The future of international restructuring after implementation of WCO II and amendment of EIR, the best is yet to come ?

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Legal Houdini Academy

Understanding Legal Hocus Pocus

Three parts

- Part 1: samples of international restructuring of EU based companies in de period 2002 – 2015 – short history of restructuring – going (further) West
- Part 2: (legislative) changes in the international restructuring landscape:
  - Trends
  - Uncitral Model Law Code
  - EIR / IVO amendments as of 26 juni 2017
  - A new interpretation of the secured creditor exception under the EIR/IVO and the synthetic secondary proceedings ad a solution
  - WCO II what to do?
- Part 3: could and would we have done it differently if the changes were already in place as of 2002?

Part 1: Samples

Part 1: Samples

I. **NL Suspension of Payment with Composition, combined with US Chapter XI**
   - **Versatel (2002)**
   - **UPC (2003)**

II. **NL Out of Court Composition / Financial Restructuring**
   - Hagemeijer (2003)
   - **Kendrion (2004**)

III. **Enforcement NL of security by Security Trustee**
   - **Schoeller Arca Systems (SAS) (2009)**

IV. **EU Forumshopping to restructure debt**
   - Daiseytek (2003), Deutsche Nickel (2004), Eurotunnel (2006). Schefenacker (2007), **Wind Hellas (2009), European Directories (2010)**

V. **The Scheme of Arrangement Route**
   - **Rodenstock (2011), Estro (2013), Magyar (2013), Apcoa Parking (2014) en Van Ganzenwinkel (2015)**

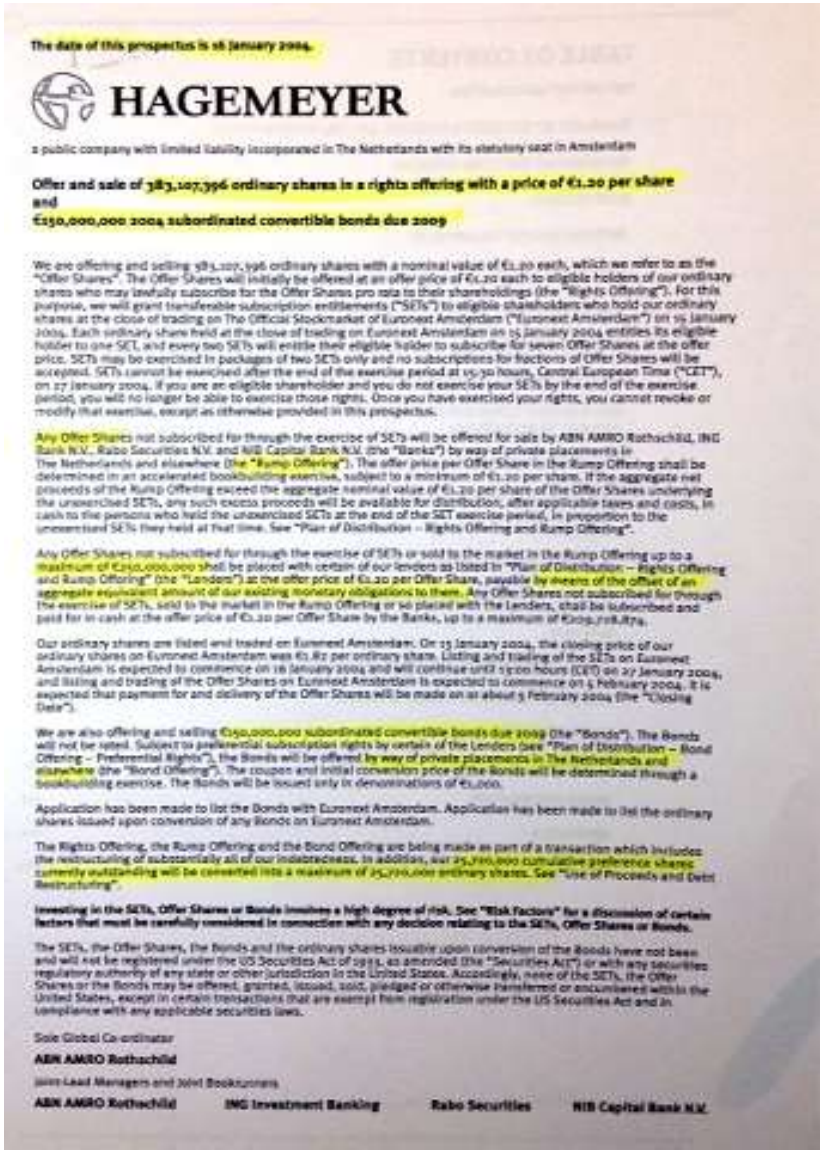
VI. **The US Chapter XI Route**
   - Almatis (2010), **Marco Polo (2011)**

Sample: NL Suspension of payment plus US Chapter XI

- No solution for overstaffing
- Versatel and UPC: Short track proceedings
- First out of court composition, if that fails, suspension of payment plus composition
- Needs to meet both the requirements of both Suspension of payments in NL and Chapter XI in US
- Reason: no acknowledgement of either Dutch suspension of payments in USA or USA Chapter 11 in NL
- Samples: **Versatel and UPC**

Sample: Out of Court Composition: 2003 : Hagemeyer

- Conversion Preferred Shares into common shares
- Rights offering, partly underwritten by Lenders Syndicated Loan, partly setting off obligation to pay up shares against claim under the Syndicated Loan
- Convertible Bond, partly underwritten by Lenders Syndicated Loan, setting of debt to fund Convertible Bond against claim under the Syndicated Loan
- Deleveraging: Lenders Syndicated Loan diminished thanks to rights offering



The date of this prospectus is 16 January 2004.

HAGEMEYER

a public company with limited liability incorporated in The Netherlands with its statutory seat in Amsterdam

Offer and sale of 383,107,396 ordinary shares in a rights offering with a price of €1.20 per share and €250,000,000 2004 subordinated convertible bonds due 2009

We are offering and selling 383,107,396 ordinary shares with a nominal value of €1.20 each, which we refer to as the "Offer Shares". The Offer Shares will initially be offered at an offer price of €1.20 each to eligible holders of our ordinary shares who may lawfully subscribe for the Offer Shares pro rata to their shareholdings (the "Rights Offering"). For this purpose, we will grant transferable subscription entitlements ("SETs") to eligible shareholders who hold our ordinary shares at the close of trading on The Official Stockmarket of Euronext Amsterdam ("Euronext Amsterdam") on 15 January 2004. Each ordinary share held at the close of trading on Euronext Amsterdam on 15 January 2004 entitles its eligible holder to one SET, and every two SETs will entitle their eligible holder to subscribe for seven Offer Shares at the offer price. SETs may be exercised in packages of two SETs only and no subscriptions for fractions of Offer Shares will be accepted. SETs cannot be exercised after the end of the exercise period at 15:30 hours, Central European Time ("CET"), on 27 January 2004. If you are an eligible shareholder and you do not exercise your SETs by the end of the exercise period, you will no longer be able to exercise those rights. Once you have exercised your rights, you cannot revoke or modify that exercise, except as otherwise provided in this prospectus.

Any Offer Shares not subscribed for through the exercise of SETs will be offered for sale by ABN AMRO Rothschild, ING Bank N.V., Rabo Securities N.V. and NIB Capital Bank N.V. (the "Banks") by way of private placements in The Netherlands and elsewhere (the "Rump Offering"). The offer price per Offer Share in the Rump Offering shall be determined in an accelerated bookbuilding exercise, subject to a minimum of €1.20 per share. If the aggregate net proceeds of the Rump Offering exceed the aggregate nominal value of €1.20 per share of the Offer Shares underlying the unexercised SETs, any such excess proceeds will be available for distribution, after applicable taxes and costs, in cash to the persons who held the unexercised SETs at the end of the SET exercise period, in proportion to the unexercised SETs they held at that time. See "Plan of Distribution – Rights Offering and Rump Offering".

Any Offer Shares not subscribed for through the exercise of SETs or sold to the market in the Rump Offering up to a maximum of €250,000,000 shall be placed with certain of our lenders as listed in "Plan of Distribution – Rights Offering and Rump Offering" (the "Lenders") at the offer price of €1.20 per Offer Share, payable by means of the offset of an aggregate equivalent amount of our existing monetary obligations to them. Any Offer Shares not subscribed for through the exercise of SETs, sold to the market in the Rump Offering or so placed with the Lenders, shall be subscribed and paid for in cash at the offer price of €1.20 per Offer Share by the Banks, up to a maximum of €209,708,874.

Our ordinary shares are listed and traded on Euronext Amsterdam. On 15 January 2004, the closing price of our ordinary shares on Euronext Amsterdam was €1.82 per ordinary share. Listing and trading of the SETs on Euronext Amsterdam is expected to commence on 16 January 2004 and will continue until 15:00 hours (CET) on 27 January 2004, and listing and trading of the Offer Shares on Euronext Amsterdam is expected to commence on 5 February 2004. It is expected that payment for and delivery of the Offer Shares will be made on or about 5 February 2004 (the "Closing Date").

We are also offering and selling €250,000,000 subordinated convertible bonds due 2009 (the "Bonds"). The Bonds will not be rated. Subject to preferential subscription rights by certain of the Lenders (see "Plan of Distribution – Bond Offering – Preferential Rights"), the Bonds will be offered by way of private placements in The Netherlands and elsewhere (the "Bond Offering"). The coupon and initial conversion price of the Bonds will be determined through a bookbuilding exercise. The Bonds will be issued only in denominations of €50,000.

Application has been made to list the Bonds with Euronext Amsterdam. Application has been made to list the ordinary shares issued upon conversion of any Bonds on Euronext Amsterdam.

The Rights Offering, the Rump Offering and the Bond Offering are being made as part of a transaction which includes the restructuring of substantially all of our indebtedness. In addition, our 25,720,000 cumulative preference shares currently outstanding will be converted into a maximum of 25,720,000 ordinary shares. See "Use of Proceeds and Debt Restructuring".

Investing in the SETs, Offer Shares or Bonds involves a high degree of risk. See "Risk Factors" for a discussion of certain factors that must be carefully considered in connection with any decision relating to the SETs, Offer Shares or Bonds.

The SETs, the Offer Shares, the Bonds and the ordinary shares issuable upon conversion of the Bonds have not been and will not be registered under the US Securities Act of 1933, as amended (the "Securities Act") or with any securities regulatory authority of any state or other jurisdiction in the United States. Accordingly, none of the SETs, the Offer Shares or the Bonds may be offered, granted, issued, sold, pledged or otherwise transferred or encumbered within the United States, except in certain transactions that are exempt from registration under the US Securities Act and in compliance with any applicable securities laws.

Sole Global Co-ordinator

ABN AMRO Rothschild

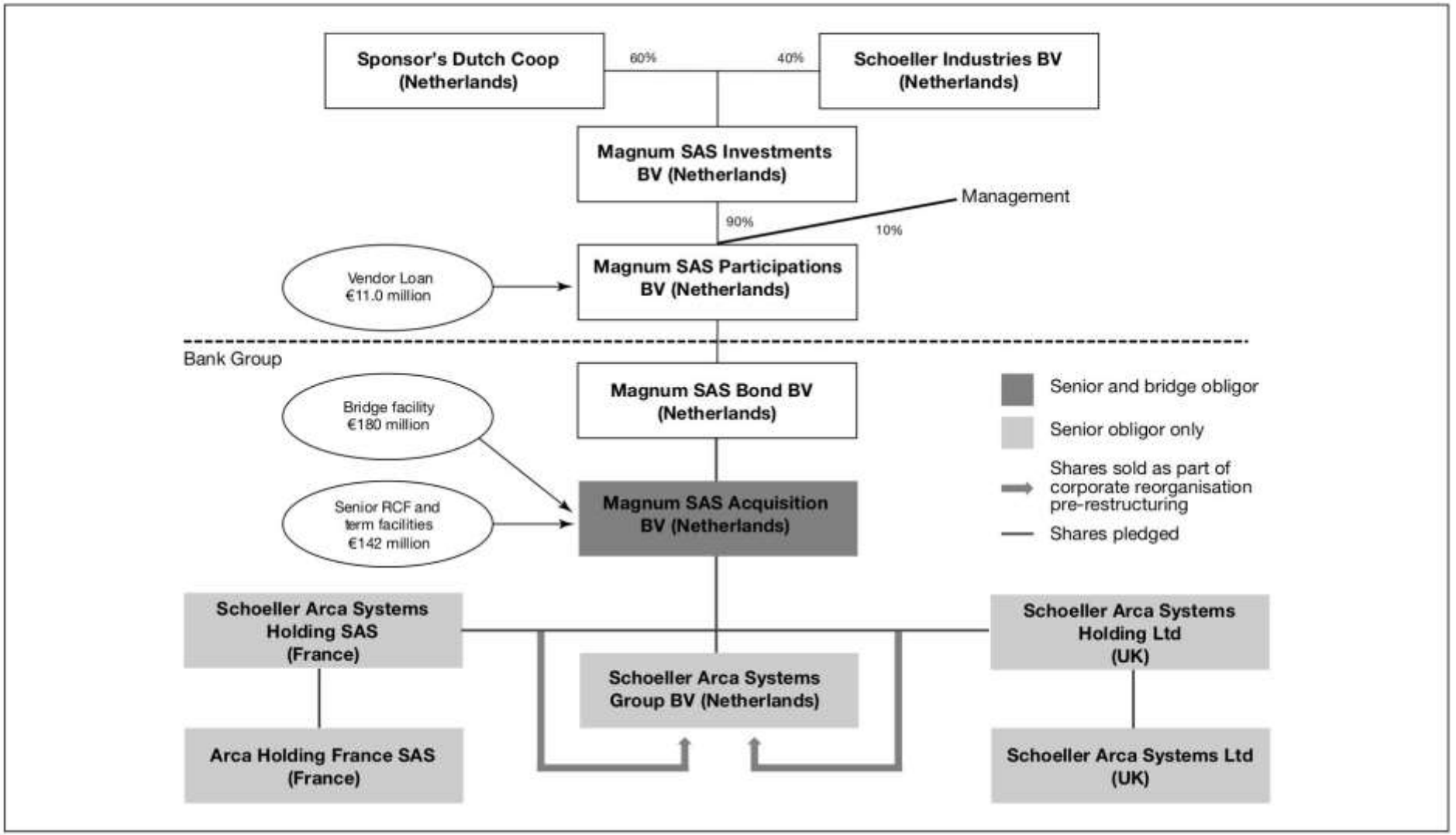
Joint-Lead Managers and Joint Bookrunners

ABN AMRO Rothschild **ING Investment Banking** **Rabo Securities** **NIB Capital Bank N.V.**

Sample: 2009: Enforcement of security by Security Trustee

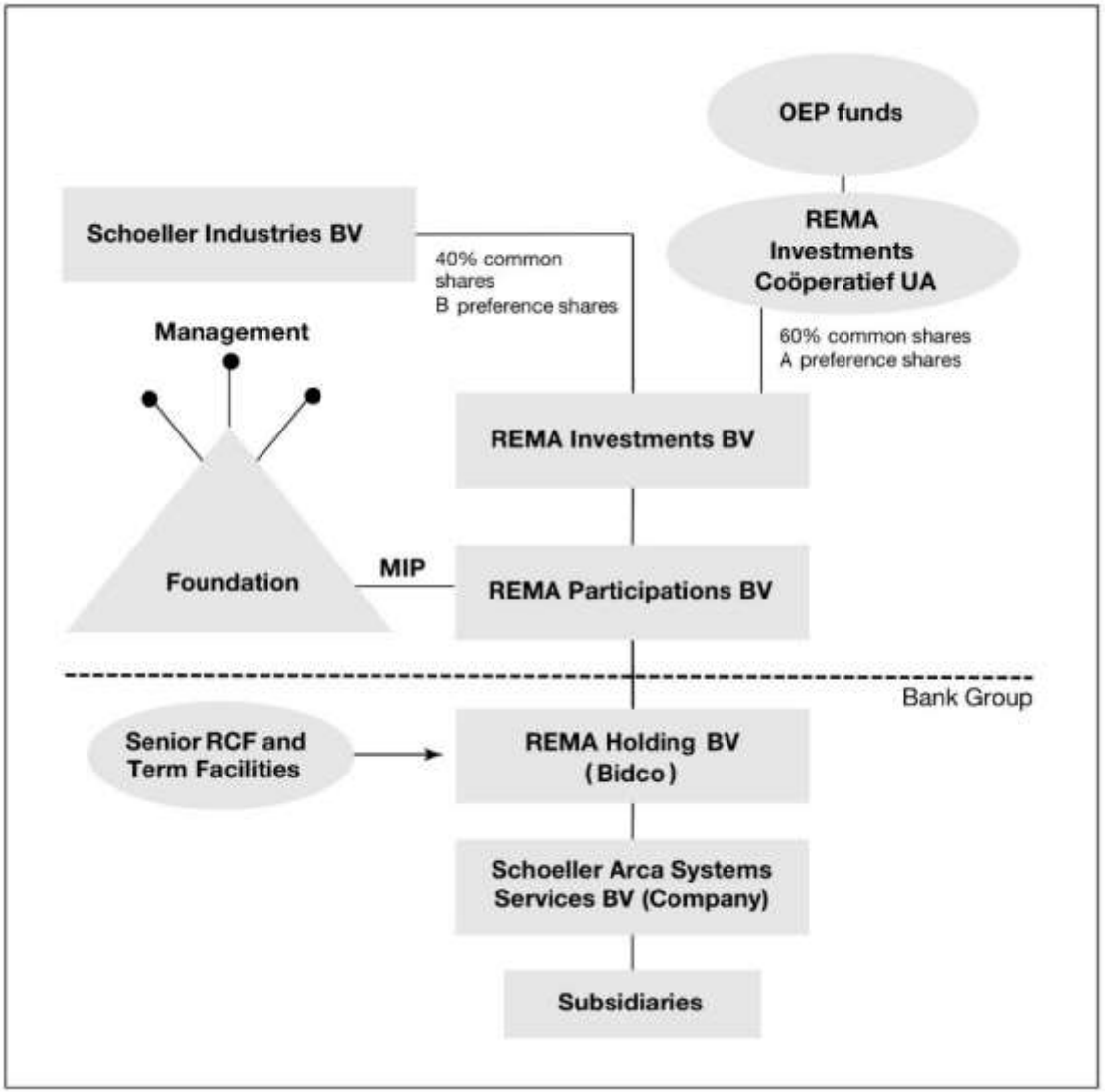
- Secured Assets are sold using the rights Security Trustee has to execute under the law governing the Secured Asset upon default under a (most often) UK loan agreement
- Buyer is choosen and alignment of interest with Secured Creditor is found
- **SAS example**, but there are many more

Figure 1. Pre-transaction structure



Holly Neavill and Teun Struycken in European Debt Restructuring Handbook (2013)

Final closing structure



Holly Neavill and Teun Struycken in European Debt Restructuring Handbook (2013)

"(b) if the asset which is disposed of consists of all of the shares (which are held by an Obligor or European Directories (DH5) BV…) in the capital of an Obligor or any holding company of that Obligor, any release of the Obligor or holding company from all liabilities it may have to any Lender, Subordinated Creditor or other Obligor, both actual and contingent in its capacity as a guarantor or borrower (including any liability to any other Obligor by way of guarantee, contribution, subrogation or indemnity and including any guarantee or liability arising under or in respect of the Senior Finance Documents or Mezzanine Finance Documents) and a release of any Transaction Security granted by that Obligor or holding company over any of its assets under any of the Security Documents; and

(c) if the asset disposed of consists of all of the shares held by an Obligor or the Parent in the capital of an Obligor or any holding company of that Obligor and if the Security Trustee wishes to dispose of any liabilities owed by that Obligor or Holding Company, any agreement to dispose of all or any part of those liabilities on behalf of the relevant Lenders, Subordinated Creditors, Obligors and Facility Agents (with the proceeds thereof being applied as if they were the proceeds of enforcement of the Transaction Security) Provided that the Security Trustee shall take reasonable care to obtain a fair market price..."

http://www.bailii.org/ew/cases/EWHC/Ch/2010/2406.html

European Directories (2010)

See also in European Debt Restructuring Handbook (2013), p. 175 e.f.

HHY Luxembourg SARL & Anor v Barclays Bank Plc & Ors [2010] EWHC 2406 (Ch) (23 September 2010)

MRS. JUSTICE PROUDMAN

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(1) HHY LUXEMBOURG S.A.R.L.
(2) AMP CAPITAL INVESTORS LIMITED **Claimants**

- and -

(1) BARCLAYS BANK PLC
(2) EUROPEAN DIRECTORIES (DH6) B.V.
(3) ALCENTRA LIMITED
(4) ALLIED IRISH BANKS PLC
(5) BANK OF SCOTLAND PLC
(6) LLOYDS TSB BANK PLC
(7) THE ROYAL BANK OF SCOTLAND PLC
(8) THE ROYAL BANK OF SCOTLAND N.V. **Defendants**

To my mind the defendants' interpretation of sub-clause 15.2 does not bear out what the clause actually stipulates. It seems to me plain that the reference to "Obligor or any holding company" is to the Obligor or holding company whose shares are being disposed of, not to other Obligors (whether or not their holding companies are Obligors) whose shares are not being disposed of. It is to my mind artificial to dissociate the expression "an Obligor or any holding company of that Obligor" in the first part of clause 15.2(b) from the two references to release of "the Obligor or holding company" in the second part. As a matter of grammar the two expressions mean the same thing, namely, the Obligor or the holding company whose shares are sold. The Intercreditor Agreement already has a defined term "Subsidiary" which could have been used if release of the liabilities of subsidiaries had been intended.

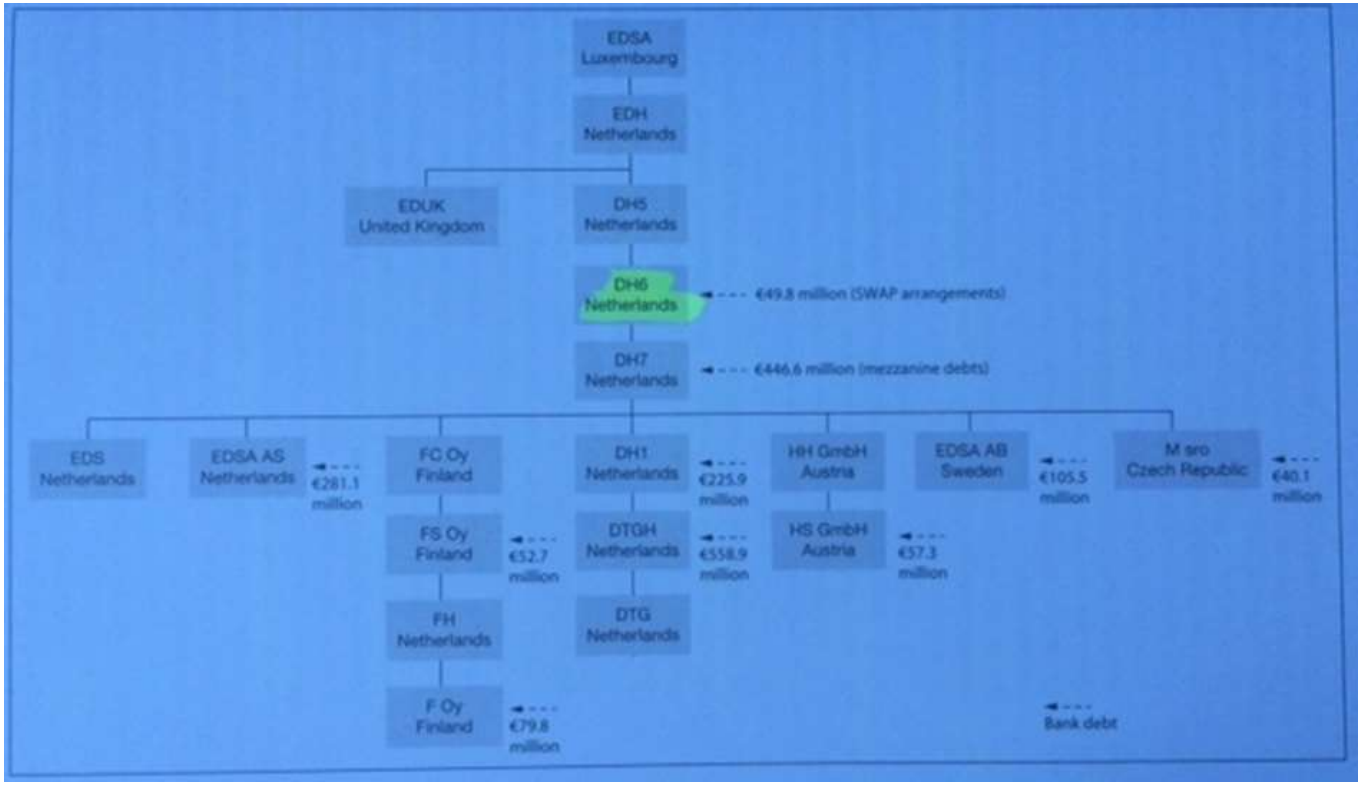
http://www.bailii.org/ew/cases/EWHC/Ch/2010/2406.html

Court of Appeal October 22, 2010

- “22. It is no misuse of language to use the words "disposal of all of the shares in the capital of an Obligor or any holding company of that Obligor" to refer to individual Obligors lower down the company chain and any holding company of such Obligors. It is agreed that the holding company can be both a direct and indirect holding company, and in such circumstances DH7 is indeed the Obligor's holding company and the company the shares in which it is proposed to dispose of. “

http://business-finance-restructuring.weil.com/wp-content/uploads/2010/11/HHY-Luxembourg-appeal.pdf

European Debt Restructuring Handbook (2013), p. 175 e.f.



Sample 4: EU Forumshopping

- EU Company uses regime of foreign EU country to restructure its debt
- Using the recognition European Insolvency Regulation: Daisytek, Collins & Aikman, Eurotunnel, Schefenacker, Wind Hellas, European Directories
- **But: what about Section 5 EIR protection of secured creditor (later this afternoon)**

Lower Court Decisions re restructuring

- Daisytek (2003)
- Deutsche Nickel (2004) (Migration)
- Eurotunnel (2006)
- Schefenacker (2007) (Migration)
  - See: Restructuring and Workouts (2008), Jurisdiction Shopping, Christine L. Childers and Ronald DeKoven, pag. 99 e.f., esp. p. 110 e.f.
- **Wind Hellas (2009) (COMI shift from Lux to UK)**
  - http://globalinsolvency.com/filing/in-re-hellas-telecommunications
  - European Debt Restructuring Handbook (2013), p. 163 e.f.
- **European Directories (2010) (COMI shift from NL to UK)**:
  - Dutch liquidators be aware of this UK danger
  - European Debt Restructuring Handbook (2013), p. 175 e.f.

Wind Hellas: Mr Justice Lewison

- "In the present case it is said that **the company's COMI was changed from Luxembourg to England in the middle of August this year**. I have to consider the position **as at today's date**. That is to say some **three months** on. The **objective and ascertainable facts** on which the company relies in support of its contention that **it has shifted its COMI** are that its head office and principal operating address is now in London, albeit that the premises it occupies are relatively modest since the **company is no more than a financing and shareholding vehicle**. The company's creditors were notified of its change of address around that time and an announcement was made by way of a press release that its activities were shifting to England. It has opened a bank account in London and all payments are made into and from that bank account although there still remains a bank account in Luxembourg to deal with minor miscellaneous payments. It has registered under the Companies Act in this country, although its registered office remains in Luxembourg and it may remain liable to pay tax in Luxembourg too. http://www.bailii.org/ew/cases/EWHC/Ch/2009/3199.html

Wind Hellas Mr Justice Lewison

- "The purpose of the COMI is to enable creditors in particular to know where the company is and where it may deal with the company. Therefore, it seems to me that one of the most important features of the evidence, which is the feature I mention next, is that **all negotiations between the company and its creditors have taken place in London**.
- On that evidence I am satisfied that the **company has moved its COMI from Luxembourg to England** with the consequence that I have jurisdiction to make the order sought"

Again: Wessels, par 10600a and 10600c: From COMI to **CANE**: **Centre where all negotiatons regarding a rescue plan takes place**

http://www.bailii.org/ew/cases/EWHC/Ch/2009/3199.html

European Directories: Mr Raynor

- Lewison J said that on the evidence he was satisfied the company had moved its COMI from Luxembourg to England.
- In the present case the evidence before me may be summarised as follows. **The company here acts as an intermediate holding company for the other companies within its group**. **It raises finance then made available to the operating subsidiaries within the group. It does not trade with third parties other than engaging legal and other advisors in connection with restructuring. Its assets mainly consist of intangible assets. It has no employees although of course the overall group has a large number of employees. The directors of the company are Mr Briggs, resident in London, Mr Cook, resident in the United States, and Mr Perisat, also resident in London.**
- **All decisions**, I am satisfied, relating to the company's strategic and financial arrangements, and in particular those concerning its financial dealings and the proposed group restructuring, are made by directors from **the Chiswick office**. The company and its directors do not operate from any office in The Netherlands in relation to the company's affairs. It created a restructuring committee with the role of considering the potential restructuring and that meets in London. The vast majority of its creditors are based in England. The principal **financing agreements are governed by English law**. The senior facilities agreement contains an **exclusive jurisdiction clause in favour of England** and the mezzanine facility and intercreditor agreements provide that the courts of England are the most appropriate and convenient forum. **All of the first lien debt, second lien debt and mezzanine debt are, as I understand it, traded on the London secondary debt market**.
- Next, and this is of significance in the light of the observations of Lewison J in the Hallas case, since the onset of financial difficulties in the second half of 2009 the **centre of discussions between the company's directors, its professional advisors and principal creditors in relation to the proposed restructuring and reorganisation has been in London**. Numerous meetings have taken place between the company and its creditors in London to consider the proposed restructuring. The majority of the advisors to the company and its creditors are based in London and thus, in order to pursue a restructuring it has been determined that the only viable option is for the company to go into administration in England.

http://www.bailii.org/ew/cases/EWHC/Ch/2010/3472.html

European Directories: Mr Raynor

- **On 14 and 21 May the board resolved to take the necessary steps to confirm the location of the company's COMI in England, and on 20 May 2010 the company wrote to the senior co-ordinating committee to inform them of the steps the company would be undertaking to confirm the location of the COMI in England. Following that resolution a number of practical steps were taken with a view to confirming the COMI in England.**
- In summary, **the company's business address registered at the Dutch Trade Registry has been designated as the Chiswick office.** This address has been designated as the Head Office of the company, and the company does not have a business address in The Netherlands. It has a registered branch in England with the Registrar of Companies at Companies House. On 24 May of this year it wrote to its creditors and counterparties to notify them that the Chiswick address was the new address for correspondence. Its website lists the Chiswick office as the company's address and states, as is factually accurate now, that the company's operational headquarters is in London. The company has a bank account in London. The sole signatory to that is the chief financial officer who is based at the Chiswick office. Creditors communicate with the company and its advisors in London.
- On that evidence, which seems to me is entirely one way, I am perfectly satisfied that the company has discharged the onus which rests upon it to satisfy me that the rebuttable presumption that the COMI is the place of its registered office has indeed been rebutted. I am perfectly satisfied on the evidence before me that the **COMI in the case of this company is England**, and that there is thus jurisdiction to make the order which is sought to be made.

http://www.bailii.org/ew/cases/EWHC/Ch/2010/3472.html

UK Scheme of Arrangement Route (i)

- Secured Creditors: in Nederland not (yet, think about WCO II) bound by (pre) insolvency proceedings
- Other countries yes, also secured creditors
- **Scheme of Arrangement** route:
  - Client Memo Clifford Chance: International restructuring – have schemes of arrangement come of age?
    - http://www.cliffordchance.com/publicationviews/publications/2011/05/international_restructuring-haveschemeso.html
  - Ilse van Gasteren in FIP 2011/2 and Book Financiële sector en internationaal privaatrecht, p. 167 e.v.
  - De erkenning van een Engelse Scheme of Arrangement door de Nederlandse rechter, H.L.E. Verhagen en J.J. Kuipers in Overeenkomsten en Insolventie (Serie Onderneming en Recht deel 72)
- UK law governed loan agreement including choice of jurisdiction UK Courts: Scheme of Arrangement is used to restructure against minority of secured lenders, even if debtor is registered in different jurisdiction.

UK Scheme of Arrangement Route (ii)

Rodenstock:

- Court Decision itself: May 6, [2011] EWHC 1104 (Ch), Case No: 2135 of 2011
- http://www.bailii.org/ew/cases/EWHC/Ch/2011/1104.html
- See also European Debt Restructuring Handbook (2013), p. 187 e.f. Florian Burder, Wolfgang Nardi, Leo Plank en Freddie Powles

- Elements:
- UK Law governed loan documentation;
- Jurisdiction Clause UK;
- Majority Senior Creditors in UK;
- Company is German (neither Comi nor Establishment in UK); and
- Pursuant to German law, decision of UK judge would according to two experts be acknowledged due to the fact that question whether or not secures debt was amended, is to be decided pursuant to German Law

Other Samples: UK Scheme Estro (2013)

- “International law firm Freshfields Bruckhaus Deringer has advised leading Dutch daycare business Estro Groep BV on the successful restructuring of its €280 million leveraged loan facilities and related finance debt. Freshfields also advised Estro on the group’s transition to new ownership.
- The restructuring was completed on a consensual basis, but backed by two English law Schemes of Arrangement which were convened and approved by the relevant creditor classes. The Schemes did not proceed to sanction on the basis that the restructuring was completed consensually prior to the sanction hearing.
- …. ‘This restructuring for Estro Groep is highly significant, not least in that it marks another occasion where English Schemes of Arrangement were prepared to assist non-English companies execute their restructurings. There is a growing use of English Schemes of Arrangement to restructure English law governed debt even where the borrower and its creditors are located outside of England. We expect them to become increasingly mainstream in the coming months and years. ……. “

Source:
http://www.freshfields.com/en/deals/Freshfields_advises_Dutch_daycare_firm_Estro_Groep_BV_on_its_successful_restructuring/

Other Samples: UK Scheme Magyar

- On 3 December, the English Court sanctioned a scheme of arrangement in respect of a non-UK company in the case of Re Magyar Telecom B.V. [2013] EWHC 3800 (Ch). The case is of particular interest as it confirms that the English Court is willing to approve schemes which (1) compromise NY law governed bonds and (2) vary/release rights against third parties. It also confirms that schemes should benefit from recognition in Europe under the Judgments Regulation.

- Source: Clifford Chance English scheme of arrangement compromises New York law bonds issued by a Dutch registered company and gains recognition in the US
  - http://www.cliffordchance.com/publicationviews/publications/2013/12/english_scheme_ofarrangementcompromisesne.html

Magyar Telecom (2013)

- JOR 2014/181 Annotator Declercq:
- "The novelty of Magyar is that in order to meet the so-called "sufficient connection with the UK" requirement for the applicability of a Scheme, **a transfer of Magyar's COMI (Centre of Main Interests) from the Netherlands to England** took place.
- In addition, on 11 December the New York Bankruptcy Court recognised the English scheme in respect of Magyar under Chapter 15 of the US Bankruptcy Code as a foreign main proceeding providing for related relief and giving full force and effect to the scheme and related documents in the US. "

See also: http://www.bailii.org/ew/cases/EWHC/Ch/2013/3800.html
And :
http://www.srz.com/Popularity_of_UK_Scheme_of_Arrangements_to_Restructure_Foreign_Companies_Continues/ (Authors: Declercq and Van de Graaf)

Other Sample UK Scheme Change of Law and Jurisdiction: APCOA

- On 14 April 2014 the English Court sanctioned schemes of arrangement for the APCOA Group, including several foreign companies within that Group. The decision is the latest in a line of cases which illustrate the willingness of the English Court to accept jurisdiction over foreign companies. For the first time jurisdiction was established on the basis of a Facilities Agreement whose governing law and jurisdiction clauses had been changed to English law and the English courts by majority lender consent.
- Source: Client Briefing Clifford Chance April 15, 2014
- See also:
- http://www.bailii.org/ew/cases/EWHC/Ch/2014/1867.html
- http://www.bailii.org/ew/cases/EWHC/Ch/2014/3849.html

Other Sample UK Scheme Change of Law and Jurisdiction: APCOA

- "To summarise my views on the jurisdictional issues, I have concluded that the combination of the fact that: (a) the facilities agreement is now (albeit pursuant to a change of law clause) governed by English law, (b) subject to one small issue, the creditors have selected the English court as having exclusive jurisdiction, and (c) the court has been provided with independent experts' opinions confirming that the courts in the jurisdiction where the creditors would have otherwise been likely to seek enforcement would indeed be likely to recognise the effectiveness of the orders if made, is sufficient to warrant the exercise of jurisdiction and the expectation that such exercise will be effective, given (of course) that I am otherwise satisfied that the schemes are fair and the relevant requirements of English law have been satisfied. "
  - HONOURABLE MR JUSTICE HILDYARD IN THE MATTER OF APCOA PARKING HOLDINGS GmbH AND OTHERS AND IN THE MATTER OF THE COMPANIES ACT 2006
  - http://www.bailii.org/ew/cases/EWHC/Ch/2014/1867.html

Conclusion UK Scheme Route

77 We find that in the development of case law, the English courts have taken a chameleonesque approach when establishing the required sufficient connection with the English jurisdiction, in order to sanction schemes. It seems that even in situations where there seems to be no relevant connection with the United Kingdom at the outset, the courts will go a long way in finding (aided by counsel) a connection with the United Kingdom that suffices to accept jurisdiction. In doing so, the courts have been pushing the envelope.

The Uneasy Case for Schemes of Arrangemnet under English Law in relation to non- UK Companies in Financial Distress: Pushing the Envelope? Lucas Kortmann en Michael Veder

Sample: The Chapter XI Route (i)

- US Chapter 11 has extraterritorial effect as a matter of US law
- Breach outside US of court order is considered contempt of court
- Thus: any creditor with commercial interest in US most likely accepts court order, even though there is no official recognition of US court order in its country
- Sample: **Almatis case** (2010), Disclosure Statement Chapter XI Proceedings, p. 59:
  - "A significant percentage of the Financial Lenders have connections in the United States.This connection provides some measure of assurance that these parties will not take actions in violation of the Bankruptcy Code and, if they do, that the Bankruptcy Court has an adequate remedy."
  - See also: European Debt Restructuring Handboek (2013), p. 153 e.f. Almatis Case by Kon Asimacopoulos, Justin Bickle and Adam Paul

Sample Chapter XI Route: Marco Polo

- Marco Polo Seatrade B.V. with three affiliated companies: Seaarland Management B.V., Magellano Marine B.V. and Cargoship Maritime B.V. files in July 29, 2011 for Chapter 11 in USA
- Marco Polo was international maritime shipping company, almost US$ 210 million of secured debt outstanding
- Its two principal lenders Credit Agricole and RBS filed motions to dismiss the case
- Assets in the USA: interest in reserve account of manager of asset pool and unused fee retainer in an amount of US$ 250,000.
- Judge denied motions of Credit Agricole and RBS on November 3, 2011 to dismiss the Chapter 11 case


Amerikaans failliet gaan

Conclusion part 1

- Go West and even further West?

Question part 1

- Should stakeholders be able to choose the restructuring forum yes or no?
- If so, who are the relevant stakeholders?

Part 2

(Legislative) Changes in the international restructuring landscape:

- Trends
- Uncitral Model Law Code
- Changes in EU legislation: Report European Commission December 12, 2012, European Commission Recommendation March 12, 2014 and EIR / IVO amendments as of 26 juni 2017
- New Interpretation of the secured creditor exception under the EIR/IVO
- WCO II what to do?

Trends: More Options

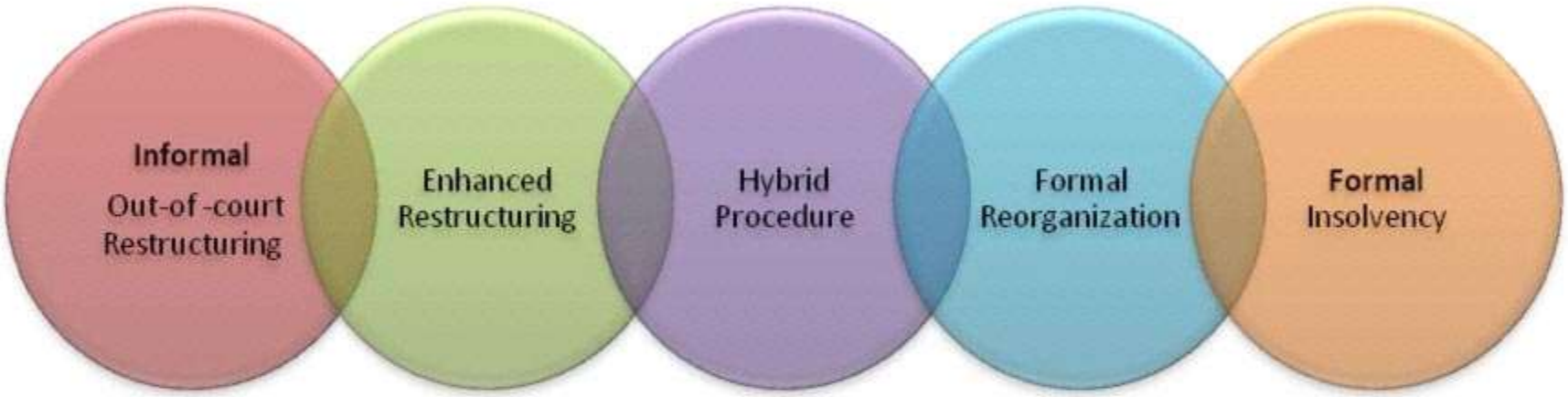


Chart 1: The continuum of procedures for the treatment of financial difficulties.

World Bank Study 2012 Out-of-Court Debt Restructuring
https://openknowledge.worldbank.org/handle/10986/2230

Informal versus Formal

- Informal Out of Court Restructuring
  - Pure consensual

- Enhanced Restructuring
  - Consensual supported by code of practises (such as London Approach and Insol 2011 Principles)

- Hybrid Proceeding (pre-pack)
  - Deal with Hold-out through execution or formal insolvency proceeding

- Reorganisation
  - Suspension of payment

- Insolvency
  - Bankruptcy

Pros and Cons Informal

- **Advantages Informal**
  - Flexibility
  - Ease of Negotiation
  - Timing Issues
  - Confidentiality
  - Less Stigma
  - Continuation business
  - Management in place
  - No amendments contracts
  - No court Involvement
  - Lower costs

- **Disadvantages Informal**
  - Analysis debtors
  - Punishment fraud
  - No avoidance actions
  - Availability remedies (f.e. no stay)
  - All consent requirement
  - Lender liability Issues
  - Multi-party negotiations
  - Recognition foreign courts

World Bank Study 2012 Out-of-Court Debt Restructuring, https://openknowledge.worldbank.org/handle/10986/2230

One conclusion part 2

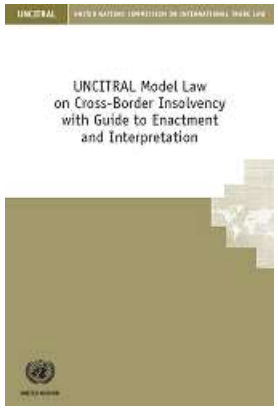
- More optionality

Question

- Does having more options enhance restructuring possibilities of a business?

UNCITRAL Model Law (i)

- In December 1997, the General Assembly endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL).
- The Model Law does not purport to address substantive domestic insolvency law, needs to be implemented in local law to become hard law
- It provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State.
- Van Galen: "**State of the Art**" (Ondernemingsrecht 2008, afl. 13., nr. 137



UNCITRAL Model Law (ii)

- Adopted and this hard law in **Australia** (2008), **British Virgin Islands**; overseas territory of the **United Kingdom of Great Britain and Northern Ireland** (2003), **Canada** (2009), **Colombia** (2006), **Chile** (2013) **Eritrea** (1998), **Great Britain** (2006), **Greece** (2010**), Japan** (2000), **Mauritius** (2009), **Mexico** (2000), **Montenegro** (2002**), New Zealand** (2006), **Poland** (2003), **Republic of Korea** (2006), **Romania** (2003**), Serbia** (2004**), Slovenia** (2007), **South Africa** (2000), **Uganda** (2011), the **United States of America** (2005) and Vanuata (2013.

- See: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective
http://www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf

UNCITRAL Model Law (x)

Position (Secured) Creditor

Article 22. ***Protection of creditors and other interested persons***

- 1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, **the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected**.
- 2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
- 3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Tell you more about it later!

NL Outside EU, Future NL Insolvency law

- Kortmann Bill proposed to insert UNCITRAL Model law on Cross-Border Insolvency inserted in Draft
- Upon request of administrator in foreign main or foreign non-main insolvency proceeding, the insolvency proceedings are recognized
- Kortmann Bill is gone
- What is next?
- Time to put effort in WCO III and/or WCO IV?
- Yes, but with some adoptions, to put more in line with Model law
    - See Van Galen, Ondernemingsrecht 2008, afl. 13., nr. 137 en Berends, de Insolventie in het internationaal privaatrecht, 2e druk, p. 102 e.v.

Other conclusion part 2

- NL is lacking behind with implementation Model Law

Question

- Does NL need the Model Law?

Section 5.1 EIR Revisited: Section 8.1

- 1. The opening of insolvency proceedings **shall not affect** the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

- 1. The opening of insolvency proceedings **shall not affect** the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

See Wessels International Insolvency Law (2012), par 10639 e.f., especially par 10653 e.f. explaining shall not affect

Discussion on shall not affect, the Heidelberg-Luxembourg-Vienna Report's View

- **Substantive restriction rule**:
- "6.2.2.1 How to achieve policy goals"
- "Therefore, the original meaning of the provision in question is not to adapt the effects form the jurisdiction of the Member State A *("member state in which the main proceedings is openened, LHA")* to the jurisdiction of the Member State B (choice of law rule), but instead to restrict the effects to the assets situated in the territory of Member State A. It is therefore a substantive rule restricting the effects of the opening of insolvency procedures on rights in rem assets located in the territory of Member State A in derogation of the general concept of Article 17 EIR …"

- "6.2.2.4 Adjustment, Reduction, or Discharge of the Secured Claim
- …
- As far as accessory securities are concerned, it is questionale whether an adjustment, a reduction or even the discharge of the secured claim "*affects*" the accessory *right in rem* and is therefore orhibitied by Article 5 EIR."

Differentiate between the secured debt and the security interest

- "One important question us unanswered by the Regulation and is not addressed in the Virgós-Schmit Report. **Does the Article (5, LHA) merely protect the right in rem in the strict sense (ie the security interest over the relevant asset) or does it also protect the underlying secured debt?** In other words, does Article 5 prevent a composition plan or proceeding which would be effective under the state of the opening of proceedings from amending or discharging the debtor's secured indebtedness and therefore protect the bank's rights to enforce its security interest in respect of that indebtedness over assets located in another Member State? Although an English voluntary arrangement (which is available as a main proceeding in the United Kingdom) cannot, by virtue of section 4(3) of the Insolvency Act 1986, affect the right of a secured creditor to enforce its security interest without its concurrence, **it may well be that main proceedings opened in another Member State could provide for the variation or discharge of a secured debt governed by English law without the express consent of the secured creditor and this could have an effect on the enforcement of security in England. Although such a result would seem to be far from the intentions of the draftsman, it cannot be excluded.**"

- Chapter 6.56 The effect of the Regulation on Cross-Border Security and Quasi-security. The EC Regulation on insolvency proceedings, a commentary and annotated guide, 2nd edition edited by Gabriel Moss QC, Ian Fletcher LLD and Stuart Isaacs QC

Differentiate between the secured debt and the security interest

- "**The Regulation is not clear in this regard**. Whilst Article 5 states that the opening of proceedings shall not 'affect' the rights in rem of creditors in respect of assets in another Member State, it could be argued that this does not prevent the discharge of secured liability. **However, without the any underlying secured liability for the security to secure, the rights in rem would be worthless. This is a matter which it might be appropriate to refer to the European Court of Justice**."
- Chapter 6.129 The effect of the Regulation on Cross-Border Security and Quasi-security. The EC Regulation on insolvency proceedings, a commentary and annotated guide, 2nd edition edited by Gabriel Moss QC, Ian Fletcher LLD and Stuart Isaacs QC

View of Michael Veder

- "'een 'hard en fast rule' bevatten die met zich brengt dat zekerheidsrechten op goederen die zich in een andere lidstaat zijn gelegen dan de lidtsaat waar de insolventieprocedure is geopend, geen invloed ondervinden van een ten aanzien van de schuldenaar geopende hoofdinsolventieprocedure. Art. 5 en 7 bevatten in die zin dan ook geen verwijzingsregels maar zijn veeleer te beschouwen als regels van uniform materieel recht voor grensoverschrijdende gevallen."
- "Een dwangakkoord heeft naar mijn mening derhalve geen invloed op de mogelijkheid van een schuldeiser zijn volledige gesecureerde vordering te verhalen op de opbrengst van met zekerheidrechten belaste goederen die in andere lidstaat zijn gelegen. Dit is naar mijn mening slechts anders indien de betreffende schuldeiser voor het akkoord heeft gestemd en zich daarmee vrijwillig heeft gebonden aan de gevolgen van dat akkoord."

For non-Dutch speakers: Excuse my Dutch
Michael Veder in Goederenrechtelijke zekerheidsrechten in de int. Handels- en financieringspraktijk, p. 306 en 314, Zekerhedenrecht in ontwikkeling KNB 2009

ECJ 5 July 2012 Case C-527/10, ERSTE Bank Hungary Nyrt v Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt , OPINION OF ADVOCATE GENERAL MAZÁK delivered on 26 January 2012

- “36. Article 5(1) of the Regulation, however, does not relate to the court’s jurisdiction. That provision does not deal with the conflict between courts which is liable to arise as a result of the insolvency proceedings. **The rule set out in Article 5(1) constitutes a conflict-of-laws rule** in the form of an exception to the general principle, laid down in Article 4(1) of the Regulation, that the law of the Member State in which the insolvency proceedings were opened is to apply”

ECJ 5 July 2012 Case C-527/10, ERSTE Bank Hungary Nyrt v Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt

- "37 Taking account of the foregoing, it must be held that the Regulation is applicable in circumstances such as those in the main proceedings given that the insolvency proceedings at issue, as is clear from paragraphs 31 and 32 of this judgment, fall within its scope and that, from 1 May 2004, the Hungarian courts were therefore required to recognise the judgment opening those proceedings handed down by the Austrian courts.
- 38 Article 4(1) of the Regulation then lays down the rule that the determination of the court with jurisdiction entails determination of the law which is to apply. According to that provision, as regards both the main insolvency proceedings and secondary insolvency proceedings, the law of the Member State within the territory of which proceedings are opened (*lex concursus*) is applicable to the insolvency proceedings and their effects (see, to that effect, *Eurofood IFSC*, paragraph 33; *MG Probud Gdynia*, paragraph 25; and Case C-191/10 *Rastrelli Davide e C.* [2011] ECR I-13209, paragraph 16). As stated in Recital 23 in the preamble to the Regulation, that law governs all the conditions for the opening, conduct and closure of the insolvency proceedings.
- 39 However, in order to protect legitimate expectations and the legal certainty of transactions in Member States other than the State of the opening of the insolvency proceedings, the Regulation lays down, in Articles 5 to 15, a certain number of exceptions to that rule of the applicable law for certain rights and legal situations which are considered, according to recital 11 thereto, as particularly important.
- 40 Thus, as regards rights in rem, Article 5(1) of the Regulation states that the opening of insolvency proceedings does not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
- 41 The scope of that provision is clarified by recitals 11 and 25 in the preamble to the Regulation, according to which there is a need for a special reference 'diverging from the law of the opening State' in the case of rights in rem, since these are of considerable importance for the granting of credit. Thus, according to recital 25, the basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings.
- **42 Therefore, Article 5(1) of the Regulation must be understood as a provision which, derogating from the rule of the law of the State of the opening of the proceedings, allows the law of the Member State on whose territory the asset concerned is situated to be applied to the right in rem of a creditor or a third party over certain assets belonging to the debtor.**"

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5fe28ec87b9114d17a4ebde8ec312226c.e34KaxiLc3eQc40LaxqMbN4ObNeRe0?text=&docid=124745&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=196141

Pielkenbrock's View of ECJ 5 July 2012 Case C-527/10, ERSTE Bank Hungary Nyrt v Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt

- "The wording of the opinion and the decision may be construed in a manner stating that Article 5 (1) EIR further allows the *insolvency law* of Member State B to be applied along with the effects such as restrictions of the enforcement of rights in rem by creditors or third parties. If this understanding were to be correct, Article 5 (1) EIR would not be an substantive restriction rule, but a typical choice of law rule."

Source:European Insolvency Law Heidelberg-Luxembourg-Vienna Report, p. 180

Veder wackes up, or at least gets more into his own balance

- "Op het congres 'The Future of the European Insolvency Regulation' dat in april 2011 plaatsvond in Amsterdam heb ik gepleit voor aanpassing van art. 5 (en 7) IVO. **Ik heb voorgesteld art. 5 IVO te herformuleren tot een verwijzingsregel en daarbij aangegeven dat zou kunnen worden overwogen de positie van zekerheidsgerechtigden in de insolventie van de schuldenaar-zekerheidsgever te beoordelen aan de hand van het (insolventie)recht van het land van ligging van het bezwaarde goed**"
- Again, excuse my Dutch
- Zekerheidsrechten en de Insolventieverordening: op zoek naar balans NTHR 2013-2, p. 91
- Originele paper in English available at:
- http://www.eir-reform.eu/uploads/papers/PAPER%204-3.pdf

Maar eigenlijk is er niets nieuws onder de zon: De oudere Kortmann en de jongere Veder in 2000

Prof. mr. S.C.J.J. Kortmann

*Mr. P.M. Veder**

- "Wij aarzelen of een dergelijke vergaande strekking van artikel 5 zoals hierboven uiteengezet, gewenst is. De bepaling reikt dan erg ver. Bedoeld is slechts om het economisch verkeer van de landen waar de goederen zich bevinden te beschermen en de rechtszekerheid ten aanzien van op deze goederen rustende rechten te waarborgen. **Voldoende is dat goederenrechtelijke rechten als gevolg van een in het buitenland geopende insolventie procedure niet sterker worden aangetast dan het geval zou zijn bij de opening van een nationale insolventieprocedure. Wij achten het niet onverdedigbaar om artikel 5 in deze zin uit te leggen."**

Veder en Kortmann in 2000 in WPNR 6421, p. 770

View of Jennifer Marshall, Allen & Overy UK

- "Perhaps the most fundamental question regarding Article 5 is unanswered by the EIR and is not addressed in the Virgos-Schmit Report. The question is this: does the Article merely protect the right in rem in the strict sense (i.e. the security interest over the relevant assets) or does it also protect the underlying secured debt? In order words, does Article 5 prevent a composition plan or proceeding which would be effective under the state of the opening of proceedings (and which other Member States would be required to recognize under Article 25) from amending or discharging the debtor's secured indebtedness and therefore protect the secured lender's rights to enforce its security in respect of that indebtedness over assets located in another Member State? Although an English company voluntary arrangement (which is available as a main proceeding in the United Kingdom) cannot, by virtue of section 4(3) of the Insolvency Act 1986, affect the right of a secured creditor to enforce its security without its concurrence, it may well be that main proceedings opened in another Member State (for example French safeguard proceedings) could provide for the variation orcharge of a secured debt governed by English law without the express consent of the secured creditor and this could have an effect on the enforcement of security in England. The composition plan or proceeding could, for example, purport to discharge the secured indebtedness or the indebtedness could be reduced to 50% (or even 99.9%) of its face value. In these circumstances, having a right in rem in relation to the remaining 0.1% of the debt would seem fairly pointless. **I would argue that, for these reasons, Article 5 must protect the secured indebtedness as well as the security interest but clarification is needed on this point**."

Jennifer Marshall in Article 5 (rights in rem) paper for the future of the European insolvency regulation, http://www.eir-reform.eu/uploads/PDF/Jennifer_Marshall.pdf

What is behind Jennifer's view and why was nothing changed?

- The UK scheme wants to rule the European restructuring world!

- Rule, Britannia! rule the waves:
  "Britons never will be slaves."

- The patriotic song 'Rule, Britannia!, Britannia rules the waves', is traditionally performed at the 'Last Night of the Proms' which takes place each year at the Royal Albert Hall.
- http://www.historic-uk.com/HistoryUK/HistoryofBritain/Rule-Britannia/

UNCITRAL Model Law View

- **Position Secured Creditor in UK and US under UNCITRAL Model Law Code**
  - Secured assets in US of UK debtor which in bankrupt in UK, are, if UK proceeding is recognised in US, stayed in US but subject to US adequate protection
  - Secured Assets in UK of US bankrupt debtor are – in accordance with UK law – not stayed in UK (but contempt of US Court)(Almatis case)
    - See f.e. section 1520 US Chapter 15 US automatic stay under section 362 is available
    - See f.e. section 20 Schedule 1 Cross-Border Insolvency regulation 2006: UK law stay as if the debtor had been declared bankrupt in UK, see also section 20.3

But is article 8 EIR really broken?

- No clear cut decisive case law of ECJ
- Those creditors equally well protected if article 8 is to be considered as choice of law rule, thus allowing the effect of the equivalent bankruptcy proceeding in state of location oif the secured asset
- Compare how UK and US have implemented the State of the Art UNCITRAL Model law Code.
- Enhances the possibilities of restructuring the business, stated purpose of both EIR 2017 and Recommendation

  - If it ain't broken, don't fix it
  - Compare recent example NL Law: Bank security

You only see it if you understand it

Another conclusion part 2

- Article 5 EIR and Article 8 EIR are not crystal clear

Question

- Do we want EIT 2017 to be State of the Art like the Model Law

Assuming article 5 is hard and fast rule, is there an alternative other than the Scheme, Virgós/Schmit-Report?

- 98. The rule does not "immunize" rights in rem against the debtor's insolvency. 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 allow the liquidator to affect these rights under the same conditions as in purely domestic proceedings.

The synthetic way, new recitals 42 to and including 45

- "(42) First, this Regulation confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated **as if secondary insolvency proceedings had been opened**. That undertaking has to meet a number of conditions set out in this Regulation, in particular that it be approved by a qualified majority of local creditors. Where such an undertaking has been given, the court seised of a request to open secondary insolvency proceedings should be able to refuse that request if it is satisfied that the undertaking adequately protects the general interests of local creditors. When assessing those interests, the court should take into account the fact that the undertaking has been **approved by a qualified majority of local creditors**.
- (43) For the purposes of giving an undertaking to local creditors, the assets and rights located in the Member State where the debtor has an establishment should form a **sub-category of the insolvency estate**, and, when distributing them or the proceeds resulting from their realisation, the insolvency practitioner in the main insolvency proceedings should respect the priority rights that creditors would have had if secondary insolvency proceedings had been opened in that Member State.
- (44) National law should be applicable, as appropriate, in relation to the approval of an undertaking. In particular, where under national law the voting rules for adopting a restructuring plan require the prior approval of creditors' claims, those claims should be deemed to be approved for the purpose of voting on the undertaking. Where there are different procedures for the adoption of restructuring plans under national law, Member States should designate the specific procedure which should be relevant in this context.
- (45) Second, this Regulation should provide for the possibility that **the court temporarily stays** the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them.

The synthetic way, new article 36 (i)

Right to give an undertaking in order to avoid secondary insolvency proceedings

- 1. In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, **it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State**. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.
- 2. Where an undertaking has been given in accordance with this Article, the law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1, **to the ranking of creditors' claims, and to the rights of creditors in relation to the assets referred to in paragraph 1 shall be the law of the Member State in which secondary insolvency proceedings could have been opened**. The relevant point in time for determining the assets referred to in paragraph 1 shall be the moment at which the undertaking is given.
- 5. The undertaking shall be **approved by the known local creditors**. **The rules on qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened shall also apply to the approval of the undertaking.** Creditors shall be able to participate in the vote by distance means of communication, where national law so permits. The insolvency practitioner shall inform the known local creditors of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.
- 6. An undertaking given and approved in accordance with this Article shall be **binding on the estate**. If secondary insolvency proceedings are opened in accordance with Articles 37 and 38, the insolvency practitioner in the main insolvency proceedings shall transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceedings.

The synthetic way, new article 36 (ii)

Right to give an undertaking in order to avoid secondary insolvency proceedings

- 8. **Local creditors may apply to the courts of the Member State in which main insolvency proceedings** have been opened, in order to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings.
- 9**. Local creditors may also apply to the courts of the Member State in which secondary insolvency proceedings could have been opened** in order to require the court to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.
- 10. The insolvency practitioner shall be liable for any damage caused to local creditors as a result of its non-compliance with the obligations and requirements set out in this Article.
- 11. **For the purpose of this Article, an authority which is established in the Member State where secondary insolvency proceedings could have been opened and which is obliged under Directive 2008/94/EC of the European Parliament and of the Council (16) to guarantee the payment of employees' outstanding claims resulting from contracts of employment or employment relationships shall be considered to be a local creditor, where the national law so provides**.

However: Limitations

- Only if and when secondary proceedings are in theory available, thus establishment.

- Approved by qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened shall also apply to the approval of the undertaking.

Future art. 47

- Power of the insolvency practitioner to propose restructuring plans
- 1. Where the law of the Member State where secondary insolvency proceedings have been opened allows for such proceedings to be closed without liquidation by a restructuring plan, a composition or a comparable measure, the insolvency practitioner in the main insolvency proceedings shall be empowered to propose such a measure in accordance with the procedure of that Member State.
- 2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary insolvency proceedings, such as a stay of payment or discharge of debt, shall have no effect in respect of assets of a debtor that are not covered by those proceedings, without the consent of all the creditors having an interest.

- But: not enough

WCO II What to do?

- **Artikel 384 Internationale verwikkelingen**
- De bepalingen van deze afdeling zijn van overeenkomstige toepassing in het geval dat een buitengerechtelijk akkoord wordt aangeboden op de voet van artikel PM, van de verordening, genoemd in artikel 5, derde lid.

- Bron: Consultatieversie WCO II: http://www.internetconsultatie.nl/wco2

- **Article 384 International issues**

- The provisions in this part apply accordingly in the event that an extrajudicial composition is offered on the basis of article […] of the regulation referred to in article 5:3.

- Source: http://www.debrauw.com/draft-bill/#

WCO II What to do?

- **MvT Artikel 384 (383) Internationale verwikkelingen**
- Dit artikel dient om de regeling in van het dwangakkoord buiten faillissement onder de werking van de Insolventieverordening te brengen. Zulks maakt automatische erkenning van de regeling in andere lidstaten gemakkelijker.

- Bron: Consultatieversie WCO II: http://www.internetconsultatie.nl/wco2

- **Article 384 (383) International issues**
- This article serves to bring the proposed scheme regarding the compulsory composition outside bankruptcy under the scope of the Insolvency Regulation. This makes the automatic recognition of the scheme on other EU Member State easier.
- Source: http://www.debrauw.com/draft-bill/#

Vriesendorp Pre-advies 2014 (I)

- **“3.3.6 Internationale aspecten**
- 101. Hoewel het wetsvoorstel in belangrijke mate is geïnspireerd door de internationale context van het buitengerechtelijk akkoord en dan vooral de voorbeelden van de Amerikaanse *Chapter 11*-procedure en de Engelse *scheme of arrangement*, raakt het zelf nauwelijks internationale aspecten. In artikel 384 – bedoeld zal zijn: artikel 383 dat immers ontbreekt - wordt met een enkele zin de verbinding gelegd met de Europese Insolventieverordening door de regeling daarop van overeenkomstige toepassing te verklaren.”

- Bron: http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Preadvies-WCO-II.pdf

Vriesendorp Pre-advies 2014 (II)

- “102. Belangrijker lijkt echter het stilzwijgen over de bevoegdheid van de Nederlandse rechter. Weliswaar moet de aanbieder van het akkoord in het kader van een verzoek tot algemeen verbindend verklaring van het akkoord de rechtbank in het verzoekschrift zodanige informatie verschaffen dat zij haar bevoegdheid op grond van artikel 3InsVo kan vaststellen (art. 374 lid 1(c)), maar dit is geen toelatingseis tot de stemprocedure van artikel 372. Iedereen kan immers op grond van artikel 368 een akkoordvoorstel aanbieden. Artikel 368 lid 1 stelt alleen de eis dat de schuldenaar een rechtspersoon dan wel een beroeps- of bedrijfsmatig opererende natuurlijke persoon is; **geenszins dat deze schuldenaar zijn centrum van voornaamste belangen in Nederland moet hebben**. De informatieplicht in artikel 374 lid 1(c) lijkt de procedure te beperken tot louter schuldenaren met een in Nederland gelegen centrum van voornaamste belangen, maar het verbiedt niet een Nederlandse forumkeuze. Op dit punt is derhalve nog wel nadere verduidelijking gewenst.”

Group restructuring. Art. 368 lid 3 WCO II

- **“Restructuring of groups of companies**
- The legislation would also facilitate the restructuring of a group of companies through one composition because a composition may amend the rights of creditors against guarantors and joint debtors, which is a necessity for the efficient restructurings of any debtor with a complicated corporate structure. It should be noted, however, that the legislation focuses mainly on debtors having their center of main interest (COMI) in the Netherlands pursuant to the European Insolvency Regulation.”

- Source: Global Distress Signal Winter 2015 Special Report by Reinout Vriesendorp, Ruud Hermans en Rob van den Sigtenhorst, http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Global.Distress.Signal.Winter2015.jan15.pdf

Group restructuring. Art. 368 lid 3 WCO II

- 3. Tenzij het akkoord anders bepaalt, blijven de rechten die schuldeisers jegens borgen, medeschuldenaren en garantiegevers van de schuldenaar kunnen uitoefenen ongewijzigd

- Bron: Consultatieversie WCO II: http://www.internetconsultatie.nl/wco2

- 3. Unless stipulated otherwise by the composition, the rights which creditors can exercise towards sureties, co-debtors and guarantors of the debtor remain unchanged.

- Source: http://www.debrauw.com/draft-bill/#

Group restructuring Art. 368 lid 3 WCO II

- If Jurisdiction NL Judge based on COMI debtor
- Question: COMI joint and several liable third parties and guarantors also in NL?
- If yes: very limited use
- If No: NL could play central role

Yet another conclusion part 2

- Scope WCO II in international contect not crystal clear

Question:

- Which route should NL take?

Part 3: Could and would we have done it differently if the changes were already in place as of 2002?

I. **NL Suspension of Payment with Composition, combined with US Chapter XI**
   - **Versatel (2002)**
   - UPC (2003)

II. **NL Out of Court Composition / Financial Restructuring**
   - Hagemeijer (2003)
   - **Kendrion (2004**)

III. **Enforcement NL of security by Security Trustee**
   - **Schoeller Arca Systems (SAS) (2009)**

IV. **EU Forumshopping to restructure debt**
   - Daiseytek (2003), Deutsche Nickel (2004), Eurotunnel (2006). Schefenacker (2007), **Wind Hellas (2009), European Directories (2010)**

V. **The Scheme of Arrangement Route**
   - **Rodenstock (2011), Estro (2013), Magyar (2013), Apcoa Parking (2014) en Van Ganzenwinkel (2015)**

VI. **The US Chapter XI Route**
   - Almatis (2010), **Marco Polo (2011)**

Findings

- 17 out of 19 deals investigated would most likely stilll be restructured in the same manner
- Practical lawyers seem to have found clever new solutions to restructuring challences much quicker than the legislator
- But: the more options available to restructure a viable business, the better.
- Implementation of WCO II is greatly appreciated in situations where only Dutch legal entities are involved, effect is less clear in groups with legal entities abroad
- EIR 2017 does fortunately not stop good forum shopping
- UK Scheme route is still open but are to be considered only if and when WCO II route fails.
- US Chapter 11 should be used exceptionally

Still confused? but in any event at a higher level

- Questions: jtjol@legalhoudini.nl
- Some answers: www.legalhoudini.nl