considerably concerning time efficiency. In England, it is estimated that a winding-up procedure takes between six and twenty-four months to reach the full liquidation of the company, although some cases may take longer.[22] In Germany, a liquidation proceeding generally lasts between three and four years.[23]

In Italy, instead, the average length of winding-up proceedings is seven years.[24] This average, however, varies significantly among regions. For instance, in Lombardia, the average length is 5.3 years, while in Basilicata, the average reaches records of 12.5 years.[25] The 2019 Italian reform seeks to simplify and unify the procedures to reduce procedural times.[26]

Also, all national systems in analysis provide some form of administration of companies in financial distress as a procedure that serves as an alternative to liquidation. In England, the administration procedure is regulated by the Insolvency Act, and its primary purpose is the rescuing of the company as a going concern.[27]

Germany provides its administration procedure within the InsO.[28] The German procedure is a self-administration procedure where the debtor retains the

---

20 ibid.

21 World Bank Resolving Insolvency ranking <https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency> accessed 21.07.2020.

22 Wayne Harrison, 'How Long Does It Take To Liquidate A Company?' < https://www.companyrescue.co.uk/guides-knowledge/guides/how-long-does-it-take-to-liqu idate-a-company-4074/ > accessed 21.07.2020.

23 Andreas Dimmling, 'Germany' in Donald S Bernstein (ed), *The Insolvency Review* (5th edn Law Business Research 2017) 86.

24 Luca Orlando, 'Fallimenti, 7 Anni per le Procedure. La Durata per Regione' *Il Sole 24 Ore* (Milan, 18.01.2018) < http://www.ilsole24ore.com/art/impresa-e-territori/2018-0117/fallimenti-sette-anni-mini-sprint-tribunali-165408.shtml?uuid=AEOmvPkD> accessed 21.07.2020.

25 ibid.

26 Statute 155/2017 (n 6) Article 2(1).

27 Insolvency Act (n 1) Schedule B1.

28 InsO (n 3) Sections 270 ff.

control and the management of the company.[29] The procedure, however, is rarely used and it involved mainly large companies.[30]

Italy, as well, provides for some procedures that can be compared with the English administration. These procedures are the deed of arrangement,[31] the extraordinary administration (reserved for companies with at least 200 employees),[32] and the special extraordinary administration (limited to companies with at least 500 employees).[33]

All the administrative proceedings have the common aim to reorganise the company's structure and avoid liquidation. However, their procedural layout widely differs. In England, the company is placed under the control of an expert insolvency practitioner that seeks to save the company where possible.[34] Germany, instead, has only a self-administration procedure where the debtor may attempt to reorganise the company's structure with the supervision of an insolvency practitioner.[35]

In Italy, both the deed of arrangement and the extraordinary administration can be a debtor-in-possession procedure or not, according to the discretion of the court examining the insolvent company.[36] Moreover, the special extraordinary administration procedure is characterised by a robust political involvement as the minister of economic development oversees the procedure.[37] The political intervention seeks to monitor the financial situation of the company and the impact of its financial distress on employees and providers, in order to avoid dominos effects.[38]

Besides the distinction between the debtor-in-possession procedures and procedures where the control is placed upon an insolvency practitioner, the

---

29 ibid.
30 '3 Jahre ESUG – die Statistik' 11.03.2015 <www.insolvenzblog.de> accessed 21.07.2020.
31 Legge Fallimentare (n 5) Articles 160 ff.
32 Law Decree 270/1999 (n 5) Article 2.
33 Law Decree 347/2003 (n 5) Article 1.
34 Insolvency Act (n 1) Schedule B1 para 3.
35 InsO (n 3) Section 270c.
36 Law Decree 270/1999 (n 5) Article 18-19.
37 ibid.
38 Giannicola Rocca and Diego Corrado, 'Le Amministrazioni Straordinarie fra Salvaguardia della Continuitá, Tutela dei Livelli Occupazionali ed Efficacia delle Azioni di Risanamento' (2006) 74 Commissione, Crisi, Ristrutturazione e Risanamento di Impresa16.

main difference among the selected legal systems is the practical use of the rescuing procedures. In England, the administration seems to be less in use, and this type of procedures represents 10% of the insolvency proceedings started between 2017 and 2018.[39] Moreover, almost half of the procedures end with the option of creditors' voluntary liquidation.[40]

In Germany, the use of the self-administration proceeding is stable at 2.6% of the total proceedings between 2012 and 2017.[41] In Italy, the deed of arrangement procedure accounts for approximately 7% of the corporate insolvency procedures.[42] In contrast, very few administrations are opened yearly. From the early 2000s until May 2018, only 121 companies and groups of companies have applied to the extraordinary administration while only 33 groups of companies have applied for the extraordinary special administration since 2003.[43]

Also, under the profile of efficiency, the procedures differ significantly among the selected countries. In England, the administration generally can take up to one year, although it can be extended for a further six months.[44] Procedures involving companies of particularly significant dimension, however, may take longer.[45] In Germany, the procedure can take from a few months to a few years.

---

39 Insolvency Statistics – April to June 2018, 5 <https://www.gov.uk/government/collections/company-insolvency-statistics-releases> accessed 21.07.2020.

40 ibid 7.

41 Ralf Moldenhauer and Rüdiger Wolf, 'Germany's ESUG Has Simplified Corporate Restructuring' < https://www.bcg.com/capabilities/corporate-development-finance/restructuring-after-germanys-esug.aspx > accessed 21.07.2020.

42 The category includes liquidation, deed of arrangement and accordi di ristrutturazione. The data refer to the 2007-2017 period. See Alesandro Danovi, Silvia Giacomelli and others 'Strumenti Negoziali per la Soluzione della Crisi di Impresa: Il Concordato Preventivo' (2018) 430 Questioni di Economia e Finanza (Quaderni Occasionali) < https://www.bancaditalia.it/pubblicazioni/qef/2018-0430/index.html> accessed 21.07.2020.

43 'Decreto legislativo 270/99 - Schede aggiornate al 31 marzo 2018' published by the Minister of the Economic Development < http://www.sviluppoeconomico.gov.it/images/stories/documenti/tabella_riepilogativa_procedure_270_31marzo2018.pdf> and 'Decreto legge 347/03 - Schede aggiornate al 31 marzo 2018' < http://www.sviluppoeconomico.gov.it/images/stories/documenti/tabella_riepilogativa_procedure_347_31marzo2018.pdf> accessed 21.07.2020.

44 Insolvency Statistics (n 39) 7.

45 E.g. Nortel administration, opened in 2009 and still on-going < Error! Hyperlink reference not valid.> and Lehman Brothers administration, opened in 2008, and still, on-going <https://www.pwc.co.uk/services/business-recovery/administrations/lehman.html> accessed 21.07.2020.

In contrast, in Italy, the length of the procedures varies considerably. The dead of arrangement procedure generally takes just over a year.[46] Conversely, among the 121 administration procedures opened between 2000 and 2018, 55 procedures lasted for at least ten years, while some of them – e.g. Gruppo Bongianni s.p.a. in a.s - have been opened eighteen years ago and are still on-going.[47]

Additionally, both England and Italy encompass procedures that allow the insolvent company to reach an agreement with its creditors regarding the repayment of debts over an agreed period of time.[48] In both countries, the use of transaction avoidance is not available during these debt restructuring procedures.[49]

Moreover, in Italy, the result of the agreements between debtor and creditors is safeguarded from transaction avoidance actions in future possible insolvency proceedings.[50] In contrast, Germany lacks a formal procedure that regulates the agreements between the debtor and creditors. Insolvent companies, however, can propose a repayment plan within the winding-up and self-administration procedures.[51]

To conclude the comparison between insolvency systems, all are aligned regarding the function of insolvency law as a process to liquidate or restructure the company. It must be noted, however, that there are substantial differences between the systems in analysis, not only under the legislative and procedural aspects. Indeed, the systems also differ in terms of clarity and efficiency. The Italian legal system, particularly, stands out for its complicated and confusing framework, which is mirrored by an overall inefficiency of the system.

Differences can also be found between Germany and England in terms of procedural frameworks. These differences, whether purely legal or merely sociological, should be taken into account as a starting point of the

---

46 I.e. 286 days with a pre-arranged plan; 432 days for procedures where the restructuring plan is designed within the procedure. See Danovi, Giacomelli (n 42) 22.

47 Decreto Legislativo 270/99 - Schede aggiornate al 31 marzo 2018 (n 43) and Decreto Legge 347/03 - Schede aggiornate al 31 marzo 2018 (n 43).

48 i.e. CVA and Scheme of Arrangements for England, Agreements of Debt Restructuring for Italy.

49 Insolvency Act (n 1) Section 238 ff; Cassazione 16.04.1996 n 3588.

50 Legge Fallimentare (n 5) Article 67.

51 InsO (n 3) Section 270b.

harmonization of the regime of transaction avoidance. Indeed, a possible harmonised system should be able to fit and adapt within the different procedural and practical settings.

7.3. Comparison of Insolvency Transaction Avoidance Claims

The legal systems analysed present differences in their transaction avoidance regimes.[52] In particular, the classification and the organisation of the individual claims within the insolvency systems differ between England, Germany, and Italy. In England, the claims can be distinguished in three categories: (i) transaction at an undervalue, (ii) preference and; (iii) transaction defrauding creditors. The latter group can also be seen as a sub-category of transactions at an undervalue since the provision specifically addresses transactions at undervalue undertaken with the purpose to prejudice the general body of creditors.[53]

For this study, however, transactions at an undervalue and transactions defrauding creditors will be considered separately. The latter claim encompasses a subjective element that better fits within the comparison of other claims of Italy and Germany that deal with fraudulent or dishonest behaviour of the debtor.

Germany, as well, provides rules for: (i) transactions that compromise the integrity of the estate and (ii) transactions that privilege one creditor over the others. However, the most relevant element of distinction among the German avoidance claims is the so-called ‘coverage’, which is the evaluation of the relationship between the original credit and the payment made at the eve of the insolvency.[54] Moreover, Germany regulates the intentionally dishonest behaviour of the debtor under the claim of ‘Intentional disadvantage.

Similarly, Italy displays rules that that target transactions at an undervalue and regulations that deal with the debtors’ payment at the eve of the insolvency,

---

52 See supra Chapter 3, 4 and 5.

53 Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* 2nd edn (Jordans 2008) 570.

54 Nadja Hoffmann, ‘La Acción Pauliana en Derecho Alemán: Impugnación de los Acreedores Según la Ley de Impugnación y la Regulación Referente a la Insolvencia’ in Joaquín J. Forner Delaygua (ed) *La protección del Crédito en Europa: La Acción Pauliana* (Bosh 2000) 15, 33.

which may constitute a preference.[55] However, in Italy, greater relevance (both in terms of academic debate and predominance of use in practice) is reserved to the insolvency revocatory action.

The following sections seek to compare these claims to assess their similarities and differences in terms of: (i) what is their scope and rationale; (ii) what are the objective and subjective criteria adopted (iii) who is entitled to bring the transaction avoidance claim to court and (iv) what are their effects.

7.3.1. Scope and Rationale of the Claims

The research aims to analyse and compare the scope and rationale of the avoidance claims in England, Germany, and Italy to assess to what extent the claims are functionally equivalent. It is, therefore, necessary to explain the concepts of 'scope' and 'rationale' for the purposes of the research. Under these labels, the study indistinctively looks at the reasons why the provision is in place.

On the one hand, these labels may address the factual circumstances to which the claims are responding. On the other hand, the justification of the provisions may refer to broader principles of law underpinning the specific claims. The following sections will focus on the individual claims, comparing their function across the three selected European countries.

7.3.1.1. Transaction at an Undervalue

In England, the claim of transactions at an undervalue targets those transactions where the debtor had received no consideration or significantly less consideration than the one given.[56] Under the English doctrine, the scope of the provision is controversial. [57] Historically, the principal rationale was to 'prevent assets from being put in the hands of the debtor's family or associate in order to preserve them from the claims of creditors.'[58] However, the purpose

---

55 Legge Fallimentare (n 5) Articles 64 and 65.

56 Rebecca Parry, James Ayliffe and Sharif Shivji, *Transaction Avoidance in Insolvencies* (Oxford University Press 2011) para 4.01

57 Reinhard Bork, 'Transactions at an Undervalue—A Comparison of English and German Law' (2014) 14(2) Journal of Corporate Law Studies 453, 458; John Armour and Howard Bennet, *Vulnerable Transactions in Corporate Insolvency* (Bloomsbury Publishing 2003) 41.

58 Armour and Benner (n 57) 44.

of the provision is broader in the current practice as it does not only target the family or the associates of the debtor. [59]

The rationale of transactions at an undervalue has been examined in details by John Armour, who suggests the idea of a non-exhaustive list of policy reasons underpinning the provision.[60] First, transactions at an undervalue may seek to address dishonest behaviours of the debtor.[61] This can be easily drawn from the historical roots of the claim that are linked to the claim of fraudulent conveyance.[62] However, currently, fraud is not an element of transactions at an undervalue.[63] Even though the discrepancies in the exchange of considerations may lead to a presumption of bad faith, not all transactions vulnerable under the provision can be considered dishonest. [64]

Second, it has been suggested that the transactions at an undervalue provision seek to reverse a situation of unjust enrichment.[65] While in practice, the claim reverses an improvement of the counterparty's financial situation,[66] the theory of unjust enrichment does not explain why the counterparty's enrichment should be deemed unjust.

Third, it has been suggested that the primary rationale of the provision is to prevent counterparties from entering into a transaction with companies in financial difficulties that are likely to accept higher risks and less consideration than a balanced one.[67] The latter argument is, however, not entirely satisfying as it explains possible practical effects of Section 238 IA more than its rationale. Moreover, it would be just a partial justification as the acceptance of higher risk is only a fraction of the circumstances that the provision targets.

Rebecca Parry suggests that the rationale of transactions at an undervalue can be found in the general principle of maximisation of the value of the estate

---

59 ibid; Insolvency Act (n 1) Section 238.
60 Armour and Benner (n 57) 37 ff.
61 ibid, 42.
62 Douglas G. Baird and Thomas H. Jackson, 'Fraudulent Conveyance Law and Its Proper Domain (1985) 38 Vanderbilt Law Review 829, 830-31.
63 Insolvency Act (n 1) Section 238.
64 Armour and Benner (n 57) 42-43.
65 ibid, 43.
66 Ibid.
67 Armour and Benner (n 57) 46.

available for distribution to the creditors.[68] Expanding on this, the rationale of Section 238 IA can be seen as to serve the general scope of insolvency as a collective procedure. In particular, it safeguards the collectivity principle and the *pari passu* principle.

The collectivity principle provides that insolvency law establishes a compulsory procedure that ensures a cooperative and orderly system of debt collection.[69] The collectivity principle is based on two axioms: (i) the creditor's wealth maximisation;[70] and the principle that that 'parties cannot contract out of the insolvency legislation.'[71] In contrast, the *pari passu* principle provides that the insolvency estate is fairly divided among the creditors according to statutory rules.[72]

The function of the provision is to maximise the value of the estate, which, in turn, may be functional to the *pari passu* principle of distribution. In this sense, when a transaction at an undervalue is undertaken with one of the debtor's creditor, the transaction may be seen as both depriving the estate and altering the distribution scheme. These types of transactions can be classified as both transactions at an undervalue and preferences.

The creditor who benefits from a transaction at an undervalue reduces the assets of the insolvency estate available for distribution to the others. Moreover, the benefit received from the transaction alters the creditor position in insolvency. More likely than not, that creditor would perceive a higher payment than the one he would have received under the statutory distribution scheme.

In contrast, other transactions at an undervalue that are not undertaken with creditors, do not breach the *pari passu* principle. These transactions, instead, breach the collectivity principle exclusively as they hinder the maximisation of the creditors' wealth. Therefore, the rationale of the English transactions at an

---

68 Parry (n 56) 2.27-2.28 and 2.33.

69 Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

70 Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (CUP 2017) 29.

71 Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38, [2012] 1AC 383.

72 Royston Miles Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 7-04.

undervalue is twofold. On the one side, the provision protects the integrity estate for distribution. On the other side, it safeguards the principle of collectivity, preventing parties to contract out of the insolvency laws.

In contrast, Germany provides clear policies underpinning transaction at an undervalue.[73] Section 134 InsO on 'gratuitous performance' deals with gifts and transactions with inadequate consideration. As the English provision, also Section 134 InsO does not require particular subjective elements. The provision can be seen as having a twofold rationale. On the one hand, the InsO provides a general policy underlining all transaction avoidance provisions:

> Legal acts which have been committed before the opening of insolvency proceedings and are detrimental to the insolvency may be avoided by the insolvency administrator as provided in Sections 130 to 146.[74]

From the text of Section 129 InsO, it is clear that the overarching principle underpinning transaction avoidance actions - including transactions at an undervalue - is to prevent any detriment to the creditors.[75]

On the other hand, the provision of transactions at an undervalue has an additional rationale that is connected with general policies of the German legal system.[76] In particular, in the German legal system, a party who benefited from a free performance is not deemed as worthy of protection as the person who has undertaken the counter-performance.[77] This general principle also applies to insolvency circumstances. Therefore, in the balance of the interests of the parties, the interests of the beneficiary of a gratuitous performance cave in for the protection of the debtor's assets. [78]

---

73 Reinhard Bork, 'Transaction at an Undervalue: A comparison of English and German Law' (2014) 14 Journal of Corporate Law Studies 453, 457; Thomas Bachner *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse* (Cambridge University Press 2009) 55.

74 InsO (n 3) Section 129 InsO.

75 Bachner (n 73) 55.

76 Bork (n 73) 458.

77 Ibid.

78 Ibid.

In Italy, the provision that deals with transactions at an undervalue is Article 64 l.f. Unlike England and Germany, where the provisions cover both gifts and transactions with significantly unbalanced considerations, in Italy, Article 64 l.f. targets only acts of gratuitous nature.[79] Similarly, also the rationale of the Italian transactions at an undervalue differs from the British and German approach.

Traditionally, in Italy, the effects of the provision are considered a punitive measure.[80] The punitive effects of the claim are to render ineffective the unlawful act of the debtor.[81] Under the Italian doctrine, it is considered unlawful for the debtor to neglect to perform their obligations while performing gratuitous dispositions at the expenses of their creditors.[82]

This approach, however, is based on considerations similar to those discussed under the German approach. In particular, the claim is based upon policy considerations of fairness.[83] Similarly to the German doctrine, the Italian approach recognises different values in the interests of a beneficiary of a gratuitous performance and those of the creditors.[84] This is because the acts of gratuitous nature impoverish the insolvency estate without bringing a counter value. [85]

Moreover, authors are supporting additional protective purposes of the provision.[86] In particular, it has been held that the position safeguards the creditors of the debtor from prejudice arising from the debtor's act.[87] The provision seeks to strike a balance between the debtor's economic freedom and the interests of the creditors to see their credits satisfied.[88] The claim

---

79 Legge Fallimentare (n 5) Article 64.

80 Cassazione 18.03.2010 n 6538: Riccardo Riedi, 'Azioni di Inefficacia e Azione Revocatoria nel Fallimento' Vicenzo Vitalone, Ugo Patroni Griffi and Riccardo Riedi (edn) Le azioni Revocatorie: La Disciplina, Il Processo (UTET 2014) loc2729 ff.

81 ibid, loc 2754.

82 ibid, loc 2762

83 Cosimo D'Arrigo, 'Atti a titolo gratuito e pagamento di debiti scaduti' G. Fauceglia e L. Panzani edn Fallimento e altre procedure concorsuali (2009 vol 1 UTET) 454.

84 ibid.

85 ibid.

86 Luciano Matteo Quattrocchio, 'Analisi del novellato art. 64 l.f.' (2016) 2 Diritto ed Economia dell'Impresa 392.

87 ibid 13.

88 ibid.

solves this conflict between the interests of the parties in favour of those of the creditors.

This recent doctrinal shift towards a protective rationale of Article 64 l.f. has not only been recognised by scholars, but it has been suggested by the Parliamentary Report accompanying the 2005 reform.[89] The 2005 Reform specified that the effects of the claim start upon the transcription of the court declaration of the ineffectiveness of the transaction.[90] In this context, the legislator highlighted that the automatic operation of the judgment is motivated by the necessity to reduce times and costs of the insolvency proceedings for the benefit of the creditors.[91]

To conclude the analysis of the rationale of transactions at an undervalue, it can be appreciated that the rationale of these claims is not straightforward in the countries analysed. Only Germany has a clear policy underpinning the claim, while in England and Italy, there are still on-going debates on the topic. All three counties, however, share some protective intents, whether these being the protection of the value of the estate for distribution purposes, like in England, or a more direct safeguard of the creditors against prejudice, as in Germany and Italy.

The confusion and uncertainty concerning the rationale of the provisions may undermine the harmonisation process. Indeed, a European Union legislative intervention may not be able to take into account all the different policies that underpin the claim in different countries.

7.3.1.2. Preferences

Preferences can be found in all three legal systems analysed. Preferences are those claims that address pre-insolvency transactions between the debtor and one or more of their creditors and that put the creditors in a better position than the one they would have been in under the statutory schemes of distribution.

---

89 Parliamentary Report on Law Decree 22.06.2012 n 83 < http://documenti.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0061600.pdf> accessed 21.07.2020.

90 Legge Fallimentare (n 5) Article 64(2).

91 Parliamentary Report on Law Decree 22.06.2012 n 83 (n 89).

In England, the claim can be traced back at least to the eighteen century, while some scholars suggest that an archetype of preference can already be found in the Elizabethan Statute of 1571.[92] Under the current insolvency law framework, preferences are regulated by Section 239 IA, which deals with advantages given by the debtor with the desire to prefer one or more creditors at the expenses of the other creditors.[93]

The rationale of the provision has been subject to academic debate, but overall the issue is more straightforward than the case of transactions at an undervalue. In regard to preferences, there are at least two possible rationales: (i) the equal treatment of creditors and (ii) deterrence of asset-grabbing by the creditors.[94]

The first approach recognises the scope of preference to safeguard the proper application of the *pari passu* principle. In this regard, the Cork Report states that:

> the justification for setting aside a disposition of the bankrupt's assets made shortly before bankruptcy is that, by depleting his estate, it unfairly prejudice his creditors (...) by altering the distribution among all creditors impossible.[95]

However, this interpretation disregards the facts that only preferences that were desired by the debtor are voidable under Section 239 IA. The opportunity of the subjective element had been called into question already at the time of the Cork Report.[96] On the one hand, the subjective element is useful to limit the scope of application of claim in support of legal certainty. On the other hand, the subjective limitation undermines the scope of safeguarding the equal treatment of unsecured creditors. The claim does not concern transactions that create an involuntary preference but only those preferential transactions that were undertaken by the debtor with the desire to prefer.

---

92 Adrian Walters 'Preferences' in John Armour and Howard Bennet eds *Vulnerable Transactions in Corporate Insolvency 127.*

93 Insolvency Act (n 1) Section 239.

94 Andrew Keay, 'In Pursuit of the Rationale behind the Avoidance of Transactions' (1996) 18 The Sydney Law Review 55.

95 Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (Cork Report) para 1209.

96 ibid paras 1248 ff.

The subjective element can be seen as a residue of the previous claim of preference that targeted 'fraudulent preferences'.[97] Moreover, the case law on Section 239 IA has lessened the boundaries of the subjective element: judges do not require a predominant desire to prefer, but they deem sufficient for the insolvency practitioner to prove the awareness of the debtor of possible prejudicial effects.[98]

Under the influence of American scholarship, the second approach suggests that an additional rationale for preference is the deterrence from asset-grabbing by creditors.[99] In this sense, the claim should prevent the creditors from engaging in preferential transactions with the debtor on the basis that those transactions would be later challenged in the insolvency proceedings.

The provision at stake should, therefore, prevent creditors from racing against each other to collect as much as possible of what is due to them. However, this possible rationale has not been accepted by the English scholarship concerning English preferences.[100] This due to various reasons. First, the English system encourages creditors to pursue their credit.[101] Second, the system does not impose any additional penalty to preferred creditors than to pay back the amount received with interests.[102] Finally, the claim targets the debtor's actions in order to eliminate favouritism in breach of the *pari passu* principle rather than addressing the creditors.[103]

The German approach to preferences is more complicated than the English approach. German insolvency law deals with preferential transactions in two provisions (Section 130 and 131 InsO) that cover two distinct sets of circumstances. Section 130 InsO deals with those legal acts undertaken by the debtor at the eve of insolvency that constitute payment of a precedent debt.[104] Section 131 InsO, instead, deals with legal acts that fulfil a previous

---

97 Walters (n 92) 127.
98 Re MC Bacon Ltd [1990] BCLC 324.
99 Walters (n 92) 133.
100 ibid 135; Cork Report para 1256.
101 ibid 136 ff.
102 ibid
103 Parry (n 56) 5.01 ff.
104 InsO (n 3) Section 130.

obligation, but they are undertaken differently from what was initially agreed by the parties.[105]

Additionally, the residual provision of Section 132 InsO deals with transactions that constitute a direct disadvantage for the general body of creditors. However, the scope of application Section 132 InsO is not limited to transactions concluded by the debtor with their creditors as it applies to third parties as well.

Moreover, the concept of direct disadvantage to the creditors may take place both in the form of preferences and transactions at an undervalue. Therefore, in comparison with English transaction avoidance system, Section 132 InsO could be seen as a hybrid between preferences and transactions at an undervalue.

The rationale of these three provisions is to safeguard the proper application of the principle of *par condicio creditorum*,[106] which is the continental equivalent of the English *pari passu* principle.[107] Although England and Germany share the same rationale for preferences, it is evident that the German response to preferential payments differs from the English approach.

Indeed, while in England, the claim focuses on the preferential intention of the debtor, Germany adopts a more objective approach based on the disadvantage created to the general body of creditors.[108] Moreover, Section 129 InsO underpins all German transaction avoidance claims. Therefore Section 130,131 and 132 InsO share the same goal to protect the creditors of the insolvent debtor from any disadvantage – whether direct or indirect.[109]

The approach differs once again in the Italian insolvency system. In Italy, Article 65 l.f. deals with preferential transactions, but it is limited to payments of debts not yet due. Secondly, like Article 64 l.f., the claim at stake operates based on mere objective elements.[110] Under Article 65 l.f., payments of debts

---

105 InsO (n 3) Section 131.
106 i.e. equal treatment of the creditors.
107 Bachner (n 73) 57.
108 InsO (n 3) Section 129.
109 ibid.
110 Lino Guglielmucci, *Diritto Fallimentare* 6th edn (Giapichelli 2014) 169 ff.

not yet due are ineffective, if undertaken by the debtor in the two years before the declaration of insolvency.[111]

In practice, the provision seems less relevant than the English and German counterparties as its scope of application is narrowly limited to payments that are not yet due. In contrast, preferential payments of due debts and other preferential transactions fall under the broader scope of application of the invalidating action that will be considered in the next section.[112]

The rationale of Article 65 l.f. is universally recognised by the Italian jurisprudence as functional to the protection of the equal treatment of the creditors.[113] The scope of the provision is to fictionally reconstruct the complex of the debtor's assets and readdress the violation of the equal treatment of creditors.[114] The claim prevents creditors from receiving an advantage - in the form of early payments - in relation to the statutory scheme of distribution and in violation of the principle of equal treatment of creditors.[115]

Overall, the approaches on preferential transactions differ procedurally among the selected insolvency systems. However, while the claims present substantially different procedural layout, their rationale is convergent. In all legal systems analysed, the scope of preferences is to safeguard the principle of equal treatment of the creditors. Moreover, in all countries analysed, the claim seeks to prevent the creditors from advancing in their right to see their debt repaid, and to readdress transactions that violate the statutory schemes of distribution.

7.3.1.3. Transaction Detrimental to Creditors

Following the discussion on the rationale of transactions at an undervalue and preferences, this section focuses on the rationale of transactions detrimental to the creditors. In broad terms, this type of claims deals with detrimental transactions entered by the parties with some degree of intention (or awareness) to prejudice the interests of the debtor's creditors.

---

111 Legge Fallimentare (n 5) Article 65.
112 Guglielmucci (n 110) 178.
113 Cassazione 04.12.1972 n 3491; Cassazione 05.04.2002 n. 4842.
114 ibid.
115 ibid.

In England, the claim of transactions detrimental to the creditors is provided in Section 423 IA. The provision allows for challenging transactions entered by the debtor with the purpose of 'putting assets beyond the reach of a person (…) or otherwise prejudicing the interests of such a person'.[116] The claim is not – strictly speaking - an insolvency claim as it does not depend upon the debtor's insolvency.[117]

One the one hand, the claim does not require the debtor to be factually insolvent at the time of the transaction.[118] On the other hand, the claim can be invoked even outside the procedural framework of insolvency.[119] Moreover, Section 423 IA is the successor of an action provided by the 13 Statute of Elizabeth of 1571, later evolved in Section 172 of the Property Act 1925 and, therefore, encompassed in the realm of property law.[120]

As previously mentioned, under the current legislation, the provision of transaction defrauding creditor can be used within the insolvency context and outside of it. This section seeks to analyse the rationale of the provision in the insolvency context. However, it cannot fail to address the general principles that govern the provision outside the insolvency context.

In the insolvency context, it has been held that the provision seeks to maximise the value of the insolvency estate and prevent debtors from depleting the assets available for distribution.[121] However, this rationale is limited by Section 423 IA to (i) transactions at an undervalue and; (ii) transactions presenting the debtor's intentional element to remove their assets from the creditors' reach.[122]

Concerning the rationale of the provision, these limitations may be understood from a historical perspective, by looking at the original claim and its functioning. The abovementioned Elizabethan statute clearly stated that it

---

116 Insolvency Act (n 1) Section 423.

117 Armour and Benner (n 57) 95.

118 Parry (n 56) 10.01.

119 Insolvency Act (n 1) Section 424(c). See also Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (Cork Report) para 1213.

120 See 13 Eliz I, c 5: Property Act 1925 Section 172. See generally Parry (n 56) 10.03; Armour (n) 96 ff.

121 Parry (n 56) 2.28 and 2.31; Keay and Walton (n 53) 570; Andrew Keay, *McPherson's Law of Company Liquidation* (3rd edn, Sweet and Maxwell 2013) para 11-109.

122 Insolvency Act (n 1) Section 243.

sought to safeguard the fair functioning of the credit system, protecting creditors that have been 'in anywise disturbed, hindered, delayed or defraud'[123] by their debtor.

In the analysis of the current legislation, Professor Rebecca Parry, recalling American scholarship,[124] highlighted several moral principles underpinning Section 423 IA.[125] First, the claim encompasses the moral principle that the debtor should be honest with their creditors about the availability of the assets. Second, the debtor should be honest in their dealing, refraining from disposing of assets instead of making them available to their creditors. Third, the claim embodies the principle that the debtor should refrain from hindering the creditors' claims.[126]

Overall, the analysis of Parry connects the rationale of Section 423 IA to the purpose of its historical precedent. Indeed, the current claim seems anchored to the principle of safeguard of the proper functioning of the credit system. It targets misbehaviour of the debtor that cannot be adequately defined as fraudulent but encompass a dishonest purpose, – that is not necessarily the only purpose nor a predominant one - which may undermine the reliability of the credit system.[127]

Germany, as well, presents a distinct claim for transactions undertaken by the debtor with the intention to prejudice their creditors. The claim is provided in Section 133 InsO, which traces its roots back to the roman *actio pauliana*.[128] In contrast to the English claim, the German approach requires not only the intention of the debtor but also awareness of their counterparty of the detrimental effects of the transaction.[129]

As the German claims already analysed (Section 130, 131, 132 and 134 InsO) also Section 133 InsO finds its primary rationale in Section 129 InsO. It seeks,

---

123 See 13 Eliz I, c 5, ss I-II.

124 Robert Charles Clark, 'The Duties of the Corporate Debtor to Its Creditors' (1977) 90 Harvard Law Review 505.

125 Parry (n 56) 2.10.

126 ibid.

127 *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981; *JSC BTA Bank v Mukhtar Ablyazov, Madiyar Ablyazov* [2018] EWCA Civ 1176.

128 Alexander Trunk, 'Avoidance Transaction under the New German Insolvency Code' (2000) 9 International Insolvency Review 37, 38.

129 Section 133 InsO.

therefore, to safeguard creditors from any detriment caused by the debtor with the intention to prejudice them. Nevertheless, the discourse on the rationale of Section 133 InsO is more complex than the mere reference to Section 129 InsO.

Firstly, the provision of Section 133 InsO, like the English Section 423 IA, it is not considered purely of insolvency nature.[130] Section 133 InsO has a similar structure and purpose to Section 3 AnfG that responds to transactions detrimental to the creditors outside the insolvency context.[131] Moreover, Section 133 InsO looks at the creditors' disadvantage not at the moment of the opening of the insolvency but at the time of the transaction.[132]

Additionally, it has been suggested that the claim does not seek to bring forward the application of the equal treatment of the creditors like the special avoidance provisions of Sections 130-132 InsO.[133] Instead, the claim can be justified by the moral principle of honesty.

On the one side, the claim targets legal acts which encompass a detrimental intention of the debtor and a collusive behaviour of the beneficiary.[134] On the other side, it has been suggested that the provision encourages creditors to behave in a normative manner during the ordinary course of business and at the eve of the debtor's insolvency.[135]

Secondly, the nature of the claim can help to clarify its rationale. Traditionally, the German scholarship considered transactions detrimental to the creditors a claim in torts. The behaviour of the creditor was deemed to breach their duty of care to take reasonable steps to satisfy their creditors' claims. In contrast,

---

130 BGH judgment of 10.02.2005 IX ZR 211/02 *OLG Dresden* (lexetius.com/2005, 20, 204) para 23.

131 Law on the contestation of legal acts of a debtor outside the insolvency proceedings (hereinafter AnfG) law of 05.10.1994 (BGBl. I p. 2911), came into force on 01.01.1999 last amended by law of 29.03.2017 (BGBl. I p. 654) Section 3; Thorsten Patrick Lind, *Zur Auslegung von § 133 InsO, insbesondere im System der Anfechtungstatbestände* (Tenea Verlag 2006) 34

132 BGH judgment of 09.06.2016 IX ZR 153/15 *Düsseldorf Higher Regional Court* (lexetius.com/2016, 2078) para 10; BGH judgment of 10.01.2008 IX ZR 33/07 *OLG Dresden* (lexetius.com/2008, 124) paras 17-26.

133 Lind (n 131) 34.

134 BGH judgment of 10.02.2005 IX ZR 211/02 *OLG Dresden* (lexetius.com/2005, 20, 204) para 23.

135 Reinhard Bork, 'Grundtendenzen des Insolvenzanfechtungsrechts' (2008) Zeitschrift für Wirtschaftsrecht 1041.

more recent developments of scholarship and jurisprudence support the idea that the claim is based on an obligation deriving from the law rather than a tortious event.[136]

Nowadays, the interpretation of transactions detrimental to the creditors as a claim in torts has been abandoned.[137] It has been argued that the claim cannot be founded in a tortious obligation because only the debtor owes a duty of care to the creditors. Such a duty of care stems from the credit-debit relationship. The counterparty of the transaction does not take part in the relationship between the debtor and the creditors. The counterparty does not owe any duty to the creditors. Additionally, the counterparty cannot be said to actively participate in the breach of the debtor, as Section 133 InsO requires the mere counterparty's knowledge of the prejudice.[138]

Moreover, under the German system, tortious obligations include the obligation to compensate for the loss of profit caused by the wrongful event.[139] In contrast, Section 133 InsO only requires the restitution of the amount abstracted from the insolvency.[140]

Currently, the claim is considered a standalone institution that is not categorised either under tort or contractual matters.[141]It is worth noting, however, that the claim shares with the category of tort some functions. Primarily, it displays the corrective and deterrent functions of tort law. On the one hand, the claim seeks to correct the debtor's wrongful behaviour and reverse its consequences. On the other hand, as Professor Bork pointed out, the claim includes a function of deterrence for the debtor and third parties not to enter in a transaction that would later be invalidated.[142]

---

136 Lind (n 131) 45 ff.
137 ibid.
138 ibid 47.
139 Bürgerliches Gesetzbuch (hereinafter BGB; i.e. Civil Code) in the version of the notice of 02.01.2002 (BGBl. I p. 42, p. 2909, 2003 p. 738) last amended by law of 31.01.2019 (BGBl. I p. 54) Section 823.
140 Lind (n 131) 45.
141 ibid 49.
142 Bork (n 135).

Also, in Italy, the issue of the rationale of transactions detrimental to the creditors has been subject to intense debate.[143] As well as in Germany, in Italy, there are elements of tortious liability in transactions detrimental to the creditors, although the claim is not deemed of a tortious nature.

Transactions detrimental to the creditors is regulated in Article 67 l.f., which is the main transaction avoidance action within the Italian insolvency system.[144] The revocatory action provision is much more complex than the rules of gratuitous acts and payments.[145] Moreover, historically, the revocatory action has been seen as the counterpart of the ordinary invalidating action available under general law.[146] Currently, the insolvency action does not examine the intention of the debtor; however, originally, the claim required a subjective element of deception (i.e. *consilium fraudis*[147]).[148] Such a subjective element has been abandoned with the reform of the insolvency system in 1942.[149]

As illustrated in chapter 6, both the insolvency and ordinary revocatory claims target acts that are detrimental to the creditors. Traditionally, both scholarship and jurisprudence supported the idea that the two actions find their rationale in the protection of the 'general guarantee over the debtor's estate'.[150] As previously discussed in chapter 6, this is the principle of economic responsibility, according to which when the debtor does not perform their obligations, all their assets can be subjected to credit enforcement.[151]

The traditional view on the rationale of the revocatory actions interpreted both actions as instrumental to the ability of the creditor to safeguard the generality

---

143 Cassazione 11.11.2003 n 16915; Cassazione 18.01.1991 n 495; Cassazione 08.03.1993 n 2751; Cassazione 28.04.2004 n 8096; Cassazione 08.07.2004 n 12558; Cassazione 16.03.2005 n 5713; Cassazione SU 28.03.2006 n 7028; Cassazione 10.11.2006, n. 24046; Cassazione 26.02.2010 n 4785; Cassazione 08.03.2010 n 5505; Cassazione 19.12.2012 n. 23430; Cassazione 12.12.2014 n. 26216.

144 Legge Fallimentare (n 5) Article 67.

145 ibid.

146 Francesco Ferrara, *Il Fallimento* (Giuffré 1995) 423; Ragusa Maggiore, *Istituzioni di Diritto Fallimentare* (2nd ed CEDAM 1994) 200 ff.; Cassazione 10.11.1992 n 12091.

147 i.e. purpose of fraud.

148 Royal Decree 14.12.1882 n 1113 (Commercial Code 1882)

149 Giorgio Cherubini, *L'Azione Revocatoria nel Fallimento* (Giuffré editore 2010) 6.

150 ibid.

151 Iacopo Pietro Cimino, *Manuale Operativo per la Tutela del Credito* (Halley editrice 2006) 243 ff.

of the debtor's assets from the prejudice deriving from the debtor's acts.[152] Under this theory, the actions have a compensatory nature that indemnifies the damage suffered by the creditors.[153] However, while this theory may be sustained for the ordinary revocatory action, its validity concerning the insolvency revocatory action has been called into question since the 70s.[154]

It has been argued that the compensatory function of the action is inconsistent with the insolvency claim because the damages are regulated differently under the civil claim and in the insolvency claim. On the one hand, the use of the ordinary revocatory action requires the parties to prove damages (so-called *eventus damni*[155]). In other words, the civil action requires the creditor to prove that the debtor damaged the creditor's interests by diminishing their assets as far as rendering them insufficient to cover the creditor's claims.[156]

In contrast, the insolvency provision does not encompass damages as an element of the claim.[157] In the past, it has been held that in the insolvency revocatory claim the damages are presumed by law.[158] This was an absolute presumption that certain acts of the debtor undertaken during the suspect period were detrimental to the creditors.

The modern approach suggests that the revocatory action does not aim to compensate damages but to safeguard the equal treatment of the creditors.[159] Currently, the rationale is to recover what has been removed from the insolvency estate at the eve of insolvency. The scope is not to compensate the creditors but to enforce the equal treatment of the creditors.

The underlying presumption is that any act (occurred within the suspected period) prejudices the equal treatment of the creditors. The action, therefore,

---

152 Francesco Ferrara, *Il Fallimento* (Giuffré 1995) 423; Ragusa Maggiore, *Istituzioni di Diritto Fallimentare* (2nd ed CEDAM 1994) 200 ff.; Cassazione n 502/1951 (n 146); Cassazione n 3298/1971 (n 146); Cassazione n 12091/1992 (n 146).

153 ibid.

154 Alberto Maffei Alberti *Il Danno nella Revocatoria Fallimentare* (CEDAM 1970); See Cassazione 20.09.1991 n 9853: Cassazione 16.09.1992 n 10570; Cassazione 12.11.1996 n 9908; Cassazione 19.02.1999 n 1390; Cassazione 12.01.2001 n 403.

155 i.e. the event of damages.

156 Royal Decree 16.03.1942 n 262 (Civil Code) Article 2901.

157 Cassazione 15.09.1997 n 9146.

158 Alberto Maffei Alberti *Il Danno nella Revocatoria Fallimentare* (Cedam 1970) 144.

159 Massimo Fabiani, 'La Revocatoria Fallimentare nelle Prospettive di Riforma' (2001) 124(9) Il Foro Italiano 245, 255; Cassazione 28.03.2006 n 7028.

seeks to reconstruct the value of the insolvency estate, which is instrumental to a fair distribution among the creditors. Therefore, the current Italian approach attributes a distributive purpose to the insolvency revocatory action: by enforcing the equal treatment of the creditors, the claim spreads the possible losses amongst all creditors.[160]

Overall, the comparison of the rationale of transactions detrimental to the creditors shows that the claim is not an insolvency claim *per se* in any of the countries analysed. Conversely, it is an atypical action that comes to serve some scopes of insolvency such as the maximisation of the value of the estate for distribution purposes. However, it also shares some commonalities with aspects of tort law, at least in Italy and Germany. Both these countries share the common historical roots of the claim from the Roman *actio pauliana*.

However, the Italian development of the claim in the insolvency context has lost the subjective component of the debtor's state of mind. It can be noted, instead, that the subjective element persists in the civil action. Generally, in all the countries analysed, the claim targets the debtor's behaviours that cause some prejudice to the creditors (qualified in Italy as the disruption of the equal treatment of the creditors). The general principles underlying the provisions appear to be the protection of the creditors from the prejudice and safeguard the predictability of the credit system.

7.3.2. The Objective and Subjective Criteria

Following the general analysis of the rationale of the main insolvency transaction avoidance claims, the research aims to address the peculiarities of the actions in the selected legal systems. The present section compares the objective and subjective elements of the actions. The comparison is supported by tables that visually present the differences between England, Germany, and Italy.

---

160 Piero Pajardi, *Il Sistema Revocatorio Ordinario, Fallimentare, Penale, tra Teoria e Applicazioni* (Giuffré 1990) 87; Giuseppe Terranova, *Le Procedure Concorsuali Problemi d'una Riforma* (Giuffré 2004) 52.

7.3.2.1 The Objective Elements

The objective elements can be identified as those facts and conditions established by the law upon which the availability of the actions depends.[161] In particular, the research addresses the so-called 'suspect periods' and the debtor's factual insolvency. The suspect periods are those time-windows before the opening of the insolvency proceedings where a transaction is vulnerable. In contrast, the factual insolvency refers to the inability of the debtor to pay their debts at the time of the transaction (original insolvency) or as a consequence of the transaction itself (consequent insolvency).

A comparative table on the objective elements encompassed in the individual claims is provided as follow:

	Provisions	**Suspected periods**	**Factual insolvency**
England	Section 238 IA	2 years	Yes
	Section 239 IA	6 months; 2 years for connected persons	Yes
	Section 423 IA	No suspect periods, limitation periods apply	No
Germany	Section 130 InsO	3 months	Yes
	Section 131 InsO	1-3 month/s	Yes
	Section 132 InsO	3 months	Yes
	Section 133 InsO	10 years/4 years for transactions with preferential effects.	No
	Section 134 InsO	4 years	No
Italy	Article 64 l.f.	2 years	No
	Article 65 l.f.	2 years	No
	Article 66 l.f.	1 year	Partially

161 Gerard McCormack, Andrew Keay and Sarah Brown, *European Insolvency Law: Reform and Harmonisation* (Elgar 2016)163.

		6 months for granting of certain securities and preferential behaviours	

Table 7.1.

As it is clear from table 7.1, the suspect periods vary extensively between the selected legal systems. Moreover, within the individual legal systems, there are relevant distinctions. In particular, in England, the suspect period for transactions at an undervalue (Section 238 IA), and preferences (Section 239 IA) is limited at two years.[162] In the case of preferences, this two years period applies only when the preference is granted to connected persons.[163] It is further limited to six months for preferential transactions concluded with non-connected persons.[164]

In contrast, the provision dealing with transactions defrauding creditors (Section 423 IA) is not bounded by a suspect period. The provision also lacks a specific statutory limitation period. However, case law has limited the application of Section 423 IA by applying the Limitation Act 1980.[165] Section 423 IA is available to the victim for six or twelve years, starting from the date of the transactions. Different limitation periods apply if the claim is a monetary claim or not. [166]

Likewise, the German insolvency system presents substantive differences in terms of suspect periods between Sections 130-132 InsO and transactions detrimental to the creditors (Section 133 InsO). Indeed, the special avoidance provisions have a minimal suspect period of 3 months.[167] Moreover, in the case of incongruent coverage of Section 131 InsO, the period is reduced to one month.

---

162 Insolvency Act (n 1) Section 240.
163 ibid.
164 Insolvency Act (n 1) Section 240(1)(b).
165 *Hill v Spread Trustee Company Ltd* [2007] 1 W.L.R. 2404, 117-118; *Giles v Rhind* [2009] Ch. 191.
166 Keay and Walton (n 53) 576.
167 InsO (n 3) Sections 130,131 and 132.

In this case, the suspicion on the transaction is so acute that the provision does not require to prove the additional element of factual insolvency.[168] In contrast, the provision on transactions detrimental to the creditors presents a suspect period of ten years, reduced to four if the transaction grants security or satisfaction of a credit to the counterparty.[169] For gratuitous performances, the suspect period is four years.[170]

Italy presents more uniform timeframes concerning the suspect periods. The Italian legislation provides a two-years suspect period for acts of gratuitous nature and payments of debt not yet due.[171] The period is reduced to one year for the revocatory action.[172] The period further limited to six months for the use of the revocatory action against particular transactions involving either the granting of a security or the payment of a debt.[173]

As illustrated, the timing of the suspect periods changes considerably from one country to another. Moreover, it is worth noting that within the analysed legal systems, the suspect periods have been modified in all the systems in the last thirty years. In England, there has been a reduction of the suspect periods for transaction at an undervalue: from a ten-years period before the Insolvency Act 1986,[174] to the current two years period.[175]

In Germany, a reform of the suspect periods has recently taken place. In 2017, the German Insolvency reform shortened the suspect period for transaction defrauding creditors from ten to four years in certain circumstances.[176] In Italy, the 2005 Insolvency reform halved the suspect period for the revocatory action

---

168 ibid Section 131(1)(1)
169 ibid Section 133.
170 ibid Section 134.
171 Legge Fallimentare (n 5) Articles 64 and 65.
172 ibid Article 67(1).
173 ibid Article 67(1)(4) and 67(2).
174 Bankruptcy Act 1914 Section 42.
175 Cork Report 1232.
176 Law to improve legal certainty in case of challenges according to the Insolvency Code and according to the Anfechtungsgesetz from 29.03.2017, Federal Law Gazette Year 2017 Part I No. 16, issued on 04.04.2017, page 654.

of Article 67 l.f.[177] Additionally, all the countries in analysis provide for longer suspect periods when connected parties are involved.[178]

Regarding the additional requirement of factual insolvency, in England, the element is displayed only in transactions at an undervalue and preferences. Section 240 IA requires the debtor to be unable to pay their debts at the time of the transaction (or as a consequence of it) according to the meaning of Section 123 IA.[179] In contrast, such an element is not required for transactions defrauding creditors.[180]

Similarly, German Insolvency law requires the debtor to be insolvent at the time of the transaction in Sections 130 (Congruent Coverage), 131 (Incongruent Coverage) and 132 InsO (Immediately Detrimental Legal Acts).[181] Instead, it does not require factual insolvency in Section 134 InsO (Gratuitous Performances).[182] Moreover, as in England, Germany does not require the debtor's factual insolvency in the case of transaction detrimental to the creditors (Section 133 InsO - Intentional Disadvantage).[183]

In contrast, the Italian approach is almost the opposite of the English one. Indeed, Italy does not require the debtor factual insolvency for acts of gratuitous nature and payments of not yet due debts.[184] In contrast, the debtor's factual insolvency is required for the application of Article 67 l.f.[185]

The timing of the suspect periods and the requirement of factual insolvency answer different policies considerations such as – among others - (i) legal

---

177 Federico Guido, 'La Riforma dell'Azione Revocatoria Fallimentare' (2008) 2 Il Nuovo Diritto Fallimentare e il Ruolo del Notaio: Atti del Convegno tenutosi a Modena il 19 gennaio 2008 <http://elibrary.fondazionenotariato.it/articolo.asp?art=13/1303&mn=3> accessed 21.07.2020.

178 Insolvency Act (n 1) Section 204; InsO (n 3) Section 138; Legge Fallimentare (n 5) Article 69.

179 Insolvency Act (n 1) Section 240.

180 ibid Section 423.

181 InsO (n 3) Section 130,131, and 132.

182 ibid Section 134.

183 ibid Section 133.

184 Legge Fallimentare (n 5) Articles 64 and 65.

185 The wording of the Italian provision does not directly require the debtor's factual insolvency; rather, it requires the knowledge of the counterparty of the debtor's inability to pay their debts. Therefore, it requires the debtor's inability to pay their debts only implicitly.

certainty; (ii) justice; (iii) procedural needs.[186] First, the suspect periods limit the applicability of the action to a period of time antecedent to the opening of the insolvency proceedings.

This time limitation is an attempt to strike a balance between the scope of insolvency to provide a collective debt solution and the necessity of legal certainty of the transactions.[187] The suspect periods limit the reach of insolvency scopes to a set time, leaving untouched the transactions that took place before the said periods. This, consequently, increases the level of stability of the transactions occurred before the debtor's insolvency.

The same policy can also justify the requirement of factual insolvency. The requirement sets boundaries to the application of insolvency law as a special law that is applicable only in the extraordinary circumstances of when the debtor is unable to pay their debts. This grants legal certainty to the transactions undertaken under normal circumstances and therefore safeguard the parties' autonomy.[188]

Second, the suspect periods are conceived in balance with the subjective criteria in order to achieve an overall objective of justice. The claims of transaction avoidance often involve subjective elements such as the debtor's intention or the counterparty's awareness. In the Cork Report, it has been suggested that the scrutiny of the subjective criteria in a period longer than six-twelve months will 'work injustice'.[189] This seems to be particularly true in those case where the parties involved in the transactions are asked to prove facts and states of mind against presumptions set against them.

Third, the necessity to limit the applicability of the actions and the difficulties in proving the subjective elements of the claims may affect the procedural efficiency of the proceedings. In Italy, for instance, the 2005 reform shortened

---

186 Rolef de Weijs, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' Amsterdam Law School Legal Studies Research Paper No. 2011-03, Centre for the Study of European Contract Law Working Paper No. 2011-06, 4.

187 Advisory Report on 2017 Reform 'Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz (6. Ausschuss)' Recital A < http://dipbt.bundestag.de/dip21/btd/18/111/1811199.pdf > accessed 21.07.2020. See also Parry (n 56) 2.20.

188 de Weijs (n 186) 5.

189 Cork Report 1260.

the suspect period for procedural efficiency purposes.[190] In practice, it was taking too long to insolvency practitioners to collect evidence on the state of mind of the parties. A shorten suspect period means a more manageable burden of proof on the insolvency practitioner. The facts called into question are closer in time, and they can more easily be recalled or reconstructed.

These considerations seem at the basis of the adoption of the suspect periods and the additional requirement of factual insolvency. The balance among the different instances and the individual policy needs of the various legal systems may explain the discrepancies among the selected countries and the internal adjustments of the suspect periods over time.

7.3.2.2 The Subjective Elements

The subjective elements of the actions address the state of mind of the parties involved in the transaction vulnerable under the insolvency law rules. All the countries analysed present some subjective criteria either on the debtor side or on the counterparty of the transaction. The presence of the subjective criteria within the different claims can be summarised as in the table below.

	Provisions	**Debtor's subjective element**	**Counterparty's subjective element**
England	Section 238 IA	Possible defence in good faith	No
	Section 239 IA	Influenced by the desire to prefer	No
	Section 423 IA	Purpose	No
Germany	Section 130 InsO	No	Knowledge of insolvency
	Section 131 InsO	No	Knowledge of insolvency or of the discriminatory

190 Guido (n 177).

			effects of the transaction
	Section 132 InsO	No	Knowledge of insolvency
	Section 133 InsO	Intention to disadvantage creditors	Knowledge of insolvency
	Section 134 InsO	No	No
Italy	Article 64 l.f.	No	No
	Article 65 l.f.	No	No
	Article 67 l.f.	No	Knowledge of insolvency

Table 7.2

As shown in the table, the selected countries have a diverging approach to the subjective elements of transaction avoidance actions. In England, the debtor's state of mind comes into consideration in preferences (Section 239 IA) and transactions defrauding creditors (Section 423 IA). For transactions at undervalue, instead, there are no subjective requirements on the parties, but the debtor is granted a defence of good faith.[191] Conversely, good faith comes into consideration as a defence for the counterparty involved in the transaction defrauding creditors (Section 423 IA).[192]

In contrast, the German approach focuses exclusively on the counterparty's state of mind, except for transactions detrimental to the creditors.[193] In particular, in Sections 130, 132 and 133 InsO, the subjective elements consist of the counterparty's knowledge of the debtor factual insolvency. Alternatively, in the case of incongruent coverage (Section 131 InsO), the subjective requirement on the counterparty focuses on the knowledge of the detrimental

191 Insolvency Act (n 1) Section 238(5).
192 ibid Section 425 (2).
193 InsO (n 3) Section 130-134.

effects of the transaction on the debtor's creditors.[194] This, however, requires the preliminary knowledge of the debtor's financial situation.

In contrast, again, Italy adopts a more radically objective approach to transaction avoidance. The Italian claims lack any subjective requirements on the debtor's part. Instead, the counterparty's knowledge of the debtor's factual insolvency is required only in the cases covered by the insolvency revocatory action.[195] Under Article 67 l.f., however, the subjective requirement comes with two different burdens of proof.

Under the first paragraph, the action targets certain acts that are voidable unless the counterparty proves they were not aware of the debtor's factual insolvency.[196] Under the second paragraph, that deals with acts displaying preferential effects, the action targets transactions that are voidable if the insolvency practitioner proves the counterparty knowledge of the debtor's factual insolvency.[197]

Although both England and Germany require some subjective elements, the substantial criteria adopted are quite different. In England, the subjective criteria adopted are the 'desire to prefer' for preferences and a specific purpose for transactions defrauding creditors. On the one hand, the desire to prefer of Section 239 IA refers to the 'debtor's subjective motivation.'[198] This criterion has two drawbacks. First, it may be challenging to identify the desire among the possible motives of the debtor's behaviour. Seconds, even if the motives are clear, it may be difficult to prove the debtor's desire.

On the other hand, Sections 423 IA requires a specific purpose of the debtor's act. The debtor should undertake the act to put the asset beyond the reach of the claimants or otherwise prejudice their interest.[199] The evolution of the case law has clarified that such a purpose does not need to be dominant, but it needs to be substantial.[200] However, the identification and proof of the substantial purpose of the debtor's acts are troublesome. In practice, the

194 ibid Section 131(1)(3).
195 Legge Fallimentare (n 5) Articles 64, 65 and 67.
196 ibid Article 67(1).
197 ibid Article 67 (2).
198 Keay (n 121) 11-071.
199 Insolvency Act (n 1) Section 423
200 *Chohan v Saggar* [1994] 1 BCLC 706.

insolvency practitioner needs to understand and prove the reasons and intentions behind the debtor's actions.

In contrast, Germany has adopted a more objective approach to the state of mind of the debtor. Section 133 InsO requires the debtor to have the intention to disadvantage creditors.[201] The concept of intention, however, includes the notion of conscious negligence.

The German subjective criteria are fulfilled when the debtor knew of the possible detrimental effects of the act and nevertheless undertook it. Such an approach is more straightforward than the English one in terms of proof. Indeed, the insolvency practitioner will only have to prove that the debtor knew of their own factual insolvency, and consequently, of the potential detrimental effects to the creditors.

In Italy, instead, the state of mind of the debtor is irrelevant, and the focal point of the action is the third party's knowledge of the debtor's financial situation. Both Italy and Germany investigate the third party's knowledge of the debtor's finances. However, while in Italy, the courts take into consideration what the party should have known, in Germany, the circumstances are evaluated as a factual clue, but the courts do not consider constructive knowledge.

7.3.3. Procedural Parties and Effects of the Actions

In England, transactions at an undervalue, and preferences share the same regulation concerning the procedural parties and the effects of the court orders. First, the insolvency practitioner can lodge the claim to the insolvency court against the counterparty of the vulnerable transaction.[202] Following the hearing of the question, the court has a broad discretion to order the most appropriate remedy.[203]

The principal purpose of the Court order is to restore as far as possible the position that the insolvency estate would have been in if the company had not entered the vulnerable transaction.[204] For instance, the court can order: (i) the

---

201 InsO (n 3) Section 133.
202 Insolvency Act (n 1) Schedule 4 Section 3A.
203 Keay and Walton (n 53) 553.
204 ibid; Parry (n 56) 4.184; Armour and Bennet (n57) 2.124; *Chohan v Saggar* (n 200) para 713.

restitution of the property to the insolvency estate; (ii) the restitution of the value of the property; (iii) a payment of a sum of money that covers the differences in consideration given and received; (iv) a removal of a security and even; (v) compensation for damages if the value of the property has been destroyed or dissipated.[205]

Most likely, the order would alter the legal and financial position of the counterparty. The Court order may also address the rights of the counterparty. If the counterparty has a claim against the debtor as a result of the court order (e.g. for the consideration given in a transaction at an undervalue), the Court may allow the claim in insolvency.[206] However, such claim will be unsecured and non-preferential. Therefore, the counterparty would be unlikely to see their claim satisfied in distribution. Alternatively, the court may order the counterparty to return the assets subject to the vulnerable transaction on the condition that the insolvency estate pays the consideration received back in full.[207]

The Court order has the potential to affect third parties. To avoid detrimental effects on innocent parties, Section 241(2)(a) IA prescribes that the order shall not prejudice any interest in property acquired by a third party who acquired it in good faith and for value.[208] When the third party is connected or associated with the counterparty of the transaction, or they were aware of the circumstances surrounding the vulnerable transaction, they are presumed to be in bad faith.[209] Moreover, in any case, the third party bears the onus of proof of their subjective position.[210]

In the case of transactions defrauding creditors, the court order has similar content and effects. Under the action of Section 423 IA, however, the Court has a wider discretion, and it may even decide not to make an order if it deems it appropriate.[211] Like in Sections 238 and 239 IA, the purpose of the court

---

205 Insolvency Act (n 1) Section 241; Parry (n 56) 4.186.
206 ibid Section 241(1)(g).
207 *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] WLR 143, para 35; *Reid v Ramlort Ltd* [2004] EWCA Civ 800 para 125.
208 Insolvency Act (n 1) Section 241(2)(g).
209 ibid, Section 241(2A).
210 *Re Sonatacus Ltd* [2007] EWCA Civ 31; [2007] B.C.C. 186, para 24.
211 *National Westminster Bank Plc v Jones* [2000] BPIR 1092.

order is to restore the position of the debtor as if the transaction had not taken place. Additionally, the order seeks to protect the interests of the victim of the challenged transaction. Therefore, the debtor's assets should be made available to the victim for execution.[212]

However, the court order takes into account also the counterparty's understanding of the purpose of the transaction.[213] The court may order to transfer the property back to the debtor's estate, to pay damages to the property and even to institute a trust to protect third parties' interests on the property.[214] Section 425 IA safeguards the third party's interests acquired in good faith, for value and without notice of the circumstances surrounding the transaction.[215]

Also, in Germany, transaction avoidance action can be brought to the insolvency court by the insolvency practitioner.[216] Moreover, it adopts a unified approach to the legal effects of all transaction avoidance actions.[217] These are regulated in Sections 143-146 InsO. Section 143 InsO makes explicit reference to the rules of unjust enrichment (S 812-822 BGB), but the legal effects slightly differ from it concerning gratuitous performances

Section 143 (1) InsO provides that assets subject to the transaction must be returned to the insolvency estate.[218] The actions of transaction avoidance do not lead to the invalidity of the transaction, but they give rise to a reimbursement obligation.[219] Concerning Section 130-133 InsO, the discipline of unjust enrichment applies. This means that where physical assets have been transferred, the successful avoidance challenge creates an obligation to give back the asset to the insolvency estate.[220]

---

212 Insolvency Act Section 425 and *Chohan v Saggar* [1994] 1 BCLC 706, para141, *4Eng Limited v Harper & others* [2009] EWHC 2633 (Ch), 2010] BPIR 1, para 9.
213 *4Eng Limited v Harper & others* (n 212) para 11.
214 Insolvency Act (n 1) Section 423(2).
215 Ibid Section 425 IA.
216 InsO (n 3) Section 129.
217 ibid Section 143.
218 ibid Section 143(1).
219 BGH judgment of 26.04.2012 IX ZR 146/11; *OLG Brandenburg* (lexetius.com/2012, 2097).
220 BGB (n139) Section 818.

When the restitution is no longer possible because the property has been dissipated or it does no longer exist, the defendant has an obligation to replace the value of the assets.[221] Instead, when the transaction discharged debt or security, the adjudication of the claim obliges the defendant to recognise their debts towards the insolvency estate.[222] Additionally, under Section 143(1) InsO and Section 818(1) BGB, the beneficiary must return any profit received from the property, even the one perceived as compensation for damage to the property.[223]

In the case of gratuitous performances (Section 134 InsO), the approach is slightly different. Section 143(2) InsO provides that the beneficiary has to return the benefit received as far as they have been enriched by it at the moment the claim was brought to court.[224] If between the vulnerable transaction and the application of Section 134 InsO, the beneficiary has depleted the benefit, they may not return anything.

The depletion occurs when the benefit received (or any financial value deriving from it) is no longer present within the beneficiary's assets.[225] In particular, if the beneficiary has used the benefit to pay liabilities that they would have paid with other resources but those resources are no longer available, the recipient can be exempted from the repayment.[226]

In contrast, if the beneficiary uses the gift to pay liabilities that they would not be able to pay otherwise, this would constitute a financial advantage. In the latter case, there would be no depletion of the benefit and the beneficiary would be asked to return the benefit.[227] Additionally, this most favourable treatment ceases to apply in case the beneficiary knew or should have known of the prejudice caused to the creditors.[228]

---

221 ibid; Daniel Visser, 'Responsibility to Return Lost Enrichment' (1992) Acta Juridica 175, 186

222 ibid.

223 BGH judgment of 01.02.2007 IX ZR 96/04; *OLG Karlsruhe* (lexetius.com/2007, 255).

224 InsO (n 3) Section 143(2).

225 BGH judgment of 17.12.2009 IX ZR 16/09; *OLG Dresden* (lexetius.com/2009, 4291); BGH judgment of 27.10.2016 IX ZR 160/14; *OLG Munich* (lexetius.com/2016, 3546).

226 ibid.

227 ibid.

228 InsO (n 3) Section 143(2); BGH judgment of 08.09.2016 IX ZR 151/14; *OLG Frankfurt* (lexetius.com/2016, 3523).

Once the counterparty of the transaction has returned the value of the benefit to the insolvency estate, their claim towards the debtor is revived.[229] The counterparty has a direct claim to the insolvency estate if they have provided a counter consideration for what they had received and then returned. The insolvency estate must return the consideration received when (i) the value of the consideration is still present and distinct within the insolvency estate or (ii) the insolvency estate has been enriched by the consideration received.[230] Outside these circumstances, the counterparty may lodge to the insolvency proceedings the claim for the return of the consideration given as an unsecured creditor.[231]

The legal effects of transaction avoidance actions extend to third parties. Section 145 InsO provides that these actions can be brought against heirs and other universal successors.[232] Instead, the availability of transaction avoidance actions against a third party who had acquired a specific right from the counterparty of the vulnerable transaction is limited.[233] These actions can be brought against third parties only when the third party acquired the right for free, and they were not aware of the circumstances surrounding the vulnerable transaction.[234]

Also, in Italy, the insolvency practitioner has the exclusive right of action regarding transaction avoidance claims.[235] Additionally, the Italian system allows the parallel use of the ordinary revocatory action by the individual creditors in exceptional circumstances. This possibility constitutes an exception to the exclusive power of the insolvency practitioner, and its specific procedural regime will be addressed later in the section dealing with the relationship between insolvency and private law avoidance actions.

Concerning the legal effects of the transaction avoidance actions, the approach is more complicated than the English and German approach. The

---

229 InsO (n 3) Section 144.
230 ibid Section 144(2).
231 ibid.
232 ibid 145(1).
233 ibid Section 145 (2).
234 ibid. If the third party is connected to the debtor according to section 138 InsO, the knowledge of the circumstances is presumed unless the third party proves that they were unaware.
235 Cassazione 02.12.2002 n 18147.

Italian insolvency framework provides for two different regimes of the legal effects of the actions. On the one side, the judgement on Article 64-65 l.f. have a declaratory nature as the judge is called to ascertain the original lack of legal effects of the vulnerable transaction.[236] On the other side, a judgment on Article 67 l.f. have a constitutive nature as the judgment alters the circumstances created by the parties.[237]

The constitutive nature of a judgment on Article 67 l.f. causes two types of effects. First, the judgement renders the transaction ineffective vis-à-vis the insolvency estate.[238] Second, it orders the counterparty of the transaction to return the assets.[239] The obligation of the counterparty is not to return the assets to the debtor's estate but to transfer them to the insolvency practitioner, for liquidation purposes.[240]

The obligation is deemed an indexed debt (i.e. *debito di valore*) which means that it is subjected to inflation adjustments and it is accompanied by interest.[241] Moreover, even if the assets have been destroyed, the counterparty has the obligation to return an amount of money equivalent to the value that the asset had at the time of the transaction. [242] If unforeseeable circumstances have destroyed the assets, however, the counterparty is due to return the value of the assets only as far as they have been enriched by them before the assets were destroyed.[243]

The difference between the declaratory nature of Articles 64-65 l.f. and the constitutive nature of Article 67 l.f. does not create significant discrepancies concerning the effects of the actions. Nevertheless, the difference affects ancillary aspects of the actions such as the moment from which the interests are due (from the transaction in Articles 64-65 l.f.; from the judgment in Article

---

236 Cassazione 09.02.2001 n1831; Cassazione 21.11.1983 n 6929; Cassazione 18.06.1980 n 3854.

237 Cassazione 11.06.2004 n 11097; Cassazione 11.11.2003 n 16905.

238 Cassazione 15.09.2004 n 18573.

239 Cassazione 22.02.2010 n 4059.

240 Angelo Bonsignori, *Diritto Fallimentare* (UTET 1992) 465.

241 Cassazione SU 15.06.2000 n 437.

242 Cassazione 14.02.1997 n 1411.

243 Giuseppe Terranova, *Legge fallimentare. Effetti del fallimento sugli atti pregiudizievoliai creditori. Vol. 1: Parte generale. Artt. 64-71.* (Giappichelli 1993) para 2031.

67 l.f.), and limitation periods (Article 64-65 l.f. are not subject to any, while Article 67 l.f. is subject to a five years limitation period).

Since the effects of the judgement of Article 67 l.f. are relative to the parties (i.e. the insolvency estate and the counterparty), the effects on third parties are peculiar. The ordinary revocatory action is available against third parties when they concluded a subsequent transaction in bad faith. In these circumstances, the insolvency revocatory action must be brought against the counterparty jointly with the ordinary revocatory action against the third party. The combination of the two actions makes the chain of transactions ineffective.[244]

7.4. Comparison of Private Law Transaction Avoidance Claims

Following the comparison of the transaction avoidance actions available within the insolvency proceedings, the present section compares the avoidance actions available or actionable outside the insolvency. These actions are Section 423 IA, the German *Anfechtungsgesetz* and the ordinary revocatory action of Article 2901 of the Italian Civil Code.

These actions have the commonality to address the dishonest behaviour of a debtor outside the rules of collective proceedings. The national approaches, however, show relevant differences, in particular, concerning the relationship between private law transaction avoidance and the insolvency avoidance actions. The interference of private law avoidance actions with the insolvency rules may be of relevance in the harmonisation of insolvency transaction avoidance. Nevertheless, the issue has not been considered extensively in the academic literature.

In order to provide a comprehensive comparison of the private law avoidance actions and later suggest their possible EU treatment, the following section will deal with: (i) their nature; (ii) the right of action and the effects of the claim; (iii) their subjective and objective criteria and; (iv) the relationship between the private law avoidance actions and the national insolvency rules.

---

244 Cassazione 08.06.2007 n 13500; Cassazione 11.06.2004 n 11083.

7.4.1. The Nature and Effects of Private Law Avoidance Actions

The three actions in analysis display different locations within their respective legislative frameworks. The English action available in private law is the same Section 423 IA available under the insolvency rules. In contrast, Germany and Italy provide for separate claims under the general law. Germany addresses the topic in a separate statute dedicated to transaction avoidance actions in private law.[245] Italy encompasses the claim within a section of the civil code dedicated to measures protective of credit.[246] The different location within the legislative framework depends upon historical development; however, it may also be an indication of the composite nature of the action.

The nature of the action is controversial, especially in Italy and Germany. The English system, instead, does not dwell on the nature of the action but focuses the debate on its scope and underpinning moral values. [247] Section 423 IA protects the rights of the creditor towards the assets of the debtor, and this protection is justifiable under moral principles such as fairness to creditors.[248]

Additionally, the English common law system allows for much higher discretion on the effects of the court orders, while a more formalist approach is found in the civil law countries. The effects of the court order under Section 423 IA are various as the court may:

> Make such order as it thinks fit for: (a) restoring the position to what it would have been if the transaction had not been entered into, and (b) protecting the interests of persons who are victims of the transaction.[249]

As seen in section 7.3.3, this discretion allows the courts to make a variety of orders, including but not limited to ordering the counterparty to transfer the property or a sum of money or create a security right. [250]

In Germany, the counterpart of the English Section 423 IA is Section 3 of the AnfG. This is an *in personam* action, which displays its effects only vis-à-vis

---

245 AnfG (n 131).
246 Civil Code (n 156) Sixth Book, Third Title.
247 Parry (n 56) 2.09.
248 See *supra* Section 7.3.1.3.
249 Insolvency Act (n 1) Section 423(2).
250 ibid Section 425.

the counterparty of the transaction. The nature of the action and its effects are controversial, and at least four theories can be found concerning the nature of private law avoidance claims.

First, the so-called *real theory* provides that the avoidance claims conduce either to the transaction's nullity similar to the one of Section 119 BGB (nullity caused by mistake) or infectiveness *ex-lege*.[251] The real theory, however, has been rejected almost universally in Germany.[252] The second theory suggests that the claim stems from a legal obligation of the counterparty of the transaction to restitute what was obtained even if the title of transfer remains valid.[253]

The third theory resembles the Italian approach as it deems the action a tool to enforce the credit liability of the debtor (so-called *liability theory*). According to this theory, the scope of the avoidance actions is to reconstruct the debtor assets and allow them to pay their liabilities. A fourth theory considers the AnfG actions as a hybrid between the liability theory and some aspects of the unjust enrichment doctrine.[254]

The comparison of the nature of the avoidance action can be instrumental in understanding the legal effects deriving from the action. In this regard, the variety of theories developed under German law are not an issue since the legal effects of private law avoidance actions are set out by Section 11 AnfG. This provision determines that the assets subject to the vulnerable transaction (or their value) must be made available to the claimant to the extent that is necessary for the satisfaction of their credit.[255] While in case of acts of gratuitous nature, the counterparty to the transaction must return what they have been enriched by.[256]

---

251 Arwed Blomeyer, *Zivilprozeßrecht, Vollstreckungsverfahren* (Springer 1975) 99.

252 Bettina Nunner-Krautgasser, 'Haftungsrechtliche Unwirksamkeit infolge Insolvensanfectung und ihre Tragweite in der Insolvenz des Anfechtungsgegners' (2015) Insolvenzrecht und Kreditschutz 129, 130.

253 ibid; Nadia Hoffmann, 'Alemania: La Actio Pauliana en Derecho Alemán: impugnación de los Acreedores Según la Ley de Impugnación y la Regulación Referente a la Insolvencia' in Joaquín J. Forner Delaygua (ed) *La Protección del Crédito en Europa: La acción Pauliana* (BOSH 2000) 27.

254 Blomeyer (n 251) 99.

255 AnfG (n 131) Section 11.

256 ibid Section 11(2).

In Italy, the traditional approach considered the ordinary revocatory action as a claim in tort law, focusing on the illicit behaviour of the debtor. Nowadays, as illustrated in Chapter 6, the scholarship has almost completely abandoned the traditional approach. The modern theory considers the action as a tool to safeguard the debtor's general guarantee over the estate.[257]

The effects of the Italian ordinary revocatory action are also peculiar in comparison to the English and German actions. The Italian action does not have restitutionary effects.[258] The action declares the vulnerable transaction ineffective exclusively vis-à-vis the creditor who brought the claim. [259] This allows the successful claimant to proceed with credit enforcement procedures over the assets subject to the ineffective transaction and still in possession of the counterparty.[260]

The differences in the effects of the actions are extremely relevant for future harmonisation. As the comparison highlights, the function of the actions is similar among the analysed legal systems, but the effects in practice have different legal connotations, which must be taken into account in future developments.

7.4.2. The Right of Action and the Effects of the Actions

As seen in section 7.3.3., within the insolvency framework, the right of action is generally reserved to the insolvency practitioner. In contrast, the right of action concerning private law avoidance actions belongs to the creditor that has suffered prejudice. The criteria that allow a creditor to bring this type of action, however, change from country to country.

In England, the person making a Section 423 IA claim outside the insolvency framework must qualify as a victim.[261] The concept of 'victim' is defined in Section 423(5) IA as 'who is, or capable of being, prejudiced' by the transaction. The concept includes persons affected by the transaction at the

---

257 Federico Roselli, *Responsabilità patrimoniale. I mezzi di conservazione* (Giappichelli editore 2005) 131.

258 Cassazione 19.06.2017 n 15096.

259 Francesco Messineo, *Manuale di Diritto Civile e Commerciale* (vol III, Giuffré 1959) 197.

260 Francesco Galgano, *Diritto Privato* (CEDAM 1994) 383; Domenico Barbero, *Il Sistema di Diritto Privato* (UTET 1993) 655; Francesco Gazzoni, *Manuale di Diritto Privato* (Edizioni Scientifiche Italiane 1996) 647.

261 Insolvency Act (n 1) Section 424(1)(c).

time it took place but also persons who may be affected by the transaction in the future.[262]

The concept of victim constitutes a broad category that includes the creditors (secured and unsecured, present and future or potential), shareholders, litigants and others who may be affected.[263] In the case of litigants, the court adjudicating on Section 423 IA may suspend the full operation of the remedies until the judgment in the other proceeding has been given.[264]

Different criteria apply to the German AnfG. Under Section 2 AnfG, the right to bring a private law avoidance action belongs to any creditor with a due and payable credit, when the enforcement of the debtor's assets has not led or is unlikely to lead to the complete satisfaction of the creditor.[265]

In Germany, the creditor who wants to bring an avoidance action is subject to two conditions to have *locus standi*. First, the creditor needs to have an actual claim against the debtor.[266] The creditor's claim must be already verified and ascertained conclusively in order to bring a transaction avoidance action.[267] This excludes the possibility to use the AnfG for provisionally enforceable instruments and while other judgments are pending, for reasons of procedural economy.[268]

The second condition the creditor must fulfil is the objective impossibility of complete satisfaction of the claim by standard means of execution.[269] The determination of the inadequacy of the debtor's assets is a question of fact.[270] The burden of proof of the circumstances is placed upon the claimant according to the German procedural rules.[271]

---

262 Parry (n 56) 10.58 ff.
263 Armour (n 58) 102-105; Parry (n 56) 10.58-10.76.
264 Parry (n 56) 10.70.
265 AnfG (n 131) Section 2.
266 BGH judgment of 02.03.2000 - IX ZR 285/99 (openJur 2010, 8126) para 16.
267 ibid 17.
268 BGH judgment of 05.02.1953 - IV ZR 173/52, para 19.
269 ibid para 22.
270 BGH judgment of 22.09.1982 - VIII ZR 293/81(NJW 1983, 1678).
271 BGH judgment of 27.09.1990 - IX ZR 67/90 (NJW-RR 1991, 104) para 5.

In contrast, the Italian approach is laxer. Like in Germany, the exercise of the revocatory action is limited to the creditors.[272] However, a creditor may bring the action to court even if the debt is subject to a condition or is not yet due.[273] Moreover, it is not required that the debt is uncontroversially ascertained.[274]

The revocatory action safeguards the legitimate expectations that creditors will be paid, preserving the integrity of the debtor's assets.[275] The Italian avoidance action does not examines nor require the verified existence of the debt but only its concrete possibility.[276] This also means than the proceedings concerning a revocatory action are not subject to the rules of 'necessary suspensions of judgment'[277] in case of other proceedings deciding on the existence of the credit relationship.[278]

Moreover, like in Germany, the creditor must prove the inadequacy of the debtor assets.[279] In Italy, this means that the creditor must prove that the vulnerable transaction has reduced the debtor's assets, and it has made it more difficult for the creditor to proceed with a successful credit enforcement procedure.[280]

These differences concerning the claimants may appear minimal. However, they have a material effect on the level of protection guaranteed to the parties in a credit-debit relationship. These differences also highlight the difficulties in balancing the protection of the creditors' rights and the economic freedom of the debtor. In addition to this central issue, the comparison has also brought

---

272 It must be noted, however, that the action is not available to all creditors. Creditors who enjoy security rights over the assets subject to the transaction are excluded from the use of the invalidating action. This is because the security right provides in itself more effective remedies. See Vincenzo Vitalone, 'Azione Revocatoria Ordinaria' in Vincenzo Vitalone, Ugo Patroni Griffi and Riccardo Rieti eds, *Le Azioni Revocatorie: La Disciplina, Il Processo,* loc 948.

273 Civil Code (n) Article 2901.

274 Cassazione 17.07.2009 n 16722; Cassazione 18.05.2004 n 9440.

275 Cassazione 05.03.2009 n 5359.

276 Cassazione 09.04.2009 n 8680; Cassazione n 16722/2009 (n 273), Cassazione n 9440/2004 (n 273).

277 Italian Procedural Civil Code Article 295. According to article 295, the judge called to decide upon a controversy that depends upon another judge decision must suspend the trial until the other judge has reached a judgment.

278 Cassazione n 9440/2004 (n 273); Cassazione 16722/2009 (n 273).

279 Vitalone (n 272) Loc 952.

280 Cassazione 29.03.1999 n 2971.

out procedural concerns of efficiency and economy that must be addressed in a future harmonisation.

7.4.3. The Subjective and Objective Criteria

Like the insolvency avoidance actions, also the private law avoidance claims are constructed with subjective and objective criteria that limit the applicability of the action. These criteria attempt to strike a balance between the protection of the creditor's interests and the debtor's economic freedom. They are (i) time limitations (either as suspect periods or limitation periods); (ii) the debtor's state of mind (debtor's subjective criteria) and; (iii) the state of mind of the counterparty of the transaction (counterparty's subjective criteria). These elements are organised as the following table:

Provision	**Objective Criteria**	**Debtor's Subjective Criteria**	**Counterparty's Subjective Criteria**
Section 423 IA	No suspect periods but limitation periods of twelve or six years	Purpose of withdrawing assets or otherwise prejudicing the creditors	No
Section 3 AnfG	Ten years/ four years/two years	Intention to disadvantage the creditors	Knowledge of the debtor's intention or of threatened insolvency and discriminatory effects
Section 4 AnfG	Four years	No	No
Article 2901 CC.	No suspect periods but five years limitation period	Intention to prejudice or knowledge of the prejudice	Only for onerous transactions: knowledge of the prejudice or participation in the debtor's intention.

Table 7.3

As the table shows, the objective criteria vary across the analysed legal systems. The countries analysed show two types of temporary limitations: (i) limitation periods and (ii) suspect periods. They both limit the use of the action but with different connotations. Limitation periods, as in general, limit the availability of the action. This means that claimants have a limited number of years to bring the claim to court.

In England, the claimant has twelve years to bring the claim to court from the date in which the prejudice arises.[281] Moreover, in case of a claim for a sum of money, the availability of the action is reduced to six years.[282] Italy, as well, applies only a limitation period of five years from the date of the transaction.[283]

On the other hand, suspect periods do not limit the availability of the claim but define how far in the past the action can investigate. In Germany, this is ten years for any legal action made by the debtor with the intention to prejudice the creditors.[284] The period is reduced to four years for granting a security right or payments with the intention of prejudicing the creditors in a situation of impending insolvency.[285] A four-years suspect period also applies for acts of gratuitous nature.[286] The suspect period is further reduced in the case of a contract with consideration, provided that the counterparty was unaware of the debtor's prejudicing intention.[287]

The variety of objective criteria may hinder a future harmonisation project. However, the periods have been subject to recent developments in England,[288] and Germany,[289] which may lead to embracing the idea that these periods may be adjusted and harmonised.

---

281 Limitation Act 1980 Section 8.
282 ibid Section 9.
283 Civil Code Article 2903.
284 AnfG (n 131) Section 3(1).
285 ibid Section 3(2) and (3).
286 ibid Section 4.
287 ibid Section 3(4).
288 *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542.
289 Law to improve legal certainty in case of challenges according to the Insolvency Code and according to the Anfechtungsgesetz (n 176).

Concerning the subjective criteria, different considerations are reserved to the debtor's state of mind and its counterparty. On the debtor's side, all national legal systems in analysis require a degree of intention. The intentional element of the English provision has already been discussed in Section 7.3.3. Section 423 IA requires the debtor to act with the substantial purpose of putting the assets beyond the reach of the creditors or otherwise prejudicing them.[290]

Italy and Germany, as well, require the intention to disadvantage the creditors. In both countries, the subjective criteria applicable to the debtor have been interpreted as a minimum degree of intention. In Germany, the doctrine on the intention of Section 133 InsO is deemed transferable and applicable in the interpretation of Section 3 AnfG.[291]

Therefore, the intention of Section 3 AnfG requires the debtor to be aware of the potential prejudice that the legal act may cause to the creditors. Such knowledge does not need to be accompanied by the will to cause the prejudice, as the acceptance of any detrimental effects that may follow from the act is sufficient to constitute intention. [292] Similarly, in Italy, a recent judgment of the court of Cassazione equates to intention the foreseeability and acceptance of the prejudice caused by the transaction.[293]

The approaches differ also concerning the counterparty's subjective criteria. The English system does not require the counterparty to be in a particular state of mind.[294] In contrast, both Germany and Italy distinguish between transactions of gratuitous nature and onerous ones. In both countries, the state of mind of the counterparty is irrelevant in case of transaction of gratuitous nature.[295] This is because the counterparty has not made any sacrifices but only gained a benefit from the debtor. This benefit can, therefore, be revoked for the interests of the creditors.

In the case of an onerous transaction, instead, Germany and Italy require the counterparty to know of the damage that the transaction would or could have

---

290 Insolvency Act (n 1) Section 423.
291 BFH judgment of 25.04.2017 – VII R 31/15, para 17.
292 ibid para 15.
293 Cassazione 07.10.2008 n 24757.
294 Insolvency Act (n 1) Section 423.
295 AnfG (n 131) Section 4; Civil Code (n 156) Article 2901(1)(2).

caused.[296] Moreover, in Italy, when the vulnerable transaction takes place before the creation of the credit relationship, the counterparty must have been aware of the prejudicial intention of the debtor.[297]

Finally, in all the countries, the jurisprudence and case law show that the use of subjective criteria is problematic as it attempts to assess the party's subjective intention from factual clues. This point should be taken into consideration in future harmonisation development, and it will be further discussed in Chapter 8.

7.5. The Relationship between Private Law Avoidance Actions and Insolvency Law

The analysed private law avoidance actions are in close relationship with insolvency law. In England, the insolvency provision of transactions defrauding creditors is allowed outside the insolvency procedural setting. Notwithstanding its historical development as a private law instrument, it is currently encompassed in the Insolvency Act, exceptionally permitted outside the insolvency framework.

In Germany, the AnfG statute provides a detailed regulation on the connections and overlaps between the AnfG actions and the insolvency proceedings. In Italy as well, the relationship between the ordinary revocatory action and the opening of the insolvency proceedings is regulated by the law. Moreover, Italy allows the use of the ordinary revocatory action within the collective proceedings in particular circumstances.

The close relationship between this type of actions and insolvency can be justified by the exceptional nature of transaction avoidance actions. Both insolvency law and avoidance claims seek to provide creditors with a tool to achieve their credit satisfaction when the conventional route of credit enforcement is unlikely to be successful. Both the insolvency proceedings and the avoidance actions respond to the failure of the debtor to pay their debts and the shortage of their assets to enforce the creditors' claims.

---

296 Ibid.

297 Civil Code (n 156) Article 2901(1)(2).

On the one side, the insolvency system deals with the chronic debtor's inability to pay their debt. This is generally characterised by insufficient assets to pay all the creditors in full. Hence, the collective procedure responds to the necessity to distribute in an orderly way the remaining debtor's asset according to statutory rules. On the other hand, private law avoidance actions are available when the debtor is momentarily unable to pay one or more creditors. This inability, however, is intentionally caused by the debtor who has put their assets beyond the reach of the creditors.

Concerning the effects of the opening of the insolvency proceedings on pending Section 423 IA lawsuits, England does not provide for any specific statutory guide. In case of winding-up or administration petition, the Insolvency Act provides for a general moratorium of all claims pending against the debtor.[298] In these circumstances, the suspended proceedings may continue with the consent of the insolvency practitioner or the court.[299] Moreover, the effects of Section 423 IA have the potential of restoring part of the insolvency estate for the benefit of all the victims, and therefore for the general body of creditors.

In Germany instead, the effects of the insolvency proceeding on the AnfG action are regulated explicitly in Section 16 AnfG and following. Section 17 provides that when the insolvency proceedings are opened against the debtor, the pending avoidance actions are suspended.[300] The right of action is transferred to the insolvency practitioner, who may consider whether to revive the claim for the benefit of the general body of creditors.[301] In the latter case, the legal costs are to be reimbursed to the original claimant.[302] The insolvency practitioner can also refuse to continue the claim, but this does not preclude the insolvency practitioner from using of the insolvency avoidance actions.[303]

---

298 Insolvency Act (n 1) Section 130, Schedule B1 para 43.

299 ibid.

300 AnfG (n 131) Section 17.

301 ibid; Section 16(1); BGH judgment of 03.12. 2009 - IX ZR 29/08 para 12(aa) and 18(a) with reference to BGH, decision of 07.12.2006 - V ZB 93/06 concerning the effects of the general moratorium.

302 AnfG (n 131) Section 16(1).

303 ibid Section 17(3).

The AnfG also regulates the circumstances where the insolvency proceedings are opened after the success of a private law avoidance claim. Section 16(2) provides that the security or satisfaction obtained through an avoidance claim can be subject to a claim, under Section 130 InsO.[304] The payment must have been made no longer than three months before the application for insolvency proceedings.[305]

In Italy, as well, the opening of the insolvency proceedings establishes a moratorium. Under Article 43 l.f., the pending claims are suspended for three months to allow the insolvency practitioner to consider whether it is convenient to take over the claims in the interest of the general body of creditors.[306] If the insolvency practitioner does not proceed within the three months, the individual creditor who brought the revocatory claim to court may continue the claim outside the insolvency proceedings.[307]

The possibility for the creditor to continue the claim lays on the fact that the assets subject to the ordinary revocatory action are not part of the insolvency estate as they have been transferred to the counterparty of the vulnerable transaction.[308] In case of success of the revocatory action, the transaction is ineffective vis-à-vis the individual creditor. Consequently, the creditor is allowed to proceed with individual credit enforcement actions against the assets subject to the transaction.[309]

Although by different routes, England and Germany display a similar relationship between private law avoidance claims and insolvency law. In contrast, Italy shows an antithetical result. Due to the peculiarity of the nature of the action and its effects, the revocatory action seems to escape the rigid rules of the collective procedure. However, a recent and highly criticised judgement of the Court of Cassazione has limited the applicability of the ordinary action against formally insolvent counterparty to the transaction.[310] Such a limitation is justified on the basis that the opening of the proceedings

---

304 ibid Section 16(2).
305 InsO (n 3) Section 130.
306 See Legge Fallimentare (n 5) Article 43and Article 66.
307 Cassazione 05.12.2017 n 29112.
308 Cassazione 28.02.2008 n 5272; Cassazione 19.05.2006 n 11763.
309 ibid.
310 Casazione 23.11.2018 n 30416.

crystallises the assets of the counterparty.[311] The peculiar Italian approach may hinder the efficient reception of a future harmonisation. The harmonisation may be jeopardised if approaches similar to the Italian one are diffused among other civil law countries of Roman tradition.

7.6. Conclusion

The chapter has analysed transaction avoidance actions in a comparative perspective. It focused on three separated topics. First, the chapter addressed similarities and differences among the insolvency systems. In this regard, it focused on winding-up and rescuing proceedings. The comparison showed that the three countries analysed differ significantly concerning the efficiency of the insolvency systems. Italy, in particular, proves to be a complicated system with inefficient outcomes for companies in distress.

The second topic of comparison has been the transaction avoidance actions available in insolvency law. The comparison of these actions has primarily shown that these claims are different in several aspects. First, the chapter has looked into the rationale of the provisions. All countries display protective purposes of transactions at an undervalue. However, in England, the rule protects the value of the estate for distribution purposes. In contrast, in Germany and Italy, the provisions seek to protect the creditor from prejudice caused by the debtor.

The rationale of preferences, instead, seems more convergent. Although with very different procedural settings, all preferences provisions analysed are deemed to protect the principle of equal treatment of the creditors. England, Germany, and Italy seem aligned to a certain extent also concerning the rationale of transactions defrauding creditors.

Notwithstanding the different historical developments and the diversified scholarship's opinions, common general principles can be identified. These principles are the protection of the creditors from prejudice caused by the debtor and the safeguarding of the predictability of the credit system.

Following the comparison of the rationale, the chapter has addressed the subjective and objective criteria that delimit the use of the actions. The

---

311 ibid.

differences among the objective criteria are justifiable by different policy needs in the selected countries. These different needs may seem an obstacle to the harmonisation process. At the same time, the critical study showed common jurisprudential issues concerning the practical application of the subjective criteria. The comparative analysis has shown similar internal criticalities that may be overcome with a centralised reform.

The analysis also compared the effects of insolvency avoidance actions. The effects of the insolvency actions are generally restitutionary. They force the counterparty to return the assets that are the subject of the vulnerable transaction to the insolvency estate. This commonality may support future harmonisation.

Finally, the comparison addressed the transaction avoidance action available in private law. The chapter has discussed their nature, effects, criteria, and their relationship with insolvency law. In particular, the critical analysis highlighted how these two institutions are related. They respond to similar phenomena of debtor's inability to pay their debt and the lack of sufficient assets for credit enforcement. These converging scopes may support the idea of including transaction avoidance actions of private law in a European harmonisation project.

From the comparison of the effects of the actions, remaining elements of tort law emerged in Italy and in Germany, which may explain the problematic qualification of the action for private international law purposes exposed in chapter 3. Additionally, the comparison of the effects of the claims available in private law showed peculiar outcomes. In particular, Germany requires stricter conditions for the legitimate use of the action than England and Italy. In particular, Italy does not need a due and payable debt as a condition for exercising the ordinary revocatory action. The Italian and German claims, although similar in structure, afford a significantly different degree of protection to the individual creditors.

Furthermore, differences emerge also concerning the relationship between private law avoidance actions and insolvency law. In contrast to the English and German approach, Italy allows the individual creditors to pursue the ordinary revocatory action even in parallel with the insolvency proceedings.

All these aspects are relevant to understand how the system works in practice and how it could be harmonised. They also reveal internal legal issues that scholarship and jurisprudence have not overcome yet. The proposal of harmonisation of these types of actions - both of insolvency law and private law - may enhance the protection of the credit system within the internal market.

Chapter 8
The Harmonisation of Transaction Avoidance: A Compromise Solution

8.1. Introduction

So far, the thesis has explored the private international law framework on transaction avoidance at the European Union (EU) level (Chapter 3) and compared the substantive regimes of England, Germany, and Italy (Chapter 6). The third chapter has highlighted particular issues arising from the application of the private international law approach applied to cross-border insolvency.

In particular, the third chapter has argued that the European Insolvency Regulation Recast – hereinafter EIR(R) - displays uncertainties relating to jurisdiction but more particularly to the applicable law. The current legal uncertainty surrounding the disputes on the topic undermines the rationale of private international law which is to increase the foreseeability of the outcome of the legal dispute.[1]

At the same time, legal uncertainty undermines the efficiency of the internal market. From an economic point of view, the objective legal uncertainty increases litigation and the cost of the legal disputes.[2] In general, legal uncertainty constitutes a deterrent for cross-border transactions, and therefore it has a negative impact on the level of integration of the internal market.[3]

The need for legal certainty is even stronger concerning insolvency law as it constitutes a system that deals with the life and death of the companies that participate in the internal market. Indeed, the Recast states that 'the proper functioning of the internal market requires that cross-border insolvency

---

1 Xandra Kramer, 'European Private International Law: The Way Forward' (September 8, 2014). In-depth analysis European Parliament (JURI Committee), in: Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament Brussels 2014, p. 77-105 < https://ssrn.com/abstract=2502232> accessed 21.07.2020.

2 Helmut Wagner, 'Economic Analysis of Cross-Broder Legal Uncertainty: The Example of the European Union' in Jan Smits (ed) *The need for a European Contract Law. Empirical and Legal Perspective* (Europa Law Publishing 2005).

3 ibid.

proceedings should operate efficiently and effectively'.[4] Moreover, the 'Five Presidents' Report: Completing Europe's Economic and Monetary Union' identifies insolvency law as one of 'the most important bottlenecks preventing the integration of capital markets'.[5]

The thesis has also analysed and compared the regimes of transaction avoidance in England, Germany, and Italy. From the comparison, common goals and divergent approaches have emerged. The present chapter seeks to assess the possible solutions to the unsatisfactory results of the current EU regulation with the knowledge acquired from the comparative process. In particular, the chapter aims to address the harmonisation of transaction avoidance at the EU level. Moreover, it suggests the possibility to harmonise the regime applicable to transaction avoidance actions available both in insolvency law and in private law.

The chapter is organised into five sections. The first section (Section 8.2) critically assesses the proposals of harmonisation suggested in the academic literature and by international organisations such as INSOL Europe.[6] In particular, the section seeks to highlight how the findings of the comparative research of the thesis may call into question the feasibility of a full harmonisation. Additionally, it explores and evaluates alternative ways to tackle the issues emerging in the EIR(R) with a private international law (PIL) approach.

The second section (Section 8.3) of the chapter explores the possibility of an alternative form of harmonisation. It proposes a partial harmonisation of the transaction avoidance rules that fits within the current EU PIL framework. The section suggests a new system of PIL rules to determine when to apply the proposed harmonised rules. Instead, the third section (Section 8.4) focuses on how to implement the proposal at the EU level. The fourth section (Section 8.5) attempts to provide more detailed guidance on the content of the proposed harmonised substantive rules in insolvency. Finally, the fifth section (Section 8.6)

---

4 Regulation (EU) 2015/848 of The European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L141/19, Recital 3.

5 Five Presidents' Report: Completing Europe's Economic and Monetary Union on 22 June 2015 <https://ec.europa.eu/priorities/publications/five-presidents-report-completingeuropesecon omic-and-monetary-union_en > accessed 21.07.2020.

6 i.e. International Association of Restructuring, Insolvency & Bankruptcy Professionals.

focuses on transaction detrimental to the creditors under the general law (i.e. *action pauliana*).

8.2. The State-of-the-Art Academic Literature and Its Critical Analysis

In the last decades, few studies have focused on the EU harmonisation of transaction avoidance.[7] These studies generally address the issue considering the option of a full harmonisation, meaning the creation of uniform rules applicable across the EU in substitution to the present national rules.[8] This section seeks to provide a critical overview of the studies conducted on the topic and provide an alternative approach to the topic of harmonisation.

First, in 2010, an EU funded study conducted by INSOL Europe dealt with the harmonisation of insolvency law at the EU level.[9] First, the study assesses the necessity and feasibility of harmonising insolvency law in general terms.[10] Second, it includes transaction avoidance actions among the matters of insolvency law where harmonisation is deemed worthwhile, necessary, and attainable.[11] It must be noted, however, that the INSOL study fails to explain how the worthiness, necessity and attainability of the harmonisation of transaction avoidance have been assessed.

On the one hand, the necessity of the harmonisation of these rules can be determined by looking at the legal issues emerged in the Court of Justice of the European Union (CJEU) case law and other potential issues. Consequently, one

---

[7] Andrew Keay, 'The Harmonization of the Avoidance Rules in European Union Insolvencies' (2017) 66 International and Comparative Law Quarterly 79 (Keay I); Andrew Keay, 'Harmonisation of Avoidance Rules in European Union Insolvencies: the Critical Elements in Formulating a Scheme' (2018) Northern Ireland Legal 85 (Keay II); Gerard McCormack, Andrew Keay, Sarah Brown, *European Insolvency Law: Reform and Harmonisation* (Edward Elgar 2017) 130; Roel J. de Weijs, 'Towards an objective European rule on transaction avoidance in insolvencies' (2011) *International Insolvency Review 20*(3) 219; INSOL Europe, 'Harmonization of Insolvency Law at EU Level' PE 419.633, April 2010 <https://www.eesc.europa.eu/sites/default/files/resources/docs/ipoljuri_nt2010419633_en.pdf> accessed 21.07.2020; Reinhard Bork, Report on Transactions Avoidance Laws (CERIL Report 2017/1) < http://www.ceril.eu/uploads/files/20170926-ceril-report-2017-1-final.pdf> accessed 21.07.2020; Federico Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 European Business Organisation Law Review 175.

[8] Eva J. Lohse, 'The Meaning of Harmonisation in the Context of European Union Law - A Process in Need of Definition' in Mads Andenas and Camilla Baasch Andersen (eds) *Theory and Practice of Harmonisation* (Edward Elgar 2011) 282.

[9] INSOL Europe, 'Harmonization of Insolvency Law at EU Level' (n 7).

[10] ibid, 26.

[11] ibid, 18-20.

should assess whether a harmonised system of rules can solve these issues. Finally, whether the proposal of harmonisation is a proportionate answer to the issues should be evaluated.

Although the INSOL study reflects upon some case law examples, it does not provide a thorough analysis that shows the necessity of harmonisation. However, (as discussed in chapter three) the current system of private international law rules on transaction avoidance lacks clarity, certainty, and predictability of the legal outcomes.[12]

Whether some of these issues could be addressed by harmonising the avoidance rules at the EU level has been discussed by Professor Andrew Keay, whose work will be later analysed in detail.[13] Instead, there is a clear gap in the scholarship on the question of proportionality. So far, there is no academic commentary on whether there are less invasive and more proportionate measures in relation to the issues.

Moreover, although the INSOL study affirms the worthiness and attainability of the harmonisation of transaction avoidance rules, it does not provide the basis of such affirmation. Both assertions could be argued on economic and legal bases. The present research does not focus on the worthiness of the harmonisation proposal. This evaluation would require an economic analysis that weighs whether the benefits introduced by harmonised rules would balance or overcome the costs of the process.[14] In contrast, the present research seeks to contribute to assessing the attainability of harmonisation. This requires a legal analysis of the present framework of rules combined with a forecast on the impact of harmonised rules on the insolvency frameworks of the EU member states.

---

12 Jurai Alexander, 'Avoid the Choice or Choose to Avoid? The European Framework for Choice of Avoidance Law and the Quest to Make it Sensible' March 2009 < https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1410157> accessed 21.07.2020; Zoltan Fabók, 'Grounds for Refusal of Recognition of (Quasi-)Annex Judgements in the Recast European Insolvency Regulation' (2017) 26 International Insolvency Review 295; (Fabók I) Zoltan Fabók, 'The jurisdictional Paradox in the Insolvency Regulation' (2016) 4 Nottingham Insolvency and Business Law eJournal 3 (Fabók II) ; Federico Mucciarelli, 'Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?' (August 25, 2015) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650414 > accessed 21.07.2020.

13 Keay I (n 7).

14 Oren Sussman, 'The Economics of the EU's Corporate-Insolvency Law and the Quest for Harmonisation by Market Forces' (2005) OFRC Working Papers Series 16.02.2005 Oxford Financial Research Centre; Louis Visscher, 'A Law and Economics View on Harmonization of Procedural Law' (2010) 09 Rotterdam Institute of Law and Economics (RILE) Working Paper Series < https://core.ac.uk/download/pdf/18510011.pdf> accessed 21.07.2020.

Although the INSOL study focused on several insolvency law issues, some suggestions were given concerning possible reforms of the EIR rules on transaction avoidance.[15] Such suggestions have been later commented in another EU study commissioned with a specific focus on avoidance actions and rules on contract.[16]

First, the INSOL study suggests abolishing any reference to the law governing the transaction in Article 13 EIR - now 16 EIR(R).[17] Second, it requires a distinction involving connected parties. Third, it recommends providing at the EU level a unified suspect period, differentiated between connected and non-connected parties. Fourth, it proposes bad faith as subjective criteria for either the debtor or the beneficiary of the transaction. It also suggests regulating the burden of proof concerning the subjective criteria, without, however, providing any guidance on the topic.

Fifth, it suggests that only insolvency practitioner should be entitled to bring avoidance action to court on behalf of the insolvency estate. Sixth, the study advises that the reform of the topic should cover a minimum list of actions. This should encompass: (i) all legal acts undertaken at an undervalue; (ii) preferences; (iii) all legal acts with connected parties and; (iv) any transfer of funds in breach of final judicial decisions.[18]

Following these assessments, some attempted to develop the idea of harmonising transaction avoidance at the EU level.[19] First, in 2011 Professor Roel J. de Weijs has addressed the topic of harmonisation of transaction avoidance in a comparative study between the English, German and Dutch regimes.[20] The study attempts to elaborate rules on transaction avoidance predominantly based on objective criteria.[21] The objective approach is suggested to reduce the time for judicial examination of avoidance claims, increase the certainty of the outcomes of the proceedings and avoid moral reproaches of the

---

15 INSOL Europe, 'Harmonization of Insolvency Law at EU Level' (n 7) 20.

16 Harmonization of Insolvency Law at EU Level: Avoidance Actions and Rules on Contracts, Briefing Note, 2011 <https://www.europarl.europa.eu/document/activities/cont/201106/20110622ATT22311/20110622ATT22311EN.pdf> accessed 21.07.2020.

17 ibid 15.

18 ibid.

19 de Weijs (n 7); Keay I (n 7); Keay II (n 7) McCormack, Keay, and Brown (n 7).

20 de Weijs (n 7).

21 Ibid 223.

parties.[22] This study, however, is limited to the formulation of a blueprint for harmonised rules at the EU level, while it does not assess the feasibility of such a harmonisation in practice.

In contrast, Professor Andrew Keay addresses the option of harmonisation and its feasibility in more concrete terms.[23] In his paper, Keay weighs the advantages and drawbacks of harmonisation. On the one hand, he considers six points in favour of harmonisation. First, Keay suggests that harmonisation “would reduce conflicts and diverges."[24] He highlights that harmonisation would bring uniformity and consistency, which in turn would enhance the development of the internal market.

Second, a common framework might facilitate credit because it increases the predictability of the outcomes of legal disputes.[25] Third, harmonised rules will foster equality among creditors as the same rules would apply to all insolvency proceedings opened within the EU territory.[26] Fourth, harmonised rules may overcome peculiarities of individual national systems that allow avoidance claims in limited circumstances.[27]

Fifth, harmonised rules could increase procedural efficiency both in terms of time and costs. Indeed, the insolvency practitioner would need to know only one set of rules to challenge any transaction regardless of the law applicable to the transaction.[28] Lastly, harmonised rules might prevent forum shopping. If the reasons for moving the centre of main interest of a company is to take advantage of more favourable avoidance rules, the harmonisation of those rules will provide a level playing field across the EU that may reduce forum shopping.[29]

On the other hand, Keay also discussed possible drawbacks of a harmonised system.[30] First, his article questions whether the harmonisation would have a

---

22 Ibid 222.
23 Keay I (n 7).
24 ibid 99.
25 ibid.
26 ibid.
27 ibid 100.
28 ibid.
29 ibid.
30 ibid 101.

positive impact on the cost of credit.[31] This is presumed to decrease due to the improved predictability of the legal disputes. However, it might also be that creditors attempt to protect themselves from the risk of avoidance by increasing interest rates.[32] Second, harmonised rules may benefit powerful creditors more than small ones.[33]

Third, having harmonised rules at the EU level would mean that any modification has to be made at a centralised level.[34] The procedural times of the EU legislator are longer than the average national ones.[35] This, in addition to a 'one size fits all' approach, is likely to damage local interest.[36]

More relevant points for assessing the feasibility of a full harmonisation emerge looking at possible obstacles to the harmonisation process. Among them, Keay first points out that there are relevant differences among the member states both concerning the avoidance regimes in general, and the responses to particular issues.[37] On a small scale, this study confirms that there are relevant differences among the member states analysed.

At the general level, the member states analysed in the thesis organise the avoidance claims differently. Although the English, German, and Italian systems cover similar issues, the modalities in which these issues are addressed differ quite substantially. England displays the organisation of the claims adopted in this thesis. It presents separate claims for transactions at an undervalue, preferences, and transactions defrauding creditors.[38] Instead, Germany distinguishes the avoidance claims incongruent coverage, incongruent coverage, transactions immediately disadvantaging the insolvency creditors, wilful disadvantage and gratuitous benefit.[39] In contrast, Italy distinguishes between acts voided by law – gratuitous acts and payments of due debts - and acts that

---

31 ibid 102.

32 ibid.

33 ibid citing Jay Lawrence Westbrook, 'Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases' (2007) 42 Texas International Law Journal 899, 903.

34 ibid.

35 Mucciarelli (n 7) 198.

36 ibid.

37 ibid, 101.

38 English Insolvency Act 1986, Sections 238, 239, and Section 423.

39 Insolvency Order of 5 October 1994 (Federal Law Gazette I p. 2866), which was last amended by Article 24 (3) of the Act of 23 June 2017 (Federal Law Gazette I p. 1693) hereinafter InsO, Sections 130, 131, 132, 133, 134.

can be voided by courts when the insolvency practitioner brings a revocatory action to Court.[40]

Besides the differences in organising the claims within their insolvency systems, some of the countries in the analysis also provide additional claims that do not fall under the categories subject of the study. The English system, for instance, provides rules on extortionate credit transactions[41] and the avoidance of certain floating charges.[42] Similarly, Germany law has some additional transaction avoidance actions that cannot be qualified as either transaction at an undervalue, preference nor transaction defrauding creditors.[43]

Also, concerning more specific issues, the member states in analysis present different approaches. For instance, the approaches of the analysed countries differ regarding the relevance given to subjective and objective criteria. Italy and Germany adopt a more objective approach to transaction avoidance in insolvency. Germany requires a particular subjective state of the debtor only in the case of transaction detrimental to creditors.

At the same time, both Italy and Germany require a certain degree of awareness of the counterparty of the transaction. Although this is still a subjective criterion, it is more manageable in terms of proof.[44] Indeed, it does not look at the intention of the party but only at their knowledge which can be more easily inferred from external factual clues.[45] In contrast, England requires the desire to prefer in preferences and a specific purpose in transactions defrauding creditors.[46]

---

40 Legge fallimentare, i.e. Insolvency Statute by Royal Decree 16.03.1942 n 267 reformed by law Statute 11.12.2016 n 232, Articles 64, 65 and 67.

41 Insolvency Act (n 38) Section 244.

42 Ibid Section 246.

43 InsO (n 39) Section 135 Loans Replacing Equity Capital, Section 136 Silent Partnership, Section 137 Payments on Bills of Exchange and Cheques, Section 141 Executable Deed, Section 142 Cash Transactions, Section 144 Claims of the Party to the Contested Transaction, Section 145 Transactions Contested and Enforced against Legal Successors.

44 de Weijs (n 7) 222.

45 BGH judgment of 24.05.2007 IX ZR 97/06 OLG Munich (lexetius.com/2007, 1696) para 29; BAG judgment of 29.01.2014 6 AZR 345/12 (lexetius.com/2014, 646) para 61; BGH judgment of 20.11.2008 IX ZR 188/07 *Schleswig-Holstein* (lexetius.com/2008, 3632) para 16; See Manocchi e Fioretti, 'La Tenuta della Presunzione nelle Revocatorie di Atti a Titolo Oneroso; Nota all'Ordinanza n 1404 del 26.01.2006 della Suprema Corte di Cassazione' <http://www.mflaw.it/media/Newsletter-MF-n.-04_2016-La-tenuta-dellapre sunzione-nelle-revocatorie-di-atti-a-titolo-oneroso.pd> accessed 21.07.2020.

46 Insolvency Act (n 38) Sections 239 and 423.

Similarly, the three member states analysed present substantial differences in the suspect periods adopted, ranging from three months to ten years.[47]

These differences, however, should not be considered as an obstacle to the harmonisation process but rather its logical precondition.[48] The purpose of harmonisation is to bring uniformity where this is lacking.[49] If the national provisions were similar to begin with, the process of harmonisation would not be necessary.

The peculiarities of each legal system, however, might reflect local instances. A full harmonisation that obliterates such differences may negatively impact the national insolvency systems. In these cases, the harmonisation may create legislative gaps regarding local issues. This is also highlighted by Keay, who suggests that harmonisation may prevent member states from dealing with local concerns and abuses.[50] This is a problem that may be addressed by a partial harmonisation that allows member states to deal with local issues in local insolvencies. The proposal of a partial harmonisation will be discussed in detail in the following section.

A third relevant obstacle identified by Keay is the lack of a common understanding of the policy issues underlying the avoidance claims.[51] This thesis has shown that there seems to be a common understanding of the rationale of preferences in the three countries in the analysis.[52] Further studies will be needed to confirm that the other member states share a similar view. Concerning the three countries at stake, they share the view that preferences safeguard the *pari passu* principle. Indeed, they all consider preference claims as a tool to re-establish the equal treatment of the creditors infringed by the preferential transaction.

---

47 See *supra* Chapter 7, Section 7.3.2.1.

48 Eva J Lohse, 'The Meaning of Harmonisation in the Context of European Union Law – a Process in Need of Definition' in Mads Andenas and Camilla Baasch Andersen (eds) *Theory and Practice of Harmonisation* (Edward Edgar 2012) 282, 283.

49 Martin Boodman, 'The Myth of Harmonization of Laws' (1991) 39 The American Journal of Comparative Law 699, 705; John Goldring, 'Unification and Harmonisation of the Rules of Law' (1978) Federal Law Review 284, 289.

50 Keay I (n 7) 102.

51 Ibid 101.

52 See supra Chapter 7, Section 7.3.1.2.

Instead, the national doctrines regarding transactions at an undervalue, and transactions detrimental to the creditors do not converge.[53] More importantly, the rationale behind these provisions is not clear even at the national level. On the one hand, the English scholarship has failed to identify a definite rationale of transactions at an undervalue. It has been suggested that the scope of the provision might be to reverse a situation of unjust enrichment or to serve the *pari passu* principle.

Both theories have been critically analysed in the previous chapter. Although the latter theory seems sounder, a clear and commonly accepted rationale of the provision is still missing. Similarly, the Italian scholarship has been tentative about the rationale of Article 64 l.f. on gratuitous acts, swinging between a punitive scope and a protective purpose of the action.[54]

On the other hand, the matter is even more complex concerning transactions detrimental to creditors. In England, the action's rationale is identified as to maximise the value of the insolvency estate and prevent the depletion of the assets.[55] However, the scope of application of the claim is limited to transactions that intentionally disrupt the proper functioning of the credit system.[56]

Also in Germany, the scholarship has struggled to find precise policies underpinning the claim beside the general safeguard of the creditors from prejudice.[57] In addition, there are ongoing discussions concerning the nature of the action. Similarly, the issue emerges among the Italian scholarship that has been questioning the nature and scope of the action for decades. Moreover, the academic debate is mimicked by the Italian jurisprudence that is incoherent on the topic at times.[58]

---

53 See supra Chapter 7, Section 7.3.1.1 and Section 7.3.1.3.

54 Riccardo Riedi, 'Azioni di Inefficacia e Azione Revocatoria nel Fallimento' in Vicenzo Vitalone, Ugo Patroni Griffi and Riccardo Riedi (edn) Le azioni Revocatorie: La Disciplina, Il Processo (UTET 2014) loc2729 ff; Luciano Matteo Quattrocchio, 'Analisi del novellato art. 64 l.f.' (2016) 2 Diritto ed Economia dell'Impresa 392.

55 Rebecca Parry, James Ayliffe and Sharif Shivji, *Transaction Avoidance in Insolvencies* (Oxford University Press 2011) para 2.28 and 2.31; Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* 2nd edn (Jordans 2008) 570; Andrew Keay, *McPherson's Law of Company Liquidation* (3rd edn, Sweet and Maxwell 2013) para 11-109.

56 Insolvency Act (n 38) Section 423.

57 Thorsten Patrick Lind, *Zur Auslegung von § 133 InsO, insbesondere im System der Anfechtungstatbestände* (2006 Tenea Verlag) 54 ff.

58 Cassazione 11.11.2003 n 16915; Cassazione 18.01.1991 n 495; Cassazione 08.03.1993 n 2751; Cassazione 28.04.2004 n 8096; Cassazione 08.07.2004 n 12558; Cassazione 16.03.2005

An attempt to build a framework of commonly understood principles across the EU member states has been carried out by the Conference on European Restructuring and Insolvency Law (CERIL).[59] The CERIL Report on Transactions Avoidance Laws focuses on the common principles rather than the differences that the Member States display in their avoidance regimes.[60]

In particular, it investigates the principle of equal treatment of creditors and the principle of protection of trust. The latter is considered to be relevant in all transaction avoidance actions while the former can be found only in claims against other creditors of the same debtor.[61] Moreover, the study reports that the relevance of the principle of equal treatment has been called into question by several authors.[62]

The CERIL Report is an interesting discussion of two principles that may be deemed common across jurisdictions and may help justify the essence of transaction avoidance. It is, however, a pilot study with substantial limitations in its focus. First, the focus is limited to only two principles among others. Therefore, it does not provide a complete overview of all the common principles that come into play within the topic of transaction avoidance.

Second, the study addresses nine countries out of the twenty-eight member states. Therefore, it cannot be said that the study proves that the two principles in the analysis are truly common among all member states. Ultimately, the lack of a common understanding, the predicaments within the national approaches as well as the necessity to respond differently to local instances may constitute the main obstacles to harmonisation in practice.

On the one hand, the lack of common understanding and the lack of a solid foundation within the national doctrines may undermine the implementation of harmonised rules. In the absence of a clear understanding of the rationale of transaction avoidance rules, the national judges might apply their own theoretical

---

n 5713; Cassazione 28.03.2006 n 7028; Cassazione 10.11.2006 n 24046; Cassazione 26.02.2010 n 4785; Cassazione 08.03.2010 n 5505; Cassazione 19.12.2012 n 23430; Cassazione 12.12.2014 n 26216.

59 Report on Transactions Avoidance laws: "Clash of Principles: Equal Treatment of Creditors vs. Protection of Trust" (CERIL Report 2017-1) < http://www.ceril.eu/projects/ kopie-avoidance-actions/> accessed 21.07.2020.

60 ibid 1.

61 ibid 4.

62 ibid 14 (mentioning Rizwaan Jameel Mokal, Adrian Walters and Rolef de Weijs).

legal frameworks to the harmonised rules. Indeed, the evolution of the law is generally a slow process that mirrors a socio-cultural transformation.[63] A vertical imposition of rules may face not only open political resistance but also an unconscious bias in the application of the new rules with cultural bias.[64] This issue hinders the scopes of harmonisation as it may lead to divergence in practice where the aspiration is to bring convergence among the legal systems.

This hypothetical divergence of application of harmonised rules would bring inconsistencies and unpredictability of the outcomes of legal disputes which could damage the functioning of the internal market. The CJEU could address the issue of interpretation through preliminary rulings[65]

The intervention of the Court, however, is limited to specific questions that are referred to it. The system would lack effective guidance on general questions of interpretation. Additionally, this might open the floodgates of the CJEU to interpretative questions, placing upon the Court an unmanageable burden and leading to procedural delays.

On the other hand, the peculiarities of the national systems may address local issues of different nature. Laws respond to factual phenomena which may encompass cultural, legal, sociological, economic and political instances.[66] Moreover, all these factors are often implicit in the mind of the national legislator, and they are not always discernible.[67] It is not feasible that a full harmonisation would take into account all the local peculiarities of all the member states. Additionally, even if the process could take into account all the peculiarities, the result would most likely be an incoherent and unworkable set of rules.[68]

---

63 See generally Brian Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44(2) Cornell International Law Journal 209, 213.

64 ibid 214.

65 Preliminary rulings are decisions of the Court of Justice of the European Union (EU) the interpretation of EU law, given in response to a request from a court or tribunal of one of the Member States. These contribute to the harmonious interpretation of EU law across the EU territory. See Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, Article 267.

66 Kurt Wilk, 'Law and the State as Pure Ideas: Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy' (1941) 51 Ethics 158.

67 Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40 Statute Law Review 53.

68 Keay II (n 7) 95.

Assuming, however, that the harmonised rules would disregard the local issues, these would be left unregulated. Within this foreseeable regulatory gap, bad practices could emerge, disrupt the functioning of the national insolvency systems and undermine the uniformity of the legal responses of the legal systems.[69] Where the process of harmonisation seeks unity and clarity, a full harmonisation with these premises may bring to significant divergences in other parts of the law, which ultimately would undermine the scope of harmonisation.

8.2.1. Alternatives to Harmonisation

The previous section has highlighted how a proposal of a full harmonisation of transaction avoidance does not seem to be feasible with the current premises. Nevertheless, the issues identified in chapter three need to be addressed. These issues could be addressed either by harmonisation of transaction avoidance rules or through reform of private international law rules.

Private international law is a useful tool to coordinate different legal systems; however, it has its limits and shortcomings. It allows to take into consideration the diversity of legal systems and recognise the value of such diversity. However, in order to be efficient, the European Union instruments have to be as complete as possible under every aspect of PIL. Otherwise, they create a patchwork of European Union and national rules which increase legal uncertainty. Ultimately, this result compromises the scope of private international law, which is to contribute to the foreseeability of the legal disputes.[70]

Currently, the cross-border regime of transaction avoidance is regulated in the European Insolvency Regulation Recast (EIR(R)).[71] Article 7(m) EIR(R) sets that the law of the insolvency proceedings determines the rules relating to the 'voidness, voidability, or unenforceability'[72] of legal acts detrimental to the general body of creditors.[73] Moreover, Article 16 EIR(R)) grants the person, who benefits from the detrimental act, the right to prove that the act is subject to the law of a

---

69 ibid.

70 Xandra Kramer and others 'A European Framework for private international law: current gaps and future perspectives' Directorate General for Internal Policies PE 462.487, 16 <http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf> accessed 21.07.2020.

71 Regulation 2015/848 (n 4).

72 ibid Article 4(m)

73 ibid.

different member state and that such law does not allow the act to be challenged.[74]

As analysed in chapter three, from the EIR(R) several issues of private international law nature arise. First, concerning the problem of jurisdiction, there is no definition of 'direct derivation' and 'close connection' of the ancillary claim to the insolvency proceedings. Second, with the introduction of an additional alternative *forum* (Article 6 paragraph 2) the EIR(R) does not specify what law applies to the claims once the insolvency practitioner opts to lodge them at the Brussels I *forum*.

Third, the Recast does not clarify what law applies to the transaction subject to the avoidance claims nor which connecting factors are relevant. Fourth, the case law has introduced in the defence provided by Article 16 EIR(R) civil claims that are outside the scope of application of the EIR(R). Fifth, the recent case law interpreting Article 16 EIR(R) has created an issue of double limitation periods in the defence of the party who benefits from the transaction.

This section seeks to provide an overview of the necessary reform of the EIR in order to address some of these issues. At the same time, it highlights how the private international law approach creates an insoluble impasse concerning some of these issues. First, for an efficient application of the Regulation, it is necessary to clarify the delimitation of transaction avoidance claims. Understandably, a European legal definition of transaction avoidance claims is not easily achievable due to the variety of actions available in the national legal systems of the Member States.[75]

Nevertheless, it is pivotal to have, at least, precise criteria to determine when a claim is directly derived from the insolvency proceedings and closely linked to them.[76] Otherwise, the decision on which type of avoidance claims fall under the ancillary claim category would be discretionary. Consequently, the coherent and homogeneous application of the Insolvency Regulation would be compromised.

In the case *NK v BNP Paribas Fortis NV,* the advocate general highlights that the court has an inconsistent approach to the concept of close connection and direct

---

74 ibid Article 16.

75 McCormack and Bork, *Security rights and the European Insolvency Regulation* (Intersentia 2017) 121 ff.

76 Alexander (n 12).

derivation.[77] In *F-Tex Sia v Lietuvos-Anglijos UAB*, the CJEU considers 'directed derivation' and 'close connection' as two separate criteria which have to be satisfied at the same time.[78]

Regarding direct derivation, the CJEU seems to base the evaluation on the legal basis of the action.[79] In other words, the Court assigns the insolvency jurisdiction on the claim, on the basis that the claim is provided within the insolvency law framework of the law of the proceedings.

The approach of the court is an attempt to narrow the application of the EIR(R) as an exception to Brussels I that is the PIL instrument of general application. The 'direct derivation' from the insolvency, however, should be considered looking at the procedural context as the abstract possibility to bring the claim to the insolvency court. Indeed, it should be noted that the legal basis of the provision does not always indicate its function and applicability.[80]

The position of the norm within the national system is a discretionary choice of the national legislator that may depend on several factors such as historical developments, legal theories, political reasons as well as the need for internal consistency and coherence.[81] When the CJEU is asked to establish the derivation from the insolvency proceedings, it should adopt a functional approach and look at how the claim is used within the national system.

This approach would not provide a uniform rule at the EU level. Moreover, it could be argued that this approach could lead to an inconsistent and fragmented application of the EIR(R) depending upon the national legal frameworks. However, uniformity is not the purpose of private international law.[82] Instead, private international law seeks to enhance the predictability of the outcome of the litigation.[83] The functional approach in determining the derivation of the claim

---

77 Case C‑535/17 *NK v BNP Paribas Fortis NV* ECLI:EU:C:2019:96, para 43 ff.

78 Case C-213/10 *F-Tex Sia v Lietuvos-Anglijos UAB "Jadecloud-Vilma* ECLI:EU:C: 2012:215 para 30.

79 Fabók I and Fabók II (n 12).

80 Case C-594/14 *Simona Kornhaas v Thomas Dithmar als Insolvenzverwalter über das Vermögen der Kornhaas Montage und Dienstleistung Ltd* ECLI:EU:C:2015:806.

81 Wilk (n 66) 158.

82 Toshiyuki Kono, *Efficiency in Private International Law* (BRILL 2014) 92.

83 Alex Mills, 'The Identities of Private International Law: Lessons From the U.S. and E.U. Revolutions' (2013) 23 Duke Journal of Comparative & International Law 445,449.

from the insolvency increases the predictability of which claim falls under the EIR(R) jurisdiction.

Also concerning the second criterion, there are different interpretations of 'close connection' of the action. On the one hand, the criterion has to be understood in relation to the scope of insolvency.[84] The claims that serve the scopes of insolvency law of collecting, maximising, and distributing the assets of the insolvency's estate must be considered linked with the insolvency.

On the other hand, it has been argued that the close connection is not a real free-standing criterion.[85] In *NK v BNP Paribas Fortis NV,* the advocate general suggest considering an action connected to the insolvency when an equivalent action cannot be brought outside the insolvency proceedings.[86] Such an interpretation could potentially be problematic with actions such as Section 423 IA, which can be brought inside and outside insolvency proceedings. Therefore, a PIL reform needs to address in specific terms the criteria to identify the ancillary claims.

The second point to be discussed is the new alternative jurisdiction on connected claims provided by Article 6(2) EIR. As illustrated in chapter three, with the introduction of an alternative forum for connected claims, Article 6 EIR(R) provides rules on jurisdiction but does not specify the law applicable to the claims brought to the forum of the defendant's domicile.[87]

Article 6(2) EIR(R) allows the insolvency practitioner to combine an ancillary claim with a claim in civil and commercial matters that is connected to the insolvency proceedings.[88] The law applicable to the ancillary claim should be determined according to rules set out in the EIR(R) since it is the tool specifically designed to regulate the PIL aspects of cross-border insolvency autonomously.

On the other hand, the law applicable to the connected civil claim should be determined by referring to other EU PIL instruments such as Rome I and Rome

---

84 Case C‑339/07 *Christopher Seagon v Deko Marty Belgium NV* ECLI:EU:C:200 9:83 [2007] ECR I-00767, para 16; Case C-213/10 (n78) para 44.

85 Case C‑535/17 *NK, liquidator in the bankruptcies of PI Gerechtsdeurwaarder-skantoor BV and PI v BNP Paribas Fortis NV* Opinion of AG Bobek 18.10.2018 ECLI:EU:C:2018:850 para 65 ff.

86 ibid 66.

87 Regulation 2015/848 (n 4) Article 6.

88 ibid.

II. However, the coordination between the EU PIL instruments is imprecise. There are significant inconsistencies in the application of different instruments of PIL.[89] Such inconsistencies decrease the predictability of the outcomes of the dispute and therefore discourage cross-border trade flow.[90] Moreover, the complexity of coordination among PIL instruments may increase the costs and increase the length of the proceedings.[91]

Also, there are issues arising from the rule exception mechanism set out in Articles 7 and 16 EIR(R) as interpreted by the CJEU. In this regard, there is a need for a clear specification of which law governs the transaction. Within the EIR(R), the connecting factors determining the law applicable to the transactions should be clarified. Moreover, certain criteria should be set out to determine which law is applicable to the transaction when there are multiple connecting factors.[92]

The necessity to provide specific and certain criteria to determine the law applicable to the transaction derives from the detrimental and often deceitful nature of the transaction subject to the avoidance action. Since the Regulation requires the party to the detrimental transaction to prove which law is applicable, providing certain criteria may lessen concerns about manipulation of the scope of the safe harbour. Additionally, the regulation on insolvency proceedings has been conceived to be self-sufficient and complete. The lack of clarity concerning which law applies to the transaction and according to which factors the law is connected to the transaction undermines the autonomy of the regulation.

Alternatively, it has also been suggested to eliminate the exception in Article 16 EIR(R) in order to strengthen the scopes of insolvency.[93] However, such a suggestion does not strike a fair balance between the interests of the insolvency's estate and the parties of the transaction. It fosters the scope of insolvency law, but it fails to consider the scenario where the party benefitting from the transaction relied bona fide on the validity of the transaction under the *lex causae*.

---

89 Kramer (n 70) 17 ff.

90 Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 American Bankruptcy Law Journal 457, 466.

91 Kramer (n 70) 77.

92 Alexander (n12) 14.

93 Piñeiro, 'Towards the Reform of the European Insolvency Regulation: Codification rather than Modification' (2014) 2 Nederland Internationaal Privaatrecht (NIPR) 207, 214.

A revision of the rule exception mechanism should attempt to improve the balance between the interests of insolvency law and the parties of the transaction. A revision should take into consideration the acquis of Rome I Regulation and implement it within the EIR(R) specifying the factors connecting the law with the vulnerable transaction. Moreover, it should be evaluated whether and how to limit the freedom of choice of law in relation to the applicability of the safe harbour provision.

Furthermore, following the case law developments, under Article 16 EIR(R) the party has to prove that the transaction is unchallengeable both under insolvency law and the general law governing the transaction in the circumstances of the case.[94] This creates the paradox that excludes civil claims from the scope of application of the EIR(R) while the person benefitting from the transaction needs to prove the validity of the transaction under both insolvency law and the general law.

The introduction of Article 6(2) EIR(R) equips the insolvency practitioner with the possibility to use civil claims in the context of insolvency if they are connected with the insolvency matter.[95] Therefore, it would be reasonable to limit the defence in Article 16 EIR(R) only to insolvency claims. This will reduce the efforts required to the parties and the court to check the vulnerability of the transaction under all the provision of the *lex causae.*

At the same time, if the transaction is vulnerable under provisions of general law, the insolvency practitioner can bring civil claims to court in coordination with the insolvency proceedings. This solution attempts to strike a fair balance between the scope of insolvency law to maximise the value of the estate, the interests of the parties involved in the vulnerable transaction and the overall efficiency of insolvency proceedings with cross-border elements.

Finally, the interpretation of article 16 EIR(R) creates a double set of limitation periods for the vulnerability of the transaction.[96] On the one hand, for the efficient conduct of the insolvency proceedings, the competent forum must apply its own procedural rules, respecting at the same time the principle of equivalence end

---

94 Case C-310/14 *Nike European Operations Netherlands BV v Sportland Oy* ECLI:EU:C:2015:690 [2015] OJ C 40.

95 Regulation 2015/848 (n 4) Article 6.

96 Case C-557/13 *Hermann Lutz v Elke Bäuerle* ECLI:EU:C:2015:227.

effectiveness.[97] On the other hand, in order to limit the application of the veto right provision, the reference to the *lex causae* imposes the necessary respect of the legal autonomy of the member states whose law would normally govern the transaction.[98] This seems unavoidable under the PIL approach applied to insolvency law

Even if a comprehensive PIL reform addresses all these issues within the EIR(R), other possible issues may arise in regard to the law applicable to the vulnerable transaction. Indeed, the overall EU PIL framework displays gaps in the matter of property law, trust, agency, and arbitration, which may become relevant concerning transaction avoidance.[99]

A PIL solution could come from the burdensome task to improve the EU PIL system overall, increasing coordination among the EU PIL instruments. A reform to improve the horizontal coherence of the present EU PIL patchwork has been discussed at the EU institutional level. [100] There are various policy options. On the less invasive end of the spectrum, it has been suggested that the PIL framework can be completed with the current approach of regulating specific matters in different Regulations. On the other side of the spectrum, it has been proposed to modify the EU PIL system with the creation of a European Code of Private International Law.[101] Both options, however, require great legislative efforts and a foreseeable long period of time.

To improve the regime of transaction avoidance with the private international law approach requires a coherent restructuring and completion of the EU PIL system that is not easily foreseeable in the near future. It is the burdensome task that requires great legal efforts and involves high costs. Such an enormous revision would have a wide beneficial impact, not limited only to transaction avoidance in cross-border insolvency. However, due to the nature of private international law, the result would only increase the predictability and coordination of the procedural responses without providing unity and certainty.

---

97 Case C-54/16 *Vinyls Italia S.p.A. in fallimento v. Mediteranea di Navigazione S.p.A*. ECLI:EU:C:2017:433 [2016] OJ C156, para 25 ff.

98 Case C-557/13 (n 97) para 47 ff.

99 Kramer (n 70) 49 ff.

100 ibid.

101 ibid.

8.3. A Compromise Solution

As both a full harmonisation and a PIL reform display significant shortcomings, it is worth exploring a third solution which is a compromise between both approaches. A third approach could encompass a partially harmonised transaction avoidance framework. As defined in the second chapter, partial harmonisation can have two meanings.[102] On the one hand, partial harmonisation can mean that the EU regulates general aspects of the topic, and the member states address the details not covered by the EU legislative acts.[103]

On the other hand, partial harmonisation can also mean that the harmonised rules provided by the EU apply only to cross-border scenarios, while member states provide rules to be applied in domestic cases.[104] This thesis suggests harmonising transaction avoidance with the latter approach.

This approach provides substantive unified rules to be applied in cross-border circumstances. On the other hand, the thesis suggests that private international law rules should modulate when the harmonised rules should be applied. This current section addresses the formulation of PIL rules, and it analyses its advantages and shortcomings. In contrast, the following section (Section 8.4) will focus on the formulation of possible substantive harmonised rules to be applied to cross-border transactions.

New private international law rules could be used to replace the current mechanism of articles 7 and 16 of EIR(R). As explained in chapter three, Article 7 EIR(R) provides that the law of the state of the opening of the proceedings governs the rules relating to transaction avoidance.[105] In contrast, article 16 EIR(R) dispenses an exception when the vulnerable transaction is governed by the law of another Member State and that law does not allow the transaction to be challenged.[106] Under these two conditions, the vulnerable transaction is safe from the application of transaction avoidance rules of the law of the proceedings.

---

102 Bartolomiej Kurcz, 'Harmonisation by Means of Directive: Never-ending Story' (2001) European Business Law Review 287, 296.

103 Ellen Vos, 'Differentiation, Harmonisation and Governance' in Bruno de Witte, Dominik Hanf, Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia2011) 149.

104 Kurcz (n 102) 296.

105 Regulation 2015/848 (n 4) Article 7(m)

106 ibid Article 16.

A possible reform could replace Article 16 EIR(R) with a provision prescribing that cross-border transactions should be governed by the harmonised rules on transaction avoidance. This would mean that transactions that are undertaken locally would be regulated by the law of the proceedings, while the harmonised rules would govern transactions having a cross-border dimension.

8.3.1. The Cross-Border Character of Vulnerable Transactions

In order to avoid legal uncertainty, the reformed provision should specify when a transaction could be deemed cross-border under the EIR(R). The concept should be constructed with two conditions. First, a transaction should be deemed cross-border when at least one of the parties of the transaction have their habitual residence or centre of main interest in a member state other than the one of the proceedings. Second, a transaction should be deemed cross-border when the law applicable to the transaction is different from the law of the opening of the proceedings.

Each condition should be considered individually sufficient to qualify the transaction as a cross-border one, in order to achieve consistency of application between primary and secondary proceedings. Otherwise, it might happen that EU rules would apply to the main proceedings and local rules would apply to secondary proceedings and vice versa.

Moreover, in order to avoid repeating the current issues of Article 16 EIR(R) and the consequent legal uncertainty, the provision should specify how to identify the law applicable to the transaction.[107] This should be a preliminary step to ascertain the cross border character of the transaction.

For the identification of the law applicable, the harmonised claims should be considered related to the contractual matter. These harmonised claims should be considered related to contractual matters rather than torts. First, generally claims concern transactions between parties that formally or informally can be deemed a contract. Second, these types of claims - including transaction detrimental to creditors - are conceived to reconstruct the insolvency estate and not to recover damages.

---

[107] Alexander (n 12) 18.

Third, from a utilitarian perspective, the characterisation of the claims as contractual allows the application of more various and developed connecting factors. Indeed, the contractual characterisation of transaction avoidance claims would allow borrowing principles to determine the applicable law from the Rome I Regulation. Under Article 4 and following, the Regulation provides general principles to determine which law governs particular transactions in the absence of a choice of law.

For instance, the Regulation provides that:

> (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
>
> (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
>
> (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
>
> (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
>
> (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
>
> (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence.[108]

Additional contracts are regulated by Rome I that could provide a comprehensive legal framework to apply in the proposed Article 16 EIR(R).[109]

The identification of the law governing the transaction would be functional only to the qualification of the transaction as a cross-border one. Once the court identifies that the law applicable to the transaction is different from the one of the

---

[108] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6, Article 4.

[109] ibid, Article 5 ff.

proceedings, both the law of the proceedings and the law applicable to the transaction should subside in favour of EU law.

To explain the application in practice of the formulated theory, an example can be provided as follows: A German Company has a secondary establishment in Spain. Two months before the opening of the insolvency proceedings, the German company grants a security right to a German Bank over assets located in Spain. Subsequently, the main proceedings are opened in Germany, and territorial proceedings are opened in Spain.

According to the proposed PIL rules, the EU harmonised rules will apply to the circumstances. If the German insolvency practitioner intends to challenge the transaction, they would have to verify the residence of the parties, which in the case corresponds to the law of the proceedings. Additionally, they will have to verify which law is the one governing the transaction. According to the rules set out in Rome I, the law applicable to rights in rem related to immovable property is the law of the place where the assets are located. In the case, this would be Spain. Once verified that the law applicable to the transaction is different from the law of the proceedings, EU transaction avoidance should apply.

Similarly, if the Spanish insolvency practitioner wishes to challenge the transaction in the Spanish territorial proceeding, they will apply the same mechanism. As a result, the law applicable to the transaction coincides with the law of the proceedings, but the COMI of the parties does not correspond to the place of the territorial proceedings. Therefore, also in case of a claim brought in the territorial proceedings, the rules applicable to transaction avoidance would be the harmonised ones.

8.3.2. Party autonomy and the Choice of Law

Particular attention should be reserved to the choice of law clauses which are contractual clauses by which the parties decide the law applicable to a contract or part of it.[110] This type of clauses is an expression of party autonomy that has assumed predominant relevance in private international law in the past

---

110 David McClean and Veronica Ruiz Abou-Nigm, *Morris: The Conflict of Laws* (9th edn Sweet&Maxwell 2016) 15-003.

century.[111] Currently, there seems to be a consensus among the scholarship that the applicability and the enforcement of choice of law clauses should be the rule rather than the exception.[112]

However, party autonomy is a sore point in the context of transaction avoidance, as in practice, these clauses may prevent the application of transaction avoidance rules.[113] Generally, party autonomy has the potential to disrupt the maximisation of the value of the estate and the provisions on transaction avoidance attempt to balance the purposes of insolvency law with the principle of contractual freedom.[114] Moreover, in the context of a proposed partial harmonisation, choice of law clauses may hinder the application of harmonised rules, making the whole process of harmonisation pointless.

It must be noted that party autonomy is not absolute, and the ability to express a choice of law can be limited in certain circumstances.[115] In particular, the choice of law option can be limited in favour of mandatory rules and the protection of consumers, employees and other weaker parties. [116]In formulating a proposal of a partial harmonisation that applies only in cross-border scenarios identified through PIL rules, it should be considered whether party autonomy should be allowed or should be limited.

On the one hand, under the current EU PIL framework, party autonomy is not limited in the choice of law against transaction avoidance regimes. In *Vinyls Italia SpA in liquidation v Mediterranea di Navigazione SpA*,[117] the CJEU held that the EIR does not derogate from the principle of party autonomy.[118] The decision has

---

111 Mathias Reimann, 'Savigny's Triumph: Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1999) 39 Virginia Journal of International Law 571, 575.

112 Patrick Borchers, 'Categorical Exceptions to Party Autonomy in Private International Law' (2008) Tulane Law Review 1645, 1646.

113 Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499.

114 de Weijs (n 7).

115 Symeon Symeonides, 'The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis' in Franco Ferrari & Diego P. Fernández Arroyo (eds.), The Continuing Relevance of Private International Law and New Challenges (Edgar Elgar 2019).

116 ibid, 41 ff.

117 Case C-54/16 *Vinyls Italia S.p.A. in fallimento v. Mediterranea di Navigazione S.p.A.* ECLI:EU:C:2017:433 [2016] OJ C 156.

118 ibid para 46.

been justified on the fact that the EIR is to be considered *lex specialis* in relation to the Rome I Regulation.[119]

Moreover, the EIR(R) does not contain a rule similar to article 3(3) Rome I that invalidates the choice of law clauses that prejudice the application of mandatory provisions.[120] Although the EIR(R) does not encompass a provision similar to Article 3(3) Rome I, the judgments has missed an opportunity to bring coherence within the EU PIL system.[121] In addition, the Court did not address the issue of whether transaction avoidance rules could be deemed mandatory rules under Article 9 Rome I and therefore justify a limitation of the party autonomy.

On the other hand, it seems worth exploring whether EU harmonised rules could be considered mandatory rules and therefore allowing the limitation of party autonomy. Mandatory rules are those that 'must be applied regardless of whatever law is applied to the contract, whether or not that choice of law is the result of party stipulation.'[122] These type of rules are substantive rules embodying public policies principles that apply in cross-border scenarios 'by-passing the ordinary choice of law rules.'[123]

Mandatory rules can be identified as those rules that serve a public policy and which rationale is to serve crucial public interests of a country such as its socio-economic or political organisation.[124] In general, mandatory rules 'are essentially matters of economic regulation designed to protect the public from negative externalities that would harm the public if the parties were to violate these rules.'[125] In other words, these rules are designed to safeguard not only the interests of the parties involved in the transactions but also the interests of other categories of persons external to the transaction.[126]

---

119 ibid para 48.

120 ibid para 50.

121 Case C-54/16 *Vinyls Italia S.p.A. in fallimento v. Meditteranea di Navigazione S.p.A.* Opinion of the AG Maciej Szpunar ECLI:EU:C:2017:164, para 123.

122 Borchers (n 112) 1651.

123 Symeon Symeonides, 'American Choice of Law at the Dawn of the 21st Century' (2001) 37 Willamette Law Review 1, 33-34.

124 Rome I Regulation (n 108) Article 9(1).

125 Henry Mather, 'Choice of Law for International Sales Issues Not Resolved by the CISG' (2001) 20 Journal of Law and Commerce 155, 202.

126 Borchers (n 112) 1652.

Transaction avoidance rules could be deemed mandatory rules in the sense that are functional to purposes of insolvency law which embodies a series of public policies (e.g. fair distribution). Moreover, transaction avoidance rules protect the interests of the general body of creditors that are external parties to the transaction. Therefore, it could be argued that transaction avoidance should be deemed mandatory rules that should not be overridden by choice of law clauses

On the other hand, whether EU rules can have a mandatory qualification in conflicts of laws should be assessed. The issue here relates to the fact that mandatory rules are generally identified as protecting public policies of states. Instead, in the case of harmonised rules, the public policies would be those of an international organisation such as the EU.

In practice, many EU mandatory rules originate from Directives.[127] Moreover, in *Ingmar GB Ltd v Eaton Leonard Technologies*,[128] the CJEU clarified that the mandatory rules of the case – Article 17 of the Directive 86/653[129] - could not be derogated even when a party of the relationship is established outside the territory of the EU.

Therefore, it is established that EU rules can be mandatory. In the case of the harmonisation of transaction avoidance, the mandatory nature of the proposed EU rules cannot, however, be inferred from the same public policies reasons that emerge at the national level (e.g. fair distribution).

Indeed, the EIR(R) has not harmonised rules on distribution, and the Member states are free to establish the ranking that better fit their internal policies. Nevertheless, the mandatory nature of the harmonised rules could be based on other policies such as the predictability of the legal outcomes, protection of the

---

127 H L E Verhagen, 'The Tension Between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd V Eaton Leonard Technologies Inc' (2002) 51(2) International & Comparative Law Quarterly 135, 136.

128 Case C-381/98 *Ingmar GB Ltd V Eaton Leonard Technologies* [2000] ECLI:EU:C:2000:605 ECR I-09305. The case dealt with the mandatory nature of the guarantee granted by the directive over certain rights to commercial agents after termination of agency contracts. See Case C-381/98 para 14.

129 Council Directive 86/653/EEC on the Coordination of the Laws of the Member States Relating to Self-employed Commercial Agents [1986] OJ L 382.

creditors' interest and more generally the enhancement of proper functioning of the internal market.[130]

Moreover, if one compares the present proposal of harmonisation with a prospective full harmonisation, it can be noted that the latter would reduce the choice of law applicable in any case. Indeed, a full harmonisation would remove the laws to be chosen altogether by replacing all national rules with EU rules. If the full option can be contemplated, then a partial harmonisation formulated as in the present study should not create logical issues. If the EU transaction avoidance rules are deemed mandatory, the choice of law expressed by the parties should be void. Consequently, the chosen law should be substituted by the harmonised rules.

A second issue to be analysed relating to party autonomy is whether the parties could opt in the harmonised framework. The parties could opt-in the EU transaction avoidance regime either directly (i.e. through a choice of law that selects EU law) or indirectly (i.e. through a choice of law that selects the law of another country).

The favour towards EU rules can be justified based on the equivalence of the EU and national systems and efficiency of the internal market. On the one hand, the national and EU system could be deemed equivalent to the national systems as they perform the same function.[131] Moreover, it could be argued that both types of systems (European and national systems) attempt to balance the interests of the insolvency's estate and those of the third parties.

On the other hand, primacy should be given to the EU rules as they seek to regulate cross-border transaction avoidance uniformly. In turn, this uniformity serves the scopes of legal certainty and support the proper functioning of the internal market.[132] However, the possibility to opt-in the supranational system may give rise to abusive use of Union law.

The abusive use of EU law may happen when the parties opt for the harmonised rules – whether directly or indirectly – with the sole purpose of avoiding national

---

130 Jay Westbrook, 'Theory and Pragmatism in Global insolvency: Choice of law and Choice of Forum' (1991) American Bankruptcy Law Review 457; Keay I (n 7).

131 Esin Orfci, 'Methodological Aspects of Comparative Law'(2006) 8 European Journal Law Reform 29, 32.

132 Keay I (n 7) 96.

regulations. The abuse of Union law can be defined as ‘a gain seeking, artificial and undesirable choice of law made by a private individual.’[133]

The concept of abuse of law is compounded of three elements. First, the parties should seek to ‘attract positive legal consequences’[134] through the choice of law. Second, the choice of law should be artificial, in the sense that the only possible explanation for the choice of law is the ‘regulatory benefit sought.’[135] In practice, this happens when the parties choose a law that is not connected to the transaction by any other factors than the choice itself. Third, the choice of law is not desirable in the circumstances. The third element is a ‘teleological assessment’[136] that evaluates ‘the nature of the law affected by the alleged abuse of law.’[137] Therefore, the judge will have to assess whether the choice of law frustrates particular interests protected by the national system.

The EU doctrine of abuse of Union law could be used to limit party autonomy in transaction avoidance further. As a consequence, the parties can choose the harmonised rules either directly or indirectly but not without conditions. When the transaction is fully domestic, and the harmonised rules have been chosen only to avoid national regulations, the competent judge will have to assess if the choice is desirable in the circumstances.

In particular, if the national law further protects the interest of the claimant (which is an external party to the vulnerable transaction), the judge should apply the national law. This is because the focus of the harmonised rules should be to balance the interest at stake in cross-border scenarios. They should be dismissed in fully domestic cases when they deprive the claimant of the rights they would otherwise enjoy under the national law.

To summarise the proposal of partial harmonisation may conflict with party autonomy. On the hand, the harmonised rules should be deemed mandatory in order to guarantee their consistent application. On the other hand, the parties can

---

133 Alexandre Sayde, ‘Defining the Concept of Abuse of Union Law’ (2014) 33 Yearbook of European Law 138, 138.
134 ibid 143.
135 ibid 139.
136 ibid 153.
137 ibid.

opt-in the harmonised rules as long as the choice does not constitute an abuse of EU law.

8.3.3. Benefits and Drawbacks

Any proposal entails benefits and drawbacks. The proposal of partial harmonisation seeks to bring uniformity and enhance legal certainty in cross-border situations. Moreover, it might foster the convergence of the national legal systems on transaction avoidance.

Additionally, the proposal provides an answer to the issues emerging in the current transaction avoidance regime, and it respects the EU principles of subsidiarity and proportionality. On the other side, the proposal is complex and may display different treatment between nationals of the country of the insolvency proceedings and non-nationals.

First, the proposal seeks to bring uniformity to the rules applicable in cross-border transaction avoidance. The proposal entails that the only law applicable to cross-border transaction avoidance will be the EU harmonised rules, which content will be discussed in section 8.5 of this chapter. This should increase the predictability of the outcome of the disputes arising in the insolvency context.

It is acknowledged that the proposal still displays some degree of uncertainty in the sense that, theoretically, it provides two possible laws applicable to transaction avoidance. However, once the transaction is characterised as either domestic or cross-border, the problem of the duplicity of law applicable should be resolved.

Moreover, such duplicity would still account as an improvement of predictability in comparison with the current situation. Indeed, within the current system, there are twenty-seven laws potentially applicable to the vulnerable transaction because there are twenty-seven EU Member States. At the same time, the duplicity of laws is intentional as it embodies an attempt to balance the necessity of legal certainty in cross-border scenarios with local particularisms. Indeed, the partial harmonisation seeks to allow the member states to address local concerns when the disputes over the vulnerable transactions have a domestic character.

Second, a partial harmonisation may foster the convergence of the transaction avoidance regimes of the EU member states. The convergence of laws is the

alignments of policies and regulations among different legal systems.[138] It may be induced by competition and emulation among legal systems, by international economic integration, or by a centralised harmonisation of laws.[139]

The development and the implementation of supernatural regulation on transaction avoidance may spring the debate on the policy issues underpinning the EU and national rule on the topic. In turn, such a foreseen academic and jurisprudential debate may create a fertile ground for a future complete harmonisation. Alternatively, the legal discourse and the possible consequent legal reforms may bring the topic to a convergence among the member states' policies as far as rendering unnecessary a further harmonisation.[140]

Third, the proposal respects the principles of subsidiarity and proportionality, which are two cardinal principles of the EU.[141] Concerning the principle of subsidiarity, article 5 TEU provides that in areas of non-exclusive competences, the centralised action of the EU institutions is permitted only 'insofar the objectives of the action cannot be sufficiently achieved by the member states.'[142] Indeed, the objective of the proposed harmonisation is to regulate cross-border transaction avoidance in order to enhance legal predictability. This could not be achieved sufficiently at the national level.

More remarkably, it can be argued that a proposal of partial harmonisation is a more proportionate response to the current issue of transaction avoidance than a proposal of total harmonisation. Under article 5 TEU, the EU legislative intervention must not go beyond 'what is necessary to achieve the objective of the treaties.'[143]

Partial harmonisation balances the objective of safeguarding the proper functioning of the internal market,[144] with the respect for local differences. In

---

138 Ian F. Fletcher, 'Perspectives on Harmonisation of Insolvency Law in Europe' in Ian F. Fletcher and Bob Wessels, Harmonization of Insolvency Law in Europe, Report for the Netherlands Association of Civil Law 2012 107, 108.

139 Ibid, Eva Lohse (n 8) 291.

140 Similar phenomenon can be appreciated in competition law. See Kati Cseres, 'Comparing Law in Enforcement of EU and National Competition Laws' (2010) 3 European Journal of Legal Studies 7.

141 See Paul Craig and Grainne De Búrca, *Eu Law: Text, Cases and Materials* (6th edn. Oxford University Press 2015) 171 ff.

142 Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13, Article 5.

143 ibid.

144 ibid Article 3.

comparison with the proposal of total harmonisation, it constitutes a less invasive measure within the national legal system, leaving some room for manoeuvre to the national legislator regarding domestic disputes.

On the other side, the proposal can be subject to some criticism. It is acknowledged that the current proposal is based on complex legal reasoning. As a preliminary step, it requires to identify the cross-border character of the transaction. Secondly, it entails the appraisal of the law that theoretically would apply to the transaction. In particular, the second step requires an in-depth assessment of the limits to the party autonomy imposed by the proposal. Only then the harmonised rules will apply.

However, judges should be familiar with the legal reasoning behind the EU principles of PIL. Moreover, it is suggested that PIL mechanism within the insolvency regulation should be supported by the reference to the principles of the Rome I Regulation. This reference not only should resolve the issues of vagueness and uncertainty of the current Article 16 EIR, but also provide clarity and predictability in the application of the proposed compromise.

8.4. How to Implement the Proposal

As the proposal entails a combination of two approaches (i.e. PIL rules and harmonised substantive rules), its implementation requires a two-step procedure. First, the PIL provision of Article 16 EIR(R) should be reformed. Second, the substantive rules on transaction avoidance should be designed and implemented through a regulation.

On the one side, Article 16 EIR(R) should be reformed to implement new PIL rules. In particular, the text of the provision could resemble the following:

> Regulation n xx/20yy on harmonised transaction avoidance rules shall apply to cross-border transactions.
>
> Transactions are deemed to be cross-border transactions where at least one of the parties to the transaction have their habitual residence or centre of main interest in a member state other than where the proceedings are opened or when the law applicable to the transaction is different from the law of the opening of the proceedings

> For the purposes of paragraph 2, the law applicable to the transaction shall be identified with reference to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

The harmonised rules on transaction avoidance shall be deemed mandatory rules from which parties cannot choose to derogate. On the other side, substantive rules should be implemented in a separate instrument. As expressly mentioned in the model PIL rules, such an instrument should be a regulation. The EU institutions can enact legislation either through regulations or directives.[145] Article 114 on the Treaty of the Functioning of the European Union (TFEU) specifies that 'the measures for the approximation of the provisions laid down by law' (i.e. harmonising instruments) should be adopted according to the ordinary legislative procedure (OLP).[146] Both regulations and directives can be adopted by means of the (OLP).[147]

Regulations are 'legislative acts that are entirely binding and directly applicable.[148]

Regulations have the benefit of not requiring a national enactment and therefore provide a speedier implementation of legislation.[149] At the same time, they are rigid legislative measures that cannot easily be used to implement procedural and substantive rules in the disparate legal and procedural settings of the member states.[150]

In contrast, directives are binding only regarding the goals and objectives to be achieved while they allow the member states to choose the form and method of implementation.[151] Therefore, they require the member states to enact national legislation to implement the directive's content. [152] Directives display the advantage to be flexible.[153] They allow adjusting the form and method of

---

145 TFEU (n 65) Article 288.
146 ibid Article 114.
147 ibid Article 294.
148 Craig and De Búrca (n 141) 107.
149 ibid.
150 ibid 108
151 ibid.
152 ibid.
153 ibid.

implementation according to the political, administrative, and social framework of the individual member states.[154]

However, leaving space of action to the national legislators often means that the implementation of the rules is delayed, sometimes considerably.[155] In addition, directives lack the so-called horizontal direct effect.[156] The principle of direct effect provides that EU law is directly applicable to the member states and confers rights and obligation to the EU citizens.[157] The direct effect qualifies as either vertical, which concerns the relationship between the state and the individual, or horizontal, which relates to the relationship among private individuals.[158]

It is established that directives may have vertical direct effect when – after their time-limit for implementation has expired- they are sufficiently clear, precise and unconditional.[159] In contrast, directives do not have horizontal direct effect because they are binding only for the member states which they are addressed to.[160]

In the case of non-transposition of a hypothetical harmonising directive, private individuals would not be able to rely on the harmonised rules. The issue of non-transposition, combined with the lack of horizontal, direct effect has the potential to create discrimination issues among the citizens of different member states. Moreover, it would undermine the scope of the harmonisation disrupting the goal of uniformity and predictability.

Additionally, the indirect nature of the directives gives rise to a risk of improper transposition.[161] In the context of transaction avoidance, where similar claims are

---

154 ibid.

155 Gerda Falkner, Oliver Treib, and others, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press 2005) 12.

156 Case 152/84 *Marshall v Southampton & South West Hampshire Area Health Authority* ECLI:EU:C:1986:84, [1986] ECR I-00723.

157 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 [1963] ECR English special edition 00001.

158 Elspeth Berry, Matthew Homewood and Barbara Bogusz, *EU Law* (3rd edn Oxford University Press 2017) 118.

159 Case 26/62 (n 157); Case 9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78, [1970] ECR I-00825; Case 41/74 *Yvonne van Duyn v Home Office* ECLI:EU:C:1974:133, [1974] ECR I-01337; Case 148/78 *Pubblico Ministero v Ratti* ECLI:EU:C:1979:110, [1979] ECR I-01629.

160 Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7 [1982] ECR I-00053.

161 Bernard Steunenberg, 'Turning Swift Policy-making into Deadlock and Delay: National Policy Coordination and the Transposition of EU Directives' (2006) 7 European Union Politics 293.

already regulated at the national level, the risk of improper transpositions seems to be significant.[162] Because the member states already have an internal regulation concerning transaction avoidance, they may end up infusing their national doctrines and approaches into the transposed harmonised rules.

This possibly biased implementation would undermine the uniform application of the harmonised rules. Although there are examples of stricter directives that dictate the details of the rules to be put in place,[163] such use of directives has been severely criticised.[164] Moreover, the issues of risk of late transposition and lack of horizontal direct effect are intrinsic characteristics of directives, which make them a non-ideal instrument of harmonisation.[165]

A regulation, therefore, seems the most appropriate instrument to implement harmonised rules.[166] However, the rigidity of the legislative instrument should be taken into careful consideration in formulating the substantive rules. Indeed, these need to be able to fit within different insolvency law frameworks.

Most likely, the suitability of EU rules could be assessed thought the regulatory policy of *better regulation.* Better regulation encompasses 'strategic planning, impact assessment, consultation and evaluation'[167] In particular, a series of consultation with the major stakeholders (such as businesses, insolvency practitioners, judges) may help adjust the content of the rules to a neutral character that fits within different legal systems.[168]

Such a Regulation could found its legal basis in Article 4 TFEU, which described the sphere of competences the EU shares with the member states.[169] In particular, Article 4 TFEU specifies that the EU has shared competences

---

162 Robert Thomson, 'Same Effects in Different Worlds: the Transposition of EU Directives' (2009) 16 Journal of European Public Policy 1.

163 E.g. Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to Cocoa and Chocolate Products Intended for Human Consumption OJ L 197, 03.08.2000, 19.

164 Mgr Bartlomiej Kurcs, 'Harmonisation by Means of Directives – Never-ending Story?' (2001) 12 European Business Law Review 287, 290.

165 ibid.

166 Keay I (n 7) 91.

167 Elisabeth Golberg, 'Better Regulation: European Union Style' 2018 M-RCBG Associate Working Paper Series No. 98, 3 < https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp98> accessed 21.07.2020.

168 ibid 96.

169 TFEU (n 65) Article 4.

concerning the 'economic, social, and territorial cohesion'.[170] The proposed regulation on partially harmonised transaction avoidance rules seeks to enhance the economic cohesion within the internal market through a reform that improves legal certainty in cross-border insolvencies.

8.5. The Substantive Harmonised Rules on Transaction Avoidance

This thesis seeks to put forward a blueprint for substantive harmonised rules to apply exclusively to cross-border scenarios. As identified in chapter two, the proposal of harmonisation is limited to three types of claims: preferences, transactions at an undervalue and transactions detrimental to creditors. Before discussing the possible content of such hypothetical provisions, two preliminary issues must be considered. First, the study considers which acts or transactions fall within the scope of application of the harmonised rules. Second, it examines the element of insolvency as a prerequisite of the harmonised claims.

Concerning the first issue, the concept of a legal act must be clarified. Currently, there is no common legal theory of legal acts in the European Union.[171] One the one side, continental civil law countries generally have their own legal theories of what a legal act is.[172] On the other side, the concept is alien to the common law system of the U.K. Although the concept is used within the English version of the EIR, it is not an original concept of English law, and it lacks a solid legal theory behind it.[173] Moreover, the English insolvency system refers to legal transactions rather than legal acts.[174] However, in the English language, the terms are synonyms.[175]

As mentioned, the concept of the legal act is used in Article 7(m) and 16 EIR(R). The application of the concept is left to the theoretical framework of the member states. In particular, the consideration of whether the facts of a case constitute a legal act belongs to the court opening the insolvency proceedings, which applies

---

170 ibid.

171 Jaap Hage, 'What is a legal Transaction?' in Del Mar and Bankowski (eds.), *Law as Institutional Normative Order* (Ashgate 2009) 103 ff.

172 ibid.

173 ibid.

174 Insolvency Act (n 38) Sections 238 and 423.

175 Hage (n 171)

the national doctrine to the facts of the case. This approach may seem problematic in the application of the harmonised rules. Depending upon the theoretical framework applied, certain acts could escape the scope of application of the harmonised rules.

However, there have been attempts to define a legal act that abstracts from the specific regulation of the national law. The legal act (i.e. legal transaction, Rechtsgeschäft, atto giuridico) can be intended as 'the means by which legal subjects can change the legal position of themselves or other persons.'[176] Such a definition is very broad as to encompass a great variety of acts by which the legal transaction can be performed. Therefore, it can be used in the context of transaction avoidance to enhance the scope of the application of the harmonised rules.

The second issue in the formulation of the content of the substantive transaction avoidance rules is the determination of insolvent status.[177] As highlighted in chapter seven, in the application of transaction avoidance claims, the vulnerability of the transactions depends upon the debtor's insolvent status. In the countries analysed in this thesis, this objective element is generally required for transactions at an undervalue and preferences.[178] In contrast, the element is not generally encompassed in transactions detrimental to creditors.[179]

The requirement of the debtor's insolvency in transactions at an undervalue, and preferences is relevant in safeguarding the principle of contractual finality (legal certainty of the transaction).[180] Indeed, it limits the application of the avoidance rules to those transaction undertaken in the deviant circumstances of insolvency. However, in the formulation of the harmonised rules, the establishment of insolvency can be troublesome as the member states do not apply a single approach to it.[181]

---

176 ibid.
177 Keay II (n 7) 95.
178 See *supra* Section 7.3.2.1.
179 ibid.
180 de Wejis (n 7) 222.
181 Keay (n 7) 95-96.

For the purposes of the current proposal, the cash flow test should be used as it allows an easier and more precise determination of the insolvency status.[182] Under this approach, a transaction could and should be challenged if at the time it was undertaken, the debtor was unable to meet their debts as they fall due or became unable as a result of the transaction.[183]

8.5.1. Transactions at an Undervalue

A harmonised provision on transactions at an undervalue should seek to restore the insolvency estate when a transaction is undertaken by the debtor and a third party and where the third party had provided no consideration or a consideration considerably below market value. The provision should seek to balance the interest of the integrity of the insolvency estate with the principles of legal and contractual certainty.[184] This balancing exercise can be achieved through the restoration of the integrity of the estate as if the transaction had not taken place with some adjustments that safeguard the contractual position of the third party.

On the one hand, the restoration of the estate depends upon the legal consequence of the claim. In practice, it can be achieved in two ways. Under a first approach, the claim of transactions at an undervalue could reverse the transaction through the imposition on the counterparty of a duty to restore the assets to the insolvency's estate.[185]

This approach may interfere with the different regimes concerning property rights adopted in the member states, which often reflect legal-political choices of the member states.[186] Such interference may, therefore, undermine the results of harmonisation as the legal consequences of the claim may depend upon the legal theories adopted by the member states in regard to property rights.

At the same time, the counterparty might have a claim against the insolvency's estate for the amount performed under the vulnerable transaction. The issue, in this case, would be the rank of the counterparty's claim in the distribution. The

---

182 Kubi Udofia, 'Establishing Corporate Insolvency: The Balance Sheet Insolvency Test (March 19, 2019)< https://ssrn.com/abstract=3355248> accessed 21.07.2020.

183 ibid.

184 de Wejs (n 7) 221.

185 John Armour and Howard Bennet (eds) *Vulnerable Transactions in Corporate Insolvency* (Bloomsbury Publishing 2003) para 2.127.

186 Bram Akkermans, 'The European Union Developments of European Property Law,2 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888294> accessed 21.07.2020.

ranking of the claims in insolvency is a matter close to the political and national interests of the estate.[187]

Such an approach may, therefore, have two drawbacks. On the one side, its interference with the national regimes and interests may cause political resistance in the implementation of the rules. On the other side, even if the controversial rule could be adopted, its consistent application throughout the member states might be undermined by the different legal regimes of the member states.

Under the second approach, the third party should be required not to restore the assets but to pay the difference between the amount paid and the market value of the assets at the time the transaction took place.[188] Such an approach provides a simpler solution that could be more easily achieved throughout the EU member states.

The suspect period should be relatively short in order to facilitate the judges' assessments.[189] As de Wejis suggests, the suspect period for transactions at an undervalue could be of one year from the moment of the opening of the proceedings.[190] Additionally, it could be extended to two years for related parties, which identity would be later discussed.

On the other hand, the balance between the interests at stake requires to consider whether subjective criteria should be adopted in relation to either of the parties of the transaction. As explained in the previous chapters, the application of the subjective criteria is problematic in practice. It requires the judge to investigate the intention of the parties which can only be inferred from factual elements that are up to interpretation. In order to keep the legal reasoning as linear as possible and avoid disparities of treatment depending upon the legal traditions of the courts, the most suitable solution would be to disregard the subjective criteria in transactions at an undervalue.[191]

---

187 Federico M. Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 European Business Organization Law Review 175, 180.

188 *Walker v WA Personnel Ltd* [2002] BPIR 621

189 Keay II (n 7) 100.

190 de Wejis (n 7) 226.

191 ibid, Keay II (n7) 97 ff.

It can be argued that an objective approach is more efficient both in terms of resources and time spent by the insolvency practitioner on the matter. However, at the same time, a completely objective approach would put the counterparty of the transaction in a limbo of legal uncertainty for one year after the transaction.[192] To temper the legal uncertainty, the counterparty could be equipped with a defence that adopts some subjective elements. [193]

The counterparty could prove that they were unaware of the debtor's factual insolvency at the time of the transaction. Such defence should be argued according to national, international, and cross-border business practices. This approach should limit the defence to those circumstances where the counterparty could not have known of the insolvency. In contrast, the party should not be allowed to escape the application of the provision when they should have been aware of the insolvency had they made the proper enquires.

The possible harmonised provision on transactions at an undervalue could be formulated as follows:

> **Article 1. Transactions at an undervalue**
>
> Any cross-border legal transaction undertaken by the debtor with a counterparty where the debtor has received no consideration or a consideration significantly below market value can be challenged by the insolvency practitioner.
>
> The transaction can be challenged if concluded in the year prior to the request of the opening of the insolvency proceedings. The period shall be extended to two years if the counterparty to the transaction is a party related or connected to the debtor.
>
> The consideration at market value due at the time of the transaction shall be restored to the insolvency estate by the counterparty.
>
> In any case, the transaction is valid and unaltered if the counterparty proves that they were not aware of the factual insolvency of the debtor.

---

192 ibid.

193 Keay (ii) 98.

8.5.2. Unfair Preferences

The harmonised provision on preferences should challenge transactions that occurred between the insolvent debtor and one or more of their creditors before the opening of the insolvency proceedings. Not all transactions occurred at the eve of insolvency proceedings should be challenged as this would paralyse the activity of businesses. The only transactions that should be challengeable are those that place the creditor in a better position than the one they would have been in the statutory distribution.

The limitation of the scope of application of the provision can be reached by either subjective criteria (as it is in England[194]) or by objective criteria (as it is in Germany[195]). However, the adoption of subjective criteria at the EU level may lead to difficulties in challenging the preferential transactions and inconsistencies of application. It is possible and preferable that a harmonised rule on preferences is based on exclusively objective criteria.

The limitation of the scope of application of the provision can be achieved by qualifying the situation in which the vulnerable transaction is undertaken and the transaction itself. First, the application of the provision can be limited by the requirement of factual insolvency. The only transactions that should be challenged are those that had occurred when the debtor was already factually insolvent. This limitation reflects the exceptional nature of preferences a rule instrumental to the collective purposes of insolvency. At the same time, it also limits the applicability of the rule to exceptional circumstances, supporting legal certainty of the transactions concluded under normal business life.[196]

Second, the scope can be limited by qualifying the transaction that can be challenged. The only transactions that should be challenged should be those that produce an unfair result. In other words, the provision should challenge the transaction in which the parties attempt to contract out of the insolvency regulation. This can be easily achieved by looking at the terms of the original agreement between the debtor and the creditor. When the transaction at the eve

---

194 Insolvency Act (n 38) Section 239.
195 InsO (n 39) Section 130 and 131.
196 Keay II (n 7) 95.

of insolvency deviates from the time and manner, in which the obligation should have been performed, then it should be challengeable.

Alternatively, when the parties do not specify the terms of the obligation, the insolvency practitioner and the courts could refer to the practices of the ordinary course of business to determine whether the transaction produces an unfair result. The latter criterion has been adopted as a possible defence in case of preferential transactions in the U.S. Bankruptcy Code.[197] Under the current proposal, the criterion might be used to establish whether the transaction can be deemed an anomaly, and therefore, vulnerable.

The granting of security as a form of preference may be a problematic aspect of preferences.[198] Indeed, security rights are not harmonised at the EU level. Therefore, every member state presents substantially different security rights. Before a possible harmonisation of the security rights at the EU level, a harmonised rule on preference should seek to challenge all those securities rights qualified as such by national law that (i) are granted within the suspect period; (ii) when the debtor was already factually insolvent; and that (iii) ameliorate the position of the creditor in the distribution system.

Third, the application of the provision on preferences should be limited in time. The suspect period should be limited to six months prior to the opening of insolvency proceedings. Eleven out of twenty-eight member states already adopt such timeframe for preference,[199] suggesting that six months may provide a reasonable balance between the interest of the insolvency proceedings and the principle of legal certainty.

Additionally, the provision on preference, like the one on transactions at an undervalue, should address related party, for which the suspect period could be increased to one year. The provision should also safeguard payment and securities granted for purposes of refinancing. Both of this topic will be dealt with in section 8.5.4.

---

197 U.S. Bankcruptcy Code, Title 11, Section 547.

198 Gerard McCormack and Reinhard Bork (Eds.), *Security Rights and the European Insolvency Regulation* (Intersentia 2017).

199 McCormack, Keay and Brown (n 7) 143 ff.

Concerning the effects of the challenge, the claims should put the creditor in the position it would have been if the transaction had not taken place. It is suggested that such a result could be achieved as for transactions at an undervalue with the payment by the creditor to the insolvency estate of what received from the debtor. Similarly, the securities granted should be made invalid by a court ruling. The possible harmonised provision on preference could be formulated as follows:

Article 2. Preference

Any cross-border legal transaction undertaken by the debtor with one or more of their creditors shall be challenged when:

(i) The transaction was undertaken within six months prior to the opening of the proceedings;

(ii) The debtor was factually insolvent at the time the transaction was undertaken;

(iii) The transaction provided payment or security for a previously established debt in a manner that is not compliant with the terms of the original transaction between the debtor and the creditor or with the practices of the ordinary course of business.

The creditor shall restore its position as it would have been had the transaction not occurred.

The creditor benefitting from the transaction can prove that they were not aware of the factual insolvency of the debtor at the time the transaction occurred.

The terms of paragraph 1.1. shall be extended to 1 year when the transaction is undertaken by the debtor with one or more related parties.

8.5.3. Prejudicial Transactions to Creditors

Prejudicial transactions to creditors should address transactions undertaken by the debtor with the intention to prejudice the creditors. This could be deemed a residual provision as it seeks to challenge those transactions that are prejudicial to the creditors, although not necessarily at an undervalue or preferential. Like

Germany and Italy, most member states provide for a provision of transaction defrauding creditors based on the Roman *actio pauliana.*[200]

Based on the common Roman tradition, a harmonised provision on transaction prejudicing creditors should encompass: (i) the prejudice to the creditors; (ii) the prejudicial intention of the debtor and; (iii) the third-party awareness of the prejudice.[201] Therefore, these three elements should be considered individually.

The concept of prejudice relates to the potential financial loss the creditors could suffer because of the debtor transaction. Although such prejudice can take place in different forms, in practice, it should be deemed realised when the debtor alters the assets available for future potential distribution to the creditors.

The prejudice should be deemed to take place when the debtor alters their estate in a way that makes it more difficult for their creditor to successfully claim and enforce their rights against the insolvency's estate.[202] However, the prejudicial outcome should be challenged and reversed only when accompanied by the debtor's intention to prejudice. Such a limitation to the scope of application of the provision appears necessary to ensure the contractual freedom of the debtor.[203]

As it has already been remarked, the subjective criteria find difficult application in practice. Therefore, it is suggested that the prejudicial intention of the debtor could be anchored to more ascertainable elements. In this context, the German experience provides some insight in designing the prejudicial intention in the harmonised provisions.[204] Within the concept of intention, the German system encompasses the so-called *dolus eventualis.*[205]

This mental element is a concept that can be placed between intention and awareness. It can be understood as the mental position of someone who knows the effects of their actions; they do not necessarily seek them but nevertheless undertakes the act and accept the foreseen effects. Such an extension of the concept of intention allows a simpler regime of proof for insolvency practitioners.

---

200 McCormack (n 7)159; S.H.A.M. Hendrix, *Transaction Avoidance in Insolvency Law: Past, Present and Future of the Actio Pauliana* (CELSUS 2019)

201 Hendrix (n 200) 125.

202 See *supra* Section 7.3.1.3.

203 Ilaria Pretelli, Cross- Border Credit Protection against Fraudolent Transfer of Assets: Actio Pauliana in the Conflict of Laws (2011) 13 Yearbook of Private International Law 589, 600.

204 See *supra* Section 5.3.2.

205 ibid.

Indeed, they will only have to prove that the debtor was aware that the transaction would have prejudiced the creditors, but they recklessly undertook the detrimental transaction.

Moreover, the harmonised provision should take into consideration the position of the counterparty of the transaction as their interests need to be balanced against the interests of the insolvency's estate.[206] The general interest of the counterparties is to be able to rely on the contractual finality of the transaction and not to be put in a worse position.[207] Therefore, in support of the principle of legal certainty, the provision should target only those transactions where the counterparty was aware of either the intention of the debtor or its financial situation.

It would be burdensome for the insolvency practitioner to prove that the counterparty was aware of the debtor's intention. It could be sufficient to require the counterparty to be aware of the debtor's factual insolvency. The latter could be more easily inferred from factual clues by both the counterparty first and the insolvency practitioner at the later stage.

Additionally, as subjective criteria already limit the scope of application of the provision, the time limitations can be more relaxed than the other provisions. The suspect period could be of five years from the opening of the proceedings, extended to ten years in case of transactions concluded with related parties. Currently, the suspect periods in the member states range from six months in Malta to 10 years in Germany.[208] The period of five years seems reasonable in balancing the interest of the insolvency with the principle of contractual finality.

The effects of the claim should be similar to those provided for transaction at an undervalue and preferences. Therefore, the counterparty should be asked to restore the debtor's estates to the position it would have been if the transaction had not taken place. The party should be asked to repay to the estate the amount that has exited the debtor's estate at the expenses of the creditors.

---

206 Pretelli (n 203) 617.
207 de Weijs (n 7) 221
208 McCormack (n 7) 160.

Article 3. Transactions Detrimental to Creditors

Any transaction undertaken by the debtor with 5 years before the opening of the proceedings shall be challenged when:

(i) the debtor intended to prejudice their creditors or was aware that the transaction would have prejudiced the creditors and;

(ii) one or more creditors are worse off in the exercise of their claims against the debtor because of the transaction;

(iii) the counterparty was aware of the factual insolvency of the debtor.

In these circumstances, the counterparty of the prejudicial transaction shall restore the debtor's estate the amount it would have been within the estate if the transaction had not taken place.

8.5.4. Miscellaneous

As it was necessary to provide some preliminary consideration about the concepts of insolvency and legal transactions, the proposal needs to address a few residual points. First, the thesis needs to address the concept of related parties, which are parties that are related, connected or associated with the insolvent debtor.[209]

Their particular relationship with the debtor places them in a position of advantage in comparison to the other parties of the insolvency. On the one hand, they generally have access to more information than the other parties involved in the insolvency proceedings. Secondly, potentially, they have more opportunities to manipulate the circumstances or collude with the debtor to profit from the debtor's insolvency or at least limit its negative impact on them.[210]

Almost all member states provide different definition or lists of subjects that can be included in the category.[211] The present study puts forward a list -inspired by the English approach to related parties[212]:

---

209 Ibid 137.
210 ibid 138.
211 ibid.
212 Parry, Ayliffe and Shivji (n 55) para 4.142.

Article 4. Related parties

a) The debtor's spouse or registered civil partner at the time of the transaction;

b) A debtor's relative intended as lineal and collateral ascendants and descendants including parents, grandparents, siblings, aunts and uncles, nephews and nieces and first-degree cousins;

c) A relative (as intended in point b) of the debtor's spouse or civil partner;

d) The spouse or civil partner of a relative of the debtor's spouse or civil partner;

e) A member of a partnership with the debtor or with their spouse or civil partner;

f) The debtor's employee or employer;

g) The trustee or beneficiary of a trust or analogous relationship where the debtor is involved;

h) The directors or shadow directors of the insolvent company (the debtor);

i) A company under the control of the debtor or of their related parties;

j) A company member of the same group of companies as the insolvent company;

k) The directors or shadow directors of a company member of the same group of companies as the insolvent company;

l) A party related to the director of a company member of the same group of companies of the insolvent company.

The list should be deemed not exhaustive and could be expanded by the CJEU, where reasons of foreseeability and fairness require. The expansion would support the maximum coverage of parties that have the potential to disrupt the efficient development of the insolvency proceedings.

The other topic that the thesis needs to address is refinancing, which is particularly relevant in the application of transaction at an undervalue and preference. Refinancing (i.e. new and interim financing) is the finance provided

in support of restructuring plans in order to avoid liquidation and allow the debtor to continue the business.[213]

The refinancing is potentially at odds with transaction avoidance.[214] The new financing generally occurs either within insolvency or in pre-insolvency scenarios where the debtor is already in financial distress. The awareness of such circumstances allows the new financer to protect themselves from the risk of insolvency with securities that will affect the distribution in case of future insolvency proceedings.[215] Nevertheless, it is commonly acknowledged that refinancing should be safeguarded from the application of transaction avoidance.[216] Otherwise, the businesses in financial distress would risk underinvestment issues or would have to face higher borrowing costs.[217]

The issue is recognised in the Directive on restructuring and insolvency.[218] Article 17 and 18 of the proposal of the Directive provide for the protection of new and interim financing. Article 17 specifies that new and interim financing should be encouraged and protected unless additional grounds are provided by the national law.[219] The text has been slightly modified from the original proposal. The proposal suggested that the financing should be protected unless realised fraudulently or in bad faith.[220]

For consistency purposes, the thesis suggests adopting the same rules with minor adjustments due to the nature of the measure proposed (i.e. a regulation). Moreover, the thesis seeks to keep the exception of bad faith encompassed in

---

213 Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, III, 6(e).

214 Roland de Weijs, Evert J.R. Verwey and Others, 'Financing in Distress Against Security from an English, German and Dutch Perspective: a Walk in the Park or in a Mine Field?' (2012) 3 International Insolvency Law Review 21.

215 Aurelio Gurrea-Martinenz, 'The avoidance of Pre-Bankruptcy Transaction: an Economic and Comparative Approach'(2018) Chicago-Kent Law Review 711.

216 ibid.

217 ibid 722.

218 Directive 2019/1023 of the European Parliament and of the Council of 20.06.2019 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures Concerning Restructuring, Insolvency and Discharge of Debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

219 ibid Article 17.

220 Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU COM/2016/0723 final - 2016/0359 (COD)

the proposal as it is more specific than the current provision that ground the exception on additional generic grounds provided by the national law.

Article 5. Protection for new and interim financing and other restructuring-related transactions

Transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan shall not be subject to the harmonised rules on transaction avoidance unless such transactions have been carried out fraudulently or in bad faith.

Transactions carried out to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such negotiations are not subject to the harmonised rules on transaction avoidance in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith.

Transactions enjoying the protection referred to in paragraph 1 shall include:

a) the payment of fees for and costs of negotiating, adopting, or confirming a restructuring plan;

b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;

c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;

d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

Transactions that are reasonable and immediately necessary for the implementation of a restructuring plan, and that are carried out in accordance with the restructuring plan confirmed by a judicial or administrative authority, or closely connected with such implementation shall not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith, irrespective of whether such transactions were deemed to be in the ordinary course of business.

8.6. Harmonised Rules of Transaction Avoidance outside Insolvency Proceedings

As seen in the previous chapters, England, Germany and Italy provide for a claim of transaction avoidance also outside the framework of insolvency law.[221] Similarly, most European Union member states encompass this type of claims within their domestic regulation.[222] In particular, almost all member states provide for a claim to be brought by a creditor against a third party that seeks to set aside a transaction made between the debtor and a third party that frustrates the enforcement of the creditor's rights.[223]

Additionally, as analysed in chapter three, the EU private international law system has struggled to deal with this type of claims. For a long time, the so-called *actio pauliana* was deemed outside the scope of application of Rome I and Rome II.[224] Therefore, the determination of the law applicable to these claims was left to domestic private international law rules of the member states, without a homogenous regulation at the EU level.[225]

Recently, the CJEU has revised the issue, deciding that this type of action is governed by the Rome I Regulation.[226] Accordingly, the law applicable to the claim will be the law governing the contract between the debtor and the creditor who seek to set aside the transaction between the debtor and the third party. As highlighted in chapter two, this new approach undermines the legal certainty for the third party.[227] Indeed, the third party cannot foresee the law applicable to their own transaction as this is determined with reference to a contract they are not part of. Consequently, they cannot foresee whether their transaction would stand against this type of claims.

---

221 See *supra* Sections 4.4; 5.4; 6.5.

222 Kristin Van Zwieten, 'Related Party Transactions in Insolvency' (2018) 401 ECGI Working Paper Series in Law, 6.

223 ibid 10.

224 Joaquín J. Forner Delaygua, 'Derecho Europeo: La acción Pauliana bajo el TJCE(una opinion discrepante de *Reichert* II) in Forner Delaygua (ed), *La protección del crédito en Europa: La acción Pauliana* (Bosh 2000) 144.

225 ibid; Laura Carballo Piñeiro, 'Acción Pauliana e Integración Europea: Una Propuesta de Ley Aplicable' (2012) 54 Revista Española de Derecho Internacional 43, 46; Pretelli (n 203) 629.

226 Case C‑337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805.

227 See *supra* Section 3.4.1.

At the same time, if the approach of the CJEU was to change under Rome II, the law applicable could be the law governing the vulnerable transaction between the debtor and the third party. Also this approach, however, would be problematic in practice. The creditor who brings the claim is an external party to the vulnerable transaction. Therefore, it would be could difficult to determine which law is applicable to the vulnerable transaction.[228]

The proposal for the harmonisation of transaction avoidance could be useful in solving the impasse created by the private international law approach. In particular, it can enhance the legal certainty for all the parties involved in the claim. The provision on prejudicial transactions to creditors proposed in this thesis could be extended to circumstances outside the insolvency framework. Indeed, the proposed provision is modelled on the Roman tradition, and there are similar provisions in several member states inside and outside the insolvency framework.[229]

8.6.1. When does the Harmonised Rule on Transactions Detrimental to Creditors Apply outside Insolvency Proceedings?

The harmonised rule transactions detrimental to creditors should be used exclusively in cross border scenarios as it is provided for the claims arising in the insolvency context. The reasons for keeping the rule only partially harmonised are the same as illustrated in section 8.2. As highlighted in chapter seven, national civil avoidance claims differ in rationale and effects.[230] Moreover, Italy and Germany lack a solid legal theory underlining these claims.[231]

Therefore, it is suggested that a partially harmonised rule on transaction avoidance outside insolvency may be more respectful of the legal autonomy of the member states. Additionally, the purpose of a unified rule for cross-border transactions should be to enhance the foreseeability of the outcomes of the dispute in cross-border scenarios. A full harmonisation could be deemed to go beyond what is necessary to achieve this goal.

---

228 Piñeiro (n 225).
229 Van Zwieten (n 222); Pretelli (n 203).
230 See *supra* Section 7.4.1.
231 ibid.

Outside the procedural framework of insolvency, the rule should apply when a transaction that prejudices the rights of the creditors has a cross-border character. This can be deemed to occur: (i) when the parties of the transaction are domiciled in two different member states or, (ii) when the law applicable to the transaction is not the law of the jurisdiction where the claim is brought.

In these circumstances, the creditor who needs to bring a claim may not know the law governing the vulnerable transaction. Within the insolvency proceedings, the insolvency practitioner is facilitated in gaining access to the details of the transaction undertaken by the debtor. In contrast, in civil proceedings, the claimant has limited rightful investigation powers on the debtor's business. However, a claimant should be able to learn the domicile of the potential defendant as a precondition of bringing the claim to the defendant's forum under Brussels I.[232]

At the same time, the counterparty of the vulnerable transaction can rely more on the contractual finality of the transaction concluded with the debtor. Indeed, they should need to check their transaction only against their national law for domestic claimants and against the harmonised rule against cross-border creditors.

Also outside insolvency proceedings, the harmonised rules on transaction avoidance should be deemed to supersede the ordinary choice of law rules. Indeed, these rules are designed to safeguard the interests of parties external to the transaction, which rights may be prejudiced by a choice of applicable law.[233]

8.6.2. The Substantial Rules

The harmonised rule on transaction avoidance outside insolvency proceedings should be modelled on the provision of prejudicial transactions to creditors. It can be questioned whether the requirement of factual insolvency is appropriate in the civil application of the claim. As highlighted in section 8.5, the factual insolvency refers to the situations where the debtor's liabilities exceed their assets or when the debtor is unable to pay their debts as they fall due.

---

232 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (recast) [2012] OJ L351/1, Article 3.

233 Van Zwieten (n 222) 13.

In transactions detrimental to creditors, the element of factual insolvency emerges only as part of the subjective criteria of the counterparty. In particular, the proposal suggests that the transaction is vulnerable only if the counterparty is aware of the factual insolvency of the debtor.

Such a requirement should be kept also in civil proceedings as it limits the application of the claim to exceptional situations where the debtor is not paying the creditor. Such a claim is a restriction of the debtor and third party's contractual freedom and therefore should be limited to special circumstances.[234] In this way, the proposal attempts to balance the contractual freedom of the debtor with the interests of the creditors to exercise and enforce their rights.

> **Article 6. Prejudicial transactions to creditors outside insolvency proceedings**
>
> A claim under Article 3 can also be brought in civil proceedings when:
>
> *(i)* the parties of the transaction are domiciled in two different member states, or
>
> *(ii)* the law applicable to the transaction is not the law of the jurisdiction where the claim is brought.

It is suggested that the member state provides a detailed procedural ruled to allow the operation of the claim in civil proceedings, as they will better fit within the different procedural settings of the member states.

8.7. Conclusion

The chapter has sought to put forward a proposal for the harmonisation of transaction avoidance at the EU level, both within and outside the insolvency proceedings. In doing so, the chapter has first critically analysed the state of the art in relation to the harmonisation of transaction avoidance. It has considered and critically review the scholarship developed up to date. Such critical analysis has highlighted the shortcomings of a full harmonisation and questioned the feasibility of such a proposal.

Secondly, the chapter has addressed the other side of the spectrum of possible reforms on transaction avoidance. It has investigated the points of reform that are

---

234 Pretelli (n 203).

necessary to the current private international law system in order to improve the clarity of the subject and the legal certainty for the parties involved.

Having assessed the PIL reform and the full harmonisation option as unfeasible, this study has put forward a compromise solution. The proposed compromise suggests enacting a Regulation that partially harmonises transaction avoidance. It is suggested that such regulation should be coordinated with the EIR(R) by private international law principles that delimit their scope of application. The proposal in this chapter seeks to apply substantively harmonised avoidance rules to cross-border transactions.

Within the insolvency framework, the proposal suggested to qualify the transaction as cross-border (i) when at least one of the parties of the transaction have their habitual residence or centre of main interest in a member state other than the one of the proceedings; (ii) when the law applicable to the transaction is different from the law of the opening of the proceedings.

Once the transaction is qualified as cross-border, the harmonised rules shall apply. The proposal has focused on harmonised rules on transactions at an undervalue, preferences and transactions detrimental to creditors. In designing the harmonised rules, this study sought to balance several interests and principles. In particular, the proposal has sought to balance:

i. The contractual freedom of the parties;

ii. the interests of the insolvency's estate in maximising the returns to creditors;

iii. the principle of contractual finality relied upon the counterparty of the vulnerable transaction;

iv. the principle of procedural efficiency and;

v. The principle of predictability of the outcomes of the legal dispute.

In this balancing exercise, the proposal suggested that the harmonised rules are to be considered mandatory rules. Such a choice partially limits the contractual freedom of the parties, but it enhances the principle of predictability of the outcomes of the legal dispute and favours the maximisation of the returns to the creditors.

Moreover, the rules have been designed based on objective criteria such as the suspect periods and the factual insolvency of the debtor. In contrast, the proposal has dismissed the subjective criteria in transactions at an undervalue and preferences in favour of the principle of procedural efficiency.

Subjective criteria have been adopted in transactions detrimental to creditors in order to safeguard the principle of contractual freedom of the debtor. Additionally, in support of the principle of procedural efficiency, the subjective criterion proposed encompasses the so-called *dolus eventualis,* which can be more easily inferred from factual clues.

Furthermore, the proposal has addressed the issue of related parties who have a peculiar position in the triangular relationship of the claim. In this regard, the chapter has suggested a non-exclusive list of possible related parties based on the English approach.

At the same time, the proposal has considered the relationship between transaction avoidance rules and financing that is necessary for the implementation of restructuring plans. For consistency purposes, it is suggested that the current proposal aligns to the proposal for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency, and discharge procedures.

On the other side, the proposal has suggested extending the application of the provision on prejudicial transactions to creditors to cases outside the formal insolvency framework. Such an extension could solve the current issues in the application of private international law principles to this particular type of claims. Also outside the insolvency proceedings, the proposal has sought to balance the principle of contractual freedom of the debtor and the interests to contractual finality of the third party and the interest to the predictability of the outcomes of the legal dispute of the creditor.

Finally, the study has suggested that this proposal could be the first step into a future full harmonisation of the topic. Indeed, a partial harmonisation may facilitate the convergence of the legal regimes of the member states towards completely unified rules of transaction avoidance within and outside the insolvency framework.

Table of legislation

European Union

1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1972] OJ L299/32

Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326

Council Directive 86/653/EEC on the Coordination of the Laws of the Member States Relating to Self-employed Commercial Agents [1986] OJ L 382

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ L 160

Council Regulation n. 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L160/1

Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II-bis) OJ L 338/1

Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations [2009] OJ L 7/1

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation [2010] OJ L 343

Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency OJ L172/19

Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to Cocoa and Chocolate Products Intended for Human Consumption [2000] OJ L 197

Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on The Reorganisation and Winding-up of Credit Institutions [2003] OJ L 38 and EEA Supplement n 9

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136/3

Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L 127

Directive 2019/1023 of the European Parliament and of the Council of 20.06.2019 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures Concerning Restructuring, Insolvency and Discharge of Debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU COM/2016/0723 final - 2016/0359 (COD)

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims [2004] OJ L 143

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II) [2007] OJ L 199/40

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (recast) [2012] OJ L351/1

Regulation (EU) 2015/848 of The European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L141/19

Treaty of Amsterdam Amending the Treaty on European Union, Treaties Establishing the European Community and Certain Related Acts [1997] OJ C340/1

England

29 Elizabeth c. 5 (1587)

34 and 35 Henry VIII c 4 (1542)

Bankruptcy Act 1914 Section 42, 44(1)

Company Act 2006.

Henry VII c. 4 (1487)

Insolvency Act 1986, Sections 73, 98, 100, 123-124, 166, 175-176, 238-246, 251, 421-425, 435-436 and Schedule B1

Law of Property Act 1925 Section 172

Limitation Act 1980 Section 8, 9, 32(2).

Germany

Anfechtungsgesetz of 20 May 1879 (RGBl 277)

Anfechtungsgesetz of 5 October 1994 (BGBl. I p. 2911), which was last amended by Article 3 of the Act of 29 March 2017 (BGBl. I p. 654), Articles 1, 3, 4, 8,11

Bürgerliches Gesetzbuch in the version of the notice of 02.01.2002 (BGBl. I p. 42, p. 2909, 2003 p. 738) last amended by law of 31.01.2019 (BGBl. I p. 54) Sections 276, 812-823

Code of Civil Procedure (Zivilprozessordnung – ZPO) as promulgated on 5 December 2005, last amended by the law of 18.07.2017 (BGBl. I p. 2745) Section 286

Insolvency Order of 5 October 1994 (Federal Law Gazette I p. 2866), which was last amended by Article 24 (3) of the Act of 23 June 2017 (Federal Law Gazette I p. 1693) Sections13-21, 39, 56, 69, 80, 129-147, 217-218, 245-248, 270

Law on Limited Liability Companies in the adjusted version published in the Federal Law Gazette Part III, Section 4123-1, last amended by Article 10 of the Law of 17.07.2017 (Federal Law Gazette I p. 2446); Stock Corporation Act 06.09.1965 (BGBl. I p. 1089), which was last amended by Article 9 of the Law of 17.07.2017 (BGBl. I p. 2446)

Strafgesetzbuch (StGB; i.e. Criminal Code) in the version of the announcement of 13.11.1998 (BGBl. I p. 3322) last amended by law of 19.06.2019 (BGBl. I p. 844) Section 15

The Act for the Further Facilitation of the Restructuring of Companies of 7 December 2011 (Federal Law Gazette I, 66 p. 2582)

Italy

Civil Code Royal Decree 16.03.1942 n 262 Articles 1153, 1447, 1448, 2470, 2643-2696, 2729, 2741, 2901-2904, 2929 bis

Insolvency Statute (Legge Fallimentare) by Royal Decree 16.03.1942 n 267 reformed by law Statute 11.12.2016 n 232, Articles 2, 5, 7, 9, 14, 15, 16, 31, 41-44, 51, 52, 64, 65, 66, 67, 104-ter, 105, 120, 160, 161, 168, 182-bis, 214-128

Law Decree 14.03.2005 n 35 converted into Statute 14.05.2005 n 80

Law Decree 22.06. 2012 n 3 converted into Statute 07.08.2012 n 134

Law Decree 27.05.2015 n 83

Legislative Decree 09.01.2006 n 5

Legislative Decree 12.01.2019 n 14 entitled ‘Code of business crisis and insolvency in the execution of the Statute 19.10. 2017 n 155' Articles 1, 2,12,32, 56, 57, 67, 74, 84, 121, 163, 293

Legislative Decree 12.09.2007 n 169

Legislative Decree 30.07.1999 n 270 (Decreto Prodi-*bis*) reformed by Law Decree 23.12. 2003 n 347 converted into Statute 18.02.2004 n 39 (Decreto Marzano), Articles 1-3, 8, 18-19, 27, 49

Ministerial Decree 25.01.2012 n 30

Procedural Civil Code Royal Decree 28.10.1940 n 1443, Articles 20, 100, 602-04

Royal Decree 14.12.1882 n 1113 (Commercial Code 1882)

Statute 19.10.2017 n 155 Articles 1, 2

Statute 27.01.2012 n 3 and Statute 17.12.2012 n 221 converting the Law Decree 18.10.2012 n 179, Articles 6, 11,12, 14-ter.14-quarter, 15

Other Jurisdictions

Australia and New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) 01.01.1983

Dutch Bankruptcy Act, Articles 25, 42

Dutch Burgerlijk Wetboek (Civil Code), Articles 3:45. 3:46

French Civil Code, Articles 1167, 2092

French *Code de Commerce,* Articles L610-1 to L680-7

Mercosur Free Trade Agreement 26.03.1991

Organisation for the Harmonization of Business Law in Africa treaty 17.10.1993

Portuguese Civil Code, Articles 610, 612

Spanish Civil Code, Articles 1111, 1191, 1291, 1295, 1297

Spanish Insolvency Act (Ley Concursal) 09.07.2003, Articles 2, 71

Greek Insolvency Code, Sections 42

U.S. Bankcruptcy Code, Title 11, Section 547

Table of Cases

European Union / EFTA/ European Court of Human Rights

C-41/93 *France v Commission* ECLI:EU:C: 1994:23 [1994] ECR I-01831, Opinion of AG Tesauro

Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) ECLI:EU:C: 1979:42 [1979] ECR 649

Case 148/78 *Pubblico Ministero v Ratti* ECLI:EU:C: 1979:110 [1979] ECR I-01629

Case 152/84 Marshall v Southampton & South West Hampshire Area Health Authority ECLI:EU:C: 1986:84, [1986] ECR I-00723

Case 189/87 *Kalfelis v Schröder* ECLI:EU:C: 1988:459 [1987] I-5579

Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration ECLI:EU:C: 1963:1 [1963] ECR English special edition 00001

Case 41/74 *Yvonne van Duyn v Home Office* ECLI:EU:C:1974:133 [1974] ECR I-01337

Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7 [1982] ECR I-00053

Case 9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78 [1970] ECR I-00825

Case C- 54/16 Vinyls Italia S.p.A. in fallimento v. Meditteranea di Navigazione S.p.A, Opinion of the AG Maciej Szpunar 02 March 2017

Case C-133/78 *Gourdain v Nadler* ECLI:EU:C:1979:49 [1979] ECR 073

Case C-213/10 *F-Tex Sia v Lietuvos-Anglijos UAB "Jadecloud-Vilma*, ECLI:EU:C:2012:215 Electronic Reports case (Court Reports – General) 19 April 2014

Case C-261/90 *Reichert v Dresdner Bank* ECLI:EU:C:1992:149 [1992] (*Reichert II*) ECR I-2175

Case C-310/14 Nike European Operations Netherlands BV v Sportland Oy ECLI:EU:C:2015:690 [2015] OJ C 40

Case C-327/13 *Burgo group v Illochroma SA (in liquidation)* ECLI:EU:C:2014:2158 [2014] ECR 114

Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* ECLI:EU:C:2018:805 [2018] Electronic Reports case (Court Reports – General) 04 October 2018

Case C-337/17 *Feniks Sp. z o.o. v Azteca Products & Services SL* ECLI:EU:C:2018:487 [2018] Opinion of AG Bobek delivered on 21 June 2018

Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* ECLI:EU:C:2009:83 [2009] ECR I-791

Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* ECLI:EU:C:200 9:83 [2007] ECR I-00767

Case C-339/07 *Seagon v Deko Marty* [2008] ECR I-769, Opinion of the AG Ruiz-Jarabo Colomer

Case C-339/07 *Seagon v Deko Marty Belgium NV* ECLI:EU:C:2009:83 [2009] BCC 347

Case C-341/04 *Eurofood IFSC Ltd* ECLI:EU:C:2006:281 [2006] ECR I-3854

Case C-381/98 *Ingmar GB Ltd V Eaton Leonard Technologies* ECLI:EU:C:2000:605 [2000] ECR I-09305

Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti S.p.A.* ECLI:EU:C:2011:671 [2011] ECR I-09915

Case C-535/17 *NK v BNP Paribas Fortis NV* ECLI:EU:C:2019:96 [2019] Electronic Reports (Court Reports – General) 06.02.2019

Case C-535/17 *NK, liquidator in the bankruptcies of PI Gerechtsdeurwaarder-skantoor BV and PI v BNP Paribas Fortis NV* ECLI:EU:C:2018:850 Opinion of AG Bobek 18.10.2018

Case C-54/16 *Vinyls Italia S.p.A. in fallimento v. Mediterranea di Navigazione S.p.A.* ECLI:EU:C:2017:433 [2016] OJ C156

Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* EU:C:2016:325 [2014] 17.02.2016

Case C-557/13 *Hermann Lutz v Elke Bäuerle* ECLI:EU:C:2015:227 [2015] Electronic Reports (Court Reports – General) 16.04.2015

Case C-594/14 *Simona Kornhaas v Thomas Dithmar als Insolvenzverwalter über das Vermögen der Kornhaas Montage und Dienstleistung Ltd* ECLI:EU:C:2015:806 [2015] Electronic Reports (Court Reports – General) 10.12.2015

Case C-722/17 *Norbert Reitbauer and Others v Enrico Casamassima* ECLI:EU:C:2019:577 [2019] Electronic Reports (Court Reports – General) 10.07.2019

Case E-28/13 *LBI hf v Merrill Lynch Int Ltd* [2014] EFTA Rep 970

Khlaifia and Others v. Italy Application no. 16483/12 European Court of Human Rights 15.12.2016

England

4Eng Ltd v Harper & Ors [2009] EWHC 2633 (Ch)

Agricultural Mortgage Corp Plc v Woodward [1994] B.C.C. 688

Arbuthnot Leasing Interational Ltd v Havelet Leasing Ltd (No.2) [1990] B.C.C. 636

B v IB [2013] EWHC 3755 (Fam)

Barnett v Semenyuk [2008] EWHC 2939 (Ch)

BAT Industries plc v Sequana SA [2019] 2 WLUK 53

Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38

BNY Corporate Trustee Services Ltd v Eurosail [2013] UKSC 28

Brady v Brady [1989] A.C. 755

BTI 2014 LLC v Sequana SA [2016] EWHC 1686 (Ch)

Chohan v Sagor [1992] B.C.C. 306

Clydesdale Financial Services Limited and others v Smailes and others [2009] EWHC (Ch) 3190

Concept Oil Services Limited v EN-Gin Group LLP [2013] EWCH 1987 (Comm)

Dickinson v NAL Realisations (Staffordshire) Ltd [2017] EWHC 28 (Ch)

Doyle v Saville [2002] B.P.I.R. 947

Edgington v Fitzmaurice [1885] 29 Ch D 459

El-Ajou v Dollar Land Holdings Plc (No.1) [1994] 2 All E.R. 685

Ex parte Cooper [1875] L. R. 10 Ch. 510

Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP [2013] EWHC 14

Freeman v Pope [1870] 5 Ch App 538

Giles v Rhind [2009] B.C.C. 590

Hill v Spread Trustee Co Ltd [2006] EWCA Civ 542

HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd [1957] 1 Q.B. 159

Illingworth v Houldsworth [1904] AC 355

Inland Revenue Commissioners v Hashmi [2002] EWCA Civ 981

IRC v Hashmi [2002] 2 BCLC 11

JSC BTA Bank v Mukhtar Ablyazov, Madiyar Ablyazov [2018] EWCA Civ 1176

Jsyke Bank Ltd v Spieldnaes [1999] 2 B.C.L.C. 101

Knights v Seymour Pierce Ellis Ltd (formerly Ellis & Partners Ltd) [2001] 2 B.C.L.C. 176

KR & Ors v Royal & Sun Alliance Plc [2006] EWCA Civ 1454

Lennard's Carrying Company v Asiatic Petroleum Company [1915] A.C. 705

Lewis v Hyde [1998] 1 W.L.R. 94

Lloyd's Bank Ltd v Marcan [1973] 2 All ER 359

Lord (Liquidator of Rosshill Properties Ltd) v Sinai Securities Ltd [2004] B.C.C. 986

Mercantile Group (Europe) AG v Aiyela [1993] 20 FSR 745

Moon v Franklin [1996] BPIR 196

National Westminster Bank plc v Jones [2001] 1 BCLC 98

Oasis Merchandising Services Ltd (in liquidation) [1995] BCC 911

Phillips and another v Brewin Dolphin Bell Lawrie Ltd and another [2001] UKHL/2

Pinewood Joinery v Starelm Properties Ltd [1994] B.C.C. 569

Power v Sharp Investments Ltd [1994] 1 BCLC 111

Random House UK Ltd v Allason [2008] EWHC 2854 (Ch)

Re Cheyne Finance plc [2008] EWHC 2402

Re Exchange Travel (Holdings) Ltd (No.3) [1996] B.C.C. 933

Re Exchange Travel (Holdings) Ltd (No.4) [1999] B.C.C. 291

Re Fairway Magazines Ltd [1992] B.C.C. 924

Re Hampton Capital Ltd [2015] EWHC 1905 (Ch)

Re Ledingham-Smith (A Bankrupt) [1993] B.C.L.C. 635

Re Lehman Brothers Ltd (In Administration) [2017] UKSC 38

Re MC Bacon Ltd (No.1) [1990] B.C.C. 78

Re New Bullas Trading Ltd [1994] B.C.C. 36 (CA (Civ Div)

Re Paramount Airways (No 2) [1993] Ch 223

Re Peak Hotels and Resorts Ltd [2017] EWCH 1511 (Ch)

Re Priority Garage (Walthamstow) Ltd [2001] B.P.I.R. 144

Re Simon Carves Ltd [2013] EWHC 685 (Ch)

Re Spectrum Plus Ltd [2005] UKHL 41

Re Stealth Construction Ltd [2011] EWHC 1305 (Ch)

Re Yagerphone Limited [1935] Ch. 392

Reid v Ramlort Ltd [2004] EWCA Civ 800

Royscot Spa Leasing Ltd v Lovett [1995] B.C.C. 502

Secretary of State for the Environment, Food and Rural Affairs v Feakins [2005] EWCA Civ 1513

Segal v Pasram [2008] EWCH 3448 (Ch)

Siebe German & co Ltd v Barclays Bank Ltd [1979] 2 Lloyd's Rep. 142 (Ch D)

Skandinaviska Enskilda Banken AB v Conway [2019] UKPC 36

TBS Bank v Katz [1997] B.P.I.R. 147

Treasury Solicitor v Doveton [2008] WWHC 2812 (Ch)

Treharne v Brabon [2000] B.C.C. 1171

Trowbridge v Trowbridge [2003] B.P.I.R. 258

Walker v WA Personnel Ltd [2002] BPIR 621

Watchorn v Jupiter Industries Ltd [2014] EWHC 3003 (Ch)

Wills v Corfe Joinery Ltd [1997] B.C.C. 511

Wilson v Masters International Ltd [2009] EWHC 1753 (Ch)

Withers LLP v Harrison-Welch [2012] EWHC 3077(QB)

Germany

BAG judgment of 29.01.2014 6 AZR 345/12 (lexetius.com/2014, 646)

BGH judgment of 05.02.1953 - IV ZR 173/52

BGH judgment of 22.09.1982 - VIII ZR 293/81(NJW 1983, 1678)

BGH judgment of 27.09.1990 - IX ZR 67/90 (NJW-RR 1991, 104)

BGH judgment of 30.09.1993 IX ZR 227/92

BGH judgment of 15.12.1994 IX ZR 24/94

BGH judgment of 17.12.1998 IX ZR 196/97 *OLG Zweibrücken* (lexetius.com/1998, 18)

BGH judgment of 21.01.1999 IX ZR 329/97 *OLG Brandenburg* (lexetius.com/1999, 680)

BGH judgment of 09.12.1999 IX ZR 102/97 *OLG Munich* (lexetius.com/1999,338)

BGH judgment of 02.03.2000 - IX ZR 285/99 (openJur 2010, 8126)

BGH judgment of 18.12.2003 IX ZR 199/02 (lexetius.com/2003, 3310)

BGH judgment of 17.02.2004 IX ZR 318/01 OLG Brandenburg (lexetius.com/2004, 406)

BGH judgment of 10.2.2005 IX ZR 211/02 *OLG Dresden* (lexetius.com/2005, 20, 204)

BGH judgment of 10.02.2005 IX ZR 211/02 *OLG Dresden* (lexetius.com/2005, 20, 204)

BGH judgment of 03.03.2005 IX ZR 441/00 *OLG Dresden* (lexetius.com/2005, 525)

BGH judgment of 24. 5. 2005 - IX ZR 123/04; OLG Hamm (lexetius.com/2005, 1508)

BGH, Judgment of 8.12.2005 - IX ZR 182/01; OLG Stuttgart (lexetius.com/2005, 3178)

BGH judgment of 08.12.2005 IX ZR 182/01 *OLG Stuttgart* (lexetius.com/2005, 3178)

BGH, Judgment of 8.12.2005 - IX ZR 182/01; OLG Stuttgart (lexetius.com/2005, 3178)

BGH judgment of 20.07.2006 IX ZR 44/05 *OLG Schleswig* (lexetius.com/2006, 1831)

BGH judgment of 07.12.2006 IX ZR 157/05 *LG Heilbronn* (lexetius.com/2006, 3368)

BGH, decision of 07.12.2006 - V ZB 93/06

BGH judgment of 01.02.2007 IX ZR 96/04 *OLG Karlsruhe* (lexetius.com/2007, 255)

BGH judgment of 24.05.2007 IX ZR 97/06 *OLG Munich* (lexetius.com/ 2007, 1696)

BGH judgment of 29.11.2007 IX ZR 121/06 *OLG Rostock* (lexetius.com/2007, 3811)

BGH judgment of 10.01.2008 IX ZR 33/07 *OLG Dresden* (lexetius.com/2008, 124)

BGH judgment of 05.06.2008 IX ZR 17/07 *LG Würzburg* (lexetius.com/2008, 1515)

BGH judgment of 09.10.2008 IX ZR 59/07 *OLG Rostock* (lexetius.com/2008, 2869)

BGH judgment of 20.11.2008 IX ZR 188/07 *Schleswig-Holstein* (lexetius.com/2008, 3632)

BGH judgment of 20.11.2008 IX ZR 188/07 *Schleswig-Holstein* (lexetius.com/2008, 3632)

BGH judgment of 19.02.2009 IX ZR 62/08 *LG Mulhouse* (lexetius.com/2009, 212)

BGH judgment of 19.03.2009 IX ZR 39/08 *OLG Koblenz* (lexetius.com/2009, 638)

BGH, Judgment of 09.07.2009 IX ZR 86/08 *LG Regensburg* (lexetius.com/2009, 2024)

BGH judgment of 13.08.2009 IX ZR 159/06 *OLG Munich* (lexetius.com/2009, 2674)

BGH judgment of 03.12. 2009 - IX ZR 29/08

BGH judgment of 17.12.2009 IX ZR 16/09 *OLG Dresden* (lexetius.com/2009, 4291)

BGH judgment of 20.01.2011 IX ZR 8/10 *OLG Dresden* (lexetius.com/2011, 237)

BGH, Decision of 10.2.2011 IX ZR 177/08 *OLG Hamm* (lexetius.com/2011, 490).

BGH judgment of 8/12/2011 IX ZR 33/11 (lexetius.com/2011, 6690)

BGH judgment of 26.04.2012 IX ZR 146/11 *OLG Brandenburg* (lexetius.com/2012, 2097)

BGH judgment of 15.11.2012 IX ZR 205/11 *LG Wuppertal* (lexetius.com/2012, 5510)

BGH judgment of 10.1.2013 IX ZR 13/12 *LG Munich I* (lexetius.com/2013, 24)

BGH judgment of 21.02.2013 IX ZR 32/12 *OLG Stuttgart* (lexetius.com/2013, 493)

BGH judgment of 25.04.2013 IX ZR 235/12 *LG Stuttgart* (lexetius.com/2013, 1388)

BGH judgment of 19.12.2013 IX ZR 127/11 *Düsseldorf Higher Regional Court* (lexetius.com/2013, 5226)

BGH judgment of 10.07.2014 IX ZR 280/13 *LG Ingolstadt* (lexetius.com/2014, 3197)

BGH judgment of 10.07.2014 IX ZR 50/12 *OLG Celle* (lexetius.com/2014, 2595)

BGH judgment of 17.07.2014 IX ZR 240/13 *Schleswig-Holstein* (lexetius.com/2014, 2586)

BGH judgment of 08.01.2015 IX ZR 203/12 *OLG Celle* (lexetius.com/2015,139)

BGH judgment of 05.03.2015 IX ZR 133/14 *Düsseldorf Higher Regional Court* (lexetius.com/2015, 477) para 56; BGH judgment of 20.04.2017 IX ZR 189/16 *LG Heilbronn* (lexetius.com/2017, 1544)

BGH judgment of 30.04.2015 IX ZR 149/14 *LG Bremen* (lexetius.com/2015, 1738)

BGH judgment of 30.04.2015 IX ZR 149/14 *LG Bremen* (lexetius.com/2015, 1738)

BGH judgment of 30.04.2015 IX ZR 149/14 *LG Bremen* (lexetius.com/2015, 1738)

BGH judgment of 04.02.2016 IX ZR 77/15 *LG Berlin* (lexetius.com/2016, 372).

BGH judgment of 16.06.2016 IX ZR 23/15 *OLG Munich* (lexetius.com/2016, 1688)

BGH judgment of 08.09.2016 IX ZR 151/14 *OLG Frankfurt* (lexetius.com/2016, 3523)

BGH judgment of 27.10.2016 IX ZR 160/14 *OLG Munich* (lexetius.com/2016, 3546)

BGH judgment of 20.04.2017 IX ZR 252/16 (lexetius.com/2017, 1428)

BFH judgment of 25.04.2017 VII R 31/15 (lexetius.com/2017, 2208)

BGH judgment of 22.06.2017 IX ZR 111/14 *OLG Dresden* (lexetius.com/2017, 1715)

BGH judgment of 27.06.2019 IX ZR 167/18 (openJur 2019, 30030) para 37

Frankfurt Higher Regional Court judgment of 18.11.2010 16 U 183/09 (openJur 2012, 33836)

Frankfurt am Main Higher Regional Court judgment of 13.04.2015 23 U 128/14 (openJur 2015, 8572)

OLG Brandenburg judgment of 13.09.2001 8 U 108/00

OLG Hamm judgment of 21.08.2008 27 U 174/06

Italy

Cassazione 23.02.1942 n 1515

Cassazione 18.11.1961 n 2691

Cassazione 08.03.1969 n 755

Cassazione 29.07.1972 n 349

Cassazione 04.12.1972 n 3491

Cassazione 28.02.1980 n. 1400

Cassazione 18.06.1980 n 3854

Cassazione 08.02.1982 n. 795

Cassazione 16.03.1982 n 1700

Cassazione 08.06.1983 n 3937

Cassazione 21.11.1983 n 6929

Cassazione 17.01.1984 n 402

Cassazione 18.01.1984 n 4221

Cassazione 27.02.1985 n 1716

Cassazione 08.11.1985 n 5451

Cassazione 01.12.1989 n 8930

Cassazione 18.01.1991 n 495

Cassazione 20.09.1991 n 9853

Cassazione 16.09.1992 n 10570

Cassazione 10.11.1992 n 12091

Cassazione 08.03.1993 n 2751

Cassazione 25.03.1994 n. 2912

Cassazione 04.11.1995 n 11518

Cassazione 19.03.1996 n 2303

Cassazione 16.04.1996 n 3588

Cassazione 03.05.1996 n 4077

Cassazione 12.11.1996 n 9908

Cassazione 27.12.1996 n 11519

Cassazione 10.02.1997 n 1227

Cassazione 14.02.1997 n 1411

Cassazione 15.09.1997 n 9146

Cassazione 06.05.1998 n 4578

Cassazione 22.01.1999 n 570

Cassazione 19.02.1999 n 1390

Cassazione 05.06.2000 n 7452

Cassazione 15.06.2000 n 437

Cassazione 12.01.2001 n 403

Cassazione 09.02.2001 n 1831

Cassazione 21.09.2001 n 11916

Cassazione 17.10.2001 n 12678

Cassazione 05.04.2002 n. 4842

Cassazione 02.12.2002 n 18147

Cassazione 24.07.2003 n 11471

Cassazione 11.11.2003 n 16915

Cassazione 23.03.2004 n 5741

Cassazione 28.04.2004 n 8096

Cassazione 18.05.2004 n 9440

Cassazione 11.06.2004 n 11083

Cassazione 11.06.2004 n 11097

Cassazione 08.07.2004 n 12558

Cassazione 06.08.2004 n 15257

Cassazione 15.09.2004 n 18573

Cassazione 15.10.2004 n 20310

Cassazione 27.10.2004 n 20813

Cassazione 16.03.2005 n 5713

Cassazione 06.10.2005 n 19443

Cassazione 14.10.2005 n 19963

Cassazione 28.03.2006 n 7028

Cassazione 21.04.2006 n 9367

Cassazione 19.05.2006 n 11763

Cassazione 04.07.2006 n 15265

Cassazione 10.11.2006 n 24046

Cassazione 15.02.2007 n 3470

Cassazione 29.03.2007 n 7764

Cassazione 08.06.2007 n 13500

Cassazione 14.06.2007 n 13972

Cassazione 28.02.2008 n 5272

Cassazione16.04.2008 n 9970

Cassazione 09.05.2008 n 11577

Cassazione 18.07.2008 n 20002

Cassazione 07.10.2008 n 24757

Cassazione 10.10.2008 n 24993

Cassazione 31.10.2008 n 26311

Cassazione 17.12.2008 n 29420

Cassazione 17.12.2008 n 29421

Cassazione 05.03.2009 n 5359

Cassazione 09.04.2009 n 8680

Cassazione 13.05.2009 n 11051

Cassazione 28.05.2009 n 12513

Cassazione 17.07.2009 n 16722

Cassazione 29.07.2009 n 17552

Cassazione 22.02.2010 n 4059

Cassazione 26.02.2010 n 4785

Cassazione 08.03.2010 n 5505

Cassazione 18.03.2010 n 6538

Cassazione 12.04.2010 n 4642

Cassazione 03.05.2010 n 10623

Cassazione 17.05.2010 n 12045

Cassazione 17.05.2010 n 12045

Cassazione 15.10.2010 n 21338

Cassazione 15.02.2011 n 3676

Cassazione 14.11.2011 n 23743

Cassazione 09.02.2012 n 1896

Cassazione 19.12.2012 n 23430

Cassazione 06.06.2014 n 12836

Cassazione 08.08.2014 n 17821

Cassazione 12.12.2014 n 26216

Cassazione 07.05.2015 n 9170

Cassazione 19.09.2015 n 18315

Cassazione 08.08.2016 n 16618

Cassazione 19.06.2017 n 15096

Cassazione 05.12.2017 n 29112

Cassazione 23.11.2018 n 30416

Corte Costituzionale 21.04.2006 n 172

Corte d'Appello di Bologna 18.02.1995 in *Fallimento* 1995, 1227

Corte d'Appello di Genova 11.02.2002 in *Fallimento* 2002, 1202

Corte d'Appello di Genova, 03.03.1990 in *Fallimento* 1990, 820

Corte d'Appello Milano 09.09.2002 in *Fallimento* 2003, 442

Tribunale di Milano 17.09.1984 in *Fallimento* 1985, 81

Tribunale di Bologna 01.12.1987 in *Diritto Fallimentare* 1988, II, 1031

Tribunale di Catania 17.12.1985 in *Diritto Fallimentare* 1986, II, 453

Tribunale di Mantova 19.04.2013 in *Fallimento* 2013, 1001

Tribunale di Napoli 13.05.2013 in *Il Foro Napoletano* 2015, I, 119

Tribunale di Udine, 26.11.2013 n 2661/012

Tribunale Pavia 25.0.2002 in *Fallimento* 445

Other Jurisdictions

Cassassion Sala Civil 26.10.1942 JPC 1943 2131

Cassassion Sala Civil, 17.10.1979 JCP 1981 II 19627

Cassassion, Sala Civil 1a, 25.02.1981, JCP 1981 II 19628

Cassassion Sala Civil 18.12.1983 DP 1984 I 263

Cassassion Sala Civil 1a 17.06.1986 JPC 1987 II 208816

Cassassion Sala Civil 1a 17.02. 2004 n 01-15484

Cassassion Sala Civil 1a 11.01.2005 n 02-12519

Cassation, 17.10.1979 JCP 1981 II 19627

Chambre Commerciale de la Cour de Cassation (Cass com) 14.05.1996 n 94-11124

Chambre Commerciale de la Cour de Cassation 24.01.2006 n 02-15295

Tribunal Supremo (Sala de lo Civil) 13 February 1992 RJ\1992\844

Bibliography

Articles

Akkermans B, 'The European Union Developments of European Property Law' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888294>

Alecci S, 'La Nuova Disciplina in Materia di Composizione della Crisi da Sovraindebitamento: Modifiche alla Legge 27 Gennaio 2012 n. 3' (2013) 11 Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente 1

Alexander J, 'Avoid the Choice or Choose to Avoid? The European Framework for Choice of Avoidance Law and the Quest to Make it Sensible' March 2009 <https:// papers.ssrn.com/sol3/papers2.cfm?abstract_id=1410157>

Anderson H, 'The Nature and Purpose of Transaction Avoidance in English Corporate Law' (2014) 2 Nottingham Insolvency and Business Law eJournal 12

Angiolini F, 'La "Nuova" Revocatoria Fallimentare' (2005) 5 Rivista del Notariato 993

Armour J, Hsu A, and Walters A, 'Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002' (2008) 2 European Company and Financial Law Review 148

Bachner T, 'Wrongful Trading- A New European Model for Creditor Protection?' (2004) 5 European Business Organisation Law Review 293

Baird D and Jackson T H, 'Fraudulent Conveyance Law and Its Proper Domain (1985) Vanderbilt Law Review 38 829.

Baird D, 'Fraudulent Conveyance Law and its Proper Domain' (1985) 38 Vanderbilt Law Review 829

Baird D, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 The University of Chicago Law Review 815;

Balz M, 'The European Union Convention on Insolvency Proceedings' (1996) 70 American Bankruptcy Law Journal 485.

Beissenhirtz V, 'Clawback of Transactions before Insolvency: Comparison of the German and English Provisions on Voidable Transactions' (2008) 5 International Corporate Rescue 360

Bianca M, ‘Atti Negoziali di Destinazione e Separazione’ (2007) 53 Rivista di Diritto Civile 197

Biscotti B, ‘Debtor's fraud in Roman Law. An opportunity for Some Brief Remarks on the Concept of Fraud’ (2011) 17 Fundamina 1

Boodman M, ‘The Myth of Harmonisation of Law’ (1991) 39 American Journal of Comparative Law 699

Borchers P, ‘Categorical Exceptions to Party Autonomy in Private International Law’ (2008) Tulane Law Review 1645

Bork R, ‘Grundtendenzen des Insolvenzanfechtungsrechts’ (2008) Zeitschrift für Wirtschaftsrecht 1041

Bork R, ‘Transaction at an Undervalue: A comparison of English and German Law’ (2014) 14 Journal of Corporate Law Studies 453

Bork R, Report on Transactions Avoidance Laws (CERIL Report 2017/1) <http://www.ceril.eu /uploads/files/20170926-ceril-report-2017-1-final.pdf>

Braun S, ‘German Insolvency Act: Special Provisions of Consumer Insolvency Proceedings and the Discharge of Residual Debts’ (2006) 7 German Law Journal 59

Burton L, ‘Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty’ (1999) 5 Annual Survey of International and Comparative Law 205

Carballo Piñeiro L, ‘Acción Pauliana e Integración Europea: Una Propuesta de Ley Aplicable’ (2012) 54 Revista Española de Derecho Internacional 43

Carballo Piñeiro L, ‘Towards the Reform of the European Insolvency Regulation: Codification Rather than Modification’ (2014) 2 Nederland Internationaal Privaatrecht 207

Carballo Piñeiro L, ‘*Vis attractiva concursus* in the European Union: Its Development by the European Court of Justice’ (2010) 3 InDret Revista para el Análisis del Derecho <www.indret.com/pdf/750_es.pdf>

Clark R C , ‘The Duties of the Corporate Debtor to Its Creditors’ (1977) 90 Harvard Law Review 505

Collinet P, 'L'Origine Byzantine du Nom de la Paulinne' (1919) Revue Historique de Droit Français et Étranger 187

Constantini C, 'Gli Effetti dell'Azione Revocatoria' (2006) 12 The Cardozo Electronic Law Bulletin < http://www.jus.unitn.it/cardozo/Review/home. html>

Costa C, 'La Revocatoria Fallimentare delle Rimesse in Conto Corrente Bancario: Problemi Attuali' (2010) 5(1) Diritto Fallimentare e delle Società Commerciali 61

Costantini C, 'La Tutela del Credito: I Recenti Percorsi dell'Azione Revocatoria Ordinaria' (2004) 10 The Cardozo Electronic Law Bulletin <http://www.jus.unitn.it/cardozo/Review/2004/REVOCATORI A.pdf >

Couwernberg O and de Jong G T, 'Redeeming Art. 13 of the European Insolvency Regulation: A Law and Economics Argument to Help Financially Distressed Companies to Restructure' (2014) 1 European Journal of Comparative Law and Governance 58

Cseres K, 'Comparing Law in Enforcement of EU and National Competition Laws' (2010) 3 European Journal of Legal Studies 7

Dalmasso di Garzegna C, 'Il Concordato delle Societá' (2013) Il Caso.it 1, 39 <http://www.ilcaso.it/articoli/356.pdf>

Danovi A, Giacomelli S and others 'Strumenti Negoziali per la Soluzione della Crisi di Impresa: Il Concordato Preventivo' (2018) 430 Questioni di Economia e Finanza (Quaderni Occasionali) < https://www.bancaditalia.it/pubblicazioni/qef/2018-0430/index.html>

Dawson J, *'Negotiorum Gestio:* The Altruistic Intermeddler' (1961) 74 Harvard Law Review 1073

De Marco P, 'Eventus Damni ed Onere della Prova nella Revocatoria Ordinaria, tra il Principio della Garanzia Patrimoniale e la Libertá di Iniziativa Economica del Debitore' (1999) 49 Giustizia Civile 1134

de Weijs R J, 'Towards an Objective European Rule on Transaction Avoidance in Insolvencies' (2011) 20 International Insolvency Review 185

de Weijs R J, Evert J R, Verwey and Others, 'Financing in Distress Against Security from an English, German and Dutch Perspective: a Walk in the Park or in a Mine Field?' (2012) 3 International Insolvency Law Review 21

Dougan M, ‘Minimum Harmonisation and the Internal Market’ (2000) 37 Common Market Law Review 853

Fabiani M and Ferro M, ‘Dai Tribunali ai Ministeri: Prove Generali di Degiurisdizionalizzazione della Gestione della Crisi di Impresa’ (2004) Il Fallimento e le Altre Procedure Concorsuali 132

Fabiani M, ‘La Revocatoria Fallimentare nelle Prospettive di Riforma’ (2001) 124(9) Il Foro Italiano 245

Fabók Z, ‘Grounds for Refusal of Recognition of (Quasi-)Annex Judgements in the Recast European Insolvency Regulation’ (2017) 26 International Insolvency Review 295

Fabók Z, ‘The jurisdictional Paradox in the Insolvency Regulation’ (2016) 4 Nottingham Insolvency and Business Law eJournal 3

Ferran E, ‘Floating Charges – The Nature of The Security’ (1988) 47 Cambridge Law Journal 213

Fletcher I, ‘The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions’ (1998) 33 Texas International Law Journal 119

Fontaine M, ‘Law Harmonization and Local Specificities - A Case Study: OHADA and the Law of Contracts’ (2013) 18 Uniform Law Review 50

Frigessi di Rattalma M, ‘Avoidance Actions under Article 13 EC Insolvency Regulation: An Italian View’ (2009) 6 European Company Law 27

Frisby S, ‘In Search of a Rescue Regime: The Enterprise Act 2002’ (2004) 67 The Modern Law Review 247

Gaa T M, ‘Harmonisation of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?’ (1993) 27 The International Lawyer 881

Gevorgyan N, ‘The Role, Impact and Development of the Principle of Mutual Recognition in EU Law’ (2014) 3 Banber - Bulletin of Yerevan University 67

Golberg E, ‘Better Regulation: European Union Style’ 2018 M-RCBG Associate Working Paper Series No. 98 <https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp98>

Goldring J, ‘Unification and Harmonisation of the Rules of Law’ (1978) 9 Federal Law Review

Gomez F and Ganuza J J, ‘An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional instrument?’ (2011) 7 European Review of Contract Law 275

Guido F, ‘La Riforma dell’Azione Revocatoria Fallimentare’ (2008) 2 Il Nuovo Diritto Fallimentare e il Ruolo del Notaio: Atti del Convegno tenutosi a Modena il 19 gennaio 2008 < https://elibrary.fondazionenotariato.it/indice.asp?pub=13&mn=3 >

Gurrea-Martinenz A, ‘The avoidance of Pre-Bankruptcy Transaction: an Economic and Comparative Approach’(2018) Chicago-Kent Law Review 711

Hage-Chahine N, ‘*Culpa in Contrahendo* in European Private International Law: Another Look at Article 12 of the Rome II Regulation’ (2012) 32 Northwestern Journal of International Law & Business 451

Haviv-Segal I, ‘Bankruptcy Law and Inefficient Entitlements’ (2005) 2 Berkeley Business Law Journal 355

Héritier A, ‘Mutual Recognition: Comparing Policy Areas’ (2207) 14 Journal of European Public Policy 800

Howcroft N J, ‘Universal vs Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails’(2007) 8 UC Davis Business Law Journal 366.

Ibrahim S and Stone R, ‘Harmonisation of European Contract Law through an Optional Instrument: Principles and Practical Implications’ (2015) 24 Nottingham Law Journal 19

Jackson T H and Scott R, ‘On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain’ (1989) 75 Virginia Law Review 155.

Jackson T H, ‘Avoiding Power in Bankruptcy’ (1984) 36 Stanford Law Review 725

Kamlah K, ‘The New German Insolvency Act: *Insolvenzordnung’* (1996) 70 American Bankruptcy Law Journal 417

Keay A, ‘Harmonisation of Avoidance Rules in European Union Insolvencies: the Critical Elements in Formulating a Scheme’ (2018) Northern Ireland Legal 85

Keay A, ‘In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions’ (1996) 18 Sydney Law Review 55

Keay A, ‘The Harmonisation of the Avoidance Rules in European Union Insolvency’ (2016) International and Comparative Law Quarterly 79

Keay A, ‘Transactions Defrauding Creditors: The Problem of Purpose under Section 423 of the Insolvency Act’ (2003) 7 Conveyancer and Property Lawyer 272

Klamert M, ‘What We Talk About When We Talk About Harmonisation’ (2015) 17 Cambridge Yearbook of European Legal Studies 360

Korobkin D, ‘Rehabilitating Values: A Jurisprudence of Bankruptcy’ (1991) 91 Columbia Law Review 717.

Kuehn C, ‘German Law to Contest Debtors’ Transactions in Insolvency Proceedings under Critical Review’ (2015) 1(1) Insolvency and Restructuring International 16

Kurcz B, ‘Harmonisation by Means of Directive: Never-ending Story’ (2001) European Business Law Review 287

Lando O, 'The Common Core of European Private Law and the Principles of European Contract Law' (1998) 21 Hastings International and Comparative Law Review 809

Lebron D W , ‘Claims for Harmonization: A Theoretical Framework’ (1996) 27 Canadian Business Law Journal 63

Lechner R, ‘Walking from the Jurisdictional Nightmare of the Multinational Default: The European Council Regulation on Insolvency Proceedings’ (2002) 19 Arizona Journal of International and Comparative Law 975

Levinthal L, ‘The Early History of Bankruptcy Law’ (1918) 66 University of Pennsylvania Law Review 223

Linna T, ‘Actio Pauliana ‘Actio Europensis”? Some Cross Border Insolvency Issues’ (2015) 10 Journal of Private International Law 69

Lo Cascio G, ‘Il Codice della Crisi di Impresa e dell’Insolvenza: Considerazioni a Prima Lettura’ (2019) 3 Il Fallimento e le Altre Procedure Concorsuali 263

Majone G, 'Policy Harmonization: Limits and Alternatives' (2014) 14 Journal of Comparative Policy Analysis 4

Manocchi e Fioretti, 'La Tenuta della Presunzione nelle Revocatorie di Atti a Titolo Oneroso; Nota all'Ordinanza n 1404 del 26.01.2006 della Suprema Corte di Cassazione' <http://www.mflaw.it/media/Newsletter-MF-n.-04_2016-La-tenuta-dellapre_sunzione-nelle-revocatorie-di-atti-a-titolo-oneroso.pd>

Mather H, 'Choice of Law for International Sales Issues Not Resolved by the CISG' (2001) 20 Journal of Law and Commerce 155

Mattei U and Bussani M, 'In Search of the Common Core of European Private Law' (1994) 2 European Review of Private Law 485

McCormack G, 'Reconciling European Conflicts and Insolvency Law' (2014) 15 European Business Organization Law Review 309

McGee A and Weatherill S, 'The Evolution of the Single Market: Harmonisation or Liberalisation' (1990) 53 The Modern Law Review 578

Mevorach I, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) 8 European Company and Financial Law Review 235.

Mills A, 'The Identities of Private International Law: Lessons From the U.S. and E.U. Revolutions' (2013) 23 Duke Journal of Comparative & International Law 445

Milman D, 'Transactional Avoidance on Insolvency: an Update on Recent Developments' (2013) 26 Insolvency Intelligence 81

Mokal R J and Ho L C, 'Consideration, Characterisation, Evaluation: Transactions at an Undervalue after *Phillips v Brewin Dolphin*' (2011) 1 Journal of Corporate Law Studies 359

Möstl M, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405

Mucciarelli F, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 European Business Organisation Law Review 175

Mucciarelli F, 'Private International Law Rules in the Insolvency Regulation Recast: a Reform or a Restatement of the Status Quo?' (2015) <https://dx.doi.org/10.2139/ssrn.2650414>

Nunner-Krautgasser B, 'Haftungsrechtliche Unwirksamkeit infolge Insolvensanfectung und ihre Tragweite in der Insolvenz des Anfechtungsgegners' (2015) Insolvenzrecht und Kreditschutz 129

Olivieri G, 'La Revocatoria dei Pagamenti' (2007) 4 Banca Borsa e Titoli di Credito 527

Omar P, 'Genesis of the European Initiative in Insolvency Law' (2003) 12(3) International Insolvency Review 147

Omar P, 'The Insolvency Exception in the Brussels Convention and the Definition of "Analogous Proceedings" (2011) 5 International Company and Commercial Law Review 172

Orfci E, 'Methodological Aspects of Comparative Law'(2006) 8 European Journal Law Reform 29

Parry P, 'Transaction Avoidance Provision in International Insolvencies' (2004) 15 International Company and Commercial Law Review 46

Paterson S, 'The Insolvency Consequences of the Abolition of the Fixed/Floating Charge Distinction' STR Secured transactions Law Reform Project Discussion Paper Series January 2017 <https://stlrp.files.wordpress.com/2017/01/paterson-fixed-and-floating-charge s.pdf>

Pardgendler M, 'The Rise and Decline of Legal Families' (2012) 60 The American Journal of Comparative Law 1043.

Paulus C, 'The New German System of Rescuing Banks' (2011) 6(1) Brooklyn Journal of Corporate, Financial & Commercial Law 171

Petrov T, 'Harmonising Restructuring Law in Europe: A Comparative Analysis of the Legislative Impact of the Proposed Restructuring Directive on Insolvency Law in the UK and Germany' (2017) 3 Anglo-German Law Journal 129

Pretelli I, 'Cross-border Credit Protection against Fraudulent Transfer of Assets: Actio Pauliana in the Conflict of Laws' (2011) 13 Yearbook of Private International Law 589

Quattrocchio L and Omegna B M, 'La Composizione delle Crisi da Sovraindebitamento: l'Accordo di Ristrutturazione dei Debiti e il Piano del Consumatore' (2018) 1 Diritto ed Economia dell'Impresa 154

Quattrocchio L, ‘Analisi del Novellato Art. 64 L.F.’ (2016) 2 Diritto ed Economia dell’Impresa 392

Reimann M, ‘Savigny's Triumph: Choice of Law in Contracts Cases at the Close of the Twentieth Century’ (1999) 39 Virginia Journal of International Law 571

Rocca G and Corrado D, ‘Le Amministrazioni Straordinarie fra Salvaguardia della Continuitá, Tutela dei Livelli Occupazionali ed Efficacia delle Azioni di Risanamento’ (2006) 74 Commissione, Crisi, Ristrutturazione e Risanamento di Impresa 16

Salazar L S, ‘La Tutela Aquiliana del Derecho de Crédito y la Revocación por Acción Pauliana’ (2007) 3 Ars Boni et Aequi 165

Sales P, ‘Legislative Intention, Interpretation, and the Principle of Legality’ (2019) 40 Statute Law Review 53

Sayde A, ‘Defining the Concept of Abuse of Union Law’ (2014) 33 Yearbook of European Law 138

Schneider S, 'Is Germany about to Become the Most Attractive Place for Business Restructurings?' (2016) 10 Insolvency & Restructuring International 15

Sheehan D, ‘*Negotiorum Gestio*: A Civilian Concept in the Common Law’(2006) 55 International and Comparative Law Quarterly 253;

Sinay H, ‘Action Paulienne et Responsabilité Delictuelle a la Lumiére de la Jurisprudence Récent’ (1948) 2 Revue Trimestrelle de Droit Civil 183

Slot P J, ‘Harmonisation’ (1996) 21 European Law Review 378

Sterio M, 'The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa' (2005) 13 Cardozo Journal of International and Comparative Law 161

Steunenberg B, ‘Turning Swift Policy-making into Deadlock and Delay: National Policy Coordination and the Transposition of EU Directives’ (2006) 7 European Union Politics 293

Stewart D, ‘New Directions in Private International Law’ (2009) 16 Agenda Internacional 255

Sussman O, ‘The Economics of the EU’s Corporate-Insolvency Law and the Quest for Harmonisation by Market Forces’ (2005) OFRC Working Papers Series 16.02.2005 Oxford Financial Research Centre;

Symeonides S, ‘American Choice of Law at the Dawn of the 21st Century’ (2001) 37 Willamette Law Review 1

Tamanaha B, ‘The Primacy of Society and the Failures of Law and Development’ (2011) 44(2) Cornell International Law Journal 209

Thomson R, ‘Same Effects in Different Worlds: the Transposition of EU Directives’ (2009) 16 Journal of European Public Policy 1

Trunk A, ‘Avoidance of Transaction under the New German Insolvency Code’ (2000) 9 International Insolvency Review 37

Udofia K, ‘Establishing Corporate Insolvency: The Balance Sheet Insolvency Test (March 19, 2019) <https://ssrn.com/abstract=3355248>

Van Hoecke M, ‘Methodology of Comparative Legal Research’ (2015) 12 Law and Method 1

Van Zwieten K, ‘Related Party Transactions in Insolvency’ (2018) 401 ECGI Working Paper Series in Law.

Verhagen H L E, ‘The Tension Between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd V Eaton Leonard Technologies Inc’ (2002) 51(2) International & Comparative Law Quarterly 135

Visscher L, ‘A Law and Economics View on Harmonization of Procedural Law’ (2010) 09 Rotterdam Institute of Law and Economics (RILE) Working Paper Series <https://core.ac.uk /download/pdf/18510011.pdf>

Visser D, 'Responsibility to Return Lost Enrichment' (1992) Acta Juridica 175

Wagner G, ‘The Economics of Harmonization: The Case of Contract law’ (2002) 39 Common Market Law Review 995

Wessel B, ‘Business Rescue in Insolvency Law – Changing the Laws and Challenges for the Profession’ (2015) 6 Tijdschrift voor Vennootschapsrecht, Rechtspersonenrecht en Ondernemingsbestuur 207

Wessels B, 'International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular against Groups of Companies' <https://www.iiiglobal.org/sites/default/files/11_InternJurisdictionCompanies.pdf>

Westbrook J L, 'Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases' (2007) 42 Texas International Law Journal 899

Westbrook J L, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499

Westbrook J L, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 American Bankruptcy Law Journal 457

Westbrook J L, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499

Wilk K, 'Law and the State as Pure Ideas: Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy' (1941) 51 Ethics 158

Worthington S, 'An Unsatisfactory Area of the Law: Fixed and Floating Charges yet again' (2004) 1(4) International Corporate Rescue 175

Books

Abriani N, Calvosa L, Ferri G and others, *Diritto Fallimentare: Manuale Breve* (Giuffré 2008)

Ambrosini S ed, *La Riforma della Legge Fallimentare: Profili della Nuova Disciplina* (Zanichelli 2006)

Andenas M and Baasch Andersen C eds, *Theory and Practice of Harmonisation* (Edward Edgar 2012)

Annichini A L e Sarti N eds, *La Giurisdizione Fallimentare. Modelli Dottrinali e Prassi Locali tra Basso Medioevo ed Età Moderna* (Bononia University Press 2011)

Armour J and Bennet H eds, *Vulnerable Transactions in Corporate Insolvency* (Bloomsbury Publishing 2003)

Bachner T, *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse* (Cambridge University Press 2009)

Barbero D, *Il Sistema di Diritto Privato* (UTET 1993)

Barbiera L, *Il Codice Civile Commentato: Responsabilitá Patrimoniale. Articoli 2740-2744* (2dn edn Giuffré Editore 2010)

Bartels F, *Insolvenzanfechtung und Leistungen Dritten* (Mohr Siebeck 2015)

Bell J, Dashwood A and Ward A eds, Cambridge Yearbook of European Legal Studies (Vol 5 Hart Publishing 2004)

Bernstein D S ed, *The Insolvency Review* (5th edn Law Business Research 2017)

Berry E, Homewood M and Bogusz B, *EU Law* (3rd edn Oxford University Press 2017)

Bhandari J S and Weiss L A eds *Corporate Bankruptcy: Economic and Legal Perspectives* (Cambridge University Press 1996)

Bigliazzi Geri L, Donato Busnelli F and others eds, *Della Tutela dei Diritti* (UTET 1980);

Blomeyer A, *Zivilprozeßrecht, Vollstreckungsverfahren* (Springer 1975)

Bonsignori A, *Diritto Fallimentare* (UTET 1992)

Calvosa L, Gianelli G and others (eds), *Diritto Fallimentare (Manuale Breve)* (3rd edn Giuffrè 2017)

Caringella F and De Marzo G, *Manuale di Diritto Civile* (Volume 3 Giuffrè 2008)

Cendon P ed, *Commentario al Codice Civile* (Giuffré 2009)

Chalmers D, Davies G, Monti G, *European Union Law* (3rd edn, CUP 2014)

Cherubini G, *L'Azione Revocatoria nel Fallimento* (Giuffré editore 2010)

Cimino I P, *Manuale Operativo per la Tutela del Credito. Aggiornato alle modifiche de Codice di Rito* (Halley 2006)

Collins H, *The European Civil Code: The Way Forward* (CUP 2008)

Conte G and Landini S eds, *Principi, Regole, Interpretazione. Contratti e Obbligazioni, Famiglie e Successioni: Scritti in Onore di Giovanni Furgiuele* (Universitas Studiorum 2017)

Craig P and de Búrca G, *EU Law: Text Cases and Materials* (6th edn. Oxford University Press 2015)

De Martini A, Il Patrimonio del Debitore nelle Procedure Concorsuali (Giuffré 1956)

de Witte B, Hanf D, Vos E eds, *The Many Faces of Differentiation in EU Law* (Intersentia 2011)

Fabiani M, Nardecchia G B, *Formulario Commentato della Legge fallimentare* (IPSOA 2008)

Falkner G, Treib O, and others, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press 2005)

Fauceglia G and Panzani L(eds), *Fallimento e Altre Procedure Concorsuali* (Vol. I UTET 2009)

Fauvarque-Cosson B and Mazeaud D, *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Walter de Gruyter 2009)

Ferrara F, *Il fallimento* (Giuffré 1995)

Ferrari F and Fernández Arroyo D P eds, *The Continuing Relevance of Private International Law and New Challenges* (Edgar Elgar 2019)

Ferri G, *Le Pretese del Terzo Revocato nel Fallimento* (Giuffré 2011)

Ferro M ed, *La Legge Fallimentare. Commentario Teorico-Pratico* (CEDAM 2007)

Finch V and Milman D, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press 2017)

Fletcher I F and Wessels B, *Harmonization of Insolvency Law in Europe* (Report for the Netherlands Association of Civil Law 2012)

Fletcher I F, *The Law of Insolvency* (4th ed. Sweet & Maxwell 2009)

Fletcher I F, *The Law of Insolvency* (4th edn, Sweet and Maxwell 2009)

Forner Delaygua J J ed, *La protección del Crédito en Europa: La Acción Pauliana* (Bosh 2000)

Galgano F, *Diritto Privato* (CEDAM 1994)

Gant J L L, *Harmonisation of European Insolvency Law* (INSOL-Europe 2017)

Gazzoni F, *Manuale di Diritto Privato* (Edizioni Scientifiche Italiane 1996)

Ghia L, Piccini C and Severino F, *Trattato delle Procedure Concorsuali Volume V: L'amministrazione Straordinaria e la Liquidazione Coatta Amministrativa* (UTET 2011)

Goode R, *Principles of Corporate Insolvency Law* (4th edn Sweet and Maxwell 2011)

Grossi M R, *La Riforma della Legge Fallimentare: Commento e Formule Della Nuova Disciplina Delle Procedure Concorsuali* (Giuffre 2008)

Guglielmucci L, *Diritto Fallimentare* (6th edn Giapichelli 2014)

Gullifer L and Payne J, *Corporate Finance Law: Principles and Policy* (2 edn Bloomsbury 2015)

Del Mar and Bankowski eds, *Law as Institutional Normative Order* (Ashgate 2009)

Held J, *Die Anfechtung Unentgeltlicher Leistungen gem. § 134 InsO* (Mohr Siebeck 2017)

Henckel W, *Anfechtung im Insolvenzrecht* (Walter de Gruyter 2009)

Hendrix S.H.A.M., *Transaction Avoidance in Insolvency Law: Past Present and future of the Actio Pauliana* (Celsus Legal Publisher 2019)

Israël J, *European Cross-border Insolvency Regulation: A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitas Europaea* (Intersentia 2005)

Jackson T H, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986)

Janssens C, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013)

Keay A and Walton P, *Insolvency law: Corporate and Personal* (2nd edn Jordans 2008)

Keay A, *McPherson's Law of Company Liquidation* (3rd edn Sweet and Maxwell 2013)

Kono T, *Efficiency in Private International Law* (BRILL 2014)

Lind T P, *Zur Auslegung von § 133 InsO, insbesondere im System der Anfechtungstatbestände* (Tenea Verlag 2006)

Lutter M ed, *Legal Capital in Europe* (European Company and Financial Law Review – Special Volume, De Gruyter Recht 2012)

Mads Andenas and Camilla Baasch Andersen eds, *Theory and Practice of Harmonisation* (Edward Elgar 2011)

Maffei Alberti A, *Il Danno nella Revocatoria* (CEDAM 1970)

Maggiore R*, Istituzioni di Diritto Fallimentare* (2nd ed CEDAM 1994)

Maierini A, *Della Revoca degli Atti Fraudolenti Fatti dal Debitore in Pregiudizio dei Creditori* (Fratelli Cammelli 1912)

Maletić I, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar Publishing 2013)

Mallon C ed, *The Restructuring Review* (10th edn Law Business Research 2017)

Mangano R, *La Revocatoria Fallimentare delle Attribuzioni Indirette* (Giappichelli 2005)

Markesinis B, Unberath H and Johnston A, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006)

Marshall J, *European Cross Border Insolvency* (Sweet & Maxwell 2004)

McClean D and Abou-Nigm V R, *Morris: The Conflict of Laws* (9th edn Sweet&Maxwell 2016)

McCormack G and Bork R, *Security Rights and the European Insolvency Regulation* (Intersenzia 2017)

McCormack G, Keay A*,* Brown S, *European Insolvency Law: Reform and Harmonisation* (Edward Elgar 2017)

Merkin R, *Privity of Contract: The Impact of Contracts (Rights of Third Parties) Act 1999* (Taylor & Francis 2000)

Messineo F, *Manuale di Diritto Civile e Commerciale* (vol III Giuffré 1959)

Monateri P G ed, *Methods of Comparative Law* (Edward Elgar 2012)

Obermüller M and Hesse H, *InsO: Eine Systematische Darstellung des neuen Insolvenzrechts* (C.F. Müller 2003)

Pajardi P, *Il Sistema Revocatorio Ordinario, Fallimentare, Penale, tra Teoria e Applicazioni* (Giuffré 1990)

Panzani L, *Il Fallimento e le Altre Procedure Conconsuali III volume* (2nd edn UTET 2014)

Papagni V, Le Azioni Revocatorie nelle Procedure Concorsuali (Giuffré 2013).

Parato S, *La Nuova Revocatoria Fallimentare* (Giappichelli Editore 2006)

Parry R, Ayliffe J and Shivji S, *Transaction Avoidance in Insolvencies* (Oxford University Press 2011)

Jorio A and Fabiani M eds, *Il Nuovo Diritto Fallimentare* (Vol 1 Zanichelli 2006)

Pototschnig P, Marelli F and Cimetti M eds, *Fallimento e Altre Procedure Concorsuali* (IPSOA 2010)

Pretelli I, *Garanzie del Credito e Conflitti di Leggi: Lo Statuto dell'Azione Revocatoria* (Editoriale Scientifica 2010)

Rago G, *Manuale della Revocatoria Fallimentare* (2nd edn CEDAM 2006)

Reischl K, *Insolvencrecht* (4th edn C.F. Müller 2016)

Roppo V, *Il Contratto* (Giuffrè Editore 2011)

Roselli F, *Responsabilità patrimoniale. I mezzi di conservazione* (Giappichelli editore 2005)

Sanford M, *New Financing for Distressed Businesses in the Context of Business Restructuring Law* (Springer 2019)

Santarelli U, *Per la Storia del Fallimento nelle Legislazioni Italiane dell'Età Intermedia* (CEDAM 1964)

Schlechtriem P and Schmidt-Kessel M, *Schuldrecht: Allgemeiner Teil* (Mohr Siebeck 2005)

Schülze R, *European Union Law* (CUP 2015)

Smits J ed, *The need for a European Contract Law. Empirical and Legal Perspective* (Europa Law Publishing 2005).

Stasi E and Zanichelli V, *Grandi Procedure non solo per le Grandi Imprese* (IPSOA 2010)

Sumampouw ed*, Law and Reality. Essays on National and International Procedural Law* (Martinus Nijhoff Publishers 1992)

Syrpis P ed, *The Judiciary, The Legislative and The EU Internal Market* (Cambridge University Press 2012)

Terranova G, *Le Procedure Concorsuali Problemi d'una Riforma* (Giuffré 2004)

Terranova G, *Legge Fallimentare. Effetti del Fallimento sugli Atti Pregiudizievoli ai Creditori* (Giappichelli 1993)

Tesauro G, *Diritto dell' Unione Europea* (CEDAM 2012)

Van Ommerslaghe P, *Traité de Droit Civil Belge: Tome 2 Les obligationes* (vol 1-3, Bruylant 2013)

Vigorito F, *Le Procedure Esecutive Dopo la Riforma. L'esecuzione Forzata in Generale* (Giuffrè Editore 2006)

Virgós M and Garcimartín F, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004)

Vitalone V, Patroni Griffi U, Riedi R, *Le azioni revocatorie: la disciplina, il processo Modelli e tecniche dei processi civili* (Utet 2014)

Wait F, *Fraudulent Conveyances and Creditor's bills* (Beardbooks 1884 republished 2000)

Wood P R, *Principles of International Insolvency* (2nd edn Sweet & Maxwell 2007)

Zweigert K and Kötz H, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998)

Other sources

'3 Jahre ESUG – die Statistik' 11.03.2015 <www.insolvenzblog.de>

'A European Framework for private international law: current gaps and future perspectives' Directorate

‘Decreto legislativo 270/99 - Schede aggiornate al 31 marzo 2018’ published by the Minister of the Economic Development < http://www.sviluppoeconomico.gov.it/images/stories/documenti/tabella_riepilogativa_procedure_270_31marzo2018.pdf>

Advisory Report on 2017 Reform ‘Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz (6. Ausschuss)’ Recital A < http://dipbt.bundestag.de/dip21/btd/18/111/1811199.pdf >

Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, III, 6(e).

Commission Staff Working Document, ‘Impact Assessment accompanying Commission Recommendation on a New Approach to Business Failure and Insolvency’ SWD (2014) 61 final, 2.

Decreto legge 347/03 - Schede aggiornate al 31 marzo 2018’ < http://www.sviluppoeconomico.gov.it/images/stories/documenti/tabella_riepilogativa_procedure_347_31marzo2018.pdf> accessed 21.07.2020.

Dig. 42.8.0. Quae in fraudem creditorum facta sunt ut restituantur.

Directorate-General for Justice and Consumers, Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States’ relevant provisions and practices, 137 <http://ec.europa.eu/justice/civil/files/insolvency/insolvency study 201 6 final_en.pdf> accessed 21.07.2020.

Etymological online dictionary < https://www.etimo.it/?term=bancarotta > accessed 21.07.2020.

Eurostat Comparison GDP <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1?inheritRedirect=true> accessed 21.07.2020.

Five Presidents’ Report: Completing Europe’s Economic and Monetary Union on 22 June 2015 <https://ec.europa.eu/priorities/publications/five-presidents-report-completingeuropesecon omic-and-monetary-union_en > accessed 21.07.2020.

General for Internal Policies PE 462.487, 21 <http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf> accessed 21.07.2020.

Harmonization of Insolvency Law at EU Level: Avoidance Actions and Rules on Contracts, Briefing Note, 2011, 12.

Harmonization of Insolvency Law at EU Level: Avoidance Actions and Rules on Contracts, Briefing Note, 2011 <https://www.europarl.europa.eu/document/activities/cont/201106/20110622ATT22311/20110622ATT22311EN.pdf> accessed 21.07.2020.

Harrison W, 'How Long Does It Take To Liquidate A Company?' <https://www.companyrescue.co.u k/guides-knowledge/guides/how-long-does-it-take-to-liqu idate-a-company-4074/ >

Heidelberger Akademie der Wissenschaften, *Deutsches Rechtswörterbuch (DRW): Wörterbuch der älteren deutschen (westgermanischen) Rechtssprache* <www.deutsches-rechtswoerterbuch.de>

Heidelberg-Vienna Report (External Evaluation of Regulation No. 1346/200/EC on Insolvency Proceedings Just/2011/JCIV/PR/0049/A4) Annex I National Reports (in Tabular Form), Q24 Germany 259 and the U.K. 271.

INSOL Europe, 'Harmonization of Insolvency Law at EU Level' PE 419.633, April 2010 <https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-jurint2010419633en.pdf>

INSOL International, 'Avoidance Provision in a Local and Cross-border Context: A Comparative Overview' 2008 Technical Series Issues No. 7, 1.

Insolvency Statistics – April to June 2018, 5 <https://www.gov.uk/government/collections/company-insolvency-statistics-releases>

Jean-Charles Bricongne and others, *Macroeconomic Relevance of Insolvency Frameworks in a High-debt Context: An EU Perspective*. (2016) Directorate General Economic and Financial Affairs (DG ECFIN) European Commission < https://ec.europa.eu/info/publications/macroeconomic-relevance-insolvency-frameworks-high-debt-context-eu-perspective_en>

Juri Meeting Minutes of 12 October 2016 <http://www.emeeting.europarl.europa.eu/emeeting/committee/ archives/JURI>

Kramer X E and others 'A European Framework for private international law: current gaps and future perspectives' Directorate General for Internal Policies PE 462.487

<http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf>

Kramer X E, 'European Private International Law: The Way Forward' (September 8, 2014). In-depth analysis European Parliament (JURI Committee), in Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament Brussels 2014 <https://ssrn.com/abstract=2502232>

Lehman Brothers administration <https://www.pwc.co.uk/services/business-recovery/administrations/ lehman.html>

Lenaerts K, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (2015) *The Fourth annual Sir Jeremy Lever lecture, All Souls College at the University of Oxford* < www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf>

Mańko R, 'EU Competence in Private Law' (2015) European Parliamentary Research Service, 7 <www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA%282015%29545711_REV1_EN. pdf>

Michela Bailo Leucari, *L'Evoluzione Della Azione Revocatoria Oridinaria: La Tutela dei Creditori dei Fenomini di Separazione Patrimoniale* (PhD Thesis) <http://www.ildirittodegliaffari.it/upload/ ebook/20130329110008 _tesi_dottorato_Michela[1].pdf>

Moldenhauer R and Wolf R, 'Germany's ESUG Has Simplified Corporate Restructuring' < https://www.bcg.com/capabilities/corporate-development-finance/restructu ring-after-germanys-esug.aspx >

Online dictionary <https://dict.leo.org/german-english/Leistung>

Orlando L, 'Fallimenti, 7 Anni per le Procedure. La Durata per Regione' *Il Sole 24 Ore* (Milan, 18.01.2018) <http://www.ilsole24ore.com/art/impresa-e-territori/2018-0117/fallimenti -sette-anni-mini-sprint-tribunali-165408.shtml?uuid=AEOmvPkD>

Parliamentary Report on Law Decree 22.06.2012 n 83 <http://documenti.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0061600.pdf>

Principle of Proportionality <http://eur-lex.europa.eu/summary/glossary/proportionality .html>

Report Cerved ‘Osservatorio su Fallimenti, Procedure e Chiusure di Imprese’ September 2016 Issue <file:///C:/Users/lwoc/Downloads/Monitor_of_Bankruptcies_Insolvency_Proceedings_and_Business_Closures_-_Second_Quarter_2016.pdf>

Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (Cork Report)

Report on the Convention on Insolvency Proceedings (Virgós-Schmit Report) para 167 ff <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf >

Report on the Convention on Insolvency Proceedings of 23 November 1995, 23 April 1999 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A 4-1999-0234+0+DOC+XML+V0//EN>

Report on Transactions Avoidance laws: "Clash of Principles: Equal Treatment of Creditors vs. Protection of Trust" (CERIL Report 2017-1) <http://www.ceril.eu/projects/ kopie-avoidance-actions/>

STR General Policy Paper April 2016 <https://stlrp.files.wordpress.com/2016/05/str-general-policy-paper-april-2016.pdf>

Strecker S, ‘Jurisdiction in, and the Law Applicable to, Cross-Border Contractual Obligations: the Objectives and Impact of the EU’s Legislative Journey’ (PhD Thesis) < http://irep.ntu.ac.uk/id/eprint/255/>

Technical Manual <https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch2536/Chapter31/part4B/part7/ part_7.htm>

The European Single Market <https://ec.europa.eu/growth/single-market_en>

World Bank Resolving Insolvency ranking <https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency>