

Insolvency & Restructuring - Netherlands

Features of universality principle introduced to Dutch international insolvency law

Contributed by **NautaDutilh**

February 28 2014

Introduction

Facts

Territoriality principle

Decision

Comment

Introduction

In a ground-breaking decision issued on September 13 2013, the Dutch Supreme Court found that a foreign bankruptcy trustee may, in principle, exercise the powers conferred on him or her under the *lex concursus* (the law governing the bankruptcy) in the Netherlands. Such powers can include the management and disposal of assets located in the Netherlands at the time of the foreign bankruptcy order. Although the Supreme Court still describes its treatment of foreign bankruptcies under Dutch law as governed by the territoriality principle, the rules it adopted bear a closer resemblance to those based on the universality principle: a foreign bankruptcy trustee can exercise all powers in the Netherlands without the requirement of a recognition procedure.

Facts

In this case the court considered the position of the Russian trustee in the Yukos bankruptcy and whether he was authorised to sell and transfer shares in a Dutch limited liability company (*besloten vennootschap*) that, under Russian law, formed part of the bankruptcy estate. According to the Supreme Court, the Russian trustee was authorised to do so if Russian insolvency law allowed this. In the Supreme Court's view, the only exception to this principle would be where the foreign bankruptcy order violated Dutch public policy. Whether the bankruptcy order in *Yukos* violates Dutch public policy must still be decided by the lower court.

Territoriality principle

The Dutch Bankruptcy Act, which dates from 1893, contains no provisions dealing with the recognition of a foreign bankruptcy. According to the drafters of the act, it was considered undesirable to include rules that would allow for the recognition of bankruptcies from any country in the world. Consequently, the Supreme Court developed the territoriality principle in its case law. This principle entails that a bankruptcy from a country with which the Netherlands has no treaty does not include any assets in the Netherlands and cannot be invoked insofar as this would negatively affect the position of creditors. The EU Insolvency Regulation, which is based on the EU Treaty, is considered a treaty in this sense. However, it is the only such treaty now in force to which the Netherlands is a party.

Decision

According to *Yukos*, the following rules for bankruptcies outside the European Union apply:

- The foreign bankruptcy freeze does not affect assets located in the Netherlands at the time of the bankruptcy order. This means that those assets may still be attached by individual creditors. If the foreign trustee sells or otherwise disposes of such assets, prior attachments made by individual creditors must be respected.
- The foreign bankruptcy trustee is authorised to manage as well as sell or otherwise dispose of assets located in the Netherlands, provided that this is allowed under the *lex concursus*. Therefore, the foreign bankruptcy trustee may, for example, exercise voting rights on shares in Dutch companies, and sell such shares to third parties and distribute the proceeds in the foreign bankruptcy in accordance with the rules of the *lex concursus* if so permitted by those rules.
- The only exception to the above authority is where the foreign bankruptcy order

Authors

Barbara Rumora-Scheltema



Robert van Galen



Teun Struycken



violates Dutch public policy. However, under *Yukos*, the foreign bankruptcy trustee is not required to obtain a court decision that the bankruptcy order is lawful before exercising his or her powers in the Netherlands. In other words, the foreign bankruptcy trustee can exercise these powers unless and until an interested party convinces a Dutch court to issue an injunction.

- Effects of the foreign bankruptcy that lead to a deterioration of the position of individual creditors will not be recognised. Thus, if under the *lex concursus* the end of the bankruptcy proceedings brings about the extinction of all unpaid debts, this will not be recognised in the Netherlands and an individual creditor can still take recourse there for the part of its claim that has remained unpaid.

Comment

As a consequence of this decision, foreign bankruptcy trustees can effectively exercise their powers in the Netherlands provided that they act within the scope of the *lex concursus* and such exercise does not lead to a deterioration of the position of the creditors. When exercising their powers, they must respect all existing attachments on Dutch assets by individual creditors. No prior court decision on recognition or relief (eg, as required under the United Nations Commission on International Trade Law Model Law), or exequatur (as required under the laws of some countries) is necessary. If an interested party believes that a foreign bankruptcy order violates Dutch public policy, it is up to that party to prevent the foreign bankruptcy trustee from exercising his or her powers by initiating court proceedings in the Netherlands.

Yukos has effectively opened the door to foreign bankruptcies to an extent that is normally found in countries adhering to the universality principle in international insolvency law. This may prove to be very useful for foreign representatives from non-EU countries that wish to include Dutch assets in the foreign insolvency.

The *Yukos* management argued for a more restrictive application of the territoriality principle. Among other things, they contended that Dutch law should provide protection against the effect of foreign bankruptcies from countries in which the rule of law is insufficiently developed. According to the *Yukos* management, this determination can be made only by the Dutch legislature, through its decision as to whether a treaty should be entered into with a particular country. In the view of the Supreme Court, such protection is granted through the public policy exception. The question of whether that exception applies in *Yukos* is still pending before the Amsterdam Court of Appeals, where the proceedings will now continue.

For further information on this topic please contact

Barbara Rumora-Scheltema, Robert van Galen or Teun Struycken at NautaDutilh by telephone(+31 20 71 71 000), fax (+31 20 71 71 111) or email (barbara.rumora-scheltema@nautadutilh.com, robert.vangalen@nautadutilh.com or [Teun Struycken](mailto:Teun.Struycken@nautadutilh.com)). The NautaDutilh website can be accessed at www.nautadutilh.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2014 Globe Business Publishing Ltd