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COMPARATIVE ANALYSIS OF VOIDABLE TRANSFERS UNDER THE US, CZECH AND ROMANIAN BANKRUPTCY LAW

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Abstrakt: Příspěvek se věnuje odporovatelným úkonům dle amerického, českého a rumunského insolvenčního práva. Americké právo hraje roli měřítka s odkazem na postavení insolvenčního správce dle federálního a národního práva, funkční roli jeho práv a jejich opodstatnění. Autoři dále analyzují právní českou a rumunskou právní úpravu, včetně doktríny a soudních rozhodnutí. V závěrečné části článek shrnuje podobnosti a hlavní rozdíly mezi jednotlivými jurisdikcemi a aspekty, které by z pohledu amerického modelu mohly být přehodnoceny.

Kľúčové slová: Odporovatelné úkony, zkracující úkony, úkony bez přiměřeného protiplnění, zvýhodňující úkony, americké, české a rumunské insolvenční právo, insolvenční správce

Abstract: The paper deals with voidable transfers under the US, Czech and Romanian Law. By using the American Law as a benchmark the paper focuses on the powers of the bankruptcy trustee under federal and state law, the functional importance of such powers and the policies supporting them. It then analyses in detail the respective provisions of the Czech and Romanian law referring both to the doctrine and the relevant case law. In the concluding part, the article identifies main similarities and differences between the three jurisdictions and the aspects which might be reconsidered based on the American model.

Key words: Voidable transfers, fraudulent transfers, undervalues, preferences, US, Czech and Romanian bankruptcy law, bankruptcy trustee.

1 INTRODUCTORY WORDS

As it is noted, there seems to be a common feature of behavior throughout the modern history of mankind: the debtors have the tendency to succumb to the feeling that persons attached to the debtor rather than the creditors should benefit from the debtor's assets.[1] Whereas the debtor and his creditors may at first maintain a good relationship, the scenario may change when it reveals that the debtor is not in the position (or does not want) to repay his debts.[2] The debtor may then give his house to a sister and sell his car to his friend below market price. This fear is reflected in the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems of April 2001 that *inter alia* set forth that "*The law should provide for the avoidance or cancellation of pre-bankruptcy fraudulent and preferential transactions completed when the enterprise was insolvent or that resulted in its insolvency*."[3] Such transfers may be called voidable transfers.

At the outset it is important to note that for the sake of this paper voidable transfers encompasses the following three types of transactions that can be avoided: fraudulent transfers, undervalues and preferences. The paper deals with comparative analysis of the definition and application thereof under the US, Czech and Romanian law. First, the paper introduces the concept of voidable transfers. The second part deals with the US law on voidable transfer, which serves also as a benchmark for comparison of the Czech and Romanian law that are further described in the

[1] RICHTER, Tomáš. *Insolvenční právo.* 1st ed. Prague: ASPI Wolters Kluwer, 2008, p. 318.
[2] ADLER, Barry A., BAIRD, Douglas G., JACKSON, Thomas H. *Cases Problems and Materials on Bankruptcy*. 4th ed. New York: Foundation Press Thomson/West, 2007, p. 276.
[3] WORLD BANK. *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* [online]. World Bank, 2001 [cited on 16 March 2013]. Available at <http://www.worldbank.org/ifa/ipg_eng.pdf>, p. 9.

fourth and the fifth part respectively. Finally, the paper sums up conclusions that can be drawn from the analysis.

2 VOIDABLE TRANSFERS AND POLICY ISSUES

2.1 Fraudulent conveyance law – general remarks

Fraudulent transfers are understood to be transfers undertaken with the intention to defraud (hinder or delay) creditors. From a more general perspective, fraudulent conveyance law is considered to be among the oldest set of rules for the protection of creditors.[4] Rules against fraudulent transfers have nothing to do with the collective nature of the bankruptcy proceedings and apply generally outside as well as inside bankruptcy.[5] In simplified terms, the function of these rules is to attack transfers that are undertaken under circumstances that are unfair to creditors.[6] Typically, fraudulent transfers are gifts made with the intention to defraud creditors.

In some states, fraudulent transfer law encompasses also constructive fraud, i.e. transactions that are not truly fraudulent but which are tainted with the so-called "badges of fraud".[7]

2.2 Undervalues

Undervalues may be described as transfers for less than reasonably equivalent value. Undervalues do not contemplate intention of the debtor to defraud its creditors. The debtor may have candid intentions toward his creditors but was merely generous.[8] Still, undervalues appear to be unfair to creditors if they lead to non-satisfaction of the creditors' claims. One of the rationales for rules against undervalues is that creditors would arguably *ex ante* agree to prohibit such transfers.[9]

As it is often noted, solvent debtors may do what they please, however, once they are insolvent (or would be rendered insolvent as a result of the transfer), they should not undertake a transaction for less than a reasonably equivalent value. What matters is the actual economic position of the creditor.[10] In this respect, the principle of legal predictability dictates that assessment of (in-)solvency must be made as of the time of the transfer. If it, for instance, appears only later that the transfer was undertaken while the debtor was bankrupt, the transfer should not be voidable.[11]

2.3 Preferences

In bankruptcy, general creditors do not, as a rule, receive 100 cents on a euro claim. Pursuant to the underlying *parri passu* principle every general creditor obtains the same portion of dividend on its claim. In other words, each creditor is paid *pro rata* in accordance with the amount of his claim (i.e. "*equally and without preference*"). If one creditor of a bankrupt debtor obtains full payment on its antecedent debt, there is obviously less to be distributed among the rest of the creditors.

Preferential transfers are transfers undertaken usually in the due course of business which, however, conflict with the mentioned *pari passu* principle. It follows that rules against preferences

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[4] ALLEN, William, T., KRAAKMAN, Reinier. *Commentaries and cases on the law of business organization.* New York: Aspen Publishers, 2003, p. 140. Historically, the so-called *Actio Pauliana* serves as a basis how to execute a claim against a property that was transferred in *fraudem creditorum.*

[5] JACKSON, Thomas H. *The Logic and Limits of Bankruptcy Law.* Washington: Beard Books, 2001, p. 68. In bankruptcy, its underlying function is to protect the value or the integrity of the bankruptcy estate. *Idem*, p. 69.

[6] ALLEN, William, T., KRAAKMAN, Reinier. *Commentaries and cases on the law of business organization.* New York: Aspen Publishers, 2003, p. 140.

[7] This is the case in the US. See bellow.

[8] ADLER, Barry A., BAIRD, Douglas G., JACKSON, Thomas H. *Cases Problems and Materials on Bankruptcy*. 4th ed. New York: Foundation Press Thomson/West, 2007, p. 277.

[9] BAIRD, Douglas G. *The Elements of Bankruptcy.* 5th ed. New York: Foundation Press, 2010, p. 143.

[10] *Idem*, pp. 141-142.

[11] *Idem*, p. 145.

are bankruptcy-specific norms. Fundamental feature of preferences is that they prejudice other creditors of the debtor (who obtain a lower dividend as a result).[12]

In this respect, it may be noted that the prospect of bankruptcy may induce creditors to take actions that would impair the advantages of collective nature of the bankruptcy proceedings.[13] Particularly sophisticated creditors may push their debtors to repay their debts or to provide them with a security interest. To tackle this issue, the bankruptcy law needs norms that have "*the effect of turning back the clock and returning people to the positions they were in before bankruptcy was on the horizon*".[14] Rules against preferences are exactly such norms as they tend to discourage strategic behavior.[15] Accordingly, justification of the policy against preferences includes equality and prevention of harassment of debtors.[16]

2.4 Policy behind voidable transfers

There are two basic rationales of the existence of voidable transfers. First, from an economic standpoint, it may be generally argued that the rules protect the debtor's unsecured creditors from the illegitimate actions that lead to the decrease of the debtor's property which would be otherwise used for the satisfaction of the claims of the debtor's creditors.[17] Consequently, such rules should arguably lead to cost-efficiency by virtue of the decreased need to monitor the debtor.[18]

Second, as Clark argues, there is a moral dimension of the problem.[19] From a moral view, the relationship of a debtor and creditor has a moral dimension which implies that the debtor should observe the ideal of Truth, Respect, Evenhandedness and Nonhindrance.[20] The ideal of Truth entails the prohibition to tell lies that will lead to non-satisfaction of claims. The ideal of Respect may be described as the imperative to prefer the conventional satisfaction of the claims before other options how to use the property, whereas the ideal of Evenhandedness may be expressed as the prohibition to prefer any creditors before other creditors if there is not enough property. Finally,

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[12] WORLD BANK. *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* [online]. World Bank, 2001 [cited on 16 March 2013]. Available at <http://www.worldbank.org/ifa/ipg_eng.pdf>, p. 39.

[13] JACKSON, Thomas H. *The Logic and Limits of Bankruptcy Law.* Washington: Beard Books, 2001, p. 68. Professor Jackson noted that preference law is essentially a transitional set of norms created to "*prevent individual creditors from opting-out of the collective proceeding once the event becomes likely."* JACKSON, Thomas H. *The Logic and Limits of Bankruptcy Law.* Washington: Beard Books, 2001, p. 124.

[14] ADLER, Barry A., BAIRD, Douglas G., JACKSON, Thomas H. *Cases Problems and Materials on Bankruptcy*. 4th ed. New York: Foundation Press Thomson/West, 2007, p. 307. Professor Baird specifically notes that preference law *"prevent creditors from receiving preferences – eve-of-bankruptcy transfers that distorts bankruptcy's pro-rata sharing rule*". BAIRD, Douglas G. *The Elements of Bankruptcy.* 5th ed. New York: Foundation Press, 2010, p. 163.

[15] JACKSON, Thomas H. *The Logic and Limits of Bankruptcy Law.* Washington: Beard Books, 2001, p. 124.

[16] *Idem*.

[17] RICHTER, Tomáš. *Insolvenční právo.* 1st ed. Prague: ASPI Wolters Kluwer, 2008, p. 321

[18] RICHTER, Tomáš. *Insolvenční právo.* 1st ed. Prague: ASPI Wolters Kluwer, 2008, p. 321 referring to Bond Financial Services v. European American Bank, 838 F.2d 890, 892 (7th Cir. 1988).

[19] The word "*credit*" comes from Latin in which it means "*to believe*". See McINTYRE, Lisa J. Sociological Perspective on Bankruptcy. *Indiana Law Review*, 1989, Vol. 65, No. 1, p. 136. Black's Law Dictionary *inter alia* defines that credit means trust or belief. BLACK, Henry C., GARNER, Bryan A. *Black's Law Dictionary*. 8th ed. St. Paul: West, 2007, p. 396.

[20] The latter is viewed as the general expression of all of the abovementioned ideals. See Clark, Charles. The Duties of the Corporate Debtor to its Creditors, 90 *Harvard Law Review*, 1977, Vol. 3, pp. 506-513.

Nonhindrance implies not to hinder the satisfaction of claims from the debtor's property by e.g. transforming the property to less liquid assets.[21]

Yet, the policy against voidable transfers is not associated solely with advantages. Particularly in case of transfers when the debtor's counter-party is not aware of the debtor's bankruptcy, the rules may bring about significant drawbacks. The outcome of the successful challenge of transfers is usually that the transfer is *ex post* considered to be not binding. Therefore, the predictability of contractual relations may be, among others, impaired.[22]

In order to mitigate such concern the law sets forth that the precondition that only transfers that occurred in the specified time frame may be attacked. This period is called the suspect period. However, as a bright-line rule, such qualification is naturally both under- and over-inclusive.[23] The rules tend to catch ordinary transactions (particularly with respect to preferences and undervalues where there is no intention to defraud creditors)[24] while leaving certain suspicious transfers untouched.

3 FRAUDULENT TRANSFERS UNDER THE US LAW

The policies behind voidable transfers are set into practice by the bankruptcy trustee, who may subrogate himself to the claims of creditors under state law[25]. His duties are to marshal the assets of the debtor, convert them into cash and pay out the money to the creditors according to the distribution scheme of the Code[26]. Such duties serve the goals of equitable distribution among similarly situated creditors[27] and maximization of the estate's value[28]. For this particular reason, the Code has provided the trustee with several avoidance powers with which to attack and invalidate pre-bankruptcy transfers. These extended powers granted to the trustee represent the most important peculiarity of the US bankruptcy law.

Under US fraudulent conveyances law several aspects must be regarded. On one hand there is the *avoidance* (by which the transfer or the obligation is set aside)[29], then the *recovery* (by

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[21] *Idem*, p. 512-513. See also Richter, Tomáš. *Insolvenční právo*. 1st ed. Prague: ASPI Wolters Kluwer, 2008, p. 321.

[22] See WORLD BANK. *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* [online]. World Bank, 2001. Available at <http://www.worldbank.org/ifa/ipg_eng.pdf>, pp. 39-40 [cited on 16 March 2013].

[23] Cf. BAIRD, Douglas G. *The Elements of Bankruptcy*. 5th ed. New York: Foundation Press, 2010, p. 168

[24] It is suggested that in case of preferences the suspect period should be is up to 6 months. See WORLD BANK. *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* [online]. World Bank, 2001 [cited on 16 March 2013]. Available at <http://www.worldbank.org/ifa/ipg_eng.pdf>, p. 40.

[25] It must be emphasized that a fraudulent conveyance or fraudulent transfer is a civil cause of action. It arises in debtor-versus-creditor relations, particularly with reference to insolvent debtors. This is why the cause of action is typically brought by creditors or by bankruptcy trustees. In a successful suit, the plaintiffs are entitled to recover the property transferred or its value from the transferee. As this article is dedicated to a comparative analysis of bankruptcy laws, we will not refer to non-bankruptcy causes of action belonging to the creditors under state laws, but focus on the way the bankruptcy trustee may use such causes of action during bankruptcy proceedings by stepping into the shoes of the creditors.

[26] KING, Lawrence P., COOK, Michael L. *Creditor's Rights, Debtor's Protection and Bankruptcy* , 3rd ed. New York: Matthew Bender, 1997, p. 963.

[27] Powers serving such goal are power to avoid preferences, power to avoid statutory liens, "strong arm" clauses which allow the trustee to avoid secret liens.

[28] Power serving such goal is avoidance under state laws.

[29] TABB, Charles J, BRUBAKER Ralph. *Bankruptcy Law: Principles, Policies, and Practice*, 1st Edition, Cincinnati, Ohio, Anderson Publishing Co, 2003, p. 383. "Avoidance *is a concept that is distinct from "recovery". A transfer is avoided under one of the specific avoiding powers, such as […] preferences, […] fraudulent transfers, and so forth. Avoidance is a judicial declaration that the transfer or obligation should be invalidated. Avoiding a transfer itself, however, does not bring money or value into the bankruptcy estate […]. After avoidance (or in conjunction with the avoidance*

which, as a result of the avoidance, the good, or its value, are brought back)[30] and finally the *preservation* (by which, both avoidance and recovery, are done for the benefit of the estate[31]).

With respect to who is entitled to bring such actions, under US law it is the bankruptcy trustee or, in reorganization cases, the debtor in possession. The trustee must bring action under one of the avoidance powers, evidently, before bankruptcy statute of limitations. The time limit to bring suit is generally two years after the entry of the order for relief or 1 year after the appointment of the first trustee[32]. In deciding and handling the administration of the estate, the trustee is entrusted with a large discretion, which is governed by a business judgment standard rule, but that does not mean that the trustee can not be removed by the bankruptcy judge for cause (e.g. for a breach in his fiduciary duties). It simply means that a trustee will not be removed for mistakes in judgment when the judgment is discretionary and reasonable under the circumstances, but in case it is removed, he will be held personally liable[33].

3.1 Trustee as Judicial Lien Creditor, Unsatisfied Execution Creditor or Good Faith Purchaser. Strong Arm Clause

A judicial lien creditor is a creditor who has obtained a lien on property of the debtor through a judicial process[34], i.e. a money judgment, and is trying to enforce it through procedural steps provided by the state law. Pursuant to Section 544 (a) the trustee is granted with the powers of such creditor holding a judicial lien on personal property of the debtor[35] and a bona fide purchaser of real property from the debtor[36]. The purpose is to subject the validity of pre-bankruptcy transfers

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action), the trustee also must bring an action […] to recover either the transferred property itself or its value."

[30] TABB, Charles J, BRUBAKER Ralph. *Bankruptcy Law: Principles, Policies, and Practice*, 1st Edition, Cincinnati, Ohio, Anderson Publishing Co, 2003, p. 383 (see note 27).

[31] As a result of the voidance, the good or its value becomes part of the bankruptcy estate and benefits all creditors in accordance with distribution rules. *Idem,* p. 384. "*This rule ensures that the bankruptcy estate actually will reap the benefits of avoidance. An example illustrates this point. Assume that property of the estate worth $20,000 is subject to two liens: a senior lien that secures a debt of $10,000 and a junior lien that secures a $25,000 debt. Assume further that the senior lien is avoided by the trustee. What happens? Without preservation of the avoided transfer, the previously junior lienholder would become the senior lien, and nothing would be left for the estate; the entire $20,000 in collateral vaue would go to the unavoided second lien. With [preservation], however, the estate takes the place of the avoided senior lien. In other words, the estate now would be entitled to the first $10,000 of the value in the property (the amount of the senior lien avoided) and the junior lien takes the residue*".

[32] *Idem,* p. 384. "*The proceeding to avoid the transfer must be brought before the expiration of the bankruptcy statute of limitations. The limitations period for actions […] is the later of two years after the entry of the order for relief, or one year after the appointment or election of the first trustee appointed or elected under any chapter, if that appointment occurs before the two year period […]. In any event, the action may not be brought after the time the bankruptcy case is closed or dismissed […]*".

[33] For a detailed discussion see AUNGST, Kristopher Edward, *Trying to Remove the Trustee? A Tough Road Ahead!*, available online at: http://www.bergersingerman.com/files/articles/Aungst/Federal%20Lawyer-%20trustee.pdf (last visited 25.05.2013).

[34] *Idem,* p. 965.

[35] TABB, Charles J, BRUBAKER Ralph. *Bankruptcy Law: Principles, Policies, and Practice*, 1st Edition, Cincinnati, Ohio, Anderson Publishing Co, 2003, p 430. "If an unperfected security interest would lose to a "lien creditor" under Article 9, then Section 544 (a) (1) empowers the bankruptcy trustee to avoid that unperfected security interest".

[36] *Idem,* p. 432. "The trustee may set aside unrecorded real estate interests under Section 544 (a) (3). That section vests the trustee with the rights and powers of a bona fide purchaser (BFP) of the debtor's real property. Thus, if under applicable non-bankruptcy law a BFP would prevail over an unrecorded interest, that unrecorded interest may be avoided under Section 544 (a) (3)".

to the test of state law[37] as against a judicial lien creditor (if personal property was transferred) or as against a bona fide purchaser (if the transfer was of realty).

The Strong Arm Clause is one of the most important avoiding powers as it enables the trustee to avoid secret (unrecorded) liens and conveyances. Such secret interests raise the issue of *ostensible ownership* given the concern that creditors continue to make business with the debtor under the false impression that the debtor has enough unencumbered goods in its property to satisfy any claim, when in reality it does not (if the secret liens are taken into consideration and are considered valid). The strong arm clause bars those creditors holding secret interests from asserting those interests during the bankruptcy procedure.

3.2 Trustee as Successor to Creditors' Rights

Under Section 554 (b) the trustee is also given the right of an unsecured creditor in order to avoid pre-bankruptcy transfer, under state law. In order to exercise such right, the Code has established certain requirements: 1) the rights must exist, 2) the unsecured creditor must be a) actual and b) existing. By such means the trustee is empowered with rights arising out of the state law referring to fraudulent transfers. Such right might not be different than those granted by the Code, but the real gain is *the avoidance of any statute of limitations that would preclude the creditors, and implicitly, the trustee's action*. This effect is due to the fact that state laws have more extensive terms for such actions than the Code[38]. Another important effect consists in the fact that the entire transfer is actually voided, regardless the value of the creditor's claim, and all creditors share the recovery, not only the creditor in whose shoes the trustee has stepped. There are certain limitations. Thus under these powers the entire transfer is voided and all creditors share recovery, which would not happen outside bankruptcy.

3.3 Preferences

The power to void preferences is the most important power under US law, as preferences are the most litigated issue in bankruptcy procedures in US[39]. It permits the avoidance of pre-bankruptcy transfers which were perfectly legal when made, but were made shortly before bankruptcy and in a way that favors one or more creditors over others[40] thus hindering the equality principle mentioned above.

Avoidance of preferences takes place in two steps. First, the trustee must prove the existence of all legal elements required (less one as Section 547 (f) establishes a presumption of insolvency): 1) a transfer, 2) of property of debtor, 3) to the benefit of a creditor, 4) for an account of an antecedent debt, 5) made while debtor was insolvent, 6) made during preference period – 90 days -,7) which enables the creditor to receive more than it would receive in bankruptcy. Secondly there is a shifted burden of proof for safe harbors (contemporaneous exchange of new value, ordinary course transfers, enabling loans, floating liens**,** statutory liens, small consumer transfers). In this respect, it is presumed that the debtor was insolvent for the 90 days prior to bankruptcy is in

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[37] "*Fraudulent conveyance law is a feature of state law that the trustee can use by invoking Section 554 (b). Most states have adopted the Uniform Fraudulent Transfer Act; some still follow its predecessor, the Uniform Fraudulent Conveyances Act, and a few, such as New York, have their own versions of fraudulent conveyance law. The Bankruptcy Code has its own version of fraudulent conveyance law as well, in Section 548. When transactions span a number of different jurisdictions, the trustee is able to invoke bankruptcy's fraudulent conveyance rules without having to identify which state's fraudulent conveyance law governs. The reach of these laws is largely the same, except that Section 548 reaches back only two years, while its state law counterparts reach back as long as the relevant statute of limitations permits*." See BAIRD, Douglas G.. *Elements of Bankruptcy,* 5th Edition, New York: The Foundation Press, Inc., 2010, p. 139

[38] *Idem,* p. 427.

[39] TABB, Charles J, BRUBAKER Ralph. *Bankruptcy Law: Principles, Policies, and Practice*, 1st Edition, Cincinnati, Ohio, Anderson Publishing Co, 2003, p. 441.

[40] KING, Lawrence P., COOK, Michael L. *Creditor's Rights, Debtor's Protection and Bankruptcy*, 3rd ed. New York: Matthew Bender, 1997, p. 978.

place and is meant to aid the trustee in proving insolvency at the moment when the transfer took place[41].

3.4 Setoff of Claims

Generally, creditors owing a debt to the debtor are entitled to set if off before the petition for bankruptcy is filed against what they are owed to by the debtor. To the extent of the set off's value, the creditors are receiving dollar for dollar on the claim, instead of the lower percentage obtained in the distribution resulting from bankruptcy. This has again an effect over the equality principle, similar to preferences, which is why the Code has granted the trustee with analogous powers against set offs[42].

4 VOIDABLE TRANSFERS UNDER THE CZECH LAW

The Czech bankruptcy law is embodied in Act No. 182/2006, Insolvency Act, as amended (hereinafter referred to as "IA"). The IA allows a challenge to fraudulent transfers, undervalues as well as preferences which hinder satisfaction of creditors or prefer some creditors to the detriment of others.[43]

Under the Czech law only a trustee may challenge voidable transfers. The trustee may be, however, essentially compelled to file such action if the creditors' committee holds so [Sec. 239(2) of the IA].[44] There is, however, one exception. If the bankruptcy estate does not consist of necessary funding to cover the expenses of litigation, the trustee may subject submission of the action to the provision of the funding.[45]

There is no explicit obligation to submit an action on the part of the trustee. Yet, the trustee is under a general duty to act diligently and with professional care. Furthermore, he shall use all efforts to achieve the highest-possible satisfaction of the creditors' claims. It follows that he should review the debtor's files and challenge transfers he reasonable believes are voidable.[46] In this regard, Professor LoPucki remarks that the remuneration scheme should motivate trustees to be effective.[47] Indeed in case of Chapter-7 like liquidation[48], the remuneration of the trustee under the Czech law is dependent on the amount of dividends which provides the incentive to the trustee to seek to set aside suspicious transfers.

The action to set aside a transfer is to be filed with the bankruptcy court (i.e. the court that deals with the bankruptcy case in question) within one year from the time when the decision on the bankruptcy became effective [(239(3) of the IA]. In effect, the trustee generally has one year to inspect the debtor's transfers and decide whether to submit an action or not. Otherwise, the action would be dismissed. If the court finds the action grounded, the transfer in question shall be considered ineffective for the sake of the bankruptcy proceedings (i.e. not invalid). This is declared by the judgment of the bankruptcy court. In other words, the transfer is valid but it is not binding.

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[41] TABB, Charles J, BRUBAKER Ralph. *Bankruptcy Law: Principles, Policies, and Practice*, 1st Edition, Cincinnati, Ohio, Anderson Publishing Co, 2003, p. 447.

[42] The powers are described in Section 553 (b). For details and cases see *Idem,* p. 1033.

[43] Sec 235(1) of the IA. It is worth noting that the IA employs both the test of insolvency as well as liquidity. Therefore, from the general definition it follows that actions to void transfers may be availed of only in case of equity test. Cf. KOTOUČOVÁ, Jiřina et al. *Zákon o úpadku a způsobech jeho řešení (insolvenční zákon). Komentář.* 1st ed. Prague: C. H. Beck, 2010, p. 504.

[44] See the decision of the Supreme Court in re Oděvní podnik, case No. 29 ICdo 3/2013 (KSBR 39 INS 398/2010) of 28 February 2013.

[45] If the action is successful, creditors who provide the funding may receive it back by filing a claim. Such claim is satisfied with preference. See Sec 239(2) of the IA.

[46] The trustee may be held responsible for failure to meet his duties. In high-stake bankruptcy cases trustees are most presumably under a thorough scrutiny. Yet, in small cases, the trustees are expectedly under lesser degree of the creditors' supervision.

[47] LoPUCKI, Lynn, WARREN, Elizabeth.*Secured Credit. A Systems Approach.* 5th ed. New York: ASPEN Publishers, 2006, p. 501.

[48] Similar rules apply to discharge of debts when the creditors are satisfied from the sale of the debtor's assets.

Ineffectiveness is mostly of no use, unless there is true recovery. If the successful challenge concerns a security interest, such security interest is generally ineffective (unenforceable) and the status of the creditor is considered to be unsecured.[49] Otherwise, the obligated person has to generally return the debtor's original asset (value) to the bankruptcy estate.[50] Provided that it is not possible (i.e. it is no longer in the possession of the obligated person or the transfer consisted of services), the equivalent must be handed over (usually the respective monetary value). If the transfer consisted of the mutual exchange of values, the trustee shall also give back the value in question.[51]

However, if such performance is not recognizable (i.e. money on the account) or it does no longer form part of the bankruptcy estate, the entitled person has a claim against the respective debtor instead. Naturally, this is less advantageous because given the bankruptcy is in question, such claim is mostly not fully satisfied.

Trustee may recover the transferred property (or the value thereof) either from the transferee or from the person for whose benefit the transfer was made. In addition to that, simply said, the trustee may recover the value from the heirs or legal successors (to whom the transfer was made) on the condition that (i) at the time when they acquired the value they must have been aware of circumstances which substantiate the voidability of transfers, or if such persons are affiliated to the debtor.[52]

As to the definition of avoidable transfers, the trustee may only avail of specifically drafted bankruptcy-law provisions.[53] Naturally, this is not surprising as regards preferences because they are not forbidden outside bankruptcy. However it is important to draw a line between fraudulent conveyance law and laws against undervalues outside and inside bankruptcy as they contemplate distinct scope of application. [54]

Finally, it may be noted that an invalid transaction may not be declared to be voidable (ineffective). Such actions are dismissed and the trustee should not file an action to enlist the respective asset (claim) as a part of the bankruptcy estate. Similarly, the rules on voidability do not affect validity of transfers. Therefore, the trustee should carefully consider whether any transfer is valid at first place. The case-law reveals that it may be sometimes difficult to assess whether the transfer is invalid or simply avoidable.[55]

As it has been already mentioned, particularly rules regarding preferences disrupts legal certainty and predictability. Therefore, the legislature needs to consider the potential time-scope of the rules. Under the Czech law, the rules governing preferences and undervalues encompass transactions undertaken one year prior to the commencement of the bankruptcy proceedings. In case of transfers made between the debtor and its affiliated persons, the scope of the provisions is broadened by two additional years. The distinction is consistent with the general recommendation of the World Bank.[56] In case of fraudulent transfers, the rules catch transactions undertaken up to five years before the filing for bankruptcy.

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[49] Ruling of the Regional Court in Brno No. 39 ICm 720/2010-354 (KSBR 39 INS 1490/2010) of 1 October 2012).

[50] Cf. RICHTER, Tomáš. *Insolvenční právo*. Prague: Wolters Kluwer, 2008, s. 338.

[51] In this respect, see ruling of the High Court in Prague No. 2 VSPH 712/2012-P45-10 (KSCB 26 INS 10715/2010) of 19 December 2012.

[52] In terms of the IA, affiliated persons form part of a corporate group or are in close relationship as defined by Sec 116 of the Czech Civil Code (Act No. 40/1964 Coll., as amended).

[53] See *inter alia* KOTOUČOVÁ, Jiřina et al. *Zákon o úpadku a způsobech jeho řešení (insolvenční zákon). Komentář.* 1st ed. Prague: C. H. Beck, 2010, p. 503.

[54] As of 1st of January 2014 new Civil Code takes effect that provides for different sets of rules on voidable transfers outside bankruptcy.

[55] This is the case of transaction when there is an intention to defraud creditors on sides of both the parties to the transaction. See e.g. ruling of the Supreme Court No. 29 Odo 1027/2006 of 1 July 2008.

[56] "*The suspect period prior to bankruptcy, during which payments are presumed to be preferential and may be set aside, should normally be short to avoid disrupting normal commercial and credit relations. The suspect period may be longer in the case of gifts or where the person receiving the transfer is closely related to the debtor or its owners*." See WORLD BANK. *Principles and Guidelines*

4.1 Fraudulent transfers under the Czech law

Under the Czech law, fraudulent transfers are regulated outside as well as inside bankruptcy. The rules are, however, different. The rules outside bankruptcy, do not operate effectively in practice. The major barrier is that the creditor must have an enforceable claim. Yet, this requirement entails time and money.

Inside bankruptcy, fraudulent transfers are transfers (i) undertaken by the debtor with the intent to defraud its creditors, (ii) if the counter-party was aware of or could not have been unaware of the debtor's intent, and which (iii) occur in the 5-year suspect period.

The law protects the counter-parties by setting a precondition that the transfer is voidable only if the counter-party was aware of or could not have been unaware with regard to all the circumstances of the debtor's intent to defraud the creditors. In case of transfers with affiliated persons, the IA assumes that the affiliated persons have the knowledge of the debtor's intent.

Since the parties that could not have been unaware of the debtor's intention to defraud the creditors do not truly deserve the protection, the trustee may challenge fraudulent transfer that occurred up to 5 years prior to the commencement of the proceedings. Obviously, a lot of transfers that could not be caught under the non-bankruptcy law may be attacked in bankruptcy.

It must be noted, though, that if the debtor's counter-party had also the intention to defraud the debtor's creditors, the transfer is considered invalid. Hence, the trustee does not have to challenge the transaction and he should simply enlist the transferred assets as the debtor's property (if practicable).

It seems that an equivalent transfer is not fraudulent even if it changes the substance of the assets.[57] Therefore, it a change of liquid to illiquid assets would not be arguably fraudulent under the Czech law. This would conflict with the abovementioned ideal of Nonhindrance.

4.2 Undervalues under the Czech law

Undervalues undertaken prior to the end of 2013 may not be attacked outside bankruptcy unless they are fraudulent.[58] The Czech IA describes undervalues as transfers (i) made gratuitously or for substantially less than current value; (ii) while the debtor is bankrupt or which rendered the debtor bankrupt, and which (iii) occur in the suspect period (one or three years).

Test implies a comparison of values exchanged. The crucial criterion is whether the debtor received "substantially less". The knowledge of the counter-party regarding the financial conditions of the debtor is not relevant. Hence, predictability of contractual relations may be undermined.

The law provides safe harbors for certain transactions such as (i) transfers mandated by law (e.g. payments of alimonies), (ii) occasional gifts of reasonable value, or (iii) transfer with non-affiliated persons which have been undertaken by the debtor with the reasonable expectation that it would bring about appropriate benefit and the person for whose benefit the transfer was made could not with due care have been aware of the debtor's bankruptcy or that it would render the debtor bankrupt. The test is objective as all the circumstances must be considered.[59]

As the law stands, not every unequal transfer is avoidable. Only those transfers, which are for *substantially* less than ordinary value, are considered undervalues.[60] Naturally, the court should be cautious in assessing the value of the transfer. Of course, monetary terms of the challenged transfer should not be decisive alone and the court should look at the transaction in the context. The court e.g. held that even though the lease payment under the lease agreement executed by the

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for Effective Insolvency and Creditor Rights Systems [online]. World Bank, 2001 [cited on 16 March 2013]. Available at <http://www.worldbank.org/ifa/ipg_eng.pdf>, p. 10.

[57] Cf. ruling of the Supreme Court No. 29 Cdo 4886/2007 of 29 April 2010.

[58] As mentioned above, since 1st January new Civil Code provides for different rules which also incorporate rules against undervalues.

[59] Cf. ruling of the Regional Court in Brno No. 29 ICm 797/2012 (KSBR 29 INS 4416/2011) of 3 July 2012.

[60] Ruling of the High Court in Prague No. 103 VSPH 36/2011 (KSPH 39 INS 4800/2009) of 1 February 2012 cited in KUČERA, Zdeněk. *Sbírka insolvenční judikatury*. 1st ed. Prague, C. H. Beck, 2013.

debtor was rather low, the transfer was held to be equal since the lessee provided the debtor (landlord) a loan with no interest fee.[61]

The case-law reveals that undervalues include:

accession to the loan agreement of a third company and provision of security interest to secure such agreement;[62] or

establishment of encumbrances consisting of the use of the burdened real estate for the 40-year period for low price which resembled a secret sale.[63]

On the contrary, the court of the first instance held that the agreement on management of an undertaking forming part of the debtor was not voidable because the debtor sought to handle its financial issues.[64] Also, the fact that a counter-party of a debtor has not paid the purchase price does not itself mean that the contract is voidable.[65]

4.3 Preferences under the Czech law

By definition, preferences cannot be set aside outside bankruptcy. Inside bankruptcy, the trustee may under Sec 241 of the IA challenge as preferences transfers (i) on the basis of which a creditor receives higher dividend than it would otherwise receive in straight liquidation to the detriment of other creditors; (ii) undertaken while the debtor is bankrupt or which rendered the debtor bankrupt; and which (iii) occur in the suspect period (one or three years).

The test implies a comparison of the received dividend on one hand and the dividend that would be otherwise obtained in liquidation. As in the case of undervalues, the knowledge of the counter-party regarding the financial conditions of the debtor is generally not relevant.

The IA provides a non-exhaustible list of examples which encompasses (i) satisfaction of a pre-mature debt; (ii) modification or substitution of a debt to the debtor's detriment; (iii) debtor's waiver of its claim or agreement to otherwise enable the termination of the debtor's right (claim); and (iv) provision of a security interest for antecedent debt (unless the establishment of a security interests follows from the internal change of collateral).

On the other hand, Sec 241(5) of the IA provides safe harbors for (i) establishment of a security interest in exchange for a concurrent provision of an appropriate value; (ii) transfer in the ordinary course of business for appropriate exchange of goods or other values if the counter-party could not with due care have been aware of the debtor's bankruptcy or that it would render the debtor bankrupt (whereas this case does not apply to transfers with affiliated persons). The court held that the issue whether a transaction is in ordinary course of business or not is the objective question and should not be assessed (solely) with respect to the particular debtor.[66] In this respect, the decision not to enforce rights from drafts does not constitute such appropriate value (since the creditor may avail of its rights in the future).[67] Nor does the creditor's decision not to enforce contractual penalties, to allow the debtor to pay in installments or to continue to order goods from the debtor[68] constitute an appropriate value. The court on the other hand rightly held that a mere acknowledgement of debt is not a preference even if it later led to the later execution lien.[69] The reason is that the acknowledgement serves role rather in further proceedings and does not itself constitute a secured (or preferred) position in bankruptcy.

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[61] Ruling of the Regional Court in Brno No. 26 ICm 2156/2011-34 of 25 February 2011.
[62] Ruling of the High Court in Prague No. 101 VSPH 42/2011-33 (KSPH 41 INS 2804/2010) of 2 June 2011.
[63] Ruling of the High Court in Prague No. 102 VSPH 34/2012-190 (KSPL 29 INS 11008/2010) of 15 March 2012.
[64] Ruling of the Municipal Court in Prague No. 78 ICm 209/2010-66 of 28 June 2011.
[65] Ruling of the High Court in Olomouc No. 13 Cmo 2/2010-93 of 19 October 2010.
[66] Ruling of the High Court in Olomouc 13 VSOL 8/2012-114 (KSBR 26 INS 7484/2009) of 28 August 2012.
[67] Ruling of the High Court in Olomouc No. 3 VSOL 6/2011-96 (KSBR 40 INS 6055/2009) of 13 October 2011.
[68] Ruling of the High Court in Olomouc No. 3 VSOL 5/2011-144 (40 ICm 118/2010) of 13 October 2011.
[69] Ruling of the Regional Court of Prague No. 40 ICm 776/2012-36 of 17 September 2012.

4.4 Set-off against an antecedent claim

A specific issue that has arisen in the Czech case-law is the following situation. A creditor A having a claim against a bankrupt B as a buyer executes a purchase agreement (or other type of agreement) on the basis of which the creditor A becomes obliged to pay a purchase price to the bankrupt B. Further, the creditor A and the bankrupt B set-off their mutual claims (i.e. claims of B to receive the purchase price from A and previous claim of A against B). Consequently, the creditor's initial claim is satisfied, the bankrupt B has less liability as the initial claim is set off, yet he also has less (or no) assets left as he transferred some of his assets to creditor A.

The courts have taken different approaches how to assess the abovementioned transfers. Certain courts dismissed the action of the trustee to set aside the respective transfer as a voidable transfer, whereas other courts noted that it is an undervalue because the debtor in bankruptcy did not receive real value in connection with the second transfer. Also, it is possible to take a slightly different view and consider the transfer to be a preference.

In the absence of the intention to defraud the creditors, it seems that the transfer should be in theory considered a preference. If the bankrupt debtor B hypothetically sells his assets and gives the value to the creditor, the transfer would most likely be a preference. Similarly, it appears the set-off has the same economic effect and thus should be (in the absence of the intention to defraud creditors) considered to be a voidable preference. Obviously, the abovementioned example should be distinguished from the case when there is no antecedent debt and the set-off is a part of the concurrent exchange of values between A and B. In other words, if two persons simultaneously execute two agreements and they concurrently set-off their mutual claims, the transfer is obviously not a preference. There is one key element missing – an antecedent debt that is to be satisfied.

5 VOIDABLE TRANSFERS UNDER THE ROMANIAN LAW

At the beginning of the insolvency procedure, there is a strong possibility that the estate was already deprived of all assets by the debtor who took advantage of the fact that he knew about the imminent occurrence of insolvency. Thus, the Romanian Insolvency Law no 85/2006[70] has regulated measures and provided for actions which are available to the trustee or the liquidator in their attempt to bring assets back in the estate.

Such actions target fraudulent transfers, undervalues and preferences and benefit from legal incentives such as judicial fees exemptions[71]. According to the law, the measures shall be available both in cases of reorganization and winding up plans as well as in case in both versions of bankruptcy procedure[72]. The actions fall in the competence of the bankruptcy judge[73].

Under the Romanian law, only the trustee (or liquidator) has the right to bring action in order to challenge transfers. It is important to underline that bringing action is a right and not an obligation of the trustee who enjoys total discretion in deciding whether to act or not. In cases where the trustee decides not to exercise its right then the Creditor's Committee[74] may bring such an action on its own with the authorization of the bankruptcy judge[75]. Yet, the Creditor's Committee is not entitled to ask

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[70] In Romanian original: Legea 85/2006 privind procedura insolventei, published in the Official Gazette of Romania no 359/26.04.2006.

[71] See Art 77 of Law no 85/2006. The exemption refers to the action itself which means it does not matter if it is one brought directly by the trustee or by the Creditor's Committee with the authorization of the bankruptcy judge.

[72] See Art 78 of Law no 85/2006.

[73] See Art. 79 and 80 of Law no 85/2006.

[74] The possibility belongs only to the Creditor's Committee and not to single creditors. In this regard see Decision no 395/12.03.2002 of Cluj Court of Appeals, reproduced by Ion Turcu in *Tratat de insolventa*, Ed. CH Beck, Bucuresti, 2007, p. 415. In the case one of the creditors had brought action to have one of the debtor's transfers annulled. The action was dismissed as inadmissible. The bankruptcy judge contained that according to the wording of the legal provisions, only the trustee or the Creditor's Committee (authorized by the bankruptcy judge) may bring such actions. Thus, it meant that the action cannot be brought by a single creditor, not even with the authorization of the bankruptcy judge.

[75] See Art. 81, Par. 2 of Law no 85/2006.

for any additional remedies or measures such as the replacement of the trustee[76], in case the trustee does not exercise the right to challenge transfers.
Action may seek to recover the transferred property (or the value thereof) from either the transferee or sub-acquirers (with exceptions) within 16 months from the beginning of the procedure, but not more than 1 year since the expiry of the term to finalize its initial report (60 days since the trustee's appointment)[77]. Generally the suspect period is 3 years[78] for fraudulent transfers, undervalues and preferences, though in some cases it might be 2 years[79] and even 120 days (in case of certain preferences[80]).

5.1 Fraudulent Transfers

According to the law, the trustee (or the liquidator) may bring action before the bankruptcy judge to annul fraudulent transfers made by the debtor that impair the creditors' interests within 3 years before the opening of the procedure[81]. Fraudulent transfers are deemed those transfers undertaken by the debtor, in bad faith, with the purpose of harming another person (a creditor). Thus, the transfers covered by the law are those: 1) undertaken by the debtor, 2) in bad faith, 3) with a double purpose: on the one hand to harm the creditors' rights or to elude the provisions of the law and on the other hand to obtain a profit for itself or for another person, 4) occurred in the 3-year suspect period. It is not relevant whether the counter-party was or not aware of the debtor's intent to defraud its creditors.

Fraudulent transfers can also be challenged outside bankruptcy under the provisions of the general law (New Civil Code) regulating *actio pauliana* (actiunea revocatorie)[82]. The doctrine has underlined the similarities and differences between the two actions. Thus the main similarity lies in the common purpose, which is to repress the debtor's fraud. The differences refer to their effects and procedural conditions: The action based on Art 79 of Law no 85/2006 (bankruptcy law) tends not only to sanction the fraud but also to restore the equilibrium between the creditors. Thus, its effects spread wider than those of *actio pauliana*, reaching judicial partitions and payments and profiting all creditors. Also it may be brought only with the county court (having a specialized panel), in front of the bankruptcy judge and it is exempted from judicial fees. *Actio pauliana* may be brought, according to the general competence established by the New Code of Civil Procedure, either in front of a low court or a county court[83]. The panels are not specialized, the action is subjected to substantial judicial fees[84] and, in case of success, it will profit only the creditor that has brought it (limited effects). On the positive side, the *actio pauliana* is not conditioned by the prior establishment of the debtor's insolvency.

In conclusion, the legal characters of the action regulated by Art 79 of the Insolvency Law no 85/2006 are the following: a) it is facultative for the trustee/liquidator, b) may be brought only in 16 months since the date when the procedure was opened, c) if the trustee/liquidator refuses to bring it, the creditor's committee may bring such action itself with the authorization of the bankruptcy

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[76] Decision no 533/02.04.2002 of Cluj Court of Appeals, reproduced by Ion Turcu in *Tratat de insolventa*, Ed. CH Beck, Bucuresti, 2007, p. 414-415. The claimant has brought action in front of the bankruptcy judge to have the trustee replaced for reasons of lack of expertise and professionalism. Among others, the claimant argued that the trustee has failed to challenge the debtor's transfers under the provisions of the law. The action was dismissed. In its decision the court reasoned that bringing action to annul the debtor's transfers under the law is not an obligation but a mere possibility, left to the appreciation of the trustee. On the other side, the Creditor's Committee was entitled to ask the bankruptcy judge an authorization to bring such actions on its own.
[77] See Art. 81 corroborated with Art 20, Par 1, letter b) of Law no 85/2006.
[78] See Art. 79, Art 80, Par 1, letters a), b), c) and Art 80, Par 2 of Law no 85/2006.
[79] See Art. 80, Par. 1, letters g) of Law no 85/2006.
[80] See Art. Art 80, Par 1, letters d), e), f) of Law no 85/2006.
[81] See Art. 79 of Law no 85/2005.
[82] See Art. 1562-1565 of the New Civil Code, published in the Official Gazette no. 409/10.06.2011.
[83] General competence of Romanian courts is determined by the value of the litigated object. See Art. 94 and 95 of the New Code of Civil Procedure.
[84] Judicial fees are established by algorithm according to Art. 2, Par. 1 of Law no 146/1997. The approximate fee will amount around 10% of the claim's value.

judge, within the same 16 months, d) the transfer harmed the creditors, e) the date of the transfer shall be within 3 years before the date the procedure was opened, f) the transfer defrauded the creditors, g) notwithstanding the value of the transfer's object, the action falls in the competence of the county court and shall be heard by the bankruptcy judge. In order to establish the existence of fraud it suffices that the debtor knew that by concluding the transfer it harms its creditors. The law does not require proof for dole or the counter party's complicity to the fraud. If successful the good or its value shall return in the bankruptcy estate and for the restitution of its performance the counter-party shall have a claim against the estate, as any other creditor, unless it was an accomplice to the fraud[85].

Romanian law has also established a special case of fraudulent transfer for which the suspect period shall be only 2 years. This is the case in which 1) the transfer or the new obligation was undertaken with the intention: a) to hide or delay insolvency or b) defraud a natural or legal person which was, at the date of the transfer its creditor as part of a netting agreement or part of a transfer of derivatives on the basis of a qualified financial agreements, 2) which occurred in 2 years suspect period[86].

5.2 Undervalues

Under the Romanian bankruptcy law undervalues cover any transfers which: 1) were made gratuitously[87] or for substantially less than the current value[88], 2) while the debtor was bankrupt or which rendered the debtor bankrupt, and which 3) occurred in the 3-year suspect period.

In the case of gratuitous transfers, the law does not distinguish between the transfer of movable and immovable, both categories being covered[89]. The logic lies in the fact that the debtor is free to be generous only when it is able to fulfill all its obligations toward its creditors. But the beneficiary of the transfer must stand in the trial brought by the trustee/liquidator, so that the decision will apply to him. The law has established a safe harbor in case of gratuitous transfers. Thus, any sponsorship made with humanitarian purpose shall be exempted from annulment action brought under Art 80, par. 1, letter a). The doctrine took the position that the legal text shall be interpreted to refer strictly to humanitarian sponsorships and not to any other commercial transfers which appear to be gratuitous, such as leases, patronage, or any other kind of sponsorships[90].

Similar conditions shall be applicable to all commercial operations made for less than the current value, under which the debtor's performance is substantially bigger than the value received. Romanian case law took the position that "commercial operations" include also any transfers related to any immovable goods contained in goodwill[91]. The rationale behind the possibility to set aside such transfers, which are valid under the general conditions of the Civil Code, is two folded: 1) the principle of legal order of creditors according to the rank of their claims which governs the insolvency procedure would be contradicted by unbalanced contracts and 2) the substantial unbalance represents a clue of the creditor's bad faith whom, in order to obtain a privileged situation, has ensured an exaggerated advantage.

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[85] See Art. 83, Par 2 of Law no 85/2006.

[86] See Art 80, Par 1, letter g)

[87] In such case the action is brought under the provisions of Art 80, par. 1, letter a) of Law no 85/2006.

[88] In such case the action is brought under the provisions of Art 80, par. 1, letter b) of Law no 85/2006.

[89] The provisions of Art 80, par. 1, letter a) cover all donations, gifts, disguised donations, remittance of debt or renunciation of a right without consideration.

[90] See Ion Turcu in *Tratat de insolventa*, Ed. CH Beck, Bucuresti, 2007, p. 425.

[91] Decision no 1851/2002 of Cluj Court of Appeals, reproduced by Ion Turcu in *Tratat de insolventa*, Ed. CH Beck, Bucuresti, 2007, p. 428. The case regarded an annulment action brought by the trustee against an asset transfer made for 400 million lei when the actual value of the goods (buildings) was beyond 6,1 billion lei. Even more, from the total price, the counter-party paid only 120 million lei, the rest being paid in installments. The court has retained a substantial and evident disproportion between the price paid and the actual value of the goods (both movable and immovable). The action was affirmed.

The legal conditions for exercising an action under Art 80, par 1, letter b) are: 1) the contract must be commutative and not aleatory, 2) the substantial unbalance must be in the detriment of the debtor and 3) the obligations undertaken by the debtor under the transfer must be substantially disproportionate towards the counter-value given by the other party.
Undervalues can be challenged and set aside also outside bankruptcy law by using the actions provided by the New Civil Code, but such actions are not advantageous for an unpaid creditor, mainly because of the judicial fees that need to be paid[92].

5.3 Preferences

The law[93] provides the possibility to challenge any transactions concluded by the debtor with the purpose of hindering the creditor's rights. Unlike in the case of fraudulent transfers covered by Art 79, mentioned above, in this case it is necessary to prove the intention of all parties involved in the transaction to either peculate the good or to deter in any way the right of the creditor.
The Romanian law empowers the trustee to challenge: 1) any property transfers, 2) concluded within 120 days before the opening of the procedure, 3) which might be justified by the total or partial satisfaction of a debt towards that creditor, born before the 120 days suspect period[94], on the basis of which a previously unsecured debt becomes secured[95] or by which non-due debts are paid with anticipation[96], 4) on the basis of which the creditor receives a higher dividend than it would have otherwise received as a result of the procedure, to the detriment of other creditors.
In order to determine whether a preference has occurred or not courts usually apply a comparison test of the received amounts and the amounts which would have been obtained in liquidation. The knowledge of the counter-party regarding the financial condition of the debtor is generally irrelevant and fraud is presumed[97].

There are also special cases of preferences sanctioned by the Romanian Bankruptcy law. In this case it is usually the quality or the status of one of the involved parties that determines the existence of a preference. Thus, the trustee may challenge: 1) any transfers made by the debtor to the detriment of its creditors, 2) concluded in the year preceding the opening of the procedure, 3) with certain categories abusing their dominant position in relationship with the debtor such as: a) a partner or an associate holding more than 20% of the subscribed capital or voting power, b) a member or an administrator when the debtor is part of an Economic Interest Group, c) a shareholder holding more than 20% of the stock or of the voting rights, d) an administrator, a manager or a member of the supervisory body of the debtor[98], e) any other natural or legal person having a dominant position over the debtor or its activity, or f) co-owner over a common good. In all cases,

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[92] Supra footnote no. …
[93] See Art. 80, par. 1, letter c) of Law no 85/2006.
[94] See Art 80, par 1, letter d) of Law no 85/2006.
[95] See Art 80, par 1, letter e) of law no 85/2006.
[96] See Art 80, par 1, letter f) of Law no 85/2006.
[97] See Decision no 571/3.07.2001 of Cluj Court of Appeals, reproduced by Ion Turcu in *Tratat de insolventa*, Ed. C. H Beck, Bucuresti, 2007, p. 434. The case regarded the annulment of several asset transfers made towards one of the seller's creditors, by public auction in the suspect period. The problem resided in the fact that after the conclusion of the transfers, the payments were successively postponed and in the end the parties resorted to compensation. The court reasoned that the fact that the transfers' prices were established by public auction was irrelevant, even more, given that it was not the result of a judicial strict foreclosure, it represented a way of dissimulating the agreement between the debtor and the creditor. The court added that the law does not distinguish between voluntary public auctions and contracts concluded by mere agreement of the parties. Last but not least, the court stated that lack of proof with respect to parties' bad faith is also irrelevant, as the law established the possibility to annul all transfers, without mentioning the necessity to prove the bad faith of those involved in the transfer.
[98] For all cases covered by letters a-d the law presumes that the damaging transfers were possible due to the abuse of the interested person which took advantage in the same time of both the position held in the company and the information regarding future insolvency to which it had access, to obtain an unjust advantage for itself to the detriment of other creditors.

the purpose of the action is to recover the value for the bankruptcy estate, in order to protect the interest of all creditors.

In all cases mentioned (fraudulent transfers, undervalues and preferences) the time period for bringing action is one year[99] calculated from the expiry of the date established for the initial report of the trustee[100], but no later than 16 months since the opening of the procedure. The prior 3 year terms or 120 days terms shall be calculated also from the actual date when the procedure was opened, in full accordance with the provisions of the New Civil Code concerning the calculation of judicial terms[101].

6 CONCLUSIONS

Given that all jurisdictions analyzed have comprised in their national law rules with respect to voidable transfers it is obvious that all have recognized the importance of this area of law. The extensive case law of each jurisdiction also underlines the need for such rules and for their effectiveness. But this does not mean there is no place for improvement and that one should not look to foreign jurisdictions for comparisons and lessons to be learned. In the authors' opinion, the powers and the obligations of the bankruptcy trustee are one aspect of fraudulent conveyances law which could benefit from the American example. That is because although all jurisdictions have empowered the trustees with different set of legal abilities allowing them to void certain transfers, there are still differences with regard to both the extent of such powers and the trustee's position towards them.

In US the bankruptcy trustee is not only delegated with the rights belonging to the creditors in order to extend its powers and to make those powers more far-reaching, but he is also obliged to act, owes a fiduciary duty to his constituents and may be held personally liable in case it is proven he broke the business judgment standard. Thus it may be inferred that the bankruptcy trustee has a mandatory obligation to exercise its powers for the benefit of the bankruptcy estate and its creditors. Such standards, duties or personal liability are not present in Romania where creditors have to go on their own, with the judge's prior approval. In the Czech Republic, the trustee has an obligation of a duty of care and bears potential liability.

In the same time the possibility provided by the American law to the trustee to benefit from the right of the creditors under the laws outside bankruptcy, underline the concern for more effectiveness by maximization of results. We have not been able to identify a similar concern in the Central and Eastern European jurisdictions discussed.

Last but not least, comparing the underlying principles, the mechanisms and the tools engaged in the area of fraudulent conveyances law, will help developing a better understanding of the topic, which would benefit both academics and practitioners. As our article is far from being exhaustive, we hope we have at least created the curiosity for others to dedicate more time and attention to the subject.

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[99] See Art 46 of Law no 85/2006.

[100] See Art 20 par 1, letter b) of Law no 85/2006, establishing a 60 days term for the initial report of the trustee.

[101] See Art 2552 and 2553 of the New Civil Code.