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Re: CERIL STATEMENT 2017/01 on Transactions Avoidance Laws

## *Clash of Principles: Equal Treatment of Creditors vs. Protection of Trust in European Transactions Avoidance Laws*

Initiated and chaired by Prof Reinhard Bork, University of Hamburg, a CERIL working group dealt with two of the fundamental principles of transactions avoidance laws: the principle of equal treatment of creditors and the principle of protection of trust. It turned out that these principles are enforced in all jurisdictions examined in this study, albeit in different ways.

The principle of equal treatment of creditors is key when it comes to justifying the avoidance of preferences, whereas other principles must be enforced where the defendant was not a creditor prior to the transaction (e. g. transactions at an undervalue). The law of preferences mirrors the underlying principles in most countries (with some exceptions for England and Wales and Spain). On the one hand, national transactions avoidance laws require (directly or indirectly) some kind of link to the debtor's substantive insolvency, which is required as well as justified by the principle of equal treatment of creditors. On the other hand, in almost all countries legitimate expectations are protected by fixed suspect periods and especially by the requirement that the defendant knew of the debtor's financial crisis, which is supported by the principle of protection of trust. Aside from differences in details (e.g. the length of the relevant suspect period), the avoidance laws involved in this study share this general approach and can be justified by the principles mentioned.

Many national laws provide additional constraints as well as extensions. Avoidance is frequently facilitated and protection of trust is thus restricted for closely related parties. As opposed to this, the defendant's expectations to keep what they have received are granted additional protection by restricting transactions avoidance to acts of the debtor, by allocating the burden of proof to the insolvency practitioner and by the use of limitation periods.

All in all, it seems promising to apply a principle-based approach to national insolvency laws. Carving out the fundamental commonalities instead of stressing the differences in details by focussing on the underlying principles and their reflection in national insolvency rules supports all efforts to understand and –

eventually – harmonise insolvency laws. However, the approach of this pilot research project must be expanded. The next step should be to apply the principle-based approach to the entirety of transactions avoidance law and gradually to other fields of insolvency laws. The results of these future research projects may help to incrementally harmonise this field of law.

The full Report is available as Report 2017/01 on CERIL's website www.ceril.eu. This site also informs about the organisation of CERIL and its activities.

In the meantime, professor Reinout Vriesendorp, secretary of CERIL (info@ceril.eu), or the Reporter, professor Reinhard Bork (bork@uni-hamburg.de), welcome the opportunity to further inform about CERIL or the contents of Report 2017/01.

On behalf of the CERIL Executive,

Bob Wessels
Chair