CROSS-BORDER INSOLVENCY
PROCEEDINGS AND SECURITY RIGHTS

A COMPARISON OF DUTCH AND GERMAN LAW, THE EC INSOLVENCY REGULATION AND THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY
SERIES LAW OF BUSINESS AND FINANCE

Editors

Sebastian Kortmann
Dennis Faber

Volume 8
CROSS-BORDER INSOLVENCY PROCEEDINGS AND SECURITY RIGHTS

A comparison of Dutch and German law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency

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ON THE AUTHORITY OF THE RECTOR, PROF. C.W.P.M. BLOM, ACCORDING TO THE DECISION OF THE COUNCIL OF DEANS TO BE DEFENDED IN PUBLIC ON WEDNESDAY 22 DECEMBER 2004 AT 3.30 P.M. PRECISELY

BY

PAUL MICHAEL VEDER
born on 22 November 1969 in Utrecht

Kluwer Legal Publishers - 2004
CROSS-BORDER INSOLVENCY PROCEEDINGS AND SECURITY RIGHTS

A comparison of Dutch and German law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency

EEN WETENSCHAPPelijke proeve op het gebied van de rechtsgeleerdheid

Ter verkrijging van de graad van doctor aan de Radboud Universiteit Nijmegen op gezag van de rector magnificus, prof. C.W.P.M. Blom, volgens besluit van het college van decanen in het openbaar te verdedigen op woensdag 22 december 2004 des namiddags om 3.30 uur precies

Door

Paul Michael Veder

geboren op 22 november 1969 te Utrecht

Kluwer Legal Publishers - 2004
PREFACE BY THE SERIES' EDITORS

The Business and Law Research Centre, established in 1994, is a leading research institute in the field of commercial and private law, recognised by the Royal Dutch Academy of Sciences. Participants in the Business and Law Research Centre are the Faculty of Law of the Radboud University Nijmegen\(^1\) and a number of renowned law firms and companies.

The Netherlands have a largely underdeveloped system of international insolvency law. The introduction of the Insolvency Regulation provides a good opportunity to rethink the core principles that govern the Dutch approach to cross-border insolvencies.

Following a comparison of the position of secured creditors in Dutch and German insolvency law, Michael Veder examines how the Insolvency Regulation, the UNCITRAL Model Law on Cross-Border Insolvency and Dutch and German customary private international law deal with cross-border aspects of insolvency proceedings. He convincingly reveals the shortcomings of the present approach of Dutch law to cross-border insolvency issues. At the same time he presents proposals for future legislation that are of great interest and may lead to a more effective and efficient operation of cross-border insolvency proceedings. With respect to the recognition in the Netherlands of insolvency proceedings opened outside of the EU, he suggests to follow the system of the UNCITRAL Model Law on Cross-Border Insolvency, i.e. to require a decision of the Dutch court to that effect. With respect to the effects of such recognition, however, he argues that the system and conflict rules of the Insolvency Regulation should be followed.

Furthermore, the author deals with the conflict rules of Dutch and German private international law regarding the transfer and encumbrance of assets situated in other States. Starting from the validity of the security right invoked by the secured creditor, the question arises whether and, if so, to what extent the opening of an insolvency proceeding influences the position of the secured creditor. In this respect Michael Veder, among other things, discusses the operation of Article 5 of the Insolvency Regu-

\(^1\) Formerly "University of Nijmegen".

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lation. With regard to Dutch customary private international law, he argues that a rule similar to Article 5 of the Insolvency Regulation should be adopted in future Dutch legislation.

In this doctoral thesis Michael Veder deals with a number of fascinating and often complex legal questions. His answers to these questions and his proposals for future legislation have great practical and academic relevance. We feel privileged to have this dissertation published in our Series and wish that it will find its way to legal practitioners and scholars throughout Europe.

October 2004

Professor Sebastian Kortmann  
Chairman of the Board of the  
Business and Law Research Centre

Dennis Faber  
Director of the Business  
and Law Research Centre
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ABBREVIATIONS

AA       Ars Aequi
A.C.     Appeal Cases
AG       Amtsgericht
All ER   All England Reports
BCC      British Company Law Cases
BGH      Bundesgerichtshof
BGHZ     Entscheidungen des Bundesgerichtshofs in Zivilsachen
BR-Drucksache  Bundesratsdrucksache
BT-Drucksache  Bundestagsdrucksache
BW       Burgerlijk Wetboek
DZWIR    Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht
ECJ      European Court of Justice
ECR      European Court Reports
EGBGB    Einführungsgesetz zum Bürgerlichen Gesetzbuch
EGInsO   Einführungsgesetz zur Insolvenzordnung
EWiR     Entscheidungen zum Wirtschaftsrecht
EWS      Europäisches Wirtschafts- und Steuerrecht
Fw       Faillissementswet
HR       Hoge Raad der Nederlanden
IIR      International Insolvency Review
InsO     Insolvenzordnung
IPRax    Praxis des internationalen Privat- und Verfahrensrechts
IPRG     Bundesgesetz über das Internationale Privatrecht
IPRspr  Die deutsche Rechtsprechung auf dem Gebiete des internationa­
        nalen Privatrechts
IR       EC Insolvency Regulation
JOR      Jurisprudentie Onderneming & Recht
JZ       Juristenzeitung
KO       Konkursordnung
KTS      Konkurs- Treuhand- und Schiedsgerichtwesen, Zeitschrift für
        Insolvenzrecht
LG       Landgericht
LMCLQ    Lloyd's Maritime and Commercial Law Quarterly
NbwB     Nieuwsbrief BW
NILR     Netherlands International Law Review
NIPR     Nederlands internationaal privaatrecht
NJ       Nederlandse Jurisprudentie
NJB      Nederlands Juristenblad

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<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
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<tr>
<td>NTBR</td>
<td>Nederlands Tijdschrift voor Burgerlijk Recht</td>
</tr>
<tr>
<td>NZI</td>
<td>Neue Zeitschrift für das Recht der Insolvenz und Sanierung</td>
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<tr>
<td>OJ</td>
<td>Official Journal</td>
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<tr>
<td>OLG</td>
<td>Oberlandesgericht</td>
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<tr>
<td>RabelsZ</td>
<td>Rabels Zeitschrift für ausländisches und internationales Privatrecht</td>
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<tr>
<td>Rb.</td>
<td>Arrondissementsrechtbank</td>
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<tr>
<td>RegElInsO</td>
<td>Regierungsentwurf der Insolvenzordnung</td>
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<td>RG</td>
<td>Reichsgericht</td>
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<td>RGZ</td>
<td>Amtliche Sammlungen der Entscheidungen des RG in Zivilsachen</td>
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<tr>
<td>Rv</td>
<td>Wetboek van Burgerlijke Rechtsvordering</td>
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<td>Stb.</td>
<td>Staatsblad</td>
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<tr>
<td>TBH</td>
<td>Tijdschrift voor Belgisch Handelsrecht</td>
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<td>TJICL</td>
<td>Tulane Journal of International and Comparative Law</td>
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<td>Trb.</td>
<td>Tractatenblad</td>
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<tr>
<td>Tvl</td>
<td>Tijdschrift voor Insolvenierecht</td>
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<tr>
<td>TVVS</td>
<td>Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen. Maandblad voor Ondernemingsrecht en Rechtspersonen</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<tr>
<td>VerglO</td>
<td>Vergleichsordnung</td>
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<td>W</td>
<td>Weekblad van het Recht</td>
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<td>WM</td>
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<td>WPNR</td>
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<td>ZIP</td>
<td>Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis</td>
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<td>ZPO</td>
<td>Zivilprozessordnung</td>
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INTRODUCTION

1. DEFINITION OF THE TOPIC AND STRUCTURE OF THE BOOK

Cross-border insolvency proceedings give rise to a multitude of complex legal problems. This book addresses the position of security rights in moveable assets or claims that are situated in another State than the State where the insolvency proceeding has been opened.

Security rights are of great importance to the proper functioning of trade and the supply of credit in the market. The existence of proprietary security rights furthers the availability and affordability of credit. The position of the holder of a security right is generally strong. A security right confers on the holder of the right the power to realise the encumbered asset and have the secured claim satisfied from the realisation proceeds in priority to other creditors. The holder of a security right has a direct (proprietary) claim in relation to the encumbered asset, as opposed to unsecured creditors seeking recourse in respect of the debtor's assets. In particular in case of the insolvency of the debtor, the security right must prove it's worth. Traditionally, insolvency laws did not impose far reaching restrictions on the exercise of security rights. Secured creditors could enforce their security "as if there were no insolvency". Modern insolvency systems, however, increasingly interfere in that strong position of secured creditors, in particular in view of furthering the possibilities of reorganisation of potentially viable businesses in financial distress. The manner in which and the extent to which infringements on the position of secured creditors are provided for differ from State to State. The approach taken does not only depend on political choices, but also on the system of security rights in place in the general law of property. Insolvency law and property law operate in close connection.

In the context of cross-border trade and finance it is crucial that parties to a transaction can, with a reasonable degree of certainty, predict what their position will be in the event of insolvency of the other party. To what extent does a security right in assets situated in another State than the State where an insolvency proceeding is eventually opened in fact provide security to the creditor? Answering this question requires that a number
of issues is addressed. Some of those issues pertain to the general law of obligations or property, such as the assessment of the validity and content of the security right in question, others pertain to the law of insolvency, e.g. (temporary) restrictions imposed on the exercise of security rights in an insolvency proceeding. The difficulties that arise in this respect in the context of cross-border transactions are caused by differences in substantive (insolvency) law on the one hand, and differences in private international law on the other hand.

Several projects have been launched in recent years aimed at creating a basis for harmonised or uniform rules of substantive law in this commercially important area of law. On the one hand, these projects are aimed at specific sectors of the market, e.g. the UNIDROIT Convention on International Interests in Mobile Equipment (supplemented by protocols with respect to aircraft equipment, railway rolling stock and space assets).\(^1\) On the other hand, projects of a more general nature have been initiated, e.g. within the framework of the United Nations Commission on International Trade Law (UNCITRAL), which in June 2004 adopted the Legislative Guide on Insolvency Law and is working on a Legislative Guide on Secured Transactions.\(^2\) Also on an academic level valuable work has been performed in this field, which has for example led to the publication of the Principles of European Insolvency Law in June 2003. Notwithstanding the increased interest and efforts to achieve at least some degree of harmonisation in this field, it is not likely that this will in the short term indeed lead to a greater correspondence of national substantive laws. Harmonisation of insolvency law is difficult as it finds itself at the crossing of the most important areas of substantive national law. The rules that national laws provide for the specific situation of a party's insolvency are embedded in and have influence on the much broader structures of the general law.

In the absence of unified or harmonised rules on security rights and insolvency law, the approach taken in private international law is of great importance. Given the existing differences in substantive law it is crucial

\(^1\) Convention on International Interests in Mobile Equipment, Cape Town, 2001. The Convention and the (draft) protocols to the Convention can be consulted at www.unidroit.org.

\(^2\) Both (draft) guides can be consulted at www.uncitral.org.
to determine in accordance with which law the position of security rights (in insolvency) should be assessed. Also on the level of private international law jurisdictions show considerable differences. These differences for example concern the determination of the law applicable to the creation and content of security rights, the recognition of foreign insolvency proceedings and the effects of such recognition. Within the EU an important step forwards has been made in this respect by the entry into force of the Insolvency Regulation.³ The Insolvency Regulation has introduced uniform rules of private international law that determine the jurisdiction of the courts of the Member States to open insolvency proceedings, provide for recognition of insolvency proceedings in other Member States and designate the law to be applied to issues of insolvency law. In addition, it also entails an important contribution to the harmonisation of private international law regarding insolvencies that fall outside the scope of the regulation. On a global scale the introduction of legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will contribute to a more effective and efficient operation of cross-border insolvency proceedings.

This study deals with issues of private international law that arise in connection with the assessment of the position of secured creditors in cross-border insolvency proceedings. It compares the approaches of the Insolvency Regulation, the UNCITRAL Model Law on Cross-Border Insolvency and German and Dutch customary private international law (regarding issues that fall outside the scope of the Insolvency Regulation). An important part of the study is devoted to the general approach towards the (recognition of) cross-border effects of insolvency proceedings as this provides the basis for determining the extent to which security rights in assets situated in a given State can be affected by the opening of an insolvency proceeding in another State. The Insolvency Regulation is taken as an established body of law. This study discusses the effects of the Insolvency Regulation on the position of secured creditors but it does not seek to propose new rules on intra-community insolvency proceedings. Proposals for the future development of Dutch customary private

Introduction

international law, which at present fundamentally deviates from internationally acceptable standards, will be presented.

In the first chapter Dutch and German law regarding the position of secured creditors in insolvency are compared. This outline is intended as illustration of the different approaches taken in national legislation. In a study that deals with cross-border insolvency proceedings and the implications for security rights, it is helpful not to limit the observations to issues of private international law but to also indicate a number of differences in national substantive law.

Chapter II examines the general approach to cross-border aspects of insolvency proceedings. A distinction is made between the cross-border effects of domestic insolvency proceedings and foreign insolvency proceedings as these are often subject to different rules. It deals with issues such as the relation between jurisdiction and cross-border effect, the (effects of) recognition of foreign insolvency proceedings and the position of foreign creditors in domestic proceedings.

In chapter III the position of security rights in cross-border insolvency proceedings is discussed. Following an outline of the conflict rules regarding the proprietary aspects of security rights in moveables and claims, the influence of the opening of an insolvency proceeding on the validity of security rights is examined. The discussion on the effects of the opening of an insolvency proceeding on security rights that - in accordance with the rules set forth in the first two paragraphs of the chapter - have been validly created in the debtor's assets, primarily focusses on Art. 5 IR.

2. TRANSLATIONS AND TERMINOLOGY

Apart from the usual linguistic problems, comparing German and Dutch law in English raises difficulties regarding terminology. In this book I have tried to maintain terminology that is used in recent international texts such as the EC Insolvency Regulation ('claim' as referred to in Art. 2 g IR), the UNCITRAL Legislative Guide on Insolvency Law ('encumbered asset' to refer to an asset in respect of which a security right has been obtained by a creditor) and the Principles of European Insolvency Law.
('administrator' to indicate the officially appointed body or person whose function it is to administer the debtor's estate; 'reversal' to indicate that juridical acts detrimental to the creditors and performed by the debtor prior to the opening of the insolvency proceeding are cancelled, avoided or otherwise rendered ineffective).

Translations of statutory texts or court decisions are by the author unless indicated otherwise.

The manuscript was finalised on 27 June 2004.
1. Introduction

Insolvency proceedings in principle include all assets belonging to the insolvent debtor at the time of opening of the proceeding and assets acquired during the proceeding. These assets form the estate - *Insolvenzmasse, boedel* - from the proceeds of which the claims against the insolvent debtor existing at the time of opening of the proceeding - insolvency claims\(^1\) - are to be satisfied. Assets that do not form part of the estate cannot be used for the satisfaction of the claims of the insolvent debtor's creditors and must be separated from the estate, a process which in German law is referred to as *Aussonderung*.\(^2\)

Many legal systems start from the principle that creditors with insolvency claims have an equal right to be paid (in proportion to the amount of their claims) from the proceeds of realisation of the assets that form part of an insolvent debtor's estate. This principle of *paritas creditorum* ("pari passu"), however, is infringed by the preferential status that certain categories of claims are granted under many national laws. An equal ranking for all creditors is probably not granted by any legal system.\(^3\) There are usually various classes of creditors and the higher the ranking the greater the chances of obtaining (partial) payment. Within a particular class creditors are treated equally in proportion to their claims.

A right to preferential payment from the proceeds of realisation of the debtor's assets may be attached to certain categories of claims by statutory provisions. Such rights of preferential payment, hereafter referred to as privileges (*voorrecht*), are generally based on social or political motives and aim to protect the interests of particular categories of creditors. In many

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1 Cf. § 3.3 of the Principles of European Insolvency Law, p. 38 et seq.
2 Cf. Art. 47 InsO.
3 Principles of European Insolvency Law, p. 81; Wood, § 1-14 et seq.
legal systems a preferential status is e.g. granted to employees' salary claims and tax claims. Creditors with privileged insolvency claims generally are barred from individually enforcing their rights in the debtor's insolvency by levying execution on the debtor's assets. Privileged insolvency claims are satisfied within the framework of the insolvency proceeding, i.e. through the process of submission and admission of claims. Creditors will receive a distribution only if the costs and expenses of the estate (administrative claims, claims against the estate) have been fully paid. Consequently, a distribution on privileged (and ordinary) unsecured claims will not follow if the value of the debtor's estate is insufficient to cover the costs and expenses of the estate.

In view of the risk of the debtor's insolvency creditors may seek to reinforce their position by obtaining security rights in the debtor's assets. A security right entitles a creditor to enforce his claim against the encumbered asset(s) and have his claim satisfied from the proceeds with priority to other creditors. Unlike a privilege, it is not a mere right to preferential payment from the proceeds of (one or more of) the debtor's assets. The secured creditor has a proprietary interest in the asset that can be invoked erga omnes and - as a rule - is enforceable in the debtor's insolvency. A secured claim is not satisfied within the framework of the insolvency proceeding to the extent that it can be satisfied from the proceeds of the encumbered asset. The secured creditor's claim is satisfied directly from the proceeds of realisation of the encumbered asset. The secured creditor does not contribute to the general costs and expenses of the insolvency proceeding (administrative expenses), notwithstanding that, as it is the case in German law, certain costs may be deducted from the proceeds that are available for the satisfaction of the secured claim.

Over the past years there has been an increasing interest in the function of insolvency proceedings as an instrument to achieve reorganisation of the

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4 A security right for claims against the debtor may also be obtained in assets owned by a third party (e.g. third-party pledge or mortgage, cf. Art. 3:231 (1) BW). Problems specifically pertaining to the fact that a security right has been obtained in third party owned assets are left aside.

5 Cf. § 9 of the Principles of European Insolvency Law, p. 57 et seq.; Report Virgós/Schmit, Nr. 103.

6 Cf. § 5 of the Principles of European Insolvency Law, p. 43-45; UNCITRAL Legislative Guide on Insolvency Law, Part I, p. 5.
debtor or the business operated by the debtor. Insolvent, but economically viable businesses should be reorganised and not liquidated. This development has also had an impact on the position of security rights in insolvency. In order not to restrict the chances for a successful reorganisation, an early disintegration of the insolvent debtor's business resulting from the fact that secured creditors take recourse in respect of encumbered assets - often assets that are crucial to the operation of the debtor's business - must be prevented. Various instruments have been introduced in national legislations that curtail the power of secured creditors to exercise security rights in view of furthering the possibilities of reorganisation. At present, the restrictions imposed on the exercise of security rights in the debtor's insolvency are more drastic in German law than in Dutch law.

Dutch law
Under present Dutch law, in principle the rights of secured creditors are not affected by the opening of an insolvency proceeding against the debtor. Art. 57 (1) Fw stipulates in this respect that a right of mortgage or a right of pledge can be exercised 'as if there were no bankruptcy'. This provision corresponds with German insolvency law prior to the enactment of the Insolvenzordnung. Furthermore, pursuant to Art. 157 Fw, which corresponds with the old German Art. 193 KO, secured creditors are not bound by a court approved composition. However, secured creditors can be temporarily prevented from exercising their rights by way of a court ordered moratorium (afkoelingsperiode). This temporary stay provides the administrator with the opportunity to assess the situation of the debtor's business. It does not as such provide the administrator with the power to use (up) or dispose of encumbered assets, even if that would be in the interest of the continuation of the debtor's business.

It is likely that the position of secured creditors will undergo changes in the future. A first move has been made by the government. Following a 'quick scan' by an advisory committee the Dutch government submitted

7 With respect to suspension of payments, cf. Art. 232 Fw.
8 Cf. Art. 4 KO.
9 With respect to suspension of payments, cf. Art. 273 io. 232 Fw
10 Art 63a Fw.
a bill aimed at improving the effectiveness of bankruptcy proceedings and suspension of payments containing reform proposals that were considered to be uncontroversial and did not require further study.\textsuperscript{12} This bill initially provided for important changes in for example the scope and effects of the moratorium with respect to secured creditors (e.g. by conferring on the administrator the power to use encumbered assets). However, the most crucial elements of these reform proposals have meanwhile been repealed after criticism from practitioners and scholars. In January 2000 the Dutch government established a committee to prepare an exploratory study on the direction and manner of a possible reform of insolvency law, in particular with respect to those issues that were regarded as more controversial and required further study. This committee published its final report in October 2001.\textsuperscript{13} In 2003 the Dutch government established a committee to advise on and prepare proposals for a reform of insolvency law, taking into consideration the recommendations of the earlier report.\textsuperscript{14} The position of secured creditors is one of the key-issues on the agenda.

\textbf{German law}

The German \textit{Insolvenzordnung}, on the other hand, in principle confers the authority to realise encumbered assets exclusively on the administrator and provides him with possibilities to use encumbered assets for the continuation of the debtor's business. However, the rights and (financial) interests of secured creditors are respected to a large extent. Secured claims are satisfied directly from the realisation proceeds of the encumbered assets (albeit with a certain deduction for costs related to the involvement of the administrator). Secured creditors are to a certain extent compensated for the loss suffered as a result of being barred from enforcing their rights and the decrease of the value of encumbered assets by their continued use in the business of the insolvent debtor.

One of the aims of the reform of German insolvency law that led to the entry into force of the \textit{Insolvenzordnung} in 1999, was to create a more market based insolvency system, that would facilitate the reorganisation

\textsuperscript{12} Bill 27 244 (Wijziging van de Faillissementswet in verband met het bevorderen van de effectiviteit van surseance van betaling en faillissement).
\textsuperscript{13} MDW-Werkgroep herziening faillissementsrecht, chaired by Prof. M.J.G.C. Raaijmakers. The final report of the committee (October 2001) has been published on the website of the Ministry of Justice (www.justitie.nl).
\textsuperscript{14} Commissie Insolventierecht, chaired by Prof. S.C.J.J. Kortmann.
and continuation of businesses where appropriate. A central issue of the reform proposals in this respect was the inclusion of the secured creditors in the insolvency proceeding, to the extent necessary to achieve these aims.\textsuperscript{15} The effects of the opening of an insolvency proceeding on the rights of secured creditors as regulated in the \textit{Insolvenzordnung}, are based on the observation that a system that places secured creditors outside of the insolvency proceeding, as it was the case under the \textit{Konkurs-} and \textit{Vergleichsordnung}, does not lead to the most favourable manner of administration and realisation of the estate in respect of all interested parties, in particular the debtor's other (unsecured) creditors,\textsuperscript{16} and that it leads to difficulties in respect of reorganisation and continuation of the debtor's business. That secured creditors in principle were able to enforce their rights without having to take into account the interests in an economically meaningful winding up of the insolvency proceeding, was seen as the main cause for the \textit{Zerschlagungsautomatik} of the old insolvency system.\textsuperscript{17}

The extent to which secured creditors should be affected by insolvency proceedings has been the subject of lengthy debate. The proposals of the Government Committee which was charged with the reform of insolvency law, the \textit{Kommission für Insolvenzrecht}, provided for a considerable weakening of the position of creditors with undisclosed (non-possessory) security rights. It was suggested that the power to realise encumbered assets should be conferred exclusively on the administrator. Furthermore, these proposals provided that secured creditors would have to suffer a deduction of 25\% on the realisation proceeds, on the one hand to cover the costs involved in the realisation of the encumbered assets, on the other hand to compensate the unsecured creditors for the fact that the recognition of forms of undisclosed security rights (such as transfers of moveables and assignments of claims for purposes of security and extended reservation of ownership clauses) had led to a considerable decrease of their chances of obtaining (partial) satisfaction of their claims.\textsuperscript{18} The suggested infringements on the rights of secured creditors and the excessive results of the efforts to achieve more \textit{Verteilungsgerechtigkeit} met with severe criticism from legal practice as well as in legal writing. In

\begin{itemize}
  \item \textsuperscript{15} BT-Drucksache 12/2443, p. 86.
  \item \textsuperscript{16} BT-Drucksache 12/2443, p. 79.
  \item \textsuperscript{17} BT-Drucksache 12/2443, p. 86.
  \item \textsuperscript{18} Cf. Balz/Landfermann (1995), p. XXXIII.
\end{itemize}
particular the argument was advanced that a shift in the allocation of value from secured to unsecured creditors was not a legitimate aim of insolvency proceedings. The failing publicity of the most common security rights in German law was indicated as one of the main problems in the area of tension between security rights and insolvency and was used by the Kommission für Insolvenzrecht as a central argument in underpinning the infringements on the rights of secured creditors. In the subsequent Bill (Regierungsentwurf) however, the proposed restrictions with respect to the exercise of security rights were underpinned with arguments related to the aim of insolvency proceedings as formulated in the Insolvenzordnung and achieving a better balance of the interests of all parties involved in an insolvency proceeding. The German government held that possible problems related to the fact that the existence of security rights was not identifiable to third parties, was not a matter that could be addressed only in relation to insolvency. The proposed changes in the field of security rights in the reform of insolvency law were therefore restricted to issues that were considered relevant for furthering the aims of the insolvency proceeding.19

Structure of chapter I
The first chapter of this study examines a number of differences between German and Dutch (insolvency) law with respect to the position of security rights in insolvency. It is not intended as a comprehensive study of the Dutch and German system of security rights - a mer à boire of legal problems in itself -, but rather to provide some examples of the diverging approaches to security rights and their position in insolvency. Issues of general (private) law for example relating to the creation of security rights are not dealt with in any detail. Such issues, relevant as they are in all insolvency proceedings, do not constitute problems of insolvency law but pertain to the general law of property as preliminary questions concerning the position of secured creditors. Paragraph 2 deals with the position of security rights in insolvency. By way of introduction, a brief overview of the types of proprietary security rights dealt with in this study is given in § 2.1. In this respect attention is also paid to the fundamental difference in approach between Dutch and German law as to the use of ownership as a security right. The paragraph further examines issues such as the

19 BT-Drucksache 12/2443, p. 86
realisation of encumbered assets (§ 2.3), the distribution of the proceeds (§ 2.4), the power of the administrator to use encumbered assets for the continuation of the insolvent debtor's business (§ 2.5) and the extent to which secured creditors are affected by compositions and reorganisation plans (§ 2.6). Reservation of ownership and the implications of the insolvency of the purchaser will be dealt with separately in paragraph 3. Both Dutch and (to a certain extent) German law do not deal with reservation of ownership on the same footing as security rights generally, but rather grant the seller the right to revindicate the goods sold and delivered under reservation of ownership from the estate. Paragraph 4 contains concluding observations.

2. SECURITY RIGHTS

2.1 Types of security rights

Art. 49-51 InsO identify the categories of creditors that under German law are entitled to separate satisfaction in an insolvency proceeding (absonderungsberechtigte Glaubiger). Such creditors include creditors with a right of pledge - by agreement, by operation of law or as a result of attachment in execution - and creditors with a right of retention. The most common form of security in moveables and claims in German law, the fiduciary transfer by way of security (Sicherungsübereignung, Sicherungsabtretung), also gives the creditor a right to separate satisfaction. The creditor acquires a right of ownership of the transferred asset that is restricted by the fiduciary nature of the relationship between the creditor and the debtor. The creditor may only dispose of the asset - in order to satisfy the secured claim from the proceeds - in case of default of the debtor. If all claims secured by the fiduciary transfer of ownership have been satisfied, the

20 Art. 1204 et seq. BGB (moveables); Art. 1273 et seq. BGB (claims).
21 E.g. Art. 562 BGB (landlord), 583 BGB (leaseholder), 593 BGB (lessor), 647 BGB (contractor), 397 HGB (broker), 441 HGB (carrier).
22 Art. 804 ZPO (Pfändungspfandrech).
23 Provided that the creditor invokes a right of retention in accordance with the Commercial Code (Handelsgesetzbuch) - cf. Art. 51 (3) InsO - or the creditor invokes a right of retention in respect of a physical object based on expenditures incurred for the benefit of that object, to the extent that the claim arising from such expenditure does not exceed the remaining value (Art. 51 (2) InsO).
asset must return to the patrimony of the debtor. Either the ownership must be transferred back to the debtor pursuant to a contractual obligation or the ownership may return to the debtor automatically because the transfer to the creditor was effected under the condition subsequent that all claims designated in the contract are satisfied. That the creditor's right of ownership is the functional equivalent of a security right entails that, for purposes of insolvency law, the asset is allocated to the estate. The creditor cannot revindicate the asset (cf. Art. 47 InsO). Pursuant to Art. 51 InsO the creditor is dealt with as a secured creditor and (merely) has a right to separate satisfaction (Absonderung). 24

The Dutch Civil Code, in addition to the 'traditional' right of pledge (with dispossession of the debtor/pledgor or notification to the debtor of the pledged claim), allows a debtor to provide undisclosed security in assets by way of the establishment of a right of pledge in moveables without dispossession of the debtor 25 and a right of pledge in claims without notification to the debtor of the pledged claim. 26 Dutch law also provides for the transfer of assets subject to a right of pledge in the transferred asset (Art. 3:81 (1) BW). The acquirer thus obtains an asset that from the outset is encumbered with a right of pledge. The pledgee may convert an undisclosed (non-possessory) right of pledge into a disclosed (possessory) right of pledge by demanding the surrender of the pledged moveable or by notifying the debtor of the pledged claim, if his debtor is or gives him good grounds to fear that he will be in default. 27 Pursuant to Art. 57 (1) Fw, the pledgee has a right to separate satisfaction in the insolvency of the debtor/pledgor. He may exercise his rights as if there were no insol-

24 This was also the approach to security ownership under the Konkurs- and Vergleichs­ ordnung. Cf. Kuhn/Uhlenbruck (1994), § 43, Nr. 15 et seq.

25 Art. 3:237 BW. A right of pledge can be created by an authentic deed or a registered private instrument, without the object being brought under the control of the pledgee or of a third person. With respect to the right of pledge in moveables with dispossession of the pledgor, cf. Art. 3:236 (1) BW.

26 Art. 3:239 BW. A right of pledge can be established by an authentic deed or registered private instrument without notification to the debtor of the pledged claim. An undisclosed right of pledge can only be validly created in respect of claims that exist at the time of execution of the authentic (notarial) deed of pledge or registration of the private instrument or directly originate from a legal relationship existing at that time. With respect to the disclosed right of pledge in claims, cf. Art. 3:236 (2) io. 3:94 BW.

27 Art. 3:237 (3) BW and Art. 3:239 (3) BW.
Secured creditors and insolvency in German and Dutch law

28 This means not only that the pledgee may realise the encumbered asset during the insolvency proceeding, but also that an undisclosed (non-possessory) right of pledge may be converted into a disclosed (possessory) right of pledge during the insolvency proceeding.²⁹

2.1.1 Divergent approach of Dutch law to ownership as a (non-possessory, undisclosed) security right

Prior to the entry into force of the present Dutch Civil Code in 1992, Dutch and German law to a large extent corresponded with respect to the approach to transfer of ownership by way of security as a means of providing non-possessory security rights in moveables and undisclosed security rights in claims. In both legal systems only disclosed - possessory - security rights were explicitly regulated by statute. The German and the Dutch Civil Code provided for a right of pledge in moveables with dispossession of the pledgor and a right of pledge in claims with notification to the debtor of the pledged claim.³⁰ The need in practice to enable the debtor to provide security rights in moveables to his creditors while continuing to use such assets for the operation of his business, or to create security rights in claims without disclosing the existence of the security to the debtor of the claim, led to the development of the fiduciary transfer of ownership in moveables without dispossession of the pledgor and the fiduciary assignment of claims by way of security without notification to the assigned debtor. This practice had been accepted by and further developed in case law.³¹ The transferee did not have the full powers that are usually attached to a right of ownership, but he had to exercise his right of ownership in view of recourse. Under Dutch law, the provisions on the exercise of a right of pledge were applied by analogy to the exercise of rights under a transfer by way of security.³²

²⁸ A creditor that invokes a right of retention under certain circumstances also has a position similar to that of a secured creditor (cf. Art. 60 (3) Fw).
³⁰ Cf. Art. 1205 and 1280 BGB; Art. 1198 (1) and 1199 BW (prior to 1992).
³¹ Cf. Baur/Stümer (1999), § 56-58; MünchKomm-Quack, Band 6, Anh. §§ 929-936; MünchKomm-Roth, Band 2a, § 398, Nr. 100 et seq. With respect to Dutch law, cf. (with extensive further references to parliamentary documents, case law and literature) Vermogensrecht (C.J.H. Jansen and T.H.D. Struycken), Art. 3:84 lid 3.
At present, certain forms of such security ownership are recognised in German and Dutch law. The present Dutch Civil Code, however, introduced important changes in the approach towards security ownership. The absence of publicity in case of a transfer of ownership of moveables - *constituto possessorio* - or assignment of claims without notification to the assigned debtor, was an important reason for the choice of the Dutch legislator to (in principle) prohibit such security transfers. As substitutes a right of pledge in moveables without dispossession of the debtor and a right of pledge in claims without the requirement of notification to the debtor of the pledged claim, were introduced.\(^{33}\)

**Art. 3:84 (3) BW**

The prohibition of transfer of ownership in moveables and the assignment of claims by way of security follows from Art. 3:84 (3) BW, which reads:

A juridical act intended to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer, after transfer, does not constitute a valid title for transfer of that property.\(^{34}\)

This provision must be read against the background of Art. 3:84 (1) BW which requires a valid legal basis ("titel") for the transfer of property. Pursuant to Art. 3:84 (3) BW, a (contractual) obligation to transfer property by way of security does not constitute a valid legal basis for the transfer of property. The effects of Art. 3:84 (3) BW are proprietary in nature in the sense that, while leaving the contractual obligations between the creditor and the debtor unaffected - the contract itself is not contrary to any rule of

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\(^{33}\) Also the present system suffers from failing publicity, however. The registration of a private instrument pursuant to Art. 3:237 or 239 BW does not take place in a public register. The purpose of requiring registration (or an authentic deed) is rather to fix the date of creation of the right of pledge in view of possible conflicts with other rights created in the same asset.

\(^{34}\) Translation taken from Netherlands Business Legislation. Art. 3:84 (3) BW: Een rechtshandeling die ten doel heeft een goed over te dragen tot zekerheid of die de strekking mist het goed na de overdracht in het vermogen van de verkrijger te doen vallen, is geen geldige titel van overdracht van dat goed.
mandatory law -, the contract does not lead to transfer of the ownership of the asset concerned.\textsuperscript{35}

The \textit{Hoge Raad} has further defined the scope of application of Art. 3:84 (3) \textit{BW} in its decision of 19 May 1995 concerning the validity of a sale and financial lease back transaction.\textsuperscript{36} The case decided by the \textit{Hoge Raad} concerned the acquisition of two printing presses by \textit{De Zaaiers BV} from \textit{Mahez BV}. The acquisition was financed by \textit{Sogelease BV}. The ownership of the printing presses was transferred by \textit{Mahez BV} to \textit{De Zaaiers BV} and subsequently by \textit{De Zaaiers BV} to \textit{Sogelease BV}, which paid the purchase price of the printing presses to \textit{Mahez BV}. The instalments to be paid by \textit{De Zaaiers BV} to \textit{Sogelease BV} pursuant to the finance lease contract, included a large redemption component. The contract conferred on \textit{De Zaaiers BV} the right to purchase the presses from \textit{Sogelease BV} for NLG 100 at the end of the contract. The costs for maintenance and the risks regarding the presses were borne by \textit{De Zaaiers BV}, which capitalised the presses on its balance sheet. Pursuant to the contract, in the event of default, \textit{Sogelease BV} would have the power to dissolve the lease contract and sell the presses to a third party. The question which was put to the court was whether the sale of the printing presses by \textit{De Zaaiers BV} to \textit{Sogelease BV} was valid under Art. 3:84 (3) \textit{BW} and had resulted in a transfer of ownership of the printing presses to \textit{Sogelease BV} which could be invoked against the creditors, in particular the tax authorities, in the insolvency of \textit{De Zaaiers BV}.

With respect to the assessment whether a juridical act "is intended to transfer property for purposes of security", the \textit{Hoge Raad} observes that the criterion to be applied is:

"whether the purport of the juridical act is to provide the other party with a security right in the asset so that he is protected in his interests as a creditor in relation to other creditors".\textsuperscript{37}

\textsuperscript{35} Vermogensrecht (C.J.H. Jansen and T.H.D. Struycken), Art. 3:84 lid 3 \textit{BW}, Nr. 2 and 12.
\textsuperscript{36} HR 19 May 1995, NJ 1996, 119, comm. W.M. Kleijn (Keereweer q.q./Sogelease).
\textsuperscript{37} HR 19 May 1995, NJ 1996, 119, Nr. 3.4.3: "of de rechtshandeling ertoe strekt de wederpartij in dier voege een zekerheidsrecht op het goed te verschaffen dat deze in zijn belangen als schuldeiser ten opzichte van andere schuldeisers wordt beschermd."
According to the *Hoge Raad* the essence of such protection lies in the power to enforce a claim with priority to other creditors by taking recourse on the asset, excluding the power to appropriate the asset concerned.\(^{38}\) Accordingly, a contract that limits the rights of the transferee in case of default by the other party to the realisation of the transferred asset in order to satisfy his claim from the proceeds (under the obligation to reimburse a possible surplus to the debtor/transferor), is not considered a valid legal basis for acquisition of ownership. In that case, parties must fall back on the security rights provided for by statute, i.e. a right of pledge.

Art. 3:84 (3) *BW* does not affect a 'real' transfer of ownership or assignment, so that a juridical act which:

"has the purport to transfer the asset to the transferee without restriction - so that he will acquire more than just a right in the asset that protects him in his interests as a creditor - is not invalid under Art. 3:84 (3) *BW*."\(^{39}\)

In this respect the *Hoge Raad* observes that Art. 3:84 (3) *BW* in particular does not prohibit a contract pursuant to which, on the one hand, the ownership of an asset is transferred, but on the other hand, the power to use the asset is conferred on the transferor against payment, under the condition that in the event of default, the transferee merely has to dissolve the contract - as regards the use of the asset - in order to regain the full and unrestricted power to dispose of the asset. For the assessment of the validity of such a contract, according to the court, it is irrelevant whether:

a. the transfer of ownership has been agreed upon in view of the provision of some kind of credit facility by the transferee;
b. the transfer concerns assets that the borrower wishes to acquire, or assets which he already had the ownership of;

\(^{38}\) Pursuant to Art. 3:235 *BW* any clause providing a pledgee or mortgagee with the power to appropriate the encumbered asset, is invalid.
\(^{39}\) HR 19 May 1995, NJ 1996, 119, Nr. 3.4.3: 'Strekt daarentegen de rechtshandeling van partijen tot 'werkelijke overdracht' (in geval van een zaak: tot eigendomsoverdracht) en heeft zij derhalve de strekking het goed zonder beperking op de verkrijger te doen overgaan - en deze aldus meer te verschaffen dan enkel een recht op het goed, dat hem in zijn belang als schuldeiser beschermt - dan staat art. 3:84 lid 3 daaraan niet in de weg.'
c. the purpose for which the supplied credit is used,
d. a contractual provision stipulating that the costs of maintenance and risk with regard to the transferred asset must be borne by the transferor

In general, a sale and financial lease back agreement is therefore valid under Dutch law and has proprietary effect. It consists of two elements that are admissible under Dutch law: a sale and transfer of property to the transferee/lessor and a lease back to the transferor/lessee. The element of security in the lessor's right of ownership is the result of the finance lease agreement, not the sale (provided that the lessor acquires full ownership). As the *Hoge Raad* observes, the security ownership of the lessor in case of a sale and financial lease back transaction is comparable to two forms of security ownership regulated in the Civil Code: reservation of ownership and hire-purchase. However, the *Hoge Raad* in general terms formulates an exception with respect to the validity of such transactions.

This does not exclude that, under incidental circumstances from which it must be inferred that it was the intention to evade the rule expressed in Art. 384 (3) BW, the transaction may be invalid by virtue of that provision.

In an *obiter dictum* the *Hoge Raad* also gives an interpretation of the second criterion of Art. 384 (3) BW, according to which also a juridical act which does not have the purpose of bringing the asset into the estate of the acquirer after transfer, does not constitute a valid legal basis for transfer of that asset. The court observes that this criterion has been formulated in particular with respect to the *fiducia cum amico*, but that also in a case of a sale and financial lease back, it does not render the transfer (to the lessor) invalid. Its objective is to prevent the creation by parties' consent of proprietary rights not regulated by statute. The powers arising from a right of ownership may not as a result of a transfer be divided among the transferor and the transferee in a manner that is inconsistent with (the system of) the law. It does not prohibit a transfer of ownership whereby

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personal rights and obligations of the transferor towards the transferee are created in respect of the transferred asset.\footnote{HR 19 May 1995, NJ 1996, 119, Nr. 3.6.} 

A restrictive interpretation must be given to Art. 3:84 (3) BW. If the purport of the transaction is to provide the creditor/transferee with merely a right in the asset that protects his interests as a creditor (transfer 'for purposes of recourse'), the transfer is invalid. A 'real' transfer, i.e. a transfer that has the purport to bring the asset into the estate of the transferee without proprietary restrictions, it is not invalid under Art. 3:84 (3) BW, notwithstanding that the ownership of the transferred asset serves as security. Even though the Sogelease-case dealt with above appears to leave a considerable degree of discretion to the parties in this respect, it has been observed in legal writing that the purport of the transaction must be assessed on the basis of objective criteria.\footnote{Van Hees (1997), p. 73; Vermogensrecht (C.J.H. Jansen and T.H.D. Struycken), Art. 3:84 lid 3 BW, Nr. 20.} For the avoidance of doubt, the legislative proposals aimed at implementing Directive 2002/47/EC on financial collateral arrangements\footnote{Uitvoering van Richtlijn Nr. 2002/47/EG van het Europees Parlement en de Raad van de Europese Unie van 6 juni 2002 betreffende financiëlezekerheidsovereenkomsten, TK 2002-2003, 28 874. In the explanatory report the government observes that the scope of Art. 3:84 (3) BW has been overestimated in legal writing and practice and stresses the restrictive interpretation that must in general be given to Art. 3:84 (3) BW (Bill 28 874, Nr. 3, p. 8). The term 'financial collateral arrangements' has been translated into a monstrous word that is not even suitable for a game of scrabble: 'financiëlezekerheidsovereenkomsten'.} contain a provision, to be incorporated as Art. 7:55 BW, to the effect that a transfer under a financial collateral arrangement is not invalid under Art. 3:84 (3) BW.

*Aussonderung, not Absonderung*

The creditor to whom assets have been transferred as security is not dealt with on the same footing as a secured creditor; the assets can be revindicated in the event of insolvency. This effect, which is a result of the fact that the creditor must have acquired full ownership, is at odds with the approach that was developed in case law with respect to the fiduciary transfer by way of security under the old Civil Code, which was more balanced in view of protection of the debtor's interests and the interests of the debtor's other creditors. Unlike it previously was the case, under present Dutch law the transferee is not held to exercise his powers on the
same basis as a pledgee. However, there is truth in the argument that the result is in conformity with the general approach in present Dutch law with respect to security rights and ownership. The creditor to whom assets have been transferred acquires full ownership without proprietary restrictions, even though his right of ownership has a strong element of security. The forms of security ownership recognised by statute, i.e. reservation of ownership (and hire-purchase), also confer on the creditor the right to revindicate the asset in case of insolvency. The creditor may be obliged to reimburse to the debtor a possible pecuniary benefit resulting from the revindication, either by operation of law or by contractual agreement. Such claim for the surrender of pecuniary benefits, however, does not impair the proprietary rights of the creditor in the asset.

2.2 Realisation of encumbered moveables

2.2.1 Dutch law

Power to realise encumbered assets vested in the secured creditor

Pursuant to Art. 57 (1) Fw, a pledgee can enforce his claim against the pledged asset(s) as if a bankruptcy proceeding had not been opened. Starting from the assumption that the right of pledge has been validly established, the pledgee can exercise his rights, i.e. take recourse in respect of the pledged asset, in accordance with the provisions on the enforcement of a right of pledge outside insolvency. In principle, the pledgee has the exclusive power to realise pledged moveables. In case of a non-possessory right of pledge, the pledgee can claim the surrender of the asset for purposes of enforcement. The secured claim is satisfied directly from the realisation proceeds.

The opening of an insolvency proceeding to a certain extent affects the position of the pledgee. In view of the efficiency and expediency of the

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44 With respect to financial collateral arrangements this is also expressly stipulated in the proposed Art. 7:55 BW.
46 Art. 7A:1576t BW with respect to hire-purchase contracts.
47 It has been argued that this obligation may also generally apply as a result of the fiduciary relationship between the creditor and the debtor (cf. Van Hees (1997), p. 185).
48 Cf. Art. 3:237 (3) BW.
insolvency proceeding, Art. 58 (1) Fw provides that the administrator can issue a demand that the pledgee realises the encumbered asset within a specified, reasonable period. If the secured creditor does not exercise his security right within that period the power to realise the encumbered asset passes to the administrator. In that case the secured creditor retains his priority in the proceeds of the asset, albeit that he is treated as a creditor with a privilege (and not as a secured creditor) and therefore obtains payment of his claim within the framework of the insolvency proceeding. Accordingly, he has to "share" in the general costs and expenses of the insolvency proceeding.

In practice, the administrator and the pledgee often agree that the administrator will realise the pledged asset and will turn over the net-realisation proceeds to the pledgee with a certain deduction for fees and expenses.\(^49\) Such agreements are possible on a variety of grounds, which will not be elaborated on here.\(^50\) In any case, the secured creditor avoids the apportionment of the administrative claims over the proceeds of the asset. His claim is satisfied directly from the proceeds of the pledged asset.

**Moratorium ("Afkoelingsperiode")**

A pledgee can be prevented from exercising his rights by a moratorium as provided for in Art. 63a Fw, which stipulates:

(1) On the application of each interested party or on his own motion, the *rechter-commissaris* may issue a written order stipulating that, for a period of one month at most, each right of third parties to recourse against property belonging to the estate or to claim property under the control of the bankrupt or the *curator* may only be exercised with his authorisation. The *rechter-commissaris* may extend this period once for no more than a month.

(2) The *rechter-commissaris* may restrict his order to certain third parties and attach conditions to both his order and to the authorisation of a third party to exercise a right to which the third party is entitled.

(3) (...)

\(^49\) With respect to the amount of the deduction directives have been drawn up by the working group of supervisory judges in insolvency (Recofa) in consultation with the Dutch Bankers’ Association (NVB), the Dutch Bar Association (NOvA) and the Professional Association of Insolvency Practitioners (INSOLAD): Richtlijnen in faillissementen en surseances van betaling, Annex 15 (separatistenregeling), *inter alia* published on www.rechtspraak.nl

\(^50\) Cf Kortmann/Faber (1996), p. 147-149
Secured creditors and insolvency in German and Dutch law

The decision referred to in the first sentence of the first paragraph may also be rendered by the court issuing the bankruptcy order on the application of the party who applied for the bankruptcy of the debtor.51

The moratorium not only prevents the holder of an undisclosed - non-possessory - right of pledge from claiming pledged moveables from the administrator.52 Any recourse on assets belonging to the estate, i.e. also on assets that are subject to a disclosed (possessory) right of pledge, is prohibited. By virtue of Art. 63a (2) Fw, the supervisory-judge may exempt pledged assets that are in the possession of the pledgee from the moratorium, for example if such assets are not necessary for the continued operation of the debtor’s business. After the moratorium has expired - a period of two months at most53 -, the pledgee can proceed with the realisation of the pledged asset. The Faillissementswet does not provide for compensation to be paid to the pledgee for loss suffered due to a delay in realisation of the pledged asset as a result of the moratorium.54 The payment of compensation may be included as a condition in the court order establishing the moratorium.

51 Translation taken from Netherlands Business Legislation. Art. 63a Fw: (1) De rechter-commissaris kan op verzoek van elke belanghebbende of ambtshalve bij schriftelijke beschikking bepalen dat elke bevoegdheid van derden tot verhaal op tot de boedel behorende goederen of tot opeising van goederen die zich in de macht van de gefailleerde of de curator bevinden, voor een periode van ten hoogste één maand niet dan met zijn machtiging kan worden uitgeoefend. (2) De rechter-commissaris kan zijn beschikking beperken tot bepaalde derden en voorwaarden verbinden zowel aan zijn beschikking als aan de machtiging van een derde tot uitoefening van een aan deze toekomende bevoegdheid. (3) (...) (4) De in de eerste zin van het eerste lid bedoelde beslissing kan ook op verlangen van de aanvrager van het faillissement of van de schuldenaar worden gegeven door de rechter die de faillietverklaring uitspreekt. With respect to suspension of payments proceedings, cf. Art. 241a Fw, and with respect to the debt reorganisation proceeding for natural persons, Art. 309 Fw. The legislative proposals for implementation of the Financial Collateral Directive (Bill 28 874) provide that the moratorium does not apply in respect of assets encumbered with a right of pledge pursuant to a financial collateral arrangement. For an overview of the operation of the moratorium and references to literature and case law, cf. Polak-Wessels II, par. 2596 et seq.

52 For an overview of the operation of the moratorium and references to literature and case law, cf. Polak-Wessels II, par. 2596 et seq.

53 Recent legislative proposals (Bill 27 244) provide for an extension of the moratorium to a maximum period of two months that can be extended once with another maximum period of two months.

54 With respect to the compensation for losses incurred during the moratorium, cf. Polak-Wessels II, par. 2628 et seq. (with further references).
Power to realise encumbered assets vested in the administrator

The approach of the German Insolvenzordnung is different. That under the Konkursordnung the secured creditor in principle had the power to enforce his security as if an insolvency proceeding had not been opened, was regarded as a major obstacle to successful reorganisations of businesses in financial distress. By enforcing their security secured creditors could bring about the disintegration of the debtor's business. In view of improving potential chances of reorganisation and continuation of the debtor's business and preventing an early disintegration of the estate and, consequently, the debtor's business, the Insolvenzordnung provides for a number of infringements on the position of secured creditors.

A key-provision in this respect is Art. 166 (1) InsO:

The insolvency administrator may privately realise upon a chattel subject to a right of separate satisfaction if he is in possession of the chattel.

Art. 166 InsO thus entails an 'automatic stay' in respect of secured creditors by conferring on the administrator the exclusive power to realise moveable encumbered assets, insofar as such assets are in his possession. The purport of Art. 166 InsO is that secured creditors are prevented from breaking down the economical unity of the debtor's business to the detriment of the other creditors and the insolvent debtor. Assets subject to undisclosed (non-possessory) security rights often form an essential part of the structure of the debtor's business. The government's view was that an efficient, effective and most profitable administration of the estate

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56 See further Landfermann in HK-InsO, § 166, Nr. 7-11. It follows from Art. 170 (2) InsO that the administrator may also leave the realisation of an asset, that he is authorised to realise by virtue of Art. 166 InsO, to the secured creditor.

57 BT-Drucksache 12/2443, p. 178
requires that this structure should remain intact as much and as long as possible.58 Furthermore, the conferral of the power to realise such assets exclusively on the administrator, facilitates a transfer of (part of) the debtor's business as a going concern, which may generate higher realisation proceeds.

The German legislator has attempted to balance, on the one hand, the interests of the estate in keeping the debtor's business intact as much as possible with, on the other hand, the interests of secured creditors in a profitable and preferably prompt realisation of encumbered assets and, in connection therewith, prompt satisfaction of secured claims.

Pursuant to Art. 168 InsO, the administrator must inform the secured creditor of the intended manner of realisation before proceeding with the realisation of an encumbered asset. The administrator must give the secured creditor the opportunity to indicate a more favourable manner of realisation. If the secured creditor informs the administrator of a more favourable manner of realisation, the administrator must either realise the asset in accordance with the secured creditor's suggestion or bring the secured creditor in the position that he would have been in, had the administrator complied with the secured creditor's suggestion. The burden of proof of the existence of a manner of realisation that is more favourable to the secured creditor, lies on the secured creditor.59 A more favourable manner of realisation may include the secured creditor acquiring the asset himself, in which case the estate's claim for payment of the purchase price can be set-off against the secured creditor's claim for payment of the proceeds pursuant to Art. 170 (1) InsO.60

Art. 159 InsO in principle obliges the administrator to realise assets that form part of the estate without delay after the first creditors' information hearing (Berichtstermin61), provided that resolutions of the creditors'

58 Cf. BT-Drucksache 12/2443, p. 87.
59 Cf. BT Drucksache 12/2443, p. 179.
60 Cf. Landfermann in HK-InsO, § 168, Nr. 9.
61 Cf. Art. 156 InsO. At the information hearing, the administrator reports on the debtor's business situation and indicates whether there is a chance to maintain the debtor's enterprise in whole or in part, what the chances are for a reorganisation plan (Insolvenzplan) and what the effects would be for the creditors. Pursuant to Art. 157 InsO, the creditor's assembly shall decide at the information hearing whether the
assembly do not conflict therewith (e.g. with respect to the preparation of a reorganisation plan). Prior to this hearing, where the decision is taken whether the debtor's business will be (temporarily) continued, the administrator should as much as possible maintain the (economic) structure of the debtor's business. He has the power to realise assets, but is not obliged to do so. In particular if the decision is taken to (temporarily) continue the debtor's business, secured creditors may have to wait some time before they receive payment on their claims. In order to protect the interests of secured creditors, Art. 169 InsO provides that interest must be paid (from the estate) on secured claims as from the information hearing.  

In case a secured creditor was already prevented from enforcing his security right prior to the actual opening of the insolvency proceeding by a court order pursuant to Art. 21 InsO, interest on the secured claim is due after at most three months after the order was issued (the information hearing may take place earlier). However, interest does not have to be paid on a secured claim insofar it is to be expected that the claim will not be satisfied from the realisation proceeds. If, for example, the secured claim is 100 and the proceeds of realisation that are to be paid to the creditor pursuant to Art. 170 InsO (will probably) amount to 70, interest is only due for the amount of 70.  

The extent to which interest is due on a secured claim is determined on the basis of the estimated value of the encumbered asset. The Insolvenzordnung does not provide for compen-

The interest that is due on the secured claim, depends on the legal relationship between the secured creditor and the debtor. Generally the interest rate will be determined by contractual agreement. Failing such agreement, the interest rate will be determined in accordance with the relevant statutory provisions (cf. Art. 288 BGB, 352 HGB).

The opening of an insolvency proceeding is preceded by an Eroffnungsverfahren, during which the court, inter alia, determines whether the conditions for the opening of an insolvency proceeding are met. Pursuant to Art. 21 InsO, the court is obliged to order any measures necessary to prevent a deterioration of the debtor's financial position during the Eroffnungsverfahren. Such measures may include a restriction of the rights of secured creditors in that the debtor will be forbidden to turn over assets to secured creditors or that enforcement measures initiated by secured creditors must be stopped.

Cf. Landfermann in HK-InsO, § 169, Nr. 8.
Realisation of encumbered assets not in the possession of the administrator

Art. 166 (1) InsO confers on the administrator the power to realise encumbered assets that are in his possession. The power to realise encumbered assets that are not in the possession of the administrator remains with the secured creditor (Art. 173 (1) InsO). This concerns in particular creditors whose claims are secured by a right of pledge, creditors who can invoke a right of retention that provides them with a right to separate satisfaction pursuant to Art. 51 InsO and creditors with a right of pledge in respect of assets following attachment in execution (Pfändungs­pfandrecht). Art. 173 (2) InsO stipulates that, following a demand by the administrator and after consultation of the secured creditor, the court can set a term within which the secured creditor must realise the asset. If the asset is not realised within this term the power to realise the asset passes to the administrator.

Art. 173 (1) InsO is based on the assumption that encumbered assets that are not in the possession of the debtor/administrator will generally not be indispensable for the continuation of the debtor’s business. The draft Bill (Regierungsentwurf) took account of the fact that there may be instances where the estate does have an interest in such assets. It provided that the administrator could obtain a court order that certain encumbered assets should be turned over to the estate.66 This provision has eventually not been incorporated in the Insolvenzordnung in order to relieve the courts, taking into consideration that the administrator has the power to satisfy the secured claim and consequently demand the surrender of such assets pursuant to the general law.67

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65 Such compensation may result from an agreement between the administrator and the secured creditor, however. Cf. Landfermann in HK-InsO, § 169, Nr. 9.
66 BT-Drucksache 12/2443, p. 41 and 183
67 BT Drucksache 12/7302, p. 178.
2.3 Realisation of encumbered claims

2.3.1 Dutch law

**Disclosed right of pledge**
Under Dutch law the power to collect pledged claims is vested in either the pledgee or the pledgor, depending on whether the debtor of the pledged claim has been notified of the existence of the right of pledge. In respect of claims that are subject to a disclosed right of pledge, i.e. a right of pledge with notification to the debtor of the pledged claim, the pledgee has the power to collect the claim. Pursuant to Art. 57 (1) Fw this power in principle remains unaffected in case of the insolvency of the pledgor. The pledgee can collect the claim in accordance with the provisions of general private law.

The power to collect the claim does not automatically entail the authority to satisfy the secured claim from the proceeds. The pledgee obtains a right of pledge in the proceeds by operation of law (Art. 3:246 (5) BW). He may satisfy the secured claim from the proceeds if and to the extent that it has become due and payable.

**Undisclosed right of pledge**
In case the debtor of the pledged claim has not been notified of the right of pledge, the power to collect the claim remains with the pledgor (Art. 3:246 (1) BW), or in case of insolvency, the administrator.

Upon payment of the pledged claim to the administrator, the debt, and consequently the right of pledge, is extinguished. As the right of pledge has extinguished, the creditor does not have any 'proprietary' rights in respect of the proceeds of the claim. In particular, he cannot demand the surrender of the proceeds from the administrator. The pledgee has priority in the distribution of the proceeds of the claim on the same basis

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68 Art. 3:246 (1) BW.
69 Pursuant to Art. 58 (1) Fw, the administrator may set a fixed, reasonable period for the realisation of the claim.
70 Art. 3:255 (1) BW.
as a privileged insolvency creditor. Accordingly, a distribution to the creditor will only be made on the basis of a distribution list, which means a delay in payment, and the creditor has to contribute to the general costs and expenses of the insolvency proceeding on the basis of Art. 182 Fw.

During the insolvency proceeding, the pledgee has the power to effect notification and convert the undisclosed right of pledge in a disclosed right of pledge, as a consequence of which the pledgee obtains the exclusive authority to collect the claim. If realisation of the pledged claim is to be effected by assignment of the claim to a third party, e.g. because it will not fall due for a period of time, the pledgee's authority to realise the claim depends on whether the requirements of the general law, generally requiring the debtor's default, are met.

**Moratorium (Afkoelingsperiode)**

The position of the pledgee can be affected by a moratorium pursuant to Art. 63a Fw. As set out above (§ 2.2.1), a moratorium prohibits secured creditors from taking recourse on encumbered assets. With respect to the pledgee, the effect of the moratorium would be that, during the moratorium, he retains the power to notify the debtor of the pledged claim and the power to collect the claim, but that he is not entitled to satisfy his claim from the proceeds, which would be an act of enforcement.

**2.3.2 German law**

Again, the approach of German law is different. Pursuant to Art. 166 (2) InsO the power to collect claims that have been assigned to a creditor by

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71 HR 17 February 1995, NJ 1996, 471, comm. W.M. Kleijn (Mulder q.q./CLBN), in particular Nr. 3.4.3. A similar situation occurs in case the pledgee does not realise the claim within the period set by the administrator pursuant to Art. 58 (1) Fw.

72 Cf. Art. 57 (1) Fw. See also HR 17 February 1995, NJ 1996, 471, comm. W.M. Kleijn (Mulder q.q./CLBN), in particular Nr. 3.3.4.

73 Cf. Art. 3:248 BW.

74 Doubts have been expressed in legal writing whether the moratorium affects creditors with security rights in claims at all (cf. Kortmann (1994), p. 157). The recent legislative proposals concerning amendments to the Faillissementswet (Bill 27 244) make clear that in the opinion of the legislator, security rights in claims are in principle affected by the moratorium.

75 See in this respect also the proposed Art. 63b Fw and the explanatory report to Bill 27 244 (TK 1999-2000, Nr. 3), p. 18. See also Kortmann (1994), p. 157.
way of security - disclosed or undisclosed\textsuperscript{76} - is exclusively conferred on the administrator.\textsuperscript{77} Art. 166 (2) \textit{InsO} stipulates in this respect:

The administrator may collect or otherwise realise upon a claim that the debtor has assigned to secure a claim.\textsuperscript{78}

Only payment to the administrator leads to discharge of the assigned claim.\textsuperscript{79} The secured creditor will be paid directly out of the proceeds (under the conditions of Art. 170 (1) \textit{InsO}).

As observed in the explanatory report to the \textit{Insolvenzordnung}, conferral of such power on the administrator does not necessarily follow from the objective to protect the prospects of continuation and reorganisation of the debtor's business.\textsuperscript{80} The provision is based on practical arguments. According to the legislator, the fact that the administrator has the company's books and records at his disposal entails that the secured creditor will anyhow regularly need the assistance of the administrator in recovering the assigned claims, e.g. in order to establish the nature, amount and debtor of the assigned claim, as well as to counter any defences advanced by the assigned debtor.

The administrator's power to collect claims pursuant to Art. 166 (2) \textit{InsO} is limited to claims that have been assigned by way of security. It does not extend to claims that are subject to a right of pledge. Pursuant to Art. 173 (1) \textit{InsO} the power to realise (collect) pledged claims remains with the pledgee. The government's idea behind this distinction with security assignments was that the creation of a right of pledge in claims, pursuant

\textsuperscript{76} Under German law, assignment of claims does not require notification to the debtor of the assigned claim (Art. 398 \textit{BGB}).


\textsuperscript{78} Translation taken from Stewart, Insolvency Code. Art. 166 (2) \textit{InsO}: Der Verwalter darf eine Forderung, die der Schuldner zur Sicherung eines Anspruchs abgetreten hat, einziehen oder in anderer Weise verwerten. The administrator may leave the realisation of the claim to the secured creditor (Art. 170 (2) \textit{InsO}).

\textsuperscript{79} Landfermann in HK-InsO, § 167, Nr. 21a.

\textsuperscript{80} BT-Drucksache 12/2443, p. 178.
to Art. 1280 *BGB*, requires notification to the debtor of the pledged claim. The debtor must therefore from the outset take into account that the pledgee and not the creditor will collect the debt (and that payment must be made to the pledgee). In the opinion of the government, conferring the right to collect the claim on the administrator would not lead to a more practical approach.\(^{81}\) For this same reason, the original government’s Bill also restricted the power of the administrator to the collection of claims that had been assigned by way of security *without* notification to the assigned debtor.\(^{82}\) However, a distinction between security assignments with and without notification to the assigned debtor has not been incorporated in the *Insolvenzordnung*. It was struck from the Bill because it was thought to lead to practical difficulties as the draft provision did not make clear until which moment notification to the assigned debtor could be effected.\(^{83}\)

### 2.4 Distribution of realisation proceeds

With respect to the distribution of the realisation proceeds, the position of secured creditors in Dutch and German insolvency law corresponds to the extent that, in both systems, secured claims are paid directly from the realisation proceeds of the encumbered asset. Secured creditors have a right to separate satisfaction, i.e. secured claims are not satisfied by way of a distribution following the process of submission and admission of claims.

If the secured creditor has proceeded with the realisation of the encumbered asset he must turn over to the administrator a surplus remaining after satisfaction of the secured claim. The secured creditor is not entitled to set-off this debt to the estate with any other unsecured insolvency claims he may have against the debtor.\(^{84}\)

\(^{81}\) Cf. BT-Drucksache 12/2443, p. 179.

\(^{82}\) Cf. BT-Drucksache 12/2443, p. 178/179. See further Landfermann in HK-InsO, § 166, Nr. 17-18b.

\(^{83}\) Cf. BT-Drucksache 12/7302, p. 176.

\(^{84}\) Cf. Art. 3:253 (2) BW.
If and to the extent that a secured claim cannot be satisfied from the realisation proceeds, the remainder of the claim can be submitted in the insolvency proceeding as an (ordinary) insolvency claim.\footnote{Art. 52 InsO; Art. 132 Fw.}

Costs and expenses are incurred as a result of the realisation of encumbered assets. This does not only concern the 'direct' costs of realisation of the asset (e.g. the costs of the bailiff, a notary or an auction, or costs involved in the collection of pledged or assigned claims), but also the time spent by the administrator on establishing if and to what extent security rights exist in certain assets. Furthermore, realisation of assets may lead to an obligation to pay turnover taxes. An important and controversial issue, in respect of which German and Dutch law show diverging solutions, is whether and to what extent the costs and expenses incurred in the realisation of encumbered assets should be borne by the secured creditor or by the estate.

\subsection{Dutch law}

In Dutch insolvency proceedings secured creditors have a strong position in respect of the distribution of the realisation proceeds. As they have the power to exercise their rights as if an insolvency proceeding had not been opened, by realising the encumbered assets they can obtain direct satisfaction from the net realisation proceeds. Provided that the secured creditor exercises his rights pursuant to Art. 57 (1) Fw only the direct costs of the realisation of the asset are deducted from the amount available for the satisfaction of the secured claim.\footnote{Art. 3:253 (1) BW. See also Boekraad (1997), p. 96/97. The pledgee and the administrator can agree that the asset will be realised by the administrator as agent or mandatary of the secured creditor (Art. 3:251 BW), in which case the administrator will demand a fee - boedelbijdrage -, which is to be deducted from the proceeds. This fee should not be confused with the contribution to the general costs of the insolvency proceeding imposed on unsecured insolvency claims pursuant to Art. 182 Fw (Boekraad (1997), p. 158/159).} To the extent that the secured claim can be satisfied from the realisation proceeds of the encumbered asset, the claim is satisfied outside of the framework of the insolvency proceeding. Secured creditors, unlike creditors with ordinary unsecured insolvency claims, do not contribute to the general costs and expenses of the insolvency proceeding pursuant to Art. 182 Fw. Furthermore, the secured claim
is satisfied from the realisation proceeds, *including* the amount, if any, for turnover taxes incorporated in the purchase price. The turnover taxes that may become due as a result of realisation of encumbered assets are borne by the estate.

**Ranking of (secured) claims**

Unlike German law, Dutch law does not have a *Klassenlosen Konkurs*. This is of importance to the position of secured creditors in respect of the proceeds of realisation. Dutch law in several places stipulates that certain types of claims are privileged in the sense that - in case of a *concursus creditorum* - they must be paid in priority to other claims. The privileged nature of claims and their ranking is not regulated in the *Faillissementswet*, but in the Civil Code and other statutes, e.g. with respect to the privilege attached to claims of the tax authorities, in the Collection of State Taxes Act 1990 (*Invorderingswet 1990*).

Dutch law distinguishes between specific privileges - a creditor has priority with respect to the distribution of the proceeds of a particular asset - and general privileges - a creditor has priority with respect to the distribution of the proceeds of all the debtor's assets. Privileged insolvency claims, unlike secured claims, are satisfied within the framework of the insolvency proceeding. They have to be submitted to the administrator and will be satisfied in priority to the ordinary unsecured claims but only after all administrative claims (claims against the estate) have been satisfied.

The ranking of (insolvency) claims finds its basis by the Art. 3:279-281 BW. Claims secured by a right of pledge rank above privileged claims and claims to which a specific privilege is attached rank above claims to which a general privilege is attached. Specific privileges in respect of the same asset have an equal rank and general privileges rank in the order determined by statute.

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88 E.g. Art. 3:283-287 BW.

89 E.g. Art. 3:288 and 3:289 BW and Art. 21 (1) *Invorderingswet 1990*. 

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The law provides for a number of exceptions to this general order of distribution. In particular, it provides that certain privileged claims must be paid from the proceeds of a particular asset in priority to a claim secured by a right of pledge in that asset.\textsuperscript{90} An important category of privileged claims that, under certain circumstances,\textsuperscript{91} rank above a right of pledge in moveables, are claims of the tax authorities. A general privilege is attached to all tax claims pursuant to Art. 21 (1) \textit{Invorderingswet} 1990. Contrary to the general order of distribution set out above, Art. 21 (2) \textit{Invorderingswet} 1990 stipulates that the general privilege of the tax authorities ranks above all other privileges, with a few minor exceptions. Furthermore, certain tax claims (such as turnover tax) rank above claims secured by a non-possessory right of pledge in - briefly stated - moveable inventory that is situated on the debtor's premises.\textsuperscript{92}

Creditors with insolvency claims cannot individually enforce their rights during the insolvency proceeding. Pursuant to Art. 57 (3) \textit{Fw} the administrator is obliged to look after the interests of creditors with higher ranking privileged insolvency claims in case of realisation of pledged assets by the pledgee. The pledgee must turn over to the administrator the realisation proceeds to the amount of the higher ranking claim of such privileged creditor.\textsuperscript{93} That privileged creditor will receive a distribution on his claim within the framework of the insolvency proceeding. Insofar as the privileged claim has priority over a non-possessory right of pledge, demanding the surrender of the pledged asset from the administrator does not change the ranking of the pledgee's claim. Such improvement of position in respect of other creditors after the opening of the insolvency proceeding.

\textsuperscript{90} E.g. Art. 21 (2) \textit{Invorderingswet} 1990 (tax claims), Art. 3:292 io 3:291 \textit{BW} (right of retention), Art. 3:284 (2) \textit{BW} (costs incurred in preserving property).

\textsuperscript{91} Cf. \textit{Invorderingswet} (loose-leaf commentary), Art. 21, Nr. 45 et seq.

\textsuperscript{92} Art. 21 (2) refers to the assets mentioned in Art. 22 (3) \textit{Invorderingswet} 1990 \textit{(bodemza-ken)}. See further \textit{Invorderingswet} (loose-leaf commentary), Art. 21, Nr. 49 and 50.

\textsuperscript{93} Particular problems arise in case of higher ranking tax claims. Only to the extent that the unpaid tax (insolvency) claims cannot be satisfied from the net proceeds - i.e. after deduction of the contribution to the general costs of the insolvency proceeding pursuant to Art. 182 \textit{Fw} - of assets that are not encumbered with a security right ('vrij boedelactief'), can recourse (through the administrator) be taken on the proceeds of pledged assets. Cf. HR 26 June 1998, NJ 1998, 745, comm. P. van Schilfgaarde (Aerts q.q./ABN AMRO), JOR 1998/126 and HR 12 July 2002, NJ 2002, 437, comm. P. van Schilfgaarde (Verdonk q.q./Ontvanger), JOR 2002/179, comm. N.E.D. Faber. See further Faber (NbBW 1999) and Van Andel (Tvl 2000).
proceeding would be contrary to one of the central principles of insolvency law, that may be referred to as the 'principle of fixation'. This principle, *inter alia*, entails that upon the opening of an insolvency proceeding the rights of creditors vis-à-vis each other are fixed.  

2.4.2 German law

With the entry into force of the *Insolvenzordnung* important changes to the position of secured creditors have been introduced into German insolvency law. As set out above, secured creditors with non-possessory security rights have lost the power to realise the encumbered asset(s) and the assignee no longer has the authority to collect claims transferred by way of security; these powers have been exclusively conferred on the administrator.

Pursuant to Art. 170 *InsO* secured claims continue to be satisfied directly from the realisation proceeds of the encumbered asset(s). However, secured creditors no longer have a claim to the full net realisation proceeds of the encumbered asset. Before any payment is made on the secured claim, certain costs have to be deducted from the realisation proceeds of the encumbered asset.

**Contribution to costs and expenses of the estate; turnover tax deducted from proceeds**

From the realisation proceeds the costs mentioned in Art. 170 (1) *InsO* must be covered, i.e. the costs incurred by the administrator's involvement in the assessment of the realised asset and security rights in that asset - *Kosten der Feststellung* - and the costs involved in the actual realisation of the asset - *Kosten der Verwertung*. Contrary to the situation under the

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94 HR 18 December 1987, NJ 1988, 340, comm. W.C.L. van der Grinten (OAR/ABN). See also § 3.4 of the Principles of European Insolvency Law.

95 Art. 170 *InsO*: "(1) Nach der Verwertung einer beweglichen Sache oder einer Forderung durch den Insolvenzverwalter sind aus dem Verwertungserlös die Kosten der Feststellung und der Verwertung des Gegenstands vorweg für die Insolvenzmasse zu entnehmen. Aus dem verbleibenden Betrag ist unverzüglich der absonderungsberechtigte Gläubiger zu befriedigen. (2) Überläßt der Insolvenzverwalter einen Gegenstand, zu dessen Verwertung er nach § 166 berechtigt ist, dem Gläubiger zur Verwertung, so hat dieser aus dem von ihm erzielten Verwertungserlös einen Betrag in Höhe der Kosten der Feststellung sowie des Umsatzsteuerbetrages (§ 171 Abs. 2 Satz 3) vorweg an die Masse abzuführen."
Konkursordnung, where turnover taxes due as a result of realisation of encumbered assets were generally borne by the estate,\textsuperscript{96} Art. 171 (2) InsO now stipulates that the turnover tax due as a result of the realisation of encumbered assets is to be deducted from the realisation proceeds before any payment is made on the secured claim.\textsuperscript{97} The objective of Art. 170 InsO is to prevent that costs that are directly connected to the realisation of encumbered assets are paid out of the estate and therefore decrease the value of the estate at the expense of the creditors with unsecured insolvency claims.\textsuperscript{98}

The amount that must be deducted from the realisation proceeds pursuant to Art. 170 InsO is determined by Art. 171 InsO. Art. 171 (1) InsO fixes the Kosten der Feststellung at 4 percent of the gross\textsuperscript{99} realisation proceeds. Art. 171 (2) InsO provides that the Kosten der Verwertung are to be fixed at 5 percent of the gross realisation proceeds, unless the actual costs were considerably higher or lower, in which case the actual costs of realisation will be deducted from the gross realisation proceeds.\textsuperscript{100} Secured creditors must therefore generally accept a deduction of 9% of the gross realisation proceeds of encumbered assets, increased, where appropriate, by turnover taxes.

The initial legislative proposals of the government went even further. Art. 196 of the government’s Bill also provided that costs incurred in respect of the preservation of encumbered assets - Kosten der Erhaltung - , e.g. costs of insurance, maintenance and repairs, should be deducted from the realisation proceeds of the encumbered asset. This proposal has eventually

\textsuperscript{96} Cf. BT-Drucksache 12/2443, p. 182. The position of claims for turnover taxes under the Konkursordnung was controversial, cf. Kuhn/Uhlenbruck (1994), § 127, Nr. 16n et seq.

\textsuperscript{97} Cf. Landfermann in HK-InsO, § 171, Nr. 8-12, with respect to the position of claims for turnover taxes due as a result of the realisation of security assets.

\textsuperscript{98} Cf. BT-Drucksache 12/2443, p. 180.

\textsuperscript{99} Cf. BT-Drucksache 12/2443, p. 181.

\textsuperscript{100} The Insolvenzordnung does not determine in which cases the actual costs are regarded considerably higher or lower than 5% of the gross realisation proceeds. The explanatory report states in this respect that a difference in any case can be regarded as considerable when the actual costs are half or double the amount of 5% of the gross realisation proceeds (BT-Drucksache 12/2443, p. 181). The burden of proof lies on the party invoking the existence of such a considerable difference, cf. Landfermann in HK-InsO, § 171, Nr. 7.
been struck in order to prevent costly and time-consuming appeals to the court.\textsuperscript{101} However, the fact that an explicit provision concerning the Kosten der Erhaltung has not been incorporated in the Insolvenzordnung does not mean that they can only be charged on the realisation proceeds available for the secured creditor following an agreement between the administrator and the secured creditor. It is possible that certain costs relating to preservation measures should be regarded as costs of realisation which are charged on the gross realisation proceeds pursuant to Art. 171 (2) InsO.\textsuperscript{102}

Furthermore, the government's Bill provided for a fixed contribution by secured creditors to the Kosten der Feststellung of 6\% of the gross realisation proceeds of encumbered assets, which included a contribution to the general costs and expenses of the insolvency proceeding - allgemeine Verfahrenskosten. This proposal for a contribution by secured creditors to the general costs and expenses of the insolvency proceeding has also been struck and the fixed percentage deductible for Feststellungskosten was reduced to the current 4\%.\textsuperscript{103}

Whether secured creditors should be allowed to negotiate a more substantial security in order to cover these costs and taxes from the proceeds of the encumbered assets, has been the subject of debate.\textsuperscript{104} Proposals of the Kommission für Insolvenzrecht to break with the existing practice which allowed the secured creditor to extend his security to also cover such costs and taxes, met with severe criticism and have eventually not been incorporated in the Insolvenzordnung. In particular, the shift of wealth from secured to unsecured creditors, which would be the result of the proposals of the Kommission für Insolvenzrecht, was contested as not being a legitimate objective of insolvency proceedings.\textsuperscript{105} Secured creditors can take these costs and taxes into account in calculating the cover

\textsuperscript{101} Cf. BT-Drucksache 12/7302, p. 177.
\textsuperscript{102} Cf. Landfermann in HK-InsO, § 170, Nr. 15-16 and 16a where the possibility is mentioned that the obligation to reimburse such costs to the estate is based on management of another’s affairs.
\textsuperscript{103} BT-Drucksache. 12/7302, p. 177: “Damit wird die Belastung der absonderungsbe­rechtigten Gläubiger auf ein erträgliches Mass zurückgeführt.”
\textsuperscript{104} Cf. Landfermann in HK-InsO, § 170, Nr. 7.
\textsuperscript{105} Cf. Balz/Landfermann (1995), p. XXXVI.
provided by the security.\textsuperscript{106} This does not constitute an unauthorised Über-sicherung.\textsuperscript{107}

**Realisation of encumbered assets by a secured creditor**

If the administrator has realised moveable assets or has collected claims pursuant to the powers conferred on him by Art. 166 *InsO*, the secured claim will be paid from the proceeds of the realisation of the asset after deduction of the aforementioned costs. If, on the other hand, the administrator has left the realisation of the asset to the secured creditor, Art. 170 (2) *InsO* stipulates that the secured creditor must, before satisfying his claim from the proceeds, reimburse to the estate the Kosten der Feststellung and the turnover tax due as a result of the realisation of the asset. The Kosten der Verwertung are of course borne by the secured creditor directly from the realisation proceeds.

The *Insolvenzordnung* does not provide for a deduction of these costs in respect of the realisation of assets that the administrator is not authorised to realise, e.g. pledged assets or assets that had been brought in the possession of a secured creditor prior to the opening of the insolvency proceeding. With respect to claims this leads to the - criticised\textsuperscript{108} - result that from the proceeds of a pledged claim, that can be collected by the pledgee, a deduction for the Kosten der Feststellung does not take place, whereas such deduction does take place from the proceeds of claims that have been assigned by way of security with notification of the assigned debtor.\textsuperscript{109}

Art. 171 (2) *InsO* does not provide for an obligation of for example the pledgee to compensate the estate for a claim for turnover taxes. As the ratio of Art. 171 *InsO* - turnover taxes resulting from the realisation of encumbered assets should not be borne by the estate - also applies to realisation of pledged assets, it has been argued that this provision should

\textsuperscript{106} Cf. BT-Drucksache 12/2443, p. 181.
\textsuperscript{107} Cf. BGH 27 November 1997, WM 1998, p. 227; Landfermann in HK-InsO, § 172, Nr. 16.
\textsuperscript{108} Landfermann in HK-InsO, § 166, Nr 17-18.
\textsuperscript{109} BGH 20 November 2003, ZIP 2004/1, p. 42: if a debt that was assigned by way of security is collected by the secured creditor without the authorisation of the administrator, this in itself does not lead to the secured creditor being liable towards the estate for the Kosten der Verwertung in addition to the Kosten der Feststellung.
be applied by analogy.\textsuperscript{110} However, a proposal to amend Art. 171 (2) \textit{InsO} to this effect, has been rejected with the argument that a further increase of costs for secured creditors should be avoided.\textsuperscript{111}

\textit{Ranking of claims: "Klassenlose Insolvenz"}

The German legislator sought to increase fairness in the distribution process in insolvency proceedings. This could only be achieved, according to the legislator, by reinstating, not only in theory but more so in the (insolvency) legislation, the \textit{paritas creditorum} principle as the leading principle in the distribution of realisation proceeds on insolvency claims.\textsuperscript{112} Art. 61 KO, which attached priority to certain categories of claims in the distribution of the realisation proceeds of the entire estate (general privileges), as well as other specific statutory provisions attaching privileges to certain categories of claims, have been struck with altogether.\textsuperscript{113}

The German government held that there are no convincing arguments for attaching privileges to certain categories of claims in insolvency. The objective of insolvency proceedings is not to introduce a redistribution of wealth in the sense that certain categories of creditors obtain a better position than they would have outside of insolvency.\textsuperscript{114} The German legislator acknowledged that the decision to attach of a privilege to certain categories of claims (and their ranking among each other) in the end is an arbitrary one and that it would be impossible to include all categories of creditors that would be able to make a claim for 'protection'. Also, and this

\begin{quote}
\textsuperscript{110} Cf. Landfermann in HK-InsO, § 171, Nr 12
\textsuperscript{111} Cf BT-Drucksache 12/7302, p. 178.
\textsuperscript{112} With respect to the \textit{paritas creditorum} (in German law), see Hæsemeyer (2003), Nr. 2.31 et seq. He is critical of the way the principle has been elaborated in the \textit{Insolvenzordnung}: "Das neue Insolvenzrecht verfolgt mit der Streichung der Vorrechte (ausser für Sozialplanansprüche) sowie Verscharfung der Insolvenzanfechtung einerseits und der Anerkennung aller vereinbarten Sicherheiten andererseits eine - wenig stimmige - 'mittlere' Linie" (Nr 2.17).
\textsuperscript{113} See the extensive (and convincing) elaboration on the grounds for and effects of the general abolition of statutory privileges in BT-Drucksache 12/2443, p. 81, 90.
\textsuperscript{114} Cf. Hæsemeyer (2003), Nr. 1.13: "Privatvermögen verwandelt sich mit der Insolvenz seines Trägers nicht in eine Verfügungsmasse für soziale Preferenzen oder öffentliche Prioritaten". It is noted here that this argument would not be valid under Dutch law as the privileged nature of claims is not based on insolvency law, but on general civil law. A privilege can be invoked in any kind of \textit{concursus}, for example in case of multiple attachments in respect of the same asset.
\end{quote}
is one of the main arguments generally advanced to support the privileged nature of tax claims, attaching a privilege to a claim can be regarded as some kind of compensation for the inability to bargain for security or as a compensation for the fact that certain creditors, like the tax authorities, do not choose the parties that they do business with. Such arguments have been rejected by the German legislator as valid arguments for the assignment of priority.

In connection with the more stringent rules on for example the reversal of juridical acts that have prejudiced creditors (Insolvenzanfechtung; Actio Pauliana), the contribution of secured creditors to the costs related to the realisation of encumbered assets and the measures aimed at increasing the chances for successful reorganisation, the legislator expects that the returns for ordinary creditors - and in connection therewith their interest in the administration of the proceeding - will increase.

The view that the German legislator has reinstated the paritas creditorum as leading principle in insolvency law without exception is not quite true, however. That the privileges have been struck does not mean that a true Klassenlosen Insolvenz has been introduced. German law attaches statutory rights of pledge to certain categories of claims. Such statutory rights of pledge in fact give creditors a much better position than they would have in case of a (specific or general) privilege, as such claims are secured claims and are therefore satisfied directly from the realisation proceeds of the encumbered asset. On the other hand, German law has also introduced statutory subordination of claims in the Insolvenzordnung. The category of provable claims has been enlarged with the claims mentioned in Art. 39 InsO, which under old German law were not provable in an insolvency proceeding at all, such as interest that has become due after the opening of the insolvency proceeding in respect of insolvency claims. These claims are subordinated to the 'normal' insolvency claims referred to in Art. 38 InsO. They will only be satisfied if all other insolvency claims have been satisfied. They have been included as provable claims as in the - unlikely - event that all insolvency claims can be satisfied from the realisation proceeds of the estate, it was considered unjust that a remaining surplus should be turned over to the (shareholders of the) debtor before these
claims have also been satisfied.\footnote{Cf. BT-Drucksache 12/2443, p. 81 and 123.} As a distribution on these claims will generally not follow, Art. 174 (3) \textit{InsO} provides that they are only to be submitted to the administrator pursuant to an explicit order of the court.

### 2.5 Use of encumbered assets by the administrator

In order to preserve the prospects of and to facilitate the reorganisation of the insolvent debtor's business it is not sufficient that secured creditors are (temporarily) prevented from enforcing their security. In the previous paragraphs the different ways in which German and Dutch insolvency law try to protect the estate and, consequently, the debtor's business from early disintegration have been discussed. German insolvency law in principle confers the authority to realise security assets upon the administrator, thereby providing for an "automatic stay" in respect of secured creditors. Dutch law provides for a court ordered moratorium, which temporarily prevents secured creditors from demanding the surrender of and realising encumbered assets.

Reorganisation, be it by way of reorganisation of the insolvent debtor's indebtedness or by way of a sale of the debtor's business as a going concern to a third party, requires that the administrator is given the possibility and 'tools' to (temporarily) continue the debtor's business. In this respect it is important that also encumbered assets - often crucial to the debtor's business - can be used for the continued operation of the debtor's business.

The use of encumbered assets in the ordinary course of the debtor's business can, however, be detrimental to the rights of secured creditors. The value of such assets may decrease as a result of their use, or the security may be lost altogether if they are processed or used up in the production process, e.g. as a result of specification or accession, or disposed of, e.g. the stock of a trading firm. Any regulation that confers on the administrator the authority to use encumbered assets for the (temporary) continuation of the debtor's business should take the legitimate interests of secured creditors in protecting the value of their security into account.
At present, the Dutch *Faillissemblewet* contains no explicit provisions on this issue. The provisions on the moratorium (*afkoelingsperiode*) in the *Faillissemblewet* do not explicitly confer on the administrator the power to use encumbered assets in the ordinary course of the debtor's business.

It has been argued that the administrator's power to use or dispose of encumbered assets could be based on the purpose of the moratorium, an instrument for facilitating the reorganisation of businesses. However, it may be argued that it does not follow from the observations in the explanatory report to Art 63a *Fw* that the continuation of the debtor's business is an objective of the moratorium. It is intended to provide the administrator with a period in which he can determine which assets belong to the estate, what rights are vested in them and which assets he may wish to preserve for the estate. An argument against accepting the power of the administrator to use or dispose of encumbered assets in the ordinary course of business, is that the statutory regulation does not balance the interests of the estate on the one hand and the interests of the secured creditor on the other hand. Protection of the value of the encumbered assets is not provided for, nor for a compensation to be paid to secured creditors for the loss suffered as a result of the continued use of assets by the administrator during the moratorium. The legislator simply did not have a clear view of the effects of the moratorium.

It has been argued that the use of encumbered assets by the administrator during the moratorium is allowed, provided that the assets do not perish and remain available for recourse by the secured creditor after expiry of the moratorium. However, the *Faillissemblewet* is silent on the question whether and, if so, to what extent, compensation should be paid to secured creditors. Possibly, the supervisory judge can provide, in his order establishing the moratorium, that encumbered assets may be used.

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117 Cf Kortmann (1994), p 149 et seq Bill 27 244 initially provided for a further regulation of the effects of the moratorium, including the conferral on the administrator of the power to use and dispose of encumbered assets, provided that the secured creditor would be compensated. The way in which these proposals had been drafted met with so much resistance, however, that they have been withdrawn. These proposals will not be dealt with.
by the administrator provided that secured creditors are compensated for possible loss.\textsuperscript{118}

With respect to the question whether the administrator has the power to process, use up or dispose of encumbered assets during the moratorium, it is submitted that the administrator in principle does not have that power.\textsuperscript{119} Insofar as the contract between the debtor and the secured creditor confers on the debtor the power to use up, process or dispose of pledged assets in the ordinary course of business, the legal relationship will generally entail that such power ends upon the opening of the insolvency proceeding.\textsuperscript{120} This may be explicitly stipulated in the contract. Insofar as the contract stipulated that the debtor had the power to use up, process and dispose of assets in the ordinary course of business, it is of course possible that insolvency law provides that such contractual agreements are upheld in insolvency proceedings, in particular during a moratorium, even if the contract provided that the debtor's power would terminate upon an event of default such as insolvency. With respect to the moratorium such provisions do not exist.\textsuperscript{121} In principle, the administrator therefore depends on an agreement with the secured creditor in this respect. Possibly, the supervisory judge can include in his order establishing the moratorium that the administrator has the power to process or dispose of secured assets, provided that compensation is paid to the secured creditor.\textsuperscript{122}

\textbf{2.5.2 German law}

In accordance with the conferral on the administrator of the exclusive power to realise encumbered assets, the \textit{Insolvenzordnung} specifically

\begin{itemize}
\item \textsuperscript{118} See further Polak-Wessels II, par. 2629.
\item \textsuperscript{119} Cf. Polak-Wessels II, par. 2628. Differently: Kortmann (1994), p 149 et seq.
\item \textsuperscript{120} Such acts under the authority of the administrator in insolvency proceedings cannot be regarded as performed in the ordinary course of business. Cf. Polak-Wessels II, par. 2630.
\item \textsuperscript{121} Bill 27 244 initially contained provisions to this effect. These have been struck, however.
\item \textsuperscript{122} Polak-Wessels II, par. 2631. In my opinion the balancing of the interests of the estate on the one hand and the interests of secured creditors on the other is a task of the legislator. Legal certainty requires that the \textit{Faillissementswet} should at least provide guidelines as to the situations in which such powers may be conferred on the administrator at the expense of the secured creditors and the compensation to be paid.
\end{itemize}
addresses the issue of the use of such assets by the administrator. Art. 172 InsO distinguishes between the power to use encumbered assets on the one hand and the power to process\textsuperscript{123} encumbered assets on the other hand.

Pursuant to Art. 172 (1) InsO, the administrator has the power to use encumbered assets that he is authorised to realise pursuant to Art. 166 InsO. Art. 172 (1) InsO in this respect overrules contractual arrangements between the debtor and the secured creditor to the contrary.\textsuperscript{124}

The secured creditor must be compensated for a decrease in value of the encumbered asset resulting from such use as from the opening of the insolvency proceeding.\textsuperscript{125} The obligation to pay compensation only exists to the extent that the decrease in value adversely affects the creditor's security. An obligation to pay compensation does not exist insofar as the value of the encumbered asset is sufficient to cover the secured claim.

The power to process encumbered assets is only conferred on the administrator to the extent that the security of the secured creditor is not adversely affected. Art. 172 (2) InsO states in this respect:

\begin{quote}
The administrator may combine, mix and process such a chattel, to the extent that the security of the creditor with a right to separate satisfaction is not impeded as a result thereof. If the creditor's right continues on another chattel, such creditor shall release the new security to the extent that it exceeds the value of the previous security.\textsuperscript{126}
\end{quote}

The explanatory report indicates that the creditor's security is adversely affected if, as a result of the processing of the encumbered assets, the

\textsuperscript{123} The term ‘process’ refers to: verarbeiten, vermischen and verbinden (cf. Art. 172 (2) InsO).

\textsuperscript{124} BT-Drucksache 12/2443, p. 182.

\textsuperscript{125} This is a claim against the estate, cf. Art. 55 (1) InsO and BT-Drucksache 12/2443, p. 182.

\textsuperscript{126} Translation taken from Stewart, Insolvency Code. Art. 172 (2) InsO: Der Verwalter darf eine solche Sache verbinden, vermischen und verarbeiten, soweit dadurch die Sicherung des absonderungsberechtigten Gläubigers nicht beeinträchtigt wird. Setzt sich das Recht des Gläubigers an einer anderen Sache fort, so hat der Gläubiger die neue Sicherheit insoweit freizugeben, als sie den Wert der bisherigen Sicherheit übersteigt.
'Rechtsstellung des Gläubigers an Wert verliert'. Whether this is the case has to be determined in accordance with the general rules of property law, in particular Art. 946-950 BGB. Accordingly, the processing of an encumbered asset is not allowed if that would lead to the dissipation of rights in the original asset(s) and consequently to the loss of the security. It would appear that this provision imposes rather serious restrictions on the administrator's authority to use encumbered assets. The original government's Bill (Regierungsentwurf) appeared to offer wider opportunities in this respect. According to Art. 197 (3) of the Bill the administrator generally had the power to process encumbered assets but, if that would adversely affect the rights of secured creditors, the administrator was obliged to provide the secured creditor with substitute security of equal value - 'gleichwertige Ersatzsicherheit'. This provision has been deleted on the grounds that it would make the law unnecessarily complicated. It was observed that the administrator always has the power to pay the secured creditor's claim, so that the security right is extinguished, and therewith obtain full power to use the relevant asset. As the claims of secured creditors may exceed the value of any particular asset that the administrator needs for the continuation of the debtor's business, this raises the question whether this will prove to be a real possibility. It must be noted that the present text of Art. 172 (2) InsO does not prohibit the conclusion of an agreement between the secured creditor and the administrator on the provision of substitute security. There seems to be no reason why an agreement between the secured creditor and the administrator could not entail the payment of the value of assets processed by the administrator (as a claim against the estate), against the release of the security right in the asset(s) concerned by the secured creditor. The problem is, however, that, unless the secured creditor's claim is paid in full, the administrator needs to conclude an agreement with the secured creditor. This would seem to run counter to the objective of the reform of German insolvency law to facilitate the reorganisation and continuation of business in financial difficulties, whereby the influence of secured creditors is decreased.

It is also possible that processing of encumbered assets leads to an increase in the value of the creditor's security, e.g. if, in case of accession, the

127 Cf. BT-Drucksache 12/2443, p. 182.
129 Cf. BT-Drucksache 12/7302, p. 178.
security asset is the principal object - the *Hauptsache*.

Pursuant to Art. 172 (2) *InsO* the secured creditor in that case is obliged to release the security in such assets to the extent that the value of the assets exceeds the value of the original security. The secured creditor can only take recourse on the proceeds of such assets to the extent that his claim would have been satisfied from the original encumbered asset.

The *Insolvenzordnung* does not confer on the administrator the power to use up encumbered assets, e.g. heating oil that has been transferred to a creditor by way of security. A proposal to confer on the administrator the power to use up encumbered assets on the condition that substitute security would be provided for, has been rejected by Parliament and has consequently not been incorporated in the *Insolvenzordnung*. The administrator's power to use up encumbered assets therefore requires an agreement to that effect with the secured creditor on the provision of substitute security, or, if such agreement cannot be achieved, on payment of the secured claim.

### 2.6 Secured creditors and compositions / reorganisation plans

One of the manners of winding up a debtor's insolvency is by a composition or reorganisation plan. Traditionally a composition provides for a reduction of the debtor's liabilities. The reduction of liabilities is achieved by a court approved agreement that binds not only the creditors who have agreed to the composition, but also those who have opposed it or have not voted at all. This is the essence of the composition as it exists in Dutch law today and as it existed in German law prior to the entry into force of the *Insolvenzordnung*.

One of the main obstacles in achieving the intended result under present Dutch law is that a composition does not bind creditors with secured or privileged claims. The rights of both secured and privileged creditors are not affected by a court approved composition. Secured and privileged creditors are not entitled to vote on the composition unless they waive

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130 In that case the secured creditor's rights extend to the original asset, including its component parts (Art. 947 *BGB*).


132 BT-Drucksache 12/7302, p. 178; BT-Drucksache. 12/2443, p. 182.
their rights to their priority for the benefit of the estate prior to the vote, in which case they will be dealt with as ordinary unsecured creditors even if the composition is not accepted.\textsuperscript{133}

\textit{Insolvenzplan}

One of the important innovations of the \textit{Insolvenzordnung} was the introduction of a new type of reorganisation plan, inspired by US bankruptcy law: the \textit{Insolvenzplan}.\textsuperscript{134} Art. 1 \textit{InsO} explicitly mentions the \textit{Insolvenzplan} as a manner of achieving satisfaction of creditors equal to the statutory regulated liquidation of the debtor's assets. The plan is set up as a more flexible instrument than the traditional composition. It provides for a large extent of party-autonomy in the winding-up of insolvency proceedings. The objective of the plan is not necessarily to achieve a reduction of liabilities necessary to facilitate the continuation of the business by the (now) insolvent debtor. Neither is it necessarily aimed at the reorganisation of the debtor or his business, even though this objective is explicitly set forth in Art. 1 \textit{InsO}.\textsuperscript{135} The provisions in the plan can also derogate from the statutory rules concerning the liquidation of the debtor's assets, irrespective of whether such liquidation takes place as a piece-meal liquidation or a transfer of (parts of) the debtor's business as a going concern. The plan is set up as an instrument providing the possibility of 'tailor-made' solutions to the debtor's insolvency.

Accordingly, the content of the plan is not strictly regulated by statute. Art. 217 \textit{InsO} states in general terms:

\begin{quote}
The satisfaction of the creditors entitled to separate satisfaction and of the insolvency creditors, the realisation upon the insolvency estate and the distribution there-\end{quote}

\textsuperscript{133} Cf. Art. 143 \textit{Fw}. If a debtor has been granted suspension of payments (\textit{surseance van betaling}), secured and privileged creditors are (within the limits of Art 233 \textit{Fw}) not entitled to submit their claims to the administrator (Art. 257 (2) \textit{Fw}). If such claims have nevertheless been submitted, a privilege, right of retention, right of pledge or mortgage with respect to such claims is lost, unless the claim is withdrawn prior to the vote on the proposed composition.


\textsuperscript{135} Art 1 \textit{InsO}: "Das Insolvenzverfahren dient dazu, die Glaubiger eines Schuldners gemeinschaftlich zu befriedigen, indem das Vermögen des Schuldners verwertet und der Erlös verteilt oder in einem Insolvenzplan eine abweichende Regelung insbesondere zum Erhalt des Unternehmens getroffen wird."
of to the participants, as well as the liability of the debtor following the insolvency proceeding may be provided for in an insolvency plan that deviates from the provisions of this code.\footnote{Translation from Stewart, Insolvency Code. Art. 217 \textit{InsO}: Die Befriedigung der absonderungsberechtigten Glaubiger und der Insolvenzglaubiger, die Verwertung der Insolvenzmasse und deren Verteilung an die Beteiligten sowie die Haftung des Schuldners nach der Beendigung des Insolvenzverfahrens können in einem Insolvenzplan abweichend von den Vorschriften dieses Gesetzes geregelt werden.}

The plan may consist of any agreement that could be achieved by way of an individual contract outside the framework of the insolvency proceeding. The idea is that the parties involved in the insolvency proceeding should be able to negotiate the way of dealing with the debtor's insolvency that best meets their interests, with as little restrictions imposed by statutory regulations concerning the contents of the agreement.\footnote{BT Drucksache 12/2443, p. 78 and 90 et seq. "Die marktwirtschaftliche Ordnung beruht auf der aus Erfahrung gewonnenen Einsicht, dass privatautnome Entscheidungen ein höheres Mass an wirtschaftlicher Effizienz verburgen als die hoheitliche Regulierung wirtschaftlicher Abläufe."} On the other hand, the regulation concerning the conclusion of the plan should provide for sufficient guarantees to safeguard that the interests of all parties affected by the plan are taken into consideration. Therefore, the procedural aspects of the conclusion of the plan are strictly regulated, e.g. with respect to the power, form and manner of presentation of the plan, the voting on the plan and its confirmation by the court.\footnote{Art. 217-269 \textit{InsO}} The protection of outvoted minorities is provided for in Art. 251 \textit{InsO}, which aims to guarantee any creditor at least the value that he would have obtained without the plan. Any creditor who establishes a \textit{prima facie} case that he will be worse off under the plan than he would have been without the plan, can request the court to deny its approval to the plan.\footnote{\textit{Cf} Plessner in HK-InsO § 251; Hasemeyer (2003), p. 608.}

An important change with respect to compositions as they existed under the \textit{Konkurs-} and \textit{Vergleichsordnung}, is the involvement of secured creditors. Art. 217 \textit{InsO} explicitly includes secured creditors in the categories of creditors whose rights can be affected by the plan. Art. 223 \textit{InsO} clarifies that modifications to the rights of secured creditors must be explicitly provided for in the plan. This provision is based on the assumption that without a plan the security right can as a rule be fully exercised
and that, as a creditor who demonstrates that his position under the plan is less favourable than it would have been without a plan can prevent the approval of the plan, secured creditors will not seldom be excluded from the effects of a plan.\(^{140}\) On the other hand, it is imaginable that secured creditors are willing to make sacrifices or that their position under a plan is not worse than it would have been without the plan, e.g. if the plan provides for the creation of substitute security or if it is shown that secured claims can be equally (or better) satisfied if the debtor's business is continued (for which the encumbered assets will often be needed).

The plan can influence the position of secured creditors in various ways.\(^{141}\) Starting from the assumption that the security right secures a claim against the insolvent debtor, the plan can contain a number of provisions modifying the position of secured creditors as regulated by the Art. 165-173 InsO. The plan can deviate from the division of rights and obligations between the administrator and the secured creditors laid down in the relevant provisions of the Insolvenzordnung. The plan can contain modifications for example with respect to the secured creditor's obligation to contribute to certain costs involved with the realisation of an encumbered asset, with respect to the administrator's or the secured creditor's power to realise encumbered assets, with respect to the possibilities to use encumbered assets for the benefit of the (temporary) continuation of the insolvent debtor's business or with respect to the distribution of the realisation proceeds. The plan may also provide for the pooling of encumbered assets and the conferral of a pro rata share in the proceeds of the pool to the secured creditors. It is also possible that the plan provides for infringements on the security itself, for example the release of encumbered assets or the substitution of a security right in a particular asset by a security right in another asset. Furthermore, the plan can provide for a modification of the secured claim. It may for example defer, reduce or cross-out entirely the secured claim, which will (indirectly) affect the security right and the position of the secured creditor.\(^{142}\)

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140 BT Drucksache 12/2443, p. 200.
141 See for a general overview of the position of security rights in an Insolvenzplan, Obermüller (WM 1998), p. 483 et seq.
142 Cf. Flessner in HK-InsO, § 222, Nr. 7, § 223, Nr. 4.
The Insolvenzordnung provides for a division of creditors in different categories, depending on their legal position in the insolvency proceeding. Art. 222 (1) InsO stipulates that in principle three different categories should be formed:

(i) secured creditors (if their rights are to be modified by the plan);
(ii) ordinary insolvency creditors;
(iii) subordinated insolvency creditors (insofar as their claims are not considered to be extinguished pursuant to Art. 225 InsO).

Secured creditors can fall into more than one category. To the extent that their claims cannot be satisfied from the realisation proceeds of the encumbered asset, secured creditors are ordinary insolvency creditors\(^1\) or - with respect to interest claims that have fallen due after the opening of the proceeding that cannot be paid from the realisation proceeds of the secured asset - subordinated insolvency creditors.\(^2\) Within the three main categories set forth in Art. 222 InsO, further subdivisions can be made depending on the nature of the (economical) interests of the particular creditors and provided that the distinction made is objective and that the criteria for the distinction are set forth in the plan. With respect to a subdivision of secured creditors one may think of a distinction between creditors who have financed specific assets and creditors who have financed the operation of the business generally, creditors with a security right in the debtor's stock, creditors with a security right in claims, creditors with a security right in machinery, etc. The creditors within each category must receive equal treatment. Differentiation between creditors within the same category is only allowed with the consent of all the creditors affected.\(^3\)

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143 Art. 52 and 237 (1) InsO. As long as the amount of the secured claim that cannot be satisfied from the realisation proceeds of the security asset is not certain, the creditor's claim is taken into account for its estimated deficit (Art. 237 (1) InsO).
144 Art. 39 (1) (1) io. 50 (1) io. 51 InsO.
145 Art. 226 InsO. Affected are those creditors whose position within the same group is less favourable than that of the others. In case of different, but not clearly unequal treatment of creditors within the same category (e.g. within one category certain claims are deferred whereas others are reduced), all creditors must be regarded as affected. Cf. Flesner in HK-InsO, § 226, Nr. 3.
Before the plan is voted on it is reviewed by the court, which, in the cases set forth in Art. 231 *InsO*, must reject the plan. The plan is voted on in a special meeting to be set by the court, the *Abstimmungstermin*. Secured creditors must be invited individually for this meeting. The plan is voted on separately in each of the categories of creditors discerned in the plan. Secured creditors have the right to vote on the proposed plan, provided that the plan provides for their rights to be affected, and provided that their security right is not contested by the administrator, a secured creditor or an insolvency creditor. As a formal procedure for the submission and admission of secured claims does not exist, the administrator is obliged to notify the court of the security rights that have been invoked by creditors or that are otherwise known to him. With respect to the assessment of the voting rights of secured creditors it is important to determine the value of the encumbered asset(s). The weight of the vote of a holder of a security right in an asset of the insolvent debtor that secures a claim against a third party, depends on the value of the encumbered asset. But also with respect to secured creditors with a claim against the debtor, the determination of the value of the asset is important as the extent to which the secured claim can or cannot be satisfied from the encumbered asset must be assessed. The determination of the value of the encumbered asset depends on what will happen with the asset according to the plan. If the plan provides for the sale of the asset, the weight of the vote is based on the estimated realisation value of the asset. If the plan provides for the continuation of the debtor's business and in connection therewith the continued use of the asset, the weight of the vote

146 Art. 235 *InsO*. The *Abstimmungstermin* is preceded by or coincides with a meeting in which the *Insolvenzplan* and the voting rights of creditors are explained, the *Erörterungstermin*, cf. Art. 235 *InsO*. In that meeting, the rights of secured creditors have to be set forth individually, insofar as they are affected by the plan, cf. Art. 238 (1) *InsO*.

147 Art. 235 (3) *InsO*.

148 Art. 243 *InsO*.

149 Art. 237 (2) and 238 (2) *InsO*.

150 Other secured creditors can only contest the security right of another creditor if they either claim the asset for themselves or if they have to vote in the same category.

151 See, with respect to unsecured insolvency claims, Art. 174 et seq. *InsO*.

152 Cf. Flessner in HK-InsO, § 238, Nr. 5.

153 Cf. Art. 76 (2) *InsO*. In a regular creditors' meeting the voting right of a creditor whose claim against the debtor is secured by a security right, is based on the value of the claim.
will be based on the estimated value of the asset in a going concern scenario - *Fortführungsverwert*.

Adoption of the *Insolvenzplan* is simplified in comparison to the adoption of compositions under the *Konkurs- and Vergleichsordnung*. The *Insolvenzplan* is adopted if in each group of creditors the majority of the voting creditors consent to the plan and if the value of the rights\(^{154}\) of the consenting majority represents more than half of the total value of the rights of the voting creditors.\(^{155}\) If all groups of creditors, following the aforementioned criteria, consent to the plan, the court must assess whether the debtor has (or is deemed to have) consented to the plan in accordance with Art. 247 *InsO* and then assess whether the plan can be approved in accordance with Art. 248-251 *InsO*. If the majority (or all) of the groups of creditors reject the plan, the plan is definitively rejected. If the plan is accepted by the majority of the groups, the rejection of one or more groups may be disregarded. Art. 245 (1) *InsO* provides in this respect that a group of creditors is deemed to have consented to the plan under a number of conditions, which include that the plan is not likely to place the creditors in that group in a worse position than they would have been without the plan.\(^ {156}\)

3. **Reservation of Ownership ("Retention of Title")**

3.1 **Introduction**

A seller of goods can obtain security for the payment of claims against the purchaser, in particular the claim for payment of the purchase price, by reserving the ownership of the goods sold and delivered. Both the German and the Dutch Civil Code contain a presumption that the reservation of

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154 These are not necessarily claims against the debtor, e.g. when a security right exists in assets of the debtor for claims against another party

155 See with respect to the majority requirement, Flessner in HK-InsO, § 244, Nr 4-6

With respect to the creditors with subordinated insolvency claims, see also Art 246 *InsO*

156 See, with respect to the *Obstruktionsverbot* of Art 245 *InsO*, Flessner in HK-InsO, § 245
ownership is construed as a conditional transfer of ownership.\textsuperscript{157} The ownership of the goods sold and delivered is transferred to the purchaser under the condition precedent that the claims of the seller against the purchaser that are stipulated in the contract of sale are paid. The right of ownership which remains with the seller until payment of his claims against the purchaser has a strong element of security. If such claims are left unpaid, the seller is entitled to terminate the contract and to re vindicate the goods.\textsuperscript{158} As Dutch and (to a lesser extent) German law do not deal with the rights of creditors under reservation of ownership on the same footing as (other) secured creditors it is dealt with in a separate paragraph.

The laws of the EU Member States show divergent approaches with respect to several issues concerning reservation of ownership, such as the nature of the claims that can be secured, requirements of publicity and registration and the enforceability against third parties, in particular in case of insolvency.\textsuperscript{159} As these differences may pose obstacles to the proper functioning and further development of intra-Community trade, an attempt has been made to harmonise the laws of the Member States in this respect or, at least, to ensure the recognition of reservation of ownership throughout the Community. Some observations are included in this paragraph on the failed attempt at harmonisation in Directive 2000/35/EC on combating late payment in commercial transactions,\textsuperscript{160} which in Art. 4 addresses reservation of ownership (§ 3.2).

Subsequently, the position of German and Dutch general private law with respect to (the limits of) reservation of ownership will be examined (§ 3.3). The claims that can be secured by reservation of ownership (§ 3.3.1) and the extension of the seller’s security to other assets of the purchaser (§ 3.3.2) will be dealt with. The paragraph is concluded with observations

\textsuperscript{157} Art. 3-92 (1) BW (‘wordt vermoed’) and Art. 449 (1) BGB (‘ist im Zweifel anzunehmen’).

\textsuperscript{158} Art. 449 (2) BGB explicitly stipulates that the seller can only reclaim the asset if the contract has been terminated.

\textsuperscript{159} For comparative studies on reservation of ownership see, inter alia, Kieninger (1996) and Rutgers (1999).

on the approach towards reservation of ownership in the insolvency of the purchaser.

### 3.2 Directive 2000/35/EC

If the European Commission and the European Parliament would have had their way, a European harmonisation of reservation of ownership would be closer than it is under the final text of Directive 2000/35/EC on combating late payment in commercial transactions. The Directive provides for a range of measures to combat (the detrimental effects of) late payment in commercial transactions within the European Union. Initially it also included provisions aimed at the harmonisation of the laws of the Member States as to the validity and enforceability of reservation of ownership clauses. The Commission and the European Parliament were of the opinion that the use of reservation of ownership clauses as a means of speeding up payment is constrained by the differences existing in national law. In the initial proposal for the Directive submitted by the Commission on 23 April 1998, the preamble therefore stipulated that "it is necessary to ensure that creditors are in a position to exercise the retention of title throughout the Community, using a single clause recognised by all Member States."\(^{161}\) Accordingly, the initial drafts of the Directive contained provisions that were intended to harmonise the standards for the validity and enforceability of reservation of ownership clauses. In its final version, however, the Directive does not go any further than imposing an obligation on the Member States to "ensure that creditors are in a position to exercise a retention of title on a non-discriminatory basis throughout the Community, if the retention of title clause is valid under the applicable national provisions designated by private international law."\(^{162}\)

In the four years that lapsed between the presentation of the Commission's proposal and the enactment of the Directive, the provisions on the requirements for a valid reservation of ownership of goods by the seller, including requirements of 'form', and the conditions for revindication of


\(^{162}\) Preamble, Nr. 21, of Directive 2000/35/EC on combating late payment in commercial transactions, OJ L 200, 8 August 2000, p. 36.
the goods on the basis of validly reserved ownership, have changed. Whereas the Commission's initial proposal provided for a unilateral reservation of ownership - a notification by the seller to the purchaser that he intended to reserve the ownership of the goods sufficed -, following the opinion of the Economic and Social Committee\textsuperscript{163} and the amendments proposed by the European Parliament\textsuperscript{164}, its scope has since been restricted to reservation of ownership based on agreement between the seller and the purchaser. Art 4 of the Commission's amended proposal stipulated that the "Member States shall ensure that the seller retains title if a retention of title clause has been agreed"\textsuperscript{165} Such agreement was to be considered valid not only if contained in an individual contract, but also if incorporated in the seller's standard contract terms, the invoice or the delivery documents accompanying the goods, provided that it had been received by the purchaser not later than at the time of delivery and that he had not objected\textsuperscript{166} As to the validity of reservation of ownership clauses, the Economic and Social Committee had observed that "the obligation to register a contract, which exists in certain member states, may be considered as an obstacle, especially in cross-border transactions"\textsuperscript{167} The Commission accepted the amendment proposed by the European Parliament in this respect and in its amended proposal specifically stipulated that "no other formality shall be required."

With regard to the effects of reservation of ownership, the Commission's initial proposal provided that "once the due date has passed without the buyer having paid, the seller may claim that the goods in question be returned to him." Following the opinion of the Economic and Social Committee and the amendments proposed by the European Parliament, the Commission sought to explicitly refer to the enforceability of reservation of ownership against third parties, in particular in the purchaser's insolvency. The Commission's amended proposal thus stipulated that "Member States shall provide for the retention of title to be enforceable against third parties, even in the case of bankruptcy of the debtor or in the

\textsuperscript{163} OJ C 407, 28 December 1998, p 54
\textsuperscript{164} OJ C 313, 12 October 1998, p 146
\textsuperscript{165} OJ C 374, 3 December 1998, p 10
\textsuperscript{166} The draft provided for an Annex, listing the clauses that the Member States should recognise as valid
\textsuperscript{167} OJ C 407, 28 December 1998, p 54 See also the amendments proposed by the European Parliament, OJ C 313, 12 October 1998, p 146
case of any other procedure recognised as being similar under the legislation of the Member States." In my opinion, this addition must not be regarded as adding a new dimension to the reservation of ownership, but rather as a clarification of the intended enforceability of a right of ownership against third parties. The references in the draft provisions on reservation of ownership to aspects not dealt with in the Directive, such as the effect on third parties acquiring rights in the goods in good faith and the effects of accession or specification, indicate that the intention of the proposal was to regulate only what is generally referred to as 'simple' reservation of ownership clauses. From the outset the Directive left unaffected the provisions of general property law dealing with issues such as accession or specification.

Notwithstanding these clear efforts to approximate the laws of the Member States with respect to 'simple' reservation of ownership, the Council identified it as one of the areas for which it could not confirm 'the need or even the possibility of harmonisation'. The provision on reservation of ownership was deleted from the common position, because:

"The Council could not accept Article 4 of the amended proposal of the Commission on the retention of title. Member States had strong doubts, that such a clause would really accelerate payments. They felt, that the retention of title was rather an instrument to protect the creditor against the risk of the debtor's insolvency. They also feared that clauses on the retention of title, especially an extended clause on this

168 Art. 4 (3) of the Commissions proposal 23 April 1998, OJ C 168, 3 June 1998, p 15; Art. 4 (4) of the Commission's amended proposal, OJ C 374, 3 December 1998, p. 11 (which explicitly refers to the discretion of the Member States to adopt provisions concerning goods which are incorporated in other moveable or immoveable property). Franx (2001), p 307, apparently starts from the assumption that the directive deals with so called 'extended' reservation of ownership clauses, but that their enforceability depends on the 'applicable national provisions designated by private international law'.

169 With the exception to the provision as proposed by the European Parliament in its legislative resolution on the Council's Common Position, OJ C 296, 18 October 2000, p. 179, which read: ' (...) They limit or exclude recourse to retention of title in the following cases: (a) where a third party has acquired the goods in question in good faith; (b) where the goods in question have been incorporated into or mixed with other goods, unless the process can be reversed without causing significant damage to other goods.' (emphasis added)

issue would interfere with their national property and insolvency law, which the Directive should leave unaffected. The Commission finally accepted the absolute lack of majority to maintain this in the Directive. This article was thus deleted from the common position. 171

The Council's observation that reservation of ownership in particular is an instrument to protect the seller against the risks of non-payment by or insolvency of the purchaser can be agreed to. However, it is not a convincing argument not to incorporate it in the directive. Harmonisation of the laws of the Member States with respect to 'simple' reservation of ownership clauses would certainly be beneficial to the development and proper functioning of the internal market. The Council's argument that the proposals would interfere with the property law in the Member States must be rejected to the extent that 'extended' reservation of ownership clauses (i.e. extension of the seller's security to other claims than the claim for payment of the purchase price and to other assets of the purchaser, e.g. following specification) are concerned. As set out above, the proposals only dealt with 'simple' reservation of ownership clauses. They only addressed the issue of non-payment of the purchase price of the goods and left the decision as to whether ownership can also be reserved by the seller for other claims against the purchaser to the discretion of the Member States. 172 Furthermore, issues of general property law, such as problems of protection of bona fide third parties acquiring (rights in) the goods, accession or specification, were explicitly left outside the scope of the directive. Apart from setting common (maximum) standards for the validity of reservation of ownership clauses, the proposals merely sought to guarantee their enforceability against third parties generally and their enforceability in the purchaser's insolvency in particular.

In its second reading, the European Parliament proposed a number of amendments to the Council's common position and reintroduced pro-

172 Cf. Art. 2 (3) of the Commission's amended proposal: 'retention of title' means the agreement, irrespective of any formal requirements, that the seller remains the owner of the goods in question until the price has been paid in full. See also Art. 2 (3) and 4 (1) of Directive 2000/35/EC. The observation that Art. 4 of the Directive leaves open the question for which types of claims the seller can reserve the ownership of goods (Freudenthal/Milo/Schelhaas (NTBR 2000), p. 298) is correct. However, it was never the intention to harmonise the rules on this type of 'extension' clauses in this Directive.
visions on reservation of ownership similar to those incorporated in the Commission's Amended proposal.\textsuperscript{173} The Council could not accept all of the amendments proposed by the European Parliament, among which those in respect of the reservation of ownership. In accordance with Art. 251 EC Treaty a conciliation committee was convened where an agreement was reached with respect to the text of the directive, including a provision on reservation of ownership. The report of the European Parliament on the joint text approved by the Conciliation Committee states that "Parliament succeeded in persuading the Council to modify its stands in important aspects". Whether this is also the case with respect to the provision on reservation of ownership as it has finally appeared in the directive is doubtful. The least that can be said is that the notion of reservation of ownership has been reintroduced into the directive. The provision also reflects the apparent lack of consensus with respect to the requirements for valid reservation of ownership. It merely states that the reservation of ownership clause must be valid under the national law applicable in accordance with private international law. If that is the case, the Member States must ensure that the seller remains the owner of the goods until they are fully paid for. The Preamble is quite clear about the objective of the directive in this respect:

"It is desirable to ensure that creditors are in a position to exercise a retention of title on a non-discriminatory basis throughout the Community, if the retention of title clause is valid under the applicable national provisions designated by private international law."\textsuperscript{174}

In interpreting the provision that has been incorporated in the Directive concerning reservation of ownership the objective thus expressed in the Preamble must be taken into consideration. It is a provision on recognition of the proprietary rights of the seller under a reservation of ownership clause. Art. 4 of the Directive in this respect stipulates:

"Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods."

\textsuperscript{173} OJ C 296, 18 October 2000, p. 178, Amendment 20 For unclear reasons the scope of the provision was restricted to durable or capital goods.

\textsuperscript{174} Preamble, Nr. 21.

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Art. 4 requires the Member States to ensure that the seller remains the owner of the goods until they are fully paid for. The Directive no longer explicitly refers to the enforceability of the reservation of ownership clause against third parties generally or in the debtor's insolvency in particular. It has been argued that the Directive consequently merely deals with something that all Member States already provide for in their laws, i.e. a contractual agreement on reservation of ownership binding between the parties. In my opinion, the Directive does go further than that and not only addresses contractual issues *inter partes* but also the proprietary effects of a reservation of ownership clause, i.e. its enforceability against third parties generally and in the debtor's insolvency in particular. Even without an explicit reference to the enforceability in the debtor's insolvency, Art. 4 in my opinion entails that the seller can in principle revindicate goods that have not been (fully) paid for from the administrator in the debtor's insolvency. He remains the owner of goods that have not been (fully) paid for. The recognition of the proprietary rights of the seller, leaves unaffected provisions of national law that temporarily curtail the unpaid seller's right of revindication insofar as these are not based on a denial of his ownership of the goods, e.g. the moratorium pursuant to Art. 63a *Fw* in Dutch insolvency law.

The addition in the text of Art. 4 that Member States shall ensure that the seller remains the owner until the goods are fully paid for "if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods" appears to reintroduce some minimum requirements. However, Art. 4 cannot in my opinion be regarded as a measure aimed at harmonisation of laws in respect of the validity of reservation of ownership clauses and as such does not oblige Member States to adapt, where necessary, their national substantive law rules. Rather, these are minimum requirements that have to be observed in order for Member States to be obliged to respect reservation of ownership clauses that are valid under the national law applicable in accordance with the rules of private international law. The directive imposes an obligation

175 Freudenthal/Milo/Schelhaas (NTBR 2000), p. 298; Freudenthal/Milo/Schelhaas (NTBR 2003), p. 92.
176 The Directive has not led to amendment of Dutch or German substantive law with respect to reservation of ownership (cf. TK 2001-2002, 28 239; BT-Drucksache 14/6040, p. 83).
on Member States to respect the proprietary effects of reservation of ownership clauses that have been expressly agreed to. The Directive does not impose an obligation on Member States to respect reservation of ownership not based on an agreement but for example based on a unilateral declaration by the seller, even if it would be valid under the applicable national law designated by private international law.\textsuperscript{177} The Directive does not impose an obligation on Member States to recognise the creditor's rights under a reservation of ownership to the extent that it seeks to secure other claims than the mere claim for payment of the purchase price.

### 3.3 Reservation of ownership in German and Dutch law

The attempts to achieve a certain degree of harmonisation of the substantive laws of the Member States regarding reservation of ownership clauses not only failed but furthermore only concerned the conditions under which a seller can reserve the ownership of goods for payment of the purchase price of those goods. Therefore, with respect to these and other issues related to reservation of ownership and the security obtained by the seller, differences continue to exist between the laws of the Member States. In the following paragraphs a number of aspects concerning reservation of ownership in respect of which Dutch and German law differ, will be examined.\textsuperscript{178} A first area of divergence that will be dealt with concerns the types of claims that can be secured by means of a reservation of ownership clause. German law quite generously allows for \textit{Erweiterung} of the reservation of ownership beyond the mere claim for payment of the purchase price of the goods sold and delivered. The position of the unpaid seller in the purchaser's insolvency, however, will differ depending on the claims that have been left unpaid. Dutch law contains more restrictions in this respect. The second area of divergence that will be examined concerns the possibilities of extending the seller's security to goods that have been manufactured by the purchaser with the goods delivered by the seller or claims that the purchaser obtains as a result of resale of the assets concerned. Also in this respect, German law

\textsuperscript{177} As provided for in Art. 4 of the Commission's initial proposal, OJ C 168, 3 June 1998, p. 13. Member States are free to apply rules that are more favourable to the creditor than necessary to comply with the directive (cf. Art. 6 (2) of the Directive).

\textsuperscript{178} More extensive comparative observations regarding reservation of ownership clauses, can be found in, \textit{inter alia}, Rutgers (1999) and Kieninger (1996).
is much more generous than Dutch law in allowing the extension - Verlängerung - of the supplier's security into other assets.

3.3.1 Claims secured by reservation of ownership

In both Dutch and German law, a seller can validly reserve ownership of goods until full payment of the purchase price of those goods. Pursuant to a contractual agreement to that effect, the ownership of goods sold and delivered remains with the seller until the purchase price of those goods has been paid in full. This reservation of ownership is enforceable against third parties generally as well as in the insolvency of the buyer. Both in Dutch and German (insolvency) law, the unpaid seller can in principle revindicate the unpaid goods from the estate. In this respect the unpaid seller is not regarded as a secured creditor stricto sensu.

Both Dutch and German law allow for an extension of a reservation of ownership clause to other claims than the mere claim for payment of the purchase price of the goods concerned. In view of the more favourable approach towards security ownership in German law than in Dutch law, it is not surprising that German law is more liberal in this respect than Dutch law. However, Dutch law is not as reserved as could be expected given the scepticism with which security ownership is regarded in the Civil Code.

German law

German case law has widely accepted the so called erweiterte Eigen­tumsvorbehalt. Ownership of goods may be reserved to secure other claims of the seller against the purchaser than the mere claim for payment of the purchase price of the goods. Under German law a reservation of ownership clause may in principle entail that ownership is transferred under the condition precedent that any existing or future claims that the seller has or may obtain against the purchaser are satisfied. It follows from Art. 158 BGB that the passing of ownership may in principle be made dependent on any contingency. The most common form of this kind of extension of the reservation of ownership clause in trade practice is the so-called (eigentlicher or uneigentlicher) Kontokorrentvorbehalt, whereby the

179 Cf. Art. 3:92 (2) BW and Art. 449 BGB.
180 Cf. MünchKomm-Westermann, Band 3, § 455, Nr. 90.
ownership of goods is reserved as security for the payment of all claims resulting from the business relationship between the seller and the buyer.\textsuperscript{181} The freedom of the parties to include all existing and future claims in a reservation of ownership clause is not unlimited, however. An explicit statutory exception to the freedom of contracting parties in this respect is contained in Art. 449 (3) \textit{BGB} with regard to the so-called \textit{Konzernvorbehalt}. Pursuant to Art. 449 (3) \textit{BGB}, a reservation of ownership clause is void insofar as the transfer of ownership is made conditional on the satisfaction by the purchaser of third-party claims, in particular those of a company associated with the seller. Furthermore, German case law has set limits to the validity of reservation of ownership clauses in view of possible \textit{Übersicherung}. The doctrine of \textit{Übersicherung} has been developed in respect of fiduciary transfer of ownership by way of security and has subsequently also been applied by the \textit{Bundesgerichtshof} to the \textit{erweiterte Eigentumsvorbehalt}.\textsuperscript{182}

\textbf{Dutch law}

In line with the general dismissal of the use of ownership as a non-possessory security right, earlier drafts of the New Dutch Civil Code contained proposals to allow the seller to reserve the ownership of goods sold and delivered only with respect to claims directly related to the consideration agreed upon in the contract of sale, i.e. the claim for payment of the purchase price, contractual penalties for late payment, etc.\textsuperscript{183} However, the restrictive approach to the use of ownership as a security right has not been consistently maintained during the legislative process. Following criticism from practice, in later drafts the category of claims for which ownership may be validly reserved has been enlarged in order to facilitate the continuation of the existing trade (credit) practice. The claims that a seller can secure by reserving the ownership of goods are limitatively enumerated in Art. 3:92 (2) \textit{BW}:

\begin{quote}
\end{quote}

\textsuperscript{181} Cf. MünchKomm-Westermann, Band 3, § 455, Nr. 91; Baur/Stürner (1999), Nr. 6.

\textsuperscript{182} BGH 9 February 1994, NJW 1994, p. 1154; see also MünchKomm-Westermann § 455, Nr. 90.

\textsuperscript{183} Cf. PG Boek 3, p. 390 and 388, where it is observed that with respect to other claims, the seller's position is no different from any other creditor and requires no specific protection. The restrictions imposed by Art. 3:92 (2) \textit{BW} are not so much a result of the legislator's fear for \textit{Übersicherung}, as suggested by Rutgers (cf. Rutgers (1999), p. 27).
Reservation of title may be validly stipulated only with respect to claims for the counterprestation (counterobligation) for things delivered or to be delivered by the alienator to the acquirer pursuant to a contract, or for work performed or to be performed pursuant to such a contract for the benefit of the acquirer, as well as with respect to claims for failure to perform such contracts. To the extent that a condition is a nullity on this basis, it is held to be unwritten.184

Consequently, Dutch law allows a seller to reserve the ownership of goods for the most important existing and future claims originating from the business relationship between the seller and the purchaser, to the extent that they can be characterised as 'trade credit'. Insofar as a reservation of ownership clause in a contract extends the operation of the clause to claims that do not fall within the categories mentioned in Art. 3:92 (2) BW, to that extent the clause is void by operation of law. Security for claims that fall outside the scope of Art. 3:92 (2) BW can be obtained by providing that transfer of ownership takes place subject to a right of pledge. Art. 3:81 (1) BW in this respect requires that the provisions for both the transfer of the asset and the establishment of a right of pledge are respected. The purchaser acquires the ownership of the transferred asset which from the outset is encumbered with a right of pledge in favour of the seller, that will therefore generally be enforceable against any other creditor in respect of whom the purchaser had previously created a right of pledge in existing and future moveables.

Art. 3:92 (2) BW allows the seller to reserve the ownership of goods as security for the payment of past and/or future deliveries. It is not required that these deliveries are effected pursuant to the same contract of sale; they may be separate contracts of sale that have been concluded in the past or will be concluded in the future.185 It is generally assumed that

184 Translation taken from Netherlands Business Legislation. Art 3:92 (2) BW Een eigendomsvoorbehoud kan slechts geldig worden bedongen ter zake van vorderingen betreffende de tegensprestatie voor door de vervreemder aan de verkrijger krachtens overeenkomst geleverde of te leveren zaken of krachtens een zodanige overeenkomst tevens ten behoeve van de verkrijger verrichte of te verrichten werkzaamheden, alsmede ter zake van de vorderingen wegens tekortschieten in de nakoming van zodanige overeenkomsten. Voor zover een voorwaarde op deze grond nietig is, wordt zij voor ongeschreven gehouden.

185 PG boek 3 (Inv. 3, 5, 6), p. 1240 (MvA II Inv.). See also Asser-Van Mierlo Goederenrecht III, Nr. 423; Goederenrecht (E.B. Rank-Berenschot), Nr. 490-491. In this respect Kieninger's interpretation of Dutch law is incorrect, where she states that 'In den Niederlanden [...] ist die Unzulassigkeit von Erweiterungsformen gesetzlich
Dutch law in this respect recognises a similar kind of *Kontokorrentvorbehalt* as German law. If at a certain moment, a seller has no claims (of the types mentioned in Art. 3:92 (2) *BW*) against the purchaser, ownership of the goods sold and delivered by the supplier does not automatically pass to the buyer if the contractual relationship between the purchaser and the seller entails that the ownership of goods sold is reserved by the seller as security for the outstanding balance of claims at the end of their business relationship.\[186\]

Even though both German and Dutch law allow a seller, to a greater or lesser extent, to retain the ownership of goods sold and delivered until also other claims against the purchaser have been paid than the claim for payment of the purchase price, the position of the unpaid seller in the insolvency of the purchaser is fundamentally different. If the purchase price of goods delivered pursuant to a particular contract of sale has been paid, but the seller has other outstanding claims against the purchaser, under Dutch (insolvency) law, the unpaid seller may revindicate the goods, whereas in German (insolvency) law he is regarded as a 'normal' secured creditor. He cannot revindicate the goods but is restricted to enforcing his claim against the goods with priority to other creditors.\[187\]

3.3.2 *Extension of the seller's security to other assets (specification and resale)*

3.3.2.1 General remarks

In accordance with general rules of - Dutch and German - property law, the seller's right of ownership in goods sold and delivered to the purchaser under reservation of ownership is extinguished if, for example, a third party acquires the ownership of these goods or if they are used by

\[\text{ausdrucklich bestimmt}\ [\text{Art. 3:92 Abs. 2 N BW bestimmt nunmehr, dass nur noch die Gegenforderung aus dem Vertrag (Kaufpreisforderung oder Werklohnforderung) und Schadenersatzforderungen wegen Nichterfüllung des Kauf- oder Werklieferungsvertrages mit einem Eigentumsvorbehalt gesichert werden können'}\]


\[187\] Cf Eickmann in HK-InsO, § 47, Nr 6 and § 51, Nr 3
the purchaser for the production of new goods. In the former case, the goods themselves continue to exist as such, but another party has validly acquired the ownership, for example pursuant to a contractual clause allowing the purchaser to dispose of the goods in the normal operation of his business, or by way of some rule of third party protection. In the latter case, the goods as such cease to exist and are replaced by new goods. Consequently, any rights existing in the original goods are extinguished. This, of course, entails a certain risk for the unpaid seller, who may require additional security. The manner in and the extent to which German and Dutch law permit the seller to obtain such additional security differ.

It is undisputed that German law allows the seller to extend his security to products that will be manufactured with the goods that were originally sold and delivered, and to claims that the purchaser obtains in case of resale. This is generally referred to as a verlängerter Eigentumsvorbehalt. This term is somewhat misleading, as the 'substitute' security that the unpaid seller obtains as a result of such Verlängerungsklausel in the contract of sale is not actually a matter of reservation of ownership. As set out above, the seller's right of ownership in the original goods will have extinguished as a result of the provisions of general (civil) law. The 'substitution' or extension of the seller's security is the result of contractual arrangements between the seller and the purchaser with respect to the assignment in advance by the purchaser of future claims originating from resale of the goods or the contractual determination - with effect against third parties - that the newly manufactured goods have been manufactured for the benefit of the seller, in the sense that he will acquire the ownership of these newly manufactured goods. This right of ownership is not an 'extension' of the seller's right of ownership in the original goods, but is based on the rules regarding specification.

3.3.2.2 Resale

If goods are intended for resale, the contract between the seller and the purchaser will generally contain a clause authorising the purchaser to transfer the ownership of the goods concerned to his clients in the
ordinary course of business.\textsuperscript{188} As a result of such authorised resale, pursuant to which a third party validly acquires the ownership of the goods, the seller's 'reserved' right of ownership is extinguished.\textsuperscript{189}

Under German law the seller and the purchaser may agree that the claims that the purchaser will obtain as a result of resale of goods of which the seller is the owner, are assigned (in advance) to the seller by way of security. Such contractual clauses are referred to as \textit{Vorausabtretungsklausel}. The original security of the seller, i.e. the ownership of the goods sold and delivered, is substituted by the security 'ownership' of the claims that the purchaser obtains against his clients. For the valid assignment of future claims by way of security, a contract of assignment between the assignor and assignee suffices. Notification of the assignment to the assigned debtor is not a requirement for the valid transfer of claims under German law, and in case of security assignments, notification is generally also not allowed until an event of default occurs on the part of the assignor.\textsuperscript{190} Generally, the contract between the seller and the purchaser will contain an (explicit or implicit) authorisation to the purchaser to collect the claims that have been assigned by way of security to the seller.\textsuperscript{191} The security assignment of future claims entitles the unpaid seller to separate satisfaction (\textit{Absonderung}) in the purchaser's insolvency.\textsuperscript{192} His right of ownership in the claims of the purchaser against his clients is dealt with in the same way as other fiduciary assignments by way of security.

\textbf{Dutch law, on the other hand, in principle does not permit such assignment (in advance) of claims by way of security.}\textsuperscript{193} The seller can obtain the desired security by way of a right of pledge created (by way of anticipation) in the purchaser's (future) claims against his clients. A mere stipulation in the contract of sale does not suffice to validly create such a

\begin{itemize}
\item \textsuperscript{188} Whether such an authorisation is agreed upon between parties is a matter of interpretation of the contract. See e.g. HR 14 February 1992, NJ 1993, 623, comm. W.M. Kleijn (Love-Love).
\item \textsuperscript{189} Cf. Art. 185 BGB. Cf. (all with further references) MunchKomm-Westermann, Band 3, § 455, Nr. 95; Kieninger (1996), p. 79; Goederenrecht (E.B. Rank-Berenschot), Nr. 494; Asser-Van Mierlo Goederenrecht III, Nr. 428.
\item \textsuperscript{190} Cf. Bulow (2003), Nr. 1266 et seq.
\item \textsuperscript{191} See, with respect to the authorisation to collect assigned claims, MunchKomm-Roth, Band 2a, § 398, Nr 46-57; Bulow (2003), Nr 1266 et seq.
\item \textsuperscript{192} Art. 51 InsO. Cf. Eickmann in HK-InsO, § 51, Nr. 3.
\item \textsuperscript{193} Cf. Art 3:84 (3) BW
\end{itemize}
right of pledge. Notification to the debtor of the pledged claim is required or, in the absence of such notification, either a notarial deed or registration of a private pledge document. A right of pledge without notification can only be validly created in claims that either exist at the time of execution of the notarial deed or the registration of the private pledge document, or in claims that will directly arise from a legal relationship between the pledgor - the purchaser - and the debtor of the pleged claim - the purchaser's client -, existing at that time.

3.3.2.3 Specification

The seller's right of ownership in the goods sold and delivered may extinguish if the purchaser uses these goods in the production of new goods, e.g. as a result of accession or specification. Any rights that the seller may subsequently obtain in the new assets is not based on his right of ownership in the original goods but on the general rules of property law. Rules of property law are generally of a mandatory nature and cannot be set aside by contractual arrangements. However, to a certain extent parties may have influence on the operation of such mandatory rules of property law. With respect to the proprietary effects of accession, parties do not have any freedom to influence the operation of such rules by contract. If and to what extent parties can influence the operation of the rules on specification by way of contractual arrangements, is controversial, in German but even more so in Dutch law.

As a result of specification, all rights in the original goods used in the production process are extinguished. The question arises who acquires the ownership of the newly manufactured goods in case the manufacturer is not the owner of (all of) the goods used. Both Dutch and German law in this respect provide that, in principle, the manufacturer acquires the

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194 Art. 3:236 (2) BW.
195 Art. 3:239 (1) BW.
197 This is explicitly provided for in Art. 950 (2) BGB. Cf. HR 5 December 1986, NJ 1987, 745, comm. W.M. Kleijn (Gescheurde Orchideeen); HR 24 March 1995, NJ 1996, 158, comm. W.M. Kleijn (Stichting Crediteurenbelangen Hollander's/Rabobank Domburg)
ownership of the goods that he has manufactured.\textsuperscript{198} However, the question is who should be regarded as manufacturer of the new goods for the application of the rules on specification: the person actually manufacturing the goods, or, for example, the person in whose order the goods have been manufactured. In particular with respect to the sale of supplies pursuant to a contract containing a reservation of ownership clause, the question arises to what extent parties are free to determine who shall be regarded as the manufacturer for the application of the rules on specification.

\textit{German law}

German law allows the parties to a contract a great deal of freedom in this respect. A \textit{Verarbeitungsklausel} in the contract between the seller and the purchaser, pursuant to which the seller shall acquire the ownership of the newly manufactured goods, is valid and may lead to the acquisition of ownership by the seller.\textsuperscript{199} The ownership thus acquired by the seller serves as security for payment by the purchaser of the purchase price for the original goods and, depending on the contract, other claims of the seller against the purchaser.

The theoretical underpinning of this result is debated.\textsuperscript{200} Some authors argue that Art. 950 BGB, pursuant to which the manufacturer in principle acquires the ownership of newly manufactured goods, is to be regarded as \textit{ius dispositivum} and that contractual arrangements between the seller and the purchaser prevail. Prevailing opinion, however, appears to be that Art. 950 BGB constitutes \textit{ius cogens}, the operation of which cannot be excluded by contract. The manufacturer for purposes of Art. 950 BGB, however, is not necessarily the person actually manufacturing the goods. Who is to be regarded as 'manufacturer' for purposes of Art. 950 BGB must be assessed on the basis of common opinion (Verkehrsanschauung).\textsuperscript{201} Case law shows that contractual arrangements are taken into consideration in determining what follows from common opinion in this respect.\textsuperscript{202} Given the lenient approach in case law, a \textit{Verarbeitungsklausel} can be said to (to

\begin{itemize}
\item \textsuperscript{198} Art. 950 BGB; Art. 5:16 (2) BW.
\item \textsuperscript{199} Cf. Kieninger (1996), p. 80-81 (with further references); Baur/Stürner (1999), p. 625/626; MünchKomm-Quack, Band 6, § 950, Nr. 21 et seq.
\item \textsuperscript{200} Cf. Kieninger (1996), p. 80-81.
\item \textsuperscript{201} MünchKomm-Quack, Band 6, § 950, Nr. 22 et seq.
\item \textsuperscript{202} Cf. Kieninger (1996), p. 81.
\end{itemize}
a certain extent) in fact operate as a contractual determination of the 'manufacturer' for purposes of application of Art. 950 BGB. On the other hand, there are authors who argue that contractual arrangements should not be taken into consideration and that the determination of the manufacturer for purposes of Art. 950 BGB should follow objective criteria only. To the extent that the seller does not acquire ownership by virtue of Art. 950 BGB, the Verarbeitungsklausel may nevertheless lead to the acquisition of ownership by the seller if it can be interpreted to effect an anticipatory fiduciary transfer of ownership of the newly manufactured goods by way of security.

Whichever way one construes the seller's acquisition of the ownership in the newly manufactured goods, his position in the purchaser's insolvency is the same. The seller cannot revindicate the goods. As his right of ownership in the goods concerned is the functional equivalent of a security right, he is dealt with as a secured creditor. The seller has a right to separate satisfaction (Absonderungsrecht) in the insolvency of the purchaser.

**Dutch law**

According to prevailing opinion, under Dutch law, a mere stipulation in the contract between the seller and the purchaser that the seller shall acquire the ownership of the goods manufactured by the buyer with goods supplied under reservation of ownership, will not have proprietary effect.

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203 Cf. MünchKomm-Quack, Band 6, § 950, Nr. 30, where it is observed that the Bundesgerichtshof is "bis an die Grenze der Fiktion großzügig".

204 Cf. Kieninger (1996), p. 81, who observes that, following strictly objective criteria, the purchaser must often be regarded as the manufacturer for purposes of Art. 950 BGB.

205 Art. 51 (1) InsO. Cf. Eickmann in HK-InsO, § 51, Nr. 3.

206 Cf. (with extensive further references to literature and parliamentary documents) Wichers (2002), p. 214 et seq. To the extent that such stipulation is to be interpreted as an anticipatory fiduciary transfer of ownership in the manufactured goods by way of security, the transfer will (most probably) be void pursuant to Art. 3:84 (3) BW. Perhaps this is different if the stipulation should be interpreted to entail a real (anticipatory) sale of the goods to the seller, which are then sold back to the purchaser under reservation of ownership. Such a construction might be valid (within the limits of Art. 3:92 (2) BW), in view of the interpretation that the Hoge Raad has given to Art. 3:84 (3) BW in its decision of 19 May 1995, NJ 1996, 119, comm. W.M Kleijn (Keereweer q.q /Sogelease).
The allocation of ownership in case of specification is dealt with in Art. 5:16 BW. It follows from Art. 5:16 (1) BW that, if a manufacturer is commissioned to create a new thing out of (one or more) moveable things owned by the customer, the customer will in principle become the owner of the new thing. This is different if the manufacturer has created the new thing 'for himself'. In that case it is the manufacturer who acquires the ownership, pursuant to Art. 5:16 (2) BW.

Whether someone has manufactured something for himself or for someone else, who has had something created for him by the manufacturer, must be determined in accordance with common opinion (verkeersopvatting), the law and the factual circumstances of the case. If the legal relationship between the manufacturer and the customer entails that things created by the manufacturer in a certain manner shall be created for the customer, things created by the manufacturer pursuant to this legal relationship shall be created for the customer, who will acquire ownership pursuant to Art. 5:16 BW. The purport of the legal relationship must be determined in accordance with common opinion. The terms of the contract between the manufacturer and the customer are not decisive in this respect, but are a factor to be taken into consideration in determining,

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207 Art. 5:16 BW reads (translation from Netherlands Business Legislation): "(1) If a person creates a new thing out of one or more moveable things, this thing is owned by the owner of the original things. The two preceding articles apply, mutatis mutandis, where these things belonged to different owners. (2) If a person creates a thing for himself, or has such a thing so created wholly or partially out of one or more moveable things not belonging to him, he becomes owner of the new thing, unless this is not justified having regard to the insignificant cost of its creation. (3) The preceding paragraphs apply, mutatis mutandis, to the processing of materials into a new material or to the cultivation of plants."

208 See also the advisory opinion of advocate general Hartkamp before HR 5 October 1990, NJ 1992, 226, comm. W.M. Kleijn (Breda/Antonijs), Nr. 7-9. If the goods that the customer has put at the disposal of the manufacturer have been sold and delivered to him by a third party that has reserved the ownership until full payment of the purchase price, the customer who has commissioned the manufacturer to produce new things, acquires ownership pursuant to Art. 5:16 (2) BW.


in accordance with common opinion, the purport of their legal relationship.\textsuperscript{211}

A contractual provision to the extent that newly manufactured goods are created by the actual manufacturer for the other party in itself does not lead to the acquisition of ownership by the other party. There must be some objective element that indicates that it is in fact realistic that specification has taken place for the other party.\textsuperscript{212} Requirements of legal certainty with respect to third parties entail that the answer to the question whether the manufacturer creates something for himself or for someone else, is not left (merely) to the discretion of the parties involved.\textsuperscript{213} In this respect reference can be made to the decision of the Hoge Raad of 5 October 1990,\textsuperscript{214} where it was observed that the answer to the question whether the manufacturer has manufactured goods for himself or for the customer:

"will depend on what follows from the legal relationship between the parties in the light of the relevant common opinion"

and that:

"in case of industrial production, this will depend on who had decisive influence on the production method and the final form of the product, and who, within the framework of that legal relationship, bore the risk resulting from disappointing utility, marketability or profitability of the product."

Relevant factors in determining whether specification was effected for the manufacturer himself or for someone else in view of acquiring the ownership thereof, include:\textsuperscript{215}

- the allocation of the costs and risks involved in the newly manufactured goods (e.g. with respect to utility, marketability, etc.);
- the allocation of the costs and risks involved in the production process;

\textsuperscript{211} Cf. Wichers (2002), p. 219. Kortmann (TvI 1998, p. 139) is inclined to accept a large degree of party autonomy in this respect and attach decisive influence to the contractual arrangements between the seller and the purchaser.


\textsuperscript{214} HR 5 October 1990, NJ 1992, 226, comm. W.M. Kleijn (Breda/Antonius)

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- the allocation of the costs and risks involved in the goods used to manufacture the new goods;
- the control over the process of specification.

With respect to the position of the seller who has reserved the ownership of goods sold to the manufacturer reference can be made to the parliamentary records concerning Art. 5:16 BW, where it is observed that:

"(...) in principle it is to be assumed that, if a manufacturer creates new things from other things that have been supplied under reservation of ownership, the right of ownership of the seller(s) extinguishes and the manufacturer acquires the ownership of the newly manufactured goods. (...) That does not exclude that, in appropriate cases, the manufacturer and the supplier can agree that the manufacturer shall act on the order of the supplier(s) in the sense that the manufacturer shall hold the newly manufactured goods for the supplier(s)."

To the extent that a stipulation in the contract between the seller and the purchaser, that the purchaser shall manufacture goods not for himself but on behalf of the seller, is merely intended to extend the seller's security to such newly manufactured goods, such stipulation will not lead to the buyer acquiring ownership. Contrary to German law, Dutch law does not provide for a verlängerter Eigentumsvorbehalt with proprietary effect. Only if the legal relationship between the seller and the purchaser, in accordance with common opinion, can be said to entail that the seller has also assumed the additional costs and risks involved in the manufacturing of the goods with the materials he has supplied, will a contractual clause have proprietary effect in the sense that the seller will also acquire ownership of newly manufactured goods pursuant to Art. 5:16 BW. The right of ownership acquired by the seller in that case does not merely

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216 PG boek 5 (Inv. 3, 5, 6), p. 1023 (MvA I): "(...) moet in beginsel worden aangenomen dat indien een producent nieuwe zaken vormt uit andere zaken met betrekking waartoe door de leverancier of de leveranciers daarvan een eigendomsvoorbehoud is bedongen, de eigendom van deze leveranciers daardoor verloren gaat in dier voege dat de producent eigenaar van de nieuwe zaken wordt (...) Dat neemt echter niet weg dat in zich daartoe lenende gevallen kan worden overeengekomen dat de producent in opdracht van de leverancier of enige onderling samenwerkende leveranciers zal handelen in dier voege dat hij ook de nieuw gevormde zaken voor deze(n) zal gaan houden." See also NvW, Parl. Gesch. Boek 5, p. 111.

serve for purposes of security for extended credit to the purchaser/manufacturer. This is also reflected in the parliamentary records:

"In this respect it is to be observed that the acquisition of ownership in the newly manufactured goods by the supplier(s) should not be able to be considered as a security transfer, that is invalid on the basis of article 3.84 BW, or as a reservation of ownership that would go beyond the limits of article 3:92 BW. It is essential in this respect that the production realistically takes place on the order of and therefore at the expense and the risk of the supplier. One may think of a supplier whose business it is to trade raw materials or semi-finished products, as well as to order the fabrication of finished products from those materials at his own expense. The construction can therefore certainly not be used by a bank who in this way merely tries to obtain security for the financing of the manufacturer's business."

To the extent that the seller would obtain the ownership in the manufactured goods under Dutch law pursuant to Art. 5:16 BW, his position is therefore quite different from the position of the seller under German law. Under Dutch law, the seller acquires full ownership that does not merely serve the purpose of security for extended credit. Consequently, the seller is not dealt with as a secured creditor. He is entitled to revindicate the goods in the insolvency of the purchaser on the basis of his right of ownership.

3.4 Reservation of ownership and insolvency of the purchaser

3.4.1 Introduction

The ownership remaining with the seller pursuant to a reservation of ownership clause has a strong element of security. Nevertheless, the

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218 PG boek 5 (Inv. 3, 5, 6), p. 1023 (MvA I). "Bij dit alles moet echter in het oog worden gehouden dat niet moet kunnen worden betoogd dat de verkrijging door A van de eindprodukten in wezen een eigendomsoverdracht tot zekerheid is, die welens het bepaalde in artikel 3.4.2.2 lid 3 niet geldig is, of dat A's eigendom van die produkten neerkomt op een eigendomsvoorbehoud dat de grenzen te buiten gaat van hetgeen volgens artikel 3.4.2.5b mogelijk is. Voor een figuur als hiervoor weergegeven is derhalve nodig dat het vervaardigen van eindproducten door B realiter in opdracht en derhalve voor rekening en risico van A geschiedt. Men denke aan het geval dat A van het vervaardigen of verhandelen van de grondstoffen of halffabrikaten, alsmede van het daaruit voor eigen rekening doen vervaardigen van eindprodukten, zijn bedrijf maakt. De constructie kan derhalve zeker niet worden gebezigd door een bank die langs deze weg slechts zekerheid voor de financiering van het bedrijf van B tracht te verkrijgen."
unpaid seller is (in Dutch law to a greater extent than in German law) not dealt with on the same footing as secured creditors generally.

If the purchase price of the goods has been left unpaid such goods can be revindicated from the estate. Given the strong element of security attached to the ownership of the seller, it has been argued that also in case of non-payment of the purchase price, the unpaid seller should not be allowed to revindicate the goods concerned, but should be restricted to taking recourse on the same basis as (other) secured creditors. This, however, does not reflect the position of present German and Dutch law. Insofar as other claims have not been paid (e.g. the purchase price of other goods), German law in principle denies the seller the right to revindicate the goods; his position in the buyer's insolvency is that of a secured creditor. Dutch law, on the other hand, would in principle allow the seller to revindicate the goods (albeit that the 'other claims' that can be secured by reservation of ownership are limited).

The same applies to other forms of extended reservation of ownership clauses, pursuant to which other assets than the goods sold and delivered serve as security for the unpaid seller's claims. The position of the unpaid seller under German law, which is much more liberal in allowing such extended reservation of ownership clauses, is that of a secured creditor. Under Dutch law the seller would in principle be entitled to revindicate the goods. This follows from the fact that his rights in such other assets, e.g. on the basis of specification, is 'real' ownership and does not merely serve for purposes of security.

Starting from the assumption that a seller is entitled to revindicate goods in the purchaser's insolvency, this paragraph examines the restrictions that Dutch and German insolvency law impose on such revindication.

219 The administrator in the insolvency of the purchaser can prevent a revindication by the seller by settling the (remaining) debt (cf Art 929 to 158 (1) BGB)

220 Cf Hasemeyer (2003), Nr 11 10, Zwalve (WPNR 1995), p 393 A provision to this effect was incorporated in an earlier draft of the Insolvenzordnung
3.4.2 Restrictions imposed on revindication by the seller

Revindication of assets from the estate may lead to an early disintegration of the estate and may consequently be detrimental to the chances of successful continuation and reorganisation of the debtor's business. Both the German and the Dutch legislator have tried to counter the adverse effects of an early disintegration of the debtor's business, also in view of the intention to further the meaning of insolvency proceedings as a means of reorganisation of potentially viable businesses. The German and the Dutch legislator have chosen different methods to achieve this objective.

Revindication of goods by the seller presupposes that the contract pursuant to which the goods have been sold and delivered to the purchaser has been dissolved.\(^{221}\) If the contract remains in force, the purchaser - in case of insolvency, the administrator - may invoke the contractual right to (hold) the goods as a defence against a revindication by the seller.\(^ {222}\) The conditions for and manner of dissolution of the contract of sale are in principle determined by the general law of contracts. However, the general law may be 'overruled' by specific provisions of insolvency law. Under German law, a seller's right under the general law of contracts to dissolve a contract of sale is subject to certain restrictions in the purchaser's insolvency. Dutch insolvency law does not impose restrictions with respect to the seller's right to dissolve the contract, but under certain circumstances prohibits the seller from exercising his right to revindicate goods from the estate.

**German law**

German insolvency law aims to prevent the unpaid seller from, shortly after the opening of the insolvency proceeding, reclaiming goods that had been sold and delivered under reservation of ownership.\(^ {223}\)

Art. 107 (2) *InsO* stipulates in this respect:

\(^{221}\) Art. 449 (2) *BGB*. Cf. Asser-Van Mierlo Goederenrecht III, Nr. 426.
\(^{222}\) Cf. Art. 986 (1) *BGB*.
\(^{223}\) Cf. BT-Drucksache 12/2443, p. 146 and 178. Preventing the untimely disintegration of the estate is also the objective of Art. 166 *InsO*.  

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In the event that, prior to the commencement of the insolvency proceeding, the debtor purchased a chattel under title retention and was given the possession of the chattel by the seller, the insolvency administrator, to whom the seller has made a demand to exercise his right of election, must make the declaration provided for in § 103 (2), sent. 2, promptly following the Information Hearing. The foregoing shall not apply if a significant reduction in the value of the chattel is probable in the period before the Information Hearing and the creditor gave the insolvency administrator notice of such circumstance.\(^{224}\)

Art. 107 (2) InsO must be read in connection with Art. 103 InsO, which deals with synallagmatic contracts that, at the time of the opening of the insolvency proceeding, have not or not fully been performed by both parties.\(^{225}\) The administrator may choose to perform such contracts, in which case the other party’s claims under the contract are claims against the estate.\(^{226}\) If the administrator chooses not to perform the contract, the other party’s claim (for damages) is an insolvency claim.\(^{227}\) Following a demand by the other party, Art. 103 (2) InsO obliges the administrator to declare without delay whether he will perform the contract or not.\(^{228}\) According to prevailing opinion, Art. 103 InsO also applies to contracts for the sale of goods under reservation of ownership.\(^{229}\) However, in respect of goods sold and delivered under reservation of ownership, the legislator wanted to give the administrator the time to decide whether to pay the purchase price of the goods or not, until a decision on the (temporary) continuation of the debtor’s business had been taken. Pursuant to Art. 157 InsO a decision on the temporary continuation of the debtor’s business is taken at the so called Information Hearing (Berichtstermin), which must

\(^{224}\) Translation taken from Stewart, Insolvency Code Art. 107 (2) InsO: Hat vor der Eröffnung des Insolvenzverfahrens der Schuldner eine bewegliche Sache unter Eigentumsvorbehalt gekauft und vom Verkäufer den Besitz an der Sache erlangt, so braucht der Insolvenzverwalter, den der Verkäufer zur Ausübung des Wahlrechts aufgefordert hat, die Erklärung nach § 103 Abs. 2 Satz 2 erst unverzüglich nach dem Berichtstermin abzugeben. Dies gilt nicht, wenn in der Zeit bis zum Berichtstermin eine erhebliche Verminderung des Wertes der Sache zu erwarten ist und der Gläubiger den Verwalter auf diesen Umstand hingewiesen hat.

\(^{225}\) Cf. Art. 37 Fw. See also § 6.3 of the Principles of European Insolvency Law.

\(^{226}\) Cf. Art. 55 (1) (2) InsO.

\(^{227}\) Art. 103 (2) InsO. Cf. Art. 37a Fw

\(^{228}\) Art. 103 (2) InsO. Cf. Art. 37 Fw, which stipulates that the other party may set a specified (reasonable) period.

\(^{229}\) Cf. Eickmann in HK-InsO, § 37, Nr. 5a; Marotzke in HK-InsO, § 103, Nr. 5 and 30; Hasemeyer (2003), Nr. 20.28 et seq. See also (with regard to the similar provision in the old Konkursordnung) MunchKomm-Westermann, Band 3, § 455, Nr 85.
take place within three months after the opening of the proceeding.\textsuperscript{230} Art. 107 (2) \textit{InsO} therefore provides that the administrator may postpone any decision on whether he will perform the contract of sale, until immediately after the \textit{Berichtstermin}. Only if it is to be expected that in the time until the \textit{Berichtstermin}, the value of the asset(s) concerned will suffer a considerable decrease, e.g. in case of perishable goods, and the creditor has brought this to the administrator's attention, the administrator must take a decision without delay. Pursuant to Art. 119 \textit{InsO}, any agreement prior to the opening of the insolvency proceeding that restricts or excludes the applicability of Art. 107 \textit{InsO} is ineffective.

In the legislator's opinion, Art. 107 (2) \textit{InsO} facilitates the (initial) preservation of assets that are needed for the continuation of the debtor's business, in particular if, at the beginning of the insolvency proceeding, the estate does not have sufficient means to pay the (remainder of the) purchase price.\textsuperscript{231} This view has been criticised as expressing "Mehr Zweckoptimismus als juristische Substanz".\textsuperscript{232} The buyer will not seldom be in arrears with the payment of the purchase price before the opening of the insolvency proceeding, in which case the seller would be entitled to dissolve the contract and, consequently, revindicate the goods. Art. 103 (2) \textit{InsO} provides the other party with the possibility to obtain certainty with respect to the performance of the contract. It does not prevent that party, however, from exercising an existing right to dissolve the contract, revindicate the unpaid goods and submit a possible claim for damages to the administrator as an insolvency claim.\textsuperscript{233} It has been suggested that only through application by analogy of Art. 112 (1) \textit{InsO} the result envisaged by the legislator can be achieved.\textsuperscript{234} Pursuant to Art. 112 (1) \textit{InsO}, a rental or lease contract to which the debtor is a party as lessee may not be terminated by the other party after the opening of an insolvency proceeding in respect of the lessee has been filed, on account of the fact that the lessee was in default with respect to payment of the

\begin{itemize}
\item \textsuperscript{230} Art. 29 (1) (1) \textit{InsO}.
\item \textsuperscript{231} Cf. BT-Drucksache 12/2443, p. 146.
\item \textsuperscript{232} Marotzke in HK-InsO, § 107, Nr. 29.
\item \textsuperscript{233} Differently: Häsemeyer (2003), Nr. 18.35 (footnote 132), who, on the basis of Art. 91 \textit{InsO}, denies the seller any right to terminate the contract after the opening of the insolvency proceeding. This assumption has been rejected by Marotzke as an 'Überinterpretation' of Art. 91 \textit{InsO} (Marotzke in HK-InsO, § 107, Nr. 31).
\item \textsuperscript{234} Cf. Marotzke in HK-InsO, § 107, Nr. 31.
\end{itemize}
instalments prior to the filing of the petition. It also follows from Art. 112
InsO that a clause in the contract pursuant to which the contract ter-
mminates automatically upon, for example, the filing of the insolvency
application is invalid.\textsuperscript{235} As Art. 112 InsO also applies to contracts of
finance leasing\textsuperscript{236} where the purchase price is incorporated in the instal-
ments to be paid to the lessor, it has been argued that it can and should
also by analogy apply to 'real' contracts of sale.\textsuperscript{237}

Starting from the assumption that it follows from Art. 103 and 107 (2) InsO
that an unpaid seller is prevented from dissolving the contract of sale
prior to the Berichtstermin, in which case he is not entitled to revindication,
the question arises whether the administrator is entitled to use or, for
example in case of stock, dispose of the assets concerned while (temporarily)
continuing the debtor's business, before he has decided whether he will
perform the contract. The Insolvenzordnung does not
contain provisions explicitly dealing with this issue. With respect to assets
cumbered with security rights, Art. 172 InsO under certain conditions
confers such power on the administrator. It has been suggested to apply
Art. 172 InsO by analogy to 'revendicatory creditors'.\textsuperscript{238} This does not seem
necessary, however. Insofar as the contract of sale remains in force, the
administrator is allowed to use or dispose of the goods concerned in
accordance with the contractual agreements between the buyer and the
purchaser.\textsuperscript{239} The seller's claim for payment of the purchase price, in case
unpaid supplies have for example been used up or disposed of by the
administrator, or a claim for compensation of the decrease of the value of
an asset resulting from its use, is a claim against the estate pursuant to Art.
55 (1) InsO.\textsuperscript{240} In case assets had been used or disposed of by the
provisional administrator (Vorläufiger Insolvenzverwalter) during the

\begin{itemize}
\item \textsuperscript{235} See further Marotzke in HK-InsO, § 112, Nr. 16 et seq. (with further references).
\item \textsuperscript{236} Cf. Marotzke in HK-InsO, § 112, Nr. 3; BT-Drucksache 12/2443, p. 148.
\item \textsuperscript{237} Cf. Marotzke in HK-InsO, § 107, Nr. 31 and § 112, Nr. 23, who also observes that in
case of default arising after the application for the opening of the insolvency proce-
ding, application by analogy of Art. 112 (1) InsO is not possible and the observations
in the explanatory report to Art. 107 InsO that were referred to above would lack
any legal basis (Marotzke in HK-InsO, § 107, Nr. 31).
\item \textsuperscript{238} Cf. Marotzke in HK-InsO, § 107, Nr. 33-36 (with further references).
\item \textsuperscript{239} Cf. Marotzke in HK-InsO, § 107, Nr. 33. Use of the goods by the administrator does
not necessarily entail an Erfüllungswahl within the terms of Art. 103 InsO (Marotzke
in HK-InsO, § 107, Nr. 33 and § 103, Nr. 62, with further references).
\item \textsuperscript{240} Cf. Marotzke in HK-InsO, § 107, Nr. 34.
\end{itemize}
Secured creditors and insolvency in German and Dutch law

Eröffnungsverfahren, such a claim for compensation is a claim against the estate pursuant to Art. 55 (1) (3) InsO.

Dutch law

As to Dutch law, the Faillissementswet does not provide for specific rules on the unpaid seller’s right to dissolve the contract of sale.\textsuperscript{241} The seller may dissolve the contract in accordance with the provisions of the general law of contracts.

This does not mean, however, that an unpaid seller can always revindicate goods sold and delivered on the basis of a reservation of ownership clause. The moratorium provided for in Art. 63a Fw\textsuperscript{242} also affects the position of third parties who wish to revindicate assets - e.g. on the basis of reservation of ownership - that are under the control of the administrator. During the moratorium a right to demand the surrender of assets that are under the control of the debtor or the administrator, cannot be exercised without the prior authorisation of the supervisory judge (rechtercommissaris).

The regulation of the moratorium in the Faillissementswet is incomplete and not well balanced. It for example does not provide whether and to what extent compensation should be paid for loss (of interest) suffered as a result of the moratorium. Payment of such compensation may, however, be included as a condition in the court order granting the moratorium.

\textsuperscript{241} With respect to hire-purchase contracts - a contract for the sale of goods by instalments whereby the transfer of ownership of the goods takes place under the condition precedent that all claims of the seller against the buyer resulting from the contract of sale are paid (Art. 1576h BW) - , see, however, Art. 38a Fw, pursuant to which both the administrator and the seller may terminate the hire-purchase contract if the buyer is declared bankrupt. Art. 37 Fw, which deals with synallagmatic contracts that at the time of the opening of the proceeding both the bankrupt debtor and the other party have not or not fully performed (cf. Art. 103 InsO), generally will not apply to contracts of sale with a reservation of ownership clause. With the delivery of the goods to the buyer, the seller will have fully performed his obligations resulting from the contract. In any case, Art. 37 Fw offers a possibility to the other party to obtain certainty from the administrator whether the contract will be performed. It does not create an obligation for the other party to set a specified period for the administrator to decide, nor does it restrict his right to terminate the contract in case of default.

\textsuperscript{242} With respect to suspension of payments proceedings, see Art. 241a Fw, and with respect to the debt reorganisation proceeding for natural persons, Art. 309 Fw.
Neither does the *Faillissementswet* stipulate whether the administrator has the power to use, use up or dispose of assets that cannot be reclaimed as a result of the moratorium for the continuation of the debtor's business. Reference is made to the observations concerning the effects of the moratorium on the position of secured creditors, which apply, mutatis mutandis, to a creditor that wishes to revindicate assets on the basis of reservation of ownership.

The tax authorities may profit from the fact that, as a result of the moratorium, a creditor cannot exercise his rights under a reservation of ownership clause. Pursuant to Art. 22 (3) *Invorderingswet 1990* (Collection of State Taxes Act), the tax authorities may, for the recovery of a number of specified taxes, attach and realise moveable inventory *belonging to third parties* which at the time of attachment is located on the debtor's premisses. Pursuant to the policy rules laid down in the *Leidraad Invordering*, the tax authorities do, however, respect 'real' - as opposed to security - ownership. For the purposes of Art. 22 (3) *Invorderingswet 1990* a right is regarded as 'real' ownership if the object concerned is not only legally owned by the third party, but if it also in economic terms must be attributed to that party's patrimony.243 A creditor whose right of ownership cannot be considered as 'real' ownership - the *Leidraad Invordering* for example refers to reservation of ownership - cannot oppose this attachment and realisation by the tax authorities. The opening of insolvency proceedings against the debtor does not prevent the tax authorities from exercising the right to attach and realise such moveable inventory, as it does not form part of the estate. During a moratorium the power of third parties to take recourse on assets belonging to the estate or to claim the surrender of assets that are under the control of the debtor or the administrator, cannot be exercised. The moratorium therefore prevents the owner - the unpaid seller or the financial lessor - from reclaiming goods from the estate. They remain on the debtor's premises. However, the moratorium does not prevent the tax authorities from attaching moveable inventory that does not belong to the estate. Consequently, after the moratorium has expired, the tax authorities will be able to take recourse on the attached assets with priority over the owner.244 This effect of the

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Moratorium has been criticised in legal writing.\textsuperscript{245} Also the government has labelled this effect of the moratorium as undesirable\textsuperscript{246} and has proposed an amendment to the \textit{Faillissementswet} to stipulate that an attachment effected during the moratorium by the tax authorities pursuant to Art. 22 (3) \textit{Invorderingswet} 1990, will not be enforceable against the owner of the attached goods, provided that the assets have been reclaimed prior to the tax authorities' attachment.\textsuperscript{247}

4. CONCLUDING OBSERVATIONS

In the previous paragraphs several issues concerning the position of secured creditors in insolvency under Dutch and German law have been compared. This comparison shows a number of important differences that have to be taken into account when assessing the position of secured creditors in (cross-border) insolvency.

These differences first of all relate to the types of security rights that are available to creditors. In particular with respect to the provision of undisclosed, non-possessorial, security German and Dutch law take a different approach. Contrary to German law, which allows the transfer of property or assignment of claims by way of security, Dutch law in principle has introduced the undisclosed, non-possessorial right of pledge as substitute for the transfer of property or assignment of claims by way of security which was commonly used prior to 1992. These rights can be regarded as functional equivalents. The position of a creditor invoking

\textsuperscript{245} Cf Kortmann (1994), p 159/160, who argues that the preferential position the tax authorities could thus obtain, runs contrary to the purport of the moratorium and is irreconcilable with the principles of reasonableness and fairness. Vriesendorp has argued that, once the seller has reclaimed the goods and the contract of sale has been dissolved, the seller's right of ownership can no longer be characterised as 'security' ownership but must be regarded as 'real' ownership that must consequently be respected by the tax authorities (cf Vriesendorp (Tvl 1998)). Vriesendorp's view has been followed by Rb Rotterdam 30 June 2004, JOR 2004/259

\textsuperscript{246} Explanatory Report to Bill 27 244 (Nr 3), § 68 A fundamental decision on whether the special position of the tax authorities (in respect of the privilege attached to tax claims and the right to take recourse on assets not belonging to the tax subject) should be amended, has been postponed awaiting a report on the budgetary effects

\textsuperscript{247} Art 63d \textit{Fw} as proposed in Bill 27 244. There are no compelling arguments why the assets should be reclaimed by means of a notification served by a bailiff, as currently provided for in Bill 27 244
either security ownership or a right of pledge is that of a secured creditor whose rights are limited to recourse on the encumbered asset for the secured claim. To the extent that Dutch law allows a creditor to obtain or reserve a right of ownership (also) for purposes of security, however, the creditor is, unlike under German law (with the exception of 'simple' reservation of ownership\textsuperscript{248}), not dealt with as a secured creditor. Such creditors are entitled to revindicate the assets concerned.

Questions relating to the validity and scope of security rights in the debtor's assets are preliminary questions that must be assessed in accordance with the applicable rules of the general law (of property). They do not pertain to insolvency law. Such preliminary questions arise on a national as well as on a cross-border level. The existing differences between legal systems with respect to the types of security rights that can be obtained by a creditor in the debtor's assets and the scope of such rights, underline the importance of rules of private international law that designate the law to be applied in particular cases. Issues of private international law relating to the creation and scope of security rights will be dealt with in the second paragraph of Chapter 3.

Insolvency law may have several implications for the position of secured creditors. Firstly, insolvency law may intervene in the validity of security rights. In this respect reference can for example be made to rules of national law that under certain circumstances give the administrator the power to avoid the provision of security to a creditor (faillissements-pauliana, Insolvenzanfechtung). Furthermore, insolvency law may impose certain restrictions on the exercise of security rights in insolvency. In this respect the position of present German and Dutch insolvency law is fundamentally different.

Traditionally, secured creditors may not only separate the proceeds of realisation of the encumbered asset(s) from the estate, but they may also individually enforce their claims against the encumbered asset and, insofar as necessary, separate the encumbered asset from the estate for

\textsuperscript{248} Prevailing opinion in German law is that the lessor under a financial lease contract is also entitled to revindicate the leased asset(s). In insolvency, the lessor's power to terminate the debtor's right to possession by dissolution of the contract is restricted, however (cf. Art. 112 InsO). Cf. Eickmann in HK-InsO, § 47, Nr. 8.
that purpose. This was the position of German law prior to 1999 and still is the position of Dutch law at this time. Under present Dutch law secured creditors may, subject to certain restrictions, separate and realise assets - and collect claims - encumbered with a security right during the insolvency proceeding. They may enforce their rights 'as if there were no bankruptcy'. A moratorium (afkoelingsperiode) may temporarily prevent secured creditors from exercising their rights under the security, but it does not fundamentally change the powers conferred on them pursuant to the general rules of private law. Secured creditors are not bound by compositions.

The approach of present German insolvency law is quite different. The enactment of the *Insolvenzordnung* in Germany in 1999 has introduced changes to the position of secured creditors, that now are to an important extent included in the insolvency proceeding. German insolvency law in principle confers on the administrator the right to realise assets - and collect claims - encumbered with a security right. The administrator has the power to use and dispose of encumbered assets in view of continuing the insolvent debtor's business. However, the essential interest of the secured creditor in obtaining satisfaction of the secured claim is respected. Secured claims are paid directly from the proceeds of realisation of the encumbered asset, albeit with a deduction for costs and expenses incurred by the estate in that respect, and mechanisms are provided for to protect the interests of secured creditors in case of the use by the administrator of encumbered asset. Furthermore, the *Insolvenzordnung* provides that also secured creditors can be included in and affected by a plan.

The absence of uniformity in the approach towards the treatment of secured creditors in insolvency and the different legal methods used to include secured creditors - at least to some extent - in the insolvency proceeding, underpin the importance of the determination of the law governing the position of secured creditors in the context of a cross-border insolvency proceeding.
CHAPTER II

CROSS-BORDER ASPECTS
OF INSOLVENCY PROCEEDINGS

1. INTRODUCTION

1.1 Universality, territoriality, unity and plurality

Cross-border aspects of insolvency proceedings are generally approached from one of the following principles: territoriality or universality. These opposite principles operate in close connection with two other principles, namely the principles of unity or plurality of insolvency proceedings. These concepts relate to distinct but connected issues and will be briefly set out hereafter.¹

Territoriality

The territoriality principle applied in its strictest form entails that insolvency proceedings only affect assets situated in the State where the proceeding has been opened. In certain cases the scope of a domestic insolvency proceeding is restricted to assets located in the State where the proceeding has been opened. This is for example the case with respect to territorial insolvency proceedings opened by virtue of Art. 3 (2) or (4) IR. More often, national laws apply the territoriality principle with respect to the determination of the effects within their jurisdiction of insolvency proceedings opened abroad. An insolvency proceeding that under the law of the State where the proceeding has been opened encompasses the assets of the debtor worldwide, may not have any or only limited effects in States that apply the territoriality principle. Used in this context, the territoriality principle does not refer to the territorially limited effect of such proceedings in general, but (merely) entails that the opening of an insolvency proceeding abroad does not affect assets situated in that State.

¹ For general observations on these principles and their foundation, see, inter alia: Jitta (1895); De Vries (1926); Kosters/Dubbink (1962), p. 851 et seq.; Trochu (1976); Beukhorst (1993); Hanisch (ZIP 1994); Bos (2000), p. 3-10; Polak-Wessels X, par. 10009-10018.
The view of insolvency proceedings as a manifestation of the exercise of a State's sovereign powers - in particular where the opening of an insolvency proceeding is regarded as resulting in a general attachment on the debtor's assets - is central to the territoriality principle. A court and the officials appointed by that court can only exercise their powers within the territory where the court has jurisdiction. The effects of the opening of an insolvency proceeding and notably the powers of the administrator appointed in the proceeding will not extend to States that apply the territoriality principle. This inevitably leads to the opening of multiple - parallel - insolvency proceedings in respect of the same debtor, if the debtor's entire estate is to be included in the realisation of the estate and the distribution of the proceeds among his creditors.

Universality

The universality principle starts from the opposite assumption. It entails that the opening of an insolvency proceeding affects the assets of the debtor wherever they are located. The effects of an insolvency proceeding are not limited to the territory where the court could exercise its jurisdiction. States generally take this approach with respect to the effects of insolvency proceedings opened within their jurisdiction. To what extent this approach, which essentially is nothing more than a claim for universal effect, indeed has the desired result, will depend on the (private international) law of the States where the effects of the insolvency proceeding are invoked. In that respect a number of jurisdictions also follow an approach based on the principle of universality. In its most extreme form, application of the universality principle in this context entails the extension of the effects that an insolvency proceeding has under the law of a foreign State where a proceeding has been opened (lex concursus) to a State where assets are situated, without the possibility of opening local proceedings. From the point of view of the State applying the universality principle in this manner, only one State has jurisdiction to open an insolvency proceeding in respect of a particular debtor and the insolvency proceeding is conducted in accordance with the insolvency law of that State.

2 Cf. Drobnig (1993), p. 13: "The true test of universality rests upon its passive aspect, i.e. the willingness to accept domestic effects of an insolvency proceeding opened abroad."

3 This is for example the position of Belgian customary private international law, cf. Sagaert (2003), p. 82-85 (with further references to Belgian literature and case law)
Cross-border aspects of insolvency proceedings

State. A variety of other forms of application of the universality principle is conceivable. From the point of view of assessing the effects of an insolvency proceeding in other States, 'universality' does not necessarily only refer to a situation where the effects of the foreign lex concursus apply throughout. It rather indicates that in some way the assets in a particular country can be affected by the opening of an insolvency proceeding abroad. Recognition of (the effects of) an insolvency proceeding may for example depend on court approval and the court may be called upon to issue orders determining how the foreign proceeding should be given effect. A foreign insolvency proceeding may affect assets in another State without prior court approval, but the effects that the foreign proceeding produces domestically may be derived from domestic insolvency law and not from the foreign lex concursus. Also, in many jurisdictions the fundamental recognition of foreign insolvency proceedings and their effects under the lex concursus does not preclude the opening of (secondary) insolvency proceedings locally. While this does not lead to 'unity' of insolvency proceedings, it does not necessarily mean a lack of 'universality'. If such local proceedings, the scope of which is restricted to the assets situated in that particular country, are opened in connection with a foreign 'main' proceeding, they can be regarded as manifestations of a universal approach. By way of example the ancillary proceedings provided for in the US Bankruptcy Code and the Hilfsverfahren of Swiss law can be mentioned.4 These proceedings are aimed at achieving 'controlled' universality in the sense that the opening of an insolvency proceeding abroad can have effect in Switzerland or the United States by way of the opening of such local proceedings. Viewed in this way, universal effect of an insolvency proceeding can also be achieved through the opening of local ancillary proceedings. The debtor's entire estate is protected from dissipation by accepting the divestment of the debtor (either on the basis of local or foreign insolvency law) and the restrictions imposed on creditors individually taking recourse against the debtor's assets.5

4 Art. 304 US Bankruptcy Code; Art. 166-175 Swiss IPRG.
5 Hanisch (ZIP 1994), who refers to Jitta (1895), p. 232 where a secondary insolvency proceeding is described as 'un satellite de la faillite générale, qui gravite autour de cette dernière, en s'associant à son but sans se confondre avec elle.'
Plurality

The principles of unity and plurality operate in close connection with the aforementioned principles of territoriality and universality. Plurality of insolvency proceedings means that the debtor may be subject to more than one insolvency proceeding. In the concept of unity of insolvency proceedings the debtor’s insolvency is dealt with in one single proceeding. Territoriality necessarily leads to plurality of insolvency proceedings. Universality is not necessarily identical to unity, but, as has been described above, can also be achieved through plurality of insolvency proceedings. The Insolvency Regulation offers an example of the realisation of a certain degree of universality, i.e. as between the Member States of the European Union, by also allowing for plurality of insolvency proceedings. In the system of the Insolvency Regulation, one main insolvency proceeding can be opened that in principle encompasses the debtor’s assets situated in all Member States, but, in view of the protection of local interests and the effectiveness of the administration of the estate, at the same time the possibility of opening secondary insolvency proceedings is provided for.

Unity

Unity of insolvency proceedings is often regarded as the ideal, but at the same time unattainable solution. The opening, conduct and closure of an insolvency proceeding in respect of one debtor are governed by one single law. The assets are administered and, if applicable, realised and distributed in one single proceeding according to one single law, also furthering the realisation of the paritas creditorum. The unity of insolvency proceedings can also in particular prove advantageous to the reorganisation of the debtor or his business. However, as shown by the Insolvency Regulation, even between jurisdictions that on many fronts converge more and more, the idea of unity has to concede to demands of reality (and political willingness to give up jurisdiction and the application of a State’s own law). Many jurisdictions that in principle accept that a foreign insolvency proceeding, even without the opening of local ‘ancillary’ proceedings, can affect the debtor’s assets situated in that country, allow for the opening of local proceedings, the effects of which are limited to assets situated in that country. These local proceedings serve a legitimate and practical purpose. Local proceedings will be helpful to the proper

settlement of legal relationships that are closely connected to that jurisdiction.

Using such general principles as described above in finding solutions to problems that arise in cross-border insolvency cases is only partially helpful. These principles can be used as the basis for a particular system of rules or for purposes of a 'quick description' of a particular system. But in respect of finding convincing and practical solutions to particular problems, principles such as universality and territoriality have their limits. They can be given different meanings in different States. There is no clear-cut definition of either of these terms and many jurisdictions do not follow one of these principles consequently for all cases. They may be combined in many different ways. Furthermore, when discussing on the basis of the principles of territoriality and universality, the focus lies on the extent to which insolvency proceedings affect assets situated in other States. Many questions that arise in insolvency proceedings are, however, more difficult to connect to the localisation of assets, such as the possible suspension of pending legal proceedings, set-off and the treatment of contracts to which the insolvent debtor is a party. Finding solutions to these problems is more difficult on the basis of either one of these principles.

1.2 Divergent national solutions

States have their own rules of private international law that decide when conferral of jurisdiction on their courts is appropriate, which law should be applied by their courts in cases with cross-border aspects and whether and to what extent foreign decisions can be recognised and enforced within their jurisdiction. The area of insolvency is no exception. Existing rules of private international law in the area of insolvency show considerable differences.

The conferral of jurisdiction on the courts of a particular State can depend on a number of factors. Jurisdiction to open an insolvency proceeding in respect of a debtor is generally based on either one of the following grounds: domicile, registered office, centre of main interests or establish-
In some States the mere presence of assets provides a sufficient basis for accepting jurisdiction to open an insolvency proceeding.

In many States the grounds on which the court's jurisdiction is based, determine the scope of the insolvency proceeding. Jurisdiction to open a main insolvency proceeding, (aimed at) encompassing the debtor's assets wherever located, is generally accepted if the debtor has his domicile, registered office or centre of main interests in the State where the proceeding is opened. In cases where the court's jurisdiction is based on the presence of an establishment (or the mere presence of assets), it is generally accepted that the scope of the proceeding is limited.

The conditions for and the extent to which cross-border effects are attached to insolvency proceedings perhaps show the most important differences and provide one of the greatest obstacles to achieving the degree of legal certainty that is required in international trade and finance. In many jurisdictions a distinction is made in this respect between domestic insolvency proceedings and foreign insolvency proceedings. While claiming (unlimited) extraterritorial effect for insolvency proceedings opened within its jurisdiction, some jurisdictions are reluctant to recognise the cross-border effects of foreign insolvency proceedings. The Netherlands are an example of this category of States, at least when assessing the approach to cross-border insolvency proceedings prior to the entry into force of the Insolvency Regulation. States that provide for the extension of effects of a foreign insolvency proceeding to (assets situated within) its jurisdiction, do so in varying manners. Some States require the opening of local 'ancillary' proceedings, such as for example the Swiss Minikonkurs pursuant to Art. 166-175 IPRG or the 'ancillary proceeding' pursuant to Art. 304 US Bankruptcy Code. The effects of the foreign insolvency proceeding in respect of local assets are then based on local law. Other States recognise the effects of the opening of an insolvency proceeding abroad on local assets without requiring a local ancillary proceeding through which the effects of foreign insolvency proceedings

9 Belgian law, until the entry into force of the Insolvency Regulation, did not allow the opening of insolvency proceedings on the basis of the presence of an establishment. Cf. Wautelet (2001), Nr. 5-37, footnote 207; Sagaert (2003), p. 85.
10 E.g. Art. 354 InsO. See also Art. 28 UNCITRAL Model Law.
11 Cf. Polak-Wessels X, par. 10032 et seq.
are channelled. This is for example the case in Germany and France. These two countries differ in the sense that under French law recognition of a foreign insolvency proceeding requires a court order - an exequatur -, whereas under German law recognition of a foreign proceeding requires no further formalities.

Starting from the assumption that an insolvency proceeding has 'universal' effect, the question arises which law governs the effects of an insolvency proceeding on assets situated in different jurisdictions. Again, often a distinction is made between the effects of domestic insolvency proceedings on assets situated abroad - applicability of the lex concursus pursuant to the 'universal effect' of the proceeding - and the effects of foreign insolvency proceedings on assets situated in the State concerned. As to the latter issue, the applicable law will first of all depend on the manner in which effect is given to foreign insolvency proceedings within a particular jurisdiction. If a foreign insolvency proceeding is given effect by way of an 'ancillary proceeding', the effects of a foreign insolvency proceeding will be taken from the local law. In the case of an ancillary proceeding under article 304 US Bankruptcy Code, for example, the effects will furthermore depend on the exercise by the court of the discretionary power to assess what kind of relief is appropriate in a given case. In jurisdictions where a foreign insolvency proceeding can have effect without the opening of local ancillary proceedings, the effects of the foreign proceeding are not necessarily derived from the foreign insolvency law. Also in that case, the effects of foreign insolvency proceedings may be based on domestic law. However, generally the effects of foreign insolvency proceedings will - insofar as issues of insolvency law are concerned - be governed by the foreign lex concursus, the applicability of the lex concursus being regarded as the 'natural' conflict rule in insolvency. With respect to a number of specific issues, in particular in view of protecting local interests, deviating conflict rules may be provided for,
such as in the case of set-off, reversal of juridical acts that have prejudiced the general body of creditors and the treatment of security rights.

1.3 International harmonisation and unification

1.3.1 Introduction

The ongoing increase of cross-border trade and finance inevitably leads to a greater incidence of insolvency proceedings with cross-border aspects. When debtors have creditors and assets in foreign jurisdictions, problems concerning the power to dispose of such assets, the treatment of rights in such assets and the treatment of foreign creditors or creditors with claims governed by foreign law will occur. The differences between national laws in respect of the way insolvencies and in particular cross-border aspects of insolvency proceedings are dealt with, prevent an efficient operation of insolvency proceedings in a cross-border context. Furthermore, they may lead to legal uncertainty. It is more difficult for parties to cross-border transactions to assess with a reasonable degree of certainty their position in the event of insolvency of one of the other parties to the transaction. Furthermore, existing differences in the treatment of cross-border insolvency cases, in particular the very limited recognition of foreign insolvency proceedings in some countries, may enable fraud by debtors, in particular by concealing assets or transferring them to a jurisdiction that does not recognise the effects of a foreign insolvency proceeding. In an increasingly globalising marketplace there is an apparent need for at least a minimum degree of harmonisation of the approach to problems arising in cross-border insolvencies. Practice is best served with clear and transparent rules.

Two recently introduced instruments that aim to provide a uniform or harmonised regulatory framework for the operation of cross-border insolvency proceedings, will be dealt with in this study. On a global level

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13 For a historical perspective on the efforts to establish (bilateral or multilateral) treaties in the field of insolvency law, among which the efforts of the Hague Convention on private international law, the Council of Europe (European Convention on Certain International Aspects of Bankruptcy, opened for signature in Istanbul on 5 June 1990) and previous draft instruments within the European Community, see, *inter alia*: Bos (2000), chapters 1, 3 and 6-9; Polak-Wessels X, par. 10019-10023. Besides the two instruments dealt with in this study - the Insolvency
the need for a harmonised and effective framework to address instances of cross-border insolvency in 1997 led to the adoption of a Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law.\textsuperscript{14} If States decide to implement this Model Law and do so without too many (fundamental) changes, the Model Law will eventually lead to a global harmonisation of the law in this field. On a European level the proper functioning and development of the Internal Market required that a common regulatory framework be introduced to promote the effective operation of cross-border insolvency proceedings. On 29 May 2000 the Council of the European Union adopted Regulation 1346/2000 on insolvency proceedings, which entered into force on 31 May 2002.\textsuperscript{15} It introduced uniform rules on jurisdiction, recognition and applicable law in the field of insolvency in the Member States of the European Union.

The Insolvency Regulation and the Model Law provide two different models for dealing with cross-border aspects of insolvency proceedings. The objectives, structure and content of these two texts are quite different. The Insolvency Regulation is of course of direct importance to Germany


and the Netherlands. However, given the restriction of its scope to, briefly stated, the intra-Community effects of insolvency proceedings, the Insolvency Regulation needs to be supplemented by other rules of private international law. Where national laws, as is the case in the Netherlands, are in need of modernisation with respect to its rules concerning the cross-border aspects of insolvency proceedings, the Model Law may provide a valuable alternative. The Guide to Enactment to the Model Law stresses the complementary nature of the Insolvency Regulation and the Model Law.

1.3.2 Insolvency Regulation

1.3.2.1 A common approach to cross-border insolvency in Europe

At an early stage in the process of the development of the European Community and its Internal Market, the need for a regulation of cross-border insolvencies was identified. During the negotiations that led to the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 ('Brussels Convention'), the specific nature of the problems arising from insolvency proceedings was acknowledged and it was decided that a specific convention dealing with issues of recognition and enforcement of insolvency proceedings should be established.\(^{16}\) Accordingly, Art. 1 of the Brussels Convention excluded 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' from its scope of application.\(^{17}\) A convention on insolvency proceedings would be the necessary complement to the Brussels Convention.

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A first preliminary draft of an EC Bankruptcy Convention was presented in 1970\textsuperscript{18}, followed by a draft convention that was submitted to the Council in April 1980.\textsuperscript{19} From the outset, mechanisms to effectively deal with cross-border insolvency proceedings within the European Community were sought on the level of private international law. It has proven not to be easy to reach (political) consensus on the structure and content of such an instrument. Efforts pursued within the framework of the EC for well over 30 years did not lead to the entry into force of any kind of insolvency convention. The final stage in this process was the failure of the draft EC Convention on Insolvency Proceedings of 1995,\textsuperscript{20} due to reasons that had nothing to do with the Convention itself. Political consensus had been reached on the text of the Convention, but it had not been signed by the United Kingdom due to a deeply rooted dispute between Spain and the United Kingdom over the sovereignty over Gibraltar, concealed by the distortion of the relations between the United Kingdom and the other Member States as a result of the BSE epidemic in 1996.\textsuperscript{21} As the Convention had only been signed by fourteen of the fifteen Contracting States within the six-month time limit set by Art. 49 (2) of the Convention, it lapsed and for some time 'languished in an uncertain limbo'.\textsuperscript{22}

The efforts to achieve a common European approach to cross-border insolvency proceedings have nevertheless been successful. The project gained new momentum with the entry into force on 1 May 1999 of the Treaty of Amsterdam. On the basis of the competence conferred on the Council of the European Union in Art. 65 of the EC Treaty to take measures in the field of judicial co-operation in civil matters having cross-border implications, insofar as necessary for the proper functioning of the internal market, the Council adopted the Insolvency Regulation on 29 May

\textsuperscript{18} E. Comm. Doc. 3.327/1/XIV/70, dated 16 February 1970. An explanatory report by Noel and Lemontey was published as E. Comm. Doc. 16.775/XIV/70. The Dutch text of the preliminary draft has been published in WPNR 5133 (1971), p. 277A et seq. For extensive references to literature concerning the 1970 draft see Wautelet (2001), p. 111, footnote 41.


\textsuperscript{21} Cf. Fletcher (1999), ch. 6.1.

\textsuperscript{22} Fletcher (1999), p. 249.
2000. The Insolvency Regulation has entered into force on 31 May 2002 for all EU Member States with the exception of Denmark.

The Insolvency Regulation mainly contains provisions on private international law. It introduces uniform rules on jurisdiction, applicable law and recognition of insolvency proceedings and judgments delivered directly on the basis of the insolvency proceeding. It does not, save for a few exceptions, contain rules of uniform substantive (insolvency) law. Differences in national substantive insolvency legislation are taken into account in several ways. On the one hand, the Insolvency Regulation opens the possibility of commencing secondary territorial insolvency proceedings in addition to a main insolvency proceeding. On the other hand, it contains a number of specific conflict rules in respect of issues for which the (exclusive) applicability of the *lex concursus* is considered undesirable or gives rise to complications.

1.3.2.2 Interpretation

It is of great importance that a uniform interpretation is given to the terms of the Insolvency Regulation throughout the Community. This is required in order to ensure equality in the rights and obligations that ensue from the Insolvency Regulation. The Report Virgós/Schmit states in this respect:

"The Convention on insolvency proceedings does not contain any explicit provision regarding its interpretation. In the same way as in the 1968 Brussels Convention and the 1980 Rome Convention, two principles should be followed when interpreting its provisions: the principle of respect for the international character of the rule, and the principle of uniformity.

23 J. Israël rejects the assumption that Art. 65 EC Treaty indeed provides a sound legal basis for adoption of the Insolvency Regulation (cf. Israël (NIPR 2001)).

24 Pursuant to the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community. Denmark initially indicated that it would apply the same rules as laid down in the EU Insolvency Regulation on the basis of a Convention to be concluded with the European Community (see Council Press Release of 29 May 2000, 8832/00 (Presse 183)). Such a convention has not been concluded.

The Convention is a self-contained legal structure, and its concepts cannot be placed in the same category as concepts belonging to national law. The Convention must retain the same meaning within different national systems. Its concepts may not therefore be interpreted simply as referring to the national law of one or other of the States concerned.

When the substance of a problem is directly governed by the Convention, the international character of the Convention requires an autonomous interpretation of its concepts. An autonomous interpretation implies that the meaning of its concepts should be determined by reference to the objectives and system of the Convention, taking into account the specific function of those concepts within this system and the general principles which can be inferred from all the national laws of the Contracting States.

However, the Convention itself may require the meaning of a concept to be found in the applicable national law, when it does not wish to interfere with the national laws or when the function of a specific provision of the Convention so requires. This is the case, for example, with the concept of insolvency in Article 1 or the concept of rights in rem as laid down in Article 5 of the Convention.

The text of the Insolvency Regulation is to a large extent identical to the text of the Convention on insolvency proceedings of 1995. The amendments to the text of the Convention are of a largely technical nature and follow from the new institutional framework within which the Insolvency Regulation, as secondary community legislation, has come into effect. The Convention on insolvency proceedings of 1995 was accompanied by an (unofficial) elaborate explanatory report by M. Virgós and E. Schmit. This report provided essential information for a good understanding of the Convention. In particular, the explanatory notes to individual provisions of the Convention provided much required information as to their interpretation. Even though the Insolvency Regulation has a quite elaborate Preamble, it is not nearly as elaborate as the Report Virgós/Schmit. The Preamble does not provide answers to certain essential questions, which are dealt with in the Report Virgós/Schmit. The Report Virgós/Schmit is therefore generally considered to remain an important source of information, also with respect to the interpretation of the Insolvency Regulation. However, to what extent the Report Virgós/Schmit may indeed be used as a relevant source for the interpretation of the Insolvency Regulation is unclear. It has not been approved by the Council and consequently has no official status. Neither does the Preamble of the Insolvency Regulation provide answers to certain essential questions, which are dealt with in the Report Virgós/Schmit.

26 Differences are indicated by Eidenmüller (IPRax 2001), p 7/8
27 See, for example, the Report Virgós/Schmit, Nrs 77-78 as opposed to Nr 6 of the Preamble. The issue to which the observations in Nr 93 of the Report Virgós/Schmit relate, are not dealt with in the Preamble at all.
Regulation in any way refer to the Report Virgós/Schmit. Nevertheless, in my opinion, this Report will be an important source for the interpretation of the Insolvency Regulation, given the information it contains with respect to the intentions and scope of the provisions of the Convention of 1995, which do not fundamentally differ from the provisions of the Insolvency Regulation.

The uniform interpretation of Community Acts in general, such as regulations, is guaranteed by the power conferred on the European Court of Justice in the EC Treaty to give preliminary rulings. Pursuant to Art. 234 EC, requests for a preliminary ruling on questions of interpretation of Community Acts can be submitted by any court or tribunal of the Member States if it considers that a decision on the question is necessary to enable it to give judgment. An obligation to request a preliminary ruling is imposed on a court or tribunal against whose decisions there is no judicial remedy under national law.

However, the possibility to obtain clarity on the interpretation of a new and complex regulation such as the Insolvency Regulation is threatened by the restrictions imposed on the authority of national courts to request preliminary rulings from the European Court of Justice concerning Community Acts based on Title IV of the EC Treaty.²⁸ Art. 68 (1) EC denies lower courts the authority to request preliminary rulings on the interpretation of Community Acts based on Title IV, such as the Insolvency Regulation. Only courts or tribunals against whose decisions there is no judicial remedy under national law have the authority - and the obligation - to request a preliminary ruling from the European Court of Justice, if they consider that a decision on the question is necessary to enable them to give judgment. In addition, the authority to request a ruling on the interpretation of Community measures based on Title IV is also conferred on the Council, the Commission or a Member State. Community measures concerning judicial co-operation in civil matters, such as the Insolvency Regulation, have thus fallen victim to political choices that primarily concern issues of asylum and migration. It is clear that the fundamental departure from Art. 234 EC is not helpful to further the uniform interpretation and application of the Insolvency Regulation. A

proper and effective administration of insolvency proceedings requires clarity and certainty of the rules to be applied. This is particularly important in case of the complex questions that arise in cross-border insolvencies.

The interpretation of the Insolvency Regulation is (primarily) a matter for the European Court of Justice. The national courts of the Member States decide on the substance of the matter in accordance with the interpretation given by the Court of Justice to the provisions of the Insolvency Regulation. This raises the concern of the uniform interpretation and application of the insolvency laws of the Member States that will apply pursuant to the conflict rules incorporated in the Insolvency Regulation. A German and a Dutch court should for example apply Spanish insolvency law, if applicable, in the same manner as a Spanish court would. In this respect it is of crucial importance that information on the insolvency laws of the Member States and its application by the courts is easily accessible. Projects such as the Principles of European Insolvency Law, which contain concise outlines of the insolvency laws of a large number of Member States, are therefore of great practical importance. Due attention should also be given to the establishment of a European database of decisions handed down under the Insolvency Regulation by the courts of the Member States. Preferably reports on the application of the Insolvency Regulation should be presented more frequently than envisaged in Art. 46 IR.

1.3.2.3 Scope of application

The Insolvency Regulation does not provide a comprehensive regulatory framework for all cross-border aspects of insolvency proceedings within the European Community. The scope of application of the Insolvency Regulation is limited in time, in respect of the types of debtors and insolvency proceedings covered and the extent to which it regulates the cross-border effects of proceedings that fall within its ambit.

The Insolvency Regulation does not apply to all proceedings provided for in the national laws of the Member States to deal with (imminent) insol-

29 Art. 43 IR.
vency. Art. 1 (1) IR in general terms states that the Insolvency Regulation applies to 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.' However, this very general description does not determine the applicability of the Insolvency Regulation. The proceedings that fall within the ambit of the Insolvency Regulation are exhaustively listed in Annex A to the Insolvency Regulation. The function of Art. 1 (1) IR is twofold. Firstly, it sets forth the conditions for proceedings to be added to the Annex and thus be covered by the Insolvency Regulation. Secondly, it follows from Art. 1 (1) IR that proceedings listed in Annex A that serve purposes that are not confined to insolvency law, only fall within the scope of the Insolvency Regulation if they are based on the debtor's insolvency. It follows from Art. 1 (1) IR and Annex A that, as to the applicability of the Insolvency Regulation, a distinction is not made with respect to the objective of insolvency proceedings. It applies to liquidation as well as reorganisation proceedings.

The Insolvency Regulation takes a neutral position in respect of the types of debtors that can be subject to an insolvency proceeding. For the purpose of the Insolvency Regulation it is irrelevant whether the debtor is a natural or a legal person, a trader or a consumer. Whether a particular type of debtor can be subject to insolvency proceedings, remains a matter of national law. As stipulated in Art. 4 (2) (a) IR, the law of the Member State where the application for the opening of an insolvency proceeding has been filed, determines in respect of which debtors insolvency proceedings may be opened on account of their capacity. Pursuant to Art. 1 (2) IR, insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings are excluded from

30 Art. 2 (a) IR.
31 The Report Virgós/Schmit (Nr. 49) mentions winding-up proceedings of English and Irish law as examples.
32 In the system of main and secondary proceedings adopted in the Insolvency Regulation, main proceedings may be liquidation as well as reorganisation proceedings, whereas secondary proceedings may only be liquidation proceedings (see Art. 2 (c) IR and Annex B). Independent territorial proceedings (cf. Art. 3 (4) IR) may be liquidation or reorganisation proceedings. Art. 37 IR provides for conversion of reorganisation into realisation proceedings. See further: Virgós (1998), p. 10-12; Report Virgós/Schmit, Nr. 31, 51 and 256-261.
33 Preamble, Nr. 9.
the scope of the Regulation. The reorganisation and winding up of insurance undertakings and of credit institutions are dealt with in two separate directives.\textsuperscript{34} At present (a proposal for) a directive relating to the insolvency of investment undertakings has not been presented.

The Insolvency Regulation only applies if the centre of the debtor's main interests is located in one of the Member States.\textsuperscript{35} It does not apply to insolvency proceedings opened in one of the Member States in respect of a debtor whose centre of main interests is located outside the Community. It does not apply to insolvency proceedings opened in third countries at all.

The Insolvency Regulation only regulates the intra-Community effects of insolvency proceedings.\textsuperscript{36} The effects vis-à-vis third countries are governed by the normal rules of private international law of the forum. This limitation to the intra-Community effects of insolvency proceedings not only has territorial aspects. The territorial aspects are, for example, reflected in Art. 16 and 17 IR, concerning the (effects of) recognition of insolvency proceedings and Art. 5, 7 and 8 IR, which contain deviations from the general applicability of the \textit{lex concursus} only if the asset(s) concerned are located in another Member State. The limitation is not merely territorial, however. Art. 13 IR, for example, stipulates that the \textit{lex concursus} does not govern the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (Art. 4 (2) (m) IR), if the person

\textsuperscript{34} Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, OJ L 110, 20 April 2001, p. 28 et seq.; Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125, 5 May 2001, p. 15 et seq. The aforementioned directives have been implemented into German law by Act of 14 March 2003 (Gesetz zur Neuregelung des Internationalen Insolvenzrechts), Bundesgesetzblatt I, p. 345. In the Netherlands, the directive on the reorganisation and winding-up of insurance undertakings has been implemented by Act of 21 February 2004 (Wet van 21 februari 2004, houdende wijziging van de Wet toezicht verzekeringenbedrijf 1993 en van de Faillissementswet in verband met de uitvoering van richtlijn Nr. 2001/17/EG van het Europees Parlement en de Raad van de Europese Unie van 19 maart 2001 betreffende de sanering en de liquidatie van verzekeringsondernemingen, Stb. 86). At present, the directive on the reorganisation and liquidation of credit institutions has not yet been implemented in Dutch law.

\textsuperscript{35} Art. 3 IR and Preamble, Nr. 14.

\textsuperscript{36} Cf. Report Virgós/Schmit, Nr. 11, 44, 45, 93 and 310.
who benefited from such act 'provides proof that the said act is subject to the law of a Member State' (emphasis added) other than that of the State of the opening of proceedings and that that law does not allow any means of challenging that act in the relevant case.' A similar limitation should be read into Art. 6 and 14 IR.\(^{37}\) In respect of issues not covered by the Insolvency Regulation as a result of its general limitation to the intra-Community effects of insolvency proceedings, the conflict rules of the forum will apply.

1.3.2.4 Relation to non EU Member States

The Insolvency Regulation does not provide for a comprehensive regulation of cross-border aspects of insolvency proceedings within the European Community. There is room and demand for (additional) national rules both with respect to issues that are\(^{38}\) but most importantly with respect to issues that are not dealt with in the Insolvency Regulation. Particularly the restriction of its territorial scope is of great immediate practical importance. An additional regulatory framework that concerns the cross-border aspects of insolvency proceedings in relation to third countries remains necessary.

In the Report Virgos/Schmit (Nr. 45), it is observed in this respect:

'As the Convention provides only partial (intra-Community) rules, it needs to be supplemented by the private international law provisions of the State in which the insolvency proceedings were opened. When incorporating the Convention into their legislations, the Contracting States will therefore have to examine whether their current rules can appropriately implement the rules of the Convention or whether they should establish new rules to that end. In this respect, nothing prevents Contracting States from extending all or some of the solutions of the Convention unilaterally on an extra-Community basis, as part of their national law.'

Cross-border insolvency proceedings will often not be limited to the territory of the European Union. A debtor with the centre of its main

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\(^{37}\) Cf. Report Virgos/Schmit, Nr. 93. In the Dutch version, Art. 14 IR also refers to the law of a Member State ("het recht van de lidstaat op het grondgebied waarvan dit onroerend goed zich bevindt of onder het gezag waarvan het register wordt gehouden"). This is inconsistent with, for example, the French, German and English texts.

\(^{38}\) E.g. Art. 21 (2) and 22 (2) IR. See also Eidenmüller (IPRax 2001), p. 8-10; Trunk (1998), p. 232 et seq.
interests in one of the Member States may have assets or creditors in third countries or may be involved in legal relationships that are governed by the law of a third country. A debtor with the centre of its main interests in a third country may have assets or creditors in one of the Member States, etc. In all of these cases the normal private international law rules of the forum apply and the existing differences between the national systems of private international law 'reappear'.

For a country like the Netherlands with - at present - a largely underdeveloped system of international insolvency law, the introduction of the Insolvency Regulation provides a good opportunity to rethink the basic assumptions that presently underlie the Dutch approach to cross-border insolvency proceedings. For Member States of the European Union, the Insolvency Regulation in this respect to a certain extent functions as the 'competitor' of the UNCITRAL Model Law. How the entry into force of the Insolvency Regulation will influence the development of the international insolvency laws of the Member States, remains to be seen. Germany, for example, has recently introduced legislation concerning cross-border insolvencies not covered by the Insolvency Regulation, that to a large extent follows the provisions of the Insolvency Regulation.39 This legislation, which also serves to implement the EC Directives on the reorganisation and winding up of credit institutions and insurance undertakings, is based on earlier drafts of a section on international insolvency law that was intended to be incorporated in the *Insolvenzordnung*.40 The United Kingdom, on the other hand, has introduced legislation that enables it to (eventually) implement the Model Law.41 The Dutch legislator, currently involved in a comprehensive reform of insolvency law, has not yet


40 Art 379-399 *RegElInsO*, BT-Drucksache 12/2443. These provisions were eventually struck because it was observed that the provisions of the EU Insolvency Convention, which was in preparation at that time, could be declared to apply by analogy in the relation to third countries (BT-Drucksache 12/7303, p. 117). Earlier drafts of provisions on international insolvency law and a critical analysis of these proposals can be found in Stoll (1992) and Stoll (1997).

41 Section 14 (1) of chapter 39 of the Insolvency Act 2000: "The Secretary of State may by regulations make any provision which he considers necessary or expedient for the purpose of giving effect, with or without modifications, to the model law on cross-border insolvency."
decided which approach should be favoured. The Standing Government Committee on Private International Law (Staatscommissie voor het internationaal privaatrecht) in its report of 13 March 2002 on the Insolvency Regulation, has indicated a number of options for the legislator to consider: (i) application by analogy of the provisions of the Insolvency Regulation, (ii) implementation of the Model Law, (iii) drafting and implementing of new provisions, or (iv) awaiting further initiatives within the European Union.  

1.3.3 UNCITRAL Model Law on Cross-Border Insolvency

1.3.3.1 Harmonisation on a global scale

On 30 May 1997 the United Nations Commission on International Trade Law adopted the Model Law on Cross-Border Insolvency by consensus. The Model Law is intended as an instrument to assist States with the introduction of a modern, (globally) harmonised and fair framework to address cross-border aspects of insolvency proceedings. Just like the Insolvency Regulation, the Model Law does not attempt to unify substantive insolvency law. By introducing provisions that are largely limited to certain procedural aspects of cross-border insolvency proceedings, the Model Law aims to facilitate judicial co-operation, court access for foreign insolvency administrators, equal treatment of foreign and domestic creditors, the recognition of foreign insolvency proceedings and coordination between concurrent proceedings. Of great practical importance is its harmonised framework of rules on recognition of foreign insolvency proceedings and the effects of recognition of such proceedings as main or non-main proceedings.

The Model Law is a legislative text that is recommended to States for incorporation into their national law. It is a flexible instrument. States can modify the proposed provisions to fit the Model Law into their national legal system. However, in order to achieve a satisfactory degree

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42 The report is published on the website of the Dutch Ministry of Justice (www.justitie.nl). On the various options, see also Polak-Wessels X, par. 10727-10736

43 Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in Eritrea, Japan, Mexico, Poland, Romania, South Africa, and Montenegro. Proposals to incorporate legislation based on the Model Law in the US Bankruptcy Code (Chapter 15) are pending.
Cross-border aspects of insolvency proceedings

of harmonisation such modifications should be kept to a minimum.\textsuperscript{44} Introducing harmonised texts in itself is not enough to maintain a sufficient degree of transparency and predictability. Laws are applied and interpreted by courts that operate independently. A supranational court that is charged with the uniform interpretation of UNCITRAL texts does not exist. The interpretation that is given to certain model provisions could therefore deviate between jurisdictions. In that respect it is important that in the interpretation of the legislative provisions that are based on the Model Law, due attention is given to the international origin of those provisions and the need to promote uniformity in its application.\textsuperscript{45} As is pointed out in the Guide to Enactment, the CLOUT information system - Case Law on UNCITRAL Texts - can certainly facilitate a uniform interpretation of the Model Law.

1.3.3.2 Scope of application

The Model Law is designed to apply to any type of insolvency proceeding in respect of any type of debtor. The inclusive approach that is taken follows from Art. 2 (a) Model Law, setting forth the necessary attributes that a foreign proceeding must possess to be considered an insolvency proceeding for the purposes of the Model Law. Both liquidation and reorganisation proceedings of varying types - ranging from complete divestment of the debtor to 'debtor in possession', including interim proceedings, such as a German Eröffnungsverfahren, fall within the ambit of the Model Law. It does not distinguish between insolvency proceedings opened in respect of natural or legal persons or between business or consumer insolvencies. Nevertheless, Art. 1 (2) Model Law provides for the possible exclusion of certain types of debtors from the application of the Model Law. In the model provision reference is made to entities such as banks and insurance companies, that are also excluded from the scope of application of the Insolvency Regulation.\textsuperscript{46} The Guide to Enactment indicates that consumers could also be excluded from the scope of appli-

\textsuperscript{44} Mexico and South Africa have made fundamental changes to its text. Both countries have adopted a reciprocity requirement that was expressly not incorporated in the Model Law.

\textsuperscript{45} Art. 8 Model Law.

\textsuperscript{46} Cf. § 1501 (c) US Bankruptcy Code.
cation by an enacting State where for example consumers are excluded altogether from the scope of insolvency law.\textsuperscript{47}

1.3.3.3 Relation to the Insolvency Regulation

The UNCITRAL Model Law is designed to operate next to other international instruments that are binding on the State enacting the Model Law. This is expressed in Art 3 Model Law. To the extent that the Model Law conflicts with an obligation arising out of a treaty or other form of agreement to which the enacting State is a party, those treaties or other agreements will prevail over the Model Law.\textsuperscript{48} For the Member States of the European Union it may offer a regime complementary to the Insolvency Regulation that addresses cross-border aspects that are not covered by the Regulation.\textsuperscript{49} The practical importance of implementation of the provisions of the Model Law in the Member States would particularly lie in the introduction of a harmonised regime of recognition of insolvency proceedings opened in non Member States. The UNCITRAL Model Law in that respect provides for a regime that is internationally acceptable.

1.4 Structure of chapter II

The general approach to cross-border aspects of insolvency proceedings is of importance to the way specific issues such as the treatment of security rights are dealt with. Therefore this chapter examines the general approach to cross-border aspects of insolvency proceedings in German and Dutch private international law, the Insolvency Regulation and the Model Law. In accordance with the distinction made in many national laws between the cross-border effects of domestic and foreign insolvency proceedings, these will be dealt with separately. Paragraph 2 deals with the cross-border effects of domestic insolvency proceedings. Paragraph 3 examines the recognition of foreign insolvency proceedings and the (immediate) effects of recognition. The chapter is concluded with some observations on the future development of Dutch law with respect to cross-border insolvencies.

\textsuperscript{47} Cf. Guide to Enactment, Nr. 66.
\textsuperscript{48} The predominance of the Insolvency Regulation over national legislation already follows from European Law.
\textsuperscript{49} Cf Sekolec (TvI 2002).
2. DOMESTIC INSOLVENCY PROCEEDINGS

2.1 Introduction

The extraterritorial effect claimed for domestic insolvency proceedings raises questions concerning the relation to the grounds of jurisdiction of the court that has opened the proceeding. German law, the Insolvency Regulation and the Model Law draw a relationship between the jurisdiction of the courts to open insolvency proceedings and the intended cross-border effects of such proceedings. Dutch law does not. The first subparagraph examines in which cases international jurisdiction to open insolvency proceedings is conferred on the courts and whether and, if so, to what extent insolvency proceedings claim extraterritorial effect. The second subparagraph deals with the obligation imposed on creditors to compensate the estate for the proceeds of recovery abroad, including dividends received in a foreign insolvency proceeding. Both subparagraphs start with a discussion of the Insolvency Regulation and the Model Law, followed by an examination of the rules of private international law applicable in Germany and the Netherlands in cases that fall outside the scope of the Insolvency Regulation. The paragraph is concluded with a subparagraph on the position of foreign creditors in domestic insolvency proceedings, including foreign tax authorities.

2.2 Jurisdiction and cross-border effects

2.2.1 Insolvency Regulation

2.2.1.1 'Mitigated Europeanism': main and territorial proceedings

The Insolvency Regulation has introduced a mandatory system of direct rules of jurisdiction. A court of a Member State that is confronted with an application for the opening of an insolvency proceeding must assess ex officio whether the case falls within the scope of the Insolvency Regulation, i.e. it must determine whether the debtor's centre of main interests is located in one of the Member States. If it does, the court must subsequently assess ex officio whether it has jurisdiction to open a proceeding in accordance with Art. 3 IR.
The underlying principle of the Regulation may be called one of 'mitigated Europeanism'.\textsuperscript{50} Contrary to earlier drafts of a European Insolvency Convention, the Insolvency Regulation does not start from the premise that only one insolvency proceeding can be opened within the European Community in respect of the same debtor. The Insolvency Regulation provides for the opening of one main proceeding with 'European effect' - jurisdiction is conferred exclusively on the courts of the Member State where the centre of the debtor's main interests is located (Art. 3 (1) IR) - and, in addition, for the opening of proceedings with territorial effect that mitigate the European effect of the main proceeding - jurisdiction is conferred on the courts of all Member States where the debtor possesses an establishment (Art. 3 (2) IR).\textsuperscript{51}

The rules on jurisdiction are supplemented by provisions on the recognition of insolvency proceedings, which ensure that an insolvency proceeding that is opened in a Member State is recognised on the same basis throughout the European Community. The order opening an insolvency proceeding must be recognised by operation of law in all other Member States from the time that it becomes effective in the Member State of the opening of the proceeding. This principle of community trust is embodied in Art. 16 IR. Recognition may not be made dependent on any formal requirements, such as publication, registration or court approval. Art. 16 (1) IR furthermore stipulates that recognition cannot be denied by Member States where insolvency proceedings in respect of the insolvent debtor could not be opened on account of his capacity, e.g. because he is not a merchant. Pursuant to Art. 26 IR, recognition of insolvency proceedings opened in another Member State may only be denied if the effects of such recognition would be manifestly contrary to the recognising State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.\textsuperscript{52} These uniform rules on recognition apply in respect of main proceedings as well as (secondary) territorial proceedings. Evidently, the effects of recognition are different. Pursuant to Art. 17 (1) IR, the judgment opening the main insolvency

\textsuperscript{51} Provided that the debtor's centre of main interests is located in one of the Member States.
\textsuperscript{52} With respect to the public policy exception, see the Report Virgós/Schmit, Nr. 203-210; Virgós (1998), p. 30.
proceeding produces the same effects in any other Member State as under the *lex concursus*, unless the Insolvency Regulation provides otherwise and as long as no (secondary) territorial proceedings pursuant to Art. 3 (2) IR have been opened.

It is important that in its decision the court indicates whether a main or a territorial proceeding is opened. The differences in the effects of a main proceeding on the one hand and territorial proceedings on the other are such that there may be no doubt as to the type of proceeding that has been opened in a particular State.\(^{53}\) This means that the court must specify the ground for its jurisdiction, i.e. whether it is based in Art. 3 (1) IR or 3 (2) IR.\(^{54}\) This obligation is not explicitly provided for but it can be said to follow from the system of the Insolvency Regulation.\(^{55}\) It has been incorporated in Dutch and German legislation.\(^{56}\) The courts or authorities in other Member States may not scrutinise the decision of the court that has opened the proceeding.\(^{57}\) If a court has decided that it had jurisdiction to open a main proceeding, that decision must be respected throughout the Community.\(^{58}\) It is in the interest of all parties involved that, once the proceeding has been opened, there are no further questions as to its scope.\(^{59}\) In this respect, the Dutch legislator has also included an obligation on the party submitting the petition to open an insolvency proceeding, to provide the court with the information necessary to assess its jurisdiction.

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53 Cf Kortmann/Veder (WPNR 2002), p 868, Kortmann/Veder (WPNR 2003), p 180-181


56 Art 102, § 2 EGInsO, Art 6 (4) Fw Unlike Berends has suggested (Berends (WPNR 2003), p 179), the incorporation of such provisions in national law that express an obligation derived from a Regulation, is not contrary to European law It must be considered as compliance with the obligations imposed by Art 10 EC (cf Kortmann/Veder (WPNR 2003), p 181)

57 This leaves unaffected remedies available under national law to appeal the decision


59 Apparently differently Berends (WPNR 2003), p 179

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under Art. 3 IR.\textsuperscript{60} This does not mean that obligations are imposed on the content of the petition that go beyond Art. 3 IR.\textsuperscript{61} If, for example, the debtor's registered office is located in the Netherlands, the petition need not elaborate on the location of the centre of the debtor's main interests. The presumption of Art. 3 (1) IR may be followed. If, however, the debtor's registered office is located in another Member State, the petition must state why the court nevertheless has jurisdiction under Art. 3 (1) IR, or, when the petition is aimed at the opening of a territorial proceeding, whether a main proceeding has been opened (so that the provisions on the opening of secondary proceedings take effect), or, if that is not the case, why the opening of independent territorial proceedings is allowed under Art. 3 (4) IR.

\textbf{2.2.1.2 Main proceedings}

Jurisdiction to open a main insolvency proceeding that includes the debtor's entire estate, by virtue of Art. 3 (1) IR is conferred exclusively on the courts of the Member State within the territory of which the centre of the debtor's main interests is situated.

With regard to companies and legal persons, Art. 3 (1) IR contains the rebuttable presumption that the centre of main interests is the place of the registered office, the siège statutaire. The observation in the Report Virgós/Schmit that this place will normally correspond to the debtor's head office,\textsuperscript{62} must be put into perspective in view of the often tax driven decisions to register companies in a particular country.

The Insolvency Regulation does not contain a similar rebuttable presumption with respect to natural persons. The centre of a natural person's main interests is not presumed to be located in the State of his domicile or residence.\textsuperscript{63}

\textsuperscript{61} Differently: Berends (WPNR 2003), p. 176-177.
\textsuperscript{62} Report Virgós/Schmit, Nr. 75.
\textsuperscript{63} Cf. HR 9 January 2004, JOR 2004/87, comm. B. Wessels (Vennink/Fortis Bank) The Report Virgós/Schmit (Nr. 75) indicates that, in case of professionals, the centre of main interests will in principle be the place of the professional domicile, and in case of natural persons in general, the place of the habitual residence. Critical of the lack
The fact that a company is incorporated under the laws of a non-Member State and has its registered office outside the EU, does not preclude the applicability of the Insolvency Regulation if that company's centre of main interests is situated within a Member State.\footnote{Cf. High Court of Justice (Ch D) of 7 February 2003, Re BRAC Rent-A-Car International Inc, [2003] EWHC (Ch) 128), [2003] 2 All E R. 201. See also Wessels (WPNR 2003).}

The centre of the debtor's main interests is a concept of fundamental importance to the Insolvency Regulation. It is the crucial factor in assessing its applicability and serves as the basis for the jurisdiction to open main insolvency proceedings. It is somewhat surprising therefore that the term has not been included in the list of definitions in Art. 2 IR. According to number 13 of the Preamble it refers to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, e.g. (potential) creditors. The term 'interests' has been chosen in order to not only encompass commercial, industrial or professional activities, but all general economic activities, including those of private individuals.\footnote{Report Virgós/Schmit, Nr. 75.} In cases where a debtor's economic activities include activities of varying kinds which are run from different centres, the decisive issue is to determine what the debtor's 'main' interests are. This may not always be easy and the assessment may be made differently by the courts of different Member States. It should also be kept in mind that a court will have to decide whether it has jurisdiction pursuant to Art. 3 (1) or 3 (2) IR on the basis of the information provided to it by either the debtor (in an \textit{ex parte} hearing) or a petitioning creditor.

The Insolvency Regulation contains no express rule to resolve cases where the courts of more than one Member State were to claim jurisdiction under Art. 3 (1). The observation in the Report Virgós/Schmit that 'such conflicts of jurisdiction must be an exception, given the necessarily uniform nature of the criteria of jurisdiction used', seems more like a mission statement. Practice shows that the courts in the Member States may very well have divergent opinions on the localisation of the debtor's
centre of main interests.\textsuperscript{66} The reality is that it will take a while before the European Court of Justice will have the opportunity to provide guidelines for a uniform interpretation of the provisions of the Insolvency Regulation, for example Art. 3 (1) IR. Until such time, solutions should be found along the lines of Community trust. It is observed in number 22 of the Preamble that the decision of the first court to open main proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

2.2.1.3 Territorial proceedings

Art. 3 (2) IR provides that, if the centre of the debtor's main interests is located in one of the Member States, the courts of another Member State have jurisdiction to open insolvency proceedings only if the debtor possesses an establishment within the territory of that Member State. The effects of such insolvency proceedings are restricted to the assets of the debtor situated in that Member State.\textsuperscript{67} If a main proceeding has been opened, such territorial proceedings are secondary proceedings and may be opened without the debtor's insolvency being examined.

Also territorial proceedings are recognised in other Member States by operation of law pursuant to Art. 16 IR, but, evidently, the effects of recognition are more limited. It entails that the effects of the territorial proceeding may not be challenged in other Member States. Any restriction of the creditors' rights provided for in the insolvency law governing the territorial proceeding, in particular a stay or discharge, shall produce effects vis-à-vis the debtor's assets situated in other Member States only with respect to those creditors who have given their consent.\textsuperscript{68}


\textsuperscript{67} Cf. Art. 3 (2), 17 (2), 27, 34 (2) IR For the determination of the location of assets, see Art. 2 (g) IR.

\textsuperscript{68} Art. 17 (2) IR.
Cross-border aspects of insolvency proceedings

of the territorial proceeding is of importance to the exercise of the administrator's powers. If moveable property has been moved to another Member State after the opening of the insolvency proceeding, the administrator may, pursuant to Art. 18 (2) IR reclaim such assets. Art. 18 (2) IR further stipulates that the local administrator 'may also bring any action to set aside which is in the interest of creditors.' Apparently, this phrase indicates that the administrator appointed in a territorial proceeding may bring action in other Member States aimed at returning to the local proceeding assets that, without the juridical act that the administrator seeks to reverse, would have been situated in the Member State where the proceeding is opened. It therefore refers to an action for the voidness, voidability or unenforceability of detrimental legal acts (Art. 4 io. 13 IR).\(^{69}\)

The concept of establishment is defined in Art. 2 (h) IR. It refers to any place of operations where the debtor carries out a non-transitory economic activity with human means and goods. This definition, however broad, shows that there must be at least a minimum level of organisation and that a purely occasional place of operations is not sufficient. In this respect the external appearance of the operations is decisive. Creditors who contract with the local establishment of a foreign company will not have to worry about the 'nationality' of their counterparty. The foreign company that has a presence on the local market is subject to the same rules as local firms.\(^{70}\)

The very open definition of 'establishment' in Art. 2 (h) IR reflects the compromise in respect of one of the most debated provisions of the Convention of 1995.\(^{71}\) Several Member States wished to link the jurisdiction to open local proceedings to the mere presence of assets (linked to an economic activity) in a given Member State without requiring the existence of an establishment. These Member States agreed to abandon the presence of assets as a basis for international jurisdiction, provided that the concept of establishment would be phrased in a broad manner. It was the express intention of the Member States that 'establishment' in the sense of the Insolvency Regulation, should not be interpreted in accordance with

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\(^{69}\) Cf. Report Virgós/Schmit, Nr 224.

\(^{70}\) Cf Report Virgós/Schmit, Nr 71

\(^{71}\) Cf. Report Virgós/Schmit, Nr. 70.
the more restrictive interpretation given by the ECJ to Art. 5 (5) of the Brussels Convention.⁷²

Functions of territorial proceedings
In the system of 'mitigated Europeanism' adopted in the Insolvency Regulation, territorial proceedings have two main functions. Firstly, they may serve to protect local interests.⁷³ Secondly, they may serve as 'auxiliary proceedings' to the main insolvency proceeding.⁷⁴

The protection of local interests through the possibility of opening local proceedings is thought to be twofold. Creditors are protected against the extra procedural costs involved in participating in a foreign insolvency proceeding (e.g. because of the need for foreign legal assistance, or costs of translation that creditors will incur in the process of submitting their claims in foreign proceedings). These increased access-costs could be particularly dissuasive for small creditors. In view of protection of the interests of local creditors it is important to observe that, given the general applicability of the *lex concursus* to the insolvency proceeding and its effects pursuant to Art. 4 IR, in principle, creditors' rights in the main insolvency proceeding will be determined by the law of the State where the centre of the debtor's main interests is located. Furthermore, these rights will have to be implemented and defended before the courts of that country.⁷⁵ Through the opening of a territorial insolvency proceeding, creditors who have concluded transactions with an establishment of a foreign company in conditions similar to a purely domestic transaction, may achieve that their legal relationship with the debtor will be settled in

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⁷³ Cf. Preamble, Nr. 11, 12; Report Virgós/Schmit, Nr. 32.

⁷⁴ Cf. Preamble, Nr. 19; Report Virgós/Schmit, Nr. 33.

⁷⁵ Virgos refers to the 'risks of internationality', see Virgos (1998), p. 8
the same manner as in an entirely domestic insolvency proceeding. The opening of local proceedings in this respect for example protects privileges attached to a claim by local law if this privilege would not be recognised in a foreign proceeding.

Territorial proceedings can also serve as auxiliary proceedings to the main proceeding. They can facilitate the effective and efficient winding up of the debtor's estate. To this end, Art. 29 (a) IR for example confers on the administrator in the main proceeding the power to request the opening of secondary proceedings. It is a particularly important instrument in case the administrator seeks to affect proprietary security rights of creditors in respect of assets situated in another Member State at the time of the opening of the proceeding. In accordance with Art. 5 IR, such rights are not affected by the opening of the main insolvency proceeding, so that any limitations that the lex concursus would impose on the exercise of for example security rights do not extend to assets situated in other Member States. The opening of secondary proceedings is necessary to 'include' encumbered assets in the insolvency proceeding to the extent provided for by the insolvency law of the secondary forum.

Co-operation and communication of information

The co-existence of more than one insolvency proceeding in respect of the same debtor requires that administrators (and courts) co-operate with and communicate information to each other. A duty for administrators to co-operate and communicate information is incorporated in Art. 31 IR. Given the central position of the courts in insolvency proceedings in many jurisdictions (e.g. with respect to supervision of the administration of the estate), it is remarkable (and unfortunate) that, unlike the UNCITRAL Model Law, the Insolvency Regulation does not provide for a similar obligation for courts.

'Independent' territorial proceedings

Territorial proceedings may also be opened prior to the opening of a main insolvency proceeding. According to number 17 of the Preamble, the cases

The provisions that confer certain powers on the administrator of the main proceeding in secondary proceedings, underline the subordination of secondary proceedings to the main proceeding (e.g. Art. 31 (2), 33, 34 IR). Cf. Report Virgós/Schmit, Nr. 14.
where local insolvency proceedings are opened before the main insolvency proceeding are intended to be limited to what is absolutely necessary. Therefore, Art. 3 (4) IR subjects the possibility to open independent local proceedings to a number of conditions. Upon examination of these conditions, the question arises, whether the opening of independent territorial proceedings will really remain as exceptional as intended. Pursuant to Art. 3 (4) IR territorial proceedings can be opened prior to the opening of a main insolvency proceeding, if

(a) the opening of main insolvency proceedings is not possible because the conditions laid down by the law of the Member State where the centre of the debtor's main interests is located, do not allow for insolvency proceedings to be opened. This may for example be the case if the debtor is a consumer and the place of his habitual residence only provides for the opening of insolvency proceedings in respect of merchants, or where the debtor is a State enterprise and the law of the Member State where the centre of its main interests is located does not allow for the opening of an insolvency proceeding in respect of such companies.\(^{77}\)

(b) the opening of the proceeding is requested by a local creditor, i.e. a creditor who has his domicile, habitual residence or registered office in the Member State where the debtor's establishment is located, or by a creditor whose claim arises from the operation of that establishment.

In particular the option for local creditors and creditors whose claim arises from the operation of the establishment to request the opening of a territorial insolvency proceeding prior to the opening of a main insolvency proceeding, may in practice not prove to be a very limiting factor. Tax authorities may for example be enticed to use insolvency proceedings as a means of tax collection at an earlier stage if the fear exists that assets will be transferred to another country. That tax authorities may lodge their claims in a main insolvency proceeding in another Member State (Art. 39 IR) may not be a dissuasive factor not to file a petition for the opening of territorial proceeding locally. The Insolvency Regulation does not

\(^{77}\) See Report Virgós/Schmut, Nr. 85.
guarantee local creditors, such as the tax authorities, that a statutory privilege connected to their claim is respected in a foreign main proceeding.\textsuperscript{78} Pursuant to Art. 4 IR, the \emph{lex concursus} determines the ranking of claims.

2.2.1.4 Allocation of assets

Territorial insolvency proceedings - whether independent (Art. 3 (4) IR) or secondary (Art. 27 et seq. IR) - only include the debtor's assets situated in the Member State where the proceeding has been opened. In order to determine which assets are included in a particular insolvency proceeding and to determine the scope of the powers of the administrator in respect of the debtor's assets, it is essential that these assets are localised in accordance with uniform criteria.

The effects of a territorial insolvency proceeding are restricted to the assets that are situated in the Member State where the proceeding has been opened. Which assets are included in the territorial proceeding must be determined at the time of opening of the territorial proceeding, i.e. the time at which the judgment opening the proceeding becomes effective, whether it is a final judgment or not.\textsuperscript{79} The \emph{situs} of assets must be determined in accordance with the criteria laid down in Art. 2 (g) IR. These criteria correspond to "traditional solutions of private international law which are well known in all the Contracting States".\textsuperscript{80} In accordance with the restrictions of this study, some remarks are made with respect to the localisation of moveables and claims.\textsuperscript{81}

\textsuperscript{78} Similarly, the absence of privileges in a particular State may be a reason to request the opening of a territorial proceeding in order to prevent assets from being moved to another State that attaches privileges to certain claims.

\textsuperscript{79} Art. 2 (f) IR.

\textsuperscript{80} Report Virgós/Schmit, Nr. 69.

\textsuperscript{81} Problems may arise with respect to the localisation of, for example, certain intellectual property rights and registered shares. The localisation of a Benelux trademark is complicated, for example. Under the Uniform Benelux Trade Mark Act, one single trade mark can be obtained for Belgium, the Netherlands and Luxembourg. Art. 8 of the Benelux Treaty concerning trade marks provides that the register for Benelux trade marks is kept under the authority of the Netherlands and has its seat in Den Haag (the Netherlands). Application of Art. 2 (g) IR to Benelux trade marks leads to the conclusion that Benelux trade marks can only be allocated to the main proceeding or a territorial proceeding opened in the Netherlands. It is submitted that, since one trade mark is obtained for the territory of all three
In respect of tangible property, the "Member State in which assets are situated" refers to the Member State within the territory of which the property is situated. Establishing the physical location of tangible property is generally possible. However, establishing where a particular asset was located at the time that the insolvency proceeding was opened, i.e. the moment that the judgment opening the insolvency proceeding became effective (sometimes with retro-active effect), may prove to be more problematic. In some cases the allocation of assets to a particular proceeding on the basis of their physical presence in a Member State will also be rather arbitrary. The presence of a particular asset in a particular Member State may be accidental, e.g. in case of transport materials and goods that are being transported from one country to another. Furthermore, the allocation of assets in accordance with the criteria laid down in the Insolvency Regulation to one or the other proceeding, is not quite clear and may have potentially far reaching and undesirable effects on the continuation of or a sale of (parts of) the debtor's business that - and this is the starting point of the Regulation - is carried out in more than one Member State through establishments (in stead of legal persons under local law). The opening of a territorial insolvency proceeding in a Member State leads to the administrator in another (main or territorial) proceeding losing the power over assets that, even though initially included in 'his' proceeding, at the time of opening of the territorial proceeding were present in that Member State.

Claims can only be localised by way of fictions. The Insolvency Regulation introduces a uniform rule on the localisation of claims in Art. 2 (g) IR. For contracting states, the Benelux trade mark should be dealt with in the same manner as the Community trade mark under Art. 12 IR and only be included in the main insolvency proceeding. A uniform rule on the allocation of registered shares has also not been incorporated. A rule may be formulated on the basis of the existing rules in Art. 2 (g) IR. A first approach, based on the second indent of Art. 2 (g) IR, is to localise shares in the Member State under the authority of which the shareholders' register is kept. A second approach is to apply the allocation rule for claims and to locate registered shares in the Member State where the legal person in which the shares are held, has the centre of its main interests. In many cases, the first and the second approach will lead to the same result. In a third approach, more consideration is given to the location of the shareholder. It could be argued that the shares are to be located in the Member State where the centre of the main interests of the shareholder is situated. This approach would result in shares always being included in the main proceeding only. In another approach, the law of incorporation (lex societatis) would govern the matter.
the purposes of the Regulation, claims of the insolvent person against a third party are deemed to be located within the territory of which the third party required to meet the claim, has the centre of his main interests as determined in Art. 3 (1) IR. This uniform rule does not necessarily lead to a uniform assessment regarding the localisation of claims. Courts in various Member States may have different views with respect to the location of the centre of a particular debtor's main interests. The localisation of claims and the resulting allocation to a particular insolvency proceeding, determines which administrator has the power to demand payment. From the point of view of the debtor, it also determines to whom payment must be made. In my opinion payment to another administrator than the one in whose proceeding the claim actually should be included will generally result in a discharge of the obligation, unless the debtor was aware that payment had to be made to another administrator. However, in my opinion a reasonable interpretation of the Regulation entails that the proceeds of the claim should be transferred to the proceeding in which the claim should be included on the basis of Art. 2 (1) IR.

Art. 2 (g) IR does not provide clarity on the localisation of a claim that originates from a transaction with the establishment of a party whose centre of main interests is located outside the European Union. In this respect one might think of a bankaccount held with an establishment of a non-European bank. It is submitted that such a claim must be allocated to the main proceeding or, where applicable, the territorial proceeding opened in the Member State where the bank's (or other type of debtor's) establishment is located.

2.2.2 UNICITRAL Model Law

With the exception of Art. 28, the Model Law does not contain rules that determine whether the courts (or other competent authorities) of the enacting State have jurisdiction to open insolvency proceedings and what the scope of insolvency proceedings opened in the enacting State shall be. This is not the objective of the Model Law.

82 If payment were made to the insolvent person, where the debtor was not aware of the opening of the insolvency proceeding, such payment would also result in a discharge (Art. 24 IR).
The relationship between jurisdiction and the scope of proceedings follows from the rules on recognition laid down in the Model Law. These rules, which are dealt with in paragraph 3, differentiate between main and non-main proceedings. A foreign main proceeding is a proceeding taking place in the State where the debtor has the centre of its main interests. A foreign non-main proceeding is a foreign proceeding, other than a foreign main proceeding, taking place in the State where the debtor has an establishment. The relief that will be granted in respect of recognition of a foreign main proceeding is more extensive than in case of a foreign non-main proceeding.

The Model Law contains a number of provisions that are aimed at providing the necessary framework for authorising an administrator to act abroad. Art. 5 Model Law stipulates that an administrator, or any other person or body administering an insolvency proceeding, is authorised to act in a foreign State on behalf of an insolvency proceeding opened in the enacting State. In States, such as Germany and the Netherlands, where such authorisation is implied, adopting a provision like Art. 5 would not be strictly necessary. However, as observed in the Guide to Enactment, it may be useful to provide clear statutory evidence of that authority.\textsuperscript{83} The formulation of Art. 5 clarifies that the action that the administrator may wish to take abroad will be action of the type dealt with in the Model Law and that the scope of the power exercised abroad by the administrator will depend on the applicable foreign law and the recognition of the proceeding by the foreign State.\textsuperscript{84}

Art. 28 Model Law, which deals with the opening of an insolvency proceeding after the recognition of a foreign main proceeding, directly links the jurisdiction of the court to the scope of the insolvency proceeding. The suggested approach is to confer jurisdiction on the courts of the enacting State if the debtor has assets in that State. The effects of such proceedings in principle are limited to assets located in that State.

Whatever the nature of the proceeding opened in a particular State - main or non-main - the UNCITRAL Model Law provides for the co-operation of the court and the administrator in that proceeding with the courts and

\textsuperscript{83} Cf. Guide to Enactment, Nr. 84.
\textsuperscript{84} Cf. Guide to Enactment, Nr. 85.
the administrators in foreign proceedings. Art. 25 (2) in this respect entitles the court to communicate directly with, or to request information or assistance directly from, foreign courts or foreign administrators. Art. 26 (2) provides that the administrator is entitled, in the exercise of his functions and subject to the supervision of the court, to communicate directly with foreign courts of foreign administrators.

2.2.3 German law

The legislation that has been introduced in Germany to complement the Insolvency Regulation, to a large extent follows the model of the Insolvency Regulation. Whether insolvency proceedings opened in Germany aim to encompass the debtor's assets that are situated outside of Germany depends on the grounds of jurisdiction of the court. German law distinguishes between main insolvency proceedings, which in principle aim to encompass the entire estate of the insolvent debtor, and local insolvency proceedings, so-called Partikularverfahren, which are limited to the assets of the insolvent debtor that are situated in Germany.

2.2.3.1 Main insolvency proceedings

The international jurisdiction of the German courts to open a main insolvency proceeding is established through application by analogy of the rules on territorial jurisdiction (venue) laid down in Art. 3 (1) InsO.

The determination of the competent court is primarily based on the economic activities carried out by the debtor. Jurisdiction is conferred on the court of the place from which (most of) the debtor's assets and his (most important) legal relationships are administered - the centre of the debtor's main interests. Pursuant to the second sentence of Art. 3 (1) InsO, jurisdiction to open an insolvency proceeding is exclusively conferred on the court of the region where the centre of an independent economic activity carried out by the debtor is located. Notwithstanding that the provision refers to 'an independent' economic activity and one debtor may

carry out several different activities, Art. 3 (1) *InsO* must be interpreted to refer to the centre of the debtor's economic activities.\(^86\) A material deviation from Art. 71 (1) *KO*, pursuant to which jurisdiction was conferred on the courts of the place where the debtor's principal place of business was located, was not intended.\(^87\) The phrase "an independent economic activity" intends to clarify that not just business activities, but any kind of economic activity, such as exercising an independent profession, is relevant for establishing jurisdiction.\(^88\) If the debtor does not carry out an independent economic activity within the meaning of the second sentence of Art. 3 (1) *InsO*, jurisdiction is conferred on the court that, pursuant to the relevant provisions of the Code of Civil Procedure,\(^89\) generally has jurisdiction in respect of actions brought against the debtor - the debtor's *allgemeine Gerichtsstand*. With regard to natural persons this is the court of the place where the debtor's domicile is located.\(^90\) With regard to legal persons this is the court of the place where the debtor's *Sitz* is located.\(^91\) Pursuant to Art. 17 (1) *ZPO* a legal person's *Sitz* in principle is located at the place where its administration is conducted. However, Art. 17 (3) *ZPO* indicates that a different location of the seat may follow from for example the articles of incorporation. Given the fact that the second sentence - centre of the debtor's main economic interests - is phrased as an exception, the court of the debtor's *allgemeine Gerichtsstand* will have jurisdiction unless it is established that the centre of the debtor's economic activities is located elsewhere.

Insolvency proceedings commenced by a German court that has jurisdiction pursuant to Art. 3 *InsO* aim to include all the debtor's assets, wherever located.\(^92\) The insolvency proceeding does not, however, encompass assets that are included in a local insolvency proceeding in the

\(^{86}\) Cf. Kirchhof in HK-InsO, § 3, Nr. 3.


\(^{88}\) Cf. BT-Drucksache 12/2443, p. 110; Flessner (IPRax 1997), p. 2.

\(^{89}\) Art. 12-18 *ZPO*.

\(^{90}\) Art. 13 *ZPO*.

\(^{91}\) Art. 17 *ZPO*.

\(^{92}\) Cf. BGH 18 September 2003, ZIP 2003, p. 2123. See also BR-Drucksache 715/02, p. 30; Kirchhof in HK-InsO (1999), Art. 102 *EGInsO*, Nr. 38; Flessner (IPRax 1997), p. 2.
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State where they are situated.\textsuperscript{93} Art. 21 of the draft provisions on international insolvency law presented by the Ministry of Justice in 1988 for discussion in the special commission on international insolvency law of the Deutsche Rat für Internationales Privatrecht, specifically stipulated that insolvency proceedings commenced in Germany would include assets situated abroad.\textsuperscript{94} A similar provision on the extraterritorial effect of insolvency proceedings opened in Germany has not been incorporated in (later drafts of) the Insolvenzordnung. The extraterritorial effect of insolvency proceedings was held to follow directly from Art. 35 InsO, stipulating that the insolvency proceeding comprises the debtor's entire estate, so that a specific provision on this issue would be superfluous.\textsuperscript{95}

Pursuant to Art. 80 (1) InsO the power to manage and dispose of assets belonging to the estate is transferred to the administrator as a result of the opening of the insolvency proceeding. The administrator must immediately take possession of and administer the assets that are part of the estate (Art. 148 InsO). The powers of the administrator extend to assets situated abroad, regardless whether in a specific case they can actually be enforced by the administrator.\textsuperscript{96} If the administrator's powers are not recognised in the State where assets are located, he depends on the cooperation of the debtor to collect and realise assets abroad. Pursuant to Art. 97 InsO the debtor must provide all information relevant to the proceeding and co-operate with the administrator in the performance of his duties. This may also entail the provision of a general power of attorney that enables the administrator to collect and realise assets situated abroad (such as bank accounts). The debtor is obliged to provide such power of attorney if, given the circumstances of the case, it is not unlikely that he has assets abroad.\textsuperscript{97}

Provisional protective measures
Under German law insolvency proceedings are commenced by a petition of the debtor or a creditor, but are not opened immediately by the court. The petition initiates the committal proceedings (Eröffnungsverfahren)\textsuperscript{98} in

\begin{itemize}
\item \textsuperscript{93} Cf. Hanisch (ZIP 1989), p. 276.
\item \textsuperscript{94} Cf. Stoll (1992), p. 9.
\item \textsuperscript{95} Cf. BT-Drucksache 12/2443, p. 235.
\item \textsuperscript{96} BGH 18 September 2003, ZIP 2003, p. 2123.
\item \textsuperscript{97} BGH 18 September 2003, ZIP 2003, p. 2123.
\item \textsuperscript{98} Art. 11 et seq. InsO.
\end{itemize}
which the court examines whether the requirements for the opening of an insolvency proceeding have been satisfied, in particular whether a ground for the opening of an insolvency proceeding exists and whether it is likely that the costs of the proceeding can be covered from the estate.\textsuperscript{99} Between the petition and the actual opening of the insolvency proceeding by the court some time may pass in which the debtor could for example dispose of assets or enter into obligations, which could prejudice the estate and the position of (existing) creditors. In order to prevent the position of creditors being prejudiced during the Eröffnungsverfahren, the court is obliged to take all measures which appear necessary to prevent a deterioration of the financial situation of the debtor.\textsuperscript{100} These protective measures can relate to the debtor's assets or his person. The court can in particular appoint a provisional administrator (vorläufiger Insolvenzverwalter), issue an order inhibiting the debtor to dispose of his assets, or order that disposition by the debtor of his assets is only valid with consent of the provisional administrator, and inhibit creditors to individually enforce their rights against the debtor's assets. Such protective measures ordered by a court that has jurisdiction pursuant to Art. 3 InsO also extend to the debtor's assets situated abroad.\textsuperscript{101}

With respect to a general prohibition of transfer of assets ordered in accordance with Art. 106 (1) KO, the Bundesgerichtshof in 1992 decided that such an order also affects the debtor's assets situated abroad.\textsuperscript{102} Art. 106 (1) KO referred to measures necessary for the purpose of protecting the 'Masse' - the estate. In its decision the Bundesgerichtshof observed that 'Masse' should be interpreted in the same way as 'Konkursmasse' in Art. 1 (1) KO and therefore included the debtor's assets situated abroad. The most important ground for the court's decision is that a general prohibition of transfer of assets ordered in the Eröffnungverfahren serves the same purpose as the eventual general attachment of the insolvent debtor's estate and the resulting divestment of the debtor in the actual insolvency proceeding. It aims to protect the estate for the benefit of the creditors and to safeguard the paritas creditorum. This aim of protection of assets and

\textsuperscript{99} Cf. Art. 16-19 and 26 InsO
\textsuperscript{100} Art. 21 (1) InsO.
\textsuperscript{101} Cf. Kirchhof in HK-InsO (1999), Art. 102 EGInsO, Nr. 38.
equal treatment of creditors would be frustrated if the assets of the debtor situated abroad would not be affected by the provisional measures ordered by the court. The Bundesgerichtshof also stated that, from the point of view of German law, it is irrelevant whether these protective measures are recognised abroad or not. 103 According to the Bundesgerichtshof the assumption of extraterritorial effect under German law does not interfere with a foreign State's (judicial power or) sovereignty as it is free to recognise the extraterritorial effect of these orders or not. From the decision of the Bundesgerichtshof it follows that any (pecuniary) advantage gained by acquisition of assets from the debtor or individual enforcement against the debtor's assets abroad, contrary to the order of the court, is considered to be unlawfully obtained and has to be turned over to the administrator. 104

The decision of the Bundesgerichtshof of 1992 referred to above concerned a general prohibition of transfer of assets imposed on the debtor. The grounds of this decision support the view that other protective measures ordered by the court in the Eröffnungsverfahren which are aimed at protecting the interests of the estate, creditors' rights and safeguarding the paritas creditorum, also affect assets situated abroad, i.e. under the same conditions as the insolvency proceeding would. 105

2.2.3.2 Territorial insolvency proceedings (Partikularverfahren über das Inlandsvermögen)

If German courts do not have jurisdiction to open a main insolvency proceeding in respect of a debtor pursuant to Art. 3 InsO, the opening of an insolvency proceeding that only includes the debtor's assets situated in Germany is possible under the conditions set forth in Art. 354 InsO. The considerations underlying Art. 354 InsO are similar to those of the Insolvency Regulation: protection of local interests where necessary and furthering an effective and efficient administration of the debtor's estate. 106 Such territorial proceedings may in principle be opened regardless of

103 Cf. Hanisch (IPRax 1993), p. 70.
104 The duty to turn over the proceeds of recovery abroad is based on unjust enrichment, see the reference made by the Bundesgerichtshof to its decision of 13 July 1983, ZIP 1983, p. 961.
106 Cf. BR-Drucksache 715/02, p. 30.
whether a main insolvency proceeding has been opened abroad (which in principle also affects assets situated in Germany, as will be discussed in paragraph 3).  

Only creditors or the administrator in a foreign main proceeding may apply for the opening of a Partikularverfahren. Such proceedings may not be opened at the request of the debtor. If a debtor sees reason to apply for the opening of an insolvency proceeding, he must do so in the State where the centre of his main interests is located. In this respect the Insolvenzordnung deviates from the Insolvency Regulation which does not prohibit the debtor from applying for the opening of an independent territorial proceeding. It follows from Art. 3 (4) IR that also a debtor may apply, if a main insolvency proceeding cannot be opened because of the conditions laid down by the law of the Member State where the centre of his main interests is situated.

In accordance with Art. 3 (2) IR, jurisdiction to open a Partikularverfahren is conferred on the German courts in case the debtor has an establishment in Germany. Contrary to the Insolvency Regulation, however, jurisdiction may also be established on the basis of the mere presence of assets in Germany. Such assets must have considerable value, however. In case of assets of only limited value the opening of an insolvency proceeding in Germany would be precluded by Art. 26 InsO, which requires that the value of the estate must be sufficient to cover the costs of the proceeding (as defined in Art. 54 InsO).

The creditor that applies for the opening of a Partikularverfahren must show a specific interest - besonderes Interesse - in the opening of the

107 Cf. Art. 354 and 356 InsO.
108 Cf. Art. 354 (2) and Art. 356 (2) InsO.
109 Cf. BR-Drucksache 715/02, p. 31.
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Such a specific interest may in particular exist, according to Art. 354 (2) *InsO*, if the creditor's position in a foreign insolvency proceeding is likely to be considerably worse than in a local German proceeding. By introducing the requirement that the petitioning creditor must show a specific interest, the German legislator tried to meet objections raised against the acceptance of the mere presence of assets as a sufficient jurisdictional basis for the opening of an insolvency proceeding on the one hand and the restrictions imposed by the requirement of an establishment on the other hand. The opening of a (parallel) insolvency proceeding in Germany should be avoided in cases where the liquidation of the debtor's estate in one unitary (foreign) proceeding would be more efficient and more economical.

Art. 354 *InsO*, unlike the old Art. 102 (3) *EGInsO*, provides for the distribution of territorial competence (venue) and conflicts resulting from multiple venue. Jurisdiction is primarily conferred on the insolvency courts of the district where the debtor's establishment is located. In the absence of an establishment in Germany, jurisdiction is conferred on the court of the district where the debtor's assets are located. The reference to the applicability of Art. 3 (2) *InsO* entails that, in case of multiple venue the court where the petition has been filed first, has exclusive jurisdiction to open the proceedings.

**Grounds for opening**

A precondition for the opening of an insolvency proceeding in Germany is the existence of a ground for opening of the proceeding - *Eroffnungsgrund* - as laid down in Art. 16-19 *InsO*. In principle, this applies to main


112 E.g if his chances of obtaining (partial) payment are clearly worse in a foreign main proceeding Cf Explanatory Report to Art. 354 *InsO*, BR-Drucksache 715/02, p 30.

113 Cf BT-Drucksache 12/2443, p 246.

114 Given the incompleteness of the provision, Leipold had suggested that Art. 102 (3) *EGInsO* should be interpreted in the sense as has now been laid down in Art. 354 *InsO* (Leipold (1995), p 540).

115 The debtor may have more than one establishment and/or assets in several places, throughout Germany.
as well as territorial proceedings. However, Art. 356 (3) InsO stipulates that, if a main insolvency proceeding has been opened abroad that is recognised in Germany, the existence of an Eröffnungsgrund does not have to be established. The question arises how the existence of the debtor's inability to pay (Zahlungsunfähigkeit) or overindebtedness (Überschuldung) should be established in case of a creditor's petition to open territorial proceedings prior to the opening of main insolvency proceedings abroad. Should they be determined by taking into account the debtor's world-wide financial position or just his financial situation in Germany?

As to the determination of a debtor's Überschuldung as a requirement for the opening of territorial proceedings, there is little difference of opinion in legal writing that the debtor's financial position has to be assessed on a global scale. All the debtor's assets, wherever located, must be compared with all existing claims against the debtor. This follows from the fact that it is the debtor, i.e. the (foreign) company and not for example the establishment - which is not a separate legal entity -, that is subject to the insolvency proceeding and that all creditors can submit their claims in the territorial proceeding, not only those creditors with claims arising out of transactions with the German establishment. Local assets may be 'separated' insofar as the effects of the insolvency proceeding are concerned, but not in the sense that they form a separate legal entity. If the debtor is not (globally) overindebted, creditors should seek satisfaction of their claims through individual recourse against the debtor's assets. There would not be a sufficient justification to subject the debtor to insolvency proceedings in Germany. Only taking into consideration the local assets would furthermore not make (economic) sense. Most, if not all, of the foreign companies operating through establishments in Germany would be overindebted and continuously run the risk of being subject to insolvency proceedings commenced by way of a creditor's petition.

116 Imminent inability to pay (Art. 18 InsO) is irrelevant in this respect. A creditor cannot request the opening of an insolvency proceeding based on the debtor's imminent inability to pay (Art. 18 (1) InsO). The debtor does not have the power to request the opening of a Partikularverfahren.


118 Cf. BT-Drucksache 12/2443, p. 237.

Cross-border aspects of insolvency proceedings

The same reasoning essentially applies to the determination of a debtor's inability to pay. Pursuant to Art. 17 (2) InsO inability to pay is established when a debtor is no longer able to meet his obligations as they become due, which as a rule can be assumed if the debtor has ceased to pay his debts. In determining whether a debtor is unable to pay his debts as they become due, the debts incurred by the debtor on a global scale should be taken into consideration. It is the debtor's, and not the establishment's, ability to pay due debts that has to be assessed. If the debtor's establishment in Germany lacks funds to pay due debts, but in other countries sufficient funds are available, creditors should seek to enforce their claims against the debtor by way of recourse in respect of the debtor's assets (abroad). There is no compelling reason to open insolvency proceedings in Germany. Again, in practice it will be difficult to establish that a debtor is unable to meet his obligations on a global scale. In its decision of 11 July 1991\(^{120}\) the Bundesgerichtshof had to decide on the question how the cessation of payments of an internationally operating company should be determined. The United States Lines (USL), a shipping company with registered office and principal business establishment in the USA, operated, \textit{inter alia}, a container service between the USA and Northern Europe. USL had a branch office in Bremen (Germany). On 24 November 1986 USL filed a petition for protection under chapter 11 of the US Bankruptcy Code. The competent American court on that same day determined that USL qualified to file the petition and was entitled to the benefits of Title 11, US Code, as a voluntary debtor. In a public statement USL announced that the loss-making around-the-world and transatlantic lines would be discontinued, however, that all goods on board ships would still be carried to their destinations. The lucrative transpacific and south america lines, including a railway service in the United States, would be continued under the protection of the US insolvency court. After the commencement of these proceedings, but before insolvency proceedings had been commenced in Germany on the basis of Art. 238 KO, a creditor attached containers that belonged to USL and claims of USL against German companies. After insolvency proceedings in respect of USL had been opened in Germany, the German Konkursverwalter tried to invalidate these attachments on the basis of Art. 30 KO. For the avoidance of the

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attachments under Art. 30 KO it was of importance to determine whether the attachments had taken place at a time when USL was in a situation that it had ceased to pay its debts. The Bundesgerichtshof decided that the standard for determining whether a company has ceased to pay its debts can only be the payment behaviour of the German branch, the principal establishment, and branches in other European countries. According to the Bundesgerichtshof, the purport of Art. 237 and 238 KO, i.e. the protection of creditors' reliance on local assets in extending credit to (foreign) debtors, would preclude to require a creditor that has extended credit to a German branch of a foreign company to seek enforcement against (unknown and not easily identifiable) assets in other parts of the world that are not easily identifiable for the creditor.

Co-operation with the administrator in a foreign main proceeding
If a main insolvency proceeding has been opened abroad, the administrator appointed in the German secondary proceeding is held to cooperate with the foreign administrator.\textsuperscript{121} He must communicate all information relevant to the operation of the main proceeding, he must give the foreign administrator the opportunity to provide suggestions as to the manner of realisation of the estate or any other use of the estate. A proposed plan (Insolvenzplan) must be presented to the foreign administrator, who himself also has the power to advance a proposal for a plan. The foreign administrator is entitled to participate in the meetings of creditors.

2.2.4 Dutch law

2.2.4.1 Jurisdiction

Unless treaties or other international regulations binding upon the Netherlands provide otherwise, the international jurisdiction of the Dutch courts to open an insolvency proceeding is established by Art. 2 Fw.\textsuperscript{122} Art. 2 Fw is primarily intended to determine the territorial competence of the court to open insolvency proceedings, but also serves as the basis for conferring

\textsuperscript{121} Cf. Art. 357 InsO.
\textsuperscript{122} See also Art. 214 (1) Fw.
international jurisdiction on Dutch courts. Art. 2 Fw must be applied by the courts ex officio. Whether a court has jurisdiction to open an insolvency proceeding must be determined on the basis of the circumstances at the time the petition is submitted to the court.

Pursuant to Art. 2 (1) Fw, Dutch courts have jurisdiction to open insolvency proceedings against natural and legal persons with domicile in the Netherlands. Whether a debtor's domicile is located in the Netherlands must be determined in accordance with the general rules of private law. Accordingly, Dutch courts have jurisdiction to open an insolvency proceeding in respect of natural persons whose place of residence is located in the Netherlands and in respect of legal persons whose registered office (siège statutaire) is located in the Netherlands. But also if the debtor's domicile is not located in the Netherlands in the aforementioned sense, Dutch courts may have jurisdiction. Pursuant to Art. 2 (4) Fw a debtor that carries on a business or practices a profession through an office in the Netherlands - the term office including a head office (centre of main interests) as well as a branch office (establishment) - may be subject to an insolvency proceeding in the Netherlands.

Art. 2 (2) Fw also confers jurisdiction on the Dutch courts if a debtor no longer has his domicile or an office in the Netherlands at the time of the

123 Art 10 Rv Cf HR 24 December 1915, NJ 1916, p 417 (Van Loo / Herzog Heinrich), Strikwerda (2002), Nr 215, Van Rooij / Polak (1987), chapter 3 1
124 Cf HR 28 January 1983, NJ 1983, 465, comm B Wachter (Fastwin VII BV / Schwirtz) a petitioning creditor is not protected against the fact that the debtor's registered office as mentioned in the Trade Registry does not correspond with the actual registered office. A choice of forum clause in a contract vesting jurisdiction in a foreign court is of no effect, see e.g Hof Arnhem 28 November 1984, NJ 1985, 652 (Cassa di Risparmio e Deposito di Prato s p a / X)
125 Cf HR 12 June 1925, NJ 1925, 994 (Koenders), HR 9 September 1947, NJ 1947, 571 (Gabrielle de K), HR 2 April 1982, NJ 1982, 319 (X / Amev) With respect to German law, see Kirchhof in HK-InsO, § 3, Nr 5
126 Art 1 10-15 BW
127 See, with respect to the domicile of natural persons, Asser-De Boer, Nr 53-63
128 See, with respect to the 'domicile' of legal persons, Asser-Maeijer 2-III, Nr 25, Asser-Van der Grinten-Maeijer 2-II, Nr 47-55a
129 The Faillissementswet contains no definition of the term 'office' Generally an office is understood to be a space permanently used in connection with the activities of the company (Van der Feltz, I, p 253, Asser-Van der Grinten-Maeijer 2-II, Nr 54) Cf Art 2 (h) IR
The purport of this provision is to prevent a debtor in financial difficulties from avoiding bankruptcy proceedings in the Netherlands simply by transferring his domicile abroad. It is not required that, at the time of the transfer of domicile, the debtor already met the substantive conditions for the opening of a bankruptcy proceeding as set forth in Art. 1 (1) Fw. Following a decision of the Hoge Raad of 1982, Art. 2 (2) Fw is not subject to any other restriction than that, at the time of the transfer of his domicile abroad, the debtor owed one or more debts - not necessarily due and payable - to the creditor that has requested the opening of the bankruptcy proceeding. It is irrelevant how much time has expired between the debtor's transfer of domicile abroad and the filing of the petition to open insolvency proceedings. Art. 2 (2) Fw is primarily relevant in respect of natural persons. They can move their domicile from the Netherlands to another country. It has no significance as far as legal persons incorporated under Dutch law are concerned because these must have their registered office (siège statutaire) in the Netherlands. In exceptional circumstances, transfer of the regis-

130 Notwithstanding the observations to that effect made during the debate in Parliament (Van der Feltz, I, p. 253), Art. 2 (2) Fw does not refer to the debtor moving his office abroad (in the sense of Art. 2 (4) Fw). That Dutch courts have jurisdiction to open an insolvency proceeding in respect of a debtor who moves his office abroad, while leaving debts unpaid, follows from HR 1 July 1976, NJ 1977, 263, comm. B. Wachter (Pronk). Such extension of the jurisdiction of the Dutch courts was rejected by, inter alia, Advocate General Berger in his advisory opinion to the aforementioned decision, and Hof Amsterdam 16 February 1928, NJ 1929, 51.

131 Cf. Van der Feltz, I, p. 249.

132 HR 18 February 1904, W. 8037; HR 3 December 1982, NJ 1983, 495, comm. B. Wachter (Boddaert q.q./Van Veen).

133 Requiring the debt(s) to be due and payable would be inconsistent with the rule that bankruptcy proceedings can be opened at the request of a creditor whose claim is not yet due and payable (e.g. HR 7 December 1990, NJ 1991, 216 (Roham/Planex)).

134 HR 3 December 1982, NJ 1983, 495, comm. B. Wachter (Bol q.q.). See also the advisory opinion of the Advocate-General Ten Kate to the aforementioned decision. In his commentary to this decision, Wachter argues that jurisdiction under Art. 2 (2) Fw should also be assumed if the debt owed to the petitioning creditor did not yet exist at the time of the debtor's transfer of domicile, but arises from a legal relationship existing at that time.

135 HR 27 November 1903, W. 7998.

136 Cf. Art. 2:27 (4), 2:53a, 2:66 (3), 2:177 (3), 2:286 (4) BW. Transfer of the registered office (siège statutaire) is, with a few exceptions, only possible by dissolution and winding-up of the legal person in the Netherlands, followed by incorporation of a new legal person abroad (see, inter alia, Vlas (2002), Nrs. 19-23; Bellingwout (1996), chapter 3; Asser-Maeijer 2-III, Nr. 25; Asser-Van der Grnten-Maeijer 2-II, Nr. 49a).
tered office abroad while maintaining legal personality under Dutch law is possible, but only if Dutch law and the law of the 'country of immigration' allow such transfer.\(^{137}\) Art. 2 (2) Fw could possibly apply to legal persons incorporated under foreign law, if that law allows the legal person to have its registered office abroad.\(^{138}\)

The mere presence of assets in the Netherlands does not provide a sufficient jurisdictional basis for the opening of an insolvency proceeding. Given the position of Dutch law in respect of the effects of a foreign insolvency proceeding in the Netherlands, another approach would not have been unthinkable. Case law shows that a foreign insolvency proceeding does not include the debtor's assets situated in the Netherlands and, consequently, does not prevent creditors from individually taking recourse against the debtor's assets situated in the Netherlands. Assets situated in the Netherlands can only be included in a (collective) insolvency proceeding if it is opened in the Netherlands. However, in the absence of an establishment in the Netherlands, a debtor with domicile or registered office in a foreign country cannot be subject to an insolvency proceeding in the Netherlands. A logical corollary of the limited effect that foreign insolvency proceedings have in respect of assets situated in the

\(^{137}\) Rijkswet vrijwillige zetelverplaatsing van rechtspersonen, 9 March 1967 (Stb. 1967, 161); Rijkswet zetelverplaatsing door de overheid van rechtspersonen en andere instellingen, 7 March 1967 (Stb. 1967, 162); Wet vrijwillige zetelverplaatsing derde landen, 13 October 1994 (Stb. 1994, 800). Art. 4 of the Wet conflictenrecht corporaties (17 December 1997, Stb. 1997, 699) deals with the transfer of the registered office from one foreign country to another.

\(^{138}\) Whether Dutch law accepts that a legal person incorporated under foreign law can have its registered office (siège statutaire) in the Netherlands, is unclear. Opinions on this issue are divided. On the one hand, it is argued that a legal person incorporated under foreign law cannot have its registered office in the Netherlands and that transfer or establishment of a foreign legal person's registered office to or in the Netherlands, would imply the nullity of that legal person under Dutch law (Cf. Bellingwout, § 3.1.2 and 3.2.3; Asser-Van der Grinten-Maeijer 2-II, Nr. 66). On the other hand, it has been argued that Dutch law cannot deny recognition to foreign legal persons with a registered office in the Netherlands, if permitted by the law of incorporation (Henriquez (1961), p. 66; Vlas (1982), p. 53; Vlas (2002), Nr. 17). Cf. Rb. Rotterdam 20 August 1993, NJ 1994, 356 (appeal of Ktg. Rotterdam 30 June 1992, not published); Vlas (TVVS 1994), p. 78; Nethe (WPNR 1992), p. 701.
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Netherlands, would have been the conferral of jurisdiction on Dutch courts on the basis of the presence of assets in the Netherlands.\textsuperscript{139}

2.2.4.2 Extraterritorial effect

A bankruptcy proceeding under Dutch law is generally described as a proceeding that results in a general attachment of all of the debtor's assets for the purpose of liquidation of those assets for the benefit of all his creditors. In particular the perception of a bankruptcy proceeding as resulting in a judicial attachment has been used as an argument to support the view that a bankruptcy proceeding only includes assets situated in the Netherlands.\textsuperscript{140} It is generally accepted that an order issued by a Dutch court cannot lead to attachment on assets situated outside the Netherlands.\textsuperscript{141}

The \textit{Hoge Raad}, however, has not followed this view on the cross-border implications of insolvency proceedings. With reference to the aims and objectives of bankruptcy proceedings - realisation of the debtor's entire estate for the benefit of the creditors -, the \textit{Hoge Raad} in a decision of 15 April 1955 determined that a bankruptcy proceeding opened in the Netherlands includes all the debtor's assets, wherever located.\textsuperscript{142} The \textit{Hoge Raad} observed that there is no provision of Dutch insolvency law that prohibits the administrator from taking control of assets of the debtor that are situated abroad, if and to the extent possible. The actual limits of the powers of the administrator in respect of assets situated abroad do not follow from the intention of the legislator to limit the effects of the proceeding to assets situated in the Netherlands, but from the limits that follow from the sovereignty of States, according to the \textit{Hoge Raad}.

\textsuperscript{139} Cf. Wachter in his commentary to HR 3 December 1982, NJ 1983, 495, who notes a discrepancy between Art. 765 et seq. \textit{Rv} (saisie foraine) and the court's interpretation of Art. 2 (2) \textit{Fw}.

\textsuperscript{140} This was the view of inter alia the \textit{Staatscommissie} charged with the drafting of the \textit{Faillissementswet} (cf. Van der Feltz, II, p. 466), the (majority of the) Council of State (cf. Van der Feltz, II, p. 294). See also Molengraaff (1951), p. 583-584. This view was also adopted in early case law, see Hof 's-Gravenhage 9 October 1914, W. 9749.

\textsuperscript{141} Cf. Verheul (1968), p. 19 and 143.

That a bankruptcy proceeding opened in the Netherlands aims to also include the debtor's assets situated outside of the Netherlands, is supported by Art. 20 and 203-205 Fw. Art. 20 Fw stipulates that the estate includes all the assets of the debtor at the time of the opening of the proceeding (as well as assets acquired thereafter). In the explanatory report to the Faillissementswet the possible international implications of this provision are not referred to. It is merely observed that a bankruptcy proceeding includes not just a part of the estate of the debtor but rather all the assets belonging to the debtor, without exceptions.\textsuperscript{143} As the Hoge Raad observed in its decision of 1955, Art. 20 Fw not only refers to assets that are actually affected by the bankruptcy proceeding opened in the Netherlands, but also to those assets to which, in accordance with the objective and purpose of the bankruptcy proceeding, the effects of the proceeding ought to extend.\textsuperscript{144} Art. 203-205 Fw, which will be dealt with in more detail later on, impose an obligation on ordinary unsecured creditors to turn over to the estate any proceeds of recourse against assets situated outside the Netherlands. These provisions are based on the assumption that insolvency proceedings in principle include the debtor's entire estate, regardless of the location of the assets.\textsuperscript{145} They show that the legislator has taken into account that foreign jurisdictions may, notwithstanding the insolvency proceeding opened in the Netherlands, allow creditors to individually take recourse against the debtor's assets.\textsuperscript{146}

That the Hoge Raad has determined the scope of bankruptcy proceedings on the basis of the aims and objectives of such proceedings, also supports the view that the extraterritorial effect equally applies in respect of other types of insolvency proceedings opened in the Netherlands, such as suspension of payments.\textsuperscript{147} The objective of a suspension of payments granted by the court is to provide the debtor with an opportunity to restructure his liabilities by establishing a temporary stay on the enforcement of claims of ordinary unsecured creditors against his assets. The objective of the proceeding requires that the stay extends to all the debtor's

\textsuperscript{143} Cf. Van der Feltz, I, p. 340 See, however, the observations by Mr Swart (member of the Council of State), Van der Feltz, II, p. 298.

\textsuperscript{144} Cf. Jitta (1894), p 19; Veder (1996), p 295-296


\textsuperscript{146} Cf. Van der Feltz, II, p. 292.

assets, wherever they are located. That the legislator did not intend to make a distinction between the cross-border implications of bankruptcy (liquidation) and suspension of payments (reorganisation) proceedings, also follows from the fact that the Art. 203-205 Fw apply by analogy to the suspension of payments proceedings.\(^{148}\)

The administrator who is appointed in a Dutch bankruptcy proceeding and on whom the right to administer and dispose of the debtor's assets is conferred by virtue of Art. 68 Fw, will have to try to collect (and realise) the debtor's assets that are situated abroad. Whether and, if so, to what extent insolvency proceedings opened in the Netherlands have extraterritorial effect, ultimately depends on the law of the State where the effects of the Dutch proceedings have to be assessed, e.g. the State where the administrator wishes to reclaim or realise assets. That law decides whether and to what extent the effects of an insolvency proceeding under Dutch law are recognised.

The administrator may be able to exercise his powers \textit{qualitate qua} if the State where he wishes to act, recognises the Dutch insolvency proceeding and the powers conferred on the administrator in that proceeding. The debtor is obliged to fully co-operate with the administrator in that respect.\(^{149}\) Case law shows examples of ways in which the courts have tried to deal with the situation that under the relevant foreign law the Dutch proceeding and the powers of the administrator were not recognised. Based on the assumption that the debtor is under a general obligation to fully co-operate with the administrator in the realisation of his assets,\(^{150}\) debtors have been required, sometimes forced, to grant a (notarial) power of attorney to the administrator in order to enable him to collect and realise assets situated abroad.\(^{151}\) The use of such a power of

\(^{148}\) Cf. Art. 251 Fw. \textit{The Faillissementswet} does not provide that Art. 203-205 also apply to the debt reorganisation proceeding for natural persons. This omission will be rectified by Bill 27 244.

\(^{149}\) E.g. Rb. Breda 16 June 1987, NJ 1988, 865, where the court issued an order that the bankrupt debtor was to permit that the balance of a German bankaccount be transferred to the administrator. Cf. Rb. Arnhem 21 January 2004, JOR 2004/145, comm. P.M. Veder.


\(^{151}\) Hof 's-Hertogenbosch 16 April 1981, NJ 1981, 524: a bankrupt was kept on remand in custody for over six months for failure to comply with a judicial order to grant a power of attorney to the administrator with respect to immoveable property.
attorney in order to ensure that the debtor's assets situated abroad can in fact be included in a Dutch bankruptcy proceeding, had already been suggested in and during parliamentary debate on early drafts of the FAILISSEMENTSWET, but was not adopted by government in the eventual Bill.152

Extraterritorial effect only with respect to 'domiciliary' proceedings?

Dalhuisen has argued that only an insolvency proceeding opened in respect of a debtor with domicile or registered office in the Netherlands, includes the debtor's assets situated outside the Netherlands.153 The effects of an insolvency proceeding in respect of a debtor that, for example, has a branch in the Netherlands, in his opinion are restricted to assets situated in the Netherlands. In support of this view he refers to decisions of the Hoge Raad of 9 June 1899 and 5 November 1915.154

I agree with Dalhuisen to the extent that in certain cases assuming extraterritorial effect is not realistic. Recognition of the effects of an insolvency proceeding in other States will also generally depend on the grounds on which the court assumed jurisdiction. However, in my opinion there is no basis in present Dutch law for the argument that the extraterritorial effect assumed in respect of an insolvency proceeding depends on the grounds of jurisdiction. It is submitted that under present Dutch law insolvency proceedings opened in the Netherlands claim extraterritorial effect, regardless of the grounds of jurisdiction.155 The aims and objectives of insolvency proceedings, referred to by the Hoge Raad in its decision of 1955 in support of the assumption of extraterritorial effect, do not differ according to the grounds of jurisdiction. The FAILISSEMENTSWET at present located in Italy, Hof s-Hertogenbosch 6 July 1993, NJ 1994, 250 a woman, who had been married in the regime of community of assets, whose ex-husband had been declared bankrupt prior to the divorce having become final, was ordered to grant a (notarial) power of attorney to the administrator in view of selling immovable property located in Spain. The latter judgment is not based on good grounds in my opinion. The (ex-) wife of the bankrupt debtor, even if married in community of assets, is not subject to the obligations to co-operate with the administrator in the realisation of assets. She could merely be required to provide information on the basis of Art. 105 (2) Fw. Cf. BGH 18 September 2003, ZIP 2003/46, p 2123.

152 Cf Van der Feltz, II, p 290-314, Kosters/Dubbink (1962), p 853
153 Cf Dalhuisen (1992), p 191 See also Polak (1972), p 393
154 HR 9 June 1899, W 7292, HR 5 November 1915, NJ 1916, p 12

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contains no basis for a limitation of the effects of insolvency proceedings opened in the Netherlands. Pursuant to Art. 20 Fw a bankruptcy proceeding encompasses all the debtor's assets, without any kind of restriction based on the jurisdiction of the court. That a distinction between domiciliary and non-domiciliary proceedings - or in fact any other kind of distinction based on the jurisdiction of the court - as far the extraterritorial effect is concerned, is not made, also can be said to follow from Art. 203-205 Fw. These provisions apply to any insolvency proceeding opened in the Netherlands.  

The decisions Dalhuisen refers to in any event do not support the assumption that under present Dutch law the extraterritorial effect of insolvency proceedings is limited to 'domiciliary' proceedings. In the decision of 1899, concerning the effects of a composition, the Hoge Raad leaves the question open whether this is a principle underlying the Faillissementswet. It could do so, because prior to 1963 the Hoge Raad could only address alleged misinterpretations of statutory provisions. As the court observes, no reference to any such limitation can be found either in a specific statutory provision, or the travaux préparatoires of the Faillissementswet. The decision of 1915 concerned the applicability of provisions of the Dutch Faillissementswet in an insolvency proceeding opened in Belgium. The court's observation that the Faillissementswet is intended to apply only in the Netherlands must be read against this background. The Hoge Raad decided that provisions of Dutch insolvency law do not apply in a foreign insolvency proceeding. It has not set any limitation to the inclusion of foreign assets in an insolvency proceeding opened in the Netherlands. In that respect, the Hoge Raad in 1955 decided that the Faillissementswet does not contain any such limitation.  

**Assets included in a foreign insolvency proceeding**

The assumption that an insolvency proceeding opened in the Netherlands also encompasses the debtor's assets situated abroad cannot be extended to situations where assets are included in an insolvency proceeding opened in another State. In 1917 the Hoge Raad decided that the powers of

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156 It would be inconsistent if, as Dalhuisen appears to suggest (Dalhuisen (1991), p. 191), a creditor would be compelled to turn over the proceeds of recovery abroad if the assets concerned are not included in the proceeding.

a foreign administrator over assets situated in the State where the insolvency proceeding has been opened, are recognised under Dutch law.\textsuperscript{158} Consequently, assets that are included an insolvency proceeding abroad cannot at the same time be deemed to be included in the Dutch proceeding.

In this respect, it might be argued that Dutch law in fact provides for secondary proceedings in the sense that an insolvency proceeding opened in the Netherlands will only include assets situated in the Netherlands if in another State an insolvency proceeding has been opened that can be characterised as a main proceeding.\textsuperscript{159} In that case it would be realistic and in line with the aforementioned decision of the \textit{Hoge Raad} of 1917 to assume that the powers of the foreign administrator in respect of the debtor's assets situated both in and outside the State where the proceeding was opened (with the exception of the Netherlands), are recognised and respected. The matter is not dealt with in the \textit{Faillissementswet}, however, which neither addresses issues of co-operation and communication between the Dutch and the foreign proceedings.

2.3 Creditors' duty to account for the proceeds of recovery abroad

2.3.1 Introduction

Starting from the assumption that an insolvency proceeding includes all the debtor's assets, wherever they are located, any restrictions imposed on the rights of creditors to individually take recourse against these assets also apply to assets situated in other States. However, whether the assets situated in other States are in fact included in the insolvency proceeding and whether creditors can in fact no longer individually enforce their claims against these assets, ultimately depends on the law of the State where recourse is sought on the assets.

The law of that State may not recognise the claim for extraterritorial effect of the insolvency proceeding at all or, while in principle recognising that

\textsuperscript{158} HR 20 February 1917, NJ 1917, p 347 et seq.

\textsuperscript{159} The opening of an insolvency proceeding in respect of the debtor in another state does not preclude the opening of an insolvency proceeding in the Netherlands, cf. HR 1 May 1924, NJ 1924, p. 847.
the assets situated in that State are included in the foreign proceeding, may nevertheless allow creditors to individually take recourse against the assets situated in that State. This raises the question whether creditors can be obliged to turn over the proceeds of such recovery abroad to the estate.

Accepting such an obligation, from the point of view of the State where the insolvency proceeding has been opened, is justified in cases where a creditor enforces his claim when he could not have done so in a purely national context. Individual recourse on the debtor’s assets situated abroad runs contrary to the protective effect of the insolvency proceeding, in relation to the debtor as well as in relation to the other creditors, and leads to an infringement on the paritas creditorum. Claims that should have been satisfied within the framework of the insolvency proceeding, are now satisfied directly from the debtor’s assets and in priority to all other insolvency claims. The Insolvency Regulation, the Model Law and German and Dutch law provide for remedies to uphold the paritas creditorum in an international context and to - indirectly - enforce the restrictions imposed on creditors with insolvency claims to take recourse individually on assets situated abroad.

A related issue, which also concerns the matter of upholding the paritas creditorum from the point of view of the law of the State where the insolvency proceeding has been opened, is the duty of creditors to account for dividends received in foreign insolvency proceedings. Creditors may recover (part of) their claims by way of dividends received in insolvency proceedings opened abroad. The opening of insolvency proceedings opened in for example Germany or the Netherlands, does not preclude the opening of insolvency proceedings abroad, just as the opening of insolvency proceedings abroad does not preclude the opening of insolvency proceedings in the Netherlands or Germany. In this case the question arises whether and, if so, how and to what extent creditors are obliged to account for the dividends received in the foreign insolvency proceeding.

160 Cf. Art. 237 KO.
2.3.2 Proceeds of individual recourse

2.3.2.1 Insolvency Regulation

As a logical corollary to the European scope of main proceedings, the Insolvency Regulation provides for the return of moneys a creditor has received outside of the collective framework of the insolvency proceeding. Pursuant to Art. 20 (1) IR, a creditor who, after the opening of a main insolvency proceeding, obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, must return what he has obtained to the estate. The administrator may demand either the return of the assets received or the equivalent in money.

Art. 20 (1) IR indicates that the rule on return operates within the limits of Art. 5 and 7 IR, pursuant to which proprietary rights of creditors and third parties in respect of assets situated outside the State of the opening of the proceeding, are not affected by the opening of a main insolvency proceeding.

The formulation of this provision deviates from the general rule of the Insolvency Regulation that the position of the parties involved in the proceeding is governed by the lex concursus. In some jurisdictions certain categories of creditors, other than creditors with a proprietary right in the debtor's assets, may be entitled to enforcement outside of the collective framework of the insolvency proceeding. A suspension of payments granted to a debtor under Dutch law, for example, does not affect creditors with claims to which a statutory privilege\footnote{A right to claim preferential payment that cannot be characterised as a 'right in rem' for purposes of Art. 5 IR.} is attached. Creditors with a privileged claim are allowed to take recourse against the debtor's assets individually. If the suspension of payments proceeding in the Netherlands is the main proceeding in terms of the Insolvency Regulation, it follows from Art. 4 IR that the position of creditors in the proceeding, e.g. with respect to a continued possibility of individual enforcement of claims, is governed by the lex concursus. If a privileged creditor were to enforce his claim against assets situated in another
Member State, this could - from the point of view of the law governing the main proceeding (i.e. Dutch law) - not be regarded as an action that contravenes the applicable rules of insolvency law. Nevertheless, Art. 20 (1) IR requires the creditor to turn over to the estate the proceeds of recovery.

2.3.2.2 UNCITRAL Model Law

The Model Law contains no rules concerning a duty for creditors to account for total or partial satisfaction of claims by way of individual enforcement against the debtor's assets or performance of obligations by the debtor, that would contravene the rules on (equal) treatment of creditors of the *lex concursus* or the relief granted in respect of that proceeding abroad. Such rules are usually in place in national laws that start from the 'universal effect' of insolvency proceedings opened in that jurisdiction. The Model Law does, of course, contain rules on the recognition of foreign (main) proceedings and a stay on enforcement of claims against assets in the enacting States. In the absence of specific rules, any action taken by creditors or debtors that would run contrary to relief granted in the enacting State, must be addressed by the appropriate rules of the national law. However, as recognition of the powers of foreign administrators to bring such action against creditors who have obtained partial or total satisfaction of their claims may raise problems, it is regrettable that explicit rules on this issue have not been incorporated. That such rules have not been incorporated in the Model Law, of course does not prevent such rules from being implemented in national jurisdictions.

2.3.2.3 German law

Until March 2003, the *Insolvenzordnung* did not contain specific provisions with respect to the consequences of individual enforcement of claims abroad in contravention to Art. 89 and 35 *InsO*.

In 1903, the silence of the *Konkursordnung* on this matter was one of the reasons for the *Reichsgericht* to decide that a duty to turn over the proceeds
of individual recovery abroad could not be accepted 162 The decision that such duty could not be imposed on creditors was further based on the observation that German law was not in a position to prohibit individual claim enforcement abroad, so that Art 14 KO - now Art 89 InsO - could only regard assets situated in Germany. A creditor who had taken recourse against assets situated in another State in accordance with the lex executionis could therefore not be said to have acted in contravention of the law. Furthermore, in the mirror-inverted situation, Art 237 KO also allowed creditors to individually enforce claims against assets situated in Germany, notwithstanding the opening of insolvency proceedings abroad.

This decision of the Reichsgericht of 1903 was the - criticised163 - point of departure in German law until the Bundesgerichtshof in 1983 adopted a different approach. In its decision of 13 July 1983 the Bundesgerichtshof accepted that a creditor with an insolvency claim, whose claim had been partially satisfied through enforcement against the balance of a bank-account kept by the debtor in Switzerland, was obliged to turn over the proceeds of recovery to the German administrator 164 The Bundesgerichtshof argued that this obligation followed from the general rules on unjust enrichment 165. It would be contrary to the principle of the partitas creditorum, which the rules on the protective effect of insolvency proceedings - in particular the prohibition imposed on creditors to individually enforce insolvency claims against the debtor's assets (Art 89 InsO)-

162 Reichsgericht 28 February 1903, RGZ 54, p 193 et seq (Kosmos)
163 Cf H Hanisch (1977), Luer (KTS 1978/1979)
164 BGH 13 July 1983, BGHZ 88, p 147 et seq, IPRspr 1983 Nr 205 Cf Hanisch (ZIP 1983)
165 See, with respect to the applicability of the German rules on unjust enrichment, Hanisch (ZIP 1983) and Trunk (1998), p 160 et seq. Both authors also deal with other possible grounds for the estate's claim to turn over proceeds of recovery abroad, such as breach of duty (based on Art 14 KO [89 InsO]), delict and management of another's affairs without mandate. Critical of the applicability of the German rules on unjust enrichment Insolvenzrechtshandbuch-Arnold, Nr 79-85. There it is argued that, if a creditor has also submitted his claim in the German insolvency proceeding, he must account for the moneys received abroad in the dividends to be obtained in the insolvency proceeding. The creditor will not receive dividends until creditors of the same class have received an equal percentage on their claims. A different interpretation of this duty to equalise is given by Hausmann, who argues that the creditor must account for the moneys recovered abroad in his claim, so that, to the extent the claims has not been satisfied from the realisation proceeds, he is entitled to receive dividends (Internationales Vertragsrecht-Hausmann, Nr 1801).
aim to safeguard, if a creditor would achieve a preference over other creditors through individual enforcement against assets situated abroad. These assets are - according to German law - part of the insolvent estate, the proceeds of which should be distributed within the framework of the proceeding in accordance with the ranking of claims in the insolvency proceeding. The creditor from whom the administrator claims back the proceeds, may subtract any costs necessarily incurred with respect to the recovery abroad.\footnote{166}{Cf. Hanisch (ZIP 1983), p. 1292.} He can participate in the proceeding and is entitled to dividends for the full amount of his claim. If a distribution had already been made to other creditors, he does not have to turn over the proceeds to the amount of the dividend he would have received in the German insolvency proceeding.

The case which led the \textit{Bundesgerichtshof} to its aforementioned decision, concerned a 'local' creditor - a bank with registered office in Germany - that had submitted its claim in the German insolvency proceeding. From the decision it did not become entirely clear whether the obligation to turn over proceeds of recovery abroad was limited to local creditors or extended to all creditors, both local and foreign, and whether it was relevant whether the creditor concerned had submitted his claim in the German insolvency proceeding. It was not likely, however, that the \textit{Bundesgerichtshof} intended to limit the obligation to turn over proceeds recovered abroad to creditors that had submitted their claim in the German insolvency proceeding.\footnote{167}{Cf. Hanisch (ZIP 1983), p. 1293 See, however. Aderhold (1992), p. 245.} There was no reasonable basis for such limitation and it would incite attempts to circumvent the insolvency regime. It would also favour the better informed, often larger, creditors who could more easily determine whether a debtor has assets abroad and whether the realisation proceeds of such assets would exceed the percentage they can expect to receive as dividend - if any - in the insolvency proceeding. Furthermore, the arguments advanced by the \textit{Bundesgerichtshof}, based on the rules of unjust enrichment, equally applied to creditors that have not submitted their claim in the insolvency proceeding. It was furthermore likely that the obligation to turn over proceeds of recovery abroad applied to all creditors because German insolvency law fundamentally did (and does) not distinguish between local and foreign...
creditors.\textsuperscript{168} Limiting the obligation to turn over proceeds of individual recovery abroad to 'local' creditors would in fact lead to discrimination of these local creditors.\textsuperscript{169} In this respect it would also seem irrelevant whether the foreign creditor could be subject to court proceedings in Germany.\textsuperscript{170} Whether the administrator brings an action against the creditor concerned should depend on his assessment of the success he would have by either bringing an action against the creditor abroad, or by enforcing abroad a judgment obtained against that creditor in Germany.\textsuperscript{171}

With the introduction of provisions on international insolvency law in March 2003, the issue has been dealt with in the \textit{Insolvenzordnung}. A general duty for creditors to turn over moneys received abroad is now provided for in Art. 342 (1) \textit{InsO}:

A creditor with an insolvency claim who, at the expense of the estate, obtains by way of enforcement, performance by the debtor or in another way, payment out of assets that are not situated in the State where the insolvency proceeding has been opened, must return to the administrator what he has obtained. The provisions on unjust enrichment apply mutatis mutandis.\textsuperscript{172}

\textsuperscript{168} Cf Hamsch (ZIP 1983), p 1293, Flessner (IPRax 1989), p 752
\textsuperscript{169} Cf Insolvenzrechtshandbuch-Arnold, § 122, Nr 82, Internationales Vertragsrecht-Hausmann, p 1399, footnote 43 The concern of possible discrimination against local creditors, which would result from the introduction of an obligation to turn over the proceeds of recovery abroad (Art 203-205 Fw), was also expressed during the parliamentary debate in the Netherlands, cf Van der Feltz, II, p 291 It was observed that such obligation would only be enforceable against local creditors, even if worded generally. The Dutch government in this respect observed that the lack of development of the international legal community should not prevent the introduction of this kind of obligation.
\textsuperscript{170} Cf Flessner (1989), p 752
\textsuperscript{171} Flessner's observation that it may not be ruled out that countries that impose a similar obligation, will either allow the administrator to bring action in that country or will facilitate the enforcement of a judgment obtained from a German court (cf Flessner (IPRax 1989), p 176), in view of HR 31 May 1996, NJ 1998, 108, comm Th M de Boer (De Vleeschmeesters), does not hold true for the Netherlands.
\textsuperscript{172} Art 342(1) \textit{InsO} Erlangt ein Insolvenzgläubiger durch Zwangsvollstreckung, durch eine Leistung des Schuldners oder in sonstiger Weise etwas auf Kosten der Insolvenzmasse aus dem Vermögen, das nicht im Staat der Verfahrenseröffnung belegen ist, so hat er das Erlangte dem Insolvenzverwalter herauszugeben. Die Vorschriften über die Rechtsfolgen einer ungerechtferigten Bereicherung gelten entsprechend. Cf Art 383 RegEInsO
This provision, which applies both in German and (subject to recognition) foreign insolvency proceedings, imposes a general duty on creditors to turn over to the administrator moneys received abroad (or in Germany) in contravention to the allocation of assets to the insolvency proceeding, be it by way of individual enforcement against the debtor's assets, performance by the debtor or in any other way. Pursuant to Art. 342 (3) InsO, the creditor is duty bound to inform the administrator, when so requested, about such recovery.

The duty to turn over the proceeds of recovery abroad generally does not apply to creditors who can invoke a security right in the assets realised. Also in German insolvency law, the right of secured creditors to receive the realisation proceeds of assets subject to a security right in priority to other creditors without having to contribute to the general costs of the proceeding, is accepted.

2.3.2.4 Dutch law

Art. 203-205 Fw, which bear the heading 'Provisions of international law', deal with the situation that a creditor's insolvency claim is satisfied (in part) from the proceeds of individual recourse against assets situated abroad, contrary to the rules of Dutch insolvency law. These provisions have been enacted in view of the possibility that de facto insolvency proceedings opened in the Netherlands would (often) not include assets situated in other States as a result of lack of recognition of the Dutch proceeding and its effects, thus enabling creditors to individually take recourse against the debtor's assets. The objective of these provisions is to enforce the insolvency regime and to safeguard the operation of the paritas creditorum, or rather, the ranking of claims according to Dutch law, in cross-border insolvencies. The proceeds of assets that, from the point of

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173 E.g. by assignment of a claim to a third party with domicile abroad who could then either enforce the claim on the basis of a security right or obtain satisfaction by way of set-off. Cf. Art. 50 and 56 KO; Art. 204 and 205 Fw.

174 Cf. BT-Drucksache 12/2443, p. 240. An explicit exception for secured creditors was incorporated in earlier drafts (see Art. 22 of the Vorentwurf von Vorschriften zur Neuordnung des Internationalen Insolvenzrechts). A number of other exceptions was also provided for, e.g. with respect to the enforcement of claims based on public law provisions of the lex rei sitae.

175 Cf. Van der Feltz, II, p. 294.
Cross-border aspects of insolvency proceedings

view of Dutch law, were part of the insolvency estate, can be recovered by the administrator and used for the benefit of the collectivity of creditors, including the enforcing creditor. Application of the Art. 203-205 Fw should lead to the net-proceeds of recovery flowing into the estate from which the creditor will then receive dividends for the full amount of his claim. Art. 203-205 Fw will each be dealt with separately below.

Art. 203 Fw

Art. 203 Fw deals with the situation that a creditor has directly taken recourse against assets situated abroad.\(^ {176}\) It reads:

A creditor who after the declaration of bankruptcy has recovered his claim separately, either in whole or in part, from goods situated abroad of a debtor declared bankrupt in the Netherlands, which are not subject to a priority right in his favour, must pay the amount so recovered into the estate.\(^ {177}\)

The objective of the provision is clear, but its wording gives rise to a number of questions. The duty to turn over the proceeds of recovery abroad is imposed on creditors who have taken recourse against assets in respect of which they did not have a right of priority (voorrang) in the distribution of the proceeds. Creditors with a right of priority in respect of the distribution of the proceeds of the asset concerned, can keep the proceeds.

The distinction made in Art. 203 Fw between creditors with and creditors without a right of priority, can lead to results that do not correspond with the distribution of the proceeds of the estate as provided for in the Faillissementswet. As a result of Art. 203 Fw all creditors with privileged insolvency claims have a position similar to that of secured creditors, in that their claim will be (partially) satisfied directly from the proceeds of a particular asset without having to contribute to the costs of the insolvency proceeding. In a purely domestic case, however, the position of

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176 For an example of one of the few (published) cases in which Art. 203 Fw was applied, see Hof Arnhem 12 January 1988, NIPR 1988, 400.

177 Translation taken from Netherlands Business Legislation. Art. 203 Fw: Schuldeisers, die na de faillietverklaring hunne vordering geheel of gedeeltelijk afzonderlijk verhaald hebben op in het buitenland zich bevindende, aan hen niet bij voorrang verbonden, goederen van den in Nederland gefailleerden schuldenaar, zijn verplicht het aldus verhaalde aan den boedel te vergoeden.
secured creditors is clearly different from the position of creditors with privileged claims, even though both can be said to have priority in the distribution of the proceeds. Secured creditors can enforce their claims against the encumbered asset as if there were no bankruptcy.\textsuperscript{178} Creditors with a privileged claim cannot individually take recourse against the asset(s) with respect to which they can claim a right to preferential payment. Privileged claims are satisfied through a distribution within the framework of the insolvency proceeding, entailing a contribution to the general costs of the proceeding (Art. 182 \textit{Fw}). The result of Art. 203 \textit{Fw} is that, if the asset against which a particular creditor has taken recourse is situated outside the Netherlands, a distinction between secured and privileged claims is not made. Pursuant to Art. 203 \textit{Fw}, creditors with privileged insolvency claims may also keep any proceeds of recovery abroad.\textsuperscript{179} It is clear that this leads to results that are incompatible with the rules on the satisfaction and ranking of insolvency claims under Dutch law, which Art. 203 \textit{Fw} aims to enforce. The exception to the duty to turn over proceeds of recovery abroad ex Art. 203 \textit{Fw} should have been restricted to those creditors that would, under Dutch law, be able to excercise their rights as if an insolvency proceeding had not been opened, i.e. secured creditors.

Art. 203 \textit{Fw} applies to all creditors, both foreign and local, irrespective of whether the creditor concerned has submitted his claim in the Dutch insolvency proceeding.\textsuperscript{180} This means that, also in relation to foreign creditors who have not submitted their claim in the Dutch insolvency proceeding, the administrator could bring an action based on Art. 203 \textit{Fw} if that creditor has taken recourse against assets of the debtor situated abroad. Enforcement of such a claim in respect of foreign creditors may prove to be problematic, however, in particular if the creditor concerned does not have assets in the Netherlands. The argument that Art. 203-205 \textit{Fw}, which cannot (easily) be enforced against foreign creditors, would put

\begin{itemize}
\item \textsuperscript{178} Art. 57 (1) \textit{Fw}. Under certain circumstances a creditor who can invoke a right of retention has a similar position, cf. Art. 60 (3) \textit{Fw}.
\item \textsuperscript{179} This was also the point of view of the government, cf. Van der Feltz, II, p. 298 (with regard to Art. 204 \textit{Fw}): "De woorden "of bij voorrang" worden vereischt met het oog op wetgevingen, die aan nationalen een voorrang toekennen boven vreemdelingen en met het oog op de mogelijkheid dat hij die vordering overneemt, daarvoor een pand-, retentie- of voorrecht volgens de vreemde wet verwerft."
\item \textsuperscript{180} Cf. Faillissementswet (R.W. de Ruuk), Art. 203, Nr. 4; Van der Feltz, II, p. 300.
\end{itemize}
Dutch creditors at a disadvantage in relation to foreign creditors, could not convince the government. In its reply to questions raised in Parliament, the government stated that

the fact that certain creditors are able to evade Dutch law as a result of the poor development of the international legal community, cannot be an argument to allow those who do fall within the reach of Dutch law, to freely diminish the insolvent estate.\(^{181}\)

Art. 203 \(Fw\) imposes an obligation to reimburse to the estate the proceeds of individual recovery abroad. The result is that, to the extent that the creditor has turned over the proceeds to the estate, the debtor's obligation has not been discharged, as the proceeds of the asset against which recourse has been taken, have not accrued to him.\(^{182}\) To the extent that the creditor's claim has not been satisfied, it can be submitted in the proceeding and will be satisfied within the framework of the insolvency proceeding.

The claim of the estate based on Art. 203 \(Fw\) can be set-off against the creditor's claim for dividends, which must be calculated on the basis of the full amount of his insolvency claim, i.e. the amount of his claim including the amount that has already been recovered abroad.\(^{183}\) The operation of Art. 203 \(Fw\) can be clarified by a simple example. A creditor with a claim of 100 recovers his claim to the amount of 50 by way of recourse against assets abroad. To that amount the administrator may claim under Art. 203 \(Fw\). If creditors receive 10% on their claims, the creditor will be obliged to turn over 40 to the administrator. It follows from Art. 53 \(Fw\) that set-off of (the remainder of) the creditor's insolvency claim against a claim under Art. 203 \(Fw\) is not possible.

According to its verbatim text, Art. 203 \(Fw\) only applies in cases where a creditor's claim has been (partially) satisfied through recourse against the

\(^{181}\) Van der Feltz, II, p. 300.
\(^{182}\) HR 12 May 1944, NJ 1944, 396. Consequently, the creditor can recover the claim from the sureties under a contract of suretyship.
\(^{183}\) Differently: Faillissementswet (R.W. de Ruuk), Art. 203, Nr. 5, where it is observed that the claim ex Art. 203 \(Fw\) can be set-off against the dividends to be distributed on the creditor's claim to the extent that is has not been recovered abroad. That would lead to a 'punitive discount' on the dividends to be received by the creditor.
insolvent debtor's situated abroad. It is submitted that a similar obligation exists in cases where a creditor's claim has been satisfied in any other way, for example performance or payment by the debtor, at the expense of the estate.\textsuperscript{184} This follows from the ratio of the provision that creditors should not be able to circumvent the protective effect of the insolvency proceeding.

\textit{Art. 204 Fw}

Art. 204 \textit{Fw} applies to cases where a creditor has obtained a preferential position by indirectly obtaining payment at the expense of the estate. It reads:

\begin{enumerate}
  \item A creditor who assigns his claim against the bankrupt, either in whole or in part, to a third party in order to enable the third party to recover the claim, either in whole or in part, separately or with priority, from assets of the bankrupt situated abroad, must pay the amount so recovered into the estate.
  \item Unless proved to the contrary, the assignment is deemed to have been effected with this purpose if it was effected with the knowledge that an application for bankruptcy had been made or would be made.\textsuperscript{185}
\end{enumerate}

The objective of this provision is to prevent the circumvention of Art. 203 \textit{Fw}\.\textsuperscript{186} A creditor could obtain a preferential position and frustrate a claim of the administrator ex Art. 203 \textit{Fw} by assigning his claim to a third party who can remain 'out of reach'. If that third party for example is a foreign (natural or legal) person without assets in the Netherlands, the administrator would in theory have the possibility of bringing an action on the basis of Art. 203 \textit{Fw}, but he could have difficulties enforcing such claim. Alternatively, the third party may be a creditor who can invoke a right of priority in respect of the assets against which recourse is taken, in which case Art. 203 \textit{Fw} does not impose on that creditor the obligation to reimburse the proceeds of the asset(s) to the estate.

\begin{footnotes}
184\textsuperscript{ } Cf Art 20 (1) IR and Art 342 (1) \textit{InsO}
185\textsuperscript{ } Translation taken from Netherlands Business Legislation Art 204 \textit{Fw} "(1) De schuldeisers, die zijne vordering tegen den gefailleerde, geheel of gedeeltelijk, aan een derde overdraagt, ten ende dezen in de gelegenheid te stellen die vordering, geheel of gedeeltelijk, afzonderlijk of bij voorrang te verhalen op in het buitenland zich bevindende goederen van den gefailleerde, is verplicht het aldus verhaalde aan den boedel te vergoeden (2) De overdracht wordt, behoudens tegenbewijs, vermoed met dit doel te zijn geschied, als zij is gedaan met de wetenschap, dat de faillietverklaring reeds was aangevraagd of aangevraagd zou worden"
186\textsuperscript{ } Cf Van der Feltz, II, p 294
\end{footnotes}
Art. 204 Fw only applies when the assignment of the claim was effected with the objective of evading the applicability of Art. 203 Fw.\textsuperscript{187} The assignment must have been effected 'in order to enable that third party to recover ...'. If the possibility of recovery abroad is a consequence of the assignment, but was not the objective of the assignment, Art. 204 Fw does not give rise to a duty to reimburse on the part of the assignor. Claims against the insolvent debtor remain assets that can freely be traded (within the limits set by Art. 204 Fw). The administrator is faced with the difficulty of proving that the claim concerned was assigned with this objective. His position is relieved by the rebuttable presumption in Art. 204 (2) Fw, that the assignment of the claim to the third party has been effected with this purpose if the assignment was effected with the knowledge that an application for bankruptcy had been or would be made.

**Art. 204 Fw: compensation of the estate and the consequences for the assignor**

A creditor who assigns his claim against the insolvent debtor to a third party in view of that third party's possibilities of recovery against the debtor's assets, is under the obligation to turn over to the estate 'the amount thus recovered'. It is submitted that reference is made to the amount of the claim that has been recovered from the net-proceeds of the asset(s) against which recourse has been taken abroad.\textsuperscript{188} Application of Art. 204 Fw should lead to the same result as Art. 203 Fw. The (net-proceeds of the) assets against which the assignee has taken recourse - from the Dutch perspective - are part of the insolvent estate and should have been distributed among the creditors in accordance with their ranking. From the proceeds of these assets the assigned claim has been (partially) recovered, therefore attaching some kind of priority to the recovered claim which would not have existed, had the assignor submitted his claim in the insolvency proceeding. The assignor will have to compensate the insolvent estate to the extent that the value of the estate

\textsuperscript{187} Cf. Van der Feltz, II, p. 294.

\textsuperscript{188} And not the amount actually "recovered" by the assignor/creditor, i.e. the purchase price he has obtained. In theory, a creditor/assignor can consequently be liable towards the estate for a greater amount than he has in fact received, taking away a possible incentive for circumventing Art. 203 Fw.
has decreased. The purchase price of the claim agreed between the assignor and the assignee is irrelevant in this respect.\textsuperscript{189}

What is the consequence of the reimbursement to the estate of the 'amount thus recovered', in particular in relation to the position of the assignor in the insolvency proceeding? Can the creditor/assignor exercise any rights that he would have in the proceeding on the basis of the assigned claim? Can the creditor for example claim dividends on the assigned claim and, if so, to what extent? With regard to Art. 203 Fw the situation is quite clear. To the extent that the creditor has turned over the proceeds of recovery abroad to the estate, his claim is not satisfied and he can consequently exercise all rights attached to his original claim. The difficulty which arises in the situation that is dealt with in Art. 204 Fw is that the claim has been assigned to another party. Strictly speaking, the assignor, even though he has had to reimburse to the estate the amount recovered abroad by the assignee, is no longer a creditor of the insolvent debtor. Consequently he would not be able to claim dividends in the proceeding, or exercise rights connected to his claim in the proceeding. Only the assignee, now creditor of the assigned claim, would have that power, but only to the amount of the claim not recovered. The assignor, after turning the proceeds of recovery abroad over to the estate (and in fact, bringing into the estate the proceeds of assets that could otherwise possibly not have been collected by the administrator), does not 'regain' any rights under the assigned claim.

This result is not in accordance with the ratio of Art. 203-205 Fw, the objective of which is to protect the value of the estate available for distribution among the creditors. Not allowing the assignor to claim in the proceeding, while requiring him to turn over the amount recovered abroad, would lead to a decrease in the total amount of insolvency claims, whereas the value of the assets of the estate remains the same. A result that would be more in accordance with the ratio of the provision would be to consider the assignment void as against the estate (but valid in the

\textsuperscript{189} See also Art. 205 Fw, which imposes a similar obligation on a creditor who has assigned his claim to a third party who is able to invoke a right of set-off incompatible with Dutch insolvency law. The obligation to turn over 'the amount thus recovered' in Art. 205 Fw can only refer to the amount to which the assigned claim has been discharged as a result of set-off.
relation between assignor and assignee) to the extent that the assignor must turn over the proceeds of recovery abroad. The assignor should be allowed to participate in the proceeding with a claim for the same amount turned over to the administrator (the assignee may participate for the remaining unrecovered part of the claim).

Art. 205 Fw

Art. 205 Fw attempts to counter transactions which, in view of the differences between the national laws regarding set-off, try to circumvent restrictions imposed on the possibility of set-off by Dutch insolvency law, by assigning a claim or delegating a debt to someone who can subsequently invoke a right of set-off in a foreign forum. As a result, the primary claim, i.e. the claim of the insolvent debtor, will (partly) disappear from the estate, thereby reducing the value of the assets which are available for distribution among the creditors in general.

Art. 205 Fw reads:

(1) A creditor who assigns his claim or his debt, either in whole or in part, to a third party thereby enabling him to effect a set-off abroad not allowed by this Act shall be subject to a similar obligation to the estate to make such payment.
(2) The second paragraph of the preceding article shall apply. 190

Similar to Art. 204 Fw an obligation to reimburse the insolvent estate is only accepted if the assignment of the claim or the delegation of the debt was effected with the objective of enabling that third party to effect a right of set-off. Pursuant to Art. 205 (2) Fw, the rebuttable presumption of Art. 204 (2) Fw applies. In the absence of proof to the contrary, the assignment of the claim or the delegation of the debt is presumed to have been effected with this purpose if the creditor or the debtor, as the case may be, knew that an application for bankruptcy had been or would be made. 191

190 Translation taken from Netherlands Business Legislation. Art. 205 Fw: "(1) Gelijke verplichting tot vergoeding jegens de boedel rust op hem die zijn vordering of zijn schuld geheel of gedeeltelijk aan een derde overdraagt, die daardoor in staat wordt gesteld in het buitenland een door deze wet niet toegelaten verrekening in te roepen. (2) Het tweede lid van het vorige artikel is hier toepasselijk."

191 As under Dutch law, delegation of a debt requires the consent of the creditor (cf. Art. 6:155 BW), in case of insolvency the consent of the administrator, delegation of debts after the opening of an insolvency proceeding will not occur to the detriment of the estate.
Art. 205 Fw: assignment of a claim
An unsecured insolvency claim in principle can only be satisfied within the framework of the insolvency proceeding. The creditor will obtain a dividend proportional to his claim. However, if a creditor can successfully invoke a right of set-off with a debt owed to the insolvent debtor, the creditor in fact obtains priority. Under Dutch law set-off in insolvency is allowed within the limits of Art. 53 and 54 Fw.

The creditor may not owe a debt to the insolvent debtor. Alternatively, the creditor may owe a debt to the debtor but he may not be entitled to set-off by virtue of Art. 53 or 54 Fw. In these cases it would be profitable for him to assign his claim to another party who can invoke a right of set-off with a debt owed to the insolvent debtor. The assignor will receive an amount which is greater than the expected dividend and the assignee obtains a claim against the insolvent debtor which enables him to effect a right of set-off. As set-off would not have been allowed under Dutch insolvency law, a preferential status is in fact attached to the assigned claim that would not have existed in the Dutch insolvency proceeding. Art. 205 Fw in this respect is based on the assumption that the claim against the foreign assignee (the primary claim) is part of the Dutch estate.

Art. 205 (1) Fw imposes a 'similar obligation to reimburse the estate' on the assignor, i.e. the assignor must turn over to the estate 'the amount thus recovered'. This means that he must turn over to the estate the amount that has been recovered on the claim, i.e. the amount to which extent the debt owed by the assignee to the insolvent debtor has been discharged as a result of set-off. The purchase price that the assignor has obtained for his claim is irrelevant in this respect. With regard to the assignor's position in the insolvency proceeding, e.g. the question whether he can claim dividends on the assigned claim, reference is made to the observations with respect to Art. 204 Fw.

Art. 205 Fw: delegation of a debt
The opening of an insolvency in principle does not affect claims that the insolvent person has against his debtors. After the opening of an insolvency proceeding a debtor remains liable towards the estate for the full amount of the debt owed. Delegation of the debt to a third party may be profitable for the debtor, who may pay less than the nominal amount
of the debt. Takeover of a debt may be profitable for a creditor if that allows him to effect a right of set-off with a claim which he could otherwise not have recovered (to its full amount). If set-off would not have been allowed under Dutch law, the result of the delegation of the debt is that, from the Dutch perspective, an asset is withdrawn from the estate, reducing the value of the assets that are available for distribution among the insolvent debtor's creditors.

If the objective of the delegation of the debt was to enable the creditor to effect a right of set-off contrary to Dutch insolvency law, a 'similar obligation to reimburse the estate' is imposed on the original debtor by virtue of Art. 205 (1) Fw, i.e. he must compensate the estate to the amount to which the debt he previously owed has been discharged by set-off with a counterclaim of a creditor.

2.3.3 Dividends received in foreign insolvency proceedings

2.3.3.1 Introduction

The opening of a main proceeding in for example Germany or the Netherlands does not preclude the opening of insolvency proceedings in other States. Creditors may submit their claims in and participate in distributions in parallel insolvency proceedings, to the extent allowed by the law governing the relevant proceeding. If claims have been submitted in more than one proceeding, such claims may therefore be (partly) satisfied through dividends received in parallel insolvency proceedings opened in another State.

The consequences of the (partial) satisfaction of claims through dividends received in parallel insolvency proceedings cannot be assessed on the same basis as satisfaction through individual recovery abroad, dealt with in the previous paragraph. A duty to turn over the amount received in parallel insolvency proceedings is generally not accepted. This is justified as the creditor, unlike the situation where he individually takes recourse on the debtor's assets, participates in a collective proceeding in which the proceeds of the debtor's assets are distributed among the creditors in accordance with the ranking of their claims. The creditor does not act contrary to the rules of distribution to be observed in the proceeding. His
actions are not aimed at obtaining a better position than he would have based on the ranking of his claim.\(^{192}\) The creditor will, however, have to account for dividends received in a foreign proceeding before being entitled to share in the proceeds of a local proceeding.

2.3.3.2 Insolvency Regulation

In order to guarantee the equal treatment of creditors, Art. 20 (2) IR stipulates that creditors who have obtained dividends in an insolvency proceeding shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

The method of calculation to be applied, is based on four basic rules.\(^{193}\)

(i) Creditors cannot obtain more than 100% on their claims.

(ii) In calculating the dividends to be received on a claim, its total original amount shall be taken into account. Whatever has been received by way of dividends in other proceedings, shall not be deducted from the value of the claim.

(iii) A claim is not taken into account in the distribution until creditors with the same ranking or of the same category have obtained an equal percentage of satisfaction in these proceedings as that obtained by the holder of the claim in the first proceeding.

(iv) The ranking or category of claims is determined separately for each insolvency proceeding, in accordance with the law of the State of the opening. This follows from Art. 4 (2) (i) IR. For the calculation of dividends, only the percentage of satisfaction obtained in other proceedings is taken into account, and not the ranking or category of the claim in those other proceedings.

Art. 20 (2) IR refers to dividends obtained on claims. It does not apply to the situation where a secured creditor has realised an encumbered asset, from the proceeds of which the secured claim has only been partially satisfied, and wishes to participate in the distribution in another proceeding for the remainder of his claim. If, for example, a creditor with a claim of 200 has a security right in an asset with a net realisation value of

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\(^{192}\) Cf. BR-Drucksache 715/02, p 25.

\(^{193}\) Cf. Report Virgós/Schmut, Nr 175.
100, the question whether and under which conditions he may participate in the distribution in another insolvency proceeding, is determined by the *lex concursus* of that proceeding. This follows from Art. 4 (2) (i) IR.\(^{194}\)

### 2.3.3.3 UNCITRAL Model Law

The Model Law also recognises the possibility of concurrent insolvency proceedings in respect of the same debtor. Art. 32 Model Law imposes a duty on creditors to account for dividends received in foreign proceedings. The rule is intended to avoid situations in which a creditor might obtain a more favourable treatment than other creditors by obtaining payment for the same claim in different jurisdictions. The rule of the Model Law operates in a similar way as Art. 20 (2) IR. A creditor who has received partial satisfaction of a claim in a foreign insolvency proceeding may keep what he has received, but will not be entitled to receive payment for the same claim in an insolvency proceeding opened in the enacting State, to the extent that the payment to the other creditors of the same class is proportionally less than the payment the creditor concerned has already received. In accordance with Art. 20 IR, Art. 32 Model Law does not affect the ranking of claims as established in the (insolvency) law of the enacting State. Ranking of claims in insolvency is a matter that is left to the (private international) law of the State where the proceeding has been opened. Art. 32 Model Law is only intended to safeguard the equal treatment of claims that, according to the law of the enacting State, belong to the same category or ranking. Art. 32 clarifies that secured creditors are not affected by this rule.\(^{195}\) They can enforce their claim against the encumbered asset to the extent allowed by the applicable law. A secured creditor will only be entitled to the proceeds to the extent that his claim has not been satisfied in a foreign proceeding. Creditors cannot receive more than the total value of their claims.

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\(^{194}\) Cf. Van Galen (Tvl 2002), p 142, who also addresses the question how to deal with (reservations for) secured claims when the encumbered asset has not yet been realised.

\(^{195}\) Art. 32 states that it applies 'without prejudice to secured claims or rights in rem'. Enacting States must choose their own relevant terminology. It is observed in the Guide to Enactment (Nr. 200), that 'the words "secured claims" are used to refer generally to claims guaranteed by particular assets, while the words "right in rem" are intended to indicate rights relating to a particular property that are enforceable also against third parties'.
Chapter II / Par. 2.3.3.4

2.3.3.4 German law

As of March 2003, a provision imposing an obligation on creditors to account for dividends received in a foreign parallel insolvency proceeding that corresponds with Art. 20 (2) IR and Art. 32 Model Law, has been included in the Insolvenzordnung.\textsuperscript{196} Art. 342 (2) InsO reads:

The creditor with an insolvency claim may keep what he has received in an insolvency proceeding opened in another State. However, he will only receive dividends on his claim if the other creditors have been placed in an equivalent position.\textsuperscript{197}

German law recognises that, even though a main insolvency proceeding has been opened in Germany that aims to include the debtor's entire estate, a parallel insolvency proceeding may be opened in another State.\textsuperscript{198} Dividends received by a creditor in such parallel proceedings do not have to be turned over to the German estate. However, the creditor will only receive dividends in the German proceeding if creditors of the same class have received an equal percentage on their claims.\textsuperscript{199} If the dividends in the German proceeding are smaller than the dividends a creditor has received in the foreign proceeding, the creditor is not under the obligation to turn over the difference to or in any other way compensate the German estate.

\textsuperscript{196} Prior to the introduction of Art. 342 InsO the approach was similar. Cf. Hanisch (ZIP 1989), p. 278; Flessner (IPRax 1989), p. 752.

\textsuperscript{197} Art. 342 (2) InsO: Der Insolvenzgläubiger darf behalten, was er in einem Insolvenzverfahren erlangt hat, das in einem anderen Staat eröffnet worden ist. Er wird jedoch bei den Verteilungen erst berücksichtigt, wenn die übrigen Gläubiger mit ihm gleichgestellt sind. Cf. Art. 383 (2) RegInsO. Based on its verbatim text, Art. 383 (2) RegInsO only applied in case of main proceedings opened in Germany, where the debtor had received dividends in a foreign (secondary) territorial proceeding ("Der Gläubiger darf behalten, was er in einem besonderen Insolvenzverfahren erlangt hat, das in einem anderen Staat eröffnet worden ist und nur das in diesem Staat belegene Vermögen erfaßt."). Art. 342 (2) InsO has been phrased more generally - and in accordance with Art. 20 (2) IR - and also applies to territorial proceedings opened in Germany where a creditor has received dividends in a foreign main or territorial proceeding.

\textsuperscript{198} For the mirror-inverted situation, see Art. 354 and 356 InsO.

\textsuperscript{199} Cf. BT-Drucksache 12/2443, p. 240, where it is explained that the phrase '(...) mit ihm gleichgestellt (...)’ indicates that a creditor will only receive dividends in the German proceeding if creditors of the same category or class in the German proceeding have received an equivalent dividend. See also BR-Drucksache 715/02, p. 25.
The obligation to account for dividends received in foreign proceedings only applies to distributions on unsecured claims. Secured creditors do not have to account for the moneys received out of the realisation proceeds of the encumbered asset. To the extent that secured claims have not been satisfied from the proceeds of encumbered assets they entitle the creditor to the same dividend as other unsecured creditors.

2.3.3.5 Dutch law

There are no statutory provisions that deal with this matter, nor has it been decided in case law. It is undisputed that a creditor is entitled to submit his claim in a Dutch proceeding when he has also submitted his claim in one or more foreign parallel insolvency proceedings. It is submitted that it follows from the *paritas creditorum* principle that a creditor claiming dividends in the Dutch proceeding is not under the obligation to turn over those "proceeds" to the Dutch estate on the basis of Art. 203 *Fw*, but that he must account for dividends received in a foreign proceeding on the same basis as provided for in the Model Law and the Insolvency Regulation.

The verbatim text and history of Art. 203-205 *Fw* support the view that they do not apply, at least not directly, to creditors having received dividends in a foreign insolvency proceeding. These provisions deal with individual recourse against the debtor's assets abroad, and do not concern creditors whose claims have been (partially) satisfied by way of a distribution in a foreign collective proceeding. In drafting these provisions in the late nineteenth century the legislator did not pay any attention to problems originating from parallel insolvency proceedings. These provisions are neither suitable for application by analogy, because the situation they address must be clearly distinguished from the question whether and, if so, how and to what extent, creditors must account for dividends received in a foreign insolvency proceeding. Furthermore, application (by analogy) of Art. 203 *Fw* to this issue would lead to all creditors with some form of priority in the foreign proceeding, being

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201 Cf. Art. 52 *InsO*.
202 Cf. Van der Feltz, II, p. 294 et seq.
exempted from the obligation to account for the dividends received. To the extent that their claims have not been satisfied, they would be entitled to share in the distribution of the realisation proceeds of the Dutch estate - in accordance with the ranking of their claims. This result could, from a point of view of maintaining the *paritas creditorum*, only be accepted in respect of secured creditors to the extent that their claims have been satisfied out of the realisation proceeds of the encumbered asset(s).

It is submitted that with respect to the obligation to account for dividends received abroad, Dutch law follows a similar approach as German law, the Insolvency Regulation and the Model Law. A creditor whose claim has been submitted and admitted in a foreign as well as the Dutch proceeding, will, if he has received dividends on his claim in a foreign proceeding, only receive dividends in the Dutch proceeding, if all creditors of the same rank have received an equivalent dividend. The dividends to which the creditor would be entitled in the Dutch proceeding must be calculated on the full amount of his (original) claim.

Secured claims are not affected. Secured creditors do not have to account for the moneys received out of the realisation proceeds of encumbered assets. To the extent that secured claims have not been satisfied from the proceeds of the encumbered asset, they entitle the creditor to the same dividend as other unsecured creditors.

**2.4 Foreign creditors**

*2.4.1 Submission of claims*

The character of insolvency proceedings as collective proceedings entails that all creditors are entitled to participate in the proceeding. In principle, no distinction ought to be made as to the nationality or domicile/seat of creditors or the law governing their claim. This principle, already accepted in German and Dutch law, is embodied in the Insolvency Regulation and the Model Law.
**German law**

For German law, this rule, which (indirectly) follows from Art. 38 InsO, has been laid down in Art. 341 InsO. Pursuant to this provision, which is of a clarifying nature, any creditor may submit his claim in a main or in any territorial proceeding. The foreign character of the claim as such is irrelevant.

Pursuant to Art. 341 (2) InsO, also a foreign administrator has the power to submit claims in an insolvency proceeding opened in Germany. This leaves unaffected the right of a creditor to oppose such submission or to withdraw the claim. The third paragraph of Art. 341 InsO stipulates that the administrator is in principle entitled to exercise the voting rights on such claims on behalf of the creditors.

**Dutch law**

Also under Dutch law, all creditors are entitled to participate in an insolvency proceeding. The Faillissementswet does not provide any basis for a distinction between local and foreign creditors, nor a distinction based on the law applicable to the claim. As the Hoge Raad observed in a decision of 1955, a Dutch bankruptcy proceeding serves for the benefit of all creditors, both Dutch and foreign, also those domiciled outside the Netherlands.

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204 Cf. BT-Drucksache 12/2443, p. 236.
205 This was also explicitly provided for in Art. 5 (1) KO and 37 VerglO.
206 BR-Drucksache 715/02, p. 24.
207 Baur/Stiimer (1990), p. 428-430, Nr. 37.15-37-19, suggested to differentiate depending on whether German insolvency proceedings are recognised in the State concerned and German creditors are entitled to equal treatment in proceedings in that State.
208 At the same time the provision confers on the administrator appointed in a German insolvency proceeding the power to submit claims in a foreign proceeding.
209 See also Art. 9 of the General Provisions Act of 1829 (Wet algemene bepalingen), which stipulates that: 'The private law of the Kingdom is the same for foreigners and Dutch nationals, unless a statute explicitly states the contrary.' The absence of a distinction based on nationality or domicile of creditors is also reflected in Art. 127 (3) Fu, which, in respect of creditors domiciled outside the European territory of the Kingdom of the Netherlands, provides for an extension of the period in which creditors can submit their claims in the insolvency proceeding.
The *Faillissementswet* follows the assumption that submission of claims is effected by creditors. It does not explicitly provide for submission of claims by a foreign administrator. Nonetheless, I would argue that also a foreign administrator has the power to submit claims on behalf of creditors, if that power is conferred on him by the foreign *lex concursus*.\(^{211}\) This leaves unaffected the right of creditors to submit claims individually or to withdraw already submitted claims. In connection therewith I would also argue that a foreign administrator is in principle entitled to exercise the rights attached to such claims in the Dutch proceeding, such as voting rights, again leaving unaffected a creditor's right to exercise such (voting) rights himself.\(^{212}\)

**Insolvency Regulation**

Art. 39 IR guarantees any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of the proceeding, the right to submit a claim in the insolvency proceeding in writing.\(^{213}\) 'To clear up any doubts', Art. 39 IR specifies that this also applies to the tax and social security authorities of other Member States.\(^{214}\)

Pursuant to Art. 41 (2) IR, creditors may submit their claims in the official language(s) of the State where they have their habitual residence, domicile or registered office. However, they may be required to provide a translation into the official language or one of the official languages of the State of the opening of the proceeding. The provision does not determine in which cases such translation may be required, but a translation will not seldom be necessary in order for the administrator to understand the exact position that is claimed by a creditor in the proceeding (e.g. whether the creditor invokes a privilege or security right). The consequences of not providing a translation where required have not been spelled out. The costs of such translation, which are borne by the creditor, can be quite

\(^{211}\) Cf. Art. 341 *InsO*.


\(^{213}\) National laws may provide for the submission of claims in a more favourable form to creditors, cf. Report Virgós/Schmit, Nr. 270. Art. 39 IR does not refer to the position of creditors situated outside of the European Union. Whether they can submit their claims in an insolvency proceeding opened in one of the Member States, remains a matter of national (private international) law.

\(^{214}\) Cf. Report Virgós/Schmit, Nr. 265.
substantial, given the content of the lodgement of a claim required by Art. 41 IR. The costs involved in providing such translation may prove discouraging for smaller creditors to submit claims in foreign proceedings, in particular when taking into account that the individual notice of the opening of the proceeding that they will receive in accordance with Art. 40 IR, containing essential information regarding their position in the proceeding, will also have to be translated at their costs.

Pursuant to Art. 32 (1) IR, creditors may submit their claims in the main proceeding as well as any secondary proceeding. The participation of creditors in parallel proceedings is facilitated by the power conferred on administrators to submit claims in other proceedings. They have that power to the extent that it serves those creditors' interests. Whether it is in the interests of the creditors that their claims are submitted in another proceeding may, for example, depend on whether the costs involved in submission in another proceeding are justified by the dividends that may be obtained. Creditors must look after their own interests. They may oppose such submission or, where the applicable law so provides, withdraw already submitted claims. Whether the administrator has the power to exercise the voting rights connected to those claims has not been regulated in the Insolvency Regulation.

**UNCITRAL Model Law**

One of the objectives of the Model Law is to provide a transparent regime for the right of foreign creditors to commence and participate in insolvency proceedings in the enacting State. It does so by proposing provisions on the right of access of foreign creditors to insolvency proceedings in the enacting State (and provisions on the information to be given to foreign creditors). The term 'foreign creditors' is not defined in the Model Law, but supposedly refers to creditors who have their habitual residence, domicile or registered office in a different State than the enacting State.

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215 Art. 32 (2) IR.
216 Cf. Report Virgos/Schmit, Nr. 240. See also Virgós (1998), p. 36; Kortmann/Veder (WPNR 2000), p. 768. Art. 341 (3) InsO explicitly provides that the administrator may exercise the voting rights, unless the creditor determines otherwise.
217 Cf. Art. 39 IR.
The first paragraph of Art. 13 Model Law reflects current German and Dutch law, where it provides that foreign creditors (in principle) have the same rights regarding the commencement of, and participation in insolvency proceedings opened in the enacting State, as creditors of that State. The second paragraph of Art. 13 is intended to guarantee that claims of foreign creditors are not treated worse than claims of domestic creditors by giving them a ranking below unpreferential creditors. A rule on the language in which the submission of claims would need to take place, along similar lines as Art. 42 (2) IR, could be added to Art. 13 Model Law, when implemented in national law.

The UNCITRAL Model Law is based on the assumption that creditors act on their own behalf. Pursuant to Art. 12 Model Law a foreign administrator is, upon recognition of the proceeding, entitled to participate in a proceeding opened in the enacting State, but it does not confer any specific powers or rights on the foreign administrator.\(^{218}\) Art. 12 Model Law could, however, serve as a basis for conferring on a foreign administrator the right to submit claims in a proceeding in the enacting State and to exercise the rights connected to such claims.

2.4.2 Information

Essential to the equal treatment of creditors is not only that all creditors are given the right to submit claims in an insolvency proceeding, but also that they are informed of its opening and conduct, in particular the procedure for submitting claims.

German and Dutch law in this respect do not provide for specific rules on informing foreign creditors. They are to receive information on the same basis and in the same manner as local creditors.\(^{219}\) The Insolvency Regulation and the UNCITRAL Model Law explicitly address this matter.

Art. 40 (1) IR contains a rule of uniform substantive law that stipulates that, as soon as an insolvency proceeding is opened in a Member State, the court of that State having jurisdiction or the administrator appointed by it shall immediately inform known creditors who have their habitual

\(^{218}\) Cf. Guide to Enactment, Nr. 101.

\(^{219}\) Cf. e.g. Art. 8, 9, 23 and 30 InsO.
The second paragraph states that this information shall be provided by an individual notice that shall in particular include the time limits for submission of claims, the penalties laid down in respect of those time limits, the body or authority empowered to accept the submission of claims, and whether creditors with preferential claims or secured claims need submit their claims. According to Art. 42 (1) IR this information shall be provided in the official language or one of the official languages of the State of the opening of the proceeding.

Unlike Art. 40 IR, Art. 14 Model Law attunes the requirement to inform foreign creditors to the requirements existing in national law. Art. 14 Model Law stipulates that, whenever notification should be given to creditors in the enacting State, such notification shall also be given to the known foreign creditors. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. The Model Law takes into account that States have different provisions or practices with respect to the means of providing notification to creditors of the opening of an insolvency proceeding. Where national laws do not provide for individual notification to creditors, foreign creditors would be in a less favourable position as they will generally not (easily) have access to local publications. Therefore, the method of notification to foreign creditors is not dealt with in accordance with the same standards that apply in respect of local creditors. Art. 13 (2) Model Law in principle requires that foreign creditors are notified individually. This rule is in accordance with Art. 40 IR, but it is more flexible in that it furthermore provides that the court may consider that, under the circumstances, some other form of notification would be more appropriate. This would for example to a great extent solve the (practical) problems that

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220 The duty to inform creditors situated in the Member State where the insolvency proceeding has been opened, is not governed by Art. 40 IR but by the relevant provision of the applicable national law. Dutch law, for example, does not impose a similar general obligation on the administrator to individually inform all known creditors of the opening of the proceeding, see HR 16 April 1996, NJ 1996, 727, comm. W.M. Kleijn (Maclou/Curatoren Van Schuppen), JOR 1996/48, comm. S.C.J.J. Kortmann.

221 Art. 40 IR requires an individual notice to all known foreign creditors, even if notice would not have to be given to local creditors.

may arise under application of Art. 40 IR, e.g. where the administrator does not have the exact addresses of creditors or in cases with a very large number of (possibly not identifiable) creditors (e.g. bondholders). The court could in such circumstances order that notification can be given by way of publication on internet or in a number of national newspapers or official gazettes (whatever the usual or appropriate way of informing creditors is in a given country) in countries where creditors may be situated. The notification that is given to creditors of the opening of the proceeding, in whatever form, shall indicate the time period and relevant procedure for submitting claims, indicate whether secured or privileged creditors need to file their claims and - preferably - the effects of filing (e.g. loss of security\textsuperscript{223}) or not filing such claims,\textsuperscript{224} and, generally, must contain any other information that would usually be given to creditors according to the law of the enacting State. The Model Law does not state in which language the notification should be given. The issue has been left to the legislation of the enacting State.

2.4.3 Tax claims

Tax authorities are among the largest creditors in insolvency proceedings.\textsuperscript{225} It is therefore of great practical importance to assess the position of their claims in insolvency proceedings. In German and Dutch law tax claims are included in the insolvency proceeding more or less on the same basis as contractual claims and other claims that have their basis in private law. The opening of an insolvency proceeding generally also affects the enforceability of tax claims against the debtor's assets.\textsuperscript{226} Tax claims must be submitted to the administrator and will be satisfied within the framework of the insolvency proceeding, in the Netherlands with, in Germany, save for some (minor) exceptions, without priority. The question arises whether foreign tax claims are dealt with in the same way as

\textsuperscript{223} Cf. Art. 257 (2) Fw, which provides that if a secured or privileged creditor submits a claim in the proceeding for the purpose of voting on a proposed composition, the priority attached to the claim is lost unless the claim is withdrawn prior to the vote.

\textsuperscript{224} Cf. Guide to Enactment, Nr. 111.

\textsuperscript{225} This paragraph is limited to tax claims. Similar observations apply to other claims based on public law, such as social security claims.

\textsuperscript{226} However, under Dutch law tax claims - which enjoy a privilege pursuant to Art. 21 (1) Invorderingswet 1990 - may be enforced notwithstanding suspension of payments granted to the debtor, cf. Art. 232 Fw.
domestic tax claims. A large number of legal systems in this respect provide for an exception to the principle of non-discrimination of foreign creditors.

In order to properly assess the position of foreign tax claims in insolvency proceedings, it is in my opinion important to first of all establish whether such claims can be enforced by foreign authorities against assets situated in another jurisdiction outside of insolvency proceedings. It is submitted that, if tax claims cannot be (directly, i.e. without the intervention of local authorities) enforced by foreign tax authorities by way of the normal enforcement processes for claims provided for in the law of civil procedure, such claims are not (directly) provable in insolvency proceedings. There are no convincing arguments why the position of such claims should change in case of insolvency.

Prevailing opinion appears to be that, unless bi- or multilateral conventions or other international regulations provide otherwise, tax claims are not enforceable in other jurisdictions. An entitlement to enforcement cannot be obtained through the enforcement mechanisms provided for in civil procedure. Enforcement of such claims is an extension of the sovereign power which imposed the taxes and "assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties." The enforcement

227 Differently: Hof Arnhem 6 July 1999, NIPR 2000, 41. The Court of Appeal assumed jurisdiction in respect of a claim brought by the German city of Krefeld for unpaid 'Gewerbesteuer'. The court held that the Brussels Convention of 1968 did not apply and based its jurisdiction on Art. 126 (1) of the Code of Civil Procedure (conferring jurisdiction on the court of the place where the debtor has his domicile). The court considered that, as there was no provision in a statute or convention by virtue of which the German tax assessment produces an entitlement to enforcement in the Netherlands (the Dutch-German Treaty of 21 May 1999 had not yet entered into force and Directive 76/308/EEC did not apply to the type of tax levied), the German city had an interest in obtaining a judgment in the Netherlands by addressing the normal civil court. Even though the court observed that the existence and the amount of the claim were not disputed and therefore not to be decided on by the court (in respect of which it probably would not have assumed jurisdiction), it nevertheless assumed jurisdiction to deal with the question governed by German public law (Abgabeordnung) whether the action of the German city of Krefeld was precluded by the lapse of time.

of obligations arising out of public law can be said to generally fall outside of the competence of the courts of other jurisdictions.\textsuperscript{229} Enforcement of tax claims is not a matter of contract, but of authority and administration as between the State and those within its jurisdiction.\textsuperscript{230} The levying of taxation is one of the principal manifestations of the sovereign authority vested in the State, and it is generally considered unacceptable that, in the absence of an international regulation to that effect, one sovereign State would in fact have to serve as the agent for the enforcement of taxes imposed by another.

The rule that foreign authorities cannot enforce tax claims in the courts of another jurisdiction, and that such claims are as a rule not provable in insolvency proceedings, is for example found in English law\textsuperscript{231}, German law\textsuperscript{232} and Swiss law.\textsuperscript{233} In Dutch legal literature, the issue has not been dealt with in detail.\textsuperscript{234} There is one published Dutch case in which the status of a foreign claim for customs duties in a Dutch bankruptcy proceeding was put the court.\textsuperscript{235} A French "commissionnaire de douane" had paid customs duties to the French authorities on behalf and for the benefit of a Dutch company. Under French law a general privilege was attached to the claim for customs duties. Pursuant to the relevant provisions of French law, the commissionnaire had been subrogated in the privileged claim of the French customs authorities. The French commissionnaire submitted the claim in the bankruptcy proceeding opened in the Netherlands in respect of the Dutch company and argued that a privilege was attached to the claim. In its decision, the court rejected the commissionnaire's argument that the claim was privileged in the Dutch bank-

\begin{itemize}
\item \textsuperscript{229} Kegel/Schurig (2000), p. 936.
\item \textsuperscript{230} Government of India v. Taylor [1955] A.C. 491, 514.
\item \textsuperscript{231} Dicey and Morris (2000), p. 97 et seq.; Fletcher (1999), p. 84.
\item \textsuperscript{232} Kegel/Schurig (2000), p. 936; Trunk (1998), p. 199 et seq.; Jahr (1973), Nr. 394. Kuhn/Uhlenbruck (1994), § 61, Nr. 51 and §§ 237, 238, Nr. 67 (who assume that foreign tax and social security claims are provable in German insolvency proceedings, albeit that a (foreign or domestic - Art. 61 KO) privilege is not attached to such claims); Drobnig (1990), p. 100; Hanisch (1992), p. 112 (who presents it as an open question).
\item \textsuperscript{233} IPRG Kommentar Art. 13, Nr. 13.
\item \textsuperscript{234} Dalhuisen starts from the assumption that foreign tax and social security claims are provable in Dutch bankruptcy proceedings, albeit without priority (Dalhuisen (1992), p. 195). Doubts are expressed by Veder (1998), p. 169.
\item \textsuperscript{235} Hof 's-Hertogenbosch 1 March 1977, NJ 1977, 543.
\end{itemize}
ruptency proceeding, even though a similar claim for Dutch customs duties would be privileged. The fundamental issue of the enforceability of claims originating from foreign public law was not put to the court. The administrators did not dispute the claim itself, but only the privilege that the French commissionaire invoked in respect of the claim.

Treaties and other international regulations concerning the collection of taxes
The Netherlands are bound by a number of conventions and other international regulations in the field of recovery of tax claims. Pursuant to these international regulations, and under the conditions set forth in such regulations, the Dutch authorities provide assistance in respect of the recovery of foreign tax claims. Such assistance may for example consist of the exchange of information and recovery in the Netherlands of foreign claims. The importance of these international regulations primarily lies in the acceptance of the enforceability of foreign tax claims through the intervention of the local authorities. Furthermore, they provide the additional advantage of the possibility to use instruments provided for in national law in respect of the recovery of foreign tax claims, e.g. with respect to the gathering of information relevant to the recovery of tax claims. Very important in this respect is that, through the intervention of the local authorities, an entitlement to enforcement may be obtained for foreign claims. The assistance provided for by the Dutch authorities in respect of the recovery of foreign claims may consist of issuing a distress warrant (dwangbevel). Unlike the notification of a foreign distress warrant through the intervention of the Dutch authorities, which does not provide

the foreign authorities with an entitlement to enforcement in the Netherlands, a distress warrant issued by the Dutch authorities in respect of a foreign claim constitutes an entitlement to enforcement in the Netherlands.\textsuperscript{237}

It is submitted that, where the recovery of foreign tax claims in the Netherlands outside of insolvency proceedings depends on the existence of a binding international regulation to that effect, the same applies to recovery of such claims in case of the debtor's insolvency. If an international regulation on the assistance in the recovery of foreign tax claims applies, foreign tax claims are provable in (Dutch) insolvency proceedings, under the conditions and in the manner set forth in such regulation. The importance of this observation, \textit{inter alia}, lies in the observance of requirements that international regulations generally impose on assistance to be provided in the recovery of foreign tax claims. In case of insolvency proceedings opened in respect of a debtor in the Netherlands, the assistance provided in the recovery of the foreign claims consists of the submission by the Dutch authorities of the foreign tax and social security claims to the administrator.\textsuperscript{238} Generally, assistance does not have to be provided in case the tax claim or the enforceable instrument has been disputed in the State where the requesting authority is situated. Furthermore, such assistance can be denied if the requesting authority has not used all local means of enforcement of the debt. The consequence of the latter would be that a foreign tax claim cannot be submitted in a Dutch insolvency proceeding for its full amount but only to the extent that it could not be enforced in the State where the requesting authority is situated.

\textbf{EC Insolvency Regulation}

With respect to the enforcement of unpaid tax claims within the European Community, the draft Convention on bankruptcy, winding-up, arrange-

\textsuperscript{237} See, however, Art. 8 (1) of Directive 2001/44/EC: The instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated

\textsuperscript{238} Cf. \textit{Voorschrift Internationale Invordering}, Nr 8.18 and 15.5 (repealed on 1 January 2002). See, with respect to the cross-border collection of taxes, \textit{Leidraad Invordering}, Chapter XVII.
Cross-border aspects of insolvency proceedings

ments, compositions and similar proceedings of 1982\textsuperscript{239} made an important step forward. Art. 44 (3) of this draft Convention provided:

In matters other than civil and commercial, and particularly in fiscal or social security matters, the public authorities, government departments and other public agencies of a Contracting State may exercise their right to payment of a debt incurred before [or after] the opening of the bankruptcy on behalf of the general body of creditors or the right of preference to which they are entitled in that State only in relation to assets situated there. To the extent that they have not obtained full satisfaction in that State and irrespective of whether their rights are preferential or not, they shall be entitled, subject always to the acts of the European Communities and to bilateral agreements concluded between Contracting States, to claim as unsecured creditors in any other Contracting State, provided the (unsecured) debt would have been admitted to proof in a bankruptcy opened in their own State.

In principle recourse for such claims had to be taken against assets in the State where the claim originated, i.e. assets situated in the State under whose authority the tax authorities fell. However, the draft did confer on tax authorities the right to submit the unpaid portion of their claims in insolvency proceedings in another Contracting State. The Explanatory Report to the draft Convention observed in this respect:

"Paragraph 3 departs from the rules contained in the [two] preceding paragraphs in regard to fiscal and social security preferential rights and, broadly, in regard to all general preferential rights securing claims other than civil or commercial, that is to say claims in public law. Precisely because of their social function, these must remain subject, without restriction, to the principle of territoriality, without any possibility of accepting them in countries other than the one where the claim originated or where the encumbered property is situated.

For fiscal preferential rights - and the same might be said of other debts in public law - there was scarcely any question of finding another solution, since fiscal law, expressing an aspect of State sovereignty, is territorial in its scope. Law-makers have never taken into consideration property situated outside the national territory. (...)"

Although, therefore, Article 44 (3) in no way changes the current situation in international law as regards fiscal and social security preferential rights, it does introduce a definite innovation by authorizing tax and social security authorities (irrespective, in the case of the latter, of what has just been said) to prove abroad, as unsecured creditors, the unsatisfied portion of their claims. The procedure for admission will be that of the law governing bankruptcy, though it must be remembered that disputes relating to such claims will remain subject to the

\textsuperscript{239} Bulletin of the European Communities, Supplement 2/82.
Art. 39 IR goes a step further. It stipulates that 'any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.' In an insolvency proceeding, tax and social security authorities of other Member States can directly, i.e. without the intervention of the authorities of the Member State where the proceeding has been opened, submit their claims for their full amount.

A literal reading of Art. 39 IR has sparked the argument that it merely confers on foreign tax and social security authorities the right to submit - lodge - claims, but that it does not confer a right to admittance of the claim and to receive dividends. In my opinion, this literal interpretation of Art. 39 IR must be rejected as it clearly violates the spirit of the provision. Art. 32 and 39 IR contain an express confirmation that admittance of claims cannot be rejected on the mere grounds that the creditor is domiciled or has the nationality of another Member State or that the submitted claim originates from the public law of another Member State.

240 Report on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings, Bulletin of the European Communities, 1982/82, p 92-93
241 See the 'Minutes of evidence taken before the European Communities Committee (sub-committee E)', p 15, in House of Lords, Select Committee on the European Communities, Session 1995-96, 7th Report, Convention on Insolvency Proceedings, 26 March 1996
242 Cf Fletcher (1999), p 295, Kortmann/Veder (WPNR 2000), p 769 See also Report Virgós/Schmit, Nr 266, although the wording of the Report leaves room for some doubt, where in Nr 266 it states that the lodging of the claim cannot be rejected, but in Nr 267 adds that the time limit for lodging claims, the effect of a late lodgement, and the admissibility and well-foundedness of the lodgement are governed by the law of the State of the opening under Art 4 IR
UNCITRAL Model Law

Equal treatment of foreign and local creditors, including tax authorities, is also the starting point of Art. 13 Model Law:\textsuperscript{243}

(1) Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.

(2) Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

However, the alternative wording of Art. 13 that is suggested in a footnote to that provision, takes into account the practice of many jurisdictions to exclude foreign tax claims from participation in insolvency proceedings altogether. The alternative that is suggested would seem to be too rigid, though. It provides:

Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

As indicated earlier, States may be bound by international regulations or treaties that provide for assistance in the recovery of foreign tax and social security claims, also in case of insolvency. In implementing the Model Law, this may be reflected in the wording of the provision.\textsuperscript{244}

\textsuperscript{243} South Africa has adopted Art. 13 of the Model Law without excluding foreign tax and social security claims from the equal treatment of foreign creditors (see Art 13 of the Cross-Border Insolvency Act).

\textsuperscript{244} See, in this respect, e.g. (the proposals for) § 1513 (2) (B) of Chapter 15 of the US Bankruptcy Code ('Ancillary and other cross-border cases'), which is intended to implement the UNCITRAL Model Law in the insolvency law of the USA: "Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein".

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Ranking

If it is established that claims of foreign tax authorities are provable in an insolvency proceeding, the issue of the ranking of such claims arises. In the laws of many countries, a (general) privilege, or some other form of priority is attached to tax claims. Whether foreign tax claims enjoy the same privilege as equivalent claims of domestic tax authorities, in my opinion first and foremost depends on the international regulation providing for the enforceability of such claims. Generally, a privilege is not attached to foreign tax claims for the recovery of which assistance is provided by local authorities.\textsuperscript{245}

As stated above, under the Insolvency Regulation tax authorities can directly, i.e. without the intervention of local authorities, submit a claim in insolvency proceedings opened in other Member States. Whether a privilege is attached to such claims is a matter that, pursuant to Art. 4 (2) (i) is governed by the \textit{lex concursus}. It is submitted that the Insolvency Regulation does not impose an obligation on Member States to confer on foreign tax claims the same status as equivalent claims of the authorities of the Member State where the proceedings have been opened.\textsuperscript{246} The preferential status given to tax claims is generally reserved for claims of local tax authorities. In this respect they are dealt with on a different footing than claims concerning 'civil and commercial matters' of creditors from other Member States, which may enjoy the benefits of the preferential status given to comparable claims under the \textit{lex concursus}. The question has been raised whether the treatment of foreign tax claims as

\textsuperscript{245} See e.g. Art. 15 of the Convention on mutual administrative assistance in tax matters, Strasbourg 25 January 1988; Art. 36 (4) of the Tax Regulation for the Kingdom of the Netherlands of 28 October 1964; Art. 10 of Council Directive 76/308/EEC, implemented in Art. 23 of the Act of 24 October 1979 on mutual assistance in the recovery of certain EC-levies, turn over taxes and excise duties; Art. 6 of the Convention between the Netherlands and Germany on mutual administrative assistance in the recovery of tax claims and the notification of documents, The Hague, 21 May 1999. Differently, with respect to social security claims: EC Council Regulation 1408/71 of 14 June 1971 (OJ L 149, 5 July 1971) on the application of social security schemes to employed persons and their families moving within the Community. Art. 92 (1) of this Regulation provides that social security contributions due to the authorities of a Member State can be recovered in another Member State in accordance with the administrative procedures applicable in that Member State and with the guarantees \textit{and privileges} that apply to the recovery of social security contributions due to the corresponding authorities of that member state.

non-preferential claims, whereas equivalent claims of the authorities where the proceeding has been opened are given a preferential status, is compatible with the principle of non-discrimination.\textsuperscript{247} I doubt whether the European principle of non-discrimination provides an argument that compels Member States to extend the preferential status of their own tax claims to those of other Member States. First of all, the principle of non-discrimination is not intended to apply to the relation between and to be invoked by the Member States. Secondly, if with respect to the enforcement of tax claims within the European Community outside of insolvency a preferential status is generally denied, I do not see why in an insolvency proceeding the status of tax claims of other Member States should be different. In order to effect a privilege attached to the claim concerned, foreign tax authorities must apply - where possible - for the opening of insolvency proceedings in their 'home country'. The fact that the tax authorities in the Member State where the main proceeding has been opened have a privilege in the distribution of the proceeds of the estate, while equivalent claims of foreign tax authorities do not, may also be a reason for creditors to request the opening of secondary proceedings.

\textbf{2.5 Conclusions with respect to domestic insolvency proceedings}

With respect to the extraterritorial effects of insolvency proceedings, the Insolvency Regulation and German law differentiate according to the grounds of jurisdiction of the court opening the proceeding. Extraterritorial effect is assumed (and recognised) if the debtor's centre of main interests is located in the State where the insolvency proceeding is opened. In other cases, where the jurisdiction of the court opening the proceeding is for example based on the presence of an establishment or (as would be possible under German law) the presence of assets, the effects of the proceeding are restricted to assets situated in the State where the proceeding has been opened. To the extent that such territorial proceedings are opened parallel to a foreign main proceeding, provisions on the coordination of such proceedings with the main proceeding are provided for. Administrators (not the courts!) must co-operate and communicate relevant information.

Chapter II / Par. 2.5

The UNCITRAL Model Law, which does not deal with the conferral of jurisdiction on courts of a particular State, with the exception of Art. 28 Model Law, also links the jurisdiction of the court opening the proceeding to the relief that may be given following recognition of such proceeding in another State. The UNCITRAL Model Law provides for relatively wide duties for courts and administrators, in main as well as a non-main proceeding, to co-operate with each other.

Present Dutch law does not contain a similar differentiation. In principle extraterritorial effect is assumed with respect to any insolvency proceeding opened in the Netherlands, regardless of the grounds of jurisdiction. Only in case an insolvency proceeding has also been opened abroad does the claim for extraterritorial effect (maybe) yield in respect of assets included in the foreign proceeding. The Faillissementswet is silent on the relation between a Dutch insolvency proceeding and foreign insolvency proceedings. Provisions on the co-ordination of parallel proceedings are not provided for.

To the extent that insolvency proceedings (aim to) encompass the debtor's entire estate, the Insolvency Regulation, German law and Dutch law impose, under certain conditions, a duty on creditors to turn over to the estate the proceeds of individual recovery of claims (against assets) in another State. The UNCITRAL Model Law is silent on this issue. The uniform rule of substantive law that has been incorporated in Art. 20 (1) IR does not take into account the differentiated approach that may exist in the laws of the Member States with respect to individual recovery by creditors during an insolvency proceeding. This matter should have been left to the lex concursus applicable pursuant to Art. 4 IR.

With respect to the duty to account for dividends received in foreign parallel insolvency proceedings, the outcome of the examined systems (including Dutch law which does not have any explicit statutory rules on this matter) is similar.

All creditors are generally entitled to participate in the insolvency proceeding. A distinction between creditors according to their nationality, domicile or the law governing their claim is not accepted. This is the underlying principle of the Insolvency Regulation, the UNCITRAL Model
Law and German and Dutch law. With respect to tax claims the Insolvency Regulation has introduced important changes by explicitly extending to tax (and social security) authorities of other Member States the right to submit claims in an insolvency proceeding. The provisions of the UNCITRAL Model Law in this respect (necessarily) take account of the fact that in many jurisdictions claims of foreign public authorities are generally not admissible or, at least, not dealt with on the same footing as similar claims of local authorities.

That the equal treatment of creditors requires equal access of creditors to information, in particular regarding the opening of the insolvency proceeding, is recognised under all examined systems. The UNCITRAL Model Law and the Insolvency Regulation both explicitly address this issue. The Model Law in this respect provides for a more flexible regime than the Insolvency Regulation, in that it attunes the requirement to inform foreign creditors to the requirements existing in national law and in that it provides for more flexibility in the manner in which foreign creditors are to receive notification of the opening of a proceeding.

3. FOREIGN INSOLVENCY PROCEEDINGS

3.1 Introduction

The recognition of the effects of foreign insolvency proceedings has always given rise to more complex problems than the acceptance of the assumption that domestic insolvency proceedings affect the insolvent debtor's assets and legal relationships globally. National laws differ as to whether and, if so, to what extent foreign insolvency proceedings affect the insolvent debtor's assets and legal relationships. Two opposites in this respect are German and Dutch law. Since 1985, German law fundamentally recognises that foreign insolvency proceedings include the debtor's assets situated in Germany, whereas Dutch law to a large extent denies effects to foreign insolvency proceedings in respect of assets situated in the Netherlands.

Since the landmark decision of the Bundesgerichtshof of 1985, which will be discussed below, a more elaborate system of international insolvency law
has been developed in Germany. Chapter 9 of the *Regierungsentwurf einer Insolvenzordnung* set out rules on recognition and applicable law in cross-border insolvency cases. These provisions were eventually not incorporated in the *Insolvenzordnung*, not because of dispute over their content, but because it was observed that the provisions of the EU Insolvency Convention, which was in preparation at that time, could be declared to apply by analogy in the relation to third countries. In the meantime, it was held that it would be sufficient to state the 'wesentlichen Grundsätze eines modernen deutschen Insolvenzrechts'.\(^{248}\) The residue of the extensive debate on international insolvency law was, until March 2003, Art. 102 *EGInsO*, which provided a statutory basis for the recognition of foreign insolvency proceedings in Germany. Meanwhile, legislation based on the earlier proposals has been incorporated in the *Insolvenzordnung*.\(^{249}\) These provisions essentially follow the same model as the Insolvency Regulation.

On an international level important progress has been made over the past few years. The UNCITRAL Model Law on Cross-Border Insolvency was adopted in 1997 and the Insolvency Regulation entered into force on 31 May 2002. Both instruments aim to improve the efficiency of the administration of cross-border insolvency proceedings by providing, *inter alia*, for rules on the recognition of foreign insolvency proceedings and the effects thereof.

The 'development' of Dutch law in this field until now contrasts sharply with the development of German law. The Dutch legislator has not taken great interest in developing a system of international insolvency law that would do justice to the international developments in this field. Whether and, if so, under which conditions and to what extent, foreign insolvency proceedings are to be recognised in the Netherlands, has been left to be decided by the courts. It will be shown that the case law of the *Hoge Raad* in this respect shows a rather reticent position in respect of the recognition of the effects of foreign insolvency proceedings on assets situated in the Netherlands.

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248 BT-Drucksache 12/7303, p. 117.

As to the issue of recognition, a distinction must be made between the (court) decision opening the insolvency proceeding and the effects thereof and the recognition of other (court) decisions that are given during and within the framework of an insolvency proceeding. The latter may, even if given within the framework of an insolvency proceeding, either be governed by the rules applicable to foreign judgments in general\textsuperscript{250}, or, to the extent that they can be characterised as pertaining to 'insolvency law', specific rules such as they are laid down in the Insolvency Regulation.

The first subparagraph deals with the recognition of foreign (court) decisions opening insolvency proceedings in general. Whether a foreign insolvency proceeding is recognised and, if so, includes the assets located in the recognising State, is a crucial preliminary question in assessing the effects of a foreign insolvency proceeding on the position of secured creditors. The (immediate) effects of recognition of a foreign proceeding, e.g. applicability of a (foreign) stay on individual enforcement of insolvency claims and the divestment of the debtor, will be briefly dealt with in this context. After examination of the approach of the Insolvency Regulation and the Model Law in this respect, the rules of German and Dutch law that govern the effects of foreign insolvency proceedings falling outside the scope of the Insolvency Regulation, will be examined. In the second subparagraph attention will be given to the recognition (and enforcement) of other decisions than the decision opening the insolvency proceeding.

3.2 Recognition of the decision opening the insolvency proceeding and its (immediate) effects

3.2.1 Insolvency Regulation

3.2.1.1 Recognition

A judgment opening insolvency proceedings that falls within the scope of the Insolvency Regulation,\textsuperscript{251} is recognised by operation of law in all other Member States from the time that it becomes effective in the Member State

\textsuperscript{250} E.g Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

\textsuperscript{251} See in particular Preamble, Nr. 14, Art. 1 (2) IR and Annex A.
of the opening of the proceeding. This principle of community trust is embodied in Art. 16 IR.

Recognition of an insolvency proceeding does not depend on any formal requirements, such as publication, registration or prior court approval. Publication or registration of the judgment opening the insolvency proceeding may, however, play a part in the protection of the insolvent debtor's counterparties.

By virtue of Art. 26 IR, recognition of an insolvency proceeding opened in another Member State may only be denied if the effects of such recognition would be manifestly contrary to the recognising State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. Art. 16 (1) IR stipulates that a judgment opening an insolvency proceeding must also be recognised by Member States, where insolvency proceedings could not be opened in respect of the debtor on account of his capacity. It follows from Art. 16 IR that the capacity of the debtor cannot give rise to a conflict with the recognising State's public policy.

The principle of automatic recognition of insolvency proceedings, laid down in Art. 16 IR applies to main as well as (secondary) territorial proceedings. The effects of recognition of an insolvency proceeding depend on the nature of the jurisdiction of the courts of the Member State where the relevant proceeding has been opened. An insolvency proceeding opened on the basis of Art. 3 (1) IR - the main proceeding - produces effects throughout the European Community, whereas the effects of an insolvency proceeding opened on the basis of Art. 3 (2) IR - a (secondary) territorial proceeding - are restricted to the assets of the debtor situated in the Member State where the proceeding has been opened.

252 Cf. Art. 21 IR. See also Art. 102 § 5 EGInsO; Art. 14 (4) Fw.
253 Cf. Art. 22 IR. See also Art. 102 § 6 EGInsO.
254 Preamble, Nr. 29; Report Virgós/Schmit, Nr. 185.
255 See e.g. Art. 14 (2) IR
3.2.1.2 Effects of recognition of a main proceeding, scope of the foreign proceeding

Applicable law

As to the effects of main insolvency proceedings the Insolvency Regulation follows a so called 'extension model'. Pursuant to Art 17 (1) IR, the decision opening the main proceeding produces the same effects in any other Member State as under the \textit{lex concursus},\(^{257}\) unless the Insolvency Regulation provides otherwise and as long as no territorial proceedings pursuant to Art. 3 (2) IR have been opened.

Pursuant to Art. 4 IR, the law applicable to the main proceeding and its effects shall be that of the Member State within the territory of which the proceeding has been opened, the \textit{lex concursus}. That law determines the conditions for the opening of the proceeding, its conduct and closure. Art. 4 (2) IR contains a non-exhaustive enumeration of issues that are regarded as matters pertaining to insolvency law that are governed by the \textit{lex concursus}.

The application of the \textit{lex concursus} may interfere with the rules under which transactions are carried out in other Member States. In order to protect the legitimate expectations and the certainty of transactions in other Member States, the Insolvency Regulation provides for a number of exceptions to the (exclusive) applicability of the \textit{lex concursus}.\(^{258}\) These exceptions are set out in Art. 5-15 IR. In a number of cases, rights of creditors are excluded altogether from the effects of the insolvency proceeding. This is the approach adopted in respect of rights in rem, set-off and reservation of ownership.\(^{259}\) In other cases, the Insolvency Regulation provides that certain effects of the proceeding are governed not (only) by the law of the State of the opening, but (also) by the law of the State concerned. In this respect the Insolvency Regulation on the one hand provides for the effects to be given to the main proceeding in other Member States to be derived solely from the law of that other Member State. This approach has been adopted in respect of the effects of the main proceeding on contracts relating to immovable property, payment

\(^{257}\) Cf. Art. 4 and Art. 16 IR.
\(^{258}\) Preamble, Nr 24; Report Virgós/Schmit, Nr. 92.
\(^{259}\) Art. 5, 6 and 7 IR.
systems and financial markets, contracts of employment, and pending lawsuits. On the other hand, the Insolvency Regulation in some cases requires a 'cumulative application' of the *lex concursus* and the law of the Member State governing the transaction. This approach has been adopted in respect of the effects of the main proceeding on rights subject to registration.

The exceptions to the application of the *lex concursus* are made in favour of the law of another Member State. Art. 6 (set-off) and 14 (protection of third-party purchasers) are, judged by their verbatim text, not restricted to exceptions in the favour of the law of another Member State. However, these provisions must by systematic arguments be interpreted in the same way, according to the Report Virgós/Schmit.

If the relevant applicable law is not the law of a Member State, this does not mean that, by way of an a-contrario interpretation, the conclusion may be drawn that pursuant to Art. 4 IR the *lex concursus* applies exclusively. The formulation of the exceptions to the applicability of the *lex concursus* must be assessed against the background of the purport of the Insolvency Regulation to regulate the intra-Community effects of insolvency proceedings. The intention to protect legitimate expectations and the certainty of transactions that underlies the Art. 5-15 IR, may equally apply to other cases. This is a matter that is left to the Member States, however. They are free to apply similar rules as those laid down in the Insolvency Regulation.

*Powers of the administrator*

With respect to the powers of the administrator who is appointed in the main proceeding, Art. 18 (1) IR stipulates that he may exercise all the powers conferred on him by the law of the State of the opening of the proceeding in another Member State, as long as no other insolvency proceeding has been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of an

260 Art. 8, 9, 10 and 15 IR.
261 Art. 11 IR.
262 Cf. Report Virgós/Schmit, Nr. 93.
263 Cf. Report Virgós/Schmit, Nr. 93.
insolvency proceeding in that State. In order to remove any doubts, Art. 18 IR expressly stipulates that the recognition of the foreign administrator's powers entails that he may remove assets from the territory of the Member State where they are situated. However, in doing so he must respect proprietary rights of creditors or third parties in such assets.

In exercising his powers, the administrator must comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures relating to the realisation of assets. The wording of Art. 18 (3) IR would seem to suggest that the manner of realisation of assets is determined in accordance with the law of the Member State where the asset concerned will be realised. However, the Report Virgós/Schmit indicates that in respect of realisation of assets, the lex concursus determines the extent of the powers of the administrator and the manner in which they may be exercised:

"Only that law can determine, for example, whether the sale of immovable property can be private (person-to-person) or if sale by public auction is necessary."

The form of sale that has been determined by the lex concursus, must then be carried out in accordance with the procedures provided for in the law of the Member State where the asset concerned is realised. Even though this approach reflects the basic rule that the powers of the administrator, the supervision on his actions and possible liability, are in principle governed by the lex concursus, it may lead to difficulties. If the lex concursus were to allow the administrator to sell assets by private contract, subject to the approval of the court, and the law of the Member State where the asset is located provides for sale by private contract without prior court approval, what must the administrator do? Where the requirement of court approval to a particular method of sale is generally intended to safeguard the interests of third parties, can the court of the Member State where the insolvency proceeding has been opened approve of a sale by private contract of assets that are situated abroad? That such a decision must be recognised in other Member States, follows from Art. 25 IR. But it is not at all obvious that that court would be in a position to assess the

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264 E.g preservation measures ordered by the court in a German Eröffnungsverfahren, see Art. 21 InsO.
265 Report Virgós/Schmit, Nr. 164 under c.
interests involved in the sale of assets located in another jurisdiction. Subjecting both the manner of realisation and the procedures to be followed to the same law, i.e. the law of the Member State where the assets concerned will be realised, would minimise such problems, while not fundamentally departing from the principle that the powers of the administrator are governed by the *lex concursus*. Whether the administrator has the power to realise (particular) assets, or whether this for example requires the participation or co-operation of the debtor, remains to be determined by the *lex concursus*.

3.2.1.3 Foreign main proceeding and the opening of a secondary proceeding

Art. 16 (2) IR explicitly states that recognition of main insolvency proceedings does not preclude the opening of territorial proceedings referred to in Art. 3 (2) IR.

The opening of secondary proceedings may be requested by any person or authority empowered to do so under the law of the Member State where the opening of a secondary proceeding is requested. By virtue of Art. 29 (1) IR this power is also conferred on the administrator in the main proceeding. Whether the debtor can be subject to an insolvency proceeding on account of his capacity, is a matter that is determined by the law of the Member State where the opening of the secondary proceeding is requested. Pursuant to Art. 27 IR, the debtor's insolvency will not be examined.

*Effects of recognition*

With respect to (secondary) territorial proceedings, Art. 17 (2) IR stipulates that, whereas the effects of that proceeding do not extend to assets situated in other Member States, the effects of the proceeding may not be challenged in other Member States. Given the limited scope of such (secondary) territorial proceedings, any restriction on creditors' rights, in particular a stay or discharge, shall produce effect vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.
The fact that a secondary proceeding is also recognised in other Member States by operation of law, is of importance to the exercise of the administrator's powers. If moveable property has been removed to another Member State after the opening of the insolvency proceeding, the administrator may, pursuant to Art. 18 (2) IR, reclaim such assets. Art. 18 (2) IR further stipulates that the local administrator 'may also bring any action to set aside which is in the interest of creditors.' This phrase indicates that the local administrator may bring action in other Member States aimed at returning to the local proceedings assets that, without some kind of fraud, would have been situated in the Member State where the proceeding is opened. It apparently refers to an action for the voidness, voidability or unenforceability of detrimental legal acts as dealt with in the article 4 (2) (m) and 13.  

Applicable law
The law applicable to matters of insolvency law that arise in secondary proceedings, is determined on the basis of the same conflict rules as in main proceedings. The secondary proceeding and its effects are therefore in principle governed by the law of the State where the proceeding has been opened. Given the limited territorial scope of secondary proceedings, some of the exceptions to the applicability of the lex concursus provided for in Art. 5-15 IR will not be relevant.

Co-ordination of proceedings
The Insolvency Regulation in Chapter III provides for mandatory rules on co-operation and communication of information between the main and secondary proceedings. These provisions reflect the supremacy of the main proceeding over secondary proceedings.

A general duty to co-operate with and communicate relevant information to each other is imposed on all administrators, whether appointed in a main or in a secondary proceeding. But in addition, the administrator in the main proceeding is given relatively extensive powers (of decision) in the secondary proceeding. The administrator appointed in the main proceeding may, for example, under certain circumstances request the court that opened the secondary proceeding to stay the process of liqui-

266 Cf. Report Virgós/Schmit, Nr. 165 and 224.
267 Art. 28 IR.
dation\textsuperscript{268} and closure of the secondary proceeding by way of a composition shall in principle not become final without his consent.\textsuperscript{269}

The obligation to co-operate and communicate information that is relevant to other proceedings is only imposed on the respective administrators. Unlike the Model Law, an obligation for administrators to co-operate with and communicate information to foreign courts, is not provided for. Given the position that courts or court officials (such as a supervisory judge) may have in the proceeding, a more extensive obligation than currently provided for in the Insolvency Regulation would appear preferable.

Pursuant to Art. 35 IR, a surplus remaining in the estate of the secondary proceeding after all admitted creditors have been paid in full, must be transferred immediately to the administrator in the main proceeding.

3.2.2 \textit{UNCITRAL Model Law}

3.2.2.1 Introduction

The Model Law provides for a quite different system with respect to the recognition of foreign insolvency proceedings and the effects thereof than the Insolvency Regulation. In view of obtaining recognition a foreign administrator can apply to the court which, if the requirements for recognition are met, has a discretionary power to order the assistance to the foreign proceeding - relief - that is considered appropriate.

3.2.2.2 Access to the courts of the enacting State and recognition of a foreign proceeding

The Model Law does not provide for the recognition of foreign insolvency proceedings by operation of law. Recognition of foreign insolvency proceedings is subject to a court decision. Pursuant to Art. 15 (1) Model Law, a foreign administrator may apply to the court in the enacting State

\textsuperscript{268} Art. 33 IR.
\textsuperscript{269} Art. 34 IR.
for recognition of the proceeding in which he has been appointed.\textsuperscript{270} In order to achieve the speed necessary for the effective protection of the debtor's assets and the interests of the creditors, Art. 17 (3) Model Law stipulates that the court shall decide on the application for recognition 'at the earliest possible time'.

The conditions for recognition of foreign proceedings are set out in Art. 17 Model Law. These conditions are not very restrictive. Under the Model Law a foreign proceeding shall be recognised if it falls within the scope of the Model Law, the application for recognition is presented by a person or body indicated as a 'foreign representative' in Art. 2 Model Law, the application meets certain requirements of proof of the opening of the foreign proceeding as prescribed by Art. 15 Model Law\textsuperscript{271} and if the application has been submitted to the court that has jurisdiction pursuant to Art. 4 Model Law. It follows from Art. 17 Model Law that, if these conditions are met and subject to the public policy exception incorporated in Art. 6 Model Law, foreign insolvency proceedings should be recognised as a matter of course. The Model Law does not provide for the court to evaluate the merits of the foreign court's decision by which the proceeding has been opened.

Neither does the Model Law provide for a reciprocity requirement. The Model Law is based on the recognition in the enacting States of foreign proceedings even if they have been commenced in countries that have not adopted the Model Law itself and would not recognise insolvency proceedings that have been opened in the enacting State.\textsuperscript{272}

Important conditions for the applicability of the Model Law are that the foreign proceeding can be characterised as an insolvency proceeding

\textsuperscript{270} Art. 9 confers on a foreign administrator the right to directly apply to a court in the enacting State, i.e. without having to go through formal - e.g. diplomatic - channels. Art. 10 addresses concerns that might arise about exposure to all-embracing jurisdiction triggered by an application (cf. Guide to Enactment, Nr. 94).

\textsuperscript{271} Art. 16 establishes a number of presumptions in respect of the nature of the foreign proceeding and the authenticity of the documents presented by the foreign administrator in order to allow the court to expedite the evidentiary process.

\textsuperscript{272} Nevertheless, a requirement of reciprocity has been introduced by some countries that have enacted the Model Law. See Art. 2 (2) of the Cross-Border Insolvency Act of the Republic of South Africa. See also Art. 280 of Title 12 of the Mexico Reorganisation Act 2000.
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within the terms of Art. 2 (a) Model Law and that the foreign administrator submitting the application for recognition to the court is a 'foreign representative' within the meaning of Art. 2 (d) Model Law. The Model Law contains a definition of a 'foreign proceeding' that indicates essential attributes of insolvency proceedings. Pursuant to Art. 2 (a) Model Law, the regime of recognition provided for in the Model Law applies to

a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

The 'definition' adopted in Art. 2 (a) Model Law is very broad in order to not unnecessarily limit the applicability of the Model Law, given the wide variety of types of insolvency and insolvency related proceedings existing worldwide. It is impossible to list all proceedings existing worldwide that have the attributes of an insolvency proceeding mentioned in Art. 2 Model Law, as has been done for the Member States of the European Union in Annex A to the Insolvency Regulation. Which foreign proceedings will be eligible for recognition in countries that have adopted the Model Law will therefore have to be established on a case by case basis by the courts of the enacting States. But, a liberal approach should be adopted in this respect. In deciding whether or not a particular insolvency proceeding meets the requirements of Art. 2 (a) Model Law, the courts of the enacting State must not strictly adhere to the concept and structure of insolvency proceedings in that State. As indicated in Art. 8 Model Law, in the interpretation of the (legislation enacting the) Model Law, the courts must take into account its international origin and the need to promote uniformity in its application and the observance of good faith. The Model Law intends to include a great variety of different types of insolvency proceedings, whether compulsory or voluntary, corporate or individual, and whether aimed at reorganisation or liquidation.273 Also proceedings where the debtor retains some measure of control over his assets, even though under some form of court supervision - often referred to as 'debtor in possession' proceedings - are meant to fall within the scope of the Model Law.

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The nature of the debtor in principle is irrelevant for the applicability of the Model Law. The Model Law does not distinguish between proceedings opened in respect of natural or legal persons or between proceedings opened in respect of 'traders' or consumers.\(^{274}\) Art. 1 (2) Model Law provides that certain exceptions may be included in the law of the enacting State to the applicability of the Model Law to insolvency proceedings opened in respect of certain types of entities, such as banks, insurance companies or public utility companies.\(^{275}\) Likewise, Art. 1 (2) Model Law leaves room for the exclusion of insolvency proceedings opened in respect of consumers.\(^{276}\)

Proceedings conducted on an 'interim' or 'provisional' basis are explicitly included in the definition of a foreign proceeding in Art. 2 (a) Model Law. This is to accommodate the practice existing in many countries that insolvency proceedings are first opened on a provisional basis, with the appointment of a provisional administrator, and that only after some time a final decision is taken on the definitive continuation of the insolvency proceeding.\(^{277}\) The reference to 'interim proceedings' would also appear to include a formal period of investigation following the submission of an application for the opening of an insolvency proceeding and preceding the decision opening the insolvency proceeding, during which period several protective measures may take effect by operation of law or by order of the court, such as the protective measures ordered by the German court on the basis of Art. 21 InsO.\(^{278}\)

**Foreign main and non-main proceedings**

The effects of recognition of a foreign proceeding depend on whether the proceeding is recognised as a foreign *main* proceeding or a foreign *non-main* proceeding. With respect to foreign main proceedings recognition

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\(^{274}\) Cf. Guide to Enactment, Nr. 24, 25, 52  
\(^{275}\) Cf. Guide to Enactment, Nr. 61 et seq. See also Art. 1 (2) IR. The Republic of South Africa has not excluded certain types of debtors from the scope of its Cross-Border Insolvency Act. § 1501 (c) of chapter 15 of the US Bankruptcy Code lists a number of debtors that are excluded from the application of that chapter.  
\(^{276}\) Cf. Guide to Enactment, Nr. 66. See also (the proposals for) § 1501 (c) (2) of the US Bankruptcy Code.  
\(^{277}\) E.g. the provisional granting of suspension of payments to a debtor under Art. 215 Fw.  
\(^{278}\) Cf. Wimmer (ZIP 1997), p. 2222.
produces a number of effects automatically by virtue of Art. 20 Model Law, whereas the effects of recognition of foreign non-main proceedings are always subject to the discretion of the court by virtue of Art. 21 Model Law.

Whether a proceeding is a foreign main or a non-main proceeding is determined on the basis of similar criteria as provided for in the Insolvency Regulation. An insolvency proceeding that takes place in the State where the debtor has the centre of its main interests is a foreign main proceeding. In the absence of proof to the contrary, the debtor's registered office or - in the case of natural persons - his habitual residence is presumed to be the centre of his main interests. 279 An insolvency proceeding taking place in the State where the debtor has an establishment - i.e. any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services - is a non-main proceeding. 280

From the wording of Art. 17 (2) Model Law it follows that a proceeding opened on the basis of Art. 28 Model Law, i.e. on the basis of the mere presence of assets, is not eligible for recognition abroad under the terms of the Model Law. The inconsistency between the criteria for determining a court's jurisdiction to open an insolvency proceeding and the criteria to determine the jurisdiction of the court whose decision is the subject of an application for recognition, may prove to be unnecessarily restrictive if the administrator who is appointed in a local proceeding for example wishes to initiate actions abroad aimed at reversing acts that were detrimental to the creditors. 281

Whether notice of an application for recognition or the decision on the application is to be issued, e.g. with respect to a possible requirement of hearing the affected parties prior to a decision on the recognition of the foreign proceeding, has been deliberately left unregulated in the Model Law. This matter is governed by the general provisions of (procedural)

279 Art. 2 (b), 17 (2) (a) and 16 (3) Model Law. Cf. Art. 3 (1) IR.
280 Art. 2 (c), 2 (f) and 17 (2) (b) Model Law.
281 Art. 23 Model Law links the standing of the foreign administrator to initiate such actions, to recognition of the proceeding in which he has been appointed.
law of the enacting State. The Model Law neither precludes the court from issuing a notice where legally required, nor imposes such notice where not provided for.

Modification or termination of recognition

Art. 17 (4) Model Law stipulates that recognition may be modified or terminated if it is shown that the grounds for granting recognition were fully or partially lacking or have ceased to exist. Modification or termination of recognition may for example be required if an insolvency proceeding has been opened following a recognised interim proceeding, the foreign proceeding has been terminated or in case the nature of the proceeding has changed (a reorganisation proceeding has for example been converted into a liquidation proceeding). The foreign administrator must inform the court promptly of any substantial change in the status of the recognised foreign proceeding or the status of the administrator's appointment (Art. 18 (a) Model Law).

3.2.2.3 Effects of recognition

In determining the effects of the recognition of a foreign insolvency proceeding, the Model Law does not follow the extension model of, for example, the Insolvency Regulation. The effects of a foreign insolvency proceeding in the enacting State are not determined by the law of the State where the proceeding has been opened, the lex concursus, but by the law of the enacting State. The effects of recognition of a foreign proceeding that either take effect automatically or by order of the court are partly based on the legislation implementing the provisions on relief provided for in the Model Law and partly on existing provisions in national law concerning relief available to administrators in local insolvency proceedings.

Automatic effects of recognition of a foreign main proceeding

As previously indicated, the effects of the recognition of a foreign proceeding depend on whether the proceeding is recognised as a main or a non-main proceeding. In case of recognition of the proceeding as a foreign main proceeding, Art. 20 Model Law determines that such recognition

282 Cf. Guide to Enactment, Nr. 120-121.

283 Cf. Guide to Enactment, Nr. 143, 159.
produces, either by operation of law or by mandatory court order\textsuperscript{284}, a number of immediate effects in the enacting State. These include a stay in respect of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets or liabilities, including execution against the debtor's assets, and suspension of the debtor's right to transfer, encumber or otherwise dispose of his assets. Art. 20 (2) Model Law provides that the scope and the modification or termination of the stay and suspension referred to in Art. 20 (1) Model Law, are subject to certain provisions of law to be identified by the enacting State. This provision would for example allow for exceptions to the automatic stay in respect of secured creditors, or claims that have arisen after the opening or recognition of the foreign main proceeding\textsuperscript{285}.

Whether or not the particular type of relief imposed by Art. 20 (1) Model Law corresponds to the effects of the insolvency proceeding in question under the \textit{lex concursus} is irrelevant. The argument advanced in the Guide to Enactment that the determination of the effects of a foreign insolvency proceeding without taking into account the effects it produces under the \textit{lex concursus} would be necessary for an orderly and fair conduct of a cross-border insolvency proceeding\textsuperscript{286}, is not convincing and in my opinion should lead to the opposite conclusion. It is difficult to see how orderly, fair and effective results can be achieved if recognition of a foreign proceeding, whereby under the foreign \textit{lex concursus} the debtor has for example retained the power to transfer his assets in order to carry on his business, would necessarily entail that the debtor loses those powers in respect of assets situated in the recognising State. The provision also does not do justice to the complex and more subtle approaches that may exist for example with respect to the concept of a 'stay' in the insolvency law of the State of the opening of the proceeding and the insolvency law of the recognising State. It would have been desirable and more convincing if a reference to the effects of the insolvency proceeding under the foreign \textit{lex concursus} had been introduced in the provision. In principle the (automatic) effects connected to the recognition of a foreign main proceeding

\textsuperscript{284} Cf. Guide to Enactment, Nr. 142.
\textsuperscript{285} Cf. Guide to Enactment, Nr. 148.
\textsuperscript{286} Cf. Guide to Enactment, Nr. 143.
Cross-border aspects of insolvency proceedings

should not go beyond the effects that the opening of the insolvency proceeding concerned produces under the *lex concursus.*

**Discretionary relief**

In addition to the effects automatically attached to the recognition of a foreign main proceeding, the Model Law confers a large power of discretion on the courts of the recognising State with respect to determining the effects of recognition of foreign main and non-main proceedings. Art. 21 (1) Model Law states in this respect that

> Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief.

The relief that the court may grant at the request of the foreign administrator, includes (i) enabling the foreign administrator to gather information, e.g. through the examination of witnesses, (ii) entrusting the administration or realisation of (part of) the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, (iii) or any other type of relief that is available under the insolvency law of the enacting State. At the request of the foreign representative, the court may also (iv) entrust the distribution of the (proceeds of the) debtor's assets located in that State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of local creditors are adequately protected.

In granting, denying, modifying or terminating relief, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. In view of the protection of the interests of all parties involved in the insolvency proceeding, e.g. the debtor or local creditors, the court may subject such relief to the conditions it considers appropriate or modify or terminate such relief.

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287 To determine the immediate effects of recognition of a foreign proceeding on the basis of the effects that the insolvency law of the recognising State attaches to similar types of proceedings would also not lead to clear and practical results. In countries with more than one type of insolvency proceeding - liquidation or reorganisation -, it will often not be easy to determine (for the courts of the recognising State) whether the foreign proceeding has the characteristics of one or the other.

288 Art. 22 Model Law. See also Art. 21 (2) Model Law.
It may modify or terminate relief at the request of the foreign administrator or a person affected by the relief or it may do so at its own motion.

Evidently, the (extent of the) relief that may be granted by the court under Art. 21 Model Law, depends on whether the foreign proceeding concerned is a main or non-main proceeding. The interests and powers of administrators in non-main proceedings are narrower than in a main proceeding. This is reflected in Art. 21 (3) Model Law, where it is stipulated that, in granting relief upon recognition of a non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the recognising State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. The objective of this provision is clear. Relief granted in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign administrator and should not interfere with the administration of another insolvency proceeding, in particular a foreign main proceeding.

**Actions to avoid acts detrimental to creditors**

An important consequence of recognition of a foreign proceeding, is that the administrator appointed in that proceeding has standing to initiate actions aimed at the reversal of pre-insolvency transactions that have prejudiced the rights of creditors. The procedural standing conferred on the foreign administrator by virtue of Art. 23 Model Law, is limited to actions that would be available to a local insolvency administrator under the insolvency law of the recognising State. Art. 23 Model Law expressly provides that the foreign administrator has standing to initiate an action aimed at reversing juridical acts detrimental to the creditors, but does not create any substantive right regarding such action. Nor does Art. 23 Model Law contain a conflict rule. Art. 23 Model Law, like Art. 24 Model Law, is limited to clarifying that a foreign administrator cannot be denied the procedural standing to initiate an action aimed at reversing certain juridical acts, or, as provided for in Art. 24 Model Law, to intervene in proceedings in which the debtor is a party, merely because the (procedural) legislation of the recognising/enacting State does not contemplate a foreign insolvency administrator as having such standing.

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289 Cf. Guide to Enactment, Nr. 158. See also Art. 3 and 18 IR.
290 Cf. Guide to Enactment, Nr. 158.
291 E.g. under Art. 42 and 47 Fw.

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3.2.2.4 Pre-recognition relief

Art. 17 (3) Model Law instructs the court to decide upon an application for recognition 'at the earliest possible time'. Nevertheless, some time may pass between the application and the decision. During that time it is important that a possibility of obtaining provisional relief exists in order to protect the debtor's assets and the interests of the debtor and the creditors.

Art. 19 Model Law confers on the competent court of the recognising State the authority to grant relief on a provisional basis at the request of the foreign administrator in cases where that is 'urgently needed'. The measures referred to in Art. 19 Model Law are essentially the same as those available under Art. 21 Model Law. However, the stay that may be imposed by the court, is limited to a stay on the execution of assets. Creditors could therefore, during this period, continue to bring action against the debtor in order to obtain an enforceable title and the debtor could, in principle, continue to discharge debts from the assets situated in the recognising State. Furthermore, the administration or realisation of (part of) the debtor's assets can be entrusted to the foreign administrator - or another person designated by the court - only in order to protect and preserve the value of assets that, either by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy. In ordering provisional protective measures under Art. 19 Model Law, the court should take into consideration whether recognition is requested for a foreign main proceeding or a foreign non-main proceeding. That the scope of the foreign proceeding is a matter that must be taken into consideration, is reflected in Art. 19 (4) Model Law, pursuant to which the court may refuse to grant requested relief if that would interfere with the administration of a foreign main proceeding. An orderly and effective operation of concurrent foreign proceedings, requires that pre-recognition relief granted in favour of a foreign non-main proceeding must be consistent with and should not interfere with (pre-recognition) relief granted in favour of a foreign main proceeding.

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292 Cf. Art. 21 (3) Model Law.
293 Cf. Art. 30 (a) Model Law. Art. 15 (3) Model Law requires the foreign administrator applying for recognition, to identify all foreign insolvency proceedings pending in respect of the debtor that are known to him. See also Art. 18 (b) Model Law.
3.2.2.5 Recognition of a foreign main proceeding and the opening of a local insolvency proceeding

The recognition of a foreign main proceeding and the granting of relief at the request of the administrator appointed in a foreign main proceeding, does not exclude the possibility of opening a local insolvency proceeding in the recognising State.

Jurisdiction and opening
Art. 28 Model Law permits the opening of a local insolvency proceeding, after recognition of a foreign main proceeding, if the debtor has assets in that State. In that respect it deviates from the Insolvency Regulation, which, pursuant to Art. 3 (2) IR, requires an establishment, but is in accordance with Art. 354 InsO. The Guide to Enactment clarifies that, if enacting States would opt for a more restrictive conferral of jurisdiction on their courts, and were to implement a provision stating that the opening of a local proceeding under Art. 28 Model Law requires the existence of an establishment in that country, this would be in accordance with the philosophy of the Model Law.\(^\text{294}\)

Pursuant to Art. 11 Model Law, also a foreign administrator, whether appointed in a main or non-main proceeding,\(^\text{295}\) has the power to request the opening of a (secondary) insolvency proceeding. He may do so even prior to the recognition of the proceeding in which he has been appointed. This is necessary, according to the Guide to Enactment, because the opening of such a proceeding may be crucial in cases of urgent need for preserving assets of the debtor.\(^\text{296}\)

As to the assessment of the insolvency of the debtor, Art. 31 Model Law stipulates that recognition of a foreign main proceeding provides a rebuttable presumption that the debtor is insolvent. Art. 27 (1) IR and 356 InsO go a step further in that a secondary insolvency proceeding may be opened without the debtor's insolvency being examined or established, therefore also if, under the law of the State where the secondary

\(^{294}\) Cf. Guide to Enactment, Nr. 186.
\(^{295}\) Differently: Art. 29 IR and Art. 356 InsO, which only confer this power on the administrator appointed in a main proceeding.
\(^{296}\) Cf. Guide to Enactment, Nr. 99.
proceeding is opened, the criteria for opening an insolvency proceeding would not have been met.

Effects
With respect to a local proceeding opened under Art. 28 Model Law, the Model Law explicitly stipulates that its effects are restricted to the debtor's assets located in that State. To the extent necessary to implement the co-operation and co-ordination under Art. 25-27 Model Law, a local proceeding opened under Art. 28 Model Law may also affect assets of the debtor that, under the law of the recognising State, should be administered in that proceeding. Within the system of the Model Law, the extension of the effects of a proceeding under Art. 28 Model Law to assets situated outside the recognising State, appears to lack a sufficient guarantee in the provisions on recognition and therefore may be without real effect. This is only different, if Art. 28 Model Law may be regarded as an exception to Art. 17 Model Law, from which it follows that only proceedings designated by the Model Law as foreign main or non-main proceedings, which require jurisdiction based on the debtor's centre of main interests, resp. the existence of an establishment, shall be recognised. The Guide to Enactment is silent on this matter.

3.2.2.6 Co-ordination and co-operation

When local proceedings are opened parallel to foreign proceedings, whether main or non-main, communication of information between these concurrent proceedings and co-ordination of the actions undertaken in these proceedings is required. Art. 25-27 and 29-30 Model Law contain general rules on the co-operation between courts and representatives from various jurisdictions involved in parallel proceedings opened in respect of the debtor. An obligation to transfer to the main proceeding, a possible surplus remaining after all claims in the secondary proceeding have been paid in full, is not incorporated in the Model Law.

Art. 25 Model Law authorises, or rather obliges ('shall'), the courts of the enacting State where an insolvency proceeding has been opened, to co-operate to the maximum extent possible with foreign courts or foreign

representatives. In paragraph 2 of that provision, the right of the court to communicate directly with, or to request information and assistance directly from, foreign courts or foreign representatives, is laid down. The intention of this provision is to ensure that the courts in the enacting State can communicate with foreign courts and administrators, without the use of time consuming procedures such as letters rogatory or diplomatic procedures. Pursuant to Art. 26 Model Law, the administrator appointed in an insolvency proceeding, shall, in the exercise of his functions and subject to the supervision of the court, co-operate to the maximum extent possible with foreign courts and foreign administrators. In the exercise of his functions and subject to the supervision of the court, the administrator is entitled to communicate directly with foreign courts and foreign administrators. That such communication and co-operation takes place 'subject to the supervision of the court' is not intended to impose additional requirements of court approval than those already existing under national laws. Imposing additional requirements would run contrary to the aim of expedient and efficient co-operation to be undertaken by the administrator in the administration of the insolvency estate. This provision does not intend to modify existing rules on court supervision. Neither should it be interpreted to suggest a requirement of some form of ad hoc authorisation for co-operation or communication with foreign courts or administrators. Art. 27 Model Law indicates - in a non-exhaustive manner - in which forms the co-operation between courts and administrators can be implemented. Under Art. 27 Model Law the co-operation in the form of Protocols that were concluded in for example the BCCI or the Maxwell case, would be possible. The forms of co-operation mentioned in Art. 27 (and the duty of co-operation itself imposed by Art. 25) may not reflect the possibilities and legal traditions in certain civil law countries, where the position of the court in insolvency proceedings is different - less active and more of a supervisory nature - from that in certain other (common law) jurisdictions. However, the importance of communication between the courts and court appointed supervisory judges in various jurisdictions may not be underestimated, e.g. where it concerns obtaining court approval for a sale of the debtor's enterprise as a going concern where the assets and business activities are situated in

299 Guide to Enactment, Nr. 82.
300 Cf. Art. 27 under (d) Model Law With regard to such protocols, see Paulus (ZIP 1998).
various jurisdictions. In practice, the exchange of information concerning
the insolvency proceeding between courts and administrators in various
jurisdictions will be particularly important, e.g. where it concerns infor­
mation on assets, liabilities and intended distributions to creditors. As the
Model Law must be implemented into the existing legislation in the
enacting State, any mandatory rules containing restrictions on the co­
operation and communication of information - for example rules on
protection of privacy - will be applicable.  

3.2.3 German law

3.2.3.1 From 'universality' to 'territoriality' and back

The development of German law with respect to the recognition of foreign
insolvency proceedings shows a shift from a liberal approach to the recog­
nition of foreign insolvency proceedings, to fundamentally denying any
effects of foreign insolvency proceedings in respect of assets situated in
Germany, and back to the recognition that foreign insolvency proceedings
include assets situated in Germany.

In the travaux préparatoires of the Konkursordnung of 1877, the German
legislator expressed a favourable approach towards the recognition of
foreign insolvency proceedings. That Art. 237 KO was introduced at some
stage in the legislative process in order to protect 'local' creditors, did not
impair the fundamental assumption advanced during the legislative
process that in principle foreign insolvency proceedings would include
assets situated in Germany.

Pursuant to Art. 237 KO, creditors continued to have the right to indivi­
dually enforce claims against the debtor's assets situated in Germany
notwithstanding the opening of an insolvency proceeding abroad. An
exception was accepted with respect to assets that had been acquired by

301 Cf. Art. 31 (1) IR: Subject to the rules restricting the communication of information,
the liquidator in the main proceedings and the liquidators in the secondary
proceedings shall be duty bound to communicate information to each other.
302 See the account of the legislative process in: Jahr (1973), Nr. 192-195.
303 Provided that the entitlement to enforcement had been obtained prior to the opening
nales Vertragsrecht-Hausmann, Nr. 1816; Aderhold (1992), p. 242 et seq.
the foreign administrator in his capacity and assets that had been brought to Germany after the opening of the insolvency proceeding. Such assets did not fall within the scope of protection of Art. 237 KO, the objective of which was to protect creditors who, in extending credit, had relied on the debtor's assets situated in Germany.

Notwithstanding the favourable approach to recognition expressed by the legislator, German case law from the end of the 19th century shows examples of application of the universality as well as the territoriality principle. The different perceptions of Art. 237 KO have strongly influenced the debate. This provision has been used as an argument in favour of the recognition of foreign insolvency proceedings - Art. 237 KO as a specific exception to the recognition of the 'universal' effect of foreign insolvency proceedings - as well as an argument against the recognition of foreign insolvency proceedings - Art. 237 KO as confirmation of the 'territorial' effect of foreign insolvency proceedings.

Universality
In one of its earliest decisions on the cross-border effects of foreign insolvency proceedings the Reichsgericht, in accordance with the considerations in the explanatory report to the Konkursordnung referred to above, held that foreign insolvency proceedings in principle extended their effects to the debtor's assets located in Germany. However, recognition could be denied if that was deemed necessary in view of the protection of local creditors.

Territoriality
Several years later the Reichsgericht expressed the view that foreign insolvency proceedings in principle did not have any effects on assets situated in Germany. The Reichsgericht based its decision on Art. 237 KO, which it considered to give expression to the principle of territoriality. Accordingly, the court held that the legal effects of insolvency proceedings

305 RG 28 March 1882, RGZ 6, 400.
306 RG 11 July 1902, RGZ 52, 156.
opened abroad were limited to the territory where the foreign insolvency law concerned was in force.\textsuperscript{307}

The territorial approach has been upheld for most of the 20th century. It became well-established, even though severely criticised, case law that assets situated in Germany were not affected by foreign insolvency proceedings.\textsuperscript{308} The territorial effect of foreign insolvency proceedings was considered to follow from their nature as foreign acts of sovereignty leading to a general attachment on the insolvent debtor's assets for the purpose of realising these assets for the benefit of his joint creditors.\textsuperscript{309} Art. 237 KO was seen as an expression of the territoriality principle, from which it followed that a foreign insolvency proceeding did not lead to an attachment on assets situated in Germany.\textsuperscript{310}

The debtor that was subject to insolvency proceedings abroad consequently retained his power to administer and dispose of assets that were situated in Germany, notwithstanding the fact that the \textit{lex concursus} exclusively conferred these powers on the administrator.\textsuperscript{311} A different view was held with regard to the insolvency of legal persons, however. The foreign administrator was accepted as representative of the insolvent legal person. The conferral of powers on the administrator in case of the insolvency of a legal person was not considered a real issue of insolvency law but rather an issue of representation of legal persons that was governed by the law of incorporation (\textit{Gesellschaftsstatut}).\textsuperscript{312}

\textbf{Universality}

With its landmark decision of 11 July 1985 the \textit{Bundesgerichtshof} ended the rule of the territoriality principle and determined that foreign insolvency proceedings in principle include the debtor's assets situated in Ger-

\textsuperscript{307} See also RG 21 October 1920, RGZ 100, 241.
\textsuperscript{308} Cf. BGH 4 February 1960, NJW 1960, 774 and BGH 30 May 1962, NJW 1962, 1511.
\textsuperscript{309} See the references in Müller-Freienfels (1963), p. 366-367.
\textsuperscript{310} BGH 30 May 1962, NJW 1962, 1511.
\textsuperscript{311} BGH 4 February 1960, NJW 1960, 774; BGH 7 December 1961, WM 1962, 263; BGH 30 May 1962, NJW 1962, 1511.
many. This change towards the fundamental recognition of foreign insolvency proceedings had first announced itself in 1983, in a case that concerned the cross-border effects of insolvency proceedings opened in Germany. The court had to deal with the question whether a creditor that, notwithstanding the opening of an insolvency proceeding against the debtor in Germany, had partly recovered a claim from a bank account kept by the debtor in Switzerland, was under the obligation to account for those proceeds in the German insolvency proceedings or to turn over those proceeds to the estate. The Bundesgerichtshof concluded that, in view of its place and meaning in the system of German international insolvency law, Art. 237 KO was to be regarded as a specific limitation imposed on the recognition of the effects of a foreign insolvency proceeding in Germany and could not be seen as generally prohibiting the recognition of effects of such proceedings in Germany.

The 1985 decision concerned a Belgian Société de personnes à responsabilité limitée that had been declared bankrupt in Belgium. The Belgian administrator brought action in Germany against two of the company's debtors, both German companies, for payment of moneys due. In compliance with previous German case law the Belgian administrator brought the action as representative of the Belgian company (in liquidation). The Bundesgerichtshof recognised the authority of the Belgian administrator to demand payment of the claims concerned, not as representative of the company, but in his capacity as administrator of the estate on the basis of the powers conferred on him by Belgian insolvency law. The court expressly rejected the previously adopted territorial approach in respect of the recognition of foreign insolvency proceedings. It decided that an insolvency proceeding opened abroad also included the debtor's assets situated in Germany and that the powers of the foreign administrator consequently extended to such assets.

313 BGH 11 July 1985, ZIP 1985, 944 The decision of July 1985 concerned a Belgian faillissement, the Belgian equivalent of the German Konkursverfahren. The same arguments advanced by the Bundesgerichtshof were held to apply in respect of the recognition of foreign reorganisation proceedings, i.e. foreign equivalents of the German Vergleichsverfahren. See also BT-Drucksache 12/2443, p. 236 Extensively on cross-border reorganisation proceedings Reinhart (1995), Laut (1997).

314 BGH 13 July 1983, BGHZ 88, 147, IPRax 1984, p. 264
The *Bundesgerichtshof* explicitly rejected the arguments previously advanced in favour of the assumption that foreign insolvency proceedings did not include assets situated in Germany.\(^{315}\) According to the *Bundesgerichtshof*, the territorially limited effect of foreign insolvency proceedings could neither be based on the nature of insolvency proceedings as foreign acts of sovereignty, nor on Art. 237 KO. In the opinion of the court the *paritas creditorum* - as underlying principle of insolvency law - can only be safeguarded in an international context by ensuring that the debtor's entire estate is included in the insolvency proceeding, regardless of the location of the assets.\(^{316}\)

The *Bundesgerichtshof* rejected the argument that the characterisation of the court decision opening an insolvency proceeding as an act of sovereignty necessarily entails that the effect of an insolvency proceeding is restricted to the State where the insolvency proceeding is opened. If the law of the State where the insolvency proceeding is opened does not limit the scope of such proceeding to its own territory, it is up to the recognising State to determine whether the opening of the insolvency proceeding can have any legal effects within its territory, according to the *Bundesgerichtshof*. The *Bundesgerichtshof* pointed out that foreign judgments concerning issues of private law were generally recognised in Germany, contrary to sovereign acts primarily aimed at achieving certain State or economic policy interests (e.g. expropriation or confiscation). Insolvency proceedings do not fit into the latter category, according to the *Bundesgerichtshof*. Their aim is not to serve the interests of a State, but to serve the interests of the creditors in general. The restrictions that are imposed on the debtor's power to manage and dispose of his assets and the regulation of insolvency proceedings are aimed at balancing the interests of all those involved in the proceeding. According to the *Bundesgerichtshof*, the aim and purpose of an insolvency proceeding entail that the decision to open an insolvency proceeding is in this respect more comparable to decisions in cases of voluntary or non-contentious jurisdiction, which are generally recognised in Germany.\(^{317}\)

\(^{315}\) See I.4.b-h of the grounds for the decision, ZIP 1985, p. 947-948.

\(^{316}\) See I.4 h of the grounds for the decision, ZIP 1985, p. 948.

\(^{317}\) See I.4.b of the grounds for the decision, ZIP 1985, p. 947.
Further to its decision of 1983, the Bundesgerichtshof observed that Art. 237 KO did not form an obstacle to the recognition of foreign insolvency proceedings. Art. 237 KO should be regarded as a specific exception to the general principle of recognition of foreign insolvency proceedings. The court held that neither from the verbatim text of the provision, nor from the parliamentary debate concerning this provision, the conclusion could be drawn that recognition of foreign insolvency proceedings was generally ruled out.\textsuperscript{318} In the opinion of the court there was no basis in Art. 237 KO for the conclusion that a foreign administrator's powers to administer and dispose of the debtor's assets could not be recognized in respect of assets situated in Germany, when the recognition of a foreign administrator's powers regarding assets in Germany as representative of a foreign legal person was held not to interfere with the aim of Art. 237 KO to protect local creditors.\textsuperscript{319} Furthermore, the court observed that Art. 237 KO should be interpreted in the light of the actual economic circumstances, in which, with the ongoing internationalisation of trade and finance, the creditworthiness of trade partners was no longer assessed on the basis of local assets only.

This decision did not entail that foreign insolvency proceedings were from then on recognised without limitations.\textsuperscript{320} In general terms the Bundesgerichtshof observed that recognition of the foreign insolvency proceeding must be embedded in the general system of domestic rules and principles of insolvency law.\textsuperscript{321} The court observed that this, for example, meant that the opening of an insolvency proceeding abroad does not prevent the opening of an insolvency proceeding against the debtor in Germany on the basis of - then - Art. 238 KO and that individual enforcement of claims against the debtor's assets in Germany remains possible pursuant to Art. 237 KO. Furthermore, the Bundesgerichtshof formulated a number of conditions for recognition of foreign insolvency proceeding. These conditions to a certain extent deviated from the conditions set forth in

\textsuperscript{318} See I 4 c of the grounds for the decision, ZIP 1985, p. 947.
\textsuperscript{319} Cf. BGH 7 December 1961, WM 1962, 263 (IPRspr. 1961, Nr. 157).
\textsuperscript{321} See I 6 of the grounds for the decision, ZIP 1985, p. 949.
Art. 328 ZPO with respect to the recognition of foreign judgments in general.\textsuperscript{322} The Bundesgerichtshof observed that a decision by a foreign court opening an insolvency proceeding is recognised in Germany, provided that (i) the foreign proceeding can be characterised as an insolvency proceeding, (ii) the court (or other competent authority) that opened the proceeding had jurisdiction according to standards of German law, (iii) the foreign decision is valid and effective (not necessarily final and conclusive) and (iv) recognition of the foreign proceeding does not lead to results contrary to German public policy. These conditions also apply in respect of, and must to a certain extent be read into, the present Art. 343 InsO.

3.2.3.2 Recognition of foreign insolvency proceedings

With the reform of insolvency law in Germany at the end of the twentieth century, the recognition of foreign insolvency proceedings had initially been given a very rudimentary statutory basis in Art. 102 EGIInsO. This provision merely stated that assets situated in Germany were affected by the opening of insolvency proceedings abroad, unless the courts of the State where the insolvency proceeding had been opened, did not have jurisdiction according to the relevant provisions of German law or recognition of the foreign insolvency proceeding would lead to results that would be manifestly incompatible with the German ordre public.

In March 2003, legislation on cross-border insolvency proceedings was enacted (Art. 335-358 InsO), based on the elaborate proposals that had been developed during the debate on the reform of German insolvency law. These provisions, which apply to insolvency proceedings that do not fall within the scope of the Insolvency Regulation, follow the model of the Insolvency Regulation.

Art. 343 (1) InsO states that a foreign decision opening an insolvency proceeding is recognised in Germany. Two exceptions are provided for.

Recognition is denied if the courts of the State where the proceeding is opened do not have jurisdiction according to the standards of German

\textsuperscript{322} Pursuant to Art. 4 InsO the provisions of the Zivilprozeßordnung apply to insolvency proceedings, unless provided otherwise. Cf. Trunk (1998), p. 266.
law. The jurisdiction of the foreign court is assessed by a 'mirror-inverted' application of Art. 3 (1) InsO. In this respect it is noted that the explanatory report to Art. 343 InsO appears to suggest that only foreign main proceedings are eligible for recognition, where it is observed that recognition means that the effects of the foreign proceeding under the lex concursus extend to German territory.\textsuperscript{323} It has been pointed out in legal writing that recognition of foreign insolvency proceedings should not be limited to foreign main proceedings.\textsuperscript{324} The administrator appointed in a foreign territorial or non-main proceeding, which does not include assets situated in Germany, may for example have a legitimate interest in reclaiming assets that, after the opening of the proceeding, have been transferred to Germany, or to commence an action aimed at reversing juridical acts detrimental to the creditors.\textsuperscript{325} Recognition of a foreign proceeding and the question whether it includes assets situated in Germany are two distinct issues. The wording of Art. 343 InsO does not preclude the recognition of territorial proceedings opened abroad. The jurisdiction of the foreign court could be assessed in accordance with Art. 354 InsO.\textsuperscript{326}

Recognition is also denied to the extent that recognition would lead to a result that is manifestly contrary to fundamental principles of German law, in particular the fundamental rights.\textsuperscript{327}

\textsuperscript{323} BR-Drucksache 715/02, p. 25. See also Art 102 (1) EGInsO (old) ("Ein ausländisches Verfahren erfaßt auch das im Inland befindliche Vermögen des Schuldners."); Art. 384 RegElInsO and the explanatory report to that draft provision, BT-Drucksache 12/2443, p. 241.

\textsuperscript{324} Cf. Trunk (1998), p. 270.

\textsuperscript{325} Cf. Art. 18 (2) IR.

\textsuperscript{326} Cf. BGH 11 July 1985, ZIP 1985/15 (with respect to the assessment of the jurisdiction of the foreign court, the Bundesgerichtshof observed that "die Zuständigkeit bestimmt sich dabei nach den Vorschriften der §§ 71 Abs. 1, 238 KO"); Trunk (1998), p. 268 and 270.

\textsuperscript{327} With respect to the public policy exception in insolvency, see: Laut (1997), p. 89-98; Spellenberg, p. 183-200; Aderhold (1992), p. 202-208. An assessment of concrete results, not abstract norms is required, which will seldom lead to a complete rejection of recognition to a foreign insolvency proceeding (cf. Reinhart (1995), p. 180; Trunk (1998), p. 272). Recognition of a general discharge of the debtor under the lex concursus (Restschuldbefreiung), which most modern insolvency laws provide for in respect of natural persons, does not lead to results that are contrary to the German ordre public (BGH 27 May 1993, IPRax 1993, 402, comm. Hanisch (p. 385)). Neither does the extinction of claims against the debtor for failure to submit them in the insolvency proceeding (OLG Saarbrücken 31 January 1989, IPRspr. 1989, Nr. 251).
Foreign insolvency proceedings are recognised by operation of law, i.e. without any further formality. A formal court proceeding where compliance with the general conditions for recognition is assessed, is not provided for. Whether and to what extent the effects of the foreign proceeding can be recognised, must be assessed on a case by case basis. Reciprocity is not a requirement for recognition. Neither is publication, registration or notification of the decision opening the insolvency proceeding a prerequisite for recognition. Whether the opening of the insolvency proceeding abroad has been published or registered in Germany, may play a role in the protection of bona fide parties who, after the opening of the insolvency proceeding abroad, have for example acquired assets from the debtor or have honoured obligations for the benefit of the debtor whereas this should have been done for the benefit of the administrator.

Pursuant to Art. 343 (2) InsO conservatory measures ordered by the foreign court after the application for the opening of an insolvency proceeding (but prior to its actual opening) are also recognised, as well as any other decisions given by that court concerning the course and closure of the proceeding. In addition, Art. 344 InsO confers on the provisional administrator appointed by a foreign court in an interim proceeding, the power to request the German courts to order the protective

328 Cf. Stephan in HK-InsO, § 343, Nr. 19; Kirchhof in HK-InsO (1999), Art. 102 EGInsO, Nr. 4.
330 Cf. Internationales Vertragsrecht-Hausmann, Nr. 1812. See also Art. 385 RegElInsO and the explanatory report to that provision, BT-Drucksache 12/2443, p. 241. Publication and registration of the decision opening the insolvency proceeding is provided for in Art. 345 and 346 InsO. A precondition for publication is that the foreign proceeding is recognised under Art. 343 InsO. Publication is compulsory when the debtor has an establishment in Germany.
331 Cf. Stephan in HK-InsO, § 343, Nr. 20. Differently: Art. 384 RegElInsO (BT-Drucksache 12/2443, p. 241). It was pointed out during the debate in the German Standing Government Committee on private international law, that, where necessary, a petition for the opening of local (secondary) proceedings could be presented to the German court, which could then order the preservation measures it would deem appropriate (Stellungnahme der Sonderkommission 'Internationales Insolvenzrecht' des Deutschen Rates für IPR, in: Stoll (1992), p. 273). Critical of the approach of Art. 384 RegElInsO: Leipold (1997), p. 194.
measures provided for in Art. 21 *InsO*, that are considered necessary for the protection of assets that would be included in a secondary proceeding opened in Germany.\textsuperscript{332}

**Insolvency proceeding**

Art. 343 *InsO* only applies to proceedings that can be characterized as insolvency proceedings according to the conceptions of German law.\textsuperscript{333} Essentially this means that, whatever the exact structure and legal effects of the foreign proceeding, it must more or less comply with the key-elements and objectives of the German *Insolvenzverfahren* set out in Art. 1 *InsO*.\textsuperscript{334} One of the key-elements in this respect is that the proceeding must be a collective proceeding that is carried out for the benefit of all the debtor's creditors.\textsuperscript{335} Whether the proceeding is aimed at liquidation or reorganisation, or a combination of both, is not essential. The unitary *Insolvenzverfahren* of German law can contain elements of either or both types of proceedings. Neither is it decisive whether the proceeding has been opened by a court or not. In the explanatory report to Art. 343 *InsO*, it is observed that the Annexes to the Insolvency Regulation may provide guidance in this respect.

Given the variety of types of 'insolvency' proceedings existing in national laws, their differing explicit or implicit policy considerations and the wide ranging differences in structure and legal effects, a characterisation of foreign proceedings on the basis of domestic conceptions of insolvency proceedings, should be as flexible as possible. In particular arguments based on the policy considerations underlying a particular proceeding, should not easily prevent a characterisation of a proceeding as insolvency

\textsuperscript{332} Cf. BR-Drucksache 715/02, p. 26.
\textsuperscript{333} Cf. BR-Drucksache 715/02, p. 25.
\textsuperscript{334} See the explanatory report to Art. 384 *RegInsO*, BT-Drucksache 12/2443, p. 236 and 241, which states the foreign proceeding must grosso modo serve the same purposes as a German *Insolvenzverfahren*. Cf. BR-Drucksache 715/02, p. 25.
\textsuperscript{335} In this respect administrative receivership based on a floating charge (not included in Annex A to the Insolvency Regulation) is generally not considered to be a true collective proceeding which presupposes the existence of a situation of insolvency as it is basically triggered on the basis of the conditions laid down in the debenture contract. Cf. Wenckstern (RabelsZ 1992), p. 624 et seq.; Flessner (1988), p. 405; Aderhold (1992), p. 182; Reinhart (1995), p. 175.
proceeding within the scope of Art. 343 *InsO*. Such arguments should rather be taken into consideration in the assessment of the extent to which the effects of the proceeding can be recognised, i.e. within the framework of the public policy exception.

**3.2.3.3 Effects of recognition**

Art. 335 *InsO* contains the central conflict rule - the *Grundnorm* - of German international insolvency law. The insolvency proceeding and its effects are governed by the law of the State where the proceeding was opened. The *lex concursus* governs aspects of procedural law as well as aspects of substantive law. In connection with the recognition by operation of law of foreign insolvency proceedings, this means that the effects of a foreign main insolvency proceeding automatically extend to the German territory. The German legislator has refrained from including a set of examples of issues that are to be considered to pertain to the law of insolvency similar to Art. 4 (2) IR. However, the explanatory report to Art. 335 *InsO* indicates that the list of issues of Art. 4 (2) IR can be used as guidance.

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338 Cf. BR-Drucksache 715/02, p. 20.

339 See also Art. 379 io. 384 *RegElInsO*.
Chapter II / Par. 3.2.3.4

As it is the case in the Insolvency Regulation, a number of exceptions are made to the (exclusive) applicability of the *lex concursus*. These exceptions are incorporated in Art. 336-340 *InsO* - general exceptions that apply in case of insolvency proceedings opened in Germany as well as abroad -, and Art. 349-352 *InsO* - exceptions that apply only in respect of the effects of foreign insolvency proceedings in Germany.

The general exceptions to the (exclusive) applicability of the *lex concursus* include the effects on contracts related to immoveable property (Art. 336 *InsO*), contracts of employment (Art. 337 *InsO*), set-off (Art. 338 *InsO*), reversal of detrimental acts (Art. 339 *InsO*) and payment systems and financial markets (Art. 340 *InsO*). These provisions provide for solutions identical to those adopted in the Insolvency Regulation and the Directives on liquidation and reorganisation of credit institutions and insurance undertakings.

The exceptions to the applicability of the *lex concursus* that apply only in respect of the effects of foreign insolvency proceedings, include the effects on disposition of immoveable property (Art. 349 *InsO*), honouring of an obligation to a debtor (Art. 350 *InsO*), proprietary rights (Art. 351 *InsO*) and pending law suits (Art. 352 *InsO*).

3.2.3.4 Recognition of foreign main proceedings and the opening of secondary insolvency proceedings

The recognition that a foreign main proceeding includes assets situated in Germany does not preclude the opening of local insolvency proceedings in Germany. This rule, which already existed in German law prior to the entry into force of the *Insolvenzordnung*, is now laid down in Art. 356 *InsO*.

Pursuant to Art. 354 *InsO*, the presence of assets in Germany suffices for the opening of a secondary proceeding. In this respect the *Insolvenzordnung* deviates from the Insolvency Regulation. The existence of an establishment in Germany is not required. However, in accordance with Art. 26 (1) *InsO*, the value of the assets situated in Germany must be

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sufficient to cover at least the costs of the proceeding. Jurisdiction is conferred on the courts of the region where the debtor's establishment or, in the absence of an establishment, assets are located. Pursuant to Art. 356 (3) InsO, in accordance with Art. 27 (1) IR, the debtor's insolvency - inability to pay or balance sheet insolvency - does not have to be established. It follows from Art. 354 (2) InsO that, if a creditor requests the opening of a secondary proceeding and the debtor does not have an establishment in Germany, the petitioning creditor must show a specific interest in the opening of the proceeding. Such a specific interest will, for example, exist if the creditor's position in the foreign proceeding is considerably worse than in a German insolvency proceeding.

The local insolvency proceeding prevails over the - recognised - foreign insolvency proceeding. As from the opening of the secondary proceeding in Germany, the assets situated in Germany are no longer included in the main proceeding, but in the German secondary proceeding. The effects of the insolvency of the debtor in respect of assets situated in Germany and the position of the parties involved in the proceeding are exclusively governed by rules of German law, unless the law provides otherwise (Art. 335 InsO).

Co-ordination and co-operation
The German legislator has introduced a number of provisions on the co-ordination of the German secondary proceeding with the foreign main proceeding. The duties of co-operation imposed on the German administrator by virtue of Art. 357 InsO are similar to those incorporated in the Insolvency Regulation. They also reflect to some extent the 'supremacy' of the main proceeding over the secondary proceeding, albeit that, unlike it is the case in the Insolvency Regulation, the administrator appointed in the foreign main proceeding, is not given any powers of decision.

The administrator appointed in the German secondary proceeding must communicate to the administrator in the foreign main proceeding any circumstances that may be of influence on the operation of the foreign proceeding, such as the opening (or intended closure) of the secondary

341 See Art. 54 InsO.
proceeding and intended payment of dividends.\textsuperscript{342} The administrator in the main proceeding must be given the opportunity to submit proposals for the (manner of) realisation or use of the assets, which for example enables him to submit proposals for a sale of (part of) the debtor's business activities in Germany as a going concern.

Pursuant to Art. 357 (3) \textit{InsO} the administrator in the main proceeding has the power to submit a proposal for an \textit{Insolvenzplan} and a proposal for an \textit{Insolvenzplan} must be forwarded to him in order to enable him to present his views on the plan. Unlike it is the case under the Insolvency Regulation, however, an \textit{Insolvenzplan} can be validly agreed on without his consent. Art. 357 (2) \textit{InsO} confers on the administrator in the main proceeding the authority to participate in the meetings of creditors.

If by the liquidation of assets in the secondary proceeding it is possible to meet all claims that have been admitted in the proceeding, the administrator must transfer a surplus (of assets) to the administrator in the main proceeding.\textsuperscript{343}

\section*{3.2.4 Dutch law}

\subsection*{3.2.4.1 Introduction}

Recognition of foreign insolvency proceedings in the Netherlands is a controversial issue. The desirability of recognising the effects of foreign insolvency proceedings in respect of assets situated in the Netherlands is generally endorsed in Dutch legal writing. The debate focusses on the extent to which present Dutch law (in cases that fall outside the scope of the Insolvency Regulation) is in fact favourable to the recognition of foreign insolvency proceedings.

The \textit{Faillissementswet} does not contain any provisions concerning this matter, nor does any other relevant statute. An exception is Art. 40 of the

\textsuperscript{342} Art. 357 \textit{InsO} does not explicitly provide for a similar duty in respect of the administrator in a main proceeding opened in Germany to communicate information to foreign administrators. Neither does it explicitly provide for a duty for the administrator in a German secondary proceeding to communicate information to administrators in other foreign secondary proceedings.

\textsuperscript{343} Art. 358 \textit{InsO}.
Charter for the Kingdom of the Netherlands (Statuut voor het Koninkrijk der Nederlanden), from which follows that the effects of an insolvency proceeding opened in the Netherlands, the Netherlands Antilles or Aruba, in principle extend to the entire Kingdom.\(^{344}\) A binding treaty concerning the mutual recognition of insolvency proceedings and the effects thereof, only existed with Belgium.\(^{345}\) The BENELUX jurisdiction and enforcement treaty of 1961, that also applied to insolvency proceedings, has never entered into force.\(^{346}\) The Dutch-German enforcement convention of 1962 was only of limited relevance for insolvency proceedings.\(^{347}\) Pursuant to Art. 16 (1) (c) and (d) of that convention, decisions regarding the admittance of claims in an insolvency proceeding and court-approved compositions could be recognised and enforced under the terms of the Convention.

The decision whether foreign insolvency proceedings are recognised in the Netherlands and, if so, the determination of the effects thereof, has been left to be decided in case law.\(^{348}\) The decisions given by the Hoge Raad with respect to this matter show a very reserved approach to the recognition of effects of foreign proceedings in respect of assets situated in the Netherlands. As will be discussed in paragraph 3.2.4.3, the Hoge Raad has consistently decided that, under Dutch law, foreign insolvency proceedings have 'territorial effect', i.e. do not affect assets situated in the Netherlands. At the same time, it must be noted that the 'territorial effect' of foreign insolvency proceedings under Dutch law, does not entail the complete disregard of foreign insolvency proceedings and their effects. The decision opening an insolvency proceeding is recognised (as a matter of fact). The effects of such recognition are rather limited at present, however. The Hoge

\(^{344}\) Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba, 4 May 1993, NIPR 1993, 488. See also Ten Wolde (WPNR 1999)


\(^{346}\) Convention between the Netherlands, Belgium and Luxembourg on territorial jurisdiction, bankruptcy and the validity and enforcement of judgments, arbitration awards and authentic instruments, Brussels, 24 November 1961 (Trb. 1961, 163).

\(^{347}\) Convention between the Netherlands and Germany on the mutual recognition and enforcement of judgments and other entitlements to enforcement in civil matters, 's-Gravenhage, 30 August 1962 (Trb. 1963, 50).

\(^{348}\) Cf. Van der Feltz, II, p. 292.
Raad has, for example, decided that an administrator appointed in a foreign (main) insolvency proceeding may bring action in the Netherlands aimed at the reversal of juridical acts performed by the debtor prior to the opening of the insolvency proceeding that have prejudiced the creditors.\textsuperscript{349} But some of the most fundamental effects of insolvency proceedings, such as the divestment of the debtor and the conferral on the administrator of the power to dispose of the debtor's assets do not affect assets situated in the Netherlands.

As far as the effects of foreign insolvency proceedings are concerned, a distinction between proceedings aimed at liquidation (of the debtor's assets) and proceedings aimed at reorganisation (of the debtor's liabilities) is generally not made. Accordingly, in the following paragraphs, a distinction shall not be made with respect to the nature of a foreign insolvency proceeding, whether it is aimed at liquidation, reorganisation or both.

\section*{3.2.4.2 No statutory impediments to the recognition of foreign insolvency proceedings}

\subsection*{3.2.4.2.1 Draft Faillissementswet of 1887}

At the end of the 19\textsuperscript{th} century, the Dutch legislator realised the importance of a regulation of the cross-border effects of insolvency proceedings. Assuming that it follows from the nature of insolvency proceedings that their effects are territorially limited,\textsuperscript{350} the Standing Government Committee for Insolvency Law (hereafter: \textit{Staatscommissie}) in its draft of the \textit{Faillissementswet} included specific provisions aimed at achieving as much extraterritorial effect of insolvency proceedings as possible. In the opinion of the \textit{Staatscommissie}, Art. 431 \textit{Rv}, dealing with the enforceability of foreign judgments in general, was a serious impediment to the recognition of, for example, the powers of an administrator appointed in a foreign proceeding with respect to assets situated in the Netherlands. Specific statutory provisions concerning the recognition of foreign insolvency proceedings were therefore incorporated in the draft. Art. 211-215

\footnotesize{\textsuperscript{349} HR 24 October 1997, NJ 1999, 316, comm. Th.M. de Boer (Gustafsen q.q./Mosk), JOR 1997/146, comm. H.L.E. Verhagen.}  
\footnotesize{\textsuperscript{350} Cf. Van der Feltz, II, p. 466.}
Cross-border aspects of insolvency proceedings

('Bepalingen van internationaal recht') of the draft were based on the principles of universality and unity of insolvency proceedings, which constituted the ideal model in the opinion of the Staatscommissie.\(^{351}\) In the explanatory report to the draft, the Staatscommissie observed that by accepting the principle of unity of insolvency proceedings, the Dutch legislator would place itself at the forefront of modern legal development.\(^{352}\)

Art. 211, the core-provision of these draft 'Provisions of international law', read:

(1) An insolvency proceeding that has been opened by a competent authority abroad, is recognised in the Netherlands

(2) With respect to rights and juridical acts to which Dutch law is applicable, it has the same effects as an insolvency proceeding opened in the Netherlands \(^{353}\)

Foreign insolvency proceedings would be recognised without any further formalities, subject to requirements of jurisdiction and publicity. Pursuant to Art. 212 of the draft, a foreign insolvency proceeding would not be recognised if the Faillissementswet conferred jurisdiction on the Dutch courts to open insolvency proceedings in respect of the debtor. This limitation was considered necessary in the absence of an international regulation of jurisdiction in matters of insolvency.\(^{354}\) Insofar as legal relationships were governed by Dutch law, the effects of the foreign insolvency proceeding would be governed by Dutch insolvency law. Consequently, pursuant to Art. 211 of the draft, all questions related to the law of property for instance would be governed by Dutch insolvency law. The question whether and, if so, to what extent the debtor had lost the right to manage and dispose of his assets situated in the Netherlands as a result of the opening of an insolvency proceeding abroad, would be governed by Dutch insolvency law.\(^{355}\) In accordance with Art. 211 of the

\(^{351}\) Cf Van der Feltz, II, p 467

\(^{352}\) Cf Van der Feltz, II, p 467

\(^{353}\) Art 211 (Van der Feltz, II, p 467) (1) De in het buitenland door de aldaar bevoegde macht uitgesproken faillietverklaring wordt in Nederland erkend (2) Zij heeft ten aanzien van rechten en rechtshandelingen, waarop de Nederlandsche wet toepasselijk is, dezelfde gevolgen als eene in Nederland uitgesproken faillietverklaring zoude hebben

\(^{354}\) Cf Van der Feltz, II, p 468

\(^{355}\) Cf Van der Feltz, II, p 468 (explanatory report to Art 213 of the draft)
draft, Dutch insolvency law would also govern the effects of the opening of an insolvency proceeding abroad on the position of creditors with security rights in assets situated in the Netherlands. In order to protect the interests of third parties, the effects of the debtor's insolvency on rights and legal relationships governed by Dutch law would only set in as from the day of publication of the foreign insolvency order in the Government Gazette (Staatscourant). In this respect, Art. 213 of the draft stipulated:

(1) With regard to the application of art. 211 (2), the day on which the insolvency order has been published in this country by an announcement in the Nederlandsche Staatscourant, shall count as the moment of opening of the foreign insolvency proceeding.
(2) The insolvency order cannot be opposed to those who can prove that the opening of the insolvency proceeding could not have been known in their place of residence, notwithstanding its prescribed publication.
(3) This provision cannot be invoked by a person who had knowledge of the decision opening the insolvency proceeding.\(^{356}\)

The proposals that were advanced in the draft of the Staatscommissie were not taken over by the government. The deletion of Art. 211-213, without any further motivation by the government for that matter, was welcomed by the Council of State and both Chambers of Parliament.\(^{357}\) The main arguments that were advanced in favour of deletion of these provisions were twofold. Firstly, it was argued that they imposed too general an obligation to recognise foreign insolvency proceedings, given the extent of the existing differences between national insolvency legislations.\(^{358}\) Secondly, it was held that enforcement of a foreign court decision in the Netherlands could not be accepted without a treaty provision to that effect.\(^{359}\) Government and Parliament favoured a regulation of the cross-border effects of insolvency proceedings by international conventions.\(^{360}\)

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356 Art. 213 (Van der Feltz, II, p. 468): (1) Bij de toepassing van het tweede lid van artikel 211 geldt als tijdstip van den aanvang van het in het buitenland uitgesproken faillissement, de dag, waarop de faillietverklaring hier te lande is openbaar gemaakt door middel eener aankondiging in de Nederlandsche Staatscourant. (2) De faillietverklaring kan niet worden tegengeworpen aan dengene, die aantoont dat zij, niettegenstaande de voorgeschreven bekendmaking, in zijne woonplaats niet bekend kon zijn. (3) Hij, aan wien de faillietverklaring niettemin bekend was, kan zich op deze bepaling niet beroepen.


359 Commentary of the First Chamber of Parliament, Van der Feltz, II, p. 293.

360 Van der Feltz, II, p. 291 and 292.
3.2.4.2.2 Art. 431 Rv

Art. 431 Rv, as amended in 1964 and 1992, in general terms regulates the (un)enforceability of foreign judicial decisions in the Netherlands:

(1) Except as provided for in the articles 985-994, decisions given by foreign courts and officially certified deeds that have been executed abroad, cannot be enforced in the Netherlands.
(2) Cases can be heard and settled again by the Dutch court.\(^{361}\)

Art. 985-994 Rv, referred to in the first paragraph of Art. 431 Rv, set out the procedure of obtaining a declaration of enforceability - an *exequatur* - on a foreign judgment. In order for foreign judgments to be enforceable in the Netherlands, Art. 985 Rv requires a provision to that effect in a statute or a convention. Art. 431 (2) Rv stipulates that, in the absence of such a statutory or conventional provision, the case can be decided again in a Dutch court. The foreign judgment itself cannot be enforced, but a judgment from the Dutch court can be obtained that is enforceable in the Netherlands.

At the time of drafting and enactment of the *Faillissementswet* - towards the end of the 19th century -, Art. 431 Rv was regarded as a problem in respect of the recognition of foreign insolvency proceedings. This was in accordance with the view prevailing at that time that Art. 431 Rv denied any effects to foreign judgments in the Netherlands. Based on the principle of sovereignty of States, it was argued that Art. 431 Rv prohibited both the enforcement and the recognition of foreign judgments in general.\(^{362}\) The *Staatscommissie* at that time observed that a foreign insolvency proceeding could be recognised in the Netherlands but that recognition of the proceeding would not affect assets situated in the Netherlands. With respect to the position of the administrator appointed in the foreign insolvency proceeding the *Staatscommissie* observed that an

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361 Art. 431 Rv: (1) Behoudens het bepaalde in de artikelen 985-994, kunnen noch beslissingen, door vreemde rechters gegeven, noch buiten Nederland verleden authentieke akten binnen Nederland ten uitvoer worden gelegd. (2) De gedingen kunnen opnieuw bij de Nederlandse rechter worden behandeld en afgedaan. The content and meaning of Art. 431 Rv in its present form are in accordance with the provision as it read prior to 1964.

362 Cf. HR 31 January 1902, W. 7717. See also Strikwerda (2002), Nr. 262.
administrator was recognised as officially appointed in the foreign proceeding. The foreign decision opening the insolvency proceeding, including the appointment of the administrator, as a fact could not be disregarded. However, it was observed that the administrator could not exercise his powers in respect of assets situated in the Netherlands, as these were not included in the foreign insolvency proceeding. In the opinion of the Staatscommissie, a furthergoing decision would be contrary to Art. 431 (1) Rv.\textsuperscript{363} The influence of Art. 431 Rv on the recognition of foreign insolvency proceedings in general and the recognition of the powers of the foreign insolvency administrator in particular, was briefly touched upon by the government in the explanatory report to Art. 203-205 Fw. The government preferred to leave the issue of recognition of foreign insolvency proceedings to international conventions and to refrain from incorporating provisions on this matter in the Faillissementswet. In view of the preference for regulating the matter by way of treaties and the fact that there was not in the least communis opinio in respect of the question whether Art. 431 Rv prevented the recognition of the powers of a foreign administrator, the government decided that the issue should be decided in case law.\textsuperscript{364}

It is submitted that Art. 431 Rv does not form an obstacle to the recognition of the foreign (judicial) decision opening an insolvency proceeding in the sense that it can have effect in respect of assets situated in the Netherlands.\textsuperscript{365} Over the years the scope of Art. 431 Rv has become more and more limited.\textsuperscript{366} Art. 431 Rv in principle prohibits the enforcement of foreign judicial decisions in the Netherlands. It prohibits the enforcement of a judicial decision against the debtor or his assets in the manner laid down in the Second Book of the Code of Civil Procedure. Art. 431 Rv is generally considered to apply in relation to judicial decisions on which enforcement may issue - i.e. condemnatory judgments - and not to judicial decisions that, from their nature, are not capable of enforcement - i.e.

\begin{itemize}
\item 363 Cf. Van der Feltz, II, p. 466.
\item 364 Cf. Van der Feltz, II, p. 292
\item 365 See already Jitta (1880), p. 119-129, 174 et seq
\end{itemize}

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dismissals, declaratory judgments and constitutive judgments.\textsuperscript{367} The (judicial) decision opening an insolvency proceeding in respect of a debtor is a constitutive decision and therefore does not fall within the ambit of Art. 431 \textit{Rv}.\textsuperscript{368} The decision puts into place a legal framework for dealing with the debtor's insolvency. The legal effects necessary to administer the proceeding take effect either by operation of law upon the opening of the proceeding or by virtue of certain (court) orders made in that decision or subsequent to that decision.

That Art. 431 \textit{Rv} does not apply to the question whether and to what extent a foreign insolvency proceeding may have effect in the Netherlands was already (implicitly) decided by the \textit{Hoge Raad} in 1888\textsuperscript{369} and clearly follows from a decision of the \textit{Hoge Raad} of 1915.\textsuperscript{370} The case concerned an action brought in the Netherlands by Belgian administrators to set aside a contract between the Belgian debtor and a Dutch counterparty. The question arose whether the (alleged) recognition by the defendants of the power of the Belgian administrators to bring an action in the Netherlands on the basis of a contract concluded by the insolvent debtor, was contrary to any statutory provision of Dutch law. In the opinion of the \textit{Hoge Raad} this was not the case. In particular Art. 431 \textit{Rv} did not prohibit such recognition or oblige the court to deny legal effect to such recognition, as:

"(...) no statutory provision prohibits the other party from renouncing its right to raise objections against this action during or prior to the proceeding, or obliges the Dutch court to deny legal effect to such renunciation; that this is in particular not the case for art. 431 \textit{Rv}, that - unless the law provides otherwise - contains the prohibition to enforce foreign judgments, i.e. to seek recourse by virtue of such judgments against the person or the assets of the debtor in the way provided for in the Second Book of the Code of Civil Procedure;"

\textsuperscript{367} Illustrative is the consideration in HR 24 November 1915, NJ 1917, p. 5 (the case concerned the recognition of a divorce): "that the same is true for art. 431 \textit{Rv}, because the recognition in the Netherlands of the validity of a legal relationship created between parties by a foreign judgment or officially certified deed, is not enforcement of a foreign judgment contrary to art. 431 \textit{Rv}, which only prohibits the enforcement of a foreign judgment with the means of coercion provided for under Netherlands law."


\textsuperscript{369} HR 5 April 1888, W. 5538.

\textsuperscript{370} HR 5 November 1915, NJ 1916, p. 12.
the institution of a legal proceeding aimed at obtaining a judgment from a Dutch court, even if this is done by an administrator appointed by virtue of a foreign bankruptcy order and in that capacity, is not 'enforcement' of that foreign order in the meaning of art. 431 Rv."\(^{371}\)

Case law shows that, under present Dutch law, creditors are allowed to individually take recourse against the debtor's assets situated in the Netherlands, notwithstanding the opening of an insolvency proceeding against the debtor abroad.\(^{372}\) It has been argued that this case law should be assessed against the background of Art. 431 Rv. Art. 431 Rv would not permit a foreign administrator to prevent creditors from seeking recourse against the debtor's assets as that could be regarded as the 'enforcement of the foreign attachment'.\(^{373}\) In support of this assumption reference is made to the observations of the *Hoge Raad* regarding Art. 431 Rv in its decision of 1915 cited above. It has been argued that the interpretation of Art. 431 Rv in the second of the cited paragraphs would lead to the conclusion that Art. 431 Rv prevents a foreign administrator from successfully resisting an attachment (in execution) against the debtor's assets in the Netherlands by individual creditors.\(^{374}\) It is submitted that this consideration does not justify the conclusion that the *Hoge Raad* would regard the fact that creditors can continue to individually take recourse against the insolvent debtor's assets as a result of the fact that Art. 431 Rv would prevent the enforcement of a foreign (general) attachment in the Netherlands. With this consideration the *Hoge Raad* has (merely) indicated the

\(^{371}\) "(...) geen wetsbepaling aan de wederpartij verbiedt om in óf voor het geding van elk verzet tegen dat optreden afstand te doen, noch ook den Nederlandschen Rechter beveelt aan zoozalig afstand rechtsgewold te ontzeggen; dat dit met name niet geschiedt in art. 431 Rv., hetwelk het verbod inhoudt om behalve in de in de wet genoemde gevallen, vreemde vonnissen hier ten uitvoer te leggen, dat wil zeggen krachtens zulke vonnissen, op de wijze als voorzien in het Tweede Boek van het Wetb. van Burgerl. Rechtsv. verhaal te zoeken op den persoon of de goederen van den veroordeelde; dat nu het instellen van een vordering met de strekking om van den Nederlandschen Rechter eene veroordeling te verkrijgen, ook al geschiedt dit door een curator benoemd bij een buitenlandsche vonnis van faillietverklaring en in die qualiteit, niet is een "tenuitoeverleggen" van dat buitenlandsche vonnis, in den zin als bedoeld bij gezegd art. 431;"


\(^{373}\) Van Galen/Van Apeldoorn (1998), Nrs. 16-52, in particular Nrs. 22, 24, 31, 33, 35, 36, 38. They do not consider the realisation of assets by the administrator a matter of enforcement of the foreign insolvency attachment.

limited scope of application of Art. 431 Rv. The *Hoge Raad* has clearly indicated that Art. 431 Rv only applies to situations where enforcement of a foreign judgment is sought by way of recourse against the person or the assets of the debtor. It applies in relation to a creditor that seeks recourse against the debtor's assets on the basis of a foreign judgment, but not in relation to a foreign administrator who opposes the creditor's action. Furthermore, it is submitted that, if a foreign administrator opposes individual enforcement measures in respect of assets situated in the Netherlands, this is not a matter of enforcement of the foreign insolvency order. Whether creditors can continue to take recourse against the debtor's assets situated in the Netherlands, is a question of recognition of a foreign insolvency proceeding and the effects thereof. If the opening of the insolvency proceeding abroad were interpreted as effecting a 'general attachment' on the debtor's assets,\(^{375}\) it may be looked upon as a question of recognition of the exclusive effect of the foreign attachment in the sense that insolvency claims can no longer be enforced by way of individual recourse but only within the framework of the insolvency proceeding. However, before the issue of possible exclusive effect of a foreign insolvency attachment can be dealt with, it must be established that the attachment has any effect in the Netherlands at all.\(^{376}\) As to this question the *Hoge Raad* has consistently decided that a foreign 'insolvency attachment' does not extend to assets situated in the Netherlands.

A parallel may be drawn in this respect with the possibility of opening a bankruptcy proceeding in the Netherlands in respect of a debtor that is already subject to an insolvency proceeding abroad. With respect to the question whether an insolvency proceeding opened abroad precludes the opening of an insolvency proceeding in the Netherlands, the *Hoge Raad* observed that:

\(^{375}\) In accordance with the prevailing view of bankruptcy proceedings under Dutch law, the *Hoge Raad* also refers to foreign insolvency proceedings as effecting a general attachment on the debtor's assets, see, inter alia, HR 2 June 1967, NJ 1968, 16, comm. L.J. Hijmans v.d. Bergh (Hiret q.q./Chiotakis); HR 31 May 1996, NJ 1998, 108, comm. Th.M. de Boer (De Vleeschmeesters), JOR 1996/75, comm. P.M. Veder.

"the decision of the French court is unenforceable in the Netherlands so that, also in view of the travaux préparatoires of the Faillissementswet, there remains room for a bankruptcy order issued by the Dutch court ( )".\(^{377}\)

As Kosters/Dubbink have observed, the court's decision that the opening of a bankruptcy proceeding against the debtor is possible, is correct, but the argument that it is a result of the unenforceability of the French insolvency order in the Netherlands, is disputable.\(^{378}\) Like the continued possibility of individually enforcing insolvency claims against assets situated in the Netherlands, the issue concerns the recognition of the effects of the opening of an insolvency proceeding. When this decision is considered in connection with the previously mentioned decision of 1888, where applicability of Art. 431 \(Rv\) to foreign insolvency orders was denied, it becomes clear that the Hoge Raad does not look at the continued possibility of opening of an insolvency proceeding in the Netherlands in terms of enforcement of the foreign insolvency order within the meaning of Art. 431 \(Rv\).

The conclusion that can be drawn from the above, is that Art. 431 \(Rv\) does not form an impediment of any kind to the recognition of the effects of foreign insolvency proceedings in the Netherlands and that this also has consistently been the point of view of the Hoge Raad.\(^{379}\)

3.2.4.3 Recognition of foreign insolvency proceedings in the decisions of the Hoge Raad

In the absence of statutory provisions that either impose or preclude the recognition of foreign insolvency proceedings, how has the Hoge Raad approached the matter?

\(^{377}\) HR 1 May 1924, NJ 1924, 847 "O echter dat het vonnis van den Franschen rechter hier te lande niet voor uitvoering vatbaar is en dan ook daarnaast, ook blijkens de geschede in der Faillissementswet, wel degelijk plaats is voor een vonnis van den Nederlandschen rechter tot des verzoekers faillietverklaring hier te lande ( )"

\(^{378}\) Kosters/Dubbink (1962), p 863

\(^{379}\) Cf the commentary of Th M de Boer to HR 31 May 1996 (De Vleeschmeesters), in NJ 1998, 108
Foreign insolvency proceedings do not include assets in the Netherlands...
The Hoge Raad has consistently adopted the view that foreign insolvency proceedings do not include assets that are situated in the Netherlands.

In 1888, in a case concerning the question whether the opening of an insolvency proceeding in respect of a debtor in another State precluded the opening of an insolvency proceeding in respect of that debtor in the Netherlands, the Hoge Raad decided that this was possible on the grounds that:

"the effects of a bankruptcy proceeding opened abroad, being a general attachment on the debtor's assets by judicial order, cannot extend beyond the territory in which the court that has issued the bankruptcy order has jurisdiction; (...)"  

In other words, the opening of an insolvency proceeding in another State does not affect the debtor's assets situated in the Netherlands. This decision, which was given prior to the entry into force of the Faillissements-wet, marks the beginning of a long line of decisions in which the Hoge Raad has adopted a territorial approach in respect of the effects of foreign insolvency proceedings in the Netherlands.

In 1907 the Hoge Raad repeated its fundamentally territorial approach and denied effects to an insolvency proceeding opened in another State, unless the opening of the insolvency proceeding had resulted in a change.

380 HR 5 April 1888, W. 5538: "Overwegende dat de beslissing omtrent de beide middelen van cassatie afhing van de vraag of een in het buitenland uitgesproken faillissement dezelfde rechtsgevolgen heeft als een hier te lande uitgesproken; (...) dat toch het faillissement, als zijnde een bij rechterlijk vonnis bevolen algemeen beslag op de goederen des schuldenaars, op zich zelf niet verder werken kan, dan de rechtsmacht strekt van den rechter, die het bevolen heeft; (...)." See also HR 1 May 1924, NJ 1924, p. 847.

381 When stating that a foreign insolvency proceeding does not have effect outside the State where the proceeding has been opened, the Hoge Raad refers to the effects of a foreign insolvency proceeding in the Netherlands (see e.g. HR 31 May 1996, NJ 1998, 108, comm. Th.M. de Boer (De Vleeschmeesters), JOR 1996/75, comm. P.M. Veder).
of the personal status of the debtor. Of particular interest is the observation of the Hoge Raad on the consequences of its approach:

"that from this it follows that the consequences of the bankruptcy proceeding in respect of the power to dispose of the bankrupt's assets, are restricted to the country where the bankruptcy order has been issued (...)."

In a decision of 1967 the Hoge Raad addressed the question whether a creditor could, notwithstanding the opening of an insolvency proceeding against the debtor in another State (France), individually enforce a claim against assets of the debtor situated in the Netherlands (i.e. a claim against a Dutch party). The administrator argued that the creditor could not bring action against the debtor, because a claim for payment should be submitted in the French proceeding, and that the attachment should not be validated, because upon the opening of a bankruptcy proceeding creditors lose their right to individually take recourse against assets that are part of the estate. The Hoge Raad decided in favour of the creditor and observed that:

"according to Dutch law, save for treaty provisions to the contrary, a general attachment on the assets of a debtor that has been declared bankrupt abroad, does not comprise his assets that are situated in the Netherlands." 

It has been argued in legal writing that this decision constitutes a breach with previous (supposedly more liberal) case law and lies at the basis of the presently prevailing opinion that foreign insolvency proceedings have no effect in the Netherlands at all. Against the background of the

382 HR 31 May 1907, W. 8553. See also HR 17 June 1927, NJ 1927, p. 1262 and Meijer's critical commentary in NJ 1927, p. 1263-1265, to arguments that insolvency would lead to a change in the personal status of a debtor and consequences with respect to recognition based on such arguments.

383 HR 31 May 1907, W. 8553: "O. dat hieruit wel volgt dat, dat de gevolgen van het faillissement, voor zooveel dit de beschikking regelt over de goederen van den gefailleerde, beperkt zijn tot het land waar de faillietverklaring is uitgesproken (...)."

384 HR 2 June 1967, NJ 1968, 16, p. 40: "dat het bestreden oordeel van het Hof echter juist is, vermits naar Nederlands recht, behoudens voor zover bij een verdrag anders is bepaald, een op het vermogen van een in een ander land gefailleerde aldaar rustend faillissementsbeslag niet mede omvat zijn in Nederland aanwezige baten."

385 Van Galen/Van Apeldoorn (1998), p. 15 and 25-35, who add that, prevailing opinion also accepts that (nevertheless) a foreign administrator can exercise rights of the insolvent debtor in the Netherlands (p. 15). In my opinion it is disputable whether that conclusion is consistent with case law (cf. Veder (1996)).
decisions of 1888 and 1907 (which explicitly states that the divestment of the debtor under foreign insolvency law does not affect assets situated in the Netherlands (Antilles)), the argument that, until its decision of 2 June 1967, the Hoge Raad did not adopt a (strict) territorial approach in respect of foreign insolvency proceedings, is not justified. In my opinion, the decision of 1967 is in accordance with previous decisions of the Hoge Raad and confirms the strict territorial approach in respect of the effects of foreign insolvency proceedings.

In 1996 the Hoge Raad repeated and expanded the central observations of the aforementioned decision of 1967 and continued to adhere to the territorial approach in respect of foreign insolvency proceedings.\textsuperscript{386}

Mr. Coppoolse, a Dutch national who operated a business in France since 10 February 1982, was declared bankrupt by order of the French court on 12 July 1989. The bankruptcy proceeding was closed on 6 January 1992 for lack of assets, leaving several creditors unpaid. Upon Coppoolse's return to the Netherlands in 1992, one of the unpaid creditors, the Dutch company De Vleeschmeesters BV, levied a prejudgment attachment on salary claims of Coppoolse against his new employer in order to secure payment of its unpaid claims. The claims of De Vleeschmeesters originated from a contract concluded with Coppoolse in 1985, governed by French law. Coppoolse opposed the attachment with the argument that pursuant to French (insolvency) law creditors could no longer enforce unpaid claims after the insolvency proceeding had been closed for lack of assets.\textsuperscript{387}

The District Court rejected Coppoolse's defence with a motivation that closely follows the decision of the Hoge Raad of 2 June 1967. The court observed that a general attachment resulting from the opening of a bankruptcy proceeding abroad, does not comprise the debtor's assets situated in the Netherlands. The debtor's assets that are situated in the Netherlands remain available for individual recourse by creditors. This


\textsuperscript{387} Art. 169 of the French Loi no 85-98 of 25 January 1985 'relative au redressement et à la liquidation judiciaires des entreprises': 'Le jugement de clôture de liquidation judiciaire pour insuffisance d'actif ne fait pas recouvrer aux créanciers l'exercice individuel de leurs actions contre le débiteur ...'.

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also applies, according to the District Court, in a case like the present one, where creditors try to enforce their rights not during the insolvency proceeding but after its closure. Given the territorial effect of foreign bankruptcy proceedings under Dutch law, all consequences that foreign insolvency legislation attaches to an insolvency proceeding, like the rule that unpaid claims are no longer enforceable at law after the bankruptcy proceeding has been closed for lack of assets, only have effect in the country where the bankruptcy proceeding was opened. In the opinion of the District Court, the provision of French insolvency law invoked by Coppoolse therefore only led to the conclusion that creditors like De Vleeschmeesters could no longer take recourse in respect of assets that Coppoolse might have in France. With respect to the enforcement of claims against the assets of Coppoolse in the Netherlands, however, this rule of French insolvency law had no relevance.

The Court of Appeal upheld the decision of the District Court, with a motivation that approaches the issue from the perspective of contract law, rather than insolvency law. Starting from the fact that French law governed the contractual relationship between Coppoolse and De Vleeschmeesters, the court examined the question whether French law can be applied in its entirety, i.e. including Art. 169 of the French Insolvency Act. It was the opinion of the Court of Appeal that:

"If a conflict rule designates French law as the law applicable to an obligation, an exception to that result must be accepted if the result of the application of the conflict rule would infringe on another (more important) principle of Dutch international insolvency law, that is that rules of French insolvency law by their nature can only be applied territorially and cannot - save for international conventions - have effect on the Dutch territory."

Critical of the characterisation of the issue as one of contract law, Advocate General Strikwerda in his advisory opinion (NJ 1998, 108, p. 564 et seq.), in particular Nrs. 16 and 20. Strikwerda argues that the question put to the court should, like the District Court had done, be characterised as an issue of insolvency law. The decision of the Court of Appeal is cited in the decision of the Hoge Raad, NJ 1998, 108, p. 568: "Wanneer nu ingevolge een IPR-verwijzingsregel op een verbin­tenis het Franse recht toepasselijk is moet dat evenwel uitzondering lijden indien het resultaat van de toepassing van de verwijzingsregel zou meebrengen dat afbreuk zou worden gedaan aan een ander (zwaarder wegend) beginsel van Nederlands internationaal faillissementsrecht, nl. dat regts van Frans faillissementsrecht naar hun aard slechts territoriaal toepassing kunnen vinden en - behoudens internationale Verdragen - op het Nederlands grondgebied geen effect kunnen sorteren."
According to the Hoge Raad De Vleeschmeesters was entitled to enforce its unpaid claims, regardless of the effects of the closure of the bankruptcy proceeding on such claims under French insolvency law. According to the Hoge Raad the issue put to the court had to be characterised as a matter of insolvency law. The court then went on to consider:

"Unless a treaty binding upon the Netherlands provides otherwise, an insolvency proceeding opened in another country has territorial effect, not only in the sense that the resulting attachment on the insolvent debtor's assets does not include his assets that are situated in the Netherlands (HR 2 June 1967, NJ 1968, 16), but also in the sense that legal consequences of the bankruptcy proceeding under the insolvency law of that country, cannot be invoked in the Netherlands insofar as they would result in unsatisfied creditors no longer being able to - during or after the proceeding - take recourse against the (previously) insolvent debtor's assets that are situated in the Netherlands."  

... but are recognised

It is important to note that it does not follow from the territorially limited effect of foreign insolvency proceedings under Dutch law that the opening of an insolvency proceeding abroad and the effects thereof under the lex concursus, are completely disregarded in the Netherlands. Recognition of a foreign insolvency proceeding on the one hand and extension of the effects of that proceeding to assets situated in the Netherlands on the other are two distinct issues. The opening of an insolvency proceeding abroad,

390 HR 31 May 1996, NJ 1998, 108, p. 567: "Voor zover niet bij een Nederland bindend verdrag anders is bepaald, heeft een in een ander land uitgesproken faillissement territoriale werking, niet alleen in die zin dat het daar op het vermogen van de gefailleerde rustende faillissementsbeslag niet mede omvat zijn in Nederland aanwezige baten (HR 2 juni 1967, NJ 1968, 16), maar ook in dier voege dat de rechtsgevolgen die door het faillissementsrecht van dat andere land aan een faillissement worden verbonden, in Nederland niet kunnen worden ingeroepen voor zover zij ertoe zouden leiden dat onvoldane crediteuren zich niet meer kunnen verhalen op - tijdens of na afloop van het faillissement - in Nederland aanwezige vermogensbestanddelen van de (voormalige) gefailleerde.” It is remarkable that, while characterising the issues under consideration as pertaining to the law of insolvency, neither the Advocate General in his advisory opinion, nor the Hoge Raad even so much as mentioned the EC Convention on insolvency proceedings of 1995, which was signed by the Netherlands on 19 March 1996.

391 This can be illustrated by the distinction drawn between main and secondary proceedings under the Insolvency Regulation. Pursuant to Art. 16 IR both types of proceedings must be recognised in all other Member States. However, only main proceedings include assets that, at the time of the opening of the proceeding, are situated in other Member States than the state where the proceeding has been opened (cf. Art. 3, 17 and 27 IR).
the appointment of an administrator in the proceeding and the powers conferred on that administrator under the *lex concursus*, are recognised under Dutch law.

This is for example shown by a decision of 23 February 1917, in which the *Hoge Raad* decided that creditors could not enforce unpaid claims against assets that, after the opening of an insolvency proceeding in Germany, had been moved from Germany to the Netherlands by the German administrator acting in his capacity. The court explicitly recognised the powers that German insolvency law conferred on the administrator in respect of assets situated in Germany at the time the insolvency proceeding was opened. According to the *Hoge Raad*, such assets are from the outset included in the foreign proceeding and the fact that they are subsequently moved to the Netherlands does not change this. Individual enforcement of insolvency claims against such assets is therefore prohibited.

Within the limits set by the territoriality principle as it has been adopted by the *Hoge Raad*, Dutch law also recognises the powers conferred on a foreign administrator by the *lex concursus* to reverse juridical acts that have prejudiced the creditors. This follows from a decision of the *Hoge Raad* of 24 October 1997 in the case of Gustafsen q.q./Mosk, concerning an action brought by a German administrator (Gustafsen) to reverse payments made by the debtor (by cheque) to a Dutch counterparty (Mosk).

It has been argued that with its decision of 1997, the *Hoge Raad* has parted with its traditional approach based on the territorial effect of foreign insolvency proceedings. In that respect reference is made to the following observation of the *Hoge Raad*:

392 HR 23 February 1917, NJ 1917, p. 347 et seq. See also HR 20 February 1903, W. 7886.
393 I.e. to the extent that the action brought by the administrator is aimed at the reversal of a juridical act in order to reclaim for the estate (the proceeds of) assets that, without the juridical act concerned would, under Dutch law, have been included in the foreign insolvency proceeding (therefore not assets located in the Netherlands).
395 Th M. de Boer in his commentary HR 24 October 1997, in NJ 1999, 316, who refers to Nr. 3.5.2 of the court's decision.
"Even though this principle [territoriality principle], according to HR 2 June 1967, NJ 1968, 16, entails that an attachment on the assets of a debtor resulting from the opening of an insolvency proceeding against him abroad, does not include his assets situated in the Netherlands, Gustafsen’s claim for repayment of the moneys paid to Mosk by BBB prior to the opening of the insolvency proceeding, even if this claim could be regarded as an asset that is situated in the Netherlands which has been withdrawn from the estate, in the current state of development of the law should not be denied because of this possible location in the Netherlands."

It is submitted that, however fortunate and desirable such a development would be, this is not (necessarily) the case. The decision of 1997 in my opinion is very well reconcilable with the approach that the Hoge Raad has adopted in respect of foreign insolvency proceedings until then (and even a little more than a year before). In this particular case there was also no need for the Hoge Raad to reformulate its fundamental appproach. The territorial approach adopted by the Hoge Raad does not mean that a foreign insolvency proceeding and the (powers of) the administrator appointed in such proceedings cannot be and are not recognised. There is no obstacle in Dutch law to such recognition. However, the territorial approach adopted in respect of foreign insolvency proceedings does entail that the effects of that proceeding do not extend to assets situated in the Netherlands. These are not included in the foreign insolvency estate. I would argue that, even following the territorial approach that the Hoge Raad has adopted, a foreign administrator can, on the basis of the Actio Pauliana, reclaim assets or reverse transactions in respect of assets that would have been situated in the State where the insolvency proceeding has been opened without the disputed transaction. This was also the

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396 HR 24 October 1997, NJ 1999, 316, Nr. 3.5.2: "Weliswaar brengt dit beginsel volgens het arrest van de Hoge Raad van 2 juni 1967, NJ 1968, 16, mee dat een op het vermogen van een in een ander land gefailleerde schuldenaar in dat land rustend faillissementsbeslag niet mede diens in Nederland aanwezige baten omvat, doch de door Gustafsen geldend gemaakte vordering tot terugbetaling van het door BBB vóór haar faillietverklaring aan Mosk betaalde bedrag, gesteld al dat deze vordering op zichzelf zou kunnen worden beschouwd als een in Nederland aanwezige - aan de failliete boedel onttrokken - bate, behoort naar de huidige stand van de rechtsontwikkeling niet af te stuiten op deze mogelijke localisering in Nederland."


398 Apparently differently: Advocate General Strikwerda in Nr. 11 of his advisory opinion to HR 24 October 1997 (NJ 1999, 316, p. 1725). However, he starts from the assumption that the territoriality principle entails that the foreign administrator’s power to act would not be accepted if the asset concerned would be situated in the Netherlands at the time of the opening of the insolvency proceeding abroad.
purpose of the action brought by Gustafsen against Mosk in the Netherlands.

In this respect a parallel can be drawn with the powers of an administrator appointed in a secondary proceeding under the Insolvency Regulation. An insolvency proceeding that has been opened in a Member State on the basis of Art. 3 (2) IR is recognised in all other Member States but only includes assets situated in that Member State. The importance of the recognition of that proceeding is shown by the administrator's power to act in other Member States. It allows the administrator appointed in the (secondary) territorial proceeding to reclaim assets that have been transferred to another Member State after the opening of the proceeding. It furthermore allows the administrator to bring action in other Member States aimed at the reversal of juridical acts that have prejudiced the rights of creditors and on that basis reclaim assets that, without the disputed transaction, would have been situated in that Member State and should have been administered in the local (secondary) proceeding. 399

3.2.4.4 Consequences of the approach adopted by the Hoge Raad

In Dutch legal writing the opinions differ with respect to the consequences of the fundamental assumption consistently expressed by the Hoge Raad that a foreign insolvency proceeding has territorial effect in the sense that the general attachment on the debtor's assets does not include assets situated in the Netherlands.

It is clear that this entails that creditors can (continue to) individually enforce their claims against the debtor's assets in the Netherlands, regardless of restrictions that foreign insolvency law - or Dutch insolvency law for that matter - imposes on individual claim enforcement. This has been confirmed in several decisions of the Hoge Raad. Also a discharge of the debtor, for example resulting from a court approved composition in a foreign insolvency proceeding, has no effect on a creditor's right of recourse in respect of assets situated in the Netherlands. This follows from the additional observation by the Hoge Raad in its decision of 31 May 1996 that "legal consequences of the bankruptcy proceeding under the insol-

399 Art. 18 (2), 4 (2) m and 13 IR. See also Report Virgós/Schmit, Nr. 224.
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However, it is debated whether it entails an 'isolation' of assets situated in the Netherlands from the debtor's insolvency that, for example, would preclude the extension of the debtor's divestment and the corresponding conferral on the administrator of the powers to administer and dispose of assets, to assets situated in the Netherlands. There is consensus in legal writing that, in principle, effects such as the divestment of the debtor should also extend to assets in the Netherlands. According to some authors this is also the prevailing view on the interpretation of the 'territorial effect' of foreign insolvency proceedings. There is also case law from lower courts that confirms the recognition of these effects. It is submitted, however, that recognition of these effects is incompatible with the decisions of the Hoge Raad. In 1907 the Hoge Raad explicitly decided that as a consequence of the 'territorial effect' of foreign insolvency proceedings, the effects of the opening of an insolvency proceeding in another State with respect to the power to dispose of assets did not extend to assets situated in the Dutch territory.

400 HR 31 May 1996, NJ 1998, 108, comm. Th.M. de Boer (De Vleeschmeesters), JOR 1996/75, comm. P.M. Veder. Cf. Van Galen/Van Apeldoorn (1998), Nr. 48. With Kleintjes, I would argue that this is different if the creditor seeking recourse on assets in the Netherlands, has agreed to the composition (cf. Kleintjes (1890), p. 261). A comparable result has been accepted in the Insolvency Regulation in respect of secondary insolvency proceedings. Pursuant to Art. 34 (2) IR any restriction of creditors' rights resulting from a composition in a secondary proceeding, may not have effect in respect of the debtor's assets not included in that proceeding without the consent of all creditors having an interest.


404 HR 31 May 1907, W. 8553. In HR 5 November 1915 (NJ 1916, p. 12) the question was left undecided. That a debtor who was declared bankrupt abroad did not as a result lose his powers to dispose of assets situated in the Netherlands, was argued by Kleintjes (1890), p. 194. Differently: Jitta (1880), p. 129-153 and 164-180.
Hoge Raad has mitigated this approach in its later decisions. On the contrary, it has consistently adhered to the fundamental assumption that foreign insolvency proceedings have 'territorial effect'.

Strikwerda has argued that the territorial effect primarily, if not exclusively concerns the effects of the general attachment on the debtor's assets resulting from the opening of an insolvency proceeding. This, in his opinion, does not entail more than that a general attachment on the debtor's assets abroad does not include assets situated in the Netherlands and that the foreign proceeding cannot result in creditors no longer being able to take recourse against assets in the Netherlands. In his opinion, it does not preclude the recognition of other effects of the foreign insolvency proceeding in the Netherlands.

These observations in my opinion do not lead to a different conclusion with respect to the issue of recognition of the debtor's divestment in respect of assets situated in the Netherlands. It illustrates that the territoriality principle adopted by the Hoge Raad does not entail that a foreign insolvency proceeding, its effects and the administrator appointed in the proceeding cannot be recognised. However, the debtor is only divested of the power to administer and dispose of assets that are included in the insolvency proceeding. It follows from the observation of the Hoge Raad that the general attachment on the debtor's assets resulting from the opening of the insolvency proceeding abroad does not encompass assets situated in the Netherlands, that assets situated in the Netherlands (at the time of the opening of the insolvency proceeding) are not included in the foreign insolvency proceeding. This conclusion is supported by the cases cited before. Assets situated in the Netherlands at the time of the opening of the insolvency proceeding abroad not only remain available for recourse by individual creditors, but the foreign administrator cannot exercise the powers conferred on him by the lex concursus in respect of them.

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405 Advisory opinion of Advocate General Strikwerda to HR 24 October 1997, NJ 1999, 316, Nr. 10.
407 Cf. Art 23 Fw and Art. 80 InsO.
This interpretation of the reference to insolvency proceedings effecting a general attachment on the debtor's assets, is in accordance with the perception of bankruptcy proceedings under Dutch law. The metaphor of a general judicial attachment for the benefit of all the debtor's creditors is often used to describe bankruptcy proceedings under Dutch law. The issue of the debtor's divestment and the conferral of the power on the administrator to manage and dispose of the debtor's assets are closely linked to this idea of an 'attachment' on the debtor's assets. The Dutch legislator has clearly indicated that the opening of a bankruptcy proceeding only affects the debtor's assets, not his person. The opening of a bankruptcy proceeding leads to a general judicial attachment on the debtor's assets: it is a collective debt enforcement proceeding. The debtor is only divested of his powers to dispose of his assets to the extent that assets are covered by the "general attachment", to the extent therefore that his assets are included in the insolvency proceeding within the terms of Art. 20 Fw. Therefore, when the Hoge Raad observes that an attachment on the debtor's assets resulting from the opening of an insolvency proceeding abroad does not encompass assets situated in the Netherlands, this entails a complete isolation of these assets from the foreign insolvency proceeding. Assets situated in the Netherlands at the time of the opening of an insolvency proceeding abroad, are not included in that proceeding. A foreign administrator cannot qualitate qua, i.e. in his capacity as administrator of the foreign estate, reclaim or realise assets that were situated in the Netherlands at the time of the opening of the insolvency proceeding abroad. This also explains why creditors can continue to individually take recourse against assets that are situated in the Netherlands, notwithstanding the opening of insolvency proceedings abroad. The argument that a foreign administrator cannot oppose individual enforcement measures of creditors because this would be 'enforcement' of the foreign bankruptcy order, which would be prohibited by Art. 431 (1) Rv, is not convincing and has no basis in present Dutch law. Staying in terms of insolvency proceedings as effecting an attachment on the debtor's assets, I would argue that such an attachment can only have exclusive effect, in the sense that the attachment is effected for the benefit of all creditors with insolvency claims and precludes individual attachments by creditors,

408 Cf. Van der Feltz, I, p. 339/340. See also Verstijlen (1998), chapter III, who also indicates the limits of the explanatory power of this metaphor.

409 Cf. Art. 26 and 33 Fw.
if that attachment has any effect in respect of assets situated the Netherlands at all.\textsuperscript{410} In this respect the *Hoge Raad* has very clearly stated that a foreign insolvency attachment does not include assets situated in the Netherlands.

A further argument that may support the conclusion that it follows from the decisions of the *Hoge Raad* that foreign insolvency proceedings in principle do not include assets situated in the Netherlands, is the complete lack of reference to conditions for the recognition of the effects of a foreign proceeding in respect of assets in the Netherlands. Foreign insolvency proceedings may include assets situated in the Netherlands if and to the extent that a treaty or other international instrument binding upon the Netherlands so provides. Such instruments generally set forth the conditions for and effects of recognition of proceedings that fall within their scope. It would be remarkable if the *Hoge Raad* were to accept that assets situated in the Netherlands are included in a foreign insolvency proceeding without imposing any conditions as to the nature of the foreign proceeding or the jurisdiction of the foreign courts or authorities that have opened the proceeding (can the proceeding be regarded as a main proceeding or not?). None of the examined cases show considerations on these issues.

A further question that is raised by Strikwerda's observations in his advisory opinion to HR 24 October 1997,\textsuperscript{411} is whether a foreign equivalent of a suspension of payments proceeding would have effect in respect of assets situated in the Netherlands. Until now, the cases brought before the *Hoge Raad* concerned the effects of foreign liquidation proceedings. The comparison with bankruptcy proceedings under Dutch law and, accordingly, the use of the same metaphor to describe its effects are therefore understandable. But how would the court decide if a creditor were to seek recourse in the Netherlands against assets of a debtor who is subject to a foreign insolvency proceeding comparable to the Dutch suspension of payments? In the perception of Dutch law, a suspension of payments does not result in an attachment on the debtor's assets. The purpose of the proceeding is not collective debt enforcement, but to provide the financially troubled debtor with some breathing space to

\textsuperscript{411} NJ 1999, 316.
work out an arrangement with his creditors. It is not aimed at realisation of his assets and distribution of the proceeds. Does a prohibition on individual enforcement measures pursuant to the foreign lex concursus also prevent creditors from seeking recourse against assets situated in the Netherlands? Let's suppose that the Hoge Raad were to apply the standards of Dutch law to describe and explain the effects of the foreign proceeding, as it does with respect to foreign liquidation proceedings. It would then have to conclude that the prohibition of individual enforcement of insolvency claims does not follow from an attachment on the debtor's assets. Would it then deny creditors the right to take recourse against assets in the Netherlands? This would be acclaimed, but such decision would be inconsistent with the position that it grants to creditors in case of foreign liquidation proceedings.

3.3 Recognition and enforcement of other judgments

3.3.1 Introduction

In the course of the insolvency proceeding a number of decisions will be handed down by the courts, besides the decision pursuant to which the insolvency proceeding is opened. These decisions may or may not follow the same regime of recognition and, where appropriate, enforcement as the decision opening the insolvency proceeding itself. Such decisions will include decisions on the course and closure of the proceeding, e.g. court approval for certain actions to be undertaken by the administrator, court approval of a composition or reorganisation plan, or a court decision that the insolvency proceeding shall be terminated for lack of assets. They may also relate to preservation measures ordered after the application for the opening of the insolvency proceeding has been filed, but prior to the actual opening of the proceeding. Some effects of the opening of an insolvency proceeding that in some jurisdictions may take effect by operation of law, in other jurisdictions may require an explicit court decision. Other judgments that are of considerable interest in this respect are judgments deriving directly from the insolvency proceeding and which are closely linked with them, such as judgments on the reversal of juridical acts detrimental to the creditors, that have been performed by the debtor prior to the opening of the insolvency proceeding (actio Pauliana, Insolvenzanfechtung) and judgments on insolvency related directors' liability.
In a European context the scope of Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the successor of the Brussels Convention of 1968, and its delimitation with the Insolvency Regulation is important. These Regulations prevail over the national laws of the Member States in respect of jurisdiction, recognition and enforcement of judgments. With respect to judgments that do not fall within the scope of the Insolvency Regulation it must be examined whether they are governed by Regulation 44/2001. Decisions that fall within the scope of that Regulation are governed by the regime set out therein, which on certain points differs from the regime of recognition and enforcement provided for in the Insolvency Regulation or national law.

3.3.2 Insolvency Regulation

Art. 25 IR distinguishes between recognition and enforcement of judgments handed down in the course of an insolvency proceeding.

Pursuant to Art. 25 (1) IR, judgments handed down by a court whose judgment concerning the opening of the proceeding is recognised in accordance with Art. 16 IR and which concern the course and closure of the insolvency proceeding, as well as compositions approved by that court, are recognised in all other Member States without any further formalities. The same applies to judgments deriving directly from the insolvency proceedings and which are closely connected to them, even

413 The following examples of such decisions are given in the Report Virgós/Schmit (Nr. 196): (i) actions aimed at reversing legal acts detrimental to the creditors as referred to in Art. 4 (2) (m) and 13 IR, (ii) actions concerning the personal liability of directors of companies insofar as they are based on insolvency law, (iii) disputes concerning the admission or the ranking of claims (but not the existence or validity of a claim under general law), (iv) disputes between the administrator and the debtor on whether an asset belongs to the estate. One may also think of actions brought by the administrator on the basis of Art. 20 (1) IR. Actions that do not originate from insolvency law, even though they may be affected by the opening of an insolvency proceeding are not covered by Art. 25 (1), second paragraph, IR: e.g. actions based on contracts concluded by the debtor, actions concerning the validity and existence of claims under general law and actions for the recovery of another's property held by the debtor.
if they were handed down by another court,\textsuperscript{414} and judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

Art. 25 (1) IR provides that enforcement of these judgments shall take place in accordance with Art. 31 to 51, with the exception of Art. 34 (2), of the Brussels Convention of 1968. In view of the entry into force on 1 March 2002 of Regulation 44/2001, Art. 25 (1) IR will have to be amended or to be interpreted as referring to the relevant provisions of Regulation 44/2001.\textsuperscript{415} This means that the Art. 38-52 of Regulation (EC) 44/2001 must be applied (with the exception of Art. 45 (1)), notwithstanding that the text of the provision refers explicitly to the corresponding provisions in the Brussels Convention.\textsuperscript{416}

Recognition and enforcement of the judgments referred to in Art. 25 IR may only be denied on the grounds mentioned in the Insolvency Regulation, i.e. Art. 26 and 25 (3) IR.\textsuperscript{417} Pursuant to Art. 26 IR recognition and enforcement of judgments handed down in the context of an insolvency proceeding may be refused where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. Art. 25 (3) IR stipulates that Member States shall not be obliged to recognise or enforce a judgment covered by Art. 25 (1) IR which might result in a limitation of personal freedom or postal secrecy.

\textsuperscript{414} This addition refers to countries that do not adhere to some kind of 'vis attractiva concursus' principle, and where other courts than the insolvency court may hand down such judgments (cf. Report Virgós/Schmit, Nr. 194).

\textsuperscript{415} On the simplified system of recognition and enforcement of judgments of the Regulation, see Vlas (WPNR 2000), p. 752; Couwenberg/Pertegás Sender (2001), p. 61-66.

\textsuperscript{416} Art. 68 (1) and (2) Regulation (EC) 44/2001. An exception applies to the position of Denmark.

\textsuperscript{417} The exclusion of Art. 34 (2) of the Brussels Convention (Art. 45 (1) Regulation (EC) 44/2001), indicates that grounds for rejection or withdrawal of the exequatur can only be taken from the Insolvency Regulation and are not to be taken from the relevant provisions of Regulation (EC) 44/2001. Cf. Report Virgós/Schmit, Nr. 192.
3.3.3 UNCITRAL Model Law

The Model Law does not provide for the recognition of other decisions than the decision opening the insolvency proceeding. This is not necessary.\(^{418}\) In the system of the Model Law a decision of a foreign court concerning the opening, conduct or closure of a proceeding does not in itself have any effects in other States. The effects of recognition of a foreign decision are determined on the basis of the law of the recognizing State pursuant to a court decision in that State.

The recognition (and enforceability) of judgments deriving from a foreign insolvency proceeding and that are closely linked with the insolvency proceeding,\(^{419}\) will be determined in accordance with the provisions of the law of the recognizing State that apply to recognition of foreign judgments in general.

3.3.4 German law

The recognition and enforcement of other decisions than the decision opening the insolvency proceeding are addressed in Art. 343 (2) and 353 InsO. Pursuant to Art. 343 (2) InsO, protective measures ordered after the petition for the opening of the insolvency proceeding and other decisions relating to the course or closure of the proceeding are recognised under the same conditions as the decision opening the insolvency proceeding (Art. 343 (1) InsO). Art. 353 InsO stipulates that enforcement of decisions handed down in a foreign insolvency proceeding requires a declaration of enforceability - *exequatur*. In accordance with Art. 723 (1) ZPO, the court that issues the *exequatur*\(^{420}\) may not assess the legitimacy of the decision. Art. 723 (2) ZPO, which stipulates that an *exequatur* can only be issued once the foreign decision is final and conclusive and that an *exequatur* may not be issued if the decision does not meet the conditions for recognition set forth in Art. 328 ZPO,\(^{421}\) does not apply.

\(^{419}\) Cf. Art. 25 IR.
\(^{420}\) The competent court is established in accordance with Art. 722 (2) ZPO.
\(^{421}\) Art. 328 (5) ZPO for example requires reciprocity ("Die Anerkennung des Urteils eines ausländischen Gerichts ist ausgeschlossen (...) wenn die Gegenseitigkeit nicht verbürgt ist").
Art. 353 InsO is restricted to decisions that are issued in the insolvency proceeding ("in dem ausländischen Insolvenzverfahren"). The examples of decisions to which the provision applies as mentioned in the explanatory report\(^{422}\) - such as decisions concerning the provision of information or co-operation, the assessment of disputed claims and the court approval of a composition - suggest that the recognition and enforcement of other decisions, e.g. with respect to insolvency related directors' liability and avoidance actions, which are covered by Art. 25 IR, follow the general rules regarding enforcement of foreign judicial decisions laid down in Art. 328, 722 and 723 ZPO.

3.3.5 Dutch law

No specific rules exist in Dutch law with respect to the recognition of other decisions taken by a foreign court in the course of an insolvency proceeding. Recognition and enforcement of decisions that do not fall within the ambit of the Brussels Convention/Regulation 44/2001, are subject to the general rules of Dutch private international law (in particular Art. 431 Rv).

With respect to the recognition of foreign decisions Dutch courts have a large power of discretion. The courts can decide on a case by case basis whether and to what extent a foreign decision has authority in the Netherlands. According to prevailing opinion, Art. 431 Rv does not contain a prohibition on the recognition of foreign decisions. It merely provides that enforcement of a foreign decision is subject to the Art. 985-994 Rv. These provisions regulate the proceeding to obtain an *exequatur* on foreign condemnatory decisions. Pursuant to these provisions an *exequatur* on a foreign decision can only be obtained if a treaty or statutory provision provides that the decision is enforceable in the Netherlands.

As to the recognition of foreign decisions Dutch law has developed along different lines with respect to constitutive decisions on the one hand and declaratory decisions, dismissals and condemnatory decisions on the other hand.\(^{423}\) However, the rules on recognition for these types of decisions have become very close and a number of general conditions for recog-

\(^{422}\) BR-Drucksache 715/02, p. 30.

\(^{423}\) Cf. Strikwerda (2002), Nr. 264
nition of foreign proceedings (minimum standard) can be formulated.\textsuperscript{424} Firstly, the jurisdiction of the foreign court must have been based on internationally accepted criteria.\textsuperscript{425} Secondly, the decision must have been given in a proper judicial procedure according to the criteria of Dutch law. And thirdly, recognition of the foreign decision may not lead to results that are contrary to the Dutch ordre public.

Recognition of decisions that are given in the course of the insolvency proceeding, for example concerning the course or closure of the proceeding, is therefore possible under Dutch law. Recognition of such decisions must, however, be compatible with the 'territorial effect' of foreign insolvency proceedings under present Dutch law. Preservation measures taken before the actual opening of the insolvency proceeding, e.g. on the basis of Art. 21 InsO, do not prevent creditors from individually enforcing claims against the debtor's assets in the Netherlands.\textsuperscript{426} Recognition of the decision of a court whereby a composition is approved, may also not preclude a creditor from taking recourse against the debtor's assets situated in the Netherlands for the full amount of his claim.\textsuperscript{427} A moratorium similar to Art. 63a Fw ordered by a foreign court will also not affect the rights of creditors in respect of assets situated in the Netherlands.

Art. 431 (1) Rv does, however, impose restrictions on the enforcement of foreign decisions, for example concerning directors' liability or decisions concerning the reversal of transactions on the basis of the Actio Pauliana that include an order to return what has been obtained on the basis of the

\textsuperscript{424} Cf. Strikwerda (2002), Nr. 270.
\textsuperscript{425} Case law shows that with respect to the recognition of declaratory decisions, dismissals and condemnedatory decisions importance may be attached to the voluntary acceptance of the jurisdiction of the foreign court (e.g. by way of a choice of forum clause). See HR 14 November 1924, NJ 1925, p. 91 (Bontmantel); HR 17 December 1993, NJ 1994, 348 (Esmil). As Strikwerda observes, the voluntary acceptance of the jurisdiction of the foreign court can be regarded as the application of the more general requirement of proper jurisdiction. Cf. Strikwerda (2002), Nrs. 268 and 269.
\textsuperscript{426} This would also be the case if such measures were deemed to be covered by the general heading of 'insolvency proceedings' as has been done in Art. 2(a) Model Law.
\textsuperscript{427} Cf. Van Galen/Van Apeldoorn (1998), Nr. 48. See also Kleintjes (1890), p. 261 (who argues that a creditor that has voted in favour of the composition in the foreign proceeding, cannot take recourse in respect of assets in the Netherlands).
reversed transaction. An exequatur on foreign condemnatory decisions can only be obtained from the Dutch courts if the enforceability of the foreign decision concerned is provided for by treaty or statute. Art. 431 (2) Rv stipulates that, in the absence of such treaty or statutory provisions, cases can be heard and settled again by the Dutch courts. This differs from the exequatur proceeding in the sense that it is the Dutch decision that will be enforced in the Netherlands. In principle the decision is based on a complete and separate assessment of the questions raised. A renewed and full assessment of the case is not necessary, however, if the foreign decision meets the criteria for recognition set out above. The foreign decision will serve as the basis for the decision of the Dutch courts. The Hoge Raad has in this respect observed that:

"( ) it must be assumed that if legal proceedings are instituted pursuant to article 431 (2) Rv on the basis of a decision of a foreign court that had jurisdiction pursuant to a choice of forum clause, in principle it suffices to invoke the clause and the decision given on the basis thereof, whereas the claim in principle only has to be aimed at obtaining an order for what the other party had been ordered to in that foreign decision. Provided that the court is satisfied that these conditions have been met, in the proceedings the binding effect of that decision between the parties must be taken as the point of departure."

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428 Cf Stinkwerda (2002), Nr 271 Differently Verschuur (1995), p 45-48, who is of the opinion that decisive influence is attached to the voluntary acceptance by the defendant of the jurisdiction of the foreign court (cf HR 14 November 1924, NJ 1925, p 91 (Bontmantel)) and that this requirement can only be dispensed with by the legislature.

429 HR 17 December 1993, NJ 1994, 348 (Esmul) "( ) aangenomen moet worden dat bij het instellen van een vordering op de voet van art 431 lid 2 op grondslag van een uitspraak van een buitenlandse rechter die op grond van een jurisdictieclausule uitsluitend bevoegd is, in beginsel kan worden volstaan met het stellen van deze clausule en de op basis daarvan verkregen uitspraak, terwijl de vordering in beginsel slechts behoeft te strekken tot veroordeling tot hetgeen waartoe de wederpartij bij die uitspraak is veroordeeld. In het geding zal, zo deze stellingen juist bevonden zijn, de gebondenheid van partijen aan deze uitspraak tot uitgangspunt moeten worden genomen. " See also HR 16 June 1996, NJ 1996, 256 (The Shipping Corporation of India/Audio Electronic Company) and HR 16 April 1999, NJ 2001, 1, comm P Vlas (Brown q q /Ultrafin), JOR 1999/156, comm PM Veder.
3.4 Conclusions with respect to foreign insolvency proceedings

The examined systems show divergent approaches to the recognition of foreign insolvency proceedings and the effects of such recognition on assets situated in the recognising State.

German law and the Insolvency Regulation fundamentally follow the same approach. Foreign insolvency proceedings are recognised by operation of law, without any further formalities. If the foreign proceeding is a main proceeding it includes assets situated in the recognising State (Germany), provided that a (secondary) territorial proceeding has not been opened (in Germany). The exact nature of the effects of the foreign proceeding (in Germany) is established through application of a number of conflict rules that start from the fundamental applicability of the lex concursus. However, with respect to a number of important issues deviating conflicts rules are provided for.

The UNCITRAL Model Law requires a court decision in respect of the recognition of a foreign proceeding. The effects of recognition of a foreign proceeding are 'channelled through' the law of the recognising State. The relief granted in respect of a foreign insolvency proceeding is in principle derived from the relief that would be available in a similar proceeding under the law of the recognising State. The court of the recognising State has a considerable degree of discretion in determining the relief that it considers appropriate. Only with respect a foreign main proceeding does the Model Law prescribe that recognition produces a number of effects automatically.

Dutch law is in sharp contrast with the other examined systems. Foreign insolvency proceedings are recognised, but the effects of such proceedings on assets situated in the Netherlands are very limited. In principle, a foreign insolvency proceeding does not include the debtor's assets situated in the Netherlands. This restrictive 'territorial' approach to foreign insolvency proceedings has important consequences. Creditors can, for example, continue to individually seek recourse against the debtor's assets and the divestment of the debtor and the conferral on the administrator of the power to administer and dispose of the debtor's assets does not affect assets situated in the Netherlands.
All examined systems allow the opening of local insolvency proceedings notwithstanding the opening of a main insolvency proceeding in another State, albeit under diverging conditions (e.g. with respect to the requirement of the existence of an establishment or the presence of assets). The examined systems, with the exception of Dutch law, in that respect also provide for a number of necessary rules on co-ordination and co-operation. Unlike German law and the Insolvency Regulation, which impose a duty of co-operation on administrators only, the Model Law extends this duty to the courts involved. Under German law the duty of co-operation appears to be unnecessarily restricted in that the Insolvenzordnung only provides that an administrator appointed in a German secondary insolvency proceeding is obliged to communicate information to the foreign administrator appointed in a main proceeding. There is no apparent reason why such a duty of communicating relevant information should not also apply in respect of an administrator appointed in a main proceeding opened in Germany or with respect to administrators appointed in other (secondary) territorial proceedings.

4. CONCLUDING OBSERVATIONS: SOME THOUGHTS ON THE FUTURE DEVELOPMENT OF DUTCH LAW

Present Dutch law does not meet the standards that are required for an effective and efficient operation of cross-border insolvencies that fall outside the scope of the Insolvency Regulation. In particular with respect to the recognition of foreign insolvency proceedings and the co-ordination of Dutch insolvency proceedings with parallel foreign insolvency proceedings, Dutch law is not in accordance with international developments as they are reflected in the Insolvency Regulation, the UNCITRAL Model Law and German law. The signing by the Netherlands of the EC Convention on insolvency proceedings of 1995 on 19 March 1996 provided the Hoge Raad with an opportunity to reconsider and reformulate its approach to cross-border insolvency issues. The Hoge Raad did not take this opportunity as shown by its 1996 decision in the case of 'De Vleeschmeesters', where the court continued to adhere to the 'territoriality principle'.

The lack of clear, transparent and consistent rules on the cross-border aspects of insolvency proceedings in Dutch law calls for action. A set of
clear and practical rules on in particular the recognition and the effects of recognition of foreign insolvency proceedings is required. These rules should unequivocally state that foreign insolvency proceedings can be recognised and can have effect in respect of assets situated in the Netherlands. The conditions for recognition of foreign proceedings and the effects of such recognition should be clearly set out. The law should furthermore provide for rules on the co-ordination of concurrent proceedings.

The question is along what lines such legislation should be drawn up. The Standing Government Committee on Private International Law (Staatscommissie voor het internationaal privaatrecht) in its report of 13 March 2002 on the Insolvency Regulation, has indicated various options for the legislator to consider: (i) application by analogy of the provisions of the Insolvency Regulation, (ii) implementation of the Model Law, (iii) drafting and implementing new provisions, or (iv) awaiting further initiatives within the European Union. 430

In drafting legislation in the field of cross-border aspects of insolvency proceedings, it is important to stay as close to existing bodies of internationally accepted rules as possible in order to achieve a maximum degree of transparency and legal certainty. This means that two texts play an important role in a possible reform of Dutch international insolvency law: the Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. Furthermore, one should carefully consider the relationship to the Insolvency Regulation of any new legislation to be introduced in this field. The complementary nature of the UNCITRAL Model Law and the Insolvency Regulation is stressed in the Guide to Enactment to the UNCITRAL Model Law. 431 However, the systems introduced by these two texts differ on a number of important issues, in particular with respect to the (immediate) effects of recognition of insolvency proceedings that can be characterised as main proceedings. One should be careful not to introduce two distinct bodies of rules on cross-border aspects of insolvency proceedings. Where a directly applicable body of rules, such as the Insolvency Regulation, exists, careful considera-

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430 On the various options, see also Polak-Wessels X, par. 10727-10736.
431 Cf. Guide to Enactment, Nr. 19; Sekolec (TvI 2002).
tion should be given to applying similar rules as much as possible in other situations.

It is submitted that neither the rules laid down in the Insolvency Regulation, nor the UNCITRAL Model Law should be implemented without modifications to address the aspects of cross-border insolvency proceedings that fall outside the scope of the Insolvency Regulation. The reciprocal nature of the Insolvency Regulation makes it less apt to be declared applicable also to insolvency proceedings opened in non EU Member States. This is for example reflected in the provisions on co-operation and co-ordination of Chapter III of the Insolvency Regulation. These provisions confer important powers of decision concerning the operation of secondary proceedings on the administrator in a foreign main proceeding that are not necessarily appropriate to apply on a global scale. Unlike Wessels, I am not convinced that the Model Law should 'without any doubt' be implemented in Dutch legislation. The Model Law has been clearly influenced by common law approaches to (cross-border) insolvency issues, for example where it concerns the position of the court in determining the appropriate relief in respect of (foreign) insolvency proceedings, and in that respect would be less suitable to be implemented without modification into the Dutch legal system.

Elements could be drawn from both texts, however. The Guide to Enactment to the Model Law stresses the interest in making as little modifications to the text of the Model Law as possible when implementing it in national legislation. The background is of course the desire and need to achieve as much global harmonisation in this field as possible as that increases the transparency of legislation and the efficient administration of cross-border insolvency proceedings. However, in implementing legislation that addresses issues such as the effects of the opening of insolvency proceedings abroad on the divestment of the debtor, the power of foreign administrators to act in the Netherlands, the suspension or prohibition of individual claim enforcement and the right of foreign creditors to participate in (concurrenct) insolvency proceedings opened in

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432 Cf. Art. 357 InsO, which, in comparison to the Insolvency Regulation, contains a more limited obligation of co-operation and communication of information.
the Netherlands, Dutch law could go beyond the rules incorporated in the Model Law.

Recognition: upon court decision; conditions
A first issue that would need to be addressed is, whether in recognising foreign insolvency proceedings the model of the Insolvency Regulation should be followed or the model of the UNCITRAL Model Law. The main difference between these two texts on this issue is the involvement of the courts of the recognising State. The Insolvency Regulation starts from the recognition by operation of law. The Model Law provides for recognition of foreign proceedings following a decision of the courts of the recognising State.

One of the most important reasons that the Insolvency Regulation can provide for the automatic recognition of insolvency proceedings opened in other Member States, is that it contains uniform rules on jurisdiction and adopts a closed list method with respect to the proceedings that fall within its scope. These uniform rules on jurisdiction must be applied ex officio by the courts of the Member States and cannot be challenged in other Member States. The Member States have agreed on the proceedings that meet the criteria of Art 1 (1) IR. Those proceedings have been listed in an Annex to the Regulation. In a global context such clarity does not exist, as has been shown by the discussions in German case law and legal writing on whether particular foreign proceedings could be regarded as insolvency proceedings (according to German standards). Uniform rules on jurisdiction in matters of insolvency do not exist on a global scale.

It is submitted that in future Dutch legislation, recognition of foreign insolvency proceedings should be channeled through the Dutch courts, as provided for in the Model Law. The recognition of foreign insolvency proceedings should be subject to a decision by the court. Jurisdiction to decide upon requests for recognition of foreign insolvency proceedings should be conferred exclusively on one (District) court in the Netherlands. This provides clarity to the international community and enables the court to build up expertise in this area. Requiring a court decision has the advantage that at an early stage a decision of principle can be taken as to whether a particular foreign proceeding is eligible for recognition and whether the proceeding concerned is a main proceeding that also includes
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assets situated in the Netherlands. This is not an issue that will have to be addressed by possibly different courts in each particular case where the effects of a foreign insolvency proceeding or actions of a foreign administrator are disputed. An assessment can be made of whether the conditions for recognition of a foreign proceeding have been met. These conditions should address:

(a) the nature of the proceeding for which recognition is requested: it must be established whether the foreign proceeding - for purposes of Dutch private international law - can be characterised as an insolvency proceeding;
(b) the jurisdiction of the court (or other competent authority) that has opened the proceeding - is it a main proceeding or a proceeding with territorially limited effect?;
(c) the validity and the effectiveness of the decision under the lex concursus;
(d) whether recognition of the proceeding would lead to results that are manifestly contrary to the Dutch ordre public.

Whether a foreign proceeding can be characterised as an insolvency proceeding may raise problems. This will have to be decided by the competent Dutch court on a case by case basis, which eventually will provide the necessary certainty as to which foreign proceedings can and which cannot be characterised as insolvency proceedings for purposes of Dutch private international law. Given the wide variety of insolvency systems and the different policy considerations underlying insolvency law in jurisdictions around the world, a liberal approach should be adopted in this respect. Assistance may be found in the broad description of insolvency proceedings provided for in Art. 1 (1) IR and Art. 2 (a) Model Law. It may be considered to include such guidance in the legislation. Guidance may also be provided by the Principles of European Insolvency Law and the UNCITRAL Legislative Guide on Insolvency Law.

Based on the jurisdiction of the foreign court, the Dutch court must determine whether the foreign insolvency proceeding should affect assets situated in the Netherlands, i.e. whether it is a main proceeding or a (non-main) territorial proceeding. Only a foreign main proceeding should in my opinion affect assets situated in the Netherlands at the time of the
opening of the proceeding. The effect of foreign non-main proceedings should be limited, in accordance with the Insolvency Regulation. Of course, this does not mean that a foreign non-main proceeding and the administrator appointed in such proceeding are not recognised. As to the determination of the nature of the proceeding, the same criteria laid down in the Insolvency Regulation and the Model Law should be employed. A foreign proceeding should be characterised as a main proceeding if it has been opened in the country where the centre of the debtor's main interests is located. In case of incorporated debtors, the rebuttable presumption that this is the place of the debtor's registered office (siège statutaire), can be added.

An advantage of requiring a court decision for recognition of a foreign insolvency proceeding, is that it would provide a basis for implementing the necessary procedural framework for providing assistance, publicity and court supervision in the Netherlands.\(^\text{435}\) If the court decides that a foreign insolvency proceeding is recognised as a main proceeding, it can appoint a supervisory judge. This supervisory judge can perform similar functions as in a 'normal' national insolvency proceeding. These functions may relate to the gathering of information by the foreign administrator or the approval to perform certain acts for which court approval is required under Dutch law.\(^\text{436}\) It could also provide a basis for a court ordered moratorium (afkoelingsperiode), (temporarily) blocking actions of secured and revendicatory creditors, without the need to open separate insolvency proceedings in the Netherlands. This court could also decide on the recognition (and enforceability) of other decisions handed down in the course of the foreign insolvency proceeding (cf. Art. 25 IR).

Requiring a court decision for the recognition of foreign insolvency proceedings does not mean that with one court decision, based on a - necessarily - summary assessment of for example public policy defences, the foreign insolvency proceeding is given general and unlimited effect in

\(^{435}\) Cf. Van Galen/Van Apeldoorn (1998), Nr. 197 et seq., who favour automatic recognition with the possibility of the opening an 'ancillary proceeding' (faillissements-hulpprocedure).

\(^{436}\) See the examples mentioned by Van Galen/Van Apeldoorn (1998), Nr. 200, as functions to be performed in an 'ancillary proceeding'.

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the Netherlands. Of course, in deciding on the general question whether a foreign insolvency proceeding meets the conditions for recognition in the Netherlands, the court cannot take into consideration all aspects of the foreign *lex concursus* in detail. Arguments based on for example a violation of the *ordre public* of certain concrete results of the recognition of the foreign insolvency proceeding can be advanced in later court proceedings. Furthermore, the 'unlimited effect' of a foreign proceeding can be mitigated by the introduction of well balanced conflict rules.

**Effects of recognition; applicable law**
As to the effects of the recognition of a foreign insolvency proceeding, a distinction must be made between foreign main and non-main proceedings. I would argue that, in accordance with German law and the Insolvency Regulation, only foreign main proceedings include assets situated in the Netherlands at the time of the opening of the proceeding.

With respect to the effects of the recognition of a foreign main proceedings, I do not favour the approach chosen by the Model Law. In my opinion, the conflict rules that have been laid down in the Insolvency Regulation provide a set of rules that should be followed as much as possible.

The possibilities of automatic relief provided for in the UNCITRAL Model Law, which are not related to the effects that a particular proceeding would have under the *lex concursus*, is too undifferentiated. Furthermore, the possibility of discretionary relief to be ordered by the courts upon request does not fit in with the position of courts in insolvency proceedings under Dutch law. Of course, on the one hand, introducing such discretionary powers would create a flexible approach that can serve the interests of the case at hand. On the other hand, however, it would entail that certain effects that the insolvency law of the recognising State attaches to the opening of an insolvency proceeding, can be 'isolated' from the general structure of that law. Even though the relief granted by the court in the system of the Model Law is based on the insolvency law of the recognising State, in deciding which relief can or should be granted, the court may have to determine whether the foreign proceeding corresponds

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437 This is advanced by Van Galen/Van Apeldoorn (1998), Nr. 190, as one of the main objections to recognition based on a court decision.
to one of the proceedings - liquidation or reorganisation - existing in his State. This may not be an easy task. Furthermore, it creates the risk of an increase in court costs as a result of appeals to the court for modification or termination of the relief.

The balance that must be struck between the relief that may be granted in respect of the foreign proceeding and the interests of persons affected by that relief, could be better achieved by introducing a clear set of conflict rules that determine which law governs the position of the interested parties in case a foreign proceeding is recognised in the Netherlands. These conflict rules should start from the applicability of the foreign lex concursus to issues pertaining to insolvency law, with possible modifications where the protection of specific interests thus requires, and subject to the public policy exception. In this respect, the Dutch legislator should not deviate too much from the conflicts rules laid down in the Insolvency Regulation. By applying the same conflict rules incorporated in the Insolvency Regulation, a harmonised system concerning the cross-border aspects of insolvency proceedings can be achieved within the Netherlands. That the effects of a main proceeding extend to (assets situated in) other jurisdictions, is a foreseeable risk for parties to a cross-border transaction, who can structure their transaction accordingly. The possibility to open local insolvency proceedings, notwithstanding the recognition of a foreign main proceeding, is an important instrument to achieve that balance and to protect specific local interests. This is also the approach in German private international law. 438

Secondary insolvency proceedings
It follows from the territorially limited effect of foreign insolvency proceedings under Dutch law that the opening of an insolvency proceeding in respect of a debtor abroad does not prevent the opening of an insolvency proceeding in respect of that same debtor in the Netherlands. As to future legislation, Dutch law should allow for the possibility to open insolvency proceedings in the Netherlands, even if a foreign main proceeding has been recognised and includes the assets situated in the Netherlands. Referring creditors to a foreign jurisdiction in case the centre of the debtor's main interests is located in a foreign jurisdiction would

438 Art. 335 et seq. InsO.
under certain circumstances be a 'Sprung ins Dunkle'\(^{439}\) that needs to be taken into consideration when developing rules that apply in relation to all foreign jurisdictions other than the EU Member States. The opening of a secondary proceeding in the Netherlands can be important to protect of local interests, to ensure a proper settlement of legal relationships that are closely connected to the Dutch legal order or to facilitate the administration of the estate.

The presence of an establishment in the Netherlands provides a 'natural' and internationally accepted jurisdictional basis. Carrying out economic activities in the Netherlands through an establishment, in the broad definition of the Insolvency Regulation and the Model Law, will entail the establishment of (often complex) legal relationships that are closely connected to the Dutch legal order (if not governed by Dutch law). In this respect one can for example think of the conclusion of employment contracts, delivery contracts and the creation of security rights in assets situated in the Netherlands in connection with the financing of the local operations. If local proceedings are opened, such relationships are settled in accordance with the law to which they are closely connected.\(^{440}\) In accordance with Art. 3 (2) IR, the opening of secondary proceedings should therefore in any case be possible if the debtor has an establishment in the Netherlands.

Nevertheless, there may be good grounds to provide for the opening of local proceedings even in the absence of an establishment. The possibility of allowing secondary proceedings to be opened in the Netherlands on the basis of the mere presence of assets, as provided for in Art. 354 InsO and Art. 28 Model Law, should be considered.\(^{441}\) In particular when a debtor has considerable assets in the Netherlands, it may be more efficient to administer and settle legal relationships that are closely connected to the Dutch legal order in a secondary insolvency proceeding in the Netherlands.\(^{442}\) The opening of an insolvency proceeding based on the presence

\(^{440}\) Cf. Hanisch (1997), p. 208, who observes that this would also serve the proper application of local rules (which might also apply pursuant to the conflict rules of the State where the main proceeding is opened).
of assets may also be justified to protect the interests of local creditors. In this respect one may think of maintaining local preferences in assets that are situated in the Netherlands.

In accordance with Art. 29 IR, Art. 356 (2) InsO and Art. 11 Model Law the administrator in a foreign main proceeding should explicitly be given the power to request the opening of secondary proceedings in the Netherlands.

Rules on the co-ordination of and co-operation between the secondary proceeding in the Netherlands and the foreign main proceeding should also be provided for. The provisions of Chapter III of the Insolvency Regulation that intend to safeguard the predominance of the main proceeding over secondary proceedings and confer far reaching powers on a foreign administrator, are not apt to be included in unilateral legislation. A general duty to co-operate and to communicate relevant information should be provided for. In this respect due consideration should be given to implementing the relevant provisions of the UNCITRAL Model Law as these provisions not only apply to administrators generally - whether appointed in a main or in a territorial proceeding - but also to courts.
CHAPTER III

SECURITY RIGHTS IN CROSS-BORDER INSOLVENCY PROCEEDINGS

1. INTRODUCTION

Upon the opening of an insolvency proceeding, the right of unsecured creditors to individually enforce their claims against the insolvent debtor's assets is generally suspended. In an international context it is not all obvious that as a result of the opening of an insolvency proceeding in State A, creditors' rights of recourse in respect of assets situated in State B are also suspended. Whether this is the case depends on the recognition in State B of the insolvency proceeding opened in State A and the effects of such recognition. In the previous chapter several approaches to the cross-border effects of insolvency proceedings have been presented.

Both German and Dutch law start from the assumption that, with respect to insolvency proceedings opened in their jurisdiction, the restrictions that apply to unsecured creditors in taking recourse against the debtor's assets also extend to assets situated in other jurisdictions. However, taking into account that those restrictions may not be held to apply in the jurisdiction where recourse is sought (or where satisfaction of claims is obtained in any other way inconsistent with the lex concursus), both systems provide for mechanisms to compensate the estate. The creditor that has obtained satisfaction of a claim in a way that is inconsistent with German or Dutch (insolvency) law respectively, will have to turn over to the estate the moneys thus recovered.

With respect to insolvency proceedings opened outside their jurisdiction, the approach of German law on the one hand and Dutch law on the other is fundamentally different. German law in principle accepts that the restrictions imposed by the foreign lex concursus on unsecured creditors also apply to assets situated in Germany. By way of contrast, Dutch law to a great extent disregards such effects of the opening of an insolvency proceeding in another jurisdiction. Creditors (whether Dutch or foreign)
can continue to individually enforce their claims against assets situated in the Netherlands.

The Insolvency Regulation has introduced common rules on the cross-border effects of insolvency proceedings opened in Member States. Insolvency proceedings opened in a Member State are recognised in other Member States and the effects of (the opening of) that proceeding are - in principle - governed by the insolvency law of the State where the proceeding has been opened. With respect to insolvency proceedings that fall within the ambit of the Insolvency Regulation, the cross-border effect of restrictions on individual recourse actions by creditors in respect of assets that form part of the estate is therefore ensured. With respect to insolvency proceedings that do not fall within the ambit of the Insolvency Regulation, the same result is achieved under present German international insolvency law and, for future Dutch law, may be achieved by either application by analogy of the (conflict) rules of the Insolvency Regulation or by implementation of the UNCITRAL Model Law. Under the Model Law, the recognition of a foreign proceeding as a foreign main proceeding automatically has the effect of suspending the commencement or continuation of individual actions or enforcements against the debtor's assets.

The chapter on the position of security rights under German and Dutch substantive insolvency law showed that a tendency exists to curtail the rights of secured and to a certain extent also revindicatory creditors, in particular in view of ensuring chances of reorganisation of economically viable businesses. Dutch and German law differ in the extent to and manners in which secured creditors are affected by the insolvency of the debtor. This chapter examines the position of security rights in cross-border insolvency proceedings and focusses in particular on the extent to which security rights in assets situated in State A are affected by the opening of an insolvency proceeding in State B.

Many different questions need to be addressed in order to assess the position of security rights in cross-border insolvency cases. Such questions for example concern the validity of the security right, its content and scope and the extent to which the enforcement of the security or the secured creditor's right to satisfaction from the realisation proceeds of the encumbered asset are influenced by the opening of insolvency proceedings.
Insolvency law - and this is true on a purely national basis as well as in cross-border cases - may not be regarded in isolation from general private (international) law. These bodies of law operate in close connection with each other. Insolvency law provides a framework for the orderly settlement of the legal relationships that are based on general (private) law in the event that the debtor has become insolvent. Insolvency law may influence legal relationships and sometimes overrule provisions of general law. In some cases insolvency law derogates from general law where that is considered necessary or desirable to further the objectives of the insolvency proceeding. The close interaction between insolvency law and general (private) law that exists on the level of national substantive law, also exists on the level of private international law. Matters of insolvency law and property or contract law are governed by their own conflict of laws rules. Not all of the issues concerning the position of security rights in the context of a cross-border insolvency case can be characterised as pertaining to insolvency law. As set out in chapter II, questions that pertain to the field of insolvency law are in principle referred to the law of the State where the insolvency proceeding has been opened.1 However, exceptions to the (exclusive) applicability of the lex concursus are generally accepted for certain areas, such as the termination of labour contracts, avoidance actions and the position of secured creditors.

Paragraph 2 of this chapter deals with a number of private international law aspects of the creation, validity and content of security rights. The focus will lie on the influence of the opening of insolvency proceedings on the validity of the creation of security rights. In this context issues connected to the debtor's divestment, the impact of the debtor's insolvency on security rights created by way of anticipation in future assets and the reversal of the provision of security rights (actio Pauliana), will be dealt with.

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1 As to present Dutch law, however, due attention must be paid to the very limited effect of foreign insolvency proceedings in respect of assets situated in the Netherlands. The UNCITRAL Model Law follows a different approach: with the exception of the effects automatically following on the recognition of a foreign main proceeding (which, when implemented, will form part of the recognising state's substantive law), the relief granted is at the discretion of the court.
Paragraph 3 examines the question which law(s) must be applied to determine the impact of the opening of an insolvency proceeding on the position of security rights. The focus in this paragraph lies on the Insolvency Regulation, which in Art. 5 and 7 provides for an important deviation from the applicability of the *lex concursus*.

2. LAW APPLICABLE TO PROPRIETARY (SECURITY) RIGHTS

2.1 Introduction

Before any consideration can be given to the extent to which secured creditors are affected by insolvency proceedings - on a purely national level as well as in a cross-border context - it should be established that the security right invoked has been validly created. Also, the content and scope of the right in the asset must be determined as well as the manner in which it must be exercised. It must further be determined whether and to what extent the creditor in question has the power to either revindicate the asset concerned or enforce the secured claim(s) against the asset. Such issues do not necessarily or primarily concern matters of insolvency law. Rather, they pertain to the complex of rules of international contracts and property law. The determination of the validity and content of rights in assets is generally governed by the law applicable in accordance with the normal, i.e. pre-insolvency, conflict rules.\(^2\) This distinction between the various categories of legal issues that the exercise of proprietary rights in an insolvency situation may give rise to, also underlies Art. 5 IR, which starts from the assumption that a right has been validly created pursuant to the law that applies in accordance with the normal pre-insolvency conflict rules.\(^3\)

Even though generally the determination of the law applicable to the validity and content of proprietary rights follows its own conflict rules, the creation of security rights in a debtor's assets may raise issues that are more closely connected to insolvency law. The protective effect of insolvency proceedings, that for example manifests itself in the divestment of the debtor, and the powers granted to the administrator to reverse


\(^3\) Cf. Preamble to the Insolvency Regulation, Nr. 25; Report Virgós/Schmut, Nr. 95.
transactions that have prejudiced the general body of creditors, may influence the validity of the security right in question. To the extent that the debtor has lost the power to dispose of his assets, security rights that have been created by the debtor after the opening of the proceeding will generally be invalid or ineffective. Security rights that have been created in future assets, e.g. claims or moveables to be acquired by the debtor in the future, will also be ineffective if the assets that have been encumbered by way of anticipation have been obtained by the debtor or have come into existence after the opening of the insolvency proceeding.

With regard to the creation of (security) rights in assets, a distinction must be made between aspects pertaining to the law of obligations and issues that pertain to the law of property. The contractual arrangements between the debtor and the creditor, for example, determine whether and to what extent the debtor is obliged to provide security and the type of security to be provided (personal or proprietary, etc.). The law that governs their contractual relationship is determined by application of the general conflict rules regarding contracts. The validity of the contractual stipulations under the *lex contractus* may have decisive influence on the validity of the creditor's security. The law governing the proprietary aspects of the provision of security may for example require a valid contract underlying the provision of security. Furthermore, the extent to which the debtor was obliged to provide (a particular form of) security is a relevant matter with respect to the chances of reversal in cases where that provision was detrimental to the other creditors. Also on the level of the enforcement of the security (either by way of revindication or enforcing the secured claims against the encumbered asset), the law governing the contractual relationship needs to be taken into consideration. The *lex contractus* for example governs such issues as whether the debtor is in default and the consequences thereof for the contract (e.g. termination, obligation to pay damages). However, the law applicable to the proprietary aspects of a security right determines the conditions under which a creditor may enforce his security (and to what extent parties are free to determine in their contract the events in which the security may be enforced).

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4 Convention on the law applicable to contractual obligations, Rome 19 June 1980, which for German law has been incorporated in Art. 27-37 EGBGB.
5 Cf. Art. 3:84 (1) BW.
6 Cf. Art. 4 (2) (m) and 13 IR
The transfer of and creation of security rights in assets particularly involves complex questions pertaining to the law of property, that underly specific conflict rules. Such issues include in particular:  

(i) the types of rights that can be created in assets (e.g. an undisclosed right of pledge or transfer of ownership by way of security);

(ii) the requirements for the creation or transfer of such rights (e.g. conditions for the acquisition of rights by operation of law (e.g. by way of accessio or specificatio), whether the validity of the security right depends on the validity of the underlying contract or not (delivery and registration requirements); and

(iii) the content and the manner of exercise of such rights.

Generally, issues pertaining to the law of property with respect to the transfer of or the creation of rights in moveables are referred to the law of the State where the asset is situated, the *lex rei sitae*. With respect to claims, the designation of the law applicable to proprietary aspects of the transfer of and creation of rights in claims is more controversial.

### 2.2 Proprietary issues regarding moveables

#### 2.2.1 Main rule: *lex rei sitae*

The proprietary aspects of the transfer of and the creation of rights in moveable assets under present Dutch and German private international law, are in principle governed by the the *lex rei sitae*. For the determination of the applicable law in respect of the acquisition, modification, transfer or extinguishment of rights in moveable assets (whether pursuant to juridical act or by operation of law), the place where the asset concerned

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7 Cf. Art. 2 (1) and 10 (2) Draft Wet conflictenrecht goederenrecht; MünchKomm-Kreuzer, Band 10, Nr. 23-33; Staudinger-Stoll, Nr. 139-159.

8 The applicability of the *lex rei sitae* is maintained in recent legislation in many European countries, see e.g. Switzerland: Art. 99 and 100 IPRG; Germany: Art. 43 EGBGB; Netherlands: Art. 3:92a BW and Art. 2 and 3 Draft Wet conflictenrecht goederenrecht.

9 Elaborately on proprietary rights in moveables in private international law, Kreuzer (1996). On the controversial issue of the compatibility of the *lex rei sitae* rule with EC law, see, in particular, Von Wilmowsky (1996); Kieninger (1996); Rutgers (1999).
is located at the time of completion of the relevant legal facts, is decisive. At present, neither German nor Dutch law accepts party-autonomy as a general rule of international property law. Save for a limited number of exceptions, parties are not free to choose the law that applies to the proprietary aspects of secured transactions regarding moveables.

Since 1999, the applicability of the lex rei sitae in Germany has a statutory basis in Art. 43 EGBGB:

Rights in an object are governed by the law of the State where the object is located.

As to Dutch law, which at present does not have a systematic body of (statutory) rules on international property law, the applicability of the lex rei sitae to the proprietary aspects of transfer of ownership, which had been widely accepted in legal writing, has been confirmed by the Hoge Raad in 1999. In its advice to the Minister of Justice on international property law, the Dutch Standing Government Committee for Private International Law has opted to maintain the referral to the lex rei sitae as the basic conflict rule. The advice is accompanied by a set of draft conflict

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10 Cf. Art. 2 (2) draft Wet conflictenrecht goederenrecht; BT-Drucksache 14/343, p. 15; MünchKomm-Kreuzer, Band 10, Nach Art. 38 Anh. I, Nr. 54; Staudinger-Stoll, Nr. 256.
11 Art. 43 EGBGB: Rechte an einer Sache unterliegen dem Recht des Staates, in dem sich die Sache befindet.
12 Following the example of countries like Germany, Switzerland and Austria, a general codification of private international law is being prepared. A consolidated overview of existing and proposed legislation in the field of private international law ('Voorontwerp van Wet houdende consolidatie van regelgeving betreffende het internationaal privaatrecht') has been published on the website of the Dutch Ministry of Justice (www.justitie.nl).
14 Staatscommissie voor het internationaal privaatrecht, Rapport aan de Minister van Justitie, Internationaal Goederenrecht, November 1998 (hereafter referred to as Advice "Internationaal goederenrecht"). The advice is published on the website of the Ministry of Justice (www.justitie.nl). The legislative provisions proposed by the Staatscommissie have been incorporated in the consolidated overview of existing and proposed legislation in the field of private international law. These proposals have replaced the proposed provisions on international property law that were incorporated in the consolidated overview of provisions on Dutch private international law published in 1992 (the 'Schets van een algemene wet betreffende het in-
of laws provisions, a draft *Wet conflictenrecht goederenrecht*. With the exception of the introduction of Art 3:92a *BW* on the law applicable to the proprietary aspects of reservation of ownership, the advice and the draft *Wet conflictenrecht goederenrecht* have not yet led to (proposals for) legislation. When reference is made to the draft *Wet conflictenrecht goederenrecht* it must be kept in mind that it is not always certain that the provisions contained therein fully reflect present Dutch law or that the proposals of the draft will be incorporated (without modifications) in future legislation. However, they are of immediate importance as is demonstrated by the explicit and approving reference that the *Hoge Raad* has made to the advice in a recent decision on the law applicable to the right of retention.\(^{15}\)

Art. 2 of the draft *Wet conflictenrecht goederenrecht* reads:

> The proprietary regime in respect of an object is governed by the law of the State on the territory of which the object is located.\(^{16}\)

As a general rule, the applicability of the *lex rei sitae* in respect of security rights in moveable assets is based on good grounds. It leads to clear and predictable results, it furthers the enforceability of judicial decisions rendered in connection with rights in the asset (taking into account that most legal systems have a *numerus clausus* of proprietary (security) rights), and it serves the interest of the 'äußere Entscheidungseinklang'.\(^{17}\) The localisation of assets is generally easily ascertainable, also for third parties, who can reckon with the possible existence of rights in the asset with the content as provided for in the law of the situs.

### 2.2.2 Other connecting factors

The applicability of the *lex rei sitae* leads to clear and convincing results in respect of transactions concerning assets that do not (or are not intended


\(^{16}\) Het goederenrechtelijke regime met betrekking tot een zaak wordt beheerst door het recht van de Staat op welks grondgebied de zaak zich bevindt.

\(^{17}\) See e.g. Staudinger-Stoll, Nr. 126 et seq., MünchKomm-Kreuzer, Band 10, Nach Art. 38 Anh. I, Nr. 12 et seq.
Security rights in cross-border insolvency proceedings to cross borders. In particular secured transactions involving the financing of operations of businesses where security is provided in for example machinery and other inventory, will therefore generally not lead to difficulties with respect to the assessment of the validity and content of rights thus created. The instances where such assets do cross borders, even though not intended by the parties to the secured transaction, can be solved by applying flexible rules on 'conflits mobiles' in respect of the recognition of rights created in accordance with the law of a former situs. However, referring matters of property law to the lex rei sitae does not in all cases provide for the kind of clear and convincing solutions that satisfy the interests and expectations of the interested parties. This is particularly the case with 'truly' cross-border transactions concerning goods that are meant for export, where particularly the proprietary security of the seller for payment of the purchase price will be an issue, and the provision of security in goods with a constantly varying situs, such as mobile transport equipment (e.g. trains, trucks and containers). Strictly adhering to the application of the lex rei sitae in such cases would lead to rather coincidental and possibly unconvincing and undesirable results. Also for that reason, there is a tendency to adopt alternatives to the traditional lex rei sitae rule in such cases.

The need and desire for more flexible solutions is to a certain extent reflected in the provisions on international property law of the German EGBGB and the Dutch draft Wet conflictenrecht goederenrecht. The exceptions to the lex rei sitae rule provided for in the draft Wet conflictenrecht goederenrecht are (prima facie) more extensive than those allowed under the German EGBGB. The draft Wet conflictenrecht goederenrecht provides for a number of divergent conflict rules, including a limited acceptance of (restricted) party autonomy, with respect to the proprietary aspects of (i) reservation of ownership clauses in international sales (Art. 3 (2)), (ii) cross-border leasing (Art. 3 (3)) and (iii) the transfer of and creation of rights in goods that are being transported under a contract of international transport, res in transitu (Art. 8). With respect to moveable assets, the

18 See also § 4.1 of the Advice 'Internationaal goederenrecht', where the Staatscommissie, with approval, cites the argument that the fact that certain problems may arise if an asset in which rights have been created, subsequently is moved to another country, does not provide sufficient justification to reject the basic assumption of the applicability of the law of the situs at the time of the creation of such rights.
Chapter III / Par. 2.2.2.1

EGBGB contains one specific exception to the general applicability of the *lex rei sitae*, namely with respect to mobile equipment for air-, water- and rail transport. Art. 45 EGBGB stipulates that rights in such assets are governed by the law of their State of origin ('Herkunftsstaat'). A certain degree of flexibility, allowing courts to exercise their discretion and apply another law than the law of the situs (Art. 43 EGBGB) or the law of the State of origin (Art. 45 EGBGB), is provided for in Art. 46 EGBGB. Art. 46 EGBGB in general terms provides that, if a considerably closer connection exists with the law of another State than the law that would apply pursuant to Art. 43-45 EGBGB, that other law applies.

2.2.2.1 International sale of goods

Following the proposals contained in the draft *Wet conflictenrecht goederenrecht*, Art. 3:92a (2) BW accepts restricted party-autonomy in respect of the proprietary aspects of reservation of ownership clauses in international sales. 19 When goods are meant for export, parties can agree that the law of the State of destination of the goods governs the proprietary aspects of reservation of ownership, in deviation from the general applicability of the *lex rei sitae*. 20 This rule, which is not limited to import to or export from the Netherlands but according to its wording applies generally, presupposes the actual transfer of the goods to the State of destination. If the goods are not transferred to the State of destination, the main rule applies, i.e. the proprietary aspects of the reservation of ownership clause in the contract of sale are governed by the law of the State where the asset is located at the time of their delivery. 21

It would make sense to extend this power of the parties to choose the law of the State of destination as the applicable law with respect to proprietary aspects of their transaction to other security rights that the seller of goods could stipulate as security, e.g. the reservation of a right of pledge in goods sold and delivered as provided for in Art. 3:81 (1) BW. 22

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19 Cf. Art. 3(2) Draft Wet conflictenrecht goederenrecht. Art. 3:92a (1) BW starts from the applicability of the law of the situs at the time of delivery ("levering").
20 Cf. Art. 103 Swiss IPRG.
21 Advice 'Internationaal goederenrecht', § 57
22 Neither Art. 3:92a BW nor the draft *Wet conflictenrecht goederenrecht* provide for this
The German legislator, on the other hand, has not followed suggestions advanced in legal writing\textsuperscript{23} to allow for a (limited) choice of law by the parties to an international sale, or, more generally transactions whereby goods are intended to be transferred from one State to another (internationale Verkehrsgeschäfte).\textsuperscript{24} In principle the proprietary aspects of reservation of ownership clauses or provision of security rights in goods that are to be transferred from one State to another are governed by the lex rei sitae at the relevant time, pursuant to the main rule of Art. 43 (1) EGBGB. 'Conflits mobiles' are covered by Art. 43 (2) EGBGB.

2.2.2.2 Res in transitu

A particular need for a (more) flexible approach exists with respect to the transfer of or creation of rights in goods that are on transport from one State to another (res in transitu) and mobile (transport) equipment. Both categories raise to a large extent similar questions, arising from the fact that they do not have a fixed and therefore often unclear situs, so that (strict) application of the lex rei sitae leads to rather coincidental and unconvincing results.\textsuperscript{25} The essential difference between these categories, however, is that mobile equipment can be 'attributed to' the State from which they are deployed. This difference is (to a certain extent) reflected in the approach taken in German and Dutch private international law with respect to the determination of the law applicable to the proprietary aspect of disposal of such assets.

\textsuperscript{23} See e.g. (with further references) Staudinger-Stoll, Nr. 262, 282-285, 288-292, 337-338.

\textsuperscript{24} BT-Drucksache 14/343, p. 16: "Der Entwurf schließt sich dieser Auffassung nicht an, weil die Rechtswahl der Parteien mittelbar systemwidrig den Numerus clausus der Sachenrechte durchbrechen würde und das von den Parteien gewählte Recht für Dritte nicht erkennbar ist; der Status einer Sache hinge von relativ wirkenden und relativ bekannten Tatsachen ab. Dies würde den Verkehrsinteressen zuwiderlaufen (BGH NJW 1997, 461, 462; Kreuzer in: Vorschläge und Gutachten zur Reform des deutschen internationalen Sachen- und Immaterialgüterrechts, 1991, S. 37, 75 bis 81)."

Even though it is generally agreed that application of the law of the - often - coincidental situs of the assets is not to be preferred, opinions differ with regard to the law that should apply to the proprietary aspects of disposal of goods on international transport. Applicability of the law of the State to which the goods are or must be carried, the *lex loci destinationis*, which is laid down in several private international law statutes, in German and Dutch legal writing is quite generally regarded as a reasonable and practical solution. This is also the primary approach adopted in Art. 8 (1) of the draft *Wet conflictenrecht goederenrecht*. Applicability of the law of the State from which the goods have been dispatched, the *lex loci expeditionis*, is not generally regarded as a suitable alternative, given the fact that after shipment the ties of the law of that State with the assets will have been severed. It is argued that it could apply as an alternative to the *lex loci destinationis*, e.g. in case the State of destination cannot be established (with certainty) at the time of disposal. It has also been argued that a certain extent of party-autonomy ought to

26 Kreuzer is of the opinion that, in the absence of real practical problems, specific conflict of laws rules for *res in transitu* are unnecessary (MunchKomm-Kreuzer, Band 10, Nach Art. 38 Anh. I, Nr. 127).
28 See the references in Staudinger/Stoll Int SachR 1996, Nr. 368.
29 Cf. Strikwerda (2002), Nr. 162; Staudinger-Stoll, Nr. 365 et seq.; MunchKomm-Kreuzer, Band 10, Nach Art. 38 Anh I, Nr. 126 et seq. See also Art. 12 (2) of the Benelux Draft Uniform Law on Private International Law (not in force). It is generally considered unnecessary or even undesirable to formulate diverging rules with respect to the disposition of goods in transit by way of transfer of papers representing the goods, such as a bill of lading. Consequently, the same conflict of laws rules apply. See Advice 'Internationaal goederenrecht', § 10; Staudinger-Stoll, Nr. 370; MünchKomm-Kreuzer, Band 10, Nach Art. 38 Anh I, Nr. 129.
30 See further the Advice 'Internationaal goederenrecht', § 10
31 As for example provided for in Art. 6 of the Hague Convention on the law applicable to the transfer of property in the case of international sale of goods, 1956 (not in force).
32 Cf Staudinger-Stoll, Nr. 368; MuchKomm-Kreuzer, Band 10, Nach Art. 38 Anh. I, Nr. 127.
be introduced, allowing the parties to determine the law applicable to the proprietary aspects of the transfer or creation of (security) rights in the goods. The choice of the applicable law is not completely left to the discretion of the parties, in that the choice is generally limited to the *lex loci destinationis*, *the lex loci expeditionis* or the law applicable to their contractual relationship.\(^{34}\) In line with the tendency to allow for a restricted party-autonomy in these cases, Art. 8 (2) of the draft *Wet conflictenrecht goederenrecht* stipulates that a designation by the parties of the law applicable to their contractual relationship - i.e. the contract of sale or the contract pursuant to which a security right in the transported goods must be created -, is considered to include the proprietary aspects of such transfer or creation of security rights.\(^{35}\) Unlike for example Swiss law\(^ {36}\) and contrary to previous drafts,\(^ {37}\) the choice of law in the contract of sale or security agreement, in the present draft would also have effect vis-à-vis third parties.\(^ {38}\)

2.2.2.3 Mobile equipment

The other category of moveable assets where a deviation from the application of the *lex rei sitae* is argued and in many cases provided for, is that of mobile equipment, such as means of transport used in international trade, e.g. ships, aircraft, railroad wagons, containers and trucks. That the *lex rei sitae* is less apt to apply to the disposal of such assets follows from the fact that they have a regularly and often quickly changing situs, that their situs is often not known or not (easily) determinable, and - with respect to water and air/space transport - their situs may not be linked to

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\(^{34}\) See Staudinger-Stoll, Nr. 368 and 369. See also Art. 81 IPR Schets.

\(^{35}\) Critical of the absence of a provision to that effect in the codification of German international property law in the *EGBGB*, Stoll (IPRax 2000), p. 264.

\(^{36}\) Art. 104 Swiss IPRG.

\(^{37}\) Art. 5 of the ministerial draft read: ‘(...) Parties can agree on the applicability of the law of the State of dispatch, or the law applicable to their contract, but such agreement has no effect vis-à-vis third parties.’ See Advice ‘Internationaal goederenrecht’, § 10.

\(^{38}\) The grounds advanced by the *Staatscommissie* for accepting a choice of law with effect vis-à-vis third parties, are remarkable. An apparently convincing argument seems to be that parties to an international contract of sale are generally not concerned with the proprietary aspects, but start from the assumption that a choice of law in their contract of sale encompasses the proprietary aspects of the transaction (cf. Advice ‘Internationaal goederenrecht’, § 10).
the territory of a particular State. Practice requires that in these cases, notwithstanding the (constantly) varying locations of these assets, transfer and encumbrance should be possible with the application of one single and easily determinable law to which the asset concerned has a more permanent connection.\textsuperscript{39}

Under German private international law (contractually created) rights in aircraft, watercraft and railroad carriages are subject to the law of the State of origin (\textit{Herkunftstaat}), as further specified in Art. 45 (1) \textit{EGBGB}. Rights in aircraft are governed by the law of the State of their nationality (based on registration), rights in watercraft are governed by the law of the State of registration, alternatively the law of the State of the home port or home place, and rights in railroad carriages are governed by the law of the State where they have been admitted.\textsuperscript{40} It is observed in the explanatory report to Art. 45 \textit{EGBGB} that the State of admittance of railroad carriages will as a rule coincide with the State where the railway company's main office is located (which is the connecting factor provided for in e.g. Art. 33 (1) of the Austrian \textit{IPRG}) or the place of their regular location.\textsuperscript{41} Following the advice of the \textit{Deutsche Rat für Internationales Privatrecht}, no derogating rules are provided for with respect to rights in means of road transport, which consequently remain governed by the \textit{lex rei sitae}.\textsuperscript{42}

The Dutch \textit{Staatscommissie voor het internationaal privaatrecht}, although acknowledging the need in practice for a more practical and flexible approach in respect of mobile equipment, has refrained from including specific rules on means of transport in its draft \textit{Wet conflictenrecht goederenrechts}. Art. 1 (1) of the draft stipulates that the provisions of the Act also apply to ships, aircraft and railroad carriages, if and to the extent that a treaty or other Act does not provide otherwise. This means that an exception to the \textit{lex rei sitae} only applies with respect to registered ships and aircraft, rights in which are governed by the law of the State of registration.

\begin{footnotes}
\item[40] See further BT-Drucksache 14/343; Kreuzer (1991), p. 123 et seq.
\end{footnotes}
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at the time of creation of such rights.\textsuperscript{43} The \textit{Staatscommissie voor het internationaal privaatrecht} has persisted in the applicability of the \textit{lex rei sitae}. It argues that, if one would allow the transfer of or creation of (security) rights in mobile equipment to be governed by one legal system - e.g. the law of the State of registration - regardless of the exact location of the assets concerned, this would lead to the acceptance of a category of registered property for the purposes of private international law, where the national law (e.g. Dutch law) would not characterise those assets as such.\textsuperscript{44} This argument is not convincing. It would only introduce a particular conflict rule with respect to a category of assets the situs of which does not provide a sufficiently clear and convincing connecting factor, as this has also been done in respect of \textit{res in transitu} and reservation of ownership in respect of goods meant for export. The argument of the \textit{Staatscommissie} that it would lead to uncertainty whether or not such rights would be recognised and enforceable abroad is more convincing, but should not necessarily lead to maintaining the applicability of the \textit{lex rei sitae}. The \textit{Staatscommissie} only observes that the Swiss IPRG does not contain a specific rule for means of transport, but does not refer to the discussions in for example Germany which have led to the introduction of Art. 45 EGBGB. Uncertainty concerning the recognition and enforceability of rights in means of transport created under the law of State of origin, as provided for in Art. 45 EGBGB and suggested for Dutch law,\textsuperscript{45} is something that parties to the transaction will have to take into account. In this respect there is no difference with the uncertainty that a right that has been created in accordance with the \textit{lex rei sitae} may not be recognised - or transformed into another right with different content - if enforcement of the right follows in another country.

2.2.3 Reservation of ownership

Art. 4 of Directive 2000/35/EC on combating late payment in commercial transactions refers to the validity of reservation of ownership under the applicable national provisions designated by private international law.

\textsuperscript{43} Art. 2 Wet van 18 maart 1993, houdende enige bepalingen van internationaal privaatrecht met betrekking tot het zeerecht, het binnenvaartrecht en het luchtrecht; Convention on the international recognition of rights in aircraft, Geneva 19 June 1948; Art. 17 of the Convention on international civil aviation, Chicago 7 December 1944.

\textsuperscript{44} Advice 'Internationaal goederenrecht', § 4.8.

\textsuperscript{45} See e.g. Van Hees/Hermans/Kortmann (1997), p. 106.
The directive does not entail a harmonisation of private international law rules in this field, nor does any other EC legislative measure at this time. The designation of the law governing the proprietary aspects of reservation of ownership clauses is left to the discretion of the Member States.\textsuperscript{46}

In both German and Dutch private international law, a distinction is made between the aspects of reservation of ownership clauses pertaining to the law of obligations and those pertaining to the law of property.\textsuperscript{47} The contractual aspects of reservation of ownership are governed by the \textit{lex contractus}. The \textit{lex contractus} will for example govern the questions whether standard contract terms that include a reservation of ownership clause have become part of the contract between the seller and the purchaser and which rights and obligations between the purchaser and the seller originate from the contract, e.g. the terms of payment and conditions for termination of the contract.

With respect to the law governing the proprietary aspects of reservation of ownership, i.e. the enforceability against third parties generally and the enforceability in the purchaser's insolvency in particular, opinions differ.\textsuperscript{48} The character of reservation of ownership as a means of security - including both contractual and proprietary elements - , has led to extensive debate with respect to the law governing the proprietary aspects of reservation of ownership clauses. In both German and Dutch legal writing on this issue, the acceptance of (restricted) party-autonomy in the case of international sale of goods has been argued for.\textsuperscript{49} Recent legislation in both countries, however, is more congruent in its rejection of party-autonomy in this field. Both in German and Dutch law the proprietary effects of reservation of ownership are primarily referred to the \textit{lex rei sitae}. The law of the State where the assets are located at the relevant time - generally the moment of delivery of the goods - determines whether the ownership has


\textsuperscript{47} Cf. Staudinger-Stoll, Nr. 334; MünchKomm-Kreuzer, Band 10, Nach Art. 38 Anh I, Nr. 91; Rutgers (1999), p. 93 and 107 et seq.; Advice 'Internationaal goederenrecht', § 5.

\textsuperscript{48} For an overview, see Rutgers (1999).

\textsuperscript{49} See e.g. Staudinger-Stoll, Nr. 282 et seq. and Nr. 337; Rutgers (1999); Verheul (1985). The scope of the reference to the \textit{lex contractus} varies. Some authors refer to the \textit{lex contractus} for the validity inter partes only. Others argue that the \textit{lex contractus} should also govern the effect as against third parties.
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remained with the seller as a result of the reservation of the ownership clause or has passed to the purchaser.\(^{50}\)

For German law, the applicability of the *lex rei sitae* follows from Art. 43 (1) *EGBGB*, which generally refers matters of property law (such as questions concerning ownership of goods) to the *lex rei sitae*.\(^{51}\)

As to Dutch law, the applicability of the *lex rei sitae* follows from Art. 3:92a *BW*, intended to implement Art. 4 of Directive 2000/35/EC.\(^{52}\) This provision is based on the draft *Wet conflictenrecht goederenrecht* presented by the Dutch Standing Government Committee on private international law,\(^{53}\) which in Art. 3 in principle referred the proprietary aspects of reservation of ownership clauses to the *lex rei sitae*. The first paragraph of Art. 3:92a *BW* reads:

(1) The proprietary aspects of reservation of ownership are governed by the law of the State where the object is located at the time of delivery. This leaves unaffected the obligations that arise from the reservation of ownership clause pursuant to the law governing that clause.\(^{54}\)

On the advice of the Council of State, the first sentence now specifies that the situs of the goods at the moment of delivery (cf. Art. 91 *BW*) is decisive. This is intended to clarify that the situs of the goods at the moment that the reservation of ownership clause is contractually agreed upon is irrelevant.\(^{55}\) The second sentence clarifies that the contractual obli-

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\(^{50}\) Henriquez has argued in this respect that proprietary effects of reservation of ownership clauses should be exclusively governed by the *lex rei sitae* at the time the reservation of title is invoked, without taking the *lex contractus* or the former *lex rei sitae* into consideration. Cf. Henriquez (1974), p. 14.

\(^{51}\) The *EGBGB* does not contain an explicit provision on reservation of ownership.

\(^{52}\) The Dutch government was of the opinion that the Directive required the incorporation of provisions on the law applicable to the proprietary aspects of international reservation of ownership clauses (see TK 28 239 B, p. 2; TK 28 239, Nr. 3, p. 6).

\(^{53}\) See Art. 3 of the draft *Wet conflictenrecht goederenrecht*. Art. 3:92a *BW* has been discussed by J.A. van der Weide in WPNR 6492 (2002), p. 411-412.

\(^{54}\) Art. 3:92a *BW*: De goederenrechtelijke gevolgen van een eigendomsvoorbehoud worden beheerst door het recht van de staat op welks grondgebied de zaak zich op het tijdstip van levering bevindt. Dit laat onverlet de verbintenissen die volgens het op het beding van eigendomsvoorbehoud toepasselijke recht, daaruit kunnen voortvloeien.

\(^{55}\) Cf. TK 28 239, A, p. 1; TK 28 239, 3, p. 7.
gations arising from the reservation of ownership clause can go beyond what the applicable rules of property law allow.\textsuperscript{56} Such further going contractual obligations are valid as between the parties but have no proprietary effect when contrary to the property law of the \textit{lex rei sitae}.

Applicability of the \textit{lex rei sitae} with respect to issues of ownership and the proprietary aspects of reservation of ownership clauses as set out above, in general provides for convincing, clear and enforceable solutions. From the point of view of obtaining consistent results that are comparable in similar cases, it is in my opinion also important that the conflict rules regarding ownership as an instrument of security pursuant to a reservation of ownership clause are in accordance with those regarding matters of (acquisition or loss of) ownership in general.\textsuperscript{57} The crucial question is after all whether the ownership of goods sold and delivered has passed to the buyer or, pursuant to the reservation of ownership clause, has remained with the seller.\textsuperscript{58} The \textit{lex contractus} governs such contractual aspects of the transaction as, for example, the question whether parties have agreed on a reservation of ownership clause in their contract, questions of interpretation of the contract, default and conformity of the goods, etc.

\textit{Cross-border sales}

In international sales whereby the goods are to be exported to another State, strict adherence to the \textit{lex rei sitae} rule could lead to unpractical and undesirable results. In the event of what in German legal writing is referred to as a \textit{qualifizierten Statutenwechsel}, the connection to the law of the State where the assets are to be exported from only has limited relevance. In such cases, the proprietary validity of the seller's reservation of ownership should not be assessed in accordance with the law of the State of export, but rather, in accordance with the law of the State of import provided that the goods concerned in fact reach their destination.\textsuperscript{59}

\textsuperscript{56} Cf. Advice 'Internationaal goederenrecht', § 5.3.
\textsuperscript{58} Cf. Advice 'Internationaal goederenrecht', § 5.2
German statutory law contains no specific provisions on reservation of ownership concerning goods meant for export. Therefore, in principle the *lex rei sitae* applies to the proprietary effect of a contractual reservation of ownership clause. In case the goods are subsequently, in accordance with the parties' intention, exported to another State, pursuant to the general rules on *conflits mobiles*, the law of the new situs will govern the (enforcement of the) seller's rights in the assets.\(^60\) German (private international) law does not accept that parties to an international sale agree on the applicability of the *lex destinationis* to the proprietary aspects of a reservation of ownership. It may therefore happen that in the State where delivery of the goods takes place not all requirements have been met to ensure that a reservation of ownership is valid and enforceable also against third parties (e.g. mandatory registration has not taken place), whereas such requirements have been met under German law as *lex destinationis*. Such problems arising out of a cross-border sale may be resolved by Art. 43 (3) EGBGB. This provision, which applies to the acquisition of proprietary rights generally, contains a rule of substantive law that entails the applicability of German property law with respect to events that have occurred in another State. It provides that, if a proprietary right in an asset has not yet been obtained prior to the asset entering German territory, for the purposes of the procurement of such right, events that have occurred in another State are to be dealt with as events having occurred in Germany.\(^61\) The scope of Art. 43 (3) EGBGB is restricted to cross-border transactions that are intended to be finalised after transfer of the asset to Germany. It does not apply to transactions that, in accordance with the intention of the parties, are finalised prior to the transfer of the asset to Germany. In such cases Art. 43 (3) EGBGB will not lead to perfection of an otherwise imperfect right.\(^62\)

The Dutch legislator on the other hand has adopted specific rules for such cases, introducing a limited possibility for the parties to choose the

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\(^{60}\) MünchKomm-Kreuzer, Band 10, Nach Art. 38 Anh. I, Nr. 91-93. A rule similar to the one adopted in Art. 3:92a BW had also been argued for in German legal writing (for cases of 'qualifizierten Statutenwechsel' such as in international sale of goods), cf. Staudinger-Stoll, Nr. 337 et seq.

\(^{61}\) Art. 43 (3) EGBGB: "Ist ein Recht an einer Sache, die in das Inland gelangt, nicht schon vorher erworben worden, so sind für einen solchen Erwerb im Inland Vorgänge in einem anders Staat wie Inländische zu berücksichtigen."

applicable law with respect to the proprietary validity of reservation of ownership. Art. 3:92a (2) BW provides in this respect:

Contrary to the first sentence of the first paragraph, parties can agree that the proprietary effects of reservation of ownership in goods meant for export are governed by the law of the State of destination if the provisions of that law in respect of reservation of ownership are more favourable to the creditor than the law designated by the first paragraph. Such designation of the applicable law only has effect if the goods are in fact imported into the designated State of destination.\(^63\)

The essence of this rule - possibility of opting for the applicability of the provisions of property law of the *lex destinationis* - is derived directly from the draft *Wet conflictenrecht goederenrecht*. However, it has been amended in several respects. Art. 3:92a BW expressly provides that the designation by the parties of the law of the State of destination of the goods only has effect if the goods are actually imported into that State. This qualification did not appear in the text of Art. 3 of the draft *Wet conflictenrecht goederenrecht*, but was nevertheless part of that rule.\(^64\) It follows from this qualification that if import into the designated State does not follow, the proprietary validity of the reservation of ownership, is governed by the law of the State where the goods are located at the time the relevant legal facts occur (delivery). Art. 3:92a BW contains a further restriction with respect to the effects of the designation of the law of the State of destination. Such designation of the applicable law only has the intended effect if the law of the State of designation is more favourable to the creditor. A clear and convincing motivation for this restriction is not given in the explanatory report to this provision. There it is merely stated that, if the law of the State of destination is not more favourable to the creditor, the seller can invoke the provisions on reservation of ownership of the State of export.\(^65\) As Van der Weide has observed, such a restriction with respect to the effects of a designation by the seller and the purchaser of the

\(^{63}\) Art. 3:92a (2) BW: In afwijking van de eerste zin van lid 1 kunnen partijen overeenkomen dat de goederenrechtelijke gevolgen van een eigendomsvoorbehoud van een voor uitvoer bestemde zaak worden beheerst door het recht van de staat van bestemming indien dat recht ter zake van het eigendomsvoorbehoud voor de schuldeiser gunstiger bepalingen bevat dan het op grond van het eerste lid toepasselijke recht. De aldus overeengekomen aanwijzing heeft slechts gevolg indien de zaak daadwerkelijk in de aangewezen staat van bestemming wordt ingevoerd.


\(^{65}\) TK 28 239, Nr. 3, p. 8.
law of the State of destination of the goods, is impractical, undesirable and based on the mistaken assumption that the law of the State of export will determine whether and to what extent the seller can invoke a reservation of ownership.\footnote{Van der Weide (WPNR 2002), p. 412.} This question, however, will be governed by the law of the State of the location of the goods at the time the seller reclaims the assets on the basis of a reservation of ownership.

In support of incorporating this provision, the Dutch government observed that this would allow sellers, in case of export of goods to Germany, the possibility to choose the more favourable rules of German law on the verlängerter Eigentumsvorbehalt to apply to the proprietary aspects of reservation of ownership. This would allow them, according to the government, to ensure that their rights continue in goods manufactured with the goods they have sold. Unlike the government assumes, this would also be possible under the main rule of Art. 3:92a BW, however.

It is not helpful to try to deal with issues such as specification as matters pertaining to 'reservation of ownership' even if they are closely connected to the reservation of ownership and the security it provides to the seller. These issues must be clearly distinguished from the reservation of ownership itself. The analysis of the German variant of a reservation of ownership clause with Verarbeitungsklausel in chapter I for example showed that such a clause operates as the contractual determination of the person acquiring ownership of newly manufactured goods. The rights of the seller based on the reservation of ownership do not 'extend' to the newly manufactured goods. The ownership acquired in newly manufactured goods by the seller of the original goods is a new right of ownership that is not derived from the ownership in the goods that were originally sold to the purchaser, but derived from the statutory rules on specification, that, as it is the case in German law, may allow a certain degree of party-autonomy.\footnote{The observation by the government (TK 28 239, Nr. 3, p. 8; see also § 7.3 of the Advice 'Internationaal goederenrecht') that a German verlängerter Eigentumsvorbehalt is vested in raw materials and continues to be vested in the products manufactured with those materials in my opinion is incorrect and does not lead to a clear understanding of the relevant issues.}
The difference between these issues must also be taken into account in the determination of the applicable law. These are general issues of property law that are governed by the law applicable pursuant to the conflict rules that would apply to similar questions arising outside the framework of a transaction involving reservation of ownership. In accordance with the conflict rules concerning (the acquisition and loss of) ownership in general, the lex rei sitae will apply to the acquisition of ownership pursuant to specification and the effect of contractual arrangements in this respect.

The assumption that, in the absence of Art. 3:92a BW, an agreement containing a reservation of ownership clause with a provision pursuant to which the seller would acquire ownership of goods manufactured with the goods sold, would not lead to a valid reservation of ownership under Dutch law, is incorrect. If Dutch law as lex rei sitae applies pursuant to Art. 3:92a (1) BW and the conditions of Dutch law for a valid transfer under reservation of ownership have been met, the seller has validly, i.e. with effect vis-à-vis third parties, retained the ownership of the goods. The related contractual agreement on the seller's acquisition of ownership pursuant to specification, even though under Dutch law it would not have the desired effect, does not render the reservation of ownership invalid. It is a valid additional contractual agreement. Whether this agreement has the desired result, must be determined in accordance with the law of the State where specification eventually takes place.

A similar reasoning applies to the extension of the seller's security into claims that the purchaser acquires against third parties from the resale of the goods. The analysis of the German variant of a reservation of ownership clause with Vorausabtretungsklausel in chapter I showed that it must be characterised as an assignment by way of anticipation of future claims. Consequently, the question whether a claim against a client of the purchaser for payment of the purchase price of goods that the purchaser had obtained under reservation of ownership, has been validly transferred to the seller, must be determined in accordance with the law applicable to (the proprietary aspects of) assignment of claims in general.68

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2.2.4 Applicability of the lex rei sitae and transfer of objects to another State ('conflit mobile')

As set out before, under German and Dutch law, matters related to the creation, validity and content of (security) rights in moveable assets are, subject to certain exceptions, governed by the lex rei sitae. This leads to the question whether and to what extent such rights continue to exist, are extinguished or modified when the asset concerned is transferred to another State. This concerns the problem of conflit mobile or Statutenwechsel. Generally, such questions will particularly arise in case of enforcement of a security right created in an asset under foreign law after it has been brought to Germany, resp. the Netherlands, or when subsequent to its transfer to Germany or the Netherlands (additional) rights are created in that asset that conflict with previously created rights. However, as the problem of conflits mobiles does not only concern the destiny of rights in assets imported into the Netherlands or Germany - the courts may also be called upon to decide on matters concerning assets situated in other States, e.g. after export from the Netherlands or Germany - the rules laid down in or proposed for legislation are of a more general nature.

The approach to the conflit mobile of German law differs from the approach suggested by the Dutch Standing Government Committee on Private International Law in its draft Wet conflictenrecht goederenrecht. The Dutch proposals start from the assumption that a right created under foreign law must be converted into an equivalent right under the new lex rei sitae. German law, on the other hand, has opted for the more convincing approach that a right created under foreign law remains unaffected but cannot be exercised in contravention to the legal order of the new situs.

Conversion
Following the approach suggested in Dutch legal writing, the Staatscommissie has proposed the following rule concerning conflits mobiles in Art. 5 of the draft Wet conflictenrecht goederenrecht:

Without prejudice to article 2, second paragraph, a right in a movable object that is moved to the territory of another State, acquires the content of a right under the law

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of that State. This content corresponds with the content of that right under the law of the State where it was created, except to the extent that such is irreconcilable with the law of the State where the object has been moved to.\footnote{Onverminderd artikel 2, tweede lid, verkrijgt een recht op een roerende zaak, indien de zaak naar het grondgebied van een andere Staat wordt verplaatst, in die andere Staat een door het recht van die Staat beheerste inhoud. Deze inhoud komt overeen met die welke dat recht had in de Staat waar het werd gevestigd, behoudens voor zover zulks onverenigbaar is met het recht van de Staat waarheen de zaak is verplaatst.}

The essence of this approach is that, if a moveable asset is transferred to another State,\footnote{See, with respect to the moment at which conversion takes place, Advice 'Internationaal goederenrecht', § 7.7-7.12.} an existing right in the asset is converted into a right under the laws of the new State. This is (or was until the introduction of Art. 43 (2) \textit{EGBGB}) also the prevailing opinion in German law.\footnote{See, with respect to this \textit{Transpositionslehre}, MünchKomm-Kreuzer, Band 10, Nach Art. 38 Anh I, Nr. 86; Staudinger-Stoll, Nr. 355.} Additional registration requirements for the continued existence of the right after conversion are not imposed, even if registration requirements would have to be observed with respect to the creation of such right under Dutch law.\footnote{This may be explained by the limited requirements of form and publicity under Dutch substantive property law. The valid creation of an undisclosed right of pledge under Dutch law (the functional equivalent of the transfer of ownership by way of security under German law), for example, requires either an authentic deed or a registered private document (Art. 3:237 \textit{BW}). Registration is, however, unable to serve as a means of publicity (the register is not a public register, and therefore third parties cannot easily ascertain which assets are encumbered with security rights) but mainly serves the purpose of fixing the moment at which non-possessory rights in moveable assets have been created.}

If the suggested provision were accepted, conversion must take place on the basis of a 'functional' approach. The foreign security right does not have to be - and often will not be - identical to a proprietary right under Dutch law. The foreign security right must be converted into an - as to objective and result - equivalent proprietary security right under the laws of the new situs.\footnote{See e.g. Hof 's-Gravenhage 28 April 1978, NJ 1981, 16 (the court converted a security right ('lien') under the law of the State of Georgia (USA) into (then accepted) security ownership). This is also the position of the \textit{Staatscommissie}, see its Advice 'Internationaal goederenrecht', § 7.4.} It is submitted that, in converting a foreign right to a right under Dutch law, a similar standard must be applied as set forth by the
Security rights in cross-border insolvency proceedings

Hoge Raad with respect to the assimilation of a foreign security right (i.e., floating charge) in claims in the Netherlands, where conversion into a similar Dutch right is not required. The Hoge Raad has observed that in determining the applicability of rules of Dutch law to a right created under foreign law, it is not decisive whether in general terms similarity exists between the foreign security right and a Dutch right (of pledge), but that the question rather is whether for the application of provisions of Dutch law, the foreign security right can be compared to the Dutch right as to its content and purport. Only in exceptional circumstances should this approach lead to the extinguishment of the foreign security right, i.e., only in case an equivalent proprietary right does not exist at all under the laws of the new situs. Dutch and German case law show a large extent of leniency in order to give effect to security rights created under foreign law. With respect to non-possessory security rights in moveables created under foreign law, e.g., a floating charge under English law and German security ownership, the Dutch undisclosed (non-possessory) right of pledge in moveables can as a rule be regarded as the functional equivalent.

As expressed in the second sentence of Art 5 of the draft Wet conflictenrecht goederenrecht, the scope of the right under the law in accordance with which it had been created must be taken into consideration. Depending on the rules of mandatory and directory law of the new situs of the asset, the largest possible conformity with the law under which the right was created must be achieved.

If the original law confers more powers on the holder of the right in the asset than the new lex rei sitae, such furthergoing powers can be exercised to the extent that parties are free to agree on such powers. If, for example, the law under which the security right in question has been created does not require the secured creditor to give notice to the debtor of an intended

75 HR 14 December 2001, NJ 2002, 241 (Sisal II), JOR 2001/70, comm H L E Verhagen
76 Cf MunchKomm-Kreuzer, Band 10, Nach Art 38 Anh I, Nr 86, Advice Internationaal goederenrecht, § 7, Stoll (IPRax 2000)
77 The Hoge Raad in Sisal II rejected the argument that a floating charge (under the law of Tanzania) cannot be characterised (for purposes of p 11) as an in rem security right but should rather be dealt with as a general privilege. A strong argument that the floating charge, for purposes of private international law, must be characterised as a right in rem can be derived from Art 5 IR. See further, Verhagen (NIPR 2002)
enforcement, the secured creditor can enforce his rights on that same basis if the assets are located in the Netherlands at the time of execution. Art. 3:249 BW allows for the exclusion of the duty of notification of an intended enforcement with respect to a right of pledge. If, on the other hand, the new lex rei sitae does not allow for the contractual extension of the powers of the holder of the right, the secured creditor can only exercise this right under the more restrictive conditions of the new lex rei sitae. If, for example, the law in accordance with which the right in question has been created allows the secured creditor to appropriate the asset in case of the debtor's default, that right would not be enforceable in the Netherlands. Art. 3:235 BW contains a mandatory rule of law pursuant to which any clause allowing a secured creditor to appropriate the asset concerned is void by operation of law.

If, on the other hand, the new lex rei sitae were to confer more powers on the secured creditor than he would have under the old lex rei sitae, the powers of the secured creditor under the new lex rei sitae will be limited accordingly to the extent that his powers can be restricted by agreement. If, for example, the law under which the security right has been created does not provide for a right of summary execution, the secured creditor will not be able to invoke the right of summary execution that is generally attached to a right of pledge under Dutch law. Art. 3:248 (2) BW allows for the exclusion of the right of summary execution with respect to a right of pledge created under Dutch law. The secured creditor would, in case the asset is located in the Netherlands at the time of enforcement, have the same position as the holder of a right of pledge under Dutch law where the right of summary execution has been excluded. The creditor will have to obtain a judgment that the debtor is in default, following which he can enforce his right in accordance with the rules of enforcement of a right of pledge. If a contractual limitation of the creditor's powers would not be possible under Dutch law, the secured creditor would obtain a more favourable position than he had in accordance with the law under which the right was originally created.

Preferred approach: right remains governed by the law under which it was created, but cannot be exercised contrary to the laws of the new situs.

An alternative approach to conversion of rights in case of a conflit mobile is that, after transfer of the object to another State, the right continues to
be governed by the law under which it was originally created.\textsuperscript{78} Conversion into a comparable right under the laws of the new situs does not take place.

This approach takes into consideration that the applicability of the laws of the new situs should not go further than necessary. If, for example, the right is not exercised or no other (conflicting) rights are created in the asset, there is no need for interference of the law of the new situs. It would be unacceptable if in such cases the right would for example extinguish because conversion cannot take place in the absence of a similar right under the laws of the new situs. Accepting that the right remains governed by the law under which it was originally created, would also eliminate the problems that the method of conversion raises by the fact that assets may pass through several States (multiple conversion?) or return to their State of origin ('resurgence' of the original right?).\textsuperscript{79} Only if the right is enforced in the country of the new situs or to the extent that the interests of third parties are involved, e.g. if other rights have been created in the asset under the laws of the new situs or a creditor seeks recourse on the asset, is there reason for intervention of the laws of the new situs.

The intervention of the laws of the new situs need not go further than necessary. It is sufficient that the exercise of rights created under foreign law does not take place in contravention to the laws of the situs.\textsuperscript{80} To that extent a right validly created under foreign law must be 'assimilated into' the system of proprietary rights in the State where the asset is located.\textsuperscript{81} It must be determined how provisions of the law of the situs, e.g. regarding the conditions for and manner of execution and (ranking of the secured claim for) distribution of the proceeds, must be applied to accommodate the foreign (security) right.

\textsuperscript{78} Cf. Strikwerda (2002), Nr 159; Stoll (IPRax 2000), 260-262; De Ly (NIPR 1995), p. 341; Staudinger-Stoll, Nr 355. See also the reference to the "dissenting opinion" of three members of the Dutch Standing Government Committee on Private International Law, Advice 'Internationaal goederenrecht', § 7.6.

\textsuperscript{79} Such issues are addressed in the Advice 'Internationaal Goederenrecht', § 7.7-7.11.

\textsuperscript{80} Cf. Stoll (IPRax 2000), p. 260.

\textsuperscript{81} Following the criteria set forth by the Hoge Raad in its decision of 14 December 2001, JOR 2002/70, comm. H.L.E. Verhagen (Sisal II). Cf. Verhagen (NIPR 2002).
This approach is followed in present German law.\textsuperscript{82} Art. 43 (2) \textit{EGBGB} states in this respect:

\begin{quote}
Gelangt eine Sache, an der Rechte begründet sind, in einem anderen Staat, so können diese Rechte nicht im Widerspruch zu der Rechtsordnung dieses Staates ausgeübt werden.
\end{quote}

The verbatim text of the statutory conflict rule introduced into the Dutch Civil Code regarding reservation of ownership (Art. 3:92a \textit{BW}) suggests that with respect to reservation of ownership Dutch law also adheres to this approach and would not require conversion. It states that the proprietary aspects of reservation of ownership are governed by the \textit{lex rei sitae} at the time of delivery. The text of the provision suggests that the proprietary aspects of reservation of ownership remain governed by the law of the situs at the time of delivery, even if goods have subsequently been moved to another State. Whether this conclusion may indeed be drawn is questionable, however. The explanatory report to the provision does not contain any reference to issues related to a \textit{conflit mobile}. The reference in the provision to the situs of the goods "at the time of delivery" is intended to clarify that the situs of the goods at the moment that the reservation of ownership clause is agreed upon, is irrelevant.\textsuperscript{83} There is no evidence that the legislator intended to deal with \textit{conflits mobiles}. It would appear that this matter has simply been forgotten by the legislator.\textsuperscript{84} An isolated provision has been taken out of a coherent set of rules on international property law set forth in the draft \textit{Wet conflictenrecht goederenrecht}. Issues relating to the effects on rights in assets if the asset is moved from one State to another, were addressed in Art. 5 of the draft. Art. 3 of the draft therefore did not have to differentiate between the moment of 'creation' of the reservation of ownership and its enforcement.

\textit{Results}

With respect to the exercise of security rights validly created under a former \textit{lex rei sitae}, the approach of the Dutch \textit{Staatscommissie} - conversion -
and the approach reflected in Art. 43 (2) EGBGB - assimilation - lead to very similar results. A right validly created under foreign law can only be exercised within the limits set by the law of the new situs. The effects of the 'imported' security right, e.g. with respect to the manner of realisation and the creditor's ranking with respect to the proceeds of realisation, are similar to their functional equivalents under the law of the new situs. If, for example, the ownership of an object has been transferred to a creditor by way of security under German law, that creditor will, in exercising his rights, have a position similar to the holder of an undisclosed right of pledge in that object under Dutch law if the asset is located in the Netherlands at the time of enforcement. The creditor for example cannot invoke a stipulation whereby he is given the power to appropriate the encumbered asset.85

The two approaches may lead to different results, however, with respect to other issues, such as the possibilities to dispose of the right in the asset after it has been transferred to another State. Take for example the transfer to the Netherlands of an object, the ownership of which has been transferred to a creditor by way of security under German law. Can the secured creditor dispose of his security ownership in the object? If the security ownership created under German law were to be converted into a Dutch right of pledge - its functional equivalent under Dutch law - the secured creditor would not be able to dispose of his rights in the asset but by assigning the secured claim. A right of pledge under Dutch law is generally regarded as an accessory right that cannot be disposed of independently from the claim it secures. Should one, on the other hand, accept the continued existence of the German security ownership, even after transfer of the object to the Netherlands, the secured creditor could dispose of his security ownership. Security ownership is not an accessory right (not under German law and not under Dutch law).

2.2.4.1 Effects of German reservation of ownership clauses in the Netherlands

As set out in chapter I, with respect to reservation of ownership German law allows for an extension of the security of the seller beyond what

85 Such clauses may be valid under German law (cf. Palandt, Bürgerliches Gesetzbuch (Bassenge), Art. 930, Nr. 33), but are null under Dutch law (cf. Art. 3:235 BW).
would be allowed under Dutch law. This extension on the one hand regards the claims that can be secured by the reservation of ownership and, on the other hand, the assets that will serve as security for the claims of seller. This raises the question what effects such agreements made between the seller and the purchaser in accordance with German law have with respect to assets sold under reservation of ownership that are subsequently brought to the Netherlands.

**Security for other claims than those referred to in Art. 3:92 (2) BW**
The unpaid seller can enforce his rights that were validly created under German law, albeit that enforcement may not run contrary to Dutch law. In this respect Art. 3:92 (2) BW, which limits the claims for which a seller can validly reserve ownership of goods sold under Dutch law, must be taken into consideration. The seller will only be entitled to revindicate goods from the buyer to the extent that the purchaser has not paid claims referred to in Art. 3:92 (2) BW. This does not mean, however, that the seller cannot invoke any proprietary rights in the goods for other claims that have been left unpaid by the buyer. In that respect he should be dealt with on the same footing as the holder of an undisclosed/non-possessory right of pledge under Dutch law.

**verlängerter Eigentumsvorbehalt and specification**
Mandatory rules of Dutch property law, such as the rules relating to specification, accession and the protection of bona fide third parties acquiring (security) rights in the goods, apply to assets situated in the Netherlands, regardless of the law governing the contract between the seller and the purchaser. Therefore, if the contract between the seller and the purchaser stipulates, in accordance with German law, that the seller acquires the ownership in goods produced with the materials that he has supplied under reservation of ownership, this agreement will only lead to the intended result within the limits set by Dutch property law. As set out in chapter I, Dutch law is restrictive in giving (proprietary) effect to such contractual agreements. Generally, the seller will not acquire ownership in the newly manufactured goods under Dutch law. As set out before, the seller's right of ownership in the raw materials he has supplied is not 'continued' into the newly manufactured goods. It is a new right of (security) ownership that the seller obtains pursuant to the relevant provisions on specification. Therefore, it is in my opinion not correct to say
that this type of reservation of ownership allowed under German law is 'extinguished' or 'invalid' if the raw materials are moved to the Netherlands and used in the purchaser's production process. The contractual agreement between the seller and the purchaser is and remains valid, but will not lead to the seller acquiring proprietary (security) rights in the newly manufactured goods. The alternative for the seller to obtain a security right in the goods manufactured with the materials he has supplied, is to agree with the purchaser that an undisclosed/non-possessory right of pledge is created by anticipation in the future assets that the purchaser will acquire, i.e. in the newly manufactured goods. In that case, the seller will, however, have to reckon with older rights of pledge created in such future assets of the debtor, for example for the benefit of banks financing the debtor's business.

2.3 Proprietary issues regarding claims

2.3.1 Introduction

The use of (existing and future) claims as security for extended credit may be an issue in a variety of situations, such as factoring, leasing, bank loans or credit extended by a supplier of goods pursuant to an extended reservation of ownership clause. The provision of security rights in claims raises particular problems in an international context. Legal systems vary on a number of issues, such as the manner in which claims can be used as security - e.g. transfer by way of security or encumbrance with dismembered "proprietary" rights such as a right of pledge - and the requirements that have to be met for the security to be enforceable against third parties and against the administrator in the insolvency of the assignor/pledgor.\(^\text{86}\) In the absence of uniform rules on such matters, the deter-

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86 Cf. Steffens (1997). Given the importance of assignment of claims for the international finance and trade practice, and the obstacles resulting from existing differences between legal systems as to assignment of claims in national and international situations, several attempts have been made to formulate common rules on the assignment of claims in an international context. See, for example, the United Nations Convention on the Assignment of Receivables in International Trade, adopted by the General Assembly of the United Nations on 12 December 2001 (www.uncitral.org) and the UNIDROIT Convention on International Factoring, concluded in Ottawa on 28 May 1988 (www.unidroit.org). The UNIDROIT convention has entered into force for Germany on 1 December 1998. The Netherlands have not signed the convention.
mination of the law governing the various aspects of the transfer or encumbrance of claims is important in order to assess the value of the security in case of insolvency. The conflict rules adopted in Germany and the Netherlands differ with respect to such important issues as the law governing the enforceability of the security against third parties.

A number of aspects must be discerned with respect to the transfer of or creation of rights in claims, including:

(i) the susceptibility of a (future) claim to assignment or encumbrance
(ii) the relationship between assignor/pledgor and assignee/pledgee
(iii) the relationship between the debtor of the assigned/pledged claim and the assignee/pledgee
(iv) the enforceability of the assignment/pledge against third parties, such as other creditors or assignees/pledgees (in case of multiple assignment of the same claim) and the administrator in the assignor's/pledgor's insolvency.

These issues, which will be dealt with in the subsequent paragraphs, are not all subject to the same conflict rule and therefore not uniformly referred to one legal system. The determination of the applicable law depends on the characterisation of the issue concerned. Similar to the creation or transfer of rights in moveables, German and Dutch private international law distinguish between aspects of assignment/encumbrance of claims pertaining to the law of obligations and aspects pertaining to the law of property. Whereas matters pertaining to the law of obligations in both German and Dutch private international law are in principle referred to the law governing the contract on which the assignment/encumbrance is based, matters pertaining to the law of property, such as the issues referred to under (iv) above, are referred to different laws under German and Dutch private international law. Under German private international law the proprietary aspects of assignment of claims are in principle referred to the law governing the assigned claim. Under Dutch private international law, the proprietary aspects of the assignment of claims are in principle governed by the law applicable to the contract of assignment between the assignor and the assignee.
Art. 12 of the Rome Convention,\textsuperscript{87} incorporated in German law in Art. 33 (1) and (2) EGBGB, is of great importance to German and Dutch private international law regarding the assignment of claims. Art. 12 reads:

(1) The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

(2) The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.\textsuperscript{88}

2.3.2 Assignability

Pursuant to Art. 12 (2) of the Rome Convention and the corresponding Art. 33 (2) EGBGB, the assignability of a claim must be determined in accordance with the law governing the claim. The law governing the claim must be determined in accordance with the relevant conflict rules. According to its verbatim text, Art. 12 (2) Rome Convention is limited to assignment, but it is generally considered that the same rule applies (directly or by analogy) in respect of the creation of security rights in the claim concerned, such as a right of pledge. For Dutch private international law, the Staatscommissie has proposed to incorporate an explicit rule to this effect.\textsuperscript{89}

\textsuperscript{87} Convention on the law applicable to contractual obligations, Rome 19 June 1980
\textsuperscript{88} Art. 33 (1) and (2) EGBGB:
(1) Bei Abtretung einer Forderung ist für die Verpflichtungen zwischen dem bisherigen und dem neuen Glaubiger das Recht maßgebend, dem der Vertrag zwischen ihnen unterliegt.
(2) Das Recht, dem die übertragene Forderung unterliegt, bestimmt ihre Übertragbarkeit, das Verhältnis zwischen neuem Glaubiger und Schuldner, die Voraussetzungen, unter denen die Übertragung dem Schuldner entgegengehalten werden kann, und die befreiende Wirkung einer Leistung durch den Schuldner.
\textsuperscript{89} Cf. Art. 10 (1) of the draft Wet Conflictenrecht Goederenrecht; Advice 'Internationaal goederenrecht', § 17.2.
The *lex causae* of the claim determines whether the claim can be assigned or encumbered with a proprietary right. The *lex causae* may for example prohibit assignment or encumbrance based on the nature of the claim, as may be the case with respect to certain claims for damages for personal injury or certain claims for damages against the directors of an insolvent company. The question whether an agreement between the debtor and the creditor of the claim that excludes or limits its assignability - a pactum de non cedendo - prohibits or limits the assignment or encumbrance of the claim is also a matter that is to be referred to the *lex causae* of the claim.

Which types of security rights can be created - e.g. a security assignment or a right of pledge - and the requirements that have to be met in order for such rights to be validly created (with against third parties) is a matter of property law. The proprietary aspects of the assignation of claims are governed by the law designated by specific conflict rules that will be dealt with hereafter.

In particular with respect to the use of claims as the object of security rights - e.g. in the case of a *Globalzession* or an *Eigentumsvorbehalt mit Vorausabtretungsklausel* under German law - the question arises which law governs the assignability of future claims. In this respect German and Dutch law follow the same approach. The assignability of future claims is a matter that, pursuant to Art. 12 (2) of the Rome Convention and Art. 33 (2) EGBGB, is to be determined by the *lex causae* of the claim concerned.
The (preliminary) question whether a claim is an existing (contingent) claim or a future claim, in my opinion is also a matter that, as it relates to the nature of the claim, is governed by the (prospective) lex causae of the claim.\(^{95}\)

The question whether future claims can in principle be the subject of assignment or encumbrance must be distinguished from the question which requirements must be met for a valid assignment of such future claims (with effect against third parties). The latter question pertains to the law of property and is therefore governed by the law designated by the conflict rules concerning the proprietary aspects of the assignment or encumbrance. Provisions of Dutch law pursuant to which assignment in principle requires notification to the debtor of the assigned claim\(^{96}\) and which restrict the possibility of encumbrance of future claims with an undisclosed right of pledge to claims that originate directly from a legal relationship existing at the time of the encumbrance (Art. 3:239 (1) BW) are therefore only applicable if and to the extent that Dutch law applies to the proprietary aspects of the assignment or encumbrance.

233  Relationship between assignor and assignee

Pursuant to Art. 12 (1) of the Rome Convention and Art. 33 (1) EGBGB, the mutual obligations of the assignor and the assignee are governed by the law which applies to the contract between the assignor and the assignee. This would also follow from the general rules of the Rome Convention. To that extent Art. 12 (1) is merely of an explanatory nature. The lex causae of the contract between the assignor and assignee governs issues of the

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95 Cf Kortmann/Veder (WPNR 2000), p 772. Differently Van Galen/Van Apeldoorn (1998), Nr 220, who have argued that, for the application of Art 35 Fw, the characterisation of a claim as a future or existing (contingent) claim must be determined in accordance with the lex concursus.

96 Cf Art 3 94 (1) BW. Recently, a new third paragraph has been added to Art 3 94 BW. Assignment of a claim may also be effected without notification to the assigned debtor under similar conditions as provided for with respect to the creation of an undisclosed right of pledge (cf Art 3 239 BW). Such assignment requires an authentic deed or registered private instrument and is only possible with respect to claims that exist at the time of the assignment or will be directly acquired pursuant to a legal relationship already existing at that time. Notification of the assignment to the assigned debtor is required if the assignment is to be invoked against the assigned debtor.
assignment pertaining to the law of obligations, such as the extent and conditions of the assignor's obligation to assign (or charge) the claim(s) and possible liability of the assignor in respect of the existence and enforceability of the claim.\(^{97}\)

Pursuant to Art. 8 (1) of the Rome Convention and Art. 31 (1) EGBGB, the existence and validity of the contract between the assignor and the assignee must be determined in accordance with the law that would apply if the contract would be valid. The validity of the contract between the assignor and the assignee can be an issue with respect to the determination of the validity of the assignment.\(^ {98}\) The question whether the invalidity of the underlying contract leads to invalidity of the assignment, with the effect that the assigned claim remains available for recourse by the assignor's creditors, however, is a matter of property law that is to be referred to the applicable property law.\(^ {99}\)

2.3.4 Relationship between the debtor of the assigned/pledged claim and the assignee/pledgee

Assignment of a claim or the creation of a security right in a claim, such as a right of pledge, does not in itself have any effect on the assigned/charged claim. The terms and conditions of payment for the assigned debtor do not change as a result of the assignment. This is clearly expressed in Art. 12 (2) of the Rome Convention and Art. 33 (2) EGBGB. The purport of these provisions is to protect the debtor of the assigned claim. The law governing the assigned claim determines whether payment made to the assignor, in contravention of the assignment, leads to the debtor's discharge. The creditor's right to demand payment, the place and time for payment and any defences that the debtor could invoke against a demand for payment, continue to be governed by the law governing the claim. That is the law that the debtor could rely upon. Also, as discussed previously, it follows from Art. 12 (2) of the Rome Convention (and Art. 33 (2) EGBGB), where it is stated that the lex causae of the claim determines its assignability and the conditions under which the assignment can be

\(^ {97}\) Cf. the 'representations of the assignor' set forth in Art. 12 of the UN Convention on the Assignment of Receivables in International Trade.

\(^ {98}\) Cf. Art. 3 84 (1) BW.

\(^ {99}\) Cf Steffens (1997), p. 186
invoked against the debtor, that the debtor can rely on a (contractual) limitation or exclusion of the assignability of the claim. The *lex causae* of the claim furthermore determines whether and how the assignment should be notified to the debtor in order for the assignment to have effect against the debtor. Within the framework of Art. 12 (2) of the Rome Convention such notification requirements are first and foremost relevant for questions pertaining to the law of obligations. Notification will be relevant for the question whether payment to either the assignor or the assignee will lead to the debtor's discharge. Whether notification of the assignment is a requirement of property law that is necessary for the assignment of the claim to be valid and enforceable against third parties, is a matter that is referred to the law governing the proprietary aspects of the assignment.\(^{100}\)

2.3.5 *Proprietary aspects*

Differences of opinion exist in particular with respect to the law applicable to those aspects of the assignment or encumbrance of claims that must be characterised as pertaining to the law of property. The proprietary aspects of the assignment concern the essential question whether the assignee/pledgee can invoke proprietary rights in the claim against third parties, such as other creditors of the assignor following attachment by garnishment on the claim, and the administrator in the assignor's insolvency.\(^{101}\)

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101 In my opinion it is not correct and rather confusing to distinguish between proprietary aspects of the assignment in the relation between the assignee and the assigned debtor on the one hand, and the assignee and 'other third parties' on the other hand. Such a distinction is made by, for example, Kieninger (RabelsZ 1998) and Steffens (1997), p. 197 et seq. (who, consequently, misunderstands the argument advanced by Bertrams and Verhagen (WPNR 1993, p. 262) that in the relation between the assignee and the debtor, the effects of the assignment are governed by the *lex causae* of the assigned claim. This, however, is not a matter of property law, but one of protection of the assigned debtor. See also Steffen's case note on HR 16 May 1997 in NTBR 1997/7, p. 214, where she refers to the court's observation that the law governing the contract between assignor and assignee also governs the validity of the passing of the assigned claim to the estate of the assignee "and the effect of the assignment vis-à-vis other third parties than the assigned-debtor". This phrase cannot justify the conclusion that the Hoge Raad indeed intended to make the distinction in proprietary aspects as feared by Steffens. The advisory opinion of Advocate General Strikwerda to the decision (JOR 1997/77, p. 537 et seq.) suggests quite the opposite. Cf. Bertrams, WPNR 6312 (1998), p. 291; Struycken (LMCLQ 1998), p. 351 (footnote 26); Rongen (1998), p. 437/438; Veder (1998), p. 185.
It essentially concerns the question whether, in case of assignment, the claim has been transferred from the estate of the assignor to the estate of the assignee, so that the assignor no longer has the right to dispose of the claim and the claim is no longer available for recourse to the assignor's creditors. In case of the encumbrance of a claim with a right of pledge, the question is essentially whether the pledgee has obtained a proprietary right in the claim with effect erga omnes.

The proprietary aspects of the assignment or charging of claims include issues like the requirements that have to be met for a valid assignment/charging of claims, the types of rights that can be vested in claims and the nature and content of such rights and the question who is entitled to exercise the rights originating from the assigned/charged claim (e.g. the pledgor or the pledgee, cf. Art. 3:246 BW).  

The determination of the law governing these proprietary aspects of the assignment or charging of claims is crucial in insolvency cases. Respecting the requirements of the law designated by the conflict rules for the proprietary aspects of the assignment, is of importance, inter alia, for the application of Art. 5 IR. Art. 5 IR presupposes the validity (with effect erga omnes) of proprietary rights in claims. Which law governs the issue of the validity of proprietary rights in claims is, however, not addressed in the Insolvency Regulation, not being a matter of insolvency law but one of general property law. The extensive debate that has taken and is taking place in legal doctrine is not to be repeated here. The conflict rules currently prevailing in German and Dutch law will be taken as the starting point.

Whether a particular aspect of the assignment of a claim is a matter of property law or one of the law of obligations, is a matter of characterisation. For example, the following provisions of Dutch law are in my opinion to be characterised as pertaining to the proprietary aspects of assignment, and are therefore only applicable if the relevant conflict rule designates Dutch law as the law applicable to the proprietary aspects of the assignment:

102 Cf. Art. 10 (2) of the draft Wet Conflictenrecht goederenrecht.
103 For the sake of brevity, I refer to (all with extensive further references): Steffens (1997); Kieninger (RabelsZ 1998); Struycken (LMCLQ 1998).
- provisions regarding the manner in which and the extent to which assigned or encumbered claims must be indentified/specified (cf. Art. 3:84 (2) BW);
- the provision stipulating that the validity of the assignment depends on the validity of the contract to assign between the assignor and the assignee (cf. Art. 3:84 (1) BW);
- the prohibition of assignment of claims by way of security (cf. Art. 3:84 (3) BW);
- the limitations on the possibility to encumber future claims with a right of pledge without notification to the debtor of the claim (Art. 3:239 (1) BW);
- registration requirements for the assignment of or the creation of a right of pledge in claims without notification (Art. 3:94 (3) and 3:239 (1) BW);
- notification of the assignment as a requirement for the valid transfer of the claim from the estate of the assignor to the estate of the assignee (cf. Art. 3:94 (1) BW).

According to prevailing opinion, the proprietary aspects of the assignment of claims fall outside the scope of the Rome Convention. The conflict rule regarding the proprietary aspects of the assignment of claims must therefore be found in customary private international law. For German law, the conflict rule is commonly considered to be embodied in Art. 33 EGBGB, which, even though incorporating the Rome Convention, does not have the limited scope - i.e. the limitation to matters pertaining to the law of obligations - of the Rome Convention itself. For Dutch law, the conflict rule is embodied in the leading case of the Hoge Raad of 16 May 1997, which has been followed by the Standing Government Committee on Private International Law in its draft Wet conflictenrecht goederenrecht.

German law

The prevailing view in German law is that Art. 33 (2) EGBGB also designates the law governing those aspects of the assignment that can be characterised as proprietary in nature, i.e. the effect of the assignment as against third parties. The proprietary aspects of assignment or charging of claims are therefore referred to the *lex causae* of the assigned/charged claim. This view has been confirmed by the Bundesgerichtshof in a decision of 20 June 1990 concerning a multiple security assignment of a claim. The court had to decide on the question according to which law a conflict between two assignees who both invoked rights in the same claim had to be decided. The Bundesgerichtshof observed that:

"It is established case law and the prevailing opinion, that assignment of claims is governed by the law applicable to the assigned claim. That law determines the conditions for and the effects of assignment."  

The Bundesgerichtshof explicitly rejected proposals advanced in legal doctrine to apply deviating conflict rules to security assignments, in particular the *Globalzession* and the *verlängerten Eigentumsvorbehalt mit Vorausabtretungsklausel*, which in the opinion of some authors ought to be governed by the law of the State of the assignor's domicile or habitual residence:

"In the interest of clarity and legal certainty as well as as in view of Art. 33 (2) EGBGB, which does not differentiate in respect of the nature of the assigned claim or the purpose of the assignment, it rather appears necessary that the conditions for and the effects of every assignment are uniformly and in every aspect referred to the law governing the assigned claim. Thus law therefore also governs the issue of priority as between competing assignments."

107 "Nach standiger deutscher Rechtsprechung und herrschender Lehre ist die Zession ( ) nach dem sog. Schuldsstatut zu beurteilen. Danach bestimmen sich Voraussetzungen und Wirkung einer Abtretung nach dem Recht, das auf die zedierte Forderung Anwendung findet."
108 Cf Staudinger-Stoll, Nr 349-351 See also Steffens (1997), p 241-242, MunchKomm-Martiny, Band 10, Art 33, Nr 14 and 15
109 "Im Interesse der Rechtsklarheit und Rechtssicherheit sowie im Hinblick auf Art. 33 Abs. 2 EGBGB n F., wonin nicht nach der Art der abgetretenen Forderung oder dem Zweck der Abtretung differenziert wird, erscheint es vielmehr geboten, die
Dutch law

The position of Dutch private international law with respect to the proprietary aspects of the assignment and charging of claims has for a long time been uncertain. In its decision of 17 April 1964, the Hoge Raad had in principle referred the proprietary aspects of assignment to the lex causae of the assigned claim.\textsuperscript{110} This decision was, however, criticised in legal doctrine and not followed by all the courts.\textsuperscript{111} In 1997 the Hoge Raad created the much desired certainty on this issue in a case concerning a dispute over the effects of an extended reservation of ownership clause under German law (verlängerter Eigentumsvorbehalt mit Vorausabtretungsklausel).\textsuperscript{112}

Under a contract of sale governed by German law, Hansa Chemie AG (Germany) had sold and delivered chemical products to Bechem Chemie BV (Netherlands). To secure payment of the purchase price, the general conditions of sale, applicable to the relationship between Hansa Chemie AG and Bechem Chemie BV, stipulated that Hansa reserved the ownership of the products sold and delivered and Bechem assigned to Hansa any claims against third parties arising from resale of the products. Bechem had resold the chemical products to Senzora BV (Netherlands). The sale to Senzora was governed by Dutch law. At the time that Bechem was declared bankrupt, Hansa had not received payment from Bechem, which in turn had not received payment from Senzora. Hansa and the administrator in the insolvency of Bechem both claimed to be entitled to the purchase price owed to Bechem by Senzora. The crucial question in the proceeding was, which law governed the proprietary effects of the assignment of claims under Dutch private international law. If the proprietary aspects of the assignment of Bechem's (future) claims were referred to German law (as the law applicable to the contract of assignment between Hansa and Bechem), Hansa would have the stronger claim on the moneys owed by Senzora. If Dutch law were to apply to the proprietary aspects of the assignment, on the other hand, the assignment to Hansa would be

\textsuperscript{110} HR 17 April 1964, NJ 1965, 22, comm. P. Scholten (Escomptobank).
\textsuperscript{111} Cf. Steffens (1997), p. 161 et seq.
ineffective, given the prohibition in Dutch law of the assignment of claims by way of security.

The *Hoge Raad* explicitly rejected the applicability of the *lex causae* of the assigned claim as it had previously adopted in its decision of 1964. According to the *Hoge Raad*, the proprietary aspects of the assignment of claims are governed by the law applicable to the contract of assignment between the assignor and assignee.\(^{113}\)

The conflict rule formulated by the *Hoge Raad* in this decision is entirely based on the reasoning that Art. 12 of the Rome Convention also covers the proprietary aspects of the assignment of claims. That assumption limited the options of the *Hoge Raad* in respect of the applicable conflict rule. Either Art. 12 (1), referring to the law governing the contractual relationship between assignor and assignee, or Art. 12 (2), referring to the law applicable to the assigned claim, would apply. According to the *Hoge Raad* the enumeration of aspects governed by the *lex causae* of the assigned claim in Art. 12 (2) of the Rome Convention is apparently exhaustive. Since the assignment itself is not mentioned in Art. 12 (2), the *Hoge Raad* held that Art. 12 (1) must designate the law governing the proprietary aspects of the assignment of claims. In support of this view the *Hoge Raad* furthermore observed that Art. 12 (1) would lack any real meaning and would be superfluous next to the general conflict rules of Art. 3 and 4 of the Rome Convention if it would only apply to the contractual relationship between assignor and assignee. The fact that the applicability of Art. 12 (2) to the proprietary aspects of the assignment of claims could lead to the relationship between assignor and assignee being governed by two different laws, is viewed by the *Hoge Raad* as an argument against the applicability of Art. 12 (2). According to the *Hoge Raad*, such a division would be undesirable and could not have been the intention of the drafters of the Convention, given its lack of simplicity and practical manageability. Applicability of Art. 12 (2) was also rejected by the *Hoge Raad* because this would make it impossible for the assignor and assignee to choose the law applicable to the assignment, whereas the principle of party-autonomy is put first in Art. 3 (1) of the Rome Convention. The consequence of this decision is that, under Dutch private international law,

\(^{113}\) Cf. Bertrams/Verhagen (WPNR 1993), p. 266.
the assignor and the assignee can, in international transactions, choose the law that governs the validity and effectiveness of the assignment of claims (with effect against third parties).

This decision of the Hoge Raad has been followed by the Standing Government Committee on Private International Law in Art. 10 of the draft Wet conflictenrecht goederenrecht:

(1) The assignability or chargability of a claim is governed by the law applicable to the claim.

(2) For the rest, the proprietary regime concerning a claim is governed by the law applicable to the contract from which the obligation to assign or charge the claim emanates. That law governs in particular:
   (a) the requirements for a valid transfer or charging of the claim;
   (b) who is entitled to exercise the rights originating from the claim;
   (c) which rights can be created in the claim, their nature and content;
   (d) in what manner the rights mentioned under (c) are modified, passed or extinguished and their interrelationship;

(3) The relationship between the assignee, respectively the holder of a right in the claim, and the debtor, the conditions under which the transfer of a claim or the creation of a right in the claim can be invoked against the debtor, as well as the question whether the debtor has been discharged by payment, are governed by the law applicable to the claim.\textsuperscript{114}

The conflict rule proposed in Art. 10 of the draft Wet conflictenrecht goederenrecht has been formulated independently of the possible applicability of Art. 12 of the Rome Convention. After consideration of four possible
solutions, the Staatscommissie expressed a preference for the applicability of the law governing the contract to assign between the assignor and the assignee. One of the main arguments advanced in favour of the proposed conflict rule, is that it provides for the flexibility required in the international finance practice, without prejudicing the position of the assigned debtor. Assignment of the claim after all does not alter the law governing the debtor's position. His position under the assigned claim remains governed by the law applicable to that claim, in relation to the assignor as well in relation to the assignee. The relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and the question whether the debtor's obligations have been discharged, are governed by the law applicable to the assigned claim. Any defences that the debtor could invoke against the assignor under the law governing their contract, can also be invoked against the assignee. That the proposed conflict rule allows the assignor and assignee to choose the law governing the proprietary aspects of the assignment is acceptable to the Staatscommissie, also because of the absence of case law showing an abuse of the freedom of choice of law and the existence of instruments to counter a possible abuse of this freedom (e.g. actio Pauliana).

That the Hoge Raad has formulated a conflict rule on the proprietary aspects of assignment of claims starting from the assumption that Art. 12 of the Rome Convention applies, raises the question whether the said conflict rule also applies to the creation of other proprietary security rights in claims, such as a right of pledge. Art. 12 of the Rome Convention only directly addresses the assignment of claims. Given the close functional similarities between the assignment of a claim by way of security and the creation of a right of pledge in the claim, there is every reason to assume that the system of Art. 12 of the Rome Convention also applies (either directly or by analogy) to the creation of other types of proprietary security rights. Given the wider scope of the conflict rule of Art. 10 of the draft Wet conflictenrecht goederenrecht - which refers to the assignment as well as the encumbrance of claims - it is submitted that under present

115 Advice 'Internationaal goederenrecht', § 18.2: (i) the law governing the assigned claim, (ii) the law governing the contract between assignor and assignee, (iii) the law of the habitual residence of place of business of the assignor or (iv) the law of the habitual residence of place of business of the assigned-debtor.

Dutch private international law, the law governing the contractual relationship between the assignor/pledgor and the assignee/pledgee applies to the proprietary aspects of transfer and creation of rights in claims generally.\(^{117}\)

Neither Art. 12 (1) of the Rome Convention, nor Art. 10 (2) of the draft Wet conflictenrecht goederenrecht, would prima facie appear to allow for the parties to choose a law that governs the proprietary aspects of their transaction other than the law that governs their contractual relationship. Both provisions refer to the law that governs the contract between assignor and assignee from which the obligation to provide security in the claim emanates. Nevertheless, a 'separate' choice of law in respect of the assignment or charging of claims, designating a different law to apply to the assignment or charging of the claim than the law governing the contract from which the obligation to do so emanates, is possible. Once it is accepted that parties are free to choose the law that applies to the proprietary aspects of the assignment by choosing the law that applies to their contract, there is no compelling argument why parties would not be able to refer the proprietary aspects of their transaction to a different law than the \textit{lex causae} of their contract. Support for this argument can be found in Art. 3 (1) of the Rome Convention, which allows contracting parties to agree on a choice of law in respect of the contract as a whole or in respect of part of the contract.\(^{118}\) It would also accommodate the needs of practice. It may be that the actual assignment or charging of the claim is effected at a later stage pursuant to a prior contract containing the obligation to assign or charge a claim at the first request. Parties should be free to create a right of pledge in a claim in accordance with e.g. Dutch law, even though the underlying contractual obligation to provide security was governed by e.g. German law. The later choice of law in respect of a

\(^{117}\) Struycken has suggested a deviating conflict rule with respect to the 'floating charge' (cf. Struycken (NIPR 2001), p. 194). Given the general nature of the floating charge (which may encompass all the debtor's present and future assets), he argues for the applicability of the law of the place where the party providing the security conducts his business at the time of the granting of the security. Verhagen (JOR 2002/70; (NIPR 2002), p. 287) is of the opinion that no compelling arguments exist to formulate a specific conflict rule and that under present Dutch private international law, the nature of the individual assets subject to a floating charge determine the applicable conflict rules with respect to the proprietary aspects of the creation of a floating charge.

\(^{118}\) Cf. Verhagen in JOR 1997/77.
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particular aspect of the transaction between assignor and assignee, i.e. the actual creation of a security right in the claim, then prevails.

2.3.6 Assimilation of foreign (security) rights in claims

A court may be required to examine whether and to what extent a right that has been validly created in a claim pursuant to foreign law can be given effect within its own legal system. Such questions may for example arise in case of attachment in execution of the (assigned or charged) claim where the debtor of the attached claim is domiciled in the Netherlands, or the assignor is declared insolvent in the Netherlands and the claim is included in the Dutch insolvency proceeding.

In a decision of 14 December 2001, the Hoge Raad has set out the principles to be applied in this respect. The case concerned a dispute between the holder of a floating charge under the laws of Tanzania in respect of claims that were subsequently attached in execution in the Netherlands by an Italian creditor. The question put to the court was whether the holder of the floating charge was entitled to request the appointment of a delegated judge ('rechter-commissaris') on the same basis as the holder of a right of pledge in the claim under Dutch law can, to decide on the (order of priority in the) distribution of the proceeds. The Hoge Raad observed:

"that this requires the assessment whether the holder of a foreign security right that has been validly created in accordance with the applicable law, from a point of view of justice and efficiency can be put on a level with the holder of a Dutch security right referred to in art. 480 and 481 Rv and thus is entitled to request a settlement of the order of priority. It must be observed that in that respect it is not decisive

This decision follows a previous decision in the same case, HR 23 April 1999, NJ 2000/30, comm. H.J. Snijders (Sisal I), JOR 1999/129, which concerned the interpretation of provisions of Dutch law (i.e. Art. 480 and 481 Rv), under the assumption that the floating charge could be treated as a Dutch right of pledge.

120 Cf. Art. 481 to 480 Rv. In its decision of 23 April 1999 (NJ 2000, 30), the Hoge Raad decided that, if following attachment by a creditor of a claim that is encumbered with a right of pledge and payment of the claim to the bailiff (for the benefit of the attaching creditor), leading to the extinguishment of the claim and consequently extinguishment of the right of pledge, the pledgee, who retains priority in the proceeds (cf. HR 17 February 1995, NJ 1996, 471) may request the court to appoint a delegated judge to decide on the order of priority between the pledgor and the creditor that had attached the claim in execution.
whether in general terms the foreign and the Dutch security right are comparable, but whether for the application of a particular provision of Dutch law - in this case art. 480 and 481 Rv - the foreign security right can in view of its content and objective be put on a level with an equivalent Dutch security right."

Against the background of this general observation concerning the assimilation of foreign security rights in claims, the Hoge Raad determines that in its view the Court of Appeal did not apply an incorrect criterion when it compared the floating charge and the right of pledge on (only) two points, i.e. objective and result. A general comparison of the features of the rights in question is not required. The question is not whether in all of its aspects a particular foreign security right is the same as a Dutch security right. Conversion of the right created under a foreign law into an equivalent security right under Dutch law does not take place.

Effect must be given to the floating charge, even if a right of pledge in the claim concerned would not be valid under Dutch law. That a floating charge can be created by one single act in all future claims of the debtor, whereas under Dutch law an undisclosed right of pledge can only be created in claims that originate directly from a legal relationship that existed at the time of the encumbrance, is irrelevant. The restrictions imposed by Art. 3:239 (1) BW only apply when Dutch law governs the proprietary aspects of the assignment or charging of claims. Once it is established that the proprietary aspects of the assignment or charging of

121 "Voor de beantwoording van de thans aan de orde gestelde vraag moet worden beoordeeld of de rechthebbende op een buitenlands zekerheidsrecht dat volgens het toepasselijke rechtsstelsel geldig is tot stand gekomen, uit een oogpunt van rechtvaardigheid en doelmatigheid op één lijn kan worden gesteld met de in art. 480 en 481 Rv bedoelde rechthebbende op een Nederlands zekerheidsrecht en deswege bevoegd is een rangregeling te verzoeken. Opmerking verdient dat daarbij niet doorslaggevend is of in algemene zin overeenstemming bestaat tussen het buitenlandse zekerheidsrecht, maar of met het oog op de toepassing van een bepaalde Nederlandse regeling - hier art. 480 en 481 Rv - het buitenlandse zekerheidsrecht naar inhoud en strekking gelijkgesteld kan worden met een verwant Nederlands zekerheidsrecht."


123 Cf. Nr. 3.5.4. of the decision of the Hoge Raad (HR 14 December 2001, JOR 2002/70).

124 In the dispute between the holder of the floating charge and the Italian creditor, the court acted under the assumption that the floating charge was valid and extended to the claims attached. See, with respect to the law applicable to the (proprietary aspects of) the floating charge under Dutch private international law, Struycken (NIPR 2001); Verhagen (NIPR 2002).
claims are governed by foreign law, the existence and the validity of the right in question must be assessed in accordance with that law.

3. **Influence of Insolvency on the Validity of Security Rights**

The opening of an insolvency proceeding may in several ways affect the validity of security rights. The opening of an insolvency proceeding triggers a number of legal consequences aimed at protecting and preserving the estate for the benefit of the creditors collectively. The inclusion of assets in the estate generally leads to a restriction of the debtor's powers to dispose of assets. After the opening of an insolvency proceeding, security rights can no longer be validly created by the debtor. Also, security rights created by way of anticipation in respect of future assets will generally not be valid if the assets concerned have come into existence or have been acquired by the debtor after the opening of the proceeding. Furthermore, juridical acts performed by the debtor prior to the opening of the insolvency proceeding, including the creation of security rights in or (security) transfer of assets, can under certain conditions be subject to reversal.

The extent to which assets that are situated in various States are included in an insolvency proceeding has decisive influence on the assessment of the (in)validity of security rights created in such assets. Whether and to what extent insolvency proceedings have effect in other States than the State where the proceeding has been opened is a fundamental preliminary issue in respect of the assessment of the validity of security rights. The extent to which a foreign insolvency proceeding is recognised and has effects in respect of assets situated in a particular State determines whether the divestment of the debtor under the *lex concursus* also extends to assets situated in that State. If a foreign insolvency proceeding is not recognised in a particular State, the possibilities of the administrator to reverse transactions in respect of assets located in that State will also be limited.
3.1 Divestment of the debtor

Under German and Dutch substantive law the debtor in principle loses the right to administer and dispose of assets that are included in the estate. These powers are conferred on the administrator appointed in the insolvency proceeding. In principle, acts of disposition by the debtor with respect to assets that are included in the estate are ineffective. However, some jurisdictions to a certain degree protect the bona fide acquirer, who was unaware and could not be aware of the opening of the insolvency proceeding. In a cross-border context this raises the question which law governs the divestment of the debtor and the possible protection of bona fide acquirers of (rights in) the debtor's assets.

The insolvent debtor only loses the power to dispose of assets to the extent that they are included in the estate. The debtor is not divested of the power to dispose of assets that are not included in the proceeding. In a purely domestic case, this generally does not raise difficulties as most assets will be included in the insolvency proceeding. In a cross-border context, the issue becomes more complicated. It is a matter of private international law whether the assets in State A are included in an insolvency proceeding that has been commenced in State B. Assuming that the law of State B will generally provide that all of the debtor's assets, wherever they are situated, are included in the insolvency proceeding, the extent to which the law of State A recognises the effects of the opening of the insolvency proceeding in State B in respect of assets situated within its jurisdiction will be decisive.

In this respect, present German law and the Insolvency Regulation share a common approach. If a foreign insolvency proceeding meets the conditions for recognition, assets situated in Germany or, in respect of the Insolvency Regulation, other Member States, are included in the proceeding. The lex concursus determines which assets are part of the estate and the treatment of assets that have been acquired by the debtor after the

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125 German and Dutch law differ to the extent that the bona fide acquirer of (rights in) moveables is protected. German law denies such protection to the acquirer. Dutch law under certain (restrictive) circumstances protects the acquirer in accordance with the rules of general private law. Cf Art 35 (3) Fw. See also Van Hees (1996)
opening of the insolvency proceeding. The result is that under present German law, the recognition of a foreign insolvency proceeding leads to the divestment of the debtor in respect of assets situated in Germany to the extent and under the conditions set forth by the law of the State where the proceeding has been opened. The Insolvency Regulation ensures that the divestment of the debtor under the lex concursus extends to all of the debtor's assets situated within the Member States of the European Community.

The UNCITRAL Model Law provides that, if a foreign proceeding has been recognised by the courts of the enacting State as a foreign main proceeding, upon that recognition the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. This approach is different from that of German private international law and the approach opted for in the Insolvency Regulation in that it is the law of the enacting State that, regardless of the provisions of the law of the State of opening of the proceedings, stipulates that the right to dispose of the assets of the debtor is suspended.

A similar effect is achieved, whichever of these approaches is followed. Dispositions by the debtor with respect to assets situated in State A, such as the creation of security rights, in principle are ineffective when the debtor has been subject to a main insolvency proceeding in State B that is recognised in State A.

By way of contrast, under present Dutch private international law, according to which a foreign insolvency proceeding has territorial effect, the divestment of a debtor resulting from the opening of an insolvency proceeding abroad (even in the State where the centre of his main interests is located), in principle does not extend to assets situated in the Netherlands. Therefore any acts of disposition by an insolvent debtor in respect of assets situated in the Netherlands in principle are valid. Consequently, a creditor acquiring (security) rights in the debtor's assets after the opening of an insolvency proceeding does not have to revert to provisions on the protection of bona fide acquirers.

126 Art. 4 IR; Art. 335 InsO.
Protection of the bona fide acquirer?

As a result of the recognition of the divestment of the debtor, acts of disposition in respect of his assets are in principle invalid or unenforceable against the estate. However, some legal systems under certain circumstances provide for protection of a party acquiring (rights in) assets of the debtor if he was unaware and could not have been aware that the transaction was entered into with an insolvent counter party.\(^{127}\) Can a bona fide acquirer invoke such rules on third party protection as applicable under the law governing the transfer of or creation of rights in assets of the debtor in case the foreign \textit{lex concursus} fundamentally denies such protection?\(^{128}\)

In my opinion the approach should be as follows. The question whether the debtor has the power to transfer or encumber assets or whether he has lost that power as a result of the opening of the insolvency proceeding, is a matter of insolvency law that is governed by the \textit{lex concursus}.\(^{129}\) Disposition of property, whether in the form of transfer (by way of security) of or the creation of security rights in assets, and the protection of bona fide acquirers against the transferor not having the power to dispose of such assets, is a matter of property law, however. Consequently, the issue of possible protection of bona fide acquirers with respect to a transfer or encumbrance of assets by the debtor after the opening of an insolvency proceeding, should be governed by the law applicable to the proprietary aspects of the transfer or encumbrance.\(^{130}\)

It is not clear whether this is also the approach that should be followed under the Insolvency Regulation. Accepting that the protection of bona fide acquirers is not a matter that is governed solely by the \textit{lex concursus} would be in line with the general tendency in the Insolvency Regulation to protect legitimate expectations and the certainty of transactions in

127 With respect to Dutch law, see Art. 35 (3) Fw io 3:86 and 3:238 BW.
128 The UNCITRAL Model Law does not address the sanctions that apply to acts (of disposition) performed in defiance of the suspension of the right to transfer or encumber assets of the debtor. These are to be determined by the law of the State where the assets are located and recognition of the foreign proceeding has been obtained. Cf. Guide to Enactment, Nr. 147.
129 Art. 4 IR; Art. 335 InsO.
Member States other than that in which the main proceeding has been opened. Accepting that the *lex concursus* exclusively governs the validity of acts of disposition over moveable assets and claims that have taken place after the opening of the insolvency proceeding, would in my opinion be difficult to reconcile with the attempts of the Insolvency Regulation to achieve a balance between recognition of the effects of a main proceeding and the protection of local interests.\(^{131}\) In this respect it is important to remember that the effects of the opening of a main insolvency proceeding in a Member State, such as the divestment of the debtor (and the corresponding conferral of powers on the administrator), are recognised in the other Member States by operation of law, i.e. without any formalities such as publication or registration.\(^{132}\) In the approach suggested above Art. 14 IR (dealing with the protection of acquirers of rights in immoveable assets, registered ships and aircraft and securities whose existence presupposes registration in a register laid down by law) could be regarded as a confirmation of a rule that would also apply pursuant to the normal conflict rules concerning the transfer of and creation of rights in such assets. In particular with respect to rights that have to be entered in a public register, doubts regarding the information in those registers should be avoided and the public should be able to rely on the information contained therein. Art. 14 IR serves to clarify this matter. Support for the view that the Insolvency Regulation follows the approach set out before might also be found in Art. 13 IR. According to its verbatim text, Art. 13 IR would appear to also provide protection in respect of acts of disposition that have taken place after the opening of the insolvency proceeding.

However, the Report Virgós/Schmit suggests that this is not the approach to be followed under the Insolvency Regulation, where it is observed that:

\(^{131}\) Cf. Report Virgós/Schmit, Nr. 141: "However, in order to protect trade and reliance on systems of publication of rights in rem, the protection of bona fide third parties should be no different in respect of proceedings in another Contracting State as compared to domestic proceedings."

\(^{132}\) See, with respect to (mandatory) publication and registration in other Member States of the decision opening the insolvency proceeding, Art. 21 and 22 IR. German and Dutch law require publication if the debtor has an establishment in that country (Art. 102, § 5 EGlinsO; Art. 14 (4) Fw). Publication of foreign insolvency proceedings that do not fall into the scope of the EC Insolvency Regulation is provided for in Art. 345 InsO; publication is mandatory if the debtor has an establishment in Germany.
"After the proceedings have been opened in a Contracting State, the creditor's reliance on the validity of the transaction under the national law applicable in non-insolvency situations is no longer justified. Thenceforth, all unauthorized disposals by the debtor are in principle in effect by virtue of the divestment of his powers to dispose of the assets and such effect is recognized in all Contracting States. Article 13 does not protect against such an effect of the insolvency proceedings and it is not applicable to disposals occurring after the opening of the insolvency proceedings."

Whether acts of disposition occurring after the opening of a main insolvency proceeding in a Member State in respect of assets situated in other Member States are valid and enforceable against the estate would therefore have to be assessed exclusively in accordance with the \textit{lex concursus}. In the approach suggested in the Report Virgós/Schmit, Art. 14 IR is to be regarded as a specific exception with respect to acts of disposition relating to the assets referred to.

3.2 Security rights in respect of future assets

Prior to the opening of the insolvency proceeding, the debtor may, by way of anticipation, have transferred or encumbered future assets, e.g. claims that will come into existence or will be obtained by the debtor in the future,\textsuperscript{134} or assets that will be manufactured or acquired. National substantive insolvency law will generally provide that a creditor will not acquire rights in such assets if acquired by the debtor after the opening of the insolvency proceeding.\textsuperscript{135} If an insolvency proceeding is opened in another State than the State where the assets concerned are (or will be) situated, the question arises whether and to what extent a foreign \textit{lex concursus} may affect the validity of rights created by way of anticipation in assets in another Member State.

It is submitted that, for the purpose of determining the applicable law, the question whether a transfer or encumbrance of future property prior to the opening of the insolvency proceeding, is enforceable against the estate, is

\textsuperscript{133} Report Virgós/Schmit, Nr. 138. See also Berends (1999), p. 146.
\textsuperscript{134} To be distinguished from existing contingent claims or claims that are not yet due and payable. A pre-insolvency disposition of such claims is generally valid and enforceable in insolvency, cf. Eickmann in HK-InsO, § 91, Nr. 12-14; Verhagen/Rongen (2000), chapters 3 and 4.
\textsuperscript{135} Art. 35 (2) \textit{Fw}; Art 91 \textit{InsO}.
a matter of insolvency law. It is a protective mechanism that, while in its operation closely connected to the system of property law, is aimed at preserving the value of the debtor's estate for the benefit of the general body of creditors. The risk of the debtor's insolvency is one that the creditor will have to reckon with and take into account when entering into a transaction. Starting from the assumption that the insolvency proceeding is recognised in the State where the assets concerned are located, the lex concursus will determine whether and to what extent the creditor validly acquires a security right in assets that have been acquired by the debtor or have come into existence after the opening of an insolvency proceeding.

Insolvency Regulation
As to the application of the Insolvency Regulation, the above in my view entails that it concerns an issue that falls within the ambit of Art. 4 IR.\(^{136}\) Whether for example a (security) assignment of or creation of a right of pledge in future claims leads to the acquisition by the creditor of rights in claims that arise after the opening of the insolvency proceeding, is governed by the lex concursus. Whether a claim is to be regarded as a present (contingent) or future claim at the time of the opening of the insolvency proceeding, in my opinion is not a matter of insolvency law. This issue, which concerns the nature of the assigned or charged claim, must be characterised as pertaining to the law of obligations and is governed by the law applicable to the (future) claim.\(^{137}\)

Art. 5 IR, pursuant to which the opening of a main insolvency proceeding in a Member State does not affect proprietary rights of creditors in assets situated in other Member States, does not apply. It does not offer protection from the effects of the opening of an insolvency proceeding with respect to security rights created by way of anticipation in future assets that will only come into existence or will be obtained by the debtor after the opening of the insolvency proceeding. Art. 5 IR only applies to proprietary rights that exist at the time of the opening of the insolvency proceeding.

137 Cf. Kortmann/Veder (WPNR 2000), p. 772. This would also seem to follow from HR 11 June 1993, NJ 1993, 776, comm. J.C. Schultsz (Caravan Centrum Zundert), where the Hoge Raad decided that the assignability of a future claim must be assessed in accordance with the law governing the claim. Differently: Van Galen/Van Apeldoorn (1998), Nr. 220 and 221.
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Whether an insolvency proceeding opened in another Member State precludes the acquisition of rights in respect of future assets pursuant to a pre-insolvency transaction is therefore a matter that pursuant to Art. 4 IR is governed by the *lex concursus*.

German law
The approach under German law with respect to the effects of a foreign main insolvency proceeding on assets situated in Germany is the same as set out with respect to the Insolvency Regulation. The protection that is granted to secured creditors under Art. 351 (1) *InsO* is also limited to rights in assets that were situated in Germany at the time of the opening of the insolvency proceeding and that existed at the time of the opening of the insolvency proceeding. In accordance with the main rule of Art. 335 *InsO*, the question whether a creditor validly acquires rights in assets that come into existence or are acquired by the debtor after the opening of the insolvency proceeding, is referred to the foreign *lex concursus*.

UNCITRAL Model Law
Under the system adopted in the UNCITRAL Model Law the effects of recognition of a foreign main proceeding will be determined by the laws of the recognising State. Therefore, the effects of recognition of a foreign main proceeding on the creation of rights in or transfer of future assets in the recognising State will be determined in accordance with the law of the recognising State. In line with Art. 20 Model Law, pursuant to which recognition of a foreign main proceeding automatically entails the suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor, such pre-insolvency transactions will generally not lead to the acquisition of rights in assets that have come into existence or have been obtained by the debtor after the insolvency proceeding has been given effect in the recognising State.

Dutch law
The restrictive approach adopted under present Dutch law with respect to the effects of recognition of foreign insolvency proceedings in respect of assets situated in the Netherlands, in my opinion entails that the foreign *lex concursus* (or Dutch insolvency law for that matter) cannot prevent the

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138 Cf Report Virgós/Schmit, Nr. 96
acquisition of rights in assets that come into existence or are obtained by the debtor in the Netherlands after the opening of an insolvency proceeding abroad. This is in line with the conclusion that under present Dutch law, the opening of an insolvency proceeding in another State does not lead to the divestment of the debtor in respect of assets situated in the Netherlands.

3.3 Reversal of security rights created prior to the opening of the insolvency proceeding

Juridical acts that the debtor has performed in the period (immediately) prior to the opening of an insolvency proceeding, including the transfer of and creation of security rights in assets, are generally subject to special scrutiny. Insolvency law under certain circumstances allows for the reversal of juridical acts that the debtor has performed to the detriment of the creditors.\textsuperscript{139} Such actions are intended to protect the integrity of the estate and to counter infringements of the \textit{paritas creditorum}. The result of such actions may for example be that (the proceeds of) assets are returned to the estate, to the extent that they would otherwise have been available for the satisfaction of creditors’ claims or to allow the administrator to realise assets unencumbered, e.g. following reversal of the creation of a security right immediately prior to the opening of the proceeding to secure a previously unsecured claim.

The conditions for and effects of the reversal of juridical acts differ widely among jurisdictions.\textsuperscript{140} In cross-border insolvency cases (and the structuring of transactions in view of the risk of insolvency) it is therefore of great importance to determine which law governs the reversal of such acts. In the following paragraphs the solutions adopted in the Insolvency Regulation, the UNCITRAL Model Law and German and Dutch customary private international law will be set forth.

\textsuperscript{139} Reversal is a term derived from the Principles of European Insolvency Law (§ 8).
\textsuperscript{140} Comparative surveys can be found in: Forner Delaygua (2000); Wood (1995), p. 72-136. See also the UNCITRAL Legislative Guide on Insolvency Law, part II, Nrs. 295-348.
3.3.1 Insolvency Regulation

Before the conflict rules incorporated in Art. 4 (2) (m) and 13 IR will be dealt with, two further issues require attention. First of all, the delimitation of the scope of main and territorial insolvency proceedings raises the issue of the division of powers between the administrators in the main and territorial proceedings to reverse juridical acts performed by the debtor. Secondly, the question arises whether the Insolvency Regulation contains (implicit) rules on the division of jurisdiction with respect to such matters.

3.3.1.1 Main and territorial proceedings

The Insolvency Regulation distinguishes between main and territorial insolvency proceedings. The main proceeding in principle includes all the debtor’s assets situated in Member States of the EU. The decision opening that proceeding in principle produces the same effects in other Member States as under the law of the State where the proceeding has been opened. The effects of territorial proceedings, on the other hand, are restricted to the assets situated in the State where the proceeding has been opened. The delimitation of the scope of these proceedings has consequences for the power of administrators to reverse juridical acts and for the applicable law pursuant to Art. 4 IR. An administrator appointed in a main proceeding or an administrator appointed in a territorial proceeding may exercise the powers to reverse juridical acts conferred on him by the relevant lex concursus only with respect to juridical acts that have prejudiced the rights of creditors with respect to 'his' estate.

The administrator appointed in the main proceeding in principle may exercise his powers to reverse any juridical act of the debtor, regardless of the location of the asset to which the juridical act relates. He is, however, restricted in the exercise of these powers by the opening of secondary proceedings.

141 Territorial proceedings can be either 'independent' proceedings (Art. 3 (4) IR) or secondary proceedings (Art. 27 IR).
142 With respect to secondary proceedings, see Art. 18 (2) IR, which stipulates that the administrator may 'bring any action to set aside which is in the interests of the creditors.'
The reversal of juridical acts relating to the estate of the secondary proceeding is in the hands of the administrator appointed in that secondary proceeding. In the exercise of these powers, the administrator appointed in a secondary proceeding is not restricted to juridical acts relating to assets that, at the time of the opening of the secondary proceeding, are situated in that Member State. His powers may extend to juridical acts in respect of assets that, at the time of the opening of the proceeding, are situated in other Member States. The scope of the powers of the administrator depends on whether, without the juridical act concerned, the assets would have been situated in that Member State and would thus have been included in the estate in the secondary proceeding. This also entails that the administrator appointed in the secondary proceeding does not have the power to reverse juridical acts in respect of assets that, as a result of that juridical act, have been moved to that Member State and would thus otherwise not have been part of the insolvency estate in the secondary proceeding.

To the extent that, with respect to the reversal of juridical acts, the insolvency law of the State where the secondary proceeding has been opened, attaches relevance to the time of the opening of the proceeding, e.g. for the determination of a 'période suspecte', or the application for the opening of the insolvency proceeding, in my opinion this reference must be understood to mean the (application for the) opening of the main insolvency proceeding. The effects of the opening of a main proceeding in respect of the debtor after all extend to all other Member States, in other

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143 Cf. Report Virgós/Schmit, Nr. 224. Assets are localised in accordance with Art. 2 (g) IR. This means, *inter alia*, that an administrator appointed in secondary proceedings in the Netherlands, can only avoid an assignment or charging of claims, if the debtor of the assigned/charged claim has its centre of main interests in the Netherlands. The same reasoning applies to the determination of the scope of the powers of the administrator in the main proceeding. If a main proceeding has been opened in the Netherlands, the administrator appointed in that proceeding may for example reverse a transfer of assets that as a result of that transfer have been moved (from the Netherlands) to Germany, even if a secondary proceeding has been opened in Germany.

144 In case of a secondary proceeding in the Netherlands, Art. 47 Fw must for example be understood not to refer to the moment of application for the opening of the secondary (Dutch) proceeding, but the application for the opening of the (foreign) main proceeding.
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words, as from the opening of a main proceeding the debtor is insolvent throughout Europe.

The assessment of the validity of juridical acts that have been performed by the debtor after the opening of the main proceeding, but prior to the opening of the secondary proceeding, is not a matter of reversal of pre-insolvency juridical acts. Such acts have been performed by the debtor after the opening of an insolvency proceeding and, insofar as they concern the disposal of assets, their validity is affected by the divestment of the debtor (subject to possible protection of the acquirer).

3.3.1.2 Jurisdiction

The determination of the jurisdiction of the courts of the Member States falls outside the scope of EC Regulation 44/2001. Pursuant to Art. 1 (2) (b), Regulation 44/2001 does not apply to "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". The similarly phrased exclusion of insolvency proceedings in the Brussels Convention has been interpreted by the European Court of Justice to also exclude actions the direct legal basis of which is insolvency law and which are closely linked with the insolvency proceedings.\(^{145}\) It is generally assumed that the type of action to which Art. 4 (2) (m) IR refers, falls within the ambit of this exclusion.\(^ {146}\)

It would have been an obvious choice to explicitly address the jurisdiction in respect of actions that are thus excluded from the scope of the Brussels Convention or EC Regulation 44/2001. Unfortunately, this has not been done, which has given rise to a debate as to whether the Insolvency Regulation provides for rules on jurisdiction for such matters.\(^ {147}\)

Art. 3 IR only explicitly addresses then issue of jurisdiction in respect of the decision to open the insolvency proceeding. Explicit rules on juris-

\(^{145}\) ECJ 22 February 1979, case 133/78 (Gourdain/Nadler), [1979] ECR p. 733.


\(^{147}\) See, inter alia, the literature referred to in Verhagen/Veder (Tvl 2002), p. 133 and 134.
diction in respect of disputes arising in the course of the proceeding have not been included. From the absence of such rules one might perhaps conclude that the jurisdiction in respect of matters other than the opening of the insolvency proceeding must be determined on the basis of the customary rules on international jurisdiction applicable in the various Member States. Or, is the division of jurisdiction implicitly provided for in the Insolvency Regulation and should one conclude on the basis of Art. 25 IR, read in connection with Art. 3 IR, that the court that has jurisdiction pursuant to Art. 3 IR also has (exclusive) jurisdiction in respect of actions that have their direct legal basis in insolvency law and are closely linked to the insolvency proceeding?

Support for the latter approach, which is followed by the Dutch Standing Government Committee on Private International Law in its report on the Insolvency Regulation, can be derived from the Preamble of the Regulation, which in Nr. 6 states that:

In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceeding and are closely connected with such proceedings (emphasis added)

With respect to this issue, the Report Virgós/Schmit states:

"Article 3 (1) gives the courts in the State of the opening of proceedings jurisdiction in relation to insolvency proceedings. However, the Convention contains no rule defining the limits of this jurisdiction. This is a fundamental question since it raises the issue of the relationship between the Convention on insolvency proceedings and the 1968 Brussels Convention and their respective scope. Certain Contracting States recognise a "vis attractiva concursus" in their national law, by virtue of which the Court which opens the insolvency proceedings has within its jurisdiction not only the actual insolvency proceedings but also all the actions arising from the insolvency. Although the projection of this principle in the international domain is controversial, the 1982 Community Draft Convention contained a provision in Article 15 which, according to the Lemontey Report, was inspired by the "vis attractiva" theory. This Article conferred on the courts of the State of the opening of insolvency proceedings jurisdiction over a wide series of actions resulting from the insolvency. Neither this precept nor this philosophy has been adopted in this

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148 Cf Lennarts (Tvl 2001), p 184
149 Staatscommissie voor het internationaal privaatrecht, Advies betreffende EU-Insolvenceverordening, 13 March 2002, § 3 2
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There is no provision in Article 3 of the Convention addressing this problem. However, the Convention’s silence on the matter is only partial. Article 25 thereof contains the delimitation criterion between the 1968 Brussels Convention and this Convention. According to this criterion, actions directly derived from insolvency and in close connection with the insolvency proceedings are excluded from the 1968 Brussels Convention. Logically, to avoid unjustifiable loopholes between the two Conventions, these actions are now subject to the Convention on insolvency proceedings and to its rules of jurisdiction.150

Strong arguments can be advanced in favour of the thesis that the matters excluded in Art. 1 (2) (b) of EC Regulation 44/2001 are covered by the Insolvency Regulation, also as regards jurisdiction.151 It is rightly observed in the Report Virgós/Schmit that with respect to these matters loopholes would otherwise exist between these two instruments. Furthermore, Art.25 IR, dealing with the recognition and enforcement of judgments in matters such as those referred to in Art. 4 (2) (m) IR, provides a strong indication that issues of jurisdiction other than those relating to the decision opening the proceeding, are covered by Art. 3 IR. A liberal system of recognition and enforcement of judgments as provided for in Art. 25 IR is only sensible and conceivable if in the same Regulation the determination of the jurisdiction of the courts of the Member States has also been regulated.

That the first paragraph of Art. 25 (1) IR also refers to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court, cannot support a different conclusion. The phrase printed in italics refers to another court than the insolvency court of the Member State where the insolvency proceeding has been opened and not the courts of another Member State.152 It serves to clarify that the Insolvency Regulation does not affect the rules dividing the jurisdiction of the courts within the Member States.

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150 Report Virgós/Schmit, Nr 77. The Report, however, is not unambiguous, where in Nr 224 it is observed that the administrator in a secondary proceeding "is also allowed to bring actions in other States for the voidness, voidability or unenforceability of detrimental legal acts (Art 4 (2) m and Art 13)"

151 Cf Verhagen/Veder (Tvl 2002), p 134

152 Cf Report Virgós/Schmit, Nrs 194 and 195. See also Fletcher (1999), p 288, Eidenmüller (IPRax 2001), p 7
Chapter III / Par. 3.3.1.3

The courts of the Member State where an insolvency proceeding has been opened, therefore also have jurisdiction in respect of actions deriving directly from the insolvency proceeding and which are closely linked to them, such as the actions referred to in Art. 4 (2) (m) IR.

3.3.1.3 Applicable law

In both main and territorial proceedings, the law governing the reversal of juridical acts that have prejudiced creditors is determined by the application of Art. 4 and 13 IR.

Pursuant to Art. 4 (2) (m) IR, the law of the Member State within the territory of which the insolvency proceeding has been opened, determines the rules relating to the voidness, voidability or unenforceability of juridical acts detrimental to all the creditors. The lex concursus determines the conditions for reversal of a legal act, the manner in which such reversal operates - e.g. by operation of law or requiring action from the administrator (either in or outside of court proceedings) - and the legal consequences of reversal. If under the lex concursus a juridical act is not subject to reversal, the administrator cannot challenge the act successfully even though it would be subject to reversal under the law governing the juridical act concerned. On the other hand, the fact that a juridical act is subject to reversal under the lex concursus does not ipso facto entail that it can indeed be successfully challenged by the administrator. Pursuant to Art. 13 IR:

Article 4 (2) (m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:
- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

153 Cf. Art. 28 IR.
154 Whether it is required that the juridical act concerned was detrimental to all creditors, is a question that is governed by the lex concursus, cf. Verhagen/Veder (Tvl 2002), p. 135.
156 If the act for example concerns a transfer or encumbrance of assets situated in a State where the debtor has an establishment, the opening of a secondary proceeding may be helpful if under the insolvency law of that State, unlike the law governing the main proceeding, the juridical act can be reversed.
Art. 13 IR thus provides the person who has benefited from a juridical act that is challenged by the administrator with a possible defence. The burden of proof is placed on him, however. He must first of all prove that the challenged act is governed by the law of another Member State than the State where the proceeding has been opened. And secondly, he must provide proof that, under the given circumstances, that law (including its insolvency law) does not allow any means of challenging the juridical act. The phrase 'in the relevant case' is used to express that in the determination of the vulnerability of the legal act under the lex causae all relevant circumstances of the case must be taken into consideration.\textsuperscript{157}

The requirement that the challenged act must be subject to reversal also under the lex causae has been introduced in order to

"uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against interference from a different 'lex concursus'."\textsuperscript{158}

This 'double test' has been incorporated notwithstanding that in legal writing it is often rejected.\textsuperscript{159} It unnecessarily restricts the possibilities of re-establishing the estate for the benefit of the creditors. The question really is whether creditors or third parties should not reckon with the possibility that a juridical act can be subject to reversal in accordance with the insolvency law of the State where the debtor has his centre of main interests. It is submitted that if the insolvency law of the State where the centre of the debtor's main interests is located, provides that the act concerned would be subject to reversal, there can be no legitimate expectation that the act would be valid only because the lex causae of that juridical act does not allow for its reversal. The opening of an insolvency proceeding in respect of one of the parties to a transaction in the State where that party's centre of main interests is located, is a foreseeable risk.

\textsuperscript{157} Cf. Report Virgós/Schmit, Nr. 137.
\textsuperscript{158} Report Virgós/Schmit, Nr. 138. Cf. Nr. 3.5.3 of the grounds of the decision of HR 24 October 1997, NJ 1999, 316, comm. Th. M. de Boer (Gustafsen q.q./Mosk), JOR 1997/146, comm. H.L.E. Verhagen; Nr. 12 of the advisory opinion of Advocate General Strikwerda to the aforementioned decision (Gustafsen q.q./Mosk).
that should be taken into account when entering into a transaction.\textsuperscript{160} Only with respect to the effects of insolvency proceedings that have been opened on the basis of the existence of an establishment or the mere presence of assets, could the protection of a legitimate expectation that the challenged act was and would remain valid, be an issue.\textsuperscript{161}

\textit{Art. 5 (4) and 7 (3) IR}

The system thus laid down in Art. 4 and 13 IR, also applies with respect to the reversal of security rights. With respect to proprietary (security) rights and reservation of ownership this has been explicitly laid down in Art. 5 (4), resp. Art. 7 (3) IR. Pursuant to these provisions, the fact that rights in assets located in another Member State than the State where the insolvency proceeding has been opened, are 'isolated' from the effects of the main insolvency proceeding "shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4 (2) (m)."

Even though not explicitly referred to in Art. 5 (4) and 7 (3) IR, the defence provided for in Art. 13 can also be invoked by the creditor that has obtained proprietary security within the meaning of Art. 5 IR and reservation of ownership referred to in Art. 7 IR.\textsuperscript{162} If, for example, a Spanish administrator invokes the voidness or avoidability of a right of pledge created in assets situated in the Netherlands, the pledgee cannot claim that, pursuant to Art. 5 (1) IR, the right of pledge is not affected by the opening of a main proceeding in Spain. This is clearly expressed by Art. 5 (4) IR. The pledgee could, however, on the basis of Art. 13 IR, claim that the right of pledge is valid and enforceable against the insolvent estate, if it could not be challenged under Dutch (insolvency) law.\textsuperscript{163}

\textsuperscript{160} This would in particular apply to intra group transactions. In a case brought before the court of Zwolle by a German administrator to avoid payments made by a GmbH to a related Dutch BV, the court only applied German insolvency law. In the opinion of the court there could be no question of protection of legitimate expectations (and therefore applicability of the \textit{lex causae}) where the parties to the challenged act were both part of a group of companies, in particular where these companies formed a 'personal union' through their common management. Such a decision, however justifiable, would be incompatible with Art. 13 IR. See Rb. Zwolle, 29 April 1998, JOR 1998/114, comm. Verhagen. Cf. Verhagen/Veder (Tvl 2002), p. 136.


\textsuperscript{162} Cf. Report Virgós/Schmit, Nr. 106.

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**Lex causae is not the law of a Member State**

Judged by its verbatim text, Art. 13 IR does not allow for the other party to successfully claim that the challenged act is not subject to reversal under the *lex causae* if that *lex causae* is the law of a non Member State. On its face, Art. 13 IR would in that case not lead to the inapplicability of Art. 4 IR, so that the reversal of the juridical act would be governed by the *lex concursus* exclusively.

The question is, however, whether this kind of a-contrario reasoning is justified. The need, if any, for the protection of the legitimate expectations of parties dealing with the debtor, that an act will not be subject to reversal under the *lex causae*, is no greater or lesser depending on whether the law of a Member State or the law of a non Member State applies to the challenged act.\[164\]

It is observed in the Report Virgós/Schmit that the wording of Art. 13 IR must be considered in the light of the scope of the Insolvency Regulation which only deals with the intra-Community effects of insolvency proceedings.\[165\] Situations where the *lex causae* is not the law of a Member State would fall outside the scope of the Regulation.\[166\] This means that the Insolvency Regulation does not uniformly *prescribe* that in case the challenged act is governed by the law of a non Member State, the other party should be allowed to invoke protection under the *lex causae*. But it does not state either that in such cases the vulnerability of the act only depends on the rules of the *lex concursus*. Whether, in analogy to Art. 13 IR, a 'veto' against reversal of the act can be derived from the law governing that act in the event that that law is the law of a non Member State, is a matter of customary private international law of the Member States. Consequently, the matter may be dealt with differently depending

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166 This may be true for transactions performed with a counterparty that is situated outside the EU or transactions in respect of assets situated outside the EU. The question is, however, whether a transaction performed with a counterparty situated in a Member State falls outside the scope of the Insolvency Regulation only as a result of the fact that that transaction is governed by the law of a non-Member State. The Report Virgós/Schmit suggests that this is the case. In any event, I see no reason why the protection provided by Art. 13 IR would not apply (by analogy) to such cases. Cf. Verhagen/Veder (Tvl 2002), p. 136.
on the rules of private international law of the forum. Each Member State is free to decide on the rules it deems most appropriate in cases falling outside the scope of the Insolvency Regulation.\textsuperscript{167}

Given the fact that present Dutch law, like the Insolvency Regulation, starts from the assumption that the protection of legitimate expectations requires a double test, it is most likely that in insolvency proceedings that fall within the ambit of the Insolvency Regulation Dutch courts will also apply this double test with respect to the reversal of juridical acts that are governed by the law of a non Member State.\textsuperscript{168} For German customary private international law, a rule similar to Art. 13 IR has been incorporated in Art. 339 InsO.

\textit{Lex causae: the law governing the proprietary aspects of the transfer or encumbrance}

Given the choice for a system whereby a juridical act can only be successfully challenged by the administrator if it is subject to reversal under the \textit{lex concursus} as well as the \textit{lex causae}, it is important to determine which is the relevant \textit{lex causae} in case of transfer or encumbrance of assets,\textsuperscript{169} and, furthermore, which provisions of the \textit{lex causae} must be applied.

The question arises whether in determining the \textit{lex causae} relevant for the application of Art. 13 IR with respect to the encumbrance or transfer of assets, attention must be given to the distinction that in some legal systems - on the level of substantive national law as well as on the level of private international law - is made between aspects pertaining to the law of obligations and aspects pertaining to the law of property. The law governing the contract in which the provision of security is agreed upon is not necessarily the same law as the law governing the proprietary aspects of the creation of the security right. A contract between a Dutch company and a Greek bank pursuant to which the bank will extend credit and as security for repayment of that credit the debtor company will provide a right of pledge in inventory and stock situated in the

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\textsuperscript{168} Cf HR 24 October 1997, NJ 1999, 316, comm. Th M. de Boer (Gustafsen q.q./Mosk), JOR 1997/146, comm. H.L.E. Verhagen

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Netherlands, may be governed by Greek law. The (creation of the) right of pledge in the inventory and stock, on the other hand, will be governed by Dutch law as lex rei sitae. Which is the lex causae against which the vulnerability of the creation of the right of pledge must be tested? Under Dutch law, in case there was an enforceable legal obligation for the debtor to provide security, the administrator can only challenge the creation of the right of pledge, if at the time of its creation the bank knew that the opening of an insolvency proceeding in respect of the debtor had been applied for, or there was collusion between the bank and the debtor company with the intent to obtain a preference over other creditors.\textsuperscript{170} The administrator will therefore have to challenge the juridical act from which the obligation to provide security emanates, i.e. the loan agreement, which, if reversed, under Dutch law automatically leads to reversal of the security provided on the basis of that agreement. If, however, Greek law, as the law governing the loan agreement, would provide that the agreement cannot be challenged but that the creation of the right of pledge itself is subject to reversal, the administrator would not be able to successfully challenge the bank's right of pledge, even in cases where under both legal systems the transaction would be subject to reversal.

It is submitted that the vulnerability of detrimental juridical acts by which the debtor has disposed of or encumbered assets is a matter that is most closely connected to the law that governs the proprietary aspects of the creation of the security right, irrespective of the fact that the technical legal cause of the reversal may lie in the reversal of the contractual obligation to provide security. For the application of Art. 13 IR, only the law governing the proprietary aspects of the transaction should be taken into consideration.\textsuperscript{171} That law should not only govern the vulnerability of the (proprietary) act of transfer of or creation of the security right in the asset, but also the vulnerability of the (contractual) obligation to provide the security, irrespective of the law applicable to that obligation. The law governing the conditions under which a security right has effect against the other creditors of the insolvent debtor should also govern the protection of such creditors where the provision of the security has prejudiced their rights of recourse in respect of the debtor's assets. To a certain extent,

\textsuperscript{170} Cf. Art. 47 Fu.

this approach eliminates the adverse effects of party-autonomy. Unlike the law governing the contractual obligations between parties, the law governing the proprietary aspects of the transfer or encumbrance of assets is generally not determined by a choice of the parties.\textsuperscript{172} Also, not in all legal systems a clear distinction is made between the juridical act that is challenged by the administrator: the contractual obligation or the (subsequent) proprietary act(s) by which the security right is created. Referring the issue of vulnerability exclusively to the law governing the proprietary aspects of the provision of security, makes this matter less important and the rule easier to apply.

**Lex causae: which rules apply?**
Pursuant to Art. 13 IR, a juridical act cannot be challenged, even though it would be subject to reversal under the *lex concursus*, if the law governing the act does not allow any means of challenging that act in the relevant case. The Report Virgós/Schmit states that by the term "by 'any means' it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act".\textsuperscript{173}

Some legal systems do not provide for specific rules on the reversal of juridical acts with respect to certain types of insolvency proceedings. In a suspension of payments proceeding under Dutch law, for example, no specific rules deviating from or in addition to the rules of general private law have been put in place. Individual creditors retain the power that they have under the general private law to challenge certain juridical acts performed by the debtor.\textsuperscript{174} In a bankruptcy proceeding, on the other hand, the power to challenge juridical acts that have prejudiced creditors is vested exclusively in the administrator and specific rules apply.\textsuperscript{175} An important extension of the reversibility of juridical acts in case of a bankruptcy proceeding as compared to the general law, is that juridical acts for which an enforceable legal obligation existed, under certain circumstances can also be challenged (e.g. payment of a due debt, provision of security

\textsuperscript{172} With the exception of the assignment or encumbrance of claims, for which, at least in Dutch private international law, the parties may choose the applicable law.
\textsuperscript{173} Cf. Report Virgós/Schmit, Nr. 137.
\textsuperscript{175} Art. 42 et seq. Fw.
pursuant to a contractual obligation), whereas outside of bankruptcy only juridical acts for which no enforceable legal obligation existed can be challenged (e.g. payment before the debt is due).

The differences that may exist between the types of proceeding and the applicable rules in the law governing a challenged juridical act, must be taken into account in the application of Art. 13 IR. If an Insolvenz­verfahren has for example been opened in Germany, the vulnerability of a juridical act governed by Dutch law may not simply be tested against the Dutch bankruptcy rules on reversal. A determination of the nature of the German proceeding in terms of Dutch law is required in order to find out whether Art. 42 et seq. Fw may be applied or not. Art. 13 IR in this respect requires an - often difficult - comparison of the nature of that German proceeding with the existing proceedings in the Netherlands. If the Insolvenzverfahren is the functional equivalent of a bankruptcy proceeding under Dutch law, i.e. a liquidation proceeding, then the vulnerability of a juridical act challenged by the German Insolvenzverwalter pursuant to the rules of German insolvency law, must be tested against the rules on reversal of juridical acts in bankruptcy. If, however, the German Insolvenz­verfahren must be regarded as the functional equivalent of the Dutch suspension of payments proceeding, i.e. a proceeding leading to reorganisation by way of a composition, then the vulnerability of the challenged act can only be tested against the rules of general private law. From this it follows, for example, that if a creditor, knowing that an insolvency proceeding has been applied for in the State where the centre of his debtor’s main interests is located, obtains a security right in assets situated in the Netherlands for an unsecured claim but pursuant to an enforceable contractual right against the debtor, the security right cannot be reversed on the basis of Art. 47 Fw if the foreign insolvency proceeding is the functional equivalent of the Dutch suspension of payments proceeding.

177 Similar problems do not arise in case German law is the lex causae of the challenged act. German insolvency law provides for a unitary proceeding with one set of rules for reversal of juridical acts that apply in reorganisation as well as liquidation proceedings.
Additional rules are required in the national laws of the Member States to cover cases that are not governed by the Insolvency Regulation. The rules set forth in Art. 4 and 13 IR only apply to the extent that the insolvency proceeding within the framework of which a juridical act is challenged falls within the ambit of the Regulation. Furthermore, even if the insolvency proceeding concerned is governed by the Insolvency Regulation, Art. 13 IR does not in all circumstances directly offer a defence to the party that has benefited from the challenged act. If the challenged act is governed by the law of a non Member State, the question whether the other party's legitimate expectations are protected on the same footing as they would be under Art. 13 IR, is a matter that is left to customary private international law of the Member States.

A rule that would complement the Insolvency Regulation with respect to this matter, is not provided for by the UNCITRAL Model Law. Art. 23 Model Law, dealing with actions to reverse acts detrimental to creditors, does not provide for a conflict rule on the reversal of juridical acts, nor does it create any substantive right for a foreign administrator regarding reversal of juridical acts. The purpose of this provision is merely to ensure that a foreign administrator is not prevented from initiating actions that would be available to an administrator in the enacting State by the sole fact that he has not been appointed in that State. Neither German nor Dutch law denies a foreign administrator standing to bring such actions.

178 Art. 23 (Actions to avoid acts detrimental to creditors)
(1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or a body administering a reorganisation or liquidation]

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

179 Cf. Guide to Enactment, Nr 166.
180 Following the fundamental recognition of foreign main proceedings and their effects also in respect of assets that are situated in Germany.
181 Cf. HR 24 October 1997, NJ 1999, 316, comm. Th.M. de Boer (Gustafsen q.q./Mosk), JOR 1997/146, comm. H L.E Verhagen. However, it may be argued that it follows from the territorial effect of foreign proceedings, that a foreign administrator can only challenge a legal act in respect of assets that, without the challenged act, would
The following paragraphs examine the conflict rules of German and Dutch private international law that operate next to and in addition to the rules of the Insolvency Regulation.

3.3.2.1 German law

Until March 2003, the 'essence' of German customary private international law regarding the cross-border aspects of insolvency proceedings was laid down in Art. 102 EGInsO. With respect to the reversal of juridical acts detrimental to the creditors, the second paragraph of this provision stipulated:

A juridical act that is governed by domestic law can only be reversed by a foreign administrator if the juridical act, also under domestic law, is either subject to reversal or cannot continue to remain in force on other grounds.\(^{181}\)

It clearly followed from this provision that a foreign administrator had standing to bring an action before a German court to reverse a juridical act, also if that act related to assets situated in Germany. To that extent, this provision was a confirmation of the fundamental recognition of the effects of foreign insolvency proceedings in Germany as expressed in Art. 102 (1) EGInsO. A foreign administrator could in principle exercise the powers conferred on him under the *lex concursus* relating to the reversal of security rights in assets situated in Germany.

As to the applicable law, Art. 102 (2) EGInsO also provided for the protection of the legitimate expectation that the challenged act would not be subject to reversal in accordance with its *lex causae*, provided that the *lex causae* was German law. Pursuant to Art. 102 (2) InsO, in principle the *lex concursus* governed the conditions for, the manner of and the consequences of the reversal of juridical acts that have prejudiced creditors. However, a challenged act could only be reversed if it would also be

181 Art. 102 (3) EGInsO (as it read prior to March 2003): Eine Rechtshandlung, für deren Wirkungen inländisches Recht massgeblich ist, kann vom ausländischen Insolvenzverwalter nur angefochten werden, wenn die Rechtshandlung auch nach inländischem Recht entweder angefochten werden kann oder aus anderen Gründen keinen Bestand hat.
subject to reversal under German law. Unlike Art. 13 IR, Art. 102 (2) EGInsO was based on a compulsory and ex officio cumulative application of the lex concursus and the lex causae.\textsuperscript{182} This double test only applied in respect of foreign insolvency proceedings and challenged legal acts that were governed by German law. In all other cases, the lex concursus applied exclusively.

The new Art. 339 InsO, enacted in March 2003, which applies with respect to insolvency proceedings opened in Germany as well as abroad, follows the Insolvency Regulation:

A juridical act can be reversed if the conditions for reversal of the insolvency law of the State where the insolvency proceeding is opened, have been fulfilled, unless the other party provides proof that the juridical act is governed by the law of another State and the juridical act is in no way subject to reversal under that law.\textsuperscript{183}

Cumulative application of the lex causae and the lex concursus is no longer provided for. In accordance with the Insolvency Regulation, the lex causae is given a veto, but only if invoked by the other party, who must prove that the challenged act is governed by the law of another State than the State where the proceeding has been opened and that that law does not allow for the reversal of the act in the given circumstances. In comparison to Art. 102 (3) EGInsO, the protection offered by the lex causae has been extended to apply in respect of all insolvency proceedings, both German and foreign, and in respect of any juridical act regardless of the law applicable to the act. The 'veto' of the lex causae has been incorporated in the Insolvenzordnung, even though the German government in principle rejected such a double test and endorsed the criticism advanced in legal writing in this respect. However, the German government did not want


\textsuperscript{183} Art. 339 InsO: Eine Rechtshandlung kann angefochten werden, wenn die Voraussetzungen der Insolvenzanfechtung nach dem Recht des Staates der Verfahrenseröffnung erfüllt sind, es sei denn der Anfechtungsgegner weist nach, dass für die Rechtshandlung das Recht eines anderen Staats massgeblich ist und die Rechtshandlung nach diesem Recht in keiner Weise angreifbar ist.
to accept a situation whereby the reversal of juridical acts within the European Community (in insolvency proceedings governed by the Insolvency Regulation) would be subject to stricter rules than in other cases.¹⁸⁴

3.3.2.2 Dutch law

Following the general approach to cross-border effects of insolvency proceedings under present Dutch private international law, it may be argued that the powers of a foreign administrator to bring an action in the Dutch courts to challenge a juridical act detrimental to the creditors, are more limited than those of an administrator appointed in a Dutch insolvency proceeding. Given the territorially limited effect of foreign insolvency proceedings under Dutch law, a foreign administrator only has the power to reverse juridical acts in respect of assets that would otherwise have been included in the foreign proceeding. Consequently, a foreign administrator would not have the power to challenge security rights created in assets situated in the Netherlands. A Dutch administrator could, on the other hand, given the universal effect of domestic insolvency proceedings under Dutch law, challenge any detrimental act, also concerning the transfer or encumbrance of assets situated outside of the Netherlands.¹⁸⁵

As to the applicable law, the approach of present Dutch private international law is similar to the solution that had been proposed for German law in Art. 382 RegElInsO.¹⁸⁶ The conditions for reversal, the manner in which the reversal is effected and the legal effects of reversal are in principle determined by application of the lex concursus. However, an action brought by an administrator to reverse a juridical act that is governed by a law different from the lex concursus will only be successful if and to the extent that the challenged act would also be subject to reversal pursuant to the law governing the act. This follows from a decision of the Hoge Raad

¹⁸⁴ Cf. BR-Drucksache 715/02, p. 22.
¹⁸⁵ Cf. HR 15 April 1955, NJ 1955, 542 (Kallir/Comfin). The international jurisdiction of the Dutch courts follows from Art. 6 (h) Rv, pursuant to which the court that has opened an insolvency proceeding also has international jurisdiction with respect to matters relating to the insolvency proceeding (‘zaken betreffende het faillissement’).
¹⁸⁶ Over the years, several conflict rules had been proposed in legal writing and were applied by the courts, e.g.: application of the lex concursus, application of the lex causae and cumulative application of the lex concursus and the lex causae. Cf. Verhagen/Veder (NIPR 2000), p. 3.
of 24 October 1997 in a case concerning an action brought by a German administrator to reverse payments made to a Dutch creditor:187

"In the opinion of the Hoge Raad present Dutch private international law refers the action brought in the Netherlands by a foreign administrator to reverse a juridical act that has prejudiced the creditors to the law governing the insolvency proceeding (the 'lex concursus'), which determines the existence and content of the powers of the administrator. However, the protection of legal certainty requires that due attention is given to the circumstance that a Dutch counterparty of the insolvent party - the party that has benefited from the challenged juridical act performed by the insolvent debtor - does not have to be prepared for an action aimed at reversal of the juridical act under foreign law, to the extent that the juridical act itself is not governed by that same law and such law imposes less strict requirements for the reversability of the juridical act than the law governing the juridical act itself (the 'lex causae'). In case the lex causae is different from the lex concursus, the success of the action brought by the administrator must therefore be assessed not only in accordance with the rules of the latter but also the rules of the lex causae, and will only lead to reversal of the juridical act if the requirements of the lex concursus as well as the lex causae have been met. Support for this approach can be found in international developments, in particular the Convention on insolvency proceedings that has been concluded on 23 November 1995 and has meanwhile been signed by the Netherlands."188

This conflict rule presented by the Hoge Raad, deviates from the approach adopted in the Insolvency Regulation in that the court must always

187 HR 24 October 1997, NJ 1999, 316, comm. Th M. de Boer (Gustafsen q.q./Mosk), JOR 1997/146, comm. H.L.E Verhagen. For an elaborate discussion of Dutch private international law with respect to the reversal of juridical acts detrimental to creditors (both in and outside of insolvency), see Verhagen/Veder (NIPR 2000).

188 "Naar het oordeel van de Hoge Raad moet naar huidig Nederlands internationaal privaatrecht het op het faillissement toepasselijke recht (de "lex concursus"), dat het bestaan en de inhoud van de bevoegdheden van de curator bepaalt, worden toegepast op een door een buitenlandse curator in Nederland ingestelde faillissements-Pauliana. De eis van rechtszekerheid brengt echter mee dat rekening behoort te worden gehouden met de omstandigheden dat de in Nederland gevestigde wederpartij van de gefailleerde - de partij met wie de gefailleerde de door de curator aangevochten rechtshandeling heeft verricht - niet bedacht behoeft te zijn op een door regels van vreemd recht beheerste vordering tot vernietiging van de betrokken rechtshandeling, voor zover deze rechtshandeling zelf niet door dat recht wordt beheerst en vorenbedoelde regels minder strenge eisen stellen aan toewijzing van een dergelijke vordering dan het recht dat de aangevochten rechtshandeling beheerst (de "lex causae"). De vordering dient dan ook, wanneer de lex causae een andere is dan de lex concursus, niet alleen aan deze laatste maar ook aan de lex causae te worden getoetst, zodat zij dan slechts toewijzbaar is indien zowel aan de eisen van de lex concursus als aan die van de lex causae is voldaan.".
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examine the vulnerability of the juridical act in accordance with its *lex causae*. It is not a mere defence that may be invoked by the party that has benefited from the challenged act. If new legislation were introduced in the Netherlands, in my opinion it would be advisable to follow the rules of the Insolvency Regulation more closely and to provide that the (ir)reversability of a juridical act under its *lex causae* need only be examined if invoked as a defence, placing the burden of proof on the person that has benefited from the challenged act.

The cumulative application of the *lex concursus* and the *lex causae* is not limited to situations where the challenged act is governed by Dutch law. The observations by the *Hoge Raad* regarding the protection of legal certainty and the resulting 'double test' is general in nature and contains no restrictions in this respect. Neither should any restriction be understood to follow from this decision with respect to the nationality or place of residence/domicile of the party that has benefited from the challenged act. The case decided by the *Hoge Raad* concerned a payment to a Dutch counterparty and in its decision the court consequently refers to a counterparty having its domicile or registered office in the Netherlands (*in Nederland gevestigde wederpartij*). This may in my opinion not to be interpreted as a limitation of the cases where the legitimate expectations based on the *lex causae* are protected. There is no convincing argument why a foreign counterparty, unlike a Dutch counterparty, should not be able to rely on the *lex causae*.

The decision of the *Hoge Raad* of 1997 referred to above, concerned an action brought by an administrator appointed in a foreign insolvency proceeding. It is submitted that the conflict rule formulated by the *Hoge Raad* equally applies in insolvency proceedings that have been opened in the Netherlands. The reference to the Convention on insolvency proceedings of 1995 suggests such a 'multilateral' conflict rule. A consistent application of the approach adopted by the *Hoge Raad* would entail that, in case of an insolvency proceeding opened in the Netherlands, the reversal by the Dutch administrator of a juridical act that is governed by foreign law is subject to the same restrictions as the reversal by a foreign administrator of a juridical act that is governed by Dutch law. If it is accepted, as the *Hoge Raad* has done, that the protection of legitimate expectations requires that a juridical act can only be reversed if it would also be subject to
reversal under the *lex causae*, there is no convincing argument why a party to a transaction should not be able to rely on such protection in case an action to reverse that transaction is brought by an administrator in an insolvency proceeding opened in the Netherlands. The decision of the *Hoge Raad* of 15 April 1955, concerning an action brought by the Dutch administrator appointed in the insolvency of "Comfin" to reverse a juridical act governed by foreign law, in my opinion cannot lead to a different conclusion. In that case, the Court of Appeal had assumed that Dutch law (as *lex concursus*) applied to the action brought by the administrator. The *Hoge Raad*, for reasons of procedure, could not deal with the issue of the applicable law and could not go into the argument advanced against the Court of Appeal's decision that "unlike the Court of Appeal had assumed, the reversal is not governed by Dutch law, but by the law governing the challenged act or the law of the place where the act was performed". The assumption that is expressed in this decision of 1955 - insolvency proceedings opened in the Netherlands in principle have universal effect - in my opinion provides no support for the exclusive application of Dutch law as *lex concursus*. The determination whether an insolvency proceeding has 'universal' or 'territorial' effect does not in itself impose a particular conflict rule. The scope of an insolvency proceeding (universal or territorial effect) is of importance to determine the scope of the powers conferred on the administrator by the *lex concursus*. The requirement of a double test for the reversal of detrimental juridical acts, is a mechanism to protect the legitimate expectations of parties to a transaction that under the law governing the transaction could not be reversed in insolvency.

4. **ENFORCEMENT OF SECURITY RIGHTS IN INSOLVENCY**

4.1 Introduction

The previous paragraphs examined a number of private international law issues regarding the validity and content of security rights. An outline was

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190 Until 1963, the *Hoge Raad* could only examine the interpretation and application of statutory provisions and not, as in this case, unwritten rules of private international law. The Advocate General Langemeijer argued in his advisory opinion to this decision, that in addition to the *lex concursus* also the law governing the challenged act ought to be taken into consideration (see NJ 1955, 542).
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given of the conflict rules regarding the creation, content and exercise of
security rights in German and Dutch private international law. Furthermore, the influence of the opening of an insolvency proceeding on the
validity of proprietary rights in a cross-border context has been discussed,
in particular from the perspective of the Insolvency Regulation. In this
paragraph it is assumed that a security right has been validly created and
cannot be challenged by the administrator.

This paragraph examines the effects of the opening of an insolvency
proceeding on security rights. On the level of national substantive law,
three primary issues can be discerned: (i) the power to realise encumbered
assets, (ii) the (conditions for) continued use of encumbered assets for the
benefit of the insolvency estate, in particular during a reorganisation, and
(iii) the distribution of the proceeds of realisation. With respect to these
issues, national laws show diverging approaches. Whereas in the
Netherlands, a secured creditor in principle retains the power to realise
encumbered assets and can only temporarily be prevented from exercising
his powers by way of a court ordered moratorium (afkoelingsperiode), in
German law this power is in principle conferred on the administrator. In
German law, the interest of the estate to either maintain such assets in
order to continue the debtor's business or to achieve the highest possible
proceeds for the estate as a whole, is taken into account from the outset in
the division of the powers between the secured creditor and the adminis­
trator. A corollary of the German approach is that the administrator is in
principle entitled to use such assets for the continuation of the debtor's
business, subject to protection of the (financial) interests of the secured
creditor. Under Dutch law, the administrator in this respect depends on
an agreement with the secured creditor. As to the distribution of the
proceeds fewer differences exist. The economic value of the security,
which is the key interest of the secured creditor, is protected. In both
German and Dutch law, a secured creditor will directly receive the pro­
cceeds of such realisation, i.e. without having to contribute to the general
costs and expenses of the insolvency proceeding. In that respect a secured
creditor is, unlike an unsecured (priviliged) creditor, not 'included in' the
insolvency proceeding. However, Dutch law provides for a higher ranking
of certain categories of privileged claims over certain secured claims.
How are these issues approached in a cross-border context? The starting point for the discussion will be the Insolvency Regulation.

4.2 Insolvency Regulation

4.2.1 Introduction

The position of secured (and revindicatory) creditors in cross-border insolvency proceedings that fall within the ambit of the Insolvency Regulation, is to an important extent covered by Art. 5 and 7 IR. These provisions contain important deviations from the general rule of the Insolvency Regulation that the judgment opening the main proceeding produces the same effects in any other Member State as under the *lex concursus*. In order to protect trade and credit and further legal certainty in the Member States, proprietary rights generally (Art. 5 IR) and rights based on reservation of ownership (Art. 7 IR) are not affected by the opening of a main proceeding if they relate to assets that, at the time the proceeding was opened, were situated in another Member State.¹⁹¹

Pursuant to Art. 5 (1) IR:

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.

A similar rule is incorporated in Art. 7 (1) IR with respect to reservation of ownership:

The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated in within the territory of a Member State other than the State of opening of proceedings.

*Assets situated in another Member State*

The special regime provided for in Art. 5 and 7 IR only applies in respect of rights in assets that were situated in another Member State at the time

¹⁹¹ Cf. Report Virgós/Schmit, Nr. 97 and 112
of the opening of the main proceeding. The localisation of assets follows the criteria of Art. 2 (g) IR. The relevant time at which the situs of an asset must be determined is the time at which the judgment opening the proceeding has become effective, whether it is a final judgment or not. Any alteration of the location of the asset after the opening of the proceeding does not affect the application of these provisions.

Art. 5 IR is based on the non-fraudulent location of assets. If it can be shown that assets have been transferred to another Member State with fraudulent intent, the idea is that such displacement must be disregarded and that the opening of the proceeding in that case does not leave rights in those assets unaffected. The existence of such fraudulent intent may not be easy to establish. Of course, in structuring a transaction the effects of Art. 5 and 7 IR can be taken into account. Using the benefits that they entail, does not constitute a fraudulent evasion of the applicability of the lex concursus.

Rights existing at the time of opening of the proceeding
In order to enjoy the benefits of Art. 5 and 7 IR, the security right must have existed at the time of the opening of the insolvency proceeding. All requirements for the right in question to be valid and enforceable against third parties, i.e. have proprietary effect, must have been fulfilled. Insofar as security rights are concerned that are created during the course of the proceeding by the administrator acting in his capacity, e.g. security rights granted to obtain funds necessary for the continued operation of the debtor's business during the proceeding, or deliveries under reservation of ownership pursuant to a contract concluded with the administrator, their position is governed by the lex concursus pursuant to the main rule of Art. 4 IR. In some cases (security) rights that have been established by

192 The position of rights in assets that are situated in a non-Member State is not governed by the Insolvency Regulation. The issue falls outside the scope of the Regulation and is consequently governed by the law designated in accordance with the provisions of customary private international law of the forum. Cf. Report Virgós/Schmit, Nr. 11 and 94

193 Art. 2 (f) IR.


195 It then follows from Art. 4 IR that their position is governed by the lex concursus

196 Cf. Report Virgós/Schmit, Nr. 96. Under Dutch law, the exercise of security rights in assets created to secure claims against the estate is not subject to the provisions
the debtor after the opening of the proceeding also 'profit' from the special regime of Art. 5 IR. This is the case with respect to rights that, even though created at a time when the debtor had lost the power to dispose of his assets, are nevertheless valid and enforceable against the estate because the acquiror of the right is protected against this effect of the opening of the proceeding.\textsuperscript{197}

Art. 5 IR does not offer protection from the effects of the opening of an insolvency proceeding with respect to security rights created by way of anticipation in future assets that come into existence or are obtained by the debtor after the opening of the insolvency proceeding. Whether an insolvency proceeding opened in another Member State precludes the acquisition of rights in respect of future assets pursuant to a pre-insolvency transaction, is a matter that is governed by the \textit{lex concursus} (Art. 4 IR).

4.2.2 Art. 5 IR

4.2.2.1 'Rights in rem' - interpretation

Art. 5 (1) IR contains an important exception to the general applicability of the \textit{lex concursus} to the effects of the opening of an insolvency proceeding on the position of involved parties. Before addressing the scope of protection granted by Art. 5 IR, it is important to establish which types of rights fall within the ambit of the provision.

The Insolvency Regulation does not define which types of rights can be regarded as 'rights in rem' within the meaning of Art. 5 IR.\textsuperscript{198} According to the Report Virgós/Schmit, a definition has been deliberately omitted in order to avoid the risk of creating a definition that, given the existing differences between the characterisation of rights under national law, would be either too broad or too restrictive.\textsuperscript{199} This raises the question

\textsuperscript{197} Cf. Report Virgós/Schmit, Nr. 96, where reference is made to Art. 14 IR.
\textsuperscript{198} With the exception of Art. 5 (3) IR: "The right, recorded in a public register and enforceable against third parties, under which, shall be considered a right in rem." Cf. Art. 7:3 BW and the \textit{Vormerking} under German law.
\textsuperscript{199} Cf. Report Virgós/Schmit, Nr. 100.
what the criteria are to determine whether a particular right enjoys the benefits of the special regime of Art. 5 IR.

As a matter of principle, an independent interpretation must be given to the provisions of the Insolvency Regulation. The concepts used in the Insolvency Regulation cannot be interpreted as a mere reference to the internal laws of the Member States. The Regulation is a self-contained legal structure, the concepts of which must retain the same meaning within all Member States. Therefore, following the guidelines developed by the European Court of Justice for the interpretation of e.g. the Brussels Convention of 1968, its terms must be interpreted by reference to the objectives and scheme of the Regulation as well as the general principles which stem from the corpus of the national legal systems of the Member States.

Lege causae interpretation

Apparently, this does not hold true for the interpretation of the concept of 'rights in rem', however. The Report Virgós/Schmit states that "the Convention itself may require the meaning of a concept to be found in the applicable national law, when it does not wish to interfere with the national laws or when the function of a specific provision of the Convention so requires."\(^{200}\) The concept of rights in rem as laid down in Art. 5 IR, is mentioned as one of the examples where the interpretation must be found in the applicable national law. According to the Report Virgós/Schmit, the interpretation of the concept of a right in rem in Art. 5 IR in principle requires a \emph{lege causae} characterisation.\(^{201}\) It is argued that this method of characterisation is required in view of the interest of each Member State to protect its market's trade by respecting rights in rem acquired over assets of the debtor located in that country under the law that is applicable before the opening of the insolvency proceeding.\(^{202}\)

According to this \emph{lege causae} method of characterisation, the first question is whether the right invoked can be characterised as a 'right in rem' under the national law that, according to the normal pre-insolvency conflict rules of the forum, governs such rights. That law will determine whether the

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200 Cf. Report Virgós/Schmit, Nr 43
201 Cf. Report Virgós/Schmit, Nr. 100.
202 Cf. Report Virgós/Schmit, Nr. 100
right in question is regarded as a proprietary right or rather as a personal right. If under the applicable national law a particular right is not characterised as a proprietary right, the creditor will not enjoy the benefits of Art. 5 IR.

However, this *lege causae* characterisation is not decisive in itself. The right that pursuant to the applicable national law is characterised as a proprietary right must also fall within the ambit of Art. 5 IR. Not all types of rights that under a given national law would be characterised as a proprietary right, are necessarily treated as such for purposes of Art. 5 IR. The rationale of Art. 5 IR imposes certain limitations with respect to the types of rights that national laws can identify as 'rights in rem'. The observation in the Report Virgós/Schmit that "an unreasonably wide interpretation of the national concept of a right in rem (...) would make the Convention meaningless" can only be agreed to as Art. 5 IR provides for a complete isolation of proprietary rights from the main insolvency proceeding.\(^{203}\) For example, rights simply reinforced by a right to claim preferential payment (e.g. privileges) should not enjoy the benefits of the special regime created by Art. 5 IR.\(^{204}\) Consequently, the characterisation by the applicable national law of a particular right as a right in rem is to a certain extent mitigated by Art. 5 IR. The criteria to be applied in this respect are not explicitly identified but are to be derived from the provision, in particular the enumeration of types of rights in Art. 5 (2) IR.\(^{205}\)

*Independent interpretation*

The *lege causae* method of characterisation as suggested in the Report Virgós/Schmit, might lead to comparable rights being treated differently under the Insolvency Regulation, depending on a possibly 'coincidental' difference of characterisation in the laws of the Member States. Furthermore, it is not always easy to establish whether under a given national law a particular right is characterised as a proprietary right. Some systems may not clearly make the distinction between personal rights and

\(^{203}\) Report Virgós/Schmit, Nr. 101.

\(^{204}\) Report Virgós/Schmit, Nr. 102.

\(^{205}\) The addition in Art. 5 (1) IR that the right in question may relate to 'both specific assets and collections of indefinite assets as a whole which change from time to time', clarifies that rights such as the English floating charge can also be regarded as rights in rem for the purpose of Art. 5 IR. Cf. Report Virgós/Schmit, Nr. 104.
proprietary rights on which Art. 5 IR is based. In systems that do make this distinction, certain rights that - for purposes of national law - are characterised as personal rights, nevertheless may have a number of important characteristics of proprietary rights. The boundaries between property law and the law of obligations are not as clear cut as the Report Virgós/Schmit seems to suggest. The possible uncertainty that in national laws may arise with respect to the characterisation of rights as proprietary rights, should not affect the scope of application of Art. 5 IR.

I would argue that it is consistent with the nature and aim of the Insolvency Regulation to start from an independent interpretation of the concept of 'rights in rem' as referred to in Art. 5 IR. An independent interpretation would ensure that the rights and obligations which derive from Art. 5 IR of the Insolvency Regulation are equal and uniform in all Member States. The question is whether a particular right, for purposes of the Insolvency Regulation, is considered as an in rem right that enjoys the benefits of the special regime of Art. 5 IR. Accepting that the concept of 'rights in rem' in Art. 5 IR should not be interpreted as a mere reference to the internal laws of the Member States concerned, would also be in conformity with decisions of the European Court of Justice regarding (similar) terms in the 1968 Brussels Jurisdiction and Enforcement Convention.

The concept of 'rights in rem' in Art. 16 (1) (a) of the 1968 Brussels Convention, is also an independent term that should not be interpreted as a mere reference to the internal law of one or more of the Member States. In my opinion, Art. 5 IR should be interpreted by reference to the objectives and scheme of the Regulation as well as the general principles which stem from the corpus of the national legal systems of the Member States.

An independent interpretation of rights in rem is facilitated by the references that the second paragraph contains of the types of rights Art. 5 IR refers to. Art. 5 (2) IR provides a list of types of rights that national laws generally tend to regard as proprietary rights and that are therefore 'in particular' referred to in Art. 5 (1) IR. Firstly, Art. 5 IR refers to rights that confer on the holder the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from

those assets. Secondly, it refers to the exclusive right to have a claim met (demand payment). Furthermore, it includes the right to demand the asset(s) concerned from, or to require restitution by, anyone having possession or use of it contrary to the wishes of the party so entitled, and a right in rem to the beneficial use of the asset(s) concerned. The enumeration of types of rights that the second paragraph of Art. 5 IR identifies as rights that are 'in particular' meant to be included in the concept of 'rights in rem', is based on a number of important characteristics that such rights have in common. Firstly, such rights have a direct and immediate relationship with the asset they relate to and not so much depend on the 'personal' relationship between the holder of the right and another person. Secondly they are characterised by their absolute and exclusive nature. In order to fall within the category of 'rights in rem' of Art. 5 IR, the right concerned must have effect *erga omnes*. This means *inter alia* that the right in question can be invoked against posterior acquirers of (rights in) the asset, subject of course to protection of bona fide acquirers. This effect *erga omnes* also means that the right in question can resist individual enforcement by other creditors and that in collective enforcement proceedings, such as insolvency proceedings, the holder of the right is entitled to either separate the asset from the estate or to claim (a portion of) the realisation proceeds directly, i.e. not within the framework of the normal claim satisfaction process in insolvency proceedings. As stated in the Report Virgós/Schmit, rights simply reinforced by a right to claim preferential payment, as is the case with (general and specific) privileges, cannot be characterised as 'in rem rights' and consequently do not enjoy the benefits of the special regime created of Art. 5 IR.

208 Art. 5 (2) (a) in particular refers to: 'pand of hypotheek', 'Pfandrecht oder Hypothek', 'gage ou hypothèque', 'lien or mortgage'.

209 Art 5 (2) (b) in particular refers to the exclusive right to demand payment on the basis of: 'een pandrecht op de vordering of door de cessie van die vordering tot zekerheid', 'eines Pfandrechts an einer Forderung oder (...) einer Sicherheitsabtretung dieser Forderung', 'la mise en gage ou de la cession de cette créance à titre de garantie', 'a lien in respect of the claim or by assignment of the claim by way of a guarantee'.

210 E.g. the in rem right of usufruct (Art. 3:201 BW) as opposed to a mere contractual right to the use of an asset.

211 Cf. Report Virgós/Schmit, Nr. 103.

212 Cf. Report Virgós/Schmit, Nr 102. It has been argued that a number of specific privileges under Belgian law should be regarded as rights in rem within the meaning of Art. 5 IR, see Dirix/Sagaert (TBH 2001), Nr 21.
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4.2.2.2 assets belonging to the debtor

Art. 5 IR refers to "rights in rem of creditors or third parties in respect of (...) assets (...) belonging to the debtor". The question has been raised how the phrase 'belonging to' should be interpreted. Does Art. 5 IR only refer to rights in assets of which the debtor is the legal owner or does it also refer to assets of which the debtor has 'economic ownership' and which (for purposes of insolvency law) are attributed to his estate?

The relevance of the issue lies in the applicability of Art. 5 IR with respect to forms of security ownership where under the applicable national property law the debtor is not the legal owner of the asset but has an economic interest in the asset, as may be the case with for example financial lease contracts and transfer of ownership by way of security. Issues related to ownership of assets, such as the characterisation of ownership as 'full' or 'security' ownership are not matters of insolvency law and therefore fall outside the scope of the conflict rules of the Insolvency Regulation. The law governing such matters is designated by the conflict rules of property law. The extent to which in insolvency such rights of ownership can be exercised - either by revindicatiion or realisation of the asset - is, however an issue of insolvency law that falls within the ambit of the Insolvency Regulation.

A broad interpretation must be given to Art. 5 IR in this respect. It must be understood to include any proprietary right in assets, regardless of the question whether under the lex concursus they form part of the debtor's estate or not. The reference to 'assignment of the claim by way of security' and the incorporation of a rule similar to Art. 5 (1) IR in Art. 7 (1) IR with respect to rights based on a reservation of ownership, indicates that the special regime created in Art. 5 IR for proprietary rights with respect to assets 'belonging to' the debtor, is not limited to situations where the debtor is the legal owner of the asset. Ownership that serves as security for credit extended by the creditor, is also protected under Art. 5

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213 Staatscommissie voor het internationaal privaatrecht, Advies betreffende EU-Insolventieverordening, 13 March 2002, Nr. 4.
214 'cessie van die vordering tot zekerheid', 'Sicherheitsabtretung dieser Forderung'.
IR.\textsuperscript{215} It is consistent with the policy considerations underlying Art. 5 IR to interpret the provision in this sense.

Art. 5 IR furthermore raises the question how the position of creditors and third parties with a right of ownership in assets that are in the control of the debtor must be determined when the right of ownership does not serve as security (e.g. assets held by the debtor pursuant to a contract of operational lease). Such assets do not form part of the estate. In most legal systems such assets can generally be revindicated from the debtor or the administrator without restriction. In some legal systems, the right to revindicate such assets in case of insolvency may be infringed upon, however. The moratorium (afkoelingsperiode) that is provided for in Dutch insolvency law (Art. 63a Fw), for example, in principle also prevents actions aimed at the revindication of third party owned assets. The right of ownership of a third party in this respect may be affected by the insolvency proceeding. The right to revindicate assets may also be affected by infringements provided for in the insolvency law on the right to terminate the contract pursuant to which the debtor had the right to possession of the asset.

It is submitted that restrictions on the revindication of third party owned assets in the debtor's insolvency also do not affect assets that at the time of the opening of the proceeding are situated in another Member State. If security rights in assets belonging to the debtor are not affected by the opening of the proceeding, this\textit{ a fortiori} applies to third parties' rights of ownership in assets that are in the possession of the debtor.

4.2.2.3 Scope of protection

Art. 5 IR provides for an exception to the principle embodied in the Insolvency Regulation that a main proceeding opened in one of the Member States produces the same effects in other Member States as under the law of the State where the proceeding has been opened. In general terms it is observed in the Preamble to the Regulation that in a number of cases an exception to this general rule is necessary to protect legitimate expectations and the certainty of transactions in the Member States.\textsuperscript{216} The Pre-

\\[\text{\textsuperscript{215} Cf. Dirix/Sagaert (Tvl 2002), p 111}\]
\[\text{\textsuperscript{216} Preamble, Nr. 24.}\]

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amble continues to explain why an exception to this principle is required with respect to proprietary rights:

There is a particular 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. 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. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.\(^\text{217}\)

The underlying policy considerations of Art. 5 IR are to protect the trade in other Member States where assets of the debtor are located, in particular by protecting the legal certainty with respect to rights in such assets. Art. 5 IR encompasses proprietary rights generally, but is of particular importance with respect to security rights. The importance of security rights for the proper functioning of the markets of the Member States requires that they are not more affected by the opening of a main insolvency proceeding in another Member State than they would be by the opening of an insolvency proceeding in the Member State where the asset concerned is situated.\(^\text{218}\)

As indicated in the Report Virgós/Schmit, there would have been several options available to achieve this aim. The alternative solutions that have been considered during the negotiations have not been set forth in the Report. However, they are mentioned by Virgós, who briefly sets out the alternatives that were discussed.\(^\text{219}\) The working group considered the following options: (i) cumulative application of the \textit{lex concursus} and the \textit{lex rei sitae}, (ii) application of the insolvency law of the Member State where the asset concerned is situated,\(^\text{220}\) (iii) application of the insolvency

\(^{217}\) Preamble, Nr. 25.
\(^{218}\) Cf. Report Virgós/Schmit, Nr. 97.
law of the situs, but only with a 'veto' function in respect of infringements on the exercise of proprietary rights under the *lex concursus* that are not compatible with the protection of proprietary rights accorded by the law of the situs,\(^{221}\) (iv) a distinction between the law applicable to the realisation of assets subject to security rights (to be governed by the *lex concursus*) on the one hand, and the (priority rules regarding the) distribution of the proceeds (to be governed by the *lex rei sitae*), on the other hand.\(^{222}\)

"shall not affect"

There has been debate in legal writing with respect to the precise meaning of the phrase "shall not affect" and its consequences for the scope of protection offered to secured creditors by Art. 5 IR. In particular Flessner has argued that Art. 5 does not prescribe the Member State where the asset concerned is situated to also shield security rights in the asset from restrictions of its own insolvency law.\(^{223}\) Prevailing opinion, however, is that Art. 5 IR should be regarded as a rule of uniform substantive law and that it results in a complete isolation of security rights from the effects of a main insolvency proceeding opened in another Member State.\(^{224}\) Neither does the *lex concursus* influence the position of the secured creditor, nor does the insolvency law of the State where the asset concerned is located affect the position of the secured creditor in the debtor's insolvency. That this is indeed the purport of Art. 5 follows from the passage of the Regulation's Preamble cited above and from several sections of the Report Virgós/Schmit, where it is observed that

\(^{221}\) Cf. Drobnig (1992), p. 177.

\(^{222}\) Cf. Von Wilmowsky (EWS 1997), p. 298 et seq. (issues of ranking to be referred to the "Schutzstatut", i.e. the law of the State where the creditors are situated whose interests are protected by priority of their claims over the claims of the secured creditor with respect to the distribution of the realisation proceeds); Liersch (2002), p. 18/19 (issues of ranking to be referred to the "Schutzstatut", however, only insofar as compatible with the law of the situs of the asset).

\(^{223}\) Cf. Flessner (1998), p. 282. He argues that Member States are free to determine the effects of a main proceeding opened in another Member State with respect to security rights in assets situated within its territory. For reasons of simplicity, he rejects the solution whereby the law of the situs is used as a control mechanism with respect to the effects on security rights under the *lex concursus*. In his opinion only the law of the situs should be decisive. See also Kortmann/Veder (WPNR 2000), p. 770.

"this provision excludes from the effects of the proceedings rights in rem of third parties and creditors in respect of assets (...) situated within the territory of another Contracting State"

that

"the holder of the right in rem retains all his rights in respect of the assets in question"

and

"may exercise the right to separate the security from the estate and, where necessary, to realize the asset individually to satisfy the claim"

whereas

"the liquidator, even if he is in possession of the asset, cannot take any decision on that asset which might affect the right in rem created on it, without the consent of the holder". 225

Rights in rem referred to in Art. 5 IR can only be affected by the debtor's insolvency by opening a secondary proceeding in the Member State where the asset in question is situated. 226 Such secondary proceedings are conducted in accordance with the relevant national law and any restrictions on, or specific insolvency rules with respect to, the position of secured creditors will apply in relation to the creditor with proprietary security over an asset situated within the territory of that Member State.

The underlying policy considerations vs. the chosen solution

The solution opted for in Art. 5 IR goes much further than required by the underlying policy considerations, i.e. the protection of creditors and third parties against infringements of in rem rights by the lex concursus that exceed those provided by the lex causae of their rights. The opening of insolvency proceedings shall not affect rights in rem in respect of assets located in other Member States (at all). Nevertheless, the "simplicity of the formula" was preferred by the majority of the States negotiating the Convention on insolvency proceedings of 1995 (and taken over by the

225 Report Virgós/Schmit, Nrs. 94 and 95.
226 See also Preamble, Nr. 25.
Council in Regulation 1346/2000) "in order to facilitate the administration of the estate". That the chosen formula is simple, can be agreed to. That it would contribute to an efficient and effective administration of the estate of the main proceeding in my opinion is doubtful. Nor does it necessarily further the chances of a successful reorganisation of the debtor or his business, given the isolation of security rights from the effects of the insolvency proceeding. Furthermore, Art. 5 IR leads to an unjustifiable bonus for secured creditors in cross-border insolvencies. It does not do justice to the balance that in national insolvency laws is sought between the interests of the secured creditor on the one hand, and the interests of the estate (the unsecured creditors) on the other.

Art. 5 IR in fact entails that secured creditors in a cross-border insolvency situation acquire a position that they have under no existing insolvency law. No restrictions on the right of individual enforcement of the security that are derived from insolvency law, can be opposed to them. The (exclusive) right that German law confers on the administrator to realise assets subject to non-possessory security rights, cannot be invoked in respect of assets situated in other Member States. Neither will a foreign administrator be able to invoke this rule of German insolvency law with respect to assets situated in Germany. A moratorium under Dutch law will not prevent secured creditors in other Member States from individually enforcing their security. A foreign administrator cannot, in accordance with Dutch insolvency law, set a reasonable time limit for the secured creditor to enforce his security against assets situated in the Netherlands. Similarly, provisions of the lex concursus (or the lex rei sitae) that limit or exclude a secured creditor's contractual right to terminate the contract pursuant to which the debtor had possession of an asset, e.g. financial lease contracts, cannot be invoked with respect to assets situated

228 See, however, Flessner (1997), p. 285/286, who argues that the approach is only seemingly simple. He proposes a rule that in his opinion is much easier to apply: determination of the effects of a main proceeding on proprietary rights by the law of the situs.
229 If Dutch law, as lex rei sitae, were to apply, the consequence would be that, if that period passes without the security being enforced, the right to realise the asset passes to the administrator, the secured creditor loses his right to separate the proceeds of realisation from the estate and will be dealt with as a preferential insolvency creditor (Art. 58 (1) Fw), who will receive payment with priority, but within the framework of the insolvency proceeding.
in other Member States at the time of opening of the proceeding.\textsuperscript{230} Neither will secured creditors be affected by provisions that appear in many insolvency laws allowing the administrator to use encumbered assets during the proceeding (or the period during which the secured creditor is barred from enforcing his rights).

In essence, Art. 5 IR contains a rule that many jurisdictions for their national law have started to abolish. The right of secured creditors to individually enforce their security in insolvency is increasingly being subject to restrictions, while respecting the secured creditor's right to immediate satisfaction of the secured claim from the proceeds of realisation of the encumbered assets. The restrictions imposed on secured creditors with respect to their right to individually enforce their security, and the related conferral on the administrator of the right to use the assets in question - disregarding any contractual arrangements to the contrary -, are aimed at furthering (existing) possibilities for reorganisation of the debtor or his business. In a cross-border context Art. 5 IR therefore entails a considerable step backwards from these developments in national laws.

\textit{Options for the administrator}

The administrator in the main insolvency proceeding who wishes to prevent a secured creditor from individually enforcing his security with respect to assets situated in other Member States (and thus possibly frustrating possibilities of an envisaged sale of the debtor's business as a going concern or possibilities of reorganisation), has several options.

The administrator can try to reach an agreement with the secured creditor providing him with the power to sell the asset concerned. A sale of (part of) the debtor's business as a going concern will usually generate higher proceeds than a piecemeal liquidation by the secured creditor himself. In jurisdictions where the right to realise encumbered assets is vested in the secured creditor, agreements pursuant to which the secured creditor releases his security, the administrator realises the assets and turns the realisation proceeds over to the secured creditor - in accordance with the ranking of his claim and subject to a deduction for expenses and salary of the administrator -, are generally allowed.

\textsuperscript{230} See e.g. Art. 105 and 112 \textit{InsO}. 
A suggestion that is advanced in the Report Virgós/Schmit is for the administrator to bring the encumbered asset(s) into the estate free of security rights, by satisfying the claims of the secured creditor.\textsuperscript{231} This, however, will only be a serious option if the value of the assets is higher than the amount of the claims that the right in the asset(s) secures.

The administrator in the main proceeding can also apply for the opening of a secondary proceeding in the Member State where the asset is situated, provided that the debtor has an establishment there. By doing so, the secured creditor will be confronted with the restrictions that the insolvency law of that State provides for (where necessary, through the intervention of the administrator appointed in the secondary proceeding).

\textit{Ranking of the secured claim}

A further effect of the rule laid down in Art. 5 IR is that it leads to an intervention, to the possible advantage of the secured creditor (never to his disadvantage!), in the distribution of the proceeds of realisation of encumbered assets. A secured creditor can possibly claim a higher percentage of the realisation proceeds than would have accrued to him if the realisation proceeds had been distributed in a concursus under the law of the situs. Pursuant to Art. 5 IR, the opening of a main insolvency proceeding shall not affect proprietary security rights. The position of creditors with (privileged but) unsecured insolvency claims, on the other hand, are governed by the \textit{lex concursus}. Generally, insolvency claims can only be enforced under the conditions of the insolvency proceeding, i.e. by submitting them in the insolvency proceeding. Pursuant to Art. 4 (2) (i) IR, the ranking of such claims is determined by the \textit{lex concursus}. Claims that under the law of the situs are privileged and would confer priority over claims secured by a security right in the asset concerned, may not receive the same treatment when settled through a foreign main proceeding. They may not enjoy any preference under the \textit{lex concursus}, which will be the case for most public law claims and claims submitted in a main proceeding opened in a Member State where privileges have (to a large extent) been abolished, such as Germany. Alternatively, if, under the \textit{lex concursus}, such claims are to be satisfied from the realisation proceeds in priority to claims secured by a security right in that asset, that rule of

\textsuperscript{231} Cf. Report Virgós/Schmit, Nr. 99.
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ranking and distribution cannot be opposed to the secured creditor. Submitting the ranking of a secured claim in the distribution of the realisation proceeds to the *lex concursus* would be irreconcilable with Art. 5 IR. The ranking of claims under the *lex concursus* cannot influence the distribution of realisation proceeds of assets subject to security rights that are situated in other Member States.

An example may serve to illustrate this matter. A (Dutch) bank that finances the operations of the Dutch branch of a German GmbH with the centre of main interests in Germany has a non-possessory right of pledge in the machinery located at the branch as security. The opening of an insolvency proceeding in respect of the GmbH in Germany, the main proceeding under Art. 3 (1) IR, does not prevent the bank from enforcing its right of pledge by realising the machines situated at the premises of the Dutch branch, even though under German law the right to realise assets subject to a non-possessory security right is conferred on the administrator.

Under Dutch law, pre-insolvency tax claims of the Dutch tax authorities would have priority over the bank’s claim secured by a non-possessory right of pledge in the machines.\(^{232}\) In case of realisation of the machines by the bank in an insolvency proceeding opened in the Netherlands, the administrator would attend to the interests of the higher ranking claims of the tax authorities on the basis of Art. 57 (3) *Fw*. The bank would have to turn over to the administrator the amount of the realisation proceeds accruing to the tax authorities. The tax authorities would not receive direct satisfaction of their claims out of these realisation proceeds, however. They receive payment within the framework of the proceeding, in accordance with the ranking of their claim. The preferential position of the tax authorities does not meet the requirements of a right in rem within the meaning of Art. 5 IR. Consequently, in case of the opening of a main insolvency proceeding in respect of the GmbH in Germany, the Dutch tax authorities are bound by the insolvency process and are in principle referred to submission of their claims in the German proceeding (Art. 4 and 39 IR). The tax authorities cannot enforce their claim directly against the machines situated in the Netherlands. The administrator appointed in

the German proceeding cannot claim a percentage of the realisation proceeds from the bank, leaving aside the question whether he has that power at all under German law as *lex concursus*. The pre-insolvency tax claims of the Dutch authorities (as those of the German tax authorities) do not enjoy a preferential status in the German proceeding. However, also if the claim of the Dutch tax authorities in the German main proceeding would have priority over the claim of the pledgee and the administrator, as under Dutch law, could, acting in the interest of higher ranking but unsecured creditors, claim part of the proceeds, this priority rule of German (insolvency) law cannot be opposed to the bank as pledgee. Accepting that the ranking of claims under German (insolvency) law could in any way interfere with the secured creditor's rights to the realisation proceeds, would mean that the security right would, contrary to the wording of Art. 5 IR, be affected by the opening of the insolvency proceeding.

The conclusion is that a higher percentage of the realisation proceeds will accrue to the pledgee than under the law of the situs, unless the creditor whose claim under Dutch law would have priority over the secured creditor's claim, requests the opening of a secondary proceeding in the Netherlands. The proceeds of the assets in the secondary proceeding will then be distributed in accordance with Dutch rules of priority. The enforceability of the ranking of claims under Dutch law is therefore linked to the existence of an establishment in the Netherlands. Only the existence of an establishment in the Netherlands allows for a mitigation of the improvement of the position of the pledgee. When considering other unsecured claims that under Dutch law have priority over a claim secured by a non-possessory right of pledge, such as claims for certain costs incurred in the preservation of assets and claims for which the creditor can invoke a right of retention, the interests of these local creditors will not necessarily be protected under the Insolvency Regulation. Such claims may exist with respect to and give the creditor priority over assets situated in the Netherlands also in the absence of an establishment of the debtor in the Netherlands. However, in that case the opening of a secondary pro-

233 Cf. Art. 28 IR.
234 Unless the right of retention were to be considered as a proprietary right within the meaning of Art. 5 IR.
235 See also Veder (2001), p. 104.
ceeding in order to render the relevant Dutch rules on ranking of claims applicable, is not possible under the Insolvency Regulation.

4.2.2.4 Contracts relating to the use of moveable assets

What is the effect of a main insolvency proceeding on contracts pursuant to which the debtor has the possession and use of moveable assets owned by a third party (e.g. a contract of operational lease) that are situated in another Member State? Is the other party (e.g. the lessor) entitled to terminate the contract or invoke an automatic termination clause and revindicate the asset?

Outside insolvency, the law governing the contract determines under which conditions a contract may be terminated. The power to terminate a contract (or invoke an automatic termination clause) allowed under general private law may, however, be subject to restrictions in case of insolvency. Insolvency law may prohibit the termination of contracts for breach of pre-insolvency obligations and may stipulate that a clause to the effect that the contract is automatically terminated upon insolvency cannot be opposed to the administrator.236

It could be argued that, pursuant to Art. 4 (2) (e) IR, which stipulates that the lex concursus governs the effects of insolvency proceedings on current contracts to which the debtor is a party, restrictions provided for by the lex concursus also apply with respect to the termination of contracts pursuant to which the debtor has the possession and use of assets situated in other Member States. In this line of reasoning the other party cannot terminate the contract as a result of the applicable provisions of the lex concursus and, consequently, would be prevented from reclaiming the asset concerned.

This outcome is difficult to reconcile with the (policy considerations underlying) Art. 5 and 7 IR, however. Could one not argue that the same policy considerations underlying Art. 5 and 7 IR, i.e. the protection of the markets in the Member States, apply with respect to contracts pursuant to which the debtor has the possession and use of assets and that infringe-

236 Cf. Art. 112 InsO.
ments on the possibility to revindicate such assets through intervention of insolvency law in contractual agreements cannot be opposed if the assets concerned are situated in another Member State? If security rights in assets belonging to the debtor that are situated in another Member State can be enforced without restriction, it would in my opinion be inconsistent if the same would not apply with respect to the revindication of assets that are not part of the estate. Art. 7 IR also points in this direction. Rights of the seller based on reservation of ownership with respect to assets situated in another Member State are not affected by the opening of a main insolvency proceeding. In my opinion, this exempts such rights not only from for example a court ordered moratorium under Dutch law, but also from provisions of the lex concursus that (temporarily) restrict the seller's right to terminate the contract of sale.\textsuperscript{237} It would be consistent if the same would apply with respect to rights in assets that the debtor did not anticipate to acquire the ownership of, but which he only could use under the terms of the contract.

4.2.2.5 Art. 5 IR in relation to Art. 25 IR

Art. 5 (1) IR stipulates that security rights shall not be affected by the opening of the main insolvency proceeding. Restrictions or modifications with respect to the enforcement of security rights are not always a direct result of or stipulated in the decision opening the proceeding itself. They may result from separate (posterior) court orders, e.g. the court ordered moratorium in bankruptcy or suspension of payments proceedings under Dutch law.\textsuperscript{238} It is also possible that they are ordered by a court as preservation measures after an application for but prior to the actual opening of the insolvency proceeding.

This raises the issue of the relationship between Art. 5 IR and Art. 25 IR, pursuant to which:

\begin{quote}
Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art. 16 and which concern the course and closure of insolvency proceedings (...) shall also be recognised with no further formalities. (...) The first subparagraph shall also apply to judgments relating to
\end{quote}

\textsuperscript{237} Cf. Art. 103 InsO.
\textsuperscript{238} Art. 63a and 241a Fw.

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Such judgments shall be enforced in accordance with the relevant provisions of Council Regulation (EC) 44/2001.\textsuperscript{239}

On its face, Art 5 IR only exempts security rights in assets situated in other Member States from the effects of the opening of a main proceeding. It has been argued that it follows from this seemingly restrictive formulation of Art 5(1) IR in combination with Art 25 IR that judgments relating to preservation measures taken after the request for the opening of the proceeding - including preservation measures taken after the actual opening of the proceeding\textsuperscript{240} - can affect (the enforcement of) security rights in assets situated in other Member States.\textsuperscript{241} The verbatim text of Art 5 IR suggests that it would only exempt security rights from the effects directly attached to the opening of the insolvency proceeding itself, but not from other measures ordered by the court prior to or during the course of the insolvency proceeding.

If this interpretation of Art 5 IR were accepted, a moratorium ordered in the course of a Dutch bankruptcy proceeding (Art 63a (1) Fw), would, for the duration of the moratorium, also prevent secured creditors from enforcing their security rights in assets situated in other Member States. Similarly, preservation measures ordered by a German court after the request for but prior to the opening of a main insolvency proceeding in Germany could also affect the enforcement of security rights in assets situated elsewhere within the EC.

I do not concur with this interpretation of the Insolvency Regulation. As set out above, Art 5 IR contains a 'hard and fast rule', the purport of which is to exempt security rights in assets situated in other Member States from the effects of the main proceeding. That proprietary rights, pursuant to

\begin{footnotesize}
\bibitem{240} Report Virgos/Schmutz, Nr 198
\bibitem{241} Cf Wessels (NB 2002), p 120, Berends (1999), p 133/134 See also, with respect to the similar provision in the proposals for the reform of German international insolvency law (Art 390 (1) RegElInsO), Flessner (IPRax 1997), p 8
\end{footnotesize}
Art. 5 IR, shall not be affected by the opening of an insolvency proceeding, may not be understood to entail that secured creditors are only protected from effects that directly emanate from the decision opening the proceeding. Art. 5 IR only refers to the opening of the proceeding, it does not refer to the decision opening the proceeding. Rather, Art. 5 IR, in view of the underlying policy considerations, must be understood to protect secured creditors from the effects of the main proceeding as such, whether (by operation of law) attached to the opening of the proceeding itself or resulting from a subsequent court decision.

If the law of the situs allows security rights to be affected in some way, the opening of a secondary proceeding in that Member State is the appropriate way to trigger such effects. This also applies to possible infringements on the rights of secured creditors emanating from preservation measures ordered by a court (that has jurisdiction under Art. 3 (1) IR) prior to the actual opening of the proceeding. It would be inconsistent (with the policy considerations underlying Art. 5 IR) if as a result of such preservation measures the rights of secured creditors could be affected, whereas similar effects emanating by operation of law from the subsequent opening of the proceeding could not be opposed to the secured creditor. In this respect it is observed that, where the court of a Member State that has jurisdiction pursuant to Art. 3 (1) IR appoints a temporary administrator, Art. 38 IR confers on that temporary administrator the power to request any measures to secure and preserve any of the debtor's assets situated in another Member State that are provided for in the law of that State for the period between the request for the opening of an insolvency proceeding and the judgment opening the proceeding. Art. 38 IR concerns the preparatory stage to the opening of a secondary proceeding, as a result of which a temporary administrator may only request such measures in Member States where the debtor has an establishment and the measures may only be those provided for in respect of liquidation proceedings.\(^\text{242}\)

\(^{242}\) Cf. Report Virgós/Schmit, Nr. 262. A temporary administrator does not have the power to request the opening of a secondary proceeding (cf. Art. 29 IR).
4.2.2.6 Stay of liquidation ex Art. 33 IR

Pursuant to Art. 33 IR, the administrator in the main proceeding may request the courts of a Member State where a secondary proceeding has been opened to order a stay of the process of liquidation (in whole or in part). Such a request may only be rejected if it is manifestly of no interest to the creditors in the main proceeding. The stay can be ordered for a period of up to three months and may be continued or renewed for similar periods. In ordering a stay of the liquidation process in the secondary proceeding the court may require the administrator in the main proceeding to take any suitable measure to guarantee the interests of the creditors in the secondary proceeding and of individual classes of creditors.

The objective of Art. 33 IR is to protect the interests of the creditors in the main proceeding against possible detrimental effects that may ensue from the liquidation of assets in the secondary proceeding. The preservation of the estate in the secondary proceeding and maintaining the economic value of the business carried out in the establishment, may for example be required for an intended sale of (part of) the debtor's business or in view of a composition or reorganisation plan proposed in the main proceeding.

This stay of the process of liquidation under Art. 33 IR may affect the realisation of encumbered assets to the extent that such realisation is in the hands of the administrator in the secondary proceeding. The realisation of encumbered assets in a secondary insolvency proceeding opened in Germany may therefore, to the extent that the administrator has the power to realise such assets, be subject to a stay under Art. 33 IR. In view of protecting the interests of secured creditors in a German secondary proceeding, Art. 102 § 10 EGInsO, in accordance with Art. 169 InsO, provides that during the stay interest must be paid on the secured claim. The secured creditor in this respect has a claim against the estate. The amount of interest due is primarily determined by the contract between the secured creditor and the debtor. In the absence of contractual provisions to this effect, the statutory interest rate applies. If and to the extent that it is not certain whether the obligation to pay interest can be met from (the

243 Cf. Preamble, Nr. 20; Report Virgós/Schmit, Nr. 243.
244 Cf. Stephan in HK-InsO, Art. 102 EGInsO, Nr. 6.
The stay of liquidation pursuant to Art. 33 IR does not affect the realisation of encumbered assets by secured creditors. If the law of the Member State where a secondary proceeding has been opened allows secured creditors to enforce their security right 'as if there were no insolvency', such right remains unaffected by Art. 33 IR. The administrator in the main proceeding may, of course, suggest the administrator in the secondary proceeding to apply for a stay or moratorium as provided for by the lex concursus of the secondary proceeding.

4.2.2.7 Security rights and reorganisation plans / compositions

Flessner has argued that Art. 5 IR only seemingly provides for a simple solution to the issue of security rights in insolvency, because it cannot prevent - and was not intended to prevent - that the restructuring of the debtor's liabilities in the main proceeding, e.g. through a composition or reorganisation plan, influences the rights of secured creditors. He argues that for example a reduction of claims on the basis of a composition in the main proceeding must be recognised in other Member States, also to the extent that it affects secured claims. Art. 5 IR would only exempt the security right from the effects of a main proceeding, not also the secured claim.

I have difficulty with this reasoning. Pursuant to Art. 4 (2) (j) and (k) IR, the conditions for and effects of closure of an insolvency proceeding, in particular by composition, and the rights of creditors after closure of the proceeding, are to be determined in accordance with the lex concursus. Art. 25 (1) IR stipulates that compositions approved by the court that has opened the main proceeding, are recognised without further formalities. In principle, a reduction of claims laid down in a court approved composition will therefore also affect the rights of creditors in respect of assets
situated in other Member States. However, Art. 5 IR entails a general exemption of security rights from the effects of the main insolvency proceeding. Any measure taken in the main proceeding that affects the position of security rights, including measures that indirectly affect security rights through a forced reduction of secured claims, in my opinion cannot affect security rights in assets situated in other Member States. A reduction of liabilities enforced on creditors bound by the plan, in my opinion cannot lead to an infringement on the right to enforce secured claims to their full extent against the encumbered assets. Art. 25 (1) IR, for reasons set out before, cannot lead to a different conclusion. However, in my opinion an exception must be made with respect to secured creditors that have given their consent to a reduction of secured claims by way of a composition or reorganisation plan in the main proceeding. A secured creditor that has voluntarily acceded to the plan is bound by this reduction also with respect to the enforcement of security rights in assets situated in other Member States.

4.2.2.8 Surplus

Art. 5 IR provides that a main insolvency proceeding shall not affect proprietary rights in assets situated in other Member States. Art. 5 IR does not, however, exclude the assets encumbered with a security right from the insolvency proceeding.

It is observed in the Report Virgós/Schmit that this is important if the value of the encumbered asset is greater than the value of the secured claim. In that case the creditor will be obliged to surrender to the estate any surplus of the proceeds of sale. This seemingly simple and convincing observation merits some further elaboration.

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248 A restriction of creditors' rights arising from a composition in a secondary proceeding, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by the secondary proceeding without the consent of all creditors having an interest (Art. 34 (2) IR).

249 A comparison might be drawn with Art. 17 (2) IR which, with respect to secondary proceedings, provides that any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Whether a surplus remains depends on the claims that the secured creditor may recover from the realisation proceeds under the applicable law. A security right may secure all (existing and future) claims of the creditor concerned, in which case it is not likely that a surplus will remain. But even if a security right only serves to secure claims of the creditor to a value that does not exceed the value of the encumbered asset, it does not necessarily mean that the proceeds in excess of the value of the secured claim must be turned over to the administrator as a surplus. It may be that under the law applicable to the security right in question, the secured creditor is not obliged to turn over a 'surplus' to the debtor (or, in case of insolvency, the administrator) but is entitled to also use the proceeds to satisfy other claims he has against the debtor (e.g. by way of set-off). It may be argued that it follows from the ratio of Art. 5 IR that such expectations of the secured creditor concerning the security he has obtained are also protected under Art. 5 IR and cannot be infringed upon by provisions of the lex concursus, stipulating that proceeds exceeding the value of the secured claim must be turned over to the estate. Protection of the trade and credit system in other Member States also requires that such expectations upon which decisions to extend credit are based are honoured and cannot be infringed upon by the lex concursus. To the extent that the use of realisation proceeds of encumbered assets for the satisfaction of other claims of the (secured) creditor is approached as a matter of set-off, application of Art. 6 IR may lead to a similar conclusion. If the lex concursus denies the creditor the right to invoke set-off in this respect, the creditor may nevertheless demand set-off of his claims against this claim (of the insolvent debtor, but invoked by the administrator) for the turn over of a 'surplus', where set-off is permitted by the law applicable to the insolvent debtor's claim. It may be argued that a claim for the surrender of a 'surplus' after realisation of the encumbered asset is not governed by the lex concursus, but by the law governing the security right in question, which determines what the rights and obligations are of the secured creditor following realisation of the encumbered asset.

251 Cf. Art. 3:231 BW.
4.2.2.9 Partial satisfaction of secured claims

The proceeds of realisation of encumbered assets may be insufficient to satisfy the secured claim. In that case, the question whether the secured creditor can obtain dividends in the distribution of the realisation proceeds of the debtor's assets on the same basis as unsecured creditors, is governed by the *lex concursus*. Pursuant to Art. 4 (2) (i) IR the rights of creditors who have obtained partial satisfaction after the opening of an insolvency proceeding by virtue of a right in rem are governed by the law of the Member State where the insolvency proceeding has been opened. This applies to the main proceeding and, where appropriate, the secondary proceedings.\(^{252}\) For each insolvency proceeding it must be determined whether and to what extent a (formerly) secured creditor can share in the proceeds of realisation of the assets to be distributed in that proceeding.\(^{253}\)

4.2.3 *Art. 7 IR*

Art. 7 IR regulates the effects of the opening of an insolvency proceeding on transactions involving a sale under reservation of ownership with respect to assets that, at the time of the opening of the proceeding, are situated in another Member State. Art. 7 IR distinguishes between the insolvency of the purchaser, dealt with in Art. 7 (1) IR, and the insolvency of the seller, addressed in Art. 7 (2) IR.

4.2.3.1 Insolvency of the purchaser

Art. 7 (1) IR provides for a rule that is identical to the rule laid down in Art. 5 IR with respect to proprietary rights generally.\(^{254}\) This is justified as both provisions deal with essentially the same issues. The seller reserves ownership in assets sold as security for payment of claims against the purchaser. The question is whether in case insolvency proceedings are opened against the purchaser, the unpaid seller can exercise the

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252 Art. 28 IR.
253 See e.g. Art. 132 Fw.
254 The remarks concerning the operation of Art. 5 IR therefore apply mutatis mutandis to Art. 7 (1) IR. They will not be repeated here. See also Report Virgós/Schmit, Nr. 112.
proprietary rights that he has in the asset pursuant to a reservation of ownership clause. Art. 7 (1) IR in this respect provides

The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

What the seller's rights based on a reservation of ownership are, must be determined in accordance with the law applicable pursuant to the conflict rules of the forum. This is a matter of property law. The symmetry of Art. 5 and 7 (1) IR in this respect avoids difficult problems of characterisation. Whereas the right to revindicate assets the purchase price of which has not been (fully) paid, is recognised in the (insolvency) laws of most Member States, other forms of security ownership resulting from a reservation of ownership are dealt with in various ways. I would argue that the right of the seller in assets produced with materials sold and delivered under reservation of ownership, e.g. pursuant to a *verlängelter Eigentumsvorbehalt* under German law, falls within the ambit of Art. 5 IR rather than Art. 7 (1) IR. The seller's right of ownership based on the reservation of ownership has extinguished and the right of ownership obtained in the manufactured goods, pursuant to the rules on specification, are regarded as a form of security ownership similar to a right of pledge.

As a consequence of the isolation of these rights from the effects of the insolvency proceeding, the rights of the seller are not influenced by specific provisions of insolvency law regarding reservation of ownership of the law of the Member State where the proceeding has been opened or where the assets are situated. Therefore, if under the general private law of the *situs* the seller has the power to revindicate the asset, he can do so in case a main insolvency proceeding has been opened against the purchaser in another Member State, even if under the insolvency law of the *situs* (or the Member State where the proceeding has been opened), he

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255 In intra-community sales, the proprietary right of the seller to revindicate an asset, the purchase price of which has not been paid, must be recognised by all Member States (see Art. 4 (1) of Directive 2000/35/EC).

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would only be entitled to (enforce his claim against the asset and) separate the proceeds of realisation of the asset from the estate.\textsuperscript{256}

4.2.3.2 Insolvency of the seller

With respect to the insolvency of the seller, the Insolvency Regulation introduces a rule of uniform substantive law. Art. 7 (2) IR stipulates that

The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

If the purchaser continues to make the payments agreed in the contract of sale, he shall acquire the ownership of the asset once the condition for passing of ownership - full payment of all claims that the seller sought to secure by the reservation of ownership - has been fulfilled. This provision clarifies that the divestment of the seller resulting from the opening of an insolvency proceeding against him does not prevent the acquisition of ownership by the purchaser. This rule of uniform substantive law only applies in case the asset sold, at the moment the insolvency proceeding is opened, is situated in another Member State than the Member State where the insolvency proceeding is opened.

4.3 UNCITRAL Model Law

Under the UNCITRAL Model Law the effects of recognition of a foreign proceeding are determined by the laws of the recognising State. With respect to recognition of a foreign main proceeding the rules to be incorporated in national law on the basis of the Model law, provide that such recognition automatically produces a number of effects in the recognising State.\textsuperscript{257} Pursuant to Art. 20 (1) of the Model Law, \textit{inter alia}, commencement or continuation of individual actions or individual proceedings

\begin{itemize}
  \item \textsuperscript{256} As would be the case under German law if the seller invokes rights under the reservation of ownership in respect of other claims unpaid claims than the claim for payment of the purchase price.
  \item \textsuperscript{257} This also applies to 'interim proceedings' (see Art. 2 (a) of the Model Law), e.g. the \textit{Eröffnungverfahren} under German law.
\end{itemize}
concerning the debtor's assets, rights and obligations or liabilities and execution against the debtor's assets is stayed. In principle, this 'stay' also extends to the enforcement of claims by secured creditors. However, Art. 20 (2) of the Model Law provides that the scope and the modification or termination of this stay can be made subject to a number of exceptions. The scope of the effects automatically attached to the recognition of a foreign main proceeding depends on the exceptions and limitations that exist in the law of the recognising State. These exceptions may include the (unrestricted) enforcement of claims by secured creditors.\textsuperscript{258} Furthermore, the influence of the recognition of a foreign main proceeding on the rights of secured creditors in respect of assets situated in the recognising State depends on measures taken by the court on the basis of the discretionary power to order appropriate relief under Art. 21 Model Law.\textsuperscript{259}

4.4 Customary private international law

4.4.1 German law

The effect of insolvency proceedings on proprietary (security) rights in respect of assets situated in other States, has been the subject of considerable debate in Germany. Generally, the approach as adopted in Art. 5 IR has been severely criticised and rejected. The following alternatives have been presented: (i) application of the \textit{lex concursus}\textsuperscript{260}, (ii) application of the \textit{lex rei sitae}\textsuperscript{261} (iii) cumulative application of the \textit{lex concursus} and the \textit{lex rei sitae}, in the sense that the effects attached to an insolvency proceeding under the \textit{lex concursus} cannot go beyond the effects provided for by the insolvency law of the situs and (iv) a distinction between the law applicable to the realisation of assets subject to security rights (to be governed by the \textit{lex concursus}) on the one hand, and the (priority rules regarding the) distribution of the proceeds (to be governed by the relevant "Schutzstatut" or the \textit{lex rei sitae}), on the other hand.\textsuperscript{262}

\begin{itemize}
\item \textsuperscript{258} Cf. Guide to Enactment, Nr. 148.
\item \textsuperscript{259} For example a moratorium ex Art. 63a \textit{Fw}.
\item \textsuperscript{260} Cf. Favoccia (1991).
\item \textsuperscript{261} Cf. Flessner (1997); Flessner (1998).
\item \textsuperscript{262} Cf. Von Wilmowsky (EWS 1997), p. 298 et seq.; Von Wilmowsky (WM 1997), p. 1461 et seq. (issues of ranking to be referred to the "Schutzstatut", i.e. the law of the State
\end{itemize}
The suggested alternatives have not been followed by the German government in the legislation it has introduced with respect to the cross-border effects of insolvency proceedings that fall outside the scope of the Insolvency Regulation. In many respects these proposals closely follow the Insolvency Regulation, also concerning the position of proprietary rights of creditors or third parties with respect to assets situated in Germany at the time of the opening of a main insolvency proceeding abroad. An insolvency proceeding opened in another State is recognised in Germany under the conditions set forth in Art. 343 InsO. Pursuant to Art. 335 InsO the insolvency proceeding and its effects are in principle governed by the law of the State where the proceeding has been opened. Like the Insolvency Regulation, the proposal provides for a number of exceptions to the general applicability of the *lex concursus*. An important exception is incorporated in Art. 351 InsO with respect to proprietary rights, aimed at the protection of the legal certainty in the trade and finance practice in Germany.

Art. 351 InsO ("Dingliche Rechte"), insofar as relevant here, stipulates:

(1) The right of a third party in an asset of the estate, which at the time of the opening of the foreign proceeding was situated in Germany, and that pursuant to domestic law entitles the holder of the right to revindication or separate satisfaction, shall not be affected by the opening of the foreign insolvency proceeding.263

The proposal, which is in accordance with the draft presented by the government in 1992 for a section on international insolvency law,264 thus provides for a solution similar to the rule laid down in Art. 5 (and 7) IR. Proprietary rights in respect of assets situated in Germany which under German law would provide the creditor or third party with a right to

where the creditors are situated whose interests are protected by priority of their claims over the claims of the secured creditor with respect to the distribution of the realisation proceeds); Liersch (NZI 2002), p. 18/19 (issues of ranking to be referred to the "Schutzstatut", however, only insofar as compatible with the law of the situs of the asset).

263 Art. 351 (1) InsO: Das Recht eines Dritten an einem Gegenstand der Insolvenzmasse, der zur Zeit der Eröffnung des ausländischen Insolvenzverfahrens im Inland belegen war, und das nach inländischem Recht einen Anspruch auf Aussonderung oder auf abgesonderte Befriedigung gewährt, wird von der Eröffnung des ausländischen Insolvenzverfahrens nich berührt.

revindicate the asset (Aussonderung) or a right to separate satisfaction from the proceeds of realisation of the asset (abgesonderte Befriedigung), are not affected by the *lex concursus*.

Neither are they affected by the effects that under German insolvency law would be attached to the opening of an insolvency proceeding, such as the conferral on the administrator of the right to realise encumbered assets in the possession of the debtor. The foreign administrator can apply for the opening of a secondary (territorial) proceeding in Germany and in that way achieve that security rights are affected and dealt with in accordance with German (insolvency) law.

The possibility of opening a secondary insolvency proceeding in Germany is, unlike under Art. 3 (2) IR, not limited to the situation where the debtor has an establishment in Germany. A secondary insolvency proceeding may also be opened if the debtor only has assets in Germany. Therefore, in practice, Art. 351 InsO will only protect security rights from infringements that go beyond German law.

Unlike Art. 5 IR, which provides for a rule for any main insolvency proceeding opened in a Member State of the Community, Art. 351 InsO is limited to a regulation of the effects of a foreign insolvency proceeding on proprietary rights in respect of assets situated in Germany. Given the express limitation of the scope of this exception to the general applicability of the *lex concursus* pursuant to Art. 345 InsO, this suggests that in case of a 'main' insolvency proceeding opened in Germany, German law as *lex concursus* will govern the effects of the debtor's insolvency on creditors' or third parties' proprietary rights in respect of assets situated in another State. This view is supported by the Explanatory Report to the proposals submitted in 1992, on which the present Art. 351 InsO is based, where it is observed that:

265 BR-Drucksache 715/02, p 29 Claims are deemed to be situated in the State where the debtor of the claim has its main office (centre of main interests) or domicile, see BT-Drucksache 12/2443, p 243

266 Art 390 RegInsO (BT-Drucksache 12/2443), was interpreted in this manner. See (critical of this interpretation) Flessner (1998), p 280

267 Cf BR-Drucksache 715/02, p 29, BT-Drucksache 12/2443, p 244 and 246

268 Art 354 and 356 InsO

269 Cf BR-Drucksache 715/02, p 29 However, the application for the opening of a secondary proceeding must be rejected, if the costs of the proceeding presumably cannot be covered from the assets situated in Germany (Art 26 InsO)
Drobnig, on the other hand, has argued that the German legislator implicitly intended to exclude from the reach of a German insolvency proceeding any security rights with respect to assets situated outside of Germany. In his opinion it follows from "the unwritten principle that a foreign insolvency proceeding as a rule should deploy the same international effects as a German proceeding" that the rule previously incorporated in Art. 390 RegInsO but now embodied in Art. 351 InsO, should also be applied with respect to the effects of a German insolvency proceeding. There is no convincing argument why proprietary rights should be dealt with differently, depending on whether the effects of a foreign insolvency proceeding on assets situated in Germany or the effects of a German insolvency proceeding on assets situated in another State are assessed. The underlying policy considerations, i.e. the protection of the trade and finance practice within a State, which at least requires a maximum degree of legal certainty with respect to security rights, equally apply. Nevertheless, Drobnig's view seems difficult to reconcile with the express observations in this respect in the Explanatory Report cited above.

4.4.2 Dutch law

Under Dutch customary private international law the effects of foreign insolvency proceedings on the rights of creditors with respect to assets situated in the Netherlands, are limited. In principle, an insolvency proceeding...
proceeding opened in another State does not encompass the assets of the debtor situated in the Netherlands.\textsuperscript{274}

Creditors can enforce claims against the debtor's assets situated in the Netherlands, notwithstanding the opening of an insolvency proceeding against the debtor in another State. Neither restrictions imposed on the enforcement of rights against the debtor's assets by the \textit{lex concursus}, nor restrictions that would be imposed by Dutch insolvency law in this respect, can be opposed to creditors. If unsecured creditors can continue to enforce their claims against assets situated in the Netherlands, irrespective of the opening of an insolvency proceeding against the debtor, this \textit{a fortiori} applies to secured creditors.\textsuperscript{275} With respect to the enforcement of security rights in assets situated in the Netherlands or the revindication of assets on the basis of (security) ownership, e.g. pursuant to reservation of ownership, this means that the position of the creditor or third party is similar to the position he would have under Art. 5 and 7 IR and Art. 351 \textit{InsO}.

That the generally restrictive approach towards foreign insolvency proceedings should be abandoned, has been argued for in chapter II. Dutch law should provide for the recognition of the effects of foreign main proceedings also in relation to assets situated in the Netherlands. In chapter II, paragraph 4, it has been argued that, while making the recognition of foreign insolvency proceedings dependent on a court decision, in determining the cross-border effects of insolvency proceedings new Dutch legislation should adopt similar conflict rules to those laid down in the Insolvency Regulation. Accordingly, the approach to security rights adopted in Art. 5 IR should in my opinion be implemented in Dutch

\textsuperscript{274} HR 31 May 1996, NJ 1998, 108, comm.Th.M. de Boer (De Vleeschmeesters), JOR 1996/75, comm. P.M. Veder. The Convention between the Netherlands and Belgium on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, of 28 March 1925 provided for a different system. Pursuant to Art. 21 and 24 of this Convention, the effects of an insolvency proceeding opened in one of the States by the competent court designated in Art. 20 extended to the territory of the other State. Art. 23 (1) provided that privileges in moveable assets of the debtor, a term that was also intended to include the right of pledge (cf. Bellefroid (1931), p. 147), were governed by the \textit{lex concursus}. This convention does not apply with respect to insolvency proceedings opened after the entry into force of the Insolvency Regulation.

\textsuperscript{275} Cf. Veder (2001), p. 100.
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customary private international law. Even though one may be of the opinion that more balanced approaches would have been possible that would have satisfied the policy considerations underlying Art 5 IR, the 'easily applicable' and 'hard and fast' rules of Art 5 and 7 IR create certainty and contribute to the foreseeability of the risks of insolvency that is crucial to the trade and the supply of credit in the market. If any other alternative were incorporated - e.g., application of the *lex rei sitae* or the *lex concursus* or a combination of both - the position of secured and revindicatory creditors would be substantially different - in fact worse - if insolvency proceedings are opened outside the European Union. I do not see any justification for that outcome. Why would an insolvency proceeding opened in, for example, Switzerland or the United States affect security rights in respect of assets situated in the Netherlands, whereas an insolvency proceeding opened in Belgium or Spain does not? The opening of a secondary insolvency proceeding in the Netherlands - which in my opinion should also be possible based on the presence of assets in the Netherlands - would provide for the possibility to subject secured creditors to the Dutch insolvency regime and, where appropriate, to distribute the proceeds in accordance with the ranking under Dutch law.

The conflict rule should be formulated to apply generally. Unlike it is the case with Art 351 InsO, it should not be limited to the issue that is most likely to be decided by a Dutch court, i.e., the effects of a foreign insolvency proceeding on security rights in assets situated in the Netherlands. The same conflict rule should be applied regardless whether the effects of a foreign main insolvency proceeding on security rights in assets situated in the Netherlands are concerned or the effects of a Dutch main insolvency proceeding on security rights in assets situated abroad. In principle, Dutch and foreign main insolvency proceedings should deploy the same effects.

5. CONCLUDING OBSERVATIONS

This chapter examined the influence of the opening of an insolvency proceeding on security rights in assets situated in another State. A number of questions that arise in this context have been addressed.

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276 Cf Veder (1998), p 186, Van Apeldoorn/Van Galen (1998), p 134 et seq. See also Veder (2001),reservedly expressing a preference for applicability of the *lex rei sitae*.
In the first paragraph the preliminary question regarding the law governing the (proprietary) validity of security rights in moveables and claims has been dealt with. This primarily raises questions that do not pertain to insolvency law but to the law of property.

As to the conflict rule regarding the proprietary aspects of the transfer or encumbrance of moveables, Dutch and German private international law both start from the applicability of the *lex rei sitae*. Dutch and German law differ in the extent to which diverging conflict rules are provided for in cases where applicability of the *lex rei sitae* does not lead to clear and convincing results, e.g. concerning *res in transitu*, international sales and mobile equipment. The fundamental assumption that the proprietary aspects of the transfer or encumbrance of moveable assets are governed by the *lex rei sitae*, requires flexible rules on recognition and enforcement of rights created under foreign law if assets are subsequently moved to another State. German law in this respect starts from the approach that in my opinion should also be adopted in Dutch law. Rights validly created under foreign law are recognised and remain governed by the applicable foreign law, but cannot be exercised in contravention to the law of the new situs.

With respect to the assignment and encumbrance of claims, German and Dutch law differ. Under German private international law, the proprietary aspects of the assignment and encumbrance of claims are governed by the law applicable to the (assigned or pledged) claim, whereas Dutch private international law refers such matters to the law governing the contract between assignor/pledgor and assignee/pledgee, thereby allowing for party-autonomy.

The opening of an insolvency proceeding may in several ways influence the validity of (the creation of) proprietary rights in the insolvent debtor's assets. In the second paragraph, the effects of the divestment of the debtor, the influence of insolvency on security rights provided in assets that are acquired by the debtor or come into existence after the opening the insolvency proceeding and the reversal of security rights established prior to the opening of the insolvency proceeding have been addressed.
The divestment of the debtor that will generally result from the opening of an insolvency proceeding under any given insolvency law, may entail that security rights in assets situated in another State can no longer be validly created. This first of all depends on the recognition of the divestment of the debtor in the State where the assets concerned are situated. If the State where the assets concerned are situated does not recognise the debtor's divestment, security rights may be validly created in such assets, notwithstanding the insolvency proceeding opened in respect of the debtor. Assuming that the divestment of the debtor is recognised, third parties acquiring rights in the insolvent debtor's assets should in my opinion be protected under the conditions of the law applicable to the proprietary aspects of the transfer or encumbrance. Whether the Insolvency Regulation leaves room for this approach is uncertain. The Report Virgós/Schmit seems to suggest that the validity of the transfer or encumbrance of assets after the opening of a main insolvency proceeding under Art. 3 (1) IR, should be assessed exclusively in accordance with the *lex concursus*.

The impact of insolvency on the transfer or encumbrance of future assets is a matter that in my opinion is governed by the *lex concursus*. Starting from the assumption that the insolvency proceeding is recognised in the State where the assets concerned are located, the *lex concursus* will determine whether and to what extent the creditor validly acquires a security right in assets that have been acquired by the debtor or have come into existence after the opening of an insolvency proceeding. The risk of the debtor's insolvency is one that the creditor will have to take account of when entering into a transaction.

Insolvency law provides for mechanisms aimed at the reversal of pre-insolvency transactions that have prejudiced the rights of creditors. In a cross-border context, the conditions for and effects of such reversal are primarily governed by the *lex concursus*. This is the approach adopted in the Insolvency Regulation, German law and Dutch law (within the restrictions imposed by the territoriality principle adopted in respect of foreign insolvency proceedings). However, the expectations of the party that benefited from the challenged act are protected by subjecting the reversability of the challenged act also to the *lex causae* of the act. If the juridical act is not subject to reversal under the *lex causae*, the adminis-
The contractor will not be able to successfully challenge the act. It was argued that, with respect to the transfer or encumbrance of assets, only the law applicable to the proprietary aspects of the transfer of encumbrance should be taken into consideration and not (also) the law applicable to the underlying contractual relationship.

Starting from the validity of the security right, the third paragraph addressed the impact of the opening of an insolvency proceeding on the position of the secured creditor. In particular Art. 5 IR, which has also more or less been incorporated in German insolvency law (Art. 351 InsO), has been dealt with. Art. 7 IR contains a similar rule specifically addressing reservation of ownership. Art. 5 IR contains a 'hard and fast' rule that exempts proprietary (security) rights in assets situated in other Member States from the effects of an insolvency proceeding opened in the Member State where the debtor's centre of main interests is located. The security right is not affected by the opening of an insolvency proceeding, neither through the lex concursus nor through the provisions of insolvency law of the State where the asset concerned is located. Infringements on security rights may (only) be achieved through the opening of secondary insolvency proceedings. Even though the effects of the approach towards proprietary (security) rights adopted in Art. 5 IR may be said to go beyond what the underlying policy considerations required, it is a clear and simple rule that provides for much needed legal certainty. It was argued that, following the general recommendation in chapter II to introduce rules in Dutch law that stay as close to the Insolvency Regulation as possible, a rule similar to Art. 5 IR should also be incorporated in Dutch law with respect to cases that fall outside the scope of the Insolvency Regulation. Unlike Art. 351 InsO, the rule should be formulated to also apply in respect of insolvency proceedings opened in the Netherlands where the effects on security rights in assets situated outside the EU have to be assessed.
Legal systems have diverging approaches to security rights. They vary in respect of the instruments that are available to creditors to obtain proprietary security in the debtor’s assets and the extent to which such rights are affected by insolvency proceedings opened in respect of the debtor. The existing differences in the approach to security rights of general property law and insolvency law underline the importance of conflict rules that determine which law governs the position of security rights in insolvency proceedings in a cross-border context. In the context of cross-border trade and finance they are crucial for parties to be able to determine, with a reasonable degree of certainty, what their position will be in the event of insolvency of another party.

In chapter I the position of secured creditors in Dutch and German insolvency law has been compared on a number of issues. Attention has been paid to the realisation of encumbered moveables and claims, the distribution of the realisation proceeds and the power of the administrator to use encumbered assets in view of (temporarily) continuing the debtor’s business. Where Dutch insolvency law at present still adheres to the (traditional) system that also existed in German law prior to 1999, the enactment of the Insolvenzordnung in Germany in 1999 has introduced important changes with respect to the position of secured creditors.

Under Dutch law secured creditors may enforce their security right as if there were no insolvency. The restrictions imposed on the enforcement of security rights are limited. A secured creditor may individually enforce the secured claim against the encumbered asset and to that effect, where necessary, separate the encumbered asset(s) from the estate. However, secured creditors may be temporarily prevented from exercising their rights by way of a moratorium (afkoelingsperiode). The Faillissementswet does not provide for the conferral on the administrator of the power to use encumbered assets for the continuation of the insolvent debtor’s business. Secured creditors cannot be bound by a reorganisation plan or composition against their will.
One of the objectives of the *Insolvenzordnung* was to further the chances for successful reorganisation. To this end fundamental changes in the position of secured creditors were introduced. The administrator has been given the exclusive power to realise encumbered assets in the possession of the debtor and to collect encumbered claims. Secured claims are still satisfied directly from the proceeds, albeit that a certain deduction for costs and expenses is provided for. In accordance with the conferral on the administrator of the power to realise encumbered assets and in view of the continuation of the debtor's business where possible and viable, the power to use encumbered assets has also been conferred on the administrator. Mechanisms aimed at protecting the interests of secured creditors in obtaining satisfaction of the secured claim are provided for. Furthermore, the *Insolvenzordnung* provides that also secured creditors can be included in and affected by a plan (*Insolvenzplan*).

Reservation of ownership was dealt with separately as it is not regarded as a security right *stricto sensu* in all its aspects. Both under German and Dutch law goods sold under reservation of ownership can be revindicated from the estate if the purchase price of the goods has not been paid. German law is more liberal than Dutch law in allowing reservation of ownership to secure other claims against the purchaser than the claim for payment of the purchase price. However, to the extent that other claims than the claim for payment of the purchase price have been left unpaid, the position of the unpaid seller under German law is different than under Dutch law. Under German law the unpaid seller is dealt with as a secured creditor and consequently does not have the power to revindicate the assets concerned from the estate. Under Dutch law, on the other hand, the unpaid seller is not dealt with as a secured creditor. He has the power to revindicate the asset from the estate, albeit that he may be temporarily prevented from exercising his rights by virtue of a moratorium (*afkoelingsperiode*). German and Dutch property law also differ in the extent to which the seller may extend his security to goods manufactured with the goods sold under reservation of ownership. The rules of German property law on specification in this respect are more liberal and allow the seller and the purchaser to determine in their contract - with proprietary effect - that the seller will acquire the ownership of such goods. To the extent that the unpaid seller has obtained the ownership of such newly manufactured goods, German law regards him as a secured creditor. To the extent that
specification under Dutch law would lead to the acquisition of ownership by the seller, his right of ownership is not regarded as security ownership and, consequently, he is entitled to revindication.

The position of secured creditors in cross-border insolvencies is first and foremost determined by the extent to which insolvency proceedings have extraterritorial effect. Chapter II examined the general approach to the cross-border effects of insolvency proceedings under the Insolvency Regulation, the UNCITRAL Model Law and German and Dutch customary private international law. Domestic and foreign insolvency proceedings were dealt with separately.

With respect to the extraterritorial effect of insolvency proceedings, German law and the Insolvency Regulation differentiate according to the grounds for jurisdiction. Where the jurisdiction of the court is based on the presence of the debtor's centre of main interests, insolvency proceedings have extraterritorial effect. Where the jurisdiction of the court is based on the presence of an establishment (or, in German law, the presence of assets) the effects of the insolvency proceeding are limited to assets situated in the State where the insolvency proceeding is opened. At present, Dutch law does not contain a similar differentiation.

To the extent that insolvency proceedings (aim to) encompass the debtor's entire estate, the Insolvency Regulation, German law as well as Dutch law impose a general duty on creditors, with the exception of secured creditors, to turn over to the estate the proceeds of individual recovery abroad. The UNCITRAL Model Law does not address the issue. The rule of substantive insolvency law that has been incorporated in Art. 20 (1) IR does not take into account the differentiated approach that may exist in the laws of the Member States with respect to individual recovery by creditors during an insolvency proceeding. The matter should have been referred to the lex concursus pursuant to Art. 4 IR.

The Insolvency Regulation, the UNCITRAL Model Law and German and Dutch insolvency law all start from the basic principle that all creditors are entitled to participate in the insolvency proceeding and in that respect recognise that they should have equal access to information. A distinction between creditors according to their nationality, domicile or the law
governing their claim is not accepted. However, an exception is generally made in this respect as regards foreign public law claims, in particular claims of foreign tax authorities. German and Dutch law, in the absence of conventions or other binding international regulations providing otherwise, in principle reject admission of foreign public law claims. The Insolvency Regulation has introduced important changes in this respect by providing that the tax (and social security) authorities of other Member States are entitled to submit their claims in an insolvency proceeding opened in another Member State.

With respect to the recognition and the effects of recognition of foreign insolvency proceedings, the examined systems show considerable differences. Present Dutch law does not meet the standards that are required for an effective and efficient operation of cross-border insolvencies. Under present Dutch law, a foreign insolvency proceeding does not include assets situated in the Netherlands. German law in this respect has adopted rules that are similar to those laid down in the Insolvency Regulation, providing for recognition of foreign insolvency proceedings without court intervention and in principle referring the determination of the effects of the insolvency proceeding to the lex concursus. The UNCITRAL Model Law starts from recognition on the basis of a court decision and in principle refers the effects of the foreign insolvency proceeding to the law of the recognising State.

It was argued that in the further development of Dutch law in this field, elements should be drawn from both the UNCITRAL Model Law and the Insolvency Regulation. Following the model of the UNCITRAL Model Law, recognition of foreign insolvency proceedings should be channelled through the Dutch courts. Requiring a court decision has the advantage that at an early stage a decision of principle can be taken as to whether a particular foreign proceeding is eligible for recognition and whether the proceeding concerned is a main proceeding that also includes assets situated in the Netherlands. For practical reasons jurisdiction to decide on a request for recognition of a foreign insolvency proceeding should be conferred exclusively on one (district) court in the Netherlands. As to the effects of recognition of a foreign proceeding, it was argued that the model of the Insolvency Regulation should be followed. Only a foreign proceeding that can be characterised as a main proceeding should include
assets situated in the Netherlands. In determining the effects of a foreign proceeding in the Netherlands, the conflict rules laid down in the Insolvency Regulation should be followed. The effects of a foreign insolvency proceeding should as a matter of principle be referred to the *lex concursus*, with possible modifications where the protection of specific interests thus requires.

In chapter III a number of private international law issues regarding the position of security rights in the context of cross-border insolvencies were examined. Before the impact of insolvency proceedings on the position of security rights in assets situated in another State requires attention, the validity of such rights and their enforceability against third parties must be determined. Therefore, first the conflict rules of Dutch and German law regarding the proprietary aspects of the transfer and encumbrance of moveables and claims were dealt with. Subsequently, the influence of the opening of an insolvency proceeding on the validity of security rights was examined. In this respect attention was paid to the influence of the divestment of the debtor, the effects of insolvency on the provision of security rights in future assets and the reversal (avoidance) of security rights by the administrator.

It follows from the territoriality principle adopted by the Dutch *Hoge Raad* that the effects of an insolvency proceeding opened in another State on (the validity of the provision of) security rights in assets situated in the Netherlands are limited. If this position of Dutch law were abandoned in future legislation, the question arises in accordance with which law the impact of the debtor’s insolvency on the validity of security rights must be assessed. This is also an issue under the Insolvency Regulation. It was argued that the divestment of the debtor, as a matter of insolvency law, should be determined in accordance with the *lex concursus*, but that the protection of bona fide third party acquirers of rights in the debtor’s assets should be governed by the law applicable to the proprietary aspects of the transfer or encumbrance. As to the impact of the opening of insolvency proceedings on the provision of security rights in future assets, it was argued that this concerns an issue of insolvency law to be governed by the *lex concursus*. With respect to the reversal of security rights created prior to the opening of an insolvency proceeding a double test must be applied. The vulnerability of the transaction and the effects of a successful reversal
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are in principle determined by the *lex concursus*. However, the expectations of the secured creditor as regards the validity of the transaction under its governing law are protected. If the creditor provides proof that the transaction is governed by a different law than the law of the State where the insolvency proceeding has been opened and that under the *lex causae* of the transaction (including its insolvency law) the security right could not be reversed, reversal of the transaction under the *lex concursus* is not accepted. It was argued that with respect to the transfer and encumbrance of assets, the relevant *lex causae* in this respect should be the law governing the proprietary aspects of the transaction.

Starting from the validity of the security right, the impact of the opening of an insolvency proceeding on the position of the secured creditor was examined. In particular the operation of Art. 5 IR ("rights in rem") was dealt with. Art. 7 IR contains a similar rule specifically addressing reservation of ownership. Art. 5 IR contains a 'hard and fast' rule that exempts proprietary (security) rights in assets situated in other Member States from the effects of an insolvency proceeding opened in the Member State where the debtor's centre of main interests is located. The position of the secured creditor is not influenced by the opening of an insolvency proceeding, neither through the *lex concursus* nor through the provisions of insolvency law of the State where the asset concerned is located. Infringements on the enforcement of security rights may (only) be achieved through the opening of secondary insolvency proceedings. Even though the effects of the approach towards security rights adopted in Art. 5 IR may be said to go beyond what the underlying policy considerations required - protection of the trade and supply of credit in other Member States could have been sufficiently achieved by subjecting security rights to the provisions of the insolvency law of the situs - it is a clear and simple rule that provides for much needed legal certainty. It was argued that, following the general recommendation in chapter II to introduce rules in Dutch law that stay as close to the Insolvency Regulation as possible, a rule similar to Art. 5 IR should also be incorporated in Dutch customary private international law. Unlike Art. 351 *InsO*, the rule should be formulated to also apply in respect of insolvency proceedings opened in the Netherlands where the effects on security rights in assets situated outside the EU have to be assessed.
SAMENVATTING EN CONCLUSIES

Rechtssystemen vertonen verschillen in hun benadering ten aanzien van goederenrechtelijke zekerheidsrechten. Deze verschillen hebben enerzijds betrekking op de aard van de goederenrechtelijke rechten die tot zekerheid van een vordering van een schuldeiser kunnen worden gevestigd en anderzijds op de wijze waarop en de mate waarin dergelijke rechten invloed ondervinden van een met betrekking tot de schuldenaar/zekerheidsgever geopende insolventieprocedure. Gelet op de bestaande verschillen in het materiële goederen- en insolventierecht is het van belang om vast te stellen welk recht van toepassing is op de vragen die zich kunnen voordoen met betrekking tot de positie van goederenrechtelijke zekerheidsrechten in grensoverschrijdende faillissementen.

In hoofdstuk I is op een aantal hoofdpunten een vergelijking gemaakt tussen de positie van zekerheidsgerechtigden in het Nederlandse en het Duitse faillissementsrecht. Daarbij is aandacht besteed aan de executie van met zekerheidsrechten belaste roerende zaken en vorderingen, de verdeeling van de executieopbrengst en de vraag of en, zo ja, in hoeverre de curator de bevoegdheid toekomt om met zekerheidsrechten belaste goederen te gebruiken in het kader van de voortzetting van de onderneming van de insolvente schuldenaar. Daar waar het Nederlandse recht op dit moment nog de (traditionele) benadering volgt die overeenstemt met het vóór 1999 in Duitsland geldende recht, is de positie van zekerheidsgerechtigden in Duitsland door de inwerkingtreding van de Insolvenzordnung op belangrijke punten gewijzigd.

Naar Nederlands recht mogen zekerheidsgerechtigden hun rechten uitoefenen als ware er geen faillissement. De executie van zekerheden in faillissement is slechts aan enkele beperkingen onderhevig. In beginsel is een zekerheidsgerechtigde bevoegd zich individueel te verhalen op de aan het zekerheidsrecht onderworpen goederen en is hij bevoegd, waar nodig, deze goederen op te eisen uit de boedel. Schuldeisers kunnen door middel van een afkoelingsperiode tijdelijk worden belet tot uitwinning van hun zekerheden over te gaan. De Faillissementswet bevat geen bepalingen die aan de curator de bevoegdheid toekennen met zekerheidsrechten belaste goederen te gebruiken voor de voortzetting van de onderneming van de
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Schuldenaar. Zekerheidsgerechtigden worden niet gebonden door een dwangakkoord.

Eén van de doelstellingen van de herziening van het Duitse insolventierecht was de reorganisatie van insolvente ondernemingen te bevorderen. In verband daarmee is de positie van zekerheidsgerechtigden op belangrijke punten gewijzigd. In beginsel komt de bevoegdheid tot executie van met zekerheidsrechten belaste roerende zaken en vorderingen bij uitsluiting toe aan de curator. Zekerheidsgerechtigden zijn slechts in die zin separatist dat zij hun vorderingen rechtstreeks uit de executieopbrengst voldaan krijgen, zij het dat de wet bepaalt dat daarop zekere kosten in mindering worden gebracht. In samenhang met het toekennen aan de curator van de bevoegdheid tot executie van met zekerheidsrechten belaste goederen en teneinde voortzetting van de onderneming van de schuldenaar, waar mogelijk en zinvol, te bevorderen, kent de wet aan de curator eveneens de bevoegdheid toe om met zekerheidsrechten belaste goederen te gebruiken. De Insolvenzordnung bevat mechanismen om de belangen van de zekerheidsgerechtigden te waarborgen. Onder de Insolvenzordnung kunnen ook zekerheidsgerechtigden worden gebonden door een reorganisatieplan (Insolvenzplan).

Het eigendomsvoorbehoud is apart behandeld omdat het niet in alle opzichten als een zekerheidsrecht wordt behandeld. Zowel naar Nederlands als naar Duits recht kunnen onder eigendomsvoorbehoud geleverde zaken door de verkoper worden gerevindiceerd als de koopprijs van die zaken nog niet is voldaan. Duits recht staat in ruimere mate dan Nederlands recht toe dat het eigendomsvoorbehoud ook kan strekken tot zekerheid voor andere vorderingen op de koper. Voor zover andere vorderingen dan de vordering tot betaling van de koopprijs onbetaald zijn gebleven, verschilt de positie van de verkoper onder het Nederlandse en Duitse recht. Naar Duits recht neemt de onbetaalde verkoper in dat geval een positie in die gelijk is aan die van andere zekerheidsgerechtigden en is hij niet bevoegd over te gaan tot revindicatie. Naar Nederlands recht daarentegen wordt de onbetaalde verkoper in dat geval niet behandeld op dezelfde voet als andere zekerheidsgerechtigden. Hij is bevoegd over te gaan tot revindicatie, zij het dat een afkoelingsperiode daaraan tijdelijk in de weg kan staan. Nederlands en Duits recht verschillen ook in de mate waarin de verkoper zijn zekerheid kan laten uitstrekken tot zaken die de
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Koper vervaardigt met de onder eigendomsvoorbehoud geleverde zaken. Het Duitse goederenrecht geeft partijen op dit punt meer ruimte en kent goederenrechtelijke werking toe aan de contractuele afspraak dat de verkoper eigenaar zal worden van de door de koper nieuw te vormen zaken. Voor zover de verkoper door zaaksvorming eigenaar is geworden, wordt hij naar Duits recht in het faillissement van de koper op gelijke voet behandeld als andere zekerheidsgerechtigden. Voor zover toepassing van de Nederlandse regels inzake zaaksvorming ertoe leidt dat de verkoper eigenaar wordt van de nieuw vervaardigde zaken, neemt de verkoper in het faillissement van de koper niet de positie in van zekerheidsgerechtigde, maar kan hij als eigenaar de betreffende zaken revindiceren.

De positie van zekerheidsgerechtigden in grensoverschrijdende faillissementen hangt allereerst af van de mate waarin een faillissement grensoverschrijdende werking heeft. In hoofdstuk II is onderzocht hoe de EG Insolventieverordening, de UNCITRAL Model Law on Cross-Border Insolvency en Duits en Nederlands commoon internationaal privaatrecht in het algemeen grensoverschrijdende aspecten van insolventieprocedures benaderen. Daarbij is onderscheid gemaakt tussen enerzijds de mate waarin grensoverschrijdende werking wordt gepretendeerd voor locale insolventieprocedures en anderzijds de mate waarin grensoverschrijdende werking wordt toegekend aan buitenlandse insolventieprocedures.

Naar Duits recht en onder de Insolventieverordening hangt de grensoverschrijdende werking die wordt toegekend aan insolventieprocedures af van de bevoegdheidsgrondslag van de rechter. Als de bevoegdheid van de rechter is gebaseerd op de aanwezigheid van het centrum van de voornaamste belangen van de schuldenaar, wordt aan een door die rechter uitgesproken insolventieprocedure grensoverschrijdende werking toegekend. Als de bevoegdheid van de rechter is gebaseerd op de aanwezigheid van een vestiging (of eventueel, zoals naar Duits recht, de enkele aanwezigheid van activa), omvat de insolventieprocedure alleen de goederen die zich bevinden in de Staat waar de insolventieprocedure werd geopend. Naar huidig Nederlands recht wordt een dergelijk onderscheid niet gemaakt.

Voor zover insolventieprocedures beogen het gehele vermogen van de schuldenaar te omvatten, voorzien de Insolventieverordening, Duits en
Samenvatting en conclusies

Nederlands recht in een verplichting voor crediteuren, met uitzondering van zekerheidsgerechtigden, aan de boedel te restitueren wat zij hebben ontvangen uit individuele executiemaatregelen ten aanzien van in het buitenland gelegen goederen. De UNCITRAL Model Law bevat op dit punt geen bepalingen. De regel van uniform materieel insolventierecht die is neergelegd in art. 20 lid 1 IVO gaat voorbij aan de gedifferentieerde benadering die in sommige lidstaten (bijvoorbeeld Nederland) wordt gevolgd met betrekking tot de mate waarin het (bevoorrechte) crediteuren is toegestaan zich tijdens de insolventieprocedure te verhalen op goederen van de schuldenaar. De in art. 20 lid 1 IVO geregelde kwestie had naar mijn mening op grond van de algemene verwijzingsregel van art. 4 IVO moeten zijn onderworpen aan de *lex concursus*.

De Insolventieverordening, de UNCITRAL Model Law en Nederlands en Duits insolventierecht gaan alle uit van het beginsel dat alle crediteuren kunnen opkomen in het faillissement van een schuldenaar en erkennen dat in dat verband gelijke toegang tot informatie moet bestaan. Een onderscheid tussen crediteuren op basis van nationaliteit, woonplaats of het recht dat van toepassing is op de vordering, wordt niet aanvaard. In het algemeen geldt een uitzondering op deze hoofdregel voor buitenlandse publiekrechtelijke vorderingen, in het bijzonder de vorderingen van buitenlandse belastingautoriteiten. Naar Nederlands en Duits recht worden dergelijke vorderingen, behoudens voorzover een verdrag of andere internationale regeling anders bepaalt, niet erkend. De Insolventieverordening bevat op dit punt een belangrijke wijziging en kent ook aan belastingautoriteiten en sociale zekerheidsinstellingen van de lidstaten het recht toe om hun vorderingen in te dienen in insolventieprocedures die in andere lidstaten zijn geopend.

Ten aanzien van de erkenning van in het buitenland uitgesproken faillissementen en de gevolgen die daaraan worden toegekend, bestaan in de onderzochte regelingen aanzienlijke verschillen. Het huidige Nederlandse recht voldoet op dat punt niet aan de voorwaarden voor een effectieve en efficiënte afwikkeling van grensoverschrijdende faillissementen. Naar huidig Nederlands recht omvat een in het buitenland uitgesproken faillissement niet het in Nederland gelegen vermogen van de schuldenaar. Duitsland heeft op dit punt regels ingevoerd die in overeenstemming zijn met de Insolventieverordening. In het buitenland uitgesproken faillisse-
menten worden automatisch, dat wil zeggen zonder rechterlijke tussenkomst, erkend en de gevolgen van de insolventieprocedure zijn in beginsel onderworpen aan de *lex concursus*. De UNCITRAL Model Law voorziet in erkenning van in het buitenland uitgesproken faillissementen door tussenkomst van een lokale rechter en bepaalt dat de gevolgen die aan een dergelijke erkenning zijn verbonden, worden ontleend aan het recht van de erkennende staat (waaronder de bepalingen van de Model Law).

In hoofdstuk II is betoogd dat bij de ontwikkeling van toekomstige wetgeving in Nederland op het terrein van de erkenning van in het buitenland uitgesproken faillissementen in sommige opzichten moet worden uitgegaan van het systeem van de UNCITRAL Model Law en in andere opzichten van het systeem van de Insolventieverordening. De erkenning in Nederland van in het buitenland uitgesproken faillissementen zou, in overeenstemming met het systeem van de UNCITRAL Model Law, moeten worden onderworpen aan een beslissing van de Nederlandse rechter. Het verlangen van een rechterlijke toetsing heeft het voordeel dat in een vroeg stadium kan worden beslist op de vraag of de betreffende buitenlandse procedure in aanmerking komt voor erkenning en, zo ja, of deze procedure een hoofdprocedure is die eveneens de in Nederland gelegen goederen van de schuldenaar omvat. Om praktische redenen zou de bevoegdheid om te beslissen op een verzoek tot erkenning moeten worden opgedragen aan één rechtbank in Nederland. Ten aanzien van de gevolgen van erkenning van een buitenlandse procedure, is betoogd dat het systeem van de Insolventieverordening moet worden gevolgd. Alleen een buitenlandse procedure die kan worden aangemerkt als hoofdprocedure zou het in Nederland gelegen vermogen van de schuldenaar moeten omvatten. Om de gevolgen van een buitenlandse insolventieprocedure in Nederland te bepalen zouden de verwijzingsregels van de Insolventieverordening moeten worden gevolgd. Als uitgangspunt moet gelden dat de gevolgen van een insolventieprocedure zijn onderworpen aan de *lex concursus*, met mogelijke uitzonderingen waar de bescherming van bijzondere belangen dat veriest.

In hoofdstuk III is een aantal kwesties van internationaal privaatrecht met betrekking tot de positie van zekerheidsgerechtigden in grensoverschrijdende faillissementen onderzocht. Alvorens aandacht te besteden aan de gevolgen van de opening van een insolventieprocedure op de positie van
Samenvatting en conclusies

Zekerheidsrechten op in andere Staten gelegen goederen, moet worden vastgesteld dat de betreffende zekerheidsrechten geldig zijn gevestigd. Daarom is eerst stilgestaan bij de verwijzingsregels van Nederlands en Duits internationaal privaatrecht met betrekking tot de goederenrechtelijke aspecten van de overdracht en bezwaring van roerende zaken en vorderingen. Vervolgens is gekeken naar de invloed van de opening van een insolventieprocedure op de geldigheid van zekerheidsrechten. In dat verband is aandacht besteed aan de gevolgen van de beschikkingsbevoegdheid van de insolvente schuldenaar, de gevolgen van de opening van een insolventieprocedure op de vestiging bij voorbaat van zekerheidsrechten op toekomstige goederen en de vernietiging door de curator van door de schuldenaar verstrekte zekerheden op grond van de faillissementspauliana.

Uit het door de Hoge Raad gehanteerde uitgangspunt dat in het buitenland uitgesproken faillissenementen slechts territoriale werking hebben, volgt dat de gevolgen van een buitenlandse insolventieprocedure op (de geldigheid van) zekerheidsrechten op in Nederland gelegen goederen beperkt zijn. Indien dit uitgangspunt in toekomstige Nederlandse regelgeving zou worden losgelaten, rijst de vraag aan de hand van welk recht de invloed van het faillissement van de schuldenaar op de geldigheid van zekerheidsrechten moet worden beoordeeld. Deze vraag speelt ook onder de Insolventieverordening. Betoogd is dat het verlies door de schuldenaar van zijn beschikkingsbevoegdheid een kwestie van faillissementsrecht is die moet worden beoordeeld aan de hand van de *lex concursus*. De vraag of derden te goederen trouw worden beschermd tegen de beschikkingsbevoegdheid van de schuldenaar moet daarentegen worden onderworpen aan het recht dat van toepassing is op de goederenrechtelijke aspecten van de overdracht of bezwaring. Ten aanzien van de gevolgen van de opening van een insolventieprocedure op bij voorbaat gevestigde zekerheidsrechten op toekomstige goederen, werd betoogd dat dit een kwestie van faillissementsrecht betreft waarop de *lex concursus* van toepassing is. De eventuele vernietigbaarheid van vóór faillissement gevestigde zekerheidsrechten is onderworpen aan een dubbele toets. In beginsel wordt de vraag of de vestiging van zekerheidsrechten op grond van de faillissementspauliana vernietigbaar is en, zo ja, welke gevolgen aan eventuele vernietiging zijn verbonden, beheerst door de *lex concursus*. Het vertrouwen van de zekerheidsgerechtigde in de geldigheid van de transactie krachtens het recht
dat op die transactie van toepassing is, wordt evenwel beschermd. Als de zekerheidsgerechtigde bewijst dat de transactie is onderworpen aan het recht van een andere Staat dan de Staat waar de insolventieprocedure is geopend en dat dat recht (inclusief het insolventierecht) in het gegeven geval niet voorziet in de mogelijkheid om het gevestigde zekerheidsrecht aan te tasten, heeft de vernietigbaarheid van de transactie op grond van de *lex concursus* geen gevolg. Betoogd is dat ten aanzien van de overdracht en bezwaring van goederen in dit verband moet worden getoetst aan het recht dat van toepassing is op de goederenrechtelijke aspecten van de transactie.

Uitgaande van de geldigheid van het zekerheidsrecht is vervolgens onderzocht welke gevolgen de opening van een insolventieprocedure heeft op de positie van de zekerheidsgerechtigde. In dat kader is in het bijzonder aandacht besteed aan de werking van art. 5 IVO dat ziet op zakelijke rechten. Met betrekking tot het eigendomsvoorbehoud kent art. 7 IVO een vergelijkbare regel. Art. 5 IVO bevat een ("hard and fast") regel die tot gevolg heeft dat de opening van een insolventieprocedure in de lidstaat waar het centrum van voornaamste belangen van de schuldenaar is gelegen, geen gevolgen heeft voor zekerheidsrechten op goederen die zich in andere lidstaten bevinden. De positie van de zekerheidsgerechtigde wordt niet beïnvloed door de opening van een insolventieprocedure, noch op grond van de bepalingen van de *lex concursus*, noch op grond van de bepalingen van het faillissementsrecht van het land waar de met zekerheidsrechten belaste goederen zijn gelegen. Alleen de opening van een secundaire insolventieprocedure in de lidstaat waar de betreffende goederen zich bevinden, kan leiden tot een eventuele beperking van de rechten van de zekerheidsgerechtigde. De gevolgen van de in art. 5 IVO neergelegde benadering ten aanzien van zakelijke (zekerheids)rechten gaan verder dan werd vereist door de aan die bepaling ten grondslag liggende overwegingen. Bescherming van het economisch verkeer van het land waar de goederen zich bevinden en bescherming van de rechtszekerheid van de rechten die op deze goederen rusten, zou in afdoende mate kunnen worden gewaarborgd door toepassing van het insolventierecht van het land van ligging. Wel moet worden geconcludeerd dat art. 5 IVO een duidelijke en eenvoudig hanteerbare regel bevat die leidt tot de in het internationale verkeer vereiste rechtszekerheid. Betoogd is dat, in aansluiting op de algemene aanbeveling in hoofdstuk II om bij de toekomstige
ontwikkeling van het Nederlandse recht zoveel mogelijk aan te sluiten bij de verwijzingsregels van de Insolventieverordening, een met art. 5 IVO vergelijkbare regel zou moeten worden ingevoerd in het commune Nederlandse internationaal privaatrecht. Het verdient aanbeveling om, anders dan de Duitse wetgever (vgl. art. 351 InsO), in dit verband een meerzijdige conflictregel te formuleren die eveneens toepassing vindt indien de gevolgen moeten worden beoordeeld van een in Nederland geopende insolventieprocedure op zekerheidsrechten die zijn gevestigd op goederen die zich bevinden buiten de EU.
COUNCIL REGULATION (EC) NR. 1346/2000
OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,
Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,
Having regard to the opinion of the European Parliament,
Having regard to the opinion of the Economic and Social Committee,

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.
(2) The proper functioning of the internal market requires that crossborder insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.
(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor’s assets.
(4) 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).
(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.
(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.
(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous pro-
ceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions on Accession to this Convention.

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets.
To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

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

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.
Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of
private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (lex concursus). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular 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. 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. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems. For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and setoff systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive
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98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,
HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Scope
1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.
2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Article 2
Definitions
For the purposes of this Regulation:
(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;
(b) 'liquidator' shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;
(c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;
(d) 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;
(e) 'judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;
(f) 'the time of the opening of proceedings' shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;
(g) 'the Member State in which assets are situated' shall mean, in the case of:
- tangible property, the Member State within the territory of which the property is situated,
- property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
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- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;
(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
(c) the respective powers of the debtor and the liquidator;
(d) the conditions under which set-offs may be invoked;
(e) the effects of insolvency proceedings on current contracts to which the debtor is party;
(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
(h) the rules governing the lodging, verification and admission of claims;
(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
(k) creditors' rights after the closure of insolvency proceedings;
(l) who is to bear the costs and expenses incurred in the insolvency proceedings;
(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

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 immovable 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.
2. The rights referred to in paragraph 1 shall in particular mean:
(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.
3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6
Set-off
1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7
Reservation of title
1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8
Contracts relating to immoveable property
The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9
Payment systems and financial markets
1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.
2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Article 10
Contracts of employment
The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11
Effects on rights subject to registration
The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12
Community patents and trade marks
For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13
Detrimental acts
Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:
- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

Article 14
Protection of third-party purchasers
Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:
- an immovable asset, or
- a ship or an aircraft subject to registration in a public register, or
- securities whose existence presupposes registration in a register laid down by law, the validity of that act shall be governed by the law of the State within the territory of which the immovable asset is situated or under the authority of which the register is kept.
Article 15
Effects of insolvency proceedings on lawsuits pending
The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II
RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16
Principle
1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.
2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17
Effects of recognition
1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.
2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18
Powers of the liquidator
1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings
in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

**Article 19**

**Proof of the liquidator's appointment**

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

**Article 20**

**Return and imputation**

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

**Article 21**

**Publication**

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).
2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22
Registration in a public register
1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.
2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23
Costs
The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24
Honouring of an obligation to a debtor
1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.
2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25
Recognition and enforceability of other judgments
1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2),
of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26
Public policy
Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

CHAPTER III
SECONDARY INSOLVENCY PROCEEDINGS

Article 27
Opening of proceedings
The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Article 28
Applicable law
Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.
Article 29

Right to request the opening of proceedings
The opening of secondary proceedings may be requested by:
(a) the liquidator in the main proceedings;
(b) any other person or authority empowered to request the opening of insolvency
proceedings under the law of the Member State within the territory of which the
opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses
Where the law of the Member State in which the opening of secondary pro­
cedings is requested requires that the debtor’s assets be sufficient to cover in
whole or in part the costs and expenses of the proceedings, the court may, when
it receives such a request, require the applicant to make an advance payment of
costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information
1. Subject to the rules restricting the communication of information, the liquidator
in the main proceedings and the liquidators in the secondary proceedings shall be
duty bound to communicate information to each other. They shall immediately
communicate any information which may be relevant to the other proceedings, in
particular the progress made in lodging and verifying claims and all measures
aimed at terminating the proceedings.
2. Subject to the rules applicable to each of the proceedings, the liquidator in the
main proceedings and the liquidators in the secondary proceedings shall be duty
bound to cooperate with each other.
3. The liquidator in the secondary proceedings shall give the liquidator in the main
proceedings an early opportunity of submitting proposals on the liquidation or use
of the assets in the secondary proceedings.

Article 32

Exercise of creditors’ rights
1. Any creditor may lodge his claim in the main proceedings and in any secondary
proceedings.
2. The liquidators in the main and any secondary proceedings shall lodge in other
proceedings claims which have already been lodged in the proceedings for which
they were appointed, provided that the interests of creditors in the latter pro­
cedings are served thereby, subject to the right of creditors to oppose that or to
withdraw the lodgement of their claims where the law applicable so provides.
3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33
Stay of liquidation
1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings 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. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.
2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:
   - at the request of the liquidator in the main proceedings,
   - of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34
Measures ending secondary insolvency proceedings
1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself. Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.
2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.
3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.
Annex I

Article 35
Assets remaining in the secondary proceedings
If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36
Subsequent opening of the main proceedings
Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37 (1)
Conversion of earlier proceedings
The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38
Preservation measures
Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV
PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39
Right to lodge claims
Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax

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authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40
Duty to inform creditors
1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.
2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41
Content of the lodgement of a claim
A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42
Languages
1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union.
2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading 'Lodgement of claim' in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

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CHAPTER V
TRANSITIONAL AND FINAL PROVISIONS

Article 43
Applicability in time
The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44
Relationship to Conventions
1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:
   (a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;
   (b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;
   (c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;
   (d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;
   (e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;
   (f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;
   (g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;
   (h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;
   (i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;
   (j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;
(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990;
(l) the Convention between the Federative People's Republic of Yugoslavia and the Kingdom of Greece on the Mutual Recognition and Enforcement of Judgments, signed at Athens on 18 June 1959;
(m) the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Arbitral Settlements in Commercial Matters, signed at Belgrade on 18 March 1960;
(n) the Convention between the Federative People's Republic of Yugoslavia and the Republic of Italy on Mutual Judicial Cooperation in Civil and Administrative Matters, signed at Rome on 3 December 1960;
(o) the Agreement between the Socialist Federative Republic of Yugoslavia and the Kingdom of Belgium on Judicial Cooperation in Civil and Commercial Matters, signed at Belgrade on 24 September 1971;
(p) the Convention between the Governments of Yugoslavia and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971;
(q) the Agreement between the Czechoslovak Socialist Republic and the Hellenic Republic on Legal Aid in Civil and Criminal Matters, signed at Athens on 22 October 1980, still in force between the Czech Republic and Greece;
(r) the Agreement between the Czechoslovak Socialist Republic and the Republic of Cyprus on Legal Aid in Civil and Criminal Matters, signed at Nicosia on 23 April 1982, still in force between the Czech Republic and Cyprus;
(s) the Treaty between the Government of the Czechoslovak Socialist Republic and the Government of the Republic of France on Legal Aid and the Recognition and Enforcement of Judgments in Civil, Family and Commercial Matters, signed at Paris on 10 May 1984, still in force between the Czech Republic and France;
(t) the Treaty between the Czechoslovak Socialist Republic and the Italian Republic on Legal Aid in Civil and Criminal Matters, signed at Prague on 6 December 1985, still in force between the Czech Republic and Italy;
(u) the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relationships, signed at Tallinn on 11 November 1992;
(v) the Agreement between Estonia and Poland on Granting Legal Aid and Legal Relations on Civil, Labour and Criminal Matters, signed at Tallinn on 27 November 1998;
(w) the Agreement between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed in Warsaw on 26 January 1993.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.
3. This Regulation shall not apply:
(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;
(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45
Amendment of the Annexes
The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46
Reports
No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 47
Entry into force
This Regulation shall enter into force on 31 May 2002.
This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

ANNEX A
Insolvency proceedings referred to in Article 2(a)

BELGIË - BELGIQUE
- Het faillissement - La faillite
- Het gerechtelijk akkoord - Le concordat judiciaire
- De collectieve schuldenregeling - Le règlement collectif de dettes

ČESKÁ REPUBLIKA
- Konkurs
- Nucené vyrovnání
- Vyrovnání

DEUTSCHLAND
- Das Konkursverfahren
- Das gerichtliche Vergleichsverfahren
- Das Gesamtvollstreckungsverfahren

- Das Insolvenzverfahren
- Pankrotimenetlus

ΕΛΛΑΣ
- Πτώχευση
- Η ειδική εκκαθάριση
- Η προσωρινή διαχείριση εταιρίας. Η διοίκηση και η διαχείριση των πιστωτών
- Η υπαγωγή επιχείρησης υπό επίτροπο με σκοπό τη σύναψη συμβιβασμού με τους πιστωτές

ESPANÀ
- Concurso de acreedores
- Quiebra
- Suspensión de pagos

FRANCE
- Liquidation judiciaire
- Redressement judiciaire avec nomination d’un administrateur

IRELAND
- Compulsory winding up by the court
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors’ voluntary winding up (with confirmation of a Court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution
- Company examinership

ITALIA
- Fallimento
- Concordato preventivo
- Liquidazione coatta amministrativa
- Amministrazione straordinaria
- Amministrazione controllata

ΚΥΠΡΟΣ
- Υποχρεωτική εκκαθάριση από το Δικαστήριο (Compulsory winding up by the court)
- Εκούσια εκκαθάριση από πιστωτές κατόπιν Δικαστικού Διατάγματος (Creditor’s voluntary winding up by court order)
- Εκούσια εκκαθάριση από μέλη (Company’s (members) voluntary winding up)
- Εκκαθάριση με την εποπτεία του Δικαστηρίου (Winding up subject to the supervision of the court)
- Πτώχευση κατόπιν Δικαστικού Διατάγματος (Bankruptcy by court order)

403
- Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα (The administration of the estate of persons dying insolvent)

LATVIJA
- maksâtnespēja

LIETUVA
- Bankroto byla
- Bankroto procedūra
- Likvidavimo procedūra

LUXEMBOURG
- Faillite
- Gestion contrôlée
- Concordat préventif de faillite (par abandon d'actif)
- Régime spécial de liquidation du notariat

MAGYARORSZÁG
- Csödeljárásv
- Felszámolási eljárás

MALTA
- Falliment
- Stralé permezz tal-Qorti
- Stralé volontarju tal-kredituri

NEDERLAND
- Het faillissement
- De surseance van betaling
- De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH
- Das Konkursverfahren
- Das Ausgleichsverfahren

POLSKA
- Postępowanie upadłościowe
- Postępowanie układowe

PORTUGAL
- O processo de falência
- Os processos especiais de recuperação de empresa, ou seja:
  - A concordata
  - A reconstituição empresarial
  - A reestruturação financeira
  - A gestão controlada

SLOVENIJA
- Stečajni postopek
- Skrajšani stečajni postopek
- Postopek prisilne poravnave
- Prisilna poravnava v stečaju

- Likvidacija pravne osebe pred sodiščem

SLOVENSKO
- Konkurzné konanie
- Nútené vyrovnanie
- Vyrovnanie

SUOMI - FINLAND
- Konkurssi - konkurs
- Yrityssaneeraus - företagssanering

SVERIGE
- Konkurs
- Företagsrekonstruktion

UNITED KINGDOM
- Winding up by or subject to the supervision of the court
- Creditors' voluntary winding up (with confirmation by the court)
- Administration
- Voluntary arrangements under insolvency legislation
- Bankruptcy or sequestration

ANNEX B
Winding up proceedings referred to in Article 2(c)

BELGIË - BELGIQUE
- Het faillissement - La faillite

ČESKÁ REPUBLIKA
- Konkurs
- Nucené vyrovnání

DEUTSCHLAND
- Das Konkursverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

EESTI
- Pankrotimenetlus

ΕΛΛΑΣ
- Πτώχευση
- Η ειδική εκκαθάριση

ESPAÑA
- Concurso de acreedores
- Quiebra
- Suspensión de pagos basada en la insolvencia definitiva

FRANCE
- Liquidation judiciaire

405
IRELAND
- Compulsory winding up
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding up (with confirmation of a court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA
- Fallimento
- Liquidazione coatta amministrativa

ΚΥΠΡΟΣ
- Υποχρεωτική εκκαθάριση από το Δικαστήριο (Compulsory winding up by the court)
- Εκκαθάριση με την εποπτεία του Δικαστηρίου (Winding up subject to the supervision of the court)
- Εκούσια εκκαθάριση από πιστωτές (με την επικύρωση του Δικαστηρίου (Creditor's voluntary winding up (with confirmation by the court))
- Πτώχευση (Bankruptcy)
- Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα (The administration of the estate of persons dying insolvent)

LATVIJA
- bankrots
- likvidācija
- sanācija

LIETUVA
- Likvidavimo procedūra

LUXEMBOURG
- Faillite
- Régime spécial de liquidation du notariat

MAGYARORSZÁG
- Csődeljárás
- Felszámolási eljárás

MALTA
- Falliment
- Stralè permezz tal-Qorti
- Stralè volontarju tal-kredituri

NEDERLAND
- Het faillissement
- De schuldsaneringsregeling natuurlijke personen
ÖSTERREICH
- Das Konkursverfahren

POLSKA
- Postępowanie upadłościowe

PORTUGAL
- O processo de falência

SLOVENIJA
- Stečajni postopek
- Skrajšani stečajni postopek
- Likvidacija pravne osebe pred sodiščem

SLOVENSKO
- Konkurzné konanie
- Nútené vyrovnanie
- Vyrovnanie

SUOMI - FINLAND
- Konkursssi - konkurs

SVERGE
- Konkurs

UNITED KINGDOM
- Winding up by or subject to the supervision of the court
- Creditors’ voluntary winding up (with confirmation by the court)
- Bankruptcy or sequestration

ANNEX C
Liquidators referred to in Article 2(b)

BELGIË - BELGIQUE
- De curator - Le curateur
- De commissaris inzake opschorting - Le commissaire au sursis
- De schuldbemiddelaar - Le médiateur de dettes

ČESKÁ REPUBLIKA
- Správce podstaty
- Předběžný správce
- Vyrovnáči správce
- Zvláštní správce
- Zástupce správce

DEUTSCHLAND
- Konkursverwalter
- Vergleichsverwalter
- Sachwalter (nach der Vergleichsordnung)
- Verwalter
- Insolvenzverwalter
Annex I

- Sachwalter (nach der Insolvenzordnung)
- Treuhänder
- Vorläufiger Insolvenzverwalter

EESTI
- Pankrotihaldur
- Ajutine pankrotihaldur
- Usaldusisik

ΕΛΛΑΣ
- Ο σύνδικο
- Ο προσωρινός διαχειριστής. Η διοικούσα επιτροπή των πιστωτών
- Ο ειδικός εκκαθαριστής
- Ο επιτροπος

ESPAÑA
- Depositario-administrador
- Interventor o Interventores
- Síndicos
- Comisario

FRANCE
- Représentant des créanciers
- Mandataire liquidateur
- Administrateur judiciaire
- Commissaire à l'exécution de plan

IRELAND
- Liquidator
- Official Assignee
- Trustee in bankruptcy
- Provisional Liquidator
- Examiner

ITALIA
- Curatore
- Commissario

ΚΥΠΡΟΣ
- Εκκαθαριστής και Προσωρινός Εκκαθαριστής (Liquidator and Provisional liquidator)
- Επίσημος Παραλήπτης (Official Receiver)
- Διαχειριστής της Πτώχευσης (Trustee in bankruptcy)
- Εξεταστής (Examiner)

LATVIJA
- administrators
- tīesu izpildītājs
- likvidators
LIETUVA
- Įmonės administrorius
- Įmonės likvidatorius

LUXEMBOURG
- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d’assainissement du notariat

MAGYARORSZÁG
- Vagyonfelügyelő
- Felszámoló

MALTA
- Kuratur tal-fallut
- Likwidatur
- Ricevitur ufficjali

NEDERLAND
- De curator in het faillissement
- De bewindvoerder in de surseance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

ÖSTERREICH
- Masseverwalter
- Ausgleichsverwalter
- Sachwalter
- Treuhänder
- Besondere Verwalter
- Vorläufiger Verwalter
- Konkursgericht

POLSKA
- Syndyk
- Nadzorca sądowy

PORTUGAL
- Gestor judicial
- Liquidatário judicial
- Comissão de credores

SLOVENIJA
- Poravnalni senat (senat treh sodnikov)
- Upravitelj prisilne poravnave
- Stečajni senat (senat treh sodnikov)
- Stečajni upravitelj
- Upniški odbor
- Likvidacijski senat (kot stečajni senat, če sodišče ne odloči drugače)
- Likvidacijski upravitelj (kot stečajni upravitelj, če sodišče ne odloči drugače)
Annex I

SLOVENSKO
- Predbežný správca
- Konkurzný správca
- Vyrovnaná správca
- Osobitný správca

SUOMI - FINLAND
- Pesánhoitaja - boförvaltare
- Selvittäjä - utredare

SVERIGE
- Förvaltare
- God man
- Rekonstruktör

UNITED KINGDOM
- Liquidator
- Supervisor of a voluntary arrangement
- Administrator
- Official Receiver
- Trustee
- Judicial factor
UNCITRAL MODEL LAW
ON CROSS-BORDER INSOLVENCY

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) Greater legal certainty for trade and investment;
(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) Protection and maximization of the value of the debtor’s assets; and
(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. General provisions

Article 1. Scope of application

1. This Law applies where:
   (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
   (b) Assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or
   (c) A foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or
   (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency].

2. This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].

Article 2. Definitions

For the purposes of this Law:

(a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law
relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [Competent court or authority]\(^1\)

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State].

Article 5. Authorization of [insert the title of the person or body administering reorganization or liquidation under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf

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\(^1\) A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of [insert the title of the government-appointed person or body].
of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Chapter II. Access of foreign representatives and creditors to courts in this state

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.
Annex II

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency].

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

1. Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13(2):

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

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3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
   (a) Indicate a reasonable time period for filing claims and specify the place for their filing;
   (b) Indicate whether secured creditors need to file their secured claims; and
   (c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
   (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
   (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
   (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.
2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.
Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
   (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
   (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
   (c) The application meets the requirements of paragraph 2 of article 15; and
   (d) The application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognized:
   (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
   (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

   (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
   (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:
   (a) Staying execution against the debtor's assets;
   (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

2. [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
   (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
   (b) Execution against the debtor's assets is stayed; and
   (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article].

3. Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
   (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
   (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
(f) Extending relief granted under paragraph 1 of article 19;
(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

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.

Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].
2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

1. In matters referred to in article 1, a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body to act at the direction of the court;
(b) Communication of information by any means considered appropriate by the court;
Annex II

(c) Coordination of the administration and supervision of the debtor's assets and affairs;
(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
(e) Coordination of concurrent proceedings regarding the same debtor;
(f) [The enacting State may wish to list additional forms or examples of cooperation].

Chapter V. Concurrent proceedings

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:
(a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
(b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
(i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
(ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;
In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.
Elfter Teil Internationales Insolvenzrecht

Erster Abschnitt Allgemeine Vorschriften

§ 335 Grundsatz
Das Insolvenzverfahren und seine Wirkungen unterliegen, soweit nichts anderes bestimmt ist, dem Recht des Staats, in dem das Verfahren eröffnet worden ist.

§ 336 Vertrag über einen unbeweglichen Gegenstand

§ 337 Arbeitsverhältnis
Die Wirkungen des Insolvenzverfahrens auf ein Arbeitsverhältnis unterliegen dem Recht, das nach dem Einführungsgesetz zum Bürgerlichen Gesetzbuche für das Arbeitsverhältnis maßgebend ist.

§ 338 Aufrechnung
Das Recht eines Insolvenzgläubigers zur Aufrechnung wird von der Eröffnung des Insolvenzverfahrens nicht berührt, wenn er nach dem für die Forderung des Schuldners maßgebenden Recht zur Zeit der Eröffnung des Insolvenzverfahrens zur Aufrechnung berechtigt ist.

§ 339 Insolvenzanfechtung
Eine Rechtshandlung kann angefochten werden, wenn die Voraussetzungen der Insolvenzanfechtung nach dem Recht des Staats der Verfahrenseröffnung erfüllt sind, es sei denn, der Anfechtungsgegner weist nach, dass für die Rechtshandlung das Recht eines anderen Staats maßgebend und die Rechtshandlung nach diesem Recht in keiner Weise angreifbar ist.

§ 340 Organisierte Märkte. Pensionsgeschäfte
(1) Die Wirkungen des Insolvenzverfahrens auf die Rechte und Pflichten der Teilnehmer an einem organisierten Markt nach § 2 Abs. 5 des Wertpapierhandelsgesetzes unterliegen dem Recht des Staats, das für diesen Markt gilt.

(3) Für die Teilnehmer an einem System im Sinne von § 1 Abs. 16 des Kreditwesengesetzes gilt Absatz 1 entsprechend.

§ 341 Ausübung von Gläubigerrechten

(1) Jeder Gläubiger kann seine Forderungen im Hauptinsolvenzverfahren und in jedem Sekundärsolvenzverfahren anmelden.

(2) Der Insolvenzverwalter ist berechtigt, eine in dem Verfahren, für das er bestellt ist, angemeldete Forderung in einem anderen Insolvenzverfahren über das Vermögen des Schuldners anzumelden. Das Recht des Gläubigers, die Anmeldung abzulehnen oder zurückzunehmen, bleibt unberührt.

(3) Der Verwalter gilt als bevollmächtigt, das Stimmrecht aus einer Forderung, die in dem Verfahren, für das er bestellt ist, angemeldet worden ist, in einem anderen Insolvenzverfahren über das Vermögen des Schuldners auszuüben, sofern der Gläubiger keine anderweitige Bestimmung trifft.

§ 342 Herausgabepflicht, Anrechnung

(1) Erlangt ein Insolvenzgläubiger durch Zwangsvollstreckung, durch eine Leistung des Schuldners oder in sonstiger Weise etwas auf Kosten der Insolvenzmasse aus dem Vermögen, das nicht im Staat der Verfahrenseröffnung belegen ist, so hat er das Erlangte dem Insolvenzverwalter herauszugeben. Die Vorschriften über die Rechtsfolgen einer ungerechtfertigten Bereicherung gelten entsprechend.

(2) Der Insolvenzgläubiger darf behalten, was er in einem Insolvenzverfahren erlangt hat, das in einem anderen Staat eröffnet worden ist. Er wird jedoch bei den Verteilungen erst berücksichtigt, wenn die übrigen Gläubiger mit ihm gleichgestellt sind.

(3) Der Insolvenzgläubiger hat auf Verlangen des Insolvenzverwalters Auskunft über das Erlangte zu geben.

Zweiter Abschnitt Ausländisches Insolvenzverfahren

§ 343 Anerkennung

(1) Die Eröffnung eines ausländischen Insolvenzverfahrens wird anerkannt. Dies gilt nicht,

1 wenn die Gerichte des Staats der Verfahrenseröffnung nach deutschem Recht nicht zuständig sind,

2 soweit die Anerkennung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere soweit sie mit den Grundrechten unvereinbar ist.
(2) Absatz 1 gilt entsprechend für Sicherungsmaßnahmen, die nach dem Antrag auf Eröffnung des Insolvenzverfahrens getroffen werden, sowie für Entscheidungen, die zur Durchführung oder Beendigung des anerkannten Insolvenzverfahrens ergangen sind.

§ 344 Sicherungsmaßnahmen
(1) Wurde im Ausland vor Eröffnung eines Hauptinsolvenzverfahrens ein vorläufiger Verwalter bestellt, so kann auf seinen Antrag das zuständige Insolvenzgericht die Maßnahmen nach § 21 anordnen, die zur Sicherung des von einem inländischen Sekundarinsolvenzverfahren erfassten Vermögens erforderlich erscheinen.
(2) Gegen den Beschluss steht auch dem vorläufigen Verwalter die sofortige Beschwerde zu.

§ 345 Öffentliche Bekanntmachung
(1) Sind die Voraussetzungen für die Anerkennung der Verfahrenseröffnung gegeben, so hat das Insolvenzgericht auf Antrag des ausländischen Insolvenzverwalters den wesentlichen Inhalt der Entscheidung über die Verfahrenseröffnung und der Entscheidung über die Bestellung des Insolvenzverwalters im Inland bekannt zu machen. § 9 Abs. 1 und 2 und § 30 Abs. 1 gelten entsprechend. Ist die Eröffnung des Insolvenzverfahrens bekannt gemacht worden, so ist die Beendigung in gleicher Weise bekannt zu machen.
(2) Hat der Schuldner im Inland eine Niederlassung, so erfolgt die öffentliche Bekanntmachung von Amts wegen. Der Insolvenzverwalter oder ein standiger Vertreter nach § 13e Abs. 2 Satz 4 Nr. 3 des Handelsgesetzbuchs unterrichtet das nach § 348 Abs. 1 zuständige Insolvenzgericht.
(3) Der Antrag ist nur zulässig, wenn glaubhaft gemacht wird, dass die tatsächlichen Voraussetzungen für die Anerkennung der Verfahrenseröffnung vorliegen. Dem Verwalter ist eine Ausfertigung des Beschlusses, durch den die Bekanntmachung angeordnet wird, zu erteilen. Gegen die Entscheidung des Insolvenzgerichts, mit der die öffentliche Bekanntmachung abgelehnt wird, steht dem ausländischen Verwalter die sofortige Beschwerde zu.

§ 346 Grundbuch
(1) Wird durch die Verfahrenseröffnung oder durch Anordnung von Sicherungsmaßnahmen nach § 343 Abs. 2 oder § 344 Abs. 1 die Verfügungsbefugnis des Schuldners eingeschränkt, so hat das Insolvenzgericht auf Antrag des ausländischen Insolvenzverwalters das Grundbuchamt zu ersuchen, die Eröffnung des Insolvenzverfahrens und die Art der Einschränkung der Verfügungsbefugnis des Schuldners in das Grundbuch einzutragen:
1. bei Grundstücken, als deren Eigentümer der Schuldner eingetragen ist;
2. bei den für den Schuldner eingetragenen Rechten an Grundstücken und an eingetragenen Rechten, wenn nach der Art des Rechts und den Umständen zu befürchten ist, dass ohne die Eintragung die Insolvenzgläubiger benachteiligt würden.

(2) Der Antrag nach Absatz 1 ist nur zulässig, wenn glaubhaft gemacht wird, dass die tatsächlichen Voraussetzungen für die Anerkennung der Verfahrenseröffnung vorliegen. Gegen die Entscheidung des Insolvenzgerichts steht dem ausländischen Verwalter die sofortige Beschwerde zu. Für die Löschung der Eintragung gilt § 32 Abs. 3 Satz 1 entsprechend.

(3) Für die Eintragung der Verfahrenseröffnung in das Schiffsregister, das Schiffsbaregister und das Register für Pfandrechte an Luftfahrzeugen gelten die Absätze 1 und 2 entsprechend.

§ 347 Nachweis der Verwalterbestellung. Unterrichtung des Gerichts

(1) Der ausländische Insolvenzverwalter weist seine Bestellung durch eine beglaubigte Abschrift der Entscheidung, durch die er bestellt worden ist, oder durch eine andere von der zuständigen Stelle ausgestellte Bescheinigung nach. Das Insolvenzgericht kann eine Übersetzung verlangen, die von einer hierzu im Staat der Verfahrenseröffnung befugten Person zu beglaubigen ist.

(2) Der ausländische Insolvenzverwalter, der einen Antrag nach den §§ 344 bis 346 gestellt hat, unterrichtet das Insolvenzgericht über alle wesentlichen Änderungen in dem ausländischen Verfahren und über alle ihm bekannten weiteren ausländischen Insolvenzverfahren über das Vermögen des Schuldners.

§ 348 Zuständiges Insolvenzgericht

(1) Für die Entscheidungen nach den §§ 344 bis 346 ist ausschließlich das Insolvenzgericht zuständig, in dessen Bezirk die Niederlassung oder, wenn eine Niederlassung fehlt, Vermögen des Schuldners belegen ist. § 3 Abs. 2 gilt entsprechend.

(2) Die Landesregierungen werden ermächtigt, zur sachdienlichen Förderung oder schnelleren Erledigung der Verfahren durch Rechtsverordnung die Entscheidungen nach den §§ 344 bis 346 für die Bezirke mehrerer Insolvenzgerichte einem von diesen zuzuweisen. Die Landesregierungen können die Ermächtigungen auf die Landesjustizverwaltungen übertragen.

§ 349 Verfügungen über unbewegliche Gegenstände
(2) Ist zur Sicherung eines Anspruchs im Inland eine Vormerkung im Grundbuch, Schiffsregister, Schiffsbauregister oder Register für Pfandrechte an Luftfahrzeugen eingetragen, so bleibt § 106 unberührt.

§ 350 Leistung an den Schuldner
Ist im Inland zur Erfüllung einer Verbindlichkeit an den Schuldner geleistet worden, obwohl die Verbindlichkeit zur Insolvenzmasse des ausländischen Insolvenzverfahrens zu erfüllen war, so wird der Leistende befreit, wenn er zur Zeit der Leistung die Eroffnung des Verfahrens nicht kannte. Hat er vor der öffentlichen Bekanntmachung nach § 345 geleistet, so wird vermutet, dass er die Eroffnung nicht kannte.

§ 351 Dingliche Rechte
(1) Das Recht eines Dritten an einem Gegenstand der Insolvenzmasse, der zur Zeit der Eroffnung des ausländischen Insolvenzverfahrens im Inland belegen war, und das nach inländischem Recht einen Anspruch auf Aussonderung oder auf abgesonderte Befriedigung gewährt, wird von der Eroffnung des ausländischen Insolvenzverfahrens nicht berührt.
(2) Die Wirkungen des ausländischen Insolvenzverfahrens auf Rechte des Schuldners an unbeweglichen Gegenständen, die im Inland belegen sind, bestimmen sich, unbeschadet des § 336 Satz 2, nach deutschem Recht.

§ 352 Unterbrechung und Aufnahme eines Rechtsstreits
(1) Durch die Eroffnung des ausländischen Insolvenzverfahrens wird ein Rechtsstreit unterbrochen, der zur Zeit der Eroffnung anhängig ist und die Insolvenzmasse betrifft. Die Unterbrechung dauert an, bis der Rechtsstreit von einer Person aufgenommen wird, die nach dem Recht des Staats der Verfahrenseröffnung zur Fortführung des Rechtsstreits berechtigt ist, oder bis das Insolvenzverfahren beendet ist.
(2) Absatz 1 gilt entsprechend, wenn die Verwaltungs- und Verfügungsbefugnisse über das Vermögen des Schuldners durch die Anordnung von Sicherungsmaßnahmen nach § 343 Abs 2 auf einen vorläufigen Insolvenzverwalter übergehen.

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Dritter Abschnitt Partikularverfahren über das Inlandsvermögen

§ 353 Vollstreckbarkeit ausländischer Entscheidungen
(1) Aus einer Entscheidung, die in dem ausländischen Insolvenzverfahren ergeht, findet die Zwangsvollstreckung nur statt, wenn ihre Zulassigkeit durch ein Vollstreckungsurteil ausgesprochen ist. § 722 Abs. 2 und § 723 Abs. 1 der Zivilprozessordnung gelten entsprechend.
(2) Für die in § 343 Abs 2 genannten Sicherungsmaßnahmen gilt Absatz 1 entsprechend

§ 354 Voraussetzungen des Partikularverfahrens
(1) Ist die Zuständigkeit eines deutschen Gerichts zur Eröffnung eines Insolvenzverfahrens über das gesamte Vermögen des Schuldners nicht gegeben, hat der Schuldner jedoch im Inland eine Niederlassung oder sonstiges Vermögen, so ist auf Antrag eines Gläubigers ein besonderes Insolvenzverfahren über das inländische Vermögen des Schuldners (Partikularverfahren) zulässig.
(2) Hat der Schuldner im Inland keine Niederlassung, so ist der Antrag eines Gläubigers auf Eröffnung eines Partikularverfahrens nur zulässig, wenn dieser ein besonderes Interesse an der Eröffnung des Verfahrens hat, insbesondere, wenn er in einem ausländischen Verfahren voraussichtlich erheblich schlechter stehen wird als in einem inländischen Verfahren. Das besondere Interesse ist vom Antragsteller glaubhaft zu machen
(3) Für das Verfahren ist ausschließlich das Insolvenzgericht zuständig, in dessen Bezirk die Niederlassung oder, wenn eine Niederlassung fehlt, Vermögen des Schuldners belegen ist. § 3 Abs. 2 gilt entsprechend.

§ 355 Restschuldbefreiung. Insolvenzplan
(1) Im Partikularverfahren sind die Vorschriften über die Restschuldbefreiung nicht anzuwenden.
(2) Ein Insolvenzplan, in dem eine Stundung, ein Erlass oder sonstige Einschränkungen der Rechte der Gläubiger vorgesehen sind, kann in diesem Verfahren nur bestätigt werden, wenn alle betroffenen Gläubiger dem Plan zugestimmt haben

§ 356 Sekundärinsolvenzverfahren
(1) Die Anerkennung eines ausländischen Hauptinsolvenzverfahrens schließt ein Sekundärinsolvenzverfahren über das inländische Vermögen nicht aus. Für das Sekundärinsolvenzverfahren gelten ergänzend die §§ 357 und 358.
(2) Zum Antrag auf Eröffnung des Sekundärinsolvenzverfahrens ist auch der ausländische Insolvenzverwalter berechtigt.
(3) Das Verfahren wird eröffnet, ohne dass ein Eröffnungsgrund festgestellt werden muss.
§ 357 Zusammenarbeit der Insolvenzverwalter
(1) Der Insolvenzverwalter hat dem ausländischen Verwalter unverzüglich alle Umstände mitzuteilen, die für die Durchführung des ausländischen Verfahrens Bedeutung haben können. Er hat dem ausländischen Verwalter Gelegenheit zu geben, Vorschläge für die Verwertung oder sonstige Verwendung des inländischen Vermogens zu unterbreiten
(2) Der ausländische Verwalter ist berechtigt, an den Glaubigerversammlungen teilzunehmen
(3) Ein Insolvenzplan ist dem ausländischen Verwalter zur Stellungnahme zuzuleiten. Der ausländische Verwalter ist berechtigt, selbst einen Plan vorzulegen
§ 218 Abs 1 Satz 2 und 3 gilt entsprechend.

§ 358 Überschuss bei der Schlussverteilung
Konnen bei der Schlussverteilung im Sekundarinsolvenzverfahren alle Forderungen in voller Hohe berichtet werden, so hat der Insolvenzverwalter einen verbleibenden Überschuss dem ausländischen Verwalter des Hauptinsolvenzverfahrens herauszugeben
European Union

EC Treaty

Art. 10 II 2.2.1.1
Art. 65 II 1.3.2.1
Art. 68 II 1.3.2.2
Art. 234 II 1.3.2.2


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Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968) II 1.3.2.1, II 2.2.1.3, II 3.3.1, II 3.3.2, II 3.3.1.2, III 4.2.2.1

Council Regulation (EC) Nr. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters II 1.3.2.1, II 3.3.2, III 3.3.1.2

Convention on the law applicable to contractual obligations (Rome Convention)

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Regulation (EEC) Nr. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community II 2.4.3

Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties II 2.4.3

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Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions II 1.3.2.3

Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties II 2.4.3


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Art. 185  I 3.3.2.2
Art. 288  I 2.2.2
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Einführungsgesetz zur Insolvenzordnung (Act on the implementation of the InsO) (as amended in March 2003)

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