



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



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General Introduction

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Pre-draft Insolvency Act – replacing BA 1986?

Insolvency Law Committee (2003 – November 2007)

350 legal provisions – 200 pages Explanatory memorandum

Main reasons:

- postponement of payment (“surseance”) does not function
- civil law changes as of 1992 influencing the BA
- inconsistent partial changes - inconvenient organization of text
- law partly in court cases, partly in BA
- no solid system of international provisions

Consultation:

- Today
- Till 15 September 2008
- www.justitie.nl.onderwerpen/wetgeving/insolventiewet
- www.nieuwinsolventierecht



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Title 10 Pre-draft

35 articles, divided over five chapters:

- Ch 10.1 – General Provisions
- Ch 10.2 – Insolvency Proceedings in the Netherlands
- Ch 10.3 – Foreign Insolvency Proceedings
- Ch 10.4 – Law Applicable
- Ch 10.5 – International Cooperation



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BA 1896: provisions of international law in Articles 203-205

– Limited scope

Convention NL-Belgium (1925) and NL-Germany (1962)

Article 44 EU InsReg



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On: Recognition

Dutch judgment re insolvency

- Supreme Court 1955: The Dutch bankruptcy liquidation aims to:

“..... benefit all creditors of a debtor, be they Dutch or foreigners, including those living outside the Netherlands. However, this can only lead to the debtor's estate being larger than his assets located on Dutch territory to the extent that the foreign legal system so allows”.

So: universal effect



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If in a foreign state a Dutch insolvency is not recognized, yet certain legal effects, on the basis of:

- an action based on tort to hand over certain assets, located abroad;
- an order (“gebod”) to perform all legal acts in order to realize that an asset is handed over to the Dutch administrator;
- a power of attorney (“volmacht”) of the former husband of an insolvent debtor (whose insolvency was adjudicated prior to the date of divorce) allowing the administrator to sell assets (Spanish real estate belonging to the marital estate);
- a power of attorney of the debtor to the administrator to perform all powers to dispose and therefore to bring assets located abroad (real estate in Italy) under his/her control



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On: Recognition (cont'd)
Foreign judgment re insolvency

- Supreme Court 1967: confirms judgment of Amsterdam Court of Appeal that:

“... according to Dutch law, except in the case that a convention provides otherwise, property falling under foreign insolvency proceedings does not include assets located in the Netherlands.”

So: territorial effect



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- On: Recognition of foreign judgment re insolvency (cont'd)

Supreme Court 1996:

“Unless a Convention, binding the Netherlands, provides otherwise, insolvency proceedings opened in another country have territorial effect. Foreign insolvency proceedings do not encompass goods belonging to the debtor which are located in the Netherlands (Netherlands Supreme Court 2 June 1967, NJ 1968, 16), in addition, the legal consequences arising under the insolvency law of that other country cannot be invoked where such action would result in unpaid creditors being prevented from taking recourse – during or after the insolvency proceedings – in respect of those assets of the (former) debtor which are located in the Netherlands.”



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If in NL a foreign is not recognized, yet certain legal effects, on the basis of:

- the respect Dutch law pays to the position of a foreign administrator, e.g. in relation to goods, which are present or located in the foreign country in which insolvency proceedings have been opened. With regard to such goods, the liquidator has exclusive authority and such authority should be recognized in the Netherlands
- contracts, concluded with the foreign administrator, must also be recognized in the Netherlands and the foreign administrator is authorized to bring an action in court should a conflict arise in relation to such goods or agreements;
- same rule applies to procedural rights: a foreign liquidator may exercise his rights and will be accepted as a party to the civil proceedings;
- the urgency of the case, e.g. an urgent interest in having the legitimacy of a prejudgment garnishment assessed by a Dutch court



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On: Law applicable

Supreme Court 1997:

“- ‘[according] to current Dutch private international law, the law which is applicable to the insolvency proceedings (the “lex concursus”), and which determines the existence and content of the powers of the administrator, shall apply to an insolvency-pauliana, invoked by the foreign administrator in the Netherlands. The principle of legal certainty includes that consideration should be given with the fact that the opposite party of the debtor, which party has its location (“gevestigd”) in the Netherlands – the party with whom the debtor has contracted, which legal act is challenged by the administrator – does not have to be prepared for an action to annul said legal act being subjected to foreign law, in as far as this legal act itself is not subjected to said foreign law and this law calls for less strict requirements for allowing such action compared to the law which applies to this legal act (the “lex causae”). In case the law which determines the challenged legal act (the “lex causae”) is another law then the lex concursus, not only to the latter law but also to the lex causae this legal act should be tested, so that she only can be awarded when the requirements of the lex concursus as well as the lex causae are met.”



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With the draft of Title 10, The Netherlands:

- terminates the old fashioned and uncertain present status of international insolvency law;
- pushes back the application of the principle of territoriality for incoming insolvency judgments;
- provides certainty with regard to the law applicable to such proceedings;
- is in alignment with recent changes in legislation in countries such as Germany, Spain, Poland, Belgium and England (inspired by Model / extended InsReg);
- creates a system of efficient and effective administration of insolvency proceedings in relation to non EU-Member States, including a framework for mutual cross-border exchange of information and cooperation between administrators and courts.



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The Insolvency Law Committee:

“.... is convinced that the pre-draft regarding international insolvency law contains a system that will work well and can bear very well the test of the present time of recently renewed systems in countries which are important trade partners of the Netherlands (UK, USA, Germany and Japan)”