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## UDINKSCHEPEL ADVOCATEN

Bankruptcy, Insolvency & Rehabilitation Proceedings in the  
Netherlands

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**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 regarding 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 26 May 2020, the Dutch Parliament's House of Representatives (*Tweede Kamer*) has adopted the Act on Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord* ("WHOA")). This bill will now go on to the

Parliament's Senate, where it is expected to be adopted and will pursuantly enter into force somewhere end 2020 or beginning 2021. The WHOA is a pre-insolvency procedure and allows a debtor to restructure its debts outside of the above-mentioned formal insolvency procedures. It is often referred to as the Dutch Scheme and acts as a debtor in possession-procedure. It is thus like the American Chapter 11-procedure and the UK Scheme. The WHOA gives effect to the EU Restructuring Directive (EU 2019/1023).

Both bankruptcy, suspension of payments and the Dutch Scheme ("Scheme") 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 restructuring plan under the Scheme can be filed by the debtor, while a creditor, a shareholder, the debtor's work council or the debtor's workplace representation can request the appointment of a restructuring expert (*herstructureringsdeskundige*), who is entitled to propose a plan to the exclusion of 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 oversees supervising

<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

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. Bankruptcy

A bankruptcy can be filed when the debtor is in a situation where he has stopped paying its due and demandable debts.<sup>4</sup>

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<sup>5</sup>. During the course of the bankruptcy this right lies exclusively with the administrator<sup>6</sup>. It is also described as a general attachment on the assets of the debtor in favor of its creditors<sup>7</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>8</sup> and have to await the claim verification procedure<sup>9</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>10</sup>.

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<sup>11</sup>.

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<sup>12</sup> 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.<sup>13</sup>

During the suspension of payment, only unsecured and non-preferential creditors are prohibited from enforcing their claim against the debtor's assets<sup>14</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>15</sup>, the debtor can only exercise its power of disposition

<sup>4</sup> Article 1 Dutch Bankruptcy Code

<sup>5</sup> Article 23 Dutch Bankruptcy Code

<sup>6</sup> Article 68 Dutch Bankruptcy Code

<sup>7</sup> Article 20 Dutch Bankruptcy Code

<sup>8</sup> Article 26 Dutch Bankruptcy Code

<sup>9</sup> Article 110 Dutch Bankruptcy Code

<sup>10</sup> Article 33 Dutch Bankruptcy Code

<sup>11</sup> Article 63a Dutch Bankruptcy Code

<sup>12</sup> Article 29 Dutch Bankruptcy Code

<sup>13</sup> Article 214 Dutch Bankruptcy Code

<sup>14</sup> Article 232 Dutch Bankruptcy Code

<sup>15</sup> Article 217 Dutch Bankruptcy Code

and capacity in relation to its assets with the cooperation or authorization of the administrator<sup>16</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 the opening of the suspension of payments cease to exist<sup>17</sup>. 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<sup>18</sup>.

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

#### IV. Scheme

The Scheme is a fast and informal pre-insolvency procedure where either the debtor or an appointed restructuring expert can propose a restructuring plan to providers of all sorts of capital, i.e. creditors and shareholders. The Scheme is applicable if the debtor is in a situation where it is to be expected that he cannot continue to pay his debts.<sup>19</sup> The restructuring plan is free of form and is based on contractual freedom. The restructuring plan can vary from suspension, reduction or elimination of debts to conversion to shares and changing or

terminating (long term) contracts. Contrary to bankruptcy, but similarly to suspension of payments, the rights of employees are protected, and employment contracts cannot be affected by the plan.

During the Scheme, the debtor stays in possession. Even when a restructuring expert is appointed; such an expert is only concerned with the development of a restructuring plan. If the debtor is a small or medium enterprise (*MKB*<sup>20</sup>), the restructuring plan can only be accepted with the consent of the debtor.

During this procedure, the debtor has access to different supportive measures, such as a stay period and a protection of security for new funding.

Creditors are categorized in classes of similarity and vote within their class about the acceptance of the restructuring plan. A 2/3-majority of the number of claims or issued capital is required for a class to accept the restructuring plan. A dissenting class can be bound by the plan ('cross class cram down') if a dissenting creditor (of that dissenting class) is not significantly worse off under the plan compared to a liquidation scenario ('best interest of creditors test') and if that dissenting creditor does not receive a value that is less than their share of the reorganization value in accordance with their statutory or contractual rank of priority ('absolute priority rule') or that dissenting creditor has been offered a cash amount equivalent to the amount that would have been received in the event of a liquidation.

<sup>16</sup> Article 228 Dutch Bankruptcy Code

<sup>17</sup> Article 230 Dutch Bankruptcy Code

<sup>18</sup> Article 241a Dutch Bankruptcy Code

<sup>19</sup> Article 370 proposed new Dutch Bankruptcy Code.

<sup>20</sup> Less than 250 employees and annual turnover of less than € 50 mio or a balance sheet of €43 mio. According to the European Union 99% of all enterprises are SME's,

Unsecured creditors that qualify as a small or medium enterprise must receive a minimum distribution of 20% of their claim, unless there are compelling grounds for a lower distribution.

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. Confirmation decision 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.

#### V. Conclusion of Dutch insolvency proceedings

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.

A debtor in possession proceeding is currently in the making in The Netherlands and it is to be expected that this bill becomes a law somewhere this year (2020).