

COMI

***The Buzzword for every
international restructuring
professional***

Topics for today

- Draft new NL Insolvency Law
- International recognition of insolvency proceedings

Draft new NL Insolvency Law, I

- Draft proposal published on internet:
 - <http://www.nieuwinsolventierecht.nl/meepraten/index.php/topic,73.0.html>
 - <http://www.minjus.nl/onderwerpen/wetgeving/insolventiewet/>
- Consultation phase, possibility to give input until September 15, 2008
- Dutch Bankers Association prepares extensive comments on behalf of Dutch banks
- Good and Bad news

Bad news: Draft new NL Insolvency Law, II

- Informal reorganization, new role for silent administrator
- Freezing period of maximum three months for creditors, including right to use and sell secured assets by administrator
- Secured creditors no longer have the right to enforce their security independently in bankruptcy
- Bankruptcy trustee, typically an attorney, is to determine whether the business of the bankrupt company is still economically “viable”
- Pauliana (fraudulent preference) rules extended to the disadvantage of secured lenders

Good news: Draft new NL Insolvency Law, III

- Could have been worse
- Out of Court composition possibility might enable restructuring (50+% of votes cast representing 50+% of the proceeds available for distributions to creditors or 50+% of votes cast and Supervising Judge decision)
- UNCITRAL Model law on Cross-Border Insolvency inserted in Draft (relevant for the recognition of non-EU bankruptcies)

International recognition of insolvency proceedings

- Within the EU
- Outside EU

Within EU: I

- Insolvency Regulation 2002 (Regulation)
- If debtor has its COMI (center of main interest) in a EU Member State
 1. Courts of that Member State have the ability to open main insolvency proceedings
 2. Scope of proceedings is EU territory
 3. Governed by the law of that Member State
 4. Automatic recognition throughout the EU
 5. Unless public policy exception (narrow)

Within EU: II

- COMI: administration of its interest on a regular basis and is therefore ascertainable by third parties (whereas 13 Regulation)
- To be decided as of the date of the application: (ECJ January 17, 2006 Susanne Staubitz-Schreiber)

Within EU: III

- Company or Legal Person: rebuttable presumption:
Registered office is presumed to be COMI (section 3.1)
- Registered office normally corresponds to the debtor's head office (Virgos/Schmit Report, nr. 75) [Theoretical point of view]

Within EU: IV

- Main Insolvency, Member State with COMI, Universal Affect (Whereas 12 Regulation)
- Secondary Proceedings; Member State with establishment, Territorial Effect Insolvency (Whereas 12 Regulation)
- Establishment: any place of operations where the debtor carries out a non-transitory economic activity with human means and goods (section 2 h Regulation)

Within EU: V

- Insolvency regulation does not contain specific rules concerning group of companies
- Each company is separate debtor with its own COMI
- Virgos/Schmit Report, nr. 76
- Whereas 4: Purpose: No Forum Shopping

Within EU : VI Early Decisions

- Daisytek (2003)
- Collins & Aikman (2005)
- Eurofood (2006)

Within EU: VII Daisytek I

- Leeds Court May 16, 2003: COMI of English Sub Holding, 9 subsidiaries UK, 3 German and 1 French subsidiary all in UK [NB Ultimate parent in US and under Chapter 11 proceedings]
- French Nanterre Commercial Court May 23, 2003: COMI French company is France
- French Versailles Court of Appeal September 4, 2003: COMI determined by another EU Court is to be upheld
- French Cour de Cassation June 27, 2006: upheld decision Versailles Court

Within EU: VIII Daisytek II

- Elements:
 - Finance function Bradford UK
 - IT from Bradford
 - Senior employees non-UK companies recruited in consultation with UK
 - Pan European Customers serviced from UK
 - 70% purchase agreements from UK
 - Corporate identity and branding from UK
 - Strategic plan UK
 - NB: business: electronic office supply whole distributor, reseller and distribution to end-users

Within EU: IX Collins & Aikman I

- May 2005: Chapter 11 proceedings USA Parent company USA
- UK High Court of Justice July 15, 2005 Administration order for 24 companies: 6 UK, 4 NL, 4 Germany, 3 Italy, 2 Sweden, 1 Spain, 1 Austria, 1 Czech republic, 1 Lux, 1 Belgium: all COMI in UK
- Automotive component systems and modules for Daimler, Ford, GM, Honda, Nissan, Porsche, Renault, Toyota and Volkswagen
- 24 facilities in 10 EU countries 4500 employees

Within EU: X Collins & Aikman II

- Arguments:
 - Main administrative functions relating to European operations from UK including: cash-coordination, pooling bank accounts, HR, IT, Engineering, design and sales
 - Purpose: group to be run and sold as a whole
- No secondary proceedings:
 - Not necessary to protect liability German directors (Court of Cologne August 10, 2005)
 - Administrators respected positions of local creditors even without those proceedings (Uk High Court June 9, 2006) (refer to Eurofood decision of ECJ of May 2, 2006)

Within EU: XI Eurofood I

- Eurofood IFSC Lid, Irish, wholly owned subsidiary of Parmalat SA, as a finance company of group
- December 24, 2004: Parmalat SpA bankrupt Italy
- January 27, 2005: Compulsory Wind up Eurofood Ireland
- February 9, 2004: Eurofood Extraordinary Administration Italy
- February 20, 2004 Italian Court: COMI Eurofood in Italy
- March 23, 2004 Irish Court: COMI Eurofood in Ireland
- Italian Administrator appealed to High Court of Ireland, High Court decided to ask preliminary ruling to ECJ

Within EU: XII Eurofood II

- ECJ May 2, 2006 COMI Eurofood in Ireland
- "Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both **objective and ascertainable by third parties** enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect ."

Within EU: XIII Eurofood III

- **Letter Box Company** versus **Active Company**
- “That could be so in particular in the case of a company **not carrying out any business** in the territory of the Member State in which its registered office is situated. By contrast, where a company **carries on its business** in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.”

Within EU: XIV

- Eurotunnel (2006)
- Migration from Germany to UK
 - Deutsche Nickel (2004)
 - Hans Brochier (2006)
 - Schefenacker (2007)

Within EU: XV Eurotunnel I

- SA Eurotunnel and Eurotunnel PLC two holding companies, in total 17 companies: 6 France, 6 UK, 1 Germany, 1 Spain, Belgium (Societe Europeene) and 1 Netherlands.
- Paris Commercial Court August 2, 2006
- All companies have COMI in France

Within EU: XVI Eurotunnel II

- Arguments:
 - Strategic and operational Management handled in Paris
 - Head office main French companies in Paris
 - Financial Management in Paris
 - Main part of the business in Paris (sic!)
 - Negotiations regarding restructuring mainly take place in Paris under responsibility French Chairman

Within EU: XVII Deutsche Nickel

- Deutsche Nickel AG, German company, vanishes from Germany and re-emerges in UK as DNICK Ltd
- DNICK Ltd goes into administration and does a Company Voluntary Arrangement
- Step 1: Deutsche Nickel AG converts itself into a limited commercial partnership. DNICK Ltd (a newly incorporated Holding) becomes one of the partners, general partner
- Step 2: Other partners out, DNICK Ltd is automatically full legal successor to the assets and liabilities
- COMI of DNICK Ltd is in UK

Within EU: XVIII Hans Brochier

- Hans Brochier GmbH & CO KG re-emerged as Hans Brochier Holding Limited but left behind its COMI in Germany:
 - Hans Brochier Holdings Ltd. operated in Germany
 - Funding of employees for three months period in Germany
 - No secondary proceedings in UK, although registered in UK

Within EU: XIX Schefenacker I

- Schefenacker AG, automotive manufacturing side and rear-view mirrors, 33 locations world wide, however:
 - Biggest plant in England, Portchester
 - Less than 10% of core assets in Germany
 - Headquarters in Germany in Schwaikheim, Alfred Schefenacker Strasse 1

Within EU: XX Schefenacker II

- Plan to restructure debt out of court in Germany seemed impossible to achieve:
 - Obligation file for bankruptcy in case of illiquidity or overindebtedness
 - 95% of the bondholders should accept debt to equity swap
- Migration to Plc and changing the COMI to UK

Within EU: XXI Schefenacker III

1. Internal corporate restructuring of operating subsidiaries to ensure that Schefenacker Management UK Ltd, 100% subsidiary of Schefenacker AG, is subholding of all opco's
2. Schefenacker AG converts into Schefenacker & Co KG, Newco: Schefenacker Plc is general partner
3. Schefenacker AG exits the partnership, Schefenacker Plc universal successor
4. Schefenacker Plc has inter alia bond debt and secured debt

Within EU: XXII Schefenacker IV

4. Schefenacker Plc proposes Company Voluntary Arrangement (main proceedings) to bond creditors
5. Amended proposal is accepted with required 75% voting majority; debt for equity swap plus cash payment and warrants to the bondholders; Bond Guarantors (subsidiaries are released under their obligations); Secured creditors not bound by CVA
6. Company Voluntary Arrangement is exported to US under Chapter 15 USA Bankruptcy Code (to be continued)

Forum Shopping Revisited I

- Whereas 4 EU regulation:
 - It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).
- Compare Dutch venue issue: Section 2 Dutch Bankruptcy Code: Domicile debtor [Registered Seat][subject to Regulation]
- USA Bankruptcy law has 4 connections (28 USC par 1408):
 - Domicile / Residence [Registered Seat, Delaware companies],
 - Principal Place of business [COMI like]
 - Location of principal assets
 - already pending bankruptcy case of an affiliate [pick and choose]

Forum Shopping Revisited II

- **USA situation:** Courting Failure, Lynn M. LoPucki (2005)
 - Forum shopping leads to suboptimisation
 - Competition between bankruptcy courts
 - Suggest to eliminate residence and affiliate possibility
 - Suggestion not yet followed
- **EU situation:**
 - COMI
 - Establishment

Outside EU, currently I

- Case law driven in **Netherlands**
- What are the consequences of Dutch insolvency proceeding outside the Netherlands
 - **Universality**
- What are the consequences of a foreign insolvency proceeding in the Netherlands
 - **Territoriality**

Outside EU, currently II

- Dutch insolvency proceeding outside the Netherlands :
Universality
 - A Dutch bankruptcy comprises all assets of the debtor, irrespective where these assets are located
 - A Dutch liquidator is authorized to act abroad
 - Subject to the limitations set by the relevant countries

Outside EU, currently III

- Foreign insolvency proceeding in the Netherlands:
Territoriality
 - A Foreign bankruptcy does not include the Dutch assets of the debtor;
 - Creditors rights to demand performance of a claim and the power to recover a debt remains unaffected when such a right concerns assets located in the Netherlands; but
 - A foreign liquidator is authorized to act on behalf of the debtor (provided the lex concursus allows him to do so)

Outside EU, currently IV

- Double standards, no reciprocity
- Sample case law
 - Hired / Chiotakis Supreme Court June 2, 1967, NJ 1968, 16 [Creditor of French bankrupt company was allowed to seize assets of company in NL]
 - Coppoolse / De Vleeschmeester Supreme court HR May 3, 1996 NJ 1998, 108 [Effect of French proceedings re discharge debt not applicable in NL]

Outside EU, currently V: Yukos

- District Court Amsterdam August 17, 2006 and Court of Appeal Amsterdam May 27, 2007(Summary proceedings): Liquidator of OAO Yukos Oil Company, Shareholder of Yukos Finance B.V. is allowed to vote on the shares
- District Court Amsterdam August 17, 2006: Russian bankruptcy does not interfere with the seizure of its assets, shares in a Dutch company
- District Court Amsterdam (Main proceedings) Oktober 31, 2007: No recognition at all of bankruptcy of OAO Yukos Oil Company, since only foreign bankruptcies taken into account due process are be given any effect; bankruptcy of OAO Yukos Oil Company contrary to due process and therefore contrary to public policy

USA Today I: Chapter 15

- UNCITRAL Model law on Cross-Border Insolvency is in place, Chapter 15 (see www.chapter15.com)
- Recognition only in case of main proceedings [COMI] and non main [Establishment] and not contrary to public policy
- Reciprocity not required
- If recognized as main proceeding: inter alia automatic stay and adequate protection rules (apply Section 1520)
- If recognized as non-main proceedings, court may at the request of foreign representative, grant any appropriate relief (Section 1521)
- NB: Secured creditor is also stayed, position UK different: Secured creditor free to enforce their security

USA Today II : Bear Stearns

- Bear Stearns Funds: Judge Lifland New York August 30, 2007:
 - Cayman registered limited liabilities companies
 - Administrator, Registrar, Transfer Agent, Investment Manager in USA
 - No employees or managers Cayman
 - Liquid assets in USA, other assets such as swaps and repo all over the world
 - COMI in USA and no establishment in Cayman
 - No recognition

USA Today II : Schefenacker V

- May 15, 2007: Chapter 15 Petition for recognition of a foreign Main Proceeding by Schefenacker Plc
 - Venue New York as place consistent with the interest of justice and the convenience of parties
- June 14, 2007: Bankruptcy Court Southern District New York: UK CVA is given full force and effect in USA and enforceable in accordance with its terms

USA Today III : Vekoma

- District Court Roermond: August 21, 2001 bankruptcy of several Vekoma companies (amusement park rides)
- February 3, 2006: Application by liquidator P.W. Schreurs to recognize proceedings as foreign main proceedings [to stay litigation pending in USA]
- March 2, 2006 Judge Clark: Granted petition and recognized as main proceedings, litigation is stayed
- But: NL does currently not recognize USA bankruptcy proceedings!

Outside EU, Future Draft Insolvency law

- Proposes 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
- But secured creditor is able to enforce its security

Further information

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