

Joint Insolvency Conference
Crossing (Dutch) Borders in Insolvency

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Insolvency in the Netherlands
(section 10.2. Voorontwerp Insolventiewet)
- Comment

Prof. Dr. Peter Mankowski
(University of Hamburg)

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Generalities

- Limited scope of application besides the European Insolvency Regulation (EIR)
- In effect restriction mainly to third-country cases
- Heavily dependent upon interpretation of the scope of application of the EIR in third-country cases: the more extensive the EIR is applied following the path of the Brussels I Regulation the less space is left for application of sec.10.2

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- Potentially misleading formulations verbally carrying more ambition than can possibly be intended
- The text of the rules does not expressly preserve the precedence of the EIR
- Respective clarifications mainly appear in the Toelichting only

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Jurisdiction (Art. 10.2.1)

- (1) (a) extremely prone to misunderstandings: in fact applicable only in the rare event that the woonplaats but not the COMI is in the Netherlands
- (2) is applicable only if insolvency proceedings are opened outside the EU. In EU cases Arts. 27; 2 (h) EIR take strict precedence. But such clarification does appear not even in the Toelichting

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- (2) is to a certain degree inconsistent: If assets are taken as a ground for jurisdiction there should not be a major qualification
- (3) opens considerable source of insecurity and lack of legal certainty insofar as it requires a "special interes" on the applicant creditor's part. The German role model as in § 354 (2) InsO at least provides for some concretisation



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Territorial effect (Art. 10.2.2)

- Why is there a reference only to Art. 10.2.1 (1)? Does it go without saying for practitioners that proceedings under Art. 10.2.1 (2) are territorial by their very nature?
- Political question as to whether territoriality fits ill with jurisdiction being based on woonplaats



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Exercise of creditors' rights (Art. 10.2.4)

- (5) very interesting attempt to establish foreign liquidator as representative *ex lege* of creditors
- (5) avoids ambiguity as to be found in Art. 32 (3) EIR
- (3) tries to solve language problems in a rather Solomonic manner (foreign language admitted in principle, but on demand translation ought to be produced)



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Return obligation (Art. 10.2.6)

- Territorial proceedings limiting their effect to the Netherlands can not possibly be recognised abroad since they do not claim to have effect outside the Netherlands
- Art. 10.2.6 does not operate in the event of purely territorial Dutch proceedings despite its systematic place since it requires recognition of the Dutch proceedings abroad as a prerequisite



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- Art. 10.2.6 in effect only applicable if COMI in the Netherlands and universal jurisdiction claimed under Art. 3 (1) EIR (supported by contention that Art. 20 EIR served as the role model)
- Is the rule in the right place and should it not better be inserted in the Uitvoeringswet?