HARMONISATION OF TRANSACTIONS AVOIDANCE LAWS

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HARMONISATION OF TRANSACTIONS AVOIDANCE LAWS

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FOREWORD

Writing a foreword for an academic book is not only a responsibility but also a task which can lead to frustration, especially when the piece is excellent, as is the case here. To honour the job, one needs to read the book thoroughly, to peruse through its pages and reflect on the contributions made by the authors. Inevitably, a myriad of ideas arises, and a will – almost a need – to share one's stream of connections, intuitions, and references with the authors and the readers of this book, emerges. And yet, this is not possible. The foreword must be brief, but brevity does not do justice to good books, and leaves the author of these introductory lines with the sour feeling that all forewords, for all books, are ultimately the same. This should not be true; this book deserves better, because the book is timely, thorough, original, and has a purpose. Allow me a few paragraphs to explain why.

A topic as difficult as this one required very gifted authors. It seems difficult to think of a better pair than the one formed by professors Bork and Veder, who have risen to the challenge in an outstanding manner. But this book also required an excellent network of national experts, and here too the list of contributors is as good as it gets. The book looks like a list of who's who of European insolvency academia.

This is a very European book. It is European because it seeks to inform the process of harmonisation of European law; it is European because of its authors and the jurisdictions analysed; it is European, profoundly European, in its methodology; and it is also European in the proposal. Precisely because it is European in all these ways, the topic is particularly relevant and well chosen. If there is an area of the law where harmonisation at a European level makes sense it is the area of avoidance actions, mostly for three reasons: because it is a highly complex topic where technical guidance is needed; because most countries are bound to have similar factual situations and problems to solve; and, above all, because it is a subject matter which affects legal certainty and the tenure of transactions, and therefore is a matter which has the potential to damage pan-European cross-border investment. Why would someone lend money to businesses in a country when there is uncertainty as to the *ex post* treatment of the loan?

One of the most interesting elements of this book, which makes it stand out from the more ordinary type of insolvency law monograph, concerns its methodology. The description of and reflections on methodology are very

present in the book, filling up almost one third of its words. No doubt the effort is worth it. The authors adopt a "principle-based approach". In short, this means that the analysis starts with a taxonomy of the relevant and accepted general principles of insolvency law, goes on to identify which of those principles are directly applicable to avoidance actions, and uses the result of the analysis to determine policy choices. The use of principles is not, by itself, original; it is the way the principles are used to elevate the analysis over the specific rules of the different jurisdictions that constitutes a resourceful ingenuity. It is, in a way, an instrument to sidestep the main hurdle posed by comparative law analyses, which are all too often inevitably rooted in the egalitarian consideration of all systems involved. By elevating the assessment through principles, the risk of stating – expressly or indirectly – the superiority of one jurisdiction's model over the rest is watered down. The authors must be commended not only for choosing a useful analytical tool, but also for using one which staves off the risk of political vanity, a classic problem in European law-making.

The book includes a two-tiered utilisation of insolvency systems: one, where most of the principles and models originate, concerns what the authors deem the more "representative" systems (Germany, France, UK, US); and the other, which examines the current systems for avoidance of transactions and preferences in 25 European jurisdictions, with data collected through very detailed questionnaires. The analysis has a certain predominance of German law-based reasoning. This should not come as a surprise, since it is the most thoroughly constructed European system, mostly through its overwhelming jurisprudence on the subject. This, however, does not detract from the usefulness of the result. The classic strict "ius-positivistic" approach of German courts – and of the majority of its academics – is on this occasion not a problem, given the very similar type of problem encountered by all jurisdictions in the area of transactions avoidance.

There is also an originality in the form used by the authors to develop the content of the book. Instead of following the more classic structure adopted by transnational law institutions when drafting model laws, the authors discuss each specific topic thoroughly, reach a conclusion, issue a recommendation, and only then a specific article of a model law is proposed. The analysis precedes the result, and not the other way around, and this is because the analysis is the main part of the work, and not only a justification of the result (as is the case for non-academic transnational law instruments, like the model laws of The United Nations Commission on International Trade Law (UNICTRAL) or The International Institute for the Unification of Private Law (UNIDROIT)).

The authors do not avoid complexity. The analysis is granular, all matters are considered, and even the most difficult questions are addressed and resolved. I may disagree with some of their conclusions, but I can only admire their courage in facing every challenge and respect the robustness of the reasoning

underlying each proposal. I could go on for a long time. As I finish this foreword – as I must – I feel the frustration of not commenting on the different proposals. But the reader does not need my input. I would have very little, if anything, to add to the excellent content of this book, which is a great service to European law. We are all indebted to the authors.

Villa Aldobrandini, Rome, September 2021
Professor Ignacio Tirado
Secretary General, The International Institute for the
Unification of Private Law (UNIDROIT)

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