

TMA

Trends and Changes in European
Insolvency Process and Law:

**Some remarks relating to
the Netherlands**

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2.15-3.00 pm

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Content

A. National level

- ▶ new draft insolvency law
- ▶ in-court creditors agreement
- ▶ quick restart/sale business
- ▶ out-of-court turn arounds

B. European level

- ▶ Comi shifts
- ▶ litigation issues

A. National level: New draft insolvency law (“*Voorontwerp Insolventiewet*”)

- ▶ May be adopted over the next couple of years.
- ▶ Puts continuity of business as a central theme.
- ▶ In view of value preservation.
- ▶ With a variety of tools for the receiver:
 - ▶ silent receiver may be appointed (7.2)
 - ▶ automatic stay 1 month (3.6.3)
 - ▶ right to use and process assets (3.6.4) for a compensation
 - ▶ right to dispose of the pledged assets without approval
 - ▶ non-compete measures via Supervisory Judge
 - ▶ low thresholds for a creditors composition (6.2.10)
 - ▶ 50% of the appeared and admitted creditors
 - ▶ representing 50% of the amount of pay-out in absence of a composition
 - ▶ debtor in possession (4.2.2)

Binding in-court creditors agreement

- ▶ Art.: 145/268 B.A.
 1. majority vote
 - ▶ majority vote in number of creditors (appeared and admitted) holding
 - ▶ 50% of the acknowledged debt amount
 2. or a cram down
 - ▶ 75% numbers in favour
 - ▶ unreasonable down voting comparing liquidation dividend with the offer at hand
- ▶ In effect as per 15 January 2005
- ▶ Unknown is unloved: rarely used
- ▶ Because:
 - ▶ dip financing = exceptional
 - ▶ employees rights are a showstopper
 - ▶ burdensome contracts too

Current practice

1. Restart/Liquidation sale 'going concern'
 - ▶ quick
 - ▶ informal
 - ▶ hardly regulated
 - ▶ unpredictable
 - ▶ procedure
 - ▶ appointment of trustees: no preparation although in exceptional cases (Meavita, Econcern) trustees to be are "on watch"
 - ▶ going concern/value preservation
 - ▶ no funding post-commencement financing
→ time pressure

2. Out-of-court turn arounds

Hatched by banks, special credit departments.

- ▶ informal/silent
- ▶ value preservation
- ▶ successful
- ▶ no supervision on other interests
- ▶ does not address the deficit

→ Netherlands need strongly improved restructuring tools by improving "*surseance van betaling*" proceedings and some other acts.

B. International level

- ▶ Questions on application of Comi:
 - i. Few older examples of foreign proceedings over Dutch entities
 - ▶ Parmalat
 - ▶ MG Rover
 - iii. Comi shift considered for example to the UK:
 - ▶ time
 - ▶ cost
 - ▶ requirements
 - v. Contemplation of a contingency plan for an inbound shift into Netherlands: registered office outside EU, Comi in the Netherlands (Brac Rent-a-car International, High court of justice, Chancery division, Companies court 7 February 2003, 2003 EWHL (ch) 128)

Litigation issues

- ▶ Frick Teppichboden
ECJ 12 February 2009
 - ▶ Art. 3 EIR Competence for claw back
 - ▶ Exclusive yes/no pending litigation
- ▶ Pending law suits
- ▶ Art. 4 EIR: applicable insolvency law: *lex concursus* (member state of opening proceedings)
 - ▶ 4.2.f: the effects of insolvency proceedings on proceedings brought by individual creditors with the exception of lawsuits pending.

- ▶ Art. 15 EIR: effects of insolvency proceedings on lawsuits pending
 - ▶ concerning an asset or a right of which has been divested:
 - lex fori processus*, law of the member state in which that lawsuit is pending

What about lawsuits pending not about an asset or right which has been divested, for example a monetary claim?

Included in art. 15 EIR?

- ▶ uncertain: pending in Netherlands, insolvency proceedings in Belgium, District Court Arnhem, 3 December 2008, LJNB96986
- ▶ no: Flightlease Ireland Ltd, Irish High Court 27 July 2005 [Irish insolvency proceedings, French litigation]
- ▶ yes: Austria Oberste Gerichtshof
17 March 2005 ZIK 2005/146, 136
24 January 2006, ZIK 2006/214, 165
- ▶ yes: English High Court of Justice in Sysha q.q. Electrim/Vivendi, 2 October 2008 (insolvency proceedings in Poland, pending litigation in the UK)

Conclusion:

Await an ECJ decision, but *lex fori processus* may prevail.

Thank you for your attention!