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Bankruptcy, Insolvency & Rehabilitation Proceedings in the
Netherlands

ILN RESTRUCTURING & INSOLVENCY GROUP

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER DUTCH LAW

I. Insolvency proceedings in The Netherlands

There are four law-regulated insolvency proceedings in The Netherlands: bankruptcy (*faillissement*), suspensions of payment (*surseance van betaling*), debt adjustment for natural persons (*schuldsanering natuurlijke personen*) and the confirmation of private plans (*homologatie onderhands akkoord (WHOA)*). Since the scope of this paper focusses on corporate entities, the debt adjustment for natural persons will not be discussed here.

Where a bankruptcy is generally described as a liquidation of the debtor's assets, a suspension of payments is – or at least theoretically – designed for the continuation of the activities of the corporation after a period of moratorium. In theory, the suspension of payment should be ended after restructuring, after which the debtor can commence his business as usual. In practice a suspension of payments often ends in a bankruptcy after which reorganization will proceed in bankruptcy. The reason for this lies with the absence of certain restructuring rules regarding employees (especially with regard to the transfer of a going concern business) in bankruptcy. Obviously, it should be noted that under Dutch law pursuing a bankruptcy with the sole object to get rid of employees, results in abuse of (bankruptcy) law.

Both bankruptcy and suspension of payment are proceedings in which the debtor loses its power of disposition and capacity in relation to its assets.

Contrary to a bankruptcy procedure or a suspension of payment, the WHOA, also known as the *Dutch Scheme*, is a debtor in possession-procedure. It resembles the American Chapter 11-procedure and the UK Scheme. In recent years, we have seen an increase in the use of the WHOA procedure in international restructurings.

The WHOA is a pre-insolvency procedure and allows a debtor to restructure its debts and/or costs outside of the above-mentioned formal insolvency procedures and prevent such procedures (and the destruction of capital that comes with it).

The WHOA is a fast and informal procedure meant for companies that are in core profitable but have come into dire straits due to issues of over indebtedness and/or recurring costs. Those companies are enabled by means of debt- and/or cost restructuring to enforce a private plan on their creditors and/or shareholders to prevent the loss in value that occurs in bankruptcy.

The WHOA is quick, flexible, and free of form. It is a debtor-in-possession procedure and has minimum judicial involvement. A WHOA-plan can be enforced on dissenting creditors or shareholders (cram down). Consent of the debtor is required in the case of a small or medium enterprise debtor.

Both bankruptcy, suspension of payments and the WHOA are opened by a district court. Bankruptcy can be filed either by the debtor itself or requested by a creditor. Suspension of payments can only be filed by the debtor. A WHOA-procedure can be filed by the debtor, a creditor, a shareholder, the debtor's work council or the debtor's workplace representation.

I. Insolvency officers

When opening a bankruptcy, the district court appoints one or more insolvency administrators (*curator*). These administrators are generally speaking attorneys at law, but there is no legal requirement for this capacity. One sees that the district court will sometimes co-appoint a banker, an accountant, or a real estate agent as an administrator with an attorney.

When opening a suspension of payments, the district court appoints one or more insolvency administrators (*bewindvoerder*). Alongside these insolvency administrators, the district court always appoints a supervisory judge (*rechter-commissaris*) who is in charge of supervising the insolvency proceedings and the administrator. The aforementioned insolvency officials in a suspension of payment (*bewindvoerder* and *rechter-commissaris*) usually also serve as an insolvency official in bankruptcy (*curator* and *rechter-commissaris*) if a suspension of payments is converted into a bankruptcy.

In a WHOA-procedure, the debtor can propose a private plan to its creditors and shareholders of it can request the appointment of a restructuring expert (*herstructureringsdeskundige*), who can propose such a plan. If the private plan is proposed by the debtor itself, the district court has the possibility to appoint an observer (*observator*). When the WHO-procedure was filed by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation the court will always appoint a restructuring expert who then is entitled to propose the plan to the exclusion of the debtor.

II. Bankruptcy

A bankruptcy can be filed when the debtor is in a situation where he has stopped paying his due and demandable debts.

In bankruptcy, the debtor loses its power of disposition and capacity in relation to its assets as of 0:00 hours of the day on which the court opens a bankruptcy procedure. During the course of the bankruptcy, this right lies exclusively with the administrator. It is also described as a general attachment to the assets of the debtor in favor of its creditors to be settled by the administrator. As a result, by law creditors can only enforce claims on the debtor by lodging their claim with the administrator and have to await the claim verification procedure. Creditors are prohibited from enforcing actions against the debtor's assets and seizures made prior to opening of the bankruptcy cease to exist.

Excluded from this prohibition are secured creditors who either have a right of pledge or a right of mortgage. They are allowed to act as if the bankruptcy does not exist and can enforce those rights against the debtor's secured assets. Also excluded are creditors to the bankruptcy estate (*boedelcrediteuren*). They can enforce their rights on the bankrupt estate.

The supervisory judge, however, can issue a stay period (*afkoelingsperiode*) stipulating that for a stay period not exceeding two months, each right of third parties, including secured creditors and creditors to the bankruptcy estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy, can only be exercised with his authorization.

Pending lawsuits instituted against the debtor before the opening of the bankruptcy that procure the performance of an obligation from the debtor are suspended by operation of law and will only continue if the obligation is disputed in the verification process.

III. Suspension of payment

The debtor who expects that he will be unable to continue paying its debts can be granted a suspension of (moratorium on) payment.

During the suspension of payment, only unsecured and non-preferential creditors are prohibited from enforcing their claim against the debtor's assets. Creditors of secured claims (holders of right of pledge of mortgage) or preferential creditors (such as the Dutch Tax Authority, employees or other creditors whose claim is preferential by law) can ignore the moratorium and can enforce their rights as if there was no moratorium.

As a result of the granting of suspension of payment, as of 0:00 hours of the day on which the court grants suspension of payment, the debtor can only exercise its power of disposition and capacity in relation to its assets with the cooperation or authorization of the administrator. This is where the suspension of payments differs from a debtor in possession proceeding.

Creditors of unsecured and non-preferential claims are prohibited from enforcing actions against the debtor's assets and seizures made prior to the opening of the suspension of payments cease to exist. Additionally, the district court (and not the supervisory judge, as in bankruptcy) can issue a written order (*afkoelingsperiode*) stipulating that, for a stay period not exceeding two months, each right of third parties, including secured and preferential creditors and creditors to the suspension of payment estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy can only be exercised with his authorization.

In contrast to a bankruptcy proceeding, pending lawsuits are not automatically suspended.

IV. WHOA – the Dutch Scheme

The WHOA is applicable for companies that are in a situation where it is expected that they cannot continue to pay their debts. The procedure can be filed by the debtor itself or by

a creditor, a shareholder, the debtor's work council or the debtor's workplace representation. When the WHOA is filed by anyone else than the debtor, a restructuring expert is automatically appointed by the District Court. A restructuring expert can also be requested when the debtor files for a WHOA. This is often done to give the restructuring plan more objectiveness.

Upon filing, one can choose between a public and a confident variant of the procedure. The public WHOA is listed in Annex A of the Regulation (EU) 2015/848 on Insolvency Proceedings and has therefore automatic recognition in all EU countries (except Denmark and Ireland).

The debtor or – if appointed – the restructuring expert proposes a private restructuring plan to (all or a subset of all) creditors and shareholders where the rights of these creditors of shareholders will be amended. The rights of employees cannot be amended under the WHOA.

During the WHOA-procedure, the debtor has access to different supportive measures to enable restructuring, such as a suspension of bankruptcy, a stay period, a protection of security for new funding and the possibility to end or alter contracts. Contrary to bankruptcy, but similarly to suspension of payments, the rights of employees are protected, and employment contracts cannot be effected by the plan. The district court can be asked to lift pre- and post judgement attachments and for any other necessary tailor-made measures. The District Court can also be asked at an early stage for binding decisions regarding legal issues (such as voting rights, class placements, etc.) to avoid uncertainties later on the procedure.

Creditors (or certain categories of creditors) are put in classes of similarity and vote within this

on the acceptance of the plan. The plan is accepted by a class if 2/3rd-majority of the number of claims or issued capital of the actual voters have voted in favor of the plan.

No dissenting creditor may receive less value than they would have in a bankruptcy situation (best interest of creditors test). The court can be asked for confirmation of the plan if at least one in-the-money class has voted in favor of the plan.

Dissenting classes can be bound (cross class cram down) unless (i) the plan is in breach of the absolute priority rule, (ii) creditors that are small or medium enterprise are not offered an amount in cash that equals 20% of their claim and (iii) the plan lacks a cash exit-possibility for creditors (professional lender excluded).

The voting can take place within a period of eight days and electronic voting is allowed. The restructuring plan becomes binding, after confirmation by the court. A confirmation decision by the court takes place within eight to fourteen days after acceptance of the plan and the confirmation cannot be appealed. In theory, the procedure could be completed within a period of three to five weeks.

In its short existence, The WHOA already has proved to be a quick, flexible and (therefore) very effective tool for reorganization of debts and costs.