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THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS BORDER INSOLVENCY CASES

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Preliminary comments

In the Netherlands, cross-border insolvency legislation is mainly codified in the national legal framework of the Dutch Bankruptcy Act 1893 (**DBA**, in Dutch: *Faillissementswet*). The DBA applies to national insolvency proceedings and furthermore contains (very limited) provisions for cross-border insolvency proceedings between the Netherlands and non-Member States and Denmark. The Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (the **European Insolvency Regulation** or **EIR**) applies to cross-border issues concerning insolvency between the Netherlands and EU Member States, not including Denmark. On 5 June 2015 the Council Regulation (EU) 2015/848 of 20 May 2015 (recast) has been published, which will come into effect on 26 June 2017 (the **recast EIR**).[1]

The questions below can both be answered for cross-border insolvency situations that fall within the scope of the EIR and for those situations that do not. The distinction between the answers is indicated per question. However, given the fact that part of the national reports to be submitted by the national reporters will see to jurisdictions that are governed by the EIR, and thus, the answers to the questionnaire from those Member-State national reporters should be identical, the focus in answering the questionnaire is on cross-border insolvency situations that fall outside the scope of the EIR.

A general remark can be made about the distinction in different insolvency proceedings in the Netherlands. The DBA provides for two different types of insolvency proceedings for legal entities: (i) bankruptcy (*faillissement*) and (ii) suspension of payments (*surseance van betaling*). In general, the goal of bankruptcy proceedings is liquidation of the debtor's assets (although restructuring of its business is sometimes possible through bankruptcy proceedings). Suspension of payments is regarded as a method to restructure debt owed to non-preferred and non-secured creditors. In answering the questionnaire, the emphasis is placed upon the bankruptcy proceedings. If a distinction with other insolvency proceedings is relevant in answering a question, it is indicated as such.

A recent and interesting case on cross-border insolvency has emerged in the Netherlands. Insolvency proceedings for several of the Dutch **OSX Group** entities have been commenced, including OSX Leasing Group B.V. and OSX 3 Leasing B.V. These entities are part of a worldwide operating group (OSX Group, headed by the Brazilian holding OSX Brasil) that specialises in the lease of ships and drilling units for the offshore oil & gas industry in mainly Latin America. OSX Group's main client is OGX, the Brazilian oil company founded by Eike Batista. Due to a drop in oil prices and unfortunate calculations of the reserves in the oil fields which were being exploited before the Brazilian coast, OGX had to file for Brazilian judicial recovery proceedings (*recuperação judicial*). As a result, OSX Brasil filed for Brazilian judicial recovery proceedings as well in November 2013.

OSX's ships (so-called FPSO's) and drilling platforms are structured and financed through Dutch entities, such as OSX 3 Leasing B.V. of which OSX Leasing Group B.V. is the

[1] With the exception of Articles 24 subsection 1, 25 and 86, which will come into force at a later stage.

(indirect) holding company. Due to the failing revenues from chartering the FPSO's to OGX, OSX Leasing Group B.V. is in bankruptcy in the Netherlands since July 2015. OSX 3 Leasing B.V., the owner of the OSX Group's largest FPSO, is in Dutch suspension of payment proceedings since December 2015. It is estimated that OSX's assets hold a value of approximately USD 1 to 2 billion dollars under normal market conditions.

A multitude of cross-border insolvency issues have arisen in the winding up of the Dutch OSX Group bankruptcy and suspension of payments. One of the more salient aspect of these bankruptcies is that the assets, belonging to the Dutch insolvency estates of OSX Leasing Group and OSX 3 Leasing are not located in the Netherlands. OSX 3 Leasing's FPSO for instance, is connected to an oil field off the coast of Brazil. The Dutch bankruptcy and suspension of payments proceedings are not automatically recognised in Brazil, as a consequence thereof the FPSO is exposed to actions from creditors who wish to circumvent the Dutch insolvency proceedings and seek recourse on OSX Group's assets. Further issues revolve around the recognition of foreign law security rights in the Dutch jurisdiction and the effects of the Brazilian judicial recovery proceedings on the Dutch insolvency proceedings.

1. **Do you have the notion in your legal system of main insolvency proceedings. Is this notion procedural or substantial? Is this notion purely international or also domestic?**

1.1 EIR

A cross-border insolvency situation between the Netherlands and another EU Member State is governed by the EIR. Article 3 subsection 1 EIR provides for the notion of main proceedings, to be opened in the 'centre of main interest' of the debtor (or COMI). The COMI is presumed to be the place of the registered office. Point 13 of the preamble to the EIR states that:

"*The 'centre of main interests' should correspond to the place where the debtor the administration of his interests on a regular basis and is therefore ascertainable by third parties.*"

The notion of main insolvency proceeding is only international and not domestic, which follows from number 15 of the preamble to the EIR, in which it is determined that the domestic competence is settled in national legislation. The Dutch Supreme Court has confirmed this and states that territorial jurisdiction within the Member State shall be determined by the national law of that Member State.[2] In the case of the Netherlands, therefore, the rules on jurisdiction of the DBA apply.

Article 3 of the recast EIR provides for a more elaborate (but not materially changed) definition of COMI, mainly drawn from the explanation as given in the preambles.

The notion of main insolvency proceedings within the meaning of the EIR is almost entirely procedural. The material rules are laid down in national legislation.

[2] Supreme Court 9 January 2004, *JOR* 2004/87.

1.2 DBA (non-EU)

Dutch national insolvency legislation does not foresee in a notion of main insolvency proceedings. Insolvency proceedings commenced before the Dutch Court are viewed as independent proceedings, concerning *all* the assets and debts of the bankrupt (legal) person, whether these assets are located within the Dutch jurisdiction or outside of it. This notion that the Dutch insolvency proceedings have a world-wide effect is known as the *universality principle*.[3] The universal effect is limited only by the sovereignty of other states.

The mirrored image of the way in which the Dutch insolvency proceedings are deemed to have universal effect, is the manner in which the effects of foreign insolvency proceedings are acknowledged in the Dutch jurisdiction. The main rule as set by the Supreme Court was that foreign insolvency proceedings should be treated in line with the *principle of territoriality*. In established case law, it was determined that the effect of foreign insolvency proceedings on assets of the debtor located in the Netherlands are not automatically recognized and have no consequences in the Dutch jurisdiction.[4] A shift from this very strict approach can be seen in more recent case law of the Supreme Court. Currently, its interpretation of the principle of territoriality is that a bankruptcy in another jurisdiction has no effects in the Dutch jurisdiction in the sense that (i) the bankruptcy does not involve the assets located in the Netherlands and (ii) the legal consequences of the bankruptcy law cannot be invoked in the Netherlands in as far they might result in creditors not being able to seek recourse – in or after bankruptcy – on assets in the Netherlands. However, the principle of territoriality does not obstruct other consequences of bankruptcy proceedings opened abroad.[5]

As a result, the Dutch insolvency proceedings do not relate to foreign insolvency proceedings for the same debtor in a manner that can be described as main vs. secondary proceedings. The fact that foreign insolvency proceedings are opened does, for instance, not hinder a Dutch court to open insolvency proceedings against a debtor (provided of course that the Dutch court is competent to hear on the insolvency application based on national DBA competence rules).[6]

The principles of universality and territoriality are guiding in determining the position of a debtor and, maybe more importantly, its creditors in a cross-border insolvency situation. In the following questions, these principles will therefore be referred back to.

One of the main reasons why case law is guiding in determining the acknowledgment of foreign insolvency proceedings within the Dutch jurisdiction is that the DBA provides for very few articles on this subject. In fact, there are only three articles that set forward rules for cross-border insolvency situations, Articles 203-205 DBA, which will be discussed under question 5 below and see to pooling of dividends on claims.

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[3] Supreme Court 15 April 1955, *NJ* 1955,542 (*Kallir/Comfin*) and Supreme Court 11 January 1980, *NJ 1980*, 563 (*ABC*).

[4] Supreme Court 2 June 1967, *NJ* 1968,16 (*Hioritis-Chiotakis*) and Supreme Court 31 May 1996, *JOR* 1996, 75 (*Vleeschmeesters*).

[5] Supreme Court 13 September 2013, *NJ* 2014, 454 (*Yukos*).

[6] Supreme Court 1 May 192 1924, 847 (*Klingsland-Tom*).

2. Do you know the notion of secondary insolvency proceedings? Is this notion purely international or also domestic?

2.1 EIR

The possibility of secondary insolvency proceedings is provided for in Article 3 subsection 2 EIR. Secondary proceedings in another Member State are only possible if the debtor has an establishment in that Member State. The secondary proceedings have consequences only for assets of the debtor that were in the jurisdiction of that Member State at the time of opening of the proceedings. Pursuant to Article 3 subsection 3 EIR and as confirmed by the Supreme Court the secondary proceedings have to be liquidation procedures, as provided for in Appendix B of the EIR.[7] With the recast EIR, secondary proceedings no longer have to be liquidation proceedings. More on this at question 8 below.

As with the main proceedings, the notion of a secondary insolvency proceeding is only international and not domestic.

2.2 DBA (non-EU)

I refer to the answer under question 1.2 above. There is no notion of secondary insolvency proceedings within the framework of the DBA.

3. Are the material effects of the main proceedings halted when secondary proceedings elsewhere are opened? Please specify, if this is not the case, whether or not the law of the State in which main proceedings are opened shall affect certain rights of third parties or have effect in certain contractual relations, e.g. labour contracts.

3.1 EIR

No, the material effects of the main proceedings are not automatically halted when secondary proceedings are opened elsewhere. However, the scope of the main proceedings are limited when it comes to the jurisdiction of the Member State where the secondary proceedings are opened. Article 28 EIR determines that the secondary proceedings are governed by the law of the *lex concursus*, except of course for those elements that are governed by another law, based on the EIR (see f.i. Article 10 in relation to employment contracts).

The other way around, liquidation actions in secondary proceedings can be suspended upon the request of the liquidator in the main proceedings, based on Article 33 EIR.

[7] Supreme Court 22 February 2013, LJN BY8092.

3.2 DBA (non-EU)

As stated above, the DBA does not foresee in a distinction between main and secondary proceedings and furthermore, Dutch insolvency proceedings are deemed to have universal effect, while foreign insolvency proceedings are deemed to have an (mitigated) territorial effect. As such, the fact that – for instance – insolvency proceedings for a specific debtor are pending in another jurisdiction, is not relevant for a Dutch court to declare itself competent to hear a petition for insolvency proceedings for that same debtor (provided that the basic requirements for competence are met).[8] If the Dutch Court were to open the insolvency proceedings, it would make no distinction in ranking of those proceedings against the already pending foreign proceedings.

4. Shall the creditors have the right to lodge claims in any of the insolvency proceedings (main and secondary)?

4.1 EIR

Yes, based on Article 32 subsection 1 EIR a creditor can file its claim in the main and in any of the secondary proceedings. The appointed liquidators have the obligation to file the claims filed in their proceedings in the other proceedings as well (Article 32 subsection 2 EIR).

4.2 DBA (non-EU)

In the Kallir/Comfin case (cited above) the Supreme Court decided that foreign and Dutch creditors have equal rights. This decision is in line with the universality principle, which holds that consequences of Dutch insolvency are not bound by the boundaries of the Dutch jurisdiction. As such, since Dutch creditors have the right to lodge their claims in any of the insolvency proceedings in the Netherlands pursuant to Article 110 DBA, so do foreign creditors.

5. Are the dividends in all proceedings pooled? In other words, are dividends obtained in proceeding X deducted from dividends to be obtained in other proceedings?

5.1 EIR

Yes, based on Article 20 subsection 2 EIR creditors that have obtained a dividend on their claim in one insolvency proceedings can only share in the proceeds of the other insolvency proceedings if creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.' Dividends obtained in one insolvency proceeding are

[8] Supreme Court 1 May 192 1924, 847 (*Klingsland-Tom*).

therefore deducted from dividends to be obtained in the other proceedings. Four rules apply in the application of this Article 20 EIR:

(i) No creditor can receive more than 100% of its claim;

(ii) In determining the dividend to be paid out, the original amount is taken into account (100% of the original value, i.e. what is paid in other proceedings shall not be deducted);

(iii) The claim shall only be taken into account in the distribution where creditors of the same rank have received a benefit in the other proceedings as well;

(iv) The ranking or category of each claim for each procedure is determined by the law of the EU Member State in which the insolvency proceedings are opened (art. 4.2 sub i).

5.2 DBA (non-EU)

The DBA contains only three articles on cross-border insolvency law, Articles 203 to 205 DBA. These articles apply when insolvency proceedings are pending in the Netherlands. The articles contain rules to prevent that foreign creditors obtain payment on their claims more than once in different jurisdictions. Article 203 DBA provides that creditors that have successfully sought recourse of their claim on assets of the debtor outside of the Dutch jurisdiction have to hand in the dividends they received on their claim to the Dutch bankruptcy estate of the debtor. This rule does not apply to creditors with a priority right.[9] Art. 204 and 205 of the Dutch Bankruptcy Act prevent that creditor assigns its claim on a debtor to a third party so this third party can seek recourse for the claim on assets in a foreign jurisdiction or can offset its claim in a manner that is prohibited by the DBA. These articles in result correspond with Article 20.2 EIR but as seen, are not identical in their application.[10]

6. If by liquidation of assets in any secondary proceedings it is possible to meet all claims, shall the liquidator transfer any remaining assets to the liquidator in the main proceedings?

6.1 EIR

Yes, based on Article 35 EIR, if it is possible to meet all claims in any secondary proceeding, the liquidator shall transfer any remaining asset to the liquidator in the main proceeding.

6.2 DBA (non-EU)

The situation of a non-EU cross-border insolvency is for the most part not arranged for in Dutch national insolvency law. For the question if a Dutch liquidator should transfer any

[9] Supreme Court 11 July 2014, *JOR* 2014/254.

[10] B. Wessels, 'International Insolvency Law Part 1', Deventer: Kluwer 2015, p. 130, 131.

surplus from liquidating the Dutch bankrupt estate to a foreign bankruptcy, the territoriality principle as developed in Dutch case law (and cited above) is therefore relevant: foreign insolvency proceedings have no consequences for assets located in the Netherlands in as far as it concerns the rights of creditors to seek recourse for their claims on those assets. As a result, a Dutch liquidator has no obligation to transfer any surplus from the liquidated assets.

It should be noted the foreign liquidator does have the opportunity to claim the assets in located the Netherlands, but he has to respect the position of creditors that have levied attachments on those assets (see more on this with question 7.2 below).

In the opposite scenario (i.e. should a foreign liquidator transfer a surplus after liquidation to the Dutch liquidator), the view is that any assets of the Dutch debtor, either located in the Netherlands or abroad, form part of the Dutch insolvency proceedings and as such should be made available to the Dutch bankrupt estate. Any surplus after liquidation of assets located in another jurisdiction should therefore be transferred to the Dutch bankrupt estate (also see Article 203 DBA as discussed above).

7. Does the so-called "dominance" of the main proceedings creates a leading role for the liquidator, appointed in the main proceedings, to coordinate all insolvency proceedings pending against the same debtor?

7.1 EIR

Yes, the liquidator of the main proceeding has a leading role, based on Article 31 subsection 3 EIR by which the liquidator in the secondary proceedings has to give the liquidator in the main proceedings the opportunity to propose a manner of liquidation or use of the assets in the secondary proceedings. Furthermore, the liquidator of the main proceeding can suspend the liquidation in the secondary proceeding (Article 33 subsection 1 EIR) provided that the liquidator in the main proceedings can be required to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Article 34 subsection 1 EIR allows the liquidator in the main insolvency proceeding to terminate the secondary proceeding without liquidation.

7.2 DBA (non-EU)

In line with the principle of universality, the Dutch liquidator has a leading role and can dispose of all the assets belonging to the bankrupt estate, located anywhere in the world, regardless of foreign pending insolvency proceedings against the debtor. Of course, in reality, a leading role for the Dutch liquidator outside of the Dutch jurisdiction is only possible when foreign law acknowledges this role, which will rarely be the case.

The other way around (i.e. when it concerns the position of a foreign liquidator in Dutch insolvency proceedings) a mitigated principle of territoriality applies. Based on case law of

the Supreme Court in the Yukos bankruptcy, although assets located in the Dutch jurisdiction do not form part of the foreign bankruptcy garnishment, a foreign liquidator can dispose of assets located in the Netherlands and claim the proceeds for the foreign insolvency proceedings, if (i) he is competent to do so based on the *lex concursus* and (ii) respects Dutch law attachments on those assets levied by creditors.[11] However, the aforementioned does not imply that a foreign liquidator takes a leading role to coordinate Dutch insolvency proceedings.

8. **How do you think the above mentioned issues have been tackled by the new EU Regulation on Transnational Insolvency? If yes, in which way defective or useful?**

The recast EIR contains numerous changes, addressing many issues, but not necessarily those that are mentioned above. The focus of the amendments are geared towards:

(i) Addressing forum shopping

(ii) Promoting rescue and recovery proceedings

(iii) Group insolvencies.

Given the fact that not all of these changes address the topics in this questionnaire, below some changes to the EIR are discussed that focus on the relationship between main and secondary insolvency proceedings.

The relationship between main and secondary proceedings – issues with regard to rescue and recovery

One of the points addressed by the Commission in the recast EIR is the manner in which main and secondary proceedings relate to one another. An issue that has arisen is the situation whereby main proceedings are opened in one Member State, which proceedings are of a *restructuring* nature, and secondary proceedings are opened in another Member State, which, by their nature had to be *liquidation* proceedings. Restructuring of a going concern pan-European group is difficult under those circumstances. With the recast EIR, secondary proceedings do not necessarily have to be liquidation proceedings. The secondary proceedings can furthermore be avoided by the liquidator of the main proceedings by providing an undertaking that the distribution of the (proceeds of) the assets will take place in line with the laws of the Member State where the secondary proceedings are opened, pursuant to Article 36 EIR. The liquidator and debtor can also request for a stay of the secondary insolvency proceedings, in case negotiations between the debtor and its creditors are taking place. Furthermore, the liquidator in the main proceedings can request the Court in the Member State where the secondary proceedings are opened to review the decision to open the secondary proceedings. These changes should allow for a better overall control of the restructuring process within the EU where it

[11] Supreme Court 13 September 2013, *NJ* 2014, 454 (*Yukos*).

concerns a cross-border insolvency. As is apparent, the dominance of the main proceedings (and its liquidator) over secondary proceedings is underlined with these new changes.

Cross-border cooperation and communication

However, to counterbalance the strengthened dominance of the main proceedings over the secondary proceedings, the EIR provides for the obligation for liquidators and bankruptcy courts to cooperate and communicate to the largest extent possible. Articles 41 to 43 EIR give new rules for cooperation between liquidators (41), courts (42) and courts and liquidators (43). If and to what extent these new rules will come into effect, remains to be seen. It seems feasible to promote the contact between main and secondary proceedings liquidators, but cooperation between national Courts seems still far-fetched. As an example, Dutch Courts are by nature passive in their communication to applicants and will not initiate debates on their own accord. It would be interesting to learn what guidelines the Dutch Courts will adopt to streamline their discussions with their European counterparts on insolvency proceedings. The 'EU Cross-Border Insolvency Court-to-Court Cooperation Principles', which have been published in February 2015 may provide useful tools in that respect.

One of the changes to promote equality between creditors of different jurisdictions is the new manner of filing claims, pursuant to Articles 53, 54 and 55 EIR. The liquidator has the express duty to inform all known foreign creditors of the specific requirements for filing a claim in the insolvency proceedings. The filing system is based on a standard claim form (Article 88 EIR for requirements) which form should be accepted by the local liquidator. Such form will save time and effort for foreign creditors when filing their claims, as investigations on the 'how' of filing a claim are diminished. Currently there still is a (practical) disadvantage for foreign creditors to file their claims, due to lack of knowledge on (i) the existence of the bankruptcy (ii) its consequences and (iii) the legal requirements for filing a claim.

9. How do you think the above mentioned issues have been tackled by the UNCITRAL Model Law on Cross-Border Insolvency? If yes, in which way defective or useful?

The UNCITRAL Model Law is a body of text that provides for recommendations to States and is not intended as international law. The Model Law by its very nature respects the differences between the different national procedural laws and does not contain conflict of law rules nor substantive law provisions. It contains procedural aspects that can be integrated in the national legislation, but there are no obligations as to the manner or scope of implementation. As such, the legal effect of the Model Law can differ from state to state and does not have the same harmonization effect that a regulation such as the EIR has.

Furthermore, the rules contained in the Model Law differ from those in, for instance the EIR, because they are not the result of the recognition of insolvency proceedings that are inbound from a specific group of states that have agreed to recognize other states' insolvency proceedings based on comity. Therefore, the essence of the Model Law is not

that insolvency proceedings in another state have full effect in the other state (as is the case with the EIR), but rather that a foreign liquidator should be allowed certain forms of relief.

Main and secondary proceedings

With regard to the relationship between main and secondary proceedings, the Model Law has the same concept of main and non-main proceedings as the EIR has. However, foreign proceedings are not automatically recognized. The Model Law has a specific regime for recognition of foreign proceedings (Articles 15-21) and without recognition by the local court, a foreign insolvency proceedings has no effect. If and when the foreign insolvency proceedings are recognized, there is no recognition of *all* effects. Recognition means (i) there can be an automatic stay of actions and execution, and (ii) the possibility of granting discretionary relief. The stay of actions and executions is only available if the foreign proceedings are the main proceedings. As such, the Model Law provides for far less possibilities to align main and secondary proceedings and provide for a global settlement of a debtor's position vis-à-vis its creditors.

Powers of trustee

The position of the foreign liquidator ('foreign representative') is not automatically recognized in the receiving state. Only if the foreign insolvency proceedings are recognized, the position of the foreign liquidator can be recognized as well, but only to a certain extent and for specific powers. The foreign liquidator (i) has standing to appear in court, (ii) may request relief from the court, (iii) can initiate claims for acts that are prejudicial to creditors (iv) may intervene in civil proceedings and (v) may request the opening of local insolvency proceedings. A foreign trustee cannot automatically dispose of assets located in the receiving state, but needs court approval. It is up to the receiving state to determine the exact scope of powers of a foreign trustee. Again, the Model Law does not require full adaptation in the national legal system and so it needs to be assessed per state what the legal powers of a foreign trustee are. This leaves room for a lot of legal uncertainty.

The Netherlands have not adopted the Model Law

The Netherlands have not adopted the Model Law. From a Dutch law perspective, the Model Law therefore provides little guidance in relation to the topics above. In a recent proposal to amend the DBA, elements from the Model Law were introduced, but the proposal failed and a 'revamp' of the DBA (although it is quite outdated) is not expected soon. In order to keep this questionnaire as to the point as possible, I will not further elaborate on the practical impact of the Model Law in the Netherlands on the questions above (as there is none).

10. **Are there other salient aspects of the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency that are key to answer the need and quest for coordination in cross borders insolvency proceedings?**
11. **Are there other devices that the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency should have**

regulated or adopted to enhance further coordination in cross borders insolvency proceedings?

Questions 10 and 11 will be dealt with jointly below.

EIR

Articles 21 and 22 EIR currently contain the obligation for the liquidator to make the bankruptcy judgment public in another jurisdiction. It could, however, be more helpful if a EU register of insolvency proceedings is set up, allowing for creditors in all EU Member States to become aware of the opening of insolvency proceedings in another Member State.

Next to this, the EIR does not contain proper regulation of the situation whereby one EU Member State's Court has jurisdiction to open insolvency proceedings, but the debtor's assets are outside of that jurisdiction. It would be advisable that the EIR would include a regulation that offers a solution for these kind of problems.[12]

1.1 UNCITRAL Model Law

Listed below are a few suggestions for adaptation of the Model Law on Cross-Border Insolvency, based on elements of Dutch law that provide useful tools in cross-border insolvency:

- In the DBA and EIR the right of retention is arranged for, which allows a creditor to retain an asset of the debtor which is in the possession of the creditor, until the latter is paid in full. The Model Law on Cross-Border insolvency makes no mention of this.
- The DBA provides for a creditors' committee, an advisory body to the liquidator, comprised of the three largest creditors. It can be a useful tool in managing larger bankruptcies and allows for a forum for creditors, especially in cross-border situations. The Model Law does not provide for a creditors' committee.
- The DBA provides for a scheme of settlement between the debtor and the creditor. In the Model Law there is nothing stated about a scheme for settlement between the debtor and the creditor.
- The DBA proceeds from the notion that a creditor with a security right can – albeit under specific circumstances – enforce such right in bankruptcy as if no insolvency proceedings were opened. The Model Law does not make mention of automatic recognition of security rights of creditors. It could be useful to make more distinct provisions on this.
- By nature the Model Law does not provide rules for conflict of law, but it may assist liquidators in cross-border insolvencies if rules of conflict of law are provided for claims of the liquidator pursuant to Article 23 subsection 1 Model Law. As a parallel, Article 13 EIR provides for the so-called 'double test' for claims for nullification of prejudicial acts in an EU cross-border insolvency scenario, i.e. the act must be voidable under the *lex concursus* and the *lex causae*.

[12] J. Sekolec, 'UNCITRAL Model Law on Cross-Border Insolvency: An indispensable complement to the EU Insolvency Regulation', *TvI* 2002.

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