COMPARATIVE SURVEY IN THE CONTEXT OF THE PROGRAM ‘HERIJKING FAILLISSEMENTSRECHT’

On 26 November 2012, the Minister of Security and Justice, in a letter to Parliament, indicated that he intends to investigate whether parts of the Dutch Bankruptcy Act can be improved. The survey of the Minister regarding the possibilities for improvement has resulted in the Program ‘Herijking Faillissementsrecht’, aimed at a realignment of insolvency law in the Netherlands, which rests on three pillars: modernizing the Bankruptcy Act, increasing the ability of businesses to reorganize themselves and combating bankruptcy fraud. In his letter, the Minister observed that the objective of strengthening the reorganizing ability of companies seeks to prevent companies from unnecessarily going bankrupt due to a minority of creditors obstructing reorganization, to make it easier to find solutions outside of bankruptcy and to simplify the bankruptcy procedure itself.

The Business & Law Research Centre of the Radboud University Nijmegen, at the request of the Legislation Department of the Ministry of Security and Justice, was approached by the WODC to conduct the present comparative survey. The aim of this study is to provide background information for the intended measures to be taken in the context of the realignment of insolvency law.

The research covers the following areas:

(i) the possibility of binding creditors to an arrangement that is reached outside the framework of (and with the intention of preventing) formal insolvency proceedings (pre-insolvency arrangement);
(ii) the possibility of binding creditors to an arrangement that is reached within a formal insolvency proceeding;
(iii) the (im)possibilities of ‘stille bewindvoering’, i.e. having a court-appointed expert assist management of the business in distress before formal insolvency proceedings have been opened;
(iv) the existence of an obligation to continue the supply of goods and services that are essential for the continuation of a business during insolvency proceedings.

The research focuses successively on the following countries: Belgium, Germany, England, France, Italy and Spain. For each country an overview is presented of arrangements concerning the aforementioned areas that can be found in legislation or in well-established case law. This comparative survey was carried out on the basis of sources available in the Netherlands, as well as information provided by foreign correspondents. The study was conducted by Prof. dr. P.M. Veder, T.E. Booms LLM MSc and N.B. Pannevis LLM MSc.  

---

Prof. dr. P.M. Veder is professor of insolvency law at the Business & Law Research Centre, Radboud University Nijmegen, and attorney/advisor with RESOR N.V. in Amsterdam. T.E. Booms LLM MSc and N.B. Pannevis LLM MSc are researchers at the Business & Law Research Centre, Radboud University Nijmegen, and paralegal with RESOR N.V. in Amsterdam.
The survey shows that there are major differences in the way the examined issues are dealt with in the various legal systems investigated.

In five of the six countries studied, some form of pre-insolvency arrangement exists. The nature of these arrangements differs from a private agreement that – after filing at the Registry of the local court – provides protection against being annulled on the basis of fraudulent conveyance (actio Pauliana) (Belgium), to a composition comparable with a composition in bankruptcy in the Netherlands (Italy). In all countries, measures exist to encourage the conclusion of an agreement with creditors before the opening of formal insolvency proceedings. Findings of note are that agreements reached before the opening of formal insolvency proceedings may be shielded from recovery on the basis of fraudulent conveyance (actio Pauliana) in all systems investigated, that in many countries new loans granted in the context of a pre-insolvency arrangement are granted special priority in a (potential) subsequent bankruptcy, and that a moratorium can be obtained in some countries to provide the debtor with an opportunity to negotiate a pre-insolvency arrangement. Typically, the debtor may choose with whom he wishes to conclude a pre-insolvency arrangement. It is generally not necessary to reach an agreement with all creditors.

In all legal systems studied, some form of composition exists in formal insolvency proceedings. In each country, a certain minority of creditors can be bound to an arrangement against their will by a majority vote. The majority required varies by country. In the greater part of legal systems (Germany, England, France and Italy), voting takes place in groups. In these countries, the position of secured creditors can be influenced by such an arrangement. In each country, the arrangement needs to pass judicial review before it can have effect.

The results with regard to the existence of ‘stille bewindvoering’ are varied. In half of the countries (Germany, Italy and Spain), no comparable phenomenon was found. English law does not know a ‘stille bewindvoerder’, but its function can be fulfilled by means of a pre-pack. Belgian and French law know various officials with similar powers.

The existence of an obligation to continue the supply of goods and services that are essential for the continuation of a business during insolvency proceedings has much to do with the general treatment of contracts during insolvency proceedings. In half of the countries surveyed, contract clauses that bring the contractual relationship to an end due to the mere fact that insolvency proceedings have been opened, are void. Many legal systems have some sort of obligation to continue the contractual relationship. The administrator of a bankrupt estate may sometimes unilaterally decide whether a contract is maintained. In doing so, he will often consider (which elsewhere is applied as a legal test) whether the contract is crucial for the continuation of the company. Nonetheless, in the majority of legal systems surveyed, a contract may be terminated on the basis of default by the debtor prior to the commencement of formal insolvency proceedings.