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# Insolvency of major bookstore company in the Netherlands

Impact of insolvency on commercial lease

by  
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# Topics



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- Impact of insolvency on commercial lease
  - Insolvency of tenant
  - Insolvency of lessor (landlord)
- Possibilities for the receiver of the tenant to transfer the lease agreement to a third party (“restart of the company”)
- Securities for the lessor

# Introduction



- Chain of bookstores:
  - 37 stores in the Netherlands (30) and Belgium (7)
  - on average 450 employees on a fulltime basis
  - consolidated net turnover 2012/2013: € 80.276.614
  - 11 February 2014 suspension of payments
  - 24 February 2014 bankruptcy
- After bankruptcy:
  - Belgian bookstores were sold
  - 19 Dutch bookstores restarted (“doorstart”)

# Impact of Insolvency on commercial lease



## Insolvency of tenant:

- Article 39 Dutch Insolvency Act:

*- 1. If the bankrupt debtor is a lessee (tenant), both, the liquidator ('curator') and the lessor (landlord), may prematurely terminate the lease agreement, provided notice of termination is given at an effective termination date in conformity with a termination date as indicated by local custom for such lease agreements. Furthermore, the agreed or customary notice periods must be observed, on the understanding, however, that three months' notice will in any case be sufficient. If rent has been paid in advance, no notice of termination of the lease can be given at an effective termination date before the last day of the period for which the rent as been paid already. The rent that becomes indebted as of the day of the declaration of bankruptcy will be an estate debt\*).*

*- 2. If the bankrupt debtor is a farm lessee (agricultural lessee), the above applies accordingly.*

*\*) Estate debts are debts which are made by or with the consent of the liquidator for account of the liquidation estate; the involved creditor has a preferential claim (estate claim) that must be satisfied first from the assets of the liquidation estate.*

# Impact of insolvency on commercial lease



## Insolvency of lessor:

- Article 37 Dutch Insolvency Act (Mutual agreements entered into prior to the bankruptcy):

- 1. *If a mutual agreement, at the time of the declaration of bankruptcy, has not been performed at all or only partially by both, the debtor and his counterparty, and the liquidator ('curator') does not state, within a reasonable period set for this purpose in writing by the counterparty, that the liquidation estate is bound by that agreement, then the liquidator ('curator') will lose his right to claim performance of the agreement.*
- 2. *If the liquidator ('curator') states that the liquidation estate is prepared to perform the agreement, then he must provide security for such performance when he makes this statement.*
- 3. *The preceding paragraphs do not apply to agreements through which the bankrupt debtor only has engaged himself to obligations which require a performance that is to be made by him personally.*

### **Article 37a Claims on account of a rescission or nullification of an agreement; claims for compensatory damages**

*With regard to claims acquired by the counterparty against the bankrupt debtor on account of the rescission or nullification of an agreement concluded prior to the declaration of bankruptcy, or acquired as a compensation for damages suffered as a result of the non-performance of a claim which the counterparty already had acquired prior to the declaration of bankruptcy, the counterparty may present himself in the bankruptcy as an unsecured creditor.*

# Impact of insolvency on commercial lease



## Insolvency of lessor:

- Dutch Supreme Court 14 July 2014 “*ABN AMRO vs Berzona*”:
  - The receiver does not have the power to terminate the tenancy actively, so that the claim for provision of tenancy rights could be ‘converted’ into a claim for compensation, which could be validated in the insolvency. The only option available to the trustee was to ‘passively’ decline to fulfil obligations, such as providing tenancy rights (maintenance, ensuring the undisturbed free use of the property). In such a case, the claims stemming from that agreement would qualify for being filed in the insolvency.
- Lease agreements remain in force. Only the tenant has the power to actively terminate the lease agreement in case the receiver does not confirm in writing it will fulfil its obligations pursuant to the lease agreement.

## Transfer of lease agreement to a third party by receiver of the tenant?



- Office space (article 7:230A Dutch Civil Code)
  - Takeover of contract, consent of lessor required
- Retail space (article 7:290 Dutch Civil Code)
  - Takeover of contract, consent of lessor required
  - Article 7:307 Dutch Civil Code substitution (“Indeplaatsstelling”)
    - What if lessor already terminated the lease on the basis of article 39 Dutch Insolvency Act? In principle no takeover of contract possible, unless termination can be regarded as improper use of law.



# Securities for the lessor



- Bank guarantee/deposit (three months rent “ROZ model”)
- Securities for loss of rental income or damages as a result of termination of lease as well?
  - Dutch Supreme Court
    - **4 January 2011 “Aukema q.q./Uni-Invest”** ; damage sustained by a lessor as a result of the, in itself lawful, early termination of a lease in case of bankruptcy of a lessee cannot be recovered from the lessee's bankrupt estate by means of calling a bank guarantee. Not even if this was stipulated in an express compensation provision.
    - **15 November 2013 “Romania”** ; an abstract guarantee, issued by a third party for the payment of lost rent after a lease has been terminated by bankruptcy definitely does have value, in accordance with the terms thereof. Any third party (e.g., a bank or another company within the lessee's group) that has issued such a guarantee will simply have to pay the required amount to the lessor in accordance with the terms of the guarantee. However, the guarantor has no recourse action against the lessee's bankrupt estate



## Questions?

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