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## UDINKSCHEPEL ADVOCATEN

Bankruptcy, Insolvency & Rehabilitation Proceedings in the  
Netherlands

ILN RESTRUCTURING & INSOLVENCY GROUP

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

### I. Insolvency proceedings in The Netherlands

There are three law-regulated insolvency proceedings in The Netherlands: bankruptcy (*faillissement*<sup>1</sup>), suspensions of payment (*surseance van betaling*<sup>2</sup>) and debt adjustment for natural persons (*schuldsanering natuurlijke personen*<sup>3</sup>). Since the scope of this paper focusses on corporate entities, the latter 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) that don't apply in bankruptcy. Obviously, it should be noted that under Dutch law pursuing a bankruptcy with the only reason 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. The Netherlands do not have (yet) a debtor in possession-procedure like the American Chapter 11-procedure. However, a new law, the Act on Dutch court confirmation of extrajudicial restructuring plans to avert bankruptcy (*Wet homologatie onderhands*

*akkoord ter voorkoming van faillissement*) is in the making. If this law passes legislative process, this would enable debtor in possession-procedures in The Netherlands to be opened.

Both bankruptcy and suspension of payments 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.

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

### II. Protection granted to the debtor against its creditors

#### II.a. Bankruptcy

In bankruptcy the debtor loses its power of disposition and capacity in relation to its assets

<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

as of 0:00 hours of the day on which the court opens a bankruptcy procedure<sup>4</sup>. During the course of the bankruptcy this right lies exclusively with the administrator<sup>5</sup>. It is also described as a general attachment on the assets of the debtor in favor of its creditors<sup>6</sup> 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<sup>7</sup> and have to await the claim verification procedure<sup>8</sup>. Creditors are prohibited from enforcing actions against the debtor's assets and seizures made prior to opening of the bankruptcy cease to exist<sup>9</sup>.

Excluded from this prohibition are secured creditors, who either have a right of pledge of a right of mortgage. They are allowed to act as if the bankruptcy does not exist and can enforce those rights against the secured debtor's 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 written order (*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<sup>10</sup>.

Pending law suits instituted against the debtor before opening of the bankruptcy that procure the performance of an obligation from the

debtor are suspended by operation of law<sup>11</sup> and will only continue if the obligation is disputed in the verification process.

#### II.b. Suspension of payment

During the suspension of payment, only unsecured and non-preferential creditors are prohibited to enforce their claim against the debtor's assets<sup>12</sup>. 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<sup>13</sup>, the debtor can only exercise its power of disposition and capacity in relation to its assets with the cooperation or authorization of the administrator<sup>14</sup>. 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 opening of the suspension of payments cease to exist<sup>15</sup> and 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

<sup>4</sup> Article 23 Dutch Bankruptcy Code

<sup>5</sup> Article 68 Dutch Bankruptcy Code

<sup>6</sup> Article 20 Dutch Bankruptcy Code

<sup>7</sup> Article 26 Dutch Bankruptcy Code

<sup>8</sup> Article 110 Dutch Bankruptcy Code

<sup>9</sup> Article 33 Dutch Bankruptcy Code

<sup>10</sup> Article 63a Dutch Bankruptcy Code

<sup>11</sup> Article 29 Dutch Bankruptcy Code

<sup>12</sup> Article 232 Dutch Bankruptcy Code

<sup>13</sup> Article 217 Dutch Bankruptcy Code

<sup>14</sup> Article 228 Dutch Bankruptcy Code

<sup>15</sup> Article 230 Dutch Bankruptcy Code

under the control of the bankruptcy can only be exercised with his authorization<sup>16</sup>.

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

### III. Conclusion of Dutch insolvency proceedings

Both in bankruptcy, as in a suspension of payment, 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. A debtor in possession proceeding does not (yet) exist in The

Netherlands. 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) have been opened.

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<sup>16</sup> Article 241a Dutch Bankruptcy Code