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Corporate Restructuring 2016

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Corporate Restructuring 2016

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Published by
Global Legal Group Ltd.
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London SE1 3PL, UK
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Cover image, chapter images
iStock.com

All other images courtesy of the authors

Printed by
Stephens & George Print Group
February 2016

ISBN 978-1-910083-84-0
ISSN 2397-2971

Further copies of this publication and others can be ordered from the publisher - please call +44 20 7367 0720

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NETHERLANDS

Claudine Maeijer and Daniëlle Hack reflect on the slowly declining rate of insolvency proceedings in the Netherlands over the last year and look forward to the anticipated update of Dutch insolvency and restructuring legislation.

1. What trends, in terms of activity levels, affected industries or investor focus, have you seen in the restructuring and insolvency market in your jurisdiction over the last 12 months?

The number of insolvency cases in 2015 has been slowly declining compared with previous years. In the last 12 months, the Dutch economy showed signs of limited economic growth and recovery from the financial crisis, which in turn also affects the financial position of businesses in several sectors.

At the start of 2015 it was already expected that the number of insolvency and restructuring cases would remain high (Business Restructuring & Insolvency Report, *Restructuring is here to stay*, contribution of PwC Netherlands, published by TIMES Group, first edition 2015). This expectation of early 2015 was driven by, for example, megatrends, market shifts, rules and policies affecting products and political, global economic and capital market conditions, such as inflation, interest and currency exchange rates. Rapid developments in technology and digitalisation also played a role. As a result, large (international) companies reconsidered their position and focused on specific business lines also resulting in divestments and the separation of underperforming or non-core activities through, e.g., split-offs or asset sales transactions.

Another reason that 2015 was still a busy year in terms of insolvency and restructuring is that at

> 2015 will be remembered as the year in which large Dutch companies, such as Royal Imtech and V&D, went bankrupt

the moment, under Dutch law, only the following (formal) insolvency procedures are recognised: (i) bankruptcy proceedings (*faillissement*); (ii) suspension of payment proceedings (*surseance van betaling*); and (iii) private persons' debt management (*schuldsanering*). New legislation is needed to increase restructuring options, to facilitate restructuring procedures for the continuity of companies in financial distress and to decrease the number of bankruptcies in the Netherlands.

In terms of affected industries, the retail market (*fashion and electronics*), healthcare, and also the hospitality and construction industry have been hit the hardest in 2015. The transport sector performed relatively well due to an increase in export volumes and relatively low fuel prices.

2015 will be remembered as the year in which Royal Imtech, listed on the AEX, (*engineering service and mechanical solutions*) and V&D (*a major department store chain*) were declared bankrupt in August and December, respectively. The shareholder and financier of V&D were no longer prepared to cover the shortage of liquidity. Macintosh (and some subsidiaries such as Invito and Manfield) (*shoe stores*) also filed for bankruptcy in December 2015/ January 2016. These cases show that, amongst others, the global trend of digitalisation (online shopping *versus* real life shopping) calls for an adjustment of business models. Other large bankruptcy cases were Huishoudelijke Hulp Patein/ Vivent (*a home care service provider*), BAS Group (*electronics*) and Etam Group (*fashion*).

Finally, an example in 2015 of recapitalisation was Van Gansewinkel (*a waste services and recycling sector*) reaching an agreement with shareholders and lenders on a new and sustainable capital structure, a debt-for-equity swap to strengthen the company's equity. With this, Van Gansewinkel created an important prerequisite for the realisation of its business plan and investments in core assets for the coming five years.

2. What is the market view on prospects for the coming year?

As the Dutch economy is expected to grow slowly but steadily, the rate of insolvency cases will continue to decrease gradually in 2016. However, the insolvencies of large companies like Royal Imtech, V&D and Macintosh may have an effect on suppliers and other companies that were too dependent on these companies.

For the beginning of 2016 and given the trends referred to in the previous question, as well as the fact that the financial crisis has taken its toll and financial institutions are still cautious to provide (new or additional) funding, we expect the situation to be much the same as in 2015.

In general, companies are re-examining the structure of their businesses and taking steps to squeeze out better financial performance. Divestments are seen as an effective tool to increase certain shareholder value. The chemicals industry is going through a period of change that will help define opportunities and challenges. The retail sector will remain to have issues. In January 2016, an announcement was made in the Dutch newspapers regarding the restructuring of Barclays, in particular of its investment banking and stockbroking services.

There are also indications that small and medium-sized enterprises (SMEs), the key driving force behind the Dutch economy, are showing signs of recovery. The core problem of Dutch SMEs, however, is their high dependency on bank loans and the insufficient "fat on the bone", so to speak. In the years before the outbreak of the financial crisis, entrepreneurs had become used to the flexible loans policy of banks, and were sometimes even provided for up to 100%. Dutch SMEs should become less dependent on bank loans and should start to look for other solutions. In that sense, the Netherlands is going through some kind of transitional phase in which other options are explored, such as crowdfunding.

3. What are the key tools available in your jurisdiction to achieve a corporate restructuring – are they primarily formal, court-driven processes, or are informal out-of-court restructurings possible? Do you feel that the tools you have available are effective in terms of providing speedy, fair and predictable outcomes?

The current Dutch Bankruptcy Act came into force in 1893 and has not been thoroughly revised since then. As stated earlier, at present, Dutch law only contemplates (i) bankruptcy proceedings (*faillissement*), (ii) suspension of payment proceedings (*surseance van betaling*), and (iii) private persons' debt management (*schuldsanering*).

In a bankruptcy procedure, a supervisory judge (*rechter-commissaris*) and a bankruptcy trustee (*curator*) are appointed by the court. During the procedure, the bankruptcy trustee is charged with the administration and liquidation of the assets of the debtor for the benefit of

the creditors. The debtor may also try to offer its creditors a composition plan (*akkoord*).

Suspension of payments (a Dutch voluntary reorganisation) almost always results in formal bankruptcy, even though it is the intention of such proceedings that debtors are given a temporary relief against creditors in order to be able to reorganise and continue the business by satisfying (part of) the creditors' claims under supervision of a court-appointed administrator (*bewindvoerder*) and a supervisory judge. Suspension of payments is not applicable to credit institutions and insurance companies. Another weakness of this procedure is that there are no effective mechanisms to bind disagreeing shareholders.

Besides the above, the Netherlands recognises the so-called formal (voluntarily) liquidation procedure which can be implemented if a debtor is able to pay its debts or if it can enter into a composition (*akkoord*) with its creditors.

As the current bankruptcy and suspension of payments procedures are in fact lengthy, inflexible and expensive, restructuring processes outside the formal insolvency frameworks have been created, such as the restructuring of business operations by asset transfers, split-offs, the generation of additional liquidity and trying to reach out-of-court arrangements with creditors. The need for new legislation is also inspired by international (e.g. US and UK) restructuring practices which offer more flexibility on several aspects.

4. In terms of intercreditor dynamics, where does the balance of power lie as between shareholders and creditors, and as between senior lenders and junior/mezzanine lenders? In particular, how do valuation disputes between different stakeholders tend to play out?

Dutch insolvency law is creditor-oriented and mainly aims to serve the interests of the creditors rather than shareholders. Looking at the balance of power between creditors, Dutch bankruptcy law is based on the principle of '*paritas creditorum*'. This means that, in principle, all creditors have an equal right to payment and that the proceeds of the bankrupt's estate shall be distributed in proportion to the size of the creditors' claims. However, there are different classes of creditors treated in order of priority. The claims of secured creditors are payable in priority to any claims of creditors with a right of privilege, but certain exceptions apply. The claims of creditors with a right of privilege include certain tax claims. Ordinary creditors, including shareholders being lenders, will be paid out of any remaining proceeds and after that the shareholders in proportion to their shareholdings. With regards to intercreditor dynamics between senior lenders and junior/mezzanine lenders, these types of facilities are mostly secured through contractual relations. We also see 'loan-to-own' strategies and the acquisition of secured debts. Other things to keep in mind are that currently, the Dutch court cannot change the rank of a creditor's claim.

> "Small and medium-sized enterprises (SMEs), the key driving force behind the Dutch economy, are nowadays showing signs of recovery, but they should become less dependent on bank loans"

5. Have there been any changes in the capital structures of companies based in your jurisdiction over recent years caused by the retreat of banks from loan origination? In particular, have you found that capital structures now increasingly comprise debt governed by different laws (such as New York law governed high yield bonds)? If so, how do you expect these changes to impact on restructurings in the future?

Since the credit crunch, Dutch banks remain active in the Dutch loan market, but there has been an increase of traded loan portfolios. Borrowers are looking for alternatives to bank financing. Large companies are involved in debt placements in the US and some to Dutch institutional investors. Mid-market companies also look at other alternatives, such as credit unions and crowdfunding.

During recent years, we have seen that several Dutch companies have made use of the UK scheme of arrangement to restructure their financial indebtedness. This may perhaps become less frequent when new legislation enters into force in the Netherlands. As an example, in 2015 Van Gansewinkel reached an agreement with its shareholders and lenders on a new and sustainable capital structure. The restructuring was achieved through a debt-for-equity swap. Van Gansewinkel sought sanctions from the English court in relation to schemes of arrangements for each of the group companies. The schemes were approved by the vast majority of creditors. On 22 July 2015, the English court sanctioned the scheme of arrangement in relation to Van Gansewinkel group while Van Gansewinkel had no centre of

main interest (COMI), an establishment, or any significant assets in England. Van Gansewinkel stated that the court had jurisdiction due to exclusive jurisdiction clauses in favour of England and Wales in a Facility Agreement and other documents.

Also, there has been an increase in New York law-governed high yield debt issuance in Europe and the emerging markets over the past few years. The Magyar Telecom transaction (December 2013 – Invitel group) is an example of how to compromise a New York law note issued by a Dutch (non-UK) incorporated company using a UK law scheme of arrangement. Another successful example is the DTEK case (2015), in which the English court sanctioned a scheme of arrangement related to obligations of a Dutch entity under high yield bonds originally governed by New York law, but changed to UK law, with the intention to create sufficient connection to the UK.

6. Is there significant activity on the part of distressed debt funds in your jurisdiction? How successful have they been in entering the market, and how much has market practice (or law) evolved in response? If funds have not successfully entered the market, can you identify reasons why?

The Netherlands does not have a very active distressed debt market and/or a high active market of funded debt trading. Bank financing remains dominant. However, there are (US) hedge funds looking to invest capital, and for creditors there are also possibilities to sell their positions to debt traders. The risk is that the involvement of several distressed investors will also have an impact on the co-ordination of restructurings.

7. Are there any unusual features of your insolvency or restructuring law that an external investor should be aware of (such as equitable subordination, or substantive consolidation)?

Some features and points to note are, amongst others, the following. Dutch insolvency legislation is based on the concept of liquidation of a company whilst other jurisdictions focus more on the concept of sustainability of enterprises to continue to participate in the economy and to create a viable position for such company in the future. Creditors may have to write off a part of their claim, but not all of it, contrary to the current Dutch legislation that almost precludes all recoveries for the average creditor also due to the Dutch creditors ranking system. The Dutch government is working on updating the current restructuring and insolvency legislation which will bring new opportunities, such as better chances of survival of a debtor. However, there will also be risks for lenders/investors under the new legislation, such as the fact that the rights of creditors may change due to a composition approved by the court. Furthermore, a lender that acquires shares in a Dutch distressed company must be aware of the risk of so-called "*shadow director liability*" if the shareholder significantly influences policy decisions. Also, shareholders can try to make use of inquiry proceedings into the policy of a company before the Enterprise Chamber of the Amsterdam Court of Appeal and arrange for an interruption of restructuring plans. Finally, with effect from 1 July 2015 and based on the Work and Security Act (*Wet Werk en Zekerheid*), the rules on dismissal and severance payments have changed. This may have an effect on insolvency/restructuring proceedings while also discussions are pending what the effect of the proposed pre-pack, new EU cross-border insolvency rules and TUPE regulation must be.

8. Are there any proposals for reform of the legal framework that governs insolvency and restructurings in your jurisdiction?

The Dutch government is working on updating the current restructuring and insolvency legislation and there are three proposals, all driven by the principle of "continuity of companies".

- Pre-pack (*Wet continuïteit ondernemingen I (WCO I)*). This provides a legal framework for the appointment of a so-called silent administrator (*stille bewindvoerder*) prior to a formal opening of bankruptcy. Even without the new legislation being in force, some Dutch courts cooperate in the appointment of a silent administrator upon request and prior to a formal bankruptcy. The silent administrator often investigates the possibility of the sale of (a part of) the business and prepares an agreement and plan. Upon bankruptcy of the business, the silent administrator will be appointed as bankruptcy trustee and an agreement with the buyer can be executed immediately. It follows from case law that a pre-pack does not bring a transfer of undertaking similar to bankruptcies but this is a subject on which discussions are pending.

  Pre-pack examples are Heiploeg (*seafood*) and the Estro Group (*Dutch childcare*). Critics stated that the bankruptcy of Estro under a 'silent' administrator had been a carefully planned operation. Around a month before the bankruptcy, Estro management moved its headquarters on paper from Amersfoort to Amsterdam. The move took Estro out of the jurisdiction of the court of Midden-Nederland court and into that of the Amsterdam court, which was known to be sympathetic to the appointment of a silent administrator.

  Critics also stated that a related party bought the company for a relatively low purchase price, that salary cuts were implemented right after the pre-pack and that a certain transparency was missing.
- Forced composition (*Wet continuïteit ondernemingen II (WCO II)*). The second piece of new intended legislation shall introduce a forced judicial composition outside a bankruptcy situation thus without formal insolvency proceedings. By doing so, creditors (including secured creditors) and shareholders may be forced to accept a certain composition (*akkoord*) offered outside an official bankruptcy situation. Thus, the whole procedure can be accomplished without having to initiate any formal insolvency proceedings, only requiring court approval for the composition in the last stage of the procedure, aiming to create a more effective and quick tool for restructurings.

> "The Dutch government is working on updating the current restructuring and insolvency legislation and there are three proposals, all driven by the principle of 'continuity of companies'"

- Forced continuation of supply in bankruptcy (*Wet continuïteit ondernemingen III (WCO III)*). It is supposed to introduce a mechanism that allows for business operations to be continued during a bankruptcy, which includes forcing important suppliers to continue to make supplies in a bankruptcy situation.

It is clear that for the new proposed legislation in the Netherlands, major inspiration has been drawn from restructuring tools of other jurisdictions, such as the UK pre-pack and US Chapter 11 combined with the UK scheme of arrangement, therefore aligning Dutch insolvency law with other European countries. Hopefully, the above-mentioned proposals will come into force in 2016 or soon thereafter.

9. If it was up to you, what changes would you make?

The new proposed legislation is promising and will bring more flexibility and improvement, which is needed. The balance should be between making it easier for companies to survive distressed situations and at the same time helping creditors to secure their claim. New legislation requires sufficient transparency, rules for the manner in which a business or its assets are valued and an independent and effective administrator. Also, we believe that creditors should be allowed to give their views more often at certain points in the insolvency proceedings. Furthermore, the position of employees in relation to bankruptcy (dismissals, transition payments and TUPE) is important, and new legislation must be aligned to avoid abuse of new insolvency and employment laws. Together with the proposed new EU cross-border insolvency rules, new legislation should make it less interesting for Dutch companies to take their business elsewhere and to make use of, e.g., the UK scheme of arrangement to restructure financial indebtedness. Time will tell if the right balance shall be found in the Netherlands.

Acknowledgment

The authors would like to thank Rob Faasen for his contribution to the preparation of this chapter. Rob Faasen is one of the founders of Eversheds Netherlands, a partner in the Corporate, M&A and Restructuring group and advises boards on (international) strategic challenges that they face or strategies that boards would like to implement in relation to transactions, restructurings, joint ventures and other entrepreneurial decisions.

Note

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