INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 6E Guidance Text

The Netherlands

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN THE NETHERLANDS

Welcome to **Module 6E**, dealing with the insolvency system of the **Netherlands**. This module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of the insolvency laws of the Netherlands;
- a relatively detailed overview of the insolvency system in the Netherlands, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of The Netherlands.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in the Netherlands:

- the background and historical development of insolvency law in the Netherlands;
- the various pieces of primary and secondary legislation governing insolvency law in the Netherlands;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;

- the rules of international insolvency law as they apply in the Netherlands;
- the rules relating to the recognition of foreign judgments in the Netherlands.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of insolvency law in the Netherlands; and
- be able to answer questions based on a set of facts relating to insolvency law in the Netherlands.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO THE NETHERLANDS[1]

The Netherlands is situated in Western Europe, bordering the North Sea between Belgium and Germany. While it is amongst the smallest countries of the European Union in size, the Netherlands is the sixth-largest economy in the EU and plays an important role as a European transportation hub. A founding member of the EU, it has a consistently high trade surplus, stable industrial relations and low unemployment. Industry focuses on food processing, chemicals, petroleum refining and electrical machinery. A highly mechanised agricultural sector employs only about 2% of the workforce, but produces large surpluses for food-processing.

The Netherlands is part of the euro zone and as a result its monetary policy is controlled by the European Central Bank. The Dutch financial sector is highly concentrated, with four commercial banks possessing over 80% of banking assets.

The Netherlands as it is commonly referred to is actually only one of four countries that together constitute the sovereign state of the Kingdom of the Netherlands: the Netherlands in Europe, and the Caribbean islands of Curacao, St. Maarten and Aruba. While all four constituent parts of the Netherlands are considered equal partners, in practical terms most of the Kingdom's affairs are administered by the Netherlands, which makes up about 98% of the Kingdom's total land area and population.

The Netherlands has a civil law legal system based on the French system. Because of its steady focus on international trade within Europe, but also across the globe, in the international business world the Netherlands is particularly known for having trade relationships and treaties with almost every other nation in the world, therefore often acting as an go-between in

[1] The information under this paragraph has been gleaned from the CIA Factbook website: https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html.

international groups, joint ventures and trade contracts. For the legal market in the Netherlands, this means that nearly all the legal affairs have a cross-border element.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

The main insolvency laws of the Netherlands are laid down in the Dutch Bankruptcy Act (DBA), which dates back to 1893. Although many amendments have occurred and the DBA is now several times as long as it once was, it was never fully overhauled and is still recognisably based on historical principles. Most importantly, and much like traditional insolvency laws in other jurisdictions, the DBA puts the interests of the creditors first. It takes the liquidation of assets and distribution among the creditors as the base case, while modern insolvency laws globally look more towards recovery of business continuation and the restructuring of debts. However, with the recent enactment of the Act on Court Confirmation of Extrajudicial Restructuring Plans (commonly referred to as WHOA as an abbreviation of its Dutch name, and also frequently referred to by its nickname the "New Dutch Scheme"), incorporated in the DBA, the prime focus of the DBA has shifted a bit. This development will be reinforced by forthcoming implementation of the European Directive on restructuring and insolvency in the DBA. You will read a lot more on WHOA later on in this syllabus and presumably also in market updates outside this syllabus.

Like the Dutch Civil Code and the Dutch Code of Civil Procedure, the DBA reflects both French civil law principles and Roman-Dutch principles. This traces back to periods in Dutch history in which the Netherlands was part of the larger Roman and French empires. For most practitioners familiar with continental European insolvency legislation, the basics will not be surprising.

The Netherlands is also a member state of the European Union and, as such, is subject to European legislation. European legislation takes the form of directives, which oblige member states to implement or amend their national legislation to achieve a wider level of harmonisation among member states. Next to directives, European legislation provides regulations, which are immediately applicable throughout the EU without the need for further implementation and have the same standing as national laws. These directives and regulations cover both material legal subjects and procedural legal subjects between the member states and nationals or residents of those member states. For matters around insolvency, European legislation constitutes a substantial part of the Dutch legal framework. For instance, for cross-border insolvencies the European Insolvency Regulation recast is the main source of law around the cross-border aspects, while the substantive laws of the individual member states continue to apply for the remainder and provided that they are not in conflict with European laws.

What sets the Dutch legal framework apart, and what makes it particularly interesting for this course, is that various business sectors, including the legislature and professionals, have been working together over the past 25 years on several major overhaul initiatives for the DBA. They did not just take into account the needs of Dutch market participants and the possibilities in the then current political climate, but also – and often with at least as much attention – looked at successful insolvency frameworks abroad and the EU initiatives developing around them. The

Netherlands is a trading nation, the world's largest exporter of Foreign Direct Investment and, when held against its population of under 18 million, hosts a disproportionately large number of headquarters or regional headquarters of multinational companies. Many stakeholders in Dutch insolvency law have an interest in upgrading the framework to the standards of the 21st century, mainly focussing on corporate recovery and the restructuring of debts, rather than the 19th century main goal of liquidation bankruptcy. Now that the latest overhaul plans have actually been implemented, and even the most far-reaching of all initiatives, WHOA, a framework allowing for extrajudicial restructuring plans to be made binding on all affected creditors through court confirmation, has been in effect as of 1 January 2021 – insolvency and restructuring professionals are well equipped for the same.

4.2 Institutional framework

4.2.1 Court system

The Dutch court system and its rules of civil procedure were codified in 1838 and have continued on roughly the same foundation since then. The fact that the system and its rules have been in active practice for nearly two centuries underscores its stability and quality. The rule of law is the backbone of the Dutch legal value system. Like other continental European systems, the Dutch system is a civil law system, with written laws and the application of customary laws only as an infrequent exception. There is a well-accessible and reasonably consistent history of case law.

The rulings of the Dutch Supreme Court play an important role in both the development of new laws and the interpretation (and filling the gaps) of written laws. These rulings, in turn, are influenced by the opinions of the advocates-general at the Supreme Court, who are appointed by the monarch at the initiative of the cabinet and take up a formal role. These opinions represent the advocate-general's own learned opinion and also reflect on legal literature, on market view and practice. As a result, the Supreme Court rulings typically do not only build on prior rulings of the Supreme Court, but also reflect relevant sentiments and developments in the legal environment.

The Dutch judiciary consists of 11 district courts, four courts of appeal and the Supreme Court. Limited exceptions aside, the division of roles is fairly simple. District courts are the first instance courts for most civil matters and their jurisdiction is determined geographically. Parties can appeal most district court decisions to the courts of appeal; again, jurisdiction between them is determined geographically. These courts review cases *de novo*, subject only to the grounds of appeal. The Supreme Court rules on appeals against decisions of courts of appeal, but does not assess facts. Lower courts can pose preliminary questions of law to the Supreme Court. As the Netherlands is part of the EU, the Supreme Court, in its turn, can pose preliminary questions to the Court of Justice of the European Union in regard to questions of the interpretation of EU law.

Specialised divisions of the courts deal with certain types of cases. Most disputes among stakeholders in a company are handled in first instance by the Enterprise Chamber of the Amsterdam Court of Appeal. This specialist court also has exclusive jurisdiction to give binding effect to class action settlements. An international commercial division, where cases can be

submitted and pleaded entirely in the English language, was established at the Amsterdam district court and Amsterdam Court of Appeal in 2019. All issues relating to **extrajudicial** restructurings in accordance with the DBA (as introduced by WHOA) are heard by a specialised pool of district court judges as first and last resort. Finally, the Netherlands has a long and unwavering tradition as a venue for international arbitration.

District courts usually review cases by a single judge, whereas courts of appeal and the Supreme Court always involve at least three judges. None of the court proceedings in the Netherlands involve a jury. The Dutch judiciary is highly trained and internationally renowned for its competence, integrity and impartiality. The legal environment in the Netherlands which, aside from the courts, also includes law firms, mediators, arbitral courts and others active in the legal industry, is both extensive and mature, compared to the size of the jurisdiction and due to the Netherlands' disproportionately high involvement in international trade. It is one of the most developed jurisdictions in Western Europe and thanks to a high command of the English language by almost the entire industry, including the courts, is very accessible to foreigners.

Insolvencies are handled in the first instance by a specialised team within the commercial division of the district courts. The district court will deal with a request for the opening of insolvency proceedings. If such a request is granted, the court will appoint an administrator or bankruptcy trustee, as well as a supervisory judge. This supervisory judge is a trained, specialised judge from the court's dedicated insolvency team. The court decision regarding a request for the opening of insolvency proceedings may be appealed to the court of appeal; the decision in appeal, in turn, is open to appeal to the Supreme Court. Most rulings of the supervisory judge pending the insolvency proceedings may be appealed to the district court. Decisions in appeal from the district court may, in turn, be appealed at the Supreme Court. The roles of the administrator, bankruptcy trustee and supervisory judge will be discussed in more detail in paragraph 6.1.3.

4.2.2 Enforcement system for creditor rights inside and outside insolvency

The position of creditors in the Netherlands is transparent. Freedom of contract, and the principle that a contract is essentially binding on the parties to the contract (*pacta sunt servanda*), are basic principles of Dutch law. No distinction is made between Dutch and foreign parties to a contract.

In the international financial markets, the Netherlands is typically viewed as a creditor-friendly jurisdiction. "Creditor" here refers equally to Dutch creditors and their claims and non-Dutch creditors and their claims. Dutch law does not differentiate between the two, nor does it contain any provisions that have the effect of disadvantaging foreign creditors beyond the fact that they have to familiarise themselves with Dutch proceedings and come to file their claims – but the latter is true for any person who is involved in cross-border trading or deals with foreign counterparties.

One of the main reasons the Netherlands was deemed creditor-friendly for years on end is that security can easily be taken over assets, providing creditors with a very strong hold on the secured assets. Regardless of the insolvency of the debtor, secured creditors can enforce their

claim against the secured assets almost without limitation. In addition, the Netherlands used to be considered debtor-unfriendly, as, until recently, it did not offer any mechanism to impose standstill measures without the creditors' consent. The recent incorporation in the DBA of a framework for extrajudicial restructurings has changed this and materially improves the Netherlands' appeal towards debtors (and many expect that debtors will even seek to benefit from this new option, by bringing themselves within its jurisdiction (see paragraph 6.1.3 on jurisdiction), sometime referred to as "forum shopping"). As of 1 January 2021, the DBA allows debtors to propose a restructuring plan to all or some of their creditors (and shareholders) and, when certain procedural and voting requirements are met, request court confirmation of this restructuring plan. The result is a restructuring plan that is binding on all affected creditors, regardless of their approval of the plan. Finally, the Dutch legal environment, including with regard to restructuring and insolvency, is highly professional. This provides creditors with abundant legal support to enforce their rights. For more reasons for the qualification of the Dutch creditor enforcement system in the case of the debtor's insolvency, please refer to paragraph 6.1.2.

Outside of insolvency, creditors are able to enforce their rights not only through the more lengthy proceedings on the merits, but in many cases also at shorter notice in so-called summary proceedings. Even though a ruling rendered in summary proceedings technically only has preliminary standing, it does provide the creditor with an executory title that can be used for executory attachments and collection. As a result (and because summary proceedings usually only take several weeks to conclude), this type of procedure is a fair option for enforcing creditor rights and is often used in practice. Both summary proceedings and proceedings on the merits can be preceded by a pre-judgment attachment. This requires leave to attach from the president of the district court, also referred to as the "provisional relief judge". Leave is typically granted upon first request if the enforceability of the stated underlying claim is sufficiently plausible. A request for leave is usually handled *ex parte*. A creditor making a pre-judgement attachment, however, will risk liability for any damage caused by the attachment in case the claim, for which the attachment was made, is denied in a final judgment and, accordingly, the creditor needs to consider and weigh the advantages and disadvantages of the attachment.

Enforcement of rights, either through the courts or extra-judicially, is no more complicated for non-Dutch creditors than for any other creditor enforcing his rights in another jurisdiction. This has mostly to do with the substantial volume of international trade disputes going through the Netherlands. The large majority of court proceedings is based on writer documentation and only in exceptional cases are proceedings conducted orally. Evidentiary documents may be in Dutch or English – without the need for a translation – and occasionally in other languages. The expected duration of court proceedings is much lower than in many other jurisdictions and the aggregate cost of quality legal representation and going through the courts is affordable when compared to other jurisdictions in Western Europe.

Once the debtor has filed for bankruptcy, unsecured creditors can only enforce their rights by filing their claim with the trustee. Enforcement proceedings can no longer be initiated; any ongoing procedure will automatically be stayed. Secured creditors may, however, continue their enforcement in relation to the secured assets. Unsecured creditors, who have a preferential right to the debtor's assets, may request relief to enforce their rights, depending on the applicable

type of insolvency proceedings. The various types of claims and security rights, and ways of enforcement in case of the debtor's insolvency, are discussed below.

4.2.3 Efficiency of the court system in the context of enforcement of debtor and creditor rights inside and outside of insolvency

The Dutch court system is generally viewed as very efficient in terms of rate of return, cost and duration.

Proceedings on the merits frequently take up to a year to complete in first instance cases, but summary proceedings can result in a decision within a few weeks and almost never take up more than two months in total. There is no back-log in the court system, as is the case in many other European jurisdictions and, as such, proceedings imply active involvement of the parties relatively soon. The Dutch system also provides for expedited appeal and expedited appeal *in cassation* at the Supreme Court. Even though a decision from a provisional relief judge is preliminary, parties often accept it as final judgement. These types of short-term proceedings, in combination with the relative ease of making an attachment in the Netherlands to ensure recovery, makes the enforcement of creditor rights outside of insolvency very efficient.

Once a debtor enters bankruptcy proceedings, enforcement against unsecured claims is stayed and claims may only be filed with the administrator or bankruptcy trustee. Only where the claim is rejected by the administrator or trustee will legal proceedings ensue while in any other case the filing suffices for the enforcement of the claim. The full process of enforcement of creditor rights in insolvency proceedings is set out in the paragraphs below. Unsecured but legally preferential claims also need to be filed with the bankruptcy trustee where the debtor is declared bankrupt. If the debtor is granted a suspension of payments (which will be discussed in more detail below), a preferential claim may be enforced in the same way as outside insolvency proceedings. Secured claims may always be enforced without taking regard of the debtor's bankruptcy proceedings.

As indicated, the Dutch law enforcement mechanisms are proficient, making creditor enforcement both inside and outside insolvency proceedings very efficient.

In regard to the enforcement of debtor rights, an important principle of Dutch law is contractual freedom. The only way for a debtor in distress to enter into any out-of-court restructuring plan is by motivating its creditors to agree to such a restructuring plan (in other words, without being able to force creditors into agreement). The enactment of WHOA has changed the game for distressed debtors in a major way. WHOA allows a debtor to bind a non-consenting minority of creditors of any class, or an entire dissenting class, to an out-of-court restructuring agreement, as long as the agreement has the consent of the majority of that class, or of a higher ranking class, respectively. Furthermore, if a debtor foresees that it will be unable to continue its debt payments, it can file a request for the opening of bankruptcy proceedings. Such a request is typically decided upon within one or two weeks. A decision on a creditors petition for a debtor's bankruptcy will also be rendered within a few weeks. Once the bankruptcy is granted, the trustee will immediately commence with his work. This makes the system of enforcement of debtor rights efficient as well.

4.2.4 Insolvency regulation

The Dutch legal system does not provide for an insolvency regulator. Certain regulators, such as the Dutch Central Bank, have authority to declare or petition restructuring or liquidation proceedings, but these then occur outside formal bankruptcy and with the regulator acting as administrator. When declaring a formal bankruptcy, the district court will appoint both a bankruptcy trustee - sometimes also translated as administrator or *curator* - and a supervisory judge. In suspension of payments, the district court will appoint a supervisory judge as well as an administrator who will typically continue as bankruptcy trustee if the suspension of payments is converted into a bankruptcy. The supervisory judge has delegated authority of the district court and advises the bankruptcy trustee. When handling a bankruptcy, the bankruptcy trustee requires the supervisory judge's consent for certain legal acts. The supervisory judge has specific powers to facilitate both the insolvency proceedings and the performance of its own duties. A supervisory judge may, for example, examine witnesses and ask experts for their assistance. Typically, the supervisory judge has a less visible and passive role.

Dutch law does not contain qualification requirements for administrators or bankruptcy trustees, although most courts set certain educational standards. Every district courts maintains a list of people registered in their district and eligible to be appointed as administrator or bankruptcy trustee. These lists consist mostly of insolvency lawyers, although in some cases an accountant may be appointed alongside a lawyer. The district court has full discretion in its appointment of an administrator or a bankruptcy trustee; neither the debtor nor the creditors can influence the court's decision. An exception applies if a regulated financial institution or an insurer has been declared bankrupt. In such cases the Dutch Central Bank may nominate candidates.

Self-Assessment Exercise 1

Study the aspects dealt with in the previous section.

Question 1

In your own words, explain why it is – when all other things are equal – that an investment into a Dutch entity, or one structured via the Netherlands, appeals to international investors.

Question 2

Name and describe the role of the various judicial parties and court-appointed officials involved in an insolvency proceeding in the Netherlands.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 Real security

5.1.1 Asset classes that can be secured

Under Dutch law, real security can be created over all assets that can be transferred or assigned (that is, identifiable and transferrable as a unit and not of such a personal nature that it becomes non-transferrable). The most frequently secured asset classes are immovable property, inventory (that is, movables in possession of the debtor), intellectual property, shares, and receivables – such as trade receivables, bank accounts, intercompany claims and insurance receivables.

5.1.2 Types of security

Certain security rights under Dutch law are established by operation of law (*ex lege*), but most security rights require a specific establishment thereof by the security provider. This is also true for all rights of mortgage (*hypotheek*) and pledge (*pandrecht*). Mortgage and pledge are mutually exclusive.

A **right of mortgage** can be created over all registered property. Under Dutch law, registered property is property the transfer or creation of which requires entry in the appropriate public registers. The main types of registered property are immovable property, registered aircraft and registered vessels (shipping). Limited rights vested in registered property may also be secured with a right of mortgage.

A **right of pledge** can be created over all transferable property that is not registered property, regardless of whether the assets are tangible or intangible, and over all limited rights on unregistered property.

A **right of retention** (*retentierecht*) and a **right of recovery** (*reclamerecht*) are created by operation of law (*ex lege*) if certain conditions are met. A right of retention authorises a creditor to suspend the performance of its obligation to surrender a movable item to its debtor until the claim relating to the item has been settled. The right of recovery allows a supplier of movable property during a legally set timeframe to reclaim the property where its claim remains unpaid and the legal requirements for termination of the underlying contract have been met.

Furthermore, a supplier of movables may subject those movables to a **retention of title** (*eigendomsvoorbehoud*).

This module focuses on mortgage and pledge, as these types are most frequently used to secure receivables and, as such, play the most important role in insolvency proceedings. Needless to say, as in other jurisdictions, the rights of a creditor over assets held by him, or supplied to the debtor under retention of title, do play an important role in insolvency or pre-insolvency situations.

5.1.3 Creation of mortgage and pledge

The establishment of a **right of mortgage** requires a specific form of deed, executed in front of a Dutch civil law notary (referred to here as a Dutch notarial deed) and registration of that deed in the Dutch public register (*Kadaster*). A pledge, on the other hand, can be created in more than one manner, depending on the asset class over which the pledge is obtained and the elected requirements of the pledge that is being established.

There are several varieties of rights of pledge and each variety has its own requirements for constituting the existence of the right.

A **pledge on movables, on rights to order and on bearer rights**, including on usufruct over such an asset, can be either possessory or non-possessory. A possessory pledge is established by bringing the asset in the control of the creditor. A non-possessory pledge is created through either a Dutch notarial deed or a private deed between the pledgor and the pledgee that is registered with the Dutch tax authorities.

A **pledge of receivables** can be either disclosed or undisclosed. A disclosed pledge requires notification of the pledge to the debtors of the pledged receivables, in addition to either a Dutch notarial deed or a private deed registered with the Dutch tax authorities. An undisclosed pledge is established pursuant to a Dutch notarial deed or a private deed registered with the Dutch tax authorities, but without any notification to the debtors of the pledged receivables. An undisclosed pledge puts the pledgee in a slightly less beneficial position, as it can only be invoked after notification of the debtors of the receivables.

It is market practice in Dutch financing transactions that a pledge on trade receivables will be undisclosed in order to avoid trade debtors being made aware of the pledge and to avoid the inconvenience of notifying large numbers of debtors of the pledge. In the same transactions, however, a disclosed pledge is often created for specific types of receivables where disclosure of the pledge is less sensitive and cumbersome, such as insurance receivables and inter-company claims.

Under Dutch law, a pledge over receivables can only be obtained in respect of receivables that exist at the date of the deed, or that directly originate from a legal relationship existing at that date. This is a concern where financiers need to rely on security over trade receivables or bank account receivables. The market solution is for the pledgor and pledgee-financier to periodically enter into supplemental deeds of pledge, in order to pledge receivables that came into existence after entering into the initial deed. Unless the additional deed is a notarial deed, the aforementioned requirement of registration deed also applies to the additional deed. Dutch banks have implemented a system to maximise their security coverage by executing, on a daily basis, supplemental pledge deeds covering all pledgors that have granted them a power of attorney to do so. The general validity of this system has been confirmed in Supreme Court case law.

A **pledge on intellectual property rights** is generally created through a registered private deed, although a pledge can also be created pursuant to a notarial deed. Specific rules exist for

specific types of intellectual property rights, such as the additional requirement to register the pledge in the appropriate public registers in order to be able to invoke the pledge against third parties. Because of the international character of intellectual property rights, creating security over intellectual property rights is rarely simple or cost-effective.

A **right of pledge over shares** in a Dutch private company with limited liability requires a Dutch notarial deed unless the articles of association provide otherwise. A pledge can only be invoked against the company whose shares have been pledged if the company is either party to the deed or it has been notified of the deed. The company must register the pledge in its shareholder register, even though this is of no influence on the validity or enforceability of the pledge. If the company has a works council in place, the works council may need to be provided with the opportunity to advise on the creation of the pledge. Importantly, a pledge over shares only authorises the pledgee to vote on the shares (if so provided at the time of the creation of the pledge or if this is agreed in writing thereafter) and provided that the transfer of the voting right is approved by the company's general meeting of shareholders. The articles of association of the company may derogate from these provisions. Registered shares in an unlisted Dutch public company are pledged in largely the same way, although some formalities may be different, depending on the company concerned.

Registration requirements

It follows from the above that most rights of pledge and mortgage require either a notarial deed or a private deed registered with the Dutch tax authorities. The public register in which mortgages are listed is open to public inspection. The purpose of the registration of private deeds with the Dutch tax authorities is to ensure that the pledge had an officially recorded date of creation. This is relevant, as the relative priority of competing pledges on a specific asset is determined by the moment of their creation (*prior tempore*). The registration is not aimed at the facilitation of levying taxes. The registration of private deeds with the Dutch tax authorities and the registration of share pledges in a shareholder's register are not subject to public inspection. As a result, there is no public source for a creditor to check whether an asset has been encumbered with a pledge and searches, as is customary in financing transactions in many other jurisdictions, are of limited value in the Netherlands.

5.1.4 Priority position

A basic principle of Dutch law is that creditors have, among themselves, an equal right to be paid from the net proceeds of their debtor's assets in proportion to their claims (*paritas creditorum*). Priority between them ensues from pledge and mortgage, as discussed above, and from preferential rights and other legal stipulations.

Preferential rights stem from Dutch law only and cannot be established by contract between the debtor and its creditor. A preference can present a creditor with a preferential right to the proceeds of a specific asset or to the proceeds of all of the debtor's assets. Examples of preferential rights relating to specific asset classes are a creditor's right to receive the reimbursement of costs made to preserve an asset out of the sales proceeds of that asset and the right of a creditor to have its damages claim settled out of the payment made by the debtor's

liability insurance. The most important general preferential claims are tax claims, costs relating to the filing of a bankruptcy petition and employee claims – such as wages and pension provisions.

Mortgage and pledge provide secured creditors with the highest priority on the proceeds of that asset, both inside and outside insolvency proceedings. Security rights have a *pari passu* ranking, unless stipulated otherwise. Both mortgage and pledge can be ranked first, second, etcetera. While their ranking may technically be *pari passu*, the priority of security rights when it comes to, *inter alia*, distribution of the proceeds is determined by the sequence in which they were created (*prior tempore*). It is possible to alter the ranking of rights of mortgage and rights of pledge by stipulating – in a notarial deed or, for a right of pledge, in a private deed registered with the Dutch tax authorities – that the right of mortgage or pledge ranks higher or lower than one or more other mortgages or pledges on the same asset than the time of its creation would suggest. In all cases, the deed has to show that the other affected mortgagees or pledgees agree to the change in ranking. To understand this is key for those who may become secured creditors of a Dutch debtor and, as discussed below, plays an important part in financing and large trade negotiations.

As a counterpart of the rules relating to priority, a creditor and a debtor may agree that the creditor's claim will take a lower ranking than conferred by law (subordination). And since a person who intends to create a ranking between creditors cannot establish priority by agreement, it is quite common, instead, to have all other creditors agree to subordination, with the obvious complication that this will require consent from the creditors whose claims are being subordinated (the juniors).

Practical implications

This is particularly relevant in situations where distressed financing is attracted from parties (mostly outside the Netherlands) that are used to funding on a US-style "DIP financing" or "super senior" basis. Outside of formal bankruptcy proceedings, such financing can, for now, not be given a preferential status or first ranking security, unless the other secured creditors agree to subordinate their claims to the new financing. In today's market, similar to the US and other developed European jurisdictions, the existing financing arrangements often allow for the debtor to attract new secured financing in a limited amount, which then takes the first slice of the proceeds of an enforcement of security. This "super senior basket" is effectively a capped contractual subordination in advance, by the lenders *vis-à-vis* any new money injections in the future. In the absence of such a contractual arrangement, however, a debtor under Dutch law has no ability to provide first priority security to new lenders over assets it has already pledged to the existing financiers.

In addition, this creates a work stream within ordinary (non-distressed) financing transactions which non-Dutch financiers or shareholders may not be familiar with. This work stream requires the identification and striking out of all existing security rights or, where such security does not need to be struck out because the value of the underlying asset exceeds the collateralised claim, to find individual solutions with the relevant beneficiaries to ensure that the financiers can take control over the collateral.

Subordination can also arise directly from the law (that is, the claims of shareholders of a company are viewed as subordinated to the claims of other creditors of that company because the shareholders provide risk capital).

5.1.5 Enforcement inside and outside insolvency proceedings

A Dutch mortgage or pledge can be enforced, in the case of a payment default, under the secured obligations. The secured creditor does not need to obtain a court decision before enforcement, as it has a right of summary execution, which means it may have a bailiff seize the assets.

In the case of a disclosed pledge over receivables, subject to any limitations agreed between the pledgor and the pledgee, the pledgee may exercise the right to collect the receivable at any time. The pledgee may apply the proceeds towards satisfaction of the secured obligations as soon as they are due and payable. The same applies to an undisclosed pledge of receivables; however, in that case, the pledgee is required to notify the debtor of that receivable first. The notification requirement may result in a timing disadvantage, but otherwise is a mere reflection of practicality: the debtor of a pledged receivable, who is not aware of the pledge, will continue to make payments to his counterparty and not to the pledgee.

A mortgage is enforced by way of a public sale. A private sale, which often generates higher proceeds, requires an authorisation by the provisional relief court at the request of the mortgagee, the mortgagor or a party that made an attachment on the asset. Either sale needs to comply with certain procedural requirements that may be time-consuming.

In the case of a non-possessory pledge over movables, the pledgee may take control of the assets if the debtor does not, or if the pledgee has good reasons to fear that the debtor will not, meet its obligations. A pledge of movables may be enforced by way of a public sale or, after obtaining authorisation from a provisional relief court, a private sale. As an alternative, the pledgee may request the court to determine that the assets shall accrue to it; appropriation (seizure by the pledgee for itself) of secured assets in general is not allowed under Dutch law. Once the pledge has become enforceable, the pledgor and the pledgee no longer require court authorisation. They may agree on a deviating method to enforce the pledge among themselves.

A pledge on intellectual property rights is enforced in the same way as a pledge on movables. However, for certain types of intellectual property rights, additional procedural rules apply.

A pledge on registered shares in a Dutch company may also be enforced in the same manner as a pledge on movables. However, any transfer restrictions in the company's articles of association must be complied with, provided that for private companies with limited liability the pledgee may exercise all rights vested in the shareholder with regard to such transfer and perform the latter's obligations in respect thereof. A sale in accordance with a company's transfer restrictions does qualify as a private sale and, therefore, requires court authorisation.

Under Dutch law, secured creditors can enforce their security rights as if the debtor did not enter into bankruptcy or suspension of payments proceedings. In the case of a bankruptcy, there are two limitations to this rule. In a case where a suspension of payments is granted to the debtor, only the first restriction applies. First, as a temporary limitation to the enforcement of security rights, a cool-down period may be ordered by the supervisory judge at the request of the administrator or bankruptcy trustee. During this cool-down period, secured creditors are not authorised to enforce their security rights without the supervisory judge's permission. The cool-down period applies to all assets that are in possession of the debtor, administrator or bankruptcy trustee (whether or not part of the insolvent estate), or that are part of the insolvent estate. A cool-down period may be set for a maximum of two months, with a possible extension for another two months. As a second limitation, the bankruptcy trustee may set a period of time for the secured creditor to exercise its security rights. Once the period expires without enforcement of the security rights, the bankruptcy trustee may dispose of the secured assets. The secured creditor will retain its priority regarding the proceeds of the assets, but the estate debts will be deducted from the proceeds. There is no rule as to the duration of the period that may be set, but if the period cannot be regarded as reasonable, it may be deemed invalid. At the request of the secured creditor, the supervisory judge may extend a set period.

Since a WHOA process is not a formal insolvency proceeding, creditors are, as a basic rule, not limited in taking recourse in whichever way is open to them, including through the enforcement of security rights in the case of a secured creditor. However, the court may order a cool-down period similar to the one described above, with one important difference: such a cool-down period does not just affect ordinary creditors but also prevents secured creditors from enforcing security rights, save for court permission. As a result, the cool-down period during a restructuring has a much broader range than the one ordered during bankruptcy or suspension of payments proceedings.

5.1.6 New money: avoidance (claw-back) and lack of super seniority

Under Dutch law, a voluntary legal act of a person resulting in prejudice of its creditors can in limited circumstances be avoided under fraudulent preference laws (sometimes also referred to as claw-back) by those creditors or by the bankruptcy trustee if that person subsequently goes bankrupt.

Dutch preference or claw-back laws may on the face of it appear similar to those in other jurisdictions, but differ quite substantially in the details, which were developed by Supreme Court case law. In cross-border transactions in distressed environments, especially where out-of-court corporate rescue and recovery strategies are developed, it is quite common that the Dutch law preference risks (and ways to mitigate those risks) play a key role in deliberations.

Avoidance of a voluntary legal act for which there was no financial consideration (that is, a transaction for no value) requires that the debtor had knowledge of the ensuing prejudice at the time of the act. However, if there was consideration but creditors or the trustee believe that the consideration was insufficient and therefore (or for another reason) prejudicial to the interests of creditors, knowledge of the prejudice is required not only on the part of the debtor, but also on the part of its counterparty. Certain evidentiary presumptions relating to the prejudice and

the knowledge thereof apply. These presumptions pertain to the relationship between the acting parties or the value of the consideration for the litigious act.

Finally, if the legal act is not voluntary but satisfies an obligation, which was due at the time, even if this results in prejudice of the creditors, avoidance is possible only on very limited grounds and only in the case of the bankruptcy of the debtor. In such a case, the trustee will typically look at the origin of the underlying obligation in the hope of avoiding the transaction in which that obligation came into existence.

Following the incorporation of WHOA, the DBA provides a safe haven for emergency funding and collateral furnished in relation thereto. The court may be requested to authorise all legal acts deemed necessary to continue the debtor's business during the restructuring, provided that these legal acts serve the interests of the debtor's joint creditors and no material harm is done to the interests of any individual creditor. The court's authorisation prevents avoidance of the legal acts in a subsequent bankruptcy of the debtor.

Practical implications

These issues are particularly relevant in the context of cross-border corporate financing transactions and the vesting of additional security for already drawn amounts. Most corporate financing documentation in the Netherlands (and in other jurisdictions) contain an obligation for the debtor to create security rights over additional assets at the financiers' first demand (a so-called positive pledge obligation). This positive pledge is typically invoked by the financiers only once the financial position of the debtor deteriorates and it becomes clear that there may not be enough assets for all creditors to be paid. The granting of security over additional assets for the benefit of one of the creditors may then well prejudice the interests of the other creditors. If a debtor acts on this obligation and grants security over additional assets to the financiers, the legal act of vesting the security cannot be avoided, unless the limited grounds for avoidance of a due obligation have been met. This will usually not be the case.

However, if the positive pledge obligation was included only recently – for instance, in connection with an amendment of the documentation and re-set of the covenants at a time when the financial performance of the debtor was already under pressure – creditors or a trustee may look to avoid the entry of the positive pledge obligation itself and argue that that act was in fact voluntary and prejudicial to the other creditors. Similarly, the creation of security rights in relation to emergency funding or a loan aimed at restructuring of the debtor is in itself without prior obligation and therefore voluntary – even though it will usually not be perceived as such by the board of directors – and subject to avoidance if, despite the new funding, the additional collateralisation of assets is such a loss of recourse to other creditors that a court would find the transaction prejudicial to the interests of the other creditors. This may be the case if, for instance, a large unsecured financier would provide an additional, relatively small loan and obtain security over assets of the debtor covering not only the additional amount, but also the larger, earlier debt. Those assets will then no longer be available for recourse by the other creditors and if the debtor subsequently goes bankrupt, those other creditors may claim that they were better off without the additional loan but with recourse to all the debtor's assets. This is why the option, introduced by WHOA, to obtain court authorisation for certain legal acts – such as entering into

an agreement for emergency funding and the grant of security rights for this loan – is an important addition to the Dutch restructuring toolkit.

At the moment, Dutch law does not provide super senior status to emergency funding. As explained above in paragraph 5.1.4, security rights rank in sequence of their creation (*prior tempore)*. If a security right is created after one or more other security rights have been created over the same asset in favour of other creditors and the last security right is supposed to take a higher ranking, the latter creditors have to agree to this change in priority.

5.1.7 Secured assets of non-Dutch debtor

While Dutch law does not distinguish between Dutch and foreign creditors, obviously the identity of the debtor and, if different, the person that has granted security for the debtor's obligations, is important. Dutch law security deeds typically contain an election for the courts in the Netherlands and are governed by Dutch law, but the underlying obligations for which the security is granted may well be governed by foreign law. That may lead to recognition issues and hinder the enforcement of security in the Netherlands pending recognition of the underlying obligations by the Dutch courts. Various practical work-around solutions have been developed in legal practice and the position of the pledgee is typically safeguarded due to the fact that the pledgee can send notices allowing it to exercise the main rights in relation to the secured assets pending full enforcement (sale) of the collateral.

An additional complication may arise in the not atypical situation that a debtor, who is perceived to be Dutch, subsequently claims to have its centre of main interests outside the Netherlands and goes into bankruptcy in a foreign jurisdiction. While the enforcement of security should then have been a domestic affair, the secured creditors find themselves dealing with a foreign insolvency practitioner.

5.2 Personal security

5.2.1 Types of personal security

The Dutch legal framework provides for several types of personal security. The three most frequently used are (i) joint and several liability (*hoofdelijkheid*) for specific contractual obligations, (ii) an independent guarantee for financial obligations in financing transactions and (iii) to benefit from an exemption in publication requirements, a generic guarantee by a shareholder for all obligations of a company pursuant to article 2:403 of the Dutch Civil Code (*403-verklaring*). These forms of personal security are easily enforceable in the Netherlands and result in the secured debt also being recoverable (in full) from an entity other than the debtor, effectively providing the secured creditor with several opportunities to recover the amount owing.

Joint and several liability agreed for specific obligations allows the creditor of those obligations to claim payment in full from each debtor that has accepted joint and several liability. If any debtor pays more than its share in the total debt, it may take recourse against its co-debtors. The debtor subrogates up to the amount of the excess payment it made and in each case up to

the share of the co-debtor in accordance with the relationship between the debtor and co-debtor.

In financing transactions, whether among Dutch parties only or in a cross-border transaction, professional lenders have grown accustomed to using an independent guarantee (*sui generis*), to be provided by one or more guarantors in the financing structure for the obligations of the borrowers, which guarantee closely follows the form of the independent, first demand guarantee developed by the Loan Market Association (LMA) in London.

Under a guarantee pursuant to article 2:403 of the Dutch Civil Code, the parent company (the guarantor) accepts joint and several liability for all liabilities arising from its subsidiary's (the principal) legal acts as of the date of the guarantee and does not relate to any specific obligations.

Other forms of personal security include suretyship (*borgtocht*), internal guarantees and comfort letters. It is not atypical for parties to negotiate a guarantee with traits of more than one of the above, which is perfectly acceptable as Dutch law allows for highly tailored guarantee instruments.

5.2.2 Creation of personal security

As already stated, contractual freedom is a basic principle of Dutch law. There are no legal requirements for the contractual creation of joint and several liability or a guarantee or comfort letter.

When granting personal security for the obligations of another person, party or affiliate, the guarantor, if a corporate, must satisfy itself that granting such security is in its corporate interest and, if needed for adequate consideration, that it is rewarded appropriately (that is, by agreeing on a fee payable to the guarantor). The latter is also important to prevent avoidance of the creation of personal security due to fraudulent preference law. Under Dutch law, unless a company's continuity is at stake, its corporate interest will be defined by the group interest. Generally speaking, as long as the security provided is of service to the financing of the group, the company's corporate interest will be met. Finally, personal security may be at risk of avoidance if the debtor's articles of association do not allow surety undertaking for the benefit of third parties, in which case it would qualify as being *ultra vires*. Most companies that are active in cross-border trade have articles of association with a broad objects clause, making this less of a concern.

5.2.3 Enforcement of personal security inside and outside insolvency

Outside of insolvency proceedings and notwithstanding a cool-down period ordered during a restructuring in accordance with the DBA, a creditor can enforce its creditor rights (as described above) and take recourse against the assets of both the original debtor and the guarantor, both in their capacity as full principal co-debtors.

The main concern for a secured creditor regarding the enforcement of personal security inside insolvency proceedings, is whether or not it will be able to effectively enforce its claim against each of the co-debtors. The fact that personal security (that is, a guarantee) has been provided by a co-debtor does not qualify the beneficiary thereof as a secured creditor in a bankruptcy of the original debtor. In the bankruptcy, the creditor only has an ordinary, unsecured claim to file with the administrator or bankruptcy trustee, bar any preference or real security applicable to that claim. The personal security of which the creditor has the benefit does, however, allow it to circumvent the debtor's insolvency proceedings by taking recourse against the co-debtor / guarantor. Any limitations that apply to the enforcement of real security do not cover the enforcement of the personal security rights, as these rights are not enforced upon the insolvent debtor but on a third-party. If the co-debtor / guarantor provides material recourse, this is a strong benefit effectively giving the creditor a preferred position despite its claim in bankruptcy ranking lower.

Amounts paid by the co-debtor / guarantor to the creditor will give the co-debtor / guarantor a right of recourse against the original (now bankrupt) debtor, which will have the same unsecured, ordinary ranking as the creditor's claim in bankruptcy. Accordingly, unless the creditor was able to have its whole claim paid by the co-debtor / guarantor, it may experience competition for distribution in the bankruptcy and the reduction of its proceeds and would then have to go after the co-debtor / guarantor once again. To prevent this chicken-and-egg situation, personal security in the Netherlands typically includes a contractual prohibition on the co-debtors to make competing claims of recourse until the creditor has been repaid in full.

Furthermore, the secured creditor may have the benefit of "double dipping": in the event of a default, the creditor may be able to take recourse against the assets of both the debtor and each co-debtor or, if there is effectively only one pool of assets, to have two claims in that pool. The treatment of double dipping varies substantially between jurisdictions. Under Dutch law, double dipping is allowed to the extent that this does not result in payment of more than the total sum of the claim. This means that a creditor can file its full claim in the insolvency proceedings of the debtor and at the same time demand payment by the co-debtor or guarantor. However, the amount paid by the co-debtor or guarantor will be deducted from the final distribution by the debtor's insolvent estate, and *vice versa*. In addition, the DBA offers a solution to double dipping by way of allowing the restructuring of both the claim on the debtor and co-debtor through one restructuring plan and without requiring the co-debtor to go through a restructuring itself. This way of preventing double dipping is one of the main reasons an informal work out under the DBA is especially useful for the restructuring of group obligations.

Self-Assessment Exercise 2

Study paragraph 5 on real security and personal security.

Assume that the ultimate parent of a multinational group of companies is a very large family-owned corporation under Indonesian law. Further assume that the group has a number of Dutch operating companies, which only have Dutch assets. The group, including the Dutch entities, is financed through bilateral finance arrangements with a wide array of financiers, many of whom have security over the assets of the group. The Dutch entities also have the benefit of these financing arrangements, and have pledged almost all their assets to a variety of financiers under as many financing arrangements. The financiers of other group companies, however, have similar arrangements and their financing contracts contain prohibitions to cross-guarantee the debt obligations of other group members (including the Dutch ones).

Finally, assume that the group is now in financially challenging territory (but nowhere near payment defaults, or worse) and seeks additional financing to fund a much-needed strategic reorientation, including factory shut-downs and lay-offs in the Netherlands. The financing package currently being negotiated with a group of international credit funds (who have no prior relationship with the group) includes standard provisions that individual members of the group will only have access to the funds to the extent they provide "first ranking security on all shares, receivables, inventory and real estate and a first demand independent guarantee from the parent company" (quote from financing term sheet).

Write a brief essay (no more than one page) on the challenges that the Dutch operational companies will face in relation to this security demand when they seek to attract, or need to get access to, this additional "super senior and secured" financing.
Do you see any solutions?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

6.1.1 Legislative framework

The Dutch framework for insolvency proceedings is codified in the Dutch Bankruptcy Act of 1893 (DBA).[2] The DBA provides for three types of insolvency proceedings serving different objectives. Bankruptcy (*faillissement*; see paragraph 6.3) is aimed at liquidating the debtor's estate in order to distribute the proceeds to its creditors. Bankruptcy proceedings may apply to

[2] The insolvency proceedings of financial institutions, such as banks or insurers, fall outside the scope of this module.

a legal entity as well as to a private person. A second type of insolvency proceeding is suspension of payments (*surseance van betaling*; see paragraph 6.5.1), which is also available to both legal entities and private persons, as long as the private person conducts an independent profession or business. The objective of a suspension of payments is to restructure debt, although in practice it is typically a gateway to bankruptcy. Finally, the DBA describes the debt restructuring scheme for private persons (*schuldsanering natuurlijke personen*; paragraph 6.2), which applies to consumer / individual debtors only. All of these insolvency proceedings are public proceedings and are visible from public registers.

These three insolvency proceedings are the only proceedings recognised as such in the Netherlands. Accordingly, while the Dutch courts will recognise certain foreign proceedings and their effects in the Netherlands, a party or person looking for insolvency measures in the Netherlands is restricted to these three options. The three proceedings are mutually exclusive and each requires that a Dutch court declares the debtor to be subject to the proceedings.

Prior to any insolvency proceedings, debtors often make an attempt at an informal restructuring. Although not a formal insolvency proceeding, the legal framework for the realisation of a court-confirmed extrajudicial restructuring plan (*homologatie van een onderhands akkoord*, see paragraph 6.5.2) has been codified in the DBA as well as in the previously described New Dutch Scheme or WHOA. It applies to legal entities and private persons that conduct an independent profession or business. Its aim is to restructure debt outside of insolvency proceedings.

6.1.2 The Dutch insolvency system is in general creditor-friendly

As indicated in paragraph 4.2.2, the Dutch legal system for the enforcement of creditor rights is on the whole creditor-friendly. This applies to the Dutch insolvency system too.

The main reason for the qualification of the insolvency system as creditor-friendly is the same as for regarding the Dutch creditor enforcement system as such: real security rights can be obtained easily and provide for an almost inviolable hold on the secured assets. As explained in paragraph 5.1.5, secured creditors can enforce their security rights without taking account of any insolvency procedure. The only limitations are the aforementioned cool-down period that can be installed during a bankruptcy, suspension of payments or a WHOA process and the period of time that the bankruptcy trustee can set for a creditor to exercise its security rights in case of bankruptcy. In addition, the Dutch tax authorities take priority over a non-possessory pledge on certain types of movables located on the debtor's premises if the insolvent estate does not allow for the full payment of its claim. The bankruptcy trustee may enforce this priority by liquidating the movables. In such a case, the proceeds will be added to the insolvent estate and are used to first settle the liquidation costs and subsequently settle the tax claim. If any proceeds remain thereafter, these are paid to the pledgee.

Furthermore, the insolvency system is beneficial to creditors because one of its main goals is the maximisation of the insolvent estate in order to settle as much debt as possible. As a result, the administrator and bankruptcy trustee are guided by the benefit of the general body of the creditors.

The creditor-friendliness of the Dutch insolvency system is strengthened by the extension of the right of set-off that applies in insolvency proceedings. Outside of insolvency proceedings, a creditor has a right to set-off any claim for performance of an obligation, which is of the same nature, to its obligation to the other party, provided that it has the right to both perform its obligation and enforce performance of its claim. In bankruptcy and suspension of payments, however, a creditor may even set-off a claim against an obligation of the same nature regardless of whether the claim is due and payable and the creditor is authorised to perform its obligation. Also, a creditor may enforce a set-off even if the claim or obligation, or both, came into existence after the debtor entered insolvency proceedings. This latter aspect is relevant because, under Dutch insolvency law, an unsecured claim has to exist at the moment the debtor enters insolvency in order to be eligible for a distribution. If an unsecured claim comes into existence after the start of the insolvency proceedings, the claim will generally be disregarded and cannot be enforced inside or outside the insolvency proceedings. This is explained in more detail in paragraph 6.3.3. Finally, a set-off performed during a restructuring is protected in a subsequent bankruptcy if it took place in the context of the continuation of the debtor's business operations. This provision has been made especially in view of the settlement mechanism of current accounts. Without this protective provision, financiers would not allow a debtor to keep using its current account because the settlements that result from such use would be in danger of avoidance. The DBA's statutory characterisation of a set-off performed during a restructuring as part of the debtor's day-to-day business as performed in good faith, eliminates the avoidance risk with the practical result of debtors being able to keep using their current accounts.

The reason for broadening the authority to set-off once insolvency proceedings have commenced is to enable a creditor to use its claim on the debtor as collateral.

6.1.3 Key players

6.1.3.1 Debtor

Since an extrajudicial restructuring in accordance with the DBA (that is, an informal restructuring ending in a **WHOA court confirmation**) **is not a formal insolvency proceeding** and court involvement can be very limited (that is, limited to confirmation of the restructuring plan only), these proceedings may be characterised as a **debtor-in-possession procedure** (that term being copied from the United States Chapter 11, which also leaves the debtor-in-possession). The debtor's management remains in full control of its business throughout the entire procedure. The restructuring is not necessarily controlled by the debtor, but can also be at the initiative of any creditor, shareholder or an employees' representative, although it will keep them at a distance. If the restructuring is initiated by such other party, the court will appoint a plan expert (*herstructureringsdeskundige*), who is authorised to design and negotiate a restructuring plan and to request court confirmation of that plan. Furthermore, if no plan expert is appointed, the court may appoint an observer (*observator*) who will supervise the drafting and negotiation of the restructuring plan for the benefit of the joint creditors. However, these professionals do not have any power over the debtor and its business, and no other administrator or supervisor is involved, besides the court itself an then only in limited circumstances. That makes the situation very different from existing insolvency laws in most countries, where the board of directors loses part or even all of its authority to an insolvency practitioner.

On the other hand, none of the three **formal** Dutch insolvency proceedings (liquidation bankruptcy, suspension of payments and the restructuring scheme for private persons) can be characterised as a debtor-in-possession procedure. Where a debtor is allowed a suspension of payments, an administrator is appointed to act alongside the debtor. The debtor and administrator have joint authority over the debtor's estate. The debtor does have the authority to offer a composition plan by itself and does not require the administrator's consent for that, although the supervisory judge will often look to the administrator for an opinion on the content.

In the case of a debt restructuring scheme for private persons or a bankruptcy, an administrator or bankruptcy trustee takes control. The debtor itself is no longer authorised to act on behalf of insolvent estate. Legal acts by the debtor do not bind the insolvent estate. The main role for a debtor in these insolvency proceedings is to co-operate with the administrator or bankruptcy trustee in every way possible. This obligation may even be enforced through detention and constitutes a ground for revocation of the application of the debt restructuring scheme for private persons. In bankruptcy proceedings, a debtor is at liberty to offer a composition plan of its own accord.

6.1.3.2 Administrator and bankruptcy trustee

In every formal Dutch insolvency proceeding, an insolvency practitioner is appointed by the district court opening the proceedings. In the case of a suspension of payments and a debt restructuring scheme for private persons, this person is referred to as an administrator (*bewindvoerder*); in the case of bankruptcy proceedings, the official is referred to as a bankruptcy trustee (*curator*).

As stated in paragraph 4.2.4, there are no legal qualification requirements for administrators and bankruptcy trustees. Most courts, however, do set educational standards. In bankruptcies and suspension of payments proceedings, courts will typically appoint specialised insolvency lawyers. In debt restructuring schemes for private persons, the court typically appoints a dedicated administrator office, which can also be a legal entity. An administrator, or at least the person performing its duties, is not always a lawyer admitted to the bar but will usually be a law graduate. Administrators and bankruptcy trustees are supervised by a supervisory judge, who also provides advice. Bankruptcy trustees require consent or authorisation from the supervisory judge for certain important steps in the process. Examples of this are the continuation of executory contracts, termination of employment contracts and lease contracts, entry into legal proceedings and settlement agreements, continuation of the debtor's business and disposition of assets. Apart from this, the administrator or bankruptcy trustee is independent and is under no obligation to follow instructions from the debtor or creditors. In every insolvency proceeding, the administrator or bankruptcy trustee acts for the benefit of, but not at the instruction of, the general body of creditors.

A bankruptcy trustee is entrusted with the administration and liquidation of the debtor's estate. In a suspension of payments, the administrator is jointly authorised with the debtor to manage the insolvent estate and restructure the debt. Under the debt restructuring scheme for private persons, the administrator is authorised to administer and liquidate the debtor's estate in order to restructure the debt. In practice, an administrator's main duty in a debt restructuring scheme

for private persons is to supervise the debtor's compliance with its debt restructuring obligations.

As stated in paragraph 6.1.3.1 (and for the avoidance of doubt, repeated here): during a WHOA process, no administrator or supervisor is appointed and the debtor remains in full control.

6.1.3.3 District court and supervisory judge

The Dutch courts are involved in the Dutch formal insolvency proceedings and the informal restructuring procedure in numerous ways.

The degree and the timing of the involvement of the Dutch court in a WHOA process varies greatly. The district court – represented by a specialised pool of judges – may be involved no sooner than in the final stages of the restructuring, when it is requested to confirm the extrajudicial restructuring plan. However, the court may also be involved from the very beginning through a request for the appointment of a plan expert. During the restructuring, the court may be approached on any number of issues, such as to provide authorisation for a legal act to protect it from avoidance in a subsequent bankruptcy of the debtor (see paragraph 5.1.6), to decide on any substantive or procedural issue relating to the restructuring, to order a cool-down period (see paragraph 5.1.5), or to make a tailor-made provision to further the restructuring. Apart from active court involvement, the court is involved in extrajudicial restructurings in a passive way: as soon as a debtor starts its restructuring, he has to file a declaration citing this with the court.

When it comes to the three Dutch formal insolvency proceedings, the Dutch court is involved from the very start. First of all, a district court will decide on the request for the opening of insolvency proceedings. A court of appeal or the Supreme Court may decide on any subsequent appeals. If the request is allowed, the district court will appoint an administrator or bankruptcy trustee, as well as a supervisory judge. Once the insolvency proceedings are underway, the district court is the forum for challenging decisions by the supervisory judge. The court also plays a role in the process of claim validation and the establishment of a composition plan between the debtor and some or all of its creditors. Finally, the court will decide upon the conclusion of the insolvency proceedings.

The supervisory judge is a member of the insolvency law team of the commercial division of the district court. A supervisory judge can be regarded as a delegated court authority. The supervisory judge acts independently and is not instructed by the court, although there is a national consultative body aimed at warranting a certain level of unity among supervisory judges. Apart from his role as an advisor to the administrator and bankruptcy trustee and his authority to consent to certain acts of the bankruptcy trustee, a supervisory judge has various powers to further the insolvency proceedings, such as examining witnesses or interviewing the debtor and powers relating to the process of claim validation. In addition to his official powers, a supervisory judge often plays a role as mediator when conflicts arise between parties to the insolvency proceedings. As stated in paragraph 4.2.4, the supervisory judge typically has a passive role and will mainly act at the request of a stakeholder in the insolvency proceedings.

6.1.3.4 Creditors

Dutch law does not differentiate between Dutch creditors and their claims and non-Dutch creditors and their claims, nor does it contain any provisions that have the effect of disadvantaging foreign creditors beyond the fact that they have to familiarise themselves with Dutch proceedings and file their claims – but the latter is true for any person who is involved in cross-border trading or deals with foreign counterparties.

Because the extrajudicial restructuring proceedings provided for in the DBA are not formal insolvency proceedings, as a basic rule, the power of creditors to enforce their claim is not limited in any way. There are some exceptions to this rule, which will be discussed in paragraph 6.5.2.3.

As stated above, in case of insolvency proceedings opened against a debtor, a secured creditor can enforce its real security rights regardless and almost without limitation. An ordinary creditor, however, is stayed from individual enforcement action upon the bankruptcy or suspension of payments being declared. From that moment on, an unsecured creditor may no longer exercise its rights in any way, other than to file the claim with the administrator or bankruptcy trustee. A preferred creditor shares an ordinary creditor's fate when it comes to bankruptcy proceedings, but in the case of a suspension of payments, the preferred creditor may continue to exercise its rights in the same way as a secured creditor. A preferred creditor is not affected by a suspension of payments.

Creditors can influence bankruptcy proceedings by requesting the supervisory judge to intervene by ordering or prohibiting the bankruptcy trustee to act in a certain way. A precondition to this authority is that the order or prohibition must be in the interests of the general body of creditors. Creditors can influence an extrajudicial restructuring in a similar way by requesting the court to appoint a plan expert, who is authorised to design and negotiate the restructuring plan on behalf of the debtor. The plan expert may, in turn, approach the court for a decision on any issue he deems relevant to the restructuring. Another option is for the debtor to request the court to appoint an observer, who will monitor the restructuring process on behalf of the joint creditors. This allows creditors to, indirectly, influence the restructuring process.

Furthermore, if a composition plan is proposed by, or on behalf of, the debtor during bankruptcy or suspension of payments proceedings, as well as in case of an extrajudicial restructuring plan, creditors eligible to vote can influence the process with their voting. Apart from this, a creditor has little way of pursuing its individual creditor position and influencing the administrator, bankruptcy trustee or the debtor. The administrator, bankruptcy trustee and observer, and the plan expert to a lesser extent, must be viewed as an advocate of the general body of creditors and their collective interests.

It is important for foreign insolvency practitioners and foreign creditors to know that the Dutch system does not provide for either formalised creditors' or *ad hoc* committees with *de facto* powers to steer the course of the restructuring in the way that US and UK law does. Under the DBA, a creditors' committee may be installed in bankruptcy proceedings if this serves the bankruptcy proceedings. A committee is appointed either by the court or by the supervisory

judge and will be limited to a single committee for all creditors. The committee is authorised to review the books and make inquiries regarding the bankruptcy. The bankruptcy trustee requires the advice of the creditors' committee on a number of occasions, such as on its intention to start legal proceedings and on the liquidation of the insolvent estate. However, the bankruptcy trustee is not bound by the advice received. Unless agreed by the trustee or administrator, the cost of running the creditors' committee is not borne by the insolvent estate.

6.1.3.5 Directors and shareholders

Contrary to what many foreign experts may be used to, a filing for bankruptcy is not the sole authority of the board of directors but requires a resolution of the general meeting of shareholders. A filing for suspension of payments and an extrajudicial restructuring, on the other hand, are indeed the sole authority of the board of directors. Accordingly, if the debtor is on the verge of bankruptcy, the required shareholder approval for bankruptcy is sometimes circumvented by the board filing for suspension of payments and, in the absence of a real plan as to how to prevent bankruptcy, is swiftly followed by conversion into bankruptcy.

Extrajudicial restructurings (debtor-in-possession) may be initiated by the debtor's board of directors without shareholder consent. Where a plan expert is appointed to restructure an SME, he does require the debtor's consent – issued by the directors, not the shareholders – to present a restructuring plan to the affected creditors and shareholders as well as to request court confirmation.

As stated above, a WHOA process is a debtor-in-possession procedure so the directors preserve their full powers. During a suspension of payments, the debtor and administrator are jointly authorised to execute the suspension of payments. Shareholders retain their powers. In the case of bankruptcy proceedings, the allocation of corporate duties and powers formally stay in place. However, the board of directors loses its power to contractually bind the debtor and dispose of its assets. Therefore, even though, formally speaking, shareholders retain their powers, they do lose their material influence.

6.2 Personal / consumer bankruptcy: Debt restructuring for private persons

6.2.1 Filing: who, when and where

Under Dutch law, private persons can enter formal bankruptcy proceedings in the same way as incorporated entities. If the private person also conducts an enterprise or is an independent contractor, he may also use the suspension of payments or extrajudicial restructuring regime (set out in paragraph 6.5). For private persons in their private capacity, an additional restructuring tool is available under the Debt Restructuring Private Persons Act (*Wet schuldsanering natuurlijke personen*, or DRPP). The DRPP, which in practice is perceived by the relevant persons so as to nonetheless constitute a "bankruptcy", was introduced to provide private persons with an opportunity to relieve themselves of their debt incurred in good faith within three years and then start over, instead of forever being hunted by debt collectors. As a reminder: a formal bankruptcy only settles the debts of the bankrupt debtor to the extent they are paid off with liquidation proceeds, or waived as part of a composition. Therefore, to a private

person who is a debtor, the main difference with ordinary bankruptcy proceedings is that if he or she adheres to all obligations imposed upon him or her by the DRPP during three years, the remaining debt will be converted into "natural obligations" under Dutch law, which cannot be enforced against the debtor. This result is referred to as a "clean sheet" (*schone lei*) or "fresh start" as it is known in some jurisdictions.

The entry requirement for the DRPP is that it is either reasonably foreseeable that the debtor will not be able to continue paying its debts, or that the debtor has actually ceased payment of its debts. In addition, a debtor is required to first attempt an out-of-court restructuring prior to its DRPP petition and has to substantiate his failed efforts to the court when filing for the DRPP.

A request for application of the DRPP can be filed with the district court by the debtor itself or by the office of the mayor and alderman of the municipality where the debtor resides or is domiciled. In the latter case, the debtor will be heard before the court decides on the request. Even though filing for application of the DRPP is a formal procedure under the DBA, legal representation (that is, the engagement of an attorney) is not mandatory. Neither the debtor nor the office of the mayor and aldermen are at any time under any legal obligation to file a DRPP request.

Because the DRPP is typically preferable for the debtor over regular bankruptcy proceedings, the DBA contains certain provisions that prioritise a DRPP request if it coincides with a bankruptcy petition. Also, if a bankruptcy petition is filed against a private person, he will be proactively reminded by the receiving district court that he may file for the application of a DRPP instead.

A DRPP request may only be allowed by the district court if the court considers it sufficiently plausible that (i) the debtor cannot continue to pay its debts, (ii) the debts incurred within five years prior to the DRPP request were entered into in good faith (in order to prevent abuse of the DRPP) and (iii) the debtor will be likely to adhere to its obligations under the DRPP (see below) and will likely make an effort to generate, during the DRPP, as many assets or income for the insolvent estate as possible. If all requirements have been met, there are still some grounds on which the court has to disallow the petition. These grounds relate mostly to the origin of the debts and previous application of the DRPP.

The court's decision to grant a request for application of the DRPP cannot be appealed; However, any decision not to grant the request is open for appeal (and subsequently cassation) by the debtor.

6.2.2 Main consequences

A request filed with the court is dealt with expeditiously, in practice on the same day or the next day. If the application proceedings take more time due to procedural issues, the district court may provide injunctive relief, for instance in case of the debtor's threatened eviction from his home or closure of utilities. If the request for the application of the DRPP is allowed, the court will appoint an administrator and supervisory judge. As explained in paragraph 6.1.3, the administrator's main task is to administer and liquidate the insolvent estate. In addition, the

administrator supervises the debtor's compliance with the debtor's obligations under the DRPP. Apart from this additional duty, the roles of both the administrator and the supervisory judge are similar to those in bankruptcy as described in paragraphs 6.1.3 and 6.3.

The notion of the DRPP is that the debtor will observe strict rules for three years. Meanwhile, the administrator will manage and liquidate the insolvent estate in order to settle as much of the debt as possible. If the debtor adheres to all of his obligations, he will be rewarded with a "clean sheet" ("fresh start") and the remainder of the debts will no longer be enforceable against him.

The DRPP applies as of the date on which the court has allowed the request for such application. As of that moment, the debtor's power to dispose of the assets that are part of the insolvent estate transfers to the administrator. It also requires the administrator's consent for certain legal acts, such as entering into a credit agreement or standing surety. For acts that do not affect the estate, the debtor maintains his power of disposition. Furthermore, certain personal assets, such as household effects and a limited cost of living allowance, are not considered part of the insolvent estate. Every other asset of the debtor – including those acquired during the DRPP and those belonging to a matrimonial community of property – become part of the insolvent estate.

6.2.3 Enforcement of creditor rights

The application of the DRPP affects all claims existing at the moment the DRPP is granted, except for secured claims and any right of retention. Claims that came into existence after the start of the DRPP are not affected except for some claims that originate from agreements or acts pre-dating the start of the DRPP. Any enforcement action for an unsecured claim is stayed and attachments cease to have effect. Any payment made on an unsecured claim by the debtor using assets that are not part of the insolvent estate is null and void. Enforcement against third parties such as co-debtors or guarantors remains possible (as discussed in paragraph 5.2.3).

Secured creditors can continue to enforce their rights without regard to the DRPP – see paragraph 6.3.4. Creditors with preferential claims are affected by the DRPP, but their claims are treated preferentially in that if a distribution to creditors is made, preferential creditors will receive twice the percentage that the ordinary creditors are paid. This deviates from the ordinary bankruptcy distribution mechanism.

Claims affected by the DRPP have to be filed with the administrator in accordance with paragraph 6.3.4. The process for the validation of claims is similar to the one described in paragraph 6.3.4. Contrary to bankruptcy proceedings, in which distribution to the creditors typically takes place in the final phase of the proceedings, distributions will be made throughout the entire duration of the DRPP.

At the same time as making a request for the application of the DRPP, a debtor may request the court to impose a previously offered debt settlement on a dissenting creditor. In such a case, both parties will be heard by the court. This is an exception to the general rule formulated above and applies only to private persons under the DRPP. The request will be allowed if the creditor's refusal is disproportionate to the prejudice on the debtor's and other creditors' interests.

Pending such request, the district court may order a moratorium if there is a threat of evicting the debtor, a termination of utilities, or termination of the debtor's health insurance.

6.2.4 Executory contracts

As a rule, Dutch insolvency proceedings do not affect executory contracts. This and the limited exceptions to this basic principle, are set out in detail in paragraph 6.3.5. For the avoidance of doubt, the extrajudicial WHOA, which is not an insolvency proceeding as such, does allow for unilateral amendment of executory contracts, subject to court approval.

6.2.5 Liabilities and avoidance

As is the case with the bankruptcy trustee, an administrator will try to reconstruct the insolvent estate. The administrator will make house visits to the debtor and may request any information from the debtor or - through the supervisory judge - third parties. If the administrator finds that the insolvent estate has been prejudiced by a third party, it may claim damages. If the debtor itself has acted unlawfully, the administrator may request termination of the application of the DRPP without the debtor being granted a clean sheet (fresh start). Finally, the administrator may avoid legal acts as set out in paragraph 6.3.6 for bankruptcy proceedings.

6.2.6 Conclusion of debt restructuring for private persons

The application of the DRPP may be concluded in various ways.

Firstly, the debtor may offer a composition plan to all creditors affected by the application of the DRPP. The process of such an offer is similar to the one described in paragraph 6.3.9. A composition plan has to be accepted by a double majority: (i) a majority in number of admitted and conditionally admitted claims of preferential creditors that have appeared at the first creditors' meeting representing (ii) at least 1/2 of amount of admitted and conditionally admitted preferential claims and the same majority of ordinary claims. If the composition plan has been accepted, it may be confirmed by the district court. Once court approval is no longer open to appeal, the plan becomes binding on all creditors affected and the DRPP is concluded.

Secondly, the district court may terminate the DRPP at the request of the debtor, its creditors, the administrator or the supervisory judge. The court may also conclude the application of the DRPP at its own motion. A termination by the court is favourable to the debtor if the ground for termination is either that all claims affected by the DRPP have been settled or that the debtor will restart paying his debt. Termination based on any other statutory ground results in the debtor's bankruptcy by operation of law. These latter grounds all relate to bad faith on the debtor's side, such as non-compliance with its obligations under the DRPP or incurring new debt.

Thirdly, a DRPP may conclude due to the effluxion of time. The DRPP will usually be applied for three years, but may be extended by the court to five years in total. No later than three months before the end of the DRPP term, the administrator will present the court with a report on the debtor's compliance with its obligations under the DRPP. During the subsequent hearing or

shortly thereafter, the court will rule whether or not the debtor has been compliant. If so, the administrator will draft a final distribution list. Once this list becomes binding, the DRPP is concluded and the debtor is awarded a clean sheet (fresh start). If the district court finds that the debtor has not fulfilled its obligations, the application of the DRPP is terminated without a clean sheet for the debtor and as a result the remaining debt will become enforceable again.

Self-Assessment Exercise 3

Study Section 6.2 on personal / consumer bankruptcy.

Consider yourself the legal advisor of a private person who can no longer satisfy his debts as they fall due and there is no prospect of that changing any time soon. Your client has been struggling for years, has already been talking to others and asks you to prepare a bankruptcy filing. "I can't cope with it anymore, I want this to be over and get on with my life". What would the main advantages and disadvantages be to file a petition for a DRPP, as opposed to the alternative of a formal bankruptcy proceeding?

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.3 Corporate liquidation: Bankruptcy

6.3.1 Filing: who, when and where

Formal bankruptcy (*faillissement*) is the Netherlands' liquidation bankruptcy proceeding. It is aimed at liquidating the debtor's assets and distributing the proceeds among its creditors in the order of priority of their claims.

Further to paragraph 6.1.1, under Dutch law any debtor, regardless of it being a legal entity or a private person, can be declared bankrupt (*failliet*). A request for bankruptcy can be filed with the district court by the debtor itself, a creditor or, for reasons of public interest, by the Public Prosecution Service (*Openbaar Ministerie*). Legal representation is mandatory. As mentioned in paragraph 6.1.3, in the case of a request for the application of bankruptcy proceedings to a legal entity, shareholder approval is required. If their approval is lacking, the court will refuse the request. However, if the directors of an insolvent company are of the opinion that the company should file for bankruptcy but the general meeting of shareholders is withholding its approval, a practical solution is to file for a suspension of payments and subsequently have the suspension converted into bankruptcy. Such a conversion is, in fact, the only additional gateway to bankruptcy proceedings.

The entry requirement for a declaration of bankruptcy is that the debtor has ceased to pay its debts as they fall due. If the bankruptcy request is not upon the debtor's own petition, a requirement for accepting that a debtor has ceased to pay its debts is that there are at least two creditors, at least one of which is due and payable.

Contrary to what is found in many other jurisdictions, there is no legal obligation for the debtor or its managing board to file for bankruptcy or any other insolvency proceedings at any time. Neither is there a balance sheet, liquidity, solvency or comparable test which obliges managing directors to file for bankruptcy. Nevertheless, the directors may at some point *de facto* have no other choice but to file for bankruptcy. The members of the managing board risk personal liability if they allow the company to enter into a contract while they know, or should have known, that the company would be unable to meet its contractual obligations and would not offer sufficient recourse. In addition, directors may be at risk for personal liability relating to tax and social security claims.

The court's decision, to either allow or disallow the bankruptcy request, is open to appeal and, subsequently, cassation for the debtor, its creditors and other interested third parties. A noticeable procedural implication is that, under Dutch law, a court of appeal will hear the case *ex nunc*.

6.3.2 Main consequences

If a bankruptcy petition is granted by the court, the bankruptcy becomes effective and a bankruptcy trustee and a supervisory judge are appointed immediately. Subject to limited exceptions, with effect from 00:00 hours of the day of the bankruptcy declaration (that is, with retroactive effect), the debtor loses its power to administer and dispose of its assets. This power transfers to the bankruptcy trustee, who is entrusted with the administration and liquidation of the insolvent estate to the benefit of the general body of creditors.

Under Dutch law, the bankruptcy order freezes all claims, priority and ranking as at the date of the bankruptcy order. In other words, any acts or changes after that date may not be taken into account when determining the position of creditors. As further explained in paragraph 6.3.4, the declaration of bankruptcy results in an automatic stay. Except for secured creditors, no individual enforcement action is allowed. All legal proceedings aimed at receiving performance by the debtor are also stayed. Civil attachments on assets that are part of the insolvent estate cease to have effect, as the Dutch insolvency system regards bankruptcy as a comprehensive attachment on behalf of the general body of creditors, which is executed by the bankruptcy trustee for their benefit. Furthermore, any transfer of assets is halted. Under Dutch law, this includes the creation of security rights.

In bankruptcy proceedings, the bankruptcy trustee has the role of liquidating the debtor's assets and distributing the proceeds to the creditors. If there is value in the business as a going concern, the bankruptcy trustee will likely try to keep that business running, or to restart that business – or a part of it – elsewhere by selling it. Under Dutch law, the transfer of a business conducted by a bankrupt entity does not result in an automatic transfer of employees. As employees are often a heavy financial burden on a debtor, the fact that their rights are not transferred by law may provide for a favourable restart scenario. Furthermore, the bankruptcy trustee will typically terminate all contracts to which the debtor is a party, as discussed in more detail in paragraph 6.3.5. The bankruptcy trustee will likely also conduct an investigation into any irregularity that may have taken place prior to the bankruptcy. When the administration and

liquidation of the insolvent estate has been completed, the bankruptcy will be concluded. The manners in which a bankruptcy can be concluded are discussed in paragraph 6.3.9.

If the insolvent estate is small or has limited assets for recovery, the consequences of the bankruptcy and the duties performed by the bankruptcy trustee are the same as they would be in a larger, more complex insolvent estate. However, where the estate is small the performance of the bankruptcy trustee's duties may take less time, as they are (in theory) less extensive. Therefore, in such a case, the total duration of a bankruptcy will be shorter, usually taking up to six to twelve months. A regular bankruptcy proceedings may take anything from one to 20 years to complete, depending largely on the necessity for legal proceedings.

6.3.3 Types of claims

Dutch law is based on the assumption that all, or at least most, claims are unsecured and are held by ordinary creditors. This is largely due to the fact that this assumption dates back to late 19th century, when enterprises were much more simple. Over time, however, economic and legal reality have done their work and while formally not recognised as such, the bankruptcy code now also contains a number of provisions on how to deal with secured creditors and other priority positions. The following types of claims are currently recognised in law, case law and practice.

Estate claims: claims arising by virtue of law, originating from estate activities of the bankruptcy trustee, or originating from acts by the bankruptcy trustee contrary to its duties or obligations. Estate creditors have a direct claim on the insolvent estate and, consequently, receive payment before any non-estate creditor. Estate claims will be settled in accordance with their ranking, if any. Examples of estate claims are liquidation costs (including the bankruptcy trustee's salary, wages and lease payments as of the date of the bankruptcy) and claims for damages caused by the bankruptcy trustee acting in his capacity as trustee.

Pre-bankruptcy secured claims: see paragraph 5.1. Although secured creditors can enforce their rights without taking the bankruptcy into account, secured claims are listed in this paragraph due to the fact that enforcement of those claims results in the disposal of assets that are part of the insolvent estate. Also, if the sale proceeds of the secured assets are insufficient to settle the secured creditor's claim, the creditor may file the remaining part of the claim as a claim in the bankruptcy proceedings. This claim will be qualified as an unsecured ordinary claim, insofar as it meets the below stated criteria for those claims.

Pre-insolvency preferential claims: unsecured claims of preferential creditors as far as they have come into existence prior to the declaration of the bankruptcy. Please refer to paragraph 5.1.4 for an explanation of Dutch preferential rights. The claims will be paid after all estate claims have been settled.

Pre-insolvency ordinary claims: claims that have come into existence before the start of the bankruptcy or are implied in or result from the creditor's existing legal position. Creditors share *pro rata* in the proceeds that result from the liquidation of the insolvent estate after the secured

creditors have executed their security rights and all estate claims and preferential claims have been paid in full.

Claims not eligible for validation (inadmissible claims): claims that came into existence after the declaration of bankruptcy and do not qualify as estate claims, as well as claims that cannot be filed by law. These claims are not eligible in the bankruptcy but remain due by the debtor should it survive the bankruptcy. An example of a statutory non-verifiable claim is interest accrued after the opening of the bankruptcy proceedings. Under Dutch law, shareholders cannot file their claims pursuant to their paid-up capital either, as they are regarded as providers of risk capital. If a shareholder holds any other claim, including pursuant to a debt instrument to the debtor (such as the typical shareholder loan), under Dutch law, this claim is not automatically characterised as subordinated risk capital but regarded in the same way as any other debt instrument of any other creditor.

6.3.4 Enforcement of creditor rights

Due to the declaration of bankruptcy, unsecured creditors may not seek recovery from assets belonging to insolvent estate. Unsecured creditors may only enforce their claims through filing the claim with the bankruptcy trustee. Unless dictated by the supervisory judge, there is no bar date and no formal requirements relating to the filing of claims. Typically, a claim will be filed by submitting invoices or other documentary evidence of a claim to the bankruptcy trustee as soon as possible in order to avoid creditors' claims not being recognised or not having the benefit of preliminary distributions.

The bankruptcy trustee will review each claim filed together with the evidence submitted and either admit or reject the claim. This is an informal procedure. If the insolvent estate allows for a distribution on both preferential and ordinary claims, a first creditors' meeting will be held. In any other case, a first creditors' meeting will typically not take place. Where there is a first creditors' meeting, the bankruptcy trustee will present the creditors with its preliminary distribution plan. Every creditor is allowed to contest another creditor's claim or priority position at the first creditors' meeting. The debtor may also contest a claim or priority. If the debtor survives the bankruptcy, its challenge prevents the creditor from receiving an executory title for the claim. All claims admitted at the end of the first creditors' meeting are eligible for a distribution. If a claim is rejected and a distribution on that type of claim will take place, a procedure on the merits will ensue. These proceedings are similar to regular proceedings aimed at obtaining an executory title for a claim. The distribution will be suspended until the claim validation proceedings have been finalised. Once the admitted and rejected claims are fixed, the bankruptcy trustee will submit its final distribution plan to the supervisory judge for his approval. This approval is subject to appeal to the supervisory judge. The supervisory judge's decision on the appeal is subject to appeal to the Supreme Court.

Secured creditors may enforce their rights with respect to the secured assets as if there was no bankruptcy, subject to the limitations indicated in paragraph 5.1.5. During a temporary stay, creditors may still exercise their security rights against third parties pursuant to a guarantee, surety, etcetera. If enforcement of a security right does not result in full payment of the secured

claim, a claim for the remainder must be filed with the trustee and qualifies as an unsecured ordinary claim.

As explained in paragraph 6.1.2, even if a creditor is not entitled to enforce its claim (for example because it has to be filed with the bankruptcy trustee or is not eligible in the bankruptcy), the creditor is authorised to set off its claim with a corresponding debt of the insolvent debtor. A condition for the right to set-off is that both the claim and the debt have arisen before bankruptcy was declared, or result from acts entered into with the debtor prior to the bankruptcy. The most important restriction to the above rule is if claims against the debtor were transferred to, or taken over by, a third party after the bankruptcy.

6.3.5 Executory contracts

The basic rule under Dutch law (including insolvency law) is freedom of contract and, accordingly, the law will not cancel a contract unless there is a very urgent reason to do so. Accordingly, even a debtor's bankruptcy has no influence on executory contracts: the contract stays in place with the estate. Executory contracts are contracts under which both parties to some extent have remaining or continuing obligations. Contractual termination and netting or set-off provisions – including those in financial contracts – stay in place. As in any normal situation, whether the termination grounds, criteria and consequences will benefit either the creditor or the debtor, in the event of a bankruptcy, will depend on the circumstances.

Two important exceptions apply:

(i) with regard to employment and lease contracts, the bankruptcy trustee is given the power to terminate the contracts while observing a very short notice period; and

(ii) more generally (and one that typically benefits the debtor), contracts for the provision of services essential to the debtor's necessities of life or the continuation of its business may not be suspended or rescinded due to non-payment by the debtor prior to its bankruptcy.

A stipulation providing for termination, whether automatic or not, of such a contract due to the debtor's bankruptcy, request for bankruptcy or attachment (a so-called *ipso facto clause*) is effectively rendered inoperative as it may only be invoked with the bankruptcy trustee's permission. Many international finance and trade contracts contain *ipso facto* clauses, sometimes disguised as undertakings or representations by the debtor. It is customary for those provisions to remain where the relevant party is a Dutch person and it is understood that it is questionable whether the relevant provisions will be enforceable.

To obtain certainty about whether or not an executory contract will be honoured, a counterparty may ask the bankruptcy trustee to confirm that the debtor's obligations will be met. If this confirmation is not provided, the bankruptcy trustee loses his right to claim performance by the counterparty. If the bankruptcy trustee confirms performance by the debtor, he has to provide security for this. Although not provided for in the DBA, it is generally accepted that the debtor's obligations, pursuant to an executory contract of which the bankruptcy trustee has confirmed performance, qualify as estate debt.

6.3.6 Avoidance of legal acts

Further to paragraph 5.1.6, in the case of bankruptcy the bankruptcy trustee may declare void any voluntary legal act performed by the debtor prior to its bankruptcy if the act resulted in the prejudice of its creditors and both the debtor and its counterparty knew, or should have known, that one or more creditors would be prejudiced. The only exception applies to legal acts performed with authorisation of the court during a WHOA process (see paragraph 5.1.6). Certain evidentiary presumptions apply to the required knowledge of prejudice. Furthermore, if the legal act was without consideration, the counterparty's knowledge of the prejudice is not required. Avoidance actions are not frequent, but the threat thereof is real and, when it does happen, such avoidance by the trustee is often litigated by the counterparty to the relevant act and sometimes also other affected parties.

The performance of an obligation that was due and payable may only be avoided if the counterparty knew that a request for bankruptcy had been filed and was not suspended in connection with a WHOA process, or the performance of the obligation was the result of deliberations between the debtor and the counterparty with a view to providing the latter with a preference over other creditors.

Consequently, a distribution of dividends by a limited liability company may be at risk of avoidance if the company becomes unable to pay its due debts. Regardless of whether the payment of the dividend was mandatory or voluntary, the recipients of the distribution, which foresaw or should have foreseen the inability of the company to continue satisfying its due and payable obligations thereafter, can be forced to repay the dividend they received up to the amount of the deficit. This is often referred to as the "cash flow test" prior to paying a dividend. If the test is not properly assessed and the company fails to satisfy its payment obligations, this may also create personal liability for the management board. The forward-looking timeframe, which needs to be taken into account for the cash flow test, is not set in stone but is typically held to be between one and two years.

6.3.7 Personal liability for the members of the board

Under Dutch law, members of the board of directors or the supervisory board are in principle not personally liable for anything they have done or omitted to do in such capacity. In going-concern circumstances, the risk of being held personally liable is low. In bankruptcy, however, the likely deficit in the estate will work to incentivise the trustee and other stakeholders to go after every possibility to decrease the deficit in the estate and find additional means of recourse. One of those is an insurance policy ("D&O" or "directors and officers insurance" policy) taken out by the company for the benefit of its directors and other management in person, but acting in their capacity as director or officer of the company. Individual board members are seldom capable of contributing a meaningful amount to the bankruptcy estate - let alone after years of litigation - but the cover under D&O policies, especially in multinational companies or groups of companies, is typically at least USD 25 million and often much more. For the trustee or other stakeholders to get access to those funds, however, they will first have to assert the personal liability of those directors or officers and either invest in years of litigation to recover the funds or try to settle with the D&O insurer. While the risk of a court actually awarding a personal liability

claim against a director or officer is low, the cost of litigation, which is also covered by the typical D&O policy, is such that the number of settlement payments by D&O insurers into bankruptcy estates is notably higher. Directors should therefore assume that a trustee or other stakeholders will try to make a personal liability claim and they are typically advised by counsel from the early stages about how to mitigate such risks.

There are, however, several grounds on which a managing director of a bankrupt company may be held personally liable. The largest companies will have taken out insurance policies that cover their directors for liability claims. Directors also often request an indemnity from the company, but that is also not universal. Each of the various grounds for liability also provides a director with a specific option to remedy a claim made against him.

First, a director may be personally liable for damages incurred by the company due to improper performance of the director's duties. Inside insolvency proceedings, only the bankruptcy trustee can invoke this liability ground. The risk of personal liability for improper performance can be averted by the director through receiving a discharge from liability by the company. This discharge is usually granted during the shareholders' meeting in which the annual accounts are adopted. If no discharge is granted, a director may challenge his liability by proving that the mismanagement was not attributable to him and that he was not negligent in acting to prevent its consequences.

Second, a managing director may be personally liable towards the insolvent estate if the managing board has manifestly improperly managed the company and this turns out to be an important cause of the bankruptcy. Evidentiary presumptions apply: if the annual accounts were not timely published or the company has not complied with its accounting obligation, it is irrefutably established that the managing board has improperly managed the company and it is refutably presumed that this was an important cause of the bankruptcy. This liability ground may also only be invoked by a bankruptcy trustee. If the claim is allowed, it results in personal liability of the director for the entire shortfall of the insolvent estate. A director can remedy his liability by making a plausible case that the bankruptcy was brought about by another important cause, other than the established manifestly improper management. If the evidentiary presumptions do not apply, the bankruptcy trustee has the burden of proof for both the manifestly improper management and this being an important cause of the bankruptcy. In such a case, the director may of course also challenge the manifestly improper management. In 2022, as part of a continuing but still temporary COVID-related governmental relief package, an exception applies: if the annual accounts relating to the most recent financial year were not published on time due to COVID-19, this will not be taken into account in the assessment of a bankruptcy trustee's claim of improper management.

A basis for liability, which may be relied upon by both a bankruptcy trustee and the company's creditors, is a wrongful act (tort). The most common grounds for a wrongful act are (i) entering into a contract while the director knows (or should have known) that the company would be unable to meet its obligations under the contract and would not offer sufficient recourse and (ii) allowing or accomplishing a failure to perform, causing damages without offering sufficient recourse. This potential risk of liability becomes most relevant in situations where a board of directors is working on a solvent solution for an imminent payment default, but the chances of a

solution being achieved becomes increasingly less likely. In that case, there comes a point when the director (or each director) may be deemed to have known (or should have known) that situation (i) as described above would apply. In case law, this moment in time, which the court determines in hindsight, has been defined as the "reference date". Effectively, if a director recognises that the reference date has passed, he should file for bankruptcy, or at least suspension of payments, to avoid incurring personal liability. If a director is held liable, he will have to settle any damages caused by his wrongful act. A liability ground, which is sometimes viewed as a species of tort, is director's liability based on fraudulent preferences as described in paragraph 6.3.6. A director can challenge a liability claim based on tort on all aspects required for a successful claim, such as the wrongfulness of the act, attribution of the damages to that act, and the existence and extent of the litigious damages.

Furthermore, the managing board of a limited liability company needs to consent to the distribution of dividends as described in paragraph 6.3.6. Subject to the joint and several liability of the managing directors, the board needs to withhold its consent if it foresees, or should reasonably foresee, that the company will not be able to satisfy its due obligations (the cash flow test). If the board does not withhold its consent, the directors are liable for the amount needed to settle the deficit. A director may remedy his liability by proving that he cannot be blamed for the distribution and has not been negligent in taking precautions to avert the negative consequences of the distribution.

Finally, if a company is unable to pay certain taxes or premiums, a director can be personally liable for that debt. One way to remedy this risk is for the director to ensure timely notification to the tax authority of the company's inability to satisfy its debt. If this notification is made, the tax authorities have to make a plausible case that the non-payment is caused by the director's manifestly improper management. If the company fails to notify the tax authorities, the non-payment is assumed to be the director's fault. A director may only try to refute this assumption if he argues convincingly that he cannot be blamed for the failure to notify.

6.3.8 Bankruptcy of groups of companies

The Dutch insolvency laws do not provide for the consolidation of bankruptcies of group companies. Case law, however, does allow consolidation between group companies which are all bankrupt in the Netherlands. The justification for consolidation then mostly lies in the fact that the assets of the companies involved have commingled in a way, which does not allow a reasonable attribution of the assets to the individual companies. In lieu of a single legal basis for consolidation, the extent and consequences of the consolidation will be determined in each individual case.

In the most far-reaching cases, internationally referred to as substantive consolidation, the assets and debts of all bankrupt group companies are merged into a single *pro forma* bankruptcy estate. Creditors may file their claims as if there was only one bankruptcy, regardless of who the original debtor may be. All creditors share in the joint insolvent estate. A less far-reaching alternative is procedural consolidation, which is aimed at the fair treatment of the bankruptcy costs that may be made for the benefit of the creditors of the entire group, but which also respects the individual legal standing of the individual debtors. This means that creditors have

to file their claims in the individual bankruptcy of their debtor and share only in the proceeds of the insolvent estate of their formal debtor. The liquidation costs, however, are aggregated rather than allocated to the individual bankruptcies. Subsequently, the costs are paid out of those insolvent estates that contain sufficient funds. For example, if one group company is party to the lease contract but all group companies use the real estate, the costs incurred for the termination of this lease and the vacation and transfer of the real estate cannot be allocated solely to the lessee company. Those costs have to be borne by all group companies that benefitted from the lease, so consolidation of costs is obvious. Procedural consolidation occurs quite frequently in the Netherlands, while substantive consolidation is rare.

Similar to consolidation for group companies, there are also no hard and fast rules regarding the co-operation and co-ordination between courts and bankruptcy trustees or individual group companies, or regarding group co-ordinators. Within the Netherlands, the various stakeholders will usually try to have the same bankruptcy trustee and supervisory judge appointed in every bankruptcy. If a group company needs to file for bankruptcy with another court due to jurisdictional issues, this court may refer the bankruptcy to the court that handles the other bankruptcies and the same bankruptcy trustee and supervisory judge will be appointed. An exception will be made in cases of a possible conflict of interest between the group companies. Please refer to paragraph 7.2 on co-operation and co-ordination in an international setting.

6.3.9 Conclusion of a bankruptcy

Nearly all Dutch formal bankruptcies end with a court order formally terminating the bankruptcy proceedings due to a lack of funds to pay the estate claims, including the liquidation costs. The company will automatically be dissolved.

Other potential ways to conclude a bankruptcy are:

(a) a successful appeal of the opening of the bankruptcy proceedings;

(b) "simplified liquidation" without a creditors' meeting, when the insolvent estate allows for full payment of the estate claims and full or partial payment of the preferential claims, so ordered by the court upon request by the bankruptcy trustee; or

(c) ordinary liquidation as described in paragraph 6.3.4, including a creditors' meeting, when the insolvent estate allows also for a distribution to ordinary creditors in addition to the full settlement of the estate and preferential claims. As soon as either the final distribution list has become binding or the final distribution has been made, the bankruptcy is concluded.

Finally, a bankruptcy can be concluded through court approval of a "composition plan", which can take any form – from a short, one-directional offer by one stakeholder to the others, to a complex restructuring agreement as is commonly found in the largest cross-border out-of-court restructuring processes, and anything in between. This plan may be offered by the debtor, a single creditor or a group of creditors, or by another third party. The plan has to be accepted by a simple majority in number of admitted and conditionally admitted claims of ordinary creditors that have appeared at the first creditors' meeting and representing at least half of the amount of

admitted and conditionally admitted ordinary claims. If the composition plan has been accepted by the ordinary creditors, it then must be confirmed by the court. Once court approval of the composition plan is no longer open to appeal, the bankruptcy is concluded.

Except for the case where a bankruptcy ends with court approval of a composition plan, the conclusion of the bankruptcy will automatically result in the dissolution of the debtor. In cases where a first creditors' meeting took place, the records of that meeting constitute an executory title for the remaining claim. An exception to this rule applies to claims that have been challenged by the debtor during the first creditors' meeting (see paragraph 6.3.4).

Self-Assessment Exercise 4

Study Chapter 6.3 on Corporate Liquidation: Bankruptcy.

Question 1

If you, as the chairman of the board of a listed Dutch company in distressed negotiations with its financiers, had come to the conclusion this morning that the only realistic solution of preventing a payment default next week is definitively off the table, what would you do and why?

Question 2

Why is the personal liability of directors such an issue, if you always have to go to court about it? (In some cases, the director – who also may be the shareholder – may be of substantial net worth and may provide meaningful recourse, but in most cases the directors will not provide meaningful recourse for a company's creditors and will provide even less after years of litigation.)

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Receivership

The Dutch legal framework does not provide for receivership. Please refer to paragraph 6.1 for a general description of the Dutch insolvency law system and to paragraph 6.3 regarding bankruptcy proceedings, as these are most similar to foreign receivership proceedings.

6.5 Corporate rescue: suspension of payments and extrajudicial restructurings

6.5.1 Corporate rescue: Suspension of payments

6.5.1.1 Filing: who, when and where

A debtor, defined as being either a legal entity or a private person conducting an independent profession or business, can request a suspension of payments. A suspension of payments is essentially a debtor protection regime designed to provide the debtor with stability while it tries to agree a restructuring of its debt obligations with its creditors.

There are no special proceedings for small- or medium-sized enterprises (SMEs). Accordingly, only the debtor itself (represented by its board) may file for suspension of payments; creditors cannot. A debtor may request a suspension of payments if it foresees that it will not be able to continue paying its debts as and when they fall due. Suspension of payments is a formal proceeding under Dutch insolvency law and accordingly legal representation is mandatory. There is no statutory requirement for shareholder approval; the management board is authorised to file a petition at its sole discretion. It is not uncommon for agreements between the company and its shareholders (and among the shareholders) to provide for prior consultation duties, but those agreements cannot prevent the board from effectively applying for a suspension of payments and also affecting the shareholders in their means of recourse against the board. As mentioned above, this is why suspension of payments proceedings are often used by managing boards of insolvent companies in circumstances where they expect pushback or factual impossibility from the general meeting of shareholders when it comes to a bankruptcy filing. In those cases, if there is no real merit in trying to restructure the debts, the suspension of payments is converted into bankruptcy within days or weeks after it was requested.

After a petition for suspension of payments is filed with the district court it will be immediately allowed, albeit on a provisional basis. The court will appoint an administrator who will manage the debtor's assets jointly with the board of the debtor. A supervisory judge is appointed to advise the administrator.

The court will then set a date for a hearing to discuss the definitive suspension of payments, to which both the debtor and the creditors are invited. Definitive, in this context, means for a duration of no more than one-and-a-half years – with an optional extension of up to another one-and-a-half years. The court may allow a definitive suspension of payments unless there is an opposing vote from creditors exceeding either i) 25% of the qualifying debt represented at the creditor hearing, or ii) more than one-third of all qualifying debt. Furthermore, a final suspension of payments may not be granted if:

(a) there is reasonable fear that the debtor will try to prejudice the creditors during the suspension of payments; or

(b) there is no prospect of the debtor at some point being able to resume satisfying its debt obligations (as restructured).

The decision regarding the allowance of a preliminary suspension of payments cannot be appealed; only the court decision regarding the allowance or rejection of definitive suspension of payments is open to appeal. The debtor may appeal the rejection of its petition and creditors that did not vote in favour of the suspension of payments may appeal a court decision allowing for the suspension of payments. Another way for creditors to challenge the court's decision is to request the court to revoke the suspension of payments on one of five limited grounds. These grounds can also be invoked by the debtor, the administrator, the supervisory judge or the court at its own discretion.

As explained in paragraph 6.3.1, there is no balance sheet, liquidity, solvency or comparable test obliging managing directors to file for suspension of payments of the debtor. However, because of their duties and potential liabilities they may have no other choice other than to do so. It is only sensible to file for suspension of payments if there are reasonable grounds for believing that the debtor will at some point be able to satisfy its creditors by means of a composition plan or otherwise and is consequently in a position as a result thereof, to continue its business or parts of that business.

6.5.1.2 Main consequences

The purpose of a suspension of payments is to temporarily protect a debtor from disruptive actions by its unsecured ordinary creditors, in order for the debtor to reorganise itself and restructure its debt with a view to continuing its business or parts of that business. Because the debtor will continue its business during the suspension of payments, the management of its assets is not transferred to the administrator, as is the case in case of a bankruptcy. During a suspension of payments, the debtor and the administrator are jointly responsible for the administration of the debtor's assets. This means the debtor is not authorised to dispose of any asset without the co-operation, permission or assistance of the administrator (and *vice versa*).

A suspension of payments will typically be financed by the debtor itself. Sometimes, emergency funding or "new money" may be provided to the debtor. As this type of financing does not automatically result in super seniority and the creation of security rights relating to it may be at risk of avoidance, this is less readily available in a Dutch suspension of payments than it is in other jurisdictions.

Similar to bankruptcy proceedings, all attachments on assets which are part of the insolvent estate are lifted as soon as the court decision granting a final suspension of payments becomes final and conclusive. If the administrator deems it necessary, he may request the court to lift the attachments at an earlier stage of the proceeding. Contrary to bankruptcy proceedings, legal proceedings are not stayed and new proceedings can be initiated against the debtor.

The consequences of a suspension of payments for executory contracts are similar to the effect in bankruptcy proceedings. Please refer to paragraph 6.3.1.5. The current Dutch legal framework does not allow the administrator and debtor to disclaim onerous contracts in any way other than in accordance with the termination clauses of that contract. An exception to that rule applies to employment and lease agreements, for which contracts the DBA provides the administrator with a special power to terminate them at short notice.

6.5.1.3 Enforcement of creditor rights

In suspension of payments proceedings, the same types of claims, as indicated in paragraph 6.3.3 for bankruptcy proceedings, are recognised. However, contrary to a bankruptcy, which affects all creditors except insofar as their claims are secured, a suspension of payments only affects ordinary creditors. As of the date allowing for the provisional suspension of payments, ordinary creditors may no longer seek recovery from the debtor's assets. Ordinary creditors can only enforce their claims by filing them with the administrator. They may, however, set-off their claim against a corresponding obligation of the debtor's in accordance with the rules explained in paragraph 6.3.4. As part of the restructuring, a debtor may offer a composition plan to its ordinary creditors. If adopted with the required majority, the plan may be declared binding by the court on all ordinary creditors. This is set out in more detail in paragraph 6.5.1.6.

Secured creditors and creditors with preferential rights can continue to enforce their rights regardless of the suspension of payments. The abovementioned effects of the suspension of payments on attachments do not apply to assets that are encumbered with any security or preferential right. As during bankruptcy proceedings, a cool-down period can be imposed by the court at the request of the administrator or the debtor. This period prevents all creditors, including preferred and secured creditors, from seeking recourse against the debtor's assets or recovering assets which are under the debtor's control without the permission of the supervisory judge. A cool-down period is usually requested in order to provide the debtor or administrator with the opportunity of determining which assets belong to the insolvent estate and which assets need to be preserved. During the cool-down period creditors may of course continue to exercise their rights against third parties, such as guarantors or co-debtors.

6.5.1.4 Liabilities and avoidance

As a suspension of payments is aimed at reorganising and restructuring the debtor and its debt, the administrator will typically not research irregularities, unless they are obvious. Also, until there is a bankruptcy with a deficit in the estate, there is little incentive for creditors or the administrator to search for additional sources of recourse, such as settlement with a D&O insurer. A liability claim made by the administrator against the director of a debtor which has been granted suspension of payments, is therefore not very likely. Typically, in cases where the administrator finds himself confronted with a ground for liability, he will ask the court to revoke the suspension of payments and convert it into bankruptcy. Nevertheless, the grounds for liability as described in paragraph 6.3.7 apply in suspension of payments as well, except for the claim based on manifestly improper management, which is reserved for a bankruptcy trustee.

Notably, the rules regarding the avoidance of legal acts set out in paragraph 6.3.6 do not apply to a suspension of payments proceeding. However, if the administrator is of the opinion that a legal act may be avoided, it will typically also request the conversion of the suspension of payments into bankruptcy proceedings in order to recover on behalf of the insolvent estate.

6.5.1.5 Suspension of payments of a group of companies

As indicated in paragraph 6.3.8, there is no legal framework for the treatment of groups of companies when one or more group companies become insolvent. The main reason for allowing consolidation, evident from case law, is that the assets of the group companies have commingled in such a way that they cannot be attributed to the various companies in a reasonable manner. This indicates a lack of proper bookkeeping. A suspension of payments requires the debtor to convince its creditors that it is essentially viable, which will typically require full disclosure and understanding of the debtor's books – if they are not correct and in order, this will make a restructuring more difficult. Therefore, successful, longer-running suspension of payments proceedings are conducted on the basis of accounts well-kept, taking away the most important ground for allowing a consolidation of the various suspension of payments proceedings. As a result, Dutch law does not provide for consolidation of the suspension of payments proceedings of group companies.

6.5.1.6 Composition plan

The debtor may offer a composition plan to its creditors, allowing it to bind all ordinary, unsecured creditors, including those who do not agree to the plan, provided that a qualified majority has accepted the plan (see below). The offer can be made simultaneously with the request for preliminary suspension of payments when it is filed, or at any time thereafter. A draft plan will be filed at the court for everyone to inspect and a hearing on the proposal will be planned. This hearing also qualifies as the first creditors' meeting.

Prior to the meeting, the administrator will file the lists of admitted and rejected claims with the court (see paragraph 6.3.4). During the meeting, both the debtor and any creditor may challenge any claim. As with bankruptcy, the result of a challenge by the debtor is that if the composition plan is approved and the suspension of payments ends, the records of the hearing do not qualify as an executory title for that debt.

In addition to claim validation, the meeting will be used for voting on the composition plan. All creditors whose claims have been admitted, are eligible to vote. The legal framework does not provide for classes of creditors but as the principle of contractual freedom applies, a debtor may choose to indeed form classes. Whether or not the creditor of a rejected claim is eligible to vote, is decided upon by the supervisory judge. The composition plan must be approved by a simple majority in number of the admitted creditors represented at the meeting and eligible to vote, demonstrating at least one-half of the amount of admitted claims that have the right to vote. If the required majority is not met, the debtor or the administrator may request the supervisory judge to adopt the composition plan as if it had been approved on condition that (i) three-quarters of the admitted creditors, which have appeared at the meeting and were eligible to vote, have voted in favour of the plan, and (ii) those rejecting the composition plan were not reasonable in rejecting the plan.

If the debtor is looking to use the suspension of payments proceedings to restructure its debt and to emerge as a going concern continuing to operate – rather than as a means of circumventing the general meeting of shareholders (or for another reason) – the debtor will

have prepared the draft composition plan or restructuring agreement upfront, potentially even having already negotiated it with one or more of its creditors. This happens frequently in larger enterprises and in such a case the filing for suspension of payments will typically already contain a draft composition plan. This may significantly shorten the duration of the suspension of payments, as the court will usually decide to dispense with deciding on a final suspension of payments and order the creditors to vote on the composition plan instead. Once the composition plan is accepted by the creditors or adopted by the supervisory judge, the plan has to be approved by the court. The DBA indicates a number of grounds for refusal of the requested approval, but the court also has the discretion to withhold its approval on any other ground. As soon as the court's approval of the composition plan is no longer open to appeal, the suspension of payments is concluded. All ordinary creditors are bound to the composition plan, regardless of whether or not they have voted on the plan.

The Dutch composition plan is a very valuable tool in the restructuring of international groups. The Dutch courts have proven to be flexible when it comes to adopting procedural rules and setting requirements for accepting the composition plan. This allows for the alignment of the procedure with foreign proceedings or financial instruments. A recent example is the Isolux restructuring.[3]

In the Isolux case the majority of claims ensued from notes held by a registered holder. The total claim, following from the notes, was filed by that registered holder. Instead of allowing only one vote for this claim, as the standard rule would imply, the court accepted a deviating assignment of voting rights: the votes were assigned to the actual note holders, instead of to the registered holder. That way the quota required for accepting the composition plan took into account the economic reality of the internationally accepted system of note programmes. Furthermore, the number of votes for every note holder was not determined through the number of notes it held, but through the actual value of its notes, which had been issued in various amounts.

Another advantage of the Dutch suspension of payments is that Dutch courts are willing to set timelines in joint consultation with the debtor and its administrator. This provides for flexibility to cater to foreign proceedings, which may sometimes require extra time or, alternatively, the need to take priority over the Dutch proceedings.

Furthermore, every composition plan can be subjected to a creditor vote, regardless of the jurisdiction of its origin. For instance, in Isolux, the composition plan was drafted in Spain and agreed upon by global creditors before it was put to vote in the Netherlands. As long as the composition plan is subsequently accepted by the creditors eligible to vote in the Dutch suspension of payments proceedings, the court will consider its approval as if the plan was fully governed by Dutch law. One of the main advantages of Dutch court approval is that the plan qualifies as a composition plan under the European Insolvency Regulation (recast) and will consequently be automatically recognised in every EU member state. This is explained in more detail in paragraph 7.

[3] District Court of Amsterdam, the Netherlands, 9 November 2016, case number C/13/16/37-S (in the Dutch language). English law detailed descriptions of the Dutch proceedings and court order are available as recognition of the order was given in the United States by the United States Bankruptcy Court, Southern District of New York, case number 16-12202.

6.5.1.7 The Dutch route: using a Dutch composition plan in the cross-border restructuring of international groups

The composition plan is also very useful for restructuring the debts of a Dutch legal entity in an otherwise foreign group of companies. Negotiations between the parent company and the group's creditors will take place elsewhere, sometimes in a language that would not allow the typical bankruptcy trustee or administrator in the Netherlands to participate. The Dutch debtor, however, is typically a party to the group's financing arrangements, may be exposed to acceleration by the creditors and, through intercompany financing lines, create exposure to the rest of the group. Accordingly, the group may have an interest in the Dutch debtor filing for suspension of payments in protection against activist creditors. At the same time, the wider group interest is not served well with the entry of an external administrator. In recent years, the Dutch courts have proved to be considerate of the potential destructive effect that a local (Dutch) proceeding may have on an otherwise realistic global restructuring effort. They have approved interpretations of the DBA, allowing them to hold off meetings in the Netherlands and align the timetable of the Dutch proceedings with the group-wide restructuring efforts abroad. This approach has allowed multinational groups of companies to negotiate a restructuring agreement in their own or the group parent's main jurisdiction, have it voted on there and then file the same agreement (which does not need to be in the Dutch language) as a composition agreement in the Dutch proceedings, have it voted on again with typically lower majority requirements than in the main jurisdiction (simple majority on number and amount) and approved by the Dutch court. The independent review by the administrator and the court are limited to a check against fundamental conflicts with Dutch law, public policy and order. An important additional benefit, in some cases, is that the Dutch court's approval of the composition plan then gives it recognition throughout Europe under the European Insolvency Regulation (recast) and / or recognition in the US under Chapter 15 / UNCITRAL Model Law,[4] while the identical original restructuring agreement has not been so recognised in situations where it lacked (or was still awaiting) court approval in the parent's home jurisdiction.

6.5.1.8 Conclusion of a suspension of payments

Apart from a successful appeal against the judgment allowing final suspension of payments, a suspension of payments can be concluded in three ways:

(a) through court approval of a composition plan (see paragraph 6.5.1.6);

(b) conversion into bankruptcy; or

(c) full resumption of payment by the debtor.

[4] UNCITRAL Model Law on Cross-Border Insolvency, issued by UNICTRAL in 1997, available with a Guide to enactment and interpretation on http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

In cases where a debtor at some point during the preliminary or final suspension of payments is capable of resuming payment of its debt, the suspension of payments may be lifted by the court at the request of the debtor.

A conversion of the suspension of payments into bankruptcy may take various forms. First of all, if after the creditors' hearing the court does not allow a final suspension of payments, it may declare the bankruptcy of the debtor. Secondly, if a suspension of payments is revoked either during its preliminary or final phase, the court may also declare the debtor bankrupt. Finally, in case a composition plan is not accepted by the creditors, the court may apply bankruptcy proceedings to the debtor. Typically, where a suspension of payments is converted into bankruptcy proceedings, the administrator will be appointed as bankruptcy trustee and the appointed supervisory judge will remain in place as well. If the suspension of payments is converted to bankruptcy after a failed attempt at restructuring through a composition plan, no plan may be offered in the subsequent bankruptcy proceedings.

6.5.2 Corporate rescue: extrajudicial restructuring

6.5.2.1 Filing: who, when and where

An extrajudicial restructuring can be initiated by the debtor, or by one or more of its creditors, shareholders or an employees' representative. A debtor is defined as being either a legal entity or a private person conducting an independent profession or business. If the debtor wishes to start an extrajudicial restructuring under the DBA, there are two options. The first option is to file a statement to that effect with the district court. The statement remains with the court for one year. It becomes open to inspection by the affected creditors and shareholders once the debtor presents the restructuring plan to them. The filing of the statement marks the official start of the extrajudicial restructuring; it does not, however, prevent the debtor from preparing the restructuring through exploratory discussions with key stakeholders beforehand. In fact, a diligent debtor will typically engage in such talks in order to test the waters. The second option open to the debtor is also open to any other party: to file a request for the appointment of a plan expert (*herstructureringsdeskundige*) with the district court. As this is a formal request made to the court, legal representation is mandatory.

As stated in paragraph 6.1.3.5, the debtor (in case of a legal entity: represented by its board) does not require consent from its shareholders to initiate a WHOA process. Any stipulation thereto, or any other provision in the law or in the debtor's articles of association limiting the debtor from extrajudicial restructuring in any way, does not apply. As the debtor's co-operation is essential for a successful restructuring, there is no legal obligation for a debtor to start one. This is also why, in the case of the restructuring of an SME by a plan expert, this expert requires the debtor's consent to present a restructuring plan for voting and to submit it for court confirmation.

The entry requirement for an extrajudicial restructuring is a pre-insolvency test: it is reasonably plausible that the debtor will not be able to continue to pay its debts. The court will test this condition in relation to a request for the appointment of a plan expert. If the condition is met and unless this does not serve the interests of the joint creditors, the plan expert will indeed be

appointed. If the request for a plan expert is made by the debtor itself, or it is supported by a creditor-majority, it will be allowed in any case. If the restructuring is initiated by the debtor by way of filing a restructuring statement, the entry requirement is checked once the restructuring plan is submitted to the court for confirmation.

Since a WHOA process is an informal work-out, the set consequences are limited. A consequence to be noted here is that, in the case of a request for the opening of insolvency proceedings against the debtor and a request for the appointment of a plan expert are pending before the court at the same time, the latter will be dealt with first and the other one will be stayed. During the cool-down period, a request for the opening of insolvency proceedings against the debtor will be stayed as well. These provisions have been introduced to give priority to the restructuring.

6.5.2.2 The extrajudicial restructuring plan

The DBA provides for two types of extrajudicial restructuring: a public restructuring process and an undisclosed restructuring process. The differences between these two types are mainly felt in relation to court jurisdiction and effect of the restructuring plan within the EU. In the case of a public restructuring, the Dutch court will assume jurisdiction in accordance with the EIR Recast as the result of such a procedure (a court-confirmed restructuring plan) has been placed on Annex A to the EIR Recast.[5] This means that a public extrajudicial restructuring is open to any debtor that has its COMI in the Netherlands. The resulting court-confirmed restructuring plan will be automatically recognised throughout the EU.[6] As for the undisclosed type: the Dutch court will assume jurisdiction in accordance with the DCC. This means that either the debtor has its COMI in the Netherlands or the restructuring is in any other way "sufficiently connected" to the Netherlands. Examples of "sufficient connection" include a substantial part of the debt subject to the restructuring being governed by Dutch law, a substantial part of the debtor's assets being located in the Netherlands, or the debtor being part of a group of companies mainly based in the Netherlands. The restructuring plan that results from the undisclosed restructuring process lacks automatic recognition but will likely be recognised in accordance with Recast Brussels Regulation, UNCITRAL Model Law or private international law.

An important upside of the undisclosed version of the extrajudicial restructuring provided for in the DBA is that it is not subject to any publication requirement. Therefore, the restructuring will stay out of the public eye. This may prevent losses incurred due to the negative connotation that continues to attach to the concept of restructurings.

For the avoidance of doubt: a debtor that has its COMI in the Netherlands may choose to exploit either the public or the undisclosed restructuring plan. A debtor without a COMI in the Netherlands, may only use the undisclosed version.

The starting point of the restructuring is that the debtor offers a restructuring plan to all or some of its creditors and shareholders. The debtor is free to determine the content and structure of

5 The amendment of Annex A to this effect has not been accepted by Ireland and Denmark.
6 Except for Ireland and Denmark.

the restructuring plan. The only exception applies to claims of employees stemming from their employment contracts. These claims are excluded from an extrajudicial restructuring under the DBA. The plan may amend creditors' and shareholders' rights. For example, it can provide for a partial release of payments obligations, an amendment to the terms of debt instruments such as included in an indenture, even if governed by foreign laws, an exchange between different types of debt instruments, or a debt-for-equity swap. A restructuring plan may be limited to one category of creditor or shareholder. Logically, voting is limited to those creditors and shareholders whose rights are affected by the plan. Classes are constituted if creditors' and shareholders' interests or rights differ to the extent that their position cannot be deemed to be similar. Creditors and shareholders, who would rank differently (statutory or contractually) in the debtor's bankruptcy, are in any event placed in separate classes. Secured creditors may only be in the same class for the part of their secured claim which is covered by the underlying collateral based on the value of the collateral in a bankruptcy liquidation. A separate class is mandatory for trade creditors that are SME enterprises.

A plan is adopted if it is approved by all classes. A class of creditors approves the restructuring plan if creditors, representing at least two-thirds of the total value of the claims held by those who voted in that class, voted in favour of the plan. The same applies to shareholders, provided that the shareholders represent at least two-thirds of the total value of the issued capital held by those who voted in that specific class.

After approval of the restructuring plan by at least one class, the debtor may request court confirmation. If all classes approved the plan, the court must declare it binding on all creditors and shareholders, including on those who voted against it, unless specific circumstances apply. If one or more classes of creditors or shareholders voted against the restructuring plan, the court may still declare the plan universally binding, disregarding the creditors or class of creditors who vote against the plan. This leads to what is known as a "cross-class cram-down". However, creditors and shareholders who voted against the restructuring plan can request the court to deny confirmation on the basis of certain limited grounds.

The entire restructuring process is relatively swift due to i) the short timelines between the offer of, the voting on and the confirmation of the restructuring plan, ii) a newly introduced procedure to settle class constitution and other preliminary disputes at an early stage and iii) the fact that the court's decision on preliminary disputes and on the confirmation is final and not subject to appeal. The fact that the stay of insolvency proceedings and enforcement actions is for a maximum of eight months (see paragraph 6.5.2.3), will also put pressure on the process.

If a plan expert has been appointed, the extrajudicial restructuring is performed in the same way as in the case where it is led by the debtor. The only difference is that where the debtor is an SME, the plan expert requires the debtor's consent to present the restructuring plan for voting and to request court confirmation of that plan.

6.5.2.3 Enforcement of creditor rights

Since a WHOA process is not a formal insolvency proceeding, creditors are, as a basic rule, not limited in the enforcement of their rights, including through the enforcement of security rights

in the case of a secured creditor. However, enforcement can be limited by a cool-down period, which can last a maximum of eight months. The effect is similar to the one that may be ordered during a bankruptcy or suspension of payments proceedings (see paragraph 5.1.5). There are three important differences.

A cool-down period ordered during a restructuring does not just affect ordinary creditors but also prevents secured creditors from enforcing their claim, save for court permission. Also, when ordering a cool-down period, a court may at the same time lift attachments. Finally, as mentioned in paragraph 6.5.2.1, a request for the opening of insolvency proceedings against the debtor is stayed. In this way, creditors lose their power to enforce their claim through filing an insolvency request against the debtor. Please note that, although the restructuring plan may target only a selection of claims (see paragraph 6.5.2.2), a cool-down period applies to all creditors regardless of whether their rights are affected by the restructuring plan.

6.5.2.4 Executory contracts

As part of the restructuring, a debtor or plan expert may propose amendment of an executory contract to the other party. If the other party refuses the amendment, the debtor or plan expert may request permission from the court to terminate the contract unilaterally. The request for permission is made simultaneously with the request for court confirmation of the restructuring plan. If the court authorises termination, the other party may be entitled to damages. This claim, however, can be included in the restructuring plan and thus struck-out.

An important deviation as compared to ordinary insolvency proceedings, in an extrajudicial restructuring, contractual provisions resulting in the suspension or termination of the contract solely based on the restructuring (so-called *ipso facto* clauses) are deactivated, that is cannot be invoked by the counterparty to the debtor. That will likely prove a significant feature in the preservation of going concern value. An exception applies to contracts that allow parties to set-off their obligations through close-out netting, such as an ISDA Master Agreement.

6.5.2.5 Avoidance of legal acts

As stated in paragraphs 5.1.6 and 6.1.2, legal acts performed with court authorisation and set-offs performed in the debtor's day-to-day business are protected from avoidance. This protection occurs once the debtor has filed a restructuring statement or a plan expert has been appointed (see paragraph 6.5.2.1).

6.5.2.5 Extrajudicial restructuring of a multinational group of companies

The legal framework for extrajudicial restructurings has been designed to cater not only to individual debtors but also to groups of companies – even if the remainder of the group is outside of the Netherlands. As mentioned in paragraph 5.2.3 and rather novel for insolvency-related legislation as we know it, not only the obligations of the debtor to which the WHOA relates directly, but also the obligations of its group members (such as its parent company, subsidiaries or sister companies) towards the main debtor's creditors can be integrated into one restructuring plan. The only requirement for the Dutch court to assume jurisdiction over those

liabilities of other (possibly non-Dutch companies) is that those group companies also themselves meet the pre-insolvency test and the Dutch court would have jurisdiction if those group companies would offer a restructuring plan under the DBA themselves (see paragraph 6.5.2.1). This means that group finance obligations, such as parent guarantees or sureties, can be included in the restructuring plan without the guarantors having to go through a restructuring themselves.

As set out in paragraph 6.5.2.1, a Dutch court may assume jurisdiction if the debtor does not have its COMI in the Netherlands but the restructuring is sufficiently linked to the Netherlands. This applies to group companies as well. Therefore, even a group company without a COMI in the Netherlands may offer a restructuring plan (the undisclosed version) or, even if all but one group companies are located outside of the Netherlands, the entire group debt may be restructured through the Dutch plan. This prevents bondholders from double dipping (see paragraph 5.2.3) and allows for the restructuring of related obligations through one restructuring plan.

6.5.2.7 Conclusion of an extrajudicial restructuring

A WHOA process may be concluded in numerous ways. The best case scenario is conclusion through court confirmation of the restructuring plan. In that case, the restructuring plan becomes binding on all affected creditors and shareholders (and constitutes entitlement to enforcement). In the worst case scenario, court confirmation is requested but refused. This results in the conclusion of the extrajudicial restructuring as well. As an additional consequence, the debtor is not to offer another extrajudicial restructuring plan under the DBA within three years, except through a plan expert. The same applies if a restructuring plan is rejected by all classes during the voting process. If a restructuring is concluded without court confirmation of the restructuring plan, any stayed request to open insolvency proceedings will revive and will be heard by the court. Finally, the debtor may also, at any point in time, decide to halt the process himself. If a plan expert has been appointed, he is obliged to do so as soon as it becomes clear that a WHOA process is not feasible. As long as no plan has been presented for voting, another attempt at an extrajudicial restructuring under the DBA can be made again without limitations.

Self-Assessment Exercise 5

Study Section 6.5 on Corporate Rescue: Suspension of payments.

Question 1

In your own words, explain the requirements for a debtor to offer a composition plan to its creditors and for it to be agreed and confirmed (with binding effect on all unsecured creditors) by the court.

Question 2

In a few sentences, describe the position of a financier with a pledge on inventory and bank account balances, once a suspension of payments is filed by his debtor.

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

7.1 General

In situations where the insolvency or restructuring of debts of a debtor or groups of debtors affects several jurisdictions, the same private international law questions arise as in other civil matters, namely jurisdiction, applicable law and the recognition and scope of insolvency proceedings. The Netherlands, by tradition a trading nation, is among the nations with the widest and most comprehensive set of international treaties. These international treaties give content to Dutch private international law. It is also one of the founding members of the EU and as such is subject to European legislation on jurisdiction as and between member states.[7]

Dutch law provides for two sources of international insolvency law: the European Insolvency Regulation recast (EIR; paragraph 7.2) and common Dutch private international law. All cross-border insolvency and restructuring proceedings that are opened in the EU (with the exception of Denmark) are governed by the EIR. If the EIR is not applicable, because the insolvency proceedings have been opened in Denmark or outside of the EU, the standing of those proceedings, consequences in the Netherlands and the effect on assets and liabilities in the Netherlands are governed by common Dutch private international law (paragraph 7.3), which includes a vast amount of treaties. Although, as stated above, a WHOA process is not a formal insolvency proceeding, it is deemed to be included where the term "insolvency proceedings" is used in this paragraph 7.

The Netherlands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency but the Ministry for Justice and Security has recently held a public consultation on, amongst others, the advisability of the adoption of the model law. For at least the next few years, however, one should assume that the Netherlands will not have adopted this Model Law.

[7] Dutch law is also heavily influenced by EU directives and automatically includes EU regulations on material insolvency laws, where this chapter 7 only touches on the procedural legislation governing jurisdiction, applicable law and recognition and enforcement as and between member states.

7.2 Cross-border EU insolvencies: European Insolvency Regulation (EIR)

7.2.1 Jurisdiction

Under the EIR, the courts in the Netherlands have jurisdiction over a request for the opening of insolvency proceedings or any issue relating to a public extrajudicial restructuring in accordance with the DBA if the debtor's centre of main interest (COMI) is located in the Netherlands. It is not relevant whether the debtor is a Dutch company or private person, or whether it resides in the Netherlands. The centre of main interest is defined by a number of cumulative factors described in the EIR, but is legally presumed (subject to evidence to the contrary) to be the debtor's domicile (in the case of a private person) or either its main establishment or statutory seat (in the case of a legal entity).

Upon being satisfied that the centre of main interest is in the Netherlands, the Dutch court may open bankruptcy proceedings, suspension of payments proceedings or the debt restructuring scheme for private persons, or hear any issue relating to a public extrajudicial restructuring in accordance with the DBA. For purposes within the EU (excluding Denmark and Ireland, when it comes to a public extrajudicial restructuring), these proceedings will be the main proceedings and, as a general rule, will cover all of the debtor's assets and debt, regardless of their location.

If the centre of main interests of the debtor is located in another EU member state, the Dutch court has jurisdiction to open territorial proceedings if the debtor has an office in the Netherlands. If main proceedings have been opened in another member state prior to the opening of the territorial proceedings in the Netherlands, these latter proceedings qualify as secondary proceedings. Territorial proceedings only affect the assets of the insolvent debtor that are located in the Netherlands.

The requirements that apply to the request filed with a Dutch court for the opening of either main or territorial proceedings, are the Dutch requirements set out in paragraphs 6.2.1, 6.3.1, 6.5.1.1 and 6.5.2.1.

In addition to jurisdiction relating to the opening of insolvency proceedings, the courts of EU member states in whose member state insolvency proceedings have been opened also have jurisdiction for any action that derives directly from the insolvency proceedings and is closely linked to those proceedings. Examples include legal proceedings regarding avoidance claims and director's liabilities.

7.2.2 Practical implications

Under the EIR, the court that is approached with a petition to open insolvency proceedings will need to determine whether or not it has jurisdiction on the basis of the COMI test, aided by the presumption the COMI is located in the same jurisdiction as the debtor's domicile in the case of a private person, and either its main establishment or statutory seat in case of a legal entity. That entirely logical rule, however, may lead to the awkward situation that, in parallel bankruptcy petitions in several member states, more than one court accepts jurisdiction. In that case, the rule of "first past the post" applies, subject to appeal. This happened in Austria and Germany

where one of the courts[8] took jurisdiction on the basis of the presumption and the other court[9] took jurisdiction on the basis of motivated COMI arguments.

Another consequence of the tie to COMI – rather than to the jurisdiction of incorporation – is that it is possible for a debtor, its management board or its shareholders to alter the debtor's COMI (often referred to as a COMI shift). That has also been done (and tried more often) in relation to Dutch companies, where the expectation was that a different COMI would either give the debtor access to more beneficial tools to restructure its debts or to go through bankruptcy. In multinational groups, a COMI shift can also have the purpose of bringing debtors from several jurisdictions under one proceeding for easier co-ordination or even consolidation. A COMI shift may be very difficult for large operational companies, but for a travelling private person or for a company which has limited activities (such as a holding company or a special purpose vehicle in a bigger group of companies), it may be an attractive option. The recast EIR (2015) has sought to restrict these COMI shifts, but it has done little more than complicate last-minute COMI shifts.

Finally, it should be noted that the COMI definition under the EIR is not the same as it is used under the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, an insolvency proceeding held before the Dutch courts, because the Dutch court has determined its (EIR) COMI to be in the Netherlands, will not by default need to be recognised as a foreign main proceeding under the UNCITRAL Model Law. Depending on the goals of the insolvency proceeding and the possibilities in the other relevant jurisdictions, it may be worthwhile considering whether it would be more beneficial to argue or even move one of the COMIs (using the EIR or UNCITRAL definition) to match the other.

7.2.3 Applicable law

Under the EIR, the basic principle is that the law applicable to the insolvency proceedings and their effects is that of the member state in which the proceedings have been opened (*lex fori concursus*). The EIR contains various exceptions to this rule. The exceptions are mainly based on the idea of the protection of the debtor's counterparty, such as an employee or creditor, which finds itself confronted with its debtor's insolvency proceedings. The protection offered by the EIR typically boils down to the additional application of the law of a specific other EU member state in order not to deprive the counterparty of an entitlement following from the law applicable to its claim, its right or the assets at stake. The exceptions include third parties' rights *in rem*, the right to set-off, reservation of title, contracts relating to immovable property, employment contracts, detrimental acts (avoidance) and the protection of third-party purchasers.

7.2.4 Recognition and scope

One of the most important consequences of the application of the EIR to cross-border insolvencies is that as soon as such insolvency proceedings have been opened by a court of an

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[8] Austrian regional Court of Korneuburg: *Landgericht Kroneuburg* (*Österreich*), Beschl v 12.01.2018 – 36 S 5/18d-3, ZIP 2018, 393.

[9] Local insolvency court in Berlin, Germany: *Amtsgericht Charlottenburg, Insolvenzgericht*, Az.: 36n IN 6433/17, available as a PDF from https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichengerichtsbarkeit/2018/pressemitteilung.662862.php.

EU member state, they (or in case of an extrajudicial restructuring: the court-confirmed restructuring plan) are automatically recognised in all other EU member states by operation of law. As a result of the automatic recognition, the insolvency proceedings have the same effects in all other EU member states as under the *lex fori concursus*, subject to the exceptions listed in the EIR itself and to territorial proceedings. The recognition includes the authority of a foreign insolvency practitioner in other EU member states.

In the case of territorial proceedings, the main proceedings are recognised in the EU member state in which territorial proceedings have been opened, but the assets remain unaffected by the main proceedings as they are only affected by the territorial proceedings. This does not prejudice the powers of the insolvency practitioner appointed in the main proceedings, although these remain subject to the limitation that the insolvency practitioner appointed in the territorial proceedings will be authorised to dispose of local assets.

7.3 Cross-border non-EU insolvencies: Dutch private international law

7.3.1 Jurisdiction

Any cross-border insolvency or restructuring relating to a debtor that has its centre of main interest outside the EU or in Denmark (or Ireland, when it comes to a public extrajudicial restructuring), is not subject to the EIR and is instead governed by Dutch private international law as codified in the Dutch Civil Code and by a few dedicated international insolvency law rules in the DBA.

The Dutch court may assume jurisdiction if the debtor has its current registered corporate seat in the Netherlands. If this is not the case, the court has jurisdiction if the debtor conducts a profession or business in the Netherlands without having its registered corporate seat in the Netherlands. An additional ground for jurisdiction applies to extrajudicial restructuring, in which case the Dutch court may also assume jurisdiction if the restructuring is "sufficiently connected" to the Netherlands (as set out in more detail in paragraph 6.5.2.2).

If a Dutch court finds that it has jurisdiction, it will apply Dutch insolvency law to the request for the opening of insolvency proceedings. As a result, the rules relating to the requirements for the allowance of an insolvency request and to the authority to file such a request are the same as those which apply to purely Dutch insolvencies (see paragraphs 6.2.1, 6.3.1, 6.5.1.1 and 6.5.2.1).

7.3.2 Applicable law

As under the EIR, the basic principle for cross-border non-EU insolvencies is that the insolvency proceedings and its effects are governed by Dutch law if the insolvency proceedings have been opened by a Dutch court. Limitations to this starting point include the *in rem* effects on items of property, claims and shares.

7.3.3 Recognition and scope

Dutch law takes a universalist approach to Dutch insolvency proceedings, effectively requiring the courts to take authority over all aspects thereof, regardless of the cross-border aspects. On the other hand, when it comes to the effect of foreign insolvency proceedings in the Netherlands, the cross-border comity principle – used, for instance, in the UNCITRAL Model Law on Cross-Border Insolvency – is absent, and territorialism prevails. The Netherlands have not implemented the UNCITRAL Model Law but the Ministry for Justice and Security has recently held a public consultation on, amongst others, the advisability of the adoption of the model law. Therefore, foreign insolvency proceedings and their effects are currently not recognised in the Netherlands, unless certain conditions have been met. Dutch assets are not affected by any moratorium or stay indicated by foreign insolvency proceedings. Furthermore, the legal consequences of the insolvency proceedings under the foreign law applicable to that insolvency (*lex fori concursus*) cannot be invoked in the Netherlands, in so far as this would limit creditors in their recourse on Dutch assets. Local proceedings are often necessary. Any other legal consequence of foreign insolvency proceedings may, however, be invoked. A general limitation on the execution of Dutch assets and the use of powers by a foreign insolvency practitioner is Dutch mandatory law.

In practice, however, this is merely a starting point from a statutory perspective. Other than in some other jurisdictions, Dutch law does not differentiate between Dutch or non-Dutch creditors or claims and, while foreign proceedings as such may not be recognised, the landscape of recognition and enforcement in the Netherlands is fairly easy and (for Western European standards) cost-effective to navigate for foreigners who have proper advice from Dutch advisors. Individual court orders and procedural requirements are typically fairly easy to obtain recognition for, or at least to be acted on. The sheer number of multinational companies operating out of the Netherlands, the effects of the EIR and the vast experience with (and understanding of) cross-border restructuring and insolvencies among both courts and professionals, has led to a situation where the Dutch elements, if managed well, are not very likely to be a major disturbance in the international context.

Several other EU member states have already implemented UNCITRAL Model Law, which gives non-EU or Danish debtors the possibility of obtaining access to the insolvency regime and courts in those member states. This is not the easy access route into the EU for non-EU proceedings that one might hope for, as the relief granted by the courts in those member states can generally not be transported to other member states. This is impossible under the EIR because the EIR only applies to proceedings in relation to a debtor whose COMI lies within the EU. It may be possible under the Recast Brussels Regulation, that applies to judgments in civil and commercial matters, although there is some discussion as to whether the WHOA should be considered insolvency proceedings as it explicitly excluded from the scope of this regulation.

7.4 Case law

The Netherlands has seen its fair share of cross-border insolvency proceedings, almost all of which pass through the Dutch courts without any specific attention or problems. Some, however,

are particularly noteworthy because they create new precedents. These are briefly described below.

7.4.1 Yukos Oil[10]

In early 2019, a Dutch Supreme Court ruling ended more than 10 years of legal battle around the recognition in the Netherlands of Russian insolvency proceedings and legal acts. The origin of the proceedings lies in 2006, when the Russian company OAO Yukos Oil Company (Yukos Oil) was declared bankrupt by the Moscow City *Arbitrazh* Court. A liquidator was appointed, who in 2007 auctioned and sold Yukos Oil's shares in the Dutch company Yukos Finance BV to the Russian company Promneftstroy. The shareholders at the time were of the opinion that the bankruptcy had been fabricated and that they were prejudiced by the sale (for a low value) and they started proceedings in the Netherlands to try and reverse the transfer of the shares to Promneftstroy.

In 2017, the Amsterdam Court of Appeal had already ruled that the bankruptcy declaration would not be recognised in the Netherlands and, as a consequence, that the liquidator was not authorised to transfer shares in Yukos Finance to Promneftstroy. The court found that Promneftstroy had not become the owner of the Yukos Finance shares.

The basis for refusing recognition of the bankruptcy proceedings was the violation of fundamental legal principles, including due process, in the Netherlands. According to the court, Yukos Oil had been confronted with extremely high VAT taxes and fines and unrealistic short time frames in which to pay them. When these could not be paid, proceedings ensued in which Yukos Oil was not allowed a reasoned defence. According to the Dutch court, a recognition of the Russian judgment declaring bankruptcy would be contrary to Dutch public policy. That court order was subsequently confirmed by the Supreme Court and, accordingly, Promneftstroy did not become the owner of the shares in Yukos Finance.

7.4.2 Grupo Isolux Corsán[11]

Grupo Isolux Corsán is a Spanish-headquartered conglomerate and global market leader in the areas of concessions, energy, construction and industrial services. As one of its main sources of financing, the group issued listed corporate bonds via a special purpose vehicle, Grupo Isolux Corsán Finance BV, in the aggregate amount of EUR 850 million. When the group experienced financial difficulties in 2016, it entered into debt restructuring negotiations with its main creditors – its banking syndicate and a representative group of bondholders. The negotiations took the form of informal, out-of-court restructuring negotiations, with the intention of arriving at a restructuring agreement that would be put to the courts in Spain for approval and binding effect also on dissenting creditors (*homologación* in Spanish). That agreement would, however, not

[10] Supreme Court of the Netherlands, 18 January 2019, case number ECLI:NL:HR:2019:54, available online at www.rechtspraak.nl (in the Dutch language).

[11] District Court of Amsterdam, the Netherlands, 9 November 2016, case number C/13/16/37-S (in the Dutch language). English law detailed descriptions of the Dutch proceedings and court order are available as recognition of the order was given in the United States by the United States Bankruptcy Court, Southern District of New York, case number 16-12202.

be binding on creditors of the financing company, a Dutch BV over which the Spanish courts did not exercise any jurisdiction, and moreover would likely not be recognised at all outside Spain as it was not a proceeding under the European Insolvency Regulation (EIR). The debtor's concern was that bondholders would enforce their claims against the Dutch BV and use intercompany claims of the BV on more valuable operating companies to obtain recourse from those operating businesses. Isolux therefore applied for suspension of payments for the BV with the Amsterdam District Court, benefitted from the automatic stay while it finalised negotiations with its bondholders and subsequently offered its bondholders a composition agreement in the Dutch suspension of payments proceeding. The composition agreement was in fact nothing more than the restructuring agreement that had been reached in Spain and was voted on and approved with the same majority as the Spanish restructuring agreement. However, the benefits were much greater than simply exporting the effect of the restructuring from Spain to the Netherlands. Because the court approval of the composition in the Netherlands is recognised as an insolvency judgment under the EIR, its effect *vis-à-vis* the bondholders had pan-European effect. Secondly, the status of the Dutch suspension of payments proceeding as an EIR-proceeding meant that this proceeding, including the approved composition, were swiftly accepted as a foreign main proceeding under Chapter 15 (UNCITRAL Model Law) of the United States Bankruptcy Code. It was by no means certain that the (identical) Spanish restructuring agreement in itself would have been recognised in the US. Thirdly, the Court in Amsterdam was very helpful in agreeing to adjust the timetable of the suspension of payments hearing, the voting deadlines and the court approval to the Spanish and US timetables, resulting in a quite positive effect on the overall proceeding for Isolux whilst at the same time the fact that the restructuring now involved an additional jurisdiction caused hardly any additional complications.

7.4.3 PTIF[12]

The Oi group is one of the world's largest integrated telecommunications service providers and a critical source of telecom services throughout Brazil. As part of its global restructuring, cross-border insolvency proceedings were opened in Brazil, the United States, the United Kingdom, the Cayman Islands, Portugal and the Netherlands. The Dutch part of the financial restructuring related to bond debt restructuring for a total value of approximately EUR 6 billion. PTIF had issued more than EUR 4 billion of bond debt. Much like the case in Isolux, the Dutch composition plans were based on a Brazilian Judicial Reorganization Plan (RJ Plan) and effectively mirrored the terms of this plan. On 1 June 2018, the Dutch compositions plan of PTIF and Oi Brasil Holdings Coöperatief UA, the Dutch financing vehicles of the Oi group, were approved by an overwhelming majority of their creditors. On 11 June 2018, the District Court of Amsterdam confirmed the Dutch composition plans.

[12] District Court of Amsterdam, the Netherlands, 11 June 2018, case number C/13/17/164-F, ECLI:NL:RBAMS:2018:5047, available online at www.rechtspraak.nl (in the Dutch language).

7.4.4 ENNIA[13]

ENNIA Caribe is the largest insurer on the islands of Curacao and St Maarten in the Caribbean, which are a constituent jurisdiction of the Kingdom of the Netherlands with laws largely similar to and based on Dutch law. As an insurance company, it is subject to the supervision of the Central Bank for Curacao and St Maarten (CBCS). In 2018, the Curacao Court pronounced emergency regulations with respect to ENNIA Caribe and the CBCS gained control over it. Many of the more liquid assets of the insurer, however, were located in bank accounts in the US and many of the solvency recovery actions that needed to be taken by the CBCS would be directed at ENNIA Caribe's ultimate beneficial owner, a US citizen. The CBCS and ENNIA applied for recognition of the emergency regulations at the Bankruptcy Court in New York, which was granted and the insurer (or CBCS on its behalf) was able to access instruments of US law which allowed it to pursue the assets and claims of the insurers in the US, such as the attribution of assets to the foreign representative.

The most interesting feature of this cross-border case, not only for Dutch practitioners but also for interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, is that the recognition of emergency regulations over a financial institution (which included not only foreign law-licensed companies but also other entities) where the regulator effectively takes over, was unprecedented.

Self-Assessment Exercise 6

Study paragraph 7 on cross-border insolvency law.

Question 1

You are required to write a brief essay (no more than one page) using what you have learnt from this paragraph 7 or from previous parts of the guidance text.

Assume that a debtor corporation, headquartered in Poland, has substantive assets, liabilities and activities in the US and the Netherlands and some activities in Belgium. Assume that the debtor corporation has the exceptional option that it can file and obtain jurisdiction for insolvency proceedings in whichever jurisdiction it elects: in Poland, based on its seat; in the US, based on substance requirements in the US; in the Netherlands, based on the fact that its EIR COMI would be deemed to be the Netherlands, despite its seat in Poland.

All countries, except the US, are member states of the EU and both the US and Poland have implemented the UNICTRAL Model Law on Cross-Border Insolvency. The Netherlands and Belgium have not.

[13] Court of First Instance of Curacao, 4 and 6 July 2018, case numbers CUR201802164 and CUR201802227, ECLI:NL:OGEAC:2018:160 and ECLI:NL:OGEAC:2018:153, available online at www.rechtspraak.nl (in the Dutch language).

In your essay, advise a theoretical client on what would be the most efficient jurisdiction to file for insolvency, looking only at the stated desire to have as few proceedings as possible – that is, to obtain as much recognition as possible. You may ignore considerations as to the substantive requirements or possibilities in each of those jurisdictions.

Question 2

Paragraph 4.1 of this guidance text includes the following statement: "In addition to directives, European legislation provides regulations that are immediately applicable throughout the EU without the need for further implementation and have the same standing as national laws."

Explain why, despite this statement, each of the previous paragraphs covers only Dutch law and not the EIR or European law. Furthermore, explain why similar paragraphs in the guidance texts for other EU member states deviate in material respects from Dutch law.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

A distinction has to be made between the recognition of foreign judgements on the one hand and the enforcement thereof on the other. Even though Dutch national law contains some provisions on both, recognition and enforcement are mainly governed by European treaties. The most relevant treaties in the Netherlands are the Recast Brussels Regulation and the Lugano Convention.

The Recast Brussels Regulation applies to civil and commercial matters but explicitly excludes insolvency proceedings, as these are covered by the EIR (see paragraph 7.2). A judgment handed down by a court of an EU member state is fully recognised within the EU if the supporting legal proceedings are within the scope of the regulation. Furthermore, the judgement may be executed in the Netherlands as if it were rendered by a Dutch court. Any measures or orders pursuant to the judgement have to be implemented in accordance with Dutch law. In cases where Dutch law does not provide for the same measure, it has to be brought in line with a Dutch measure or order that has similar consequences and goals.

Parties to the Lugano Convention are the EU, Iceland, Norway and Switzerland. The objective of the Lugano Convention is similar to that of the Recast Brussels Regulation. It also applies to civil and commercial matters and excludes insolvency proceedings. As under the Recast Brussels Regulation, a judgement rendered by a court of a member state within the scope of the convention is automatically recognised. However, enforcement of the judgement requires an *exequatur*. This *exequatur* will be granted unless a ground for refusal occurs. The following are grounds for refusal:

(a) enforcement flagrantly conflicts with Dutch public policy rules;

(b) the debtor has not been able to defend its position due to the untimely and undue presentation of the document initiating the principal procedure; or

(c) the judgement is irreconcilable with a prior judgement rendered in respect of the same parties by a court established in a member state.

If no treaty applies, a foreign judgement is not automatically recognised and cannot be executed unless the creditor obtains an *exequatur*. These proceedings are a bit more extensive, compared to the *exequatur* proceedings required to obtain an executory title for a judgement within the scope of the Lugano Convention. Basically, the court will hear both parties to the judgment and determine whether there are any impediments pursuant to Dutch law and which preclude execution. The court will issue an executory title if the court finds that:

(a) the principal court's jurisdiction is based on internationally generally accepted grounds;

(b) proper legal procedures have been observed;

(c) the judgment does not contravene Dutch public policy; and

(d) the judgment is not irreconcilable with any prior judgment of a Dutch court or any foreign court insofar as that judgement is eligible for recognition in the Netherlands.

Self-Assessment Exercise 7

Study paragraph 8 on the recognition of foreign judgments.

Explain the three routes available to obtaining recognition of a foreign judgment in the Netherlands?

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

9. INSOLVENCY LAW REFORM

In 2012, the Dutch legislature initiated a comprehensive overhaul of Dutch insolvency law, serving three goals: modernisation, combating fraud and increasing companies' restructuring abilities. Various legislative proposals ensuing from this overhaul have already entered into force. As part of the programme, a bankruptcy trustee has been provided with extra powers to enforce the mandatory co-operation of a managing director regarding the execution of the bankruptcy of a company. Furthermore, some procedural aspects of liquidation of bankruptcies have been updated. And finally, a major reform has taken place through the enactment of the legal framework for extrajudicial restructurings as set out in paragraph 6.5.2.

A proposal providing for a pre-packaged asset deal out of bankruptcy proceedings is still pending. This proposal will allow a debtor to ask the court who it would appoint as bankruptcy trustee if the debtor were to file for its bankruptcy. The intended bankruptcy trustee will then observe the process of the preparation of a restart of all or part of the debtor's business by way of an asset transaction. The debtor subsequently files for its bankruptcy and the intended bankruptcy trustee is formally appointed as such by the court. Completion of the pre-packaged deal typically takes place within one or two days after the opening of the bankruptcy proceedings, made possible by the preparation of the deal as observed by the bankruptcy trustee before the formal proceedings were opened.

Steps are also being taken with regard to European insolvency law. As mentioned above, the EU Directive on restructuring and insolvency is currently being implemented. This will result in some minor changes in the DBA. Next to that, the European Commission has consulted the public on harmonisation of material insolvency law topics such as creditor ranking, procedural insolvency law and directors' liability. Such harmonisation will affect the Dutch legal framework in due course, as the Netherlands are an EU Member State.

Finally, new legislation aimed at the recognition of cross-border non-EU insolvencies is being prepared by the Ministry of Justice and Security. This will include the recognition and enforcement of non-EU insolvency proceedings, as well an attempt to further the recognition of Dutch insolvency proceedings outside of the EU by seeking a link to the UN Model Law on Cross-Border Insolvency.

10. USEFUL INFORMATION

- www.bobwessels.nl. A very useful website and blog maintained by professor Bob Wessels who happens to be Dutch but is much involved and well-known in cross-border restructuring and insolvency, including at INSOL International.

- https://d3t3v28hssk3qg.cloudfront.net/wp-content/uploads/2020/10/20210302-WHOA-Booklet-March-2021-edition.pdf. A booklet prepared by De Brauw Blackstone Westbroek on the Dutch WHOA, setting out (as a means of reference for practitioners) practical implications and possibilities under the new Dutch scheme.

- All information on the Dutch scheme can be found on the dedicated website https://www.debrauw.com/articles/new-dutch-scheme-the-act-on-court-confirmation-of-extrajudicial-restructuring-plans.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Study the aspects dealt with in the previous section.

Question 1

In your own words, explain why it is – when all other things are equal – that an investment into a Dutch entity, or one structured via the Netherlands, appeals to international investors.

Question 2

Name and describe the role of the various judicial parties and court-appointed officials involved in an insolvency proceeding in the Netherlands.

Commentary and feedback on Self-assessment Exercise 1

Question 1

You should have identified that investors will appreciate that, prior to their investment decision, they can determine their legal position (that is: their power to enforce their rights *de iure* and *de facto*) *vis-à-vis* the debtor in every phase: going concern, restructuring and bankruptcy. On the one hand the Dutch court system, supported by a mature market for legal advice, is quite efficient and predictable and allows creditors to swiftly act to enforce their rights. While proceedings on the merits may take a long time, parties in any state of play have the opportunity to file for summary proceedings and obtain an expedited ruling. The timelines for bankruptcy and other insolvency filings are equally short. On the other hand, the insolvency laws – as they currently stand (a reference to WHOA would be sensible in this respect) – have a traditional focus, designed primarily to protect the position of the creditor.

Question 2

You should have named at least the district court as the court overseeing the insolvency proceedings (including, most importantly, their application on any particular debtor), the administrator (in suspension of payments) as the official sitting next to the board of directors on matters relating to the estate and advising the court, the trustee (in bankruptcy) taking control over the estate and pursuing liquidation of the assets and distribution among the creditors in order of ranking, and the supervisory judge as the judge exercising day to day oversight. The provisional relief judge (who is the president of the district court in the region in which the debtor has its corporate seat; not necessarily the same court as where the proceedings are pending) also has a potential side role, when approached by parties for provisional relief.

Self-Assessment Exercise 2

Study paragraph 5 on real security and personal security.

Assume that the ultimate parent of a multinational group of companies is a very large family-owned corporation under Indonesian law. Further assume that the group has a number of Dutch operating companies, which only have Dutch assets. The group, including the Dutch entities, is financed through bilateral finance arrangements with a wide array of financiers, many of whom have security over the assets of the group. The Dutch entities also have the benefit of these financing arrangements, and have pledged almost all their assets to a variety of financiers under as many financing arrangements. The financiers of other group companies, however, have similar arrangements and their financing contracts contain prohibitions to cross-guarantee the debt obligations of other group members (including the Dutch ones). Finally, assume that the group is now in financially challenging territory (but nowhere near payment defaults, or worse) and seeks additional financing to fund a much-needed strategic reorientation, including factory shut-downs and lay-offs in the Netherlands. The financing package currently being negotiated with a group of international credit funds (who have no prior relationship with the group) includes standard provisions that individual members of the group will only have access to the funds to the extent they provide "first ranking security on all shares, receivables, inventory and real estate and a first demand independent guarantee from the parent company" (quote from financing term sheet).

Write a brief essay (no more than one page) on the challenges that the Dutch operational companies will face in relation to this security demand when they seek to attract, or need to get access to, this additional "super senior and secured" financing.
Do you see any solutions?

Commentary and feedback on Self-assessment Exercise 2

The question is a real-life example in the restructuring practice in the Netherlands, and is meant to lure you towards thinking about formal vesting requirements, then taking a step back to consider whether, regardless of the vesting requirements, "first ranking" is even possible. In many jurisdictions there are ways to achieve the first rank but in the Netherlands this will always require that the existing pledge is removed. You are expected to have flagged this point, explaining the *prior tempore* rule, including that it cannot be overruled other than with the consent of the prior mortgagee. Also, the requirement for a guarantee from the parent company will not be possible, although this is a contractual restriction rather than a legal restriction (in any event, not under Dutch law).

You should also have considered the fact that the large number of bilateral financing arrangements will mean that negotiations will be necessary with quite a number of financiers who all have their own negotiating position. Thinking a bit further, you may have considered that the existing financiers will likely heavily resist a release of their security – even if they are subsequently granted a second ranking security – in a distressed environment, as the granting of security for an existing debt raises concerns of preference under Dutch law. When thinking about a solution, you may have considered that the group, together with the new financiers, could consider taking out the existing pledgees if their debt is relatively minor (not a popular solution in any restructuring), or to use a foreign restructuring solution, such as a US Chapter 11, to address the existing pledges or mortgages.

Self-Assessment Exercise 3

Study paragraph 6.2 on personal / consumer bankruptcy.

Consider yourself the legal advisor of a private person who can no longer satisfy his debts as they fall due and there is no prospect of that changing any time soon. Your client has been struggling for years, has already been talking to others and asks you to prepare a bankruptcy filing. "I can't cope with it anymore, I want this to be over and get on with my life". What would the main advantages and disadvantages be to file a petition for a DRPP, as opposed to the alternative of a formal bankruptcy proceeding?

Commentary and feedback on Self-assessment Exercise 3

From the facts it is clear that the client needs clarity and a basis upon which to move on.

In such a situation, the main advantages of the DRPP are the fact that after three to five years all debts are settled (or at least transformed into non-enforceable claims). That is different than the case in a formal bankruptcy, when the usual assessment is that the debts usually far outweigh the assets available for distribution and that the bankruptcy will be concluded with many of the debts still in place, unless the debtor can convince its creditors to agree on a composition. For the debtor, it may also be a comfort that he is simply deprived of his authority over his assets for a few years, which avoids the inevitable stressful discussions with creditors. Finally, the fact that the debtor is granted access to a limited income and his personal belongings (including reasonable home furniture) means that creditors will have to leave those to him for a few years. On the flip-side, a debtor will not look forward to being under curatorship for three to five years and the DRPP only addresses good faith debts. All in all though, there are hardly any situations in which a formal bankruptcy would be preferred over the DRPP.

Self-Assessment Exercise 4

Study Chapter 6.3 on Corporate Liquidation: Bankruptcy.

Question 1

If you, as the chairman of the board of a listed Dutch company in distressed negotiations with its financiers, had come to the conclusion this morning that the only realistic solution of preventing a payment default next week is definitively off the table, what would you do and why?

Question 2

Why is the personal liability of directors such an issue, if you always have to go to court about it? (In some cases, the director – who also may be the shareholder – may be of substantial net worth and may provide meaningful recourse, but in most cases the directors will not provide meaningful recourse for a company's creditors and will provide even less after years of litigation.)

Commentary and feedback on Self-assessment Exercise 4

Question 1

This question has three elements: (i) what is your legal position as chairman of the board?; (ii) what can you do about it?; and (iii) how to do it? You should have identified the potential liability concerns for a director who continues operations while he knows (or should have known) that the company will not be able to meet its payment obligations as they fall due. The solution would be to file for bankruptcy, but that requires consent of the general meeting of shareholders. In a listed company, obtaining such consent is even more difficult and impractical than in a non-listed company, so the board of directors may instead decide to file for suspension of payments. This is within their own power. If a suspension of payments will not likely result in the company restarting its payments, the administrator will probably request the court to convert the suspension of payments into bankruptcy shortly after commencement of the suspension of payments.

Question 2

This question is aimed at creating awareness about the effect that D&O insurance has on this topic. D&O insurance typically covers not only liability claims pay-out, but also the costs of litigation. Accordingly, creditors or the trustee with a meritorious claim against a director may have an interest in pursuing that claim, in the hope that the threat of lengthy and costly litigation – plus, potentially, a pay-out – will bring the D&O insurer to the table for a settlement payment. On the other hand, D&O insurers are, of course, cautious not to create any precedents and will not lightly accept this strategy.

Self-Assessment Exercise 5

Study Section 6.5 on Corporate Rescue: Suspension of payments.

Question 1

In your own words, explain the requirements for a debtor to offer a composition plan to its creditors and for it to be agreed and confirmed (with binding effect on all unsecured creditors) by the court.

Question 2

In a few sentences, describe the position of a financier with a pledge on inventory and bank account balances, once a suspension of payments is filed by his debtor.

Commentary and feedback on Self-assessment Exercise 5

Question 1

Important elements are the free format, allowing also a foreign restructuring agreement to serve as composition plan, the double 50% majority vote, the test of the court against fundamentals of Dutch law and the binding effect of the court confirmation on all unsecured creditors, even if they voted against the plan.

Question 2

Your answer should include the following elements: (i) secured creditors can continue to enforce their rights regardless of the suspension of payments; (ii) the secured assets will also not be affected by the suspension of payments; and (iii) a secured creditor may be faced with a limited cool-down period.

Self-Assessment Exercise 6

Study paragraph 7 on cross-border insolvency law.

Question 1

You are required to write a brief essay (no more than one page) using what you have learnt from this paragraph 7 or from previous parts of the guidance text.

Assume that a debtor corporation, headquartered in Poland, has substantive assets, liabilities and activities in the US and the Netherlands and some activities in Belgium. Assume that the debtor corporation has the exceptional option that it can file and obtain jurisdiction for insolvency proceedings in whichever jurisdiction it elects: in Poland, based on its seat; in the US, based on substance requirements in the US; in the Netherlands, based on the fact that its EIR COMI would be deemed to be the Netherlands, despite its seat in Poland.

All countries, except the US, are member states of the EU and both the US and Poland have implemented the UNICTRAL Model Law on Cross-Border Insolvency. The Netherlands and Belgium have not.

In your essay, advise a theoretical client on what would be the most efficient jurisdiction to file for insolvency, looking only at the stated desire to have as few proceedings as possible – that is, to obtain as much recognition as possible. You may ignore considerations as to the substantive requirements or possibilities in each of those jurisdictions.

Question 2

Paragraph 4.1 of this guidance text includes the following statement: "In addition to directives, European legislation provides regulations that are immediately applicable throughout the EU without the need for further implementation and have the same standing as national laws."

Explain why, despite this statement, each of the previous paragraphs covers only Dutch law and not the EIR or European law. Furthermore, explain why similar paragraphs in the guidance texts for other EU member states deviate in material respects from Dutch law.

Commentary and feedback on Self-assessment Exercise 6

Question 1

In your essay, you should address the fact that the EIR applies only to proceedings in other member states (that is, that it would not provide recognition to any US proceedings). The UNICTRAL Model Law, on the other hand, does not contain any fundamental limitation in its scope in this respect, but only works to the extent countries have adopted the Model Law (that is, the US and Poland will be able to recognise a foreign proceeding on that basis, but the Netherlands and Belgium will not).

Question 2

In your question, you should have considered that the EIR does not harmonise substantive European insolvency legislation, but provides for procedural agreements between members states as to which of them has jurisdiction in certain cases and how proceedings in one member state are perceived, supported and recognised in other member states.

Self-Assessment Exercise 7

Study paragraph 8 on the recognition of foreign judgments.

Explain the three routes available to obtaining recognition of a foreign judgment in the Netherlands?

Commentary and feedback on Self-assessment Exercise 7

You should have identified:

(i) the Recast Brussels Regulation (not applicable to insolvency proceedings);
(ii) the Lugano convention; and
(iii) independent recognition without a treaty, if the court finds that (i) the principal court's jurisdiction is based on internationally generally accepted grounds, (ii) proper legal procedures have been observed, (iii) the judgment does not contravene Dutch public policy, and (iv) the judgment is not irreconcilable with any prior judgment of a Dutch court or any foreign court insofar as that judgement is eligible for recognition in the Netherlands

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