

CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW



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De Montfort University
United Kingdom

Contact:

Prof. Reinout Vriesendorp
Leiden Law School
PO Box 9520
2300 RA Leiden
The Netherlands

E: info@ceril.eu
W: www.ceril.eu

Date: 24 October 2019
Re: **CERIL STATEMENT 2019-2 on
Reversal of Value Extraction
Schemes**

CERIL highlights that in many jurisdictions in Europe value extraction schemes can be challenged through transactions avoidance laws and other remedies in company law and/or civil law. Generally, national laws provide for sufficient protection against value extraction schemes, however acquiring the necessary information to initiate a claim needs improvement.

Initiated and chaired by Prof Reinhard Bork, University of Hamburg, a CERIL working group¹ dealt with value extraction schemes and their combating in national transactions avoidance laws of the EU Member States. The resulting Report Reversal on Value Extraction Schemes covers fourteen European jurisdictions.

Insolvencies are sometimes caused by shareholders sucking the last valuable assets from their company, only based of the sheer ownership of the shares in the company. It can frequently be observed that investors buy a company in financial distress via share deal and, while feigning a rescue attempt, strip it of its assets and eventually send it into insolvency proceedings. The company is then no longer salvageable, is subject to liquidation proceedings, and creditors will then receive only a small (if any) return of the proceeds.

¹ The group of conferees was chaired by Reinhard Bork (Germany) and Catarina Serra (Portugal). Members of the group are Reinhard Dammann (France), Miodrag Dordevic (Slovenia), Artur Galea Salomone (Malta), Jasnica Garašić (Croatia), Tuomas Hupli (Finland), Ivan Ikrényi (Slovakia), Renato Mangano (Italy), Grégory Minne (Luxembourg), Anders Ørgaard (Denmark), Annina H. Persson and Göran Millqvist (Sweden), Tomás Richter (the Czech Republic), Ignacio Sancho (Spain), Jean Luc Vallens (France), Melissa Vanmeenen (Belgium), Rolef de Weijs (the Netherlands), Oleg Zaitsev (Russia), Kristin van Zwieten (United Kingdom). Contributions came from 13 group members, namely Reinhard Bork (Germany, also reporting on the law of England and Wales), Miodrag Dordevic (Slovenia), Jasnica Garašić (Croatia), Tuomas Hupli (Finland), Ivan Ikrényi (Slovakia), Renato Mangano (Italy), Anders Ørgaard (Denmark), Annina H. Persson and Göran Millqvist (Sweden), Tomás Richter (the Czech Republic), Ignacio Sancho (Spain), Catarina Serra (Portugal), Jean Luc Vallens (France) and Rolef de Weijs (the Netherlands). The author of the text is *Reinhard Bork*, based on input and discussions with all conferees mentioned.

Such value extraction schemes appear in various shapes: (i) shareholders (or other closely related persons) are granted a contract as directors and receive an unusually high salary, (ii) the company pays a “management fee” to the shareholders without them being official directors, (iii) shareholders grant a short term loan with unusually high interest rates which is paid back in the vicinity of the application for, or opening of, insolvency proceedings, (iv) shareholders receive charges over company property for securing such loans, (v) shareholders buy assets for an unusually low price or lease them back for excessive remuneration; etc.

After the opening of insolvency proceedings, Insolvency Practitioners (if necessary by approaching a court) will try to reverse such a value extraction scheme by recollecting unfair advantages from the shareholders, be it by means of transactions avoidance, be it by means of company or general civil law.

The analysis in the Report on Value Extraction Schemes supports the thesis that, in all jurisdictions covered by the survey, value extraction schemes can be challenged through transactions avoidance law, particularly through rules on transactions at an undervalue and on intentionally fraudulent transactions, providing for aggravation to the disadvantage of closely connected parties by extension of suspect periods or by rebuttable presumptions for certain prerequisites such as mental elements or detriment to the general body of creditors. Additional remedies can be found in company law and/or certain rules of general civil law (including tort law), particularly in the rules on directors’ liability. Interestingly, nearly all national reporters feel that their national laws provide for sufficient protection against value extraction schemes already, while the decisive problem can be seen in acquiring the necessary information about the relevant facts rather than in pursuing the claims resulting from these facts.

The full Report is available as Report 2019-2 on CERIL’s website www.ceril.eu. This website also contains information about the organisation of CERIL and its activities.

In the meantime, professor Reinout Vriesendorp, secretary of CERIL (info@ceril.eu), or the Reporter, Prof. Bork (bork@uni-hamburg.de) welcome the opportunity to further inform you about CERIL or the contents of Report 2019-2.

On behalf of the CERIL Executive,

Bob Wessels
Chair