Global Restructuring and Insolvency Guide - Netherlands

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*This content was last reviewed around October 2021.*

**Remark:** The Netherlands is a member of the European Union. Please refer to the section "European Union" under Quick Links below to learn more about the implications with respect to the European rules that apply in the field of restructuring and insolvency. The EU Restructuring Directive is still to be implemented in The Netherlands.

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Suspension of Payments ('Surseance van betaling')**

Yes, in principle, security can be taken over all types of assets that are freely transferable (*overdraagbaar*) subject to statutory and contractual transfer restrictions. If assets cannot be freely transferred, they cannot be encumbered with a security interest. Parties can contractually limit the transfer of assets. Examples of statutory limitation of transferability are assets used for public service or assets that are exempt from attachment (basic necessities of life such as bed and linen, stock of food and drink; tools of craftsmen; monies in a third-party judicial account). (Articles 475a, 475b-475e, 447, 448, 642c Code of Civil Procedure)

**Bankruptcy ('Faillissement')**

The bankrupt estate cannot effectively encumber its assets with a security interest in bankruptcy.

**Dutch scheme of arrangement (WHOA)**

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## What is the nature of the insolvency process?

**Suspension of payments (Surseance van betaling)**

Court-ordered suspension of payments (SoP) aims to grant relief to a debtor facing temporary liquidity issues. The effect of court-ordered SoP is that unsecured creditors without any preference cannot recover their claims against the debtor and attachments are lifted. Secured creditors are not affected by the SoP (unless the court ordered a Cooling cooling-off Period period). Preferred creditors are not affected either unless their claims cannot be recovered from the assets that fall within the scope of the relevant preference.

The court appoints an administrator (a "bewindvoerder"), and the debtor can only be represented by the administrator and the board of directors jointly.
The court-ordered SoP is preliminary at first and may either become a final SoP (upon a favorable vote of the creditors) or be changed into a bankruptcy (if the debtor, in reality, does not have a chance to overcome the liquidity issues and is unable to pay its debts when they fall due).

The debtor will negotiate an agreement with its unsecured creditors during the SoP. The creditors will then vote on the plan. After the vote, the debtor will ask the court to confirm the agreement/plan. Court confirmation may be sought if either (i) the creditors representing at least half of the total amount of admitted claims voted in favor or (ii) if three-quarters of the creditors (with claims admitted by the administrator) that appeared at the meeting voted in favor of the composition, and if the rejection of the composition was the result of creditors voting against the composition on unreasonable grounds. The court will confirm the plan if the grounds for refusal as set out in the Dutch Bankruptcy Act (DBA) do not apply and if it does not find another ground for refusal.The court-confirmed plan binds all creditors that are affected by it.

**Bankruptcy ('Faillissement')**

Bankruptcy is (primarily) aimed at the liquidation (sale) of the debtor's assets, followed by the distribution of the sales proceeds in accordance with the statutory distribution system. The test for bankruptcy is whether the debtor fails to make payments to its creditors when they fall due (i.e., a liquidity test).

When the bankruptcy is declared, the court appoints a trustee in bankruptcy (a 'curator'"curator"). This trustee will work under the supervision of a supervisory judge. The trustee has the task of administering and liquidating the bankrupt estate. The company's directors are no longer authorized to represent the company to the extent that the company's assets are affected.

The effect of bankruptcy can be best described by making reference to the so-called "principle of fixation." The principle of fixation results in an automatic general arrest over the debtor's assets as of midnight of the day on which the bankruptcy was declared by the court. This implies that unsecured creditors can no longer enforce their claims but must submit these to the trustee in bankruptcy. The trustee in bankruptcy may either admit the claims or deny them. In the latter case, court proceedings should be initiated by a creditor to get their claim admitted.

Attachments (*beslagen*) that have been levied against the company will be considered lifted, as the bankruptcy itself is considered an (almost) all-encompassing attachment on the bankrupt company's assets.

In a bankruptcy scenario, as an alternative to liquidation, the debtor may make a (going concern) restart, and a composition (binding only unsecured creditors) is also explicitly allowed.

**Dutch scheme of arrangement (WHOA)**

The Dutch Scheme is an out-of-court debt-restructuring process that combines Chapter 11 and the English Scheme of Arrangement features.
It is an easy-to-use, flexible and short process. The debtor in possession can propose a plan of restructuring. While there are options to involve a restructuring expert or a court-appointed monitor, this is not required. The debtor (or a group of creditors via a court-appointed restructuring expert) prepares and negotiates a plan that may include one or multiple classes of creditors. The voting thresholds are competitive (two-thirds of the amount of debt held by creditors that vote; cross-class cramdown and cram-up). The court can confirm the plan. Moreover, certain protective measures are available during the process (e.g., stay of enforcement, stay of ipso facto clauses in contracts, stay of bankruptcy and suspension of payments procedures, fresh money protection, the appointment of restructuring expert or monitor).
When considering approval of the plan, the court will (apart from certain mandatory checks, for example, in relation to the information provided to relevant creditors) apply the best interest of the creditor's test and the absolute priority rule. Creditors that feel the voting classes' setup is incorrect can protest in court.
The plan may also include unilateral amendment or termination of burdensome contracts by the debtor, subject to certain conditions.

As a final note, there are public and private proceedings available. Public proceedings are registered in a public register in the Chamber of Commerce's Trade Register, and the hearings are public. Private proceedings are behind closed doors in court and nobody is aware except the parties that are directly involved. There is no registration of private proceedings.

The public proceedings meet the requirement of insolvency proceedings under the EU Insolvency Regulation-Recast (implying they are recognized throughout the EU except for Denmark), while jurisdiction and recognition and enforcement of private proceedings are subject to a different regime (of private international law instruments).

The rights of employees cannot be changed by a composition plan.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Suspension of payments (Surseance van betaling)**

The debtor expects that it will not be able to continue paying its (future) debts as they fall due. This should be a temporary issue for a business that is otherwise viable.

**Bankruptcy ('Faillissement')**

The test for bankruptcy is whether the debtor fails to make payments to its creditors when they fall due (i.e., a liquidity test).

**Dutch scheme of arrangement (WHOA)**

A liquidity test applies: If a debtor on a reasonable basis foresees that it will not be able to continue paying its debts as they fall due, a composition plan may be offered under the rules of the Dutch Scheme.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Suspension of payments (Surseance van betaling)**

Yes, as the court needs to assess if the EU Insolvency Regulation (recast) applies (is COMI of the debtor located in a member state except for Denmark?). If so, Dutch courts are competent in the following cases:

If the COMI of the debtor is located in the Netherlands. The Dutch courts will then open "main proceedings."

If the COMI is located in another member state that is not Denmark, Dutch courts may only open secondary insolvency proceedings.

Alternatively, if the EU Insolvency Regulation (recast) does not apply, article 2 DBA includes the test for the court's competence. The Dutch court of the place of the debtor's statutory seat is competent.

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**Dutch scheme of arrangement (WHOA)**

Access to both the public and the private Dutch Schemes is very broad.

For a private Dutch Scheme, the Dutch courts will apply article 3 of the Dutch Code of Civil Procedure. Either one of the following criteria must be met: the applicant (debtor or a creditor) has its corporate seat in the Netherlands or one or more of the creditors that would be impacted by the private Dutch Scheme has their corporate seat in the Netherlands. In addition, the courts have jurisdiction in case there is sufficient connection with the Netherlands (this implies: COMI or branch is in the Netherlands; a substantial part of assets are in the Netherlands; a substantial part of a debt is governed by Dutch law or subject to the jurisdiction of Dutch courts; the debtor is part of a group of which a substantial part consists of companies domiciled in the Netherlands; the debtor is guaranteeing a debt subject to the jurisdiction of Dutch courts).

For a public Dutch Scheme, the only requirement is that the COMI of the debtor is in the Netherlands or outside the EU in case of sufficient connection with the Netherlands.

## Is restructuring of both secured and unsecured claims possible?

**Suspension of payments (Surseance van betaling)**

The debtor may offer its unsecured and nonpreferential creditors a composition in SoP. The court-confirmed plan binds all creditors that are affected by it.

**Bankruptcy ('Faillissement')**

The bankrupt estate may offer its joint creditors a composition. This is an alternative to the application of the statutory distribution system, where the sales proceeds of all assets are to be distributed in accordance with the law.

As a matter of principle, composition in bankruptcy is only binding upon unsecured creditors. However, preferred creditors may voluntarily participate as well, but they then need to give up the preference.

**Dutch scheme of arrangement (WHOA)**

Yes, both secured and unsecured claims can be part of the composition plan (the rules allow for a lot of flexibility for the debtor and the creditors to negotiate).
The court-confirmed plan binds all creditors that are affected by it.

## Is there a classification of creditors and shareholders?

**Suspension of payments (Surseance van betaling)**

SoP only affects unsecured creditors and creditors who do not have a preference right.

**Bankruptcy ('Faillissement')**

In a bankruptcy, various classes of creditors can be identified, most notably: secured and unsecured creditors; preferred creditors with a statutory (e.g., tax and social security administrations) or nonstatutory (e.g., retention of title, set-off, right to retain property) priority; and estate creditors (having claims against the bankrupt estate that the bankrupt estate incurred). These are all "absolute" positions (i.e., these positions have an effect on everyone else).

Dutch law also identifies one type of "relative" position: subordination. Subordination under Dutch law creates an order of payment: Certain claims have to be satisfied before the subordinated claim as per the terms of the subordination contract.

**Dutch scheme of arrangement (WHOA)**

Creditors and shareholders will be classed differently if the following are so different that these creditors are not in a comparable position:

The rights they have upon liquidation of the company's assets

The rights that they will get upon liquidation of the company's assets

The rights that they will get upon implementation of the composition plan

Each class will be proposed a separate composition plan to vote on.

Creditors that rank differently between them on the basis of their security or preferred position will, in any event, be classed separately. This refers to mortgages, pledges, retention of title, preferences, and subordination of debt. Tax effects may also be taken into account when forming classes.

## Is there a requirement for voting approvals by shareholders?

**Suspension of payments (Surseance van betaling)**

To file a petition for (preliminary) SoP, the debtor's board of directors does not need the shareholders' approval.

Moreover, there are two relevant votes within the SoP procedure: (i) to change the preliminary SoP into a final SoP and (ii) to vote on the composition itself.

Vote on the final SoP

For the final SoP to be declared, the voting requirements are:

At least two-thirds of all creditors present at the voting meeting that are affected by the SoP must vote in favor.

Creditors that represent at least 75% of the total amount of admitted claims must vote in favor.

Vote on the composition

If a majority of the admitted creditors representing at least half of the total amount of the admitted claims approve the composition, the composition may be submitted to the court for confirmation (homologatie). Court confirmation of the composition makes it binding also for dissenting creditors. However, the court may still confirm the composition as if it were approved if three-quarters of the number of admitted creditors voted in favor (that jointly do own less than half of the admitted claims) and if the other creditor(s)' vote is deemed unreasonable in view of the recovery of their debt in a bankruptcy/liquidation scenario.

There are no specific voting requirements for shareholders in the context of final SoP or composition.

**Bankruptcy ('Faillissement')**

To file a petition for bankruptcy, the board of directors must first receive an instruction from the general meeting of shareholders (unless the articles of association of the company stipulate otherwise).
When voting on composition in bankruptcy, the voting requirements are as follows: If a majority of the admitted creditors representing at least half of the total amount of the admitted claims approve the composition, the composition may be submitted to the court for confirmation (homologatie). Court confirmation of the composition makes it binding also for dissenting creditors. However, the court may still confirm the composition if three-quarters of the number of admitted creditors voted in favor (that jointly do own less than half of the admitted claims) and the other creditor(s)' vote is deemed unreasonable in view of the recovery of their debts in a liquidation scenario.

There are no specific voting requirements for shareholders.

**Dutch scheme of arrangement (WHOA)**

No, the same regime applies to creditors and shareholders, i.e.,:

Who can vote: creditors and shareholders whose rights are impacted by the composition plan.

Voting is done per class of shareholders or creditors.

A notice period of at least eight days must be observed.

Voting threshold is two-thirds of the total amount of debt (or nominal capital) that participates in the vote per class.

Each class votes on their own plan.

Voting may be in a physical meeting, in digital form or in writing.

Voting outcome is to be communicated by the debtor within seven days by way of minutes of the meeting of the voting, as well as the intention to file with the court for confirmation.

## Is there a requirement for voting approvals by shareholders creditors

**Suspension of payments (Surseance van betaling)**

Shareholders may participate in the voting if they are unsecured creditors without a right of preference.

**Bankruptcy ('Faillissement')**

Shareholders may participate in the voting on the composition if they are unsecured creditors without a right of preference.

 **Dutch scheme of arrangement (WHOA)**

No. Shareholders may participate in the voting. There may even be separate classes of shareholders (depending on the impact of a plan on their rights or of liquidation of the company's assets on their rights and whether they enjoy certain preferences or not).

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Suspension of payments (Surseance van betaling)**

Yes, by court confirmation (*homologatie*) of the composition in SoP. If a majority of the admitted creditors representing at least half of the total amount of the admitted claims approve the composition, the composition may be submitted to the court for confirmation. Court confirmation of the composition makes it binding also for dissenting creditors. However, the court may still confirm the composition as if it were approved if three-quarters of the number of admitted creditors voted in favor (that jointly do own less than half of the admitted claims) and if the other creditor(s)' vote is deemed unreasonable in view of the recovery of their debt in a bankruptcy/liquidation scenario.

**Bankruptcy ('Faillissement')**

Yes, by court confirmation (*homologatie*) of the composition in bankruptcy. If a majority of the admitted creditors representing at least half of the total amount of the admitted claims approve the composition, the composition may be submitted to the court for confirmation. Court confirmation of the composition makes it binding also for dissenting creditors. However, the court may still confirm the composition as if it were approved if three-quarters of the number of admitted creditors voted in favor (that jointly do own less than half of the admitted claims) and if the other creditor(s)' vote is deemed unreasonable in view of the recovery of their debt in a liquidation scenario.

**Dutch scheme of arrangement (WHOA)**

Yes, there is an ability to bind minority dissenting creditors. Ratification (or confirmation) of the plan by the court is required to bind all creditors (in all classes).
In order to be eligible for ratification, at least one class of creditors needs to have approved the plan. If the plan includes one or more classes of creditors that are fully or partially in the money, the composition plan needs to be approved by at least one of the "in the money" classes of creditors to be eligible for court ratification.

# Commencing the Process

## Who can commence?

**Suspension of payments (Surseance van betaling)**

The board of directors.

**Bankruptcy ('Faillissement')**

 The board of directors or a creditor.

**Dutch scheme of arrangement (WHOA)**

A Scheme can be initiated by the debtor (by depositing a scheme declaration with the court). The debtor may prepare a composition plan or request the court to appoint a restructuring expert.

Creditors, shareholders or the works council may also initiate a Scheme (with a request to the court to appoint a restructuring expert who will prepare a composition plan on behalf of the debtor).

## Is shareholder's consent required to commence proceeding?

**Suspension of payments (Surseance van betaling)**

No

**Bankruptcy ('Faillissement')**

Shareholders' consent is required in case the debtor files for its own bankruptcy (unless the company's articles of association stipulate that such shareholders' consent is not required).

**Dutch scheme of arrangement (WHOA)**

No

## Is there an ability to consolidate group estates?

**Suspension of payments (Surseance van betaling)**

No

**Bankruptcy ('Faillissement')**

No. As a matter of principle, only individual companies are declared bankrupt. However, in practice, if subsidiaries of the debtor are declared bankrupt as well, often the same trustee in the bankruptcy is appointed and the same supervisory judge.

**Dutch scheme of arrangement**

Yes, groups of companies can jointly do a Dutch Scheme. The group has to meet certain criteria testing economic and organizational unity. Moreover, especially if certain group companies would be foreign companies, for each of them the Dutch court must be competent (i.e., COMI in the Netherlands or sufficient nexus). Note that each company must meet the criteria that it (on a reasonable basis) foresees that it cannot continue to pay its debts as they fall due.

## Is there any court involvement?

**Suspension of payments (Surseance van betaling)**

Yes, to grant preliminary SoP, then organize a hearing/vote on final SoP, and then confirm the composition.

**Bankruptcy ('Faillissement')**

Yes, to declare the debtor bankrupt (and appoint a trustee in bankruptcy and a supervisory judge), and then through the supervisory judge mostly. In case of composition in bankruptcy, the court organizes a hearing/vote and confirms the composition.

**Dutch scheme of arrangement (WHOA)**

Yes, there is court involvement to get the composition plan ratified (and additional involvement where needed, e.g., if a creditor or shareholder initiates the Scheme process, with the appointment of a restructuring expert, or to seek certain protective measures). The setup of the process is lean and mean and aims to balance the protection of the parties involved with as little court involvement as possible.

## Who manages the debtor?

**Suspension of payments (Surseance van betaling)**

The administrator and the board of directors jointly

**Bankruptcy ('Faillissement')**

The trustee in bankruptcy represents the bankrupt estate. The board of directors can no longer represent the bankrupt estate if the assets are affected (i.e., the BoD, for example, votes in the GM of a subsidiary still notwithstanding the parent company's bankruptcy).

**Dutch scheme of arrangement (WHOA)**

The Scheme is a debtor-in-possession instrument, i.e., the debtor manages itself.

## What is level of disclosure of process to voting creditors?

**Suspension of payments (Surseance van betaling)**

**Bankruptcy ('Faillissement')**

**Dutch scheme of arrangement (WHOA)**

There are formal requirements that the draft composition plan must meet and there are timing requirements (a notice period of at least eight days must be taken into account between offering the plan to a class of creditors and the vote).

The information that must be provided includes:

The various classes of creditors and criteria for application of the classes

Financial consequences per class of creditors

The expected value that can be realized if the plan materializes (reorganization value)

The amount of proceeds that will likely be realized upon a bankruptcy liquidation

The assumptions on which the reorganization value and the liquidation proceeds are based

Any fresh money required and reasoning as to why that is necessary

The voting procedure

Works council advice as sought and provided during the process

Moreover, a detailed breakdown and analysis of the financial situation and of the plan will have to be made available to the creditors, which includes:

Overview of all assets and liabilities

Details of all affected creditors/shareholders and the debts/shares they hold

Details of unaffected creditors/shareholders with an explanation why they are not included in the plan

Description of causes of financial difficulties and efforts to resolve these

Description of the effects of the plan on the debtor

Timeline of plan implementation

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Suspension of payments (Surseance van betaling)**

There is a specific regime in the DBA for financial institutions and insurance companies; they are excluded from the SoP regime.

**Bankruptcy ('Faillissement')**

There is a specific regime in the DBA for financial institutions and insurance companies. Moreover, non-public partnerships (*niet openbare maatschappen*) are excluded.

**Dutch scheme of arrangement (WHOA)**

The Dutch Scheme is meant for businesses (i.e., excluding individuals that do not operate a business). Banks and insurance companies are excluded as well.

Moreover, excluded are parties in relation to whom the court has refused to ratify a plan in the past three years or where all classes voted against the proposed plan. There is one exception: if a restructuring expert is appointed.

## How long does it generally take for a creditor to commence the procedure?

**Suspension of payments (Surseance van betaling)**

Creditors may not file for their debtor's SoP; only the debtor can file a petition for (preliminary) SoP.

**Bankruptcy ('Faillissement')**

Creditors can commence bankruptcy proceedings by filling out a form and submitting this with the competent court.

**Dutch scheme of arrangement (WHOA)**

Creditors can commence a Dutch Scheme by filing a petition with the court to appoint a restructuring expert (short timeline).

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Suspension of payments (Surseance van betaling)**

The debtor's board of directors can bind the company by acting jointly with the court-appointed administrator.

**Bankruptcy ('Faillissement')**

The trustee in bankruptcy is exclusively authorized to dispose of the bankrupt estate's assets.

**Dutch scheme of arrangemennt (WHOA)**

Yes. The debtor remains in possession. If a restructuring expert is appointed, his role is to prepare a plan.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Suspension of payments (Surseance van betaling)**

The (preliminary) SoP effectively puts in place a stay for all unsecured creditors.

**Bankruptcy ('Faillissement')**

The bankruptcy creates a general moratorium for both unsecured and preferred creditors. Only secured creditors may act as if there was no bankruptcy.

**Dutch scheme of arrangement (WHOA)**

A stay of enforcement can be requested in court by the debtor (for the duration of four months + four months' extension). The stay of enforcement can be requested as soon as a Scheme Declaration is filed, while the debtor needs to confirm it has already offered a composition plan to its creditors or will do so within two months.

During the stay, creditors cannot enforce their rights against the debtor, nor can third parties reclaim their assets with the debtor unless the court would specifically allow the debtor to do so. The court may also lift seizures that creditors put over the debtor's assets. Bankruptcy and suspension of payments' petitions are also stayed.

The stay can be general (all assets) or limited to specific creditors/assets.

The court will allow a stay (i) if a stay is required to protect the debtor's business during the Dutch Scheme proceedings and (ii) if it is reasonable to believe that the stay best serves the interests of the joint creditors and the interests of individual creditors are not materially affected.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Suspension of payments (Surseance van betaling)**

No, Dutch law does not include a provision for debtor-in-possession (DIP) super-priority financing in SoP.

**Bankruptcy ('Faillissement')**

 No, Dutch law does not include a provision for DIP superpriority financing in bankruptcy.

**Dutch scheme of arrangement (WHOA)**

The Dutch Scheme allows for fresh money protection. The debtor must show that:

Attracting fresh money and providing security is necessary to protect the going-concern business during the scheme process.

This is in the best interest of joint creditors.

No individual creditor is materially affected.

In which case the court will grant leave to the debtor to enter into transactions such as providing security interests over assets against being provided with fresh money. With leave being granted, these transactions cannot be subjected to clawback if the restructuring fails (*Actio Pauliana*).

## Can procedure be used to implement a debt-to-equity swap?

**Suspension of payments (Surseance van betaling)**

No, as shareholders are not bound by the SoP (and they need to decide on issuing the required new shares).

**Bankruptcy ('Faillissement')**

No

**Dutch scheme of arrangement (WHOA)**

Yes, a debt-to-equity swap can be part of the plan.

## Are third party releases available?

**Suspension of payments (Surseance van betaling)**

No

**Bankruptcy ('Faillissement')**

No

**Dutch scheme of arrangement (WHOA)**

The guarantees and sureties provided by affiliates in connection with debts owed by the debtor can be restructured as part of the Dutch Scheme.

The following requirements must be met:

These affiliates are within the same group as the debtor (organizationally connected via central leadership in a group that acts as an economic unity).

These affiliates can reasonably assess that they will not be able to pay their debts as they fall due.

The court has jurisdiction over these affiliates if they would file for a Dutch Scheme individually.

## Are the proceedings recognised abroad?

**Suspension of payments (Surseance van betaling)**

Yes, under the regime of the EU Insolvency Regulation.

**Bankruptcy ('Faillissement')**

Yes, under the regime of the EU Insolvency Regulation.

**Dutch scheme of arrangement (WHOA)**

Yes, public Dutch Scheme as per the regime of the EU Insolvency Regulation-Recast and private Dutch Schemes as per other private international law instruments of the jurisdiction where enforcement is sought (e.g., treaties or model laws). The latter also applies when enforcement of a public Scheme is sought in a non-EU member state or in Denmark.

## Has the UNCITRAL Model Law been adopted?

**Suspension of payments (Surseance van betaling)**

No

**Bankruptcy ('Faillissement')**

No

**Dutch scheme of arrangement (WHOA)**

No

## How long, complex and expensive is the process?

**Suspension of payments (Surseance van betaling)**

The final SoP is declared for a maximum period of 1.5 years (this period can then be extended for another period of 1.5 years). The procedure is not very expensive nor is it very complex.

**Bankruptcy ('Faillissement')**

Generally, bankruptcy lasts up to three years. The procedure is not very expensive nor is it very complex.

**Dutch scheme of arrangement (WHOA)**

Depending on the complexity of the restructuring, the process could be quick and not very expensive.

Filing a Scheme Declaration is generally the starting point (or the appointment of a restructuring expert) and the preparation time required for the plan is generally decisive for the timeline.

Moreover, the notice period between the offering of a plan and the voting (eight days minimum) has to be taken into account. And following the vote, communication of the voting results must be done within seven days after the vote.

After the voting phase, a court may decide on a ratification request soonest, which may even be within seven to 14 days of the filing. In complex restructurings or where objections have been filed, the timeline may, of course, be longer.

## Is there a mandatory set-off of mutual debts on insolvency?

**Suspension of payments (Surseance van betaling)**

No

**Bankruptcy ('Faillissement')**

No

**Dutch scheme of arrangement (WHOA)**

No

## Can a debtor continue to carry on business during insolvency proceedings?

**Suspension of payments (Surseance van betaling)**

Yes, but the debtor can only be jointly represented by the board of directors and the court court-appointed administrator.

**Bankruptcy ('Faillissement')**

Yes, but only if the trustee in bankruptcy thinks a restart (going concern) is feasible.

**Dutch scheme of arrangements (WHOA)**

Yes, as these are DIP proceedings aimed at continuing the business.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Suspension of payments (Surseance van betaling)**

N/A.

There should be a prospect of the company's survival if the burden of debt is restructured; assuming this is indeed the case, there is no specific liability risk for directors to continue the business.

**Bankruptcy ('Faillissement')**

Directors may be held personally liable for acting unlawfully if:

They make selective payments (which is only allowed if there is a realistic perspective of survival for which making the selective payment is required, and if not, all (unsecured) creditors should be treated equally)

They are entering into new obligations on behalf of the company knowing (or when the director should have reasonably known that) the company cannot fulfill its obligations and offer no recourse for damages suffered as a consequence thereof

Distributions are made when the company cannot pay its debts as they fall due (taking a perspective of looking one year ahead); the distribution may be unlawful and lead to liability of both shareholder(s) and director(s) (toward the company)

Moreover, when:

Following the bankruptcy, directors (and *de facto* or shadow directors) may be held liable for manifestly improper management that was an important cause of the bankruptcy.

Under certain circumstances, Dutch law provides that directors may be held personally liable by authorities and institutions for the BVs nonpayment of certain taxes, social security contributions and pension premiums if the BV has not duly notified the relevant authority/institution of its inability to pay, or if the nonpayment was caused by the culpable manifestly improper performance of duties by the directors.

**Dutch scheme of arrangements (WHOA)**

The threshold for having access to the Dutch Scheme proceedings (i.e., the company can reasonably assess that it will not be able to continue to pay its debts as they fall due) is meant to reflect a pre-insolvency situation (where insolvency is reasonably likely to occur on a reasonably short term). Hence, there should be no specific liability risk for directors (unless in reality, the company is already insolvent). However, directors must at all times be mindful of the financial situation of the company and the implications thereof for creditors.

## What is the order of priority of claims?

**Suspension of payments (Surseance van betaling)**

N/A

**Bankruptcy ('Faillissement')**

Secured creditors (with a mortgage (*recht van hypotheek*), or a pledge (*pandrecht*))

Estate creditors (*boedelcrediteuren*) (having claims against the bankrupt estate that were incurred by the bankrupt estate)

Preferred creditors with a statutory (e.g., tax and social security administrations) or non-statutory (e.g., retention of title, set off, right to retain property) priority

Unsecured/non-preferred creditors

**Dutch scheme of arrangements (WHOA)**

N/A.

There will be separate classes of creditors and/or shareholders that each can vote on their own plan.

## Do pension liabilities have any priority over other unsecured claims?

**Suspension of payments (Surseance van betaling)**

N/A

**Bankruptcy ('Faillissement')**

For certain types of pension funds (*bedrijfstakpensioenfondsen*), there is an obligation to notify if the company is unable to pay its pension debts when they fall due. Failing to properly notify the pension fund leads to a personal liability risk for the director(s).

**Dutch scheme of arrangements (WHOA)**

No

## Is it possible to challenge prior transactions?

**Suspension of payments (Surseance van betaling)**

Under Dutch law, it is possible outside bankruptcy to challenge transactions that were prejudicial to one or more creditors. This is referred to as "Actio Pauliana." Actio Pauliana has been accepted by Dutch courts under various circumstances, e.g., in cases of payment of debts, set-off, granting of security rights and even in case of distribution of dividends. The case law is extensive and at times, complex.

In order for the Actio Pauliana to apply:

The legal act must be nonobligatory (not mandatory by law or contract).

The legal act must have prejudiced the creditors (in bankruptcy – the combined creditors; outside of bankruptcy – one or more creditors).

If the legal act was performed in exchange for consideration, the creditor/trustee must prove that both the debtor and the other party knew that the act would prejudice the creditor at the time the legal act was performed.

If no consideration was concerned (e.g., a donation or payment well below the actual value), the creditor must only prove that the debtor knew they acted to the detriment of creditors in order for the Actio Pauliana to be accepted at the time the legal act was performed.

Third parties may, under certain circumstances, remain unaffected by the Actio Pauliana if they acted in good faith and — if there was no consideration for the legal act — if the third party did not benefit in any way from the legal act at the time Actio Pauliana was invoked (outside of bankruptcy).

The knowledge that a legal act would prejudice the debtor's creditors is presumed by law outside of bankruptcy: for all transactions that occurred within one year of invoking Actio Pauliana, when it can also be established that the transaction meets the criteria of one of the following categories:

Transactions in which the debtor received substantially less than the value that was given by the debtor

Payment of, or granting of security for, debts that are not yet due

Transactions entered into by the debtor-natural person with certain relatives

Transactions entered into by the debtor-corporation with its managing or supervisory director(s) or relatives to these directors or shareholders

Transactions by the debtor-corporation with another legal entity, provided that one of the involved entities is a director of the other, or that there are certain family ties between either the director-natural persons or the shareholder-natural persons of the involved entities

Transactions by the debtor-corporation with a subsidiary or affiliate company

Note that prejudice of the creditors may also be presumed to exist even if the balance sheet of the debtor remains practically unaffected.

The presumption of knowledge may be overcome by the debtor and/or other party by providing evidence to the contrary.

**Bankruptcy ('Faillissement')**

Under Dutch law, it is possible in bankruptcy for the trustee to challenge transactions that were prejudicial to one or more creditors. This is referred to as "Actio Pauliana." Actio Pauliana has been accepted by Dutch courts under various circumstances, e.g., in cases of payment of debts, set-off, granting of security rights and even in case of distribution of dividends.

In order for Actio Pauliana to apply:

The legal act must benonobligatory (not mandatory by law or contract).

The legal act must have prejudiced the creditors (in bankruptcy – the combined creditors; outside of bankruptcy – one or more creditors).

If the legal act was performed in exchange for consideration, the creditor/trustee must prove that both the debtor and the other party knew that the act would prejudice the creditor at the time the legal act was performed.

If no consideration was concerned (e.g., a donation or payment well below the actual value), the creditor/trustee must only prove that the debtor knew they acted to the detriment of creditors in order for Actio Pauliana to be accepted at the time the legal act was performed.

Third parties may, under certain circumstances, remain unaffected by the Actio Pauliana if they acted in good faith and — if there was no consideration for the legal act — if the bankruptcy was adjudicated.

The knowledge that a legal act would prejudice the debtor's creditors is presumed by law for all transactions performed in case of bankruptcy: within one year of adjudication of bankruptcy, when it can also be established that the transaction meets the criteria of one of the following categories:

Transactions in which the debtor received substantially less than the value that was given by the debtor

Payment of, or granting of security for, debts that are not yet due

Transactions entered into by the debtor-natural person with certain relatives

Transactions entered into by the debtor-corporation with its managing or supervisory director(s) or relatives to these directors or shareholders

Transactions by the debtor-corporation with another legal entity, provided that one of the involved entities is a director of the other, or that there are certain family ties between either the director-natural persons or the shareholder-natural persons of the involved entities

Transactions by the debtor-corporation with a subsidiary or affiliate company

Note that prejudice of the creditors may also be presumed to exist even if the balance sheet of the bankrupt estate remains practically unaffected.

The presumption of knowledge may be overcome by the debtor and/or other party by providing evidence to the contrary.

In bankruptcy, a debtor under a legal obligation (i.e., an act that is mandatory by law or by contract) to pay a certain creditor may still be confronted with Actio Pauliana if it is demonstrated by the trustee that the other party knew that a petition for bankruptcy was actually filed at the time of payment, or if it is demonstrated that the legal act is a result of a conspiracy between the debtor and the other party to defraud creditors. Once demonstrated, evidence to the contrary is no longer allowed.

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In order for Actio Pauliana to apply:

The legal act must be nonobligatory (not mandatory by law or contract).

The legal act must have prejudiced the creditors (in bankruptcy – the combined creditors; outside of bankruptcy – one or more creditors).

If the legal act was performed in exchange for consideration, the creditor/trustee must prove that both the debtor and the other party knew that the act would prejudice the creditor at the time the legal act was performed.

If no consideration was concerned (e.g., a donation or payment well below the actual value), the creditor must only prove that the debtor knew he acted to the detriment of creditors in order for the Actio Pauliana to be accepted at the time the legal act was performed.

Third parties may, under certain circumstances, remain unaffected by the Actio Pauliana if they acted in good faith and — if there was no consideration for the legal act — if the third party did not benefit in any way from the legal act at the time Actio Pauliana was invoked (outside of bankruptcy).

The knowledge that a legal act would prejudice the debtor's creditors is presumed by law outside of bankruptcy: for all transactions that occurred within one year of invoking Actio Pauliana, when it can also be established that the transaction meets the criteria of one of the following categories:

Transactions in which the debtor received substantially less than the value that was given by the debtor

Payment of, or granting of security for, debts that are not yet due

Transactions entered into by the debtor-natural person with certain relatives

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Transactions by the debtor-corporation with a subsidiary or affiliate company

Note that prejudice of the creditors may also be presumed to exist even if the balance sheet of the debtor remains practically unaffected.

The presumption of knowledge may be overcome by the debtor and/or other party by providing evidence to the contrary.

## Is state support for distressed businesses available?

**Suspension of payments (Surseance van betaling)**

Most government support was terminated as of 1 October 2021; in view of new measures, it is still unclear what support will be offered.

For now, only certain sectors continue to receive support (events, clubs and night cafés).

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