Restructuring across borders
Netherlands

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | MARCH 2025

Contents

Introduction

The principal restructuring and insolvency regimes for companies under Dutch law are:

- bankruptcy (faillissement);
- suspension of payments (surseance van betaling);
- out-of-court composition (the “Dutch scheme” or “WHOA”); and
- voluntary liquidation.

Bankruptcy

Bankruptcy involves the winding-up of a company that has ceased paying its debts. The purpose of bankruptcy is to liquidate the company's assets and distribute the proceeds amongst those creditors who were creditors of the company at the time of the bankruptcy order. The bankruptcy estate will in principle not be liable for any new debts, subject to certain limited exceptions, for example, if such debts were incurred by the trustee in bankruptcy in the course of liquidating the company. The trustee in bankruptcy, who takes primary responsibility for the winding-up process, is appointed by the court and is supervised by a court appointed supervising judge. The law provides that various decisions of the trustee in bankruptcy (for example, to sell the company's assets and to enter into settlements), are subject to the prior approval of the supervising judge. In practice, the supervising judge will usually give their permission. The trustee in bankruptcy may also seek a decision of (or advice from) the supervising judge on other matters. In any event, the trustee in bankruptcy will be responsible for their own decisions. In addition, the company's creditors may file a petition with the supervising judge for an order that the trustee in bankruptcy take, or refrain from taking, certain actions.

In theory a company could survive bankruptcy proceedings if the creditors of such a company adopt a composition plan that is subsequently ratified by the court. In general, however, almost all bankruptcy proceedings result in the dissolution of the company.

Bankruptcy in itself has no effect on corporate governance in the sense that the managing directors of the company will remain in office. However, during bankruptcy proceedings, the trustee in bankruptcy is in charge of managing the company's assets and has exclusive power of disposal over the assets. Consequently, the trustee in bankruptcy effectively controls and represents the company during the bankruptcy.

The primary duty of the trustee in bankruptcy is to obtain the highest possible return for the company's creditors by selling the company's assets to the highest bidder and distributing the proceeds in accordance with the rules of the Dutch Bankruptcy Act and Dutch Civil Code. There is a debate in legal literature as to whether a trustee in bankruptcy could also pursue other goals, such as saving jobs and representing other "societal interests" and whether such interests may be used as an excuse for not always obtaining the highest possible price for the bankrupt's assets. The trustee in bankruptcy also has the task to investigate irregularities that, amongst other things, caused the bankruptcy or increased the deficit in the bankruptcy.

Suspension of payments

Suspension of payments proceedings seek to protect a company from its unsecured, non-preferential creditors if the company is unable to meet its liabilities and/or obligations when they fall due, by imposing a court-ordered standstill, provided that there is a reasonable prospect of the company being able to satisfy its creditors. This does not mean that creditors must be paid in full; partial payment will be sufficient, provided that it is accepted by a majority of the company's admitted creditors representing at least half in amount of the total debt owing to the admitted creditors of the company. An application for suspension of payments can only be made by the company itself.

The rights of preferential and secured creditors are in principle not affected by the suspension of payments proceedings, provided that the court may impose a temporary stay or moratorium (afkoelingsperiode) of a maximum of four months suspending actions aimed at enforcement of the debtor's assets, unless such a creditor obtains prior court approval for an enforcement action against the debtor's assets in a moratorium.

The main purpose of the procedure is to restructure a company's unsecured, non-preferential debts by way of offering a composition plan to the company's creditors. If the voting thresholds (a majority both in number of admitted creditors and amount of total admitted debt is required) are met and the composition plan is subsequently ratified by the court, it will be binding on all of the company's unsecured, non-preferential creditors thus allowing the company to continue its business on a restructured basis. Suspension of payments proceedings that do not lead to the adoption and ratification of a composition plan will usually result in a bankruptcy of the company.

During suspension of payments proceedings, the company's management will not be able to act on behalf of or bind the company in any way without the consent of a court-appointed administrator who is normally supervised by a court-appointed supervising judge. Usually, the supervising judge will only give decisions if the administrator or the creditors request the supervising judge for a decision on a specific matter.

Thus, the management of the company will be in the hands of the administrator and management, acting jointly.

Pre-packs

Bankruptcy proceedings can also be used to effect what is known as a pre-packaged insolvency proceeding. The term "pre-pack" is used to describe a sale of the business of an insolvent company which is negotiated and agreed prior to the company entering formal insolvency proceedings. Although there is no legal basis for implementing pre-packs in the Netherlands, certain courts developed a practice whereby they, at the company's request, appoint a so-called "silent administrator" or "informal administrator" prior to the commencement of actual insolvency proceedings. The informal administrator is involved in determining the value of the business and overseeing the discussions on the terms of a sale so that immediately upon, or very shortly after, the formal appointment as trustee in bankruptcy, they are able to execute a sale agreement transferring the business and assets to the purchaser.

A "pre-pack" is therefore used to achieve a rapid sale out of bankruptcy proceedings in which scenario it is important to cause as little disruption to the business as possible. The key issue in a pre-pack is value. An informal administrator will need to be comfortable that, in proceeding with a pre-pack, they have obtained, for all creditors, the best price reasonably obtainable for the business.

Over the last decade, the use of pre-packs has increased significantly. One of the major benefits of the pre-pack mechanism is that certain provisions protecting the rights of employees in an acquisition of their employer (effectively transferring the rights and obligations under the employment contract to the purchaser) are not applicable in bankruptcy. Therefore, the purchaser in an acquisition of the business was free to cherry-pick which of the company's employees would be offered an employment contract after the pre-pack.

However, the European Court of Justice (ECJ) initially put an end to that approach in 2017. In its FNV/Smallsteps judgment (ECJ, 22 June 2017, ECLI:EU:C:2017:489) the ECJ ruled that the exception to the aforementioned protective rule does not apply if the aim of the bankruptcy is to transfer the business as a going concern by way of a pre-pack. The main basis of the ECJ's decision was that a pre-pack is primarily focussed on the continuity of the business and not liquidation of the company. This is particularly so in circumstances where a court-appointed silent administrator has investigated the possibility for continuation of the business by a third party and prepared the deal to complete immediately on appointment. Under those circumstances, the exception to employment law protection does not apply.

However, in the Heiploeg judgment (ECJ, 28 April 2022, ECLI:EU:C:2022:321) the ECJ seemingly changed course and held that a business transfer effected through a pre-pack procedure may in fact sometimes fall within the scope of the exception provided that the pre-pack (i) pursues the objective of maximising the recovery of all creditors' claims, (ii) seeks to preserve employment as far as possible and (iii) is subject to legal or administrative rules.

Following the guidance from the ECJ, the Dutch Supreme Court subsequently determined that the condition that the prepack procedure is regulated by legal or administrative provisions was not satisfied in this case as the "silent administrator" lacks a legal basis for its role and does not possess any formal legal powers.

A draft bill on this topic that will provide such a legal basis is currently being debated, but the process faces significant challenges, and the timing is uncertain.

Out-of-court composition

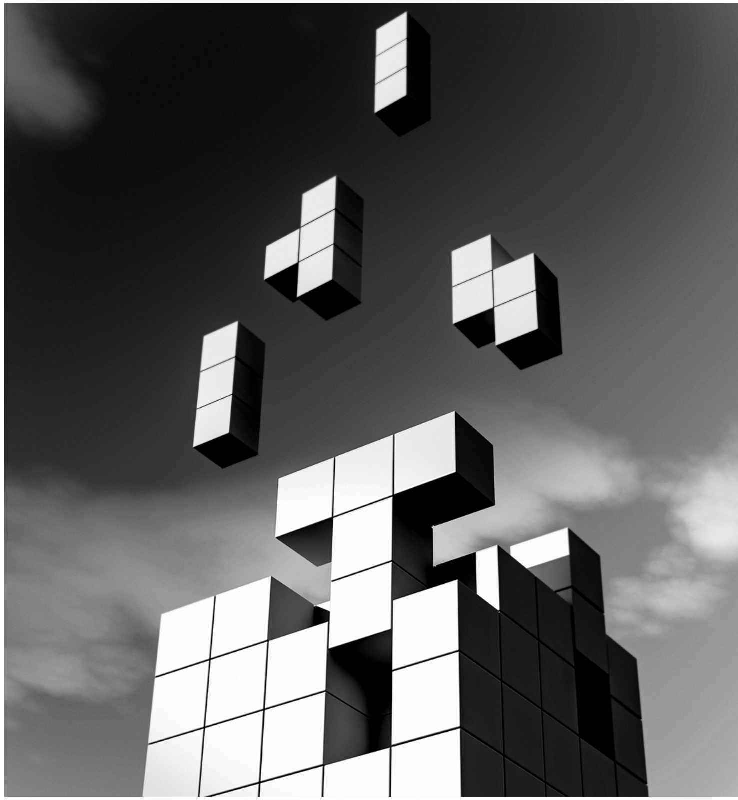
On 1 January 2021, a bill relating to an out-of-court restructuring instrument entered into force in the Netherlands (the Dutch scheme). The legislation, called the Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans (the WHOA) is part of the Dutch Bankruptcy Act. The WHOA is inspired by and contains elements of the English scheme of arrangement and restructuring plan as well as the U.S. Chapter 11.

Under the WHOA, a financially distressed debtor can offer an extrajudicial restructuring plan to its creditors and shareholders. The purpose of such a restructuring plan could be either to prevent the debtor going insolvent or to accommodate a controlled liquidation and distribution of an (insolvent) debtor's assets to its creditors. Once approved and confirmed by the relevant percentage of creditors and the court, the restructuring plan will be binding on all creditors and shareholders involved in the restructuring plan. Subject to certain safeguards, creditors and shareholders who have voted against the restructuring plan could be (cross-)crammed down and thus also be bound by the restructuring plan.

A restructuring plan under the WHOA can be proposed by a debtor who foresees that he will not be able to continue paying his due and payable debts. Alternatively, a restructuring plan can also be initiated by the creditors, shareholders, or the works council or worker's representation of a debtor by requesting the competent court to appoint a restructuring expert who will then prepare a restructuring plan on behalf of the debtor. The debtor itself may also apply for the appointment of a restructuring expert, for example if the debtor deems itself incapable of preparing a restructuring plan.

Under a WHOA restructuring plan, the rights and claims of all involved creditors and shareholders may be amended. In principle, the debtor (or the restructuring expert, as the case may be) is free to determine the restructuring plan's content and structure. In doing so the debtor has a wide range of options.

A restructuring plan can apply to all creditors and shareholders of a company, or it can be limited to a certain category of shareholders or creditors, for example secured creditors. Except for the rights of employees, the restructuring plan may lead to an amendment of the rights of any creditor (noting that amendment of rights of certain SME creditors is subject to limitations) or shareholder, including preferential and secured creditors, guarantors and co-debtors. As a result, the WHOA provides proper options for group restructurings.



Out-of-court composition (cont.)

During the process, the debtor will remain in possession. Affected creditors and shareholders are divided into classes and allowed to vote on the plan. The debtor is required to divide the relevant creditors and shareholders into different classes such that if the rights they would have in the event of a liquidation in the debtor's bankruptcy or the rights that are offered to them under the restructuring plan are dissimilar or incomparable then they would have to be allocated in different classes. Secured creditors need to be divided into different classes for the secured and unsecured parts of their claim. Provided the above is complied with, the debtor has the discretion to constitute further classes.

The vote can be passed by a two-thirds majority of the number of shareholders, or a two-thirds majority in value of creditors, in the relevant class. If at least one class of in-the-money creditors voted in favour of the restructuring plan, the debtor or restructuring expert can request the court to confirm the restructuring plan. The court will consider whether any grounds apply on the basis of which it must reject the restructuring plan, and, if this is not the case, the court will confirm the restructuring plan. After confirmation, the restructuring plan will be binding on all creditors and shareholders involved in the restructuring plan. Appeal against the confirmation is in principle not possible.

The WHOA provides for several features which enhance deal certainty, including the option to request a preliminary judgment from the court on several points. Moreover, the debtor may under certain circumstances request a full and temporary stay or moratorium (afkoelingsperiode) for a maximum period of eight months, which will in principle prevent any creditor from enforcing its claims against assets of the debtor during the restructuring phase. In addition, ipso facto clauses are suspended to prevent these from interfering with the restructuring plan. The WHOA provides debtors and creditors with an option, at the beginning of the process, to choose whether or not the restructuring plan will fall under the scope of the Recast Regulation (or, whether it will remain domestic in nature (see below)).

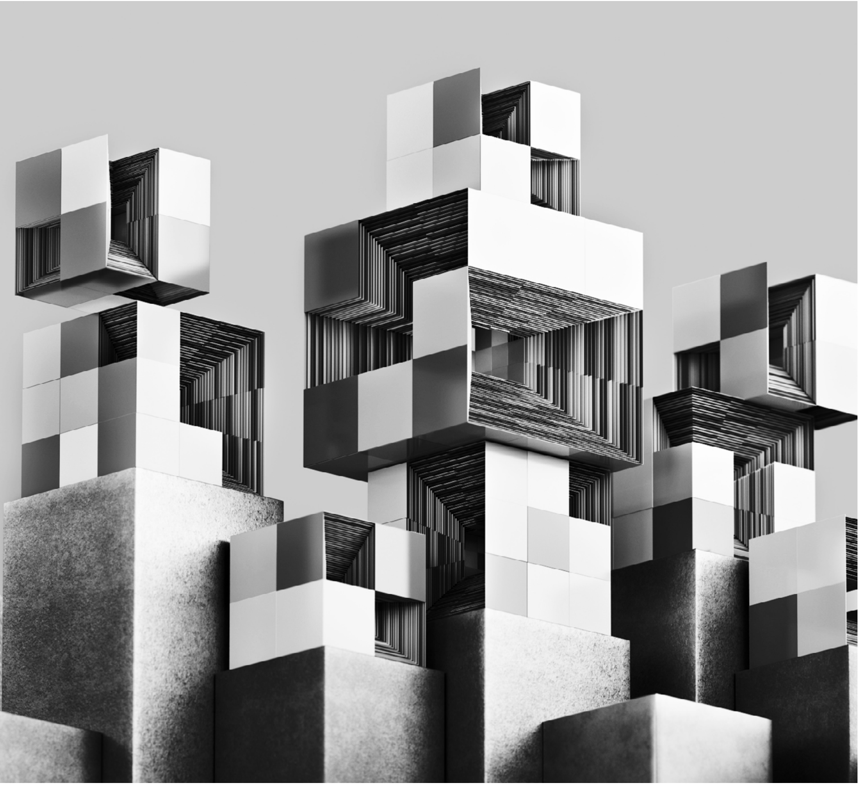
Voluntary liquidation

The shareholders of a company can resolve to liquidate a company. This, however, is not regarded as an insolvency proceeding under Dutch law and is not capable of being recognised under the European Insolvency Regulations. If a company is put into liquidation by a shareholders' resolution, the board of directors will become liquidators of the company unless the articles of association of the company or the resolution provide otherwise.

Any remaining balance after payment of the creditors will be distributed amongst the shareholders. The liquidators are obliged to file for bankruptcy of the company should the company be unable to pay its debts in full.

On 15 November 2023, the Temporary Transparency Act on Voluntary Liquidations came into effect for an initial term of two years. This act introduced three new measures to enhance the safeguards and protections for creditors in cases of voluntary liquidation: (i) disclosure obligation: the board's directors must publish certain financial documents and inform all creditors in writing of the liquidation; (ii) right of inspection: creditors can inspect the preserved records of the dissolved legal entity if the board has failed to fulfil certain disclosure obligations; and (iii) disqualification order: if any debts remain after liquidation, the Public Prosecution Service can issue a disqualification order against the board's directors involved.

European Insolvency Regulation



The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848 of the European Parliament and of the Council of 15 December 2021 (as amended)) (the Recast Regulation) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the Original Regulation) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings, and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding-up proceedings - secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, bankruptcy (faillissement) and suspension of payments or "moratorium" (surseance van betaling) were available as main proceedings under the Original Regulation and bankruptcy (faillissement) was also available as a secondary proceeding under the Original Regulation.

Under the Recast Regulation both bankruptcy (faillissement) and suspension of payments or "moratorium" (surseance van betaling) are listed in Annex A (and, therefore, both procedures are available as main and secondary proceedings).

As noted above, debtors and creditors have the option to choose whether or not restructurings under the WHOA will fall under the scope of the Recast Regulation.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

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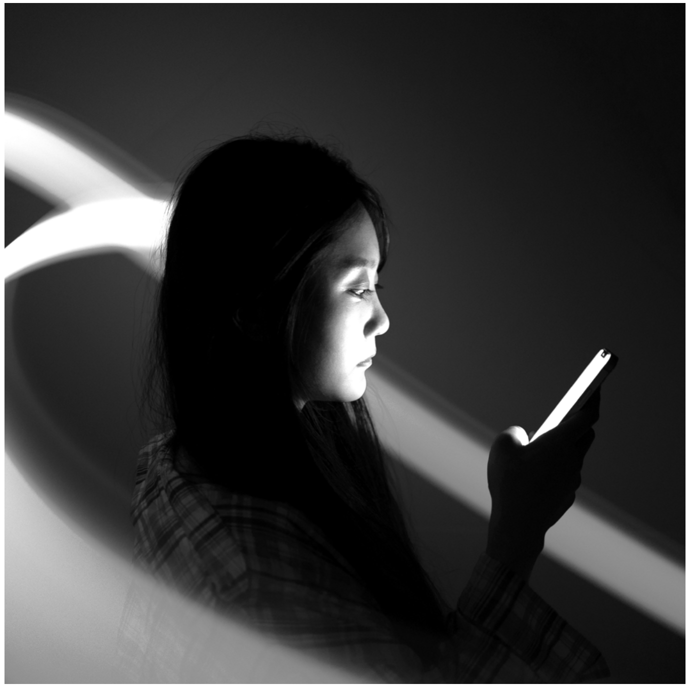
Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



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