

Some practical issues regarding cross-border co-operation

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BenQ Mobile Holding B.V.

- Declared insolvent Netherlands + Germany
- Comi?
- Main proceedings Netherlands
- Secondary proceedings Germany
- Co-operation Protocol

Practical obstacles for co-operation

- Interest of creditors – gap
- Power to start avoidance action
- Reverse internal transactions prior insolvency
- Conflicts between liquidators

Interest of creditors – gap

- Leading principal
- Same creditors but other ranking
- Domestic law of main or secondary proceedings
- German law: loan parent subordinated
- Netherlands law: ordinary unsecured

Power to start avoidance action

- Money transferred from German bank account
- Power shift to secondary liquidator + laws:
 - Assets would situate on territory at opening if no fraud (18.2 EIR)
 - Detrimental to all creditors
 - Main: universal effect
 - Sec: protection local interests/supportive
 - Outside territory/EU
 - Possible to abuse (forum shopping)

Reverse internal transactions prior insolvency

- Parallel art. 5: no protection rights in rem if fraudulently transferred
- Ratio: creditors not with debtor enhance position (infringe pc)
- Ground termination:
 - Ratio EIR or domestic law
 - Main or secondary
 - Pauliana or wrongful act?
 - Not detrimental to all creditors (only main)
 - Moving money legal act?

Conflicts between liquidators

- No rule EIR $\Rightarrow$ Guidelines $\Rightarrow$ protocol
- Stay only to stop liquidation (31 EIR)
- Expert
- Joint action
- Arbitration
- Local court

Conclusion

- Practical obstacles for co-operation BenQ
- Interest of creditors – gap
- Who starts avoidance action?
- Reverse internal transactions?
- How resolve conflicts?
- EIR unpredictable / scope secondary unclear
- More guidance for uniform interpretation (ECJ / literature)