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1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

Until fairly recently, the Dutch jurisdiction was primarily creditor-friendly. The primary aim of the Dutch Bankruptcy Act ("**DBA**") – more specifically the bankruptcy proceedings – is to ultimately satisfy the creditors, and not to give the debtor a remedy to reorganise its business and to grant a (full or partial) discharge of debts. However, on 1 January 2021, the Act on confirmation of private restructuring plans (*Wet homologatie onderhands akkoord*, the "**Dutch Scheme**") came into effect, giving the debtor a remedy to reorganise its business.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

The DBA provides for two formal corporate insolvency proceedings: bankruptcy proceedings (*faillissement*; corporate liquidation proceedings); and suspension of payments (*surseance van betaling*; corporate restructuring proceedings).

In both formal insolvency proceedings, the debtor can offer a composition plan (*akkoord*) to its ordinary creditors, but this does not happen often.

Suspension of payments is rarely successful and is often followed by bankruptcy proceedings. In practice, bankruptcy proceedings are the most used.

The legislative framework also allows informal work-outs, for example, by means of a plan of composition. Such an informal composition requires the cooperation of all creditors.

The Dutch Scheme consists of a framework that allows debtors to restructure their debts outside formal insolvency proceedings. The Dutch Scheme combines features of the US Chapter 11 and English schemes of arrangement. The purpose of the restructuring can be (i) to restructure the debt and equity structure in order to prevent insolvency, or (ii) to liquidate the assets of the company and distribute the proceeds amongst the creditors (see further under section 3). The Dutch Scheme is actively used in practice and a significant number of schemes have been confirmed by the court.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

The managing directors of the debtor are not under a statutory obligation to file for the opening of insolvency proceedings. Although the DBA does not contain such obligation, the managing directors may become personally liable *vis-à-vis* the creditors if the managing directors have permitted the company to incur obligations towards a third party that they know, or should have known, the company will not be able to timely meet. In such circumstances, the managing directors will be required to take appropriate measures, which could – depending on the circumstances – include the cessation of trading and the filing for suspension of payments or bankruptcy.

A managing director can be held liable for losses suffered by the company due to improper management if the managing director can be seriously blamed (*ernstig verwijt*), taking into account all facts and circumstances, such as the allocation of duties within the management board, the management board guidelines, information that the member of the management board is or should have been aware of, etc. These proceedings can only be initiated by the company, or by the bankruptcy trustee in case of a bankrupt company.

Managing directors are liable for the deficit of the estate if it is plausible that the management board manifestly improperly managed the company and this was an important cause of the bankruptcy. Certain legal presumptions apply. This liability towards the bankruptcy estate also applies to a *de facto* managing director.

Although the main rule is that only the company (and not its managing directors) is liable towards third parties such as creditors of the company, personal liability towards third parties may nevertheless arise if a managing director has committed an unlawful act towards such third party by violating his general duty of care. In all cases, the standard of liability is that the member of the management board can be seriously blamed for this.

Members of the management board may further become jointly and severally liable for the payment of certain taxes.

This liability arises in the case of manifestly improper management. If the company or any of the managing directors timely filed a notification of non-payment, the tax authorities must demonstrate that there was such manifestly improper management. If the company or any of the managing directors failed to timely file the notification, it is legally assumed that the non-payment of taxes was caused by the managing director, unless he proves otherwise.

In conclusion, certain criminal law provisions apply, e.g. in the case of fraudulent conveyance.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

In the Netherlands, it is fairly easy for creditors to obtain leave for conservatory attachment. Such creditors may also file a petition for bankruptcy. The filing of such petition can trigger contractual clauses that make it possible to terminate existing contracts.

Dutch law further provides for a broad retention of title regime. Suppliers can arrange to reclaim their goods until all invoices have been paid.

Secured creditors (financiers) also have a strong influence. In practice, a company in financial difficulties will be placed under the supervision of the financiers' special management department because certain covenants under the financing agreements will be breached. Formally, the secured creditor has no role within the company, but in practice the company often cooperates with the bank, in the knowledge that the cooperation of the financiers is required for any restructuring due to all assets being pledged.

Employees take a special position in the Netherlands. Outside of a bankruptcy scenario, the possibilities to dismiss employees are limited. This is one of the reasons why it is difficult to successfully restructure a company outside insolvency proceedings. Legislation is being drafted to strengthen the position of employees in case of a transfer of undertaking during bankruptcy proceedings. Also note that it is not possible to affect the rights of employees under employee contracts in the Dutch Scheme.

In the Netherlands, suspension of payments (moratorium) is granted on a preliminary basis if a debtor foresees that it will be unable to meet its obligations. During suspension of payments proceedings, the debtor cannot be forced to pay his debts and all actions in progress to recover those debts are suspended. However, this regime only affects the ordinary creditors. See question 3.2 and further.

A freeze period can apply in the Dutch Scheme, bankruptcy or suspension of payments (see questions 3.4 and 4.4).

Stakeholders can have influence in relation to the Dutch Scheme. Not only the debtor, but also any of its creditors, shareholders or employee representatives may take the initiative for the Dutch Scheme. In general, the debtor does not require shareholder consent for a restructuring plan in the Dutch Scheme. An exception applies in case a restructuring expert is appointed as part of a scheme for small or medium-sized enterprises ("**SMEs**"). If one of the creditors, shareholders or employee representatives takes the initiative for a restructuring plan under the Dutch Scheme, it must request the court to appoint a restructuring expert, who will prepare a restructuring plan on behalf of the debtor. The debtor or the restructuring expert can request the court to grant a freeze order for a period of four months, which can be extended by another four months (see question 3.4).

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

The bankruptcy trustee is entitled to invalidate legal acts of the bankrupt debtor that were carried out before the declaration of bankruptcy and that were detrimental to the creditors. No hardening period applies. The burden of proof may be reversed in respect of voluntary legal acts that took place less than a year before the debtor was declared bankrupt (e.g. legal acts entered into with related parties or transactions at undervalue).

Voluntary legal acts by the bankrupt debtor, of which the results are detrimental to creditors (which is established when the action is invoked), may be invalidated if both the debtor and its counterparty knew or should have known (at the time the legal act was voluntarily entered into) that such legal act would have a detrimental effect on the creditors. The fact that a transaction was at arm's length does not necessarily mean that a transaction cannot be challenged.

Also, compulsory legal acts can be invalidated if (a) the creditor knew that the request for bankruptcy was pending, or (b) the creditor consulted with the debtor with the intention to put him in a more favourable position than the other creditors. The bankruptcy trustee has the burden of proof. There is no presumption of knowledge as in the case of voluntary legal acts.

Outside of formal insolvency proceedings, transactions can also be challenged. As a matter of Dutch law, every creditor may nullify (by a simple declaration) any legal act entered into by a debtor with a third party if the requirements for voidable preference outside bankruptcy are met.

In case of a Dutch Scheme, court authorisation can be requested for restructuring efforts, such as debtor-in-possession ("**DIP**") financing. If court authorisation is obtained, such efforts are protected from avoidance actions.

The validity and enforceability of the obligations of a debtor under, e.g., guarantee or security interest, may be successfully contested by a debtor (or its bankruptcy trustee) if the execution of the security document is not within the scope of the corporate objects of the debtor (*doeloverschrijding*) and the counterparty of such debtor under the security document knew or ought to have known (without enquiry) of this fact.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Yes, the Dutch Scheme allows for work-outs outside formal insolvency proceedings by means of a court-approved restructuring plan (see question 3.2 and further).

3.2 What informal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies?

As explained, the purpose of a restructuring by means of a Dutch Scheme can be (i) to restructure the debt and equity structure in order to prevent insolvency, or (ii) to liquidate the assets of the company and distribute the proceeds amongst the creditors. The Dutch Scheme allows for a wide range of possibilities to restructure the debt; for example, by means of a debt for equity

swap, a haircut or extension of payment obligations, or through amendments to contractual terms (see further under question 3.7). It is also possible to restructure guarantees provided by group companies. The Dutch Scheme allows for a cross-class cram-down.

3.3 Are debt-for-equity swaps and pre-packaged sales possible? In the case of a pre-packaged sale, are there any restrictions on the involvement of connected persons?

Debt-for-equity swaps are possible as mentioned above.

Following the ruling of the European Court of Justice (*FNV/Heiploeg*) in 2022, the Dutch Supreme Court ruled at the end of 2023 that pre-packaged sales need to be regulated by statutory or administrative provisions, which requirement is not met in the Netherlands. A legislative proposal to introduce a legal framework for pre-packaged sales has been put on hold, with the exception of a legal framework for pre-packaged sales for companies that serve social interests (see question 10.1).

Following said case law from the European Court of Justice, the pre-pack has not been very popular as there is a risk that employees of the debtor automatically transfer to the purchaser in a pre-packaged asset sale. Currently, the Dutch courts are reluctant to appoint an envisaged bankruptcy trustee, which further complicates pre-packs. There are no formal limitations on connected persons taking part in a restart of the company through bankruptcy.

3.4 To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

Under the Dutch Scheme, the court can grant a freezing order of a maximum of four months at the request of the debtor or restructuring expert. The freezing order can be extended by four months for a total maximum of eight months. If a freezing order applies, the enforcement of security rights is restricted, the court can lift attachments and bankruptcy applications and applications for suspension of payments are stayed.

Creditors and shareholders with dissimilar rights are placed in different classes. Creditors and shareholders are considered to have dissimilar rights if: (i) they have different rights in case of bankruptcy proceedings; and/or (ii) they are offered different rights under the restructuring plan. Only creditors/shareholders whose rights are affected in the restructuring plan are entitled to vote. The final restructuring plan must be presented to these creditors and shareholders at least eight days prior to a vote. The voting will be carried out per class and can take place either in a meeting or electronically. A two-thirds majority in value is required for a particular class to consent to the restructuring plan.

The debtor or restructuring expert can request the court for a confirmation of the restructuring plan if at least one class of creditors voted in favour of the plan. Upon confirmation by the court, the restructuring plan becomes binding on the debtor and all creditors and shareholders who were entitled to vote.

The court must test the restructuring plan at its own motion against the general grounds for refusal and reject the plan if any of those grounds applies, e.g., procedural requirements have not been met, the performance of the plan is not sufficiently guaranteed, the plan is a result of fraud, etc. The court may also reject the restructuring plan at the request of opposing creditors or shareholders, if they would be significantly worse off under the plan compared to a liquidation scenario ("**best interest of creditors test**").

If one or more classes have rejected the restructuring plan, the court can still confirm the plan if at least one class, which is expected to receive cash payment in the event of bankruptcy, has accepted the plan (cross-class cram-down). However, the court must reject the plan at the request of opposing creditors or shareholders from a dissenting class when any of the following apply: (i) the order of priority is disregarded in relation to the opposing class, unless there is a justifiable reason for that deviation and the relevant creditors or shareholders' interests are not prejudiced ("**absolute priority rule**"); or (ii) the plan does not offer creditors, other than secured commercial lenders, a distribution in cash of the amount they would receive in cash in a bankruptcy proceeding of the debtor. In relation to secured creditors, certain exceptions apply. The supplemental grounds for refusal are inspired by the US Chapter 11 best interest of creditors test and absolute priority rule.

Suspension of payments is the main formal rescue procedure available in the Netherlands. Suspension of payments only affects the rights of ordinary creditors; the obligations of the debtor to pay its ordinary creditors are suspended. The rights of secured and preferential creditors are not affected.

The debtor can offer a composition plan that provides for a full or partial payment of the suspended claims of the creditors, in full satisfaction of their claims. Using the plan of composition during suspension of payments may lead to a successful reorganisation. Dissenting ordinary creditors can be forced to accept the composition if – in summary – the majority of the creditors vote in favour of the plan and the plan is approved by the court. However, in practice, it is difficult to achieve a successful restructuring by way of offering a composition plan in suspension of payments proceedings.

3.5 What are the criteria for entry into each restructuring procedure?

The Dutch Scheme can be initiated when the debtor is in a position in which it can be reasonably expected that it will not be able to continue paying its debts. For example, when the debtor foresees not being able to repay a loan in six or 12 months' time and this would result in a bankruptcy of the debtor.

The debtor can file a petition in court for a suspension of payments if it foresees that it will be unable to continue to timely meet its obligations. Suspension of payments is immediately granted on a preliminary basis. In theory, the object of a suspension of payments is to allow the debtor time either to overcome temporary illiquidity or to propose a settlement to its creditors. An application for suspension of payments cannot be made by creditors or other third parties.

3.6 Who manages each process? Is there any court involvement?

The intention of the legislator with respect to the Dutch Scheme is, in principle, to minimise the involvement of the court. Court involvement can in theory be limited to the confirmation hearing during which the court will test the plan against the grounds for refusal (see above under question 3.4). However, if one of the creditors, shareholders or employee representatives takes the initiative for the Dutch Scheme, that same entity must request the court to appoint a restructuring expert who will prepare the restructuring plan on behalf of the debtor. A debtor may also request the appointment of a restructuring expert by the court, for example, to avoid any suggestion of a conflict

of interest. Regardless of the appointment of a restructuring expert, the debtor remains in control of the business and the day-to-day management of the company.

The court can be involved earlier in the process. During the process, the debtor or the restructuring expert can request the court to issue preliminary judgments on several points such as class formation, eligibility and valuation. This often happens in practice.

Upon granting a preliminary suspension of payments, the court will appoint an administrator (*bewindvoerder*) and usually also a supervisory judge. The administrator and the management board will jointly administer the affairs of the debtor and investigate the possibilities of a reorganisation of the debtor's company and/or full or partial payment of the creditors through a plan of composition. By law, the management and the administrator may only act together; the administrator is *de facto* in control during suspension of payments. In practice, the preliminary suspension of payments is most often swiftly followed by a bankruptcy because the administrator considers that a successful reorganisation is unlikely.

3.7 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

The Dutch Scheme allows for the possibility to restructure debt by amending the contractual terms of existing agreements with the exception of employment contracts. The debtor or restructuring expert can propose to its counterparty a voluntary amendment or termination of an existing agreement. If the counterparty is not willing to accept such proposal, the debtor or the restructuring expert may terminate such agreement against a certain termination period with court approval, provided that the restructuring plan is confirmed by the court. The court can extend the termination period up to a maximum of three months. The counterparty might have a claim for damages due to the early termination of the agreement, but such claim can be included in the restructuring plan.

Ipso facto clauses are temporarily not enforceable. In principle, suspension of payments does not affect existing agreements. However, the debtor's payment obligations in relation to ordinary claims are suspended. Moreover, these contracts might contain provisions on the consequences of the granting of suspension of payments on any of the parties to the agreement, and these remain valid in principle. The same applies to set-off provisions.

Although agreements in principle are not affected by suspension of payments, the administrator/debtor does not have to perform all obligations under agreements as this may conflict with his duty to treat all creditors equally (e.g. not obliged to make payments, deliver goods). The counterparty can file its ordinary claim in the bankruptcy estate. The administrator/debtor does have the obligation to passively perform (e.g., honour the lease agreement if the debtor is the lessor). If such obligations are not honoured, the counterparty has a direct claim on the estate.

If both the debtor and the counterparty have not or have only partially performed under an agreement, the counterparty can request that the administrator/debtor confirm within a reasonable time whether they are willing to perform under the contract. If the administrator/debtor does not confirm this, he/she loses the right to claim performance of the counterparty's obligations. If the administrator/debtor confirms that he/she will perform, the administrator/debtor must provide security.

3.8 How is each restructuring process funded? Is any protection given to rescue financing?

Reorganisation of the company will generally be funded by the debtor itself or parties with an interest in the debtor, such as the shareholders.

In the Dutch Scheme, the restructuring costs, e.g. the costs for the restructuring expert, will be borne by the debtor. Restructuring efforts, such as DIP financing, can be protected from avoidance actions if the court has granted authorisation for such legal act. The court grants authorisation if: (i) the relevant legal act is necessary for the continuation of the business during the scheme process at the time of the granting of the authorisation; and (ii) the relevant legal act is expected to be in the interest of the joint creditors while interests of individual creditors are not substantially prejudiced.

Rescue financing is not protected in case of a suspension of payments or bankruptcy proceedings. However, after the opening of insolvency proceedings, it is possible for a financier to provide a preferential loan that has a higher rank than other debts of the debtor if the bankruptcy trustee or the administrator agrees.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The key insolvency procedure available to wind up a company is bankruptcy. The Dutch Scheme can also be used for a wind-up.

4.2 On what grounds can a company be placed into each winding up procedure?

A debtor can be declared bankrupt by a Dutch court if it resides or has a place of business in the Netherlands and either applies for bankruptcy itself or an application for bankruptcy is filed by a creditor.

The petition must reveal facts and circumstances that constitute *prima facie* evidence that the debtor has ceased to pay its debts. This is considered the case if there are at least two creditors, one of whom has a claim that is due and payable and that the company cannot or refuses to pay. The DBA does not require that other creditors support the petition.

In addition, the administrator in suspension of payments might have to file for bankruptcy. This would be the case, for example, if there were no outlook that the debtor would be able to satisfy its creditors or if the debtor acted in bad faith.

In relation to the Dutch Scheme, we refer to the answer to question 3.5. The debtor must be in a position that it can reasonably be expected that it will not be able to continue paying its debts.

4.3 Who manages each winding up process? Is there any court involvement?

When making the bankruptcy order, the court appoints a supervisory judge (*rechter-commissaris*) and at least one bankruptcy trustee (curator). The bankruptcy trustee is entrusted with the administration of the bankruptcy and is exclusively entitled to administer and dispose of the assets. The bankruptcy trustee is usually an attorney of the local Bar Association and, especially in case of larger bankruptcies, is usually a specialised insolvency lawyer.

The supervisory judge's task is to supervise the bankruptcy trustee and he has a statutory duty to approve certain decisions to be made by the bankruptcy trustee.

We refer to the answer to question 3.6 in relation to the Dutch Scheme. In summary, the debtor or a restructuring expert manages the process. Court involvement can be limited to only the confirmation hearing.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

The management board is not authorised to file for bankruptcy without a resolution to do so from the general meeting of shareholders. Other than that, shareholders have little influence over the bankruptcy proceedings.

The court may, depending on the type and size of the bankruptcy, decide to form a creditors' committee whose task is to advise the trustee. If a creditors' committee is installed, the bankruptcy trustee is obliged to seek advice from the committee with regard to the subjects referred to in the DBA. In addition, creditors have the right to file a request with the supervisory judge objecting to acts of the bankruptcy trustee or demanding an order from the supervisory judge.

Ordinary creditors are not entitled to enforce their claims; all attachments on the debtor's assets that benefit specific creditors are replaced by a general bankruptcy attachment that benefits all creditors. Pending legal proceedings are suspended. Creditors must file any claims on the debtor in the bankruptcy estate.

Creditors that have a right of mortgage or right of pledge have more influence. Subject to any applicable freeze order, secured creditors are entitled to foreclose their collateral during bankruptcy. The bankruptcy trustee is in principle not entitled to the proceeds of the sale of the secured assets, nor is he entitled to withhold these assets. The secured creditors cannot be charged with the costs of the bankruptcy.

However, the bankruptcy trustee may impose on the mortgagee or pledgee a reasonable term for selling the collateral. If secured creditors do not execute the collateral before the deadline, the bankruptcy trustee is entitled to liquidate the collateral himself, notwithstanding the creditor's right of priority to the proceeds as a preferential creditor. In that case, the secured creditor must share in the costs of the bankruptcy, which may mean that they will receive little or no proceeds.

The supervisory judge may declare a freeze period, during which recourse can only be sought against (some of the) assets of the estate or assets in the possession of the bankruptcy trustee, after having obtained authorisation from the supervisory judge. The freeze period applies for a maximum period of two months and may be extended once, for a maximum of two months.

In relation to the Dutch Scheme, we refer to the answers to questions 3.5 and 3.6. In summary, creditors, shareholders or employee representatives may take the initiative for the Dutch Scheme.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

In principle, bankruptcy proceedings do not affect the validity or the content of an agreement. Set-off provisions and termination provisions will be upheld. The DBA provides for broad set-off possibilities.

Although agreements are in principle not affected by the bankruptcy proceedings, the bankruptcy trustee does not have to perform obligations under agreements that may conflict with his duty to treat all creditors equally (e.g. not obliged to make payments, deliver goods). The counterparty must file its claim with the bankruptcy estate. The bankruptcy trustee has the obligation to passively perform (e.g. honour the lease agreement if the debtor is the lessor). Alternatively, the counterparty has a direct claim on the estate.

If both the debtor and the counterparty have not, or have only partially performed under an agreement, the counterparty can request the bankruptcy trustee to confirm within a reasonable time whether he is willing to perform under the contract. If the bankruptcy trustee does not confirm, he loses the right to claim performance of the counterparty's obligations. If the bankruptcy trustee confirms that he will perform, he must provide security.

The DBA grants the bankruptcy trustee the right to terminate lease agreements and employment contracts.

The Dutch Scheme allows for the possibility to restructure debt by amending the contractual terms of existing agreements (see question 3.2). However, it is not possible to affect the rights of employees under employment contracts.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The ranking of claims is as follows:

1. **Estate claims** (*boedelvorderingen*) are direct claims against the estate. Estate claims have priority over all other claims. An exception applies to the claims of secured creditors that have timely foreclosed their security, as they can act as if there is no bankruptcy at all.
   Estate claims are claims that arise by virtue of law (e.g. rental payments during the bankruptcy, and salaries dating from after the date of the bankruptcy order), from legal acts performed by the bankruptcy trustee in his capacity and resulting from actions of the bankruptcy trustee in breach of an obligation or commitment applicable to him in his capacity as bankruptcy trustee. The salary and costs of the bankruptcy trustee are estate claims as well.
2. **Claims of secured creditors** are claims of creditors that are secured by a right of mortgage (*hypotheek*) or a right of pledge (*pandrecht*). Subject to any applicable freeze order, secured creditors are entitled to foreclose their collateral during bankruptcy (see above under question 4.4). To the extent that not all claims can be satisfied from the proceeds of the enforcement of the security rights, the remainder is treated as an ordinary claim.
3. **Preferential claims** are claims that have a priority right to the proceeds of all or certain assets of the estate (depending on the type of claim). The claims of the tax and social authorities (taxes and social insurance contributions) as well as certain claims of employees, are the most important categories of preferential claims. Preferential creditors only receive payment if all estate claims are paid. With regard to the proceeds of fixtures and fittings, tax claims take preference over secured claims under certain circumstances.
4. **Ordinary claims** are claims that already existed on the date of the bankruptcy order or were already a part of the legal position of the creditor at the date of the bankruptcy order. Ordinary claims must be submitted for verification. The ordinary creditors receive a *pro rata* share of the remainder after the estate claims and preferential claims are paid.
   Post-insolvency claims are claims that arise after the bankruptcy and do not fall within one of the above-mentioned categories. Those claims cannot be submitted for verification.

4.7 Is it possible for the company to be revived in the future?

In theory, the bankruptcy can end with a plan of composition offering the creditors a partial payment of their claim. The bankrupt legal entity then emerges from bankruptcy and can continue to do business. In practice, the plan of composition is almost never offered in case of bankruptcy proceedings.

5 Tax

5.1 What are the key tax risks which might apply to a restructuring or insolvency procedure?

Restructuring and insolvency proceedings can significantly affect the tax position of the company. Certainly, in group relationships, complex tax regulations can have far-reaching consequences that affect not only the distressed company itself, but also the group of companies to which it belongs. Examples of possible tax risks are:

- Companies in distress are obliged to timely report to the tax authorities their inability to pay tax debts. Not timely reporting the inability to pay tax debts may lead to directors' liability.
- Many groups of companies form a fiscal unity (*fiscale eenheid*) for corporation tax, VAT, or both. If a company in a fiscal unity goes bankrupt, this may affect and eventually terminate the fiscal unity in relation to that company, which may lead to Dutch corporate income tax due in the year of termination.
- If a creditor remits a claim, this can lead to taxable profit (*kwijtscheldingswinst*) for the debtor. Under Dutch law there is a specific regulation concerning these kinds of profits. Remission is also possible within the company's fiscal unity.

It is therefore important to map out the distressed company's tax position adequately and in good time.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

With authorisation from the supervisory judge, the bankruptcy trustee is entitled to terminate the employment contracts. The applicable termination period depends on the terms of the relevant employment agreement but is capped at six weeks.

The salary and pension contributions between the bankruptcy date and the date of termination of the employment agreement rank as estate claims. Claims that pre-date the bankruptcy date and that arose within one year prior to that date are preferential claims. Any further claims rank as ordinary claims.

In practice, most of the employee's claims on the estate will be paid by the Employee Insurance Agency ("**UWV**") under the wage guarantee scheme. It concerns the amount that ranks as estate claims (with a maximum of six weeks) and also the salary for the period until 13 weeks prior to the bankruptcy and certain other amounts (e.g. holiday pay and holidays for the year preceding the bankruptcy). The UWV in turn will subrogate in the claims of the employees towards the estate.

In a suspension of payments, the administrator and debtor acting jointly can terminate the employment contracts together. The termination period can vary depending on the length of the relevant employment contract but is capped at four months. The ranking of the claims is similar to those in bankruptcy proceedings.

Under the Dutch Scheme, it is not possible to affect the rights of employees under employment contracts.

European rules on the transfer of undertakings are not applicable in case of an asset sale during bankruptcy proceedings. The recent case of the European Court of Justice and the Dutch Supreme Court illustrate that this can also be the case when it comes to a pre-packaged sale (see question 3.3 above). However, legislation is being drafted so that the transfer of undertakings rules are also applicable in bankruptcy proceedings, unless the purchase can provide economic, technical or organisation reasons that justify changes to staff or the employment contracts (see under question 10.1).

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Any debtor residing in the Netherlands or with its centre of main interests ("**COMI**") located in the Netherlands can enter into insolvency proceedings in the Netherlands.

The Dutch Scheme provides for two types of proceedings: public proceedings; and confidential proceedings.

The Dutch government has requested to place the **public proceedings** in Annex A to the EU Insolvency Regulation and as of 9 January 2022, the public proceedings are placed in the Annex. As of that moment, the public proceedings are automatically recognised in other EU Member States (with the exception of Denmark). The Dutch courts have jurisdiction if the COMI or a branch is located in the Netherlands.

Recognition of the **private proceedings** depends on the private international law regime of the relevant jurisdiction. It is expected that the Dutch Scheme will be recognised in jurisdictions that have incorporated the UNCITRAL Model Law, unless the relevant jurisdiction requires reciprocity. The Dutch courts have jurisdiction if any of the affected parties is located in the Netherlands, or other aspects provide for sufficient connection with the Netherlands.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

There is a difference between proceedings commenced in an EU Member State and those commenced in a non-EU Member State.

Insolvency proceedings commenced in EU Member States (with the exception of Denmark) are recognised pursuant to the EU Insolvency Regulation (recast).

Proceedings commenced in non-EU Member States are formally not recognised in the Netherlands absent any treaty, but in practice do have some effect. When determining a claim for recognition of insolvency proceedings rendered by a court in a non-EU Member State, Dutch courts will apply the Dutch private international rules for recognition of foreign judgments. Foreign judgments will be recognised if – in summary – the authority of the relevant court is based on internationally accepted standards and the foreign judgment does not conflict with the Dutch public order. The recognition of the foreign insolvency order might, however, be limited by the principle of territoriality. This means that the foreign proceeding, for example, cannot impair the rights of creditors to take recourse on assets located in the Netherlands.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Occasionally, companies incorporated in the Netherlands enter into insolvency proceedings or restructuring proceedings in other jurisdictions. Dutch incorporated companies have, in the past, for example, used the English scheme of arrangement in order to restructure their debt. It is not unusual, but neither is it common practice. We expect that this will happen less frequently now the Dutch Scheme has been introduced.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Dutch legislation does not provide for a formal procedure with regard to the insolvency of a group of companies. The main rule is that each company must be separately liquidated.

In exceptional cases, the bankruptcies can be settled jointly by means of what is known as a consolidated settlement. At the request of the bankruptcy trustee, the appointed supervisory judge is authorised to decide whether a consolidated settlement is necessary.

Dutch law does not provide for a statutory obligation for bankruptcy trustees to cooperate with one another.

It is possible to restructure guarantees of group companies under the Dutch Scheme. In the event of a group restructuring, the Dutch courts have ruled that offering a joint composition plan is not possible, but two (or more) separate plans can be submitted for confirmation at the same time with the same court.

9 The Future

9.1 What, if any, proposals exist for future changes in restructuring and insolvency rules in your jurisdiction?

The following developments in the context of reform of the corporate rescue and insolvency regime in the Netherlands are worth mentioning. However, a lot of these initiatives are not progressing as swiftly as expected.

- **Continuity of Enterprises Act** (*Wet Continuiteit Ondernemingen I*), providing legislation regarding pre-packs. The purpose of this proposal is to provide a legal basis for the working method that has arisen in practice, whereby in certain cases an intended bankruptcy trustee is appointed prior to an expected bankruptcy, often termed a "pre-pack". The Senate has postponed discussion of this proposal because another bill is also being prepared which regulates the position of employees in the event of such a relaunch, the "Transfer of Undertaking in Bankruptcy Act" (*Wet overgang van onderneming in faillissement*) (see below). The senators have rightly pointed out that the bills are interrelated and therefore want to deal with them together. The recent judgment of the European Court of Justice and the Dutch Supreme court might give an impulse to pick up the discussion of the proposal. The European Commission's proposal for a directive harmonising certain aspects of insolvency law also calls for the establishment of a pre-pack procedure.
- **Novella to the Continuity and Enterprises Act** (*Novelle op de Wet Continuïteit Ondernemingen I*), purports to restrict the scope of application of the WCO I and the focus of the legislation is placed on companies with activities that serve social interests, such as hospitals and educational institutions. The Novella allows for a controlled wind-down of activities in bankruptcy and, at the same time, takes into account the as yet undefined position of employees by temporarily limiting the scope of the regulation. The scope of the WCO I is envisaged to be temporarily restricted to meet the urgent need in practice. When the legislative process concerning the WCO I is resumed, the scope of WCO I will be broadened again. The internet consultation for the Novella ended on 21 July 2021.
- **Transfer of Undertaking in Bankruptcy Act**, purports to introduce a new regulation concerning the position of employees in bankruptcy. In particular, it concerns the rights of employees in the case of a transfer of undertaking in bankruptcy. The internet consultation for the Transfer of Undertaking in Bankruptcy Act ended on 31 August 2019 and the legislator is preparing a legislative proposal. It is not yet known when the proposal will be submitted to Parliament.
- **Consultation Bankruptcy Act** (*Consultatiedcoument insolventierecht*), the Ministry of Justice and Security has issued a discussion paper. The discussion paper aims to involve practitioners in the development of insolvency law and to gather views on a number of current themes, such as: the future of the moratorium; the efficiency of bankruptcy proceedings; the trustee's duties and the empty estate problem; the supervision of the supervisory judge in bankruptcy; and the extent to which different categories of creditors in bankruptcy can still expect any payment on their claims. The internet consultation for the Bankruptcy Act ended on 15 March 2022.

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