# The recognition of foreign insolvency proceedings in the Netherlands: A new approach?

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## Introduction

The Dutch Bankruptcy Act (or *Faillissementswet*) dates back to 1896. Concerns about its structure, antiquity and essentially territorialist aims have prompted the formation of a committee to recommend replacement legislation more suited to present day conditions. The core objection to the law is that the reorganisation procedure it contains does not function at all.[1] This work succeeded in producing a pre-draft in 2007, which included, for the first time in Dutch insolvency legislation, a specific chapter dealing with the position of cross-border insolvencies. These provisions were the subject of some commentary at the Academic Forum's conference in Leiden in June 2008,[2] prior to the end of the consultation period in respect of the draft in September of that year. They are said to represent a considerable improvement on the previous position, one that has been described as "inconsistent and protectionist".[3] Although Title 10 is designed to apply to cross-border instances outside the scope of the European Insolvency Regulation ("EIR"), many of its provisions are largely consonant with the position in the European text. However, Chapter 3 on the recognition of foreign insolvency proceedings displays greater influences from the UNCITRAL Model Law on Cross-Border Insolvency 1997 ("Model Law"). The Netherlands is not alone in taking this step,[4] but the structure of Chapter 3 displays sufficient differences that it may be worth noting where the two texts converge or diverge.

Article 10.3.1 provides that foreign insolvency proceedings will be recognised in the Netherlands by an application being filed with the District Court of The Hague, whether the recognition is for main or non-main status. Interestingly, going beyond the rule in Article 15(1) of the Model Law, applications may be filed, not just by the foreign liquidator, but also the debtor or a creditor.[5] However, recognition applications do invite a revisiting of the jurisdiction exercised by the foreign court, unlike the position in relation to cases falling under the EIR or the Brussels I Regulation in relation to civil matters. As a result, recognition may be denied if the foreign court does not have jurisdiction to open insolvency proceedings according to internationally accepted norms and also where the effects of recognition would be manifestly contrary to public policy. This system reflects the German rule of recognition in non-EU cases.

## Public policy

The public policy exception is not generally contentious, given this is also reflected in Article 26 of the

EIR and Article 6 of the Model Law. However, the EIR provision on public policy is tempered by the principle that the member states of the European Union take all possible measures to ensure fulfilment of the obligations they have entered into under the treaty, in practice setting out a principle of conduct in the interests of the supranational body.[6] This provision is understandably absent from the Model Law, which has a global reach, but the question does arise as to whether the availability of this exception will change current practice in the Netherlands, particularly given its territorialist history. The phrase "internationally accepted norms" also raises a question as to what it might mean. Although not explicitly stated as such, the view might be taken that it is a reference to Article 17(1) of the Model Law and the stipulation that certain positive requirements be met for recognition to be forthcoming, i.e. the application relates to proceedings falling within the definition of insolvency in the text, is made by a recognised liquidator, in the requisite form and to the appropriate court. There are no presumptions, however, in relation to recognition under Chapter 3 as there are in Article 16 of the Model Law, which returns the question again to the consideration of Dutch domestic practice and whether or not it will adapt to the universalist aims of Title 10.

Interestingly, once recognition is obtained by means of a decision stating that fact, under Article 10.3.2, the foreign insolvency is taken to extend to assets situated in the Netherlands unless insolvency proceedings have been opened in the Netherlands on the basis of domicile or the carrying out of business, but which will be, in any event, territorial in nature.[7] The extension, seemingly on the basis of recognition of the universality of proceedings, is a ground-breaking step for the Netherlands, given its history of territoriality. Recognition does, however, only have prospective effect and the applicant remains bound to inform the court of any substantial change in the status of the foreign insolvency or the status of the applicant, a position also replicated in Article 18 of the Model Law. Article 10.3.8 also protects the position of a third party who has honoured an obligation towards the debtor arising out of a pre-existing obligation or legal relationship after recognition is forthcoming, provided that the third party is genuinely unaware that recognition has taken place. This is consonant with the rule in Article 24 of the EIR, but which is not contained within the Model Law.

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## Recognition

Extending the recognition framework, Article 10.3.3 applies the same principles in relation to recognition applications and the effect of recognition to the case of applications for the recognition of preservation measures that have been ordered by a foreign court. In a similar vein, Article 10.3.4 sets out the principle that judgments regarding the conduct and closure of recognised proceedings as well as compositions approved by the foreign court are to be recognised with no further formalities, subject again to a public policy exception. There is one notable exception to this comparative lack of formality. Article 10.3.7 states that, where recognition has been obtained, but for the purposes of any further steps in proceedings, Dutch law requires a decision by a supervisory judge, then the District Court in The Hague or any supervisory judge appointed by that court will make the necessary decision. This is generally consonant with the rule contained in Article 27(a) of the Model Law permitting cooperation under Articles 25-26 to be effected by the appointment of a person or body to act at the direction of the court. However, a question does arise as to how this sits with the duty contained in Article 10.5.1 to communicate and cooperate with the foreign court where the issue might well be whether the judge, assuming the requisite experience and expertise, has the necessary inclination towards cooperation. This might be a difficult task for a judge unused to the demands of the new universalist approach on which Title 10 is predicated. This is the same concern that has prompted the drafting of Article 27 of the Model Law in the way it is couched so as to provide some examples (on a non-limitative basis) for judges who may come from jurisdictions without a strong tradition of cooperation.

It is in the context of powers of the foreign liquidator and entitlement to relief that a number of significant comments can be made. Article 10.3.5 states that a foreign liquidator appointed in foreign main insolvency proceedings may exercise, pursuant to a recognition order, all powers conferred by the law of the jurisdiction where proceedings were opened. The application here of the *lex concursus* rule is substantially different from the position in Articles 20-21 of the Model Law, which assumes the application of the law of the recognising state. According to André Berends, there may well be an issue here surrounding the availability of relief such as witness examination, evidence gathering and information delivery.[8] A curiosity here too is the fact that Title 10 permits challenges to the removal of assets and actions to set aside to be taken by the foreign liquidator, perhaps to cover the situation where the *lex concursus* may be silent. This raises the question as to whether a foreign liquidator whose powers under the *lex concursus* are already extensive may in fact have more powers than a comparable Dutch liquidator.[9] The only limitation Title 10 contains is the stipulation that powers cannot include coercive measures or adjudicatory rights in relation to legal proceedings or disputes. This raises another question, particularly if one considers the powers that United Kingdom liquidators have in relation to settlement of claims, most often seen in the context of contributions by directors “extorted” on the basis of threats to bring wrongful trading actions.

## Conditional relief

In any event, relief is conditional on there not being any territorial proceedings opened under Article 10.2.1 or where the exercise of such powers may conflict with preservation measures recognised under Article 10.3.3. Nonetheless,

an important difference in the texts here is that, under Title 10, the foreign liquidator may remove the debtor's assets from the Netherlands, subject to respecting any *in rem* or set off rights, while Article 21(2) of the Model Law provides that this may only happen following an application by the foreign liquidator.[10] This facility is incidentally supported by the stipulation in Article 10.3.9 that any surplus from Dutch insolvency proceedings are to be transferred automatically to the liquidator in foreign main insolvency proceedings. A further difference is to be found in relation to the modification or termination of relief, which is a matter expressly provided for in Article 22(3) of the Model Law, but not in Title 10, except insofar as interim relief is concerned.[11] There are also differences in the interim relief available, where the types of relief mentioned in Article 19 of the Model Law and Article 10.3.6 differ in content, the scope of the Model Law being wider.

Ultimately, despite the differences between the Dutch provisions and their international counterparts, the existence of Title 10 and particularly its recognition provisions do represent a significant improvement on the position hitherto prevailing in the Netherlands. In January 2011, the Dutch government decided finally not to adopt the committee's proposals, as these were unacceptable to the banks due to limitations on their secured rights and to the tax authorities by reason of the proposal to abolish Crown preference. A more limited proposal, to include a better functioning reorganisation procedure, is expected to be tabled in due course. In the meantime, although positive reactions have been received to the international insolvency law provisions, it remains to be seen, as and when the provisions are enacted (either in their own right or as part of the overall reform of insolvency law), whether the judiciary, who are given the task of implementing these provisions, will rise to the challenges posed by the universalism inherent in the drafting in this text. It is to be hoped this is the case.

## Footnotes

1. Thanks are due to Professor Bob Wessels for reviewing and commenting on this piece.
2. See, by various authors, Chapters 7-14 in B. Wessels and P. Omar (eds), Crossing (Dutch) Borders in Insolvency (2009, Insol-Europe, Nottingham). A translation into English of the text of Title 10 itself is contained in Appendix Two of this work.
3. B. Wessels, Chapter 7 at p. 63.
4. Ibid., at p. 66.
5. A. Berends, Chapter 10 at p. 79.
6. Formerly Article 10, EC Treaty (now Article 4(3), Treaty on European Union).
7. This is the impact of the rules in Article 10.2.1.
8. A. Berends, Chapter 10 at p. 79.
9. Ibid., at p. 80.
10. Ibid., at p. 79.
11. Ibid., at p. 80.

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