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# Restructuring & Insolvency 2021

A practical cross-border insight into restructuring and insolvency law

**15th Edition**

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# Preface

Welcome to the 2021 edition of *ICLG – Restructuring & Insolvency*. Macfarlanes is delighted to continue to serve as the Guide's contributing editor.

The detailed content of year's edition is very different from years gone by, primarily as a consequence of the government reactions to the consequences of COVID-19, and I expect that there will be yet more change to reflect in the chapters of this Guide in the years to come. A lot of what we have seen in the past year could be described as 'crisis management'. For example, suspensions of director liability for late insolvency filings and blocks on creditor action to recover unpaid debts in many jurisdictions have helped to ensure that formal insolvencies are much lower than the historic average. However, those types of measures fail to address the massive accrual of liabilities on corporate balance sheets through the deferral of tax payments, the non-payment of rent to landlords and borrowing under government-backed loan schemes. If the post-pandemic economic recovery is not to be drawn out for many years to come, practitioners will need to come up with appropriate solutions – potentially with the assistance of further legal reform. My colleagues Simon Beale and Amy Walker consider this in their Expert Analysis chapter, which I commend to you.

This year's edition contains contributions from many leading practitioners, including an insight into the issues in restructuring and insolvency across 25 jurisdictions. We are very grateful for their support and we trust that you will find it valuable. Please do get in touch with relevant contributors directly, should you need to understand the most recent developments in any particular place.

I hope that you keep well.

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# Netherlands


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## 1 Overview

### 1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

Until recently, the Dutch jurisdiction was primarily creditor-friendly; the primary aim of the Dutch Bankruptcy Act ("**DBA**") – more specifically the bankruptcy proceedings – is to ultimately satisfy the creditors, and not to give the debtor a remedy to reorganise its business and to grant a (full or partial) discharge of debts. However, on 1 January 2021, the Act on confirmation of private restructuring plans (*Wet homologatie onderhands akkoord*, the "**Dutch Scheme**") came into effect, giving the debtor a remedy to reorganise its business.

### 1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

The DBA provides for two formal corporate insolvency proceedings: bankruptcy (*faillissement*; corporate liquidation proceedings); and suspension of payments (*surseance van betaling*; corporate restructuring proceedings).

In both formal insolvency proceedings the debtor can offer a composition plan (*akkoord*) to its (ordinary) creditors, but this does not happen often.

Suspension of payments is rarely successful and is often followed by bankruptcy. In practice, bankruptcy is the most used insolvency proceeding.

The legislative framework also allows informal work-outs, for example, by means of a plan of composition. Such an informal composition currently requires the cooperation of all creditors.

As mentioned, the Dutch Scheme entered into force on 1 January 2021. The Dutch Scheme introduces a framework that allows debtors to restructure their debts outside formal insolvency proceedings. The Dutch Scheme combines features of the US Chapter 11 and English schemes of arrangement. The purpose of the restructuring can be (i) to restructure the debt and equity structure in order to prevent insolvency, or (ii) to liquidate the assets of the company and distribute the proceeds amongst the creditors (see further under section 3). Although the Dutch Scheme was only introduced on 1 January 2021, it is already actively used in practice.

## 2 Key Issues to Consider When the Company is in Financial Difficulties

### 2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

The managing directors of the debtor are not under a statutory obligation to file for the opening of insolvency proceedings. Although the DBA does not contain such obligation, the managing directors may become personally liable *vis-à-vis* the creditors if the managing directors have allowed the company to incur obligations towards a third party that they know, or should have known, the company will not be able to timely meet. In such circumstances, the managing directors will be required to take appropriate measures, which could – depending on the circumstances – include the cessation of trading and the filing for suspension of payments or bankruptcy.

A managing director can be held liable for losses suffered by the company due to improper management if the managing director can be seriously blamed (*ernstig verwijt*), taking into account all facts and circumstances, such as the allocation of duties within the management board, the management board guidelines, information that the member of the management board is or should have been aware of, etc. These proceedings can only be initiated by the company, or by the bankruptcy trustee in case of a bankrupt company.

Managing directors are liable for the deficit of the estate if it is plausible that the management board manifestly improperly managed the company and this was an important cause of the bankruptcy. Certain legal presumptions apply. This liability towards the bankruptcy estate also applies to a *de facto* managing director.

Although the main rule is that only the company (and not its managing directors) is liable towards third parties such as creditors of the company, personal liability towards third parties may nevertheless arise if a managing director has committed an unlawful act towards such third party by violating his general duty of care. In all cases, the standard of liability is that the member of the management board can be seriously blamed for this.

Members of the management board may further become jointly and severally liable for the payment of certain taxes. This liability arises in the case of manifestly improper management. If the company or any of the managing directors timely filed a notification of non-payment, the tax authorities have to demonstrate that there was such manifestly improper management. If the company

or any of the managing directors failed to timely file the notification, it is legally assumed that the non-payment of taxes was caused by the managing director, unless he proves otherwise.

In conclusion, certain criminal law provisions apply, e.g. in case of fraudulent conveyance.

**2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?**

In the Netherlands, it is fairly easy for creditors to obtain leave for conservatory attachment. Such creditors may also file a petition for bankruptcy. The filing of such petition can trigger contractual clauses that make it possible to terminate existing contracts.

Dutch law further provides for a broad retention of title regime. Suppliers can arrange to reclaim their goods until all invoices have been paid.

Secured creditors (financiers) also have a strong influence. In practice, a company in financial difficulties will be placed under the supervision of the financiers' special management department because certain covenants under the financing agreements will be breached. Formally, the secured creditor has no role within the company, but in practice the company often cooperates with the bank, in the knowledge that the cooperation of the financiers is required for any restructuring due to all assets being pledged.

Employees take a special position in the Netherlands. Outside of a bankruptcy scenario, the possibilities to dismiss employees are limited. This is one of the reasons why it is difficult to successfully restructure a company outside insolvency proceedings. Legislation is being drafted to strengthen the position of employees in case of a transfer of undertaking during bankruptcy proceedings. Also note that it is not possible to affect the rights of employees under employee contracts in the Dutch Scheme.

In the Netherlands, suspension of payments (moratorium) is granted on a preliminary basis if a debtor foresees that it will be unable to meet its obligations. During suspension of payments proceedings, the debtor cannot be forced to pay his debts and all actions in progress to recover those debts are suspended. However, this regime only affects the ordinary creditors. See question 3.2 and further.

A freeze period can apply in the Dutch Scheme, bankruptcy or suspension of payments (see questions 3.2 and 4.4).

Stakeholders can have influence in relation to the Dutch Scheme. Not only the debtor, but also any of its creditors, shareholders or employee representatives may take the initiative for the Dutch Scheme. In general, the debtor does not require shareholder consent for a restructuring plan in the Dutch Scheme. An exception applies in case a restructuring expert is appointed as part of a scheme for small or medium-sized enterprises (SMEs). If one of the creditors, shareholders or employee representatives takes the initiative for a restructuring plan under the Dutch Scheme, it must request the court to appoint a restructuring expert, who will prepare a restructuring plan on behalf of the debtor. The debtor or the restructuring expert can request the court to grant a freeze order for a period of four months, which can be extended by another four months (see question 3.2).

**2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?**

The bankruptcy trustee is entitled to invalidate legal acts of the bankrupt debtor that were carried out before the declaration of bankruptcy and that were detrimental to the creditors. No hardening period applies. The burden of proof may be reversed in respect of voluntary legal acts that took place less than a year before the debtor was declared bankrupt (e.g. legal acts entered into with related parties or transactions at undervalue).

Voluntary legal acts by the bankrupt debtor, of which the results are detrimental to creditors (which is established when the action is invoked), may be invalidated if both the debtor and its counterparty knew or should have known (at the time the legal act was voluntarily entered into) that such legal act would have a detrimental effect on the creditors. The fact that a transaction was at arm's length does not necessarily mean that a transaction cannot be challenged.

Also, compulsory legal acts can be invalidated if (a) the creditor knew that the request for bankruptcy was pending, or (b) if the creditor consulted with the debtor with the intention to put him in a more favourable position than the other creditors. These must be proven by the bankruptcy trustee. There is no presumption of knowledge as in the case of voluntary legal acts.

Outside of formal insolvency proceedings, transactions can also be challenged. As a matter of Dutch law, every creditor may nullify (by a simple declaration) any legal act entered into by a debtor with a third party if the requirements for voidable preference outside bankruptcy are met.

In case of a Dutch Scheme, court authorisation can be requested for restructuring efforts, such as debtor-in-possession ("**DIP**") financing. If court authorisation is obtained, such efforts are protected from avoidance actions.

The validity and enforceability of the obligations of a debtor under, e.g. guarantee or security interest, may be successfully contested by a debtor (or its bankruptcy trustee) if the execution of the security document is not within the scope of the corporate objects of the debtor (*doeloverschrijding*) and the counterparty of such debtor under the security document knew or ought to have known (without enquiry) of this fact.

## 3 Restructuring Options

**3.1 Is it possible to implement an informal work-out in your jurisdiction?**

Until 1 January 2021, the Dutch legislative framework only allowed informal work-outs if all creditors cooperate and approved the informal work-out. As already briefly mentioned above, as of 1 January 2021 the Dutch Scheme was introduced, which allows for work-outs outside formal insolvency proceedings by means of a court-approved restructuring plan (see question 3.2).

**3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?**

As explained, the purpose of a restructuring by means of a **Dutch Scheme** can be (i) to restructure the debt and equity structure in

order to prevent insolvency, or (ii) to liquidate the assets of the company and distribute the proceeds amongst the creditors. The Dutch Scheme allows for a wide range of possibilities to restructure the debt; for example by means of a debt for equity swap, a haircut or extension of payment obligations, or through amendments to contractual terms (see further under question 3.5). It is also possible to restructure guarantees provided by group companies. The procedure can be finalised in only four to six weeks.

Once the debtor has announced the restructuring plan, the court can grant a freezing order of a maximum of four months at the request of the debtor or restructuring expert. The freezing order can be extended by four months for a total maximum of eight months. If a freezing order applies, the enforcement of security rights is restricted, the court can lift attachments and bankruptcy applications and applications for suspension of payments are stayed.

Creditors and shareholders with dissimilar rights are placed in different classes. Creditors and shareholders are considered to have dissimilar rights if (i) they have different rights in case of bankruptcy proceedings, and/or (ii) are offered different rights under the restructuring plan. Only creditors/shareholders whose rights are affected in the restructuring plan are entitled to vote. The final restructuring plan has to be presented to these creditors and shareholders at least eight days prior to a vote. The voting will be done per class and can take place either in a meeting or electronically. A two-thirds majority in value is required for a particular class to consent to the restructuring plan.

The debtor or restructuring expert can request the court for a confirmation of the restructuring plan if at least one class of creditors voted in favour of the plan. Upon confirmation by the court, the restructuring plan becomes binding on the debtor and all creditors and shareholders who were entitled to vote.

The court has to test the restructuring plan at its own motion against the general grounds for refusal and reject the plan if any of those grounds applies, e.g. procedural requirements have not been met, the performance of the plan is not sufficiently guaranteed, the plan is a result of fraud, etc. The court may also reject the restructuring plan at the request of opposing creditors or shareholders, if they would be significantly worse off under the plan compared to a liquidation scenario (*best interest of creditors test*).

If one or more classes have rejected the restructuring plan, the court can still confirm the plan if at least one class, which is expected to receive cash payment in the event of bankruptcy, has accepted the plan (*cross-class cram-down*). However, the court must reject the plan at the request of opposing creditors or shareholders from a dissenting class when any of the following apply: (i) the order of priority is disregarded in relation to the opposing class, unless there is a justifiable reason for that deviation and the relevant creditors or shareholders' interests are not prejudiced (absolute priority rule); or (ii) the plan does not offer creditors, other than secured commercial lenders, a distribution in cash of the amount they would receive in cash in a bankruptcy proceeding of the debtor. In relation to secured creditors, certain exceptions apply. The supplemental grounds for refusal are inspired by the US Chapter 11 "best interest of creditors test" and "absolute priority rule".

**Suspension of payments** is the main formal rescue procedure available in the Netherlands. Suspension of payments only affects the rights of ordinary creditors; the obligations of the debtor to pay its ordinary creditors are suspended. The rights of secured and preferential creditors are not affected.

The debtor can offer a composition plan that provides for a full or partial payment of the suspended claims of the creditors, in full satisfaction of their claims. Using the plan of composition during suspension of payments may lead to a successful reorganisation. Dissenting ordinary creditors can be forced to accept the composition if – in summary – the majority of the creditors vote in favour of the plan and the plan is approved by the court. However, in practice, it is difficult to achieve a successful restructuring by way of offering a composition plan.

Currently, a pre-packaged sale is also allowed under Dutch law. Although there is no specific legislation regarding pre-packaged sales yet, the majority of Dutch courts have allowed for pre-packaged sales. Since the European Court of Justice has decided that the transfer of undertaking rules in respect of employment contracts can be applicable in pre-packaged sales, the pre-packaged sale has not been very popular as there is a risk that employees of the debtor automatically transfer to the purchaser in a pre-packaged asset sale. Case law from the Dutch Supreme Court on this topic is expected.

### 3.3 What are the criteria for entry into each restructuring procedure?

The Dutch Scheme can be initiated when the debtor is in a position in which it can be reasonably expected that it will not be able to continue paying its debts. For example, when the debtor foresees not being able to repay a loan in six or 12 months' time and this would result in a bankruptcy of the debtor.

The debtor can file a petition in court for a suspension of payments if it foresees that it will be unable to continue to timely meet its obligations. Suspension of payments is immediately granted on a preliminary basis. In theory, the object of a suspension of payments is to allow the debtor time either to overcome temporary illiquidity or to propose a settlement to its creditors. An application for suspension of payments cannot be made by creditors or other third parties.

### 3.4 Who manages each process? Is there any court involvement?

The intention of the legislator with respect to the Dutch Scheme is, in principle, to minimise the involvement of the court. Court involvement can in theory be limited to the confirmation hearing during which the court will test the plan against the grounds for refusal (see above under question 3.2). However, if one of the creditors, shareholders or employee representatives takes the initiative for the Dutch Scheme, that same entity must request the court to appoint a restructuring expert who will prepare the restructuring plan on behalf of the debtor. A debtor may also request the appointment of a restructuring expert by the court, for example to avoid any suggestion of a conflict of interest. Regardless of the appointment of a restructuring expert, the debtor remains in control of the business and the day-to-day management of the company.

The court can be involved earlier in the process. During the process, the debtor or the restructuring expert can request the court to issue preliminary judgments on several points such as class formation, eligibility and valuation.

Upon granting a preliminary suspension of payments, the court will appoint an administrator (*bewindvoerder*) and usually also a supervisory judge. The administrator and the management board will jointly administer the affairs of the debtor and investigate the possibilities of a reorganisation of the debtor's company and/or full or partial payment of the creditors through a plan of composition. By law, the management and the administrator may only act together; the administrator is *de facto* in control during suspension of payments. In practice, the preliminary suspension of payments is most often swiftly followed by a bankruptcy, because the administrator considers that a successful reorganisation is unlikely.

**3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?**

The Dutch Scheme allows for the possibility to restructure debt by amending the contractual terms of existing agreements with the exception of employment contracts. The debtor or restructuring expert can propose to its counterparty a voluntary amendment or termination of an existing agreement. If the counterparty is not willing to accept such proposal, the debtor or the restructuring expert may terminate such agreement against a certain termination period with court approval, provided that the restructuring plan is confirmed by the court. The court can extend the termination period up to a maximum of three months. The counterparty might have a claim for damages due to the early termination of the agreement, but such claim can be included in the restructuring plan.

*Ipso facto* clauses are temporarily not enforceable.

In principle, suspension of payments does not affect existing agreements. However, the debtor's payment obligations in relation to ordinary claims are suspended. Moreover, these contracts might contain provisions on the consequences of the granting of suspension of payments on any of the parties to the agreement, and these remain valid in principle. The same applies to set-off provisions.

Although agreements in principle are not affected by suspension of payments, the administrator/debtor does not have to perform all obligations under agreements as this may conflict with his duty to treat all creditors equally (e.g. not obliged to make payments, deliver goods). The counterparty can file its (ordinary) claim in the bankruptcy estate. The administrator/debtor does have the obligation to passively perform (e.g. honour the lease agreement if the debtor is the lessor). If such obligations are not honoured, the counterparty has a direct claim on the estate.

If both the debtor and the counterparty have not or have only partially performed under an agreement, the counterparty can request that the administrator/debtor confirms within a reasonable time whether they are willing to perform under the contract. If the administrator/debtor does not confirm this, he/she loses the right to claim performance of the counterparty's obligations. If the administrator/debtor confirms that he/she will perform, the administrator/debtor has to provide security.

**3.6 How is each restructuring process funded? Is any protection given to rescue financing?**

Reorganisation of the company will generally be funded by the debtor itself. The debtor can generate money by selling certain assets in order to pay off debts.

In the Dutch Scheme, the restructuring costs, e.g. the costs for the restructuring expert, will be borne by the debtor. Restructuring efforts, such as DIP financing, can be protected from avoidance actions if the court has granted authorisation for such legal act. The court grants authorisation if (i) the relevant legal act is necessary for the continuation of the business during the scheme process at the time of the granting of the authorisation, and (ii) the relevant legal act is expected to be in the interest of the joint creditors while interests of individual creditors are not substantially prejudiced.

Rescue financing is not protected in case of a suspension of payments or bankruptcy proceedings. However, after the opening of insolvency proceedings it is possible for a financier to provide a preferential loan that has a higher rank than other debts of the debtor if the bankruptcy trustee or the administrator agrees.

## 4 Insolvency Procedures

**4.1 What is/are the key insolvency procedure(s) available to wind up a company?**

The key insolvency procedure available to wind up a company is bankruptcy. The Dutch Scheme can also be used for a wind-up.

**4.2 On what grounds can a company be placed into each winding up procedure?**

A debtor can be declared bankrupt by a Dutch court if it resides or has a place of business in the Netherlands and either applies for bankruptcy itself or an application for bankruptcy is filed by a creditor.

The petition must reveal facts and circumstances that constitute *prima facie* evidence that the debtor has ceased to pay its debts. This is considered to be the case if there are at least two creditors, one of whom has a claim that is due and payable and that the company cannot or refuses to pay. The DBA does not require that other creditors support the petition.

In addition, the administrator in suspension of payments might have to file for bankruptcy. This would, for example, be the case if there is no outlook that the debtor will be able to satisfy its creditors or the debtor acts in bad faith.

In relation to the Dutch Scheme, we refer to the answer to question 3.3. The debtor has to be in a position that it can reasonably be expected that it will not be able to continue paying its debts.

**4.3 Who manages each winding up process? Is there any court involvement?**

When making the bankruptcy order, the court appoints a supervisory judge (*rechter-commissaris*) and at least one bankruptcy trustee (*curator*). The bankruptcy trustee is entrusted with the administration of the bankruptcy and is exclusively entitled to administer and dispose of the assets. The bankruptcy trustee is usually an attorney of the local bar association and, especially in case of larger bankruptcies, a specialised insolvency lawyer.

The supervisory judge's task is to supervise the bankruptcy trustee and he has a statutory duty to approve certain decisions to be made by the bankruptcy trustee.

We refer to the answer to question 3.4 in relation to the Dutch Scheme. In summary, the debtor or a restructuring expert manages the process. Court involvement can be limited to only the confirmation hearing.

**4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?**

The management board is not authorised to file for bankruptcy without a resolution to do so from the general meeting of shareholders. Other than that, shareholders have little influence on the bankruptcy proceedings.

The court may, depending on the type and size of the bankruptcy, decide to form a creditors' committee whose task is to

advise the trustee. If a creditors' committee is installed, the bankruptcy trustee is obliged to seek advice from the committee with regard to the subjects referred to in the DBA. In addition, creditors have the right to file a request with the supervisory judge objecting to acts of the bankruptcy trustee or demanding an order from the supervisory judge.

Ordinary creditors are not entitled to enforce their claims; all attachments on the debtor's assets that benefit specific creditors are replaced by a general bankruptcy attachment that benefits all creditors. Pending legal proceedings are suspended. Creditors have to file any claims on the debtor in the bankruptcy estate.

Creditors that have a right of mortgage or right of pledge have more influence. Subject to any applicable freeze order, secured creditors are entitled to foreclose their collateral during bankruptcy. The bankruptcy trustee is in principle not entitled to the proceeds of the sale of the secured assets, nor is he entitled to withhold these assets. The secured creditors cannot be charged with the costs of the bankruptcy.

However, the bankruptcy trustee may impose on the mortgagee or pledgee a reasonable term for selling the collateral. If secured creditors do not execute the collateral before the deadline, the bankruptcy trustee is entitled to liquidate the collateral himself, notwithstanding the creditor's right of priority to the proceeds as a preferential creditor. In that case, the secured creditor has to share in the costs of the bankruptcy, which may mean that they will receive little or no proceeds.

The supervisory judge may declare a freeze period, during which recourse can only be sought against (some of the) assets of the estate or assets in the possession of the bankruptcy trustee, after having obtained authorisation from the supervisory judge. The freeze period applies for a maximum period of two months and may be extended once, for a maximum of two months.

In relation to the Dutch Scheme, we refer to the answers to questions 3.3 and 3.4. In summary, creditors, shareholders or employee representatives may take the initiative for the Dutch Scheme.

### 4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

In principle, bankruptcy proceedings do not affect the validity or the content of an agreement. Set-off provisions and termination provisions will be upheld. The DBA provides for broad set-off possibilities.

Although agreements are in principle not affected by the bankruptcy proceedings, the bankruptcy trustee does not have to perform obligations under agreements that may conflict with his duty to treat all creditors equally (e.g. not obliged to make payments, deliver goods). The counterparty has to file its claim with the bankruptcy estate. The bankruptcy trustee does have the obligation to passively perform (e.g. honour the lease agreement if the debtor is the lessor). Alternatively, the counterparty has a direct claim on the estate.

If both the debtor and the counterparty have not, or have only partially performed under an agreement, the counterparty can request the bankruptcy trustee to confirm within a reasonable time whether he is willing to perform under the contract. If the bankruptcy trustee does not confirm, he loses the right to claim performance of the counterparty's obligations. If the bankruptcy trustee confirms that he will perform, he has to provide security.

The DBA does grant the bankruptcy trustee the right to terminate lease agreements and employment contracts.

The Dutch Scheme allows for the possibility to restructure debt by amending the contractual terms of existing agreements (see question 3.2). However, it is not possible to affect the rights of employees under employment contracts.

### 4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The ranking of claims is as follows:

**Estate claims** (*boedelvorderingen*) are direct claims against the estate. Estate claims have priority over all other claims. An exception applies to the claims of secured creditors that have timely foreclosed their security, as they can act as if there is no bankruptcy at all.

Estate claims are claims that arise by virtue of law (e.g. rental payments during the bankruptcy, and salaries dating from after the date of the bankruptcy order), from legal acts performed by the bankruptcy trustee in his capacity and resulting from actions of the bankruptcy trustee in breach of an obligation or commitment applicable to him in his capacity as bankruptcy trustee. The salary and costs of the bankruptcy trustee are estate claims as well.

**Claims of secured creditors** are claims of creditors that are secured by a right of mortgage (*hypotheek*) or a right of pledge (*pandrecht*). Subject to any applicable freeze order, secured creditors are entitled to foreclose their collateral during bankruptcy (see above under question 4.4). To the extent that not all claims can be satisfied from the proceeds of the enforcement of the security rights, the remainder is treated as an ordinary claim.

**Preferential claims** are claims that have a priority right to the proceeds of all or certain assets of the estate (depending on the type of claim). The claims of the tax and social authorities (taxes and social insurance contributions) as well as certain claims of employees, are the most important categories of preferential claims. Preferential creditors only receive payment if all estate claims are paid. With regard to the proceeds of fixtures and fittings, tax claims take preference over secured claims under certain circumstances.

**Ordinary claims** are claims that already existed on the date of the bankruptcy order or were already a part of the legal position of the creditor at the date of the bankruptcy order. Ordinary claims must be submitted for verification. The ordinary creditors receive a *pro rata* share of the remainder after the estate claims and preferential claims are paid.

Post-insolvency claims are claims that arise after the bankruptcy and do not fall within one of the above-mentioned categories. Those claims cannot be submitted for verification.

### 4.7 Is it possible for the company to be revived in the future?

In theory, the bankruptcy can end with a plan of composition offering the creditors a partial payment of their claim. The bankrupt legal entity then emerges from bankruptcy and can continue to do business. In practice, the plan of composition is almost never offered in case of bankruptcy proceedings.

## 5 Tax

### 5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

Restructuring and insolvency proceedings can significantly affect the tax position of the company. Certainly in group relationships, complex tax regulations can have far-reaching

consequences that affect not only the distressed company itself, but also the group of companies to which it belongs. Examples of possible tax risks are:

(a) Companies in distress are obliged to timely report to the tax authorities their inability to pay tax debts. Not (timely) reporting the inability to pay tax debts may lead to directors' liability.

(b) Many groups of companies form a fiscal unity (*fiscale eenheid*) for corporation tax, VAT, or both. If a company in a fiscal unity goes bankrupt, this may affect and eventually terminate the fiscal unity in relation to that company, which may lead to Dutch corporate income tax due in the year of termination.

(c) If a creditor remits a claim, this can lead to taxable profit (*kwijtscheldingswinst*) for the debtor. Under Dutch law there is a specific regulation concerning these kinds of profits. Remission is also possible within the company's fiscal unity.

It is therefore important to map out the distressed company's tax position adequately and timely.

## 6 Employees

### 6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

With authorisation from the supervisory judge, the bankruptcy trustee is entitled to terminate the employment contracts. The applicable termination period depends on the terms of the relevant employment agreement, but at the longest is six weeks.

The salary and pension contributions between the bankruptcy date and the date of termination of the employment agreement rank as estate claims. Claims that pre-date the bankruptcy date and that arose within one year prior to that date are preferential claims. Any further claims rank as ordinary claims. The same regime applies in a suspension of payments.

In practice, most of the employee's claims on the estate will be paid by the Employee Insurance Agency ("**UWV**") under the wage guarantee scheme. It concerns the amount that ranks as estate claims (with a maximum of six weeks) and also the salary for the period until 13 weeks prior to the bankruptcy and certain other amounts (e.g. holiday pay and holidays for the year preceding the bankruptcy). The UWV in turn will subrogate in the claims of the employees towards the estate.

In a suspension of payments, the administrator and debtor acting jointly can terminate the employment contracts together. They require a dismissal permit from the UWV. The termination period can vary depending on the relevant employment contract.

Under the Dutch Scheme, it is not possible to affect the rights of employees under employment contracts.

European rules on the transfer of undertakings are not applicable in case of an asset sale during bankruptcy proceedings. This, however, might differ in the case of a pre-packaged sale due to the recent judgment of the European Court of Justice in relation to Smallsteps; see also question 3.2 above. In addition, legislation is being drafted so that the transfer of undertakings rules are also applicable in bankruptcy proceedings, unless the purchase can provide economic, technical or organisation reasons that justify changes to staff or the employment contracts.

## 7 Cross-Border Issues

### 7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Any debtor residing in the Netherlands or with its centre of main interests ("**COMI**") located in the Netherlands can enter into insolvency proceedings in the Netherlands.

The Dutch Scheme provides for two types of proceedings: public proceedings and confidential proceedings.

The Dutch government has requested to place the **public proceedings** in Annex A to the EU Insolvency Regulation. Once placed in the Annex, the public proceedings will be automatically recognised in other EU Member States (with the exception of Denmark). The Dutch courts have jurisdiction if the COMI or a branch is located in the Netherlands.

Recognition of the **confidential proceedings** depends on the private international law regime of the relevant jurisdiction. It is expected that the Dutch Scheme will be recognised in jurisdictions that have incorporated the UNCITRAL Model Law, unless the relevant jurisdiction requires reciprocity. The Dutch courts have jurisdiction if any of the affected parties is located in the Netherlands, or other aspects provide for sufficient connection with the Netherlands.

### 7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

There is a difference between proceedings commenced in an EU Member State and those commenced in a non-EU Member State.

Insolvency proceedings commenced in EU Member States (with the exception of Denmark) are recognised pursuant to the EU Insolvency Regulation (recast).

Proceedings commenced in non-EU Member States are formally not recognised in the Netherlands absent any treaty, but in practice do have some effect. When determining a claim for recognition of insolvency proceedings rendered by a court in a non-EU Member State, Dutch courts will apply the Dutch private international rules for recognition of foreign judgments. Foreign judgments will be recognised if – in summary – the authority of the relevant court is based on internationally accepted standards and the foreign judgment does not conflict with the Dutch public order. The recognition of the foreign insolvency order might, however, be limited by the principle of territoriality. This means that the foreign proceeding, for example, cannot impair the rights of creditors to take recourse on assets located in the Netherlands.

### 7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Occasionally, companies incorporated in the Netherlands enter into insolvency proceedings or restructuring proceedings in other jurisdictions. Dutch incorporated companies have, in the past, for example, used the English scheme of arrangement in order to restructure their debt. It is not unusual but neither is it common practice. We expect that this will happen less frequently now the Dutch Scheme has been introduced.

## 8 Groups

### 8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Dutch legislation does not provide for a formal procedure with regard to the insolvency of a group of companies. The main rule is that each company has to be separately liquidated.

In exceptional cases, the bankruptcies can be settled jointly by means of what is known as a consolidated settlement. At the request of the bankruptcy trustee, the appointed supervisory judge is authorised to decide whether a consolidated settlement is necessary.

Dutch law does not provide for a statutory obligation for bankruptcy trustees to cooperate with one another.

It is possible to restructure guarantees of group companies under the Dutch Scheme. In the event of a group restructuring, the Dutch courts have ruled that offering a joint composition plan is not possible, but two (or more) separate plans can be submitted for confirmation at the same time with the same court.

## 9 COVID-19

### 9.1 What, if any, measures have been introduced in response to the COVID-19 pandemic?

The following measures in response to the COVID-19 pandemic are worth mentioning in the Netherlands:

- As of 17 December 2020, the Temporary Act COVID-19 (*Tijdelijke wet COVID-19*) aims to prevent unnecessary bankruptcies as a consequence of the COVID-19 pandemic. At time of writing, the Temporary Act remains in effect until 1 June 2021. A debtor can request the court to: (i) suspend the application for bankruptcy by a creditor; (ii) suspend other recovery measures taken by a creditor (for example, a debtor may request the provisional judge to terminate or suspend an attachment or an execution-sale); and (iii) grant the debtor a temporary stay of payments. In his request, the debtor has to make summarily plausible that he is in a situation in which he has been unable, solely or principally as a result of the outbreak of COVID-19, to continue his business as usual and is therefore unable to pay his debts.
- The Time Out Arrangement ("**TOA**"). The TOA purports to support business owners in distress by preventing bankruptcy and making them aware of the Dutch Scheme. As part of the TOA, a credit facility will be introduced for business owners wishing to use the Dutch Scheme. Also, as part of the TOA, the Tax and Customs Administration wishes to look more flexibly, together with creditors and debt counsellors, at waiving certain (tax) debts, in cases where a payment arrangement is not sufficient.
- Temporary emergency scheme for job retention (*Tijdelijke Noodmaatregel Overbrugging voor Werkbehoud*; "**NOW**"). Employers with more than 20% turnover loss can apply for the Temporary Emergency Bridging Measure for Sustained Employment to receive compensation of their employees' wages from October 2020–July 2021. NOW 3 is divided into three periods: NOW 3.1 compensates wages from 1 October 2020 until 1 January 2021; NOW 3.2 runs from 1 January 2021 until 1 April 2021; and NOW 3.3 from 1 April 2021 until 1 July 2021.

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**About Stibbe**

Stibbe is an international law firm advising on the laws of the Benelux countries and European law, with offices located in Amsterdam, Brussels and Luxembourg as well as in Dubai, London and New York.

Our practice groups include restructuring and insolvency, employment, pensions and incentives, corporate, mergers and acquisitions, real estate, construction, telecom, media and technology, administrative law, environment and planning, private equity, capital markets, finance, tax, litigation and dispute resolution, EU competition, energy and intellectual property.

In addition to our own international offices, we collaborate closely with other top-tier firms for cross-border matters outside our Benelux home jurisdictions. These relations are non-exclusive and enable us to assemble a tailor-made, integrated team of lawyers with the best expertise and contacts for each specific matter. This guarantees efficient coordination on cross-border matters, whatever their complexity and nature.

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