



Hindsight bias in insolvency law: foresight in retrospect

Leiden, Thursday 23 June 2016

Scholars and lawyers come across situations where insolvency office holders (court-appointed administrators/trustees) of insolvent/bankrupt companies chase the company's directors, and sometimes shareholders, because the directors/shareholders did not prevent the insolvency/bankruptcy. In addition, the insolvency office holders may initiate proceedings against those parties, claiming mismanagement, damages or even the entire deficit, in order to 'reconstruct' (or reconstitute) the bankruptcy estate.

See for recent examples f.i. Enterprise Chamber (Amsterdam Court of Appeal) 2 November 2015 (Meavita, ECLI:NL:GHAMS:2015:4454) in the Netherlands (successful for trustees), Grant & Anor v Ralls & Ors (re Ralls Builders Ltd) [2016] EWHC 243 (Ch) (11 February 2016) in England and In re SemCrude LP, 14-4356 (3d Cir. April 28, 2016) in the US (unsuccessful for trustees).

Occasionally, an insolvency office holder has an interest in the outcome of these proceedings or settlement because the proceeds will be used to cover his costs and salary. The sole fact that the company went bankrupt becomes a factor (and presumption) of wrongful acts by the directors and the burden of proof of the contrary shifts to them. Subsequently, a court from time to time seems to have difficulty in recognising and/or considering the risk of hindsight bias in its judgment regarding the behaviour of directors.

This topic will be touched upon in the inaugural address on Friday, 24 June 2016, marking Reinout Vriesendorp's formal acceptance of his appointment at Leiden University as Professor of Insolvency Law (partially as successor of Bob Wessels) in the Leiden Law School, titled

[] it happens: then and now**

Over terugblikken en vooruitkijken in het insolventierecht (translation: *About hindsight and foresight in insolvency law*)

In this inaugural address, Reinout Vriesendorp will deal with issues related to hindsight bias in insolvency law (esp. related to directors' liability, transaction avoidance and fraudulent conveyance issues) and the factor of coincidence in the assessment by administrators and courts of events and behaviour by directors in the twilight zone of a company before its ultimate insolvency.

Because the inaugural address will be in Dutch, even though this topic is not limited to Dutch law, the hindsight bias issue with recent developments abroad will be the subject of a mini-seminar in English with contributions from various foreign jurisdictions, including Belgium, Germany, Italy, Netherlands, and UK, and potentially France and Spain.

The mini-seminar hopes to foster a debate about possible cross-border experiences and solutions. Consequently, INSOL Europe has adopted the seminar and labelled as an INSOL Europe Academic Forum event.

Programme

13.00 - 13.30 Welcome coffee

13.30 - 13.40 Opening – *Professor Rick Lawson, Dean of Leiden Law School*

13.40 - 14.00 Introduction – *Reinout Vriesendorp, Leiden University, Leiden/De Brauw Blackstone Westbroek, Amsterdam & Ruud Hermans, De Brauw Blackstone Westbroek, Amsterdam*

Hindsight bias versus other types of bias, bias of the administrator/trustee versus bias of the court, which situations are prone to bias

14.00 - 15.00 Hindsight bias as a multi-jurisdictional issue – domestic experiences in various jurisdictions: Belgium, France, Germany, Italy, Spain, UK, and others

Ruud Hermans, De Brauw Blackstone Westbroek, Amsterdam

Sarah Paterson, London School of Economics, Slaughter and May, London

Daniel Weiss, Hengeler Mueller, Frankfurt

[France, TBC]

15.00 - 15.30 Coffee and tea break

15.30 - 16.30 Hindsight bias as a multi-jurisdictional issue: domestic experiences in various jurisdictions (cont'd)

David Burdette, Nottingham Law School

Giorgio Corno, Studio Corno Avvocati, Milan

Joeri Vananroye, KU Leuven, Quinz advocaten, Brussels

[Spain, TBC]

16.30 - 17.00 Panel and audience discussion

17.00 - 18.30 Closing and drinks

19.00 Dinner (by invitation only)

Venue: Academiegebouw, Rapenburg 73, 2311 GJ Leiden, The Netherlands

Registration: Before 16 June 2016 by e-mail: Bedrijfswetenschappen@law.leidenuniv.nl.