



Joint Insolvency Conference

Crossing (Dutch) Borders in Insolvency



APPLICABLE LAW

(CHAPTER 10.4)

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INTRODUCTION

- IP IN NL >>>>> ASSETS IN RUSSIA
- IP IN JAPAN >>>>> ASSETS IN NL



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INTRODUCTION

IP IN JAPAN >>>>> ASSETS IN NL:
Article 10.3.2(1): extraterritorial effect

IP IN NL >>>>> ASSETS IN RUSSIA:
extraterritorial effect



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APPLICABLE LAW: GENERAL RULE

Article 10.4.1:

‘Save as otherwise provided in this Act, the law applicable to insolvency proceedings in respect of the debtor and their effects shall be the law of the State within whose territory such proceedings are opened.’



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APPLICABLE LAW: EXCEPTIONS

- **Third parties' rights *in rem*** (Article 10.4.2)
equivalent: Article 5 EC Insolvency Regulation
- **Set-off** (Article 10.4.3)
equivalent: Article 6 EC Insolvency Regulation
- **Reservation of title** (Article 10.4.4)
equivalent: Article 7 EC Insolvency Regulation
- **Current contracts relating to immovable property** (Article 10.4.5)
equivalent: Article 8 EC Insolvency Regulation
- **Payment systems and financial markets** (Article 10.4.6)
equivalent: Article 9 EC Insolvency Regulation



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APPLICABLE LAW: EXCEPTIONS

- **Contracts of employment** (Article 10.4.7)
equivalent: Article 10 EC Insolvency Regulation
- **Effects on rights subject to registration** (Article 10.4.8)
equivalent: Article 11 EC Insolvency Regulation
- **Detrimental acts** (Article 10.4.9)
equivalent: Article 13 EC Insolvency Regulation
- **Protection of third-party purchasers** (Article 10.4.10)
equivalent: Article 14 EC Insolvency Regulation
- **Effects insolv. proceedings on lawsuits pending** (Article 10.4.11)
equivalent: Article 15 EC Insolvency Regulation



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APPLICABLE LAW: EXCEPTIONS

Proprietary features:

- Article 10.4.2: third parties' rights *in rem*
- Article 10.4.4: reservation of title
- Article 10.4.8: effects on rights subject to registration
- Article 10.4.10: protection of third-party purchasers



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RIGHTS *IN REM*

Article 10.4.2(1):

‘The insolvency of the debtor *shall not affect* the rights *in rem* of creditors or third parties in respect of assets (...) belonging to the debtor which are situated within the territory of *another* State at the time of the opening of proceedings.’



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RIGHTS IN REM

Case:

Hiroshi Industries bankrupt (17 March 2008) >>> assets:

- computer chips in Rotterdam > pledge Deutsche Bank
- factory sites in Amsterdam > mortgage ING Bank
- sole shareholder two Dutch limited companies
- claims against several Dutch debtor's



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RIGHTS *IN REM*

Article 10.4.2 > questions:

- Types of rights
- Which law should be applied?
- Where are the debtor's assets located?
- *Conflit mobile* or *Statutenwechsel*
- 'Shall not affect'



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CONCLUSIONS

- The extraterritorial effect of Dutch insolvency proceedings should be codified
- Article 10.4.1 should contain a non-exhaustive list of subjects that are governed by the *lex concursus*
- The explanatory report should clarify the term ‘rights *in rem*’ as used by Article 10.4.2
- The text of Article 10.4.2 and the explanatory report should clarify the position of quasi-property rights



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CONCLUSIONS

- Article 10.1.2(g) should give answer to the question where shares, payment or settlement systems, and tangible claims are situated
- What are the legal consequences of the *conflict mobile* concept in international insolvency proceedings?
- Book 10 Dutch Civil Code (PIL)