

**Current Developments
in
International and
Comparative Insolvency Law:
The Dutch Perspective for Corporate
Insolvency Law
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Overview Today

1. Current Legal Background Dutch Corporate Insolvency Proceedings
2. Sample of NL restructurings and relevant issues
3. The Way Forward

Figures Corporate Bankruptcies NL

Faillissementen van bedrijven en instellingen (excl. eenmanszaken)



Bron: CBS

Formal Dutch Insolvency Proceedings

a. Bankruptcy

b. Suspension of payment

Unofficial English Translation of Netherlands Bankruptcy Code

<http://www.dutchcivillaw.com/bankruptcyact.htm>

Insolvency proceedings in the Netherlands, Insol Europe,

www.insol-europe.org/download/file/827

Bankruptcy

- **How:** at the request of debtor, a creditor or the public prosecutor pronounced by the District Court of the place where the debtor resides
- **When:** the debtor has ceased to pay its debts; i.e. debtor has at least two creditors; thus: one of them has a claim that is due and payable; **liquidity test**
- **No obligation** to request for a bankruptcy

Consequences of bankruptcy

- Debtor loses its right to manage and dispose of its assets (both current assets and future assets)
- The so called “Curator” (liquidator) (chosen by Court) is the sole representative of the bankrupt estate
- Enforceable against all creditors of debtor

Fases

Theory

- Draw up statement of affairs
- Verification of claims
- Liquidation
- Distribution

Practice

- Draw up statement of affairs and Liquidation
- Verification (informal only formal if and when sufficient proceeds)
- Distribution

Suspension of payment

- **How:** at the request of debtor, pronounced by the District Court of the place where the debtor resides
- **When:** foresees it will not be able to pay all its creditors having due and payable claims; thus: **liquidity** test
- **No obligation** to request for a suspension of payment

Consequences suspension of payment

- Debtor loses its right to manage and dispose of its assets independently (both current assets and future assets)
- The so called “Bewindvoerder” (administrator) (chosen by Court) is together with the debtor the representative of the estate, Siamese Twins
- Enforceable only against ordinary (non-preferential) creditors of debtor existing when suspension of payment is pronounced

Fases

Theory

- Provisional suspension of payment
- Final suspension of payment
- Composition

Practice

- Provisional suspension of payment
- Bankruptcy

Relevant Parties (i)

- Debtor, Liquidator or Administrator (mostly: advocaten), Supervising Judge and Commission of Creditors
- Bankruptcy: liquidator/administrator is sole representative of the estate
- Suspension of payment: Siamese twins

Relevant Parties (ii)

- Supervising Judge: mandatory in bankruptcy, a possibility in suspension of payment
- Commission of Creditors only mentioned as a possibility in bankruptcy, in practice also applied in suspension of payment, limited legal influence

Position Secured Creditor: pledgee, mortgagee: Separatist (i)

- Separatist means that a pledgee/mortgagee is able to foreclose the collateral as if no bankruptcy/suspension of payment exists.
- Separatist is able to foreclose without an additional title of enforcement being needed (right of summary execution)

Position Secured Creditor: pledgee, mortgagee: Separatist (ii)

- The collateral is sold in a public auction and the proceeds are used to repay the secured debt (including interest during the time of insolvency proceedings),
- **Practice:** a private sale for the benefit of the secured party pursuant to an arrangement (including financial agreement) between the liquidator/administrator and the secured party.

Insolvency stay

- Any right of third parties to take recourse against assets belonging to the estate or assets in control of the liquidator/administrator is adjourned for a period of two month subject to permission of the court (or, if appointed, supervising judge) (to be extended once with an additional two months)

Distribution of proceeds waterfall

- Estate claims/ Administrative Claims
- Preferential claims
- Non-preferential claims
- Subordinated claims
 - Reorganization of debt: the same order but no full payment of preferential debt, but preferential debt receives twice the amount of non-preferential debt
- Note: Separatist receives proceeds collateral outside the waterfall!

Samples of restructuring of debt

- I. Out of Court Financial Restructuring
- II. Suspension of payment with Composition
- III. Bankruptcy with Composition
- IV. Restart out of Bankruptcy

Out of Court Financial Restructuring

- Restructuring of debt (relevant creditors consent)
 - Issue: disconsenting minority
- Debt for equity swap (consent shareholders and relevant creditors and shareholders)
 - Issues: disconsenting minority creditors, refusal to cooperate by shareholders

Restructuring of debt (i)

- Consent required of **all relevant creditors**, unless:
 - art. 287a Bankruptcy Code: Natural persons: the creditors unreasonably withheld its permission to a restructuring, taking into account the disproportionality between its interest to refuse and the interest of the debtor and/or of the other creditors;
 - Supreme Court February 6, 2004, JOL 2004, 59, Bb 2004, 36 Hectic Illusions/Payroll: Creditor admits that his interest is not served better in a bankruptcy; no other assets exist; abuse of right

Restructuring of debt (ii)

Bonds, not always unanimity required:

- Dutch law: customary to allow amendments of bonds with consent of $\frac{2}{3}$ (or $\frac{3}{4}$) majority representing $\frac{2}{3}$ (or $\frac{3}{4}$) of the nominal value of the bonds
- UK law: majority decision is possible and used in practice
- US law: unanimity is legal requirement for any change in conditions of bonds with regard to interest or principal, unless bonds are issued by foreign government in which case a collective action clause is allowed

Restructuring of debt (iii)

Syndicate lending

- Majority versus Unanimity
- Unanimity if:
 - Extension of date of payment any amount
 - Reduction of Margin or, principal, interest, fee or commission
 - Increase in commitment
 - Change to Borrowers or Guarantors
 - Release Security

Suspension of payment with composition

- No unanimity (art. 268 en 268 a Bankruptcy Act):
- Either majority of the votes of the creditors attending the meeting, representing a simple majority of the creditors admitted to vote
- Or forced composition if 75% majority of the votes of the creditors attending the meeting agreed and the other creditors could not reasonably vote otherwise
- Issues: **Shareholders and Secured Creditors** not bound!

Bankruptcy with composition

- Similar to suspension of payment but including termination of employment contracts with no permit required (but prior approval of Supervising Judge)
- Issues: **Shareholders and Secured Creditors** not bound

Restart out of Bankruptcy

- Company (limited liability cooperation, NV or BV) applies for bankruptcy and asset deal to Newco
- In bankruptcy transfer of (a part of) the business; the employment contracts relating to (that part of) the business are not by operation of law transferred to the purchaser, only a part of the staff gets employment offer
- No forced cooperation of Secured Creditor, Shareholders are left behind.
- Issue: The need for speed and deal certainty

Summary of issues

- Outside formal insolvency proceeding: unanimity requirement includes shareholders and creditors
- Inside formal insolvency proceeding: secured creditor and shareholders not bound; curator and bewindvoerder not predictable, no deal certainty

Recalibration of NL Insolvency law

- Letter of November 26, 2012: Secretary for Safety and Justice: three pillar approach:
 - Modernization of the bankruptcy proceeding;
 - Tackling bankruptcy fraud; and
 - Strengthening possibilities for corporate restructuring.

Modernization of the bankruptcy proceeding

- Elimination of the need to hold physical claim admission meeting
- More flexibility with regard to credit committees
- Introduction of bar date for admission of claims.

Tackling Bankruptcy Fraud

- Bill on modernization of criminal liability for acts in relation to bankruptcy
- Bill Civil Director Disqualification, enabling a trustee to claim that a director of a bankrupt company cannot serve as a director in any other Dutch legal entity for a maximum period of five years
- Imposing duty on trustee to signal bankruptcy fraud.

Strengthening possibilities for corporate restructuring

- the trilogy of the **Wet Continuïteit Ondernemingen**: Enterprise Act 1, Enterprise Act 2 and Enterprise Act 3 (WCO 1, WCO 2, WCO 3):
 - WCO 1: Facilitate pre-packaged asset sale in bankruptcy proceeding
 - WCO 2: Informal, pre-insolvency restructuring plan
 - WCO 3: Other measures.

WCO 1: Facilitate pre-packaged asset sale in bankruptcy proceeding

- Statutory basis for prepack to facilitate:
 - Structured and efficient settlement of bankruptcies;
 - Continuation of viable business activities, specifically by means of asset sale
- At request of corporate debtor: Silent Trustee and Supervising Judge are appointed before bankruptcy is declared
- Obligation to file public report of findings by silent trustee after debtor is declared bankrupt

WCO 2: Informal, pre-insolvency restructuring plan

- Informal reorganization plan outside formal insolvency proceedings
- Classes of creditors and shareholders voting
- Possibility to cram down within a class and perhaps also between classes, details still under review, intention seems to be to deal with practical issue

WCO 3: Other Measures

- Examples (no wording available):
 - Duty for suppliers to supply goods and services;
 - Power of trustee to use, consume and sell goods during cooling-off period
 - Certain powers for Supervising Judge (to extinguish non-compete clauses employees, to amend and dissolve contracts)

European Commission

Recommendation March 12, 2014

- Text available at:
http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf
- “The objective of this Recommendation is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.” (Whereas 1)
- “Several Member States are currently undertaking reviews of their national insolvency laws with a view to improving the corporate rescue framework and the second chance for entrepreneurs. Therefore it is opportune to encourage coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market.” (Whereas 10)

European Commission

Recommendation March 12, 2014

- “It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union. (Whereas 11)
- “A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. (Whereas 12).

View of European Commission Recommendation March 12, 2014

- “The Member States are invited to implement the principles set out in this Recommendation” (Rec. 34)
- Shareholders position is not dealt with in recommendation
- How to determine which enterprises are viable or not and which entrepreneurs are honest and which are not
- Members State should look further and Dutch WCO 1, 2 and 3 are doing so.