

CONTENTS

Abbreviations	XV
Introduction	1
1. Definition of the topic and structure of the book	1
2. Translations and terminology	4
Chapter I Secured creditors and insolvency in German and Dutch law	7
1. Introduction	7
2. Security rights	13
2.1 Types of security rights	13
2.1.1 Divergent approach of Dutch law to ownership as a (non-possessory, undisclosed) security right	15
2.2 Realisation of encumbered moveables	21
2.2.1 Dutch law	21
2.2.2 German law	24
2.3 Realisation of encumbered claims	28
2.3.1 Dutch law	28
2.3.2 German law	29
2.4 Distribution of realisation proceeds	31
2.4.1 Dutch law	32
2.4.2 German law	35
2.5 Use of encumbered assets by the administrator	41
2.5.1 Dutch law	42
2.5.2 German law	43
2.6 Secured creditors and compositions / reorganisation plans	46
3. Reservation of ownership ("retention of title")	52
3.1 Introduction	52
3.2 Directive 2000/35/EC	54
3.3 Reservation of ownership in German and Dutch law	60
3.3.1 Claims secured by reservation of ownership	61
	IX

3.3.2	Extension of the seller's security to other assets (specification and resale)	64
3.3.2.1	General remarks	64
3.3.2.2	Resale	65
3.3.2.3	Specification	67
3.4	Reservation of ownership and insolvency of the purchaser	73
3.4.1	Introduction	73
3.4.2	Restrictions imposed on revindication by the seller	75
4.	Concluding observations	81
Chapter II	Cross-border aspects of insolvency proceedings	85
1.	Introduction	85
1.1	Universality, territoriality, unity and plurality	85
1.2	Divergent national solutions	89
1.3	International harmonisation and unification	92
1.3.1	Introduction	92
1.3.2	Insolvency Regulation	94
1.3.2.1	A common approach to cross-border insolvency in Europe	94
1.3.2.2	Interpretation	96
1.3.2.3	Scope of application	99
1.3.2.4	Relation to non EU Member States	102
1.3.3	UNCITRAL Model Law on Cross-Border Insolvency	104
1.3.3.1	Harmonisation on a global scale	104
1.3.3.2	Scope of application	105
1.3.3.3	Relation to the Insolvency Regulation	106
1.4	Structure of chapter II	106
2.	Domestic insolvency proceedings	107
2.1	Introduction	107
2.2	Jurisdiction and cross-border effects	107
2.2.1	Insolvency Regulation	107
2.2.1.1	'Mitigated Europeanism': main and territorial proceedings	107
2.2.1.2	Main proceedings	110
2.2.1.3	Territorial proceedings	112
2.2.1.4	Allocation of assets	117
2.2.2	UNCITRAL Model Law	119

2.2.3	German law	121
2.2.3.1	Main insolvency proceeding	121
2.2.3.2	Territorial insolvency proceedings (<i>Partikularverfahren über das Inlandsvermögen</i>)	125
2.2.4	Dutch law	130
2.2.4.1	Jurisdiction	130
2.2.4.2	Extraterritorial effect	134
2.3	Creditors' duty to account for the proceeds of recovery abroad	139
2.3.1	Introduction	139
2.3.2	Proceeds of individual recourse	141
2.3.2.1	Insolvency Regulation	141
2.3.2.2	UNCITRAL Model Law	142
2.3.2.3	German law	142
2.3.2.4	Dutch law	146
2.3.3	Dividends received in foreign insolvency proceedings	155
2.3.3.1	Introduction	155
2.3.3.2	Insolvency Regulation	156
2.3.3.3	UNCITRAL Model Law	157
2.3.3.4	German law	158
2.3.3.5	Dutch law	159
2.4	Foreign creditors	160
2.4.1	Submission of claims	160
2.4.2	Information	164
2.4.3	Tax claims	166
2.5	Conclusions with respect to domestic insolvency proceedings	175
3.	Foreign insolvency proceedings	177
3.1	Introduction	177
3.2	Recognition of the decision opening the insolvency proceeding and its (immediate) effects	179
3.2.1	Insolvency Regulation	179
3.2.1.1	Recognition	179
3.2.1.2	Effects of recognition of a main proceeding, scope of the foreign proceeding	181
3.2.1.3	Foreign main proceeding and the opening of a secondary proceeding	184

3.2.2	UNCITRAL Model Law	186
3.2.2.1	Introduction	186
3.2.2.2	Access to the courts of the enacting State and recognition of a foreign proceeding	186
3.2.2.3	Effects of recognition	191
3.2.2.4	Pre-recognition relief	195
3.2.2.5	Recognition of a foreign main proceeding and the opening of a local insolvency proceeding	196
3.2.2.6	Co-ordination and co-operation	197
3.2.3	German law	199
3.2.3.1	From 'universality' to 'territoriality' and back	199
3.2.3.2	Recognition of foreign insolvency proceedings	205
3.2.3.3	Effects of recognition	209
3.2.3.4	Recognition of foreign main proceedings and the opening of secondary insolvency proceedings	210
3.2.4	Dutch law	212
3.2.4.1	Introduction	212
3.2.4.2	No statutory impediments to the recognition of foreign insolvency proceedings	214
3.2.4.2.1	Draft <i>Faillissementswet</i> of 1887	214
3.2.4.2.2	Art. 431 <i>Rv</i>	217
3.2.4.3	Recognition of foreign insolvency proceedings in the decisions of the <i>Hoge Raad</i>	222
3.2.4.4	Consequences of the approach adopted by the <i>Hoge Raad</i>	230
3.3	Recognition and enforcement of other judgments	235
3.3.1	Introduction	235
3.3.2	Insolvency Regulation	236
3.3.3	UNCITRAL Model Law	238
3.3.4	German law	238
3.3.5	Dutch law	239
3.4	Conclusions with respect to foreign insolvency proceedings	242
4.	Concluding observations: some thoughts on the future development of Dutch law	243

Chapter III	Security rights in cross-border insolvency proceedings	253
1.	Introduction	253
2.	Law applicable to proprietary (security) rights	256
2.1	Introduction	256
2.2	Proprietary issues regarding moveables	258
2.2.1	Main rule: <i>lex rei sitae</i>	258
2.2.2	Other connecting factors	260
2.2.2.1	International sale of goods	262
2.2.2.2	Res in transitu	263
2.2.2.3	Mobile equipment	265
2.2.3	Reservation of ownership	267
2.2.4	Applicability of the <i>lex rei sitae</i> and transfer of objects to another State ('conflit mobile')	275
2.2.4.1	Effects of German reservation of ownership clauses in the Netherlands	281
2.3	Proprietary issues regarding claims	283
2.3.1	Introduction	283
2.3.2	Assignability	285
2.3.3	Relationship between assignor and assignee	287
2.3.4	Relationship between the debtor of the assigned/pledged claim and the assignee/pledgee	288
2.3.5	Proprietary aspects	289
2.3.6	Assimilation of foreign (security) rights in claims	298
3.	Influence of insolvency on the validity of security rights	300
3.1	Divestment of the debtor	301
3.2	Security rights in respect of future assets	305
3.3	Reversal of security rights created prior to the opening of the insolvency proceeding	308
3.3.1	Insolvency Regulation	309
3.3.1.1	Main and territorial proceedings	309
3.3.1.2	Jurisdiction	311
3.3.1.3	Applicable law	314
3.3.2	Customary private international law	322
3.3.2.1	German law	323
3.3.2.2	Dutch law	325
4.	Enforcement of security rights in insolvency	328

4.1	Introduction	328
4.2	Insolvency Regulation	330
4.2.1	Introduction	330
4.2.2	Art. 5 IR	332
4.2.2.1	'Rights in rem' - interpretation	332
4.2.2.2	assets <i>belonging to</i> the debtor	337
4.2.2.3	Scope of protection	338
4.2.2.4	Contracts relating to the use of moveable assets	347
4.2.2.5	Art. 5 IR in relation to Art. 25 IR	348
4.2.2.6	Stay of liquidation ex Art. 33 IR	351
4.2.2.7	Security rights and reorganisation plans / compositions	352
4.2.2.8	Surplus	353
4.2.2.9	Partial satisfaction of secured claims	355
4.2.3	Art. 7 IR	355
4.2.3.1	Insolvency of the purchaser	355
4.2.3.2	Insolvency of the seller	357
4.3	UNCITRAL Model Law	357
4.4	Customary private international law	358
4.4.1	German law	358
4.4.2	Dutch law	361
5.	Concluding observations	363
	Summary and conclusions	367
	Samenvatting en conclusies	373
Annex I	Council Regulation (EC) Nr. 1346/2000 of 29 May 2000 on insolvency proceedings	381
Annex II	UNCITRAL Model Law on cross-border insolvency	411
Annex III	Insolvenzordnung (§ 335-358)	423
	Legislation and Conventions	431
	Cases	445
	Bibliography	449