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Law and Practice – Netherlands

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Contributed by Florent **Authors:** Kees van de Meent, Hanneke De Coninck-Smolders, Carolien van Tilburg, Jurgen van den Heuvel

Law and Practice

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Florent was founded in 2017 by partners of BLIX Advocaten and four partners of Höcker Advocaten, who joined their forces (in terms of expertise and solid reputation, their respected clients and distinct multi-disciplinary team orientation). Together with their teams, the corporate boutique firm consists of about 30 lawyers. Florent's experienced lawyers focus to assist companies during major phases in their life cycle; start and expansion, governance matters, disruptive events (ie, fraud and liability), major disputes, restructuring and insolvency. Insolvency and restructuring is one of the main and important practice areas of the firm. Florent possess one of the leading trustee practices in the Netherlands. The firm has been appointed in the largest bankruptcies in the Netherlands and advises both creditors and debtors on contentious and non-contentious proceedings.

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1. Market Trends and Developments

1.1 The State of the Restructuring Market

Since the significant increase in restructurings at the beginning of, during and after the financial crisis in 2007/2008, the number of restructurings has been decreasing in the Netherlands every year. From a peak in 2013 of 8,376 bankruptcies, the number of bankruptcies rapidly decreased to 4,396 in 2016. This decrease is mostly due to the gradual but robust recovery of the Dutch economy and a subsequent rise in consumer expenses.

The number of bankruptcies decreased particularly substantially in the real estate and construction sector, from 611 bankruptcies in 2015 to 411 bankruptcies in 2016, which is a decrease of 33%. This is a result of the continuing recov-

ery of the Dutch housing market, which is also affected by low interest rates in the Netherlands. In 2016 alone, a total of 215,000 houses were sold, the highest number since the Dutch Statistics Agency (*Centraal Bureau voor de Statistiek*) started measuring.

In the healthcare sector, however, the number of bankruptcies has not decreased, due to budget cuts and general reforms by the Dutch government.

Most bankruptcies in 2016 occurred in the wholesale and retail sector, followed by financial institutions and the business services sector. 0.4% of the 265,898 companies in the wholesale and retail sector were declared bankrupt in 2016, ie, 1,184 companies. This "top 3 trend" is likely to continue in 2017.

Although the number of bankruptcies has been decreasing in the retail sector, retailers still face financial difficulties due to high competition in the retail market combined with the rise of web shops and often substantial fixed expenses, including employees and lease agreements. This has resulted in a string of bankruptcies of large-scale retail companies, including department store V&D, shoe retailer MacIntosh Retail Group, sportswear retailer Unlimited Sports Groep, drugstore chain DA Retailgroep and fashion chains Miss Etam, McGregor and MS Mode. Recently, smartphone retail chain The Phone House and fashion chain Charles Vögele were not able to meet their financial obligations and therefore filed for bankruptcy.

Looking at the future, recent predictions by credit insurer Atradius and ING Economic Bureau point out that the number of bankruptcies is expected to continue to decrease in 2017, with an estimated decrease of 10-12% in comparison with 2016. However, due to the volatility of the market following political developments in the United States and European developments such as Brexit, which could have a direct impact on the number of bankruptcies in the Netherlands, the figures are difficult to predict and somewhat uncertain.

Also, the expected reduction of the massive bond-buying programme by the European Central Bank might exert downward pressure on interest rates in the Netherlands and the Dutch economy. An increase in interest rates might be problematic for highly debt-financed companies.

1.2 Changes to the Restructuring and Insolvency Market

With regard to restructuring strategies, there is an increasing interest among legislative bodies in the Netherlands in pre-insolvency restructuring measures.

First of all, the Continuity of Companies Act I (*Wet continuïteit ondernemingen I*) is currently in the process of a legislative procedure. See **6 Statutory Restructurings, Rehabilitations and Reorganisations** for more detail.

In addition, the draft bill of the Continuity of Companies Act II (*Wet continuïteit ondernemingen II*) has been made public, introducing extrajudicial debt restructuring compositions. Also, at a European level, a draft directive on this matter has recently been published by the European Commission.

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

2.1 Overview of the Laws and Statutory Regimes

The different insolvency proceedings that exist under Dutch law are as follows, and are all governed by the Dutch Bankruptcy Act:

- bankruptcy (*faillissement*);
- suspension of payments (*surseance van betaling*) and;
- statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*).

In addition, the Financial Supervision Act (*Wet op het Financieel Toezicht*) contains special proceedings for banks and insurance companies.

2.2 Types of Voluntary and Involuntary Financial Restructuring, Reorganisation, Insolvency and Receivership

Bankruptcy

Bankruptcy is a liquidation proceeding that aims to liquidate the assets of the bankrupt company and distribute the proceeds to the creditors. It is possible to file for bankruptcy when a debtor has ceased paying its debts, which under Dutch law means that there must be more than one creditor and that at least one of the debts of those creditors is due and payable.

When a debtor is declared bankrupt, the district court will appoint a bankruptcy trustee (*curator*) and a supervisory judge (*rechter-commissaris*). The bankruptcy trustee is in charge of the administration and liquidation of the estate, and is subject to the supervision of the supervisory judge. The bankruptcy trustee will almost always be a member of the local bar association. For certain acts, the bankruptcy needs the authorisation of the supervisory judge, such as the termination of lease agreements and employment agreements.

Suspension of Payments

Suspension of payments is a temporary relief against the non-preferential creditors of the debtor. The goal of a suspension of payments is the reorganisation and continuation

of wholly or partly viable businesses that are in financial distress.

Only the debtor itself is able to file for suspension of payments, and can do so when they anticipate that they will not be able to continue to meet liabilities as they fall due. A provisional suspension of payments is automatically granted and can later be declared to be definitive after a hearing is held where the administrator, the supervisory judge and the company are present. During the suspension of payments, the business of the company is managed jointly by the company and the court-appointed administrator.

Statutory Debt Restructuring for Natural Persons
Statutory debt restructuring for natural persons has been a part of the Dutch Bankruptcy Act since 1 December 1998 and applies only to natural persons. It is possible to apply for a statutory debt restructuring when it is reasonably foreseeable that the applicant will be unable to pay his or her debts as they fall due, or if he or she is in a situation in which they have ceased to pay their debts as they fall due. When certain conditions have been met, the natural person will be granted a "clean slate" (*schone lei*) when the statutory debt restructuring proceedings have reached their conclusion.

2.3 Obligation to Commence Formal Insolvency Proceedings
There are no obligations for companies to commence formal insolvency proceedings within specified times.

2.4 Procedural Options
A company in financial distress is able to file for bankruptcy proceedings or suspension of payments. The board of directors is only able to file for bankruptcy after being instructed to do so by the general meeting of shareholders, unless the articles of incorporation state otherwise. The board of directors can decide to file for suspension of payments without being instructed to do so by the general meeting of shareholders. If the company has a supervisory board, the supervisory board will have to consent to filing for either bankruptcy or suspension of payments proceedings.

2.5 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings
Since there are no mandatory insolvency proceedings under Dutch law, there are no liabilities or penalties for a company and/or its officers, directors and/or owners for not commencing insolvency proceedings. However, a director may be held personally liable if he or she enters into obligations on behalf of the company while they knew or should have known that the company was not able to meet these obligations and would not offer sufficient recourse.

2.6 Ability of Creditors to Commence Insolvency Proceedings
Creditors may file for the bankruptcy of a debtor when the company has ceased paying its debts, meaning that there has to be more than one creditor and that at least one of the debts of those creditors is due and payable.

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

2.7 Requirement for "Insolvency" to Commence Proceedings
When a company is no longer paying its debts as they fall due, it can be declared bankrupt. For this to be the case, the company must have more than one creditor, and one debt that has fallen due must be unpaid. In order to be able to file for suspension of payments, a company must provide for the possibility that it will not be able to continue paying its debts.

2.8 Specific Statutory Restructuring and Insolvency Regimes
Banks and insurance companies, as defined in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*), may not file for suspension of payments. The Financial Supervision Act provides for separate proceedings for these institutions prior to bankruptcy: the interim procedure (*noodregeling*). The interim procedure can be requested from the District Court of Amsterdam by the Dutch Central Bank (*De Nederlandsche Bank N.V.*) if the Dutch Central Bank considers that – in short – dangerous developments are taking place with regard to the financial position of that bank or insurance company. Furthermore, the Dutch Bankruptcy Act includes special provisions regarding the bankruptcy of banks and insurance companies. Banks in the Netherlands are also subject to the EU Bank recovery and resolution directive (2014/59/EU) and the single resolution mechanism.

In addition to the above, the Act on Special Measures for Financial Institutions (*Wet bijzondere maatregelen financiële ondernemingen*) grants special powers to the Dutch Central Bank and the Minister of Finance to intervene when a bank or insurance company is in financial difficulty.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings
The general perception among restructuring market participants in the Netherlands is that an informal restructuring is preferable to statutory processes, due to the far-reaching consequences of a bankruptcy, the often disappointing out-

come – especially for unsecured creditors – and the risk of destruction of value of the company.

Banks, credit funds and other lenders are generally supportive of borrower companies experiencing financial difficulties pending a detailed assessment of their financial position, but it depends greatly on the circumstances of the case. The far-reaching consequences of a bankruptcy might influence stakeholders to continue out-of-court restructuring negotiations.

There is no obligation for mandatory consensual restructuring negotiations to take place before formal insolvency proceedings are commenced. In addition, Dutch law contains no formal provision that a director must file for bankruptcy if certain requirements are met. However, a director may be held liable if he or she continues the activities of the company while they knew or should have known that the company was not in a position to fulfil all its obligations. A director should and will adopt a reticent attitude towards continuation of the company.

The "INSOL Principles" are not implemented in the Dutch legal framework, nor are they in any way mandatory or binding. However, these principles are used by the participants in most restructuring cases.

3.2 Typical Consensual Restructuring and Workout Processes

Standstill agreements and credit agreement default waivers as part of an initial informal and consensual restructuring process are not uncommon in the Netherlands. A standstill agreement will generally provide obligations for the company aimed at – for example – providing the senior lenders with information regarding the state of the company, protecting their position in relation to other creditors and/or obliging the company to draft and implement a restructuring plan. In certain cases, a steering committee is appointed in the early stages of the restructuring process to "steer" the restructuring.

3.3 Injection of New Money

The injection of new money may be made by various stakeholders, such as shareholders and secured creditors. Under Dutch law there is no provision that investors of new money automatically receive super-priority liens or rights, but an investor of new money can achieve such status with the consent of the debtor and the secured creditors.

3.4 Duties of Creditors to Each Other, or on the Company or Third Parties

In general a creditor is entitled to act on its own interest in the course of which all parties should keep the principles of reasonableness and fairness (*redelijkheid en billijkheid*) in mind. In principle, a creditor may decline a proposal for out-of-court restructuring but in exceptional cases a creditor can be forced to cooperate by a court order. As discussed in **12 Duties and Personal Liability of Directors and Officers of Financially Troubled Companies**, directors are obliged to act in the interest of the company and all stakeholders.

3.5 Consensual, Agreed Out-of-Court Financial Restructuring or Workout

In principle, there must be consensus between all stakeholders in order for an out-of-court restructuring to be of effect. Most stakeholders will approve such restructuring when the only other option is to file for bankruptcy or moratorium.

There is no statutory provision that enables a cramdown. However, in exceptional circumstances a creditor can be forced to co-operate by a court order. Moreover, the bill on the Continuity of Companies Act II seeks to regulate the compulsory composition outside insolvency proceedings.

4. Secured Creditor Rights and Remedies

4.1 Type of Liens/Security Taken by Secured Creditors

Under Dutch law, a security right may be established on all transferable property. A right of mortgage (*hypotheek*) may be established on property subject to registration (*registergoederen*), such as real estate. Security on all other transferable property, such as equity shares, moveable assets, intellectual property, receivables and bank accounts, may be provided through a right of pledge (*pandrecht*).

A right of pledge on non-bearer shares (*aandelen op naam*) is created by executing a deed before a Dutch civil law notary. The acknowledgement of the right of pledge by the company that has issued the shares is also required. The articles of association of a company may prohibit the pledge of the shares of the company. The deed of pledge may provide that the voting rights associated with the pledged shares are transferred to the pledgor, unless this is prohibited by the articles of association of the company. A right of pledge on bearer shares (*toonder aandelen*) is created in the same manner as a pledge on moveable assets.

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

With regard to receivables, it is possible to create both a disclosed and a non-disclosed right of pledge. A disclosed right of pledge requires a privately executed deed of pledge and notice to the debtor. For a non-disclosed right of pledge, a deed of pledge must be executed before a Dutch civil law notary or a privately executed deed of pledge must be registered with the Dutch tax authorities. It is not possible to create a right of pledge over future receivables, unless they originate from a legal relationship that already existed at the time the right of pledge was created. Because of this, it is common practice for a deed of pledge regarding receivables to contain an obligation for the borrower to pledge its future receivables regularly. A pledge over bank accounts is created as a pledge over the receivables owed by the bank to the account holder. In general, such a pledge will be created as a disclosed pledge, with notice being given to the bank where the bank account is held.

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

4.2 Rights and Remedies for Secured Creditors

When a company is in default in payment of its secured obligations, Dutch security rights may be enforced. This applies both in and outside of insolvency proceedings. Secured creditors are able to enforce their security rights as if there were no insolvency proceedings. The security-holder has the right to summary execution (*parate executie*), meaning the secured property can be sold, with the proceeds being for the benefit of the security-holder.

In the case of a mortgage, the secured property may be sold publicly in the presence of a Dutch civil law notary. Both the mortgagee and the mortgagor may request the court to determine that the secured property be sold via a private sale by contract. In the case of a pledge, the pledgee is entitled to sell the pledged property publicly. At the request of the pledgee or the pledgor, the court may determine that the pledged property be sold in another manner. The pledgee may also request the court to have the pledged property remain with the pledgee as the buyer, with the amount to be paid to be determined by the court.

Considering the above, secured creditors have a strong position in a restructuring situation. Their co-operation will generally be necessary for a restructuring to be successful.

Secured creditors are not subject to an automatic stay in Dutch insolvency proceedings, but the court can impose a cooling-off period (*afkoelingsperiode*) of two months. The cooling-off period can be extended only once for a period of two months at the most. During the cooling-off period, rights of third parties to take recourse against the assets of the bankruptcy estate or to hand over assets which are under control of the bankrupt debtor or the bankruptcy trustee may only be exercised with the authorisation of the supervisory judge. Such authorisation is rarely granted.

4.3 The Typical Time-lines for Enforcing a Secured Claim and Lien/Security

The bankruptcy trustee is able to require a secured creditor to enforce its security rights within a reasonable timeframe, which is determined according to the facts and circumstances of the specific situation. If the secured creditor does not enforce its security rights within the reasonable period of time provided, the bankruptcy trustee is entitled to sell the secured assets in question him or herself. The secured creditor will still have a preferred claim on the proceeds of such a sale, but will have to share in the estate costs and will in principle have to wait for a distribution to be made before receiving any proceeds.

4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors

There are no special procedures or impediments that apply to foreign secured creditors in Dutch insolvency proceedings.

4.5 Special Procedural Protections and Rights for Secured Creditors

In principle, secured creditors are able to exercise their rights as if there were no bankruptcy. Secured creditors will not have to pay for any estate costs or wait for the bankruptcy to reach its conclusion in order to be able to collect their proceeds.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities Among Classes of Secured and Unsecured Creditors

During insolvency proceedings, the following pre-bankruptcy or pre-moratorium creditors can be distinguished:

- preferred creditors;
- secured creditors; and
- unsecured creditors.

In principle, preferred creditors are ranked highest but, since secured creditors can act as if there were no bankruptcy,

they have priority over the proceeds of specific assets, under particular circumstances.

5.2 Unsecured Trade Creditors

In the Netherlands, a restructuring process will typically involve only the senior lenders of a company (such as banks and shareholders). Unsecured trade creditors are generally kept whole during a restructuring process, to allow the business to continue operations.

5.3 Rights and Remedies of Unsecured Creditors

In a restructuring context, unsecured creditors have various rights and remedies equal to normal creditors. Under certain circumstances, unsecured creditors may invoke a retention of title (*eigendomsvoorbehoud*), invoke a right of suspension to which a creditor is entitled (*opschortingsrecht*), and claim back unpaid goods (*recht van reclame*) if certain conditions are met. Furthermore, unsecured creditors may impose a pre-judgment attachment (*conservatoir beslag*) or request bankruptcy against their debtor. As mentioned above, a creditor is generally entitled to act in its own interest, in the course of which all parties should keep the principles of reasonableness and fairness (*redelijkheid en billijkheid*) in mind.

During insolvency proceedings, unsecured creditors can still rely on certain rights and remedies, including invoking a retention of title, invoking a right of suspension to which a creditor is entitled, and claiming back unpaid goods if certain conditions are met. Some unsecured creditors can even force a bankruptcy trustee or an administrator to pay all their outstanding claims by acting as an essential supplier (*dwangcrediteuren*). Furthermore, unsecured creditors may request the supervisory judge to instruct the bankruptcy trustee to perform or refrain from performing a specific act, and they may vote against a proposed composition plan. Moreover, unsecured creditors may vote against granting a definitive moratorium. On the other hand, unsecured creditors may not attach assets of the debtor since insolvency proceedings can be qualified as a general attachment on all assets. Unsecured creditors can file claims with the bankruptcy trustee or the administrator.

5.4 Pre-Judgment Attachments

Dutch law provides for the option of pre-judgment attachment (*conservatoir beslag*). A creditor who wishes to secure payment by the debtor by the attachment of assets will have to obtain leave from the judge in preliminary relief proceedings (*voorzieningenrechter*). This leave is generally easily obtained in the Netherlands but, if the attachment proves to be wrongful, the creditor can be held liable for the damages incurred by the debtor due to the attachment. Once the leave is obtained, a bailiff is instructed to attach the assets. Besides pre-judgment attachment against the debtor, a creditor can impose pre-judgment garnishment against the debtor (ie, a bank account). The creditor is obliged to start proceedings on the merits within a period to be specified by the judge in preliminary relief proceedings. Once an enforceable judgment against the debtor is obtained, the pre-judgment attachment will change into attachment in execution (*executoriaal beslag*). The creditor is entitled to execute the attached assets.

5.5 Typical Timeline for Enforcing an Unsecured Claim

If the unsecured claim is eligible for summary proceedings, a judgment can be obtained within weeks. For an unsecured claim to be eligible for summary proceedings, the claim in question must be undisputed or easily proven. If an unsecured claim is not eligible for summary proceedings, standard court proceedings can be initiated. Such proceedings generally take between six months and two years.

5.6 Bespoke Rights or Remedies for Landlords

Due to the fact that Dutch law does not include a specific provision to give notice of termination of the lease in a restructuring situation, a landlord often has a strong position. In order for a restructuring to succeed, a company needs the consent of a landlord.

If the tenant has been declared bankrupt, the bankruptcy trustee and the landlord are both entitled to terminate the lease agreement. The termination is subject to a notice period of a maximum of three months. The outstanding claim of the landlord before bankruptcy (if any) is qualified as an unsecured claim where the claim of the landlord with regard to the termination period can be qualified as a claim against the estate (*boedelvordering*).

5.7 Special Procedures or Impediments or Protections That Apply to Foreign Creditors

Under Dutch law there are no special procedures or impediments or protections that apply to foreign creditors.

5.8 The Statutory Waterfall of Claims

Dutch law does not provide for a waterfall of claims. However, an order of priority of claims does apply: first, the estate or administrative claims; second, the preferential claims; third, the non-preferential claims; and fourth, and last, the subordinated claims. Secured creditors are not a part of this order due to the fact that they can act as if there were no bankruptcy.

5.9 Priority Claims

As stated above, the estate or administrative claims are the first in order, and include the bankruptcy trustee's fees and debts incurred by the bankruptcy trustee (*boedelvorderingen*).

5.10 Priority Over Secured Creditor Claims

In principle, these claims have priority over secured creditors. However, secured creditors have priority over the proceeds of specific assets since secured creditors are entitled to act as if there were no bankruptcy. There is an exception to this rule: if the pledgee holds a non-possessory pledge on the inventory on the debtor's premises, the tax authorities have a privileged claim on these assets.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/ Reorganisation

Dutch law does not provide for any statutory proceedings to reach and effectuate a financial restructuring/reorganisation plan or agreement outside of insolvency proceedings. The Continuity of Companies Act II is draft legislation aimed at creating a way for a debtor to restructure its debts outside of insolvency proceedings, but it is unclear if and when it will be implemented. A debtor can offer a composition to its creditors but, under certain circumstances, the creditors may also offer a composition.

Scheme of Arrangement

The proposed legislation aims to implement a scheme with the following characteristics. A composition can be offered to the creditors and/or shareholders, who can be divided into different classes. All creditors/shareholders that can reasonably be considered equal have to be made part of the same class. A class will have approved a composition if a simple majority of the class have voted in favour, provided they represent at least two thirds of the relevant debts or shares. If a composition has been approved by the creditors and shareholders, the court can be requested to declare the composition generally binding, meaning that it also applies to creditors and shareholders who did not vote in favour of the composition. The court will not do so if, for example, it is not certain that funding is available to implement the composition, if the voting process has been unfair, or if the interests of one or more creditors or shareholders will be damaged disproportionately. Under certain circumstances, the court can also declare a composition that was rejected by the creditors and shareholders generally binding if the rejecting creditors or shareholders could reasonably not have voted in the manner they did.

In addition, in November 2016 the European Commission issued a proposal for a Restructuring Directive aimed at implementing such a scheme of arrangement in the legal framework of every member state. If this proposal is accepted, the implementation might influence the Dutch draft legislation regarding such schemes.

Pre-Pack

In addition to the scheme of arrangement, there is also draft legislation aimed at implementing a formal insolvency (the Continuity of Companies Act I), seeking to make it possible for a debtor in financial difficulty to request the appointment of a silent receiver (*beoogd curator*) in order to attempt a silent restructuring of its business. The appointment of the silent receiver – and the supervisory judge – is not made public. The goal is silently to prepare a sale of assets that is to be effectuated as soon as formal insolvency proceedings are opened.

A number of courts in the Netherlands have appointed silent receivers in the past, even though there was no statutory basis for this practice yet. This practice was challenged by unions and their members.

The European Court of Justice in the Smallsteps case determined – in short – that a restructuring of a debtor's business by way of a pre-pack classifies as a transfer of an undertaking (*overgang van onderneming*). As a result of this, the rights of the employees of the debtor's business that is aiming to be restructured are safeguarded in such a situation. Considering this development, it is most uncertain if the pre-pack will be implemented in its current – or any – form.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings

Dutch law distinguishes three types of insolvency proceedings:

- bankruptcy, which aims at the liquidation of the assets of the debtor;
- suspension of payments, which aims at reorganisation and the restructuring of debts; and
- statutory debt restructuring for natural persons, which aims to restructure debts and obtain a "clean slate" for natural persons.

Bankruptcy

The bankruptcy order is issued at the request of the debtor, or at the request of one or more creditors if the debtor has ceased paying its debts. It is not necessary for the debtor to have negative equity capital. Seen from a practical point of view, the criterion "has ceased paying its debts" implies that the debtor has left unpaid any debts to two or more creditors, of which debts at least one must be immediately due and payable. Except for the case of a settlement with creditors, which may be forced by specific majorities, the bankruptcy does not end with a "clean slate" for the debtor. As a consequence of a bankruptcy order, the debtor loses the

right to manage and dispose of its assets with effect from and including the day on which the bankruptcy order is issued. The court appoints a bankruptcy trustee to take charge of the liquidation of the debtor's assets, including the transfer of the business as a going concern. The bankruptcy trustee acts under the general supervision of a supervisory judge. The bankruptcy trustee requires the prior authorisation of the supervisory judge for certain acts, such as reaching amicable settlements, initiating legal proceedings and terminating agreements with employees and landlords.

Creditors' claims must be lodged with the bankruptcy trustee in the form of an invoice or other written statement listing the nature and amount of the claim, with documentary evidence or copies of documentary evidence and a statement as to whether or not a right of preference, pledge, mortgage or lien is claimed. A claim with an uncertain due date or which entitles the claimant to periodic payments will be admitted for its value at the date of the bankruptcy order. Further, claims having an indeterminate or uncertain value or whose value is not expressed in Dutch currency or euros or not expressed in a monetary value at all will be admitted for their estimated value in Dutch currency or euros. Claims of creditors can be traded and transferred from one party to another by deed of assignment and giving notice to the bankruptcy trustee.

If legal proceedings are pending at the time of the bankruptcy order and were instituted by the bankrupt debtor, the proceedings will, at the request of the defendant, be stayed to permit him or her to summon the bankruptcy trustee to take over the proceedings, within a period to be set by the court. If the bankruptcy trustee does not respond to the summons, the defendant has the right to request that the proceedings be dismissed. However, if legal proceedings instituted against the bankrupt debtor are pending at the time of the bankruptcy order, the claimant has the right to request a stay in the proceedings in order to summon the bankruptcy trustee to appear in the proceedings within a period to be set by the court. If the bankruptcy trustee entering an appearance immediately consents to the claim, the costs of the proceedings of the counterparty will not constitute a debt of the estate.

A person who is both a debtor and a creditor of the bankrupt debtor may set off his or her debt against their claim against the bankrupt debtor, provided each arose before the declaration of bankruptcy, or if they resulted from legal acts entered into with the bankrupt debtor before the declaration of bankruptcy. However, a person who has assumed a debt owed to, or acquired a claim against, the bankrupt debtor from a third party before the declaration of bankruptcy may not effect a set-off if they have not acted in good faith with respect to such an assumption or acquisition.

As a rule, at the end of each three-month period of time, the bankruptcy trustee must report on the state of affairs of the estate. The contents of this periodic report are open to the public.

Suspension of Payments

A suspension of payments order may be requested only by the debtor itself. Suspension of payments is open to a debtor who is not currently able to pay its debts, but who expects to be able to pay its creditors in the foreseeable future. A provisional suspension of payments is automatically granted after it has been filed for. The suspension of payments can later be declared to be definitive. The creditors will be able to vote on whether definitive suspension of payments should be granted.

When suspension of payments is granted, the court appoints an administrator. As a consequence of the suspension of payments order, the debtor can no longer manage and dispose of its assets without the co-operation or authorisation of the court-appointed administrator. While it is not mandatory for the court to appoint a supervisory judge in a suspension of payments, in practice a supervisory judge is always appointed. A suspension of payments order will suspend enforcement measures of unsecured creditors, but is not effective towards preferred and security creditors. Suspension of payments may last up to a period of one and a half years and may be extended, at the debtor's request, an unlimited number of times, each time for one and a half years. Suspension of payments orders are often converted into bankruptcy in the short or long term.

Statutory Debt Restructuring for Natural Persons

Statutory debt restructuring is available only to natural persons and exclusively upon an individual's own request. A natural person may apply for a debt-restructuring scheme if it is reasonably foreseeable that the individual will be unable to pay his or her debts as they fall due, or if the individual is in a situation in which he or she has ceased to pay their debts as they fall due. When a debt-restructuring scheme is granted, an administrator (*bewindvoerder*) and a supervisory judge – who supervises the actions of the administrator – will be appointed.

As a rule, the debtor will end up with a "clean slate" (*schone lei*) after three years if certain conditions are met. This means that the claims to which the debt-restructuring scheme applies will no longer be enforceable, regardless of when a creditor entered a claim in the debt-restructuring scheme. A personal debt relief arrangement is not available to a debtor if debts were incurred in bad faith.

7.2 Distressed Disposals as Part Insolvency/ Liquidation Proceedings

See **7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings**. The bankruptcy trustee will consider the various alternatives for the sale of assets, including the transfer of the business as a going concern. The bankruptcy trustee is rather flexible in entering into an agreement with a potential purchaser, provided the agreed purchase price is in the best interest of the joint creditors of the bankrupt debtor. Such a sale of assets requires by law the prior authorisation of the supervisory judge. The bankruptcy trustee will also have to take into account the interests of the secured creditors, who have a strong legal position in the process of selling the assets. In practice, this means that the bankruptcy trustee needs the approval of a secured creditor before selling a secured asset to a purchaser. In addition, the bankruptcy trustee will request a fee from a secured creditor for the trustee's co-operation in facilitating the sale of a secured asset to a purchaser. Dutch law does not provide for any rules that prevent a secured or unsecured creditor to participate in the sale process. As a rule, the bankruptcy trustee will not give any representations and warranties to a purchaser. Finally, a bankruptcy trustee is not bound by a pre-negotiated and pre-insolvency sales transaction of assets.

7.3 Implications of Failure to Observe the Terms of an Agreed or Statutory Plan

The debtor may offer a scheme of arrangement to its joint creditors. Once this scheme of arrangement is final and binding, the debtor is obliged to fulfil the performance of the scheme of arrangement. Any creditor whom the debtor fails to satisfy under the scheme of arrangement may demand from the court that this scheme be set aside.

7.4 Investment or Loan of Priority New Money

It is not unusual for a bankruptcy trustee or an administrator to approach secured and other creditors to obtain an estate loan to cover the costs of the estate. If there is value in the estate, those secured or other creditors are stimulated to provide such a loan secured by security on assets of the debtor.

7.5 Insolvency Proceedings to Liquidate a Corporate Group on a Combined Basis

The Dutch Bankruptcy Act does not provide for the liquidation of a corporate group on a combined basis or under related proceedings for administrative efficiency. Having said this, there is case law in the Netherlands allowing such consolidation of insolvency proceedings on the basis of administrative efficiency.

7.6 Organisation of Creditors

The Dutch Bankruptcy Act provides for a creditors' committee. If such a committee is appointed, the bankruptcy trustee is obliged to provide its members with all information requested. By law, the bankruptcy trustee is also obliged to seek advice from this committee, but is not bound to act on it.

7.7 Conditions Applied to the Use of or Sale of Its Assets

As a rule, the bankruptcy trustee will not give any representations and warranties to a purchaser in the context of the sale of assets from the estate. Furthermore, by law, such a sale of assets requires the prior authorisation of the supervisory judge.

8. International/Cross-border Issues and Processes

8.1 Recognition or Other Relief in Connection with Foreign Restructuring or Insolvency Proceedings

Within the EU (except for Denmark): the European Insolvency Regulation recast (EIR recast), which entered into force on 26 June 2017, provides for automatic recognition in the Netherlands of foreign insolvency proceedings (listed in the EIR recast).

Outside the EU: the Dutch Bankruptcy Act contains no provisions with regard to the recognition of a foreign insolvency. This Act dates back to 1893 and at that time it was considered undesirable to include rules that would allow for the recognition of foreign insolvencies. As a consequence of this, the Dutch Supreme Court applied the "territoriality principle" in its case law. Because of this principle, an insolvency from a country with which the Netherlands has no treaty in this respect does not include any assets in the Netherlands, and may not be invoked if this would result in the deterioration of the position of creditors. This principle of territoriality has been somewhat softened by the Dutch Supreme Court. In short, a foreign bankruptcy trustee can effectively exercise his or her powers in the Netherlands provided that he or she acts within the scope of the *lex concursus* (ie, the law of the country of the opening of the insolvency proceedings) and that such an exercise does not lead to a deterioration of the position of the creditors of the insolvent company. When exercising his or her powers, the foreign bankruptcy trustee must respect all existing attachments on Dutch assets by individual creditors. No prior court decision on recognition or relief (eg, as required under the UN Model Law) or exequatur is necessary. If an interested party believes that a foreign insolvency order violates Dutch public policy, it is up to that party to prevent the foreign bankruptcy trustee from exercising their powers by initiating court proceedings in the Netherlands in order to obtain an injunction in that respect.

8.2 Protocols or Other Arrangements with Foreign Courts
The EIR recast includes several clauses on co-operation and communication between courts, as well as between courts and insolvency practitioners.

8.3 Foreign Creditors
Foreign creditors are not dealt with any differently in Dutch insolvency proceedings.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers Appointed in Proceedings
Under Dutch law there are two types of statutory officers: a bankruptcy trustee (*curator*) and an administrator (*bewindvoerder*). A bankruptcy trustee is appointed by the district court simultaneously with the adjudication of a bankruptcy (*faillissement*). An administrator is also appointed by the district court but simultaneously with granting suspension of payments (*surseance van betaling*).

9.2 Statutory Roles, Rights and Responsibilities of Officers
Both statutory officers report to the supervisory judge (*rechter-commissaris*). A bankruptcy trustee, however, is appointed in bankruptcy proceedings which can be described in general as liquidation proceedings. A bankruptcy trustee is entrusted with the administration of a bankrupt company, and charged with its winding up. Alongside the management of the company, an administrator is entrusted with the administration of the company and will investigate whether or not the suspension of payments is likely to succeed.

9.3 Selection of Statutory Officers
When appointing a bankruptcy trustee or an administrator, district courts use a list of eligible lawyers: a "bankruptcy trustee list" (*curatorenlijst*). The *Recofa* principles provide guidelines for the district courts for the admission or removal of lawyers from the list as well as guidelines for the appointment in individual bankruptcies and court-based quality and control instruments. Because these guidelines are principles and not mandatory rules or binding policies, the various district courts use their own procedure. For example, the District Court of Amsterdam has divided the list into four levels (1 to 4), based on years of experience, with level 1 being the lowest rank and level 4 being the highest. Depending on the company's size and insolvency proceedings requested (bankruptcy or suspension of payments), a bankruptcy trustee or an administrator is appointed. On a level basis, the eligible persons are appointed in turn.

Furthermore, the district courts may dismiss the bankruptcy trustee at any time after he or she has been heard or duly summoned to appear, and replace him or her with someone else or appoint one or more bankruptcy co-trustees, in each case either on the recommendation of the supervisory judge or upon a substantiated request of one or more of the creditors, the creditors' committee or the bankrupt debtor. A similar provision is included in the Dutch Bankruptcy Act for an administrator. The district court may dismiss an administrator at any time after he or she has been heard or properly summoned, and replace him or her with someone else or appoint one or more additional administrators, in each case either upon his or her own request or upon the request of the other administrators or of one or more creditors, or upon the recommendation of the supervisory judge or of the court's own motion.

9.4 Interaction of Statutory Officers with Company Management
Once a bankruptcy trustee is appointed, the company management is no longer entitled to dispose of the assets of the bankrupt company. In the appointment of an administrator, the administrator works together with the company's management, and they are jointly authorised to represent the company.

9.5 Restrictions on Serving as a Statutory Officer
Only individuals on the list mentioned in **9.3 Selection of Statutory Officers** may serve as a statutory officer. Before accepting an appointment, a statutory officer should verify whether or not he or she is conflicted in any way. If that is the case, the bankruptcy trustee or administrator appointed will have to withdraw. A statutory officer is conflicted if he or she is a creditor, creditor representative, owner, officer or director of the company concerned.

In general, a lawyer is appointed as a statutory officer. In some cases, if and in so far as necessary, an expert – such as an accountant – is appointed as bankruptcy co-trustee or co-administrator.

10. Advisors and Their Roles

10.1 Types of Professional Advisors
Period Leading up to Suspension of Payments/Bankruptcy
When a company is considering filing for bankruptcy or suspension of payments, it will typically employ an attorney to advise on how best to proceed and avoid liability, and to draft and file the petition for suspension of payments or bankruptcy. Costs incurred by an attorney in order to file for bankruptcy have preferential treatment in the bankruptcy of the company. Generally, an attorney will ask for a retainer in such situations, to ensure that his or her invoices are paid.

In certain cases, interim management (such as a chief restructuring officer) is appointed in the period leading up to the insolvency of a company. This is usually instigated by the company's senior lenders.

During Suspension of Payments
Since the debtor still has the capacity to act on its own behalf during suspension of payments, albeit with the co-operation or authorisation of the administrator, it is up to the company to decide which professionals to employ, taking into account that the administrator will have to approve.

During Bankruptcy
After the bankruptcy has been declared, it is not typical for a bankruptcy trustee to employ any attorneys, seeing as in the Netherlands a bankruptcy trustee is typically an attorney him- or herself. If the estate is a party to legal proceedings where representation by an attorney is required, the estate will normally employ an attorney who works at the same law firm as the bankruptcy trustee to act on behalf of the estate in such proceedings. The approval of the supervisory judge is required for the bankrupt estate to be a party to legal proceedings.

Depending on the size of the bankruptcy, the bankruptcy trustee may employ forensic accountants and/or other financial specialists to assist in a reconstruction of the causes of the bankruptcy, mainly from a financial point of view. Seeing as such parties are employed by the estate, the costs associated with employing such parties will be estate costs. In large retail bankruptcies, an advisory firm may be employed by the estate to assist the bankruptcy trustee with the valuation of the assets of the company and with the more practical matters related to the bankruptcy. In addition, IT experts may be employed by a bankruptcy trustee in order to secure and preserve digital data. The costs associated with employing such a party will also be estate costs.

Other parties that wish to employ professional advisers will have to bear their own costs, as there is no mechanism under Dutch law that obliges the (bankrupt) company to pay or reimburse such professionals' compensation.

11. Mediations/Arbitrations

11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters
Arbitrations and mediations are utilised in restructuring, liquidation, insolvency and bankruptcy matters if it is agreed between the parties. As a rule, a court-appointed bankruptcy trustee is bound by pre-insolvency agreements, including clauses with regard to choice of forum, arbitration or mediation.

11.2 Parties' Attitude to Arbitration/Mediation
Pre-insolvency disputes are often still brought before the court, although there is a rising trend in mediations in bankruptcies in an attempt to avoid prolonged legal action, often at the instigation of a supervisory judge in a bankruptcy matter.

11.3 Mandatory Arbitration or Mediation
To our knowledge, courts do not order mandatory arbitration or mediation in a judicially supervised insolvency or restructuring proceeding.

11.4 Pre-insolvency Agreements to Arbitrate
In principle, a court-appointed bankruptcy trustee is bound by pre-insolvency agreements, including arbitral clauses.

11.5 Statutes That Govern Arbitrations and Mediations
The Dutch Civil Code contains several provisions governing arbitrations. There are no statues that govern mediations.

11.6 Appointment of Arbitrators/Mediators
The manner in which arbitrators/mediators are appointed depends on the applicable arbitration rules and/or agreements between parties.

Who can serve as an arbitrator/mediator depends on the applicable arbitration rules and/or agreements between parties.

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

12.1 The Duties of Officers and Directors of a Financially Distressed or Insolvent Company
The board of directors owes a fiduciary duty to the company (including its subsidiaries) and its stakeholders, such as the shareholders, creditors, employees, customers, suppliers and other third parties. In the performance of their duties, the directors must direct their attention to the interests of the company and of the enterprises connected with it.

Each director is responsible towards the company for proper performance of the tasks assigned to him or her. All duties of directors that have not been assigned to one or more other directors by or pursuant to law or the articles of incorporation accrue joint responsibility, ie belong to the duties of the board of directors. Each director is responsible for the general conduct of business. A director is liable for the full consequences of an improper performance of duties, unless – also in regard to the tasks assigned to the other directors – he or she cannot be held seriously culpable and he or she has not failed to take steps to prevent the consequences of mismanagement.

In the case of bankruptcy, a director may be held liable, amongst others reasons, if he or she has manifestly improperly performed their duties, and if it is plausible that their improper performance substantially contributed to the company's bankruptcy. This is the case if no reasonable director would have acted similarly under the circumstances. If that threshold is met, each director may be held jointly and severally liable for the shortfall in the bankrupt estate. The bankruptcy trustee is exclusively authorised to pursue this claim, and bears the burden of proof. However, the burden of proof is materially reversed if the board of directors has failed to keep proper records or to file the company's annual accounts in a timely manner. The board of directors can rebut this presumption by sufficiently demonstrating that another entirely different circumstance was the primary cause of the bankruptcy.

Under certain circumstances, a director may be held liable towards a third party, such as a creditor or the bankruptcy trustee, on the basis of a wrongful act (*onrechtmatige daad*). Such a liability only occurs if a director can be held seriously culpable, ie where he or she is personally at fault. Examples of liability on the basis of a wrongful act include entering into an agreement on behalf of the company if the director knew or should have understood that the company would not be able to meet its obligations under such an agreement and that the creditor would not be able to recoup its losses from the company, and thus wilfully preventing the company from performing its obligations towards a third party when it is otherwise able to do so. This means that directors of financially distressed companies should be (extra) careful when entering into new agreements that result in new obligations for the company.

Upon the request of the bankruptcy trustee or the public prosecutor, the court may impose a ban (*bestuursverbod*) for a period up to five years on a (shadow) director who has committed bankruptcy fraud or has been guilty of misconduct.

12.2 Direct Fiduciary Breach Claims

The bankruptcy trustee as well as individual creditors may assert direct fiduciary breach claims against the directors. According to case law, legal proceedings initiated by the bankruptcy trustee take priority in the event that both the bankruptcy trustee and an individual creditor start legal proceedings against a director based on the same facts. After these proceedings, the individual creditor may receive a payment out of the bankrupt estate and, in case of remaining damages, may file a claim for such damages. The bankruptcy trustee is only entitled to pursue a claim on behalf of the entire body of creditors and not on behalf of a (specific) group of creditors.

12.3 Chief Restructuring Officers

Companies can appoint a chief restructuring officer, as a full board member, adviser to the board or consultant. Although such appointments were rare in the past, they are becoming increasingly common. Often the appointment of a chief restructuring officer takes place on the initiative of the bank.

12.4 Shadow Directorship

Third parties or any of a company's representatives who are acting as if they are a director and determining or co-determining the day-to-day affairs of the company ("shadow directors"; *feitelijk bestuurders*) are exposed to the same liability as directors.

12.5 Owner/Shareholder Liability

In principle, the liability of shareholders is limited to the called-up share capital of the company. However, under specific circumstances, a shareholder may be held liable if he or she acts as a shadow director. In such situations, the shareholder will be equated with a statutory director and held to the same standards.

The articles of incorporation of the company can impose additional obligations on the shareholders. In addition to this statutory provision, Supreme Court case law shows that, in certain situations, mainly in group structures, the doctrine of piercing the corporate veil is applicable. Examples are (indirect) piercing of the corporate veil in the case of keeping up a façade of solvency or creditworthiness, withdrawal of assets by the parent company in the capacity of creditor of the subsidiary, and withdrawal of assets by the parent company in its capacity as shareholder. Besides these main categories, case law shows that there are examples of situations in which the parent company was held liable because of wrongful acts. For example, under certain circumstances, setting up and maintaining a business structure in which a separate (subsidiary) legal entity is responsible for all debts but another (subsidiary) legal entity owns all assets of the company can be unlawful towards creditors that remain unpaid.

13. Transfers/Transactions That May Be Set Aside

13.1 Grounds to Set Aside/Annul Transactions

For the protection of creditors, the bankruptcy trustee may – if certain requirements are met – by notice in writing void any transaction pursuant to which other creditors' rights are prejudiced (*actio pauliana*). First, the bankruptcy trustee may void a transaction entered into by the company without a previously existing obligation to do so if the interests of the other creditors are prejudiced thereby and if both the company and the other party to the transaction were aware or should have been aware that the transaction was prejudicial to the interest of the other creditors. The burden of

proof rests upon the bankruptcy trustee, but the aforementioned knowledge is assumed if the transaction is entered into within one year prior to the bankruptcy of the debtor and if, amongst others:

- the value of the obligation of the creditor is substantially exceeded by the value of the obligation of the debtor; or
- payment has been made of, or security has been granted for, a debt which is not due and payable; or
- the debtor and creditor are legal entities and one of such legal entities is director of the other, or at least half of both their issued share capital is owned by one and the same shareholder.

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

13.2 Look-back Period

There is a reversal of burden of proof in favour of the bankruptcy trustee in relation to certain suspicious transactions entered into within one year prior to the bankruptcy. The limitation period for voidable preference claims is three years from the date on which the bankruptcy trustee discovered the detrimental effect of the relevant transaction.

13.3 Claims to Set Aside or Annul Transactions

In a bankruptcy, the bankruptcy trustee has the exclusive right to nullify a transaction entered into by the bankrupt debtor with a third party. Outside bankruptcy, any creditor has this right. Creditors may fund the bankrupt trustee in order to enable him or her to take certain actions.

The articles relating to *actio pauliana* as stated in the Dutch Bankruptcy Act are applicable only in the case of bankruptcy, and may exclusively be used by the bankruptcy trustee. If suspension of payments is granted to a debtor, the articles in the Dutch Civil Code relating to *actio pauliana* that grant the right to nullify transactions pursuant to which other creditors' rights are prejudiced to each creditor apply.

14. Intercompany Issues

14.1 Intercompany Claims and Obligations

The treatment of an intercompany claim, irrespective of whether it qualifies as a secured, unsecured or subordinated claim, will not change once a company undergoes a statutory insolvency, liquidation or reorganisation. Usually this question will focus on the company being the debtor of the claim but, for the avoidance of doubt, the answer is not different if the troubled or insolvent company is the creditor of the intercompany claim.

14.2 Offset, Set off or Reduction

An intercompany claim is subject to set-off against an intercompany debt, even if the claim and the debt have a different priority ranking (non-preferential, preferential or subordinated claim). The basic rules for setting-off, as laid down in the Dutch Bankruptcy Act, remain in place; see **7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings**.

14.3 Priority Accorded Unsecured Intercompany Claims and Liabilities

Unsecured intercompany claims/liabilities are treated similarly to third-party unsecured claims/liabilities. Secured intercompany claims are also treated similarly to third-party secured claims.

14.4 Subordination to the Rights of Third Party Creditors

The starting point in Dutch legislation is that intercompany claims are not subordinated to third-party claims. Subordination is not regulated by law: it is a matter of contract. However, failing a subordination by contract, case law shows that shareholder loans under certain circumstances may be treated as subordinated to third-party claims, in particular if the court determines that the loan has the features of an 'informal capital injection'. Two indicators that could lead to this treatment (ie, not an exhaustive list) are as follows:

- the shareholder loan is granted at such a moment and under such conditions that would not be acceptable to any third-party lender; and
- the parent company takes operational control of a subsidiary and continues financing its loss-making business.

If financing by a shareholder is not documented, it is easier to qualify that financing de facto as 'informal capital' than when there is a loan document. However, even if a loan document is in place, a court could exceptionally rule that the loan is subordinated, eg, when the implementation of the document is manifestly contrary to the wording of the document.

14.5 Liability of Parent Entities

Within a group of companies, under certain circumstances not all individual companies are obliged to publish and file annual accounts. In such a case, the financial information of the company must be consolidated by another company of the group, usually the parent company, in consolidated annual accounts. A further condition is that the parent company has declared in writing that it assumes joint and several liability for any obligations arising from the legal acts

of the subsidiary involved. This written statement must be filed with the commercial registry where the subsidiary is registered.

14.6 Precedents or Legal Doctrines That Allow Creditors to Ignore Legal Entity Decisions

Reference must be made to the legal doctrine of annulment of legal acts because of prejudice to creditors, which is codified in the Dutch Civil Code. If the insolvent company, prior to its formal insolvency and in the performance of a legal act which it was not obliged to perform, knew or should have known that this would adversely affect the possibility of recourse of one or more of its creditors, any creditor whose possibility of recourse has been adversely affected by the legal act may invoke this ground for annulment of that act (most often: a transaction). The annulment may only be invoked if the counterparty also knew or should have known that prejudice to one or more creditors would result from that legal act. The creditor bears the burden of proof. However, if the act was performed within one year prior to invoking the ground for annulment, and between affiliated companies within a group, there is the presumption that, on both sides, one knew or should have known that such prejudice would be the result of the legal act. This legal instrument as laid down in the Dutch Civil Code, to be used by a creditor against the insolvent company and/or its subsidiary, could be seen as the mirror image of the legal instrument contained in the Dutch Bankruptcy Act whereby the bankruptcy trustee/administrator uses the instrument, on behalf of the insolvent company, against a subsidiary or a third party; see **13.1 Historical Transactions**.

14.7 Duties of Parent Companies

A distinction must be made as to whether or not the parent company as legal entity is a director of the subsidiary. If that is the case, the information above, in **13 Transfers/Transactions That May Be Set Aside**, is applicable.

If the parent company is not a director of the subsidiary, the legal concept of 'piercing the corporate veil' may be applicable, through either direct or indirect piercing. Direct piercing is involved if two companies – the parent and the subsidiary – materially could be deemed to be identical. In Dutch case law, arguments to this effect are honoured very rarely. The concept of indirect piercing is more important, and pertains to shareholder liability for corporate torts/wrongful acts. This could be involved if the parent company fails to do what it should do in situations where it has (almost) complete understanding of and control over the business of the subsidiary or, as a variant, where the parent is intensively and intrusively involved in the day-to-day activities of the subsidiary. Case law is very factual and circumstance-driven. Three types of corporate torts/wrongful acts which are regularly seen in case law are as follows:

- the parent upholds a façade of credibility of the subsidiary;
- the parent, also being a creditor of the subsidiary, illegally withdraws assets/capital from the subsidiary; and
- the parent, being the sole shareholder, illegally withdraws assets/capital (eg, by declaration of dividend) from the subsidiary.

14.8 Ability of Parent Company to Retain Ownership/Control of Subsidiaries

The parent company retains ownership in terms of remaining a shareholder of the subsidiary. In insolvencies in the Netherlands, the bankruptcy trustee or the administrator operates at company level only, not at shareholder level. As explained above under **2.2 Types of Voluntary and Involuntary Financial Restructuring, Reorganisation, Insolvency and Receivership**, if the company is declared bankrupt, it loses the right to manage and dispose of its assets. So if the parent is the managing director of the subsidiary, this applies to the parent. During suspension of payments, the company (ie, its director) remains in control but, in order to bind the company, it needs the co-operation or authorisation of the court-appointed administrator.

15. Trading Debt and Debt Securities

15.1 Limitations on Non-banks or Foreign Institutions

Generally, non-banks or foreign institutions are not restricted from holding loans and bonds in the Netherlands, and are not required to register for this purpose. However, non-banks may not solicit or hold funds provided by parties that are part of the "public". Parties are *not* part of the public if they are either a group company of the borrower or a professional market party as defined in the Dutch Financial Supervision Act. Professional market parties include regulated entities such as banks, pension funds and insurance companies, in addition to persons or entities with a certain minimum balance sheet value and professional market makers. Any party that provides a loan of which the first tranche is at least equal to EUR100,000 is also considered a professional market party.

15.2 Debt Trading Practices

Standard LMA documentation is frequently used in the Netherlands, especially for large, complex and/or multiple jurisdiction financing transactions. Sometimes, local adaptations of LMA templates (governed by Dutch Law) are used, alongside other templates, which are usually shorter and less detailed than the LMA forms. Legal mechanics for a transfer may vary, but usually take the form of assignment or a transfer of contract. A transfer can be arranged in such a way that associated benefits of guarantees and security can be transferred with the debt. However, parallel debt structures are commonly used in the Netherlands, which include

a security agent to which security rights are granted, allowing the possibility of transfer of debts without the need to re-establish security rights.

15.3 Loan Market Guidelines

There are no market standard guidelines in the Netherlands, but the LMA forms and Guidelines are frequently applied voluntarily by parties.

15.4 Transfer Prohibition

Restrictions on transferability are common but are not always included in loan documentation, depending on the nature of the deal. Transferability to certain (types of) parties is sometimes excluded while other transfers (to group companies, related parties and/or syndicate members) are often allowed. Restrictions on transferability may not apply in the case of events of default.

15.5 Navigating Transfer Restrictions

In the Netherlands, trusts, synthetic structures, silent contractual third-party participations and other – mostly contractual – strategies are applied to avoid transfer restrictions.

16. The Importance of Valuations in the Restructuring & Insolvency Process

16.1 Role of Valuations in the Restructuring and Insolvency Market

In the Dutch restructuring market, valuations are of importance in the pre-insolvency stage as well as during insolvency proceedings.

Because of the lack of a scheme of arrangement outside insolvency proceedings, Dutch restructurings often take place by the sale of the parent company through the enforcement of a share pledge. The use of valuation reports is not mandatory by law. Nevertheless, in practice independent valuations are key in support of the submission made to the court for its consent to a private enforcement of a share pledge, and to limit the possibilities of third parties claiming that the pledgee has not diligently sold the shares. Valuation reports are also used in the context of the enforcement of a share pledge by way of agreement between the pledgee and the debtor.

In general, in insolvency proceedings, bankruptcy trustees will use independent valuation reports to assess bids from potential purchasers and to substantiate a request to the supervisory judge for the approval of the aimed-for sale of assets.

16.2 Initiating Valuation

Depending on the circumstances, the company, creditors or bankruptcy trustee initiates a valuation.

16.3 Jurisprudence Related to Valuations

The most notable judgment with regard to restructurings implemented by share pledge enforcement is *Schoeller Arca*, which was rendered in 2009. In this case, a share pledge enforcement sale initiated by the senior lenders was approved by the court, even though the mezzanine lenders opposed the enforcement sale. The value break was in the mezzanine debt. Among other things, the approval of the court was based on two independent valuation reports and the fact that there was no unconditional alternative offer. As a result of this judgment, independent valuation reports are a necessity when a restructuring through a share pledge enforcement is contemplated and it is expected that there will be opposition to the enforcement sale. Typically, the valuation will be done based on a going-concern scenario (including discounted cash flow and multiple analysis), but will also include an analysis liquidation scenario.

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