Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Insolvency

Second Edition

Netherlands
Florent

chambers.com

2019

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 and employment 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 of 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 counterparties. 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 – for instance, the Act on the Confirmation of Private Restructuring Plans (ACPRP).

Karin Sixma is a senior associate at the firm, and part of the insolvency and restructuring team as well as the litigation team. Karin is specialised in insolvency law and has ample experience in high-end and complex (cross-border) restructuring and insolvency proceedings, both in advising and representing the debtor and/or its directors in such proceedings as well as creditors. Further, Karin has significant experience in D&O liability litigation, acting for both directors and bankruptcy trustees, and insolvency and restructuring-related disputes. Karin is a fellow of INSOL International.

1. Market Trends and Developments

1.1 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 the export of goods. In 2018 the downtrend levelled off and the number of bankruptcies reached its lowest level since 2001 in September 2018. The Netherlands' GDP increased by 2.5% in 2018 compared to 2017 while the unemployment figures show a rapidly downward trend, approaching the potential minimum of 3.5% in August 2019.

The number of bankruptcies decreased in almost all sectors, but most significantly in the financial sector. The Netherlands is generally recognised as a favourable and stable business and tax environment and its financial sector is traditionally large. This has meant significant insolvency cases during the financial crisis, but the sector has been restructured and returned to stability. In wholesale and retail, the number of companies that went bankrupt fell in 2017 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, leading to improved revenues for DIY and furniture stores, for example. As a result of low mortgage interest rates in the Netherlands, in 2017 a record of 241,860 houses were sold, the highest number since the Dutch Statistics Agency (*Centraal Bureau voor de Statistiek*) started measuring. Since then the sales of houses have decreased slightly, but a continuing shortage in the housing market is expected.

Still, in 2018 most bankruptcies occurred in the wholesale and retail sector (687), followed by the financial institutions and the business services sectors. Bankruptcies in the hotels, restaurants and cafés industry increased from 185 in 2017 to 210 in 2018. Retailers still face financial difficulties due to stiff competition in retail in general, combined with the continuing rise of online 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 last years. In the Netherlands, this has already resulted in the bankruptcy of several hospitals in late 2018 and is expected to lead to further insolvencies in the future. However, the aggregate number of insolvencies in 2018 and 2019 has stabilised.

The Dutch economy continues to benefit from the worldwide economic growth. Economic growth in the Netherlands is continuing yet flattening, with a growth of 2.7% in 2018 and an expected growth of 1.8% in 2019. International trading tensions have led to a degree of uncertainty. Further, the outcome of the Brexit discussions will be of significant importance 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 legislator is taking steps to install restructuring measures, both pre-insolvency and post-insolvency, and strengthen prevention of 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 with the Upper House (*Eerste Kamer*). However, as a consequence of the judgment of the European Court of Justice In re Smallsteps (C-126/16) regarding the position of (former) employees of the bankrupt debtor in a Dutch (unofficial) pre-pack, the legislative process has been put on hold in anticipation of new legislation on the transfer of enterprise in bankruptcy. In this respect, a new draft bill, the Act on Transfer of Enterprise in Bankruptcy (*Wet overgang van onderneming in faillissement*) was presented on 31 May 2019 and is currently in consultation.

Further, a revised draft of the Act on the Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord*, ACPRP) is pending in the House of Representatives (*Tweede Kamer*), which could mean it coming into effect in 2020. 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 providing significantly more flexibility, cost-effectiveness and speed than its foreign examples. Especially, the ACPRP is expected to have a major impact on the restructuring market as it will provide companies with an effective tool to restructure 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 the above-mentioned bills, see **6. Statutory Restructurings, Rehabilitations and Reorganisations**.

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

2.1 Overview of Laws and Statutory Regimes

Dutch law recognises 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*) also contains applicable provisions.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies 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 in case 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 a member of the local bar association. The bankruptcy trustee requires the authorisation of the supervisory judge for certain acts, such as the termination of lease agreements and employment agreements and the transfer of (part of) the business as a going concern. A committee of creditors may be established, but is not usually appointed, except in larger/more complex bankruptcies.

Notwithstanding its nature as a liquidation proceeding, bankruptcy can be used as a restructuring tool, including by means of a (pre-packaged) restart of the business of the bankrupt company or the offering of a composition (ie, accord/restructuring plan/plan of reorganisation) to the creditors, including in international/cross-border cases to implement (give effectiveness to) the foreign/global restructuring plan for local Dutch debtors.

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 the court-appointed administrator (*bewindvoerder*), the supervisory judge (if appointed) 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. As a straightforward restructuring tool, suspension of payments is rarely successful, as it is outdated and lacks many modern tools and features. Notwithstanding, it can be used creatively in certain situations; in international/cross-border cases, suspension of payments has been successfully used as a protection and/or to implement (give effectiveness to) the foreign/global restructuring plan for local Dutch debtors.

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 be 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

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, personal liability for taxes/social security claims) may lead to managing directors filing at some point.

Since there is no obligation for a company to commence formal insolvency proceedings at any stage, there are no liabilities or penalties for a company and/or its officers, directors and/or owners directly due to 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, among other things in case of "wrongful trading". Examples of "wrongful trading" include 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 or did not properly keep its books, 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. Further, directors may become personally liable for certain taxes left unpaid by the company.

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 the general meeting of shareholders, unless the articles of incorporation provide otherwise. The management board may file for suspension of payments without being instructed to do so by the general meeting of shareholders, unless the articles of incorporation provide otherwise. In practice, this is used to circumvent the limitation on filing for bankruptcy. In 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.

2.5 Commencing Involuntary Proceedings

Creditors may file for the bankruptcy of a debtor when the company 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 in the case the above criteria are met.

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

2.6 Requirement for Insolvency

A company can be declared bankrupt when it 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 in case the above criteria are met. There is, however, no formal requirement to file at any time; see also **2.5 Commencing Involuntary 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. There is no formal filing requirement in this respect.

2.7 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 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 financial companies in distress if this immediately and severely threatens the stability of the financial system. Banks and insurance companies are also subject to European legislation – eg, 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 Restructuring Market Participants

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, the often disappointing outcome – especially for unsecured creditors – and the risk of destruction of value of the company.

Banks, credit funds and other lenders are generally supportive of borrower companies experiencing financial difficulties pending a detailed assessment of their financial position, but their attitude depends very much 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). As bankruptcy or suspension of payments means near total loss of control to a court-appointed bankruptcy trustee or administrator, 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, in principle all creditors must consent to the terms of an out-of-court restructuring: only in exceptional cases is a court-sanctioned cram-down 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 legislator 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 would 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 (or majorities) of creditors. The process would also leave the debtor in possession, be flexible, fast and comparatively inexpensive. Hence it is expected that once introduced the ACPRP will significantly boost the number of restructurings outside of formal insolvency proceedings in the Netherlands; it is expected to be introduced in 2020. See **6. Statutory Restructurings, Rehabilitations and Reorganisations** for a more in-depth discussion of the upcoming new 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 as much as possible to try and avoid formal proceedings, like the ACPRP, through first negotiating to try and receive an out-of-court restructuring. Dutch law admits no formal requirements obliging directors to file for bankruptcy if certain requirements are met or at any specific time. However, there may be liability risks for directors or affiliated companies around not filing in a "timely" manner. 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 case of "wrongful trading"; see **2.3 Obligation to Commence Formal Insolvency Proceedings**, above.

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 restructuring market participants in restructuring cases.

3.2 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. Especially in larger restructurings, many of the practices common in larger/more complex restructurings are followed or mirrored (with local adaptations). 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 Restructuring Market Participants**), any restructuring outside formal insolvency proceedings requires the consent of all parties involved with no truly effective in-court restructuring process to bind dissenting creditors. See **6. Statutory Restructurings, Rehabilitations and Reorganisations** for a more in-depth discussion of the upcoming new ACPRP restructuring legislation.

3.3 New Money

New money could 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 rem security rights (liens) as a condition for providing their money, but by doing so 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.

3.4 Duties on Creditors

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 12. **Duties and Personal Liability of Directors and Officers of Financially Troubled Companies**, directors are under the 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, whereby as the company comes more and more into the "realm of bankruptcy", directors should more and more take note of and protect the interests of the creditors.

3.5 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, for instance, 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 cram-downs. 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 new ACPRP restructuring legislation.

4. Secured Creditor Rights and Remedies

4.1 Liens/Security

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, moveable 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, upon an 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 moveable assets.

A pledge over moveable 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 moveable 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 they originate from a legal relationship that already existed at the time the right of pledge was created. For that reason it is marketpractice for a deed of pledge on receivables to contain an obligation for the borrower to regularly execute supplemental deeds of pledge. There is a draft bill *(Wet opheffing verpandingsverboden*) in consultation that prohibits restrictions on the possibility to assign or transfer claims between companies in order to assure such claims remain available for assignment or transfer 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 the right of pledge is not required to be registered in the relevant IP register in order to be valid, such a registration is required to be able to invoke the right of pledge against third parties who have relied in good faith on the information contained in the register in question.

4.2 Rights and Remedies

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 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 the court to have the pledged property remain with the pledgee as the buyer, with the amount to be paid to be determined by the court.

Considering the above, secured creditors have a strong position in a restructuring situation. Their co-operation will generally be necessary in order 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 for a period of a further 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 or 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 it will have to have enforced its rights, failing which the bankruptcy trustee may take over such enforcement. While the secured creditor remains entitled to the relevant proceeds, those 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 pay-out until the bankruptcy trustee has progressed the liquidation of the estate to the stage of making distributions.

4.3 Typical Timelines

A secured creditor may in principle enforce its rights "as if there were no bankruptcy", meaning broad discretion in manner and timing of enforcement. However, 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**). What period of time 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 immovable property, for example. 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 have to have enforced timely or face potentially severely reduced proceeds (see **4.2 Rights and Remedies**).

4.4 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 Dutch assets is also possible in principle, provided it can be embedded in the Dutch closed system of in rem rights, either through transformation or assimilation. The enforcement of such foreign security rights entails a number of potentially complex questions of international law regarding private rights, property rights and security rights.

4.5 Special Procedural Protections and Rights

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 for 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 further details).

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

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;
- unsecured creditors.

As secured creditors can in principle act as if there were no bankruptcy (see **4.2 Rights and Remedies**), 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 that, ipso facto, clauses under current legislation function without limitation (which 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 creditors is at the root of the issues which the business face (eg, landlords in retail businesses with excessive rental costs).

5.3 Rights and Remedies for Unsecured Creditors

In a restructuring context, unsecured creditors have various rights and remedies 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, terminate/rescind 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 they are an essential supplier (*dwangcrediteur*) – eg, needed to continue or wind down the business. Creditors are generally entitled to act in their own interest, whereby 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 on a proposed composition plan. During a suspension of payments unsecured creditors may, moreover, vote on granting a definitive suspension of payments. In case of bankruptcy proceedings, creditors can no longer attach assets of the debtor (and pre-bankruptcy attachments lapse) since bankruptcy proceedings qualify as a general attachment of all assets of the debtor. Unsecured creditors can file their claims with the bankruptcy trustee for verification (and/or voting) purposes. In case of suspension of payment proceedings, creditors can submit their claims with the administrator for voting purposes.

5.4 Pre-judgment Attachments

Dutch law provides for the option of pre-judgment attachment (*conservatoir beslag*). A creditor who wishes to secure payment by the debtor by the attachment of assets will have to obtain leave from the judge in preliminary relief proceedings (*voorzieningenrechter*). This leave is generally easily obtained in the Netherlands, but if the attachment proves to be wrongful, the creditor 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 the debtor, a creditor can impose pre-judgment garnishment against the debtor (ie, a bank account). The creditor is obliged to start proceedings on the merits within a period to be specified by the judge in preliminary relief proceedings. Once an enforceable judgment against the debtor is obtained, the pre-judgment attachment 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 Timeline for Enforcing an Unsecured Claim

Outside insolvency proceedings, if the 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 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 – however, this can take anything from a few months up to several years.

In insolvency proceedings the period of time for payment on a claim of unsecured debtors by the bankruptcy trustee, if any, is strongly dependent on the circumstances of the bankrupt estate. This could take several months or even a number of years.

5.6 Bespoke Rights and Remedies for Landlords

Due to the fact that Dutch law does not provide for a 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 a 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 (administrative claim – *boedelvordering*).

5.7 Foreign Creditors

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

5.8 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 a part of this order due to the fact that they can act as if there were no bankruptcy; see also **4.2 Rights and Remedies for Secured Creditors**.

5.9 Priority Claims in Restructuring and Insolvency Proceedings

Priority Claims

See **5.8 Statutory Waterfall of Claims** : estate or administrative claims are first in the order of payment, and include the bankruptcy trustee's fees and debts incurred by the bankruptcy trustee (*boedelschulden*). Claims of the Dutch tax authorities and the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*) qualify as preferential claims. To the extent claims of the Employee Insurance Agency regard the salary of employees during the first weeks

(a maximum of six weeks) of the bankruptcy proceedings, such claims are estate claims. There are also other statutory general or specific preferences.

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 otherwise subject to priority claims, as secured creditors are entitled to act as if there were no bankruptcy (see **4.2 Rights and Remedies**). 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. Further, secured creditors may lose the right to enforce without regard for the insolvency; see also **4.2 Rights and Remedies**.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 Statutory Process for a Financial Restructuring/ Reorganisation

Dutch law does currently not provide for 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) also binding 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 means loss of control to a court-appointed bankruptcy trustee – respectively, a serious limitation in control due to joint control with a court-appointed administrator as well as relatively rigid limitations on the ability to continue the business as a going concern and on restructuring options, so that it is 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 opportunities for court intervention) for any restructuring plan.

In September 2017, the Dutch legislator 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 would do so by taking away uncertainty, delay, imbalances between stakeholders, and holdout/nuisance positions generally. A revised draft bill is currently pending in the House of Representatives (*Tweede Kamer*), which could mean the ACPRP passing through the legislature and coming into force in 2020.

Based on the current draft, the ACPRP would allow debtors, and under certain circumstances creditors, to offer a composition to any or all classes of creditors and shareholders, which upon approval by the requisite majority and court confirmation would be generally binding, also upon dissenting creditors and/or shareholders. It has been inspired in important parts by the UK Scheme of Arrangement and the US Chapter 11 proceedings, taking those features that works best and avoiding certain pitfalls.

Private Restructuring Plan
The ACPRP would, according to the current draft, have the following key characteristics.

Eligible debtors
Businesses, regardless of whether they are organised as a company/legal entity or not (and which one), and self-employed private citizens are eligible debtors. If the debtor foresees that he or she will be unable to continue paying his due debts, he or she 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, anyone left out of the plan retains its rights unaltered. There is one general exclusion, employees: their rights cannot be affected by a plan under the ACPRP in any way (unless of course the rights of individuals who all consent voluntarily). Further, under the ACPRP there must be a "reasonable ground" 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 or shareholders whose rights or interests are so dissimilar that it cannot be said that 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 bar set out above is 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 free, making the plan a very flexible, versatile instrument. Hence the potential use of ACPRP plans includes 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 cram-down
The ACPRP makes it possible to have a plan declared binding on all those affected, including dissenters: "homologation" in terms of the ACPRP, or "confirmation" as it is most

commonly known internationally. The ACPRP contains both intra-class cram-down and cross-class cram-down. A plan will be confirmed, if at least one class voted in favour. Intra-class cram-down: a plan can be confirmed over the objections of dissenters within a class, and declared binding on them, if two-thirds in amount in that class voted in favour. Cross-class cram-down: a plan can be confirmed over the dissent of entire classes (ie, 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 for individual nay-sayers to act against confirmation. These include, notably, the best interest of creditors test: a plan which provides for a lower distribution than which 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 with 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 (limited) gifting exception. 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 for a safe haven for interim financing. Further, it will allow to restructure 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. This strong power for the court to protect the restructuring was inspired by the famous § 105(a) US Bankruptcy Code, as suggested in comments relating to the previous draft of the Act.

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, *Wet continuïteit ondernemingen* 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 the silent bankruptcy trustee – and the silent supervisory judge – is not made public. The goal is to without publicity disruptive to the business prepare a sale of assets that is to be effectuated once as formal insolvency proceedings are opened by the silent bankruptcy trustee, then formally appointed as 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 yet. This practice was challenged mainly by labour unions and their members. Pre-packs (with or without appointment of a silent bankruptcy trustee and also otherwise in various forms and shapes) have been a longstanding practice in the Netherlands, but, before the currently proposed act, without legislative or other formal basis.

In view of challenges by labour unions and their members, including the European Court of Justice In re Smallsteps (C-126/16), regarding the position of (former) employees of the bankrupt debtor in a Dutch (unofficial) pre-pack, the Continuity of Companies Act I has been held up in the legislative process. 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. The legislative process of the Continuity of Companies Act I has been put on hold in anticipation of new legislation on the transfer of enterprise in bankruptcy. In this respect, a new draft bill, the Act on Transfer of Enterprise in Bankruptcy (*Wet overgang van onderneming in faillissement*) has been presented on 31 May 2019 and is currently in consultation. The draft bill deals with the position of employees of a bankrupt employer in case the bankruptcy trustee transfers the enterprise of the employer.

Mostly due to the uncertainty caused by the Smallsteps judgment and related discussions, in practice the requests for new pre-packs have dried up and nowadays courts generally exercise caution in facilitating (allowing) any new pre-packs, thereby diminishing the pre-pack practice.

6.2 Position of the Company

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. The developed practice of courts to appoint a silent bankruptcy trustee (*beoogd* curator) has diminished in anticipation of the fate of the Continuity of Companies Act I and the Act on transfer of enterprise in bankruptcy (*Wet overgang van onderneming in faillissement*). Under the proposed ACPRP (see **6.1 Statutory Process for 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.

.3 Roles of Creditors

The creditors of the company usually take decisions regarding a financial restructuring/reorganisation plan or agreement outside of insolvency proceedings, whether or not following a proposal made by the company. Outside of insolvency proceedings, currently, in principle the consent of all parties involved is required. Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), creditors may propose a restructuring plan in certain circumstances; further, there must be justifiable reasons for not including certain creditors in a restructuring plan.

6.4 Claims of Dissenting Creditors

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, absent a creditor's consent – its rights may only be amended under exceptional circumstances. However, under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), intra-class and cross-class cram-downs would become possible.

6.5 Trading of Claims Against a Company

In general, there are no prohibitions or restrictions on trading claims against the debtor, but the possibilities to set-off newly acquired claims from a third party against payments due by the acquiring party to the debtor are limited during bankruptcy proceedings while, in principle, the debtor does not lose its right of set-off of claims due to the original debtor. Under the proposed ACPRP (see **6.1 Statutory Process for 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 Use of a Restructuring Procedure to Reorganise a Corporate Group

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**) a composition (ie, accord, restructuring plan, or plan of reorganisation) may also affect amendment rights of creditors of legal entities that are part of a group with the debtor if:

- the rights of those creditors against the relevant legal entities entail payment of, or security for, the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;
- the relevant legal entities foresee that they will be unable to continue paying their due debt;
- the relevant legal entities have approved the proposed amendment or the composition is proposed by a restructuring expert; and
- the court would have jurisdiction if these legal entities were to propose their own plan under the ACPRP.

In case the financial distress at the level of group companies of the debtor company is solely caused by the joint liability for certain debts of such debtor company, the above-mentioned provision would provide for a restructuring solution without the need to open separate ACPRP procedures for the individual group companies. Should that not be the case, then separate ACPRP procedures can be initiated for the group companies, provided they meet the criteria.

6.7 Restrictions on a Company's Use of or Sale of Its Assets

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), the right of the debtor company to use or sell its assets is not amended as a general rule. Should a cooling-off period (*afkoelingsperiode*) have been imposed by the court, the debtor retains rights to use, expend or dispose of assets or to collect claims existing prior to such cooling-off period during the cooling-off period, provided this falls within the debtor's ordinary course of business.

Such rights may only be exercised if the interests of third parties that are affected by the use or sale of such assets are adequately protected. Affected third parties can request the court to revoke or limit exercise of the aforementioned rights if adequate protection is no longer provided for.

6.8 Asset Disposition and Related Procedures

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), as a starting principle the debtor remains in possession and any sale of assets or the business in the course of an ACPRP process will be executed by the debtor itself. The right of the debtor company to use or sell its assets during a cooling-off period (*afkoelingsperiode*) is discussed in **6.7 Restrictions on a Company's Use of or Sale of its Assets**. During the ACPRP procedure, existing rights in rem in principle remain in place in full and a sale conducted in respect of encumbered assets will not be free and clear of claims.

6.9 Secured Creditor Liens and Security Arrangements

The proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**) does not provide for procedures regarding the release of secured creditor liens and security arrangements.

6.10 Priority New Money

Under the proposed ACPRP (see **6.1 Statutory Process for 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 could 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 rem security rights (liens) as a condition for providing their money, but by doing so 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.

6.11 Determining the Value of Claims and Creditors

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), the court can determine whether a creditor or shareholder should be admitted to the vote and, if so, for what amount. This determination can take place prior to the composition being put to a vote upon request of the debtor or the restructuring expert, if appointed. This decision is binding on the affected creditors and shareholders who were given an opportunity by the court to express their views. Changes to the amount of claims at a later stage do not affect the validity of the adoption, determination or refusal of the composition.

6.12 Restructuring or Reorganisation Agreement

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), a restructuring plan can be declared binding on all those affected, including dissenting parties, with possibilities for intra-class and cross-class cram-down. 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 Restructuring Market Participants** and **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Further, the proposed ACPRP 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 will have a claim for damages; the debtor may restructure such claim as part of the restructuring plan. An exception applies to employment contracts which cannot be affected.

6.13 Non-debtor Parties

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**) a composition (ie, accord, restructuring plan, plan of reorganisation) may also amendment rights of creditors of legal entities that are part of a group with the debtor, provided certain conditions are met (see **6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group**).

6.14 Rights of Set-off

Set-off rights are not affected during a restructuring, unless otherwise agreed to by the relevant creditor. The same applies under the proposed ACPRP (see **6.1 Statutory Process for 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 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, the bankrupt debtor from a third party before the declaration of bankruptcy may not effect a set-off if he or she has not acted in good faith with respect to such assumption or acquisition. There is extensive case law around set-off in bankruptcy.

6.15 Failure to Observe the Terms of Agreements

Under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**) non-compliance with the terms of a restructuring plan by the debtor will most likely lead to dissolvement of the plan and, provided that 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. Currently, the same generally applies for a suspension of payments or bankruptcy composition or an out-of-court restructuring.

6.16 Existing Equity Owners

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 Statutory Process for 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, the absolute priority rule, as well as other confirmation tests, and therefore seems less likely than in current practice (also because the ACPRP will significantly reduce any nuisance value shareholders currently may have in a restructuring).

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Dutch law distinguishes three types of insolvency proceedings:

- bankruptcy (*faillissement*), which aims at the liquidation of the assets 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 (*schuldsaneringsregeling natuurlijke personen*), 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" 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 in case 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 the 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 for verification purposes (*verificatie*) with the bankruptcy trustee in writing 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 whose value is not expressed in Dutch currency or euros or not expressed in a monetary value at all will be admitted for their estimated value in Dutch currency or euros. Claims of creditors can be traded and transferred, also in bankruptcy, from one party to another by deed of assignment and giving notice to the debtor (bankruptcy trustee). The aggregate number of votes (head count) that can be cast in relation to the voting on a composition cannot be increased as a result of such post-bankruptcy declaration transfer.

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

A person who is both a debtor and a creditor of the bankrupt debtor is generally allowed to set-off his debt against his claim against 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, the bankrupt debtor from a third party before the declaration of bankruptcy may not effect a set-off if he or she 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 of time, the bankruptcy trustee must report on the state of affairs of the estate. The contents of this periodic report are open to the public. Also, a committee of creditors may be established, but this is rarely done and only relevant for large and/or complex 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 have come into 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 the court-appointed administrator (*bewindvoerder*), the supervisory judge and the company are present. During the suspension of payments, 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 of unsecured creditors, but is not effective towards preferred and security creditors. Suspension of payments may last up to a period of 18 months and may be extended, at the debtor's request, an unlimited number of times, each time for a further 18 months. 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, Insolvencies and Receivership**). 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. A natural person can apply for a statutory debt restructuring when he or she reasonably foresees that he or she will be not be able to pay his debts as they fall due, or if he/she is in a situation in which 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 if its debts were incurred in bad faith.

7.2 Distressed Disposals

See **7.1 Types of Voluntary/Involuntary 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 is rather 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 a purchaser. Dutch law does not provide for any rules preventing an existing secured or unsecured creditor to participate 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 the silent bankruptcy trustee (*beoogd* curator) made certain undertakings, which is generally unlikely.

7.3 Failure to Observe Terms of Agreed/Statutory Plan

In bankruptcy or suspension of payments, the debtor may offer a composition (ie, 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 dissolvement of the plan and the opening of insolvency proceedings (bankruptcy).

Under the upcoming ACPRP (see **6.1 Statutory Process for 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, also upon dissenters.

7.4 Priority New Money During the Statutory Process

It is not unusual for a bankruptcy trustee or an administrator to approach secured and other creditors to obtain an estate loan (*boedelkrediet*) 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 against the estate (*boedelvordering*) and have priority as such (see **5.8 Statutory Waterfall of Claims**).

7.5 Insolvency Proceedings to Liquidate a Corporate Group

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 case the estates are so entangled that they cannot be efficiently liquidated separately.

7.6 Organisation of Creditors or Committees

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 information requested. By law, the bankruptcy trustee is also obligated 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 and/or complex cases.

7.7 Use or Sale of Company Assets During Insolvency Proceedings

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 Relief in Connection with Overseas Proceedings

Within the EU (Except for Denmark)

The European Insolvency Regulation recast 2015/848 (EIR recast) provides for automatic recognition in the Netherlands of foreign insolvency proceedings (listed in the EIR recast) opened on or after 26 June 2017.

Outside the EU

The Dutch Bankruptcy Act (DBA) contains no provisions with regard to the recognition of a foreign insolvency. UNCITRAL Model Law or (other) rules based on comity have not been implemented in the Netherlands. 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 from a country with which the Netherlands has no relevant treaty (such treaties being exceptionally rare) does not 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 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 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 described 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 (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 that respect.

8.2 Co-ordination in Cross-border Cases

The EIR recast includes several clauses on co-operation and communication between courts, as well as between courts and insolvency practitioners. As far as we are aware there are 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 Rules, Standards and Guidelines

The most important rules under Dutch law regarding the recognition of foreign insolvency proceedings and (other) decisions of foreign courts are the European Insolvency Regulation recast 2015/848 (EIR recast) respectively the European Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters recast 1215/2012 (Brussels I recast), applicable in a EU context, except for Denmark.

Recognition of insolvency proceedings other than based on the EIR recast is not possible in the Netherlands,. However, the exercise of powers by foreign insolvency practitioners can be recognised under certain circumstances and to a certain extent (see **8.1 Recognition or Relief in Connection with Overseas Proceedings**).

Recognition and enforcement of (other) foreign decisions can only be based on the Brussels I recast or treaties. Should those not apply, de facto recognition can be obtained through a so-called quasi-exequatur procedure (*verkapte exequatur-procedure*), provided that the foreign decision meets the following minimum criteria:

- the jurisdiction of the judge who rendered the foreign decision must be based on an internationally accepted ground for jurisdiction;

- the foreign decision came into being in legal proceedings based on proper and well-founded administration of justice;
- the recognition of the foreign decision is not contrary to Dutch public order; and
- the foreign decision is not incompatible with a decision of the Dutch court given between the same parties, or with a previous decision of a foreign court given between the same parties in a dispute concerning the same subject and based on the same cause, provided that the earlier decision is eligible for recognition in the Netherlands (Dutch Supreme Court In re Gazprombank, ECLI:NL:HR:2014:2838).

8.4 Foreign Creditors

Foreign creditors do not have a different standing in Dutch insolvency proceedings compared to local creditors.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

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

In the course of a pre-pack, without a statutory basis being present, a silent bankruptcy trustee (*beoogd* curator) can be appointed by the court in order to attempt a silent restructuring of the business of the company. The court also appoints a 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 Statutory Process for 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 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 the court-appointed administrator is required. The administrator will investigate whether or not the suspension of payments is likely to lead to the situation in which company will be continued while it is (or in the future will be able to) pay its debts, failing which he or she might request conversion into bankruptcy.

9.3 Selection of 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, based on years of experience. Depending on the company's size and insolvency proceedings requested (bankruptcy or suspension of payments), a bankruptcy trustee or an administrator is appointed. On a level basis, the eligible persons are appointed in turn.

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

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 (in matters directly related to or indirectly affecting the value of the assets of the debtor company). The bankruptcy trustee or administrator usually requires information and co-operation from the directors of the company – ie, in order to realise a sale of (part of) the business as a going concern. The directors of the company also have the obligation under the Dutch Bankruptcy Act to provide the bankruptcy trustee with any and all requested information.

In practice, only individuals on the "bankruptcy trustee list" mentioned above are appointed as a statutory officer. However, the Dutch Bankruptcy Act contains no formal requirements as to identity, qualifications or credentials, allowing for appointment of others in exceptional situations. Before accepting an appointment, a statutory officer should verify

whether or not he or she is conflicted in any way. If that is the case, the bankruptcy trustee or administrator appointed will have to withdraw. A statutory officer is conflicted if he/she is a creditor, creditor representative, owner, officer or director of the company concerned.

In general, only bankruptcy lawyers are on the court's lists and appointed as statutory officers. In some cases, if necessary, an expert – such as an accountant – is appointed as bankruptcy co-trustee or co-administrator.

10. Advisers and Their Roles

10.1 Typical Advisers Employed

In case of the (potential) opening of formal insolvency proceedings, both debtor and creditors usually engage professional advisors. Which professional advisors are appointed depends on many factors, including the size and complexity of the bankruptcy, the possibility of selling (part of) the business as a going concern, the intention to offer a composition to the creditors and the like. Usually, in any case legal counsel (attorneys) is engaged by the debtor company prior to the opening of insolvency proceedings. See further **10.2 Compensation of Advisers** on the relevant actors in insolvency proceedings employing such professional advisors, in what circumstances they are employed and how and by whom they are compensated.

In the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**) no administrator or trustee will be appointed by the court. The ACPRP does provide for the appointment of a "restructuring expert" (*herstructureringsdeskundige*), which can be a lawyer or other professional advisor, with the authority to submit a composition – that is, put to a vote. To the extent no restructuring expert has been appointed, the court can appoint an observer (*observator*), supervising the formation of the composition and cooling-off period (if applicable) in the interest of the joint creditors. Both the restructuring expert and the observer are paid for by the debtor company. The salary of the restructuring expert is determined by the court.

10.2 Compensation of 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 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 with the co-operation or authorisation of the administrator, it is up to the company to decide which professionals to employ, taking into account that the administrator will have to approve their appointment. This could be, for example, a restructuring officer, financial advisor 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 and part of a law firm. If the estate is a party to legal proceedings where representation by an lawyer is required, the estate will normally employ legal counsel form the same law firm as the bankruptcy trustee's 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, other than limited possibilities of members of the creditors committee to claim reimbursement of costs.

10.3 Authorisation and Judicial Approval

There are no mandatory authorisations 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.

10.4 Duties and Responsibilities

No information has been provided.

11. Mediations/Arbitrations

11.1 Utilisation of Mediation/Arbitration

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.

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

11.2 Mandatory Arbitration or Mediation

Courts do not order mandatory arbitration or mediation in a judicially supervised insolvency or restructuring proceeding.

11.3 Pre-insolvency Agreements to Arbitrate

In principle, a court-appointed bankruptcy trustee is bound by pre-insolvency agreements, including arbitral clauses.

11.4 Statutes Governing Arbitration/Mediation

The Dutch Civil Code contains several provisions governing arbitrations, besides the statutes usually applied by the relevant arbitration institute. There are no formal statutes that govern mediations.

11.5 Appointment of Arbitrators

The manner in which arbitrators/mediators are appointed depends on the applicable arbitration statutes and/or agreements between parties. Who can serve as an arbitrator/mediator also depends on the applicable arbitration statutes and/or agreements between parties.

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

12.1 Duties of Directors

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 direct their attention to 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. All duties of directors that have not been assigned to one or more other directors by, or pursuant to, law or the articles of incorporation accrue joint responsibility, and belong to the duties of the board of directors. Each director is responsible for the general conduct of business. A director is liable for the full consequences of an improper performance of duties, unless – also in regard to the tasks assigned to the other directors – no material reproach thereof 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, among other reasons, if (i) he or she has manifestly improperly performed his duties, and (ii) it is plausible that such improper performance substantially contributed to the company's bankruptcy. To clarify (i): this is the case if no right-thinking director would have acted similarly under the same 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 an important 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 acting for the benefit of the joint creditors, 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 (wan)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 was guilty of misconduct. Transactions that are prejudicial to the rights of creditors or fraud 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 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 for the benefit of the joint creditors and not on behalf of or for the benefit of a (specific) group of creditors.

12.3 Chief Restructuring Officers

Companies can appoint a chief restructuring officer, either as 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 ("shadow directors" or "de factodirectors" – *feitelijk bestuurders*), are exposed to the same liability risks as directors.

12.5 Owner/Shareholder Liability

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

The articles of association of the company can impose additional obligations on the shareholders. In addition to this statutory provision, Supreme Court case law shows that, in certain situations, mainly in group structures, the doctrine of piercing the corporate veil is applicable. Examples are indirect piercing of the corporate veil in the case of keeping up a façade of solvency or creditworthiness, withdrawal of assets by the parent company in the capacity of creditor of 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 was 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 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 ceases its activities, and the company is not able to fulfil its obligations vis-à-vis its creditors.

13. Transfers/Transactions That May Be Set Aside

13.1 Historical 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 its 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 the aforementioned knowledge is assumed if the transaction is entered into within one year prior to the bankruptcy of the debtor and, among others:

- the value of the obligation of the creditor is substantially exceeded by the value of the obligation of the debtor;
- payment has been made of, or security has been granted for, a debt which is not due and payable; or
- the debtor and creditor are related parties/entities.

Secondly, the bankruptcy trustee may void transactions which are entered into with the legal obligation to do so if (i) 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 (ii) where the transaction is the result of discussions between the company and the other party with the purpose to prefer the latter to the detriment of the debtor's other creditors.

13.2 Look-Back Period

There is no real look-back period under Dutch law, but in connection with the test for avoidance (see **13.1 Historical 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 the actio pauliana – avoidance, fraudulent preference/conveyance – are applicable only in the case of bankruptcy and may exclu-

sively be used 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 paulianaare 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 on largely the same tests as for the bankruptcy avoidance claim (see **13.1 Historical Transactions**).

14. Importance of Valuations in the Restructuring and Insolvency Process

14.1 Role of Valuations

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 example, in limiting the possibilities for third parties to claim in an actio pauliana action that assets have been sold at an uncommercial price. Also, in case of the 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 for lack of formal options; with the introduction of the ACPRP (see **6.1 Statutory Process for 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 be 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.

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.

Further, valuations of the (liquidation) value of the company play a key role in negotiations with creditors in light of a composition, restructuring plan or accord in insolvency proceedings as well as the court confirmation process following approval of such composition, restructuring plan or accord. Court-appointed bankruptcy trustees or administrators in insolvency proceedings can engage their own advisors to conduct such a valuation (or provide for a "sanity check" or second opinion) in light of the bankruptcy trustee's or administrators (as applicable) duty to advise the creditors on the composition, restructuring plan, accord.

14.2 Initiating a 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.

14.3 Jurisprudence

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, for example, 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 normally not 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 the future this will also be done by courts in the process of confirmation of private restructuring plans under the proposed ACPRP (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Florent

NoMA House
Gustav Mahlerlaan 1236
1081 LA AMSTERDAM

Tel: +31 (0)20 303 59 00
Fax: +31 (0)20 303 59 99
Email: info@florent.nl
Web: www.florent.nl