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Law and Practice

Contributed by Florent

Contents

Florent was launched in 2017 by partners from BLIX and Höcker Advocaten, and now consists of about 35 lawyers. It has a strong focus on corporate/M&A, commercial and corporate litigation, banking and finance, and insolvency and restructuring. The firm employs real estate, employment and intellectual property experts in support of its focus areas, so is able to assist clients throughout a company's life cycle, from start-up to investment round, from acquisition to litigation, and from financial distress to exit. The Insolvency team is appointed by the courts as bankruptcy trustees or administrators in the largest bankruptcies in the Netherlands. It also advises companies in distress, lenders, borrowers and financial institutions, as well as other creditors and counterparties, on all aspects of debt recovery, restructuring and insolvency. In addition to the team's strong roots in domestic practice, the firm has excellent capabilities for and experience in dealing with cross-border/international and complex cases (including INSOL Fellows). Florent is the only major firm in the Netherlands with a substantial asset recovery practice, so can assist with cross-border asset recovery, fraud litigation (prosecuting civil claims for fraud) and financial fraud investigations.

Authors

Kees van de Meent is a co-managing partner of the firm, and co-head of the Insolvency and Restructuring team. He is active in restructuring and insolvency, as well as asset tracing and recovery, and has been involved as bankruptcy trustee or adviser in various high-profile and complex insolvencies and restructurings. Kees is the exclusive Dutch member of FraudNet, the prestigious global network operating under the International Chamber of Commerce (ICC) that was launched in 2004 to provide fraud victims with an all-embracing global service to respond to fraud. He is also Chairman of the Asset Recovery Chamber of the Institute for Financial Crime (IFFC), the Netherlands national institute for innovation of investigation, co-operation and education in the field of financial crime.

Hanneke De Coninck-Smolders is a partner of the firm, and co-head of the Insolvency and Restructuring team. She also has extensive experience in the areas of banking, financing and security rights. Hanneke is regularly appointed by the Amsterdam court as bankruptcy trustee or administrator in high-profile and complex insolvencies. She also works for companies facing financial difficulties or insolvency, or their stakeholders. She has significant experience with pre-packs, both as counsel to the company/debtor and as court-appointed (undisclosed/'silent') administrator. In addition, she regularly represents clients in major (corporate/commercial) litigation.

Rob van den Sigtenhorst is a partner at the firm, and head of the Banking and Finance team. He has extensive experience in high-profile, complex, cross-border corporate and multi-financier restructurings and insolvencies, representing debtors, lenders and other (counter-)parties. He combines in-depth knowledge of Dutch, US and international insolvency law with his understanding of (corporate) finance, corporate litigation and (director) liability issues. Rob is heavily involved with the efforts of the Dutch legislator to create new Dutch restructuring legislation: the Act on the Confirmation of Private Restructuring Plans (ACPRP).

1. Market Trends and Developments

1.1 The State of the Restructuring Market

In the Netherlands, the number of insolvencies has decreased every year since 2013. From a peak of 8,376 bankruptcies in that year, the number of bankruptcies fell to 3,290 in 2017. This decline is mostly due to the gradual but robust recovery of the Dutch economy and the corresponding increase in investments and exports. The Netherlands' GDP increased by 3.1% in 2017, as compared to 2016, while unemployment figures have shown a rapid downward trend, approaching the potential minimum of 3.9% in March 2018.

The number of bankruptcies has decreased in almost all sectors; most significantly, however, in the financial sector. The financial sector in the Netherlands is traditionally large, as the country is generally recognised as a favourable and stable business and tax environment. During the financial crisis, there were a significant number of insolvency cases, but the sector has since been restructured and returned to stability. In wholesale and retail, the number of companies that went bankrupt also declined in 2017, in this case by over 25%, while in the years before there was a series of major bankruptcies of retail chains, as well as numerous less significant insolvencies. Here, the improvement is partly due to the continuing recovery of the Dutch housing market, which has led to improved revenues for DIY and furniture stores, among others. As a result of low mortgage interest rates in the Netherlands, in 2017 a record 241,860 houses were sold, the highest number since the Dutch Statistics Agency (*Centraal Bureau voor de Statistiek*) started measuring.

Nevertheless, in 2017 most bankruptcies occurred in the wholesale and retail sector, followed by the financial institutions and business services sectors. Retailers still face financial difficulties due to stiff competition in retail in general, combined with the rise of internet shopping and often substantial fixed expenses, such as employees and lease agreements. (Private) healthcare companies (eg, hospitals) also appear to be at risk as a result of severe budget cuts over the past few years.

The number of insolvencies is likely to decrease further in 2018 as the Dutch economy continues to benefit from worldwide economic growth. However, there are a couple of risks that could stop the current downward trend. The anticipated end of the European Central Bank's expanded asset purchase programme (APP) might exert upward pressure on interest rates in the Netherlands and put strain on the Dutch economy. An increase in interest rates will be generally problematic for companies substantially financed with debt, but is expected to cause difficulties in particular for those companies which have been teetering on the brink of a restructuring scenario, only able to cling on by the grace of the friendly debt environment (both as to interest rates and liquidity). Another factor that could become more and more problematic is the current low unemployment rate. Companies already face serious challenges in filling vacancies, putting upward pressure on wages. Increased labour costs for companies could depress economic growth. The outcome of the Brexit discussions will also be significant for the Dutch economy, given its openness to the EU and world markets, and its position as an international logistics and services hub.

1.2 Changes to the Restructuring and Insolvency Market

In line with international developments (eg, the EU Commission's draft directive), the Dutch legislature is taking steps to install restructuring measures, both pre-insolvency and post, and to prevent bankruptcy fraud. A bill on pre-packs, the Continuity of Companies Act I (*Wet continuïteit ondernemingen I*), is currently in the last stage of parliamentary approval, pending approval by the upper chamber (*Eerste Kamer*). A revised draft of the Act on the Confirmation of Private Restructuring Plans or ACPRP (*Wet homologatie onderhands akkoord*) is expected to be presented to parliament shortly, which could mean it will come into effect in 2019. The ACPRP is loosely inspired by the English Scheme of Arrangement and the United States Chapter 11 proceedings, and will introduce debt restructuring compositions (ie, accords/restructuring plans/plans of reorganisation) outside of insolvency but it will provide significantly more flexibility, cost-effectiveness and speed than the foreign Actson which it is based. The ACPRP is especially expected to have a major impact on the restructuring market, as it will provide companies with an effective tool to facilitate restructuring outside of formal bankruptcy proceedings, while remaining in possession. Pre-packs are already a long-established practice in the Netherlands, but the new Act could provide them with a formal framework. For more on both Bills, see **6 Statutory Restructurings, Rehabilitations and Reorganisations**.

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

2.1 Overview of the Laws and Statutory Regimes

Dutch law has the following insolvency proceedings:

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

In addition, there are special proceedings for banks, insurance companies, and investment firms. The first three procedures are entirely governed by the Dutch Bankruptcy Act; for the others, the Financial Supervision Act (*Wet op het Financieel Toezicht*) contains applicable provisions as well.

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

Bankruptcy

Bankruptcy (*faillissement*) is a liquidation proceeding aimed at monetising the assets of the bankrupt company (estate) and distributing the proceeds thereof to the creditors. It is possible to file for bankruptcy when a debtor is *"in the state that it has ceased paying its debts"* and there are at least two creditors, one of which has a due and payable claim that remains unpaid. This is an open norm: the state of having ceased payments can be disproved even if the above criteria are met. Both the debtor itself as well as creditors may file.

When a debtor is declared bankrupt, the district court appoints a bankruptcy trustee (*curator*) and a supervisory judge (*rechter-commissaris*). The bankruptcy trustee is in charge of the administration and liquidation of the bankrupt estate under the supervision of the supervisory judge. The bankruptcy trustee will almost always be a lawyer and member of the local Bar association. For certain acts, such as the termination of lease agreements and employment agreements and the transfer of the whole (or part) of the business as a going concern, the bankruptcy trustee requires the authorisation of the supervisory judge. A committee of creditors may be appointed, but this is not usually done, except for in larger/more complex bankruptcies.

Although it is a liquidation proceeding, bankruptcy can be used as a restructuring tool, including for a (pre-packaged) sale and restart of the business of the bankrupt company or the offering of a composition (ie, an accord/restructuring plan/plan of reorganisation) to the creditors. The latter can also be done in international/cross-border cases, to implement (give effectiveness to) a foreign/global restructuring plan for local Dutch debtors and their assets and liabilities.

Suspension of Payments

Suspension of payments proceedings (*surseance van betaling*) are meant as a temporary relief against the non-preferential creditors of the debtor. The goal of a suspension of payments is the reorganisation and continuation (in whole or in part) of viable businesses which have come into financial distress, by offering a composition (ie, an accord/restructuring plan/plan of reorganisation) to the creditors.

Only the debtor itself may file for suspension of payments. A debtor can do so when it foresees that it will not be able to continue meeting its debts as they fall due. A provisional suspension of payments is automatically granted by the court on filing of the application and can later be declared to be definitive after a hearing has been held where a court-appointed administrator (*bewindvoerder*), a supervisory judge and the company were present. Creditors are heard and, if too many object, no final suspension can be granted leading to bankruptcy. During the suspension of payments, the business of a company is managed by the management as usual, but for acts binding/impacting the estate, the co-operation (approval, authorisation) of the court-appointed administrator is required. A suspension of payments can be converted into a bankruptcy by the court at its own initiative or at the request of the supervisory judge, the court-appointed administrator or one or more creditors. As a straightforward restructuring tool, suspension of payments is rarely successful, as it is outdated, provides only for a short stay, cannot bind preferential and secured creditors, and also otherwise lacks many modern tools and features. Nevertheless, it can be used creatively in certain situations; in international/cross-border cases, suspension of payments has been used successfully as a form of protection and/or to implement (give effectiveness to) a foreign/global restructuring plan for local Dutch debtors and their assets and liabilities.

Statutory Debt Restructuring for Natural Persons

Statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*) applies only to natural persons. It is possible to apply for a statutory debt restructuring when it is reasonably foreseeable that the natural person will not be able to pay his or her debts as they fall due, or if he or she is in a situation in which he or she has ceased to pay his or her debts as they fall due. When certain conditions have been met, the natural person will eventually 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

In the Netherlands, there are no formal tests, such as solvency, liquidity or other balance sheet requirements, and hence no formal obligation for directors or shareholders to file for bankruptcy or other formal insolvency proceedings at any time. However, liability concerns (akin to 'wrongful trading' concepts, as well as personal liability for certain taxes/social security claims) may lead to managing directors filing at some point.

2.4 Procedural Options

A company in financial distress may file for bankruptcy proceedings or suspension of payments. The management board is only able to file for bankruptcy after being instructed to do so by a general meeting of shareholders, unless the articles of incorporation provide otherwise. The management board may, however, file for suspension of payments without being instructed to do so by a general meeting of shareholders; in practice, this is used to circumvent the limitation on filing for bankruptcy. In the case of a large dual-board company (*structuurvennootschap*), the supervisory board will have to consent to the management board filing for either bankruptcy or suspension of payments proceedings. For 'large' entities under the Companies Act, the supervisory board has a right of prior approval for filing either of the two in-

solvency proceedings. A company's articles may also contain provisions in this respect.

2.5 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings

Since there is no obligation for a company to commence formal insolvency proceedings at any stage, there are no direct liabilities or penalties for a company and/or its officers, directors and/or owners for not (timely) commencing insolvency proceedings. However, if a company is eventually declared bankrupt, the bankruptcy trustee may hold supervisory and managing directors liable for damages – or in some cases the entire deficit in the estate – if they "manifestly improperly fulfilled their duties", amounting to personally reproachable conduct. This includes, among other things, in the case of 'wrongful trading' – continuing the company for too long, entering into obligations on behalf of the company when the directors knew or should have known that bankruptcy was imminent, selective (non-)payment, and (fraudulent) preference. If the company did not timely file its annual accounts, there is an irrebuttable presumption that there was manifestly improper management by the managing directors, and a rebuttable presumption that such improper management was an important cause of the bankruptcy. Individual creditors or other parties may also hold (managing/supervisory) directors liable on comparable grounds (but without any statutory presumptions). Directors may further become personally liable for certain taxes left unpaid by the company.

2.6 Ability of Creditors to Commence Insolvency Proceedings

Creditors may file for the bankruptcy of a debtor when the company is *"in the state that it has ceased paying its debts,"* whereby there have to be at least two creditors, one of which has a due and payable claim that remains unpaid. Further, it is an open norm: the state of having ceased payments can be disproved.

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

2.7 Requirement for Insolvency to Commence Proceedings

A company can be declared bankrupt when it is *"in the state that it has ceased paying its debts,"* whereby there have to be at least two creditors, one of which has a due and payable claim that remains unpaid. Further, it is an open norm: the state of having ceased payments can be disproved. There is, however, no formal requirement to file at any time (but see **2.5 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings**). In order to be able to file for suspension of payments, a company must foresee that it will not be able to continue paying its debts. Also here, there is no formal filing requirement.

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 Dutch Financial Supervision Act provides for separate proceedings for these institutions prior to bankruptcy: the interim procedure (*noodregeling*) and certain intervention measures. 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. The Dutch Financial Supervision Act contains special provisions and powers for the minister of finance regarding a financial company in distress if it immediately and severely threatens the stability of the financial system. Banks and insurance companies are also subject to European legislation such as, for banks, the EU regulation on the single resolution mechanism (2014/806/EU). The measures discussed above are primarily aimed at restructuring a financial institution; the Bankruptcy Act contains specific provisions for the bankruptcy of banks, insurance companies and investment firms.

There are no specific statutory restructuring or insolvency regimes for companies in other sectors.

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 proceedings, due to the far-reaching consequences of a bankruptcy or suspension of payments, plus the often disappointing outcome – especially for unsecured creditors – and the risk of loss 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 their attitude depends to a great extent on the circumstances of the case (eg, the extent to which their position is covered by security rights, guarantees or sureties, the prospects of the underlying business, and the viability of the restructuring plan/efforts of management). Since bankruptcy or suspension of payments means near-total loss of control to a court-appointed bankruptcy trustee or administrator, and relatively rigid limitations on the ability to continue the business as a going concern and on restructuring options, it normally entails potentially large loss of value. At the same time, under current law, all creditors must consent in principle to

the terms of an out-of-court restructuring; only in rare cases is court-sanctioned cramdown on creditors possible.

In view of these challenges, as well as international developments, such as the European Commission's proposal for a Restructuring Directive, the Dutch legislature has moved to introduce the Act on the Confirmation of Private Restructuring Plans (ACPRP). Provided that certain conditions are met, a restructuring outside of bankruptcy will no longer require the unanimous consent of all (classes of) creditors of the company, with only limited grounds for dissenting creditors to appeal the confirmation by the court of a restructuring plan that is adopted by the requisite majority(ies) of creditors. The process will also leave the debtor-in-possession, as well as being flexible, fast and comparatively inexpensive. Hence, it is expected that the ACPRP will, once introduced (expected in 2019), significantly boost the number of restructurings outside of formal insolvency proceedings in the Netherlands. See **6 Statutory Restructurings, Rehabilitations and Reorganisations** for a more in-depth discussion of the upcoming ACPRP restructuring legislation.

In view of the above, there is no obligation under Dutch law for mandatory consensual restructuring negotiations to take place before formal insolvency proceedings are commenced – although the current draft of the ACPRP presumes that parties do try to avoid formal proceedings as far as possible, through first trying to negotiate to receive an out-of-court restructuring. Dutch law has no formal requirements obliging directors to file for bankruptcy if certain criteria are met, or at any specific time. However, there may be liability risks for directors or affiliated companies around not filing in time. If a company is eventually declared bankrupt, the bankruptcy trustee may hold supervisory and managing directors liable for damages – or in some cases the entire deficit in the estate – if they manifestly improperly fulfilled their duties, amounting to personally reproachable conduct, among other things, in the case of 'wrongful trading' – continuing the company for too long, entering into obligations on behalf of the company when the directors knew or should have known that bankruptcy was imminent, selective (non-) payment, and (fraudulent) preference. If the company did not timeously file its annual accounts, there is an irrebuttable presumption that there was manifestly improper management by the managing directors, and a rebuttable presumption that this improper management was an important cause of the bankruptcy. Individual creditors or other parties may also hold (managing/supervisory) directors liable on comparable grounds (but without any statutory presumptions). Directors may further become personally liable for certain taxes left unpaid by 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 market participants in restructuring cases.

3.2 Typical Consensual Restructuring and Workout Processes

Standstill agreements, default waivers or similar agreements as part of an (initial) informal and consensual restructuring process are not uncommon in the Netherlands. Many of the practices common in larger/more complex restructurings are followed or mirrored (with local adaptations), especially in larger restructurings. A standstill agreement generally contains obligations for the company aimed at, for example, providing the (senior) lenders with information regarding the financial situation of the company, protecting or enhancing 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 consisting of creditors is appointed in the early stages of the restructuring process to guide the restructuring. It should be noted that pending the introduction of the ACPRP (see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**), any restructuring outside formal insolvency proceedings requires the consent of all parties involved, with no truly effective in-court restructuring process to cram down classes of dissenting creditors or parts of them. See **6 Statutory Restructurings, Rehabilitations and Reorganisations** for a more in-depth discussion of the upcoming ACPRP restructuring legislation.

3.3 Injection of New Money

New money may be injected by various stakeholders, such as current or new shareholders or (secured) creditors. Under Dutch law, there is no real possibility either in or outside formal insolvency proceedings to grant providers of new money any super-priority liens or rights; new money providers may stipulate in remsecurity rights (liens) as a condition for providing their money, but by doing so can only jump ahead of unsecured creditors, not existing secured or otherwise preferred creditors (except with their consent). There may also be concerns as to the (bankruptcy/preference) hardness of such security.

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

As a general rule a creditor is entitled to act in its own interest, whereby it may be limited by other stakeholders' interests in accordance with the general Dutch law principles of reasonableness and fairness (*redelijkheid en billijkheid*). In principle, a creditor may decline any proposal for an out-of-court restructuring, but in exceptional cases, creditors may be forced to co-operate by a court order. As discussed in section **12 Duties and Personal Liability of Directors and Officers of Financially Troubled Companies**, directors are under obligation to act in the interest of the company and all stakeholders involved, such as the shareholders, creditors, employees, customers, suppliers and other third parties, but as the company moves further into the realm of bankruptcy, the directors should increasingly take note of and protect the interests of the creditors.

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

Under current law there must in principle be consensus between all creditors or stakeholders in order for an out-of-court restructuring to be effective. Most creditors will co-operate with such a restructuring out of necessity when the only other option is (liquidation) bankruptcy or suspension of payments, except when they expect their (recovery) position will be better in insolvency proceedings as a result of security rights, guarantees and/or sureties.

There is currently no statutory provision that enables a cram-down of creditors. However, in exceptional circumstances, a creditor can be forced to co-operate by a court order. The proposed Act on the Confirmation of Private Restructuring Plans (ACPRP) seeks to introduce compulsory composition (ie, accord/restructuring plan/plan of reorganisation) outside formal insolvency proceedings, including the possibility of intra-class and cross-class cramdowns. A composition under the proposed ACPRP will be subject to court confirmation to be universally binding (also on dissenters). See **6 Statutory Restructurings, Rehabilitations and Reorganisations** for a more in-depth discussion of the upcoming ACPRP restructuring legislation.

4. Secured Creditor Rights and Remedies

4.1 Type of Liens/Security Taken by Secured Creditors

Under Dutch law, an in rem security right may be established on all property which is not non-transferable. A right of mortgage (*hypotheek*) may be established on registered property (*registergoederen*), such as real estate, aircraft and ships. Security on all other transferable property, such as equity shares, movable assets, intellectual property, receivables and bank accounts, may be established by way of a right of pledge (*pandrecht*).

A right of pledge on non-bearer shares (*aandelen op naam*) is created by executing a deed before a civil law notary. The acknowledgement of the right of pledge by the company that has issued the shares is required for the pledge to have full effect. The articles of association of a company may prohibit the creation of a pledge over the shares of the company. The deed of pledge may provide that the voting rights associated with the pledged shares are (conditionally, for instance, in the event of default) transferred to the pledgor, again 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 movable assets.

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

With regard to receivables, it is possible to create either a disclosed or a non-disclosed right of pledge. A disclosed right of pledge requires both a privately executed (or notarial) deed of pledge and notice to the debtor. For a non-disclosed right of pledge, a deed of pledge must either be executed before a Dutch civil law notary or a privately executed deed of pledge must be registered with the Dutch tax authorities. Future receivables may only be pledged to the extent that they originate from a legal relationship that already existed at the time the right of pledge was created. For this reason, it is market practice for a deed of pledge on receivables to contain an obligation for the borrower to execute supplemental deeds of pledge regularly and/or on request. There is a draft bill (*Wet opheffing verpandingsverboden*) in consultation which, in short, prohibits restrictions on transferability for debts between companies which are transferred for financing purposes.

A pledge over bank accounts is created as a pledge over the receivables owed by the bank to the account holder. In general, such right of 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 must be registered with the Dutch tax authorities. Although it is not required that the right of pledge be registered in the relevant IP register in order to be valid, such registration is required in order 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

If a company defaults on the payment of its secured obligations, security rights may be enforced. The security holder has the right to summary execution (*parate executie*), meaning the secured property can be sold, with the proceeds being available for payment of the claim of the security holder. This applies both outside and during insolvency proceedings. Under Dutch law, secured creditors are in principle able to enforce their security rights *"as if there were no insolvency proceedings"* – with certain possible (temporary) limitations discussed below.

In the case of a right of mortgage, secured property may be sold publicly in an auction presided over by 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. In the case of a pledge, the pledgee is entitled to sell the pledged property at a public auction, but 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 that the court permit the pledged property to 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. This may change to some extent with the introduction of the ACPRP; see **6 Statutory Restructurings, Rehabilitations and Reorganisations**.

Secured creditors are not subject to an automatic stay in Dutch insolvency proceedings, but the court can impose a cooling-off period (*afkoelingsperiode*) of up to two months, to be extended only once by another period of up to two months. During the cooling-off period, rights of third parties to take recourse against the assets of the bankrupt estate or to hand over assets which are in the possession of the bankrupt debtor/the bankruptcy trustee may only be exercised with the authorisation of the supervisory judge. Such authorisation is rarely granted. A bankruptcy trustee may, if the (expeditious) liquidation of the estate would otherwise be unduly held up, impose a reasonable term upon a secured creditor within which to complete enforcement of its rights, failing which, the bankruptcy trustee may take over such enforcement. While the secured creditor remains entitled to the relevant proceeds, these then flow through the estate, seriously diminishing any return – in addition to the loss of control by the secured creditor over the enforcement and the creditor having to wait for any payout until the bankruptcy trustee has progressed the liquidation of the estate to the stage of making distributions.

4.3 The Typical Timelines for Enforcing a Secured Claim and Lien/Security

A secured creditor may in principle enforce its rights *"as if there were no bankruptcy,"* meaning broad discretion in the manner and timing of enforcement, but in a bankruptcy, the court can impose a cooling-off period (*afkoelingsperiode*) and/or the bankruptcy trustee may set a reasonable term for the enforcement to be completed (see **4.2 Rights and Remedies for Secured Creditors**). The period of time that is reasonable for enforcement is determined according to the facts and circumstances of the specific situation. The timeline for receivables is typically shorter than, for example, immovable property. Secured creditors may fight the setting of a term (eg, on the grounds that it is not reasonable), but this is associated with risk: if the creditor loses, he or she will need to show timely enforcement or face potentially severely reduced proceeds (see **4.2 Rights and Remedies for Secured Creditors**).

4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors

There are no special procedures or impediments in Dutch insolvency proceedings that apply to foreign secured creditors. The enforcement of foreign security rights over (shortly put) Dutch assets is possible in principle, but entails a number of potentially complex questions of international private/property/security rights law.

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, subject to a possible cooling-off period and/or a reasonable term set by the bankruptcy trustee for the enforcement to be completed. If they do, secured creditors will not have to pay any estate costs or wait for the bankruptcy to reach its conclusion in order to be able to collect their proceeds (see **4.2 Rights and Remedies for Secured Creditors**).

5. Unsecured Creditor Rights, Remedies and Priorities

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

In formal insolvency proceedings (bankruptcy or suspension of payments), the following classes of pre-bankruptcy or pre-suspension of payments creditors can be distinguished:

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

As secured creditors can in principle act as if there were no bankruptcy (see **4.2 Rights and Remedies for Secured Creditors**), they may have priority over the proceeds of specific assets. Certain (tax) preferences may, however, interfere with this in certain circumstances. With respect to the general assets of the debtor (not subject to in rem security or similar rights), preferred creditors generally outrank unsecured creditors. Preferences may be general or only relate to certain assets.

5.2 Unsecured Trade Creditors

In the Netherlands, a restructuring process will typically involve only the (senior) lenders/financial creditors of a company (such as banks and shareholders). Unsecured trade creditors are generally kept whole in a restructuring process, to allow the business to continue operating as a going concern. It should be noted, among other things, that ipso facto clauses under current legislation function without limitation (this may change under the ACPRP), that there is no automatic stay, and that there is as yet no effective in-court restructuring process to cram down dissenting minorities (see also **6 Statutory Restructurings, Rehabilitations**

and Reorganisations for the upcoming ACPRP legislation). Exceptions may be when a certain class of unsecured/trade creditor is at the root of the issues facing the business (eg, landlords in retail businesses with excessive rental costs).

5.3 Rights and Remedies of Unsecured Creditors

In a restructuring context, unsecured creditors have various rights and remedies that are generally available to creditors. Under certain circumstances, unsecured creditors may in addition be able to invoke retention of title (*eigendomsvoorbehoud*), rights of suspension (*opschortingsrecht*), set-off, or termination/rescission, or claim back unpaid goods (*recht van reclame*). Creditors may further levy pre-judgment attachments (*conservatoir beslag*) against or request the bankruptcy of their debtor. In bankruptcy, some unsecured creditors can as a matter of fact force the bankruptcy trustee or administrator to pay all their outstanding claims (as administrative claims) to the extent that they are an essential supplier (*dwangcrediteuren*), eg, needed to continue or wind down the business. Creditors are generally entitled to act in their own interest, but they may be limited by other stakeholders' interests in accordance with the general Dutch law principles of reasonableness and fairness (*redelijkheid en billijkheid*).

In bankruptcy, creditors may request the supervisory judge to instruct the bankruptcy trustee to perform, or refrain from performing, a specific act; they may also vote against a proposed composition plan. During a suspension of payments, unsecured creditors may moreover vote against granting a definitive suspension of payments. In the case of insolvency, creditors can no longer attach assets of the debtor (and pre-bankruptcy attachments lapse), since insolvency proceedings qualify as a general attachment of all assets of the debtor. Unsecured creditors can file their claims with the bankruptcy trustee or the court-appointed 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 from a debtor by the attachment of assets will have to obtain leave from a 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 is in principle liable for the damages incurred by the debtor due to the attachment. Once the leave is obtained, a bailiff can be instructed to attach the assets. Besides pre-judgment attachment against a 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 converts into attachment in execution (*executoriaal beslag*). The creditor is then entitled to enforce on the attached assets and be paid out of the proceeds.

5.5 Typical Timeline for Enforcing an Unsecured Claim

Outside insolvency proceedings, if an unsecured claim is eligible for summary proceedings, a judgment can be obtained within a few weeks. For an unsecured claim to be eligible for summary proceedings, the claim must, in short, be undisputed or easily proven. If an unsecured claim is not eligible for summary proceedings, regular court proceedings can be initiated. Such proceedings generally take between six months and two years in the first instance. Under certain circumstances, Appeal and Supreme Court appeal are possible, which can take months up to years.

In insolvency proceedings, the period of time for payment of a claim on unsecured debtors by the bankruptcy trustee, if any, depends greatly on the circumstances of the bankrupt estate. This could take several months or even many years. Between one and two years might be average. Interim payments are possible.

5.6 Bespoke Rights or Remedies for Landlords

Due to the fact that Dutch law does not provide specific protection against termination of leases in restructuring situations (with ipso facto clauses generally effective currently, but see **6 Statutory Restructurings, Rehabilitations and Reorganisations** for possible changes under the ACPRP), a landlord often has a strong position. In order for a restructuring to be successful, a company will typically need the consent/co-operation of the landlord, both to avoid termination and to transfer, amend or novate any lease to the extent needed.

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 relating to the period before bankruptcy (if any) qualifies as an unsecured claim, while the claim of the landlord with regard to the termination period qualifies as a direct claim against the estate (an administrative claim or *boedelvordering*).

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

Under Dutch law, no special procedures or impediments or protections apply to foreign creditors.

5.8 The Statutory Waterfall of Claims

Dutch law does provide for an order of priority of claims:

- first (in insolvency proceedings), estate or administrative claims;
- second, preferential claims;
- third, non-preferential claims; and
- fourth, subordinated claims.

Secured creditors are in principle not part of this order due to the fact that they can act as if there were no bankruptcy: see **4.2 Rights and Remedies for Secured Creditors**.

5.9 Priority Claims

As noted in **5.8 The Statutory Waterfall of Claims**, estate or administrative claims are first in the order of payment, and these include the salary of and fees and debts incurred by the bankruptcy trustee (*boedelvorderingen*). Claims of the Dutch tax authorities and the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*) qualify as preferential claims. There are also other statutory general or specific preferences.

5.10 Priority Over Secured Creditor Claims

In principle, secured creditors have priority over the proceeds of the specific assets over which they have security, without having to share in the estate costs or being otherwise subject to priority claims, as secured creditors are entitled to act as if there were no bankruptcy (see **4.2 Rights and Remedies for Secured Creditors**). An important exception to this rule is when the pledgee holds a non-possessory pledge over (certain) inventory on the debtor's premises. The Dutch tax authorities have a priority claim with respect to such assets. Furthermore, secured creditors may lose the right to enforce without regard for the insolvency; see **4.2** Rights and Remedies for Secured Creditors above.

6. Statutory Restructurings, Rehabilitations and Reorganisations

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

Dutch law does not currently provide any statutory proceedings to reach and effectuate a restructuring/reorganisation plan or agreement outside of formal insolvency proceedings. Compositions (ie, accords/restructuring plans/plans of reorganisation) which also bind dissenting creditors can currently only be adopted under the Dutch Bankruptcy Act when insolvency proceedings (bankruptcy, suspension of payments) have been opened. However, bankruptcy or suspension of payments mean near-total loss of control to a court-appointed bankruptcy trustee or administrator, plus relatively rigid limitations on the ability to continue the business as a going concern and on restructuring options, so they are perceived as value-destructive by creditors and other stakeholders. Outside of bankruptcy, in principle the consent of all parties involved is required (with only rare possibilities for court intervention) for any restructuring plan.

In September 2017, the Dutch legislature published draft legislation to overcome these issues: the Act on the Confirmation of Private Restructuring Plans (ACPRP) or what has been referred to as the 'Dutch Scheme of Arrangement'. The ACPRP is aimed at providing the Netherlands with a strong, effective, flexible, cost-efficient, fast and modern restructuring tool to save viable enterprises. It will do so by removing uncertainty, delay, imbalances between stakeholders, and holdout/nuisance positions generally. A revised draft is expected in the second half of 2018, which could mean the ACPRP passing through the legislature and coming into force in the first half of 2019.

Based on the current draft, the ACPRP will allow debtors, and under certain circumstances creditors, to offer a composition (ie, an accord/restructuring plan/plan of reorganisation) to any or all classes of creditors and shareholders, which upon approval by the requisite majority and court confirmation would be generally binding, including upon dissenting creditors or shareholders. Inspired by the UK Scheme of Arrangement and the US Chapter 11 proceedings, it takes those features that work best and avoids certain pitfalls.

Private Restructuring Plan

The ACPRP will, according to the current public draft, have the following key characteristics:

- *Eligible debtors* – Businesses, regardless of whether they are organised as a company/legal entity or not, and self-employed private citizens are eligible debtors. If debtors foresee that they will be unable to continue paying their due debts, they may offer an 'accord' (ie, a composition or restructuring plan: the Plan).
- *Included creditors, classes, class formation* – The debtor is at liberty to include any or all creditors or shareholders in the restructuring, but anyone whose rights are to be altered in any way must be included in the Plan. Thus, any party left out of the Plan retains its rights unaltered. There is one general exclusion – employees. Their rights cannot be affected in any way by a Plan under the ACPRP (unless of course these are the rights of individuals who all consent voluntarily). Furthermore, under the ACPRP there must be 'reasonable grounds' for leaving anyone out of the Plan, which translates as a justifiable (business) reason for doing so. This flexibility in targeting the Plan makes it possible to, for instance, entirely leave out trade creditors, as is usual internationally in business restructurings. Creditors and shareholders may be divided up into classes. In many cases this will be necessary: creditors/shareholders whose rights or interests are so dissimilar that it cannot be said they are in a similar position, may not be included in the same class. This does mean that class formation is very flexible and largely up to the debtor, as long as the conditions set out above are met.
- *Nature and flexibility of the Plan* – A Plan is in principle considered to be a contract between the debtor and the relevant creditors/shareholders. Its contents and form are in principle free, making the Plan a very flexible, versatile instrument. Hence the potential use of ACPRP Plans includes, but is not at all limited to, the usual restructuring

solutions, such as debt amendments or exchanges, debt for equity swaps, fresh money injections with squeeze-out of shareholders, etc.

- *Plan confirmation and cramdown* – The ACPRP makes it possible to have a Plan declared binding on all those affected, including dissenters: 'homologation' as it is known in the ACPRP, or confirmation as it is most commonly known internationally. The ACPRP contains both intra-class cramdown and cross-class cramdown. A Plan will be confirmed if at least one class voted in favour. Intra-class cramdown: a Plan can be confirmed over the objections of dissenters within a class, and declared binding on them, if two thirds in amount of that class voted in favour. Cross-class cramdown: a Plan can be confirmed over the dissent of entire classes (ie, within which less than two thirds in amount voted in favour). Notably, there is no criterion that any number of creditors must have voted in favour. A Plan will be confirmed by the court if the criteria above are met and the debtor followed due process in informing the involved stakeholders, unless opposing creditors or shareholders invoke any of the grounds listed in the statute for not confirming. There are limited grounds on which individual nay-sayers can act against confirmation, including notably, the best interest of creditors test: a Plan which provides for a lower distribution than the creditor/shareholder would have received in a liquidation bankruptcy is not confirmable. Feasibility is another important test. Opposing creditors or shareholders who are part of a class that voted against the Plan – and which are thus to be crammed down – may in addition rely on certain strong protections of their economic and other interests, including the absolute priority rule: a class may not get a haircut under the Plan if there is any class of creditors or shareholders whose claims rank lower which is to receive or retain any rights under the Plan. There is a new money exception and a gifting exception may be included in the next draft as well. Additional protections included in the ACPRP are a 'not more than 100% rule' and a 'no unfair discrimination rule'.
- *Other relevant useful features* – The ACPRP will provide a safe haven for interim financing. Furthermore, it will allow restructuring of guarantees and suretyships provided for the debts of the ACPRP debtor and executory contracts. An ACPRP process will, once underway, be protected against the functioning of ipso facto clauses. While there is no automatic (worldwide) stay, the debtor may request that the court grant a moratorium against individual enforcement actions by creditors, including filings for involuntary (liquidation) bankruptcy. Finally, the court may at the request of the debtor (or on its own initiative) order any such relief as necessary to protect the interests of the creditors or shareholders. Giving the court such a strong power to protect the restructuring was inspired by the famous § 105(a) US Bankruptcy Code.

Pre-pack

In addition to the scheme of arrangement, there is draft legislation aimed at implementing a formal pre-pack (Continuity of Companies Act I). This would make it possible for a debtor in financial difficulty to request the appointment of a silent bankruptcy trustee (*beoogd curator*) in order to attempt a silent restructuring of its business through a pre-pack. The appointment of a prospective (or 'silent') bankruptcy trustee – and a prospective supervisory judge – is not made public. The goal is to prepare a sale of assets, without publicity disruptive to the business, and to reach agreement with a buyer and effectuate this once formal insolvency proceedings are opened by the prospective bankruptcy trustee, who is by then formally appointed as the bankruptcy trustee.

A number of courts in the Netherlands have appointed silent bankruptcy trustees in the past, even though there was no statutory basis for this practice at the time. This practice was challenged mainly by labour unions and their members. Pre-packs (with or without the appointment of a prospective bankruptcy trustee and also otherwise, in various shapes and forms) have been a long-standing practice in the Netherlands, but, before the currently proposed act, without legislative or other formal basis.

In view of (most importantly) challenges by labour unions and their members, and taking into account the European Court of Justice Smallsteps case, the Continuity of Companies Act I has been held up in the legislative process and it is questionable whether, or when, it will come into force (in the current form). The Smallsteps case can be read as critical of certain variants of implementing a pre-pack under Dutch law; however, Dutch courts so far appear to read the ECJ's judgment restrictively and uphold pre-packs in other cases.

6.2 Position of the Company During Procedures

Since statutory proceedings to reach and effectuate a financial restructuring/reorganisation plan or agreement outside of insolvency proceedings do not yet exist in the Netherlands, the company usually has a facilitating/leading role in discussions with its lenders, creditors and other stakeholders. It appears that the developed practice of courts to appoint a silent bankruptcy trustee (*beoogd curator*) has diminished in anticipation of the possible introduction of the Continuity of Companies Act I. Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), a debtor can request the court to grant a moratorium against individual enforcement actions by creditors, including filings for involuntary (liquidation) bankruptcy.

6.3 The Roles of Creditors During Procedures

The creditors of the company usually take decisions regarding a financial restructuring/reorganisation plan or agreement outside of insolvency proceedings, whether or not they are following a proposal made by the company. Outside

of insolvency proceedings, in principle, the consent of all parties involved is currently required. Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), creditors may propose a restructuring plan in certain circumstances; furthermore, there must be justifiable reasons for not including certain creditors in a restructuring plan.

6.4 Modification of Claims

Since Dutch law does not provide for statutory proceedings outside of insolvency proceedings and, in principle, the consent of all creditors is required for a restructuring, this means that in the absence of a creditor's consent, its rights may only be amended under exceptional circumstances. Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), however, intra-class and cross-class cramdowns would become possible.

6.5 Trading of Claims

In general there are no prohibitions or restrictions on trading claims against the debtor, but the possibility to set off newly acquired claims against payments due by the acquiring party to the debtor are limited during bankruptcy proceedings, while the debtor does not, in principle, lose its right to set off claims due to the original debtor. Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), it might be possible to request the court to impose (temporary) restrictions on trading claims against the restructuring debtor.

6.6 Availability of Priority New Money

Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), injections of new money are facilitated, with a safe haven for such financing and any security granted for it, and an exception to the absolute priority rule. Currently, money can be injected during a restructuring by various stakeholders, such as current or new shareholders or (secured) creditors, but under Dutch law there is no real possibility, either in or outside formal insolvency proceedings, to grant providers of new money any super-priority liens or rights; new money providers may stipulate in remsecurity rights (liens) as a condition for providing their money, but by so doing can only jump ahead of unsecured creditors, not of existing secured or otherwise preferred creditors (except with their consent). There may also be concerns as to the (bankruptcy/preference) hardness of such security.

6.7 Restructuring or Reorganisation Plan or Agreement Among Creditors

Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), a restructuring plan can be declared binding on all those affected, including dissenting parties, with the possibility of intra-class and cross-class cramdown. Creditors who voted against the restructuring plan can challenge confirmation by the court on limited grounds only, which include internationally familiar protections such as the absolute priority rule. Currently, compositions are possible in bankruptcy and suspension of payments: these may bind dissenting ordinary unsecured creditors only and are also otherwise generally unattractive (see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings** and **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation** above).

6.8 The Ability to Reject or Disclaim Contracts

The proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**) provides for the possibility for a debtor to offer counterparties amendments to the contract. If the counterparty rejects the offer, the debtor may terminate the contract. The counterparty may then claim for damages, and the debtor may restructure such a claim as part of the restructuring plan. This does not, however, apply to employment contracts, which cannot be affected.

6.9 Creditors' Rights of Set-off, Off-set or Netting

Set-off rights are not affected during a restructuring, unless otherwise agreed by the relevant creditor. The same applies under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), although it may be possible to get temporary relief against (certain) creditors. A person who is both a debtor and a creditor of the bankrupt debtor is generally allowed to set off their debt against their claim on the bankrupt debtor, provided both arose before the declaration of bankruptcy, or both result directly 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 this person has not acted in good faith with respect to such assumption or acquisition. There is extensive case law around set-off in bankruptcy.

6.10 Failure to Observe the Terms of an Agreed Restructuring Plan

Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**) non-compliance with the terms of a restructuring plan by the debtor will most likely lead to dissolution of the plan and, if the debtor has ceased paying its debts, the opening of insolvency proceedings (bankruptcy), either at the request of the debtor or at the request of one or more creditors. The same generally applies currently for a suspension of payments or bankruptcy composition or an out-of-court restructuring.

6.11 Receive or Retain Any Ownership or Other Property

Under the current practice of a restructuring through creditors' agreement outside of insolvency, there is no prohibition against equity owners retaining their equity and/or other interests. Under a bankruptcy or suspension of payments composition, the same applies, provided that other confirmation requirements are met. Under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), equity owners could also retain equity, but this will be subject to limitations due to, among other things, the best interest of creditors test and (most importantly) the absolute priority rule, as well as other confirmation tests, and therefore seems less likely than in current practice. The latter is also because the ACPRP will significantly reduce any nuisance value shareholders currently have in a restructuring.

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 (*faillissement*), which aims at the liquidation of the estate of the debtor;
- suspension of payments (*surseance van betaling*), which aims at reorganisation and the restructuring of debts; and
- statutory debt restructuring for natural persons (*schuldsanering*), which aims to restructure debts and obtain a 'clean slate' for natural persons.

Bankruptcy

Bankruptcy (*faillissement*) is a liquidation proceeding aimed at monetising the assets of the bankrupt company (estate) and distributing the proceeds thereof to the creditors. It is possible to file for bankruptcy when a debtor is *"in the state that it has ceased paying its debts,"* whereby there have to be at least two creditors, one of which has a due and payable claim that remains unpaid. Further, this is an open norm: the state of having ceased payments can be disproved even in a case where the above criteria are met. Both the debtor itself as well as creditors may file. There are no other formal requirements or criteria forcing a filing, such as solvency, liquidity or balance sheet tests. Except for the case of a settlement (composition) with creditors, which may be bindingly enforced upon approval by specific majorities and court confirmation, 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, as a possibility, the transfer of the business as a going concern. The bankruptcy trustee acts under the general supervision of a supervisory judge. For certain acts, such as continuation of activities, reaching amicable settlements, initiating legal proceedings, transfer of (part of) the business as a going concern and terminating agreements with employees and landlords, the bankruptcy trustee requires the prior authorisation of the supervisory judge.

Creditors' claims must be filed (*verificatie*) 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. Claims having an indeterminate or uncertain value, or a value that 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, also in bankruptcy, from one party to another by deed of assignment and giving notice to the debtor (bankruptcy trustee).

If legal proceedings instituted by the bankrupt debtor are pending at the time of the bankruptcy order, the proceedings will, at the request of the defendant, be stayed to permit the defendant 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. In the case of legal proceedings instituted against a bankrupt debtor which 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 at the proceedings within a period to be set by the court. If, following this appearance, the bankruptcy trustee immediately consents to the claim, the cost 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 is generally allowed to set off his debt against his claim on the bankrupt debtor, provided both arose before the declaration of bankruptcy, or result directly 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, a bankrupt debtor from a third party before the declaration of bankruptcy, may not effect a set-off if this person has not acted in good faith with respect to such assumption or acquisition. There is extensive case law around set-off in bankruptcy.

As a rule, at the end of each three-month period, the bankruptcy trustee must report on the state of affairs of the estate.

The contents of this periodic report are open to the public. A committee of creditors may also be established, but this is rarely done and is only relevant for large bankruptcies.

Suspension of Payments
Suspension of payments proceedings (*surseance van betaling*) are meant as a temporary relief against the non-preferential creditors of the debtor. The goal of a suspension of payments is the reorganisation and continuation (in whole or in part) of viable businesses which are in financial distress, by offering a composition (ie, accord/restructuring plan/plan of reorganisation) to the creditors.

Only the debtor itself is able to file for suspension of payments. A debtor can do so when it foresees that it will not be able to continue meeting its debts as they fall due. A provisional suspension of payments is automatically granted by the court on filing of the application and can later be declared to be definitive after a hearing is held where a court-appointed administrator (*bewindvoerder*), a supervisory judge and the company are present. During the suspension of payments, the business of a company is managed by the management as usual, but for acts binding/impacting the estate, the co-operation (approval, authorisation) of the court-appointed administrator is required. A suspension of payments can be converted by the court into a bankruptcy at its own initiative or at the request of the supervisory judge, the court-appointed administrator or one or more creditors.

A suspension of payments order will suspend enforcement measures relating to 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. As a straightforward restructuring tool, suspension of payments is rarely successful, as it is outdated and lacks many modern tools and features (see also **2.2 Types of Voluntary and Involuntary Financial Restructuring, Reorganisation, Insolvency and Receivership**). Hence, most suspensions of payments are converted into bankruptcy relatively quickly after their commencement.

Statutory Debt Restructuring for Natural Persons
Statutory debt restructuring for natural persons (*schuldsaneringsregeling natuurlijke personen*) applies only to natural persons. It is possible to apply for a statutory debt restructuring when it is reasonably foreseeable that the natural person will not be able to pay his or her debts as they fall due, or if he or she is already in a situation where he or she has ceased to pay his or her 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 filed its claim in the debt restructuring scheme. A debtor will not be granted statutory debt restructuring, however, if its debts were incurred in bad faith.

7.2 Distressed Disposals as Part of Insolvency/Liquidation Proceedings

See also **7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings**. The bankruptcy trustee will consider the various available alternatives for liquidation of the bankrupt estate, including the transfer of the business as a going concern by way of an asset sale. The bankruptcy trustee can be quite flexible in entering into an agreement with a potential purchaser, provided that the agreed transaction is in the best interest of the joint creditors of the bankrupt debtor. A sale of assets requires the prior authorisation of the supervisory judge. The bankruptcy trustee will also have to take into account the interests of secured creditors, who have a strong legal position in the process of selling assets over which they may have security. In practice, this means that the bankruptcy trustee needs the approval of a secured creditor before selling a secured asset to a purchaser. If the security rights of the creditor are recognised by the bankruptcy trustee, the creditor can claim the relevant part of the proceeds, while the bankruptcy trustee will request a fee from the secured creditor for the trustee's co-operation in facilitating the sale of the secured asset to the purchaser. Dutch law does not have any rules preventing an existing secured or unsecured creditor from participating in the sale process as a (potential) purchaser. As a rule, the bankruptcy trustee will not give any representations and warranties to a purchaser. Finally, a bankruptcy trustee is not bound by any pre-negotiated and pre-insolvency sales transaction of assets, except perhaps in pre-pack situations, to the extent that the prospective bankruptcy trustee (*beoogd curator*) made certain undertakings – which is generally unlikely.

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

In bankruptcy or suspension of payments, the debtor may offer a composition (ie, an accord/restructuring plan/plan of reorganisation) to its creditors, which may be declared binding upon all unsecured creditors upon majority approval and court confirmation. Any creditor whom the debtor fails to satisfy, in accordance with the terms of the composition, may demand from the court that this scheme be set aside. Such non-compliance will most likely lead to dissolution of the plan and the opening of insolvency proceedings (bankruptcy).

Under the upcoming ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), debtors may offer restructuring plans to

(classes of) creditors and shareholders outside of formal insolvency proceedings, which may be declared generally binding, even upon dissenters.

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, which may be attractive if there is value in the estate. The resulting claim of the creditor will qualify as a claim on the estate (*boedelvordering*) and have priority as such (see **5.8 The Statutory Waterfall of Claims**).

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. However, there is case law in the Netherlands allowing such consolidation of insolvency proceedings on the basis of administrative efficiency and, in exceptional cases, substantive consolidation in a case where the estates are so entangled that they cannot (efficiently) be liquidated separately.

7.6 Organisation of Creditors

The Dutch Bankruptcy Act provides for a creditors' committee. If such a committee is appointed, the bankruptcy trustee is obligated to provide its members with all the information requested. By law, the bankruptcy trustee is also obliged to seek advice from this committee, but is not bound to act on it. Certain rights of consent also fall to a committee, if approved. Creditors' committees are rare; they are usually appointed only in large/complex cases.

7.7 Conditions Applied to the Use of or Sale of 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 sale of assets requires the prior authorisation of the supervisory judge. In practice, a sale of assets also requires the consent of the holders of security rights on all or part of the assets sold.

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 came 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 (DBA) contains no provisions with regard to the recognition of a foreign insolvency. Dutch law does not implement the UNCITRAL Model Law or (other) rules based on comity. The DBA 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 in a country with which the Netherlands has no relevant treaty (with such treaties exceptionally rare) does not, according to Dutch law, include any assets in the Netherlands, and a foreign insolvency practitioner may not act on the basis of it, with respect to such assets, to the extent that this would result in the deterioration of the position of (individual) creditors and their (individual) recourse rights. However, softening this principle of territoriality somewhat, the Dutch Supreme Court has ruled, in short, that a foreign insolvency practitioner 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 exercise does not lead to a deterioration of the position of the creditors of the insolvent company, as outlined above. 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 UNCITRAL Model Law) or exequatur is necessary for such exercise of powers. 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 his or her powers by initiating court proceedings in the Netherlands, in order to obtain an injunction in this 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. There appear to be no other arrangements with foreign courts to co-ordinate insolvency proceedings, but in ad hoc cases of large/complex cross-border insolvencies, Dutch courts/insolvency judges have occasionally entered into more or less formal contact with their foreign counterparts.

8.3 Foreign Creditors

Foreign creditors have no different standing in Dutch insolvency proceedings than local creditors.

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 the granting of suspension of payments (*surseance van betaling*).

In the course of a pre-pack, which has no statutory basis, a prospective (or 'silent') bankruptcy trustee (*beoogd curator*) can be appointed by the court in order to in silence prepare a restructuring of the business of the company. The court then also appoints a (prospective) supervisory judge. The Continuity of Companies Act I (*Wet continuïteit ondernemingen I*) which would regulate this procedure is pending in the legislature (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**).

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. In a suspension of payments, the business of a company is managed by the management as usual, but for acts binding/impacting the estate, the co-operation (approval, authorisation) of a court-appointed administrator is required. The administrator will investigate whether or not the suspension of payments is likely to lead to a situation in which the company can continue and in the future pay its debts, failing which, the administrator might request conversion into bankruptcy.

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* (association of supervisory judges) 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 procedures. 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 (bankruptcy or suspension of payments), a bankruptcy trustee or an administrator is appointed. On a level basis, eligible persons are appointed in turn.

Furthermore, the district courts may dismiss a 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 in respect of an administrator. The district courts 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 directors of the company are no longer entitled to dispose of the assets of the bankrupt company. On the appointment of an administrator in suspension of payments, the administrator works together with the company's management, and they are only jointly authorised to represent the company. The bankruptcy trustee or administrator usually requires information and co-operation from the directors of the company, ie, in order to realise the sale of (or part of) the business as a going concern. The directors of the company also have an obligation under the Dutch Bankruptcy Act to provide the bankruptcy trustee with any and all requested information.

9.5 Restrictions on Serving as a Statutory Officer

In practice, only individuals on the 'bankruptcy trustee list' (*curatorenlijst*) mentioned in **9.3 Selection of Statutory Officers** may be appointed to serve as a statutory officer; however, the Dutch Bankruptcy Act contains no formal requirements as to identity, qualifications or credentials, allowing for (co-)appointment of others (eg, financial experts, accountants in case of a financial institution) in exceptional situations. Before accepting an appointment, a bankruptcy trustee of the administrator must verify whether he or she is conflicted. If that is the case, the bankruptcy trustee or administrator 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.

10. Advisers and Their Roles

10.1 Types of Professional Advisers

Period leading up to Suspension of Payments/Bankruptcy

When a company is in financial distress or even considering filing for bankruptcy or suspension of payments, it will typically involve qualified legal counsel to advise on how best to proceed and avoid liabilities, and if need be, 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, lawyers will ask for a retainer in such situations in order to ensure that their fees are paid.

In certain cases, interim management (such as a chief restructuring officer) is appointed in the period prior 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 in co-operation with, or with the 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 their appointment. This could, for example, be a restructuring officer, financial adviser or other consultant.

During Bankruptcy

After bankruptcy has been declared, it is not typical for a bankruptcy trustee to employ any (outside) legal counsel, as in the Netherlands a bankruptcy trustee is typically a lawyer who is part of a law firm. If the estate is a party to legal proceedings where representation by a lawyer is required, the estate will normally employ legal counsel from the bankruptcy trustee's law firm 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 an investigation of the causes of the bankruptcy, mainly from a financial point of view. As such parties are employed by the estate, the costs associated with employing such parties will be estate costs. In large 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.

10.2 Authorisations Required for Professional Advisers

No mandatory authorisations are required for the appointment of professional advisers, but the bankruptcy trustee should act in the interest of the estate and the joint creditors, and the costs associated will be estate costs.

11. Mediations/Arbitrations

11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters

Arbitrations and mediations occur in restructuring, liquidation, insolvency and bankruptcy matters if this 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. Parties in the Netherlands are generally open to arbitration and mediation.

11.2 Parties' Attitude to Arbitration/Mediation

Pre-insolvency disputes are often still brought before the court, although there is a rising trend for 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

It is not customary for courts in the Netherlands to 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, besides the rules of arbitration usually applied by the relevant arbitration institute. There are no formal statutes that govern mediations. In Dutch insolvency proceedings, alternative dispute resolution does not play any role of significance; the Dutch Bankruptcy Act itself does not provide for it as a means of solving disputes in the context of bankruptcy or suspension of payments. Whether the Act *allows* for the same is questionable in varying degrees. In principle, where it concerns a legal relationship that can be determined solely by the parties, those parties may, under Dutch law, choose extrajudicial/alternative dispute resolution, such as arbitration or mediation. If an arbitration clause has been agreed, the civil courts will, in principle, deny jurisdiction. However, if and to what extent an existing agreement be-

tween an insolvent debtor and a counterparty is applicable in insolvency proceedings – ie, to, among other things, the submission of the claim to the estate, if the bankruptcy trustee, administrator, debtor or another creditor would dispute the claim, or if the bankruptcy trustee claims against the counterparty of the insolvent debtor in connection with an agreement that contains an arbitration clause – is unsure. It is argued that an arbitration that is pending when the debtor is declared insolvent will be postponed just like civil proceedings, and continued with the bankruptcy trustee and/or opposing other creditor or the insolvent debtor if the relevant claim is disputed on submission to the estate. The same case is made, but more uncertain, as to whether those parties would be bound to arbitration with respect to disputing a submitted claim.

11.6 Appointment of Arbitrators/Mediators

The provisions in the Dutch Code of Civil Procedure governing arbitrations that take place in the Netherlands are mostly of a regulatory nature and not a mandatory nature. Hence, the manner in which arbitrators/mediators are appointed depends on the applicable rules of arbitration and/or agreements between parties; the same applies for the question of who can serve as an arbitrator/mediator.

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

12.1 Duties of Officers and Directors of a Financially Distressed or Insolvent Company

The board of directors owes fiduciary duties to the company (including its subsidiaries) and its stakeholders, such as the shareholders, creditors, employees, customers, suppliers and other parties. In the performance of their duties, the directors must focus their attention on the interests of the company and of the enterprise connected with it.

Each director is responsible towards the company for the proper performance of the tasks assigned to him or her. All duties of directors that have not been assigned to one or more directors by or pursuant to law, or the articles of incorporation, are the joint responsibility and fall under the duties of the board of directors. Each director is responsible for the general conduct of the 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 – no material reproach can be made to him or her personally, 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 his or her duties, and if it is plausible that such 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 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 agreement and that the creditor would not be able to recoup its losses from the company. 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. A director could also be liable to the bankrupt estate for the selective (non-)payment (*selectieve betaling*) of creditors when either bankruptcy is unavoidable or the company ceases its activities, and the company is not able to fulfil its obligations vis-à-vis its creditors.

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 is guilty of misconduct. Transactions that are prejudicial to the rights of creditors, or that are fraudulent, may lead to criminal charges against the directors of the company.

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 the case of remaining damages, may assert claims for such remaining damages directly against the director. 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 either a full (statutory) board member, adviser to the board or consultant. Although such appointments were rare in the past, they are becoming increasingly common, especially in larger restructurings. Often the appointment of a chief restructuring officer takes place on the initiative of the (senior) lender.

12.4 Shadow Directorship

Third parties or any of a company's representatives who are acting as if they are a director and are determining or co-determining the day-to-day affairs of the company are regarded as shadow directors (*feitelijk bestuurders*) and are exposed to the same liability risks 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 has acted 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 facade of solvency or creditworthiness, withdrawal of assets by the parent company in the capacity of creditor of a 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 has been held liable because of wrongful (tortious) 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 the assets of the company can be unlawful towards creditors that remain unpaid. Also the shareholder may be liable towards the creditors if it encourages or allows the company to selectively pay its debts or selectively leave its debts unpaid, while it is clear that either bankruptcy is unavoidable or the company is about to cease its activities, and it is not able to fulfil its obligations vis-à-vis its creditors.

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 avoid any transaction pursuant to which other creditors' rights are prejudiced – actio pauliana; comparable to (fraudulent) preference/conveyance. First, the bankruptcy trustee may void a transaction entered into by the company without a prior legal obligation to do so if the interests of the other creditors are prejudiced by that transaction and if both the company and the counterparty 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 aforementioned knowledge is assumed if the transaction was entered into within one year prior to the bankruptcy of the debtor and, 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 towards, 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 was 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 no real look-back period under Dutch law, but in connection with the test for avoidance (see **13.1 Grounds to Set Aside/Annul Transactions**) there are evidentiary presumptions in relation to certain types of 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

The articles in the Dutch Bankruptcy Act relating to actio pauliana (avoidance/(fraudulent) preference/conveyance) are applicable only in the case of bankruptcy and may be used exclusively by the bankruptcy trustee. Creditors may fund the bankrupt estate in order to enable a bankruptcy trustee to take certain actions. If suspension of payments is granted to a debtor, the articles in the Dutch Civil Code relating to actio pauliana are applicable. These articles grant the right to each creditor to nullify transactions pursuant to which the rights of other creditors are prejudiced. Creditors have the same right outside of insolvency proceedings.

Outside of bankruptcy, individual creditors may avoid certain transactions based largely on the same tests as for

the bankruptcy avoidance claim (see **13.1 Grounds to Set Aside/Annul Transactions**).

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. In other words, intercompany claims have no different status or rank in a Dutch insolvency than other claims, regardless of whether the bankrupt company is the debtor or the creditor of such a claim.

14.2 Off-set, Set-off or Reduction

An intercompany claim can be set off against an intercompany debt, also in insolvency proceedings, just like any other claim(s) and debt(s) (see **6.9 Creditors' Rights of Set-off, Off-set or Netting** and **7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings**). This applies even if the claim and the debt have a different priority ranking (non-preferential, preferential or subordinated claim).

14.3 Priority Accorded Unsecured Intercompany Claims and Liabilities

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

14.4 Subordination to the Rights of Third-party Creditors

In principle, under Dutch law, intercompany claims are not subordinated to third party claims: there is no principle of equitable subordination. Subordination is a matter of contract. However, failing subordination by contract, case law shows that shareholder loans may in exceptional circumstances 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 financing de facto as 'informal capital' than when a loan document is available. 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, there are certain circumstances under which not all the individual companies are obliged to publish and file annual accounts. In this 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 declares in writing that it assumes joint and several liability for any obligations arising from the legal acts of the subsidiary involved. Such written statement must be filed with the commercial registry where the subsidiary is registered.

The parent company may be liable towards the creditors if it encourages or allows the company to selectively pay its debts or selectively leave its debts unpaid (*selectieve betaling*) while it is clear that either bankruptcy is unavoidable or the company is about to cease its activities, and the company is not able to fulfil its obligations vis-à-vis its creditors.

In addition to this, 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 facade 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.

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, then any creditor whose possibility of recourse has been adversely affected by the legal act may invoke this as 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 an 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 Grounds to Set Aside/Annul Transactions**.

14.7 Duties of Parent Companies

A distinction must be made as to whether the parent company as legal entity is a director of the subsidiary. If this 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 – could materially be deemed to be identical. In Dutch case law, arguments to this effect are very rarely honoured. 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 an example, 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 the facade of credibility of the subsidiary; and/or
- the parent, also being a creditor of the subsidiary, illegally withdraws assets/capital from the subsidiary; and/or
- the parent, being 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 a company level only, not at a shareholder level. If the company is declared bankrupt, it and therefore its director, loses the right to manage and dispose of the assets of the company. If the parent company is the director of the subsidiary, this applies to the parent company. During suspension of payments, the company and therefore its director, remains in control, but in order to legally bind the company, the co-operation or authorisation of the court-appointed administrator is needed.

15. Trading Debt and Debt Securities

15.1 Limitations on Non-banks or Foreign Institutions

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, except where it concerns loans to parties that qualify as a consumer under the Dutch Financial Supervision Act. In addition, 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.

15.2 Debt Trading Practices

Standard LMA documentation is frequently used in the Netherlands, especially for large, complex and/or multiple jurisdiction financing transactions. Local adaptations of LMA templates (governed by Dutch Law) are commonly used as well, 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 the 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.

The possibility to set off newly acquired claims against payments due by the acquiring party to the debtor are limited during bankruptcy proceedings, while the debtor does not in principle lose its right of set-off of claims due to the original debtor.

15.3 Loan Market Guidelines

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

15.4 Transfer Prohibition

Restrictions on the transferability of debts are common, but this depends 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; transferability may also, however, be excluded generally. Restrictions on transferability do not usually apply in the case of an event of default. If properly documented, transfer restrictions have an in rem effect. However, there is a draft bill (*Wet opheffing verpandingsverboden*) in consultation that – in short – prohibits restrictions on the transferability of debts between companies which are transferred for financing purposes.

15.5 Navigating Transfer Restrictions

In the Netherlands, 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 and 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. Valuation reports are not mandatory by law, but are nonetheless widely used.

Outside of insolvency proceedings, independent valuations are key for limiting the possibility for third parties to claim in an actio pauliana action that assets have been sold at an uncommercial price. Also in the case of enforcement of a share pledge, in the current absence of a scheme of arrangement as a possible way to restructure a company, valuations are frequently used to substantiate the price for which the shares shall remain with the pledgor.

As is common, valuations generally drive (the outcome of) restructuring negotiations. This currently applies to out-of-court restructurings, which are prevalent in the Netherlands due to the lack of formal options. With the introduction of the ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**), it is expected that valuations will become increasingly important. The ACPRP will require the debtor to meet the best interest of creditors test, and hence demonstrate liquidation value; in addition, the distribution of the company's restructuring value will be driven by the valuation thereof. Hence, valuations presented by the debtor and/or other stakeholders will be determining for both the negotiation process and, if necessary, a confirmation (valuation) fight.

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In current insolvency proceedings, bankruptcy trustees may typically use independent valuations to determine the value of assets in the bankrupt estate (ie, the value of stock/inventory/IP rights etc) or to assess bids from potential purchasers and to subsequently substantiate a request to the supervisory judge for the approval of the aimed-for sale of the company as a going concern, or certain assets of the company.

16.2 Initiating Valuation

Depending on the circumstances and the purpose of the valuation (eg, validating the value of assets to be sold by the company in a restructuring situation, or establishing the value of assets in the bankrupt estate in order to assess bids from potential purchasers), the company, creditors or bankruptcy trustee may initiate a valuation.

16.3 Jurisprudence Related to Valuations

Independent valuators are privately appointed, usually by the company, the creditors or the bankruptcy trustee. Valuations based on multiples, cash-flows or peer groups are frequently used. Typically, valuations are based on a going-concern scenario, but in restructuring situations, valuation reports also include an analysis of the liquidation scenario. Valuations of stock or real estate are regularly based on the market value, but in restructuring situations, the value in case of a distressed sale by the company before bankruptcy, or by the bankruptcy trustee, will be included.

Regarding the case law on valuations it must be noted that the approval decisions of supervisory judges will not normally be published. Outside of bankruptcy, ie, in the situation of the enforcement of a share pledge or the sale of assets before bankruptcy, case law shows that independent valuation reports are frequently used by courts as a basis to sanction a sale of shares or to rule that assets have been sold at a fair price. It is expected that in future this will also be done by the courts in the process of confirmation of private restructuring plans under the proposed ACPRP (see **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation**).