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"Come and talk": The insolvency judge as de-escalator

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Abstract

How insolvency courts handle conflicts is an important aspect of the Directive on preventive restructuring frameworks and it has become more important in the current COVID-19 crisis, as a result of which insolvencies are or will be on the rise. Insolvency courts are one of the key actors that can impact the length and costs of conflicts, and, consequently, the effectiveness and efficiency of insolvency proceedings. However, there is a lack of empirical research that examines when, why and how insolvency courts prevent actual or potential conflicts. This article reports the results of an empirical study that explored the strategies used by insolvency judges in the Netherlands to resolve conflicts and to prevent a dispute from becoming one. The results show that insolvency courts deploy "under the radar" mediation-like strategies to prevent actual and potential conflicts involving insolvency practitioners, enhancing the speed and cost-effectiveness of the winding-up of cases in the perceptions of stakeholders. Consequently, insolvency judges do not only act as adjudicators in court pro-

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ceedings, but also take on mediation-like roles, at least in some jurisdictions. Limitations and challenges of these roles are discussed. The findings of this study are relevant for determining and regulating the roles and tasks of insolvency judges.

1 | INTRODUCTION

Conflicts in insolvency cases, like in other areas of the law, are likely to lead to lengthy legal proceedings. This hampers an efficient and timely winding-up or restructuring of the estate. One of the actors who can have an impact on the length and costs of conflicts is the court. The issue of how insolvency courts handle conflicts has been recognized in the Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures ("Restructuring and Insolvency Directive").[1] Title IV of the Restructuring and Insolvency Directive contains a number of rules referring to the role of insolvency courts, which aim to improve the general effectiveness and efficiency of insolvency procedures in terms of duration and costs.[2] From this, we derive that the EU legislator assumes courts play an important role in providing a quick, flexible and low-cost insolvency procedure.

The importance of the role that courts play can be further illustrated by the attention, the concept of mediation has received, in general but also in the context of insolvencies. Mediation, which is a distinctive type of alternative dispute resolution (ADR), can be defined as a:

> "facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute."[3]

The European Union encouraged mediation in civil and commercial matters by introducing the Mediation Directive in 2008,[4] because of the:

> "cost-effective and quick resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties."

and because of the assumption that:

> "agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties."[5]

Pursuant to the Mediation Directive, which scope is limited to cross-border disputes,[6] mediation can be ordered by the court and the role of mediator can be assumed by a judge who is not responsible for any judicial proceedings concerning the dispute in question.[7] Interestingly, in various jurisdictions, both inside and outside the European Union, the role of judges has evolved from merely being an adjudicator, to becoming more actively involved in a mediation-like role to prevent or resolve conflicts in these cases – also in cases assigned to them for adjudication.[8]

The attention to the mechanism of mediation can also be observed in the field of insolvency law. In the Netherlands, for example, the court of Amsterdam launched a pilot study on mediation in insolvency matters in 2012. In this pilot study, the investigation focused on whether mediation in disputes that arise during an insolvency procedure as well as disputes that have led to an insolvency procedure may lead to a swifter and more cost-effective resolution of these disputes, which disputes would otherwise have led to litigation or to the opening of an insolvency procedure.[9] In this pilot study, the mediators were experienced court mediators with a background in insolvency law.[10] A similar pilot study was also initiated by other district courts in the Netherlands, including the court of Rotterdam.[11] The latter pilot study showed that mediation processes were completed in 1–8 months, which is considered faster than regular in-court legal procedures.[12] Delays in these mediation processes were caused by conflicting agendas of the parties involved.[13] Mediation in insolvency matters has also received attention in other Member States.[14]

While previous (empirical) research revealed that civil judges have adopted a more active role by applying mediation-like strategies in order to solve conflicts and settle court cases,[15] thus far, however, no empirical evidence is available regarding how insolvency judges respond to actual and potential conflicts in order to enhance a quick and cost-effective winding up or, at least, to prevent delays and to prevent escalation of disputes. However, improving the duration and reducing the costs of insolvency procedures requires insights into how insolvency judges operate when dealing with conflicts (actual or potential), relying on empirical research rather than on case law. This article addresses this knowledge gap. It reports the findings of an empirical study that analysed blockages, strategic behaviour and best practices of insolvency courts in relation to cases of winding-up in insolvency. In this study, responses frequently raised the point that judges use their position to de-escalate in conflicts to which the insolvency practitioner is a party. The research focuses on the Netherlands, which represents a model in which the court has the active task of supervising the insolvency practitioner.[16] By analysing the actual and potential conflicts judges face and the strategies to de-escalate conflicts, this article seeks to understand the mechanisms that allow or prevent insolvency judges to intervene when it comes to reducing or preventing conflicts to which the insolvency practitioner is a party. This analysis is particularly interesting, as insolvency courts in these models do not only act as adjudicators in court proceedings, but also conduct supervisory tasks over the insolvency practitioners. Consequently, the findings are not only relevant to the Netherlands, but to potentially every legal system where insolvency judges perform supervisory and/or mediation-like activities.

The structure of this contribution takes the form of five sections. In order to have an understanding of how insolvency courts usually operate in conflicts, this article first provides a description of the institutional role of the court in insolvency cases in the Netherlands (Section 2). This is followed by an explanation of the methodology of the empirical study that examined in which way insolvency courts in the Netherlands exercise discretion to de-escalate conflicts (Section 3). The results of this study are subsequently reported (Section 4). The analysis is followed by a conclusion (Section 5).

2 | THE ROLE OF INSOLVENCY JUDGES IN THE NETHERLANDS

The Dutch Bankruptcy Act (*Faillissementswet*) ("DBA") plays a central role in Dutch insolvency practice. This act originates from 1893 and has since undergone only a number of (minor) reforms.[17] The objectives of the insolvency procedures provided by the DBA distinguish

between winding-up (*Faillissement*) and debt rescheduling (*Surséance van betaling* and *Wet Schuldsanering Natuurlijke Personen*). Both liquidation and restructuring can take place under the DBA.[18] In practice, the insolvency practitioner will explore possibilities to rescue a company or parts of it. If deemed feasible, the company is restructured. If not, it will be liquidated. The analysis will include both liquidation and restructuring efforts under the DBA. This will be referred to below when using the term "insolvency procedure."

The Netherlands does not provide for a judicial system in which only specialized courts are competent to handle insolvency cases, but instead there is a system in which this competence belongs to all 11 district courts.[19] Within each court, chambers exist that specialize in commercial cases, including insolvency cases. It is within these chambers that teams are formed of insolvency judges dealing (procedurally) with insolvency cases. Nevertheless, the rotation system requires judges to move to a different department and a different area of the law after a certain period, normally every 5 years, which can prevent judges from obtaining the necessary expertise.[20]

As indicated in the introduction to this contribution, the Netherlands represents a model in which insolvency judges have a dual role: an adjudicator's role and an active supervisory role. Although the court indeed does provide supervision over the insolvency procedures, the role of the court itself in these procedures remains limited. It is limited to taking certain decisions, including the opening of the insolvency procedure, the appointment of the insolvency practitioner and the supervisory judge (Article 14 of the DBA), the suspension and dismissal of the insolvency practitioner (Article 73 of the DBA) and the termination of the insolvency procedure (Article 16 of the DBA). The task of supervision has been vested in the supervisory judge:

> "The supervisory judge supervises the management and winding-up of the insolvency estate" (Article 64 of the DBA).

In turn, the task of management and winding-up has been assigned to the insolvency practitioner (Article 68[1] of the DBA).[21] The supervisory task has been further specified by the DBA in a way that the insolvency practitioner needs authorization or approval by the supervisory judge for certain actions, including, for example, termination of an employment contract,[22] a private sale of assets instead of a public sale[23] and commencing legal proceedings on behalf of the estate.[24]

The question arises as to what the supervisory role entails when a dispute occurs during an insolvency procedure. As already mentioned, this contribution focuses on conflicts to which the insolvency practitioner is a party. What the role of the supervisory judge entails is dependent on the type of conflict. We can distinguish a conflict revolving a claim against the insolvency estate, a conflict over a claim of the estate and conflicts revolving around the management of the estate (Article 69 of the DBA). The following three subsections will discuss the role of the supervisory judge in these three types of conflicts. This discussion is, however, not aimed at providing an exhaustive overview of the various types of conflicts in insolvency procedures, but are merely clear examples where conflicts might arise involving both an insolvency practitioner and a supervisory judge.

2.1 | Claims against the estate

If a creditor argues they have a pre-insolvency claim against the debtor, (s)he has to submit that claim to the insolvency practitioner for verification in order to be eligible for payments from the proceeds. The insolvency practitioner provisionally recognizes that claim if (s)he does not have objections to the existence or amount of that claim. If then no other creditor disputes (the

amount of) the claim, the verification meeting establishes the validity of the submitted claim, meaning that the creditor in question will share in the proceeds.[25] The insolvency practitioner will dispute the submitted claim if (s)he has any concerns regarding the existence of the amount of that claim, which may give rise to a conflict with the creditor.[26]

The Dutch Bankruptcy Act provides for a mechanism to resolve such a dispute (Article 122). Pursuant to this mechanism, the supervisory judge has to make an effort (at the verification meeting) to achieve a settlement between the disputants. If the conflict over the claim against the estate cannot be resolved by a settlement, the supervisory judge will then refer the conflict to legal proceedings before the court.[27] In view of the definition of mediation established in this contribution, it could be argued that the supervisory judge has been assigned with a task that includes a "light" form of mediation.[28] We refer to this practice as a light form of mediation, as its application is limited to the verification meeting.

2.2 | Claims of the estate

The role of the supervisory judge in relation to conflicts around claims of the estate against third parties is rather limited, since (s)he has only to decide on authorizing the insolvency practitioner to start legal proceedings on behalf of the estate.[29] For example, disputes between the insolvency practitioner and the debtor may revolve around liability. The interviewees provided various examples of conflicts in which the (board of) directors of an insolvent limited liability company were held personally liable by the insolvency practitioner.

The insolvency practitioner has a range of legislative bases at his or her disposal to hold the board of directors – or an individual director – of a company jointly and severally liable. The insolvency practitioner may, inter alia, hold the director(s) liable towards the company for improper management on the basis of Article 2:9 of the Dutch Civil Code ("DCC")[30] or, under Articles 2:138/248 of the DCC,[31] (s)he can hold the director(s) liable towards the insolvency estate for the improper performance of tasks, if it is plausible that the improper performance of tasks is an important cause of the insolvency.[32]

Thus, if the insolvency practitioner wants to start litigation to claim damages from the director(s) of the insolvent company, (s)he needs authorization from the supervisory judge. Once the supervisory judge provides such authorization, the proceedings are brought before the competent court.

2.3 | Management of the estate (article 69 of the DBA)

Conflicts can also arise in the context of the management of the insolvency estate (Article 69 of the DBA). Pursuant to this provision, creditors, the creditors' committee and the debtor (or the debtor's representatives)[33] can challenge any act of the insolvency practitioner with the supervisory judge or instigate an order from the supervisory judge that the insolvency practitioner should perform a specific act or should refrain from an intended act. Nevertheless, these acts, both the acts challenged as well as the acts instigated, must fall under the insolvency practitioner's legal task to manage and liquidate the insolvency estate.[34] This provision puts the insolvency practitioner under the control of those in whose interest he has been appointed,[35] meaning that it aims to provide the aforementioned actors with a simple and quick instrument to influence the management over the bankrupt estate.[36] Article 69 of the DBA determines that

the supervisory judge has to take a decision within 3 days. When taking a decision in an Article 69 procedure, the supervisory judge effectively acts more as an adjudicator than as a supervisor.

The confluence of the supervisory role and the adjudicatory role in Article 69 procedures has been criticized in the Dutch legal literature. The criticism revolved around the appearance of partiality of the supervisory judge. Partiality can become an issue when the supervisory judge takes a decision regarding an Article 69 request without hearing both sides of the argument, but by making use of non-public information and information from informal (preliminary) consultations with the insolvency practitioner.[37] This raises the question to what extent the supervisory role can go hand in hand with another role, such as the adjudicatory one.

3 | METHODOLOGY OF THE EMPIRICAL STUDY

The study, whose results are reported here, was part of an empirical research project that aimed to identify obstacles, best practices and possible strategic behaviour of relevant key players in relation to the role of courts competent in insolvency cases. The qualitative study consisted of an interview study and the conducting of three focus groups. The interviews were semi-structured, following the three themes of the project (obstacles, best practices and strategic behaviour).[38] The interviews were conducted with 32 key-players in the insolvency process. The majority of the interviewees were insolvency/supervisory judges (6) and insolvency practitioners (12). Additionally, interviews were conducted with insolvency specialists working for the tax authority (Ministry of Finance) (2), a bank employee (1), insolvency specialists working for the Dutch Employee Insurance Agency (UWV) (7) and insolvency law professors (4).

Each theme was briefly introduced to the interviewee and was followed by a question to report the most prevalent thoughts about the specific topic, allowing the interviewers to further explore that topic. The focus groups were aimed at reflecting on the results of the interview study. Three focus groups were held at three different locations in the Netherlands. In total, experiences from eight different district courts were collected.[39] All interviews and focus group sessions were recorded and subsequently transcribed (all participants were informed about the recordings and agreed to the recordings).[40] The transcriptions were sent to the interviewees for them to indicate whether certain information should not end up in the reports or publications. The transcripts were coded, after first dividing the texts into the three main themes (obstacles, best practices, strategic behaviour). Additional labels were created and assigned per theme, which was an iterative process. Software (ATLAS.ti) was used to assist in analysing the qualitative data. The findings per theme were systematically analysed, meaning that all answers per sub-topic were inspected and general impressions were formulated.

4 | MEDIATION IN PRACTICE

4.1 | Results

In the interview study, 15 (out of 32) individuals raised the view that supervisory judges apply strategies to prevent conflicts other than through adjudication.[41] This section discusses the essential facets of this mechanism on the basis of evidence from the empirical study. The aim of

this section is to describe when, why and how supervisory judges deploy mediation-like strategies or activities in practice.

4.1.1 | Types of conflicts

The question may arise as to what types of conflicts de-escalation strategies are applied. One might immediately think of the typical conflict over a claim against the estate. We previously discussed the "light" form of mediation that supervisory judges deploy during the verification meeting. The interviewees, however, only reported examples in which the supervisory judge mediated outside the verification meeting. The lack of examples could be explained by the pragmatic approach of insolvency practitioners and supervisory judges towards cases of winding up in insolvency, where the approach entails the vast majority of cases being wound up without a verification meeting.[42]

There is thus no evidence that supervisory judges mediate during the verification meeting; nonetheless, in the examples provided by the respondents, the supervisory judges exercise discretion when it comes to resolving conflicts or preventing possible conflicts concerning claims against the estate. A reported example of such a conflict is one in which a financial institution claimed to have collateral security rights on the debtor's assets.

> "A few years ago, I had an insolvency case in which the insolvency practitioner and the bank had a major discussion about how it should go with the sale of a large business and the proceeds from that sale [...] the insolvency practitioner and bank just got stuck in their dialogue. The nice thing is that you actually get a kind of request from both of them like 'Can you play a kind of mediating role in that?' In a certain sense, that is of course also your job as supervisory judge, but you can also say all sorts of things [...] very formally and you can say to the insolvency practitioner like 'You have to do this and that,' but in such a case you can also try to get such a conversation going again and to get people talking again and then you are trying to get lawyers here in [anonymized] [...] back in conversation. So in that sense, there are quite a lot of forms of informal action that are nowhere [described in the law], but that can help to resolve such a dispute, conflict, problem - whatever you want to call such a situation." (Interview quote 13:10).

Furthermore, supervisory judges do not only apply this mechanism in conflicts over claims against the estate, but also in conflicts on behalf of the estate. A dispute may, for example, arise between the insolvency practitioner and the insolvent debtor. In this context, one of the interviewed supervisory judges reported:

> "If [the conflict] is between the debtor and the insolvency practitioner, then you often have to draw the conclusion: 'Look, the debtor does not have [...] a big role in insolvency, other than that he has to tell the truth and has to provide information.' So, I mediate in [conflicts with the debtor], but I'm not going to arbitrate." (Interview quote 18:17).

As previously discussed, disputes between the insolvency practitioner and the debtor may revolve around liability. The interviewees provided various examples of conflicts in which the

(board of) directors of the insolvent limited liability company were held personally liable by the insolvency practitioner. Rarely will a director agree with the insolvency practitioner about the grounds for personal liability, resulting in conflicts in which parties may not reach agreement short of litigation. Supervisory judges reportedly mediate in these conflicts, an example of which is:

> "It was a situation where things had gotten completely out of hand between the insolvency practitioner and the director of the bankrupt company. This then becomes an argument between the director's attorney and the insolvency practitioner, while the director's lawyer is also an experienced insolvency practitioner. Then I asked the parties if they wanted to come to the courthouse offices to discuss under my direction a number of problems and to make at least agreements on future communication." (Interview quote 27:29).

As already discussed in Section 2.3 of this contribution, conflicts can also arise in the context of Article 69 of the DBA. One supervisory judge reported that Article 69 requests are being made quite frequently:

> "Articles 67 and 69; you could almost say that we [the judiciary] are no longer doing anything else." (Quote Interview 18:16).

Interestingly, the supervisory judge reportedly also aims to de-escalate in conflicts that loom in Article 69 procedures. Such a conflict may lead to an impasse between the insolvency practitioner and the applicant. Instead of taking a formal decision upon the Article 69 request, the supervisory judge thus tries to break through the impasse by applying soft skills.

> "Sometimes there has been an Article 69-request and then you [the supervisory judge] try to break through the impasse that arises [due to the Article 69-request]. What you do is by having a discussion; you try if you can work things out with the parties and so come to an agreement. Sometimes the two parties just cannot figure it out themselves, and then they add a third person - that is the supervisory judge - to see if they can break through the impasse. If that does not work, then it will just stop [...]." (Quote Interview 21:25).

The Article 69 procedure is also triggered to request information from the insolvency practitioner. The Dutch Supreme Court ruled that a right of information follows from this provision, since (according to the Dutch Supreme Court) it is inevitable to have information when exercising the rights provided for in Article 69 of the DBA.[43] A conflict may thus arise if the insolvency practitioner refuses to provide this information, in which case the supervisory judge aimed to de-escalate the conflict:

> "He [the creditor] has made requests to me, because he thinks that the insolvency practitioner does not give him sufficient information and he thinks he is entitled to it. I have not yet interpreted that request as a 69 request [Article 69 DBA], but I did say: 'Come and talk.' So [...] the insolvency practitioner and this attorney [of the third party] will come to my office to look if we can work it out in a different way." (Interview quote 10:46).

4.1.2 | Objective of de-escalation

In view of the concept of mediation, it could be evident that the ultimate goal is to prevent or avoid litigation. Reportedly, the question as to why supervisory judges deploy techniques to de-escalate conflicts is, in line with the concept of mediation, to prevent litigation and, thus, unnecessary delays:

> "[...], bottlenecks [between the disputants] are detected much more quickly and you can say much faster [that the insolvency practitioner] is in it too deep and [...] has to take a bit more distance. It is just good for the settlement of the dispute. Things are not prolonged unnecessarily and they don't enter into a legal procedure unnecessarily if things can be solved much earlier in a conversation." (Interview quote 1:42).

> "[...] just to keep it practical. To achieve practical solutions. To prevent us from ending up in endless procedures." (Interview quote 10:69).

> "It may then turn out that board members made [improper] payments just before insolvency or that they have done their job improperly and all those things more, and that they possibly could be held liable for all that. Well, then you can say 'Okay, I agree with the insolvency practitioner, so he can litigate [about that].' That is one possibility and then you will just go look if there is something like redress that can be sought from the director. What I like about our work is that you have the opportunity - and I [...] make use of it - to [say]: 'Well, let's first see if we can't work it out in a conversation.' The insolvency practitioner will also try to do that in the first instance, but he might get stuck there. My approach is very often that before an insolvency practitioner is allowed to litigate at all, that I [first] say 'let's [...] try to work it out in a conversation [with the parties],' in which I then can play a role." [...] playing the mediating role entails, of course, that you ensure that people can reach a solution by themselves, and then [the dispute] is over, because then they have no appeal or something like that and they cannot go anywhere else [with the dispute]. Then the problem is gone - at least they can move on again. [...] Anyway, that is what I feel about the profession of a judge, that the more you succeed – and, of course, that is not possible in every type of case - to persuade people themselves to achieve a solution with your help, the better. Then the case is over: dispute is resolved [...]. Then there is no higher appeal and you no longer have to [go on with the dispute]. So, I think that is a very important task for a judge, also in general [...] we can actually contribute a great deal in this regard. [...]." (Interview quotes 13:8 and 13:11).

> "[...] There are also insolvency practitioners who you get to know as 'biters,' but who therefore do not easily come to solutions. That just costs a lot of money. Then you see afterwards that they may have been legally proven right, but the estate has not really benefited from it, because a lot of money has run away as a result of this argument. Then, you [as a supervisory judge] are thinking: 'We could have solved that differently.' So, in the future you will say more quickly to these types of insolvency practitioners: 'Come here and sit down with all these parties and let's have

look whether I can 'massage' this dispute a little bit, because otherwise things will only go wrong and it will be going to cost a lot of money'." (Interview quote 1:3).

The degree of involvement in reaching an agreement, however, can also be less far-reaching as in the previous examples. For example, supervisory judges only de-escalated between the disputants in order to restore or to create constructive dialogue between them in several instances. The process is then not directly aimed at achieving a substantive settlement on the underlying dispute, as is the case in mediation, but only resolving difficulties in communication. The supervisory judge "de-escalates" a situation by forcing arrangements on future communication, but (s)he is not involved with the ultimate settlement on the dispute at hand.

"[...] Then I asked the parties whether they wanted to come to the courthouse offices to discuss under my direction a number of problems and to make at least agreements on future communication. They were very focused on keeping each other busy, but not always with the most business-like motives. As soon as you see that [as a supervisory judge], you have to discuss it [with the parties]. [...] A number of workable agreements have been made. They adhere reasonably well. It looks reasonable. They obviously have different interests, but now it is more about how we can settle things instead of throwing mud around." (Interview quotes 27:29 and 27:40).

Communication between disputants can be difficult because they have difficulties to get along with each other. This may lead to an impasse in achieving a settlement:

"[...] it also played a role - and you see that a lot - that things are not going well on a personal level. The communication did not go smoothly between the insolvency practitioner and the representative of the bank – it clashed continuously. Then I said that we should talk about this. I then sat down at the table, while the representative of the bank also brought [a third person] to the table. What you saw happening was that, because [...] someone else was also joining [the conversation], a very different conversation emerged. Since then, we were able to work it out quite quickly. [...] I am not sure whether my role has been decisive in finding a solution, but at least the setting provided that these parties came out of the stalemate." (Interview quote 21:25).

"I see it a lot in [article] 2:248 [DCC] cases; it often happens that in an early stage of the insolvency case, the insolvency practitioner thinks: 'This crook [the director] must hang,' without having done a proper investigation or you name it. [...]. Just in the first minutes, hours, days of such an insolvency, things can go wrong between the director and insolvency practitioner, causing to get their backs up. I think a supervisory judge [...] can do wonders in insolvencies, in which he has the impression that it is escalating, to have those parties come to visit him in the courthouse. Then let them tell their story [...]. There are a lot of supervisory judges who do wonderful and good work in that by simply acting as an 'oil man' and thereby also making a huge contribution to more efficient settlement of an insolvency case." (Interview quote 16:24).

The supervisory judge thus applies soft skills to either achieve a substantive settlement on the underlying dispute (mediation) or to prevent escalation by facilitating a conversation in which difficulties that have led to an impasse are being addressed (de-escalation). As a result of de-escalation, the insolvency practitioner and the other party may then achieve a substantive agreement by themselves. Without such intervention by the supervisory judge, the conflict might have escalated, which could have led to litigation.

4.1.3 | Initiation of the de-escalation mechanism

A number of supervisory judges pointed out that they invite the parties for a meeting at the courthouse offices if they observe a conflict or a potential conflict between the insolvency practitioner another third party.

> "Here, as best practice, we have all embraced that we hold many and frequent discussions. So, if there are any bottlenecks or things are going in a difficult way, then we quickly offer: 'Come here to the office [at the courthouse] with the parties with whom there is fuss and let's start talking about it'." (Interview quote 1:20).

In view of the discretion they have to assume in order to exercise the role of de-escalator, it remains unclear in which stage of the conflict they have to assume this role.

> "You always try to mediate in conflicts. I think that is your task as a supervisory judge. You have to moderate when there is an argument. I think that the average supervisory judge feels the same way. The question, however, is: 'At what time do you intervene?' When the fight has already run high or when you see the beginning of it? At the start of such conflict, you can suggest to first look at it together before starting a big fight, because before you know it, it will take a lot of hours, which is not in the interest of the creditors." (Interview quote 18:18).

One representative of a creditor reported an example in which the supervisory judge exercised discretion even before a potential conflict arose.

> "We have had it happen [i.e. a meeting with the supervisory judge] sometimes. That was indeed a file in which both the Tax Authorities and the insolvency practitioner wanted to carry out [procedures] and then we actually had to coordinate 'who does what?' and 'what information can we share with each other?' and 'how are we going to proceed with this file?' Then we had a conversation with the supervisory judge and who did indeed look like a kind of chairperson - like a kind of coordinator - of 'it seems good to me to start this step and then we will do this' and 'it is great if this information is shared.' So, in this way we made a sort of a plan together." (Interview quote 17:6).

It has also been reported that the insolvency practitioner and the third party together requested the supervisory judge to assume the de-escalation role.

> "So, they [the disputants] actually come to me [...] and certainly if they have experienced it with me before: 'Gosh, well, the last time we did it like this, couldn't we do it again?' That they know that I am willing to do it and that I also like to do it [to de-escalate]." (Interview quote 13:23).

One supervisory judge also reported that an attorney, who acted on behalf of a third party with whom an insolvency practitioner had a conflict, approached him with such a request.

> "[...] We once had an insolvency case in which an attorney came to us [the court] on behalf of a party and he indicated that it was important to discuss a number of points together with the insolvency practitioner and the supervisory judge. [...] Anyway, we did have such a conversation here and it was about a claim of the insolvency practitioner against a public entity [...]." (Interview quote 21:20).

Whether or not mediation-like practices are applied, and if so, how they are applied, is entirely dependent on the discretion that the supervisory judge assumes during an insolvency case.

4.2 | Challenges

The definition of mediation, as established in the introduction of this contribution, emphasizes the neutrality of the mediator, which requires the supervisory judge – as mediator – to show impartiality and independency in the processes of mediation. The way in which the supervisory judge is positioned in relation to the insolvency practitioner, however, gives rise to a number of challenges to his or her impartiality and independency in these processes. The interviewees reported several examples in which these challenges were raised.

For instance, the impression may arise that the supervisory judge is not impartial when disputes arise between insolvency practitioners and third parties, but rather has the back of insolvency practitioners in such a way that there is no more room for additional viewpoints, arguments or perspectives.

> "This morning the tax authority called me. He is now working with insolvency practitioner number three in a large insolvency case where real estate is sold far too cheaply. There, the insolvency practitioner, who now had one of his employees call, says that he is going to close the insolvency case due to the condition of the estate. So, he did not feel like it [i.e. conducting activities] at all. So, the tax authority calls me in distress and says, 'What should I do now?' Then I said, 'Give the supervisory judge a call or otherwise I can call.' But I am also curious how that will turn out. Is that the supervisory judge who stands behind the insolvency practitioner and says: 'Yes, the insolvency practitioner is already so busy, he has not earned much money and so on.' Or [am I saying this] [...] because actually I think that you as an insolvency practitioner should go all the way and certainly if, as in the case I am now sketching out, money can probably still be collected from the directors and so forth, then I think that you simply have the assignment to do that." (Interview quote 7:7).

The impression of partiality can prevent a defendant to approach the supervisory judge to inform him or her about possible misinformation by the insolvency practitioner over the dispute to which the defendant is a party.

> "Sometimes an insolvency practitioner has been authorized to start litigation, while I think: '[...] you did not tell the whole story [to the supervisory judge], because otherwise - in my opinion - you could never have received this authorization.' [...]. I have also seen situations in which an insolvency practitioner, for example, litigated against us and made really huge costs. At the time I thought: 'Shouldn't I inform the supervisory judge about what is going on [in this case]?,' because it was costing the estate a lot of money. The problem with this is that we were, of course, also a party to the proceedings, so that would also prevent you from approaching the supervisory judge, because I do not expect the supervisory judge to tell the insolvency practitioner [...] that he is not allowed to start legal proceedings. I have the impression that supervisory judges will not turn away from the insolvency practitioners quickly [...] and in this case certainly [not], because we were the defendants. [...]. However, I did not approach the supervisory judge because I have the impression - certainly as a defendant - that the supervisory judge will certainly not tell the insolvency practitioner that he must stop the legal proceedings. [...] So, that really is a situation in which the supervisory judge has already given its consent [to start legal proceedings] and I don't expect they will revoke that consent." (Interview quotes 17:3 and 17:8).

Needless to say, the impression of partiality regarding the individual who is assuming the mediation role is undesirable for the processes of mediation. The challenge of partiality consists of the risk that the supervisory judge accepts the information (s)he obtains from the insolvency practitioner for truth, while, in principle, (s)he does not allow room for discussions.

> "In an insolvency case, we have had about seven meetings and that was not with creditors. The insolvency practitioner must, of course, coordinate with his supervisory judge, because (s)he simply needs approval [e.g. to start litigation on behalf of the estate]. In that respect it is not strange [to coordinate with the supervisory judge], but at the moment that certain things are not going well... By the way, you can see that the supervisory judge grows during a meeting, because he will then take on the role of mediator: 'I have heard the insolvency practitioner's story, so tell me your story now.' So, he both mediates and tries to find out what is actually going on in that conflict. But in the beginning of an insolvency case, they accept things from the insolvency practitioner very quickly as being plausible. They also say at the beginning of such a meeting: 'this is not a court hearing, so I'm not going to have a discussion here.' The fact that they bring it that way, I have problem with that. That's a bottleneck." (Interview quote 20:6).

The previous example is linked to the information asymmetry between the insolvency practitioner and the supervisory judge. In the interview study, more than 18 individuals reported obstacles related to the information asymmetry. The Dutch system, in which the insolvency practitioner operates very near to the insolvency estate while the supervisory judge is in principle limited to judicial supervision, entails that the latter is completely dependent on the former

with respect to information supply. Respondents expressed, for example, that information asymmetry may lead – and has led in certain instances – to approval to litigation on behalf of the estate, whereas the approval would not have been given if the supervisory judge had the same information as the insolvency practitioner.

> "[...] for example, you gave permission to start legal proceedings while thinking: 'I have been sufficiently informed, so I don't need to have any more information,' but once the procedure is ongoing, it appears from the underlying documents that things are a bit different. Then you think [as a supervisory judge]: 'I should have prevented that.' [...]." (Interview quote 1:3).

The information asymmetry is also detrimental to the independence of the supervisory judge. Since the insolvency practitioner is de facto the only actor that provides the supervisory judge with information, there is a risk that the information is possibly one-sided and the insolvency practitioner may strategically present the information to the supervisory judge. This may lead to a loss of objectivity in a conflict.

> "You know ... the problem is if you work with the same people all the time ... If you ask a supervisory judge whether he independently assesses an insolvency practitioner, he will say 'yes.' The practice is of course a lot subtler than that. The supervisory judge himself does not have the information he needs, because who provides him with that information? That is the insolvency practitioner. Of course, the creditors also give some information, but the one who gives the real information is the insolvency practitioner. So, you already have a 1–0 deficit. In addition, you must remember that you also have the 'informal preliminary consultation' with the supervisory judge. That means that as an insolvency practitioner you first visit the supervisory judge to tell him how it all works. Then you come as a creditor ... Well, talking about due process!" (Interview quote 22:19).

The information asymmetry is thus a potential challenge in the context of de-escalating conflicts.

5 | CONCLUSION

This contribution has addressed the knowledge gap regarding the way in which insolvency courts operate when dealing with conflicts (actual or potential). Using empirical research, rather than case law as the source of information, the findings revealed that supervisory judges deploy de-escalation strategies or activities to resolve or prevent actual and potential conflicts revolving around claims against the insolvency estate, conflicts over claims on behalf of the estate and conflicts revolving around the management of the estate (Article 69 of the DBA).

Depending on the discretion exercised by the supervisory judge, the strategies are applied either to achieve a substantive settlement on the underlying dispute or to create a constructive environment to promote a substantive agreement between the insolvency practitioner and the other party with whom the insolvency practitioner has a conflict. By applying these strategies, supervisory judges prevented lengthy legal procedures between disputants, and, in doing so, contributed to the efficiency of the winding-up and restructuring of an insolvency estate.

Reportedly, both insolvency practitioners as well as the parties with whom the insolvency practitioners have had a conflict have welcomed this practice. Consequently, the speed and cost-effectiveness of the winding-up and restructuring of cases are considerably enhanced in the interviewees' perception when supervising insolvency courts deploy mediation-like strategies to de-escalate actual and potential conflicts. These practices can be considered to be in line with the ongoing pursuit of improving the general effectiveness of insolvency procedures, yet they have received hardly any attention in the literature and policy documents. Given that the national laws of several EU jurisdictions charge insolvency courts with supervisory tasks, more attention to the deployment of mediation-like strategies by these courts seems warranted.

Nevertheless, supervising insolvency courts have to overcome various challenges when deploying mediation-like strategies and activities. Conflict resolution presupposes neutrality of the adjudicator, mediator, problem solver, and so forth, but the way in which supervisory judges are positioned in relation to insolvency practitioners makes their ability to be a neutral individual during mediation processes questionable. The non-judges participating in the empirical study linked these concerns to the information supply in insolvency cases. One important distinction between supervisory judges and "ordinary" judges in civil and commercial cases is the way in which they are informed about, for example, a dispute. Normally, there is a level playing field for both parties to present information to the judge, and both parties know what information the judge has been provided with. Such an equal position may help in ensuring that the disputants have no doubt about the impartiality and independency of the judge that is handling their case.

However, in the perception of the various parties interviewed, such equality is not found in insolvency cases, at least not with respect to the supervisory judge, since the insolvency practitioner is in principle the first and foremost actor that provides the supervisory judge with information. The supervisory judge is therefore dependent on the insolvency practitioner to receive information. Consequently, there is a risk that the information presented to the supervisory judge about a conflict is one-sided and presented strategically by the insolvency practitioner. Moreover, such information often concerns non-public information provided in informal (preliminary) consultations between the insolvency practitioner and the supervisory judge. In other words, current information supply in insolvency cases may lead to a loss of objectivity in a conflict and may pave the way for partiality and dependency.

In view of the positive effects that these mediation-like practices reportedly have on the perceived efficiency of insolvency procedures, additional research that explores alternative and appropriate methods of information supply in insolvency procedures is recommended. It may be investigated whether other parties than the insolvency practitioner should have (more) frequent access to the supervisory judge, for example, through (informal) consultations at the courthouse offices, or whether courts can access information through other means, for example, through IT infrastructure and the use of Big Data analytics through the use of algorithms. To find such alternative method is, however, no sinecure, since proposed changes should be compatible with the distance that is necessary for a supervisor and, furthermore, should be adequate in preventing (the perception of) partiality and dependency of the supervisory judge.

As is the case with all empirical research, the study conducted has limitations. The number of interviewees is a small sample of all insolvency practitioners out there. Although the information appeared saturated with additional interviews (i.e., no more new information with an additional interview), it cannot be excluded that different perspectives or arguments would have been found had more interviews been conducted. Furthermore, the empirical study focused on Dutch insolvency practitioners, whose conduct is governed by Dutch insolvency law and the

Dutch legal culture, which may provide different incentives than in other jurisdictions. Nevertheless, the mechanisms observed in this study are likely to hold under similar circumstances, and therefore in different legal systems that are similar to the Dutch one. Countries may explore and re-assess the role of the insolvency judge. The conducted study may assist in defining this role and in having a better understanding of how an assigned role, or changing this role will impact the practice of the winding-up or restructuring and the interaction between the insolvency judge and other actors.

The main contribution of this research is that it offers an original perspective on, and perhaps a new line of research into, the role of the insolvency judge. However, the research is the first in its kind, and it is therefore important to properly explore the possible impact of changing the role of insolvency judges prior to assigning a new role to them.

ENDNOTES

[1] Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 [2019] OJ L172/18 ("Restructuring and Insolvency Directive").

[2] See for example, Articles 25 and 27, Restructuring and Insolvency Directive.

[3] Henry Brown and Arthur Marriott, *ADR: Principles and practice* (2nd edn) (Sweet & Maxwell, 1999), 127. See also the definition of mediation by for example, Klaus Hopt and Felix Steffek, "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues," in Klaus Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP, 2013), 6: "Mediation is a procedure based on the voluntary participation of the parties, in which an intermediary (or multiple intermediaries) with no adjudicatory powers systematically facilitate(s) communication between the parties with the aim of enabling the parties to themselves take responsibility for resolving their dispute."

[4] Directive 2008/52/EC of the European Parliament and of the European Council of May 21, 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L136/3 ("Mediation Directive"). The Mediation Directive defines mediation as: "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on a settlement of their dispute with the assistance of a mediator."

[5] See Recital 6, Mediation Directive. Although the European Union promoted the development of mediation in civil and commercial courts by introducing the Mediation Directive, it has been argued that the implementation of this Directive in the laws of the Member States leaves much to be desired. See for example, Bob Wessels and Stephan Madaus, *Instrument of the European Law Institute – Rescue of Business in Insolvency Law* (2017), paragraph 106 (and the literature cited there), available at: <https://ssrn.com/abstract=3032309>.

[6] Article 1(2), Mediation Directive.

[7] Ibid., Article 3(a).

[8] See for example, in Germany the "*Güterichter*," who is a mediator-judge trained in mediation. The mediator-judge does not adjudicate the case. The "*Güterichter*" finds its legal basis in § 278, Absatz 5, Zivilprozessordnung. In Germany, there is also attention to the concept of "*Gerichts-Integrierte Mediation*," a model in which the trial judge is both the mediator as well as the adjudicator in the same court case, for which see Arthur Trossen and Ralf Käppele, "Gerichts-Integrierte Mediation" (2006) 39 *Zeitschrift für Rechtspolitik* 97. In their research about the "*Gerichts-Integrierte Mediation*," the authors focused on family cases. See also Arthur Trossen, "Mediation ist DIE—oder KEINE Alternative!" (2012) 45 *Zeitschrift für Rechtspolitik* 23, in which the author argues that the development of court-annexed mediation within German courts cannot be reversed. See for example, in the Netherlands the discussion paper by Barbara Baarsma and Maurits Barendrecht, "Mediation 2.0" (SEO Economisch Onderzoek/HiiL–Tisco) (University of Tilburg, 2012), 10, 15–16, available at:<http://www.seo.nl/en/page/article/mediation-20/>. One of their research findings is that trial judges do training in mediation techniques and apply these techniques during court sessions.

According to these authors, court sessions are nowadays more focused on reaching settlements than traditional adjudication. See also Wibo van Rossum and Rick Verschoof, "De civiele rechter als problem solver" (2017) 2 *Recht der Werkelijkheid* 51. See for example, in the United States Marc Galanter, "The Emergence of the Judge as a Mediator in Civil Cases" (1986) 69 *Judicature* 257. The author observes that civil cases in the United States are in many instances actively mediated by the judge and investigates what factors contributed to judges becoming more actively involved as mediators (e.g., it could be explained by "a drive towards managerial efficiency," or that court cases became "a series of proceedings" instead of centring around "discrete plenary trial," etc.). See also Ellen Deason, "Beyond Managerial Judges: Appropriate Roles in Settlement" (2017) 78 *Ohio St LJ* 73; Jean-Francois Roberge and Dorcas Quek Anderson, "Judicial Mediation: From Debates to Renewal" (2018) 19 *Cardozo J Conflict Resol* 613; See for example, for empirical research on this development from a United States-perspective Peter Robinson, "Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial" (2006) *J Disp Resol* 335. There is a considerable amount of research available about mediation within the judiciary. Considering the size and focus of this contribution, it is impracticable to provide a synopsis of the full body of research in this respect.

[9] See for example, Annet Draaijer and Toni van Hees, "Pilot mediation in faillissementen" *Tijdschrift voor Insolventierecht* 2013/40, available at: <http://deeplinking.kluwer.nl/?param=00C4E4CE&cpid=WKNL-LTR-Nav2>; Jan Adriaanse and Ellen van Beukering-Rosmuller, "ADR/mediation bij (dreigende) insolventie" *Tijdschrift voor Arbitrage* 2014/51, available at: <http://deeplinking.kluwer.nl/?param=00C81394&cpid=WKNL-LTR-Nav2>; Bob Wessels, "Mediation in restructuring and insolvency" *Tijdschrift voor Arbitrage* 2016/56, section 2.1, available at: <http://deeplinking.kluwer.nl/?param=00CC25E8&cpid=WKNL-LTR-Nav2>.

[10] G. Lankhorst, "Mediation ook in faillissementszaken?" *Bedrijfsjuridische Berichten* 2012/32, available at: <http://deeplinking.kluwer.nl/?param=00B796DF&cpid=WKNL-LTR-Nav2>.

[11] For an overview and descriptions of these pilot studies (in Dutch), see: <http://www.insolventiemediation.nl/rechtbanken>.

[12] E. van Gruijthuijsen and A. van Spengen, "Mediation in de Rotterdamse insolventiepraktijk: gewoon doen!" [2018] *Financiering, Zekerheden en Insolventierechtpraktijk* 41, 42–43.

[13] Idem.

[14] See, for a brief overview of insolvency mediation in the EU and the type of mediators in various Member States, Wessels and Madaus (above note 5), paragraphs 115–117 (and the literature cited there).

[15] Above note 8.

[16] The supervisory task is carried out by supervisory judges: Article 64, DBA. We will come back to this below. See for example, Bob Wessels, *Wessels Insolventierecht. Deel IV. Bestuur en beheer na faillietverklaring* (fourth edn) (Wolters Kluwer, 2020), paragraph 4008; Wessels and Madaus (above note 5), paragraph 73.

[17] An important reform was the introduction of the statutory debt-rescheduling rules for natural persons in 1998 (*WSNP*). In 2012, the Dutch legislator announced a number of additional reforms in the legislative programme "Re-evaluation of Insolvency Law," which is aimed at improving the adequacy of insolvency law in the Dutch insolvency practice. This legislative program consists of three pillars: Modernizing the Insolvency Act, improving and promoting business rescue and continuity, and preventing and combatting insolvency fraud. See: *Kamerstukken* II 2012/13, 29,911, 74, available at: <https://zoek.officielebekendmakingen.nl/kst-29911-74.html>.

[18] The Dutch winding-up procedure concerns "*het faillissement*." See for example, Frank Verstijlen, "De dubbele natuur van de doorstart" *Tijdschrift voor Insolventierecht* 2017/20, available at: <http://deeplinking.kluwer.nl/?param=00CE48FA&cpid=WKNL-LTR-Nav2>.

[19] The competency rules of Article 2, DBA determine that the court of the district in which a debtor has its residence has jurisdiction to handle the insolvency case of that debtor. If the debtor is a legal entity, the court in the district where the legal entity has its statutory seat has jurisdiction. For an overview of these districts, see: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Paginas/Werk-en-rechtsgebieden-rechtbanken.aspx>.

[20] See for example, Reinout Vriesendorp, "De rechter-commissaris bij insolventies; onpartijdige rechter of betrokken commissaris?" (2000) 26 [2] *Justitiële Verkenningen* 55; Reinout Vriesendorp, "Veranderend insolventierecht; voortgang gewenst!" (2001) 6463 *WPNR* 890, 896.

[21] The insolvency practitioner has to perform this task for the benefit of the creditors, meaning that (s)he has to seek value maximization in order to increase the recovery rates of the creditors, for which see Wessels (above note 16), paragraph 4092. The Dutch Supreme Court has ruled that the interests of the joint creditors should have a central place in carrying out this task: Dutch Supreme Court December 23, 1994, ECLI:NL:HR:1994:ZC1590, *NJ 1996*, 628 (*Notarissen THB II*). There is a clear trend in the case law, the result of which is that the insolvency practitioner must also consider important interests of societal origin (e.g., the continuity of the company or the preservation of employment). The Dutch Supreme Court has determined that important interests of social origin may be given—under circumstances—priority over the interest of individual creditors: Dutch Supreme Court February 24, 1995, ECLI:NL:HR:1995:ZC1643, *NJ 1996/472* (*Sigmacon II*) and Dutch Supreme Court April 19, 1996, ECLI:NL:HR:1996:ZC2047, *NJ 1996/727* (*Maclou/Curatoren Van Schuppen*).

[22] Article 68(3) (in conjunction with Article 40), DBA.

[23] Ibid., Articles 101 and 176.

[24] Ibid., Article 68(3). For most decisions of the supervisory judge, including a decision whether to grant an authorization or not, it is possible to appeal to the court within 5 days of that decision (Article 67(1), DBA). The exceptions to this rule are listed in the same article. For example, it is not possible to appeal against the authorization for a private sale of assets instead of a public sale (Article 67(1) [in conjunction with Article 176], DBA).

[25] Depending on both the ranking of the claim as well as whether the estate is sufficient to satisfy the claim in question.

[26] The verification process is laid down in Article 110 *et seq*., DBA.

[27] This is referred to as a "*renvooiprocedure*" (claim validation proceeding).

[28] Rutger Schimmelpenninck, "De rol van de rechter c.q. rechter-commissaris," in Sebastian Kortmann and Teun Struycken (eds), *Herijking van het faillissementsrecht* (Kluwer, 1999), 96: "Ook blijkt dat de wetgever aan een bemiddelende rol van de R-C heeft gedacht."

[29] Article 68(3), DBA.

[30] Pursuant to this provision, the director is liable for damages suffered by the company because of improper management.

[31] Article 2:138, DCC is only applicable to the public limited liability company. Article 2:248, DCC is the equivalent for the private limited liability company. Pursuant to these provisions, the directors are liable for the amount of which the debts of a company exceeds the assets after liquidation.

[32] There are also other grounds on which the insolvency practitioner may hold a director personally liable. For further reading on directors' liability in the Netherlands, see for example, H. De Groot, *Bestuurdersaansprakelijkheid. Recht en Praktijk nr. ONR2* (Wolters Kluwer, 2011).

[33] Wessels (above note 16), paragraph 4228.

[34] Ibid., paragraph 4225. See also Marinus Pannevis (ed), *Polak's Insolventierecht* (14th edn) (Wolters Kluwer, 2017), paragraph 7.3.6.1.

[35] "Het [Article 69 DBA] stelt den curator onder de voortdurende controle van hen in wier belang hij is aangesteld," for which see the Explanatory Memorandum of the Dutch Insolvency Act in Sebastian Kortmann and Dennis Faber (eds), *Geschiedenis van de Faillissementswet. Heruitgave van Van der Feltz II* (Wolters Kluwer, 2016), 8–9.

[36] Dutch Supreme Court January 20, 2006, ECLI:NL:HR:2006:AU3721, *NJ* 2006, 161: "(...) biedt aan de daarin genoemden een eenvoudige en snelle mogelijkheid invloed uit te oefenen op het beheer over de failliete boedel en om, zo zij menen dat bij dit beheer fouten worden gemaakt, deze te doen herstellen of voorkomen."

[37] See for example, Sijmen de Ranitz, "De curator als onderhandelaar," in H. Schoordijk et al. (eds), *Rond de tafel. De juridische kaders van het onderhandelen. Bogaerts en Groenen-bundel* (Kluwer, 1999), 55; Wessels (above note 16), paragraph 4226.

[38] The framework of themes that we explored during these interviews are available online at: <https://hdl.handle.net/10411/1TN7AZ> accessed May 27, 2020 (only available in the Dutch language).

[39] Eight out of a total of 11 district courts. See: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Paginas/Werk-en-rechtsgebieden-rechtbanken.aspx>.

[40] The study was conducted in the Dutch language. For the purpose of this contribution, the selected citations (in our view, the most representative citations) were translated into English.

[41] Interviews 1, 9–10, 12–14, 16–23 and 27.

[42] On this approach, see for example, Wessels (above note 16), paragraphs 5242–5244 (and the literature cited there). The fact that it was not reported in this study does not mean that supervisory judges never assume a de-escalating role at the verification meeting. There is no empirical evidence available to legitimize such a conclusion.

[43] Dutch Supreme Court January 21, 2005, ECLI:NL:HR:2005:AS3534, *NJ* 2005, 249 (*Jomed I*).

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