ALLEN & OVERY

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Restructuring Across Borders

Netherlands: corporate restructuring and insolvency procedures

Contents

Introduction

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

- bankruptcy (*faillissement*)
- suspension of payments or "moratorium" (*surséance van betaling*)
- 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 not be liable for any new debts, unless such debts were incurred by the bankruptcy trustee in the course of liquidating the company. The bankruptcy trustee, who takes primary responsibility for the winding-up process, is appointed by the court and is supervised by a court-appointed examining judge. Whilst the law provides that various decisions of the bankruptcy trustee (eg to sell the company's assets and to enter into settlements), are subject to the prior approval of the examining judge, in practice the examining judge will usually give his or her permission. Thus, in practice, the examining judge's task is often limited to advising the bankruptcy trustee. In any event, the bankruptcy trustee will be responsible for his or her own decisions. The bankruptcy trustee may also seek a decision of (or advice from) the examining judge on other matters. In addition, the company's creditors may file a petition with the examining judge for an order that the liquidator 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 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 liquidator is in charge of managing the company's assets and he has exclusive power of disposal over the assets. Consequently, there is no role for management in that respect and the bankruptcy trustee effectively controls and represents the company during the bankruptcy.

The primary duty of the bankruptcy trustee 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 bankruptcy trustee 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.

Suspension of payments or "moratorium"

The moratorium procedure seeks 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 stand-still, 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 a moratorium can only be made by the company itself.

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 the company's unsecured, non-preferential creditors thus allowing the company to continue its business on a restructured basis. A moratorium that does not lead to the adoption and ratification of a composition plan will usually result in a bankruptcy of the company.

During a moratorium procedure 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 supervised by a court-appointed examining judge. The administrator will be able to act without the consent of the examining judge on almost all matters. Usually the examining judge will only give decisions if the administrator or the creditors request the examining 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 have in recent years developed a practice whereby they, at the company's request, appoint a so-called 'silent administrator' or 'informal administrator' prior to actual insolvency proceedings having commenced. The informal administrator will be 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, his or her formal appointment as liquidator upon bankruptcy he or she is able to execute a sale agreement transferring the business and assets to the purchaser. A "pre-pack" is thus a mechanism used to achieve a rapid sale from bankruptcy where 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, he or she has obtained, for all creditors, the best price reasonably obtainable for the business. There has been an increase in the use of pre-packs in recent years and this has caused the process to come under greater scrutiny, in particular due to the lack of legal basis. Draft legislation on pre-packs has been approved by ministers and is in final form; it is currently going through the legislative process.

Out-of-court composition

Recently, revised draft legislation in respect of a Dutch out-of-court composition (comparable to an English scheme of arrangements) has been published for consultation.

Although not identical to the English scheme of arrangements, the currently proposed Dutch out-of-court-composition contains elements of the English scheme as well as the US Chapter 11. It allows a debtor which is in financial distress but is not bankrupt, to bind all or some of its secured and unsecured creditors as well as its shareholders to a restructuring plan, outside of formal insolvency proceedings.

Affected creditors are divided into classes and allowed to vote on the plan, which is subsequently homologated by the court, provided that the required majority in at least one class voted in favour of the plan. The court can declare the plan binding on all creditors, notwithstanding the fact that certain classes voted against the plan, resulting in a cram down of the hold-out classes.

It is expected that the legislation will enter into force in the course of 2018.

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.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (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" (*surséance van betaling*) were available as main proceedings under the Original Regulation.

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" (*surséance van betaling*) will be listed in Annex A (and, therefore, both procedures will be available as main and secondary proceedings). At this moment, the Netherlands have no pre-insolvency proceedings that could be included in Annex A of the Recast Regulation.

Further information

For further information on Dutch restructuring and insolvency procedures we would refer you to the Sweet & Maxwell book "European Cross Border Insolvency" edited by Allen & Overy. To purchase a copy of this book, please visit sweetandmaxwell.co.uk.

Allen & Overy has launched an online service for clients focusing on debt restructurings and insolvency issues. Developed by Allen & Overy'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 and the U.S.

To request access for your organisation, please contact your usual Allen & Overy contact, or email rab@allenovery.com.

Key contacts

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