The Growing International Dimension of Insolvency:

The Dutch Response

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1. Introduction

1.1 The European Insolvency Regulation (EIR) has placed cross-border insolvency on the map in Europe. However, the EIR has neither been the beginning of European cross-border insolvencies nor does it give answers to all problems posed by it.

1.2 Much has been left to domestic law, mainly for three reasons. The first of those is that the EIR does not explicitly deal with all issues that may come around in bankruptcies. Furthermore, a number of provisions of the EIR deal with situations between EU member states (with the obvious exception of Denmark[1]) only. Finally, the EIR provides for a certain interconnection between the Regulation itself and national law.

1.3 In this paper, I will discuss a number of Dutch developments relating to international insolvency law. A number of those developments are directly related to the EIR. Others are clearly not.

2. Jurisdiction

2.1 If the debtor has its center of main interests (COMI) within an EU member state, the jurisdiction of the Dutch courts for insolvency proceedings is subject to the EIR. Article 3 (1) EIR provides that only the member state, where the debtor has its COMI may open a main proceedings with an universal effect. Each member state where the debtor has an establishment may open territorial proceedings.

2.2 If the debtor does not have a COMI within an EU member state, the Dutch domestic rules as to jurisdiction apply. Article 2 Bankruptcy Act (*Faillissementswet*) provides that any person or entity who has or used to have residence (in case of a company: a branch) in the Netherlands is subject to jurisdiction under the Bankruptcy Act.

2.3 Early Dutch case law with respect to the COMI of debtors has not shown spectacular results, comparable to the English *Daisytek*-case or the Italian *Parmalat* cases, in which entire groups of companies were brought under centralised proceedings. However, there have been reported cases, in which it has become clear that Dutch courts have adjudged the COMI of foreign entities to be in the Netherlands. The bottom line is that now that case law of the European Court of Justice has allowed corporations to move freely through Europe[2], even as a pseudo-foreign company, this cannot lead to a shift in jurisdiction.[3] As a result, pseudo-foreign companies such as *Interexx Ltd*. have been declared bankrupt in the Netherlands, without too much ado.[4]

2.4 There has been more discussion in the Netherlands as to the notion of an establishment. The Dordrecht District Court had to deal with a German entity that used to do business in

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1 In the remainder of this paper, references to the EU or to a member state should be read as references to the EU without Denmark and a member state other than Denmark respectively.

2 HvJ EG 9 March 1999, nr. C-212/97, NJ 2000, 48 (Centros), HvJ EG 5 November 2002, nr. C-208/00, NJ 2003, 58 (Überseering) HvJ EG 30 September 2003, nr. C-167/01, NJ 2004, 394 (Inspire Art).

3 Kuipers/Roelofs, Judical Comity and Chauvinism: The Need to Go Forum Shopping in Insolvency Matters, in: International Corporate Rescue, Volume I, issue 6, 2004, p. 319-327.

4 Hof Den Haag 8 April 2003, unpublished, reported by Wessels in: The European Insolvency Regulation: It's First Year in Dutch Court Cases, http://www.iiiglobal.org.

the Netherlands through an establishment. The debtor's office in the Netherlands had shut down well before the request for a secondary proceedings. However, the claimant held that there still was an establishment, as the debtor still had an entry in the Dutch Trade Register and the debtor's cars had been seen in the Netherlands. None of these factors could convince the court that the debtor had an establishment in the Netherlands.[5]

2.5 The order by the Dordrecht court was bad news for the claimant, as this was the Dutch Social Security Authority (Uwv), who would have been assured of a very high preference in a Dutch insolvency proceedings, but would have to do without a preference in a German one. In this respect it should be repeated that one of the main purposes of secondary proceedings is to ensure that preferential creditors can exercise their preference in any bankruptcy.[6]

2.6 The Dordrecht Court, however, draws the line by (implicitly) holding that the position of preferential creditors will only be guaranteed, if there is an ongoing presence in the jurisdiction, whose laws provide for that preference. This presence should be in the form of an establishment as stipulated by article 2 (h) EIR, which result in the end appears to be a right one.

2.7 Another case regarding secondary proceedings had to do with an English main proceedings. In *Transbus*, the debtor had employees in the Netherlands. The English administrators sought to dismiss all Dutch employees. This was seemingly difficult, as under Dutch bankruptcy law (which would apply by virtue of article 10 EIR) a leave for a dismissal by the Supervisory Judge is required. As a result, the English administrator sought opening of a secondary proceedings in the Netherlands.

2.8 One employee held that opening secondary proceedings in the Netherlands formed an abuse of process, since the secondary proceedings would only be used to dismiss him. This position could have been in line with domestic Dutch case law, preventing a company to file for insolvency with the objective to prejudice on the rights of employees.

2.9 The District Court of Den Bosch, however, quickly dismissed the employee's arguments by holding that the state of insolvency of the debtor was given, as the debtor already had entered into main proceedings in the UK (article 27 EIR). As a result, there was every reason to open a secondary proceedings in the Netherlands (there was no discussion as to having a Dutch establishment) and this was therefore not done with the objective to prejudice the employee's rights.[7]

2.10 In all, the Den Bosch court proved itself very liberal in dealing with the English order and administrator. Not only did it grant the request to open secondary proceedings, it also appointed the officeholder requested by the English administrator, namely a lawyer related to the administrator's firm. Such an approach ensures co-operation instead of possible conflicts between the officeholders (article 31 EIR).

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5 Rechtbank Dordrecht 11 August 2004, NIPR 2004/372 (Müller Gerüstbau).

6 M. Virgós / E. Schmit, Report on the Convention on Insolvency Proceedings, Chapter 2 under H.

7 Rechtbank Den Bosch 16 June and 24 June 2004, JOR 2004/213 and 214 (Van der Putten / Transbus).

3. Recognition and enforcement of foreign judgements

3.1 Other EU member states have seen something of an outcry, after an entity incorporated in that member state was brought under a foreign main proceedings.[8] Examples include the French and German reactions to the *Daisytek* decision by the Leeds High Court, as well as the Irish reaction to the *Eurofood* order by the *Tribunale* in Parma.

3.2 In the Netherlands, on the other hand, finance SPVs related to the Parmalat and Cirio del Monte groups of companies were placed under an Italian *amministrazione straordinaria.*[9] A few commentators posed questions as to whether the Italian courts had correctly adjudicated the COMI of these entities to be in Italy, but in the end there was common ground that the Italian decisions had to be recognised in the Netherlands. No attempts were made to challenge the Italian orders in the Netherlands on *ordre public* or other grounds.

3.3 This is probably good news for companies choosing a (tax) structure, which uses Dutch SPVs. It is not seen as a problem in the Netherlands, if these entities enter into an insolvency proceedings in the member state where they are mostly related to, namely the member state of the parent company.

3.4 With the finance SPV and the parent usually being very closely linked through joint and several liabilities, this method of consolidation should lead to more effective insolvency proceedings. However, the European Court of Justice may eventually decide otherwise as to the COMI of finance SPVs in the Eurofood matter.[10] It will take some time to come, however, before that decision will be taken. A motion for accelerated proceedings before the ECJ was dismissed.

3.5 Opposed to this rather liberal approach to foreign EIR-judgments stands the traditional line of Dutch case law against recognition and enforcement of foreign bankruptcy proceedings. As early as 1968, the Dutch Supreme Court (*Hoge Raad*) held that foreign insolvency proceedings always have a territorial effect and therefore do not extend to assets situated in the Netherlands.[11] Dutch courts have never gone any further than to recognise the standing of the foreign officeholder and the loss of possession over its assets (if any) by the debtor.

3.6 This restrictive approach has traditionally allowed individual creditors to foreclose upon the debtor's Dutch assets, thus giving creditors the opportunity to break through the notions of *pari passu* and hotchpot. Also, there is no indication yet that foreign schemes of arrangements would be recognised in the Netherlands.[12] Companies that have successfully reorganised using proceedings such as Chapter 11 would have their entire

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8 Including the (in)famous "imperialism-comment" by Mankowski on the English *Daisytek* order.

9 Tribunale Civ. Roma 13 August 2003, unreported (Cirio del Monte N.V.); Tribunale Civ. Parma 4 February 2004, unreported (Parmalat Netherlands).

10 *In re Eurofood Limited*, ECJ Case C-341/04 (pending).

11 Hoge Raad 2 June 1967, NJ 1968/16 (Abend / Chiotakis).

12 A French discharge of certain debts after a French bankruptcy proceedings was left unrecognised in Hoge Raad 31 May 1996, NJ 1998, 108 (De Vleeschmeesters).

old debt enforced against them before Dutch courts. However, new Dutch insolvency law is currently being prepared and this might lead to more contemporary rules in this respect.

3.7 The restrictive line is ever more surprising in the light of the more pragmatic approach adopted by the courts on three occasions, including the Supreme Court, in the UPC case. In a rather close co-operation with the Bankruptcy Court of the Southern District of New York, the creditors of both Dutch and US UPC-companies voted in favour of a scheme of arrangements, leading to the successful reorganisation of this group of companies. Individual creditors have since sought court orders against this scheme by quite a few means, including objections against the decision to grant the vote for note holders to the beneficial owners rather than the legal owners, because this was the rule under US bankruptcy law as well. The Supreme Court, however, confirmed the co-operation on all points. [13]

3.8 A similar approach was successfully adopted in the restructurings of Versatel and Global Telesystems.

3.9 On another point, creditors seeking an US-style bankruptcy lost out in the Netherlands. In the JOMED-case, two US investment funds did not agree with the approach adopted by the receivers. In particular, they held that the sale of the company as purported by the receivers had been under the value. As they tried to find evidence for this claim, they were denied disclosure orders against the receivers.[14] The Supreme Court held that whilst the books of the debtor may under certain circumstances be disclosed, the books maintained by the receivers are not subject to that rule.

3.10 It is still in the open, to which extent there is room for disclosure orders in Dutch bankruptcy proceedings. Generally, a debtor in bankruptcy is required to disclose his books to each creditor with a reasonable interest therein (article 3:15j Dutch Civil Code). However it is still unclear which documents constitute the books and what constitutes a reasonable interest.

3.11 Some authors promote a very restrictive approach to this provision.[15] The discussion as to the scope of article 3:15j Dutch Civil Code can be seen in a somewhat broader perspective. In 2001, the Supreme Court held that creditors in principle can file directors liability claims concurrently to the receiver.[16] Many legal writers and practitioners, however, appear to have preferred to centralise the power to take action against the director with the receiver, at least in first instance.

3.12 Giving room to creditors for disclosure would be bad news for those promoting a central role for the receiver. Denying creditors to obtain disclosure orders would in the same way be good news for receivers, who can on behalf of the generality of creditors claim against directors, without having to fear that the pockets of the directors have already been emptied by a single creditor. After all, the odds that these creditors have not yet obtained

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13 Hoge Raad 26 August 2003, NJ 2004/549 (UPC).

14 Hoge Raad 21 January 2005, RvdW 2005/13 and 14 (Jomed).

15 Van Daal, Van overlegging naar openlegging: artikel 3:15 b BW een Doos van Pandora?, Tvl 2003/89; Van Hees, Schuldeisers en de afwikkeling van het faillissement: De curator onder invloed?, Tvl 2004, p. 291-297.

16 Hoge Raad 21 December 2001, RvdW 2002/7 (Lunderstädt / De Kok).

the evidence needed for the action is smaller, if the books are kept closed for individuals other than the receiver.

3.13 In any event, the ever-growing international scope of insolvency proceedings has seen Dutch creditors successfully applying for a foreign (mostly American) disclosure order. Also, directors and shareholders liability claims related to Dutch bankruptcies are pending before US-courts. Using an international 'side-step' to achieve one's goals is very much a possibility in modern Dutch bankruptcy law.

3.14 In the recent Landis-case[17], the Enterprise Section of the court of appeals in Amsterdam, held that the costs of an inquiry into company affairs in a bankruptcy situation must be paid by the bankruptcy officeholders as costs of the bankruptcy estate. Under Dutch law such an inquiry, which can be requested by shareholders and trade unions (a.o.), will be conducted by (a) court appointed investigator(s), who will investigate the company's policies and state of affairs. The Enterprise Section will allow the inquiry in case there are well-founded reasons to doubt the company's policy. The costs of the inquiry are to be paid by the subject of the inquiry.[18]

3.15 In this case the shareholders of the parent company requested the Enterprise Section to order an inquiry into the company affairs of the parent company and several subsidiaries. At the time of this request all of these companies were bankrupt. Therefor the shareholders requested the Enterprise Section to order the receivers in the bankruptcy of the parent to furnish security for the payment of the costs of the inquiry. According to the Enterprise Section, these costs must be paid a debt of the estate.

3.16 According to this judgement shareholders can request an investigation of the company's books in case of bankruptcy proceedings, without incurring any costs and at the expense of the creditors.

4. Recognition and enforcement of foreign security rights

4.1 Article 5 EIR provides for an instant recognition of rights *in rem* on goods situated in another member state. A right *in rem* may be a charge over a variable group of assets, such as a floating charge, or a charge over a particular asset or group of assets, such as a pledge or a mortgage.

4.2 Article 5 EIR provides that the holder of such a charge may exercise its rights without a possibility of interference by the receiver. There is no Dutch case law (or reported case law from other European jurisdictions) as to how this provision works out. The scope of the non-interference is subject to extensive discussions in European insolvency law.[19] In Dutch legal literature, it is held that basically no provision of Dutch insolvency law could prevent the holder of the charge from foreclosing. In particular a moratorium order by a Dutch bankruptcy court should not do so.[20]

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17 Court of appeals in Amsterdam, Enterprise Chamber, 22 March 2005, JOR 2005, 89.

18 Section 2:344 – 2:359 of the Dutch Civil Code.

19 Haubold, in: Gebauer / Wiedmann (ed.), Zivilrecht unter europäischem Einfluss (2005), Kap. 30, Rn. 116

20 Kortmann / Veder, De Europese Insolventieverordening, WPNR 6421, 2000, page 770.

4.3 In the end, it will be up to the courts to decide, whether this view is a correct one. Much of the issues surrounding article 5 EIR have to do with a distinction between rights *in rem* and the *lex concursus* as stipulated by article 4 EIR.[21] The holder of an English law floating charge may, under certain circumstances, appoint a receiver, which receiver is granted powers under the English Insolvency Act as well as powers normally vested with the debtor itself. These powers may have to be recognised under article 5 EIR, but they also seem to contravene with the jurisdiction rules of article 3 EIR and the *lex concursus* rule of article 4 EIR.

4.4 It is unclear, whether article 5 EIR should go that far. At some point or another, the line will have to be drawn where the 'unlimited' exercise of rights *in rem* under article 5 EIR stops and application of the common rules starts.

4.5 Whilst article 5 EIR gives rules for charged assets situated in other member states, there are no provisions in the EIR relating to assets situated in the member state of the insolvency that are charged with a foreign law right *in rem*. This issue has been left to the individual member states and therefore to *lex concursus*. Contrarily to quite a few other EU jurisdictions, Dutch law has adopted a fairly liberal approach towards foreign law security rights. The Supreme Court has eventually confirmed this approach in *Sisal*. [22]

4.6 *Sisal* had to do with assets that were validly encumbered in Tanzania with a floating charge under Tanzanian law. Subsequently, the goods were put on transport and made it into the Netherlands. The charge holder claimed the charged goods in a Dutch bankruptcy proceedings. The defendant pointed at the *numerus clausus* of Dutch security rights, hence held that any foreign charges should be null and void if the goods make it into the Netherlands.

4.7 The Supreme Court held that when assets have been validly encumbered in accordance with the law applicable under Dutch private international law and subsequently make it into the Netherlands, the charge over those assets should in principle be recognised. However, as a result of the Dutch *numerus clausus*, the charge holder cannot exercise its rights under the law governing the charge. Instead, the foreign law charge must (if by any means possible) be adapted into its Dutch equivalent and the charge holder may assume the rights of the holder of that Dutch equivalent. Under this line of case law, floating charge holders are usually given the rights of the holder of a Dutch non-possessory pledgee.

4.8 A number of exceptions to this rule apply. The first thereof is that foreign law charges may be recognised *as is* under treaties or other instruments. At the moment, charges over aircraft should be recognised *as is* pursuant to the Geneva Convention on the International Recognition of Rights in Aircraft of 1948, if they are validly created under the law of the state of registration and if that state is a party to the Convention. As an aside, the Netherlands are not yet a party to the Cape Town Convention, which would also give rules for charges over aircraft and other moving goods. Apparently, the European Union considers joining in full, but there is no proposal to do so yet.[23]

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21 Niggemann / Blenske, Die Auswirkungen der Verordnung (EG) Nr. 1346/2000 auf den deutsch-französichen Rechtsverkehr, NZI 2003/474.

22 Hoge Raad 23 April 1999, NJ 2000/30 (Tanzania National Bank of Commerce / Sisal).

23 Osborne, Lex Situs and Aircraft, 2004 LMCLQ, p. 311.

4.9 A further exception has to do with security rights providing for a full transfer of title (as opposed to a charge over the security assets). If the transfer has been validly perfected under the laws of the place of transfer, the transfer will be recognised before Dutch courts, even though Dutch law in itself prohibits a transfer of title for security reasons. Parties should revert to a non-possessory pledge or an undisclosed pledge, depending on the assets, instead.

4.10 In the 1997 *Hansa* case, the Supreme Court had to determine the law applicable to the proprietary effects of an assignment of receivables. It held that under article 12 (1) of the Rome Convention, the law governing the obligations of the parties to the assignment also governs the proprietary effects of the transfer.[24]

4.11 This landmark decision allows parties to choose the law that will govern the proprietary effect of assignments generally, including security assignments. This allows parties to avoid application of statutes requiring notification or registration of the assignment before the assignment is perfected. Statutes prohibiting security assignments can also be avoided. Once more, the Dutch courts prove themselves rather liberal in recognising foreign security instruments, even where those do not really fit within the Dutch legal system.

4.12 A further exception applies for retention of title. As an implementation measure of EU Directive 2000/35,[25] the Dutch legislature enacted a choice-of-law rule for the proprietary effect of retention of title (article 3:92a Dutch Civil Code). Generally, the proprietary effects of such retention are governed by the law of the place of transfer (which place can of course be agreed upon). On top of that, parties are free to choose the law of the state of destination instead. Choice of other laws is not allowed.

4.13 At the moment, the consequences of the choice for another law than the place of transfer or the place of destination are unclear. It could be held that the entire retention of title would become ineffective, because it has not been validly created. Alternatively, it could be held that a retention of title so created would be adapted into a retention of title under the laws of the place of transfer. Cases relating to this issue are pending.

5. **Applicable law**

5.1 As cases relating to insolvency procedures opened under the EIR continue, the first few decisions as to the choice-of-law provisions of the EIR have started to pour in. In the absence of enacted domestic choice-of-law provisions relating to insolvency, the Dutch courts have started to apply the rules of the EIR to non-EIR bankruptcies as well. This has for instance been the case in matters relating to fraudulent preference.[26]

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24 Hoge Raad 16 May 1997, NJ 1998/585 (Brandsma q.q. / Hansa Chemie). German and English courts have adopted a contrary approach to article 12 Rome Convention, holding that the proprietary effects of the assignment are governed by the law governing the assigned receivables pursuant to article 12 (2) Rome Convention. Bundesgerichtshof 20 June 1990, VIII ZR 158/89, BGHZ 111,376; *Raiffeisen Zentralbank Österreich AG v An Feng Steel Co. Ltd.* 2001 EWCA Civ 1223 (C.A.). The European Court of Justice or the European legislative branch (which is preparing a Rome I-Regulation) will eventually have to decide as to the correct approach.

25 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions.

26 Hoge Raad 24 October 1997, NJ 1999/316 (Gustafsen / Mosk).

5.2 There is no guidance, however, that these rules apply under all circumstances in all insolvency proceedings before Dutch courts. Rules could in particular be different, where rules of the EIR grant some kind of *favour* to persons from other member states or to instruments governed by the law of another member state.

5.3 One of these *favours* in the EIR relates to set-off. Article 6 EIR allows counterparties of the debtor to set-off, even where set-off is not permissible under the *lex concursus*, if that counterparty already had a right of set-off at the moment of the bankruptcy order under the law governing the relation between debtor and counterparty.

5.4 The Maastricht District Court had to deal with a counterparty not acting in good faith against the debtor. This not only prevented the counterparty from setting-off under Dutch bankruptcy law, but also from setting-off under German law as the *lex causae*. The court held that the provision of German insolvency law denying set-off to counterparties not acting in good faith, caused that the counterparty did not have a right of set-off at the moment of the bankruptcy order. It could therefore not invoke article 6 EIR.[27] Whilst the decision appears to be a right one, it remains odd that the German Insolvenzordnung was indirectly applied in a Dutch bankruptcy.

5.5 The entry into force of the EIR and the ECJ case law relating to pseudo-foreign corporations has in particular in Germany provoked a discussion on the law governing director's liabilities. Even though the discussion has hardly made it into Dutch academic circles so far,[28] Dutch courts have had to deal with choice-of-law issues relating to directors and officer's liability.

5.6 Still before that ECJ case law taking centre stage, the Supreme Court applied Dutch law without any motivation in a claim in tort against a shadow-director of a bankrupt Dutch company, notwithstanding the fact that this shadow director was a Swedish entity.[29] Also, the Advocate-General to the Supreme Court has once advised the Supreme Court to apply the incorporation statute to claims in tort against directors, unless there are indications that the management of the company had taken place elsewhere.[30] The Supreme Court needed not to deal with the issue.

5.7 More recently, the Arnhem District Court had to deal with the director of an English private limited company that had not kept its books properly. The District Court applied the Dutch law director's liability provision of article 2:138 Dutch Civil Code, as the entity had been directed from the Netherlands.[31] This article contains an assumption of improper management, if the directors have not kept the books in a proper manner. The District

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27 Rechtbank Maastricht 14 July 2004, JOR 2004/285 (Spreksel q.q. / Willich).

28 One notable exception: Rammeloo, Vrij verkeer van Rechtspersonen in Europa na HvJ EG Inspire Art Ltd.: zetelleer controverse beslecht! Voortgang harmonisatieproces grensoverschrijdende migratie rechtspersonen onontbeerlijk (HvJ EG 30 sept. 2003, C-167/01 (Inspire Art Ltd.)), NIPR 2004, p. 283-295.

29 Hoge Raad 25 September 1984, NJ 1982/443 (Osby).

30 Advocate-General Mr. Strikwerda before Hoge Raad 9 December 1988, NV 1989/203 (Kanhai/Nardinoyannis).

31 As stipulated by article 5 of the Dutch Law on Choice-of-law and Corporations (*Wet Conflictenrecht Corporaties*).

Court held that this particular assumption could only apply, if English company law provided for a comparable duty to keep the books.[32]

5.8 In all, the court seems to take the position that while Dutch law applies to the liability, the notion of improper management is governed by the incorporation statute instead. However it remains up to the European Court of Justice to decide whether this approach is permissible under its case law on freedom of capital monument. I am, however, not aware of any referral in this field. If should be noted though that the European Commission currently considers harmonising wrongful trading laws.[33]

5.9 The issue of the law applicable to director's liability claims is mainly a characterisation issue. After all, director's liability has aspects of company law (which could lead to application of the incorporation statute), of insolvency law (which could lead to application of the *lex concursus*) and of tort law (which could lead to application of the *lex loci delicti*). With a now widely recognised right to incorporate entities in member state A, direct from member state B and subsequently go bankrupt in member state C, these choice-of-law issues will most certainly entertain the Dutch and European courts in the near future.

6. **Conclusion**

6.1 The Dutch courts and the Dutch legislature have continued to act in the Dutch tradition of international co-operation rather than protectionism. This can be seen in the Dutch approach to foreign EIR judgments, foreign law security rights of all kinds (both under the EIR and under internal law), but also in the choice of rather pragmatic co-operation with the US Chapter 11 procedure in the UPC restructuring.

6.2 Further clarification as to the international dimensions of bankruptcies can be expected in the next few years, as EIR provisions crystallise and further decisions pour in. Enactment of a new Dutch Bankruptcy Act, as envisaged for the next few years, could also lead the way.

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[32] Rechtbank Arnhem 30 June 2004, NIPR 2004/241 (De Kerf q.q. / Rothuizen).

[33] Omar, Wrongful Trading: Prospects for a Harmonizing Text in the European Union, 2004 ICR, p. 294.