Claw-back Rules and Creditors' Protection

by

Christoph G. Paulus *

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I. General Considerations

As far as the corporate capital requirement is supposed to fulfil the function of a creditors' protection, there are some overlappings of this field with the one of the law of enforcement. However, their respective thrusts differ to the degree to which their starting points differ: Whereas the capital requirement shall guarantee protection for the creditors in advance – prospectively – the law of enforcement "enters the stage" only when and once the individual need for such protection has been proven to exist. The enforcement of, e.g., money judgments protects ex post insofar as it is dependent on the established claim of a creditor which has not been satisfied by the debtor – for what reasons so ever. It is probably the key purpose of the capital requirement to make such an event unlikely to the extent possible.

As an aside – a similar purpose underlies the discussion about and the introduction of Corporate Governance Codes – namely to avoid what is seen as the

* Prof. Dr. Christoph G. Paulus, LL.M., Professor of Law at the Humboldt-Universität zu Berlin

worst case, i.e. enforcements of, i.a., money judgments and, even more, the debtor's insolvency.[1] In contrast, the law of secured transactions is even based on such worst case scenario in that it offers protection by providing the secured creditor a privileged position.[2]

The protection of the creditors is, almost by definition, the dominant underlying principle of both the law of enforcement and the insolvency law. Therefore, it comes not as a surprise that both areas share a common feature for a very long time[3] in what is – even and still nowadays – often called Actio Pauliana (or claw-back rules). Its effect presents an important peculiarity:[4] Due to its retroactivity, both the claw-back rules for individual creditors (regulated in Germany in the so called Anfechtungsgesetz = AnfG) as well as those for the creditors in general in an insolvency proceeding (regulated in Germany in sec. 129 seqq. Insolvenzordnung = Insolvency Ordinance = InsO) do not inflict with the legal position of the transaction at stake – at least not immediately.

They do so only when and if certain preconditions within the financial situation of the debtor have occurred. They must be of a quality which justifies restricting the debtor's freedom to act in accordance with private autonomy for the benefit of one or even all creditors. Once this is the case, the claw-back rules attempt to restore the debtor's estate as it should have been without the transaction or the legal act which – ex post – turned out to diminish the creditors' right to full satisfaction of their claims. To put it slightly differently: The creditors are given the right to get satisfied not only by means of the debtor's assets which he owns precisely at the time of the commencement of such proceeding but also those which he owned formerly but which he had given away in an avoidable manner.

Thus, the claw-back rules protect one or all creditors by ex post rescinding rights of third parties which originally had been acquired in full accordance with the general rules of the law of transactions.[5] This means that for a period of ten years – that is in German law the longest period covered by the claw-back rules,

1 In this context, it should be noted that the underlying pattern might change due to the introduction of the so called plan proceeding in sec. 217 seqq. InsO; cf. Paulus, Die Insolvenz als Sanierungschance – ein Plädoyer, ZGR 2005, 309; additionally Haarmeyer, Die Insolvenz kann eine strategische Option sein, FAZ v. 15. 11. 2005, S. 7.

2 For such interdependence between securitisation of credits and the achievement of control by the creditors over the debtor very informative Westbrook, The Control of Wealth in Bankruptcy, 82 Texas L.R. 795 (2004).

3 About the historical development of the Pauliana see Ankum, De Geschiedenis der „Actio Pauliana“, 1962.

4 Ground breaking G. Paulus, Sinn und Formen der Gläubigeranfechtung, AcP 155 (1956), 277.

5 In case there is another flaw in the transaction which causes its nullity, both sets of rules are applicable.

sec. 3 AnfG, 133 InsO – the interest of the individual to keep the transaction valid is superseded by the interests of the creditors to receive full satisfaction of their money claims. Insofar it is justified to interpret the general insolvency law principle of the par condicio creditorum – the equal treatment of the creditors – as not being restricted to the insolvency proceeding but also as reaching out to transactions which, seen from an ex ante perspective, might not be in need of such protection. This insight is true even for the much shorter period of three months which governs the specific insolvency claw-back rules in sec. 130 through sec. 132 InsO; since this time span does not necessarily correspond with the duration of the debtor's crisis – suffice it to mention solely the industry of modern communication systems where the crisis can break out within much shorter periods.

It is, thus, not without justification that the German Supreme Court (Bundesgerichtshof = BGH) utilises the duty of an equal treatment of the creditors not only in the context of the retroactively functioning claw-back rules but imposes it also prospectively on a company's director as long as the company is in a critical situation.[6]

Irrespective of such interdependencies it is, however, to be warned to see the claw-back rules as a kind of potential compensation for the loss of the capital requirements for corporations. Since the main disadvantage of relying on the claw-back rules is just the retroactivity of their mechanism; it is this peculiarity which aggravates any ex ante-calculation. Such calculation is at least facilitated under a regime of a capital requirement for corporations. It should be noted, additionally, that the success of a single creditor's or of an insolvency administrator's attempt to rescind transactions or legal acts of the debtor is dependent on a number of uncertainties – ranging from the provability to the cost risks of any law suit. It is this ex post-perspective which causes one of the most troublesome problems of any claw-back rules and which is described in the UNCITRAL Legislative Guide on Insolvency Law as:

> *As is the case with a number of core provisions of an insolvency law, 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 maximize the value of the estate for the benefit of all creditors and, on the other, the possible undermining of contractual predictability and certainty.*[7]

6 BGH ZIP 2003, 1005.
7 Note 154 of the Guide (quoted in n 10).

II. Comparative Overview

As a consequence of the collapse of the so called Tiger States and the following East Asia crisis in the mid-90ies the multinationals such as the International Monetary Fund,[8] the Worldbank[9] and UNCITRAL[10] promoted legislative support for the drafting of insolvency laws. Thereby, they initiated a wave of new insolvency legislation[11] which, irrespective of all differences in detail, leads to a kind of assimilation of these laws. Part of it is that there is nowadays probably no one insolvency law which does not contain a more or less explicit set of claw-back rules.[12] This is to say that virtually everywhere the need is seen and addressed that creditors are to be protected from disadvantageous transactions or acts done by their debtor in the run-up to his insolvency.

1. Germany

The claw-back rules of the sec. 129 seqq. InsO has emerged from the predecessor statute of the Insolvency Ordinance (the Bankruptcy Ordinance, Konkursordnung); thereby, however, alleviating the recovering possibilities for the insolvency administrator. In addition to the elements addressed in sec. 129 InsO, further more specific elements as described in sec. 130 through sec. 136 have to be fulfilled. The latter group of norms is usually subdivided into sec. 130 through sec. 132 on the one hand, the further norms on the other hand. The first group is called the specific insolvency claw-back rules because, unlike the norms of the other group, these rules are reserved exclusively for the powers of an insolvency administrator; they share a three months suspect period. The norms of the other group (sec. 133 through sec. 136) are also provided for the individual creditor in the abovementioned Anfechtungsgesetz.

The elements of sec. 129 InsO which have just been addressed and which are to be fulfilled in any claw-back case are: a legal act (which is much broader than just a transaction and which can also be done through an omission) which causes[13] a detrimental effect for the common creditors. Goal of the claw-back rules is

8 Orderly & Effective Insolvency Procedures, 1999; to be found under www.imf.org/external/pubs/ft/orderly.

9 Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, 2001; to be found under www.worldbank.org/ifa/ipg_eng.pdf.

10 Legislative Guide on Insolvency Law, 2004; cf. www.UNCITRAL.org/english/texts/insolven/insoguide.pdf.

11 Cf. Paulus, Der Internationale Währungsfonds und das internationale Insolvenzrecht, IPRax 1999, 148 seqq.

12 See, e.g., the Armenian Insolvency Code – to be amended in 2006 – which has a specific (however short) claw-back rule in art. 54.

13 It is worth mentioning that, generally speaking, indirect causation is sufficient for

precisely the rescission of such detrimental effect; this is the contents of the claim given to the administrator, sec. 143 InsO. As a result of a virtually age-old experience certain insiders and related persons to the debtor, sec. 138 InsO, are discriminated with respect to the burden of proof; since they have been and still are evident and appreciated collaborators for disguising manoeuvres. In contrast, such transactions are excluded from rescissions which have been performed on the basis of market conformity – i.e. at a fair price and at an immediate exchange of good and consideration.[14]

The first claw-back rule of the specific insolvency rules, sec. 130 InsO, relates to what in German terminology is called congruent performance. That is to say that such transactions of the debtor which have been performed in full accordance with the underlying obligation – e.g. a contract or a statutory duty – can be rescinded. Precondition for that is, however, an accumulation of an objective and a subjective element: the first one being the debtor's inability to fulfil all his obligations as they are due at the time of this transaction; and the second one being the other party's knowledge of this inability. In contrast, if the debtor's transaction did not comply with the underlying obligation – because he might, e.g., deliver a different good or service than the one owed or he delivers earlier than he is in fact obligated – there is to be assumed some preferential treatment of the transferee; therefore, it is seen as justified to alleviate the possibility of a rescission. These anomalies are called incongruent performances, sec. 131 InsO. They are ipso iure avoidable – as are securities received in the course of an enforcement proceeding, sec. 88 InsO – provided they have been done within one month before the petition for opening the insolvency proceeding has been filed. If these performances, however, have been done in the two previous months (i.e. the second and the third one before the petition) a rescission is possible if either the objective criterion of the debtor's inability to pay is given at the time of the transaction or if the transferee has, at the time of the performance, knowledge of the detrimental effect of the transaction on the general unsecured creditors. The third rule, sec. 132 InsO, refers to such legal transactions which cause an immediate detrimental effect on the general unsecured creditors. The best example for such a transaction is a sale by the debtor at an undervalue because he is in desperate need for quick cash in order to fill ever new opening gaps in his financial situation.

The so called general claw-back rules are headed by sec. 133 InsO which case law of the Supreme Court has changed more and more into a norm of almost all-encompassing applicability.[15] When and if the debtor has done any legal act with

avoidability; that is to say that it suffices if at the end of a respective law suit a deterioration can be established.

14 The prevalent opinion, however, reduces the applicability of sec. 142 InsO to cases of sec. 130 InsO – even though the wording is indicating it differently.

15 Such a development would – if at all – be justified only if the law's tool box for the

the intent (be it unconditioned or conditioned) to cause a detriment to his creditors and when and if the other party did have knowledge of such intent (under certain conditions, this knowledge is presumed), such legal act is subject to avoidability when it has been committed within the last ten years before the filing of the petition. A transaction performed by the debtor at undervalue (most prominent but not the only example is a gift) can be rescinded if the transferee (!) of such undervalue transaction is not in the position to prove that this transaction has been performed longer than four years before the filing of the petition, sec. 134 InsO. Sec. 135 InsO refers to the securitisation and the repayment respectively of loans which have been given by shareholders and which are replacing equity capital; here the suspect period is ten years or one respectively. Finally, sec. 136 InsO allows to rescind the restitution of the interest of a silent partner in a silent partnership if such restitution has taken place within one year before the filing of the petition.

2. *Belgium*[16]

Belgium has enacted a completely new Bankruptcy Code in 1997 (Faillissementswet – Loi sur les Faillites); it replaces a Statute which had been in force for 146 years. Art. 20 of the new Code refers to and specifies for the bankruptcy context what art. 1167 of the Belgium Code Civil provides for the individual creditor – namely the so called Actio Pauliana. This Actio (or right) results in the nullity of any transactions done by the debtor (a) to the detriment of such individual creditor and (b) with the debtor's intent of such detrimental effect as well as (c) the transferee's knowledge of this intent. In a bankruptcy case, art. 20 extends the detrimental effect to all existing creditors of the debtor and concentrates this legal tool solely in the hands of the bankruptcy administrator. There are no explicit time limits – it is left to the increasing difficulty to prove these facts when the transaction at stake happened a longer time ago. These difficulties exclude practically all transactions that happened ten or more years back. The same mechanism is to be applied in case of a gratuitous transaction; all what is required is the debtor's wish of the detrimental effect; as in German law, sec. 134 InsO[17], there is no subjective element on the side of the recipient necessary.

In addition to this general claw-back rule, art. 12 Loi sur les Faillites grants the bankruptcy court the right – following thereby the French tradition – to

protection of creditors would be diminished elsewhere – e.g., if the capital requirement would be reduced.

16 The following country reports are based on the book Principles of European Insolvency Law, edited by McBryde/Flessner/Kortmann, 2003.

17 This rule stands in a long line of historical development; Cicero has put it that nobody shall make gifts as long as he has debts – "*nemo liberalis nisi liberatus*".

determine a suspect period of up to six months. For such period it is to be assumed that the debtor has been substantively insolvent. This allows the administrator to rescind certain transactions of the debtor under alleviated conditions: Thus, a fraudulous tendency is presumed at all transactions which are done with certain anomalies – such as performance before due time, dissolution of goods or securitisation of before unsecured claims. In cases like these, automatic nullity of the transactions is the consequence; there is no requirement of further subjective elements be it on the debtor's be it on the transferee's side.

Finally, art. 18 Loi sur les Faillites provides that all transactions done within the court-given suspect period are subject to the said automatic nullity when and if they have been done even though there was knowledge of the imminent bankruptcy.

3. Denmark

The Bankruptcy Code of Denmark is from 1977; it has ever since been amended several times. Regarding claw-back rules, it differentiates between a general rule and several specific ones. Pursuant to the general rule, sec. 74, all transactions by the debtor are subject to rescission which either inappropriately prefer one creditor over the others or withdraw assets from the reach of the creditors or increase the amount of debts to the detriment of the creditors – provided that (a) the debtor, at the time of the perfection of the transaction, has already been insolvent (or has become insolvent as a consequence of that transaction) and (b) that the transferee – knowing the circumstances which justify the avoidability of the transaction – did know or should have known that the debtor was already insolvent. There is no explicit suspect period; however, in practice the maximum reach back is eight months.

The specific rules are almost entirely free from subjective requirements; thereby, they make avoidability easier since the difficulty of proving such subjective requirements is eliminated. These rules refer to transactions which demonstrate, so to speak, by their very nature the suspicion of a preferential treatment of a single creditor. The end (reference date) of the suspect period is to be determined by the judge – fairly often is that the date of the filing. Thus, pursuant to sec. 64 gifts are rescinded when and if they are made within a period of six months before that date. Sec. 67 refers to certain suspicious performances within three months – such as payment with unusual means. Finally, sec. 70 deals with the securitisation of unsecured claims if so done within three months.

The legal consequence of the claw-back rules varies; it can be a duty to compensate for the damages suffered (primarily in cases of sec. 74) or the duty of restitution in accordance with the rules about unjust enrichment, cf. sec. 75 seq.

4. France

The French insolvency law is to be found in the Code de Commerce. The numbering was recently changed by the Loi de sauvegarde des entreprises (enterprise protection law) from July 26, 2005. It is now: Art. L. 611-1 to L. 612-5; Artt. L. 620-1 to L. 627-4, Artt. L. 631-1 to L. 632-4, Artt. L. 640-1 to L. 644-6, Artt. L. 651-1 to 654-20, Artt. L. 661-1 to 663-4, and Artt. L. 670-1 to 670-8.

Unlike in most other states, France has the term *action paulienne* restricted to what has its equivalent in the German Anfechtungsgesetz, i.e. the claw-back rules for individual creditors (more precisely the rule against intentious causation of a detriment for the creditors); cf. art. 1167 Code Civil. The insolvency rules, however, make a distinction between automatic nullity, Art. L. 621-107, and the possibility to rescind, art. L. 621-108. The said nullity applies to such transactions within the suspect period which either have been gratuitous or undervalue or which confer to the transferee what he could not claim – be it the performance of something different or more than owed or earlier – or which secure a formerly unsecured debt.

In cases of mere avoidability the judge is given some discretion. Here transactions are at stake which do not display any of the aforementioned irregularities. Instead, the transferee must have had knowledge (this is to be proven by the administrator or the creditors' representative) of the (future) debtor's insolvency or that he stopped payments respectively. The date of such stopping of payments is not necessarily an objective fact; it rather is defined by the judge and might reach as far back as 18 months before the opening of the insolvency proceeding. This date is decisive for the determination of the suspect period of the claw-back rules. Given this correlation, individual cases might go without any suspect period; this is when the judge does not determine such a date.

5. England

The English Insolvency Act (plus the relevant Insolvency Rules) dates from the year 1986; it has been amended in particular by the so called Enterprise Act 2002. There is a strict distinction between the financial break-down of an individual (bankruptcy) and a company (insolvency). This division causes duplicity of rules which are – seen from a unified system like the German one – not easy to keep apart. This is true, i.a., for the claw-back rules.[18]

18 For this, see KRANEMANN, Insolvenzanfechtung im deutschen Internationalen Insolvenzrecht und nach der Europäischen Insolvenzrechtsverordnung, 2002; BEISSENHIRTZ, Die Insolvenzanfechtung in Deutschland und England, 2003. Both authors concentrate on the complications resulting from the differences of the claw-back rules in England and Germany with respect to the European Insolvency Regulation.

Both sets of rules have a provision for gratuitous or under-value transactions of the debtor, sec. 339 and 238. In a company case (i.e. its insolvency), however, such transaction cannot be rescinded if the company justifiably was of the opinion that it would turn out advantageous. The suspect period is in an insolvency case two years, in a bankruptcy case five years.

Further parallel rules exist with respect to such transactions of the debtor which he entered into with the intent to prefer the transferee, sec. 340, 239; the suspect period here is six months (or two years if the transferee is a closely related person or an insider). And finally, a parallel rule relates to credits given within a period of three years in a manner which eminently contradicts the standards of fair trading. In such cases (which might encompass loans given by shareholders to their company), the court is given the power to either annul the underlying agreement or to modify it, sec. 244 subs. 3 and 343 subs. 3.

When and if a company has secured its debt with a floating charge it will effectuate in the company's insolvency only if the secured party has given Consideration at the same time as the charge has been created or at a later time. If not, the security is seen as a preference which is subject to rescission for a suspect period of one year (in cases of insiders two years), sec. 245. Unlike under the abovementioned sec. 239, here the intent to prefer the transferee needs not be proven.

Not only the administrator but also the creditors both of natural and juridic persons (inside and outside an insolvency proceeding) are given the right to avoid transactions of the debtor if this person can prove that this transaction is contrary to the interests of the creditors – in particular, since the transaction was intended to hide away assets of the debtor. There is no suspect period for this claw-back rule.

6. *Italy*

The Italian insolvency law is mainly regulated in the Bankruptcy Code (Legge Fallimentare) from the year 1942 (a new Code is expected now for years). There are four different proceedings: Bankruptcy (fallimento), composition (concordato preventivo), reorganisation (amministrazione controllata) and liquidation (liquidazione coatta amministrativa). A further type of proceeding, the Amministrazione Straordinaria delle Grandi Imprese Insolventi from the year 1979, has received some (in)famous attention through the insolvency proceedings of Parmalat and Volare. This type of proceeding is, as a consequence of these cases, subject to so many amendments that even Italian experts have serious difficulties to follow the path of changes.

See, additionally, Meyer-Löwy/Poertzgen/de Vries, Einführung in das englische Insolvenzrecht, ZInsO 2005, 293, 297 seq.

Regarding the claw-back rules,[19] one has to differentiate between the common rule and the specific ones that are applicable only in insolvency cases. The first one is art. 2901 Codice Civile; it refers to those transactions of the debtor which he has done with the intent to deteriorate the creditors' condition and the other party had knowledge of this deterioration. The claw-back period is five years.

The specific rules are to be found in the Legge Fallimentare. Pursuant to art. 64 seq. gratuitous transactions as well as the debtor's payments before due date are automatically null and void if done so within two years before the opening of the proceeding. There is, thus, – apart from claiming the surrendered assets back, obviously – no need of any declaration or action by the administrator. In contrast, art. 67 subs. 1 requires such declaration of avoidability when and if the debtor has done certain legal acts within one year: these acts can be either an act for inadequate consideration[20] or the delivery of other goods than originally owed or the securitisation of formerly unsecured debts. In all these cases, the indispensable knowledge of the other party of the debtor's actual insolvency is subject to a rebuttable presumption. The same is true – if only for a suspect period of six months – for securities given for debts which had already been due, art. 67 subs. 1. Finally, each payment, disposition, or securitisation is subject to rescission if the administrator proves that the other party had knowledge of the debtor's actual insolvency at the time of the said transaction, sec. 67 subs. 2; the suspect period here is six mouths. Art. 69 establishes a presumption for all the aforementioned claw-back rules according to which the debtor's spouse has knowledge of the debtor's actual insolvency.

All the rules described so far, are generally applicable in all of the said five different types of proceedings. It is worthwhile to note that in case of the Amministrazione Straordinaria the suspect period is substantively prolonged for those transactions which have been made within a group of companies.

7. Netherlands

The present Dutch Bankruptcy Code (Faillissementswet) is from the year 1896; a completely new Code is about to be drafted right now. For the time being, there are three different types of proceedings: Bankruptcy (faillissement), a moratorium (surseance van betaling) and the adjustment of the debts of a natural person (schuldsaneringsregeling). The insolvency claw-back rules do not apply in moratorium cases; instead, the creditors here are dependent on the respective protection mechanism provided for in the Burgerlijk Wetboek.

19 They have only recently been changed (in March and May 2005).
20 I.e., the debtor's performance is more valuable than five quarters the consideration.

The claw-back rules for a bankruptcy administrator refer to legal acts were: (a) the debtor has paid on a debt which could not be enforced; (b) the satisfaction prospect of the creditors has thereby been impaired – be it by reducing the assets, be it by increasing the amount of debts; and (c) the debtor and, in cases of transactions with a consideration, the other party had knowledge (or should have known) of the detrimental effect of this transaction for the general unsecured creditors. Moreover, a transaction without any of the aforementioned flaws can be rescinded when and if the administrator proves that the recipient had, at the time of the transaction, knowledge (or should have known) of the filing of the petition or that both the debtor and the transferee acted intentionally to the detriment of the general unsecured creditors.

There is no explicit suspect period prescribed. However, if the transaction at stake has taken place more than one year before the commencement of the proceeding, the burden of proof shifts to the administrator with respect to the subjective requirements. Since, as a matter of fact, the proof of the subjective elements is key for success or failure of any claw-back rule, the said rule has the practical effect that it – more or less – fixes the suspect period.

8. USA

The claw-back rules (in the USA they are called avoidance powers) of the Bankruptcy Code distinguish strictly between fraudulent conveyances and preferential transfers.[21] Thereby, this law stands in kind of direct line with the classification to be found in the Roman Law Digests – more specific: the distinctions made by the late classical jurist Iulius Paulus. Since ever, debtors tend to shift their assets or to prefer certain creditors over others in the dawning of their financial break-down. It is not difficult to recognise this distinction in almost all claw-back rules.[22]

Transfers or conveyances respectively are defined in sec. 101 (54) of the Bankruptcy Code (BC); accordingly, they are "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with property or with an interest in property, including retention of title as security interest and foreclosure of the debtor's equity of redemption."

Fraudulent conveyances are regulated in sec. 544 (b) and 548 BC. This duplicity results from the fact that the US bankruptcy law is federal law. In addition,

21 The following remarks are based on a not yet published manuscript by Stefan Riesenfeld for the International Encyclopedia of Comparative Law, s.v. "Insolvency Proceedings".

22 Regarding, in particular, the German claw-back rules see Paulus, Germany: Lessons to Learn from the Implementation of a New Insolvency Code, 17 Connecticut Journal of International Law 89 seqq. (2001).

there is a Uniform Fraudulent Transfer Act which serves as a kind of model law for the states. Sec. 544 (b) BC refers to this Act, whereas sec. 548 BC gives a federal rule. Both tools have in common that they are to be applied to all transfers which have been done with the actual (sometimes, e.g. in cases of gratuitous or undervalue transfers, with constructive) intent to hinder, delay or defraud the other creditors – provided, however, that the debtor at the time of such transfer had already been insolvent or has become so as a result of it. The difference between the two tools is that the Uniform Act provides for a suspect period of four years and sec. 548 BC only for two years.[23] Another difference is that sec. 548 is applicable in any bankruptcy proceeding; in contrast, sec. 544 (b) is applicable only if there is at least one creditor among all creditors of the debtor whose claim against the debtor had already existed before the transfer at stake had been done.

Sec. 547 describes a preferential transfer as: "transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on (A) or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive (without the transfer in a liquidation)." Accordingly, there are no subjective requirements; the general suspect period is 90 days. However, sec. 547(c) BC provides for a number of exceptions to avoidability – especially the so called "new value exception", which means that the preferred debtor renders unremunerated and unsecured performances afterwards; or all those transactions which comply with the standards of the ordinary course of business.

9. *Further Countries*

In order to display the ubiquity of the claw-back rules a few other insolvency laws might be referred to shortly.

It may be, thus, worth mentioning, that China, too, is considering to establish an insolvency law for economic companies or entrepreneurs respectively – and indeed not only for state owned companies but also for those acting purely under private law. This is a step forward in sight of the fact that Chinese officials had barred themselves for a long time against this for ideological reasons.[24] Numerous changes are to be expected here; however, the draft of the insolvency law from the

23 Under certain conditions this period can be prolonged to ten years, sec. 548 (e) BC.

24 Cf. Gebhard/Olbrich, Das Chinesische Konkursrecht auf dem Weg in das 21. Jahrhundert, DZWIR 2001, 186 seqq.

year 2000 provided for quite detailed claw-back rules. Accordingly, the regular suspect period shall be six months calculated retroactively beginning from the commencement of the proceeding. It covers, i.a., a transfer of title at an unusually low price, the securitisation of a formerly unsecured debt, or payments of the debtor to certain creditors even though both parties have knowledge of the debtor's illiquidity. Not only avoidable but right away automatically null and void are those legal acts of the debtor by which he tried to put aside assets and which were supposed to be distributed outside of the proceeding; additionally, those acts which pretend or acknowledge a non-existing debt.

Indonesia is at the same time "problem child" and kind of model of the International Monetary Fund's development successes; it is, therefore not surprising that Indonesia has a new Insolvency Code since 1998.[25] In its Artt. 41 seqq. one finds the claw-back rules: Accordingly, a legal transaction which has been undertaken before the commencement of an insolvency proceeding is avoidable if both parties had the knowledge of the transaction's disadvantageous character for other creditors – unless the legal transaction was in fulfilment of a contractual or legal obligation. In some particular suspicious transactions – e.g., such which are from the debtor's perspective rather disadvantageous or such which are done with insiders or persons who are closely connected with the debtor – the disadvantageous character for the creditors is presumed if the transaction was undertaken within one year before the commencement of the insolvency proceeding.

Croatia has a Bankruptcy Code since 1996. It is modeled quite closely after the German Insolvency Ordinance.[26] Pursuant to Artt. 127 seqq. congruent and incongruent performances are rescindable if they are undertaken within a period of three months before the filing of the petition. The same is true with respect to legal transactions which discriminate the general unsecured creditors directly or intentionally. Gratuitous performances are subject to avoidance for a suspect period of four years. The same is true for the refund and securitization respectively of loans replacing equity capital, and for creditors discriminating refunding of silent interests.

The Romanian Insolvency code came into force in 1995; its claw-back rules are to be found in Artt. 42 seqq.[27] Accordingly, all legal acts of the debtor are subject to rescission when and if he accomplished them within a period of three years before the commencement of the insolvency proceeding and with the intent to disadvantage his creditors. A special rule specifies that these are, i.a., such trade related transactions where the actual value of the debtor's performance obviously

25 Cf. Kilgus/Yayang Setiadarma, Das neue indonesische Insolvenzrecht, RIW 1999, 47 seqq.

26 Cf. Boochs, Das Insolvenzrecht Kroatiens, KTS 1998, 385.

27 Cf. Teves, Rumänien: Reorganisation, Liquidation und Gläubigerbefriedigung nach dem Insolvenzgesetz, RIW 2000, 681 seqq.

exceeds the received consideration. Moreover, those legal acts of the debtor might also be avoidable which he undertook within one year before the commencement of the insolvency proceeding with shareholders or equity holders respectively, with executives or with other closely connected people – provided that these acts had a detrimental effect for the general unsecured creditors.

Sweden has a new bankruptcy ordinance since 1987.[28] The claw-back rules reach uniformly back for a period of five years before the filing of the petition. However, this time limitation does not apply if the beneficiary is a person who is closely connected to the debtor. Subject to the claw-back rules are those legal acts through which one creditor is unjustifiable preferred over other creditors, through which assets of the debtor are detracted from the creditors, or through which the debtor's amount of debts is enlarged. If gifts have been made within six months they are subject to a separate avoidability; there is no other need of evidence than that it was in fact beneficence. Moreover, subject to the claw-back rules is the satisfaction of claims with other than the usual instruments as well as the granting of securities to which there was no claim (or not in this form).

Poland's new Insolvency Code is as young as from October 1, 2003; it replaces the predecessor statute from 1954.[29] In its Artt. 127 and 135 the claw-back rules are regulated. They refer only to those legal acts which have been done by the debtor. Accordingly, gratuitous (or undervalue) transactions are null and void when done within one year before the filing of the petition; similarly, securitisation or satisfaction of claims which are not yet due are challengeable or even null and void when done within the preceding two months (provided that on that date an insolvency reason has already been given). A period of six months is covered by the avoidability of those transactions which the debtor performed with affiliated people. Moreover, the insolvency judge is empowered to reduce retroactively increased salaries of the management or to annul the granting of securities without consideration within the last years. Other rules are to be found by reference to the Civil Law Code, more precisely to its Artt. 527 seqq. They subject those legal acts to rescission that discriminate the insolvency creditors – which is especially the case when they cause the debtor's insolvency or when his already existing insolvency thereby is engrossed.

28 Cf. Hallberg/Jungmann, Unternehmensinsolvenzen nach schwedischem Recht, RIW 2001, 337 seqq.

29 Cf. Reisch, Polnisches Insolvenzrecht, ZIK 2005, 21 seqq.

III. Conclusions

The foregoing outline might give a feeling for that there are considerable differences in details between the claw-back rules – so considerable that this subject of law (apart from the treatment of tax claims and securities) is seen as the most conflicting within the international insolvency law: It has not only endangered the successful outcome of the UNCITRAL model law but also the European insolvency treaty.[30] The differences not only affect the factual requirements (as described supra) but also the more specific rules concerning burden of proof, enforcement and authorisation of rescission (these questions are only scarcely mentioned supra).

Nevertheless, certain patterns are detectable: There is a howsoever shaped reclaimability in each one of the covered (as well as in many others) insolvency laws. It is usually justified with the necessity to establish ex post the par condicio creditorum. The specific factual requirements also show some similarities – apart from the coarse classification of fraudulent and preferential conveyances: Gratuitous acts are primary and ubiquitous candidates for a claw-back thereby referring to what Cicero has described in a classical way as "nemo liberalis nisi liberatus".[31] But also those performances of the debtor which deviate from the usual course of business (such as benefits instead of performance, payments prior to maturity or belated securitisation) are often subject to avoidability. However, from this base stock on variations begin.

The fact that the claw-back rules operate sometimes by means of automatic voidness and sometimes differently is not particularly remarkable since that is just a technical tool. In contrast, it is of utmost importance for the practical efficiency of the claw-back rules how the burden of proof (and here in particular in regard to the subjective elements) is distributed. Only in the USA, this question is of minor importance due to their pre trial discovery proceeding. In almost all of the continental European litigation laws, the burden of proof decides about success and failure of the avoidability.

Finally back to the starting point: What conclusion can one reach from the foregoing, if the general question aims in the following direction: if at all (and if yes in how far) do the claw-back rules contribute to the creditors' protection? This is a question to which the answer resembles the evaluation of a half filled or half emptied glass according to the reader's individual orientation or character. It

30 That is the predecessor of the European Insolvency Regulation.

31 Admittedly, the phrase – see already n 17 – that nobody shall make gifts unless he is free of debts implies that he knows all his creditors at the time when the gift is made. This interrelation, however, is today irrelevant: If someone today is debt-free at the time the gift is made and goes bankrupt in Germany within the next, e.g., three years the applicability of sec. 134 InsO is given.

is taken away from one creditor what, according to the estimation of the law (or the judiciary), appertains to all creditors and what shall be distributed among them pro rata. Because the claw-back rules are a separate subject of law, everything the one creditor has received from the debtor before the insolvency proceeding was in accordance with the law; measured by the standard of the general business law, it was effectively acquired. It is only the subsequent insolvency proceeding which causes the vulnerability of that transaction. This risk turns to the advantage of the general unsecured creditor, yet often only in the form of the famous drop on a hot stone.

However, if it is correct that companies without a capital requirement are more endangered to becoming insolvent than those with such requirement (irrespective of all prima vista lucid consistency, this assumption is, in my opinion, not easily verifiable) then one could say that the claw-back rules with their ex-post-mechanism fulfil at least one function which is presently granted by the ex-ante working capital requirement – namely to make sure, that the debtor is able to supply a serious business conduct. However, that can only be said on a very high level of abstraction; since ex ante, generally nobody is obliged to treat his creditors equally. In contrast, this is exactly the primary concern of the claw-back rules. In the end, the problem of a direct parallelization of the capital requirement with the claw-back rules results from that insolvency proceedings display a situation in which the rules of the general law of transactions are abrogated.[32] Therefore, all what remains is the poorly enlightening and not really satisfying conclusion that both legal institutions someway-somehow contribute to the creditors' protection; but apart from that they scarcely fulfil any complementary functions. To come closer to such complementary functions, it would be necessary that all legal acts which are presently sanctioned by German company law in sec. 30, 31 GmbHG for the protection of the creditors are transferred to the claw-back rules in the Insolvency Ordinance.

32 Cf. Paulus, Passivierungspflicht und Rangordnung eigenkapitalersetzender Darlehen in der Insolvenz, ZGR 2002, 320 seqq.