

Hypothetical case: NetVision

NetVision BV, a Dutch company, produces and trades computer and telecom components all over Europe. NetVision BV is operationally based in the Netherlands, with offices in Rotterdam and Amsterdam. Its statutory seat is in Willemstad, Curacao (Dutch Antilles). NetVision is wholly owned by Durring NV, the 100 % shares of which are in the hands of Dirk Durring, who also acts as the sole director and manager of NetVision BV. Dirk lives in Germany.

Role play:

Assets in:

Germany ship in Hamburg
Belgium: office space, rented by Belli system
Canada 30 % shares in CanMedia Ltd
UK real estate

Establishment of NetVision:

Italy warehouse /office space

Main creditors:

Austria Austria Telekom
Sweden: Swedish Tax Authority
US IBP Inc. (South Dakota)
NorthAm Inc. (NYC), having bought 100 % shares in NetVision
UK LondonCover (warehouse construction)

Local creditors:

Germany: GWR ship providers and Hamburg Port Authority

Secured creditor:

UK Feathers Bank

Q1.

A Belgium creditor files in the Netherlands a request to have NetVision BV declared insolvent ('faillissement'). Which Dutch court will have jurisdiction to open an insolvency proceeding and what is the effect of the opening?

Q2.

The Dutch court decided to open 'faillissement' proceedings, which is the main proceeding. The court appoints Holman as the 'curator'.

NetVision BV is the registered owner of a yacht, since a few months situated in the Hamburg harbor. The ship, registered in the Netherlands, acts as an important meeting place for German government officials and businessmen with regard to the negotiations re several subsequent transactions where NetVision is involved in.

In Germany a creditor, GWR ship providers, claims outstanding debts and – getting no satisfaction – starts insolvency proceedings.

Can a German court assume jurisdiction?

Q3.

The German court notes that several interests are concentrated in the Northern part of Germany, that a main asset is located at the Hamburg harbor and is used as important commercial center, and that CEO Dirk Durring lives in Germany. The court concludes that NetVision has its center of main interest in Germany, and opens proceedings called 'Insolvenzverfahren', with the appointment Ludwig as 'Sachverwalter'.

A week later liquidator Holman in NL hears about this. What can he do?

Q4.

The Dutch 'faillissement' proceedings are the main proceedings.

Main issues in these proceedings:

4.1. NetVision is party to a research and development contract with Austria Telekom (AT). How will AT be informed re his creditors' position? What law is applicable when AT wishes (a) to terminate the contract, and (b) to lodge a claim for non-paid outstanding costs?

4.2. In Belgium NetVision owns real estate. Dutch law applies to the lease contract with BelliSystems Dutch law applies. Can liquidator Holman terminate the lease-contract with BelliSystems?

Presumption: Belgium Insolvency Law provides for a mandatory maximum termination period of 2 months.

What termination period will apply, and what court will decide?

4.3. NetVision is 30 % shareholder in CanMedia Ltd, located in Toronto. Liquidator Holman claims (a) payment of the dividend, declared to be distributed by CanMedia, and (b) to call for a special shareholders meeting, to which the by-laws of CanMedia provide for. Which law applies here?

4.4. IBP Inc (South Dakota) sold to NetVision – based on a contract excluding the Vienna CISG – equipment, glassfiber and software, and stored (without transferring title) these at the request of NetVision in Houston, awaiting payment. As payments, even after chasing, did not follow, IBP was obliged to sell the goods for lower prices to third parties. IBP claims damages (including warehouse charges, missed income deriving from interest) of \$ 46,000.

IBP requests verification of his claim to which Nebraska law applies. Holman opposes, stating that to the claim Dutch law applies.

Q5.

In Italy NetVision BV has an office. The elegant furniture of this office has not been paid for. The Italian supplier has started civil proceedings a few months before the declaration of 'faillissement'.

Is Holman authorized to involve himself in the Italian civil procedure and to ask for a postponement of these proceedings (according to art. 29 Dutch Insolvency Act)

Q6.

Netvision is wholly owned by Durring NV, the 100 % shares of which are in the hands of Dirk Durring, who also acts as the sole director and manager of

Netvision BV. Because financial information seems to be missing liquidator Holman requests the Dutch court for Durring's imprisonment. Dirk Durring lives just across the border in Germany. What defense could Dirk Durring bring forward?

Q7.

NetVision owns real estate in Reading (UK) and a small warehouse (leased), in which many components are stored.

Does the opening of main proceedings in NL influence Feathers Bank (London)'s position as a holder of a floating charge?

Q8.

LondonCover is the main construction company for NetVision in NL and for the warehouse in Italy. In Italy 'Liquidazione coatta amministrativa' have been opened, with the appointment of mr Baresi as 'Curatore'. From its construction work in Italy LondonCover still has an uncovered claim of € 72,000. On the other hand, LondonCover is a debtor of NetVision, for the purchase of € 52,000 worth of computer components.

LondonCover wishes to set-off his claim:

- a. in the Italian proceedings;
- b. in the Dutch proceedings.

Is he able to do so?

Q9.

Back to the German proceeding, to be presumed secondary proceedings.

Mosk, a Dutch company, has delivered and leased shipping materials, including navigation instruments for € 163,000. The contract implied a choice for Dutch law. Two weeks after the money has been transferred to Mosk, the secondary German proceedings opened, with the appointment of Gustafsen as 'Konkursverwalter'. Gustafsen claims the repayment of the amount. His argument is that according to German law he can invoke the voidness of the payment, because Mosk knew at that moment of NetVisions' financial problems.

Q10.

Holman is the liquidator of the main proceedings in the Netherlands.

What are his rights with regard to both secondary proceedings in Germany and Italy.

And, what are his duties?

Q11.

The US Tax Authorities (IRS) pretends to have a tax claim (based on a NYC Real Estate Tax). The debtor is NetVision, subject to main proceedings in the Netherlands. In addition secondary proceedings have been opened in Italy. Under the EU Insolvency Regulation:

- a. Has the US Tax Department the right to lodge a claim in the Italian procedure?

Q12.

In stead of the US Authorities, the Swedish Tax Authorities have a tax claim.

- a. Has the Swedish Tax Auth. (STA) the right to lodge a claim in the Italian procedure?
- b. In which language should this claim be lodged?
- c. Can STA, after having lodged its claim in the Italian proceeding, nevertheless lodge the same claim also in the main proceeding in the Netherlands?
- d. Presume: Swedish Tax law provides for a 60 day time limit for lodging tax claims. Italian law has a 30 day time limit provision. What law governs the time limit for lodging the tax claim?

Q13.

Now presume NetVision is a wholly owned BV by a US holdingcompany, NorthAm Inc. In Dordrecht (NL) NetVision operates with:

- a call center, that counts fifty employees (from which 8 are from the US, with employment contracts governed by NY law),
- administration of distribution done in English
- this administration runs on the NYC NorthAm computersystem,
- sales and marketing is done out of the US
- IT facilities are fully integrated in the North Am IT system.

Is the Dutch court allowed to appoint in the main proceeding a US 'liquidateur'?

Q14.

In the US NorthAm Inc. have gone into Chapter 11, including a stay. Given the main proceeding of NetVision is in the Netherlands, does the EU Regulation provide an answer for a way of coordinating both (US and Dutch) proceedings?

Case NetVision

(Guidelines for possible answers)

A1.

Art. 3, par. 1: international jurisdiction ('center of main interests')

Additional: art. 2 (a): proceeding listed in Annex A.

Art. 3, par. 1, 2nd sentence: in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Now: Registered office in a non-Member State. Does presumption work?

Which specific court in NL: The Hague, Amsterdam, Rotterdam? Domestic NL law decides.

A2.

Art. 3 (2) int'l jur. when there is an 'establishment', meaning 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods', see art. 2 (h).

A3.

Art. 21: publication of main proceeding and the decision of his appointment in Germany, according to German publication rules.

Art. 22: publication of the main proceedings in ship register (art. 22). As the ship is 'Dutch', this publication will be governed by Dutch law.

Within the short time frame given publication hardly will have effect.

Art. 31 (1) also will apply in a case where the German liquidator (claiming 'main' proceedings), so there is a duty to communicate and (art. 31.2) to cooperate.

The Regulation does not provide any express rule to resolve cases where the courts of two States concurrently claim jurisdiction in accordance with Art. 3, par. 1.

A4.1.

Art. 40: 'known' creditors immediately must be informed, so also AT.

Re (a) art. 4 (1) provides for lex concursus, being NL Insolvency law (art. 37 for executory contracts). Re (b) see art. 4 (2) (h) specifically.

A4.2.

See as an exclusion to art. 4 the provision of art. 8 re a contract to 'make use of immovable property' which is in principle 'solely' governed by the lex rei sitae (Belgium).

A4.3.

According to Dutch law the (a) right is a financial claim, belonging to the NetVision estate. The (b) provision from the by-laws will not be under the

Dutch 'curator' function; it is an asset that is not a part of the estate (art. 4.2 (b)).

Decision: general PIL-rules decide, specifically the 'lex societatis', but the right to convene a meeting is, as a non-financial right, not in the power of the Dutch liquidator.

A4.4.

Does art. 4.2 (h) apply? See Court of Arnhem 15 March 2001 (NIPR 2001, 119) (in a decision with regard to meat and beef). IBP claimed applicability of law of the State of Nebraska (being the law of the place of establishment of the party that has to perform the most substantial obligation). The Dutch curator tried the applicability of Dutch law by referring to art. 4.2 (h) EU InsReg. The Court (in my translation; Wess.):

'Under the presumption that the EU Insolvency Regulation can be seen as a codification of present Dutch international private law, this does not result in applicability of Dutch law. The fact that art. 4.2 (h) states that the rules governing lodging, verification and admission of claims will be determined by the lex concursus, does not mean that on a claim, that has been requested to be verified, also Dutch law will apply.'

A5.

1. art. 3 (1) provides for int'l jurisdiction of Dutch court, to open proceedings.
2. art. 16 leads to automatic recognition of the opening judgment
3. which, with no further formalities, produce same effects, unless in other Member-State secondary proceedings have been opened (art. 17)
4. and liquidator may in principle exercise all powers (art. 18),

but art. 15 provides that opening of Dutch proceedings on a lawsuit pending is governed (not by lex concursus, but) by law of Member State. Italian (procedural) law decides on postponement.

A6.

Does art. 26 (contrary to German public policy) apply?

A7.

Art. 5 excludes from the effects of the opening of the insolvency proceedings rights in rem of creditors or third parties in respect of assets belonging to the debtor which, at the time of the opening of the proceedings, are situated within the territory of another Member State.

Feathers Bank may exercise his floating charge, appoint a receiver and realize the assets in the UK 'situated' within the UK.

On the other hand, the liquidator, even if he is in possession of the asset, cannot take any decision on that asset which might affect the right in rem created on it, without the consent of its holder.

Art. 5, however, does not 'immunise' fully rights in rem against the debtor's insolvency. Art. 5, par. 1, states that the opening of insolvency proceedings shall not affect rights in rem in respect of assets located in other Member States; it does not say that the proceedings shall not affect assets located in another State. As the main proceedings are universal they encompass all the debtor's assets. If the law of the State where the assets are located allows

these rights in rem to be affected in some way, the liquidator (or any other person empowered to do so) may request secondary insolvency proceedings be opened in that State if the debtor has an establishment there. The secondary proceedings are conducted according to national law and they allow the liquidator to affect these rights under the same conditions as in purely domestic proceedings.

If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings, see (Whereas (25)).

A8.

Article 4, par. 2 (d), insolvency set-off is subject to the competence of the State of the opening of the insolvency proceeding, the 'lex concursus'.

If the 'lex concursus' allows the set-off no problem will arise under Article 4.

If the lex concursus does not allow for set-off, Article 6 constitutes an exception to the general rule of the applicability of the law of the State where the proceedings are opened.

A9.

A Dutch Supreme Court ruling of October 1997, deciding:

"The principle of legal certainty however demands to take into account that a Dutch counter-party of the foreign insolvent debtor will not be prepared for the application of non-Dutch rules in a case where the legal act (of payment) is not subject to that foreign law and those foreign rules are less strict when granting a claim than the law applicable to the legal act itself ('lex causae', which was in this case Dutch law). And because of the fact that the Dutch Bankruptcy Act has some other, more strict provisions, the claim of Gustafsen is denied.

The Supreme Court explicitly considers that its ruling 'is supported by international legal development, as particularly is seen in the EU Convention on Insolvency Proceedings', referring to the above mentioned Articles 4 and 13'.

A10.

Rights of liquidator in the main proceedings: 20/21/22/29/32/33/34/35/37.

Duties of the liquidator in the main proceedings: 31/32/40

A11.

Art. 39 (no, unless one defends that IRS can have a 'registered office' in an Member State)

A12.

a. art. 39

b. language art 42.

c. art. 32 (1)

d. Art. 4 (2) (h): the national law of the State of the opening will govern the time limit for lodging claims (Report Virgos/Schmit, para. 267)

A13.

Non-native speaker as liquidator in NL is allowed; would it be practical?

A14.

Open debate; see slide 20.