



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Conference Sponsors



HOUTHOFF BURUMA

Our thanks also to INSOLAD – conference supporters

Academic Forum Sponsors

EdwinCoeLLP
LAW FIRM



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



EBRD Insolvency Office Holders Principles

Neil Cooper

June 2008



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 1 - Qualifications

Principle 2 - Appointment

Principle 3 - Review of Appointment

Principle 4 - Removal, Resignation and Death

Principle 5 - Replacement

Principle 6 - Standards of Professional and Commercial Conduct

Principle 7 - Reporting and Supervision

Principle 8 - Regulatory and Disciplinary Functions

Principle 9 - Remuneration

Principle 10 - Release

Principle 11 - Insurance and Bonding

Principle 12 - Code of Ethics



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 1 - Qualifications and Licensing Generally

- Because of the tasks, responsibilities and trust, the Office Holder (**OH**) should have fundamental qualifications, including general ability and intelligence, experience, professional knowledge and good character. Most professions have licensing. OHs should be regarded as a professional body of persons and licensed accordingly
- The law or regulatory framework should provide:
 - qualification of an OH
 - an examination in insolvency law and practice
 - licensing of candidates who meet qualification standards
 - register of licensed/registered OHs
 - requirement for continuing education
 - renewal of license or registration
 - licensing of corporate bodies



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 2 - Appointment in an Insolvency Case

- A predictable and fair process for the appointment of an OH is required
- Accordingly, the law should state:
 - the grounds of ineligibility
 - the body who may appoint
 - in appointment by court, guidelines for selection
 - in appointment by creditors, the manner of appointment
 - in appointment by debtor, the manner of appointment
 - no restriction upon the number of cases



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 3 - Review of OH Appointment

- Process for determining an appointment is transparent and impartial and creditors and debtors, have the opportunity to oppose
- Law should facilitate review of a decision to appoint by:
 - providing grounds upon which appointment may be reviewed
 - providing process for review
 - if appointment is set aside, providing for appointment of another qualified OH



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 4 - Removal, Resignation and Death of OH

- Where parties in interest wish to remove an OH from office and cases in which an OH may wish to retire or may die
- Law should provide for:
 - resignation from office
 - grounds for removal
 - process for removal



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 5 - Replacement of OH

- Where an OH dies, retires or is removed, law should provide:
 - prompt appointment of a new OH
 - new OH is entitled, without delay, to assets, books and records of the debtor
 - new OH is entitled, without delay, to books and records of former OH that concern or are related to the previous conduct of the administration
 - retiring or removed OH must co-operate with and assist new OH



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 6 - Standards of Professional and Commercial Conduct

- Most useful way of establishing and measuring level of performance of OH
- Accordingly, the law should:
 - by primary legislation, provide basic, fundamental standards that are critical to proper professional and commercial conduct on the part of OHs
 - by secondary legislation, provide standards relating to:
 - a) reports
 - b) initial collection and safeguarding assets
 - c) trading of debtor's business subsequent to commencement
 - d) keeping of records
 - e) convening and conduct of creditors meetings
 - f) sale of assets
 - g) opening and operation of bank accounts
 - h) reorganisation plan contents and explanatory memorandum



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 7 - Reporting and Supervision

- Creditors, debtor and others in interest are entitled to be regularly informed about the progress of cases. This also provides a basis upon which the OH may be monitored
- Law should provide:
 - OH provide regular reports progress of cases
 - for appointment of committees of creditors
 - performance of cases to be monitored



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 8 - Regulatory and Disciplinary Functions

- The level of trust, responsibility and work standards, regulation and discipline
- Law should provide:
 - government or other body to have regulatory, investigatory and disciplinary powers
 - grounds on which the conduct of an OH may be investigated
 - powers of a regulatory body, including:
 - a) investigation upon a referral from a court, third party or own motion
 - b) intervene and be heard on any application to a court
 - c) impose disciplinary measures
 - provide that disciplinary powers include power to:
 - a) impose a fine
 - b) suspend license or registration
 - c) terminate registration or license
 - d) require compensation for third parties
 - e) require further education and training



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 9 - Remuneration and Expenses

- The level of reward and manner of determination is critical
- Law should provide:
 - entitlement to remuneration and expenses
 - entitlement may be determined by court or creditors
 - basis of calculating remuneration
 - mechanism for review of determination
 - payment of remuneration out of the estate
 - appropriate level of priority for remuneration



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 10 - Release of OH

- The law should provide that, subject to any objection by a regulatory body or an interested party, an OH may be released from appointment



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 11 - Insurance and Bonding

- The law should require that an OH must at all times maintain a bond or professional indemnity insurance cover to protect third parties against negligence or breach of duty or fraud by an OH



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principle 12 - Code of Ethics

- The law should encourage and facilitate the development of a code of ethics for OHs, preferably through a professional body



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



The Recommendations by the “Uhlenbruck-committee”

**Prof Dr. Ulrich Haas,
University of Zurich**



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Overview

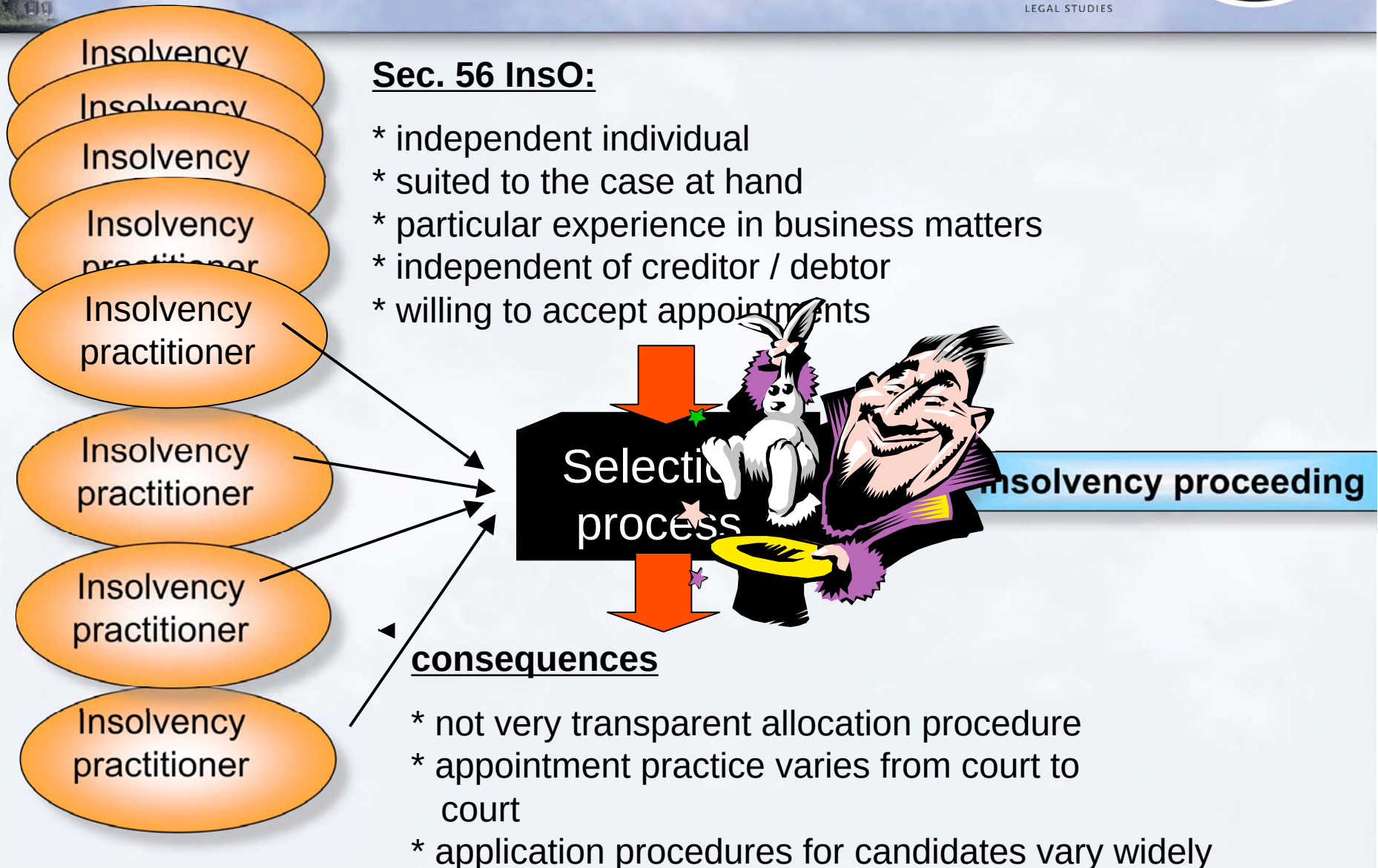
- (1) some background information
- (2) purpose and contents of the recommendations
- (3) the impact of the recommendations in practice





Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency





Joint Insolvency Conference

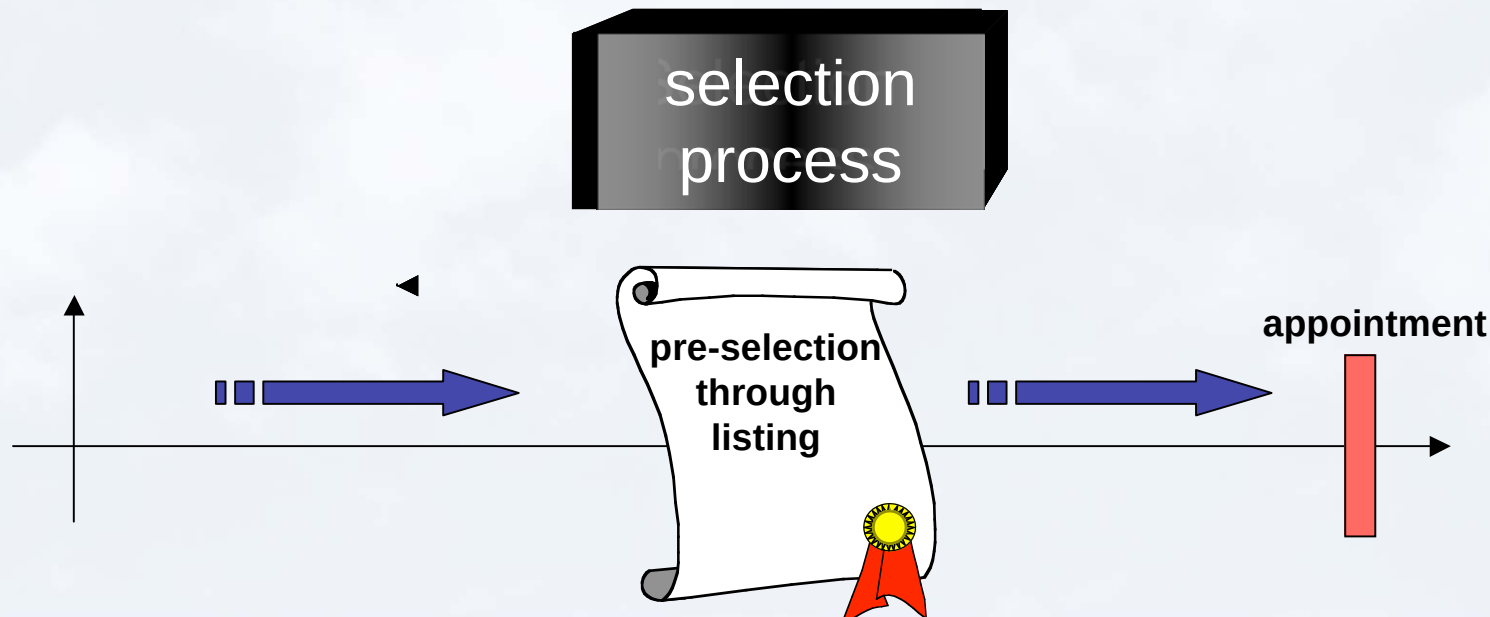
Crossing (Dutch) Borders in Insolvency



German Const. Court (2004 / 2006)

large discretion of judge in the selection process. However, discretion is limited by the following principles:

- fair chance for all applicants
- interests of creditors / debtors (speedy decision, high quality standards, specificity of the case at hand)
- subject to judicial review (balancing interests of all stakeholders)





Joint Insolvency Conference

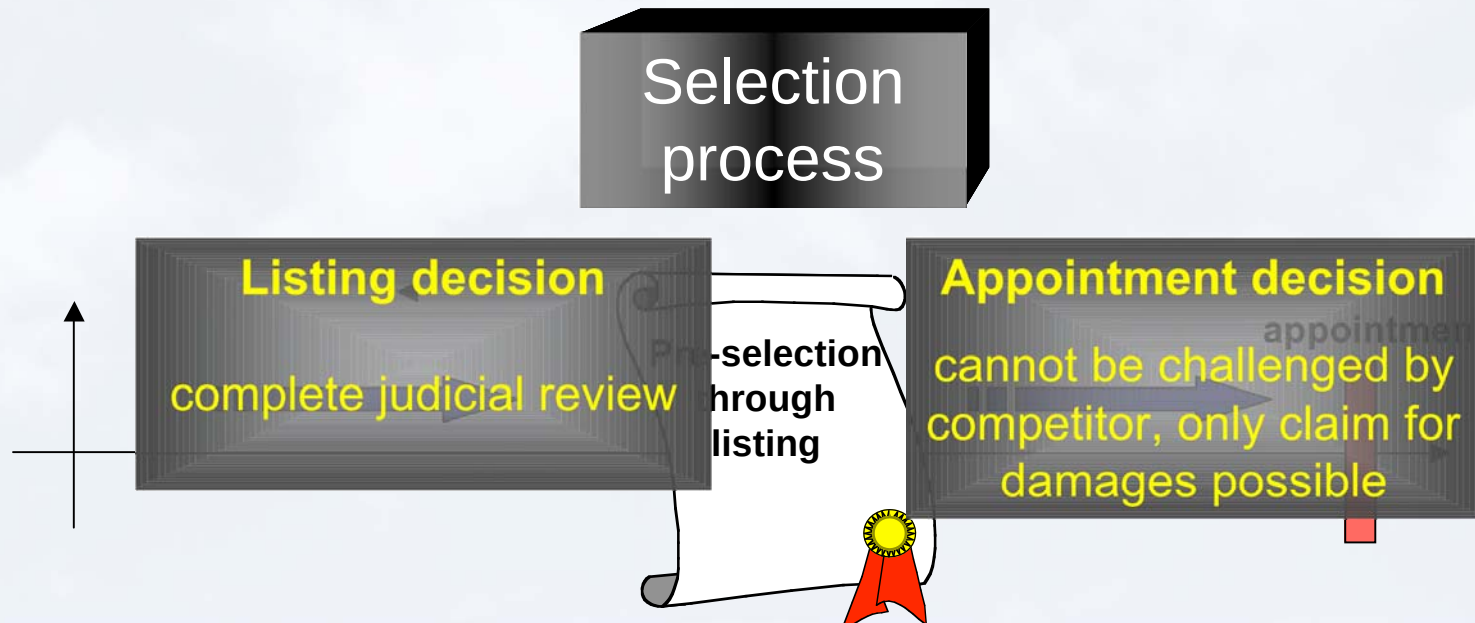
Crossing (Dutch) Borders in Insolvency



German Const. Court (2004 / 2006)

large discretion of judge in the selection process. However, discretion is limited by the following principles:

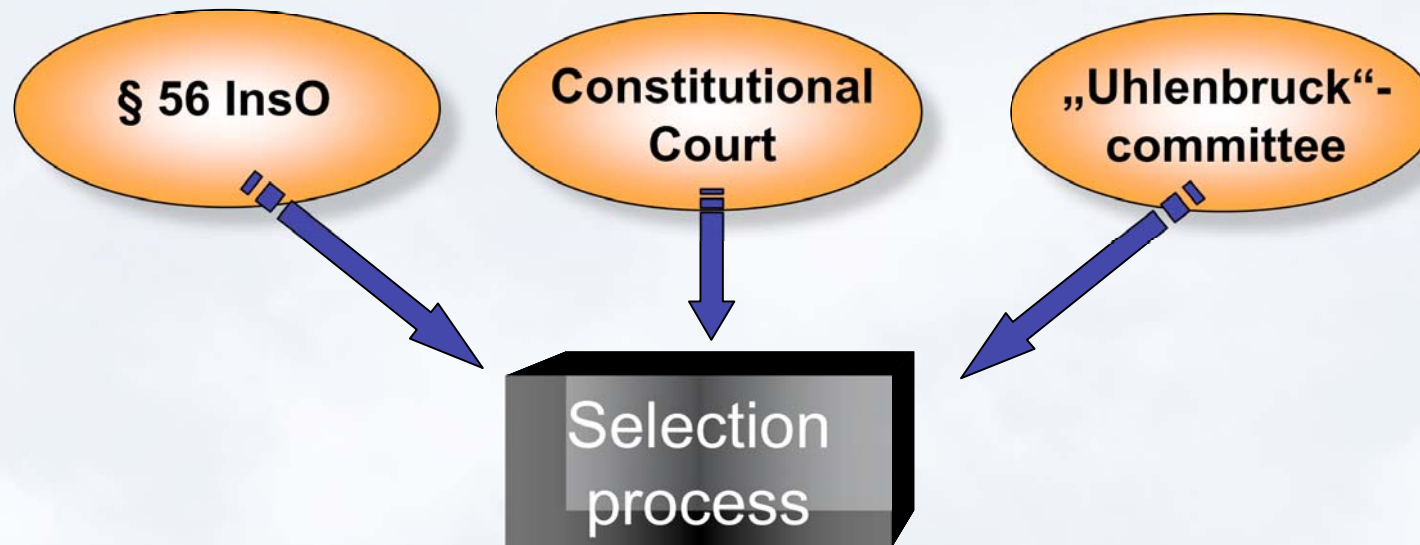
- fair chance for all applicants
- interests of creditors / debtors (speedy decision, high quality standards, specificity of the case at hand)
- subject to judicial review (balancing interests of all stakeholders)





Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



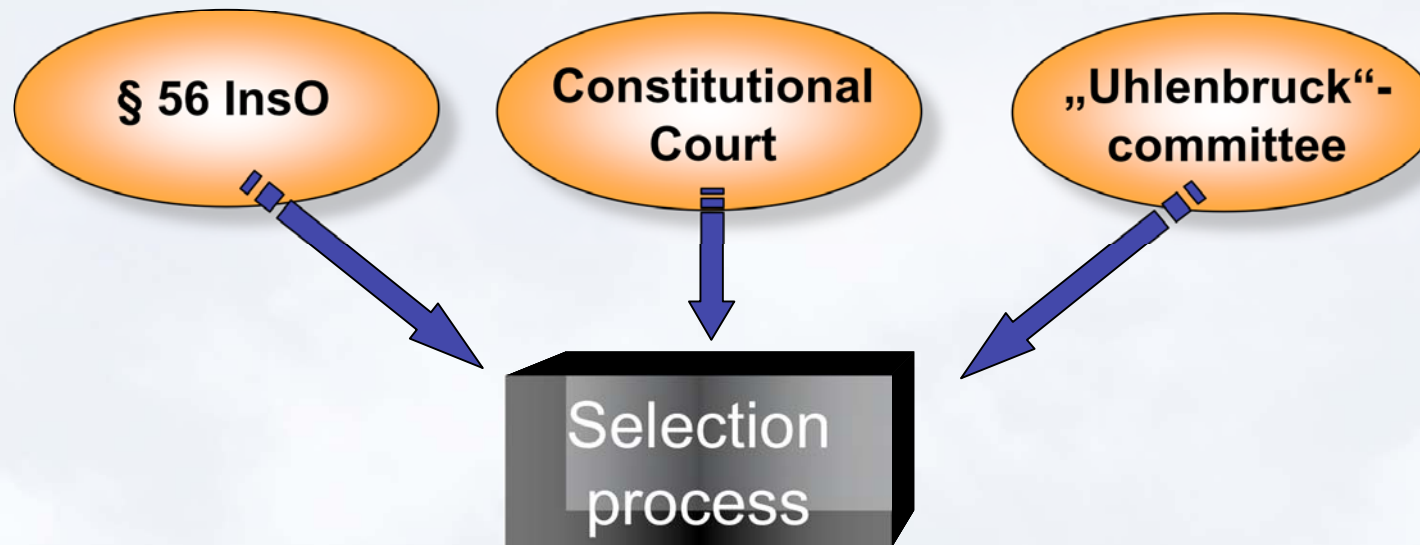
- name
- 33 members representing various groups of stakeholders (creditors, insolvency practitioners, judges, creditors, etc.)
- committee started work in October 2006 and published its recommendations / conclusions in July 2007





Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- Name

goal of Uhlenbruck committee

- 33 members representing the various groups of stakeholders (creditors, insolvency practitioners, judges, creditors, etc.)
- committee started work in October 2006 and published its recommendations in July 2007

- respect independence of judges
- give some guidance in order to achieve uniform standards among insolvency courts

majority decision



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Must lead to a restriction
of the number of
potential candidates

Must be based on
objective and
transparent quality
criteria

professional criteria: Education / (business)
experience

personal criteria: reliability / independence

organisation: insurance / vicinity / equipment / staff

past (success) record:

**not exclusive
list of criteria**

**differentiation
on the list**



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



must lead to a restriction
of the number of
potential candidates

must be based on
objective and
transparent quality
criteria

must follow a process
that respects basic
judicial principles

**system in place to gather all
relevant information**

right to be heard

written and reasoned decision

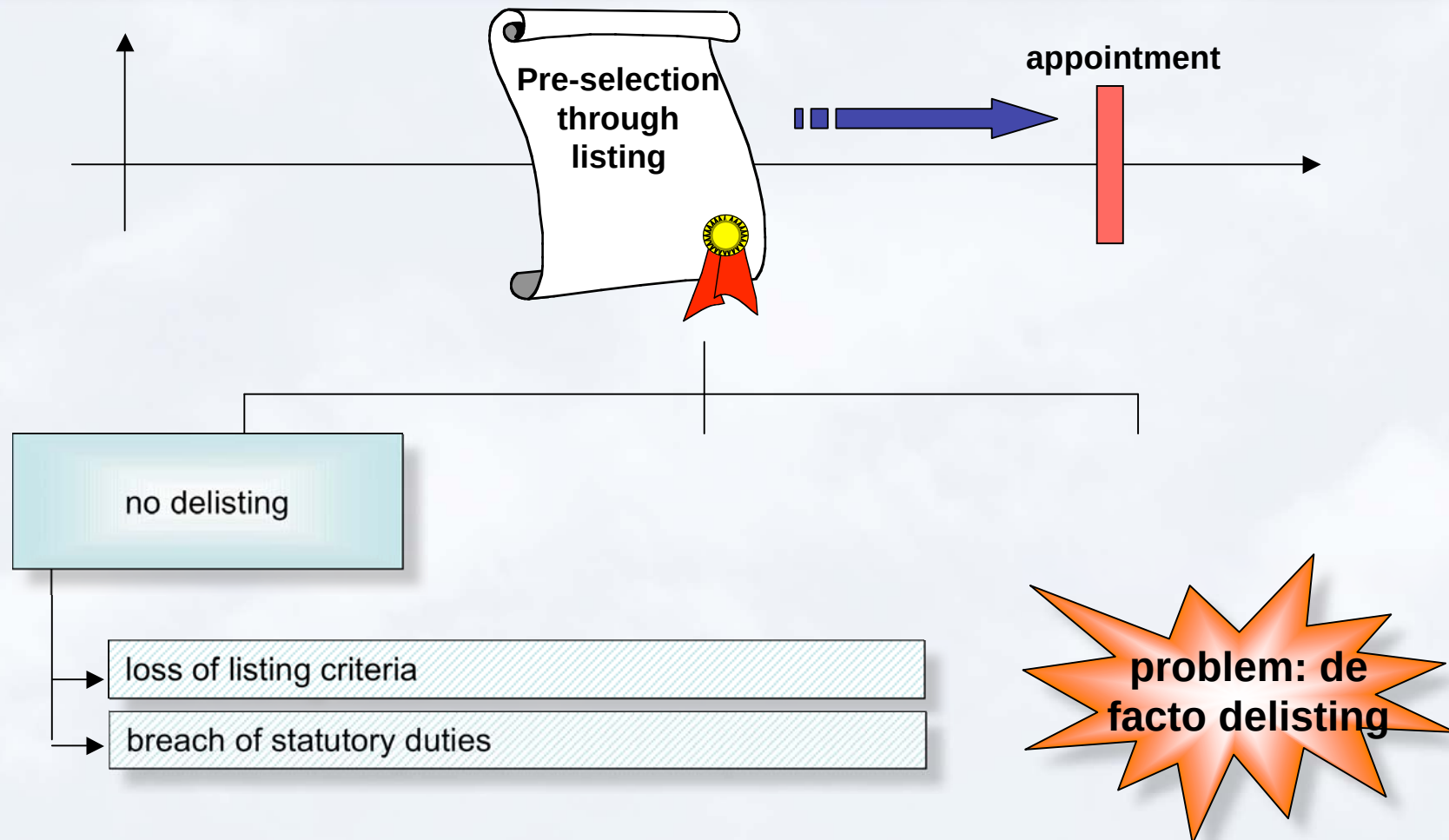
judicial review (right to be listed)

scope of decision is limited to indiv. judge/court



Joint Insolvency Conference

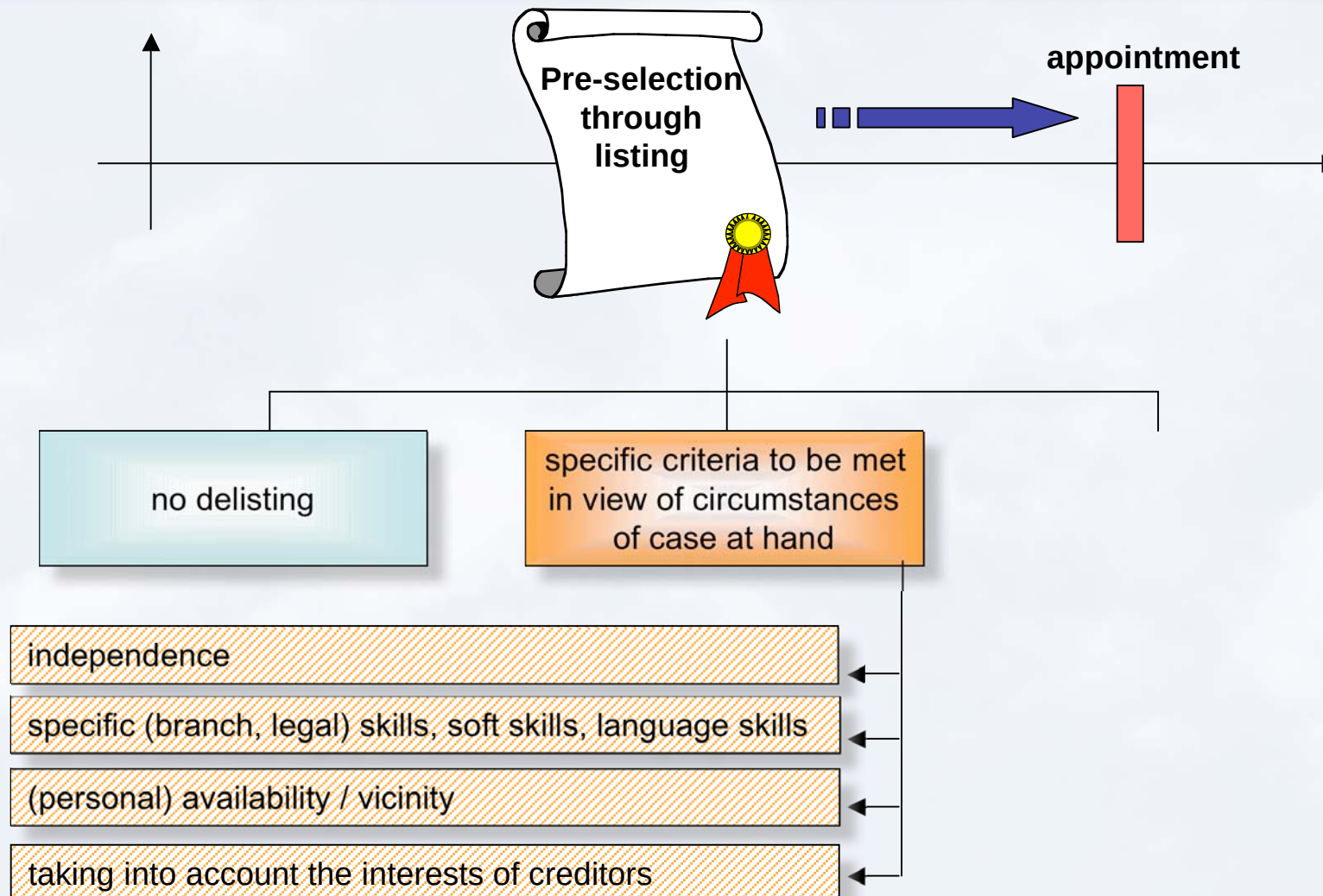
Crossing (Dutch) Borders in Insolvency





Joint Insolvency Conference

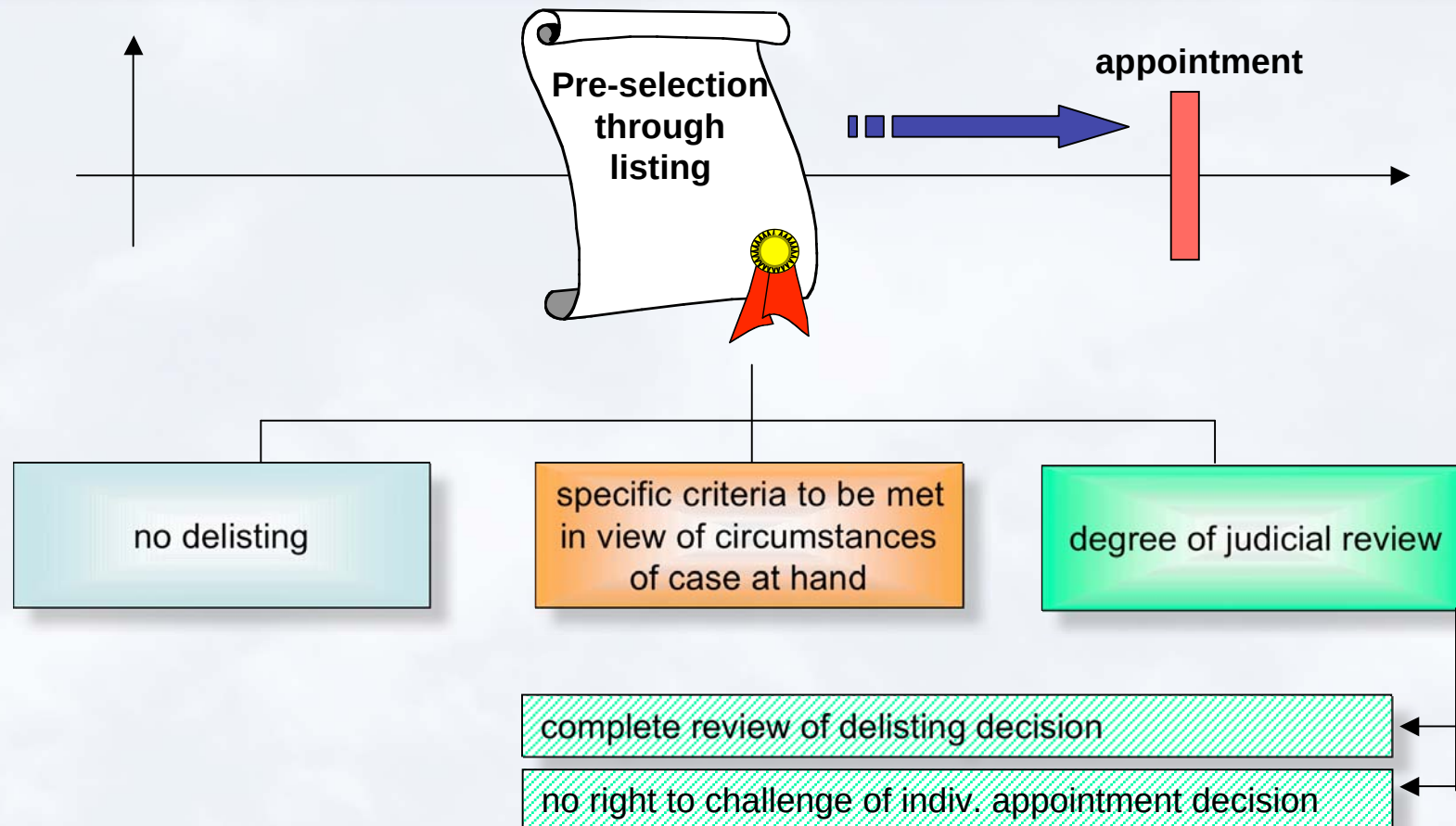
Crossing (Dutch) Borders in Insolvency





Joint Insolvency Conference

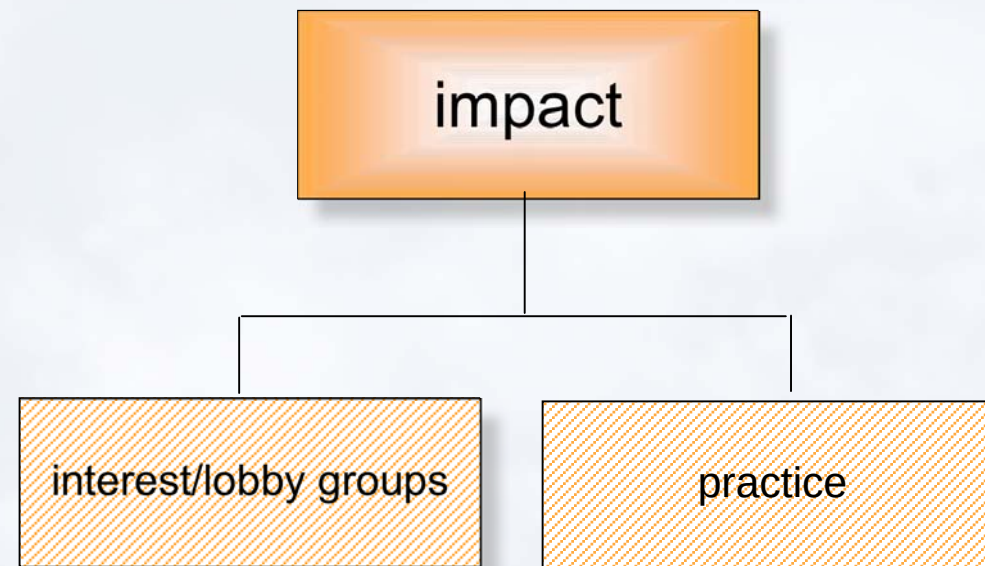
Crossing (Dutch) Borders in Insolvency





Joint Insolvency Conference

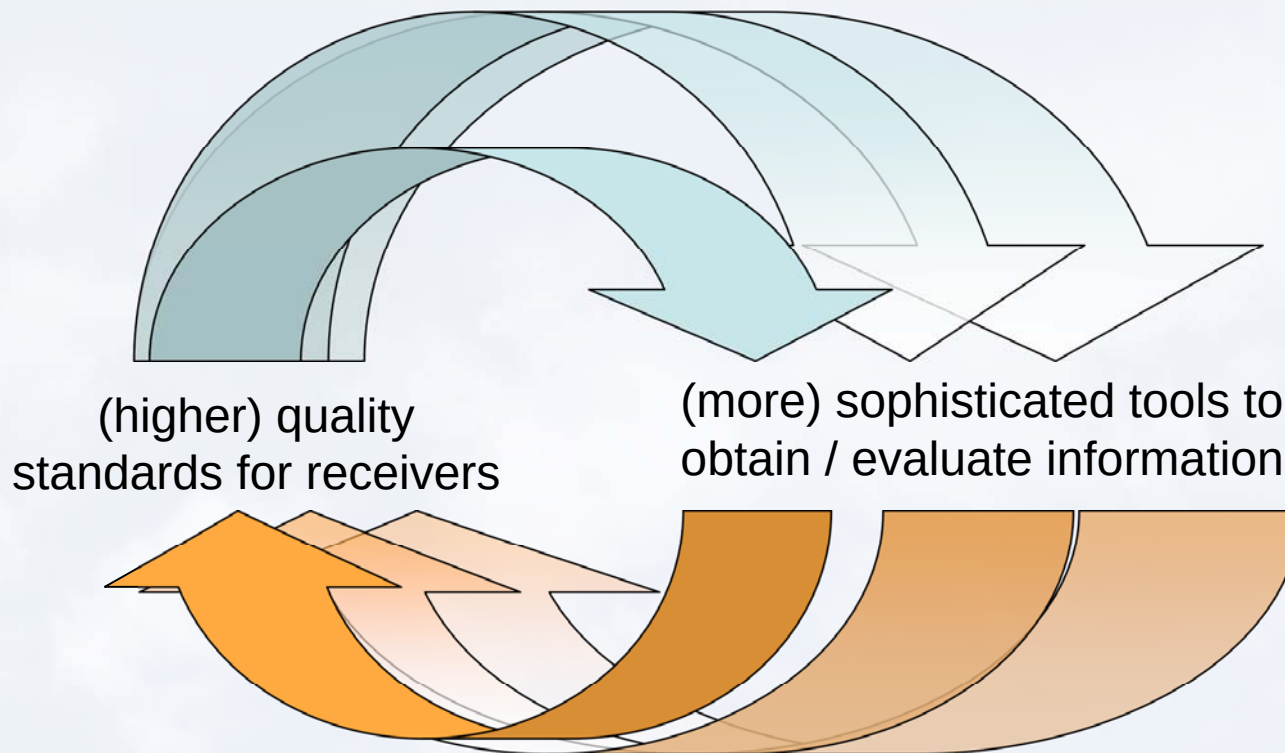
Crossing (Dutch) Borders in Insolvency





Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



**weighting of
criteria**

**higher quality of
judges / court
infrastructure**

**need of external
rating /
certification?**



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Thank you very much for your attention

Prof. Dr. Ulrich Haas
LS für Bürgerliches Recht und Zivilverfahrensrecht
Treichlerstrasse 10/15
CH-8032 Zürich
Email: ulrich.haas@rwi.uzh.ch



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Insolvency Proceedings in the Netherlands (Chapter 10.2)

Martijn Polak



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Issues

- Limited relevance of Chapter 10.2 (*slide 3*).
- Principal rule and exception (*slides 4-7*).
- Specific scope of application of each provision or paragraph (*slides 8-16*).
- Critique of some provisions (*slides 17-19*).
- Conclusions (*slide 20*).



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Limited relevance of Chapter 10.2

- EC Insolvency Regulation prevails over Title 10 “*International Insolvency Law*” (*caveat* in Article 10.1.1).
- Dutch insolvency proceedings are most likely to be opened if the centre of a debtor’s main interests is situated in (a) the Netherlands, or (b) another EU member state, *i.e.*, in cases covered by the EC Insolvency Regulation.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principal rule and exception - 1

- *Principal rule*: Dutch insolvency proceedings, opened on the basis of Article 3 (1) of the EC Insolvency Regulation, claim universal territorial effect (outside the European Union), in particular through Articles 10.2.4-10.2.6.
- Principal rule is not codified in Chapter 10.2.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principal rule and exception - 2

- *Exception*: Dutch insolvency proceedings, opened on the basis of Article 10.2.1 (or on the basis of Article 3 (2) of the EC Insolvency Regulation), claim limited territorial effect, *i.e.*, only affect the debtor's assets located in the Netherlands.
- Exception is codified in Article 10.2.2.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principal rule and exception - 3

- Principal rule is in conformity with case law (HR 15 April 1955 (*Comfin*), NJ 1955, 542) and builds on the EC Insolvency Regulation (Articles 3 (1), 16 and 17).
- Exception builds on the EC Insolvency Regulation (Articles 3 (2), 16 and 17).



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Principal rule and exception - 4

- Principal rule is to be codified in (new) Article 10.2.2, paragraph (1).
- Exception is to be transferred to (new) Article 10.2.2, paragraph (2).



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 1

- Article 10.2.1 (*Jurisdiction*), paragraph (1): Opening of Dutch insolvency proceedings + EC Insolvency Regulation is inapplicable + the debtor is (a) domiciled in the Netherlands, or (b) exercises a profession or a business out of an office in the Netherlands.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 2

- Paragraphs (2) and (3): Opening of Dutch insolvency proceedings + EC Insolvency Regulation is inapplicable + foreign non-EC Insolvency Regulation insolvency proceedings have been recognized as foreign main insolvency proceedings pursuant to Chapter 10.3 + (some of) debtor's assets are located in the Netherlands.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 3

- Article 10.2.2 (*Territorial effect*): Dutch insolvency proceedings opened on the basis of Article 10.2.1.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 4

- Article 10.2.3 (*Notification of creditors*), paragraphs (1) and (2): Any notification pursuant to the Insolvency Act.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 5

- Article 10.2.4 (*Lodging of claims and exercise of creditors' rights*), paragraphs (1) and (3): Dutch insolvency proceedings opened on the basis of Article 3 (1) of the EC Insolvency Regulation + creditor domiciled in non-EU member state **or** Dutch insolvency proceedings opened on the basis of Article 10.2.1 + creditor domiciled outside the Netherlands.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 6

- Paragraphs (2), (3) and (5): Dutch insolvency proceedings (opened on the basis of either Article 3 (1) of the EC Insolvency Regulation or Article 10.2.1) + liquidator appointed in foreign non-EC Insolvency Regulation insolvency proceedings + foreign insolvency proceedings recognized pursuant to Chapter 10.3.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 7

- Paragraph (4): Dutch insolvency proceedings opened on the basis of Article 3 (1) of the EC Insolvency Regulation (= claiming universal territorial effect (outside the European Union)) + foreign non-EC Insolvency Regulation insolvency proceedings (whether or not recognized pursuant to Chapter 10.3).



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 8

- Article 10.2.5 (*Imputation*): Dutch insolvency proceedings, opened on the basis of Article 10.2.1 (*or rather on the basis of Article 3 (1) of the EC Insolvency Regulation?*) + foreign non-EC Insolvency Regulation insolvency proceedings (whether or not recognized pursuant to Chapter 10.3).



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Specific scope of application of each provision/paragraph - 9

- Article 10.2.6 (*Return*), paragraphs (1)-(5): Dutch insolvency proceedings, opened on the basis of Article 3 (1) of the EC Insolvency Regulation (= claiming universal territorial effect (outside the European Union)) + creditor's (in-)direct individual recovery in (non-EU member) state X + recognition of Dutch insolvency proceedings in state X.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Critique of some provisions - 1

- Article 10.2.3: mechanism for notification of creditors in cross-border situations?
- Individual notification or collective notification through Internet and mass media?



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Critique of some provisions - 2

- Article 10.2.4 (1)-(2): provisions/ mechanism for verification + ranking of claims governed by foreign public law?
- Foreign tax and social security claims to be treated on the same footing / with equivalent priority as Dutch tax and social security claims?



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Critique of some provisions - 3

- Article 10.2.6: mandatory character to be replaced by discretionary character?
- Liquidator may welcome individual recovery abroad resulting in proceeds for the Dutch insolvency proceedings, and may wish to compensate/award active creditor out of these proceeds.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Conclusions

- Chapter 10.2 is of limited relevance.
- Principal rule should be codified.
- Specific scope of each of the Articles 10.2.1-10.2.6 makes application of Chapter 10.2 complicated.
- Some modifications/additions necessary.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Foreign insolvencies (section 10.3)

Dr. André Berends



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- Current situation: very limited recognition of foreign insolvencies
- **Section 10.3 PDIA:**
- inspired by UNCITRAL Model Law
- but not identical



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Request by:
 - foreign representative
 - debtor
 - creditor

- **UNCITRAL**

- Request only by:
 - foreign representative



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Both main and non-main

- **UNCITRAL**

- Both main and non-main



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Relief main:

- upon recognition
- not specified

(lex
concursum)

- **UNCITRAL**

- Relief main

- upon recognition (main) ↔
- upon request
- entrusting distribution



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Relief non-main

- ‘Assets removed to NL after opening of insolvency proceeding’

- **UNCITRAL**

- Relief non-main

- Upon request
- including hearing of witnesses



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Powers of liquidator:

lex concursus

– (Chapter 10.4?)

- **UNCITRAL**

- Powers of liquidator:

Model law = law
of recognising
state



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Preservation measures:
 - Recognition of foreign measures
 - ‘domestic measures’

- **UNCITRAL**

- Preservation measures:
 - measures mentioned in Model Law
(= Law of reconising State)



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- Preservation measures
 - Staying execution
 - Divestment
 - Hearing witnesses

(also territorial?)

- **UNCITRAL**

- Preservation measures:
 - staying execution
 - Divestment
- ‘usually available only in collective proceedings’
(Report)



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **PDIA**

- No explicit rule on modification or termination of relief

- **UNCITRAL**

- Court may modify or terminate relief



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Commentary on Draft Article 10.3

Paul Omar
University of Sussex



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- 10.3.1
- Revisiting jurisdictional issues (not EIR/BC Model)
- Does denial if breaching ‘internationally accepted norms’ mean Model Law Art 17 framework?
- i.e. insolvency proceedings, application in proper form by relevant official to right court.



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- 10.3.1
- Public Policy exception (Art 26 EIR and Model Law Art 6)
- EIR recognition scheme tempered by Art 26, but Art 26 tempered by Art 10, EC Treaty; no such tempering for Model Law Art 6
- i.e. how will existing practice on non-recognition change?



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- 10.3.5.4
- Powers of the liquidator, not to include coercive/adjudicatory powers
- What would coercive include?
- ‘securing contributions by negating liability suits’: UK and IE practice
- May need to use 10.3.7 (supervisory judge’s role) to support these powers



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- 10.3.7
- This permits the appointment of a supervisory judge where Dutch law applies
- 10.3.7 is consonant with Model Law Art 27(a), but....
- How does this sit with 10.5.1 duty?



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



FOREIGN INSOLVENCIES PROCEEDINGS

(Section 10.3)

Ángel M. Ballesteros



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



- **Legal standing to request for the recognition**
- **Judgments susceptible of obtaining the recognition**
- **Causes for rejecting the recognition**
- **Competent Court**
- **Recognition proceeding**
- **Seizure before Judgment**



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



Conference Sponsors



HOUTHOFF BURUMA

Our thanks also to INSOLAD – conference supporters

Academic Forum Sponsors

EdwinCoeLLP
LAW FIRM