

Internationaal Faillissementsrecht (06-01-2014)

In deze les komt het internationaal faillissementsrecht aan de orde. De volgende onderwerpen worden behandeld:

- Internationale erkenning van faillissementen
- De geschiedenis van het internationale faillissementsrecht
- Territorialiteit versus Universaliteit versus Contractualisme
- Uncitral Model Law on Cross-Border Insolvency, erkenning buitenlandse faillissementen
- Nederland en de European Insolvency Regulation
- Toekomstige ontwikkelingen Internationaal Faillissementsrecht

Het volgende materiaal kan als achtergrondinformatie dienen :

Algemeen

- Ian Fletcher, the Law of Insolvency (2009), chapter 1 (**bijgevoegd als Bijlage 1**)
- **Appendix I** bij deze syllabus: Definities ontleend aan Uncitral Legislative Insolvency Guide 2004,
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html
- Bob Wessels, International Insolvency Law (2012), Chapter I and III (naslagwerk)
- UNCITRAL Model Law on Cross-Border Insolvency (1997) ("**Uncitral Model Law**") (soft law, naslagwerk):
 - UNCITRAL Practice Guide on Insolvency Cooperation (2009)
 - UNCITRAL Legislative Guide on Insolvency Law (Parts I and II 2004; Part III 7/1/10)
 - The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (2011)
 - Beschikbaar op: Uncitral website
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html

EU and NL

- Bob Wessels, THE EUROPEAN UNION INSOLVENCY REGULATION. AN OVERVIEW WITH TRANS-ATLANTIC ELABORATIONS (**bijgevoegd, als Bijlage 2**), beschikbaar via www.iiglobal.org
- European Insolvency Regulation, beschikbaar via: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:en:NOT>
- Virgos-Schmit Report on the Convention on Insolvency Proceedings, available at: http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf (naslagwerk)
- Bob Wessels, International Insolvency Law (2012), Chapter II and IV (naslagwerk)

- Bob Wessels, International Insolvency Law in the Netherlands: the pre-draft of Title 10 (**bijgevoegd, als Bijlage 3**), te vinden via <http://bobwessels.nl/wordpress/wp-content/uploads/2008/06/iir-2008-wessels-final.pdf>
- Forum Shopping Under the EU Insolvency Regulation, Wolf-Georg Ringe (2008) (**bijgevoegd, als Bijlage 4**), te vinden op http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1209822
- One Comi or Not that's the question, Johan Jol in de Vriendenbundel ter ere van het veertig jarig advocatenbestaan van Mrt Franken (2013) (**bijgevoegd, als Bijlage 5**)
- COMI shift from Lux to UK: **Hellas**, High Court of Justice Chancery Division Mr Justice Lewison, November 26th, 2009 (**bijgevoegd, als Bijlage 6**), <http://www.bailii.org/ew/cases/EWHC/Ch/2009/3199.html>

Appendix 1

- **(a) “Administrative claim or expense”:** claims that include costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative’s functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings;
- **(b) “Assets of the debtor”:** property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in encumbered assets or in third party-owned assets;
- **(c) “Avoidance provisions”:** provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors;
- **(d) “Burdensome assets”:** assets that may have no value or an insignificant value to the insolvency estate or that are burdened in such a way that retention would require expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money;
- **(e) “Cash proceeds”:** proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest;
- **(f) “Centre of main interests”:** the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties;
- **(g) “Claim”:** a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent.
 - Note: Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim;
- **(h) “Commencement of proceedings”:** the effective date of insolvency proceedings whether established by statute or a judicial decision;
- **(i) “Court”:** a judicial or other authority competent to control or supervise insolvency proceedings;
- **(j) “Creditor”:** a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings;
- **(k) “Creditor committee”:** representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law;
- **(l) “Debtor in possession”:** a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;

- **(m) “Discharge”**: the release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings;
- **(n) “Disposal”**: every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part;
- **(o) “Encumbered asset”**: an asset in respect of which a creditor has a security interest;
- **(p) “Equity holder”**: the holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise;
- **(q) “Establishment”**: any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;
- **(r) “Financial contract”**: any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;
- **(s) “Insolvency”**: when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets (Added note: this definition denotes commercial insolvency or cash flow insolvency and balance sheet insolvency respect. The terms bankruptcy is also sometimes used but it usually refers to the formal state of being in bankruptcy);
- **(t) “Insolvency estate”**: assets of the debtor that are subject to the insolvency proceedings;
- **(u) “Insolvency proceedings”**: collective proceedings, subject to court supervision, either for reorganization or liquidation;
- **(v) “Insolvency representative”**: a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;
- **(w) “Liquidation”**: proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;
- **(x) “Lex fori concursus”**: the law of the State in which the insolvency proceedings are commenced;
- **(y) “Lex rei situs”**: the law of the State in which the asset is situated;
- **(z) “Netting”**: the setting-off of monetary or non-monetary obligations under financial contracts;
- **(aa) “Netting agreement”**: a form of financial contract between two or more parties that provides for one or more of the following:
 - **(i)** The net settlement of payments due in the same currency on the same date whether by novation or otherwise;
 - **(ii)** Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or
 - **(iii)** The set-off of amounts calculated as set forth in subparagraph (ii) of this definition under two or more netting agreements;

- **(bb) “Ordinary course of business”**: transactions consistent with both:
 - **(i)** the operation of the debtor’s business prior to insolvency proceedings; and
 - **(ii)** ordinary business terms;
- **(cc) “Pari passu”**: the principle according to which similarly situated creditors are treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank;
- **(dd) “Party in interest”**: any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest;
- **(ee) “Post-commencement claim”**: a claim arising after commencement of insolvency proceedings;
- **(ff) “Preference”**: a transaction which results in a creditor obtaining an advantage or irregular payment;
- **(gg) “Priority”**: the right of a claim to rank ahead of another claim where that right arises by operation of law;
- **(hh) “Priority claim”**: a claim that will be paid before payment of general unsecured creditors;
- **(ii) “Protection of value”**: measures directed at maintaining the economic value of encumbered assets and third party owned assets during the insolvency proceedings (in some jurisdictions referred to as “**adequate protection**”). Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection;
- **(jj) “Related person”**: as to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity;
- **(kk) “Reorganization”**: the process by which the financial well-being and viability of a debtor’s business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern;
- **(ll) “Reorganization plan”**: a plan by which the financial well-being and viability of the debtor’s business can be restored;
- **(mm) “Sale as a going concern”**: the sale or transfer of a business in whole or substantial part, as opposed to the sale of separate assets of the business;
- **(nn) “Secured claim”**: a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor’s default;
- **(oo) “Secured creditor”**: a creditor holding a secured claim;
- **(pp) “Security interest”**: a right in an asset to secure payment or other performance of one or more obligations;

- **(qq) “Set-off”**: where a claim for a sum of money owed to a person is applied in satisfaction or reduction against a claim by the other party for a sum of money owed by that first person;
- **(rr) “Stay of proceedings”**: a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor’s assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate;
- **(ss) “Suspect period”**: the period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement;
- **(tt) “Unsecured creditor”**: a creditor without a security interest;
- **(uu) “Voluntary restructuring negotiations”**: negotiations that are not regulated by the insolvency law and generally will involve negotiations between the debtor and some or all of its creditors aiming at a consensual modification of the claims of participating creditors.

Note: Allemaal definities van Uncitral Legislative Insolvency Guide 2004, te vinden op http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html