INSOL International

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December 2008

Technical Series Issue No. 7

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Avoidance Provisions in a Local and Cross-border Context: A Comparative Overview

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1 Introduction

In administering a bankrupt estate, the insolvency representative will examine transactions in which the debtor was involved before the onset of bankruptcy to ascertain whether any of the debtor's property/assets that should be available for distribution among all his or her creditors was disposed of improperly. Such transactions may usually be contested with a view to reclaiming these assets from the recipient or beneficiary for the benefit of the creditors as a group.

This paper studies the avoidance provisions of several jurisdictions including any cross-border implications that are applicable. The study of this subject is important for a number of reasons. First, the avoidance of pre-bankruptcy transactions is often at the centre of problems involving cross-border issues. Second, the legal systems of countries are not identical and it is instructive to see how different systems deal with the issue; some with a traditional common law system and others with a civil law tradition. Third, in the context of the rapid globalization of commercial activities, the bankruptcy laws of a country may be in need of reform to deal with these developments more effectively. Fourth, the fight against commercial fraud is growing in importance[1]

The jurisdictions that are considered include England[2] and the United States of America, representing the common law approach; the Netherlands and Germany, being civil law jurisdictions; and South Africa and India, both two former British colonies, representing emerging markets. South Africa has a mixed legal system with its roots in both civil and common law, while India follows the common law approach.

* I wish to thank INSOL International for granting me the INSOL Scholarship for 2007/08, as well as my colleagues Lee Steyn and Alistair Smith who nominated me for this position. My sincere gratitude is also extended to Sonali Abeyratne who ably managed the scholarship, and the following people who kindly assisted me in completing this paper by providing information and/or commentary: Sumant Batra (Vice President, INSOL); Volker Beissenhirtz; Eberhard Braun; David Burdette; Hakan Friman; Garima Makker; Stefan Feckl; Paul Omar; Vaneeta Patnaik; Adrian Walters; and Bob Wessels.

[1] See the agenda of UNCITRAL Working Group V of 29 July 2008.

[2] Although 'England' is used, it actually refers to both England and Wales.

2 A framework for the doctrine of avoidable transactions

In both the common law and in civil law, rules designed to avoid certain transactions that are to the detriment of creditors developed concomitantly with execution (debt-collecting) procedures of property. The *actio Pauliana* of the Roman law developed into the civil law remedy whilst the Act of Elizabeth of 1571 was considered the backbone of this kind or remedy in the common law jurisdictions.

The notion of avoidable or voidable transactions further developed into two distinct categories, namely (1) fraudulent conveyance law that formed the basis and (2) preference law.[3] Glenn[4] states that both forms are within the field of creditors' rights. He refers to both as "that body of doctrine which bears the name of creditors' rights".

In essence fraudulent conveyance law infringes creditors' rights in individual execution and collective debt procedures, namely bankruptcy. It should be studied in the light of judgment and execution, being the *general law*, also referred to as 'non-bankruptcy law'.[5] Fraudulent conveyance law is intended to strike down actions designed to hinder, delay or defraud creditors, or such dispositions made by insolvent debtors for less than, or without a fair consideration.[6] The beneficiary may be a creditor or any other person.

Preference law deals with the transfer of money or some assets of a debtor to a creditor to settle a pre-existing debt or to improve a particular creditor's position by, for example, granting him or her real security, thereby improving his or her position in the ladder of payments. The preferential transaction or disposition benefits the favoured creditor and prejudices other creditors.[7] Traditionally, preference law is restricted to bankruptcy law.[8] The beneficiary is always a creditor who stands in an existing debt relationship with the insolvent debtor. This is the real distinction between a preference and a fraudulent conveyance in the form of an undervalue transaction, since in the case of the preferential transaction a lawful pre-existing obligation to pay the creditor exists.

[3] H.G. Bauer, *The Bankrupt's Estate: A Study of Individual and Collective Rights of Creditors under Roman and Early English Bankruptcy Laws* (LLM dissertation, 1980, Southern Methodist School of Law) 11 *et seq*; J.A.Ankum, *De Geschiedenis der actio Pauliana* (1962) 25–26.
[4] G. Glenn, *Fraudulent Conveyances and Preferences* vol 1 (1940) 1.
[5] Ibid.
[6] T.H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 69.
[7] R. Weisberg, "Commercial Morality, the Merchant Character, and the History of the Voidable Preference" 1986 *Stanford Law Review* 3. C. Smith, *The Law of Insolvency (*1988) 125 states that preference law is aimed at securing that a distribution will take place with a prescribed legal order of preference in the distribution.
[8] G. Glenn 1; T.H. Jackson 69.

3 Fraudulent transactions and preferences in common law jurisdictions

3.1 Introduction

Although earlier legislation dealt with fraudulent conveyances to some extent, the famous Statute of Elizabeth enacted in 1571[9] formed the basis of the modern law of fraudulent conveyances.[10] The Act provided:

> [f]or the avoiding and abolishing of feigned covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and of tenements and chattels . . . devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others . . . [they] . . . shall be utterly void . . . and of no effect . . . [11]

It protected those transfers effected in return for good consideration made lawfully and bona fide, thus without knowledge of the fraud and as such it prescribed the remedy of the general law.

3.2 England

3.2.1 General

The Insolvency Act of 1986 that applies in England and Wales provides for the adjustment of prior transactions which include those at an undervalue,[12] and fraudulent conveyances and preferences.[13] This Act deals with both corporate and individual insolvency matters, and provides separate or almost identical provisions for the various categories of debtors.[14] The insolvency representative, who may be a trustee, liquidator or administrator of a company under administration, depending on the relevant bankruptcy procedure, has standing and may approach the court with a view to avoiding certain transactions.[15]

3.2.2 Fraudulent conveyances under the general law

Sections 423 to 425 of the 1986 Insolvency Act replaced section 172 of the 1925 Property Act by introducing a new set of rules governing transactions intended to defeat and delay creditors. Although contained in the Insolvency Act, this is the remedy of the general law, since formal bankruptcy is not a prerequisite. The basic preconditions for invoking these rules are (1) a transaction at an undervalue and (2) the purpose of the transaction being either to put assets beyond the reach of persons (creditors) making a claim against the transferor, or to otherwise

[9] Stat 13 Eliz c 5, 6 Stat at Large (Pick) 268 (1571).
[10] H.L. Oleck, *Debtor-Creditor Law* (1953) 83.
[11] This statute had a distinct penal character due to the clause giving the Crown half the recovery. The courts, however, developed it into the prime remedial measure available to creditors aggrieved by their debtor's fraudulent dispositions. See Glenn 79 *et seq*; F.R. Kennedy, "Involuntary Fraudulent Transfers" 1987 *Cardozo Law Review* 537.
[12] In the case of company debtors see ss 238-241 of the Insolvency Act of 1986 and ss 339–342 of the Insolvency Act 1986 in the case of individuals.
[13] S 240 (corporate debtors).
[14] The Insolvency Act of 1986 resulted from an intensive insolvency law review by Sir K Cork during the 1980s and it was published as the *Insolvency and Practice Report of the Review Committee* Cmnd 8558 London (1982). The Act was amended by the Insolvency Act 2000 and the Enterprise Act 2002. For a full discussion see I.F. Fletcher *The Law of Insolvency* 3rd ed (2002); and L. Sealy & D.Milman, *Annotated Guide to the Insolvency Legislation* 10th ed (2007) for a comprehensive discussion of English bankruptcy law.
[15] Where a private-sector insolvency practitioner is not in office, the official receiver may act as trustee or liquidator.

prejudice the interests of such persons. Fraud is not expressly mentioned in respect of these rules, but authors accept dishonesty or some sharp practice to be an element in view of the use of the word 'purpose', which denotes a state of mind.[16] These provisions have replaced the former fraudulent conveyance provisions, and that the undervalue transactions contained in sections 238 and 239 are members of the same family, namely fraudulent transactions.[17] A transaction that falls within the ambit of this remedy may be set aside at the instance of either the insolvency representative or the victim of the transaction.[18]

Although section 423 has a great deal in common with the sections exclusively dealing with undervalue transactions in bankruptcy, it differs in the following respects: inability to pay debts at the time of the transaction is not a prerequisite; section 423 does not impose any time limits during which the transaction must have taken place; and the section allows a wider range of people to apply it.[19]

3.2.3 Undervalue transactions in terms of bankruptcy law

Section 238 deals with transactions at an undervalue, namely the setting-aside of such transactions entered into at an "undervalue"[20] during the prescribed "relevant time".[21]

A transaction is at an "undervalue" if a company makes a gift to another person or otherwise enters into a transaction with that person on such terms that the company receives no consideration; or where the consideration received by the company in return 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.[22]

The "relevant time" refers to a period as well as the financial condition of the company at that time. The period is two years prior to the onset of insolvency proceedings as described in section 240(3) of the Insolvency Act, and the company must have been unable to pay its debts,[23] or the transaction must have caused this dire financial state of affairs.[24]

Transactions with "associates", that is, persons connected to the company[25] create presumptions in respect of the debtor's state of insolvency during the relevant time, with the result that, in order to save the transaction, the connected person must prove that the company was able to pay its debts when it entered into the transaction.[26]

[16] P. Totty, *Insolvency* (1987) H23.17.
[17] J.Armour, *Vulnerable Transactions in Corporate Insolvency 9* (2002) at 39.
[18] S 424 and see *undervalue transactions* below.
[19] P. Totty H23.18; H. Rajak, *Company Liquidations* (1988) 291–292.
[20] S 238(4) and see s 339(3) .
[21] The relevant time is defined in s 240 and see also s 341.
[22] See s 238(4).
[23] In terms of s 123, both cash-flow and balance sheet insolvency will suffice.
[24] S 240(1)(a) and (2). Depending on the particular insolvency proceeding at hand, s 240(3) prescribes different time periods with regard to the relevant moment for calculating the applicable time period.
[25] See ss 249 and 435 regarding connected persons and associates.
[26] See s 240(2).

Generally, recipients have certain statutory defences in that they may rely on the fact that the transaction was entered into in good faith and for the purpose of carrying on the debtor's business in the belief that it would be to the benefit of the debtor company.[27]

3.2.4 Preferences in terms of bankruptcy law

In the case of preferences provided for by the 1986 Insolvency Act, section 239 provides that a preferential transaction must have occurred in that the debtor must have placed a creditor, surety or guarantor in a better position than that which the person would have been in if the transaction had not taken place.[28]

The preference must have been made during a relevant time, which refers to both a prescribed period and the fact that the company was insolvent at such time. The period is generally six months prior to the onset of insolvency that is described in section 240(1)(b). Where the creditor is connected to the company, it is extended to two years.[29]

The debtor must have been influenced by a desire to prefer the beneficiary.[30] Where the beneficiary is connected to the debtor, this desire is presumed and, in order to save the transaction, the beneficiary must show that the debtor had not been influenced by such a desire to prefer.[31]

3.3 The United States of America

3.3.1 General

The current federal bankruptcy statute in the United States is the Bankruptcy Reform Act of 1978 (Bankruptcy Code). It is an example of a truly unified piece of legislation, because it deals with both corporate and individual bankruptcy.[32] Bankruptcy legislation is a federal matter, while legislation such as the Uniform Fraudulent Transfers Act (UFTA) forms part of the general law that can be dealt with at state level.[33] Particular provisions concerning the avoidance of certain prior transactions were enacted in various bankruptcy statutes.[34] These rules did not exclude the state law on fraudulent conveyances. They are treated as part of the insolvency representative's (being a trustee in terms of American law) avoidance powers.

[27] S 238(5). In the case of individuals s 339 prescribes a five-year period ending with the date of presentation of the bankruptcy petition on which the individual is adjudged bankrupt.
[28] S 239(4).
[29] S 240(1)(a).
[30] S 239(5) read with s 239(4)(b). See in *Re M.C. Bacon Ltd* [1990] B.C.C. 78 at 87 *re* the intention to prefer.
[31] S 239(6). See s 340 for a similar provision regarding individuals.
[32] The Bankruptcy Code of 1978 came about as a result of the *Report of the Commission on the Bankruptcy Laws of the United States* HR Doc no 137 93d Congress session 1973. The Bankruptcy Code was further amended in 2005 by the Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005. For an exposition of the current legislation see J. Ferriel & E.J. Janger, *Understanding Bankruptcy Law* (2007).
[33] D.G. Baird, *The Elements of Bankruptcy* (1993) 4.
[34] See, for instance, §§ 67 and 70 of the former 1898 Bankruptcy Act.

3.3.2 Fraudulent conveyances under the general law

Initially, the Statute of Elizabeth of 1571 was recognised in virtually every state in the United States, either as part of the common law or enacted in local state legislation.[35] The Uniform Fraudulent Conveyance Act (UFCA) was promulgated in 1920 in an attempt to unify this branch of the law in all states.[36] However, only 26 states accepted it. The drafters attempted to make fraudulent conveyance law more definite by defining various combinations of circumstances constituting fraudulent transfers – even when lacking the intent to hinder, delay or defraud. The UFCA defines particular core terms: "assets", "conveyances", "creditor", "debt", "insolvency" and "fair consideration". The purpose of the UFCA was to codify the decisions and body of law that had developed under the 1571 Elizabethan Act.

In 1984 the Commissioners on the Uniform Laws promulgated the UFTA, which has been adopted by the majority of states since.[37] Section 1 defines certain terms that are largely in accordance with similar terms found in the present Bankruptcy Code.[38] An interesting feature of the UFTA is that it does not only deal with the avoidability of fraudulent transfers,[39] but makes a preferential transfer in favour of an insider in order to settle an antecedent debt voidable if the insider had reasonable cause to believe that the debtor was insolvent.[40]

Section 544(b) of the Bankruptcy Code empowers the insolvency representative to avoid any pre-bankruptcy transfer that is voidable under *applicable* law by a creditor holding an unsecured claim that is allowable. It thus incorporates into the Bankruptcy Code state fraudulent conveyance law, state law based on the 1571 Act, the UFCA or the UFTA, thereby making it available as a remedy to the insolvency representative.

3.3.3 Undervalue transactions in terms of bankruptcy law

Section 548 of the Bankruptcy Code of 1978 deals with fraudulent transfers in insolvency.[41] Section 548(a)(1) is based on §7 of the UFCA. It grants the trustee the power to invalidate transfers made with the actual intent to hinder, delay or defraud creditors. It denounces transfers as defined in § 101(48) made with actual, that is, the subjective intent to defraud existing or future creditors and constructively fraudulent transfers.

Section 548(a)(2) resembles §§ 4 to 7 of the UFCA. It provides for avoidance of constructively fraudulent transfers where the debtor:

(a) received less than a "reasonably equivalent value";
(b) was insolvent or became insolvent as a result of this;
(c) was engaged in business or was about to engage in a business transaction for which his or her remaining property was deemed to be unreasonably small capital; or

[35] D.G. Baird and T.H. Jackson, *Cases, Problems and Materials on Bankruptcy* (1990) 247.
[36] L.J. Vener, "Transfers in Fraud of Creditors Under the Uniform Acts and the Bankruptcy Code" 1983 *Commercial Law Journal* 221–222.
[37] D.G. Baird 146.
[38] *Ibid*.
[39] See §§ 4 and 5(a) of the UFTA.
[40] See § 5(b) of the UFTA.
[41] See in general and J. Ferriel & E.J. Janger 581–602.

(d) intended to incur or believed that he or she would incur debts beyond his or her ability to pay.

The most important difference between § 548 and state law is that it applies only to transfers that took place within a year prior to the bankruptcy petition being filed.

3.3.4 Preferences in terms of bankruptcy law

In terms of § 547(b) of the Bankruptcy Code, the insolvency representative may avoid any transfer of an interest of the debtor in property when such transfer is:

(a) to or for the benefit of a creditor;
(b) for, or on account of, an antecedent debt owed by the debtor before transfer was made;
(c) made while the debtor was insolvent;
(d) made during the prescribed period that is usually 90 days before the date of the filing of the petition or between 90 days and one year before the date of the filing of the petition, if the creditor at the time of such transfer was an insider;[42] and
(e) the transfer enabled such a creditor to receive more than such creditor would have received under a Chapter 7 proceeding.

Section 547(c) contains defences against an attack on such a transfer, such as:

(a) Section 547(c)(1) protects the transfer to the extent that it was intended by the debtor and creditor to be a contemporaneous exchange for new value.
(b) Section 547(c)(2) protects the transfer if the debt was incurred in the ordinary course of business or financial affairs of the debtor and the transferee; *and* either the transfer was made:
    (i) in the ordinary course of business or financial affairs of the debtor and the transferee; or
    (ii) made according to ordinary business terms.[43]
(c) Section 547(c)(9) protects transfers of less than US$ 5475.00 because such small transfers have little effect and they cannot be recovered in a cost-effective way.

Section 547(f) contains a presumption that the debtor is presumed to have been insolvent on, and during, the 90 days immediately preceding the date on which the petition is filed. The estate representative has the burden of proving the avoidability of a transfer under subsection (b) and the creditor or party in interest against whom recovery or avoidance is sought carries the burden of proving the non-voidability of a transfer under subsection (c) of this section in order to prevent the transaction from being set aside.[44]

4 Fraudulent transactions and preferences in some civil law jurisdictions

4.1 Historical development

Two praetorian remedies in Roman law, namely the (1) *restitutio in integrum* and the (2) *interdictum fraudatorium* were initially available to recover property fraudulently transferred by the debtor.[45] These remedies caused the eventual embodiment of the well-known *actio*

[42] See § 101(31) for a definition of the term 'insider'.
[43] The 2005 amendments eased the burden for the recipient to ward off an avoidance claim by allowing him or her to prove either the elements listed in the text above in (b)(i) or b(ii); see §§ 574(c)(2)(A), 547(c)(2)(B) and J. Ferriel & E.J. Janger 566–576.
[44] See § 547(g) of the Code.
[45] J.A. Ankum 17, 52 *et seq*.

Pauliana, which is much earlier than the Act of Elizabeth of 1571**,** in the codification of Justinian.[46] Roman law first directed its attention to dispositions that were fraudulent.[47]

The essential elements for successfully invoking the *actio Pauliana* against the recipient are a fraudulent disposition of his or her property by a debtor; the disposition must have caused or increased the alienator's insolvency; and the recipient must have participated in the fraud. If the property was obtained by a lucrative title (e.g., a donation), the fraudulent intention of the debtor would suffice.[48]

Principles concerning the *actio Pauliana* were also adopted in later Roman-Dutch law. Great lawyers of the time systemised the principles,[49] but they remained the rules that evolved in Roman law that were subsequently codified in the Code of Justinian.[50]

A development similar to that in English law took place in the Netherlands.[51] For some time the *actio Pauliana* was the general law on the subject. Insolvency laws did, however, introduce provisions dealing with fraudulent conveyances in insolvency.[52] The *actio Pauliana* remained the remedy of the general law until the codification of the Dutch law.[53]

It could be said that the *actio Pauliana* was as important as the Act of Elizabeth of 1571 in respect of the development of avoidance transactions in common law jurisdictions and became the backbone of this important part of the law in civil law jurisdictions.

4.2 Current Dutch law

4.2.1 General

The Faillissementswet of 1897 (Fw) is the main bankruptcy statute in the Netherlands.[54] This Act deals with three types of bankruptcy; (1) liquidations, (2) suspensions of payments and (3) debt restructuring for individuals. The Fw empowers the insolvency representative, termed a '*curator*' in Dutch law, to attack the prescribed avoidable transactions.

[46] D 42.8 and C 7.75. See in general O. Lenel, "Die Anfechtung von Rechtshandlungen des Schuldners im Klassischen Romischen Recht" 1903 *Festschrift zu A.S. Schultzes siebenziegstem Geburtstag* 23.
[47] F.R. Kennedy 1987 *Cardozo Law Review* 535.
[48] This remedy developed further in later bankruptcy legislation, especially in Italian and French law, see in general W.Gerhardt, *Das systematische Einordnung der Glaubigeranfechtung* (1969) 77.
[49] See Pothier *Commentarius ad Pandectas* ad D 42.8; Voet *Commentarius ad Pandectas* ad D 42.8 containing the Paulian provisions of the 17th century Roman-Dutch Law.
[50] By and large codified in D 42.8.
[51] Although French law did influence Dutch law in this respect.
[52] See eg s 3 of the *Ewige Edik* of Karel V of 4 October 1540; The Ordinance of Amsterdam of 1777, s 12.
[53] Cf s 1377 of the *Burgerlijk-Wetboek* of 1898 which section was replaced by ss 3.45–48 of the *Nieuw Burgerlijk Wetboek* of 1992. See A.S. De Blecourt-Fischer, *Kort Begrip van het Oud Nederlands Burgerlijk Recht* (1967) for a discussion of the historical development of the Dutch Civil Code.
[54] See P.J.M. Declercq, *The Netherlands Bankruptcy Act and the Most Important Legal Concepts* (2001) for a fairly comprehensive discussion of Dutch bankruptcy law. The Netherlands is currently reviewing its antiquated laws in this regard. See B. Wessels, "International Insolvency Law in the Netherlands: The Pre-Draft of the Title" 2008 *Insol International Insolvency Review* 143.

4.2.2 Fraudulent conveyances under the general law

"*De Pauliana*", as it is referred to in modern Dutch law is dealt with in sections 3.45–48 of the *Nieuw Burgerlijk Wetboek* (*NBW*).[55] This is the remedy of the general law. In principle, this remedy entails a *rechtshandeling*, that is, a *legal act* or *transaction*, whereby property is disposed of, either without value or for insufficient value in return. Further requirements for successfully invoking this remedy are:

(a) *Onverplicht verricht:* a *voluntary disposition* made where no existing contractual or statutory legal obligation thereto exists;
(b) *Benadeling:* the creditors or even only one creditor should be *prejudiced* by the disposition in that it caused or increased the debtor's insolvency; and
(c) *Wetenschap:* the debtor and the recipient must have been aware (*knowledge*) that the disposition would cause prejudice to creditors. (If the debtor received no value in return for the disposition, his or her knowledge in this regard would suffice.)

4.2.3 Undervalue transactions in terms of bankruptcy law

The *faillissementspauliana*, being the remedy in bankruptcy, is enacted in sections 42–51 of the Fw.[56] These sections regulate both fraudulent conveyances and preferences. Section 42 is important, since it deals with fraudulent conveyances in bankruptcy.

The prerequisites for invoking section 42 are largely similar to those prescribed in section 3.45 *NBW*.[57] When bankruptcy is imminent, the required knowledge of prejudice is generally assumed.[58] A formal statutory presumption regarding knowledge will apply when an undervalue transaction is effected within one year prior to bankruptcy, or where the parties involved are associates.[59]

4.2.4 Preferences in terms of bankruptcy law

Section 47 of the Fw refers to transactions that amount to preferences. Although the settlement of an existing debt is, in principle, valid, such a payment may be set aside in two circumstances: where it is proved either that (1) the person receiving the payment knew that the bankruptcy application of the debtor had already been filed, or that (2) the payment was arranged between the debtor and the creditor with the intention of preferring that creditor over other creditors.[60] These provisions have recently been criticised.[61]

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[55] The "New Civil Code" referred to as the *NBW*. See R.J.Q. Klomp *et al, Burgerlijk Wetboek* (1991).
[56] The proposed new provisions for the *pauliana* in bankruptcy have been criticised with comparative notes regarding German and English law by R.J. de Weijs, "De pauliana in het Voorontwerp: over het verschil tussen één- en tweerichtingsverkeer op de valreep" (2008) *Tijdschrift voor Insolventierecht* 245.
[57] See par 39.1.
[58] See G. van Dijk, "Comparing Empirical Results of Transaction Avoidance Rules Studies" (2008) INSOL *International Insolvency Law Rev* 123 at 130.
[59] See ss 43 and 45 of the Fw.
[60] See R. D. Vriesendorp & F. van Koppen, "Transactional Avoidance in the Netherlands" (2000) *INSOL International Insolvency Review* 47.
[61] See L.J. van Eeghen, Het schemergebied vóór faillissement. Een onderzoek naar de wenselijke verdeling van verhaalsrisico's van de onderneming vóór faillissement (Doctoral Thesis, 2006, Tilburg) who submits that Section 47 is unjustified); and G. van Dijck, De faillissementspauliana: revisie van een relict (Doctoral thesis, 2006, Tilburg) who submits that the development of remedies of private law in general prevents the practical problems in applying ss 42–51 Fw). For a full overview see B. Wessels, "Gevolgens van faillietverklaring" (2), Series Wessels Insolventierecht, Vol III, 2007 at 9–231.

4.3 German law

4.3.1 General

Germany reformed its bankruptcy laws during the 1990s and the Insolvenzordnung (InsO) that came into operation on 1 January 1999 is the current Bankruptcy Code.[62] The insolvency representative is termed the *Insolvenzverwalter* (the insolvency administrator). Although this is another example of unified legislation dealing with bankruptcy of both corporations and individuals, the avoiding provisions of the general law are like the position in the United States with the UFTA contained in a separate Act, the Anfechtungsgesetz (AnfG). The AnfG was amended and updated by the Einführungsgesetz zur Insolvenzordnung (EGInsO), being the Act that introduced the current InsO.

The position is that the InsO contains avoidance provisions in Part Two, section 3 §§ 129–146 that apply in bankruptcy. The AnfG contains those provisions that apply outside bankruptcy. In terms of § 129 of the InsO, the insolvency representative will have the right to contest pre-bankruptcy transactions that amount to avoidable transactions in terms of the relevant provisions of the InsO, being §§ 130–146. This last-mentioned section also prescribes a general requirement for the avoidable transactions in terms of the InsO: they must be to the disadvantage of the creditors of the bankruptcy proceeding.

Since it is a civil law jurisdiction, the avoiding transactions, named *Anfechtungsrecht* (avoidance provisions) in German law also developed from the Paulian action.[63]

4.3.2 Fraudulent conveyances under the general law

Article 1 of the EGInsO contains the amended provisions of the AnfG. These provisions are broader than the traditional fraudulent conveyance law in the other systems included in this paper. Like the UFTA in the United States, the AnfG also seems to provide an anti-preference provision.[64] These provisions are available to creditors,[65] but § 16(1) states that the insolvency representative may continue with such action initiated by a creditor if bankruptcy intervenes.

The general rule is stated in § 1 of the AnfG, namely that transactions by a debtor that prejudice the creditors may be subject to avoidance proceedings.

Section 4 resembles fraudulent conveyances in that it makes a transaction by the debtor without receiving (proper) consideration in return avoidable, unless such transaction was effected more than four years prior to the avoidance action.

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[62] See C.E. Stewart, *Insolvency Code* (1997); E. Braun, *Commentary on the German Insolvency Code* (2006) for an English copy of, and commentary on, the InsO; F. Kekebus, *Cross Border Insolvencies* (2007). For a comparison between the English and German provisions , see Beissenhirtz. V, "Clawback of Transactions before Insolvency: Comparison of the German and English Provisions on Voidable Transactions" (2008) *International Corporate Rescue* 306.

[63] W.W. McByrde *et al, Principles of European Insolvency Law* (2003) at 349–350.

[64] Article 1, §§ 3 and 6 of the amended AnfG.

[65] Article 1, § 2 of the amended AnfG.

The AnfG also deals with transactions that amount to intentional prejudice of the creditors' rights.[66] They seem to be actions that may amount to either fraudulent conveyances or even preferences. The intention of the beneficiary or relationship between the debtor and the beneficiary is relevant in these instances. This provision may be aimed at some kind of collusive transaction between the debtor and the beneficiary. Sections 5 and 6 of the AnfG contain avoidable provisions regarding transactions entered into by heirs and loans in lieu of capital.

More elaborate provisions are those dealing with the calculation of relevant periods, prayers for relief, the legal consequences of avoidance and avoidance provisions against successors in title.[67] Most importantly, § 19 states that where facts contain a foreign element, the law to which the effects of the transactions are subject shall determine the avoidability of such transaction.

4.3.3 Undervalue transactions in terms of bankruptcy law

Section 134 of the InsO allows the insolvency representative to contest pre-bankruptcy transactions that amount to dispositions without consideration. The requirements are almost identical to article 1 § 4 of the AnfG in that they do not affect such transactions effected more than four years before the start of the bankruptcy proceeding.

4.3.4 Preferences in terms of bankruptcy law

In terms of §§ 130 and 131 of the InsO, a transaction in which the debtor granted a creditor a security interest or satisfied the claim within three months prior to the petition for bankruptcy will, in principle, be contestable under the conditions set out below. A distinction must be drawn between the so-called congruent coverage, where the creditor had an actual claim against the debtor, and incongruent coverage where the creditor either had no claim at all or the claim was not feasible due to the manner in which it was made, or the timing thereof.

(a) Incongruent coverage

Paragraph 131 states that incongruent coverage given during the month prior to the bankruptcy filing or after the filing will be contestable. Such actions that occur two or three months prior to filing may also be contestable if the debtor is either unable to pay the other creditors at the time of the act, or if the preferred creditor knew that such an act would defeat the payment of other creditors.

(b) Congruent coverage

Congruent coverage that occurred within three months prior to the filing or even after the filing may be contestable if the debtor is unable to pay the other creditors at the time of the act and the preferred creditor had been aware of this fact.[68]

[66] Article 1, § 3 of the amended AnfG.
[67] Article 1, §§ 7, 8, 13 and 15 of the amended AnfG.
[68] *InsO* § 130.

5 Fraudulent transactions and preferences in the jurisdictions of some developing countries

5.1 South African law

5.1.1 General

South Africa has a mixed legal system due to the huge influence by both Roman-Dutch law and English law. The Insolvency Act of 1936 is the main bankruptcy statute and it resembles earlier English law.[69] This Act is not a unified insolvency Act and especially corporate bankruptcy is largely regulated by the Companies Act of 1973, while certain uncodified Roman-Dutch law principles still apply.[70] Statutory avoidable dispositions are prescribed by the Insolvency Act and these provisions will also apply to bankrupt companies.[71] These statutory remedies are only available once formal bankruptcy of the debtor has commenced.

The uncodified principles of the *actio Pauliana* as they applied in seventeenth-century Roman-Dutch Law, however, remain the remedy of the general law that applies in and outside formal bankruptcy. The insolvency representative is known as a 'trustee' in the case of sequestration in terms of the Insolvency Act of 1936 and as a 'liquidator' in case of a company wound up in terms of the provisions of the Companies Act of 1973.

5.1.2 Fraudulent conveyances under the general law

The *actio Pauliana* of the Roman-Dutch law still applies in its original form in South African law. This remedy can be invoked by a creditor who enforces a debt against a debtor whose estate has not yet formally been declared bankrupt, as well as by the insolvency representative in formal bankruptcy. To void a fraudulent conveyance successfully under the *actio Pauliana* the following must be proven:[72]

(a) the alienation must have diminished the debtor's assets;
(b) the recipient must not have received his or her own property;
(c) the debtor–alienator must have had the intention to defraud his or her creditors, but if value was received, the recipient must have been aware of such an intention to defraud;
(d) the fraud must have caused the detrimental consequences for the creditors.

[69] See J. Kunst *et al*, *Meskin: Insolvency Law* (1990, loose leaf); E. Bertelsman *et al*, *Mars: The Law of Insolvency* (2008) and R. Sharrock *et al*, *Hockly's Insolvency Law* (2007) for current texts on South African insolvency law.

[70] South African insolvency law is, however, the subject of law reform and new uniform insolvency legislation is envisaged, although corporate rescues will continue to be dealt with as part of a new Companies Act that is in the parliamentary process at present. See SA Law Commission Project 63 Review of the Law of Insolvency Report, vol 1 Explanatory Memorandum, and vol 2, Draft Bill (2000).

[71] The Companies Act of 1973 does not contain its own avoidance provisions but s 339 read with s 340 of this Act make the statutory avoidance remedies provided by the Insolvency Act of 1936 as well as the *actio Pauliana* available to the insolvency representative.

[72] South African courts place much reliance on the construction of Pothier ad D 42 8 regarding the principles of the *actio Pauliana*. See *Hockey v Rixom and Smith* 1939 SR 107 at 118.

Unlike many civil law jurisdictions, the *actio Pauliana* has not yet been codified in South African law, and modern pleadings are based on this action and South African courts set precedents based on it.[73]

5.1.3 Undervalue transactions in terms of bankruptcy law

In terms of the Insolvency Act, any disposition not made for value by the insolvent can be set aside by the court if the insolvency representative can prove, in instances where the disposition was made more than two years before the date of sequestration, that immediately after the disposition had been made, the person disposing of the property was insolvent (liabilities exceeded assets).[74] If the disposition was made less than two years prior to sequestration, the court can set it aside if the person who benefited from the disposition cannot prove that the assets of the insolvent exceeded his or her liabilities immediately after the disposition had been made.

Where it is proven that at any time after such a disposition had been made, the insolvent's liabilities exceeded his or her assets by less than the amount of the disposition, the extent to which it can be set aside is limited to the amount of such excess.[75]

The South African section requires that the insolvency representative prove that the disposition was not made for value. 'Without value' in section 26 is not defined in the Insolvency Act. As it has no technical meaning, it should be interpreted in the ordinary sense of the word, namely without reasonable value or for inadequate value.[76] 'Value' was, for instance, described as the price that the disposed property will demand in the market.[77]

5.1.4 Preferences in terms of bankruptcy law

A disposition by a debtor may, in terms of section 29(1) of the Insolvency Act, be set aside as a voidable preference if it appears that the debtor, due to a dire financial situation, was unable to pay all his or her creditors fully, but nevertheless favoured a particular creditor (e.g., by making full payment of pre-existing debts). The insolvency representative must prove the following:

(a) A disposition was made by the insolvent within six months prior to bankruptcy;
(b) The effect of the disposition was to prefer one creditor over others; and
(c) That immediately after making such disposition, the debtor's liabilities exceeded the value of his or her assets (i.e., the value on the date of the disposition).

If the insolvency representative succeeds in proving the above-mentioned facts, the beneficiary may raise a statutory defence that will, if successful, prevent the transaction from being set aside. The beneficiary will thus be able to avoid the setting-aside of the disposition by proving, first, that the disposition was made in the ordinary course of business and, second, that it was not the

[73] For a plea to improve this remedy in South African Law, see A. Boraine, "Towards Codifying the *Actio Pauliana*" (1996) *SA Merc Law Journal* 213.
[74] S 26(1) of the Insolvency Act.
[75] S 26(1).
[76] *Estate Wege v Strauss* 1932 AD 76.
[77] *Bloom's Trustee v Fourie* 1921 TPD 599.

intention to prefer one creditor over another.[78] In order to determine the 'ordinary course of business', the courts apply an objective test, while in the case of the second part of the defence, the test applied is a subjective one and is concerned with the subjective intention of the debtor, which often, in the absence of direct evidence, has to be inferred from the surrounding circumstances.[79]

Section 30 of the Insolvency Act prescribes the requirements for an undue preference, which involves a disposition of assets to a creditor, made at any time before sequestration and while the liabilities of the debtor exceeded assets, with the intention of preferring one creditor over others.

5.2 India

5.2.1 General

The current position in India resembles elements of South African law. The insolvency laws of both jurisdictions have their roots in English law, and they reflect the older English model that provided different legislation for companies and for personal bankruptcy; thus no unified insolvency legislation.[80] The Companies Act of 1956, as amended, contains provisions that deal with the winding up of companies. The Companies Bill of 2008 will soon be proposed to Parliament.[81] There are two other pieces of legislation that deal with personal insolvency, namely (1) the Presidency Towns Insolvency Act of 1909 that applies in the provinces of Mumbai (Bombay), Chennai (Madras) and Kolkata (Calcutta), and (2) the Provincial Insolvency Act of 1920 that applies to the rest of India.[82]

India's commercial laws are largely based on English law, that is, English common law. Like South Africa, the Companies Act of 1956 prescribes the winding-up provisions for companies, but section 529 imports certain provisions of the insolvency laws that will apply in prescribed instances.[83] In the case of an insolvent company that has been declared bankrupt, the Companies Act, unlike in South Africa, has its own provisions to deal with undervalue and preferential transactions.

5.2.2 Fraudulent conveyances under the general law

The most pertinent fraudulent conveyance remedy outside bankruptcy that resembles a classical fraudulent conveyance claim is to be found in the Transfer of Property Act of 1882. It would appear that the Act of Elizabeth of 1571 applied in India in the past, but that it was

[78] S 29(1).
[79] These concepts have been the subject of many judgments as will be clear from the judgment in *Cooper NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA).
[80] See R. Puliani *Bharat's Manual of Companies Act & Corporate Laws* (2007) and P.S. Narayana *Law of Insolvency* (2007) in general.
[81] It is to be noted that the 2008 Companies Bill contains new winding-up and liquidation, as well as a consolidation of business rescue provisions, and it is due to be tabled in Parliament during October 2008.
[82] Against the backdrop of India's constitutional make-up consisting of states and union territories P.R. Wood at 116 indicates that the winding up of corporations is a matter for central government, while individual bankruptcy is both a central and state matter.
[83] Individual bankruptcy rules that are, for example, imported include proof by secured creditors; insolvency set-off; interest on debts and the ranking of debts, see Wood at 116.

repealed by the Act of 1882.[84] The pertinent provision that deals with fraudulent conveyances (transfers) in the 1882 Act is section 53, but it limits its application to immovable property.[85] This section, inspired by the Elizabethan Act, makes the transfer of immovable property with intent to defeat or delay the creditors of the transferor voidable at the option of any creditor so defeated or delayed. The rights of a transferee in good faith and for consideration are, however, protected. Where a creditor institutes such a suit, the section states that it will be on behalf of, or for the benefit of all the creditors. It is assumed that an insolvency representative may also invoke this provision in bankruptcy. Section 53 seems to imply that this provision will otherwise not impair any avoidable provisions in bankruptcy, since it states that this section will not affect any law in force relating to insolvency.

Although not strictly a fraudulent conveyance provision, section 128 of the 1882 Act states that where a donor donates all his or her property, the donee who accepts such a gift becomes personally liable for all the debts due by, and liabilities of, the donor at the time of the gift. The amount of the liability seems to be limited to the value of the donated property.

5.2.3 Undervalue transactions in terms of bankruptcy law

Section 531A of the Companies Act allows for the avoidance of voluntary transfers of movable or immovable property or any delivery of goods made by a company within one year prior to formal bankruptcy. This section stipulates that such a transfer or delivery is only void if it is made outside the ordinary course of its business, or in favour of a purchaser or encumbrancer, but not in good faith and not for valuable consideration.

5.2.4 Preferences in terms of bankruptcy law

In terms of section 531 of the Companies Act of 1956, a fraudulent preference by the company debtor may be set aside. Any transfer of movable or immovable property, a delivery of goods, payment, execution or other act relating to property made, taken or done by, or against, a company within six months before it is wound up will be deemed to be a fraudulent preference. In the event of the company being wound up, such a fraudulent preference shall be deemed to be invalid.[86]

The transaction must be made voluntarily and therefore a transaction made under pressure by the creditor is not fraudulent preference.[87] The mere fact that some preferential treatment was shown to a particular creditor will not suffice and it must thus be proved that it was one 'with a view' to giving such a creditor favoured treatment.[88] The dominant motive in the mind of the company as represented by its directors should be to prefer a particular creditor. Where

[84] See the Schedule to the Transfer of Property Act of 1882.
[85] This provision is also analogous to ss 172(repealed) and 173 of the later (English) Law of Property Act of 1925 which Act first replaced the Act of Elizabeth of 1571 in England.
[86] The insolvency representative carries the burden of proof, see *Jayanthi Rai v. Popular Bank Ltd.* (1966) 36 Comp. Cas. 854.
[87] *Monark Enterprises v. Kishan Tulpule* (1992) 74 Comp. Cas. 89 (Bom).
[88] The dominant motive for making the transaction has to be ascertained and if it is tainted with an element of dishonesty, the question of fraud arises. See *Official Liquidator v. Victory Hire-Purchasing Co. (P.) Ltd.* (1982) 52 Comp. Cas. 88 (Ker).

the transaction is made in favour of a creditor solely with a view to avoiding civil or criminal proceedings, the transaction will also not be viewed as a fraudulent preference.

6. Cross-border implications of avoidable transactions

6.1 General

In modern-day commerce more than one jurisdiction may be involved in a bankruptcy matter. In many such instances the company debtor may own assets in various jurisdictions and may have entered into transactions that may be avoidable in some jurisdictions, but not in others. In spite of a variety of legal models and a body of principles of private international law, uncertainty still prevails in many areas in the cross-border situation.[89]

The position regarding avoidable transactions will be affected by the bankruptcy proceedings that are in place in a particular case. For instance, if a company has a presence and an estate in each one of the jurisdictions included in this paper and thus qualifies for bankruptcy, a separate bankruptcy proceeding may, in principle, be opened in each one of the jurisdictions in terms of their respective bankruptcy laws. Here there will be a number of concurrent bankruptcy proceedings and, in principle, each one of the jurisdictions will apply its own avoidance provisions to those transactions that transpired within its jurisdiction. If the insolvency representative from England, for example, wants to become part of the concurrent bankruptcy proceeding in South Africa, he or she will at least have to qualify for ancillary relief in terms of South African law in order to join the South African proceeding with a view to lodging claims on behalf of the English creditors against the South African estate. The South African insolvency representative will, however, be in charge of the South African proceeding and, as stated before, South African insolvency law will largely be used to attack voidable dispositions that took place within this jurisdiction in such a case.

Where there is only one (main) proceeding, for instance, an English bankruptcy order, the English insolvency representative (being the foreign insolvency representative in the other jurisdictions) will have to approach each of the other jurisdictions with an ancillary proceeding with a view to having the English bankruptcy order and his or her appointment as such recognised in the foreign jurisdiction. The position of foreign insolvency representatives in respect of their recognition and powers to deal with assets and related matters such as avoidable transactions in the foreign jurisdiction will depend on the rules of the foreign jurisdiction, which may well differ from country to country.

Usually, the cross-border rules of a specific jurisdiction will be contained in either local legislation, a treaty or convention that might exist between the relevant jurisdictions, supranational legislation that applies in regions such as the European Union or it may be based on common law principles derived from international law, such as comity, that may prompt a foreign court to assist the

[89] See in general P.J. Omar, "The Landscape of International Insolvency Law" (2002) *INSOL Inter-national Insolvency Rev* 2002; I.F. Fletcher, *Insolvency in Private International Law: National and International Approaches* (2005).

foreign insolvency representative in this regard. Sometimes, and depending on the countries involved, a particular jurisdiction may offer more than one option for the purposes of recognition.[90]

To illustrate the complexity of the problem from a recognition point of view, it must be noted that a foreign insolvency representative who, for instance, wants to be recognised as such in England, will have to consider if he or she qualifies for the relevant recognition by utilising section 426 of the English Insolvency Act of 1986 that grants foreign insolvency representatives from certain designated 'relevant countries' a relatively easy route to be recognised as such. Since England has also adopted its own version of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency of 1997, known as the 'Cross-Border Insolvency Regulations of 2006', such an insolvency representative my also be able to apply for recognition in terms of this structure. Where the jurisdictions involved are European Union Member States, except Denmark, the European Union Regulation on Insolvency Proceedings of 2000 (EU Insolvency Regulation) will apply.

The position of a foreign insolvency representative in respect of avoidable dispositions that took place in the foreign jurisdictions will raise a number of questions, such as what law will be applicable in such an instance and whether he or she will have the required standing to attack such a transaction in the foreign jurisdiction. The position on this aspect is not clear and well regulated in all countries.

Clearly, where a well-developed system is in place, a foreign insolvency representative will have the benefit of using those procedures, but in its absence, the broad principles of the private international law of the particular jurisdiction are consulted to determine what rules to apply.

Specific terminology used in this section is the 'centre of main interest' (COMI), referring to the jurisdiction where the debtor has been incorporated and has its head office and/or main place of business. The *lex concursus* is the law of the country where the main bankruptcy proceeding is initiated, usually where the COMI of the debtor is deemed to be. The law of the country where a particular transaction takes place is referred to as the *lex causae*.

6.2 Hypothetical case study: main proceeding scenario

To illustrate the above, a hypothetical practical problem will be used to demonstrate the operation of a cross-border insolvency matter: a company has been incorporated, and has its main place of business and head office in England and through local branch offices it operates in all the jurisdictions dealt with in this paper.[91] If only a main bankruptcy proceeding is opened with regard to the 'parent ' company in England where the COMI is deemed to be for the purposes of

[90] See in general B. Wessels, *International Insolvency Law* (2006) for a discussion of various cross-border dispensations.
[91] It is to be noted that this example does not entail a group of companies, since it is one and the same company that is operating through branches in the various jurisdictions. In a group situation, each group member remains a distinct juristic person. Clearly the group concept also poses many difficulties from an insolvency point of views, e.g. UNCITRAL Legislative Guide on Insolvency Law (www.uncitral.org/uncitral/en/commission/working_groups) paras 82–92.

this discussion, the English insolvency representative will attempt to trace assets of the company within these other jurisdictions as well. Where only a main proceeding is in place, he or she will establish whether they will be able to gain recognition in the foreign jurisdiction based on the foreign main bankruptcy order by way of an ancillary proceeding within them, and with the further view to tracing and attaching the relevant assets for the benefit of the English creditors. If recognition as such can be obtained and permission is granted to examine and attack possible avoidable transactions, the question is what legal system to apply to determine whether certain pre-bankruptcy transactions carried out are avoidable in order to reclaim the assets disposed of by such transactions.

The English insolvency representative considers his or her position in respect of the applicability of English law (the local law of the home country) or the local law of the other relevant jurisdiction. In some jurisdictions the same kind of disposition will not be avoidable due to different time frames or a different interpretation of core elements. The various dispensations will also allow the English insolvency representative to apply either the home country's law or English law.

For the purposes of the jurisdictions under review, the European Union Insolvency Regulation will apply to its Member States in the current example, namely England, the Netherlands and Germany. Accepting that there is only a main proceeding where the COMI has granted the main bankruptcy order, the law of that jurisdiction, the *lex concursus*, being English law in this example, will in terms of article 4(2)(m) also regulate the avoidance of transactions that took place in the other Member States. Article 13 of the European Union Insolvency Regulation grants the recipient or beneficiary of such an avoidable transaction a special defence: reliance on the fact that a transaction that is avoidable in the *lex concursus* would not amount to an avoidable transaction in the *lex loci*. It is notable that the European Union Insolvency Regulation amounts to supranational legislation and in the absence of such a dispensation or a convention between non-Member States, the legal positions might be less clear.

Where the English insolvency representative approaches a court in the United States for recognition, Chapter 15 of the Bankruptcy Code, being the adopted version of the UNCITRAL Model Law, applies. If he or she is successful in obtaining recognition for the English main proceeding in the United States, § 522(a), Chapter 15 of the United States Bankruptcy Code grants him or her standing to apply certain avoidable provisions of the code.[92] When a foreign proceeding is, however, a foreign non-main proceeding, the American court must, in terms of § 522(b), be satisfied that an avoidance action relates to assets that, under United States law, should be administered in the foreign non-main proceeding.[93]

[92] Prior to Chapter 15, the now repealed § 304 of the Bankruptcy Code regulated cross-border matters. Although the provision was hailed as a progressive embracement of universality, it did not deal with all related issues like the treatment of avoidable dispositions in a cross-border situation. See J.L. Westbrook, "Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases" 2007 *Texas International Law Journal* 899 for case studies as well.

[93] This section is in line with the UNCITRAL Model Law on Cross-Border Insolvency.

Generally, there is no statutory dispensation regarding cross-border insolvency matters between the Netherlands and non-European Union Member States. Where such a foreign insolvency representative applies for recognition in the Netherlands, principles of Dutch private international law will apply. Assistance granted by Dutch courts in such instances in the past were of a limited nature.[94] Since the Netherlands is a European Union Member State, the European Union Insolvency Regulation will, however, apply with regard to the English bankruptcy order. English bankruptcy law, being the *lex concursus* in this instance, will apply and English avoidance provisions will, in principle, apply with regard to voidable transactions that took place in the Netherlands.

Braun[95] indicates that Germany has various international (or cross-border) insolvency systems that will find application, depending on the other country involved. The European Union Insolvency Regulation will apply in a cross-country bankruptcy matter if Germany and any other European Union Member State, except Denmark, is involved. As regards other non-European Union Member States, Part Eleven, §§ 335 to 338 of the InsO, which was, to some extent, modelled on the EU regulation, will apply. In terms of § 335, the effects of an insolvency proceeding opened in another country will, in principle, be subject to the local laws of the home country where the debtor has its COMI. Germany adopts an approach of universality: it deems its bankruptcy proceedings to operate outside its borders, but simultaneously recognises foreign bankruptcy orders. In terms of § 339, a transaction may be contested by a foreign insolvency representative in Germany in accordance with the local law of the opening country (the *lex concursus* being applicable.) The beneficiary or recipient may, however, try to save the transaction in his or her favour by proving that the law of another state is relevant for the purposes of the transaction and that the transaction is not contestable in terms of that particular law. In this instance and if it is accepted that the COMI is in England, English law may be applied to attack transactions that were effected in Germany subject to the statutory defence as explained.

Although South Africa has adopted the UNCITRAL Model Law on Cross-Border Insolvency in the form of the Cross-Border Insolvency Act of 2000, this option is not available to any foreign insolvency representative yet, since the South African version includes a designation clause that makes the Act applicable only to designated countries and no country has as yet been designated.[96] In the absence of any enforceable legislative dispensation in South Africa, local common law are applicable. As a result, the English insolvency representative will first have to approach a South African high court to apply for recognition and request the court to grant him or her the necessary powers to trace and execute on local assets. In exercising discretion

[94] See *Gustafsen q.q. Mosk 24* (Supreme Court, October 1997., NJ 1999, 316) referred to in *Insol Cross-Border Insolvency Guide* (2003) at 161 where the Dutch court allowed the *lex concursus* to be applied in a case of an avoidable transaction but on the basis that the foreign law basically agreed with the *lex causae*, i.e. Dutch law in that instance.
[95] *Supra* at 561.
[96] As from the moment for the first designation, South Africa will have a dual cross-border system in that designated countries will have the benefit of the Cross-Border Insolvency Act of 2000, whilst non-designated countries will still be subject to the less predictable current uncodified system. See A. Smith & A. Boraine, "Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law" 2002 *American Bankruptcy Institute Law Review* 135.

territoriality is still largely the norm with the courts. In theory, he or she may ask to be allowed to attack local transactions in terms of English avoidance provisions, but the South African court will at best allow such transaction to be dealt with in terms of South African bankruptcy law. The position is not clear, especially since the periods in the statutory provisions are calculated as from the date of formal bankruptcy. In the absence of a statutory rule, a South African court may argue that the ancillary order in the format of a recognition order does not amount to a bankruptcy order for this purpose.[97]

At present India has no specific statutory regime that deals with cross-border insolvency matters, but it is said that Indian courts "have a well-developed and predictable approach to issues of foreign claims, creditors and judgments including those involving cross-border insolvency issues".[98] It seems that this jurisdiction will recognise foreign bankruptcy orders, but it is not clear to what extent, if at all, its courts will allow a foreign insolvency representative to attack transactions that transpired in India in terms of the *lex concursus*. In *National Textiles Workers' Union v P R Ramakrishnan*[99] a constitutional bench of the Supreme Court held that foreign decisions could be followed, unless they are opposed to Indian ethics, traditions, jurisprudence or are otherwise unsuitable. In view of judgments such as this, a case to apply the *lex concursus* could certainly be argued.

Except for the jurisdictions regulated by the European Union Insolvency Regulation, the other dispensations will allow the English foreign insolvency representative to apply the principles of the *lex causae* in an attempt to avoid certain avoidable transactions that were carried out in their respective jurisdictions. The exception is where a pertinent legal rule applies in that country that would allow the insolvency representative to apply the *lex concursus*, that is, English law, in this regard.[100] With the exception of the European Union Insolvency Regulation and the German dispensation that deal with substantive issues, such as the treatment of avoidable dispositions in bankruptcy, the other models are largely concerned with procedural issues relating to the recognition of a foreign insolvency representative or the bankruptcy order as such. The effect of such recognition on substantive issues must then be considered in view of private international law principles; specifically, choice of law rules that apply in the particular country. It may thus also happen that both the local law and the law of the *lex concursus* will apply in this regard. In many instances the avoidable provisions of the country where the transaction took place (the *lex causae*) and where the assets that were the object of such transaction are situated will apply. The outcome will necessarily be influenced by the discretion of a local court and especially the view that the court holds regarding a universality or territoriality approach.[101]

[97] S 23 of the Cross-Border Insolvency Act of 2000, however, follows the proposal in the UNCITRAL Model Law on Cross-Border Insolvency by granting a foreign insolvency representative standing to attack transactions in South Africa in terms of local insolvency laws.
[98] See the *Insol Cross-Border Insolvency Guide* (2003) at 127.
[99] AIR 1983 SC 75, referred to in INSOL *Cross-Border Insolvency Guide* (2003) at 127.
[100] In this regard the German *InsO* does contain a provision that emulates the position in the EU Insolvency Regulation.
[101] Westbrook, 2007 *Texas International Law Journal,* 899.

Although England has issued the main bankruptcy proceeding in the present example, the position of a foreign insolvency representative who wants to operate as such in England will depend on the specific English statutory measure that applies in the particular instance. If he or she comes from another European Union Member State, the European Union Insolvency Regulation will apply. Where the Cross-Border Insolvency Regulations of 2006 find application, he or she will, in terms of article 23, at least have the standing to attack avoidable transactions, but in terms of the prescribed sections of the English Insolvency Act of 1986. Foreign insolvency representatives from relevant and designated countries who rely on section 426 of the 1986 Insolvency Act will, to some extent, be in the hands of the courts. In this last dispensation an English court will apply private international law principles that may allow the court to prescribe either English law or the substantive law from the foreign jurisdiction.[102]

6.3 A special case study: concurrent proceedings

In this instance at least two bankruptcy proceedings with regard to the same debtor are opened in different countries. The country where the COMI of the company is deemed to exist will operate the so-called main bankruptcy proceeding, while the other country where the debtor has a presence will regulate the concurrent bankruptcy proceedings. In principle, the bankruptcy provisions of the respective jurisdictions will be applied with regard to assets situated in each country, but a foreign insolvency representative may apply for recognition in order to prove claims and participate in the other bankruptcy proceeding, though in accordance with the law of the relevant country. In the absence of a firm legal principle that may apply, it is improbable that a foreign insolvency representative will be allowed to apply his or her home country avoidance provisions in such an instance.

However, estate representatives must always be mindful of all the legal avenues open to them when dealing with a cross-border situation. In an extraordinary South African case, a foreign company incorporated in Namibia opened a branch in South Africa and it was properly registered in terms of South African company law as an external company.[103] The Namibian-based company contracted the services of a South African company, but failed to pay its debts. Prior to its liquidation, the Namibian company paid the South African creditor by way of a money transfer from its Namibian bank account to the creditor's South African bank account. In the meantime, the South African branch of the Namibian company was also liquidated in South Africa. As a result, there was a concurrent bankruptcy proceeding.

The South African insolvency representative acting on behalf of the liquidated South African branch could also have approached the Namibian court for a recognition order with a view to invoking Namibian avoidance provisions, but he elected to contest the aforementioned payment by the Namibian company in accordance with South African avoidance provisions, which are virtually identical to their Namibian counterparts. While the South African insolvency

[102] S 426(1), (English)Insolvency Act of 1986. See also *Hughes v Hannover-Ruckversicherungs AG* [1997] B.C.C 921.
[103] *Sackstein NO v Proudfoot SA Pty (Ltd)* 2006 (6) SA (SCA) 358 and the preceding judgments in the same matter reported in 2003 (4) SA 348 (SCA) and [2005] JOL 14088 (W).

representative attempted to establish his standing to attack this payment in a South African court, the Namibian court granted an order based on a compromise that rescinded the Namibian liquidation order of the mother company. The South African branch remained under liquidation in terms of South African law. The South African insolvency representative, seeking to claim the payment that had emanated from Namibia, relied on the fact that the mother branch in Namibia and its daughter branch in South Africa were one and the same entity, but he then looked to South African courts and bankruptcy law in order to contest the transaction in South Africa because the money was within the boundaries of South Africa.

After years of litigation in this regard, the South African Supreme Court of Appeal ruled that the South African insolvency representative's claim could not proceed because of the effect of the Namibian court order. This judgment thus foiled the territorial approach adopted by the South African insolvency representative, and the South African court used the 'one company' concept against the insolvency representative in the end. However, from the court's point of view it did acknowledge what had happened in Namibia. Suffice to say that avoidable transactions that transpired within a group of companies will pose another set of difficulties that fall outside the scope of this paper.

7. The future

Despite the fact that the various jurisdictions considered for the purposes of this paper are based on either the common law, the civil law, or a blend of these legal systems, the notion of avoidable transactions as provided for in each jurisdiction share certain core characteristics.[104]

In order to assist countries that are in the process of reforming their local bankruptcy laws, various international instruments emanating from important bodies, such as UNCITRAL and the World Bank, contain principles and guidelines designed to assist such countries when conducting the actual reform.[105] On the one hand, the aim of these guidelines is to try and set minimum standards regarding the bankruptcy principles that should apply in all jurisdictions and, on the other hand, their implementation may also lead towards more harmonised local bankruptcy laws on a global scale.

As regards avoidance provisions in cross-border matters, UNCITRAL followed a cautionary approach by indicating that this was one of the difficult areas to manage in a cross-border scenario.[106] The UNCITRAL Model Law on Cross-Border Insolvency, which has been incorporated into the UNCITRAL Legislative Guide on Insolvency Law, proposes in article 23 that a foreign insolvency representative must have standing to bring an action to contest avoidable dispositions. The matter is, however, otherwise left open to the adopting countries to provide the

[104] See paras 2–5 *supra*.
[105] See the UNCITRAL Legislative Guide on Insolvency and the World Bank Principles and Guidelines for Effective Insolvency and Creditors Rights 2001 and 2005 (www.worldbank.org/gild), which may be mentioned as two prime documents in this regard. For a comprehensive view of international instruments see B.Wessels, *Cross-Border Insolvency Law: International Instruments and Commentary* (2007).
[106] Explanatory memorandum to the implementation of the UNCITRAL Model Law on Cross-Border Insolvency.

particulars, such as the substantive principles relating to avoidance provisions to be applied in a particular cross-border case.[107]

At the same time, a rather extensive debate is raging on the setting of norms and standards regarding avoidance provisions in general.[108] Some researchers are conducting surveys in order to fathom the cost-effectiveness of the various provisions in this regard.[109] The UNCITRAL Legislative Guide on Insolvency Law states in paragraph 154 that the design of avoidance provisions requires a balance to be reached between competing social benefits such as, on the one hand, the need for strong powers to maximise the value of the estate for the benefit of all creditors and, on the other, the possible undermining of contractual predictability and certainty. It may also require a balance to be reached between avoidance criteria that are easily proven, and will result in a number of transactions being avoided and narrower avoidance criteria that are difficult to prove, but more restricted in the number of transactions that will be avoided successfully.

In view of the numerous problems faced by creditors and insolvency representatives in cross-border bankruptcy generally, initiatives have been launched in order to establish more predictable cross-border rules. Some countries have entered into treaties or conventions, either among themselves or on a wider regional basis.[110] Supranational legislation has been adopted among participating countries of which the European Union Insolvency Regulations are probably the best-known example at present.[111] The provision in this regulation that deals with the cross-border application of the *lex concursus*, also with regard to substantive issues such as avoidable transaction provisions, may serve as a suitable model for reform.

A few countries have fairly elaborate local legislation to deal with cross-border insolvency matters.[112] The UNCITRAL Model Law on Cross-Border Insolvency is a global initiative of the United Nations that serves as a model for reform or for establishing a local legislative framework on cross-border insolvency rules to the Member States of the United Nations. Although the UNCITRAL Model Law on Cross-Border Insolvency is a giant leap forward in many respects, current drawbacks are the fact that relatively few countries have adopted it, it is largely limited to procedural issues, and in particular with regard to the application of avoidance rules there seems

[107] From the discussion *supra* it is clear that those countries who have already adopted the UNCITRAL Model Law on Cross-Border Insolvency prefer to allow a foreign IR to use their avoidance provisions.
[108] Cf. C. Tabb, (1992) 43 *South Carolina Law Review* 981; A. Smith, "Presuming, Assuming, and Interfering an Intention to Prefer a Creditor in Impeachable Preferences" 2001 *SA Mercantile Law Journal* 1; T.G.W. Telfer, "Voidable Preference Reform: A New Zealand Perspective on Standards and Goalposts" 2003 *Insol International Insolvency Law Review* 55.
[109] See for instance G. van Dijk, (2008) *Insol International Insolvency Law Rev* 123 at 141.
[110] See, for instance, the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico that envisaged a cross-border insolvency treaty among themselves. Within this context the American Law Institute (ALI) has approved a set of principles and guidelines regarding its *Transnational Insolvency Project* – B. Wessels (2006) 42. ALI and the International Insolvency Institute (III) are the sponsors of a project to develop so-called *Global Principles for Cooperation in International Insolvency Cases* which project includes recommendations regarding applicable legal principles. (The reporters are Ian Fletcher (London) and Bob Wessels (Leiden) and see www.bobwessels.nl, blog 2008-07-doc3 for a status report.)
[111] See also the initiative of the Organisation pour l'Harmonisation Afrique du Droits des Affairs (OHADA) in Western and Central Africa that comprises co-operation on the harmonisation of business law among French-speaking African States. Sixteen member states have entered into a treaty that includes a harmonised bankruptcy legislative regime, together with cross-border insolvency rules that apply amongst the participating countries – B. Wessels (2006) 44.
[112] See, for instance, Chapter 11 of the German InsO.

to be a tendency by such adopting states to apply their local avoidance rules in this regard. These countries, however, represent important economies, such as the United States, United Kingdom, Mexico, Japan and Australia.

Ultimately, bankruptcy law reform, particularly the operation of avoidable dispositions in an international context, remains an exciting evolutionary process necessitated by the realities of the twenty-first century. An eventual harmonisation of local bankruptcy laws linked to a uniform approach regarding cross-border insolvency matters result in a natural embracement and application of universalism in this area of the law. In spite of certain shortcomings, the UNCITRAL Model Law on Cross-Border Insolvency can thus be hailed as an important developmental model in this evolutionary chain, since it serves as a bridge between foreign, and in some instances vastly differing, insolvency regimes.