

## Developments

### **Book Review – Bob Wessels, *International Insolvency Law***

By Jessica Schmidt\*

[Bob Wessels, *INTERNATIONAL INSOLVENCY LAW*, Kluwer, 3<sup>rd</sup> ed. 2012, hardback, ISBN: 978-90-13-07707-0, €180]

Over the past decades, the continuing and ever-increasing global expansion of trade and investment has also brought about a tremendous rise of cross-border insolvencies. In their attempts to keep pace with this development, national and international legislators and standard setters have created a veritable “jungle” of national and international rules, standards and recommendations. The third, revised and augmented edition of *Bob Wessels’ “International Insolvency Law”* aims to provide not only insolvency practitioners and judges, but also researchers and students with an authoritative and detailed “map” enabling them to clear a path through this dense and sometimes seemingly impenetrable thicket of national and international rules and regulations.

The book is actually Volume X of *Wessels’ 10 volume series *Insolventierecht* (Insolvency Law)* and as such also functions as the “international capstone” to the other 9 volumes dedicated to Dutch insolvency law. However, as one can already see from its sheer size (863 pages of text, more than 100 pages of reprinted legal texts and various appendices and indices comprising another more than 250 pages), it is also a most impressive opus in its own right and, with regard to its content, is also entirely independent of its Dutch language companion volumes.

The author, Professor Bob Wessels, is an eminent insolvency practitioner and scholar, who not only commands vast practical experience, but has also published extensively on insolvency law, has acted and continues to act as advisor to and member of various national and international bodies, institutions and organizations, and is a much sought-after speaker at national and international professional events.<sup>1</sup> The book consists of five chapters and is complemented by an extensive bibliography, a list of relevant websites, tables of legislation and a table of the several hundred cases of various jurisdictions cited. Moreover, there are 14 appendices comprising reprints of the most relevant legislation, treaties, conventions, guidelines etc., making them easily accessible to the reader.

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<sup>1</sup> More information on the author is available on his website. See Bob Wessels, *Welcome* (2012), available at: <http://bobwessels.nl/uk/index.php> (last accessed: 27 June 2013).

Chapter I (p. 1 – 97) is simply entitled “International Insolvency Law” and functions as an introduction. After setting out the doctrinal perspectives and the historical development of international insolvency law, it provides a comprehensive, but also a very compact overview of the pertinent unilateral, bilateral and regional regulation as well as the relevant “soft law”. Chapter II (p. 99 – 142) on “International Insolvency Law in the Netherlands” is obviously a concession to the book being part of a Dutch series on insolvency law. However, Wessels’ very learned and concise presentation of the Dutch legal framework, which consists primarily of case law, is also of great value to any non-Dutch insolvency practitioner or judge faced with a cross-border case with a “Dutch element”. Moreover, the chapter provides very interesting insights and impulses for any academic active in the field of international insolvency law, especially since Wessels throughout endeavors to present the Dutch law in the context of and against the background of other national and international legal frameworks.

Chapter III (p. 143 – 339) is dedicated to the most important work products of UNCITRAL, the leading global standard setter. The primary focus is on the Model Law on Cross-Border Insolvency of 1997<sup>2</sup>. After some introductory remarks (§ 1) and outlines of the history (§ 2), the parameters for enactment (§ 3) and the scope and practical context of the Model Law (§ 4), Wessels provides a very thorough and detailed commentary on its individual provisions (§§ 5 – 9). The commentary is particularly valuable in that it does not confine itself to a thorough analysis of the rationale and content of the various provisions of the Model Law “in isolation”. Rather, it shows them “as law in action” by also presenting and analyzing the relevant enactment provisions in the U.S. (Chapter 15 U.S. Bankruptcy Code<sup>3</sup>) and the UK (Schedule 1 of The Cross-Border Insolvency Regulations 2006<sup>4</sup>) as well as the rapidly growing body of case law on these enactments. The section on the Model Law is completed by a short survey of the status of the enactment process (as of August 2011) (§ 10) and a critical appraisal of its structure and success (§ 11). Wessels’ assessment that the Model Law is – despite a number of undeniable downsides – overall a “well-balanced draft” and “succinct piece of exemplary legislation” (para. 10388) can only be underlined; its adoption in significant markets like especially the U.S. and the UK may be seen as ample proof (*cf.* para. 10386).

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<sup>2</sup> United Nations Commission on International Trade Law, *1997 - UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, UNCITRAL (1997), available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html) (last accessed: 27 June 2013). Also reprinted in the reviewed book, BOB WESSELS, *INTERNATIONAL INSOLVENCY LAW* 911 *et seq.* (2012).

<sup>3</sup> 11 U.S.C. Sec. 1501 – 1532, reprinted at 921 *et seq.* of WESSELS, *supra* note 1.

<sup>4</sup> The Cross-Border Insolvency Regulations SI 2006/1030 (2006), available at: [http://www.legislation.gov.uk/ukSI/2006/1030/pdfs/ukSI\\_20061030\\_en.pdf](http://www.legislation.gov.uk/ukSI/2006/1030/pdfs/ukSI_20061030_en.pdf) (last accessed: 27 June 2013).

In addition to the Model Law, Chapter III also covers the UNCITRAL Legislative Guide on Insolvency Law of 2004<sup>5</sup>, including the 2010 addition to it on enterprise groups<sup>6</sup> (§ 12), and the Practice Guide of 2009<sup>7</sup> (§ 13).

Chapter IV (p. 341 – 853) contains an article-by-article, in-depth commentary and analysis of the EU Insolvency Regulation<sup>8</sup>, which in quality and profoundness not only rivals, but actually surpasses most stand-alone commentaries. It derives special value from the digestion of a tremendous amount of literature as well as hundreds of cases, both from almost all EU jurisdictions, rendering a real “European perspective”. To be welcomed is in particular that Wessels generally provides a short summary of the relevant cases, thus also making accessible case law from jurisdictions whose language the reader might not be familiar with. Coupled with Wessels’ elegant presentation and most succinct doctrinal analysis, which also carves out the underlying concepts, rationales and policy considerations and subjects them to a critical evaluation, this is a real “must-read” for anyone – whether insolvency practitioner, judge or academic – engaged in any work for which the EU insolvency regulation is relevant.

This holds especially true for the very detailed and thorough section on the central criterion of “COMI” (“centre of main interests”) in article 3(1) of the Regulation, which has given rise to so many controversies between practitioners and academics as well as a myriad of “insolvency battles” – actually to such an extent that *Wessels’* is more than justified in his designation as a virtual “global comedy of errors” (*cf.* para. 10600f). *Wessels’* provides a comprehensive and complete portrayal of all the relevant problems and issues and the current status of the judicial and academic debate. Special applause is due in particular for his very sound and convincing rejection of the “head office functions” doctrine (*cf.* paras. 10563 – 10564, 10570d, 10594 – 10600f). Indeed – at least in its “pure” form, which deems purely internal, intra-group factors sufficient to rebut the COMI presumption in favor of the registered office – the “head office functions” (or “mind of

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<sup>5</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, UNCITRAL (2004), available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html) (last accessed: 27 June 2013). Also reprinted in the reviewed book, WESSELS, *supra* note 1, at 908 *et seq.*

<sup>6</sup> United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency*, UNCITRAL (2010), available at: <http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf> (last accessed: 27 June 2013).

<sup>7</sup> United Nations Commission on International Trade Law, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (hereinafter the “Practice Guide”), UNCITRAL (2009), available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2009PracticeGuide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html) (last accessed: 27 June 2013).

<sup>8</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. 2000 L 160/1, reprinted at 933 *et seq.* of WESSELS, *supra* note 1.

management") doctrine is clearly irreconcilable with the ECJ's emphasis on objective and ascertainable factors in the leading *Eurofood*-decision<sup>9, 10</sup>, which the court has again confirmed and reemphasized in its *Interedil*-decision<sup>11</sup> (which, however, was issued after the book's cut-off-date of 1 Sept. 2011).

The chapter is made perfect by a section on "The Insolvency Regulation as a model" (IV-6) in which Wessels provides a sound critical evaluation of the advantages and disadvantages of the Regulation's general concept and provides 20 recommendations for improvement (paras. 10949 *ff.*). Although one may not agree with all them of, they are undoubtedly carefully thought-through and well founded. Fortunately, at least some of these issues have been addressed in the Commission's proposal for a revision of the EU Insolvency Regulation presented in December 2012<sup>12</sup>, which is currently being debated in the Council.

In the final chapter V (p. 855 – 863), Wessels reflects again on many of the themes and issues raised in the various chapters and draws a number of conclusions on "the road ahead" which provide some interesting "food for thought".

Altogether, the ultimate upshot of this short review is therefore: A marvelous work which should form an integral part of the library of anyone concerned with international insolvency law!

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<sup>9</sup> *Eurofood IFSC Ltd.*, Case C-341/04, [2006] E.C.R. I-3813, Judgment of 2 May 2006.

<sup>10</sup> *Cf.* also MARCUS LUTTER, WALTER BAYER & JESSICA SCHMIDT, *EUROPÄISCHES UNTERNEHMENS- UND KAPITALMARKTRECHT* (European Business and Capital Markets Law) § 16 para. 19 (5<sup>th</sup> ed. 2012), with further references.

<sup>11</sup> *Interedil*, Case C-396/09, ZIP 2011, 2153, Judgment of 20 October 2011. *See* on this case, e.g. LUTTER, BAYER & J. SCHMIDT, *supra* note 10 at 3, 11.

<sup>12</sup> Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM (2012) 744. For an overview, *see* LUTTER, BAYER & J. SCHMIDT, *supra* note 10 at 3, 8 *et seq.*; *Reuß* *EuZW* 2013 please, 165 *et seq.*