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Netherlands: Law & Practice

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NETHERLANDS

Law and Practice

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Contents

Florent was launched in 2017 and now consists of about 40 lawyers. The firm has a strong focus on corporate M&A, commercial and corporate litigation, and restructuring and insolvency. It employs real estate, employment, and banking and finance experts (and flexible experts in other practice areas), and assists clients throughout a company's life cycle, including during start-up, investment round, acquisition, litigation, financial distress and exit. The restructuring and insolvency team is appointed by the courts as bankruptcy trustee or administrator in the largest bankruptcies in the Netherlands. It also advises companies in distress, lenders, borrowers and financial institutions, as well as other creditors and counterparties, on all aspects of debt recovery, restructuring and insolvency. In addition to the team's strong roots in domestic practice, the firm has excellent capabilities for and experience in dealing with cross-border/international and complex cases. Florent is the only major firm in the Netherlands with a substantial asset recovery practice, so can assist with cross-border asset recovery, fraud litigation (prosecuting civil claims for fraud) and financial fraud investigations.

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1. State of the Restructuring Market

1.1 Market Trends and Changes

In the Netherlands, the number of company insolvencies has decreased almost every year since 2013, from a peak of 8,376 bankruptcies in that year to 1,537 in 2021. During the COVID-19 pandemic, extensive government support programmes for wages and fixed costs were in place. 2022 saw 1,854 bankruptcies and a slight increase in the number of company insolvencies was recorded. The Netherlands' GDP grew by 4.9% in 2021, and continued to grow in 2022 by 4.5%. In August 2023, the unemployment rate was 3.6%.

In 2022, compared to 2021 the number of company insolvencies slightly increased in almost every sector of the economy. The sector with the highest number of bankruptcies was the wholesale and retail sector, followed by the business services and construction industry sectors. Retailers still face financial difficulties due to stiff competition in retail in general, combined with the continuing rise of online shopping and often substantial fixed expenses, such as employee wages and lease agreements. The number of bankruptcies in the healthcare sector doubled compared to 2021. In the financial institutions, information and communication sectors, the number of bankruptcies is still decreasing.

While the Dutch economy benefitted from the worldwide economic growth prior to COVID-19, due to extensive government support programmes it took some time for the number of insolvencies to increase. In previous years, the Dutch government supported companies affected by COVID-19 with subsidies for salary payments, fixed costs and the deferment of tax payments. Now that the government support has ended and the tax authorities have started to collect deferred taxes, an increase in the number of bankruptcies and WHOA restructurings is expected.

For an open economy like the Dutch one, international trade is of great importance. The green lights for the Dutch economy may turn to yellow if international uncertainties change into setbacks. The war in Ukraine, as well as spiking inflation and staff shortages in almost every sector, have led to a higher degree of uncertainty.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

Dutch law recognises the following insolvency proceedings:

- bankruptcy (*faillissement*);
- suspension of payments (*surseance van betaling*);
- statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*); and
- the Act on the Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord* – WHOA or "Dutch Scheme").

In addition, there are special proceedings for banks, insurance companies and investment firms. For these special proceedings, in addition to the Dutch Bankruptcy Act, the Financial Supervision Act (*Wet op het Financieel Toezicht*) contains applicable provisions.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Bankruptcy

Bankruptcy (*faillissement*) is a liquidation proceeding aimed at monetising the assets of the bankrupt company (estate) and distributing the proceeds thereof to the creditors. Both the debtor itself and the creditors may file. The management board of the debtor is only able to file for bankruptcy after being instructed to do so by the general meeting of shareholders, unless the articles of incorporation provide otherwise. For more detailed information, see **7.1 Types of Voluntary/Involuntary Proceedings**.

Notwithstanding its nature as a liquidation proceeding, bankruptcy can be used as a restructuring tool, including by means of a (pre-packaged) restart of the business of the bankrupt company or by offering a composition (ie, accord/restructuring plan/plan of reorganisation) to the creditors, including in international/cross-border cases to implement (give effectiveness to) the foreign/global restructuring plan for local Dutch debtors.

Suspension of Payments

Suspension of payments proceedings (*surseance van betaling*) are meant as a temporary relief against the non-preferential creditors of the debtor. The goal of the suspension of payments is the reorganisation and continuation (in whole or in part) of viable businesses that are in financial distress, by offering a composition to the creditors. Only the debtor itself is able to file for suspension of payments. For more detailed information, see **7.1 Types of Voluntary/Involuntary Proceedings**.

Suspension of payments is rarely successful as a straightforward restructuring tool, as it is outdated and lacks many modern tools and features. However, it can be used creatively in certain situations – for example, suspension of payments has been successfully used in international/cross-border cases as a protection and/or to implement (give effectiveness to) the foreign/global restructuring plan for local Dutch debtors.

Statutory Debt Restructuring for Natural Persons

Statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*) applies only to natural persons. It is possible to apply for a statutory debt restructuring when it is reasonably foreseeable that the natural person will not be able to pay their debts as they fall due, or when they have ceased to pay their debts as they fall due. When certain conditions have been met, the natural person will eventually be granted a clean slate (*schone lei*) when the statutory debt restructuring proceedings have reached their conclusion. For more detailed information, see **7.1 Types of Voluntary/Involuntary Proceedings**.

WHOA/Dutch Scheme

The WHOA, also called the "Dutch Scheme", draws its inspiration from the UK Scheme of Arrangement and the US Chapter 11 proceedings. This innovative legal framework enables a debtor or a qualified restructuring expert to present a strategic plan aimed at preventing the debtor's insolvency. The WHOA officially became effective on 1 January 2021. See **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings** for an in-depth discussion of the WHOA.

2.3 Obligation to Commence Formal Insolvency Proceedings

There are no formal tests – such as solvency, liquidity or other balance sheet requirements

– and hence no formal obligation for directors or shareholders to file for bankruptcy or other formal insolvency proceedings at any time. Consequently, there are no liabilities or penalties for a company and/or its officers, directors and/or owners directly due to not (timely) commencing insolvency proceedings. However, liability concerns (akin to "wrongful trading" concepts, personal liability for taxes/social security claims) may lead to managing directors filing at some point.

If a company is eventually declared bankrupt, the bankruptcy trustee may hold supervisory and managing directors liable for certain damages – or in some cases the entire deficit in the estate – if they manifestly improperly fulfilled their duties, amounting to personally reproachable conduct, among other things in the case of "wrongful trading".

Examples of "wrongful trading" include:

- continuing the company for too long;
- entering into obligations on behalf of the company when the directors knew or should have known that bankruptcy was imminent; and
- selective (non-)payment and (fraudulent) preference.

If the company did not timely file its annual accounts or did not properly keep its books, there is an irrebuttable presumption that there was manifestly improper management by the managing directors, and a rebuttable presumption that such improper management was an important cause of the bankruptcy. Individual creditors or other parties may also hold (managing/supervisory) directors liable on comparable grounds, but without any statutory presumptions.

Lastly, directors may become personally liable for certain taxes left unpaid by the company.

2.4 Commencing Involuntary Proceedings

Creditors may file a petition with the court for the bankruptcy of a debtor when the company is "in the state that it has ceased paying its debts" and when there are at least two creditors, one of which has a due and payable claim that remains unpaid. This is an open norm: the state of having ceased payments can be disproved even if the above criteria are met.

The public prosecutor may also file for the bankruptcy of a debtor when this is in the public interest, which is only the case in exceptional circumstances.

2.5 Requirement for Insolvency

As stated in **2.4 Commencing Involuntary Proceedings**, a company can be declared bankrupt when it is "in the state that it has ceased paying its debts" and when there are at least two creditors, one of which has a due and payable claim that remains unpaid. As this is an open norm, the state of having ceased payments can be disproved even if the above criteria are met.

There is, however, no formal requirement for (the management board of) the debtor to file at any time. In order to be able to file for suspension of payments, a company must foresee that it will not be able to continue paying its debts. There is no formal filing requirement in this respect.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Banks and insurance companies, as defined in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*), may not file for suspension

of payments. The Dutch Financial Supervision Act provides for separate proceedings for these institutions prior to bankruptcy: the interim procedure (*noodregeling*) and certain intervention measures. Banks and insurance companies are also subject to EU legislation – eg, the EU regulation on the single resolution mechanism (2014/806/EU) for banks.

These measures are aimed primarily at restructuring a financial institution; the Dutch Bankruptcy Act contains specific provisions for the bankruptcy of banks, insurance companies and investment firms.

There are no specific statutory restructuring or insolvency regimes for companies in other sectors.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

The general perception among restructuring market participants in the Netherlands is that an informal restructuring is preferable to statutory proceedings, due to the far-reaching consequences of a bankruptcy or suspension of payments, the often-disappointing outcome – especially for unsecured creditors – and the risk of destruction of the company's value.

Banks, credit funds and other lenders are generally supportive of borrower companies experiencing financial difficulties pending a detailed assessment of their financial position, but their attitude depends very much on the circumstances of the case (eg, the extent to which their position is covered by security rights, guarantees or sureties, the prospects of the underlying business, and the viability of the restructuring plan/efforts of management). As bankruptcy or suspension of payments mean near-total loss of control to a court-appointed bankruptcy trustee or administrator, and relatively rigid limitations on restructuring options and the ability to continue the business as a going concern, they normally entail a potentially large loss of value. At the same time, in principle all creditors must consent to the terms of an out-of-court restructuring: a court-sanctioned cram-down on creditors is only possible in exceptional cases.

The Dutch legislature introduced the WHOA in view of these challenges, as well as of international developments such as the EU Restructuring Directive 2019/1023. Provided that certain conditions are met, a restructuring outside bankruptcy no longer requires the unanimous consent of all (classes of) creditors of the company, with only limited grounds for dissenting creditors to appeal the confirmation by the court of a restructuring plan that is adopted by the requisite majority (or majorities) of creditors. The process also leaves the debtor in possession, and is flexible, fast and comparatively inexpensive. See **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings** for an in-depth discussion of the WHOA restructuring legislation.

In view of the above, there is no obligation under Dutch law for mandatory consensual restructuring negotiations to take place before formal insolvency proceedings are commenced – although the WHOA presumes that parties will do as much as possible to try and avoid formal proceedings.

The "INSOL Principles" are not implemented in the Dutch legal framework, nor are they in

any way mandatory or binding. However, these principles are used by restructuring market participants in restructuring cases.

3.2 Consensual Restructuring and Workout Processes

Standstill agreements, default waivers or similar agreements as part of an (initial) informal and consensual restructuring process are not uncommon in the Netherlands; many of the practices common in larger/more complex international restructurings are followed or mirrored (with local adaptations), especially in larger restructurings. A standstill agreement generally contains obligations for the company aimed at, for example:

- providing the (senior) lenders with information regarding the financial situation of the company;
- protecting or enhancing their position in relation to other creditors; and/or
- obliging the company to draft and implement a restructuring plan.

In certain cases, a steering committee consisting of creditors is appointed in the early stages of the restructuring process to guide the restructuring. It should be noted that, apart from the WHOA, any restructuring outside formal insolvency proceedings requires the consent of all parties involved, with no truly effective in-court restructuring process to bind dissenting creditors. See **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings** for a more in-depth discussion of the WHOA restructuring legislation.

3.3 New Money

New money could be injected by various stakeholders, such as current or new shareholders or (secured) creditors. Under Dutch law there is no real possibility for granting any super-priority liens or rights to providers of new money, either in or outside formal insolvency proceedings. New money providers may stipulate security rights in rem (such as liens) as a condition for providing their money, but by doing so can only jump ahead of unsecured creditors, not existing secured or otherwise preferred creditors (except with their consent). There may also be concerns as to the (bankruptcy/preference) hardiness of such security, with the exception of the WHOA where protection against preference claims can be requested of the court.

3.4 Duties on Creditors

As a general rule, a creditor is entitled to act in its own interest, whereby it may be limited by other stakeholders' interests in accordance with the general Dutch law principles of reasonableness and fairness (*redelijkheid en billijkheid*). In principle, a creditor may decline any proposal for an out-of-court restructuring, but in exceptional cases creditors may be forced to co-operate by a court order. As discussed in **10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies**, directors are obliged to act in the interest of the company and all stakeholders involved (such as the shareholders, creditors, employees, customers, suppliers and other third parties), so should take increasing notice of creditors' interests as the company comes into the "realm of bankruptcy", and should act to protect them.

3.5 Out-of-Court Financial Restructuring or Workout

In principle, for an out-of-court restructuring to be effective there must be consensus between all creditors or stakeholders. Most creditors will co-operate with such a restructuring out of necessity when the only other option is (liquidation) bankruptcy or suspension of

payments, except when they expect their recovery position will be better in insolvency proceedings as a result of, for instance, security rights, guarantees and/or sureties.

The WHOA has introduced compulsory composition (ie, accord/restructuring plan/plan of reorganisation) outside formal insolvency proceedings, including the possibility of intra-class and cross-class cram-downs. A composition under the WHOA is subject to court confirmation in order to be universally binding (also on dissenters). See **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings** for a more in-depth discussion of the WHOA restructuring legislation. Apart from the WHOA, in exceptional circumstances a creditor can be forced to co-operate by a court order.

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

Under Dutch law, a security right in rem may be established on all property that is not non-transferable. A right of mortgage (*hypotheek*) may be established on registered property (*registergoederen*), such as real estate, aircrafts and ships. Security on all other transferable property, such as equity shares, movable assets, intellectual property, receivables and bank accounts, may be established by way of a right of pledge (*pandrecht*).

A right of pledge on non-bearer shares (*aandelen op naam*) is created by executing a deed before a civil law notary. The acknowledgement of the right of pledge by the company that has issued the shares is required in order for the pledge to have full effect. A right of pledge on bearer shares (*toonder aandelen*) is created in the same manner as a pledge on movable assets.

A pledge over movable assets can be either possessory or non-possessory. For a possessory pledge, the pledgee will have to take and retain possession of the pledged assets. For a non-possessory pledge, a deed of pledge executed before a Dutch civil law notary or a privately executed deed of pledge is required. A privately executed deed of pledge will have to be registered with the Dutch tax authorities. Under Dutch law, it is possible to pledge movable assets in advance.

Regarding receivables, it is possible to create either a disclosed or a non-disclosed right of pledge. A disclosed right of pledge requires both a privately executed (or notarial) deed of pledge and notice to the debtor. For a non-disclosed right of pledge, either a deed of pledge must be executed before a Dutch civil law notary or a privately executed deed of pledge must be registered with the Dutch tax authorities. Future receivables may only be pledged to the extent that they originate from a legal relationship that already existed at the time the right of pledge was created. For that reason, it is market practice for a deed of pledge on receivables to contain an obligation for the borrower to regularly execute supplemental deeds of pledge. There is a draft bill (*Wet opheffing verpandingsverboden*) pending before the House of Representatives (*Tweede Kamer*) that prohibits restrictions on the possibility of assigning or transferring claims between companies in order to ensure that such claims remain available for assignment or pledge for financing purposes.

A pledge over bank accounts is created as a pledge over the receivables owed by the bank to the account holder. In general, such right of

pledge will be created as a disclosed pledge, with notice being given to the bank where the bank account is held.

Intellectual property rights can be pledged either by execution of a deed of pledge before a Dutch civil law notary or by a privately executed deed, which must be registered with the Dutch tax authorities. Although the right of pledge is not required to be registered in the relevant intellectual property register in order to be valid, such a registration is required to be able to invoke the right of pledge against third parties who have relied in good faith on the information contained in the register in question.

Goodwill is not an asset that can be pledged in the Netherlands.

4.2 Rights and Remedies

If a company defaults on the payment of its secured obligations, security rights may be enforced. The security holder has the right to summary execution (*parate executie*), meaning that the secured property can be sold, with the proceeds being available for payment of the security holder's claim. This applies both outside and during insolvency proceedings. Under Dutch law, secured creditors are, in principle, able to enforce their security rights "as if there were no insolvency proceedings", with certain possible (temporary) limitations, as discussed below.

In the case of a right of mortgage, secured property may be sold publicly at an auction presided over by a Dutch civil law notary. Both the mortgagee and the mortgagor may request the court to determine that the secured property be sold via a private sale. In the case of a pledge, the pledgee is entitled to sell the pledged property at a public auction, but the court may determine that the pledged property can be sold in another manner, at the request of the pledgee or the pledgor. The pledgee may also request the court to have the pledged property remain with the pledgee as the buyer, with the amount to be paid to be determined/confirmed by the court.

Considering the above, secured creditors have a strong position in a restructuring situation. Their co-operation will generally be necessary in order for a restructuring to be successful. This has changed to some extent with the introduction of the WHOA; see **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**.

Secured creditors are not subject to an automatic stay in Dutch insolvency proceedings, but the court can impose a cooling-off period (*afkoelingsperiode*) of up to two months, to be extended only once for an additional two months. During the cooling-off period, rights of third parties to take recourse against the assets of the bankrupt estate or to hand over assets that are in the possession of the bankrupt debtor or the bankruptcy trustee may only be exercised with the authorisation of the supervisory judge, which is rarely granted. If the (expeditious) liquidation of the estate would otherwise be unduly held up, a bankruptcy trustee may impose a reasonable term upon a secured creditor – within such term, it will need to have enforced its rights, failing which the bankruptcy trustee may take over such enforcement.

While the secured creditor remains entitled to the relevant proceeds, those then flow through the estate, seriously diminishing any return – in addition to the loss of control by the secured creditor over the enforcement and the creditor having to wait for any payout until the bankruptcy trustee has progressed the liquidation of the estate to the stage of making distributions.

4.3 Special Procedural Protections and Rights

In principle, secured creditors are able to exercise their rights as if there were no bankruptcy, subject to a possible cooling-off period and/or a reasonable term set by the bankruptcy trustee for the enforcement to be completed. If they do, secured creditors will not have to pay for any estate costs, nor wait for the bankruptcy to reach its conclusion in order to be able to collect their proceeds (see **4.2 Rights and Remedies** for further details).

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

In formal insolvency proceedings (bankruptcy or suspension of payments), the following classes of pre-bankruptcy or pre-suspension of payments creditors can be distinguished:

- preferred creditors; and
- unsecured creditors.

As secured creditors can, in principle, act as if there were no bankruptcy (see **4.2 Rights and Remedies**), they may have priority over the proceeds of specific assets. Certain tax preferences may, however, interfere with this principle in certain circumstances. With respect to the general assets of the debtor (not subject to security rights in rem or similar rights), preferred creditors generally outrank unsecured creditors. Preferences may be general or relate only to certain assets.

5.2 Unsecured Trade Creditors

Unsecured trade creditors are generally kept whole in a restructuring process, to allow the business to continue operating as a going concern – it should be noted that, ipso facto, clauses under current legislation function without limitation (except under the WHOA), and there is no automatic stay. Exceptions may include when a certain class of unsecured/trade creditors is at the root of the issues facing the business (eg, landlords in retail businesses with excessive rental costs). The WHOA has created an in-court restructuring process to cram down dissenting minorities (see also **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings**).

5.3 Rights and Remedies for Unsecured Creditors

In a restructuring context, unsecured creditors have various rights and remedies generally available to creditors. Under certain circumstances, unsecured creditors may also be able to invoke the following:

- retention of title (*eigendomsvoorbehoud*);
- right of retention (*retentierecht*);
- possessory pledge (*vuistpandrecht*);
- right of suspension (*opschortingsrecht*);
- set-off; and
- termination/rescinding or claiming back of unpaid goods (*recht van reclame*).

Creditors may further levy pre-judgment attachments (*conservatoir beslag*) against, or request the bankruptcy of, their debtor. In bankruptcy, some unsecured trade creditors can force the bankruptcy trustee or administrator to pay all their outstanding claims (as administrative claims) to the extent that they are an essential supplier (*dwangcrediteur*) – eg, if they are essential for continuing or winding down the business. Creditors are generally entitled to act in their own interest, whereby they may be limited by other stakeholders' interests in accordance with the

general Dutch law principles of reasonableness and fairness (*redelijkheid en billijkheid*).

In bankruptcy, creditors may request the supervisory judge to instruct the bankruptcy trustee to perform, or to refrain from performing, a specific act; they may also vote on a proposed composition plan. During a suspension of payments, moreover, unsecured creditors may vote on granting a definitive suspension of payments. In the case of bankruptcy proceedings, creditors can no longer attach assets of the debtor (and pre-bankruptcy attachments lapse), since bankruptcy proceedings qualify as a general attachment of all assets of the debtor. Unsecured creditors can file their claims with the bankruptcy trustee for verification and/or voting purposes. In suspension of payment proceedings, creditors can submit their claims to the administrator for voting purposes.

5.4 Pre-judgment Attachments

Dutch law provides for the option of pre-judgment attachment (*conservatoir beslag*). A creditor who wishes to secure payment by the debtor through the attachment of assets will have to obtain leave from the judge in preliminary relief proceedings (*voorzieningenrechter*). This leave is generally easily obtained in the Netherlands, but if the attachment proves to be wrongful, the creditor is in principle liable for the damages incurred by the debtor as a result of the attachment. Once the leave is obtained, a bailiff can be instructed to attach the assets.

As well as pre-judgment attachment against the debtor, a creditor can also impose pre-judgment garnishment against the debtor (ie, a bank account). The creditor is obliged to start proceedings on the merits within a period to be specified by the judge in preliminary relief proceedings. Once an enforceable judgment against the debtor is obtained, the pre-judgment attachment converts into an attachment in execution (*executoriaal beslag*). The creditor is then entitled to enforce on the attached assets and to be paid out of the proceeds.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

General

Dutch law provides for the following order of priority of claims:

- first (in insolvency proceedings) – estate or administrative claims;
- second – preferential claims;
- third – non-preferential claims; and
- fourth – subordinated claims.

Priority Claims

Estate or administrative claims are first in the order of payment, and include the bankruptcy trustee's fees and debts incurred by the bankruptcy trustee (*boedelschulden*). Claims of the Dutch tax authorities and the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*) qualify as preferential claims. Claims of the Employee Insurance Agency relating to the salary of employees during the first weeks of the bankruptcy proceedings (a maximum of six weeks) are estate claims. There are also other statutory general or specific preferences.

Secured Creditor Claims

In principle, secured creditors have priority over the proceeds of the specific assets over which they have security, without having to share in the estate costs or be otherwise subject to priority claims, as secured creditors are entitled to act as if there were no bankruptcy. An important exception to this rule is when the pledgee holds a non-possessory pledge over (certain)

inventory on the debtor's premises. The Dutch tax authorities have a priority claim with respect to such assets. Furthermore, secured creditors may lose the right to enforce without regard for the insolvency; see also **4.2 Rights and Remedies**.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation

Bankruptcy or suspension of payments means loss of control to a court-appointed bankruptcy trustee – respectively, a serious limitation in control due to joint control with a court-appointed administrator as well as relatively rigid limitations on the ability to continue the business as a going concern and on restructuring options, so that it is perceived as value-destructive by creditors and other stakeholders. Outside bankruptcy proceedings or the WHOA, in principle the consent of all parties involved is required for any restructuring plan (with only rare opportunities for court intervention).

The WHOA, or what has been referred to as the "Dutch Scheme of Arrangement", provides the Netherlands with a strong, effective, flexible, cost-efficient, fast and modern restructuring tool for saving viable enterprises by taking away uncertainty, delay, imbalances between stakeholders, and holdout/nuisance positions generally.

The WHOA allows debtors and, under certain circumstances, creditors to offer a composition to any or all classes of creditors and shareholders, which upon approval by the requisite majority and court confirmation will be generally binding, including on dissenting creditors and/or shareholders. It has been inspired in important parts by the UK Scheme of Arrangement and the US Chapter 11 proceedings.

Since its introduction, case law on the WHOA has become steadily available. The WHOA has proven its effectiveness in both small and larger restructurings, including the restructurings of the Vroon Group and Royal IHC.

Private Restructuring Plan

Debtors have two options under the WHOA: non-public or public proceedings. Most debtors under the WHOA opt for non-public proceedings, taking away potential publicity that is disruptive to the business. The public proceedings have the advantage of being included on Annex B to EU Insolvency Regulation recast 2015/848 (the "EIR recast"), which provides certainty of recognition in member states of the European Union. The WHOA has the following key characteristics.

Eligible debtors

Regardless of whether they are organised as a company/legal entity or not (and which one), businesses and self-employed private citizens are eligible debtors. If the debtor foresees that they will be unable to continue paying their due debts, they may offer an "accord" – ie, a composition or restructuring plan (the "plan").

Included creditors, classes and class formation

The debtor is at liberty to include any or all creditors or shareholders in the restructuring, but anyone whose rights are to be altered in any way must be included in the plan. Thus, anyone left out of the plan retains their rights unaltered. There is one general exclusion for employees, whose rights cannot be affected by a plan under the WHOA in any way (except, of course, the

rights of individuals who all consent voluntarily). Furthermore, under the WHOA there must be a "reasonable ground" (ie, a justifiable (business) reason) for leaving anyone out of the plan. This flexibility in targeting the plan makes it possible to, for instance, leave out trade creditors entirely, as is usual in business restructurings internationally.

Creditors and shareholders may be divided into classes. In many cases this will be necessary: creditors or shareholders whose rights or interests are so dissimilar that it cannot be said that they are in a similar position may not be included in the same class. This means that class formation is very flexible and largely up to the debtor, as long as the bar set out above is met.

Nature and flexibility of the plan

In principle, a plan is considered to be a contract between the debtor and the relevant creditors/shareholders. Its contents and form are free, making the plan a very flexible, versatile instrument. Therefore, the potential use of WHOA plans includes the usual restructuring solutions, such as:

- debt amendments or exchanges;
- debt-for-equity swaps; and
- fresh money injections with squeeze-out of shareholders, etc.

Plan confirmation and cram-down

The WHOA makes it possible to have a plan declared binding on all those affected, including dissenters: "homologation" in terms of the WHOA, or "confirmation" as it is most commonly known internationally. The WHOA contains both intra-class cram-down and cross-class cram-down. A plan will be confirmed if at least one class votes in favour. In an intra-class cram-down, a plan can be confirmed over the objections of dissenters within a class, and declared binding on them, if two thirds in amount in that class voted in favour. In a cross-class cram-down, a plan can be confirmed over the dissent of entire classes (ie, if less than two thirds in amount voted in favour). Notably, there is no criterion for any number of creditors to have voted in favour. A plan will be confirmed by the court if the criteria above are met and the debtor followed due process in informing the stakeholders involved, unless opposing creditors or shareholders invoke any of the grounds listed in the statute for not confirming.

There are limited grounds for individual naysayers to act against confirmation, including the best-interest-of-creditors test, under which a plan that provides for a lower distribution than the creditor/shareholder would have received in a liquidation bankruptcy is not confirmable. Feasibility is another important test. Opposing creditors or shareholders who are part of a class that voted against the plan – and which are thus to be crammed down – may in addition rely on certain strong protections of their economic and other interests, including the absolute priority rule: a class may not get a haircut under the plan if any class with creditors or shareholders whose claims rank lower is to receive or retain any rights under the plan. There is a new money exception and a (limited) gifting exception. Additional protections included in the WHOA are a "not more than 100% rule" and a "no unfair discrimination rule". The WHOA also provides for additional protection for small and medium-sized enterprises.

Other relevant useful features

The WHOA provides for a safe haven for interim financing, and allows for guarantees and suretyships provided for the debts of the

WHOA debtor and executory contracts to be restructured. Once underway, a WHOA process will be protected against the functioning of ipso facto clauses. While there is no automatic (worldwide) stay, the debtor may request that the court grants a moratorium against individual enforcement actions by creditors, including filings for involuntary (liquidation) bankruptcy. Finally, at the request of the debtor (or on its own initiative), the court may order any such relief as necessary to protect the interests of the creditors or shareholders.

Pre-pack

There is draft legislation aimed at implementing a formal pre-pack (Continuity of Companies Act I – *Wet continuïteit ondernemingen I*), which would make it possible for a debtor in financial difficulty to request the appointment of a silent (non-public) bankruptcy trustee (*beoogd curator*), in order to attempt a silent restructuring of its business. The goal is to prepare a sale of assets that is to be effectuated once formal insolvency proceedings are opened by the silent bankruptcy trustee, then formally appointed as bankruptcy trustee, without causing any publicity that is disruptive to the business.

A number of courts in the Netherlands have appointed silent bankruptcy trustees in the past, even though there was no statutory basis. As a result of challenges by labour unions and their members, including before the European Court of Justice (ECJ) in Smallsteps (C-126/16), the requests for pre-packs have dried up and the attempt to give the pre-pack a legal basis through the Continuity of Companies Act I has been put on hold.

It is expected that the ECJ judgment in Heiploeg (C-237-20) will have its effect on both the Continuity of Companies Act I and another draft bill that has been presented: the Act on Transfer of Enterprise in Bankruptcy (*Wet overgang van onderneming in faillissement*), which deals with the position of employees if the bankruptcy trustee transfers the enterprise of the bankrupt employer. In the Heiploeg judgment, the ECJ ruled that a takeover arranged within the framework of a pre-pack procedure, such as the Heiploeg acquisition, can, under specific circumstances, fall within the exception mentioned in Article 5(1) of Directive 2001/23. This exception applies when the pre-pack:

- is geared towards satisfying the claims of all creditors to the greatest extent possible;
- seeks to preserve employment to the greatest extent possible; and
- is subject to regulation by statutory or administrative provisions.

In view of the judgment of the Dutch Supreme Court following up on the judgment by the ECJ in Heiploeg, it is clear that in order to fall within the exception of Article 5(1) of Directive 2001/23 the pre-pack practice requires a legal basis.

6.2 Position of the Company

Outside insolvency proceedings, both under the WHOA and in other out-of-court restructurings, the company usually has a facilitating/leading role in discussions with its lenders, creditors and other stakeholders. The developed practice of courts to appoint a silent bankruptcy trustee (*beoogd curator*) has diminished (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**). Under the WHOA, a debtor can request the court to grant a moratorium against individual enforcement actions by creditors, including filings for involuntary (liquidation) bankruptcy.

6.3 Roles of Creditors

The creditors of the company usually take decisions regarding a financial restructuring/reorganisation plan or agreement outside insolvency proceedings, whether or not they are following a proposal made by the company. Outside insolvency proceedings, in principle the consent of all parties involved is currently required. Under the WHOA, creditors may propose a restructuring plan in certain circumstances. There must be justifiable reasons for not including certain creditors in such restructuring plan.

6.4 Claims of Dissenting Creditors

In out-of-court restructurings, in principle the consent of all creditors is required and therefore creditors' rights may only be amended without their consent under exceptional circumstances. However, subject to certain limitations, intra-class and cross-class cram-downs are possible under the WHOA.

6.5 Trading of Claims Against a Company

In general, there are no prohibitions or restrictions on trading claims against the debtor, but the possibilities to set off newly acquired claims from a third party against payments due by the acquiring party to the debtor are limited during bankruptcy proceedings; while, in principle, the debtor does not lose its right of set-off of claims due to the original debtor. Under the WHOA, it might be possible to request the court to impose temporary restrictions on trading claims against the restructuring debtor.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

Under the WHOA, a composition (ie, accord/restructuring plan/plan of reorganisation) may also affect the amendment rights of creditors of legal entities that are part of a group with the debtor if:

- the rights of those creditors against the relevant legal entities entail payment of, or security for, the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;
- the relevant legal entities foresee that they will be unable to continue paying their due debt;
- the relevant legal entities have approved the proposed amendment, or the composition is proposed by a restructuring expert (*herstructureringsdekundige*); and
- the court would have jurisdiction if these legal entities were to propose their own plan under the WHOA.

If the financial distress at the level of group companies of the debtor company is caused solely by the joint liability for certain debts of such debtor company, the above-mentioned provision would provide for a restructuring solution without the need to open separate WHOA procedures for the individual group companies. Should that not be the case, separate WHOA procedures can be initiated for the group companies, provided they meet the criteria.

6.7 Restrictions on a Company's Use of Its Assets

Under the WHOA, the right of the debtor company to use or sell its assets is not amended as a general rule. If a cooling-off period (*afkoelingsperiode*) has been imposed by the court, the debtor retains rights to use, expend or dispose of assets, or to collect claims existing prior to such cooling-off period during the cooling-off period, provided this falls within the debtor's ordinary course of business.

Such rights may only be exercised if the interests of third parties that are affected by the use or sale of such assets are adequately protected. Affected third parties can request the court to revoke or limit exercise of the aforementioned rights if adequate protection is no longer provided for.

6.8 Asset Disposition and Related Procedures

Under the WHOA, in principle the debtor remains in possession, and any sale of assets or the business in the course of a WHOA process will be executed by the debtor itself. See **6.7 Restrictions on a Company's Use of Its Assets** regarding the right of the debtor company to use or sell its assets during a cooling-off period (*afkoelingsperiode*). During the WHOA procedure, in principle existing rights in rem remain in place (in full), and a sale conducted in respect of encumbered assets will not be free and clear of claims.

6.9 Secured Creditor Liens and Security Arrangements

The WHOA does not provide for procedures regarding the release of secured creditor liens and security arrangements.

6.10 Priority New Money

Under the WHOA, injections of new money are facilitated, with a safe haven for such financing and any security granted for it, and an exception to the absolute priority rule. Outside the WHOA, money could be injected during a restructuring by various stakeholders, such as current or new shareholders or (secured) creditors, but under Dutch law there is no real possibility either in or outside formal insolvency proceedings for granting providers of new money any super-priority liens or rights. New money providers may stipulate security rights in rem (such as liens) as a condition for providing their money, but by doing so can only jump ahead of unsecured creditors, not existing secured or otherwise preferred creditors (except with their consent). There may also be concerns as to the (bankruptcy/preference) hardiness of such security.

6.11 Determining the Value of Claims and Creditors

Under the WHOA, the court can determine whether a creditor or shareholder should be admitted to the vote and, if so, for what amount. This determination can take place prior to the composition being put to a vote upon the request of the debtor or, if appointed, the restructuring officer (*herstructureringsdeskundige*). This decision is binding on the affected creditors and shareholders who were given an opportunity by the court to express their views. Changes to the amount of claims at a later stage do not affect the validity of the adoption, determination or refusal of the composition.

In general, under the WHOA the claims of secured creditors have to be split between the part of the claim that is covered by security and the part of the claim that is not, with the respective portions of the claim being part of a different class of creditors. In the case of secured creditors, it will therefore have to be determined what part of the claim is secured.

6.12 Restructuring or Reorganisation Agreement

Under the WHOA, a restructuring plan can be declared binding on all those affected, including dissenting parties, with possibilities for intra-class and cross-class cram-down. Creditors who voted against the restructuring plan can challenge confirmation by the court on limited grounds only, which include internationally familiar protections such as the absolute prior-

ity rule. Currently, compositions are possible in bankruptcy and suspension of payments; these may bind dissenting ordinary unsecured creditors only and are also otherwise generally unattractive (see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings** and **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Furthermore, the WHOA provides for the possibility for a debtor to offer counterparties amendments to the contract. If the counterparty rejects the offer, the debtor may terminate the contract. The counterparty will have a claim for damages; the debtor may restructure such claim as part of the restructuring plan. An important exception applies to employment contracts, which cannot be affected.

6.13 Non-debtor Parties

Under the WHOA, a composition (ie, accord/restructuring plan/plan of reorganisation) may also amend the rights of creditors of legal entities that are part of a group with the debtor, provided certain conditions are met (see **6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group**).

6.14 Rights of Set-Off

Set-off rights are not affected during a restructuring, unless otherwise agreed by the relevant creditor. The same applies under the WHOA, although it may be possible to get temporary relief against certain creditors. A person who is both a debtor and a creditor of the bankrupt debtor is generally allowed to set off their debt against their claim on the bankrupt debtor, provided that both arose before the declaration of bankruptcy or result directly from legal acts entered into with the bankrupt debtor before the declaration of bankruptcy. However, a person who has assumed a debt owed to – or acquired a claim against – the bankrupt debtor from a third party before the declaration of bankruptcy may not effect a set-off if they have not acted in good faith with respect to such assumption or acquisition.

6.15 Failure to Observe the Terms of Agreements

Under the WHOA, non-compliance with the terms of a restructuring plan by the debtor will most likely lead to the dissolution of the plan and, provided the debtor has ceased paying its debts, the opening of insolvency proceedings (bankruptcy), at the request of either the debtor or one or more creditors. The same generally applies for a suspension of payments or bankruptcy composition, or for an out-of-court restructuring.

6.16 Existing Equity Owners

In a restructuring through creditors' agreement outside insolvency, there is no prohibition against equity owners retaining their equity and/or other interests. The same applies under a bankruptcy or suspension-of-payments composition, provided that other confirmation requirements are met. Under the WHOA, equity owners could also retain equity, but this will be subject to limitations due to (among other things) the best-interest-of-creditors test, the absolute priority rule and other confirmation tests, and therefore seems less likely than in an out-of-court restructuring. The WHOA significantly reduces any nuisance value shareholders may have.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Dutch law distinguishes three types of insolvency proceedings:

- bankruptcy (*faillissement*), which aims for the liquidation of the assets of the debtor;
- suspension of payments (*surseance van betaling*), which aims for reorganisation and the restructuring of debts; and
- statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*), which aims to restructure debts and obtain a "clean slate" for natural persons.

While formally an insolvency proceeding, and also due to the public WHOA proceedings being included on Annex B to the EIR recast, the WHOA/Dutch Scheme is regarded as a statutory restructuring proceeding. See **6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings** for an in-depth discussion of the WHOA.

Bankruptcy

Bankruptcy (*faillissement*) is a liquidation proceeding aimed at monetising the assets of the bankrupt company (estate) and distributing the proceeds thereof to creditors. It is possible to file for bankruptcy when a debtor is "in the state that it has ceased paying its debts" and when there are at least two creditors, one of which has a due and payable claim that remains unpaid. As stated previously, this is an open norm: the state of having ceased payments can be disproved even if the above criteria are met.

Either the debtor itself or the creditors may file. There are no other formal requirements or criteria forcing a filing, such as solvency, liquidity or balance sheet tests. Except for the case of a settlement (composition) with creditors, which may be bindingly enforced upon approval by specific majorities and court confirmation, the bankruptcy does not end with a clean slate for the debtor. As a consequence of a bankruptcy order, the debtor loses the right to manage and dispose of its assets with effect from and including the day on which the bankruptcy order is issued.

The court appoints a bankruptcy trustee to take charge of the liquidation of the debtor's assets, including the possible transfer of the business as a going concern. The bankruptcy trustee acts under the general supervision of a supervisory judge. The bankruptcy trustee requires the prior authorisation of the supervisory judge for certain acts, such as:

- the continuation of activities;
- reaching amicable settlements;
- initiating legal proceedings;
- transferring (part of) the business as a going concern; and
- terminating agreements with employees and landlords.

Creditors' claims must be filed for verification purposes (*verificatie*) with the bankruptcy trustee in writing, listing the nature and amount of the claim, with documentary evidence or copies of documentary evidence and a statement as to whether or not a right of preference, pledge, mortgage or lien is claimed. A claim that has an uncertain due date or that entitles the claimant to periodic payments will be admitted for its value at the date of the bankruptcy order. Claims that have an indeterminate or uncertain value, or whose value is not expressed in euros or not expressed in a monetary value at all, will be admitted for their estimated value in

euros. Claims of creditors can be traded and transferred, also in bankruptcy, from one party to another by deed of assignment and by giving notice to the debtor (bankruptcy trustee). The aggregate number of votes (head count) that can be cast in relation to the voting on a composition cannot be increased as a result of such post-bankruptcy declaration transfer.

Any legal proceedings instituted by the bankrupt debtor that are pending at the time of the bankruptcy order will, at the request of the defendant, be stayed to permit said debtor to summon the bankruptcy trustee to take over the proceedings, within a period to be set by the court. If the bankruptcy trustee does not respond to the summons, the defendant has the right to request that the proceedings be dismissed. Legal proceedings instituted against the bankrupt debtor that are pending at the time of the bankruptcy order are automatically suspended or, in the case of claims of a personal nature, the claimant has the right to request a stay in the proceedings in order to summon the bankruptcy trustee to appear in the proceedings within a period to be set by the court.

A person who is both a debtor and a creditor of the bankrupt debtor is generally allowed to set off their debt against their claim against the bankrupt debtor, provided that both arose before the declaration of bankruptcy or result directly from legal acts entered into with the bankrupt debtor before the declaration of bankruptcy. However, a person who has assumed a debt owed to – or acquired a claim against – the bankrupt debtor from a third party before the declaration of bankruptcy may not effect a set-off if they have not acted in good faith with respect to such assumption or acquisition. There is extensive case law around set-off in bankruptcy.

As a rule, after the first month and at the end of each following three-month period, the bankruptcy trustee must publish a public report on the state of the estate's affairs.

Suspension of Payments

Suspension of payments proceedings (*surseance van betaling*) are meant as a temporary relief against the non-preferential creditors of the debtor. The goal of a suspension of payments is the reorganisation and continuation (in whole or in part) of viable businesses that have come into financial distress, by offering a composition (ie, accord, restructuring plan or plan of reorganisation) to the creditors.

Only the debtor itself is able to file for suspension of payments, when it foresees that it will not be able to continue meeting its debts as they fall due. A provisional suspension of payments is automatically granted by the court upon the filing of the application and can later be declared to be definitive after a hearing is held where the court-appointed administrator (*bewindvoerder*), the supervisory judge (if appointed) and the company are present. During the suspension of payments, the business of a company is managed by the management as usual, but the co-operation (approval/authorisation) of the court-appointed administrator is required for acts binding/impacting on the estate. A suspension of payments can be converted by the court into a bankruptcy at its own initiative or at the request of the supervisory judge, the court-appointed administrator or one or more creditors.

A suspension of payments order will suspend enforcement measures of unsecured creditors, but is not effective towards preferred and security creditors. Suspension of payments may last up to 18 months and may be extended, at

the debtor's request, an unlimited number of times – each time for a further 18 months. As a straightforward restructuring tool, suspension of payments is rarely successful, as it is outdated and lacks many modern tools and features. Most suspensions of payments are converted into bankruptcy relatively quickly after their commencement.

Statutory Debt Restructuring for Natural Persons

Statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*) applies only to natural persons, who can apply for a statutory debt restructuring when they reasonably foresee that they will not be able to pay their debts as they fall due, or when they are in a situation in which they have ceased to pay their debts as they fall due. When a debt restructuring scheme is granted, an administrator (*bewindvoerder*) and a supervisory judge – who supervises the actions of the administrator – will be appointed.

As a rule, the debtor will end up with a clean slate (*schone lei*) after one and a half years if certain conditions are met. This means that the claims to which the debt restructuring scheme applies will no longer be enforceable, regardless of when a creditor filed its claim in the debt restructuring scheme. A debtor will not be granted statutory debt restructuring if its debts were incurred in bad faith.

7.2 Distressed Disposals

In a bankruptcy, the bankruptcy trustee will consider the various available alternatives to the liquidation of the bankrupt estate, including the transfer of the business as a going concern by way of an asset sale. The bankruptcy trustee is rather flexible when entering into an agreement with a potential purchaser, provided that the agreed transaction is in the best interest of the joint creditors of the bankrupt debtor. A sale of assets requires the prior authorisation of the supervisory judge. The bankruptcy trustee will also have to take into account the interests of secured creditors, who have a strong legal position in the process of selling assets over which they may have security. In practice, this means that the bankruptcy trustee needs the approval of a secured creditor before selling a secured asset to a purchaser.

If the security rights of the creditor are recognised by the bankruptcy trustee, the creditor can claim the relevant part of the proceeds, while the bankruptcy trustee will request a fee from the secured creditor for the trustee's co-operation in facilitating the sale of the secured asset to a purchaser. Dutch law does not provide for any rules preventing an existing secured or unsecured creditor from participating in the sale process as a potential purchaser. As a rule, the bankruptcy trustee will not give any representations and warranties to a purchaser.

Finally, a bankruptcy trustee is not bound by any pre-negotiated and pre-insolvency sales transaction of assets – except, perhaps, in pre-pack situations to the extent that the silent bankruptcy trustee (*beoogd curator*) made certain undertakings.

7.3 Organisation of Creditors or Committees

The Dutch Bankruptcy Act provides for a creditors' committee, though such committees are rare; they are usually appointed only in large and/or complex cases. If such a committee is appointed, the bankruptcy trustee is obliged to provide its members with all requested information. By law, the bankruptcy trustee is also obliged to seek advice from this committee,

but is not bound to act on it. Certain rights of consent also fall to a committee if approved.

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection With Overseas Proceedings

Within the EU (Except for Denmark)

The EIR recast provides for automatic recognition in the Netherlands of foreign insolvency proceedings (listed in the EIR recast) opened on or after 26 June 2017.

Outside the EU

The Dutch Bankruptcy Act contains no provisions with regard to the recognition of a foreign insolvency. The UNCITRAL Model Law or (other) rules based on comity have not been implemented in the Netherlands. The Dutch Bankruptcy Act dates back to 1893, at which time it was considered undesirable to include rules that would allow for the recognition of foreign insolvencies. As a consequence of this, the Dutch Supreme Court applied the "territoriality principle" in its case law, so an insolvency from a country with which the Netherlands has no relevant treaty (such treaties are exceptionally rare) does not include any assets in the Netherlands, and a foreign insolvency practitioner may not act on the basis of it with respect to such assets to the extent that doing so would result in the deterioration of the position of (individual) creditors and their (individual) recourse rights.

However, softening this principle of territoriality somewhat, the Dutch Supreme Court has ruled, in short, that a foreign insolvency practitioner can effectively exercise their powers in the Netherlands if they act within the scope of the lex concursus (ie, the law of the country of the opening of the insolvency proceedings) and if such exercise does not lead to a deterioration of the position of the creditors of the insolvent company as described above. When exercising their powers, the foreign bankruptcy trustee must respect all existing attachments on Dutch assets by individual creditors. No prior court decision on recognition or relief (as required under the UNCITRAL Model Law) or exequatur is required for such exercise of powers. If an interested party believes that a foreign insolvency order violates Dutch public policy, it is up to that party to prevent the foreign bankruptcy trustee from exercising their powers by initiating court proceedings in the Netherlands in order to obtain an injunction in that respect.

8.2 Co-ordination in Cross-Border Cases

The EIR recast includes several clauses on co-operation and communication between courts, as well as between courts and insolvency practitioners. As far as is known, there are no other arrangements with foreign courts to co-ordinate insolvency proceedings; however, in ad hoc cases of large/complex cross-border insolvencies, Dutch courts/insolvency judges have occasionally entered into more or less formal contact with their foreign counterparts.

8.3 Rules, Standards and Guidelines

The most important rules under Dutch law regarding the recognition of foreign insolvency proceedings and (other) decisions of foreign courts are the EIR recast and the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters recast 1215/2012 ("Brussels I recast"), which are applicable in an EU context, except for Denmark.

The recognition of foreign insolvency proceedings is not possible in the Netherlands, other than

based on the EIR recast. However, the exercise of powers by foreign insolvency practitioners can be recognised under certain circumstances and to a certain extent (see **8.1 Recognition or Relief in Connection With Overseas Proceedings**).

8.4 Foreign Creditors

Foreign creditors do not have a different standing in Dutch insolvency proceedings compared to local creditors.

8.5 Recognition and Enforcement of Foreign Judgments

In civil and commercial matters, the recognition and enforcement of judgments from EU member states (except Denmark) is laid down by Brussels I recast and other EU regulations. If the matter involves the recognition or enforcement of a judicial decision of a non-EU member state, domestic Dutch law is applicable. The recognition and enforcement of foreign arbitral awards is governed by domestic Dutch law in combination with conventions, if applicable.

If Brussels I recast and other EU regulations do not apply for a judicial decision, de facto recognition and enforceability in the Netherlands can be obtained through a so-called quasi-exequatur procedure (*verkapte exequaturprocedure*), provided that the foreign judicial decision meets the following minimum criteria:

- the jurisdiction of the judge who rendered the foreign decision is based on an internationally accepted ground for jurisdiction;
- the foreign decision came into being in legal proceedings based on a proper and well-founded administration of justice;
- the recognition of the foreign decision is not contrary to Dutch public order; and
- the foreign decision should not be irreconcilable with an earlier decision of the Dutch courts between the same parties and involving the same cause of action, or with an earlier decision of a foreign court between the same parties and involving the same cause of action, provided that this earlier court decision of a foreign court fulfils the conditions necessary for its recognition in the Netherlands.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

There are two types of statutory officers in bankruptcy proceedings: a bankruptcy trustee (curator) and an administrator (*bewindvoerder*). A bankruptcy trustee is appointed by the district court simultaneously with the adjudication of a bankruptcy (*faillissement*). An administrator is also appointed by the district court, but simultaneously with granting suspension of payments (*surseance van betaling*).

In the course of a pre-pack, without a statutory basis being present, a silent bankruptcy trustee (*beoogd curator*) can be appointed by the court in order to attempt a silent restructuring of the business of the company (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Under the WHOA, the court may appoint a restructuring officer (*herstructureringsdeskundige*) or an observer (*observator*).

9.2 Statutory Roles, Rights and Responsibilities of Officers

The bankruptcy trustee and the administrator both report to the supervisory judge (*rechter-commissaris*). A bankruptcy trustee is appointed

in bankruptcy proceedings that can be described in general as liquidation proceedings. A bankruptcy trustee is entrusted with the administration of a bankrupt company, and charged with its winding-up. In a suspension of payments, the business of a company is managed by the management as usual, but the co-operation (approval/authorisation) of the court-appointed administrator is required for acts that bind/impact on the estate. The administrator will investigate whether or not the suspension of payments is likely to lead to a situation in which the company will be continued while it is (or in the future will be) able to pay its debts, failing which they might request conversion into bankruptcy.

Under the WHOA, the restructuring officer and the observer both report directly to the court. The restructuring officer, if appointed, will investigate the feasibility and content of a restructuring plan under the WHOA, and may submit the composition plan at its initiative or as composed by the debtor. The observer, who is only to be appointed in cases where there is no restructuring officer in place, monitors the process, especially whether the interests of creditors are observed well.

9.3 Selection of Officers

When appointing a bankruptcy trustee or an administrator, district courts use a list of eligible lawyers – a "bankruptcy trustee list" (*curatorenlijst*). In practice, only individuals on the "bankruptcy trustee list" are appointed. The Dutch Bankruptcy Act contains no formal requirements regarding identity, qualifications or credentials. In exceptional cases, an expert – such as an accountant – is appointed as co-bankruptcy trustee or co-administrator.

Further to EU Restructuring Directive 2019/1023, the Recofa (association of supervisory judges) principles provide guidelines for the district courts regarding the admission or removal of lawyers from the list, and guidelines for the appointment in individual bankruptcies and court-based quality and control instruments. Because these guidelines are principles and not mandatory rules or binding policies, the various district courts use their own procedures.

The district court may dismiss the bankruptcy trustee at any time after said trustee has been heard or duly summoned to appear, and may replace them with someone else or appoint one or more bankruptcy co-trustees, in each case either on the recommendation of the supervisory judge or upon a substantiated request of one or more of the creditors, the creditors' committee or the bankrupt debtor. A similar provision is included in the Dutch Bankruptcy Act in respect of an administrator.

The directors of the company remain in function once a bankruptcy trustee is appointed, but are no longer entitled to dispose of the assets of the bankrupt company. An administrator appointed in a suspension of payments works together with the company's management, and they are jointly authorised to represent the company (in matters directly related to or indirectly affecting the value of the assets of the debtor company). The bankruptcy trustee or administrator usually requires information and co-operation from the directors of the company – eg, in order to realise a sale of (part of) the business as a going concern. The directors of the company also have an obligation under the Dutch Bankruptcy Act to provide the bankruptcy trustee with any and all requested information.

Under the WHOA, the party submitting the request for the appointment of a restructuring officer has to submit at least two quotes from suitable persons. There are no formal requirements for bankruptcy trustees and administrators, and the restructuring officer does not need to be a lawyer. Dismissal and replacement of the restructuring officer works in a similar way as for bankruptcy trustees and administrators.

For the appointment of observers under the WHOA, the court uses the "bankruptcy trustee list" described above.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

The board of directors owes fiduciary duties to the company (including its subsidiaries) and its stakeholders, such as the shareholders, creditors, employees, customers, suppliers and other parties. In the performance of their duties, the directors must direct their attention to the interests of the company and of the enterprise connected with it.

Each director is responsible towards the company for the proper performance of the tasks assigned to them. All duties of directors that have not been assigned to one or more other directors by, or pursuant to, law or the articles of incorporation accrue joint responsibility, and come under the duties of the board of directors. Each director is responsible for the general conduct of business. A director is liable for the full consequences of an improper performance of duties, unless – and also in regard to the tasks assigned to the other directors – no material reproach thereof can be made to said director personally and they have not failed to take steps to prevent the consequences of mismanagement.

In the case of bankruptcy, a director may be held liable, among other reasons, if they have manifestly improperly performed their duties (ie, if no right-thinking director would have acted similarly under the same circumstances) and if it is plausible that such improper performance substantially contributed to the company's bankruptcy. If that threshold is met, each director may be held jointly and severally liable for the shortfall in the bankrupt estate. The bankruptcy trustee is exclusively authorised to pursue this claim, and bears the burden of proof. However, the burden of proof is materially reversed if the board of directors has failed to keep proper records or failed to file the company's annual accounts in a timely manner. The board of directors can rebut this presumption by sufficiently demonstrating that a different circumstance was an important cause of the bankruptcy.

Under certain circumstances, a director may be held liable towards a third party, such as a creditor or the bankruptcy trustee acting for the benefit of the joint creditors, on the basis of a wrongful act (*onrechtmatige daad*). Such liability only occurs if a director can be held seriously culpable (ie, where they are personally at fault). Examples of liability on the basis of a wrongful act include entering into an agreement on behalf of the company if the director knew or should have understood that the company would not be able to meet its obligations under such agreement and that the creditor would not be able to recoup its losses from the company. This means that directors of financially distressed companies should be extra careful when entering into new agreements that result in new obligations for the company. A director could also be liable to the bankrupt estate for the selective (non-)

payment (*selectieve (wan)betaling*) of creditors either when bankruptcy is unavoidable or when the company ceases its activities, and the company is not able to fulfil its obligations vis-à-vis its creditors.

Upon the request of the bankruptcy trustee or the public prosecutor, the court may impose a ban (*bestuursverbod*) for a period of up to five years on a director who has committed bankruptcy fraud or was guilty of misconduct. Transactions that are prejudicial to the rights of creditors or fraud may lead to criminal charges against the directors of the company.

The above also applies to shadow directors who have determined or co-determined policy as if they were a director.

10.2 Direct Fiduciary Breach Claims

The bankruptcy trustee and individual creditors may assert direct fiduciary breach claims against the directors. According to case law, legal proceedings initiated by the bankruptcy trustee take priority if both the bankruptcy trustee and an individual creditor start legal proceedings against a director based on the same facts. After these proceedings, the individual creditor may receive a payment out of the bankrupt estate, and may assert claims for any remaining damages directly against the director. The bankruptcy trustee is only entitled to pursue a claim for the benefit of the joint creditors and not on behalf of or for the benefit of a (specific) group of creditors.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

For the protection of creditors, the bankruptcy trustee may – if certain requirements are met – by notice in writing or in court avoid any transaction pursuant to which other creditors' rights are prejudiced (actio pauliana – comparable to fraudulent preference/conveyance). Firstly, the bankruptcy trustee may void a transaction entered into by the company without a prior legal obligation to do so if the interests of the other creditors are prejudiced by that transaction and if both the company and its counterparty to the transaction were aware or should have been aware that the transaction was prejudicial to the interest of the other creditors. The burden of proof rests upon the bankruptcy trustee, but the aforementioned knowledge is assumed if the transaction is entered into within one year prior to the bankruptcy of the debtor and, among others:

- the value of the obligation of the creditor is substantially exceeded by the value of the obligation of the debtor;
- payment has been made of, or security has been granted for, a debt which is not due and payable; or
- the debtor and creditor are related parties/entities.

Secondly, the bankruptcy trustee may void transactions that are entered into with the legal obligation to do so if the other party at the time the transaction was entered into knew that an application had been made for the bankruptcy of the company, or where the transaction is the result of discussions between the company and the other party with the purpose of preferring the latter to the detriment of the debtor's other creditors.

During WHOA proceedings, upon certain conditions being met the court may, in view of avoidance thereof, grant protection to specific transactions that are necessary to continue the

business of the debtor while the restructuring plan under the WHOA is being prepared.

11.2 Look-Back Period

There is no real look-back period under Dutch law, but in connection with the test for avoidance (see **11.1 Historical Transactions**) there are evidentiary presumptions in relation to certain types of transactions entered into within one year prior to the bankruptcy. The limitation period for voidable preference claims is three years from the date on which the bankruptcy trustee discovered the detrimental effect of the relevant transaction.

11.3 Claims to Set Aside or Annul Transactions

The articles in the Dutch Bankruptcy Act relating to the actio pauliana – avoidance, fraudulent preference/conveyance – are applicable only in the case of bankruptcy and may be used by the bankruptcy trustee exclusively. Creditors may fund the bankrupt estate in order to enable a bankruptcy trustee to take certain actions. If suspension of payments is granted to a debtor, the articles in the Dutch Civil Code relating to actio pauliana are applicable, which grant each creditor the right to nullify transactions pursuant to which the rights of other creditors are prejudiced. Creditors have the same right outside insolvency proceedings. Outside bankruptcy, individual creditors may avoid certain transactions based on largely the same tests as for the bankruptcy avoidance claim (see **11.1 Historical Transactions**).

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