III Article – Comparative Approaches to Cross-Border Recognition [Title pending]

I. INTRODUCTION

Significant technological shifts over the last 50 years have marked a clear transition towards increased globalization and multi-national enterprise. For this reason, the number of cross-border insolvency cases has increased significantly since the 1990s.

The United Nations Commission on International Trade Law ("**UNCITRAL**") recognized this shift and the need for a coordinated approach towards the insolvency of a multinational enterprise. The result was the adoption of the UNITRAL Model Law on Cross-Border Insolvency (the "**Model Law**") in 1997. Since this time, the Model Law has been formally adopted in 93 states and 127 jurisdictions, creating a formulaic, predictable process for the recognition of foreign proceedings in these adopting jurisdictions.

Yet, nearly 30 years later, there continue to be notable gaps in the adoption of the Model Law and local variations in its adoption.

This paper discusses the comparative approach to recognition of foreign insolvency proceedings across the United States, Canada, Brazil, the Netherlands and Japan and focusses on the extent to which each jurisdiction has departed from the Model Law.

II. THE MODEL LAW

The Model Law, at its core, embraces the idea of "modified universalism". Under this principle, a single foreign proceeding is initiated in the debtor's "centre of main interest" ("**COMI**") – this foreign proceeding is the "foreign main proceeding". Non-main proceedings may also be commenced in places where the debtor has a presence, but which are not the debtor's actual COMI.[1]

The Model Law defines a "foreign proceeding" as a "collectively judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose or reorganization or liquidation.[2]

Under the Model Law, there is a presumption that the debtor's COMI is the location of its registered office.[3] As set out below, the strength of this presumption generally varies across the adopting countries, with some jurisdictions allowing this presumption to be rebutted if it is shown that the majority of the debtor's business decisions are made in a different jurisdiction.

Once a foreign main proceeding is recognized, the Model Law provides for an automatic stay of proceedings.[4] The recognition proceeding then serves as a platform for a representative of the

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[1] file:///C:/Users/CAI/Downloads/ssrn-4839163.pdf

[2] Model Law, Art 2(a).

[3] Model Law, Art 16(3).

[4] Model Law, Art 20(1).

debtor company (the “foreign representative”) to return to seek local recognition and enforcement of the various steps taken and orders granted in the foreign main proceeding. The Model Law restricts the type of relief that can be granted on recognition to that which is available under the local law of the recognizing jurisdiction.[5] As set out below, in adopting the Model Law, many jurisdictions have allowed for a wider range of relief to be recognized, however. The Model Law provides for a “public policy” exception to the general rule of deference owed to the foreign main proceeding however – nothing in the Model Law prevents a local court from refusing to take an action that would be “manifestly contrary to the public policy” of the local state.[6]

I. JAPAN

Japan’s framework for cross-border insolvency is governed by the Act on Recognition of and Assistance for Foreign Insolvency Proceedings, commonly referred to as “RAFIP”.[7] Enacted in 2001 and based on the UNCITRAL Model Law on Cross-Border Insolvency, RAFIP made Japan one of the earliest jurisdictions to adopt a Model Law-based framework.[8] The legislation marked a shift away from Japan’s former strict territorial approach. Under the previous framework, Japanese insolvency proceedings did not extend to assets outside Japan, and foreign insolvency proceedings had no direct legal effect over assets located in Japan.[9] RAFIP introduced a mechanism through which Japanese courts may recognize foreign insolvency proceedings and provide assistance in relation to assets and business operations in Japan.

Recognition in Japan is not automatic. A foreign insolvency proceeding becomes effective in Japan only after a court issues a recognition order. The Tokyo District Court has exclusive jurisdiction at the initial stage, reflecting its concentration of international insolvency expertise.[10] The petitioner is generally the foreign trustee or, where there is no such trustee, the debtor itself.

Several requirements must be satisfied.[11]

- The foreign proceeding must be broadly equivalent to one of Japan’s judicial insolvency procedures, such as bankruptcy, civil rehabilitation, corporate reorganization or special liquidation. Exact correspondence is not required; for example, Chapter 11 proceedings in the United States may fall within the scope of Japanese recognition.

- The foreign proceeding must also have commenced by the time the recognition order is issued, although a recognition petition may be filed after the foreign filing and before formal commencement.

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[5] Model Law, Art 21(1)(g).

[6] Model Law, Art 6.

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- In addition, the debtor must have a domicile, residence, business office or other office in the foreign jurisdiction. Proceedings based merely on the location of property may not qualify.
- Finally, recognition must not be contrary to Japanese public policy, a standard that may raise issues where a foreign process discriminates against foreign creditors, significantly departs from Japanese priority norms, or lacks procedural fairness.

A distinctive feature of the Japanese regime is that recognition alone does not create substantive relief. Unlike the Model Law, which provides certain automatic effects upon recognition, RAFIP requires separate court orders for assistance.[12] These may include stays or revocation of compulsory execution, provisional attachment or provisional disposition, a general prohibition on enforcement, stays of security enforcement, restrictions on the debtor's asset dispositions, requirements for court permission before transferring Japanese assets abroad, or the appointment of a trustee to manage the debtor's Japanese business and property. In practice, administration orders are more commonly associated with trustee-led or receiver-led foreign proceedings, while execution prohibition orders are often used in debtor-in-possession proceedings such as Chapter 11.

Regarding COMI, RAFIP defines a main proceeding by reference to the country where the debtor's principal business office is located, a concept closely analogous to the "center of main interests" under the Model Law.[13] In the think3 case, the Tokyo District Court interpreted "principal office" as the debtor's substantive headquarters, substantially equivalent to COMI.[14] The court considered factors such as the location of the debtor's nerve center, where management functions were carried out, and what location was objectively recognizable to creditors.[15]

Although reported recognition cases in Japan remain relatively limited, (22 cases as of March 9, 2025[16]), cross-border restructurings increasingly require early analysis of whether Japanese recognition is necessary, what relief should be sought, how Japanese creditors and assets may be affected, and whether a parallel domestic proceeding may be more effective.

II. USA

The United States adopted the Model Law in **[X]**.[17] The U.S. framework for cross-border insolvency recognition is found in Chapter 15 of the U.S. Bankruptcy Code[18] which incorporates many of the concepts seen in the Model Law, subject to certain modifications and differences.

As is the case under the Model Law, a Chapter 15 case is commenced by a "foreign representative," typically a liquidator, administrator, monitor, trustee, debtor representative or other person

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authorized in a foreign proceeding to administer the debtor's assets or act as a representative of that proceeding.[19] The foreign representative files a petition for recognition in a U.S. bankruptcy court. Chapter 15 is not a full U.S. bankruptcy case in the ordinary sense; it is an ancillary proceeding. Its function is to give effect in the United States to a foreign insolvency or restructuring process and to provide assistance where U.S. assets, creditors, litigation or discovery are involved.

As a gating issue, the bankruptcy court must determine whether the foreign proceeding qualifies as a "foreign proceeding" under Chapter 15[20] and whether it should be recognized as either a "foreign main proceeding" or a "foreign nonmain proceeding." A foreign proceeding under Chapter 15 is **[X]**. Recognition is available to a broad range of proceedings and does not necessarily require that the debtor be insolvent. Recognition is possible for solvent restructurings (for example, an adjustment of debt).[21]

Consistent with the Model Law, A foreign main proceeding is one pending in the country where the debtor has its center of main interests, or COMI.[22] Consistent with the Model Law, COMI is assessed with reference to the location of the debtor's head office. This presumption may, however, by rebutted with reference to .objective factors that would be ascertainable to creditors, including the location of headquarters, management, principal assets, creditors, books and records, and the jurisdiction whose law creditors would reasonably understand to govern the restructuring. COMI can become especially important in group restructurings, pre-filing migrations, or cases filed in jurisdictions selected for restructuring efficiency.[23] A foreign nonmain proceeding is one pending in a country where the debtor has an "establishment," meaning a place of operations involving non-transitory economic activity.[24]

The consequences of recognition depend on whether the foreign proceeding is recognized as main or nonmain. Recognition of a foreign main proceeding automatically triggers important protections, including the automatic stay with respect to the debtor and property within the territorial jurisdiction of the United States, as well as restrictions on transfers of U.S.-located property.[25] These protections can be critical where the debtor faces U.S. litigation, enforcement action, asset seizures, or competing creditor remedies.

For both main and nonmain proceedings, the court may also grant discretionary relief where necessary to protect assets or creditor interests. This may include staying litigation or enforcement, suspending asset transfers, ordering discovery, entrusting U.S. assets to the foreign representative, or granting other appropriate assistance. Chapter 15 is therefore frequently used to protect U.S. assets, halt U.S. litigation, obtain discovery, support foreign restructuring plans or schemes, and

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21 For the definition of 'foreign proceeding' in the United States, see 11 USC §101(23

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facilitate sales or distributions approved abroad. **[NTD: Can we provide some examples of these in the footnote with references to precedent cases?]**

Overall, the statutory requirements for recognition are relatively structured. Subject to the narrow public policy exception[26], the court generally must recognize the foreign proceeding if (i) the proceeding is a qualifying foreign main or nonmain proceeding, (ii) the applicant is a proper foreign representative, and (iii) the petition is supported by the required evidence of the foreign proceeding and the representative's authority.[27] In that sense, recognition is not intended to be a broad merits review of the foreign insolvency system or of the foreign court's decisions. Instead, it provides a flexible ancillary mechanism for coordinating with the foreign main process while protecting U.S. assets, creditors and procedural safeguards.

III. CANADA

The Canadian approach to cross-border insolvency is largely consistent with that of the United States. The Model Law was adopted by Canada in 2009 and memorialized in Part IV of the *Companies' Creditors Arrangement Act*.[28]

Under Part IV, the recognition of a foreign proceeding must be sought by a "foreign representative" in the foreign proceeding.[29] A foreign representative is a person or body, including one appointed on an interim basis, who is authorized in a foreign proceeding in respect of a debtor company to (1) monitor the debtor company's business and financial affairs for the purpose of reorganization or (2) act as a representative in respect of the foreign proceeding.[30]

A foreign proceeding is a judicial or administrative proceeding held in a jurisdiction outside Canada that deals with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.[31] Importantly, this definition has been found to be broad enough to include restructuring of debt

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28 RSC 1985, c C-36 [*CCAA*]. The predecessor to Part IV of the *CCAA* is the now-repealed section 18.6. The Canadian Parliament contemporaneously adopted provisions equivalent to Part IV of the *CCAA* as Part XIII of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. The *CCAA*, however, is typically the statute of choice for large cross-border restructurings.

29 CCAA, section 46(1). Prior to such application, often as a result of a delay in the formal appointment of a foreign representative in the foreign proceeding, a proposed foreign representative may seek an interim order that provides for a stay of proceedings to protect the assets of the debtor company for the period of time between the commencement of a foreign proceeding and the date on which a foreign representative is appointed by the foreign court, after which it may seek full recognition of the foreign proceedings. See eg, *In the Matter of Knotel Inc and Knotel Canada Inc* (9 March 2021), Toronto CV-21-00658434-00CL (Ont Sup Ct J [Comm List]) (Interim Stay Order (Foreign Proceeding)); *In the Matter of Red Lobster Management LLC, Red Lobster Hospitality LLC and Red Lobster Canada Inc* (21 May 2024), Toronto CV-24-00720567 (Ont Sup Ct J [Comm List]) (Interim Stay Order (Foreign Proceeding)).

30 CCAA, section 45(1), "foreign representative".

31 CCAA, section 45(1), "foreign proceeding".

under corporate statues routinely used to address financial challenges for corporations in distress in foreign jurisdictions.[32]

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court is obligated to make an order recognizing the foreign proceeding.[33]

In addition, the order granting recognition must specify whether the proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".[34] As is the case under the Model Law, a foreign proceeding will be a "main" proceeding if it is taking place in the jurisdiction that is the debtor's COMI[35] and there is a presumption that the debtor's COMI is the location of its registered head office.[36] This presumption may, however, be rebutted having regard to the location of the debtor which is readily ascertainable by creditors, where the debtor's principal assets or operations are found, and where management of the debtor takes place.[37]

If an order recognizing a foreign proceeding is made, the court is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.[38] Consistent with the Model Law, however, nothing, prevents the Canadian court from refusing to do something that would be contrary to Canadian public policy.[39] This is not interpreted to mean that the relief requested must be identical to that available in a plenary insolvency proceeding. Canadian courts have concluded that they have the authority to recognize orders granted by a foreign court even if identical orders could not be granted in a plenary case, provided that the recognition of such order would not be offensive to Canadian public policy.[40]

While not expressly contemplated by Part IV of the CCAA, Canadian courts have introduced the concept of an "information officer" in recognition proceedings. The information officer (i) provides assistance to the foreign representative, (2) reports to the court and stakeholders generally regarding the foreign proceeding and any other materials information, and (3) responds to inquiries from Canadian stakeholders.[41]

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[32] See, for example, the Part IV recognition proceeding of syncreon Group Holdings B.V. and its subsidiaries involving the recognition of a U.K. scheme of arrangement proceeding under the *Companies Act 2006.*

[33] CCAA, section 47(1).

[34] CCAA, section 47(2).

[35] CCAA, section 45(1).

[36] CCAA, section 45(2).

[37] *Zochem Inc. (Re)*, 2016 ONSC 958 at para 22, *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, at para 33; CHC Group Ltd (Re), 2016 BCSC 2623 at para 11, citing Angiotech Pharmaceuticals Inc. (Re), 2011 BCSC 115 at para. 7 ; Massachusetts Elephant & Castle Group, Inc (Re), 2011 ONSC 4201 at paras 26-31

[38] CCAA , section 52.

[39] CCAA, section 61(2).

[40] *Hartford Computer Hardware, Inc*, 2012 ONSC 964

[41] *Tucker v Aero Inventory (UK) Limited),* [2009] OJ No 4797 at paras 20-22, 2009 CanLII 63138 (Sup Ct J [Comm List]).

IV. BRAZIL

The Brazilian Bankruptcy Law[42] ("**BBL**") establishes insolvency mechanisms comparable to several provisions of the U.S. Bankruptcy Code. Since its enactment, the BBL has provided for two reorganization proceedings: one akin to a pre-packaged Chapter 11 reorganization[43], under which a creditor-approved reorganization plan is filed with the court for confirmation, and a second proceeding comparable to a standard Chapter 11, which grants the debtor a stay period upon filing, followed by the submission and creditor approval of a reorganization plan.[44] The BBL also provides for debtor liquidation in terms broadly analogous to Chapter 7.[45]

In its original form, however, the BBL contained no provision for the recognition of foreign insolvency proceedings. This legislative gap left courts and practitioners operating in a fragmented environment, lacking both legal certainty and the instruments necessary to coordinate cross-border insolvency proceedings, particularly in cases involving multinational corporate groups undergoing restructuring in multiple jurisdictions simultaneously. In one notable cross-border case involving a Brazilian corporate group (Grupo Oi), for example, two group entities were declared bankrupt by a Dutch court during the pendency of an ongoing reorganization in Brazil; the Brazilian court declined to recognize the Dutch bankruptcy declaration and ultimately approved the reorganization.[46]

The 2020 amendment to the BBL introduced several significant reforms to the Brazilian insolvency framework, most notably the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law was incorporated into the BBL, with certain modifications, in Chapter VI-A, Articles 167-A through 167-V.

Although Brazil's adoption of the UNCITRAL Model Law on Cross-Border Insolvency was largely faithful to the original text, the BBL version departs from the Model Law in several significant respects, particularly with regard to the automatic stay.

The stay is addressed in Article 167-M of the BBL, which contains features that may narrow the scope of the protection afforded by the Model Law, depending on the debtor's creditor profile.

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[42] Law No. 11,101/2005, as amended by Law No. 14,112/2020)

[43] Articles 161 et seq. of the BBL.

[44] Articles 47 et seq. of the BBL.

[45] Article 94 et seq. of the BBL.

[46] Grupo Oi filed for judicial reorganization on June 20, 2016, before the 7th Business Court of Rio de Janeiro, Brazil, Case No. 0203711-65.2016.8.19.0001. The group subsequently initiated insolvency proceedings in Portugal, the Netherlands, and the United States. On July 7, 2017, Grupo Oi announced that two of its subsidiaries—Oi Brasil Holdings Coöperatief U.A. and Portugal Telecom International Finance B.V.—had been declared bankrupt by a Dutch court. The group stated that "*These* judgments *rendered today by the Dutch Supreme Court do not have effects* in Brazil *nor* in *the* other jurisdictions where the authority of the Brazilian Judiciary to process the judicial reorganization *has* been recognized" (Notice to the Market (July 2017), available at the company's Investor Relations website: https://api.mziq.com/mzfilemanager/v2/d/4d705e6d-cd28-4747-8452-0a0a616e5243/c8caf434-95ed-4662-84ae-241a8698fd56?origin=2. Reorganization was ultimately granted.

One significant divergence concerns the timing of the stay. Article 19(1)(a) of the UNCITRAL Model Law authorizes the court to stay executions against the debtor's assets from the moment an application for recognition is filed until it is adjudicated. The BBL, by contrast, provides that the stay takes effect only upon formal recognition of the foreign proceeding.[47]

A further distinction arises from the BBL's treatment of "unimpaired" claims, i.e., claims that are expressly excluded from the scope of reorganization proceedings and that remain unaffected by a reorganization plan and/or by a liquidation proceeding. Examples include claims secured by chattel mortgage, tax claims, and advance payment claims under foreign exchange contracts. In adopting the UNCITRAL Model Law, the BBL preserves this exclusion, providing that "The measures provided for in this article do not affect creditors who are not subject to judicial reorganization, extrajudicial reorganization, or bankruptcy proceedings, except within the limits permitted by this Law."[48]. This provision enables holders of unimpaired claims to continue enforcement actions against the debtor's assets notwithstanding the recognition of a foreign proceeding.

The BBL also permits creditors to commence lawsuits and arbitral proceedings against the debtor during the stay period[49] . This stands in contrast to the UNCITRAL Model Law, which contemplates the possibility of staying "the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities."[50]. It should be noted, however, that the BBL's permission to initiate individual actions is limited in scope: no executory measures may be taken against the debtor during the stay period.

The amendment of the BBL and the adoption of a modified version of the UNCITRAL Model Law represent an unambiguously positive development for the Brazilian insolvency system, constituting the most significant modernization of Brazil's cross-border insolvency framework to date. For two decades, Brazilian companies have sought recognition of their domestic insolvency proceedings abroad, most notably under Chapter 15 of the U.S. Bankruptcy Code. The 2020 reform now enables foreign companies to obtain analogous protection for their Brazilian subsidiaries and affiliates, reflecting Brazil's growing capacity to engage with the complexities of modern cross-border insolvency.

V. NETHERLANDS

Unlike the other jurisdictions discussed in this paper, the Netherlands has not adopted the Model Law. The Dutch Bankruptcy Act (DBA), enacted in 1890s, contains a chapter on cross-border insolvency matters, but this chapter only contains three brief sections that merely regulate dealing with assets of a Dutch debtor located abroad.[51] The Dutch legislator was thus not keen to introduce legislation in relation to the recognition of foreign insolvency proceedings.[52]

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[47] See BBL art. 167-M(I)

[48] BBL art. 167-M, § 3

[49] BBL art. 167-M, § 2

[50] BBL, Art. 21(1)(a)

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When considering the approach to recognition of foreign insolvency proceedings in the Netherlands, there is a distinction between judgments rendered by a European Union ("EU") member state or otherwise.

As the Netherlands is a member of the European Union, the EU Insolvency Regulation (2015/848) has direct effect in the Netherlands and applies to all insolvency proceedings opened after 26 June 2017. This regulation governs insolvency proceedings across the European Union and ensures that judgments concerning insolvency proceedings issued in the European Union are, in principle, recognized in the Netherlands without any need for a further court order (subject to certain conditions). Moreover, as an EU member state the Netherlands is bound by the EU Restructuring Directive (2019/1023). This has been implemented into Dutch national law, most notably in the WHOA.[53]

Because there are no statutory provisions dealing with the recognition of foreign non-EU insolvency proceedings, the recognition of foreign non-EU insolvency proceedings is subject of extensive case law. Briefly stated, the Netherlands apply the principle of territoriality (*territorialiteitsbeginsel*) to foreign non-EU insolvency proceedings.[54] This means that, in principle, foreign non-EU insolvency proceedings have no effect in the Netherlands. The assets of a foreign debtor located in the Netherlands are not subject to the foreign non-EU insolvency proceedings and the legal consequences of the insolvency laws applicable to the foreign non-EU insolvency proceedings do not apply in the Netherlands, *i.e.* creditors may still have recourse to assets located in the Netherlands.

However, this does not mean that foreign non-EU insolvency proceedings have no effect at all in the Netherlands. Case law of the Dutch Supreme Court provides for a rather a complex set of practical rules for the recognition of foreign non-EU insolvency proceedings, set out in greater detail below.

A Dutch court will, in principle, recognize a foreign non-EU insolvency judgment, if it finds: (i) the foreign court rendering the judgment had jurisdiction over the subject matter of the judgment on internationally acceptable grounds; (ii) the foreign court has conducted the proceedings in accordance with generally accepted principles of fair trial (e.g. after proper service of process and giving the parties sufficient time to prepare for the proceedings); (iii) such recognition is not in conflict with Dutch public policy; and (iv) the foreign judgment is not in conflict with a decision rendered by a Dutch court between the same parties, nor with an earlier judgment rendered by a foreign court in proceedings involving the same cause of action and between the same parties, provided that the earlier decision can be recognized in the Netherlands.[55] For example, if the above-mentioned requirements are met, an insolvency practitioner appointed in a foreign non-EU insolvency proceeding has the powers to dispose of the debtor's assets located in the Netherlands, if he or she has the authority to do so under the laws of the jurisdiction where the insolvency

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[53] The Dutch Act on the Confirmation of Private Plans, as enacted on 1 January 2021.

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[55] *See* Supreme Court 26 September 2014, ECLI:NL:HR:2014:2838.

proceeding was opened and if potential attachments on the assets by creditors are respected. Also, the liquidation should take place according to the rules on liquidation under Dutch law.

A moratorium, or stay, declared in a foreign country has no effect on the assets located in the Netherlands. In order to secure a stay over Dutch assets, the foreign bankruptcy trustee or debtor typically must initiate separate parallel proceedings in a Dutch court.

Lastly, under Dutch law, there are no rules governing cooperation with their counterparts in other jurisdictions in the case of cross-border insolvency or restructuring proceedings. The willingness to cooperate will depend on the individual circumstances. A Dutch bankruptcy trustee and its supervisory judge must act in accordance with the best interests of the body of the joint creditors (*gezamenlijke schuldeisers*). It will depend on the circumstances whether it is in the best interests of the joint creditors to cooperate with foreign courts or foreign insolvency administrators. Courts and judges are generally willing to cooperate with foreign courts. Where the EU Insolvency Regulation applies, the Dutch courts are obliged to cooperate with foreign courts and will do so accordingly.

VI. CONCLUSION