



**THE CONTEST OF CREDITORS' INSOLVENCY CLAIMS AND DEBTORS'
FRAUDULENT TRANSACTIONS IN THE CZECH AND THE GERMAN
INSOLVENCY PROCEEDINGS**

by

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Abstract

The thesis first briefly outlines the historical development of Czech and German private law¹ in general, and in terms of insolvency law in particular. Further, the emphasis is put on the mechanisms that the Czech Insolvency Code provides in order to protect the insolvency estate from unjustified insolvency claims and debtor's transactions. By comparing the relevant Czech provisions with their German counterpart, the thesis shows the parallels and differences between the two legal systems concerning the contest of insolvency claims and debtor's fraudulent transactions, and makes concrete suggestions on how the Czech system can profit from adapting legal concepts from Germany.

The thesis asserts that despite some minor differences the Czech and German concepts on the contest of insolvency claims and debtor's transactions are very similar. It concludes that the creditors' competences concerning the contest of other creditors' insolvency claims are a little weaker in the Czech than in the German system. It demonstrates the slight differences of the two countries' concepts on the contest of fraudulent transactions, and outlines a set of legal issues which should be subject to future discussion and clarification in the Czech Republic.

¹ Note that the Czech and German notion of 'private law' also comprises the areas of business law as well as the law of civil procedure including insolvency law.

List of abbreviations

AnfG - Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens (Anfechtungsgesetz, effective since 1 January 1993, last amended on 9 December 2010)

InsO - Insolvenzordnung (Insolvency Code of the Federal Republic of Germany, last amended on 20 December 2011, effective since 1 January 1999)

IZ - Insolvenční zákon (Czech Insolvency Code, Law No. 182/2006 Coll., last amended by Law No. 73/11 Coll., effective since 1 April 2011)

ObčZ - Občanský zákoník (Civil Code of the Czech Republic, Law No. 40/ 1964 Coll., last amended by Law No. 28/2011 Col.

Introduction

The Czech-German history of the 20th century is most of all characterized by occupation and oppression of the Czechs by the Germans, and displacement and expropriation of the Germans by the Czechs, followed by disputes about restitution and compensations after the Cold War. This part of history is the main reason why both Czechs and Germans until the present time are more aware of their differences than of their similarities. However, the similarities between the two nations are striking: The cultural similarities can not only be found in matters of everyday life,² but also in resembling work ethics and closely related legal cultures.³ Because of those cultural similarities - combined with investor-friendly conditions - the Czech Republic has been one of the most attractive areas for German business investments since the early 1990s. Nowadays, Germany is by far Czech Republic's most important foreign trade partner – more than 25% of the Czech imports come from Germany, and almost 32% of the Czech exports go to Germany.⁴ These close economic ties go far beyond the usual cooperation of neighbors within the internal market of the European Union.⁵

The closer the economic cooperation is, the higher also the benefit of common or at least similar rules of business law⁶ can become. One important field of business law that is under

2 According to the author's personal experience, the Czech culture values personal liability, punctuality and the keeping of promises almost as high as the German society.

3 For example: In both cultures, a bankrupt creditor is deemed to be an 'unreliable person who breaks his promises' rather than an 'honest but unlucky businessman', which might rather be an appropriate description of the public notion of a bankrupt creditor in the United States. This cultural characteristic in the Czech Republic and Germany of course also influences the concepts of insolvency law in both countries. On the ethic role of promises in insolvency law see also KILPI, Jukka. *Ethics of Bankruptcy*. London and New York, 1998, p. 51-64.

4 Economic data report 2011 of the German Chamber of Foreign Trade, available under http://ahk.de/fileadmin/ahk_ahk/GTAI/tschechien.pdf.

5 Compare the foreign trade statistics of the other EU countries, provided by the German Trade and Invest Agency, available under <http://www.gtai.de/GTAI/Navigation/DE/trade.html>.

6 This paper understands the term 'business law' as all fields of law which regulate the foundation, conduct and

constant development in both countries is the field of Insolvency Law. Until this day, the harmonization of insolvency proceedings on the level of the European Union has not come very far:⁷ The European Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings starts with the conclusion that universal European insolvency proceedings are not feasible due to the wide differences above all concerning the laws of security interests and preferential rights.⁸ The regulation itself concerns questions of international insolvency law, but leaves widely untouched the national differences in the insolvency proceedings.

Thus, European Insolvency Law until this day remains a heterogeneous pool of national legislations, based on different traditions and legal cultures. In many countries the practice of insolvency proceedings even does not match the standard of what should be expected from modern rule-of-law states. Also in the Czech Republic, the insolvency proceedings are an abiding source of legal uncertainty and corruption, and therefore not only a potential impediment for foreign investments, but also a threat to the public confidence into the rule of law. Surely, in the Czech lands insolvency law practically didn't exist for already four decades when after the fall of the Iron Curtain the need to organize the failing of businesses came up again. In view of that, the last 22 years already brought considerable progress. However, it cannot be denied that the Czech Insolvency Law needs further development in order to achieve a level that is competitive with the big Western European economies, not even to speak about the country which has the world's most developed system of insolvency resolution – the United States of America.

In order to enhance the necessary development of Czech Insolvency Law, Czech scholars and practitioners often do not need to invent new legal innovations. In many respects it is enough

closure of business, including the law of insolvency and liquidation proceedings.

7 See HÄSEMEYER, Ludwig. *Insolvenzrecht*. Cologne/Munich: Carl Heymanns, 2007, pp. 68 et seq.

8 Introductory note No. 11 of the Regulation (EC) Nr. 1346/2000 of 29.5.2000.

to look at the more developed European partners' experiences and analyze whether their solutions can be transferred and used in the Czech legal order as well. The U.S. Bankruptcy Code provides the world's most developed system of insolvency resolution, but since the Czech Insolvency Code is drafted in the tradition of Continental European codifications,⁹ a transfer of legal concepts and solutions from the American to the Czech system is more difficult than a transfer within Continental Europe. Additionally, it is easier to find orientation at a jurisdiction like Germany which is one step ahead than to model oneself on an insolvency law regime which is – seen from the Czech perspective – miles away on the ladder of legal development.¹⁰ Finally, the goal of a deeper harmonization of European business law can be achieved only when the European states align themselves to each other instead of finding orientation overseas.

In order to illustrate the common grounds of legal traditions, the thesis will begin with a brief comparison of the development of Czech and German legal history in general, though with a focus on insolvency law. It will show that the historical and systematic similarities are close enough to allow the transfer of theoretical approaches and particular legal solutions without major difficulties. The main part of the paper will make a comparative analysis concerning the provisions on the contest of insolvency claims and debtors' transactions. It will compare the structures of both countries' systems of contest of insolvency claims and show that the German creditors have a more comfortable position concerning the contest of other creditors' insolvency claims. It will conclude that the German 'preliminary contest of claims' is not an ideal solution for the Czech legal order. Further on, the thesis will argue that the German concepts of the 'participation right' in the insolvency proceedings and 'declaratory action'

9 Note that the Continental European codes are usually drafted much less detailed and less technical than U.S. Codes, but therefore use a higher level of abstraction.

10 Note that Germany introduced some core concepts of modern Insolvency Law such as the option for reorganization and the fresh start principle only by the coming-into-force of the current Insolvency Code on 1 January 1999, when these concepts had been working already for decades in the United States.

could also be very useful in the Czech system. The last chapter will deal with the contest of debtor's (fraudulent) transactions¹¹. It will make a comparison to the German system of contest of fraudulent transactions and draw the attention to a few ambiguities in the Czech code, which need further legal discussion. The thesis will propose a checklist for the contest of fraudulent transactions with which practitioners should work, and take a brief look at the current legal situation in the Czech Republic concerning the contest of debtor's transactions in the course of ordinary judicial execution.

Since this paper compares two Continental European jurisdictions, it will use a Continental European terminology of insolvency law. In case of discrepancies between the Czech and the German legal terms it will use the terminology provided by the official English version of the German Insolvency Code.¹² The thesis not only means to provide a so far not existing basic comparative analysis of the concerned legal issues. It most of all aims to propose practitioners who are familiar with the German insolvency system a way to approach the Czech provisions on the contest of insolvency claims and debtor's transactions. By pointing out similarities and possibilities for the further harmonization of the Czech and German legal cultures, this paper finally also aims to make a little contribution to the progress of the legal integration in Central Europe.

11 This paper will use the term 'debtor's transactions' for what is known under the term 'fraudulent transfers' respectively 'fraudulent conveyances' in the United States and 'wrongful trading' in the United Kingdom.

12 GERMAN FEDERAL MINISTRY OF JUSTICE, latest official version available online under http://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html.

1. Common and different traditions of Insolvency Law

“The further backward you look, the further forward you are likely to see.”

These words by Winston Churchill¹³ are also valid for the field of legal science, since any legal culture is nothing but a large set of rules and customs that were developed in the past and that determine our way of thinking and acting today and also in the future. That is why a look into the history of Czech and German insolvency law can make us understand the possibilities and burdens for the transfer of legal ideas and solutions from one system to the other.

Historical development

Both the Czech Republic and Germany are deeply rooted in the Central European civil law culture.¹⁴ Germany with its Commercial Code of 1897 and most of all its Civil Code that came into force on January 1st, 1900, developed a system of civil law which has a very high level of abstraction, generality and predictability of legal decisions. The Czech Republic, having been part of the Austro-Hungarian Empire until it fell apart in 1918, has until today closer similarities with the other jurisdictions of the Austro-Hungarian subtype of Central European civil law culture than with the German legal traditions. The main differences between the German and the Austro-Hungarian subtypes of the Civil Law cultures can best be characterized by the fact that the Austrian Civil Code was introduced in 1812 and is an expression of the post-Napoleonic liberal thinking of the early 19th century, whereas the German Civil Code that came into force in 1900 provides a very high level of abstraction,

¹³ See for example <http://jpetrie.myweb.uga.edu/bulldog.html>.

¹⁴ The paper means the Central European civil law culture as it can be distinguished from the other Continental European civil law cultures such as the French, the Latin and the Scandinavian. This notion of Central European civil law cultures mainly comprises the countries on what was the territory of the former German and Austro-Hungarian empires.

and addresses legal experts rather than the normal citizens.

After 1918, the First Czechoslovak Republic's legal system continued in the tradition of the civil law culture of the Austro-Hungarian subtype, until it was occupied by Nazi Germany in March 1939. During the six years of occupation, the Czechoslovak courts continued to apply the civil laws of the Czechoslovak Republic in relation to the Czech majority of inhabitants of the so-called „Protektorat“.¹⁵ Most of all, the communist tyranny between 1948 and 1989 led to the country's backdrop from the rule-of-law standard that it used to have until 1939. Communism did not only leave behind codifications such as the Civil Code of 1964 which did not fit the requirements of a market economy. It also left behind a judicial system that was a government instrument for the repression of private individualism – including private economic initiatives and entrepreneurship - rather than a guardian of individuals' rights that was obliged to the principles of rule-of-law and division of powers.

While the vast majority of the East German communist laws were immediately declared invalid and the communist legal tradition was wiped out by the GDR's accession to the Federal Republic of Germany on October 3rd, 1990, Czechoslovakia and its successor – the Czech Republic – had to develop its legislation and its court system out of what communism left behind. In consequence of this there were frequent changes in legislation,¹⁶ a high degree of legal uncertainty, a comparatively long duration of court proceedings as well as a level of corruption in the public sector which is until today far above the Western European average.¹⁷

15 This term was introduced by the German Nazi administration and is still now used to mark the area of Bohemia and Moravia which was occupied by German forces in March 1939, and which was populated by a majority of people with Czech ethnicity.

16 The Czech Commercial Code was changed 64 times since its coming into force in 1994, see the header of the Commercial Code, law No 513/1991 Coll.

17 TRANSPARENCY INTERNATIONAL, Corruption Perceptions index 2011, available under <http://cpi.transparency.org/cpi2011/results/>; compare also Transparency International, Global Corruption Reports 2001-2010, available under <http://www.transparency.org/publications/gcr>, see also http://www.transparency.org/news_room/latest_news/press_releases_nc/2011/2011_12_08_institutional_pilla

The mentioned features of the Czech legal system make an efficient implementation, development and discussion of new and complicated laws and legal institutions more difficult than in Germany, which has 44 accredited law schools¹⁸ (this is eleven times more than the Czech Republic)¹⁹ and a large amount of cases and legal literature. The scientific discussion about Czech Insolvency Law on the other hand is concentrated on a few protagonists.²⁰

Nevertheless, the difficulties in the Czech system do not change the fact that - seen from a European or even global perspective - the Czech and the German legal systems have major similarities, and legal innovations can be transplanted from one system to the other very easily and mostly without significant changes. Consequently, many innovations from German legislation have already been adapted by the Czech(slovak)²¹ legislator, such as the concept of Constitutional and Administrative Jurisdiction and many particular legal instruments like the Constitutional Complaint.²²

In the field of Insolvency Law, all the Central European legal cultures are rooted in the tradition of Roman Law, and developed their culture of insolvency resolution from the ancient predecessors, dating back even to the times of pre-Christian Roman democracy.²³ In modern times, the development of German Insolvency Law made a big step by the coming

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- [rs of the czech republic do not provide sufficient support to the anti corruption efforts.](#)
- 18 See the list of all officially accredited German law schools on http://de.wikiversity.org/wiki/Liste_der_juristischen_Fakult%C3%A4ten_in_Deutschland.
- 19 The Czech Republic has the four law schools of Prague, Brno, Olomouc and Pilsen, compare for example <http://www.vysokeskoly.cz/clanek/prohlaseni-dekanu-pravnickych-fakult-cr>.
- 20 See for example the search results for the term „insolvenční právo“ of the online catalog of Charles University Prague, <http://ckis.cuni.cz>.
- 21 Czechoslovakia was dissolved by the foundation of the Czech and the Slovak Republics on 1 January 1993. The modern concept of constitutional jurisdiction was however implemented already in 1991 by the constitutional law No 20/1991 Coll. Since 1993, the Slovak Republic often made itself a model on the Czech legal developments, and many Slovak lawyers until today go for education to the Czech Republic. In the field of Insolvency Law the Slovak Republic also shows a development which is parallel to the Czech Republic, compare <http://www.eurojuris.net/assets/insolvency%20newsletter%202008.pdf>.
- 22 For an overview of the spread and influence of the German-origin constitutional complaint see for example <http://de.wikipedia.org/wiki/Verfassungsgerichtsbarkeit>, http://cs.wikipedia.org/wiki/%C3%9Astavn%C3%AD_st%C3%AD%C5%BEnost.
- 23 GOTTWALD, Peter. *Insolvenzrechtshandbuch*, 3rd ed. Munich: C.H. Beck, 2006, p. 3.

into force of the *Konkursordnung* (KO) on October 1st, 1879²⁴. The *Konkursordnung* was one of the four „Reichsjustizgesetze“ which were created to unify the procedural law of the young „2nd German Empire“ that was founded in 1871. Its main goals were the equal treatment of all creditors and to safeguard the social peace not only between debtors and creditors, but also between the individual creditors.²⁵ Interestingly, the initiative for a unified Insolvency Law first came from the merchants, who triggered a legislative initiative of the *Bundesrat* (the Federal States' representative body), which asked Chancellor Bismarck to have a unified Insolvency Code drafted.²⁶ The drafters decided for a system of a state-monitored self-administration of the creditors, and thereby chose for a combination between the two models that mainly inspired them – that was the Spanish system and the one that was used by some Upper-Italian municipalities. The first draft of 1873 even contained a legal institution pretty similar to what we today know as reorganization, the so-called „Sanierungsverfahren“, which however did not become part of the *Konkursordnung* as it was enacted by the Parliament on December 21st, 1876.²⁷ From 1927 on, this statute was complemented by the *Vergleichsordnung* (VerglO),²⁸ which provided a procedure by which the creditors could agree on a work-out of the debtor and thereby avoid the opening of insolvency proceedings. The *Konkursordnung* and the *Vergleichsordnung* were applied on insolvency cases that occurred on the territory of the old West German states until 31 December 1998.

Latest reforms

“Bankruptcy of the bankruptcy” was the famous slogan that was used to describe the situation of German Insolvency Law in the 1980s and 90s. That was the time when more than two

24 See idem, p. 5-6.

25 HÄSEMEYER, Ludwig. *Insolvenzrecht*. Cologne/Munich: Carl Heymanns, 2007, p. 67.

26 PAPE, Gerhard, UHLENBRUCK, Wilhelm. *Insolvenzrecht*. Munich: C.H. Beck 2002, p. 29-30.

27 Idem.

28 Official Gazette Reichsgesetzblatt I (1927), p. 139.

thirds of the insolvency requests were rejected because the assets were too marginal to cover even the estimated costs of insolvency proceedings.²⁹ Consequently, instead of undergoing regulated and judge-monitored proceedings of assets allocation, most debtors shut down their businesses without judicial control of the allocation of assets.³⁰ That opened a wide space for the debtors to evade their obligations, by stashing away assets before and after the moment of becoming insolvent. Thereby they could harm their creditors without being held to account for breach of law and undue enrichment of themselves or third persons. Therefore, from the 1970s on – that was the time when West Germany felt the consequences of its first post-war economic downturns³¹ - it was undisputed among experts that the old system of the *Konkursordnung* no more fulfilled its task of organizing the financial breakdown of debtors and efficiently mitigating the creditors' losses and inequities.³²

That is why in 1978 the federal government appointed a commission of experts to draft a new Insolvency Code. The commission presented its final results in 1986. Political disputes and the German reunification process however delayed the coming-into-force of the new Insolvency Code until January 1st, 1999. The Code's main achievements are a unified procedure on individual and company bankruptcies, the implementation of reorganization proceedings as a legal instrument that is tantamount to the liquidation proceedings, the introduction of a market-oriented system of bankruptcy resolution and the possibility of the discharge of residual debts (fresh start principle).³³

The new Czech Insolvency Code came into force on July 1st, 2007 and was since then

29 GOTTWALD, Peter. *Insolvenzrechtshandbuch*, 3rd ed. Munich: C.H. Beck, 2006, p.10.

30 WEBER, Friedrich. *Contribution to 'Festschrift Einhundert Jahre Konkursordnung'* 1977. Cologne: Arbeitskreis für Insolvenz- und Schiedsgerichtswesen e.V. Köln, 1977, p. 334.

31 See the numbers of economic development in post-war Germany on http://upload.wikimedia.org/wikipedia/commons/8/8d/Wirtschaftswachstum_Deutschland.JPG.

32 Compare GOTTWALD, Peter. *Insolvenzrechtshandbuch*. 3rd ed. Munich: C.H. Beck, 2006, p. 10.

33 Compare PAPE, Gerhard, UHLENBRUCK, Wilhelm. *Insolvenzrecht*. Munich: C.H. Beck 2002, p. 15-17.

changed 14 times.³⁴ Before the reform, the Czech Republic had a statute of 1991 called “law of bankruptcy and composition”³⁵ which had just about a fifth of the length of the current Insolvency Code. It was drafted shortly after the fall of communism in order to have a basic legislation on a field which was actually unregulated since 1951, when the prewar bankruptcy code³⁶ was suspended by the communist regime.³⁷ The 1991 bankruptcy code was drafted to solve the failure of small businesses with a very limited number of creditors, but didn't manage to provide a procedure that could cope with insolvency cases that had a large number of creditors or contained complicated legal issues. The new Insolvency Code was meant to fill that gap by giving much more detailed instructions on the conduct of the insolvency proceedings (434 sections instead of 73 sections in the 1991 code) and installing organs of creditors' representation and shifting responsibilities from the courts to the Insolvency Administrator and creditors' organs.³⁸

The Czech legislator was guided by several other modern insolvency codifications that had already brought practical experiences. Firstly, the U.S. Bankruptcy Code of 1978 which contains many principles that were adopted not only by national legislations, but also by the community legislations such as the Council Regulation on Insolvency Proceedings,³⁹ brought an input to the Czech Insolvency Code.⁴⁰ Additionally, the German Insolvency Code as well as its long preceding legislative discussions also served as an important source of inspiration for the Czech legislator.⁴¹

34 See introduction to the Czech Insolvency Code, law No. 182/2006 coll. in the version of March 2012.

35 Zákon o konkurzu a vyrovnání, No. 328/1991 coll.

36 Law No. 64/1931 Coll., zákon o konkurze, vyrovnání a odporování.

37 HOLEČEK, Jakub. *Postavení finančních institucí v novém insovenčním zákoně v kontextu úpravy komunitárního práva, praktická právní příručka*. Praha: Linde, 2009, p. 25-26.

38 See idem, p. 26.

39 Council Regulation (EC) Nr. 1346/2000.

40 HOLEČEK, Jakub. *Postavení finančních institucí v novém insovenčním zákoně v kontextu úpravy komunitárního práva, praktická právní příručka*. Praha: Linde, 2009, p. 27.

41 TARANDA, Petr. Postavení věřitelů v režimu insolvence dlužníka ve světle německé právní úpravy. *Právní rozhledy*, 2008, No. 6, pp. 202-210.

Statistical data show that the German insolvency reform brought some measurable success. Whereas in the years before the implementation of the 1998 Insolvency Code more than 70% of all insolvency requests were rejected due to a lack of assets,⁴² this level considerably decreased afterward. In 2010, only 12 770 out of 168 458 insolvency requests were rejected due to the lack of assets,⁴³ which makes a quota of only 7,6%. However only 1,3% of all insolvency requests were solved by the procedure of reorganization, so that this new legal institution cannot be deemed to be widely accepted in the German practice so far. The overall number of insolvency requests however did not significantly grow with the implementation of the 1998 German Insolvency Code.⁴⁴

This last point is different in the Czech insolvency system. With the introduction of the 2007 Insolvency Code, the number of insolvency requests increased from 3918 in 2003⁴⁵ to 24 353 in 2011.⁴⁶ A problem in the Czech system however is that a very high number of cases are pending for a very long timespan⁴⁷ and thereby do not only consume a high proportion of the insolvency estate, but also decrease the public legitimacy of the whole proceedings, since no creditor can be expected to be confident in proceedings that give him the perspective of having to deal with his debtor's affairs for almost a decade.

42 See GERMAN FEDERAL BUREAU OF STATISTICS, *Yearbook of statistics 1998*, p. 138.

43 See GERMAN FEDERAL BUREAU OF STATISTICS, *Yearbook of statistics 2011*, p. 497. Available online under https://www.destatis.de/DE/Publikationen/StatistischesJahrbuch/StatistischesJahrbuchKomplett.pdf?__blob=publicationFile.

44 INSTITUT FÜR MITTELSTANDSFORSCHUNG. *Die Entwicklungen des Insolvenzgeschehens seit 1995, IfM-Materialien 148*. Bonn: Institut für Mittelstandsforschung, 2001 p. 18.

45 HOLEČEK, Jakub. *Postavení finančních institucí v novém insovenčním zákoně v kontextu úpravy komunitárního práva, praktická právní příručka*. Praha: Linde, 2009, p. 24-25.

46 Note however also that the numbers of insolvency requests of 2011 were not only effected by the economic and financial crisis that started in 2008, but also by the fact that there were 17600 individual insolvency requests in, whereas the option for individual insolvency requests didn't exist before 2007. The number of legal persons' insolvency requests was 6753 which means an increase of 72% compared to 2003. For the statistical data see http://www.tyden.cz/rubriky/byznys/cesko/pocet-insolvenčních-navrhu-loni-vzrostl-o-vice-nez-polovinu_221589.html.

47 It used to be 9 years in 2005, compare <http://www.konkursni-noviny.cz/clanek.html?id=1329>, HOLEČEK speaks about 9,2 years in his book that was published in 2009, however not indicating the date of the presented data, see HOLEČEK, Jakub. *Postavení finančních institucí v novém insovenčním zákoně v kontextu úpravy komunitárního práva, praktická právní příručka*. Praha: Linde, 2009, p. 24-25.

We can conclude that the Czech reform of insolvency law was made out of mainly the same motivation as the German insolvency law – which was to create a modern system of insolvency resolution that can exercise more judicial control over the economic failing of businesses than the old system could do. In both countries, the systems of insolvency resolution had been at a point when profound changes were urgently needed in order to cope with the challenges of modern commercial reality. Additionally, both reforms introduced legal institutions that were first invented in the U.S. Legal culture – such as the insolvency of individuals and the procedure of reorganization of businesses. In both jurisdictions, the effects of the system change can be measured by statistical data. The Czech reform provided a steep rise of insolvency cases, and the German reform brought a considerably lower rate of insolvency requests that were rejected due to the lack of assets.

2. The contest of insolvency claims in the Czech Republic and Germany

The determination of insolvency claims is one of the most sensitive parts of the insolvency proceedings: The final list of claims decides about the allocation of the insolvency estate, and the registration of non-existing claims means just as much a legal wrong as the unjustified rejection of existing insolvency claims. That is why the procedure on the registration and rejection of insolvency claims not only needs to be transparent to the creditors, but also requires the option for a judicial review. On the other hand, the procedure of the determination of claims may also not be too costly in terms of time and money, because this can consume too much of what can be distributed to the creditors (think of the 'bankruptcy of the bankruptcy' problem). The following chapter will analyze how the German and the Czech legislators approach this crucial issue.

2.1. The procedure

In the Czech Insolvency Code, the provisions on the contest of insolvency claims can be found under General Part Subchapter V, which is titled „the creditors and the exercise of claims“. In the German Code, it can be found in Part 5 Chapter 1, which is titled “determination of claims” and contains provisions that are dealing only with this subject-matter.

When we take a closer look at the procedural steps that the two legislations require in order to determine the insolvency claims, they turn out to be very similar. In both systems, the debtor is obliged to provide the court all available information about his legal obligations and the names of his creditors.⁴⁸ According to this information the court determines the date and the

48 Compare §§ 20, 97, 98, 101 InsO versus § 104 IZ.

participants of the first creditors' meeting⁴⁹ in which the creditors and the insolvency administrator get together in order to decide about the future of the insolvency proceedings. At this point, the creditors determine whether to go the path of reorganization or liquidation of the debtor. Then, after the expiration of the deadline for the registration of claims,⁵⁰ there is the second mandatory meeting (verification meeting)⁵¹ that deals with the verification of the by then registered claims.⁵² In the more frequent case of liquidation proceedings, the verification meeting has to take place between one week and two months after the expiration of the deadline for the registration of claims.⁵³ The main purpose of the verification meeting is to give the creditors an opportunity to challenge unjustified insolvency claims and to defend themselves in case that their own claims are contested by the administrator, the debtor or another creditor.⁵⁴ It is then the Insolvency Court's task to decide about the legitimacy of the contested claims and – if necessary – order evidence to be taken about the facts in dispute. The dates of the meetings are in both systems determined by the Insolvency Court.

Like in any other German creditors' meeting (§ 74 InsO), all creditors as well as the members of the creditors' committee and the debtor are entitled to take part at the verification meeting, whereas only the insolvency administrator is obliged to participate. The debtor is not obliged to participate, but can be forced to do so by the mechanisms of §§ 97, 98 InsO. At the Czech verification meeting - as defined by § 190 IZ - all creditors are entitled to participate, whereas not only the administrator, but also the debtor is obliged to take part and has to receive an official court notification of the meeting's date and place (§ 190 (2) IZ). The German concept

49 The InsO calls this meeting „report meeting“, while there is no legally defined term in the IZ, compare § 29 InsO vs. § 137 IZ.

50 Compare § 28 (1) InsO vs. § 136 (3) IZ.

51 This meeting is defined as „Prüfungstermin“ by § 29 (1) Nr.2 InsO, while the IZ calls this meeting „přezkumné jednání“, see for example § 190 IZ. Both terms can be translated into English by the words „verification meeting“.

52 Note that the debtor's insolvency is published in the Insolvency Court's official gazettes and websites and that thereby also those creditors which the debtor missed to report get the opportunity to learn about the debtor's insolvency and the deadline for the registration of claims.

53 Compare § 29 (1) Nr. 2 InsO with § 137 (2) IZ.

WIESER, Raimund. *Online-Insolvenzrechts-Ratgeber*. Gauting: conjus GmbH, 2012. Online available under http://www.insolvenzrecht-ratgeber.de/insolvenzrecht/verfahren/index_05.html.

has the advantage that it avoids unnecessary delay of proceedings in case of the debtor's absence, which is – especially in individual insolvency cases – not an improbable event. Still, if the court deems the debtor's presence to be necessary, he can be forced to attend the creditors' meeting.

§ 176 InsO determines the agenda of the verification meeting just very briefly: The claims are verified according to their amount and rank. § 191 IZ sets up a similar procedure as § 176 InsO, since it requires a verification of the claims according to the claims register.

The legal preconditions for the “determination of claims” is also very similar in both legal systems. According to § 178 InsO, a claim is determined when in the verification meeting neither the insolvency administrator nor one of the creditors object against it, or such an objection is „removed“. § 201 (1) IZ lists up four optional conditions that lead to the determination of a claim in the Czech insolvency proceedings: A claim is determined when neither the administrator nor one of the creditors have taken use of the possibility to challenge it, or if the court rejects a creditor's challenge or decides about its existence, amount or ranking. Hence, there is no difference in the legal term of the “determination” of a claim, either.

2.2. The “preliminary contest” - a model for the Czech system?

Since the time plan is very tight and the filed insolvency claims can be of large numbers, the German legal practice developed an instrument to give the administrator more time in case that he doesn't manage to form an opinion on all claims until the verification meeting. The instrument is called “preliminary contest of claims”, and it has been recognized by case law although it is not based in any provision of the Insolvency Code.⁵⁵ If the administrator does

⁵⁵ See BUNDESGERICHTSHOF, decision published in Zeitschrift für das gesamte Insolvenzrecht 2006, p.320, OBERLANDESGERICHT MÜNCHEN, decision published in the same periodical 2005, p.778;

not manage to examine all the claims until the examination meeting, he declares the “preliminary contest”. By doing so, the administrator formally fulfills his obligation to make a statement concerning the claim in the verification meeting, however indicating that his statement is not final. If the administrator had not this option, he would need to contest the unexamined claim. The creditors of the contested claims then would need to file a lawsuit against the administrator's decision in order to avoid the non-registration of their claim.⁵⁶ The administrator would then find time to examine the claims and in most cases recognize their existence. The court which already compiled records about the contest would then close the file and impose the court fees upon the insolvency estate.

The “preliminary contest” therefore avoids lawsuits, but also bears the danger of procrastination of the proceedings and is controversial because the law does not provide for such an instrument. The German courts are relatively tolerant concerning this practice. With the aim to mitigate the number of litigation concerning contested insolvency claims, German courts even accepted several subsequent postponements of verification meetings due to preliminary contests.⁵⁷

The “preliminary contest” so far does not exist in the Czech judicial practice, and the literature does not discuss such an instrument either. Thus it is questionable if the Czech insolvency proceedings should adopt this instrument in order to achieve its advantages.

Surely, also the Czech system will face the problem that in comprehensive cases the administrator is not able to examine all insolvency claims until the court-determined

OBERLANDESGERICHT HAMM, decision published in the same periodical 1999, p. 352; see also HERCHEN, Axel in SCHMIDT, Andreas. *Hamburger Kommentar zum Insolvenzrecht*. Münster: LexisNexis Deutschland, 3rd edition, 2009, pp. 1616 et seq.

56 Compare SPECIOVIUS, Detlef in BRAUN, Eberhard. *Insolvenzordnung*. 4th ed., Munich: C.H. Beck, 2010, pp. 1105-1106.

57 Idem.

verification meeting with due diligence. However, in my view, the preliminary contest of claims is not the best way to solve that problem. Its disadvantages are legal uncertainty about several issues: Firstly, how long is the period in which the administrator may decide whether he wants to recognize or finally contest the claim? In this period, the effected creditor has no certainty about the future of his claim, although the verification meeting had already taken place and although the law provides for a contest in the verification meeting at the latest. Secondly, can the creditor also sue against the preliminary contest in case of undue delay of a decision about his claim? This as well as the rather theoretical questions about the legal nature of the preliminary contest remains so far unanswered.⁵⁸

Hence, I think that in respect of the issue of the administrator's capacity overload, Germany cannot give a model for the Czech legislation. In my view, the solution to this practical problem should be found on the level of procedural law, and not by creating a new legal instrument without foundations in the Insolvency Code. Because of the lack of the creditors' right to contest insolvency claims, the administrator has an even higher responsibility to examine the claims with due diligence and care. That needs time and - due to a big workload in a complicated case – might even not be finished by the date of the verification meeting. Putting pressure on the administrator to finish on time will have objectionable consequences concerning his level of care and diligence. Therefore, an instrument to deal with this problem is needed.

In my opinion, the problem should be solved by an official postponement of the verification meeting instead of the preliminary contest. If the administrator doesn't manage to give a statement concerning all the insolvency claims that were reported to him, he should request to delay the verification meeting as a whole, or to interrupt the verification meeting in order to continue it after a period that is long enough to give him the opportunity to carefully examine

58 NOWAK, Barbara in KIRCHHOF, Hans-Peter, LWOWSKI, Hans-Jürgen, STÜRNER, Rolf. *MünchKommZurInsolvenzordnung*. Munich: C.H. Beck, 2002, Vol. 2, p. 1126.

the insolvency claims. This has the advantage of avoiding all legal uncertainties that the preliminary contest implicates: Firstly, the unexamined claims are not “contested” at all and no legal remedy can be used against this action. Secondly, every creditor knows the exact date when he can expect the administrator's decision about his claim. And finally, this solution avoids also all uncertainties about the legal qualities of such a preliminary contest and promotes the coherence of the system of insolvency resolution by restraining from using legal instruments that neither the general law of civil procedure nor the Insolvency Code expressly accepts.⁵⁹

2.3. The two main risks for creditors in the procedure of determination of claims

The legitimate creditor's interest in the insolvency proceedings as a whole is easy to describe: He wants to have as much money as quickly as possible. The determination of claims bears some risks for the satisfaction of this desire. Firstly, if unsubstantiated claims are accepted and considered in the distribution procedure, the proportion of the insolvency estate of which the legitimate creditor is entitled decreases. Secondly, if his claim is unlawfully rejected, he receives nothing from his claim, but bears the costs of participating at the insolvency proceedings. And finally, if the proceedings themselves come too costly and take too long, there is nothing left from the insolvency estate that could (at least partly) satisfy the creditors' claims. The judicial instruments that serve to control the first two risks can lead to the realization of the third risk: If the measures to grant the fair determination of claims get too complex and expensive, then they might eat up a big part of the insolvency estate and become therefore economically useless.

⁵⁹ See also the recommendation of HERCHEN, Axel in SCHMIDT, Andreas. *Hamburger Kommentar zum Insolvenzrecht*, 3rd ed. Münster: LexisNexis Deutschland, 2009, p. 1617.

To face **the first of the mentioned risks**, the two insolvency codes provide the possibility for judicial review of the filed insolvency claims. § 178 (1) InsO explicitly grants the creditors the right to contest the other creditors' insolvency claims during the verification meeting. Those creditors who do not take part at the verification meeting are represented by the insolvency administrator who is obliged to account for the creditors' interest in the proceedings of the determination of claims. Also the Czech system provides the creditors a right to request for judicial review of other creditors' insolvency claims. However, this right did not go unchallenged during the last years: The original version of the 2006 Czech Insolvency Code expressly excluded the creditors' right to contest other creditors' insolvency claims in § 192 (1) IZ.⁶⁰ Under this version of the Insolvency Code, the Czech creditors' possibilities to control the risk of the registration of unjustified insolvency claims were very limited. They could only carefully watch the administrator's assessment of claims, inform the administrator about their concerns, and finally request the administrator's dismissal according to § 29 IZ.⁶¹ Additionally, the creditors could use their right to claim damages from the administrator in case that he violates the standard of professional diligence⁶² and if the creditor suffered an individual financial damage, § 37 IZ.⁶³ Several constitutional complaints were filed against the cutback of creditors' rights,⁶⁴ until the Czech Constitutional Court reinstalled the creditors' right to contest claims by a decision of July 1st, 2011.⁶⁵ The Court declared the lack of this right a violation of the right of legal procedure as guaranteed by

60 See for example KOTOUČOVÁ, Jiřina a kolektiv. *Zákon o úpadku a způsobech jeho řešení (insolvenční zákon)*, 1st ed., Prague: C.H. Beck, 2010, pp. 416-417 (§ 192 IZ).

61 Idem.

62 SICKLINGER, Stephan. *Das neue tschechische Insolvenzrecht aus Sicht des deutschen Gläubigers*. Jena: JWV Jenaer Wissenschaftliche Verlagsgesellschaft, 2009, pp. 68ff.

63 ZELENKA, Jaroslav a kolektiv, *Insolvenční zákon, poznámkové vydání s důvodovou zprávou a nařízením Rady ES 1346/2000*, 2nd ed., Praha: Linde, 2008, p. 84.

64 KOTOUČOVÁ, Jiřina a kolektiv. *Zákon o úpadku a způsobech jeho řešení (insolvenční zákon)*, 1st ed., Prague: C.H. Beck, 2010, p. 417 (§ 192 IZ).

65 Constitutional Court of the Czech Republic, decision reference number PL ÚS 14/2010, Czech version available under <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=66774&pos=1&cnt=4&typ=result>.

Article 36 (1) of the Czech Charter of Basic Rights and Freedoms, and declared the old version of § 192 (1) IZ invalid by March 31st, 2011.

Still, even after the reintroduction of the creditor's right to contest insolvency claims in Czech Republic, the proceedings to enforce this right remain different from their German counterpart. As in Germany, it is the two creditors that are parties of the lawsuit on the existence, amount or ranking of the claim. However, § 200 (2) IZ requires the contesting creditor to file a claim at the insolvency court three days before the verification meeting, while the German contesting creditor only needs to declare his contest on the verification meeting and wait until the contested claim's creditor takes action to enforce his claim by filing a lawsuit against the contest. That means that the German contesting creditor can stay passive until the contested claim's creditor files a lawsuit and pays the requested advance on court fees. In addition, the contesting Czech creditor even needs to determine the reason for his contest from the very beginning (§ 200 (2) IZ), while in the German proceedings, the reasoning of the contest does not become relevant before the time when the lawsuit is pending at the insolvency court.⁶⁶

Therefore we can conclude that the Czech Insolvency Code sets higher procedural demands to creditors who contest other creditors' claims. The contesting creditor's legal position in the Czech system is therefore a little weaker than in the German system.

Against **the second of the above-mentioned risks** – the unlawful rejection of creditors' insolvency claims by the administrator – it is also judicial control that provides an instrument to protect the creditors.

Under German law, the creditor needs to sue for the registration of his claim against the

⁶⁶ Compare SCHUMACHER, Robert in KIRCHHOF, Hans-Peter, LWOWSKI, Hans-Jürgen, STÜRNER, Rolf. *Münchener Kommentar zur Insolvenzordnung*. Munich: C.H. Beck, 2002, Vol. 2, p. 1158.

person who objects against the claim's registration, § 179 (1) InsO. In the Czech system, it is also the creditors who need to take action in case their claim is contested. § 198 IZ gives them a deadline of 30 days after the verification meeting (respectively 15 days after the delivery of the contest notification according to § 197 (2) IZ) to file their claim at the insolvency court.⁶⁷ However, the Czech literature and case law is very fragmentary concerning the procedure that governs the dispute about a contested claim, and there is no information to be found concerning the legal nature of such a lawsuit on the contest of an insolvency claim.

In this respect, German legal scholars and jurisprudence are a step further. They have developed a sophisticated dogmatic system concerning the procedure of registration and contest of insolvency claims. Under German law, the procedure on the contest of claims is a *declaratory action*⁶⁸. In these terms, the creditor's aim of the lawsuit is to receive a judicial confirmation of the existence of his creditor's right in the insolvency proceedings. § 182 InsO also supports this assumption: In order to calculate the value in litigation and the court fees, § 182 InsO expressly refers to the amount that the claim is expected to achieve in the distribution of assets, and not to the nominal value of the contested claim.⁶⁹ The German concept understands the insolvency claim as a “subjective liability right”. The right to seek settlement from the insolvency estate is the procedural right to take part at the distribution proceedings, and it is congruent to the original claim neither in its legal meaning nor in its economic value.⁷⁰ By the opening of the insolvency case, the original claim gets “frozen”⁷¹

67 Compare also KOTOUČOVÁ, Jiřina a kolektiv. *Zákon o úpadku a způsobech jeho řešení (insolvenční zákon)*, 1st ed., Prague: C.H. Beck, 2010, p. 418 (§ 192 IZ).

68 The German term is „Feststellungsklage“, compare SCHUMACHER, Robert in KIRCHHOF, Hans-Peter, LWOWSKI, Hans-Jürgen, STÜRNER, Rolf. *MünchKommInsolvenzordnung*. Munich: C.H. Beck, 2002, Vol. 2, p. 1157 (§179 Rz. 5).

69 Idem.

70 Idem, p. 1158.

71 ECKART, Diederich. *Kölner Schrift zur Insolvenzordnung, das neue Insolvenzrecht in der Praxis*, 2nd ed.

and an independent right to participate in the proceedings as an insolvency creditor comes into being. Through the procedure of claims determination, the “participation right” again turns into a right for a payment of a certain amount of money. This amount depends on the total amount of insolvency estate and stands in relationship to the claims of the other creditors (*par conditio*). The creditor's abstract liability right⁷² turns again into a concrete right for the payment against the insolvency estate. The insolvency claim is examined as a whole and concerning all legal reasons of its existence, amount and ranking. The parties of the lawsuit are obliged to present the facts of the case, but the court is free to find its conclusion on any legal ground that it deems applicable.⁷³

It is questionable whether the German concept can be followed by the Czech courts. Although the general principles concerning the presentation of facts and the burden of proof are similar,⁷⁴ the specific provisions of the Czech Insolvency Code provide one significant difference from the specific German and Czech provisions: The last sentences of §§ 194 and 195 as well as § 196 (1) IZ make a clear distinction between the contest of the amount and the contest of the ranking of a claim. § 196 (1) IZ says that “*the contest of the amount of the claim has no influence on its ranking. The contest of the ranking of the claim has no influence on the existence or amount of the claim*”. This is a clear legislative statement against an overall examination of the claims regardless of the reason for their contest. The German insolvency court will examine the claim concerning all legal aspects, including a possible invalidity due to the provisions on fraudulent transfers⁷⁵. Surely, like in any other German

Herne/Berlin: Verlag für Rechts- und Anwaltspraxis, 2000, p. 744.

72 The paper will use this term as translation for the German term „abstraktes Haftungsrecht“.

73 Compare § 139 of the German Code of Civil Procedure, for a brief description of those principles of German civil procedure see also <http://www.lexexakt.de/glossar/darlegungslast.php>.

74 Compare § 79 (1), § 101 (1) and § 120 (1) of the Czech Code of Civil Procedure, see also http://www.sagit.cz/pages/lexikonheslatxt.asp?cd=151&typ=r&levelid=oc_077.htm.

75 Robert SCHUMACHER, Robert in KIRCHHOF, Hans-Peter, LWOWSKI, Hans-Jürgen, STÜRNER, Rolf. *Münchener Kommentar zur Insolvenzordnung*. Munich: C.H. Beck, 2002, Vol. 2, p. 1158 (§ 179 Rz. 8).

civil lawsuit it is the parties who need to present the facts that speak in favor of their request or defenses,⁷⁶ and the court is only obliged to ensure that the parties “amend by further information the facts that they have asserted only incompletely”.⁷⁷ But it is the court's task to draw its own legal conclusions from the presented facts, independent from what legal opinions the parties are advancing during the lawsuit.⁷⁸ This is why the German insolvency court can take into account all legal aspects of a contested insolvency claim – and does not need to leave aside the law of fraudulent transactions.

The Czech court on the other hand is bound to examine only the particular question that was posed by the contesting party concerning *either* the claim's existence *or* amount *or* ranking. Under this precondition, the court does not decide about the creditor's subjective right as a whole, but just about a particular quality of that right. Therefore, many answers that the German concept on the procedure of the contest of insolvency claims provides cannot be used in the proceedings governed by the precondition set by the Czech Insolvency Code.

Despite of this, I propose to follow the German general concept of insolvency claims also for the Czech legal order. It helps not only to deal with the practical questions of value in litigation and court fees, but also enables the courts to develop coherent concepts of the matter in dispute, phrasing of petitions and decisions as well as the competence of courts. Even though the Czech Insolvency Court's decision on the insolvency claim is narrower and reduced to just one aspect of the claim's nature, it still remains a decision about the content of the creditor's right to participate at the procedure of the distribution of assets. By qualifying

76 This is the principle of party representation (German: “Verhandlungsgrundsatz”) which governs the German law of Civil Procedure.

77 § 139 (1) of the German Code of Civil Procedure, see the official English version on http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0547.

78 Note that the German courts are – unlike for example the courts in the Romanic legal cultures – not bound by any of the legal opinions that the parties presented. This is part of the principle ‘iura novit curia’ and governs all civil proceedings in Germany.

the lawsuit about the contest as a declaratory action, the Czech courts can resort to well-established rules of procedure⁷⁹ instead of developing a legal device sui generis which will be a source of legal uncertainty just as the current situation in which the basics of the contest procedures are not determined at all.

⁷⁹ The Czech term for declaratory action is “určovací žaloba“. An elaborate analysis of this legal instrument can be found in KOSTÍK, Radim. *Určovací žaloby, Rigorózní práce*. Brno: Masarykova Univerzita, Katedra občanského práva, 2008, online available under http://is.muni.cz/th/41762/pravf_r/?lang=en;id=160032.

3. The concepts on the contest of (fraudulent) debtor's transactions

3.1. The legislative challenge concerning the avoidance of fraudulent transactions

The insolvency proceedings secure the insolvency estate from the opening of the insolvency case. Insolvency law enjoins the debtor from disposing of his assets, and the automatic stay⁸⁰ prevents the creditors from seeking settlement by foreclosure and compulsory execution.

Before the opening of the insolvency case, however, the debtor is a private player in a free market economy and contributes to the economic circulation of goods, services and capital. This circulation is based on the premise that contractual promises are binding and that everybody can keep what he lawfully acquired. Hence, any retroactive invalidity of transactions that were lawfully conducted bears a potential danger for the free flow of the exchange of goods and capital. The legislator's intention to avoid this danger is the reason why legal acts that were conducted before the opening of the insolvency case are generally valid even though they might entail a shortage of the debtor's assets: If a retroactive challenge of the debtor's transactions was too easy, this would create a level of legal uncertainty that would not only harm bona fide businesses partners, but also the economy as a whole. Therefore, the legal possibilities for the retroactive annulment of transactions are designed to be exceptions from the general rule that the legal order protects holders of lawfully acquired rights. On the other hand, however, a creditor who transfers his assets without (proper) consideration, who wastes his assets for private consumption or satisfies only creditors that are urging him or to which he has a close relationship, severely harms the bona fide creditors

⁸⁰ What is widely known as the automatic stay in the U.S. is called “Vollstreckungsverbot” by the German version, and “prohibition of execution” by the official English version of § 89 InsO. It prohibits the creditors to execute into the insolvency estate or the debtor's other property during all the insolvency proceedings.

who were - before insolvency - relying on the creditor to perform his promised contractual obligations, and who - after insolvency – may expect at least to receive an appropriate proportion of the insolvency estate.

That is why the legislators created the rules for the contest of “fraudulent transactions”. They cautiously intervene into the principle of legal stability in order to create substantive justice in favor of the creditors. In order to draw a sharp line between transactions that can be retrospectively contested and those that cannot, the legislators implemented detailed provisions that define the conditions for the contest of creditors' pre-insolvency transactions.

3.2. The German and Czech concepts of the contest of fraudulent transactions

The German chapter on the contest of debtor's transactions in insolvency proceedings (§§ 129-147 InsO) starts with a comprehensive clause which sets up the two basic requirements for the successful contest of debtor's transactions. A transaction made by the debtor prior to the opening of the insolvency proceedings which is disadvantaging the creditors may be contested by the insolvency administrator if one of the specific conditions of the following provisions (§§ 130-146) is fulfilled. The first alternative contest criteria is a “precursor of insolvency”⁸¹, which is namely the debtor's insolvency or an insolvency petition: the sections 130-132 InsO deal with the contest of claims under this main criterion. The second alternative contest criteria is the transaction beneficiary's malice, § 133 InsO. The third alternative criterion is the gratuitous character of a transaction, § 134 InsO.

81 GOTTWALD, Peter. *Insolvenzrechtshandbuch*, 3rd ed. Munich: C.H. Beck, 2006, p. 774.

The provisions concerning the first criterion (“precursor of insolvency”) have the rationale that the recipient of a transaction who knows or is supposed to know about the forthcoming insolvency, is not deemed to have good faith in the consistency of the transaction. The German legislator makes a differentiation between “congruent” (§ 130 InsO) and “incongruent” (§ 131 InsO) transactions. A transaction is congruent if the recipient was legally entitled to the granted settlement or security. It is incongruent if the recipient was not entitled to such a settlement or security at the time of the transaction.

In case of a *congruent transaction*, the law always requires the creditor's active knowledge about either the debtor's illiquidity or the request to open insolvency proceedings for a successful contest. An *incongruent* transaction can be contested when it was made during the last month prior to the request to open insolvency proceedings, or – secondly – if it was made up to three months prior to the request to open insolvency proceedings in case that the debtor in fact was already insolvent at the date of the transaction, or – thirdly – also if it was made up to three months prior to the request to open insolvency proceedings in case that the creditor was aware of the disadvantage to the insolvency creditors.

All *incongruent* transactions that were made during the last month before the opening of the insolvency proceedings can be contested, as well as those that were made within two months before the opening in case of the debtor's illiquidity. Transactions that were made up to three months before the opening of the proceedings can be contested in case of the beneficiary's awareness of the disadvantages to the creditors arising from the transaction.⁸²

In case of the *debtor's intention to harm the creditors*, the transaction can be contested even if it was made up to ten years prior to the request to open insolvency proceedings if – as an additional condition for this contest - the creditor is aware about the debtor's bad faith.⁸³ An

⁸² § 132 InsO.

⁸³ § 133 InsO.

onerous contract between the debtor and a person with whom the debtor has a *close relationship* can be contested when it directly constitutes a disadvantage for the creditors, and if the creditor cannot prove that the transaction was made more than two years prior to the request to open insolvency proceedings or that he was not aware of the debtor's bad intention. The meaning of the term 'close relationship' is defined in detail by § 138 InsO.

In case of a *gratuitous benefit* which is beyond the scope of a usual casual gift of minor value, the transaction can be challenged if it was made up to four years prior to the request to open insolvency proceedings.⁸⁴

Further on, a transaction may be contested if it granted a security to *partner's loan replacing equity capital* to the debtor company within the last ten years before the request to open insolvency proceedings, or which granted a settlement within the last year before the request to open insolvency proceedings.

Also the Czech provisions on the avoidance of fraudulent transactions start with a comprehensive clause: § 235 (1) IZ declares every legal transaction as void which “shortens the possibility of settlement of the creditors or privilege some creditors at the expense of others”.

After four sections concerning procedural and technical issues (§§ 236-239 IZ), the Czech Insolvency Code names the three substantive alternatives under which a transaction can be contested. Firstly, § 240 IZ names the conditions under which transactions *without appropriate consideration* can be contested. According to paragraph 2, only “transactions that the debtor made in the period since his insolvency and those that led to insolvency” are meant by this provision. Transactions can be contested in case that they were made within one year

84 § 134 InsO.

before the opening of the insolvency case, or – when the transaction's beneficiary has a close relationship or is affiliated with the debtor - within three years before the opening of the insolvency proceedings.

Secondly, § 241 IZ names the conditions under which debtor's transactions that *privilege* one of the creditors to the detriment of the other insolvency creditors can be contested. Like in § 240 IZ, it shall apply also only on “transactions that the debtor made in the period since his insolvency and those that led to insolvency”. § 241 (3) IZ further gives examples of privileging transactions: the performance of a debt before its due date, the negotiation of a change in an existing obligation which is disadvantageous for the debtor's estate, and debt cancellation or a security agreement in favor of a creditor without a due factual reason are considered to be privileging transactions. The privileging transactions can be contested in case they were conducted up to one year or - in case of the beneficiary's close relationship or affiliation to the debtor - up to three years before the opening of the insolvency proceedings.

Lastly, § 242 IZ determines that transactions by which the debtor *willfully* meant to impede the settlement of a creditor can be contested if it was conducted within the last five years before the opening of the insolvency proceedings and the beneficiary knew about the debtor's malice. In case of close relationship or affiliation, this knowledge is assumed according to § 242 (2) IZ. The term of persons with close relationship to the debtor is defined by § 116 of the Czech Civil Code.⁸⁵

3.3. Analysis

If we compare the substantive conditions for the contest of debtors' transactions, we can see several parallels, but also differences between the two national legislations. Firstly, both

⁸⁵ Compare KOTOUČOVÁ, Jiřina a kolektiv. *Zákon o úpadku a způsobech jeho řešení (insolvenční zákon)*, 1st ed., Prague: C.H. Beck, 2010, p. 540.

statutes provide that transactions by which the debtor willfully disadvantages his creditors can be contested, when also the transaction's beneficiary is aware of the debtor's intention or if the beneficiary cannot rebut the statutory presumption of his awareness.

While the German Insolvency Code classifies between transactions to which the debtor was legally obliged (congruent) and those to which the debtor was not obliged (incongruent), the Czech Insolvency Code knows the categories of transactions that do not have an adequate consideration and those that privilege some creditors to the detriment of others.

The policies concerning the time limits within which the debtors' transactions can be challenged differ slightly. In the German system, no transaction can be contested which was made more than three months before the request to open the insolvency proceedings, unless there was bad faith of the debtor or the transaction was gratuitous or the transaction's parties had close personal or business relations. Regarding these time limits, the Czech Insolvency Code is more tolerant: In case of a lack of (proper) consideration or in case of privileging transactions, the debtor's transactions can be contested if they were made not earlier than one year prior to the opening of the insolvency proceedings. The beneficiaries of those debtor's transactions hence have a considerably longer period of uncertainty whether they can keep what they acquired. Under specified conditions however⁸⁶, the German statute allows transactions to be challenged that were made up to ten years before the opening of the proceedings, while no Czech transaction can be contested that was made more than five years before the opening of the insolvency proceedings.

3.4. Several ambiguities in the Czech Code

The wording of the Czech provisions on the avoidance on debtor's transactions leave a few questions unanswered.

⁸⁶ See supra p. 28.

Firstly, § 235 (1) IZ states that “*Ineffective* are transactions by which the debtor shortens the creditors' possibilities to settlement or privileges some creditors to the detriment of others.” [emphasis added].⁸⁷ The second paragraph states however that “*the ineffectiveness* of the transactions *is based on the Insolvency Court's decision* (...) of the Insolvency Administrator's lawsuit by which the debtor's transactions were contested” [emphasis added]. The wording of the provision therefore leaves open if the transactions' ineffectiveness is already given ab initio by statute or needs to be declared by the insolvency court.

Secondly, for a successful contest of a claim, the Czech code requires that the transaction was either made in the time after the opening of the insolvency proceedings, or that the transaction '*led to insolvency*'.⁸⁸ There is no answer to the question what this criterion means in the Czech literature⁸⁹. A narrow interpretation is the literal understanding of the term '*led to insolvency*', in which the transaction is seen as a *conditio sine qua non* that caused the debtor's insolvency. This interpretation however would exclude any smaller transaction which is not economically important enough to cause the debtor's insolvency on its own. A very wide interpretation of the term however would lead to the complete irrelevance of the criterion, since any transaction which is economically disadvantageous to the debtor could be deemed to have '*led to insolvency*'. Since the debtor's economic disadvantage of the transaction is a condition to any of the alternative contest reasons of §§ 240-242 IZ, the criterion '*led to insolvency*' cannot be deemed to have such an intent. The criterion also cannot mean to set a time limit, since the time limits in which the transactions can be contested are determined by § 240 (3), § 241 (4) and § 242 (3) IZ.

87 The Czech original wording of § 235 (1) s. 1 is: „Neúčinnými jsou právní úkony, kterými dlužník zkracuje možnost uspokojení věřitelů nebo zvýhodňuje některé věřitele na úkor jiných.“.

88 The Czech original version speaks about a “právní úkon, který vedl k dlužníkovu úpadku“, which literally means „a transaction which led to the financial collapse.“.

89 See for example KOTOUČOVÁ, Jiřina a kolektiv, pp. 531 et seq.

These ambiguities cannot be solved by seeking for advice in the German system either.

Concerning the first of the mentioned issue, the German Insolvency Code's concept is too different. It says that debtor's transactions *may be contested*⁹⁰ by the insolvency administrator. The insolvency administrator's declaration of contest voids the debtor's transaction. The administrator then has to sue against the transaction's beneficiary in case that the latter is not willing to pay the transaction's benefits into the insolvency estate.⁹¹ The Czech ambiguous wording however does not give space for the adaption of this concept.⁹²

To dissolve the second ambiguity of the Czech Code – the requirement that a transaction '*led to insolvency*' –, a look into the German system cannot help either, since the German Insolvency Code does not contain any term or requirement which is similar. The Czech legal literature and case law should discuss and dissolve these ambiguities in the future.

3.5. Proposal for a checklist

Since this paper means to be a contribution to enhance the practical applicability of the Czech Insolvency Code, it will make a proposal for a checklist that can be used by practitioners in order to quickly find a precise answer to the question of whether a debtor's transaction can be contested. German jurists use this kind of checklist in order to be able to easily locate legal problems and to visualize the structure of complicated legal norms.⁹³ In order to let the Czech system also benefit from this technique, I propose the following checklist:

90 This wording can be found in §§ 129 (1), 130 (1), 131 (1), 132 (1), 133, 134 (1), 135, 136 (1), 145 and 147 (1) InsO.

91 The beneficiary is of course then also entitled to receive back what he gave in exchange for the debtor's transaction under the law of undue enrichment, §§ 812 et seq. of the German Civil Code (BGB). For an overview of the German contest of debtor's transactions see also ZENKER, Wolfgang. Geltendmachung der Insolvenz- und der Gläubigeranfechtung. *Neue Juristische Wochenschrift* 2008, pp. 1038–1042.

92 See supra p.

93 See for example GOTTWALD, *Insolvenzrechtshandbuch*, 3rd ed. Munich: C.H. Beck, 2006, pp. 808-809.

Conditions for the contest of a debtor's transaction:

1. General criteria for the contest of transactions
 - a) Debtor's transaction before the opening of the insolvency proceedings
 - b) disadvantage for the other creditors
 - shortening of the creditors possibilities for settlement or
 - privileging one creditor to the detriment of the others
2. The three alternative particular reasons for the contest of transactions (§§ 240-242 IZ)
 - a) Contest because of the lack of appropriate consideration
 - gratuitous transaction OR lack of appropriate consideration
 - made at the time of insolvency OR 'led to insolvency' OR beneficiary is a person with close relationship to the debtor
 - transaction was made within three years before the opening of the insolvency proceedings in case of persons with close relationship OR within one year in all other cases
 - b) Contest because of privileging one creditor on the expense of the others (§ 241 IZ)
 - some creditor(s) receive a higher settlement than others
 - creditor(s) receive more than they would in liquidation proceedings
 - this happens at the expense of the other creditors
 - made at the time of insolvency OR 'led to insolvency' OR beneficiary is a person with close relationship to the debtor
 - transaction was made within three years before the opening of the

insolvency proceedings in case of persons with close relationship OR
within one year in all other cases

- c) Contest because of willful shortening of the other creditors' settlement (§ 242 IZ)
- shortening of the creditors' settlement
 - willful intent
 - beneficiary's awareness of debtor's intent OR presumption of beneficiary's awareness OR beneficiary is a person with a close relationship to the debtor

3.6. Does the Czech Republic lack an equivalent of the German *Anfechtungsgesetz*?

A debtor may be unable to pay his debts, but insolvency proceedings do not take place – for example because the expected costs of the proceedings exceed the debtor's assets. For this situation, the German *Anfechtungsgesetz*⁹⁴ contains a set of provisions which allow the creditors to contest debtor's transactions that unduly impede the creditor's settlement in the way of ordinary judicial execution. There are three groups of transactions that can be contested: Firstly, transactions that were made with the debtor's intention to disadvantage a creditor can be contested if the beneficiary was aware of the debtor's intention.⁹⁵ The second group concerns contracts with persons to which the debtor has a close relationship.⁹⁶ Thirdly,

94 This term can be best translated by „law of contest“. Since the historic origin of the law dates back until 1879 and it has a specific content which is not directly comparable to any legal term of English language, this paper will use the German term.

95 § 3 (1) AnfG.

96 § 3 (2) AnfG.

gratuitous transfers can be contested.⁹⁷ By the contest, the creditor can achieve to get access to a certain asset that the debtor transferred to a third person (beneficiary), and use the asset for the purpose of his settlement by judicial execution. The roots of this German legislation date back until 1879,⁹⁸ and the creditors' possibilities of contest were considerably widened by the coming-into-force of the current statute together with the German Insolvency Code on 1 January 1999.

A Czech equivalent can be found in the general part of the Civil Code.⁹⁹ § 42a ObčZ is a brief section which allows creditors to contest a debtor's transaction that shortens the creditor's settlement. There are two groups of transactions that can be contested not more than three years after they were made: Firstly, transactions which the debtor made with the intention to shorten the creditor's settlement, if the transaction's beneficiary was aware of this intention. Secondly, transactions which the debtor made with or to the benefit of persons with whom he had a close relationship, with the exception of cases in which the beneficiary could not know about the debtor's intention.

We can conclude that the basic structures of §§ 3 and 4 AnfG and the Czech § 42a ObčZ are very similar. However, the Czech provision is very brief and doesn't contain any details concerning for example its relationship to insolvency law,¹⁰⁰ the contest of transactions against the debtor's legal successor¹⁰¹ or its precise legal consequences¹⁰².

Interestingly, the new Czech Civil Code that will come into force on April 1st, 2014¹⁰³ doesn't

97 § 4 (1) AnfG.

98 HUBER, Michael. *Anfechtungsgesetz (AnfG)*. 10th ed. Munich: C.H. Beck, 2006, pp. 7-8.

99 Law No. 40/ 1964 Coll., last amended by Law No. 28/2011 Coll.

100 Compare §§

101 Compare § 15 AnfG.

102 Compare § 11 AnfG.

103 Law No. 89/2012 Coll. The code's text was first published in the internet in March 2012, and by the submission date of this thesis no scientific sources concerning the completely new draft of the Czech Civil Code was yet available.

contain any provision which is comparable to § 42a of the current Civil Code.¹⁰⁴ Since the substantive Czech Civil Law is at the moment in a period of profound reforms, the issue of how the contest of debtor's transactions outside of insolvency proceedings will be approached by future legislation deserves our curiosity. There are currently no public sources that can tell if the Czech legislator is planning to implement a code which has a similar concept as the German *Anfechtungsgesetz* or the Austrian *Anfechtungsordnung*,¹⁰⁵ or if the legislator aims to find another solution for the replacement of § 42a ObčZ. Therefore, it is better not to make suggestions for legal solutions now, since the Czech legislator can be expected to present his own answers within the period until the coming into force of the new Civil Code.

¹⁰⁴At least the author could not find any similar provision by scanning the new code with diligence.

¹⁰⁵See for example http://www.jusline.at/Anfechtungsordnung_%28AnfO%29.html.

4. Conclusions

The history of Czech and German Insolvency Law shows remarkable parallels. Before the recent insolvency reforms, both systems had been at a point where profound changes were urgently needed to meet the challenges that modern business reality provides. Both reforms managed to achieve measurable changes in insolvency practice.

The procedural steps of the verification and contest of insolvency claims are very similar in the Czech and the German systems. However, when contesting an insolvency claim, the Czech creditors need to commit themselves to the contest of either the existence, the amount or the ranking of the claim from the beginning, whereas the German creditors do not have to make such a commitment. This weakens the Czech creditors' competences for the contest of other creditors' claims in comparison to the German creditors. The concept of “preliminary contest” of claims in Germany serves to deal with the Insolvency Administrator's capacity overload, but a solution to this problem should be found in Czech Republic by using the instrument of a postponement of the verification meeting instead of adapting the German concept. The Czech system however should adapt the German concept that considers the insolvency claims as a participation right in the insolvency proceedings. The Czech system can also use the German approach of classifying the lawsuit on the contest of insolvency claims as a declaratory action, for it can provide coherent legal solutions and avoid future uncertainties.

The structure of the Czech provisions on the contest of debtor's (fraudulent) transactions slightly differ from those in Germany. Whereas the German code classifies between congruent and incongruent debtor's transactions, the Czech code distinguishes the categories of transactions that are lacking a (proper) consideration and those which are privileging some creditors to the detriment of others. The time limits within which a debtor's transaction can be

contested follow different concept as well. The Czech code is ambiguous about whether a debtor's transaction which fulfills the conditions for a contest is void ab initio or whether it is the court's decision that voids the transaction. In addition, the meaning of the requirement that a transaction which was made before the opening of the insolvency proceedings must have 'led to insolvency' to be contestable is not clear either. In order to solve these ambiguities, also the German system cannot give any useful advice. The Czech system has only a fragmentary equivalent to the German Anfechtungsgesetz at the moment, but profound reforms of Czech Civil Law are currently taking place which justify expectations of legislative changes in this field.

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