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## UDINKSCHEPEL ADVOCATEN

Bankruptcy, Insolvency & Rehabilitation Proceedings in the  
Netherlands

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## KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER DUTCH LAW

### I. Insolvency proceedings in The Netherlands

There are four law-regulated insolvency proceedings in The Netherlands: bankruptcy (*faillissement*<sup>1</sup>), suspensions of payment (*surseance van betaling*<sup>2</sup>), debt adjustment for natural persons (*schuldsanering natuurlijke personen*<sup>3</sup>) and the confirmation of private plans (*homologatie onderhands akkoord (WHOA)*<sup>4</sup>). Since the scope of this paper focusses on corporate entities, the debt adjustment for natural persons will not be discussed here.

A bankruptcy is generally described as a liquidation of all the debtor's assets whereas a suspension of payments should – theoretically – seek continuation of the activities of the debtor after a period of moratorium. In theory the suspension of payment should be ended after restructuring, after which the debtor can commence his business as usual. In practice a suspension of payments often ends in a bankruptcy after which reorganization will proceed under bankruptcy. The reason for this lies with the absence of certain restructuring rules regarding employees (especially with regard to the transfer of a going concern business) in bankruptcy. Obviously it should be noted that under Dutch law pursuing a bankruptcy with the sole object to get rid of employees, results in abuse of (bankruptcy)law.

Both bankruptcy and suspension of payment are proceedings in which the debtor loses its power of disposition and capacity in relation to its assets.

On 1 January 2021 the Act on Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord* (“WHOA”)) came into force. The WHOA gives effect to the EU Restructuring

Directive (EU 2019/1023). The WHOA is a pre-insolvency procedure and allows a debtor to restructure its debts outside of the above-mentioned formal insolvency procedures. The WHOA is a debtor in possession-procedure. It is similar to the American Chapter 11-procedure and the UK Scheme and is therefore often referred to as the Dutch Scheme.

Both bankruptcy, suspension of payments and the WHOA are opened by a district court. Bankruptcy can be filed either by the debtor itself or requested by a creditor. Suspension of payments can only be filed by the debtor. A WHOA-procedure can be filed by the debtor, a creditor, a shareholder, the debtor's work council or the debtor's workplace representation.

### I. Insolvency officers

When opening a bankruptcy, the district court appoints one or more insolvency administrators (*curator*). These administrators are generally speaking attorneys at law, but there is no legal requirement for this capacity. One sees that the district court will sometimes co-appoint a banker, an accountant, or a real estate agent as an administrator with an attorney.

When opening a suspension of payments, the district court appoints one or more insolvency administrators (*bewindvoerder*). Alongside these insolvency administrators, the district court always appoints a supervisory judge (*rechter-commissaris*) who is in charge of supervising the insolvency proceeding and the administrator. The aforementioned insolvency officials in a suspension of payment (*bewindvoerder* and *rechter-commissaris*) almost always serve as an insolvency official in

<sup>1</sup> Article 1 – 213kk Dutch Bankruptcy Code (*Faillissementswet*)

<sup>2</sup> Article 214-283 Dutch Bankruptcy Code

<sup>3</sup> Article 284-362 Dutch Bankruptcy Code

<sup>4</sup> Article 369 – 387 Dutch Bankruptcy Code

bankruptcy (*curator* and *rechter-commissaris*) if a suspension of payments is converted into a bankruptcy.

In a WHOA-procedure, the debtor can propose a private plan to its creditors and shareholders of it can request the appointment of a restructuring expert (*herstructureringsdeskundige*), who can propose such a plan. If the private plan is proposed by the debtor itself, the district court has the possibility to appoint an observer (*observator*) When the WHO-procedure was filed by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation the court will always appoint a restructuring expert who then is entitled to propose the plan to the exclusion of the debtor.

## II. Bankruptcy

A bankruptcy can be filed when the debtor is in a situation where he has stopped paying its due and demandable debts.

In bankruptcy the debtor loses its power of disposition and capacity in relation to its assets as of 0:00 hours of the day on which the court opens a bankruptcy procedure. During the course of the bankruptcy this right lies exclusively with the administrator. It is also described as a general attachment on the assets of the debtor in favor of its creditors to be settled by the administrator. As a result, by law creditors can only enforce claims on the debtor by lodging their claim with the administrator and have to await the claim verification procedure. Creditors are prohibited from enforcing actions against the debtor's assets and seizures made prior to opening of the bankruptcy cease to exist.

Excluded from this prohibition are secured creditors who either have a right of pledge or a right of mortgage. They are allowed to act as if the bankruptcy does not exist and can enforce those rights against the debtor's secured assets.

Also excluded are creditors to the bankruptcy estate (*boedelcrediteuren*). They can enforce their rights on the bankrupt estate.

The supervisory judge, however, can issue a stay period (*afkoelingsperiode*) stipulating that for a stay period not exceeding two months, each right of third parties, including secured creditors and creditors to the bankruptcy estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy, can only be exercised with his authorization.

Pending lawsuits instituted against the debtor before the opening of the bankruptcy that procure the performance of an obligation from the debtor are suspended by operation of law and will only continue if the obligation is disputed in the verification process.

## III. Suspension of payment

The debtor who expects that he will be unable to continue paying its debts, can be granted a suspension of (moratorium on) payment.

During the suspension of payment, only unsecured and non-preferential creditors are prohibited from enforcing their claim against the debtor's assets. Creditors of secured claims (holders of right of pledge of mortgage) or preferential creditors (such as the Dutch Tax Authority, employees or other creditors whose claim is preferential by law) can enforce their rights as if the proceeding has not been opened.

As a result of the granting of suspension of payment, as of 0:00 hours of the day on which the court grants suspension of payment, the debtor can only exercise its power of disposition and capacity in relation to its assets with the cooperation or authorization of the administrator. This is where the suspension of payments differs from a debtor in possession proceeding.

Creditors of unsecured and non-preferential claims are prohibited from enforcing actions against the debtor's assets and seizures made prior to the opening of the suspension of payments cease to exist. Additionally, the district court (and not the supervisory judge, as in bankruptcy) can issue a written order (*afkoelingsperiode*) stipulating that, for a stay period not exceeding two months, each right of third parties, including secured and preferential creditors and creditors to the suspension of payment estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy can only be exercised with his authorization.

In contrast to a bankruptcy proceeding, pending lawsuits are not automatically suspended.

#### IV. WHAO

The WHOA is a fast and informal pre-insolvency procedure meant for companies that are in core profitable but have come into dire straits due to issues of over indebtedness and/or recurring costs. The companies are enabled by means of debt and/or cost restructuring to enforce a private on their creditors and/or shareholders to prevent the loss in value that occurs in bankruptcy.

The WHOA is quick, flexible, and free of form. It is a debtor-in-possession procedure and has minimum of judicial involvement. The WHOA has the possibility of enforcing a private plan on dissenting creditors or shareholders (cram down).

The WHOA is applicable for companies that are in a situation where it is to be expected that they cannot continue to pay their debts. It can be filed by the debtor itself or by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation. In the latter case, a restructuring expert is appointed by the District Court. Upon filing one can choose

between a public or a confident variant of the procedure. The debtor or – if appointed – the restructuring expert proposes a private restructuring plan to (all or a subset of all) providers of capital, i.e., creditors and shareholders.

The WHAO provides for a lot of supportive measures to enable restructuring. During the WHOA-procedure the debtor has access to different supportive measures, such as a stay period, a protection of security for new funding and the possibility to end or alter contracts. Contrary to bankruptcy, but similarly to suspension of payments, the rights of employees are protected, and employment contracts cannot be effected by the plan. The district court can be asked to lift pre- and post judgement attachments. The Court can also be asked for binding decisions regarding difficult issues (such as voting, class placements, etc.) in a very early stage to avoid uncertainties or fort any other necessary tailor-made measures.

Creditors are categorized (by either the debtor or the restructuring expert) in classes of similarity and vote within this on the acceptance of the plan. The plan is accepted by a class if 2/3<sup>rd</sup>-majority of the amount of claims or issued capital of the actual voters have voted in favor of the plan.

No dissenting creditor may receive less value than they would have in a bankruptcy situation (best interest of creditors test). The court can be asked for confirmation of the plan if at least one in-the-money class has accepted the plan.

Consent of the debtor is required in case of a small or medium enterprise-debtor. Dissenting classes can be bound (cross class cram down) unless (i) the plan is in breach of the absolute priority rule, (ii) creditors that are small or medium enterprise are not offered an amount in cash that equals 20% of their claim and (iii) the

plan lacks a cash exit-possibility for creditors (professional lender excluded).

The voting can take place eight days after the restructuring plan has been offered and electronic voting is allowed. The restructuring plan becomes binding to the debtor and all creditors who were entitled to vote, after confirmation by the court. A confirmation decision by the court takes place within eight to fourteen days after acceptance of the plan and the confirmation cannot be appealed. In theory, the procedure could be completed within a period of three to five weeks.

In its short existence, The WHOA already has proved to be a quick, flexible and (therefor) very effective tool of reorganization of debts and costs.

#### V. Asset protection

Both in bankruptcy and suspension of payments the debtor loses (some sort of) power of

disposition and capacity in relation to its assets. Either it loses it completely (bankruptcy) or can only exercise it with authorization of the administrator. The debtor's assets are protected against all unsecured creditors (bankruptcy) or only against non-preferential creditors (suspension of payment). Secured creditors, such as holder of a right of pledge of mortgage, can enforce their right as if no insolvency proceeding (neither bankruptcy nor suspension of payment) has been opened.

In a WHOA-procedure, the debtor remains in full possession. Attachments can be lifted during the WHOA in order to realize a restructuring. A restructuring plan cannot be enforced against the will of a small business and entrepreneur-debtor.