



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



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EBRD Insolvency Office Holders Principles

Neil Cooper

June 2008



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- Principle 1 - Qualifications
- Principle 2 - Appointment
- Principle 3 - Review of Appointment
- Principle 4 - Removal, Resignation and Death
- Principle 5 - Replacement
- Principle 6 - Standards of Professional and Commercial Conduct
- Principle 7 - Reporting and Supervision
- Principle 8 - Regulatory and Disciplinary Functions
- Principle 9 - Remuneration
- Principle 10 - Release
- Principle 11 - Insurance and Bonding
- Principle 12 - Code of Ethics



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Principle 1 - Qualifications and Licensing Generally

- Because of the tasks, responsibilities and trust, the Office Holder (**OH**) should have fundamental qualifications, including general ability and intelligence, experience, professional knowledge and good character. Most professions have licensing. OHs should be regarded as a professional body of persons and licensed accordingly
- The law or regulatory framework should provide:
 - qualification of an OH
 - an examination in insolvency law and practice
 - licensing of candidates who meet qualification standards
 - register of licensed/registered OHs
 - requirement for continuing education
 - renewal of license or registration
 - licensing of corporate bodies



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Principle 2 - Appointment in an Insolvency Case

- A predictable and fair process for the appointment of an OH is required
- Accordingly, the law should state:
 - the grounds of ineligibility
 - the body who may appoint
 - in appointment by court, guidelines for selection
 - in appointment by creditors, the manner of appointment
 - in appointment by debtor, the manner of appointment
 - no restriction upon the number of cases



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Principle 3 - Review of OH Appointment

- Process for determining an appointment is transparent and impartial and creditors and debtors, have the opportunity to oppose
- Law should facilitate review of a decision to appoint by:
 - providing grounds upon which appointment may be reviewed
 - providing process for review
 - if appointment is set aside, providing for appointment of another qualified OH



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Principle 4 - Removal, Resignation and Death of OH

- Where parties in interest wish to remove an OH from office and cases in which an OH may wish to retire or may die
- Law should provide for:
 - resignation from office
 - grounds for removal
 - process for removal



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Principle 5 - Replacement of OH

- Where an OH dies, retires or is removed, law should provide:
 - prompt appointment of a new OH
 - new OH is entitled, without delay, to assets, books and records of the debtor
 - new OH is entitled, without delay, to books and records of former OH that concern or are related to the previous conduct of the administration
 - retiring or removed OH must co-operate with and assist new OH



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Principle 6 - Standards of Professional and Commercial Conduct

- Most useful way of establishing and measuring level of performance of OH
- Accordingly, the law should:
 - by primary legislation, provide basic, fundamental standards that are critical to proper professional and commercial conduct on the part of OHs
 - by secondary legislation, provide standards relating to:
 - a) reports
 - b) initial collection and safeguarding assets
 - c) trading of debtor's business subsequent to commencement
 - d) keeping of records
 - e) convening and conduct of creditors meetings
 - f) sale of assets
 - g) opening and operation of bank accounts
 - h) reorganisation plan contents and explanatory memorandum



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Principle 7 - Reporting and Supervision

- Creditors, debtor and others in interest are entitled to be regularly informed about the progress of cases. This also provides a basis upon which the OH may be monitored
- Law should provide:
 - OH provide regular reports progress of cases
 - for appointment of committees of creditors
 - performance of cases to be monitored



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Principle 8 - Regulatory and Disciplinary Functions

- The level of trust, responsibility and work standards, regulation and discipline
- Law should provide:
 - government or other body to have regulatory, investigatory and disciplinary powers
 - grounds on which the conduct of an OH may be investigated
 - powers of a regulatory body, including:
 - a) investigation upon a referral from a court, third party or own motion
 - b) intervene and be heard on any application to a court
 - c) impose disciplinary measures
 - provide that disciplinary powers include power to:
 - a) impose a fine
 - b) suspend license or registration
 - c) terminate registration or license
 - d) require compensation for third parties
 - e) require further education and training



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Principle 9 - Remuneration and Expenses

- The level of reward and manner of determination is critical
- Law should provide:
 - entitlement to remuneration and expenses
 - entitlement may be determined by court or creditors
 - basis of calculating remuneration
 - mechanism for review of determination
 - payment of remuneration out of the estate
 - appropriate level of priority for remuneration



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Principle 10 - Release of OH

- The law should provide that, subject to any objection by a regulatory body or an interested party, an OH may be released from appointment



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Principle 11 - Insurance and Bonding

- The law should require that an OH must at all times maintain a bond or professional indemnity insurance cover to protect third parties against negligence or breach of duty or fraud by an OH



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Principle 12 - Code of Ethics

- The law should encourage and facilitate the development of a code of ethics for OHs, preferably through a professional body



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The Recommendations by the “Uhlenbruck-committee”

**Prof Dr. Ulrich Haas,
University of Zurich**



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Overview

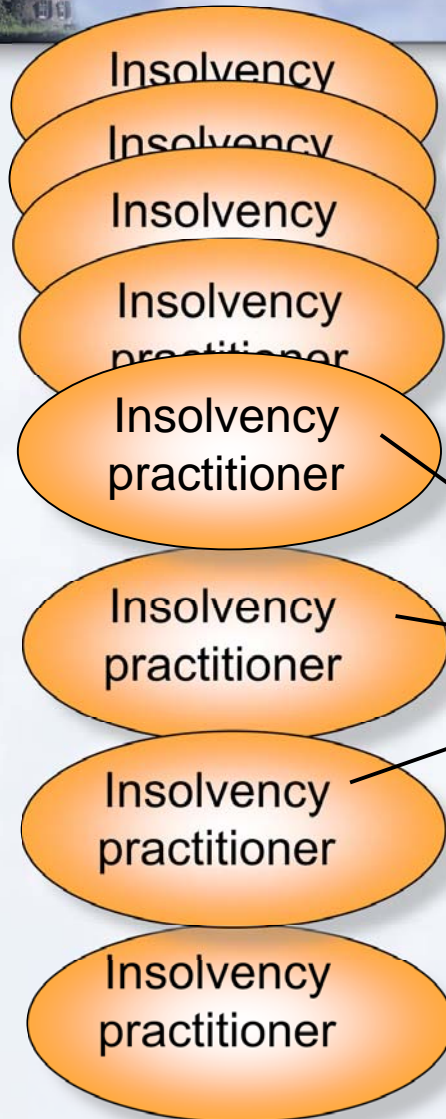
- (1) some background information
- (2) purpose and contents of the recommendations
- (3) the impact of the recommendations in practice





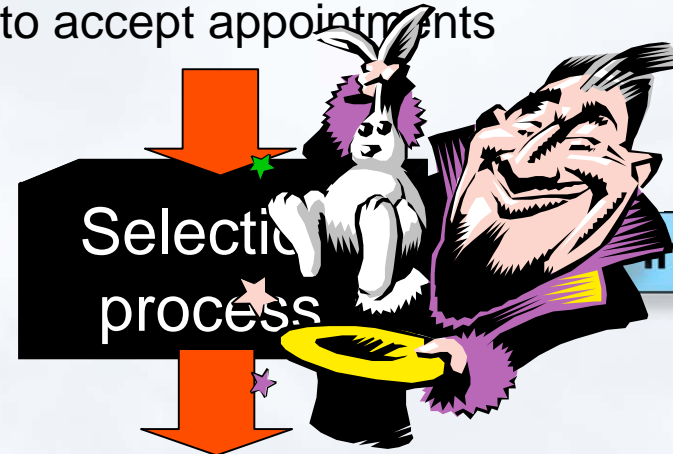
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Sec. 56 InsO:

- * independent individual
- * suited to the case at hand
- * particular experience in business matters
- * independent of creditor / debtor
- * willing to accept appointments



consequences

- * not very transparent allocation procedure
- * appointment practice varies from court to court
- * application procedures for candidates vary widely



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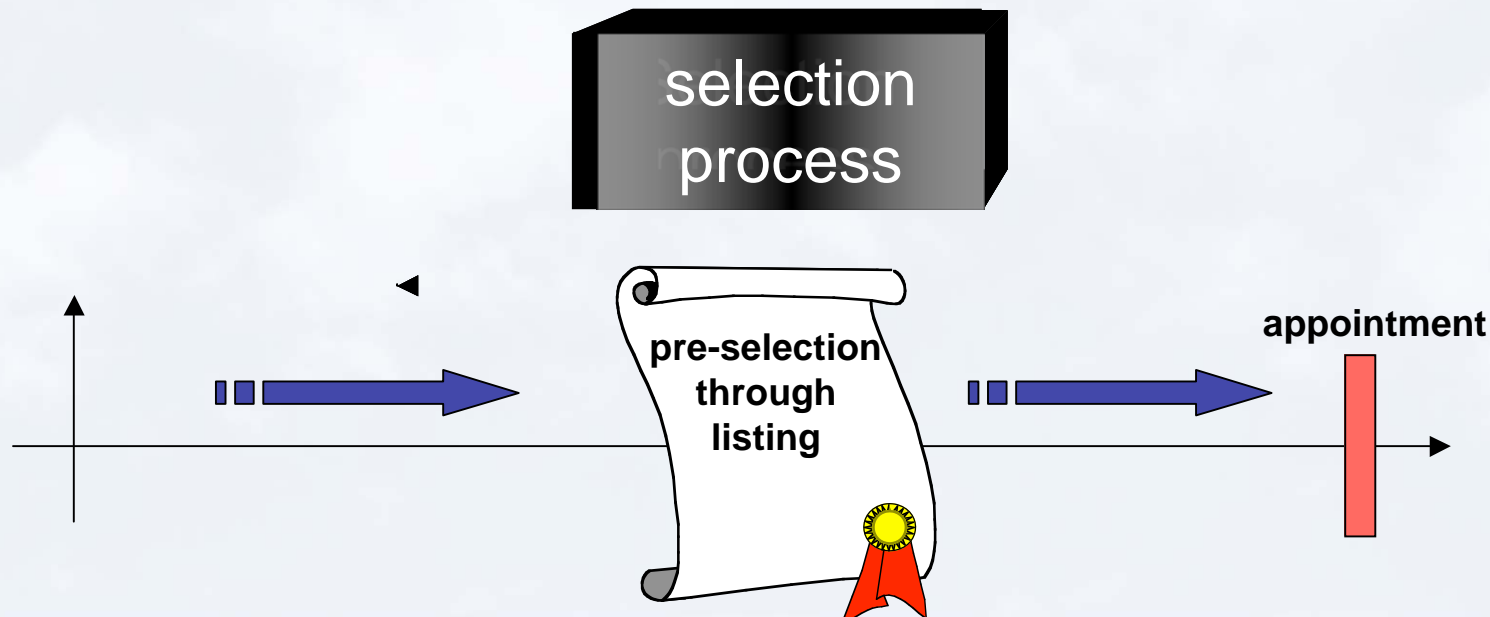
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German Const. Court (2004 / 2006)

large discretion of judge in the selection process. However, discretion is limited by the following principles:

- fair chance for all applicants
- interests of creditors / debtors (speedy decision, high quality standards, specificity of the case at hand)
- subject to judicial review (balancing interests of all stakeholders)





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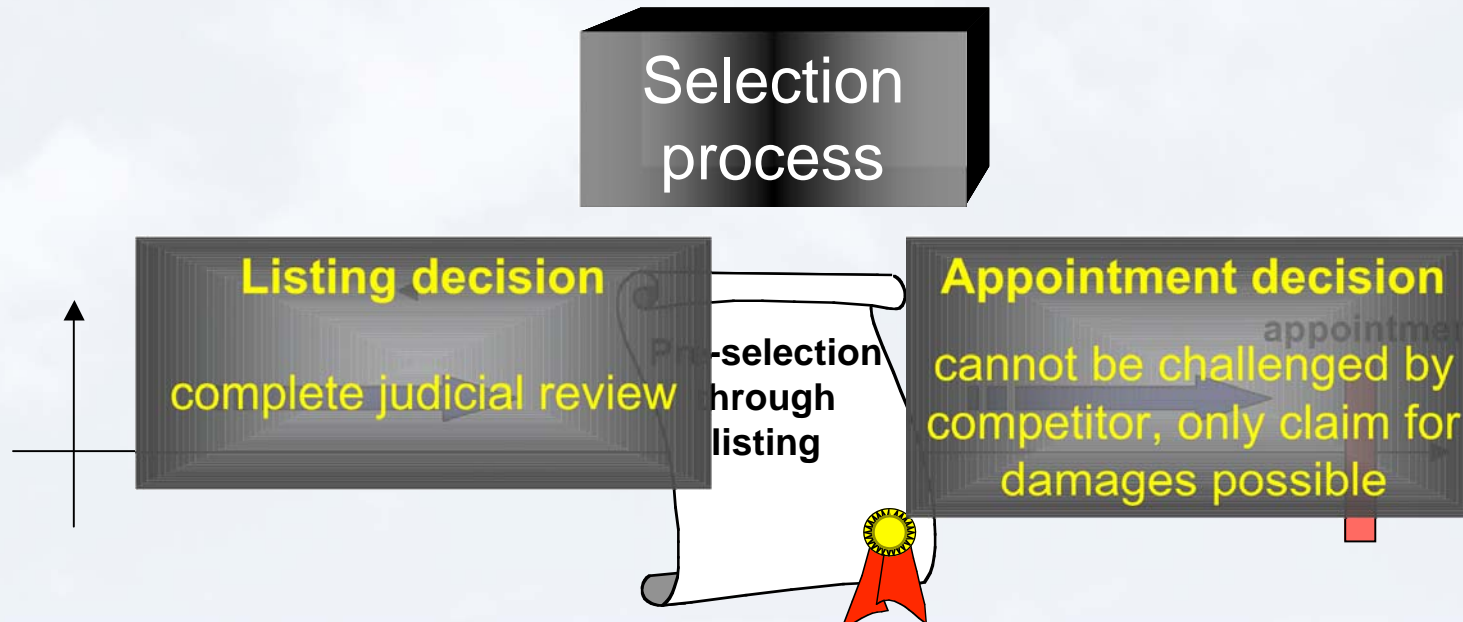
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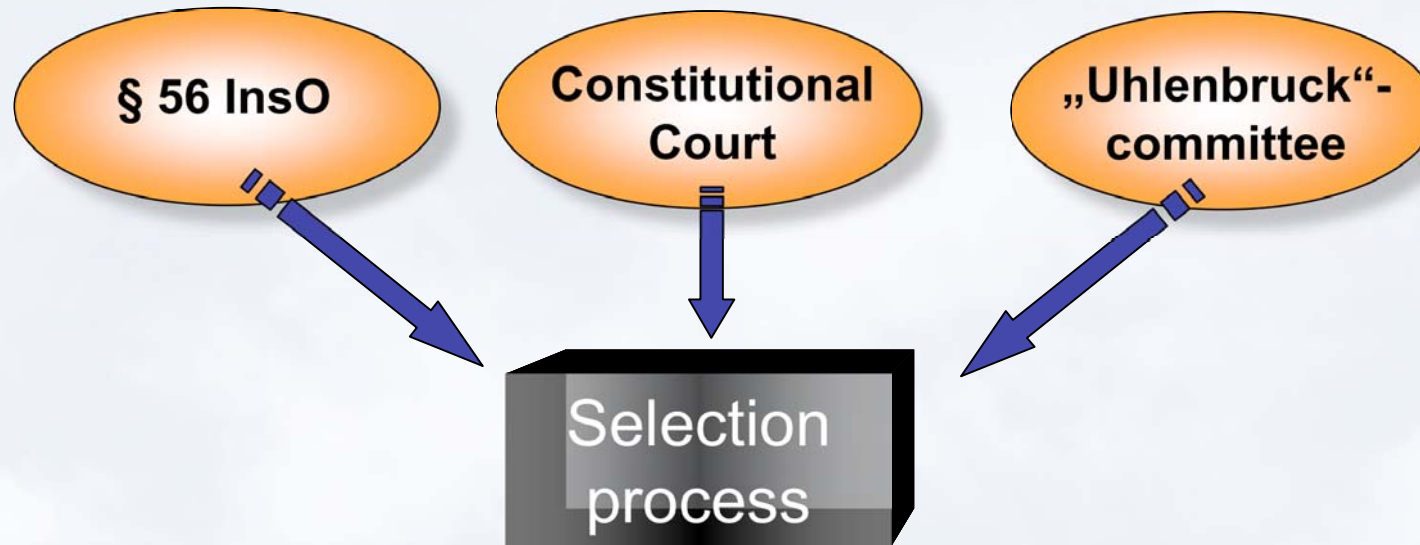
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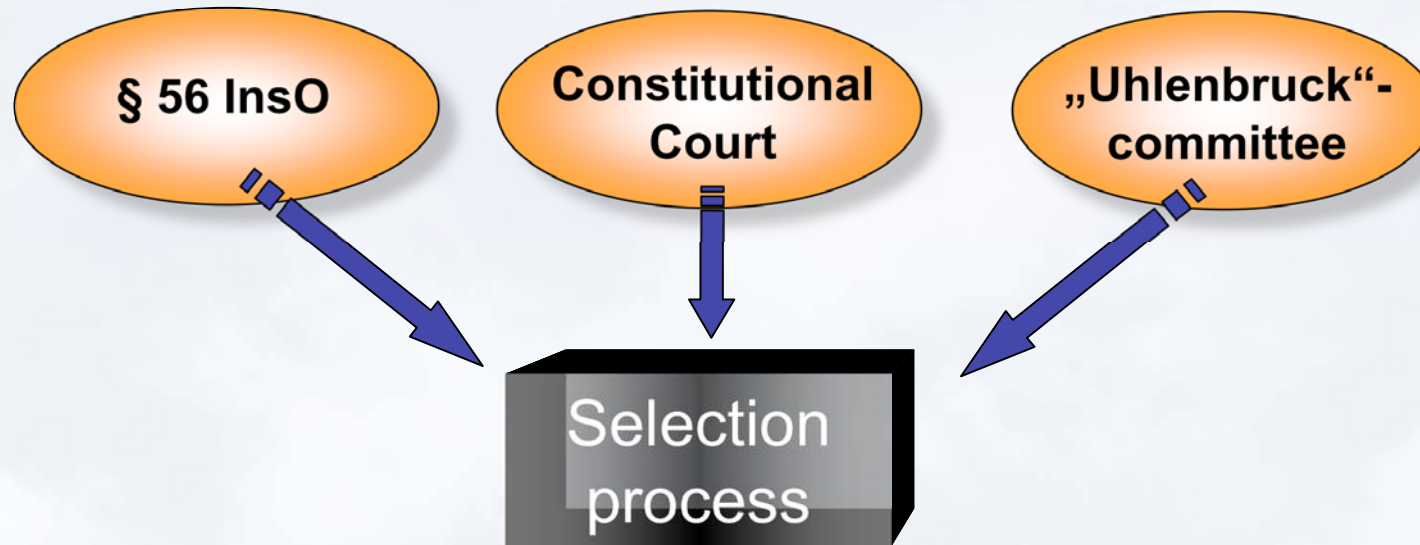
- name
- 33 members representing various groups of stakeholders (creditors, insolvency practitioners, judges, creditors, etc.)
- committee started work in October 2006 and published its recommendations / conclusions in July 2007





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- Name **goal of Uhlenbruck committee**
- 33 members representing the various groups of stakeholders (creditors, insolvency practitioners, judges, creditors, etc.)
- committee started work in October 2006 and published its recommendations in July 2007

goal of Uhlenbruck committee

- **respect independence of judges**
- **give some guidance in order to achieve uniform standards among insolvency courts**

majority decision



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Must lead to a restriction of the number of potential candidates

Must be based on objective and transparent quality criteria

- professional criteria: Education / (business) experience
- personal criteria: reliability / independence
- organisation: insurance / vicinity / equipment / staff
- past (success) record:

not exclusive list of criteria

differentiation on the list



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must lead to a restriction of the number of potential candidates

must be based on objective and transparent quality criteria

must follow a process that respects basic judicial principles



right to be heard

written and reasoned decision

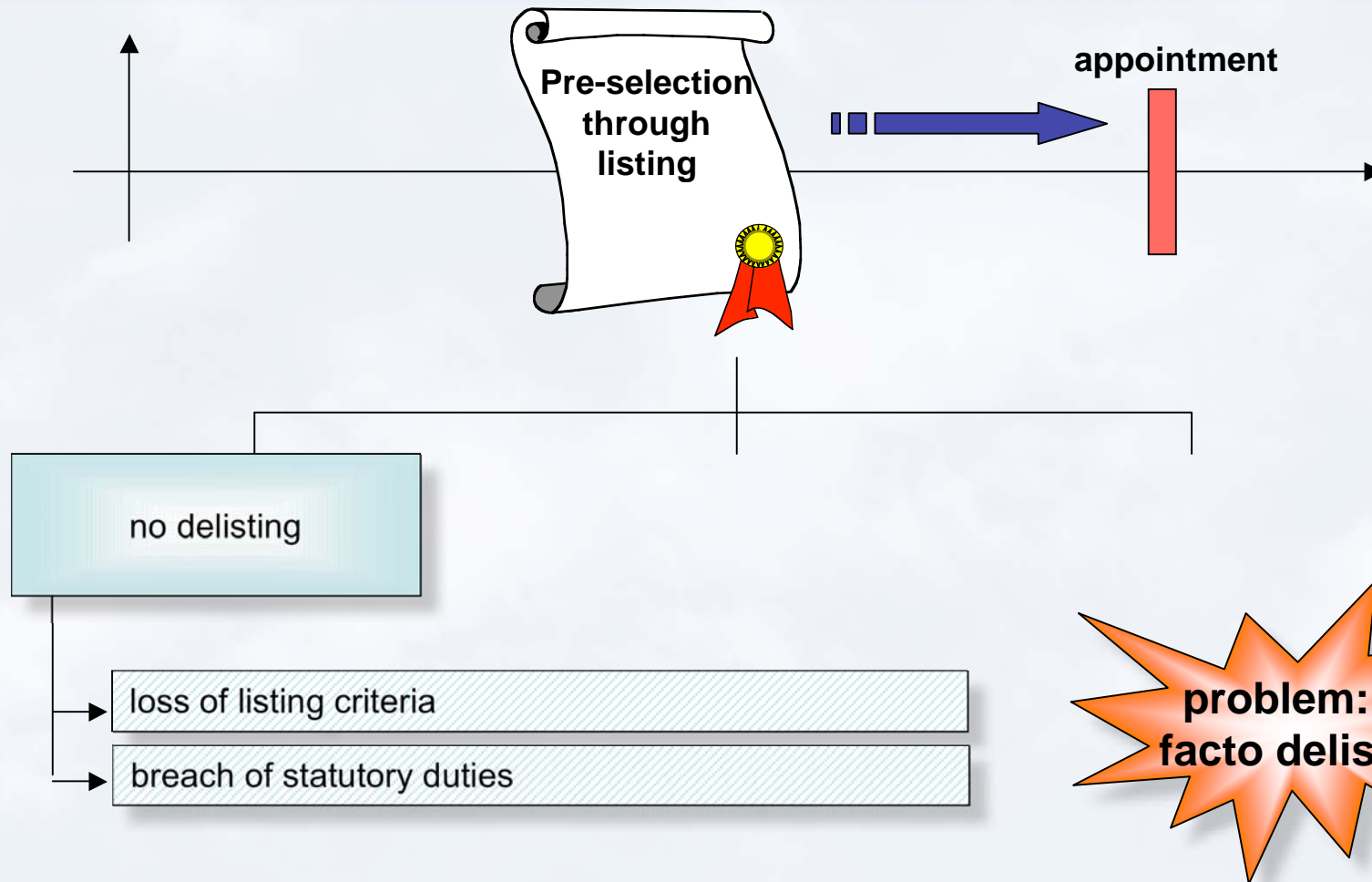
judicial review (right to be listed)

scope of decision is limited to indiv. judge/court



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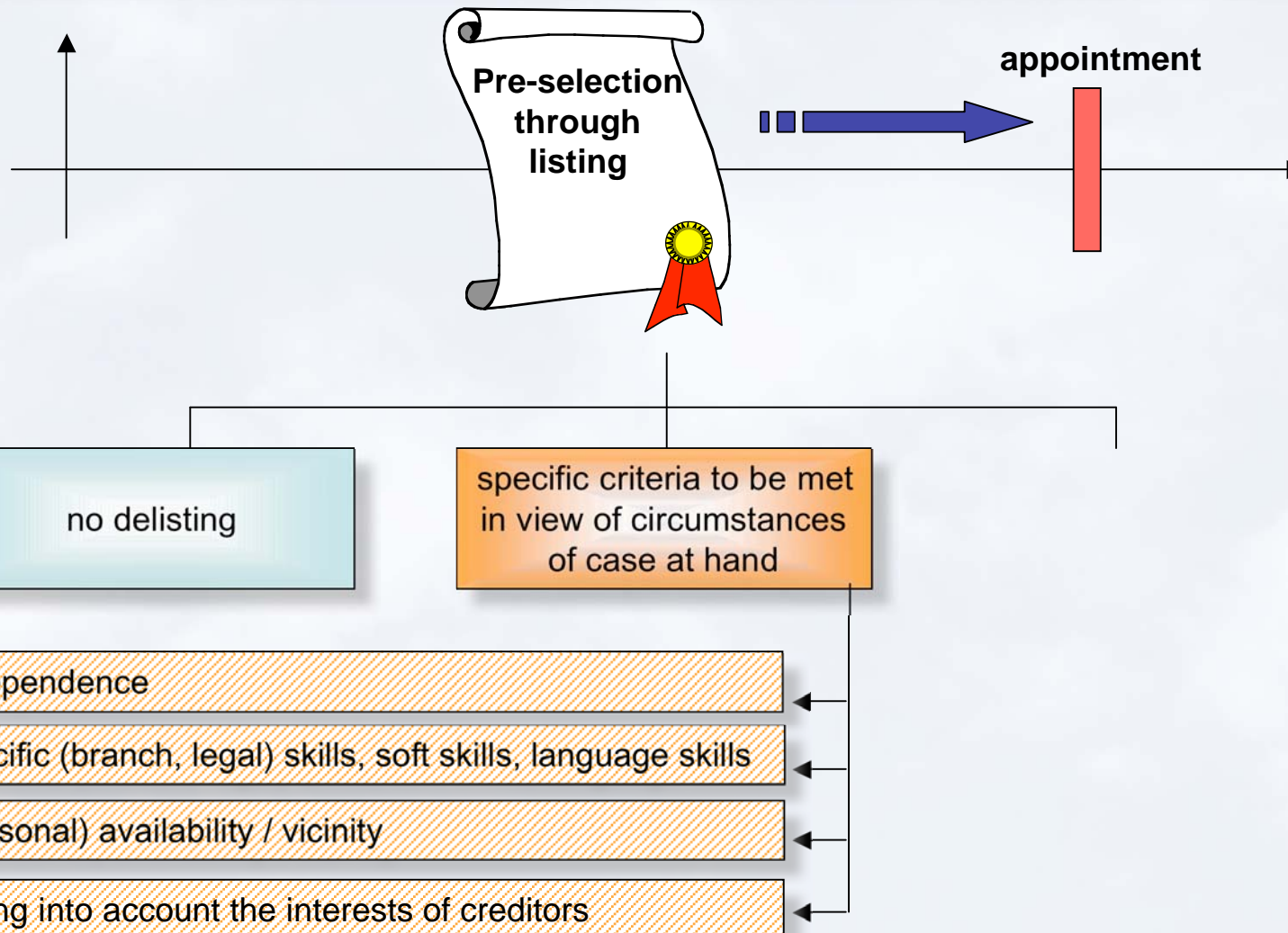
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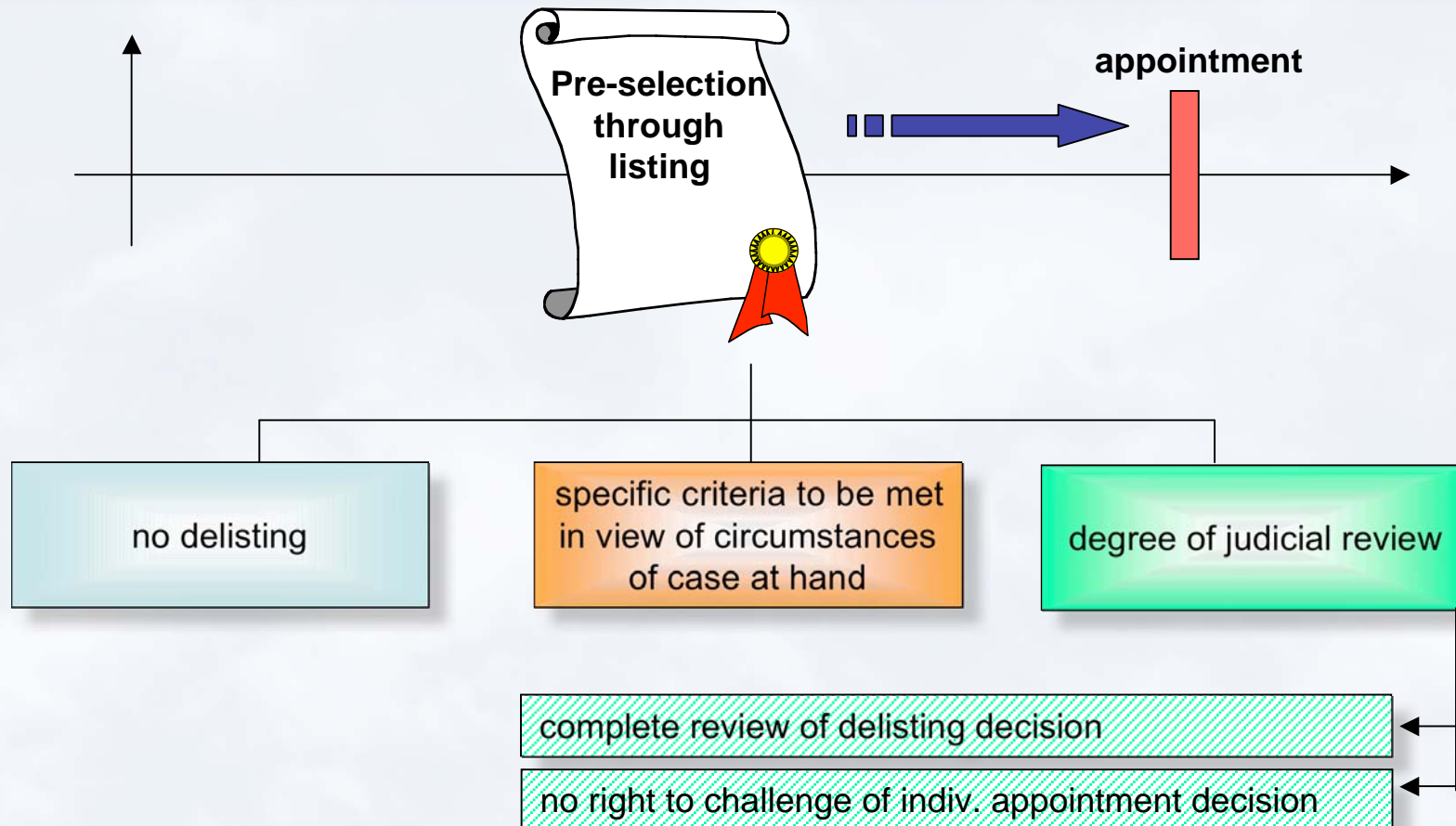
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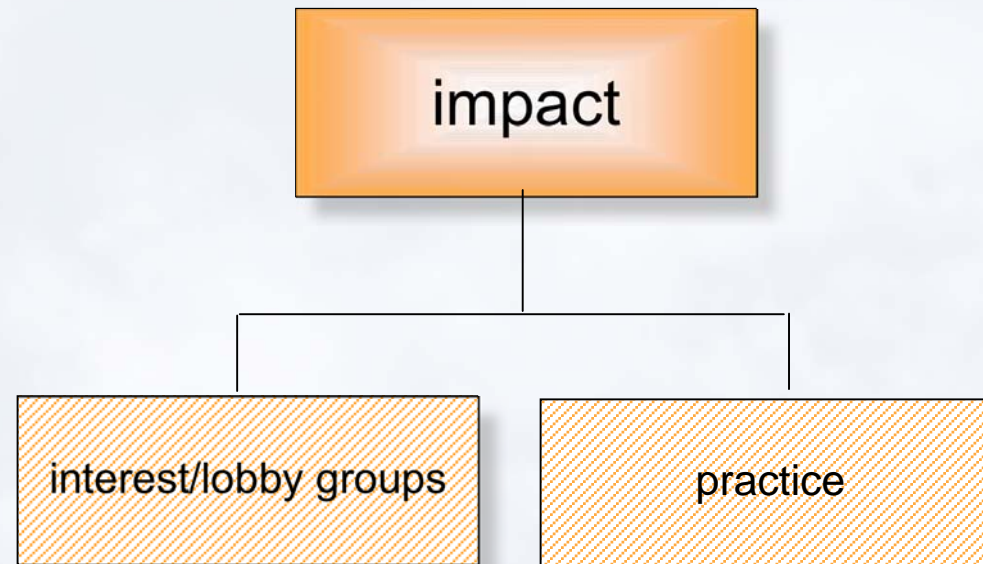
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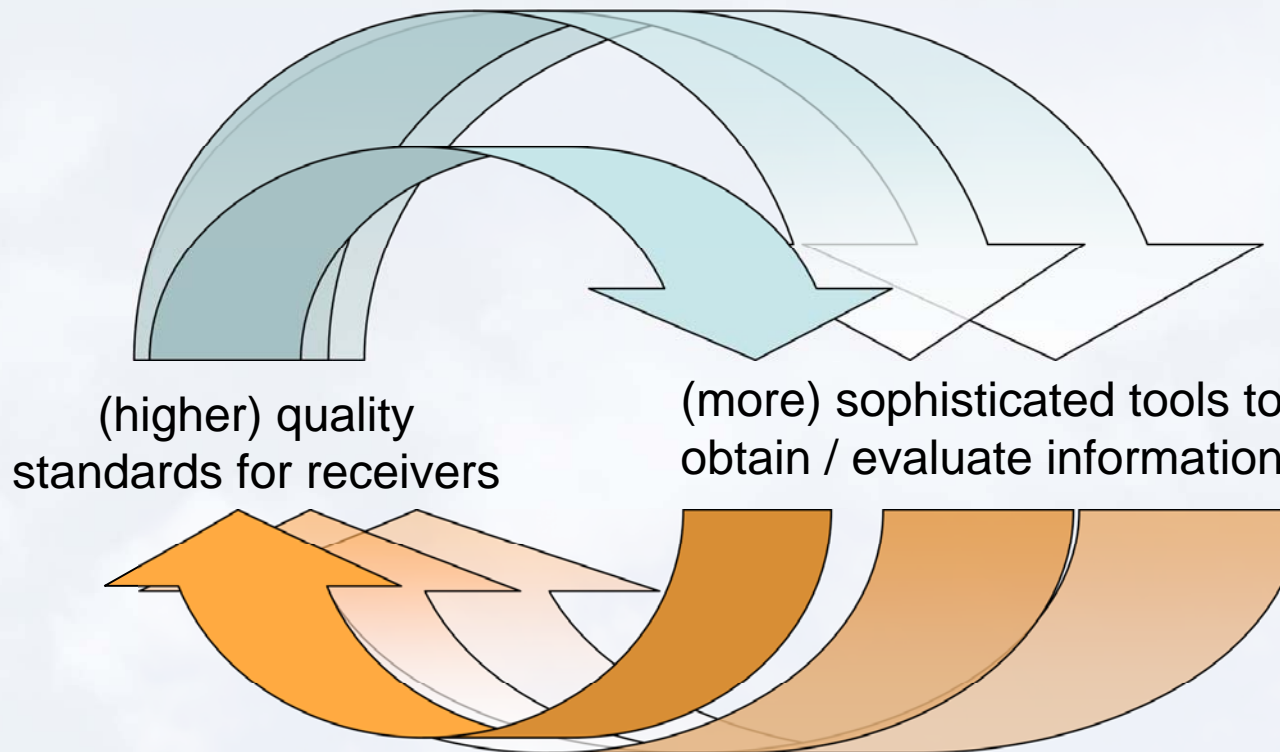
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weighting of criteria

higher quality of judges / court infrastructure

need of external rating / certification?



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Thank you very much for your attention

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Insolvency Proceedings in the Netherlands (Chapter 10.2)

Martijn Polak



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Issues

- Limited relevance of Chapter 10.2 (*slide 3*).
- Principal rule and exception (*slides 4-7*).
- Specific scope of application of each provision or paragraph (*slides 8-16*).
- Critique of some provisions (*slides 17-19*).
- Conclusions (*slide 20*).



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Limited relevance of Chapter 10.2

- EC Insolvency Regulation prevails over Title 10 "*International Insolvency Law*" (*caveat* in Article 10.1.1).
- Dutch insolvency proceedings are most likely to be opened if the centre of a debtor's main interests is situated in (a) the Netherlands, or (b) another EU member state, *i.e.*, in cases covered by the EC Insolvency Regulation.



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Principal rule and exception - 1

- *Principal rule*: Dutch insolvency proceedings, opened on the basis of Article 3 (1) of the EC Insolvency Regulation, claim universal territorial effect (outside the European Union), in particular through Articles 10.2.4-10.2.6.
- Principal rule is not codified in Chapter 10.2.



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Principal rule and exception - 2

- *Exception:* Dutch insolvency proceedings, opened on the basis of Article 10.2.1 (or on the basis of Article 3 (2) of the EC Insolvency Regulation), claim limited territorial effect, *i.e.*, only affect the debtor's assets located in the Netherlands.
- Exception is codified in Article 10.2.2.



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Principal rule and exception - 3

- Principal rule is in conformity with case law (HR 15 April 1955 (*Comfin*), NJ 1955, 542) and builds on the EC Insolvency Regulation (Articles 3 (1), 16 and 17).
- Exception builds on the EC Insolvency Regulation (Articles 3 (2), 16 and 17).



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Principal rule and exception - 4

- Principal rule is to be codified in (new) Article 10.2.2, paragraph (1).
- Exception is to be transferred to (new) Article 10.2.2, paragraph (2).



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Specific scope of application of each provision/paragraph - 1

- Article 10.2.1 (*Jurisdiction*), paragraph (1): Opening of Dutch insolvency proceedings + EC Insolvency Regulation is inapplicable + the debtor is (a) domiciled in the Netherlands, or (b) exercises a profession or a business out of an office in the Netherlands.



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Specific scope of application of each provision/paragraph - 2

- Paragraphs (2) and (3): Opening of Dutch insolvency proceedings + EC Insolvency Regulation is inapplicable + foreign non-EC Insolvency Regulation insolvency proceedings have been recognized as foreign main insolvency proceedings pursuant to Chapter 10.3 + (some of) debtor's assets are located in the Netherlands.



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Specific scope of application of each provision/paragraph - 3

- Article 10.2.2 (*Territorial effect*): Dutch insolvency proceedings opened on the basis of Article 10.2.1.



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Specific scope of application of each provision/paragraph - 4

- Article 10.2.3 (*Notification of creditors*), paragraphs (1) and (2): Any notification pursuant to the Insolvency Act.



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Specific scope of application of each provision/paragraph - 5

- Article 10.2.4 (*Lodging of claims and exercise of creditors' rights*), paragraphs (1) and (3): Dutch insolvency proceedings opened on the basis of Article 3 (1) of the EC Insolvency Regulation + creditor domiciled in non-EU member state **or** Dutch insolvency proceedings opened on the basis of Article 10.2.1 + creditor domiciled outside the Netherlands.



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Specific scope of application of each provision/paragraph - 6

- Paragraphs (2), (3) and (5): Dutch insolvency proceedings (opened on the basis of either Article 3 (1) of the EC Insolvency Regulation or Article 10.2.1) + liquidator appointed in foreign non-EC Insolvency Regulation insolvency proceedings + foreign insolvency proceedings recognized pursuant to Chapter 10.3.



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Specific scope of application of each provision/paragraph - 7

- Paragraph (4): Dutch insolvency proceedings opened on the basis of Article 3 (1) of the EC Insolvency Regulation (= claiming universal territorial effect (outside the European Union)) + foreign non-EC Insolvency Regulation insolvency proceedings (whether or not recognized pursuant to Chapter 10.3).



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Specific scope of application of each provision/paragraph - 8

- Article 10.2.5 (*Imputation*): Dutch insolvency proceedings, opened on the basis of Article 10.2.1 (*or rather on the basis of Article 3 (1) of the EC Insolvency Regulation?*) + foreign non-EC Insolvency Regulation insolvency proceedings (whether or not recognized pursuant to Chapter 10.3).



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Specific scope of application of each provision/paragraph - 9

- Article 10.2.6 (*Return*), paragraphs (1)-(5): Dutch insolvency proceedings, opened on the basis of Article 3 (1) of the EC Insolvency Regulation (= claiming universal territorial effect (outside the European Union)) + creditor's (in-)direct individual recovery in (non-EU member) state X + recognition of Dutch insolvency proceedings in state X.



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Critique of some provisions - 1

- Article 10.2.3: mechanism for notification of creditors in cross-border situations?
- Individual notification or collective notification through Internet and mass media?



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Critique of some provisions - 2

- Article 10.2.4 (1)-(2): provisions/ mechanism for verification + ranking of claims governed by foreign public law?
- Foreign tax and social security claims to be treated on the same footing / with equivalent priority as Dutch tax and social security claims?



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Critique of some provisions - 3

- Article 10.2.6: mandatory character to be replaced by discretionary character?
- Liquidator may welcome individual recovery abroad resulting in proceeds for the Dutch insolvency proceedings, and may wish to compensate/award active creditor out of these proceeds.



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Conclusions

- Chapter 10.2 is of limited relevance.
- Principal rule should be codified.
- Specific scope of each of the Articles 10.2.1-10.2.6 makes application of Chapter 10.2 complicated.
- Some modifications/additions necessary.



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Foreign insolvencies (section 10.3)

Dr. André Berends



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- Current situation: very limited recognition of foreign insolvencies
- **Section 10.3 PDIA:**
- inspired by UNCITRAL Model Law
- but not identical



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- **PDIA**

- Request by:
 - foreign representative
 - debtor
 - creditor

- **UNCITRAL**

- Request only by:
 - foreign representative



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- **PDIA**

- Both main and non-main

- **UNCITRAL**

- Both main and non-main



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- **PDIA**

- Relief main:

 - upon

 - recognition

 - not specified

 - (lex

 - concursum)

- **UNCITRAL**

- Relief main

 - upon

 - recognition

 - (main) ↔

 - upon request

 - entrusting

 - distribution



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- **PDIA**

- Relief non-main

- ‘Assets removed to NL after opening of insolvency proceeding’

- **UNCITRAL**

- Relief non-main

- Upon request
- including hearing of witnesses



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- **PDIA**

- Powers of liquidator:

lex concursus

– (Chapter 10.4?)

- **UNCITRAL**

- Powers of liquidator:

Model law = law of recognising state



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- **PDIA**

- Preservation measures:
 - Recognition of foreign measures
 - 'domestic measures'

- **UNCITRAL**

- Preservation measures:
 - measures mentioned in Model Law (= Law of reconising State)



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- **PDIA**

- Preservation measures
 - Staying execution
 - Divestment
 - Hearing witnesses

(also territorial?)

- **UNCITRAL**

- Preservation measures:
 - staying execution
 - Divestment
- 'usually available only in collective proceedings' (Report)



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- **PDIA**

- No explicit rule on modification or termination of relief

- **UNCITRAL**

- Court may modify or terminate relief



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Commentary on Draft Article 10.3

Paul Omar
University of Sussex



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- 10.3.1
- Revisiting jurisdictional issues (not EIR/BC Model)
- Does denial if breaching 'internationally accepted norms' mean Model Law Art 17 framework?
- i.e. insolvency proceedings, application in proper form by relevant official to right court.



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- 10.3.1
- Public Policy exception (Art 26 EIR and Model Law Art 6)
- EIR recognition scheme tempered by Art 26, but Art 26 tempered by Art 10, EC Treaty; no such tempering for Model Law Art 6
- i.e. how will existing practice on non-recognition change?



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- 10.3.5.4
- Powers of the liquidator, not to include coercive/adjudicatory powers
- What would coercive include?
- 'securing contributions by negating liability suits': UK and IE practice
- May need to use 10.3.7 (supervisory judge's role) to support these powers



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- 10.3.7
- This permits the appointment of a supervisory judge where Dutch law applies
- 10.3.7 is consonant with Model Law Art 27(a), but....
- How does this sit with 10.5.1 duty?



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FOREIGN INSOLVENCIES PROCEEDINGS

(Section 10.3)

Ángel M. Ballesteros



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- **Legal standing to request for the recognition**
- **Judgments susceptible of obtaining the recognition**
- **Causes for rejecting the recognition**
- **Competent Court**
- **Recognition proceeding**
- **Seizure before Judgment**



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