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Restructuring & Insolvency in the Netherlands

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Legal framework

Legislation

What is the primary legislation governing insolvency and restructuring proceedings in your jurisdiction?

Dutch insolvency proceedings are mainly governed by the Bankruptcy Act 1893. Two insolvency proceedings exist in the Netherlands for legal entities (ie, the suspension of payments and bankruptcy) and a debt reorganisation procedure for natural persons. All three proceedings qualify as main proceedings under the EU Insolvency Regulation (1346/2000).

Cross-border insolvency proceedings opened in other EU member states (except for Denmark) are governed by the EU Insolvency Regulation. Consequently, the effects of such proceedings are directly recognised in the Netherlands under Article 16 of the regulation, notwithstanding secondary or territorial insolvency proceedings being opened in the Netherlands.

Regulatory climate

On an international spectrum, is your jurisdiction more creditor or debtor friendly?

The Netherlands is generally a creditor-friendly jurisdiction. In particular, the position of secured creditors (ie, pledgees and mortgagees) is strong, as they may independently exercise their security rights regardless of the debtor being subject to insolvency proceedings (Article 57 of the Bankruptcy Act).

As a result, secured creditors enjoy the full benefit of their security rights throughout the debtor's insolvency. They remain entitled to a summary execution of their collateral without any further judicial intervention by means of a public sale or to foreclose on their collateral through a private sale, subject to the consent of the competent court (not the supervisory judge in bankruptcy, but the competent section of the district court), without the cooperation of the bankruptcy trustee being required.

However, during both the suspension of payments and bankruptcy, the supervisory judge may order a two-month general stay, with a possible extension of another two months. During this cooling-off period, all creditors' actions, including summary foreclosure by secured creditors, are stayed. The cooling-off period is intended only to prevent third parties (eg, lessors, suppliers with a right of title or pledgees with a non-possessory pledge) from

converging at the debtor's premises to effectuate their rights without the trustee being able to assess their positions, thus allowing for a coordinated settlement of the insolvent estate. Eventually, the stay will not block secured creditors from exercising their rights.

Further, secured creditors can apply the proceeds of their collateral directly to their claims against the debtor without any remittance to the bankruptcy estate. Only the excess proceeds must be remitted to the trustee or lower-ranking secured creditors, if any, effectively excluding the collateral from the debtor's estate. This is also referred to as the right of separatism.

Notwithstanding their strong position in Dutch insolvency proceedings, it is common practice in the Netherlands for secured creditors to agree on a coordinated private sale of the collateral with the bankruptcy trustee in order to achieve maximum proceeds. In return for the bankruptcy trustee's collaboration with the private sales process, secured creditors pay a certain amount into the bankruptcy estate, to be agreed on by the bankruptcy trustee and the secured creditor. Indicative outlines for such arrangements may be found in guidelines agreed on between the body of supervisory judges and the Dutch Bar Association.

Sector-specific regimes

Do any special regimes apply to corporate insolvencies in specific sectors (eg, insurance, pension funds)?

Under Dutch insolvency law, special regimes apply to banks and insurers.

Apart from the European legislative framework regarding credit institutions created under the EU Bank Recovery and Resolution Directive (2014/59/EU) and the single resolution mechanism, under the existing domestic regime in the Netherlands and before formal bankruptcy, banks and insurers can be made subject to emergency proceedings. Under these proceedings, the Dutch Central Bank can apply to the courts and request that an administrator be appointed to restructure the financial institution involved (including the transfer of its assets to a third party) or liquidate it.

In addition to this resolution regime, the Act on Special Measures for Financial Institutions was introduced in 2012. It introduced additional powers for the Dutch Central Bank and the minister of finance to transfer the activities of a failing bank or insurer to a third party in order to protect the solidity of the Dutch financial system. Further, this legislation provides for restrictions on the bank's or insurer's counterparties in exercising their contractual rights with regard to the troubled institution (or its group companies) in order to safeguard the effectiveness of the intervention measures.

Reform

Are any reforms to the legal framework envisaged?

In recent years, although lacking a clear statutory foundation, a pre-pack procedure has been developed in Dutch legal practice. A legislative proposal for the codification of this practice, the Continuity of Companies Act I (WCO I) is under review for enactment by the Senate.

WCO I will allow debtors in financial distress to prepare and attempt a silent restructuring of their businesses through a pre-pack procedure, allowing the debtor – which remains authorised to dispose of its assets – and a court-appointed trustee to jointly investigate and prepare an asset sale to be implemented immediately on the opening of formal insolvency proceedings.

In addition, draft legislation was prepared on the introduction of a restructuring procedure akin to the English scheme of arrangement – generally referred to as the Continuity of Companies Act II (WCO II) – presenting a legal framework for a binding composition following court approval without having to undertake formal insolvency proceedings. Both the position of classes of secured and ordinary creditors and the rights of shareholders can be subjected to a composition plan under WCO II – even allowing for:

- an amendment of the debtor's articles of association;
- the exclusions of pre-emptive rights of existing shareholders; and

- the issuance of new shares to effect a debt-for-equity swap.

Only creditors and shareholders whose rights are affected by the scheme can vote.

If the composition plan is enacted by a majority of the creditors in the relevant classes (or, as the case may be, a majority of the shareholders) and is ratified by the court, it will also be binding on dissenting creditors (or shareholders), thus introducing a cram-down possibility out of formal insolvency which is currently unknown in Dutch insolvency law.

If the debtor refuses to offer a composition of its own accord, creditors can present a composition plan to their fellow creditors.

The composition will be adopted if all classes of creditors or shareholders approve it. Within a class, an absolute majority of the number of the creditors (or shareholders) casting a vote should vote in favour of the composition plan, representing at least two-thirds of the total value of the voting creditor's claims within that class (or two-thirds of the relevant issued share capital).

A down vote of the composition plan by one or more classes can be overturned by the court if it is held that the plan was rejected on unreasonable grounds, in which case the composition will be universally binding. On the other hand, the court will reject the adoption of a composition plan that is disproportionately detrimental to one or more creditors or shareholders.

The offering of a composition plan does not result in an automatic stay, but the court can decide to stay any bankruptcy proceedings pending against the debtor. Throughout the proceedings, the debtor remains fully authorised to dispose of its assets.

Director and parent company liability

Liability

Under what circumstances can a director or parent company be held liable for a company's insolvency?

As a rule, directors are not personally liable under Dutch corporate or insolvency law for the debts of a limited liability company or a Dutch public limited company. In general, director's liability arises only if a serious personal fault can be attributed to him or her.

Dutch corporate law allows directors wide discretion in how they fulfil their responsibilities. Even if a director takes a decision that (in retrospect) proves to have negative consequences for the company or its creditors, the starting point remains that the director is not personally liable.

Dutch law draws a rough distinction between liability to:

- the company under corporate law (ie, internal liability);
- the bankruptcy estate under insolvency law; and
- the company's creditors under tort law (ie, external liability).

Internal liability may arise if the directors fail to fulfil their fiduciary duties. Only the company or its bankruptcy trustee can bring actions on this ground. Violations of corporate rules (eg, the company's articles of association) are deemed to be improper management.

Upon bankruptcy, the bankruptcy trustee can hold directors personally liable for the estate's deficit if they have performed their duties as directors in an inappropriate manner for a three-year period preceding the bankruptcy. The trustee must prove that the inappropriate fulfilment of the director's duties was an important cause of the company's bankruptcy. That said, statutory presumptions to lessen the trustee's burden of proof apply if the board of directors has failed to conduct a proper administration or properly deposit the company's annual accounts in accordance with statutory requirements. In those cases, the directors are irrefutably deemed to have performed

their duties improperly and a statutory presumption applies that the improper performance of duties was an important cause of the bankruptcy. The latter presumption may be rebutted if the directors can prove that other external causes for the company's bankruptcy exist.

Finally, directors may be liable towards the company's creditors under tort law. In contrast to a number of other jurisdictions, directors of a distressed Dutch company are not explicitly obliged to file for insolvency at a given moment as a result of not meeting a certain liquidity or equity test. However, a director may be personally liable towards the company's creditors if he or she enters into obligations knowing, or having sufficient reason to know, that the company would be unable to fulfil those obligations and has insufficient assets against which the deprived creditor could take recourse.

Shareholders are generally not liable for debts incurred by the company. However, a shareholder that has determined the policy or predominantly participated in determining the company's policy may be regarded as a shadow director and held liable on the same basis as a director.

A shareholder (including its directors, as the case may be) may face liability towards the creditors of its subsidiaries only under specific circumstances. In order for a shareholder's duty of care towards the company to be established, the shareholder must:

- have control over the company (ie, be a majority shareholder or at least have a similar position);
- be intensively involved in the company's business; and
- have insight into the financial position of its subsidiary.

Defences

What defences are available to a liable director or parent company?

Directors' liability towards creditors can be mitigated by informing prospective counterparties of the company's financial position and the risk that the company will be unable to meet its obligations. If a counterparty nevertheless decides to enter into an agreement with the company, there will be, as a rule, no grounds for directors' liability under tort law.

The general shareholders' meeting may discharge a director or the board of directors at the end of the book year on acceptance of the annual accounts. Such a discharge may prevent internal liability for the matters set out in the annual accounts, but does not apply to facts that were not disclosed in the annual accounts. The company or its bankruptcy trustee may invalidate the discharge decision if it is incompatible with the overriding principles of reasonableness and fairness under Dutch corporate law.

For any insolvency-specific liability claims brought by the trustee against a director, a possible defence is that even if the board of directors mismanaged the company, such mismanagement did not cause, or at least was not the main cause of, the company's bankruptcy. If the directors can prove that other circumstances (eg, the economic situation) caused the bankruptcy, they will not be held liable. The discharge of a director will not prevent liability towards the bankruptcy estate.

Due diligence

What due diligence should be conducted to limit liability?

In order to prevent statutory presumptions of mismanagement in bankruptcy, it is important to deposit the annual accounts in accordance with statutory requirements and keep the books and records of the company is such a way that its assets and liabilities can be assessed at all times.

Tort liability towards creditors can be mitigated by duly documenting the assumptions made by the directors when entering into new obligations. In case of financial hardship, it is advisable to provide for a well-documented and substantiated business plan – for instance, by means of a continued liquidity forecast with at least an 18-

month horizon. Such documentation will help to demonstrate that, on the basis of the fair presumptions of the directors made at the time of entering into the new obligations, they did not know, or had no reason to believe, that the company would be unable to fulfil the obligations.

Managing directors should refrain from making dividend payments or other distributions to the company's shareholders if they reasonably know or ought to foresee that the company will be unable to pay its due and collectable debts after that distribution.

To prevent personal liability for certain taxes and social security contributions, directors should, within two weeks of the due date, inform the relevant authorities of the debtor's inability to fulfil its obligations. Failure to do so may result in the directors being held jointly and severally liable for the taxes and social security payments.

Position of creditors

Forms of security

What are the main forms of security over moveable and immoveable property and how are they given legal effect?

The main types of security right under Dutch law are a right of mortgage and a right of pledge, each of which cover specific types of property. These security rights are unaffected by insolvency proceedings against the debtor (or, as the case may be, against the third party providing the security in case of a third-party security right). Generic security interests without specific pre-defined collateral (eg, floating charges) do not exist in the Netherlands.

A right of mortgage is the only form of security that can be created over immovable property, registered ships and aircraft. A mortgage creates a security interest in favour of the lender. A right of mortgage is created by means of a deed passed by a Dutch civil law notary and subsequent registration in the relevant public register.

Pledges over moveable assets can be created either as a non-possessory or possessory pledge – the latter of which requires the pledgee to take possession of the pledged assets. Both types of pledge require a deed to be executed before a Dutch civil law notary or a privately executed deed of pledge, followed by the pledgee taking possession of the pledged assets in the case of a possessory pledge or, in the case of a non-possessory pledge, by registration with the Dutch tax authorities for date stamping purposes only. Moveable assets not yet obtained by the pledgor may be pledged in advance.

A right of pledge over non-bearer shares is created by the execution of a deed before a Dutch civil law notary. The company's articles of association may prohibit the creation of a right of pledge over its shares. The deed of pledge may state that the voting rights on the pledged shares are transferred to the pledgee, but voting rights typically remain with the shareholder or pledgor until the (impending) event of default, followed by a voting right notification issued by the pledgee. A right of pledge over bearer shares is created in the same manner as a right of pledge over movable assets.

A right of pledge over receivables can be either a disclosed or non-disclosed right of pledge. The first is created by way of a private deed and giving notice to the debtor of the pledged receivable and the latter is created by a notarial deed or a private deed to be registered with the Dutch tax authorities – again for date stamping purposes only.

An undisclosed right of pledge over receivables encompasses only the pledgor's existing receivables and its receivables that originate from legal relationships already in existence when the undisclosed right of pledge was created. Consequently, receivables that the debtor will obtain in the future do not fall within the scope of an undisclosed right of pledge. In practice, this restriction is circumvented by the Dutch loan market by including an obligation for the pledgor to pledge its future receivables, combined with a proxy given by the pledgor to the pledgee to register supplemental documents, which is done by professional lenders on a daily basis. The Supreme Court decisively punished this practice in 2012 and 2013.

Ranking of creditors

How are creditors' claims ranked in insolvency proceedings?

As a rule, secured claims take priority in respect of the proceeds of the secured assets and can be separated from the debtor's estate. However, certain specific claims may take priority over secured claims. The most important example of this is the preference that is granted to the Dutch tax authorities to take a non-possessory right of pledge over movable assets that are located on the premises of the pledgor. This fiscal preference pertains only to certain categories of movable asset, such as machinery, equipment and furniture. It does not take priority over a non-possessory right of pledge over the pledgor's trading stock.

In insolvency proceedings, the debts of the bankrupt estate itself rank first, comprising statutory debts of the estate (eg, the bankruptcy trustee's remuneration and rent payable after the date of bankruptcy until the end of the statutory notice period) and debts incurred by the receiver.

All (non-subordinated) unsecured creditors rank equally in a bankruptcy or moratorium unless the creditor has been granted statutory preferential rights (eg, tax and social security claims).

Can this ranking be amended in any way?

First and lower-ranking mortgagees may validly agree on a change in the priority of their security rights under Section 3:262 of the Civil Code. In relation to pledgees, the priority of rights may also be changed by way of an intercreditor agreement. Further, subordination of debt is possible on a contractual basis.

Foreign creditors

What is the status of foreign creditors in filing claims?

The status of foreign creditors in filing claims is virtually identical to that of domestic creditors. They enjoy the same rights as a creditor whose domicile or registered office is in the Netherlands.

Unsecured creditors

Are any special remedies available to unsecured creditors?

No special remedies are available to unsecured creditors: any pre-insolvency legal actions for recourse initiated by unsecured creditors are stayed once insolvency proceedings against the debtor are opened and unsecured creditors are no longer allowed to initiate actions against the debtor to obtain payment of their claims.

However, the ranking of unsecured debt may *de facto* be influenced by, for example, set-off rights, retention of title or unsecured creditors (other than utility companies) that provide essential goods or services to the debtor, which can make further deliveries during insolvency conditional on payment in full or in part of their pre-insolvency claims against the debtor.

Debt recovery

By what legal means can creditors recover unpaid debts (other than through insolvency proceedings)?

Unsecured creditors must commence legal proceedings against the debtor for the recovery of their claims in ordinary legal proceedings (proceedings on the merit of the case) or summary proceedings. The latter is more appropriate for claims that are undisputed or easily proven.

In advance of such proceedings, the creditor may attach the debtor's assets with court approval, which is generally easy to obtain. The attachment is then levied by a bailiff and the creditor must pursue legal action against the debtor within the period stated in the leave for attachment (typically within 14 days of the attachment). If no legal action is pursued, the attachment will expire. The purpose of a pre-judgment attachment is to converse the assets of the debtor for later recourse, referred to as a 'conservatory attachment'. If the creditor obtains a favourable judgment against the debtor, the conservatory attachment will be converted into an executory attachment by operation of law, allowing the creditor to take recourse against the attached assets.

In practice, a pre-judgment attachment may be deployed to force the debtor to obtain other collateral, such as a bank guarantee against lifting the attachment.

Finally, a petition for bankruptcy is commonly filed against the debtor as a means of debt collection, assuming that the debtor is willing to pay its debt (or at least offer a payment scheme) in order to avoid insolvency.

Is trade credit insurance commonly purchased in your jurisdiction?

Yes. The Dutch trade credit insurance market has grown at a consistent rate in recent years.

Liquidation procedures

Eligibility

What are the eligibility criteria for initiating liquidation procedures? Are any entities explicitly barred from initiating such procedures?

One or more of the debtor's creditors, the debtor itself or, in an exceptional case where public interest so requires, the public prosecutor can petition for bankruptcy. A bankruptcy proceeding can also be opened following a suspension of payment proceedings or a debt rescheduling scheme for natural persons. The criterion for opening bankruptcy proceedings is that the debtor has ceased to pay its debts and hence is in a state of insolvency. A creditor requesting bankruptcy has to:

- provide *prima facie* evidence of its claim against the debtor;
- demonstrate that the debtor is unable to pay its debts; and
- prove that there are multiple creditors, at least one of which has a claim against the debtor that is due and payable.

Notably, specific resolution regimes exist for banks and insurers, and proceedings concerning such institutions are excluded from the scope of the EU Insolvency Regulation (1346/2000).

Procedures

What are the primary procedures used to liquidate an insolvent company in your jurisdiction and what are the key features and requirements of each? Are there any structural or regulatory differences between voluntary liquidation and compulsory liquidation?

The only Dutch insolvency procedure aimed at liquidation of an insolvent company is bankruptcy. A court-appointed bankruptcy trustee will liquidate the debtor's assets and apply these to the creditors' claims.

A bankruptcy petition should be filed with the competent district court:

- in the place of the debtor's residence or domicile in the Netherlands;
- in the place of the debtor's office, in the absence of a domicile in the Netherlands; or
- if the debtor has moved out of the Netherlands, its last known domicile in the Netherlands.

There is no framework under Dutch law for a voluntary liquidation of the company, other than a liquidation by means of distribution of the company's assets followed by a dissolution of the company under Dutch corporate law.

How are liquidation procedures formally approved?

The court will declare a debtor bankrupt if it has ceased to pay its debts. From midnight on the day on which the bankruptcy is declared, the directors lose the authority to dispose of the company's assets. All individual creditors' actions and claims are automatically stayed.

What effects do liquidation procedures have on existing contracts?

As a rule, existing contracts remain unaffected by liquidation procedures. However, the Bankruptcy Act 1893 contains a number of provisions on the termination of contracts, including provisions for specific termination clauses for leases (Article 39 of the Bankruptcy Act) and labour contracts (Article 40 of the Bankruptcy Act). If the obligations under a reciprocal agreement have been wholly or partially fulfilled at the time of bankruptcy, the counterparty may request the trustee to declare within in a reasonable period whether the estate is prepared to honour the agreement. If the trustee is willing to do so, he or she must provide ample security to the counterparty for the performance of the estate's obligations under the contract. If the trustee is not willing to honour the contract or fails to indicate this within the reasonable period set by the counterparty, the estate loses its right to demand performance of the agreement from the counterparty and the counterparty can dissolve the agreement and claim damages as an ordinary, unsecured creditor.

What is the typical timeframe for completion of liquidation procedures?

According to a Netherlands Research and Documentation Centre report:

- 30.9% of all bankruptcies of corporations terminated in 2015 were completed within 18 months;
- 51.2% were completed between 18 months and four years; and
- 16.4% had a lead-time of over four years, with shorter average lead times for liquidations procedures pertaining to natural persons.

Role of liquidator

How is the liquidator appointed and what is the extent of his or her powers and responsibilities?

The liquidator is a court-appointed officer charged with the administration and liquidation of the bankrupt's estate. Neither the debtor nor the creditor can select the liquidator; the liquidator is appointed at the discretion of the court. Bankruptcy trustees are typically lawyers who specialise in insolvency law.

Immediately upon appointment, the bankruptcy trustee must take any necessary steps to preserve the estate. The liquidator's authority to manage and dispose of the debtor's estate applies retroactively from midnight on the day on which the bankruptcy is adjudicated.

The liquidator can open letters and telegrams addressed to the bankrupt. In addition, he or she will immediately take possession of the debtor's records. Whenever the debtor is asked to appear, he or she must appear before the liquidator and provide him or her with all requested information.

Court involvement

What is the extent of the court's involvement in liquidation procedures?

The trustee is subject to the supervision of the supervisory judge, who supervises the administration and winding up of the estate. Certain acts require the trustee to obtain the supervisory judge's approval – for example, starting legal proceedings, terminating employment and rental contracts and disposing of assets.

In certain cases and at the request of the debtor or a creditor, the supervisory judge can order the trustee to perform a specific act or refrain from performing an intended act. The court has the power to dismiss the trustee at the request of the supervisory judge, a creditor or a debtor.

Creditor involvement

What is the extent of creditors' involvement in liquidation procedures and what actions are they prohibited from taking against the insolvent company in the course of the proceedings?

If desired by the creditors, the court may nominate a committee of creditors to advise the trustee. However, the trustee is not bound by the committee's recommendations. In practice, the nomination of a creditors' committee is uncommon.

Director and shareholder involvement

What is the extent of directors' and shareholders' involvement in liquidation procedures?

The corporate law capacities of the directors and shareholders are generally unaffected by insolvency procedures. The shareholder is entitled to any liquidation surplus.

Restructuring procedures

Eligibility

What are the eligibility criteria for initiating restructuring procedures? Are any entities explicitly barred from initiating such procedures?

Only the debtor can petition for payments to be suspended on the grounds that it foresees that it will be unable to continue paying its debts when due.

Natural persons may file for a debt-rescheduling scheme if they are unable to reach a voluntary settlement with their creditors.

Notably, specific resolution regimes exist for banks and insurers, and proceedings concerning such institutions are excluded from the EU Insolvency Regulation (1346/2000).

Procedures

What are the primary formal restructuring procedures available in your jurisdiction and what are the key features and requirements of each?

The suspension of payments is aimed at preserving a company by staying the collection of debts. It offers the debtor two forms of relief:

- a temporary stay (moratorium) against unsecured creditors; and
- the ability to implement a restructuring plan with majority consent of its creditors, thus being able to cram down dissenting creditors.

However, in practice, a suspension of payments procedure usually leads to the opening of a bankruptcy procedure, because the suspension has effect only in respect of unsecured creditors. Only the debtor may apply for a suspension of payments. Once a suspension is granted, the debtor loses its right to dispose of its assets without the cooperation of the administrator. As long as the request is properly submitted to the competent court, a provisional suspension of payments is immediately granted and the court will appoint one or more administrators and a supervisory judge.

Natural persons may file for a debt-rescheduling scheme if they are unable to reach a voluntary settlement with their creditors. In this proceeding, the debtor's assets are liquidated for the benefit of its creditors under the supervision of a supervisory judge and a receiver. The debtor's remaining debts will be cleared after three years.

How are restructuring plans formally approved?

Pending suspension of payment or bankruptcy proceedings, the debtor may propose a scheme of composition to its ordinary creditors with claims that arose before the proceedings were opened. Essentially, the composition plan is an agreement between the debtor and its creditors within the framework of insolvency proceedings for partial payment of creditors in full discharge of their claims. The composition plan may be imposed on dissenting creditors if certain criteria are met; it is not binding on secured creditors and creditors with preferential rights, but the latter (in practice, the Dutch tax authorities) tend to approve composition plans that are consistent with their internal guidelines. If the composition plan is enacted, the liquidation phase of the insolvency proceeding will not be instigated and the proceedings will end.

A composition plan must be filed with the court, which will set a date for a creditors' meeting, during which the scheme will be voted on. The administrator or bankruptcy trustee will submit his or her written opinion on the composition plan in advance.

The scheme is accepted if at least 50% of the present creditors representing at least 50% of the total value of the claims vote in favour. If this majority is not achieved, the court can nonetheless impose the scheme in a cram down if at least 75% of the number of creditors voted in favour of the scheme, and the scheme was voted down due to one or more dissenting creditors not exercising their voting rights in a reasonable manner.

In certain cases, the court will withhold its approval of an adopted scheme – for instance, if the liquidation value of the debtor's assets exceeds the total amount offered to the creditors.

What effects do restructuring procedures have on existing contracts?

Save for termination clauses, existing contracts remain unaffected by a suspension of payments.

What is the typical timeframe for completion of restructuring procedures?

A suspension of payments may last up to 18 months, but the actual timeframe depends on whether the suspension is followed by the opening of a bankruptcy procedure and the offering of a composition.

Court involvement

What is the extent of the court's involvement in restructuring procedures?

The court will appoint an administrator and a supervisory judge. In addition, the court will decide whether to grant a definitive suspension of payments and will be involved if a composition plan is offered.

Creditor involvement

What is the extent of creditors' involvement in restructuring procedures and what actions are they prohibited from taking against the company in the course of the proceedings?

Creditors are allowed to vote on a composition plan, if presented. Individual enforcement actions by unsecured creditors will be stayed.

Under what conditions may dissenting creditors be crammed down?

Dissenting creditors may be crammed down if at least 75% of the number of creditors voted in favour of the composition and the scheme was voted down because one or more dissenting creditors failed to exercise their voting rights in a reasonable manner.

Director and shareholder involvement

What is the extent of directors' and shareholders' involvement in restructuring procedures?

Directors may play in important role in offering a scheme of composition, whereas shareholders may act as contributors to the amounts offered in the composition plan.

Informal work-outs

Are informal work-outs available for distressed companies in your jurisdiction? If so, what are the advantages and disadvantages in comparison to formal proceedings?

A debtor can implement a voluntary liquidation of its business in accordance with general corporate procedures only if it can pay its debts or agree on a composition with its creditors. The relevant corporate procedure is liquidation by means of dissolution, whereby the shareholders' general meeting adopts a resolution to dissolve the company.

<u>Transaction avoidance</u>

Setting aside transactions

What rules and procedures govern the setting aside of an insolvent company's transactions? Who can challenge eligible transactions?

In bankruptcy, the bankruptcy trustee may annul certain legal acts by the debtor, provided that:

- no prior obligation to enter into the challenged legal act existed;
- the interest of the creditors were harmed (to be determined when the legal act is challenged);
- the debtor knew or ought to have known that the legal act would harm creditors' possibilities for recourse; and
- if the legal act was for consideration, the debtor's counterparty knew, or ought to have known, that it would prejudice one or more of the creditors.

The ability to avoid legal acts for which a prior legal obligation existed is more limited; they may be annulled only if the bankruptcy trustee can demonstrate that:

- the debtor's counterparty knew that a petition for bankruptcy had already been filed at the time that the act was performed and the debtor was subsequently declared bankrupt; or
- the legal act was a result of a collusion between the debtor and its counterparty with the aim of preferring the counterparty over the debtor's other creditors.

The bankruptcy trustee must prove that the requirements for annulment are satisfied, but a number of statutory presumptions which benefit the bankruptcy trustee may apply – for instance, in transactions with group companies or if the debtor's consideration substantially outweighs the consideration for the transaction given by the counterparty.

Operating during insolvency

Criteria

Under what circumstances can a company continue to conduct business during an insolvency procedure?

As the suspension of payment proceedings seeks to reorganise and continue businesses in financial difficulties, the administrator will, as a rule, seek to conduct the debtor's business during a suspension of payment together with the company's management.

The company's business may also be continued in bankruptcy if this is deemed to be in the creditors' interest. The bankruptcy trustee needs the supervisory judge's approval to continue the debtor's business.

Stakeholder and court involvement

To what extent are relevant stakeholders (eg, creditors, directors, shareholders) and the courts involved in any business conducted during an insolvency procedure?

N/A.

Financing

Can an insolvent company obtain further credit or take out additional secured loans during an insolvency procedure?

In principle, the estate is permitted to take out additional loans during insolvency and provide security for such loans; however, typically little or no unencumbered assets are available. There is no priming lien or debtor-in-possession financing rule under Dutch insolvency law.

Existing secured lenders may be willing to grant some additional unsecured funding to the estate in order to allow the liquidator to continue the debtor's operations or maximise the proceeds of their security. Such financing arrangements require an agreement between the liquidator and secured creditors and will rank as estate claims.

Employees

Effect of insolvency on employees

How does a company's insolvency affect employees and the company's legal obligations to employees?

Employment contracts are not terminated by operation of law following bankruptcy. However, if so authorised by the supervisory judge, the bankruptcy trustee can terminate employment contracts without obtaining a permit from the Employee Insurance Agency, with a maximum notice period of six weeks. To terminate any employee contracts, the bankruptcy trustee requires prior approval of the supervisory judge. During the suspension of payment, regular Dutch dismissal law still applies.

Cross-border insolvency

Recognition of foreign proceedings

Under what circumstances will the courts in your jurisdiction recognise the validity of foreign insolvency proceedings?

Under Article 16 of the EU Insolvency Regulation (1346/2000), the opening of insolvency proceedings in an EU member state (except for Denmark) and the effects thereof are directly recognised in the Netherlands.

In the absence of a treaty, convention or regulation on international insolvency law matters, the effects of insolvency proceedings opened in other jurisdictions are recognised in the Netherlands only to a limited extent. According to Dutch case law and legal doctrine, the basic assumption is that foreign insolvency proceedings have a mere territorial effect. Consequently:

- a foreign moratorium or bankruptcy does not extend to the debtor's assets situated in the Netherlands;
- no automatic stay applies; and
- individual creditors are not prevented from taking recourse against the debtor's assets.

Over the past decades, the Supreme Court has gradually observed a less restrictive view with respect to the recognition of foreign bankruptcies (sometimes referred to as the principle of (limited) territoriality). In *Yukos* (Supreme Court, September 13 2013, ECLI:NL:HR:2013:BZ5668), the Supreme Court clarified the scope of the recognition of foreign insolvency proceedings in the Netherlands.

The effects of foreign insolvency proceedings will not be recognised where they might result in unsatisfied creditors no longer being able to take actions against the debtor's assets in the Netherlands. Provided that the foreign judgment is not contrary to Dutch public policy, and in the absence of insolvency proceedings against the debtor in the Netherlands, a foreign trustee can perform acts of administration and disposal with respect to assets situated in the Netherlands – including alienation of the assets and transfer of the proceeds into the foreign bankruptcy estate – provided that the trustee is empowered to do so under its own *lex concursus*. However, any attachments in the Netherlands by individual creditors levied up to the moment of transfer must be respected. A foreign insolvency trustee or comparable office can act in the Netherlands without a prior court decision, *exequatur* or court recognition of the foreign proceedings, provided that the *lex concursus* allows for such actions.

Winding up foreign companies

What is the extent of the courts' powers to order the winding up of foreign companies doing business in your jurisdiction?

Under the EU Insolvency Regulation (1346/2000), the Dutch courts have authority to open insolvency proceedings against foreign companies whose centre of main interest is in the Netherlands. Under domestic insolvency law, the jurisdiction of the Dutch courts is in principal determined by the debtor's domicile. If the debtor has no domicile within the Netherlands but conducts business in the Netherlands, the district court within whose district its office is located has jurisdiction under the Bankruptcy Act 1893.

Centre of main interests

How is the centre of main interests determined in your jurisdiction?

In accordance with the Insolvency Regulation, the centre of main interests is defined as the place where the debtor conducts the administration of its interests on a regular basis, as ascertainable by third parties. There is a rebuttable presumption that a corporate debtor's centre of main interests is located at the place of its registered office.

Cross-border cooperation

What is the general approach of the courts in your jurisdiction to cooperating with foreign courts in managing cross-border insolvencies?

Dutch insolvency law contains no requirements for Dutch insolvency trustees with regard to cooperation with insolvency trustees and courts in non-EU cases. However, Dutch insolvency trustees and supervisory judges are generally willing to investigate the possibility of making specific arrangements with foreign trustees on a voluntary basis in order to minimise costs and maximise recoveries for the joint creditors – for instance, by promoting the sharing of relevant information among the parties and the international coordination of related activities in the insolvency proceedings.

The Netherlands has not adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.

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