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Client briefing October 2013

A receiver in foreign bankruptcy proceedings may also sell and transfer assets located in the Netherlands

On 13 September 2013 the Dutch Supreme Court ruled that a receiver in foreign bankruptcy proceedings may, in principle, sell assets of the bankrupt company that are located in the Netherlands whilst any attachments levied on these assets before such sale are to be respected.

The Supreme Court thereby overturned a decision by the Amsterdam Court of Appeal that had held that in light of the Dutch 'territoriality principle' the Russian receiver of Yukos Oil could not sell the shares of Yukos Oil's Dutch subsidiary.

The case

The case concerns the bankruptcy of Russian oil company Yukos Oil. Following its bankruptcy, the receiver of Yukos Oil sold the shares of Yukos Oil's Dutch subsidiary, Yukos Finance BV. The key question in the matter was whether a foreign bankruptcy receiver could exercise the powers granted to him under the law that governs the bankruptcy (the *lex concursus*) in the Netherlands, including his power to sell and transfer assets located in the Netherlands. The Court of Appeal in Amsterdam held that the bankruptcy receiver could not do so as such sale would make it impossible for unpaid creditors to take direct recourse against such assets in the Netherlands during the bankruptcy or after it ended. The Supreme Court has now overturned this decision.

In earlier decisions the Supreme Court held that, a bankruptcy pronounced in a foreign country only has territorial effect, except when a binding international regulation is in place (for the Netherlands the European Insolvency Regulation is the only relevant regulation that is currently in force).

The territoriality principle has been developed in case law of the Dutch Supreme Court in the absence of provisions in the Dutch Bankruptcy Act on the recognition of foreign bankruptcies. According to the Dutch Supreme Court's earlier case law application of the territoriality principle has the following effects:

1. The general bankruptcy freeze of the assets of the bankrupt company does not affect assets located in the Netherlands.
2. The legal effects of the foreign bankruptcy law cannot be invoked in the Netherlands if unpaid creditors would then no longer have recourse against the Dutch assets during or after the bankruptcy (eg when foreign bankruptcy rules entail that creditors shall no longer have an enforceable claim when the bankruptcy has ended, this legal effect cannot be invoked in the Netherlands).
3. The territoriality principle does, however, not preclude the effect in the Netherlands of other consequences of the foreign bankruptcy.

In the Yukos Oil case the Court of Appeal Amsterdam had ruled that rule 2 meant that the receiver of Yukos Oil could not sell assets located in the Netherlands as this would mean that unpaid creditors would no longer have recourse against such assets.

The Supreme Court has now overturned the decision of the Court of Appeal. It confirmed that under the above principles the foreign receiver may perform acts of management and disposition in the Netherlands and clarified that the foreign receiver may thus also sell and transfer assets located in the Netherlands for the benefit of the joint creditors, provided he has the authority to do so under his own laws and assuming that the bankruptcy judgment is not contrary to Dutch public order, whilst prior attachments levied on such assets must be respected. According to the Supreme Court, rule 2 does not stand in the way of the right of the receiver to sell assets located in the Netherlands as the unpaid creditors have the possibility to take recourse against the Dutch assets as long as they are owned by the bankrupt company.

Comments

The European Insolvency Regulation (in place since 2002) provides that the legal consequences of insolvency proceedings in one member state will in principle be acknowledged by the other member states.

The Supreme Court provides an important clarification on the effects in the Netherlands of foreign insolvencies that do not fall under the scope of the European Insolvency Regulation, as was the case with the Yukos Oil bankruptcy.

As a consequence of the current decision it is now clear that the territoriality principle that applies in such cases does not stand in the way of a foreign bankruptcy receiver selling and transferring assets located in the Netherlands (a recognition procedure (or an *exequatur* or relief) with respect to the foreign bankrupty judgment is not required), provided that the law governing the bankruptcy proceedings grants such power to the receiver, and provided that the bankruptcy judgment is not arrived at in a manner that is contrary to Dutch public policy.

The more restrictive interpretation of the territoriality principle as adopted by the Court of Appeal in the Yukos Oil case would be highly unpractical as it would mean that a receiver of a bankrupt company that was not located in the EU could never sell assets in the Netherlands. This would also be an unnecessary protection of creditors as creditors are always able to levy attachments on the Dutch assets prior to any such sale, and such attachment has to be respected by any buyer. The clarification now given by the Supreme Court is therefore welcomed.

The case has been referred back to the Amsterdam Court of Appeal that will have to assess whether or not the Russian bankruptcy of Yukos Oil violates Dutch public order.

Clifford Chance acts for the buyer of the asset in this matter (together with Houthoff Buruma).

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