



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

OH, THE PLACES YOU'LL GO
Forum shopping and filing insolvency proceedings in a global legal world

Commission(s) in charge of the Session/Workshop:

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National Report of The Netherlands

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1. Proper place for commencement of insolvency proceedings and centre of main interests.

- a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?**

In the Netherlands insolvency proceedings should be commenced at the Dutch court in the place where a person resides (according to the municipal personal records database) or the place where a company has its business location (according to the trade register). The applicable law is not determined separately than the venue. On Dutch insolvency proceedings the Dutch Insolvency Act ("DIA") is applicable. Article 2 of the DIA stipulates at which local court the insolvency proceedings should be commenced.

- b. Is there in your country a notion or definition of the debtor's centre of main interests ("COMI")?**

Yes, the definition of COMI in the Netherlands is the centre of the main interests.

- c. Which are the factors relevant to the determination of centre of main interests?**

To determine the COMI the most relevant factor is the place where the debtor conducts its business on a regular basis and is therefore ascertainable by third parties

- d. Is this essential in determining the jurisdiction?**

Yes, the COMI is essential. Subject to proof to the contrary the COMI is considered to be the place where a company has its business location according to the trade register.

- e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?**

Yes, the council regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings ("European Insolvency Regulation" hereinafter to be referred as "EIR") is applicable in the Netherlands.

f. Is the debtor's centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?

Yes, normally this is also the place where the debtor has its business location and on the basis of the DIA and EIR in this place insolvency proceedings should be commenced.

g. Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?

When commencing insolvency proceedings in the Netherlands the petitioner is required to state in the petition for bankruptcy where the debtor has its COMI. Because of the fact that the COMI is considered to be the place where the debtor has its business location according to the trade register, the petitioner generally can suffice with submitting an extract from the trade register. No real investigation by the court takes place. Should the debtor or any other party concerned however challenge the jurisdiction of the court because of the fact that its COMI is not in the Netherlands, a judicial termination will be made. Therefore an actual determination on this issue is generally only made if the COMI of the debtor as stated by the petitioner is challenged. In the Netherlands insolvency proceedings start with a petition followed by an oral hearing where the debtor can put forward its defenses. During the hearing the termination of the COMI will take place and the debtor has to prove its COMI is not in the Netherlands

2. Movement of the place of registration (or habitual residence) of centre of main interest.

a. Is it possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?

It is possible for the debtor to move its place of registration prior to commencement and during the insolvency proceedings. However, in practice it is very unlikely that the debtor would be able to move its place of registration during insolvency proceedings as these proceedings are generally very short in the Netherlands. A debtor can be declared bankrupt within a week after filing the petition for bankruptcy. If the debtor moves its place of registration during the insolvency proceedings, in principle this would not effect the decision as to the COMI and the determination about the commencement of the proceeding

as jurisdiction of the court is determined at the moment of the beginning of the proceedings, which is the moment at which a creditor files the petition for bankruptcy¹.

b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?

Yes

c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?

No, in the Netherlands the application for commencement of the insolvency proceedings is the actual commencement of those proceedings. There is no period in between.

d. If there is evidence of such a move in close proximity to the commencement of the proceedings, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?

The court will look where the debtor has its registered office at the time of commencement of the proceedings as this is where the COMI of the debtor is considered to be. It is up to the debtor to contest the jurisdiction of the court and to state and substantiate that its COMI is outside the Netherlands. If the debtor has moved its COMI in close proximity to the commencement of the insolvency proceedings the court will most likely scrutinize such a move more closely.

e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?

It is possible to forum shop in the Netherlands, but to do that the debtor has to move its registered office to another place in the Netherlands which also requires amending the articles of association.

¹ Court of Appeal Arnhem Leeuwarden 15 August 2014, ECLI:NL:GHARL:2013:6095

- f. **What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?**

The only reason in the Netherlands to choose one forum over another is that certain courts in the Netherlands do not allow the appointment of a so-called "silent trustee" and some do. Dutch insolvency law does not provide for the appointment of a silent trustee yet, but certain courts already appoint silent trustees. In the near future the appointment of the silent trustee will be codified.

- g. **Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?**

Yes.

3. Recognition of foreign proceedings, main and secondary proceedings

- a. **Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of centre of main interests?**

Yes, foreign insolvency proceedings that are commenced within the European Union and in a state which is a party to the EIR will be automatically recognized. Insolvency proceedings that are commenced in a state that is not a party to the EIR will not be recognized. The recognition on the basis of the EIR is affected by the notion of centre of main interests.

- b. **Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?**

Yes. On the basis of the EIR which is applicable in the Netherlands main proceedings have to be started in a state where the COMI of the debtor is. Secondary proceedings can be commenced in a state where the debtor has assets.

- c. **Does your legislation permits secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary**

proceedings limited to the assets located in that State where secondary proceedings are opened?

Yes and Yes. This follows from the EIR which is applicable in the Netherlands

d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.

If secondary proceedings are commenced in the Netherlands on the basis of the EIR secondary proceedings will be opened without examining the debtor's insolvency (article 27 EIR). Secondary proceedings can be challenged on the basis of article 26 EIR (see answer under 4.a).

4. Abuse of process

a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?

Yes, but not so much on the basis of abuse of processes. On the basis of article 26 of the EIR 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

b. What happens if the applicant falsely claims the centre of main interests to be in a particular State?

If the applicant falsely claims the debtor has its COMI in the Netherlands its petition for bankruptcy will not be awarded if the debtor challenges and substantiates that its COMI is in the Netherlands

c. Are those issues governed by international or supranational regulations or only by domestic law?

By Dutch insolvency law and the EIR.