

**BANKRUPTCY AND A FRESH START:
STIGMA ON FAILURE AND LEGAL CONSEQUENCES OF
BANKRUPTCY**

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TITLE 1. INTRODUCTION

History

The present Dutch Bankruptcy Act has entered into force on September 1, 1896. The reason for the implementation of the present Bankruptcy Act was the numerous complaints against the bankruptcy provisions in the then Commercial Code. The most important complaints were: a) the high bankruptcy costs due to the numerous and high court registry charges, b) the number of prescribed formalities, c) the long duration of the winding up of the bankrupt estate, d) the limited influence of creditors on the course of business, e) the easy way scheme of arrangements were concluded¹. Also case law had displayed the lacunae in the then applicable bankruptcy provisions, i.e. the lack of provisions regulating the effect of the bankruptcy on existing legal relationships, the lack of provisions regarding the non compliance of the debtor of a court sanctioned scheme of arrangement, and the uncertain position of the creditors and the debtor after the bankruptcy has de facto come to an end after approval of the account of the trustee².

The Dutch Bankruptcy Act has been changed several times. The most important changes are³: i) the introduction to continue the activities of a company even after the state of insolvency, ii) the changes in the suspension of payments procedure, iii) the introduction of Anti Abuse Laws, iv) the extension of the possibilities for the trustee to annul prejudicing transactions, v) the introduction of the cooling down period and vi) the implementation of the Debt Restructuring Act for Private Individuals.

Current insolvency procedures

Three species of insolvency procedures are to be distinguished in the present Bankruptcy Act: I) the bankruptcy; II) the suspension of payments, and III) the debt restructuring private individuals.

¹ S.C.J.J. Kortmann and N.E.D. Faber, *Geschiedenis van de Faillissementswet*, heruitgave Van der Feltz I, October 1994, p. 7.

² S.C.J.J. Kortmann and N.E.D. Faber, *Geschiedenis van de Faillissementswet*, heruitgave Van der Feltz I, October 1994, p. 7.

³ Polak-Wessels, *Insolventierecht deel I; Faillietverklaring*, 1999, nr. 1051.

I. Bankruptcy

The original purpose of the legislator for a bankruptcy procedure was to liquidate the assets of the debtor to the benefit of its creditors. A bankruptcy is generally characterised as a general attachment on the assets of the debtor to the benefit of all creditors.

The debtor can petition its own bankruptcy or its creditors can file for the bankruptcy of the debtor. For reasons of public order the public prosecutor also can file for the bankruptcy. Both legal entities and private individuals can be declared bankrupt. Since the Act Debt Restructuring Private Individuals has entered into force, the number of bankruptcies of private individuals has diminished drastically. Required for a bankruptcy is that the debtor has ceased to pay its obligations. In case law it has been established that there should be more than one creditor.

The district court appoints a trustee. In the Netherlands usually an attorney at law is appointed. In large bankruptcies more than one trustee can be appointed. The trustee is charged with the administration and liquidation of the bankruptcy estate. The fees of the trustee are determined by the district court and are based on an hourly fee dependent on the experience of the trustee and the amount of the available assets in the bankruptcy estate. The trustee's fees are to be paid from the proceeds of the bankruptcy estate. No assets mean no fees. The district court also appoints a bankruptcy judge who supervises the administration and liquidation of the bankruptcy estate.

A bankruptcy affects both common unsecured creditors and preferred creditors. Secured creditors may exercise their security rights as if there were no bankruptcy. In practice secured creditors are affected by the bankruptcy, since secured creditors tend to prefer a private sale of the secured goods instead of the legally required public sale. The reason for this preference is that the proceeds through a private sale are most of the time higher than through a public sale. In order to sell the security goods through a private sale the co-operation of the trustee is required. The practice has risen that the trustee asks a certain percentage of the sale proceeds for his co-operation, the so-

called “boedelbijdrage⁴”.

Secured creditors and even third parties are not allowed to exercise their rights if a cooling down period⁵ is ordered.

A bankruptcy can be ended in several ways: a) if the bankruptcy judgement is reversed by the Court of Appeal, b) closing of the bankruptcy for lack of assets, c) closing of the bankruptcy due to the fact that the debtor is in the position to resume payments of its debts, and d) the conclusion with the creditors of a scheme of arrangement.

II. Suspension of payments

The procedure of suspension of payments was according to the legislator intended for the cases in which the enterprise of the debtor is viable, but is temporarily in financial difficulties⁶. The goal of the suspension of payments procedure could be described as providing the legal instruments in order to restructure and continue an enterprise in financial distress, which in whole or in part is viable. The suspension of payments procedure, however, never satisfactory fulfilled its goal and has become more or less the gateway to a bankruptcy. In practice reorganisations of enterprises with financial difficulties take place through the bankruptcy of the legal entity in which the business was conducted.

Only the debtor itself can petition for a suspension of payments when it foresees that it no longer will be able to pay its due and payable debts. There is no obligation whatsoever for the debtor to petition for suspension of payments. A preliminary suspension of payment is immediately granted by the district court, unless the required legal formalities for the petition have not been met. If at the same time both a petition for bankruptcy and a petition for suspension of payments are pending before the court, the court first shall deal with the latter. This is the reason why debtors as a defence measure petition for suspension of payments when a petition for bankruptcy has been filed against them.

⁴ A.S.K. Terng, De boedelbijdrage: (on)geregeld?, Insolad Jaarboek 2001: Onzekere zekerheid, 2001, p. 177 - 186.

⁵ Reference is made to Title 2.

⁶ S.C.J.J. Kortmann and N.E.D. Faber, Geschiedenis van de Faillissementswet, heruitgave Van der Feltz II, October

The big difference with the trustee in a bankruptcy is that the court appointed administrator has to co-operate with the debtor. The administrator can not act without the co-operation of the debtor and vice versa. The debtor therefore can exercise some influence in the suspension of payments process.

In the Netherlands usually attorneys at law are appointed as administrator. In large companies two or more administrators can be appointed. The administrator receives an hourly fee for his activities. The district court determines the amount of the fees. The administrator's fees are paid from the proceeds of the estate. If the assets of the estate are insufficient or if there are no assets at all, the administrator will receive only part of his fees or in the latter no fees at all.

The role of the bankruptcy judge in a suspension of payments is different from his role in a bankruptcy. The bankruptcy judge in a suspension of payments has only an advisory role. He only advises the administrator at his specific request.

A suspension of payments only effects common unsecured creditors. Secured creditors and preferred creditors are as a general rule not effected and should in principle be fully paid. The practice, however, is somewhat different, due to inter alia the introduction of the cooling down period and the grown practice that preferred creditors like the tax authorities and the social insurance board under circumstances give their co-operation to a scheme of arrangement. Since the circumstances under which co-operation is given are laid down in policy rules such co-operation could be enforced legally.

Within a suspension of payments the company can be reorganised in grosso modo three different manners: a) the debtor offers its creditors a scheme of arrangement, b) the debtor sells parts of its enterprise or assets and uses the proceeds to either pay its creditors or to offer them a scheme of arrangement, c) the revenues of the company in the end are sufficient to pay the creditors in full or

particle If no reorganisation is possible within the suspension of payments, the suspension of payments will usually be revoked and the debtor will be declared bankrupt.

III. Debt restructuring private individuals

The Act debt restructuring private individuals has entered into force on December 1, 1998 and as such has been incorporated in title 3 of the Dutch Bankruptcy Act. This Act applies both to private individuals with and without a business. Only the private individual himself can petition for the applicability of the debt-restructuring act.

The court appoints an administrator. The administrator is charged with the supervision over the debtor in the sense that the debtor complies with his obligations under the debt restructuring. In the majority of the debt restructuring cases debt relief social workers are appointed as administrators. In the more complex cases (most of the time if the debtor runs a business) attorneys at law are appointed. The administrator is paid a small monthly fee and receives a subsidy. The monthly fee is to be paid from the proceeds of the estate. The subsidy is only a temporary measure and subject to review. The bankruptcy judge in a debt restructuring supervises the administrator.

The core of this Act is to provide the possibility to private individuals in a debt position without any prospects to make a fresh start without being chased for life by his creditors. The fresh start is obtained by the liquidation of the assets of the debtor and to save during a period of at the most five years his repayment capacity (earnings less minimum costs of living). At the end of the term these proceeds are divided among the creditors and a fresh start is obtained. During this term the debtor has to observe the terms and conditions set out by the law and the so-called restructuring plan (saneringsplan). If the debtor does not comply with these terms the debt restructuring could be revoked and the debtor will be declared bankrupt without getting a fresh starticle

The debt restructuring can also be ended by offering the creditors a scheme of arrangement. Under the debt-restructuring act different voting ratios are applicable and under circumstances the judge can

even impose a scheme of arrangement on the creditors.

Future

Currently in the Netherlands discussions are launched to change the Bankruptcy Act. Even legislative proposals have been submitted to that extent. This call for change has inter alia been inspired by the fairly recent implementation in a number of West-European countries (i.e. France, Belgium and Germany) of their insolvency laws. In these countries the insolvency laws have been drastically innovated with the aim to safeguard the continuity of companies in financial distress to the disadvantage of the (recovery) interest of the creditors⁷.

Influenced by these developments the Ministers of Justice and Economic Affairs have plead for modernisation of the Bankruptcy Act and within the framework of the operation *Marktwerking, Dereguleren and Wetgevingskwaliteit* (MDW; *Market Mechanism, Deregulation and Legislative Quality*) have established an interministerial committee Modernisation Bankruptcy Act. The reason for the establishment of the committee is that the impression exists that the current Dutch Bankruptcy Act does not function optimal and that there is doubt as to whether the current suspension of payments-procedure suffices to timely reorganise viable parts of insolvent companies. The main reason for the doubt is that de facto 73% of the suspension of payments end in a bankruptcy⁸.

The task of the committee is to carry out a research on the afore-mentioned aspects, and - if the results of the research give reason thereto - to propose amendments to the Bankruptcy Act. The committee should at least address the following questions: a) How do we achieve that suspension of payments is timely petitioned for?, b) Which instruments are needed to allow the administrator and the entrepreneur to reorganise and continue the viable parts of an enterprise in a suspension of payments procedure?, and c) How can we prevent that a bankruptcy procedure is not abused to the disadvantage of creditors and employees?

⁷ Onderzoekscentrum Onderneming & Recht, De efficiëntie van de Faillissementswet, April 2001, p. 11.

⁸ Onderzoekscentrum Onderneming & Recht, De efficiëntie van de Faillissementswet, April 2001, p. 12.

The project is executed in two phases⁹. In the first phase a quick scan was performed to identify subjects which are appropriate to include in a first proposal for amendment of the Bankruptcy Act without a thorough economic research being necessary. This phase has been concluded and has led to the much criticised bill 27 244¹⁰. In the second phase topics should be discussed for which more thorough research is needed. This phase has resulted in an End Report of the MDW-committee Modernisation Bankruptcy Act, second phase, which report has been presented to the Council of Ministers. The Council of Ministers has adopted the findings of the committee and communicated that it will comply with the recommendations made by the committee¹¹. The recommended innovations mentioned in the press release are: 1) the authority granted to the judge to approve a collective dismissal of employees within the scope of a reorganisation of a company in financial distress, 2) the simplification - where possible - of insolvency procedures, 3) the possibility for the judge to temporarily impose on financiers and suppliers the obligation to continue their obligations towards companies in financial difficulties, 4) incentives for companies to timely report their financial difficulties.

TITLE 2. DEFINITIONS AND TERMINOLOGY

- **Afkoelingsperiode**¹² : *cooling down period* : The district court in a suspension of payment or the bankruptcy judge in a bankruptcy may either at the request of an interested party or of his own motion issue an order stipulating that for a period of at most one month each right of third parties for recourse against assets belonging to the estate or to claim assets which are in the control of the bankrupt or the trustee, may only be executed with his authorisation. The bankruptcy judge or district court may extend this period once for at most one month.
- **Akkoord** : *scheme of arrangement* : The debtor may offer its unsecured common creditors a scheme of arrangement against full and final settlement. If at least two-thirds of

⁹ Report of the MDW-committee, October 2001, p. 5.

¹⁰ Reference is made to Title 6.

¹¹ Press release of the Council of Ministers dated November 23, 2001.

¹² A.S.K. Terng, Machtiging ex article 241a Fw. en hoger beroep, TvI 1997, p. 74 - 76.

the recognised unsecured common creditors, representing at least 75 % of the total amount of the claims of the common creditors approve the offered scheme of arrangement, then it is submitted to the district court for sanctioning. All unsecured common creditors are bound by such court-sanctioned scheme of arrangement. The voting ratios for a scheme of arrangement in a debt restructuring are somewhat different.

- **Bewindvoerder** : *administrator* : The official appointed by the district court to administer the affairs of the debtor together with the debtor.
- **Concurrente crediteur** : *common creditor* : a non-preferred, unsecured creditor.
- **Curator** : *trustee* : The official appointed by the court charged with the administration and liquidation of the bankruptcy estate.
- **Failliet** : *bankrupt* : The debtor who has been declared bankrupt.
- **Faillissement** : *bankruptcy* : A bankruptcy is in general described as a general attachment of the debtor's entire estate for the benefit of its aggregate creditors.
- **Faillissementspauliana** : An action available to the trustee to annul every transaction voluntarily performed by the debtor and prior to the declaration of the bankruptcy of which the debtor knew or should have known at that time that the transaction would prejudice the creditors.
- **Faillissementswet** : *Bankruptcy Act*.
- **Vereffening** : *winding up* : The process in which the trustee sells off the assets of the bankruptcy estate in order to divide the proceeds among the creditors.
- **Preferente crediteur** : *preferred creditor* : A creditor with a preferential right created by a statutory provision, i.e. the tax authorities and the social insurance board are examples of high ranking preferred creditors.
- **Rechtbank** : *district court* : The court who declares the bankruptcy or grants the suspension of payments; usually the court of the statutory seat of the company.
- **Rechter-commissaris** : *bankruptcy judge* : A distinction should be made between the role of the bankruptcy judge in a suspension of payments or in a bankruptcy. In a bankruptcy situation the bankruptcy judge is charged with the supervision of the administration and

liquidation of the bankruptcy estate. In a suspension of payments the bankruptcy judge has an advisory role at the request of the administrator.

- **Saniet** : The debtor to whom the Wet Schuldsanering Natuurlijke Personen applies.
- **Schuldenaar** : *debtor*.
- **Separatisten** : *secured creditors* : Creditors with some kind of security, i.e. right of pledge or mortgage. Secured creditors in general may exercise their rights as if there were no bankruptcy or suspension of payments.
- **Surseance van betaling**: *suspension of payments* : A temporary relief against its common creditors granted by the court to the debtor, in order to attempt the continuation of the enterprise and, ultimately, the satisfaction in whole or part of its creditors.
- **Sursiet** : The debtor to whom suspension of payments has been granted.
- **Uitvoeringsinstelling** : *social insurance board* : Institution responsible for the collection of social insurance premiums and the execution of social insurance regulations.
- **Wet Schuldsanering Natuurlijke Personen** : *Act Debt Restructuring Private Individuals* : This act has entered into force on 1 December 1998 and its goal is to restructure the debts of private individuals with or without a business.

TITLE 3. WARNING LIGHTS AND PREVENTION OF INSOLVENCY

Under Dutch law there are only few existing formal procedures that serve to detect companies with financial difficulties.

Notification of tax authorities, social insurance board and pension fund

One of these formal procedures is the legal obligation to timely notify the tax authorities, social insurance board and -if applicable- the pension fund, if the company is no longer able to pay its taxes and/or premiums. This procedure is laid down in the so-called Second Anti-Abuse Act (*Tweede Anti Misbruik Wet*). A timely notification is within two weeks after the date the claim of the tax

authorities, social insurance board and/or pension fund has become due. If the inability of payment has not been notified in time, the director(s) of the company could be held personally liable for the unpaid claims.

The above-mentioned procedure is only of practical use for the authorities that are to be notified under these rules. Other creditors are not notified. This procedure does not directly lead to timely liquidation or successful rescue operations.

Books and records and publication of accounts

Other formal procedures are the obligation for legal entities to keep a proper financial administration in such a way that at all times the rights and obligations of the legal entity are known, as well as the obligation to periodically publicise its financial accounts. Large companies have also the obligation to have the financial accounts audited by an external accountant. The accountant has to ascertain whether the financial accounts satisfy the requirements set by and pursuant to the law. The result of his audit should be set out in a certificate as to whether the accounts give a true and fair view. A disadvantage of the publication is that at the moment of publication the information contained therein is often outdated. The value of an accountant's certificate is relative since the accountant is dependent on the information provided to him, and the valuation of assets is dependent on partly subjective factors. Given the position of trust an accountant usually has in a company, he should be in a good position to detect in an early stage financial difficulties within a company. In practice this signalling function is limited and too often financial difficulties are distinguished too late or in such a late stage that rescue operations are in vain.

In the line of the above companies registered at the Dutch stock and options exchanges have the obligation to report their financial accounts on an interim base. They also are obliged to issue public announcements of major developments, i.e. a poor financial performance etc.

Informal work out by financial institutions

Financial institutions are often the first to be notified of financial distress, since most of the times

companies have a contractual obligation to inform the financial institutions from time to time of their financial position. Furthermore, information regarding the financial position is obtained by these institutions because revenues and payments are often channelled through them. Financial institutions are claiming that by means of an informal work out they rescue a large number of companies with financial difficulties. Only little information on this subject is available. An informal work out consists among other things of strict credit and cost control and often the appointment of an interim/crisis manager. According to the information provided by the financial institutions around 80 % of all cases is solved through such an informal work out via the Intensive Control Departments¹³. As far as we are aware of no scientific study has been performed on this specific subject. The informal work out only covers the companies who are financed and monitored by these institutions. The informal work out is primarily in the interest of the financial institutions.

Credit control by creditors

Creditors themselves are also in the position to detect financial difficulties with their debtors i.e. by intensifying their credit control. When invoices are not paid within the term of payment creditors could consider stipulating that future deliveries are only executed after payment in advance or cash on delivery. The effect in practice of intensifying the credit control is limitation of the credit risk of the creditor, but in general shall not lead to timely liquidations or successful rescue-operations.

TITLE 4. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES

Chapter 4.1. Introduction

An enterprise¹⁴ in financial difficulties can take various types of action outside of bankruptcy proceedings to continue its economic activities. A first option is to reorganise, whereby the

¹³ Discussion Memorandum MDW- committee faillissementsrecht nadere herziening van het Nederlandse insolventierecht, 8 March 2001, p. 24.

¹⁴ The same applies to private individuals.

enterprise, whether or not assisted by another legal entity, continues its “sound” activities, while making a part of its employees redundant on the basis of a social plan. That first option will not be discussed in this report, as it does not require a separate procedure besides fulfilling procedural requirements under labour law.

Activities may also be continued on the basis of a scheme of arrangement with the enterprise’s creditors. The so-called private or out-of-court scheme of arrangement will be discussed in chapter 4.2. A last option is to request the court to give the enterprise some time to put its financial affairs in order and grant a suspension of payments. That option will be discussed in chapter 4.3.

Chapter 4.2 The out-of-court scheme of arrangement

§ 4.2.1 Comprehensive description of the regime as well as its underlying philosophy

4.2.1.1 Description

An out-of-court scheme of arrangement means that an enterprise in financial difficulties offers to pay its creditors a certain percentage of the outstanding claims.¹⁵ The creditors accepting the percentage offered grant final discharge in respect of the remainder of their claims.

Unlike a (compulsory) judicial scheme of arrangement, which may be proposed within the framework of a debt restructuring arrangement, a suspension of payments or a bankruptcy¹⁶, an out-of-court scheme of arrangement is not regulated by law. The scheme of arrangement is therefore entirely governed by the normal rules of property law and only feasible if all of the (common unsecured and preferential) creditors agree with its content.¹⁷

¹⁵ Cf. inter alia H.B. Oosthout, *De doorstart van een insolvente onderneming*, Deventer 1998, p.7.

¹⁶ The types of scheme of arrangements are set out in the Bankruptcy Act and therefore have procedural and substantive guarantees. They will be discussed in Chapter 5, below.

4.2.1.2 Critical analysis

Preferential creditors

When drafting a scheme of arrangement, it should be borne in mind that certain categories of creditors have a preferential right or priority under Dutch legislation. The first category are creditors with a security right, i.e. mortgagees and pledgees. They are entitled to summary execution and in general will only be prepared to participate in a scheme of arrangement to the extent that they have claims that are not covered by their securities. The second category are creditors with a statutory preferential right, like the tax authorities and the National Institute for Social Insurance (*Landelijk Instituut Sociale Verzekeringen "LISV"*)¹⁸, which have a high-ranking statutory preferential right.

The tax authorities will accept the scheme of arrangement proposed if the following conditions are fulfilled¹⁹:

- the percentage of the tax claim paid shall be at least twice the percentage to be paid to the common unsecured creditors;
- the amount to be received by the tax authorities shall at any rate be higher than the amount the tax authorities can obtain by taking measures of enforcement;
- the amount to be paid to the tax authorities shall be substantial, both in absolute terms and in proportion to the total tax liability;
- implementation of the scheme of arrangement shall offer realistic prospects for continuation of the enterprise.

To date, there still is the requirement that any VAT-tax deducted by the entrepreneur in advance and

¹⁷ Vgl o.a. Polak-Wessels VI, par. 6202-6204.

¹⁸ Since 1 January 2002 incorporated in UWV, Uitvoering Werknemersverzekeringen

⁶ See Leidraad Invordering 1990, article 26, 4..

to be repaid as a result of the (partial) remission, is fully paid upon release when the scheme of arrangement takes effect.²⁰

The LISV has no formal policy on the remission of debts, but in practice conforms to the course of action adopted by the tax authorities.

Common unsecured creditors

In practice, the requirement that besides the preferential creditors, all common creditors should agree to the scheme of arrangement, frequently frustrates the conclusion of an out-of-court scheme of arrangement. As a general rule, each creditor may, in principle, accept or refuse the scheme of arrangement proposed. The freedom of negotiating and contracting is put first. But it may be inferred from Dutch case law that under circumstances, unwilling creditors may be imposed by the judge to co-operate in an out-of-court scheme of arrangement.²¹

Courts may base a decision to override the principle of freedom of the creditor to accept or refuse a scheme of arrangement on various legal grounds:²²

1. under the circumstances, the refusal to accept the proposed scheme of arrangement is contrary to reasonableness and fairness²³
2. the refusal to accept the scheme of arrangement constitutes abuse of power²⁴;

²⁰ As many out-of-court scheme of arrangements were doomed to fail because a substantial amount of the available assets had to be reserved for the tax authorities, a provision will soon be included in the Leidraad (*Guidelines*), to the effect that full payment is no longer required and that also with regard to this debt, payment of a double percentage suffices.

²¹ For a list of literature and case law (mainly of lower courts), reference is made to H.B. Oosthout, p. 8 et seq. and Polak-Wessels VI, par. 6208 et seq. See also Cantonal Court of 's-Hertogenbosch, 5 August 1999 PRG 1999/5339 and the President of the Amsterdam District Court, 16 September 1999, JOR 2000,36, with notes by A.D.W. Soedira. It is assumed both in literature and case law that compulsory participation is an exception to the general rule that a creditor is free to refuse an arrangement proposed.

²² Cf. Polak-Wessels VI, par. 6212 et seq.

²³ See article 6:2 lid 2 jo. article 6:248 lid 2 BW and for example Rechtbank Almelo 4 februari 1998, JOR 1998, 66 m.nt. A.D.W. Soedira.

²⁴ Article 3:13, paragraph 2, of the Dutch Civil Code, provides that abuse of power may be involved, for example, if

3. the refusal to accept the scheme of arrangement does not satisfy generally accepted standards under unwritten law;

It is possible to derive from case law a number of requirements to be fulfilled in order for a court to be prepared to compel an unwilling creditor to accept the proposed scheme of arrangement.²⁶ The proposed debt restructuring arrangement shall:

- be properly substantiated and give full insight into the debtor's debt position and financial position;
- offer insight into the maximum attainable result;
- be prepared and monitored by an independent expert;
- make it plausible that failure to conclude a out of court scheme of arrangement will lead to bankruptcy, as a result of which the creditors will receive less;
- state that the debtor will make every effort to repay to its creditors the highest possible portion of the debt;
- offer sufficient guarantees that the creditors will be kept informed of any relevant developments during its implementation;
- result in preservation of employment;
- treat similar creditors in the same manner, and substantiate deviations from that rule, if any;
- be accepted by a qualified majority of the creditors.

power is exercised for the sole purpose of harming another party or for a purpose other than the one for which the power was granted or if such exercise, considering the interest served by it and the interest harmed by it, cannot be based on reasonableness.

²⁵ See Article 6:162, paragraph 2, of the Dutch Civil Code. For a list of case law in which a refusal was ruled unlawful, reference is made to Polak-Wessels, see note 8.

²⁶ See Polak-Wessels VI, paragraph 6222 et seq., in which reference is made to the judgment of the Almelo Court of 4 February 1998 (JOR 1998/66), already referred to in footnote 9. The Almelo Court considers that there are nine criteria to assess whether a creditor should be ordered to co-operate in a scheme of arrangement. Wessels believes that that list unjustly fails to consider the creditor's interests.

This list of requirements is not exhaustive, but contains those found most frequently in Dutch case law.

§ 4.2.2 Criteria to benefit the regime (the origin of the criteria (legal, case law, practice) must be specified)

Benefits for debtors

An advantage of an out-of-court scheme of arrangement is that an enterprise in financial difficulties may be continued within the framework of an existing legal entity and that existing relations may be maintained as much as possible. As there is no obligation to publish the scheme of arrangement in daily newspapers, the economic damage is negligible.

In addition, although it is certainly no sinecure to contact all creditors and persuade them to accept the scheme of arrangement, the procedure is far less time-consuming for a debtor than realisation of a restart after a suspension of payments or bankruptcy, as such a restart requires fulfilment of certain procedural and substantial requirements.

Benefits for creditors

In return for remitting a portion of their claims, creditors obtain certainty that a portion of their claim will actually be paid. Such certainty is usually much less probable if the debtor is declared bankrupt. The main reasons therefor are that financiers will normally not provide funds to finance the scheme of arrangement if the scheme of arrangement is not implemented, and that in case of a suspension of payments or bankruptcy, a portion of the assets will have to be applied to pay the trustee's salary.

Chapter 4.3 Suspension of payments

§ 4,3.1 Comprehensive description of the regime as well as its underlying philosophy

4,3.1.1 Description

Suspension of payments may be regarded as a general postponement of payments, granted by the court to the debtor towards its creditors. The underlying philosophy of a suspension of payments is that the debtor should have an opportunity to put its financial affairs in order²⁷.

The law provides that a debtor may file a petition for suspension of payments if the debtor expects to be unable to continue payment of its due and payable debts. For the record, the debtor is not obligated to apply for suspension of payments under such circumstances.

The court granting the suspension of payments appoints one or more administrators. That administrator administers the estate jointly with the debtor. Immediately upon the granting of suspension of payments, the administrator investigates whether it is possible to continue the activities. If the situation appears to be so bad that it will be impossible to pay a reasonable amount of the debts in the near future, the administrator in principle has the obligation to apply for conversion of the suspension of payments into a bankruptcy.

If the suspension of payments becomes final, there are three methods to make the enterprise financially “sound”.

The first option is that the enterprise uses the suspension of payments to put its financial affairs in order, so that it can independently resume its activities after expiry of the term of the suspension of payments. Existing creditors are therefore kept at a distance during the suspension of payments, so that the debtor can focus entirely on making its activities profitable. Debts made after the granting of the suspension of payment should be paid in full, as well as the claims of preferred creditors.

²⁷ Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 39; Polak-Wessels VIII, par. 8000; Van Buchem-

The second option is that the debtor makes use of the possibilities offered by the Bankruptcy Act to propose to its creditors a (compulsory) judicial scheme of arrangement. A majority of the creditors, at least two-thirds of the total number of acknowledged creditors jointly representing at least three-fourths of the total amount of acknowledged claims, can bind a minority. After acceptance by the above-mentioned majority of the creditors, the scheme of arrangement will still need to be approved by the court. This court approval is generally referred to as the “homologation” of the scheme of arrangement. The suspension of payments ends after the homologation of the scheme of arrangement.

The last option is to use the suspension of payments to effect a transaction of assets, whereby the assets of (the financially sound parts of) the debtor are transferred to a new company. The proceeds of the assets may subsequently be used to pay the creditors or propose a scheme of arrangement.

4.3.1.2 Critical analysis

In practice, it rarely happens that an enterprise in financial difficulties realises a solution to its problems on the basis of a suspension of payments. The reasons therefor are the following: ²⁸

1. The postponement of payments in effect during the suspension only pertains to the claims of common unsecured creditors. The number of claims with a statutory preferential status, not affected by the postponement of payments, is still considerable.
2. In many cases, the debtor applies too late for suspension of payments, in the sense that the debtor is unable to pay the due and payable debts and has, in addition, allowed the preferential debts to increase, as a result of which the debtor’s bankruptcy can no longer be

Spapens, *Faillissement en surséance van betaling*, Deventer, Tjeenk-Willink 1998, p. 118.

²⁸ See the report of the Onderzoekscentrum Onderneming & Recht, *De efficiëntie van de faillissementswet*, april 2000, p. 5 et seq. And the in there mentioned report of the Committee Mijnsen, p. 283-284.

avoided.

3. The debtor must initiate any debt restructuring measures. Both debtor and administrator are unable to take measures independently, and must seek each other's co-operation. That may cause problems, particularly if the debtor's financial difficulties are due to poor management.
4. If an asset transaction is effected during the suspension of payments, the rules protecting employees in the event of a transfer of the enterprise, which are based on European legislation, will apply in full. One of the consequences thereof is that the employees of the debtor enter into the service of the purchaser of the assets by operation of law. If a reorganisation of the work force is required, protection against dismissal and the employees' entitlement to compensation constitute major obstacles. The provisions protecting employees do not apply in the event of a bankruptcy. As a reorganisation of the workforce is usually required when a company wishes to put its financial affairs in order, it is for practical reasons preferred to effect an asset transaction on the basis of the debtor's bankruptcy.

§ 4.3.2 Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law

4.3.2.1. Description

The debtor shall file the petition for suspension of payments through a solicitor at the court of its place of residence. A legal entity's place of residence is the place where the legal entity has its registered office, pursuant to statutory provisions or according to its articles of association or regulations.

The court will provisionally grant the suspension of payments, unless the petition fails to fulfil formal

requirements. The court appoints one or more administrators and schedules a meeting at which the debtor's creditors may give their opinion on whether or not the suspension of payments should be made final. The meeting is usually scheduled on a date two or three months after the date on which the suspension of payments was provisionally granted. This gives the administrator the time to investigate whether it is useful to actually convene the afore-mentioned creditors' meeting. If it turns out that the prospects are such that a bankruptcy cannot be avoided, holding a creditors' meeting makes no sense.

If the administrator deems it useful to hold a creditors' meeting, he will convene the creditors. The creditors cast their votes at the creditors' meeting, after which the court decides on whether or not to grant a final suspension of payments.

If the suspension is denied, the court may ex officio declare the company bankrupt. The debtor may appeal the court's decision to deny the final suspension of payments and declare the debtor bankrupt.

If it is ruled that the suspension becomes final, the court determines the term of the suspension at a maximum of 18 months. Upon expiry of that term, the suspension may be renewed by a maximum of 18 months. After each expiration the term can be extended.

The Bankruptcy Act contains a regulation with regard to recovery of assets of a debtor abroad granted suspension of payments by the Dutch court. That regulation is based on the universality principle, which means that the suspension covers the debtor's entire estate, including assets located abroad. Obviously, it falls under the jurisdiction of the court of the relevant foreign country to decide whether the Dutch administrator may exercise his powers in that country. The administrator and the debtor shall make an effort, however, to ensure that, in so far as possible, the suspension is also effective in respect of the assets abroad²⁹.

²⁹ See HR 15 april 1955, N.J. 1955, 542 m. nt. HB en Leuftink, *Surseance van betaling*, Deventer, Kluwer 1995.

On 31 May 2002, Regulation (EC) no. 1346/2000 of the Council of 29 May 2000, pertaining to insolvency procedures, will come into effect. That Regulation contains rules with regard to, for example, international jurisdiction, applicable law and the acknowledgement of insolvency procedures within the EU, with the exception of Denmark.

4.3.2.2 Critical analysis

It is sometimes argued that the strict separation of the procedure of the suspension of payments and the procedure of the bankruptcy should be cancelled. An advantage of integrating the two procedures would be that the separation of the continuity function of the suspension and the liquidation function of the bankruptcy would disappear. A so-called general “insolvency procedure” would be more in line with existing practice, since the suspension is hardly ever used for its intended purpose and the bankruptcy is often used to achieve what was originally to be achieved by means of the suspension³⁰. There is now a bill to amend the Bankruptcy Act, aimed at, among other things, amendment of the regulation of the suspension of payments in such a manner that it will again serve its original purpose, to wit continuation of the economic activities of an enterprise³¹.

§ 4.3.3 Criteria to benefit the regime

4.3.3.1 Description

According to the law, any debtor anticipating that it cannot continue to pay its due and payable debts may apply for suspension of payments. Only legal entities and private individuals with an independent professional practice or business are eligible for the suspension of payments. The court will always grant provisional suspension, without substantially reviewing the petition therefor, and will deny the

³⁰ See the report of the Onderzoekscentrum Onderneming & Recht, *De efficiëntie van de faillissementswet*, april 2000, p. 70 et seq.

³¹ TK 1999-2000, 27-244, nrs. 1-2, see Title 6.

petition only if it shows formal defects. A more substantial review takes place at the creditors' meeting where the granting of the final suspension is discussed. The court must deny the final suspension if any of the following three grounds apply:

1. if either the holders of more than one-fourth of the amount of the claims represented at the meetings or more than one-third of the holders of those claims vote against the final suspension;
2. if there is reason to fear that the debtor will attempt to prejudice the creditors during the suspension;
3. if there is no prospect of the debtor being able to satisfy the creditors.

4.3.3.2 Critical analysis

The creditors cast their vote before their claims have been allowed, so the possibility cannot be ruled out that certain persons participating in the vote actually have no claim. The court settles any disputes in this regard, and its decision is not open to appeal.

The prospect of the debtor being able to satisfy its creditors should not be interpreted as the prospect of the debtor being able to fully pay all of its creditors.

§ 4.3.4 Specification of the possible initiators of the procedure

4.3.4.1 Description

Only the debtor itself may file a petition for suspension of payments, unless the debtor is an unregistered credit institution in the sense of the Dutch Act on the Supervision of the Credit System

(*Wet toezicht kredietwezen*), in which case the Dutch Central Bank is also authorised to apply for the suspension³².

4.3.4.2 Critical analysis

It is sometimes argued that the fact that creditors are not authorised to apply for the granting of suspension of payments to their debtor puts them at a disadvantage, since it is precisely that creditors may benefit from a suspension to improve the financial position of their debtor³³. Under circumstances, creditors may press for the debtor to apply for suspension³⁴. They can do so by filing a petition for bankruptcy of the debtor, knowing that the debtor will not take the risk of a bankruptcy and will therefore apply for suspension. If a petition for bankruptcy and a petition for suspension of payments are filed simultaneously, the petition for suspension will be dealt with first and the petition for bankruptcy will be deferred.³⁵

§ 4.3.5 Administration of the procedure

4.3.5.1 Description

During the suspension, the debtor and the administrator are jointly authorised to administer and dispose of the debtor's estate. Neither can act independently and both shall seek the co-operation of the other. The creditors have voting rights both in respect of the decision on the granting of final suspension and in respect of acceptance of a scheme of arrangement proposed by the debtor. The court may appoint a bankruptcy judge who may give advice to the administrator. Lastly, the court has a decisive vote with regard to the granting of the final suspension of payments and the acceptance of the scheme of arrangement proposed by the debtor.

³² Van Buchem-Spapens, *Faillissement en surséance van betaling*, Deventer, Tjeenk-Willink 1998, p. 118; Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 15.

³³ See Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 15 and the there in note 15 mentioned literature.

³⁴ Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 15

³⁵ Polak-Wessels VIII, par. 8070.

4.3.5.2 Critical analysis

Unlike the bankruptcy trustee, the administrator in a suspension of payment procedure does not require the consent or authorisation of the bankruptcy judge for his decisions. If the court has appointed an bankruptcy judge, the administrator will have to consider the advice given by the bankruptcy judge.

§ 4.3.6 Restructuring plan

4.3.6.1 Description

The debtor may make use of the possibilities offered by the Bankruptcy Act to propose to its creditors a (compulsory) judicial scheme of arrangement. In that event, a majority of the creditors, to wit at least two-thirds of the total number of acknowledged creditors jointly representing at least three-fourths of the total amount of acknowledged claims, can bind a minority. After acceptance by the above-mentioned majority of the creditors, the scheme of arrangement still requires the approval of the court. That judicial approval is referred to as the “homologation” of the scheme of arrangement.

4.3.6.2 Critical analysis

The law provides that the scheme of arrangement is only binding on creditors in respect of which the suspension has effect. That means that the scheme of arrangement only binds the common unsecured creditors and that preferential creditors can recover their claims in full³⁶.

³⁶ See Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 281; Van Buchem-Spapens, *Faillissement en*

§ 4.3.7 The degree of protection of the actors implied in the procedure: public investors, creditors, as well as the way to carry out this protection

4.3.7.1 Description

Secured creditors, like pledgees and mortgagees are not affected by the suspension. They maintain their privileged position.

If mismanagement is established during the suspension of payments that there is question of mismanagement, the suspension shall be terminated. A request thereto may be made by the administrator, the creditors or the bankruptcy judge, if one was appointed. In addition, the court may terminate the suspension *ex officio*³⁷. If the debtor performs management acts or acts of disposition without the administrator's consent or co-operation, the administrator will be authorised to perform any act required to prevent that those acts cause damage to the estate. For the record, the estate is liable for acts performed by the debtor independently only if the estate benefited from those acts.

4.3.7.2 Critical analysis

The main protection offered to the creditors lies in the principle that the creditors have voting rights in respect of the granting of the final suspension and acceptance of the scheme of arrangement proposed by the debtor, and in the appointment of the administrator with his powers.

§ 4.3.8 Termination of the procedure

4.3.8.1 Description

The suspension may end in a number of ways. The most important are³⁸:

surséance van betaling, Deventer, Tjeenk-Willink 1998, p. 129; Polak-Wessels VIII, par.8406.

³⁷ See Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 144

³⁸ See Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 329 et seq.; Van Buchem-Spapens,

1. denial of the final granting of the suspension;
2. expiry of the term fixed by the court;
3. termination by the court at the initiative of the bankruptcy judge, the administrator or the creditors;
4. termination by the court at the request of the debtor;
5. homologation of the scheme of arrangement by the court;
6. denial of homologation of the scheme of arrangement by the court.

4.3.8.2 Critical analysis

The court's decision to terminate the suspension may be appealed, also in cassation, unless the decision was made at the debtor's request. In connection with the urgent nature of the procedure, appeals shall be brought within a term of no more than eight days.

§ 4.3.9 Degree of information on the development of the procedure towards creditors

4.3.9.1 Description

Everyone is entitled to inspect and, in most cases, receive a copy of the following documents, which are filed at the court registry, in exchange for payment:

- public reports of the administrators;
- excerpts from the court decisions (the provisional and final granting and renewal or termination of the suspension);
- the appointment of a bankruptcy judge;
- a brief summary and the homologation of the scheme of arrangement;

- the dissolution of the scheme of arrangement;
- the petition containing the application for suspension;
- the expert report;
- the draft scheme of arrangement;
- the list of the claims submitted to the administrator (no entitlement to a copy);
- the official report of the creditors' meeting dealing with the scheme of arrangement (no entitlement to a copy).

4.3.9.2 Critical analysis

The suspension is public by nature. The creditors have an interest in proper insight into the progress of the suspension. It offers them the possibility to define their position and contest claims by other creditors, and does justice to the intention of the suspension, as in the final analysis, whether or not a suspension is successful depends on the approval of the creditors.

§ 4.3.10 Costs related to the procedure

4.3.10.1 Description

The administrator receives a wage for his work that is fixed by the court; payment of that wage has priority over any other claims to be paid from the estate. The costs incurred by the administrator shall be settled directly between the administrator and the debtor.

The registrar's disbursements are charged directly to the debtor's solicitor.

Any experts appointed receive a salary fixed by the court and to be paid by the debtor.

4.3.10.2 Critical analysis

The salary of the administrator is fixed according to the Guideline for salaries of administrators and

trustees (*Richtlijn Salarissen Curatoren en Bewindvoerders*).³⁹.

§ 4.3.11 Competence, knowledge and functioning of insolvency (bankruptcy) courts

4.3.11.1 Description

The courts have separate bankruptcy sections. The judges of those sections deal with petitions for suspension of payments and act as bankruptcy judges.

4.3.11.2 Critical analysis

Since judges are often transferred to another section of the court after 2 to 3 years, the court's expertise in the field of insolvency law is left with the trustees and administrators. It is therefore argued that judges should not be transferred until after 4 to 6 years, so that the courts' expertise may increase⁴⁰. It is also proposed to concentrate the insolvency sections in five of the in total 19 Dutch courts.

§ 4.3.12 Publicity conditions

4.3.12.1 Description

When a petition for suspension of payments has been filed, the court registrar publishes the provisional granting of the suspension, the name of the bankruptcy judge, if appointed, the names and places of residence of the administrators, and the date of the creditors' meeting that is to decide on

³⁹ See Leuftink, *Surséance van betaling*, Deventer, Kluwer 1995 p. 94.

⁴⁰ Final report MDW-committee modernisering faillissementsrecht tweede fase, [http://www.ez.nl/beleid/home_ond/projmarktwerking/faillissementswet/MDW-rapport](http://www.ez.nl/beleid/home_ond/projmarktwerking/faillissementswet/MDW-rapport.pdf).pdf, p. 54

the final suspension, in the *Nederlandse Staatscourant* and in one or more newspapers to be designated by the court. The publication will also state any draft scheme of arrangement enclosed with the petition.

In addition, the administrator publishes the date by which claims shall have been submitted to the administrator, as fixed by the court, and – if no draft scheme of arrangement was enclosed with the petition – the submission of the draft scheme of arrangement, in the *Nederlandse Staatscourant* and the afore-mentioned newspapers.

4.3.12.2 Critical analysis

The newspapers to be designated by the court may be national or regional newspapers.

TITLE 5. LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

Chapter 5.1 Bankruptcy procedures

In the Netherlands, there are three different legal procedures in relation to the insolvency of (legal) persons, to wit the bankruptcy, the suspension of payments and debt restructuring of private individuals. Bankruptcy and debt restructuring will be discussed in this chapter. Suspension of payments was discussed in Title 4.

§ 5.1.1 The bankruptcy

Title I of the Dutch Bankruptcy Act deals with bankruptcy. The bankruptcy may be described as a general attachment of almost all of the debtor's property for the benefit of all of its creditors.⁴¹ In the

⁴¹ A.M.J. van Buchem-Spapens, *Faillissement en surséance van betaling*, Deventer, W.E.J. Tjeenk Willink 1998, p. 118.

Netherlands, both enterprises and private individuals may be declared bankrupt.⁴²

A declaration of bankruptcy requires⁴³ prima facie evidence of the existence of facts and circumstances evidencing that the debtor's situation is such that it has ceased to pay. An additional requirement is that there are several creditors, referred to as the so-called plurality requirement. This is not a statutory requirement but one based on case law.⁴⁴

The petition for bankruptcy may be filed by the debtor itself, by one or more creditors or by the Public Prosecutor if a public interest is involved. The petition for bankruptcy is filed with the court of the debtor's place of residence. If the debtor is a legal entity, the petition shall be filed with the court of the place where the legal entity has its registered office.

As from the date of the declaration of bankruptcy, the bankrupt loses the free disposal and administration of its property, which is subjected to a general attachment by operation of law.

Simultaneously with the declaration of bankruptcy, the court appoints a trustee. It also appoints a bankruptcy judge who will supervise the trustee's acts and the winding-up of the bankruptcy.

The trustee is charged with the administration and the winding-up of the bankrupt estate.⁴⁵ The bankruptcy ends by closing for lack of assets or a scheme of arrangement.

§ 5.1.2 Debt restructuring of private individuals

The Netherlands have had a regulation for restructuring the debts of private individuals since 1999. It is based on the Debt restructuring of private individuals act (*Wet Schuldsanering Natuurlijke Personen (WSNP)*) and is as such incorporated as an independent regulation in title III of the

⁴² N.J. Polak, *Faillissementsrecht*, Deventer, Kluwer 1999, p. 18. et seq.

⁴³ R.J. van Galen, E.W.J. Liagre Böhl en R.W. de Ruuk, *Faillissementswet*, Deventer, Kluwer 1997, Losbladige Kluwer, article 1, note 8.

⁴⁴ HR 24 juli 1995, NJ 1995, 733.

⁴⁵ F.M.J. Verstijlen, *De faillissementscurator*, Deventer, W.E.J. Tjeenk Willink 1998.

Bankruptcy Act.⁴⁶The principal objective of the regulation is to ensure that private individuals finding themselves in a financially difficult situation are not pursued for years on end by the debts they incurred. Another objective of the regulation is to ensure that fewer private individuals are declared bankrupt.⁴⁷

As stated, the regulation applies to private individuals. That includes private individuals with an own enterprise (a one-man business or general or limited partnership). Application of the regulation also requires that one of the two criteria set out in Article 284, paragraph 1, of the Bankruptcy Act, is fulfilled, *i.e.* it can reasonably be expected that the individual will be unable to continue to pay his/hers debts, or the individual has actually ceased to pay.

The private individual may file the petition himself with the Court of his place of residence. The petition shall be accompanied by a statement of income and expenditure. The petitioner shall furthermore submit a number of other documents with his petition, including a draft debt restructuring scheme. The petitioner shall also submit a reasoned statement, issued by the Municipal Executive (authorised institution) of the debtor's place of residence, evidencing that there are no feasible options to effect out-of-court debt restructuring, as well as setting out the debtor's repayment options. The latter because one of the objectives of the WSNP is to have debt restructuring effected as much as possible out of court.⁴⁸

Article 288 of the Bankruptcy Act sets out a number of mandatory and optional grounds that must or may lead to denial of the petition. The concept of "good faith" is very important in this regard. If there is good reason to fear that the debtor will attempt to prejudice his creditors during the term of the debt restructuring arrangement, or will fail to properly fulfil his obligations under the debt restructuring arrangement, the request for access to the WSNP shall be rejected.

⁴⁶ R.J. van Galen, E.W.J. Liagre Böhl and R.W. de Ruuk, *Faillissementswet*, Deventer, Kluwer 1997, Losbladige Kluwer, inleiding Titel III.

⁴⁷ N.J. Polak, *Faillissementsrecht*, Deventer, Kluwer 1999, p. 276.

Access to the WSNP may also be denied if it is plausible that the debtor did not act in good faith with regard to the occurrence or leaving unpaid of debts. The court shall review whether this criterion was fulfilled. The review shall take all circumstances into account, such as the nature and the amount of the debts and the degree to which there is question of imputable fault on the part of the debtor. Also to be taken into account is the number of times that debts were incurred and attempts were made to repay those debts.

The “good faith” criterion is applied to prevent abuse of the debt restructuring arrangement and to ensure that only debtors acting in good faith are eligible for a fresh debtfree starticle

The debt restructuring arrangement usually comes into effect rapidly, as petitions therefor are quickly dealt with. The court appoints an bankruptcy judge and an administrator. The regulation may initially be applied “only” provisionally, for example because the petitioner is unable to submit all documents to the court or because the court deems it desirable that the administrator (or an expert) conduct a further investigation into whether the good-faith requirement was fulfilled.

If a person is given access to the procedure, he or she will be rid of his/her debts after three years. That term may be extended or reduced for special reasons. The court may extend the three-year term by at most five years. A term of at most five years may be justified, for example, if there is a special situation and there is question of a natural person as entrepreneur and the amount of the debts and/or the repayment capability give reason therefor. The assets generated during the three-year term, minus a minimum amount for cost of living, are used to pay the creditors in proportion to their claims. Any remaining debt of the debtor is, so to speak, “discharged” upon expiry of the aforementioned term: the debtors can no longer claim the remaining amount from the debtor, who therefore gets a “fresh start”.

If the person given access fails to fulfil certain conditions, such as the obligation not to incur any new

⁴⁸ N.J. Polak, *Faillissementsrecht*, Deventer, Kluwer 1999, p. 278. et seq.

debts, the debt restructuring arrangement may cease to apply to him and he may still be declared bankrupt (Article 350, paragraph 3, of the Bankruptcy Act), after which a fresh start will no longer be attainable.

A decision to prematurely terminate is also based on a review of the “good faith” requirement. If the WSNP ends normally, there is a final hearing to decide whether or not the debtor will be granted a fresh start, whereby it is assessed whether the debtor acted in good faith during the term of the debt restructuring arrangement.

Chapter 5.2 Legal effects of the initiation of bankruptcy procedures

We will discuss a number of consequences of a bankruptcy in Chapter 5.3. The most relevant legal effects of the bankruptcy are laid down in the Bankruptcy Act⁴⁹ and pertain to:

- a. the bankrupt’s assets;
- b. the bankrupt’s powers of administration and disposition;
- c. any legal claims by or against the bankrupt;
- d. any ongoing executions against the bankrupt;
- e. any mutual agreements in effect at the time of the declaration of bankruptcy;
- f. the trustee’s power to annul legal acts performed prior to the bankruptcy;
- g. the third party paying to the debtor after the bankruptcy but prior to publication thereof;
- h. the creditor wishing to set off a debt to the debtor against his claim against the debtor after the declaration of bankruptcy;
- i. existing security rights;
- j. the spouse or registered partner if there was any community property between him or her and the bankrupt.

A number of other legal effects relating to the bankruptcy are regulated outside of the framework of

⁴⁹ See B. Wessels, *Gevolgen van faillietverklaring* (1), deel II, Kluwer 2000, p. 1.

the Bankruptcy Act and are set out in the Dutch Civil Code⁵⁰:

- a. the ineligibility for suspension or dismissal from certain positions under the law of persons, such as the positions of guardian or administrator, or the restrictions on the exercise of professions such as the suspension of an estate agent, an attorney, a civil-law notary, or the placing on non-active service of members of the judiciary;
- b. the end of a power of attorney;
- c. the ineligibility for appointment to the position of executor;
- d. the impossibility of invocation of a time clause by the debtor⁵¹.

In this paragraph, we will discuss relevant effects of a petition for bankruptcy.

The final report of the MDW committee Modernisation of Bankruptcy Law, Second Phase (*Modernisering Faillissementsrecht Tweede Fase*)⁵² rightly notes: *“Bankruptcy and suspension are often petitioned for at a time when there is no (longer any) prospect of recovery or payment to the creditors. Otherwise, the concept of timeliness remains problematic, as in our society’s economic life the mere petitioning for an insolvency procedure (further) endangers the continuity of the enterprise. In other cases, sounding the alarm continues to cause a creditors’ race and usually the end of the enterprise; cheerfully “muddling on”, however, may cause irreparable damage to the creditors. The problem is in the grey area between entrepreneurship (overcoming problems inherent in an enterprise on the basis of courage, personal commitment and the willingness to take risks) and irresponsibly “muddling on” at the creditors’ expense (without them being aware of the actual situation and therefore unable to take measures (in a timely manner)). The critical factor is the entrepreneur’s assessment of his chances to overcome his problems. Experience shows that*

⁵⁰ B. Wessels, *Gevolgen van faillietverklaring* (1), deel II, Kluwer 2000, p. 2-3.

⁵¹ See for a number of effects of a bankruptcy on the special agreements regulated in book 7 of the Dutch Civil Code and Book 8 of the Dutch Civil Code and on a number of unspecified agreements: B. Wessels, *Gevolgen van faillietverklaring* (1), deel II, Kluwer 2000, § 2576 et seq.

⁵² Oktober 2001, www.ez.nl/beleid/home-ond/projmarktbewerking/faillissementswet/home-htm, hereafter referred to as: MDW-report.

*entrepreneurs are often too optimistic about the prospects of recovery”.*⁵³

In the context of the discussion about improvement of the timing of the application for insolvency procedures and the setting up of early-warning systems, the MDW committee pointed at existing disclosure and information obligations and, particularly, at the scope and frequency of and the manner in which legal entities (the public and private limited liability company in particular) provide or shall provide information. As a result of those information obligations, which may be statutory or contractual, certain parties are (may be) cognisant of (imminent) financial difficulties and the possibility of a petition for bankruptcy before the general public is⁵⁴.

Within the framework of a petition for bankruptcy, the following (information) obligations of managing directors and enterprises, some of which were referred to by the MDW committee, are relevant⁵⁵:

Administrative obligation and obligation to prepare annual accounts.

Article 2:10 of the Dutch Civil Code obliges every legal entity to keep accounts. It is an administrative obligation. In addition, every legal entity must annually publish its annual accounts⁵⁶. The annual accounts and the auditor’s report shall evidence whether valuations are on a going concern basis. If that is no longer justified, valuations shall no longer be effected on that basis. This must be clear from the annual accounts. If the board fails to initiate a downward revaluation, the accountant shall state his deviating opinion in his report. In both cases, third parties taking cognisance thereof can take action. In this regard, the MDW committee draws attention to the following⁵⁷: *“The disclosure obligation, however, is only annual, enterprises may be released from the obligation to prepare annual accounts, the figures are, by definition, historical, and the continuity assessment is still primarily an assessment of the board, while the accountant*

⁵³ See MDW-report, p. 31-32.

⁵⁴ See MDW-report, p. 33.

⁵⁵ Vergelijk MDW-report, pag. 33 et seq.

⁵⁶ See article 2:394 jo. 392/393 of the Dutch Civil Code.

⁵⁷ See p. 33 of the MDW-report.

usually is insufficiently equipped to review that assessment other than marginally”.

Additional rules for exchange listed companies.

Under Article 28h of the Listing Rules (*Fondsenreglement*), listed companies are not only subject to the afore-mentioned obligation to prepare annual accounts, but shall also submit interim reports on their financial affairs and make public statements about important developments, such as a poor financial performance or the filing for bankruptcy. Listed companies also often are the subject of ratings, which are published and give an indication of the company’s financial state⁵⁸.

Obligation to report to the tax authorities,(social insurance board (Lisv) and industrial pension fund.

The enterprise is obliged to report any failure to pay taxes and/or social security contributions to the tax authorities and the Lisv. That reporting obligation is complied with reasonably well, also on account of the penalty on failure to comply, to wit liability of the managing directors (see § 5.5 below).

Contractual information obligation towards the bank.

Credit institutions or other financiers granting a credit usually impose a contractual obligation on the borrower to provide interim information. Credit institutions also have the option of monitoring the borrower’s financial state, as they have insight into the flow of incoming and outgoing payments. A debtor running into financial difficulties will usually be subjected to a special credit monitoring regime. The principal banker obviously plays an important role in the preparation of a petition for bankruptcy. The borrower will often be compelled to discuss the decision to file for bankruptcy with its principal banker and largely comply with the latter’s opinion in that regard.

High ranking of the tax authorities.

As banks often have a security right (pledge) on, for example, the debtor’s machinery and

⁵⁸ See MDW-report, p. 34.

equipment, and in the light of the higher ranking of the tax authorities, a bank will, prior to the bankruptcy, proceed to removing the relevant movable goods from the debtor/tax subject's premises or apply a so-called land lease construction, thereby (practically) barring the borrower from continuing its business activities⁵⁹.

Liability of the managing directors.

The liability of the company's managing directors in the event of a bankruptcy will be discussed in § 5.5. The filing for bankruptcy obviously casts its shadow. In the so-called twilight zone preceding the bankruptcy, the managing directors are by no means entirely free with regard to policy issues and therefore not entirely free to decide whether or not to conclude agreements or pay creditors or decide which creditors to pay.

Apart from the fact that certain of the legal entity's managing directors' acts performed prior to the bankruptcy, during the twilight zone, may be relevant to the question of what action the trustee may take towards them (see § 5.5 below), the afore-mentioned acts of the managing directors are also relevant to the question of what action creditors of the subsequently bankrupt company/entrepreneur may take towards the managing directors. Under Dutch law, the creditors are, under circumstances, entitled to institute an action on account of unlawful act towards the managing directors (Article 6:162 of the Dutch Civil Code):

1. The managing director may, for example, be liable towards the creditor of a subsequently bankrupt company if at the time of the conclusion of the agreement the managing director knew or should have known that the company would not be capable of performing the agreement concerned (within a reasonable term) and it was to be expected that the company would also have insufficient assets from which the creditor's claim could be recovered⁶⁰.
2. Selective payment to creditors is not always allowed in a pre-bankruptcy situation. The

⁵⁹ See S.C.J.J. Kortmann, Fiscaal privilege, bodemrecht en bodemvoorrecht: recht of onrecht?, in: Faillissement en fiscus, Deventer 2001, p. 75 et seq. alsmede N.J. Polak bewerkt door C.E. Polak, Faillissementsrecht inclusief de schuldsaneringsregeling natuurlijke personen, Kluwer, Deventer, 1999, p. 130-131.

Supreme Court ruled as follows⁶¹: “*Coral substantiated its claim by adducing, among other things: (a) that the proceeds of the shares transferred by Forsythe were only used to pay an intercompany claim, (b) that Forsythe deliberately subordinated Coral, its creditor, to other creditors on the basis of subjective criteria, (c) that Stalt (addition: the parent company) was actively involved in the course of affairs at Forsythe and had a hand in the discontinuation of Forsythe’s business activities, (d) that Stalt effected that all of Forsythe’s commercial creditors, with the exception of Coral, were fully paid, (e) that Forsythe’s remaining assets after payment to those commercial creditors were used to pay the claims of sister companies as much as possible and (f) that when paying those commercial creditors and sister companies, Forsythe’s board of managing directors knew, at any rate should have known, that there would be nothing left to pay Coral’s claims. If it is established that Coral’s arguments (a) through (f), with regard to which the Court of Appeal gave no ruling, are correct, the only possible conclusion is that, by subordinating Coral’s claim, Forsythe acted unlawfully towards Coral and that, by encouraging or permitting Forsythe’s course of action, Stalt in its turn acted unlawfully towards Coral.*”

With regard to a company belonging to a group of companies, such as Forsythe, the Supreme Court thus refuses to accept the rule that such a company, having decided to terminate its activities and not having sufficient assets to pay all of its creditors, is, in principle, free to pay the creditors belonging to its group with priority over creditors not belonging to its group, other than on the basis of priority grounds under the law. In the situation described above, the company concerned does not act contrary to generally accepted rules of unwritten law only if the preferential treatment of the creditors belonging to the group is justifiable on the basis of special circumstances, to be adduced by the company and to be proven by it if contested⁶².

⁶⁰ See HR 6 oktober 1989, NJ 1990, 286 and recently Rechtbank Rotterdam 22 maart 2001, JOR 2001, 126.

⁶¹ HR 12 juni 1998, NJ 1998, 727.

⁶² See regarding selective payment also Court of Zwolle 21 March 2001, JOR 2001, 173: Personal liability of managing directors and quasi managing directors in respect of non-performance of an agreement by the company, as well as court of Utrecht 23 May 2001, JOR 2001, 166: In principle, a debtor may itself determine which of its

In the afore-mentioned situations, it is obviously important what date is fixed as reference date, being the time at which the managing directors may be deemed liable in the situations referred to under 1 and 2 above. Reference is made here to a recent judgment of the Supreme Court⁶³. The case involved a contracting company (the subsidiary) belonging to a group of companies that went bankrupt. A number of subcontractors and suppliers instituted a claim against the contracting company's parent company as well as the parent company's only shareholder/managing director. The action was based on unlawful act, as a result of which the creditors concerned had not been paid their contractual claims against the subsidiary.

The Court of Appeal fixed 1 July 1984 as the reference date on which the parent company should have acknowledged that the subsidiary did not have sufficient assets from which the creditors' claims could be recovered. The Court of Appeal ruled that the parent company should have concerned itself with the creditors' interests as of that date and should have taken various measures, such as issuing a warning (or having a warning issued) to the creditors or filing (or having filed) for suspension of payments. According to the Court of Appeal, the parent company's managing director was also personally liable for the debts that had arisen after 1 July 1984, because as from that date he had been guilty of unlawful act towards the creditors, as - although apparently actively involved in the serious financial difficulties of the subsidiary - he failed to personally intervene to prevent creditors from actually granting credits after 1 July 1984, although he knew or should have known that it was unlikely that those creditors would ever be paid. With regard to the fixing of the afore-mentioned reference date, the Supreme Court considered as follows:

creditors it will pay. The company has not acted unlawfully in this case by paying all of its creditors with the exception of the plaintiff. The company's managing directors also did not act unlawfully. Lastly, see also court of Rotterdam 4 October 2001, JOR 2001, 257: in this case, an unlawful act of the managing directors was assumed towards the company's creditor: as from the time that they shall seriously consider the possibility that the company will not be able to pay its debts (in a timely manner), managing directors may not have their own claims against the company paid with priority over the claims of other creditors with the same preference. As from the said time, managing directors shall pay creditors with the same preference to the same extent from the available means of the company.

⁶³ HR 21 december 2001, RvdW 2002, 6.

“..... briefly stated, the Court considered as follows: in cases such as these, and also the one under consideration, there is a series of events that should lead the parties involved to become aware of the fact that their course of action is not or is no longer permitted. In connection with the claim lodged, it is inevitable that a point in time is fixed as from which the course of action is to be characterised as unlawful. As the fixing of that point in time is to some extent arbitrary, the court will select a date on the safe side, also because the reproach pertains to acts contrary to the standard of due care, therefore inevitably to the advantage of the party against which the reproach is directed. The criterion applied by the Court of Appeal to fix a reference date such as the one under consideration does not display an incorrect conception of law ”.

Actio pauliana.

Articles 42-51 of the Bankruptcy Act set out in which cases goods withdrawn from the estate prior to the bankruptcy date still fall under the bankruptcy⁶⁴. As already stated above, pursuant to Article 6:162 of the Dutch Civil Code, the debtor (subsequently bankrupt) is not at liberty under all circumstances to decide which creditors it will pay and/or what agreements it will conclude, certainly not when a petition for bankruptcy has been filed. In principle, the trustee may, for the benefit of the estate, annul any voluntary acts of the debtor performed prior to the declaration of bankruptcy while it was cognisant or should have been cognisant of the fact that those acts would prejudice the creditors. That which was withdrawn from the estate by the annulled legal act returns to the estate, subject to the conditions and restrictions stipulated by the law⁶⁵.

Examples of voluntary acts are: provision of security in respect of another, non-payable debt incurred in the past, whereby no provision of security was stipulated at the time, transfer of ownership of goods or claims belonging to the debtor as payment of a monetary debt, whether or

⁶⁴ N.J. Polak - C.E. Polak, *Faillissementsrecht inclusief de schuldsaneringsregeling natuurlijke personen*, Kluwer, Deventer, 1999, p. 92.

⁶⁵ N.J. Polak - C.E. Polak, *Faillissementsrecht inclusief de schuldsaneringsregeling natuurlijke personen*, Kluwer,

not due and payable, that was incurred in the past, sale and purchase and subsequent transfer of goods and claims belonging to the debtor by way of set off against a claim against the debtor-seller. Repayment of a non-payable loan without prior mutual consultation also constitutes a voluntary act⁶⁶.

Payment of an due and payable debt by the subsequently bankrupt party is an obligatory legal act, which can therefore, in principle, not be annulled as an *actio pauliana* pursuant to Article 42 of the Bankruptcy Act. There are two exceptions to that rule, both to be found in Article 47 of the Bankruptcy Act. If the trustee proves:

- a. that the party receiving the payment knew that the debtor's bankruptcy had already been filed for, or
- b. that the payment was the result of consultations between the debtor and the creditor, aimed at favouring the latter by that payment at the expense of the other creditors, annulment is still possible⁶⁷.

All in all, the conclusion must be that the above obligations resting on the company/legal entity or its managing directors constitute both legal and factual restrictions on the freedom of that company to conclude new agreements or pay certain creditors, once it has decided to file or has filed for bankruptcy. That means that it may not be permitted under the above-mentioned circumstances to make new investments or issue or sell shares of the company, and that still performing such acts may lead to liability of the managing directors (*cf.* § 5.5 below).

Chapter 5.3. Legal effects of bankruptcy as such

Above, we discussed the consequences of the filing for bankruptcy.

A discussion and evaluation of the consequences of a bankruptcy declared by the court for the

Deventer, 1999, p. 94.

⁶⁶ N.J. Polak - C.E. Polak, *Faillissementsrecht inclusief de schuldsaneringsregeling natuurlijke personen*, Kluwer, Deventer, 1999, p. 97

⁶⁷ N.J. Polak - C.E. Polak, *Faillissementsrecht inclusief de schuldsaneringsregeling natuurlijke personen*, Kluwer, Deventer, 1999, p. 101.

possibility or impossibility to restart shall distinguish between the situation in which a restart with (maintenance of) the bankrupt legal entity was intended, and the situation in which the previously involved managing directors and/or shareholders aim for a restart in a new legal setting.

Restart with maintenance of the entity.

In practice, the first situation will not frequently occur, as it requires either full payment of the creditors or a composition proposed by or on behalf of the bankrupt legal entity that is accepted by the creditors concerned and approved (confirmed) by the court.⁶⁸ In most cases, a bankruptcy ends for lack of assets or a very limited payment to the (preferential) creditors, after which (a portion of) the indebtedness remains.⁶⁹ The managing directors and shareholders (broader: financiers) involved in a bankruptcy hardly ever feel called upon to finance a scheme of arrangement, as that will usually not be profitable. In addition, they previously proved to be unwilling or unable to finance/rescue the legal entity. As regards the bankruptcy of a legal entity, the Bankruptcy Act does not contain remittance provisions to facilitate a restart of the bankrupt legal entity.

The restart after a bankruptcy will be extensively discussed from another perspective hereinafter.

Bankruptcy of a private individual and WSNP.

The bankruptcy of a private individual, whether or not an entrepreneur, may also lead to a debt-free restart only if either the bankrupt person is able to repay his debts – aided by third parties – or reaches an agreement with his creditors on the basis of a scheme of arrangement to be approved by the court. As it turned out in the past that only very few bankrupt private individuals succeeded therein, meaning that most of them continued to be indebted to and hounded for life by their creditors after termination of the bankruptcy, the legislator started looking for a procedure that would give such persons the chance of a real, debt-free restart: the Wet Schuldsanering Natuurlijke Personen (WSNP) (*Debt restructuring of private individuals act*).⁷⁰

An indebted private individual may compulsorily – pursuant to a pending bankruptcy procedure - or

⁶⁸ Article 138 et seq. Fw.

⁶⁹ Par. 5.4 of this report.

⁷⁰ R.J. Verschoof, *Schuldsaneringsregeling voor natuurlijke personen*, NIBE 1998, p. 9-21, and B. Wessels,

voluntarily opt for access to that regulation, which finally leads to a fresh start and hence remittance of the old debts, provided that various obligations are properly fulfilled during the said three-year term. Just like a bankruptcy, the WSNP is intended to liquidate the assets and – in principle – only offers the possibility of a temporary continuation of the enterprise by the debtor if such is required to allow for a transfer of the enterprise to a third party “going concern” in a manner that, on balance, is beneficial to the estate.⁷¹ The debtor can only restart its enterprise on the basis of the WSNP in the case of a very rapidly-effected scheme of arrangement. A third party will then have to offer sufficient guarantees for the event that the scheme of arrangement and the restart turn out to be impracticable. In the event of the sale of an enterprise to a third party on the basis of the WSNP, the WSNP offers (im)possibilities similar to the bankruptcy.

Restart after bankruptcy.

After a bankruptcy, the possibilities to restart an enterprise lie much more in the afore-mentioned second situation, whereby the parties previously involved in the bankrupt legal entity make a new start in a new legal setting. A bankruptcy and the related legal consequences under the law offer possibilities for rather than obstacles to the restart method referred to here. But improvement and simplification are obviously possible.⁷²

Simultaneously with the declaration of bankruptcy, the legal entity loses the administration and disposal of its assets, which the trustee must perform. The bankrupt legal entity’s capital position is fixed, any (pre-judgment) attachments lapse and are included in the general bankruptcy attachment and executions initiated are discontinued. In addition, legal proceedings are suspended and all creditors involved – both preferential and common – shall submit their claims to the trustee for approval. In combination with the possibility of a one-month cooling-off period (moratorium) ordered by the court or the bankruptcy judge, which may be extended by at most one month, a bankruptcy may effect the temporary freezing of the debtor’s assets and an opportunity to review the

Schuldsaneringsregeling natuurlijke personen, deel IX, Kluwer 1999, p.1-20.

⁷¹ Article 311 of the Bankruptcy Act only provides for the possibility of a temporary continuation.

⁷² See par. 6.1. of this report. In there the relevant bills will be discussed.

possibility of a restart –“going concern”.⁷³

Downsizing of the enterprise (employees' aspect).

In the Netherlands, bankruptcy is often used to downsize the enterprise, at a time when there are insufficient financial means to reorganise in a normal manner, whereby superfluous personnel must be made redundant on the basis of a very costly social plan.⁷⁴ An out-of-court reorganisation as well as a reorganisation within the legal framework of the suspension of payments are not quite suitable for a successful and affordable reorganisation of enterprises in financial difficulties. Particularly the employees' aspect constitutes a major obstacle to a restart/transfer of the enterprise, in the sense that the employees with all their rights and the related obligations pass with the enterprise to the restarting/acquiring legal entity. That is why a bankruptcy and an intended transfer of assets are often actually prepared, and a restart can be completed soon after the bankruptcy and the trustee's intervention. This is referred to as a technical bankruptcy. The superfluous personnel is left in the bankrupt enterprise and the employees required can be employed on new employment conditions, without the protected rights built up by them.⁷⁵ It also frequently occurs that an interested party awaits the bankruptcy of the enterprise in difficulty before actually taking any initiative and purchasing the assets desired (“the best bits”).

A transfer/restart on the basis of the suspension of payments is often effected in the same manner. As soon as a transaction of assets is feasible, the suspension of payments is terminated, while a bankruptcy is simultaneously declared, after which the asset transaction may be effected under the conditions desired.

Naturally, a bankruptcy is often not deliberately sought, but simply inevitable; but also in those cases, the above offers the possibility to restart the enterprise.

⁷³ B. Wessels, *Gevolgen van de faillietverklaring* (1), deel II, Kluwer 2000, N.J. Polak - C.E. Polak, *Faillissementsrecht inclusief de schuldsaneringsregeling natuurlijke personen*, Kluwer 1999.

⁷⁴ A.M. Luttmer-Kat (red.), *Werknemers en insolventie van de werkgever; is de balans in evenwicht?*, *Insolad Jaarboek* 1999, Kluwer 2000.

⁷⁵ See in this regard also par. 6.1, where bill 27 469 is discussed, which is intended to protect employees against

The cooling-off period.

Except with regard to the employees' aspect, the cooling-off period plays an important role in effecting a restart of a bankrupt enterprise.⁷⁶ In principle, the cooling-off period has effect in respect of all creditors and third parties, including the so-called secured creditors (mortgagees and pledgees) who attempt to realise their security in respect of the assets under the control of the bankrupt legal entity, or claim their – alleged – properties/securities. In that manner, a situation is created during the hectic early stages of a bankruptcy, in which the trustee can form a picture of the size of the estate and the rights of all of the parties involved. An additional effect of the cooling-off period is that the trustee can still sell the enterprise as a whole to a party intending to make a restart, which makes it possible to realise higher proceeds, although such sale is obviously subject to observing/honouring in some way any third-party rights.

Obstacles to a successful restart.

One obstacle to a temporary continuation of the enterprise after a bankruptcy and realisation of a restart is the absence of a possibility to obligate creditors (suppliers) in a monopoly position, so-called compulsory creditors, to continue supplies for a certain period of time. The creditors concerned (often utility companies) are often only willing to continue supplies if their claim is fully or substantially repaid prior to the bankruptcy date. To date, the Supreme Court has been unwilling to impose an obligation to continue supplies (to enterprises) on compulsory creditors, as there is no statutory ground for such order.⁷⁷ The WSNP only contains an obligation to continue supplies to private individuals in so far as such supplies must be deemed part of the so-called necessities of life.⁷⁸ The financing of the temporary continuation of the enterprises constitutes another obstacle to a successful restart. In this regard, it could be considered to impose a temporary obligation to

abuse of the bankruptcy procedure/application.

⁷⁶ The cooling-off period within the framework of bankruptcy is regulated in Article 63a of the Bankruptcy Act. See in this regard B. Wessels, *Gevolgen van faillietverklaring* (1), deel II, Kluwer 2000, p. 338-360. Bill 27 244 proposes an extension of the cooling-off period; see about this bill par. 6.1, as well as S.C.J.J. Kortmann, N.E.D. Faber, R.G.J. Nowak and P.M. Veder, *WPNR* 2001/6463, p. 897 et seq.

⁷⁷ HR 16 oktober 1998, NJ 1998, 896 and HR 20 maart 1981, NJ 1981, 640.

⁷⁸ See article 304 Fw, about the delivery of gas, water, electricity or heat.

continue financing on previously involved bankers/financiers.⁷⁹ There is, however, no statutory ground for such a far-reaching measure.

Legislation is currently being prepared, however, that may include a (partial) solution to the aforementioned obstacles. Reference is made to Chapter 6 of this report.

A new enterprise.

It also frequently happens that the parties involved in a bankrupt enterprise do not opt for a restart of the bankrupt enterprise but for a new start without any relation to the bankrupt enterprise in which they were involved. There are actually no statutory obstacles to prevent the afore-mentioned persons (managing directors, managers and shareholders of the bankrupt company) from opting for such a new start, other than the possibly negative consequences of the obligatory publication⁸⁰ of the bankruptcy and the requirement of a “declaration of no objection” issued by the Ministry of Justice with regard to the incorporation of a new private limited liability company. Obtaining that declaration will often be problematic only if the incorporators/managing directors of a new private limited liability company were involved in fraudulent businesses/bankruptcies in the past and/or leave behind a trail of bankruptcies.⁸¹

After its incorporation, the new legal entity will hardly be burdened by the past of its incorporators/managing directors, as it is a new independent legal entity. It is conceivable, however, that contacts (former business relations) will be more careful and cautious and require (additional) securities and guarantees from the persons involved in the new entity.

A new start of a private individual.

If a private individual goes bankrupt and is not debt-free after the bankruptcy, that person will find it difficult to obtain financing or create confidence with institutions/customers/suppliers, etcetera. There are no statutory obstacles to the desired new start, other than a permitted –negative – registration

⁷⁹ F.M.J. Verstijlen, De aangekondigde doorleverings- en doorfinancieringsverplichting, NJB 1998, p. 1678-1681 en J.W. Winter, Afkoelen, doorleveren en doorfinancieren naar huidig, komend en wenselijk (Nederlands) recht, TvI 1998, p. 91-100.

⁸⁰ Article 14 Fw.

⁸¹ Par. 5.4 en par. 5.5.

with the Credit Registration Bureau (*Bureau Krediet Registratie or BKR*), but also no facilities to facilitate such a new starticle By contrast, the WSNP does lead to a facilitated new start, as that Act regulates that the former debtor should no longer be hindered by his former burden of debt⁸²; nevertheless, institutions/persons involved may be reluctant to commit themselves, for example in the event of a credit application.

Fraud/not in good faith.

Fraudsters will obviously be confronted with additional obstacles if they attempt to start anew. If their fraudulent acts led to an intervention under criminal law⁸³, a restart will be more difficult, if only on account of the criminal record of the person concerned (bankrupt or managing director). A court may, for example, order discontinuation of all or part of a company’s activities for a maximum period of one year.⁸⁴ A private individual in danger of going bankrupt has no chance of being admitted to the WSNP, and thus obtain a fresh start, if he did not act in good faith.⁸⁵

Schematically:

Incentives:	Obstacles:
Cooling-off period	Compulsory creditors
Employees left behind	Publication
Lapsed attachments	Registration with the Credit Registration Bureau
Suspension of executions	Estate financing lacking
Fresh start (only under the WSNP)	Declaration of no objection

⁸² After all, this is the underlying philosophy of the clean slate to be realised by the debt *restructuring* arrangement, laid down in Article 358 paragraph 1 of the Bankruptcy Act.

⁸³ See for example culpable/fraudulent bankruptcy (Articles 340-344 Penal Code), with as additional consequences dismissal from certain positions and publication of the court judgment (Article 349 Penal Code). See in this regard, inter alia. C.M. Hilverda e.a., *Faillissementsfraude in de praktijk*, *Praktijkreeks insolventierecht*, Kluwer, 2001 and C.M. Hilverda, *Bedrieglijke bankbreuk*, Zwolle, 1992.

⁸⁴ See article 7 en article 8 van de Wet op de Economische Delicten.

Chapter 5.4 “Excusability” following bankruptcy

Above, we discussed the former debtor becoming debt-free after the debt restructuring. The situation is different in the event of a bankruptcy. The bankruptcy is discontinued due to lack of assets and a part of the debts remains. This is often accompanied by a bankruptcy of the estate, to wit if the debts of the estate, *e.g.* debts directly based on a legal relationship that arose as a result of or after the declaration of bankruptcy, exceed the assets present in the estate.

If the bankrupt builds up new assets in the future, creditors may again come knocking at his door, for example, by attachment or by again filing for bankruptcy. If a bankruptcy is filed for within three years of the previous bankruptcy, the petitioning creditor is obligated to prove that there are new assets from which the costs of the bankruptcy may be recovered, Article 18 of the Bankruptcy Act.

The bankrupt may also propose a scheme of arrangement. The scheme of arrangement could be referred to as the agreement between the bankrupt and its creditors, setting out how the creditors are to be paid.⁸⁶

If the creditors and the court approve the scheme of arrangement, the creditors have granted the debtor discharge in respect of the remaining amount. However, such remittance of debts does not prejudice the creditors’ rights towards co-creditors and third parties. In the light of that limited effect, it is assumed that the remaining claims continue to exist as natural obligations. Natural obligations are obligations that cannot be legally enforced.⁸⁷ The same applies to remaining debts within the framework of the debt restructuring.⁸⁸

A debtor may propose a scheme of arrangement to its creditors both within and outside the framework of a bankruptcy. Outside of the framework of a bankruptcy, all creditors shall agree with

⁸⁵ See par. 5.1.

⁸⁶ A.M.J. van Buchem-Spapens, *Faillissement en surséance van betaling*, Deventer, W.E.J. Tjeenk Willink 1998, p. 106 et seq.

⁸⁷ Asser-Hartkamp Deel I *Verbintenissenrecht*, 11e dr. Deventer, W.E.J. Tjeenk Willink 2000, nr. 57.

⁸⁸ N.J. Polak, *Faillissementsrecht*, Deventer, Kluwer 1999, p. 328. et seq.

the scheme of arrangement. In principle, they may refuse the scheme of arrangement. Creditors refusing the scheme of arrangement retain their full claims. The scheme of arrangement proposed within the framework of a bankruptcy procedure shall be accepted by two-thirds of the acknowledged unsecured common creditors representing three-fourths of the amount of the acknowledged claims. As the scheme of arrangement is compulsory, it is subject to the approval of the court. The court will refuse approval of the proposed scheme of arrangement if the assets of the estate substantially exceed the amount stipulated under the scheme of arrangement, compliance is insufficiently guaranteed or the scheme of arrangement was made through dishonest means. The court may refuse its approval ex officio on still other grounds.

A party that was involved in the bankruptcy of an enterprise will often want to set up a new enterprise later on. There are hardly any statutory obstacles thereto in the Netherlands. But the fact that a party has been bankrupt may affect the possibility to obtain a “declaration of no objection”, see Article 2:68 of the Dutch Civil Code. Such a declaration, issued by the Ministry of Justice, is required for the incorporation of a new private limited liability company. The declaration is intended to prevent unlawful use of the new company.⁹⁰ The declaration serves as a kind of sieve.

Pursuant to paragraph 1 of the 1968 Guidelines for the assessment of incorporations and amendments of Articles of Association of public and private limited liability companies (Richtlijnen 1986 voor het beoordelen van oprichtingen en statutenwijzigingen van n.v.’s en b.v.’s), the declaration of no objection is denied if there is reasonable doubt with regard to the reliability or integrity of the policy-making individuals in the company. Such doubt exists, if the policy-making individuals turn out to have been involved in a bankruptcy or suspension of payments in the past. The declaration shall not be denied if that is apparently unreasonable. For information about the causes of the bankruptcy, the Ministry of Justice may consult, for example, the trustees of the companies that went bankrupt in the past.

⁸⁹ R.J. van Galen, E.W.J. Liagre Böhl en R.W. de Ruuk (red.), *Faillissementswet*, Deventer, Kluwer 1997, Losbladige Kluwer, article 153, aantekening 1 t/m 4.

⁹⁰ W.C.L. van der Grinten, *Handboek voor de naamloze vennootschap en de besloten vennootschap*, Zwolle:

If debts remain after the winding up of the bankruptcy of a private individual, problems may arise for the bankrupt. For example, he will have to regain the confidence of financiers. The bankrupt will be registered with the Credit Registration Bureau. That bureau keeps a central register of all credit obligations undertaken by consumers in the last five years.⁹¹

The debt restructuring arrangement results in a “fresh start”. After three years, the debtor is without debts. The act stipulates that the former debtor shall no longer be hindered by his former debts. However, it cannot be avoided that such persons sometimes have a negative reputation.

Chapter 5.5 Responsibility of the Company’s management in case of bankruptcy of a limited liability company

In the event of a bankruptcy of a company, the trustee or a creditor may hold the company’s managing director personally liable on various grounds. The principal grounds will be explained below, to wit Article 2:138/248 of the Dutch Civil Code, Managing Directors’ Liability Act (*Wet Bestuurdersaansprakelijkheid*), Article 6:162 and Article 2:9 of the Dutch Civil Code.

Article 2:138/248 of the Dutch Civil Code stipulates that if a company goes bankrupt, each managing director is jointly and severally liable towards the estate for the amount of the debts, to the extent that those debts cannot be paid from the other assets, if the board of managing directors apparently failed to properly perform its duties properly and it is plausible that their failure substantially contributed to the bankruptcy.⁹² The claim may be instituted by the trustee if there is question of improper performance of duties during the three years preceding the bankruptcy.⁹³ In the event of failure to fulfil the obligation to keep accounts (Article 2:10 of the Dutch Civil Code) or publish annual accounts (2:394 of the Dutch Civil Code), it is suspected that improper performance

W.E.J. Tjeenk Willink 1992, nr 151 et seq.

⁹¹ www.bkr.nl (geraadpleegd 6-2-2002).

⁹² See J.B. Wezeman, *Aansprakelijkheid van bestuurders*, Kluwer 1998, p. 275 et seq.; H. de Groot, *Bestuurdersaansprakelijkheid*, Kluwer 1997, p. 57 et seq.

⁹³ If the bankruptcy was preceded by a suspension of payments, the assessment period begins sooner, to wit

of duties was an important cause of the bankruptcy. A minor default in that regard will be ignored. Managing directors who can prove that they are not to blame for the improper performance of duties by the board of managing directors and that they have not been negligent with regard to the taking of measures to prevent adverse consequences of such improper performance, will not be held liable.

For the purpose of these articles, a person who determined the policy of the company, independently or jointly with others, is put on a par with a managing director. The court may reduce the amount for which the managing directors are liable. If the estate is insufficient to institute a legal claim pursuant to these articles (or Article 2:9 of the Dutch Civil Code) or to initiate a preliminary investigation into the possibilities thereto, the trustee may request the Ministry of Justice to provide the required financial means by way of an advance, such with the approval of the bankruptcy judge.⁹⁴

A number of examples of improper performance of duties may be derived from the legislative history of the act, such as: acts contrary to the corporate objective or the corporate interest, providing disproportionately large securities to banks in order to obtain credits, assuming debts in the name of the company without properly considering whether the company would be able to repay those debts or even while knowing that the company would not be able to repay those debts, neglecting credit monitoring, taking decisions with major financial implications without due preparation, insufficiently ascertaining the creditworthiness of contracting partners to which supplies are made on credit, not collecting claims in a timely manner or not hedging against clearly foreseeable risks in a timely manner.⁹⁵

The Managing Directors' Liability Act furthermore sets out the grounds on which certain creditors – to wit tax authorities, the social insurance board and industrial pension funds participation in which is obligatory – may hold the managing directors of a company jointly and severally liable for any outstanding wage tax, turnover tax, social security contributions or compulsory contributions to

three years before the granting of the suspension of payments (Article 249 of the Bankruptcy Act).

⁹⁴ See the “Besluit Garantstellingsregeling curatoren”; Stcrt. 1993, 76 (d.d. 21 april 1993) and C.W.M. Slegers, De Garantstellingsregeling curatoren geëvalueerd”, TvI 2001, p. 90 et seq.

industrial pension funds that were payable by the bankrupt company.⁹⁶ At the heart of the regulation is the notification obligation; as soon as it has become apparent that the company will be unable to pay the afore-mentioned obligations, it shall notify same to the relevant creditor without delay and upon request, provide further information and submit documents. If the notification obligation is fulfilled in a timely manner, the managing directors will be liable only if it is plausible that the failure to pay is due to apparently improper management during the three-year period preceding the report.

If the inability to pay is not reported (in a timely manner), the managing director will be jointly and severally liable for payment of the debt, whereby the presumed evidence is that he is to blame for the failure to pay and the three-year period is deemed to have started at the time when the company was in default. The managing director shall make it plausible that he is not to blame for the company's failure to fulfil its payment obligations. Again, anyone determining the policy of the company, independently or jointly with others, is put on a par with a managing director. The regulation under the Managing Directors' Liability Act runs parallel with the claim of the trustee under Article 2:138/248 of the Dutch Civil Code. Co-ordination of the claims of the trustee and the creditor is therefore required.⁹⁷

A company's managing director may also be sued by the trustee⁹⁸ or a creditor for unlawful act (Article 6:162 of the Dutch Civil Code). An individual creditor may also enforce a claim against a managing director during the bankruptcy of the company; the interest of a proper winding-up of the bankruptcy may entail, however, that if the trustee enforces a claim against the managing director for unlawful act on the basis of the same facts, a decision is taken on the trustee's claim first and on the individual creditor's claim thereafter.⁹⁹ There are several types of claims for unlawful act.¹⁰⁰

⁹⁵ J.B. Wezeman, p. 285 et seq.

⁹⁶ Article 36 Inv. Wet 1990, 16d Coördinatiewet Sociale Verzekeringen and 23 Wet betreffende verplichte deelname aan een bedrijfstakpensioenfonds 2000. See J.B. Wezeman, p. 129 et seq.; H. de Groot, p. 29 et seq.

⁹⁷ Leidraad Invordering 1990, paragraaf 1, 3e lid.

⁹⁸ See HR 14 januari 1983, *NJ* 1983, 597; HR 8 november 1991, *NJ* 1992, 174; HR 23 december 1994, *NJ* 1996, 627-628 en HR 15 september 1995, *NJ* 1996, 629.

⁹⁹ HR 21 december 2001, RvdW 2002, 7.

¹⁰⁰ See also par. 5.2 en voorts: P. van Schilfgaarde, *Van de BV en de NV*, Gouda Quint 1998, p. 156-157; J.B. Wezeman, p. 103 et seq.; H. de Groot, p. 26 et seq.

In the Beklamel decision¹⁰¹ the Supreme Court ruled that a managing director is liable towards a creditor if he undertakes an obligation on behalf of the company while he knew or should have known that the company would not be able to fulfil that obligation.

A managing director/shareholder with full control may also be personally liable if the negligence of the company is due to unwillingness to pay.¹⁰² A managing director may also be liable if he made payments prior to the bankruptcy without observing the statutory applicable order of priority of the creditors.¹⁰³ Liability may also be assumed in the event of involvement in transactions that are disadvantageous to the company, against which a creditor or the trustee may institute an “Actio Pauliana”¹⁰⁴.¹⁰⁵

In addition, Article 2:9 of the Dutch Civil Code (internal liability) stipulates that a managing director is obligated to properly perform the duties assigned to him towards the legal person; if the case concerned pertains to the duties of two or more managing directors, each of them will be fully liable for the failure, with the exception of the managing directors who is not to blame for the failure and was not negligent with regard to the taking of measures to prevent consequences thereof.¹⁰⁶ A managing director may be liable under Article 2:9 of the Dutch Civil Code if he is seriously at fault.¹⁰⁷ Improper performance of management duties is deemed to have occurred only if no reasonably acting managing director would have acted similarly under the circumstances. Whether that applies will have to be assessed in each case on the basis of the circumstances of the case.

The Supreme Court ruled that the following should be considered: the nature of the activities carried out by the legal entity, the risks usually related thereto, the division of tasks within the board of

¹⁰¹ HR 6 oktober 1989, *NJ* 1990, 286.

¹⁰² HR 3 april 1992, *NJ* 1992, 411.

¹⁰³ See F.M.J. Verstijlen, *De aansprakelijkheid voor de selectieve voldoening van schuldeisers*, WPNR 1999, p. 301-308.

¹⁰⁴ Article 3:45 BW and article 42 tot en met 51 Faillissementswet.

¹⁰⁵ See daaromtrent paragraaf 5.2.

¹⁰⁶ See J.B. Wezeman, p. 65 et seq.; H. de Groot, p. 5 et seq.

managing directors, any instructions applicable to the board of managing directors, the information that the managing directors had or should have had at the time of the decisions or conduct attributed to them and the insight and care of a competent managing director conscientiously performing his duties.¹⁰⁸ Examples of an improper performance of duties include: withdrawing assets from the legal entity (including “corporate opportunities”), competing with the company, taking irresponsibly high financial risks, and taking decisions with major financial implications without due preparation.

For the purpose of the afore-mentioned regulations, it applies that if the managing director is a legal person, both the legal person and its managing directors are jointly and severally liable (Article 2:11 of the Dutch Civil Code).

For the sake of completeness it is pointed out that in the event of damage to the creditors or entitled parties, the managing director of a bankrupt company may always be sued under criminal law, and not just under civil law.¹⁰⁹

In principle, the law attaches no consequences to the bankruptcy of the company for the (former) managing directors’ position. But a managing director may be confronted with difficulties when incorporating a new company, which requires obtaining a declaration of no objection issued by the Ministry of Justice.¹¹⁰ That declaration may be denied if, in the light of the intentions or antecedents of the persons who will determine the company’s policy, independently or jointly with others, there is a risk that the company will be used for unlawful purposes or its activity will prejudice its creditors. A successful claim of the trustee or a creditor against a managing director in response to a company’s bankruptcy may indicate that the afore-mentioned grounds for denial apply. Otherwise, there seem to be no statutory obstacles preventing a (former) managing director of a bankrupt company from incorporating a new company or holding a position elsewhere.¹¹¹

¹⁰⁷ HR 6 januari 1997, *NJ* 1997, 360.

¹⁰⁸ *Idem*.

¹⁰⁹ Boek II, Titel XXVI Wetboek van Strafrecht.

¹¹⁰ Report INSOL INTERNATIONAL, *Directors in the Twilight Zone*, 2001, p. 336.

¹¹¹ The report “Efficiëntie van de faillissementswet” (S.C.J.J. Kortmann & N.E.D. Faber, april 2001, p. 58-59) refers

TITLE 6. PROSPECTS AND RECOMMENDATIONS

§ 6.1 Law proposals

In his letter of 23 February 2001, the Minister of Justice explained his legislative programme in the field of private law for the years to come¹¹². With regard to bankruptcy law, the Minister states “..... *it has not been brought into line with to new developments in the field of economy and finance and changed views on the equilibrium between creditors and debtors for too many years. I am under the impression that same is due to over-ambitious proposals to fundamentally review bankruptcy law*”. The Minister’s policy is to submit bills that are limited in scope, such because he wishes to “..... *soon achieve results with regard to a number of acknowledged bottlenecks*”.

The following bills are relevant in this regard:

Bill 27 244 (enhancing the effectiveness of suspension of payments and bankruptcy)

On 24 March 1999, the Ministers of Economic Affairs and Justice sent a letter to the Chairman of the Lower House about the market mechanism, deregulation and the legislative quality (*Marktwerking, Deregulering en Wetgevingskwaliteit (MDW)*)¹¹³. The letter advocates, among other things, modernisation of the Bankruptcy Act. Within the framework of the MDW project “*Modernisation of the Bankruptcy Act*”, an interdepartmental committee chaired by Prof. Raaijmakers investigated whether it would be possible to reinforce the restructuring capacity of the Bankruptcy Act and more particularly of the regulation pertaining to the suspension of payments¹¹⁴.

to an investigation into the position of the management of an enterprise restructured by means of a bankruptcy; it turned out that in 43% of the cases the “old” management held positions in the “new” enterprise; in 42% of the cases the “old” acquired shareholdings in the “new” enterprise.

¹¹² Kamerstukken II 2000/01 27 400 VI, nr. 54.

¹¹³ TK 1998-1999, 24 036, nr. 126.

¹¹⁴ See the final report of this committee (oktober 2001, <http://www.ez.nl/beleid/home-ond/projmarktwerking/faillissementswet/info.htm>, hereinafter referred to as the: “MDW-rapport”).

Under the responsibility of the Minister of Justice and on the basis of a quick scan carried out by the MDW committee, bill 27 244, pertaining to “*Amendment of the Bankruptcy Act in connection with the enhancement of the effectiveness of the suspension of payments and the bankruptcy*”, was submitted to the Lower House on 22 July 2000. On 22 November 2000, the Lower House adopted the report with regard to the bill. The criticism expressed in the report was to a large extent derived from the literature¹¹⁵

The principal amendments of the Bankruptcy Act contained in bill 27 244 may be summarised as follows¹¹⁶:

- the court grants suspension of payments after a brief review of the petition; there must be prima facie evidence that the debtor will be unable to continue payment of its due and payable debts; the debtor will have to submit a statement evidencing that it will be possible for it to wholly or partially continue the enterprise it operated and will have to submit a draft debt restructuring arrangement to the court; in principle, the statement and the draft restructuring plan shall be submitted jointly with the petition for suspension of payments; if any information is lacking in the petition or the documents to be submitted with the petition, the court may grant the provisional suspension of payments for a maximum term of 28 days, and shall grant the debtor a maximum term of 21 days to provide the lacking information;
- the number of grounds on which a final suspension of payments must be denied is increased;
- the suspension of payments will also have effect in respect of preferential claims: only claims covered by a pledge, mortgage or right of retention will not fall under the suspension;
- the cooling-off period regulation applicable to bankruptcy and suspension of payments is worked out; the maximum term of the cooling-off period is set at 4 months; the trustee or the debtor and the administrator are authorised, subject to certain conditions, to use, consume and alienate goods falling under the scope of the cooling-off period;

¹¹⁵ See N.E.D. Faber en R.G.J. Nowak, *Wijzigingen Faillissementswet: broddelwerk*, 150 kanttekeningen bij wetsvoorstel 27 244 (www.insolad.nl and www.njb.nl). See the critical remarks about the herefore mentioned bill of S.C.J. Kortmann, *TVI-special*, januari 2000, p. 31 et seq and Van Hees, *TVI* 2000, p. 153 et seq. and en B. Wessels, *NBBW* 2000, p. 134 et seq. See also Faber and Nowak, *NJB* 2001, p. 76 et seq.

¹¹⁶ S.C.J.J. Kortmann, N.E.D. Faber, R.G.J. Nowak en P.M. Veler, *WPNR* 2001/6463, p. 897 et seq.

- the administrator is authorised to give instructions to the debtor;
- the number of votes required to accept a scheme of arrangement in a bankruptcy and suspension of payments is changed to increase the likelihood of acceptance of a scheme of arrangement;
- under circumstances, the bankruptcy judge may impose a scheme of arrangement on creditors and debtor;
- the energy supplier shall not discontinue supplies in order to enforce payment of a claim that arose prior to the granting of the suspension or the bankruptcy, if the energy concerned is required for continued operation of the debtor's enterprise;
- a central public register will be created in which all data on bankruptcies, granted suspensions of payments and debt restructurings in court registers is brought together.

The MDW committee advised to separate the regulation pertaining to the right of use or consumption of, briefly stated, goods during the cooling-off period and transfer it for further consideration to the second stage of the revision of bankruptcy legislation. The committee then assumes that the government energetically proceeds with the treatment of the thus adjusted proposal, in spite of the criticism expressed in relation thereto, as the MDW committee considers the proposal to be an essential component of the programme proposed by the MDW committee in its advice¹¹⁷.

The position of the Council of Ministers evidences¹¹⁸ that the Government will adopt nearly all of the MDW committee's recommendations. The Council of Ministers' position includes a reconsideration of the currently very high ranking of the tax authorities as a preferred creditor in bankruptcies. To date, the tax authorities' means of recovery are often dodged through all types of legal constructions and a threatening insolvency leads to a creditors' race to dismantle the business. Decision-making on the cancellation of the tax authorities' preferential rights is deferred until completion by the Central Planning Bureau (CPB) of an analysis of the economic and budgetary effects of the measures proposed. The Ministry of Justice will set up an advisory committee to assist in the execution of the

¹¹⁷ The MDW-report, p. 22.

legislative programme.

Main issues in the intended legislative programme are:

- structure and principles of the Bankruptcy Act: clarification of objectives and the role of the various parties involved in the insolvency procedure and of the timing and content of the application;
- revision of the system of preferential rights;
- continued supplies and financing;
- provisions of the scheme of arrangement;
- technical improvements: procedural bankruptcy law, regulation of the cooling-off period, estate debts and procedures with a large number of creditors;
- professionalisation of the judiciary and trustees or administrators;
- liability issues, information obligation and combatting fraud;
- reduction of formal requirements.

As regards bill 27 244, the Council of Ministers resolved to cancel the right of use and consume and related entitlement to compensation. The relevant memorandum of amendments will be submitted at the beginning of 2002¹¹⁹.

Bill 27 199 (simplified winding-up of bankruptcies)

This bill was submitted to the Lower House on 21 June 2000¹²⁰. The content of the bill may be summarised as follows¹²¹: point of departure of the Bankruptcy Act is that the trustee will not settle the estate's debts until after it has become insolvent. That stage is reached if no agreement is reached at the creditors' meeting. Subsequently, assets are realised and distributed. There are two exceptions: first, the bankruptcy judge may order cancellation of the bankruptcy if the state of the estate gives cause thereto; second, the trustee may alienate goods from the estate because they may

¹¹⁸ www.ez.nl/beleid/home-ond/projmarktwerking/faillissementswet/home.htm

¹¹⁹ See R.J. van Galen, *Ondernemingsrecht* 2001, p. 167-168 en *Ondernemingsrecht* 2002, p. 34.

¹²⁰ Kamerstukken II 1999/2000, 27 199.

be kept only to the detriment of the estate. The bill under consideration pertains to the first exception, which, contrary to what was likely the legislature's original intent, has become very common, as in many cases the estate is insufficient to wholly or partially pay the claims of the tax authorities and the insurance boards, both high-ranking preferential claims.

In practice, the bankruptcy is terminated in such cases as soon as the trustee has paid the estate debts and transferred the balance of the available assets to pay tax liabilities and social security contributions. In such a case, continuation of the bankruptcy has become useless, because there is nothing left to distribute among the common unsecured creditors.

Bill 27 199 is intended to enact what has become common practice, not to obstruct or even cancel this type of winding-up, but rather to make it more transparent and provide a legal basis therefor. The following procedure is proposed: after realising the estate, the trustee prepares a list of distributions and submits it to the bankruptcy judge for approval. After approval by the bankruptcy judge, it is filed at the court registry, open to objection for a limited period of time. Upon expiry of that period, the distribution is made. Under circumstances, however, claims may be allowed and settled in the normal manner¹²².

Bill 22 942 (priority of claims)

The afore-mentioned bill was submitted in November 1992¹²³. The bill is intended to regulate two issues¹²⁴:

- a. amendments in connection with the priority of claims (preferential claims) and the granting of a special right of recovery to certain claims, particularly to the Dutch Civil Code, the Bankruptcy Act and the Debt Collection Act (*Invorderingswet*), and
- b. amendments in connection with the introduction of the possibility of a more simple winding-up

¹²¹ See the final report of the MDW-committee oktober 2001, p. 23-24.

¹²² See the extensive exposition of B. Wessels about this bill, TVI 2001/4, p. 110-111.

¹²³ Kamerstukken II 1992/93, 22 942.

of a bankruptcy, particularly to the Bankruptcy Act.

In 1994, discussion of this bill was discontinued. In his letter of 23 February 2001, the Minister of Justice notes the following with regard to the afore-mentioned bill¹²⁵: *“An example of such an ambitious proposal , particularly because it will be difficult to anticipate the consequences of replacement of the right of seizure by the tax authorities by a special right of recovery for the tax authorities”*.

Bill 27 469 (provisions to prevent abuse of bankruptcy procedures)

The afore-mentioned bill was submitted on 26 October 2000 and serves to implement Directive 98/50 EC of the Council of the European Union of 28 June 1998 to amend Directive 77/187 EC regarding mutual co-ordination of the legislation of the member states with regard to the retention of employees' rights in the event of a transition of an enterprise, in branches or parts of the enterprise or branches. The bill has meanwhile been submitted to the Senate¹²⁶.

§ 6.2 Critics and Recommendations

As regards the proposals to amend the Bankruptcy Act, we will restrict ourselves to amendments that we believe are necessary to (better) facilitate a successful restart of an enterprise.¹²⁷

¹²⁴ B. Wessels, TVI 2001/4, p. 110.

¹²⁵ Kamerstukken II 2000/01, 27 400 VI, nr. 54.

¹²⁶ Explanatory Memorandum dated 10 December 2001, Kamerstuk 2001-2002, 27469, nr. 163. See extensively about the afore-mentioned bill inter alia B. Wessels, TVI 2001/4, p. 111 as well as Berens, TVI 2001, p. 7 et seq.. The Guideline should have been implemented by 17 July 2001. See about the afore-mentioned bill also the report of the MDW committee, p. 25: *“The guideline furthermore expressly stipulates that this employee protection does not apply to a transition within the framework of a liquidation procedure of the alienator, unless member states provide otherwise. It is furthermore intended to prevent abuse by rules against evasion of the protection under labour law. Member states shall take measures to prevent that bankruptcies are used to evade employee protection. The Netherlands have already implemented that by providing that the “penalty” on abuse of the petition for bankruptcy is application of the employment protection applicable outside of the bankruptcy: see the proposal for Article 13a of the Bankruptcy Act. The legislative has opted for offering this anti-abuse protection also in cases of a transition of the enterprise. As a result, the employee has the possibility to opt for compensation or nullity of the termination of the employment contract; the latter is relevant in connection with the possibility to obtain an unemployment benefit”*.

¹²⁷ S.C.J.J. Kortmann, N.E.D. Faber e.a., rapportage inzake onderzoek naar de efficiëntie van de faillissementswet,

We agree with the following proposal of Prof. Kortmann *et al* with regard to amendment of the Bankruptcy Act¹²⁸:

1. enterprises shall be obliged to take action in a timely manner. That obligation may substantially increase the chances of rescuing an enterprise in financial difficulties. The Bankruptcy Act shall therefore impose on the debtor the obligation to petition for an insolvency procedure if it can reasonably foresee that it will no longer be able to pay its debts. With regard to debtors that have reasonable doubt with regard to the question of whether or not they will be able to continue paying their debts, the act shall stipulate the obligation to consult with an external accountant;
2. the various tasks imposed by the Bankruptcy Act on various judicial institutions shall be assigned to specialised insolvency sections of a restricted number of courts (and courts of appeal), rather than charging all courts and courts of appeal with issues under insolvency law. The duties of the bankruptcy judge shall be performed by judges specialised in insolvency issues;
3. the regulation of the cooling-off period during bankruptcy and suspension of payments shall be adjusted and worked out. The existing regulation is incomplete and gives rise to much uncertainty. The regulation of the cooling-off period contained in bill 27 244 is also insufficiently clear and will give rise to new questions and problems. Criticism is aimed particularly at the manner in which the rights of creditors and interested third parties are guaranteed in the event that the trustee (or the debtor and the administrator) are authorised to use, consume or alienate goods in respect of which creditors and interested third parties intend to exercise their rights, but that are affected by the cooling-off period. In addition , there is insufficient reason to include goods other than those required for the continuation of the debtor's enterprise in the cooling-off period;

Onderzoekscentrum Onderneming & Recht, Instituut voor Insolventierecht, Faculteit der Rechtsgeleerdheid Katholieke Universiteit Nijmegen, april 2001, met name p. 68 et seq. and the MDW-report oktober 2001, p. 28 et seq.

4. the number of preferential rights shall be reduced (further): the Bankruptcy Act shall be adjusted in that regard. The principle of equality of creditors shall be restored. Articles 21 and 22 of the Debt Collection Act, in which the preferential right of seizure and the right of seizure by the tax authorities are laid down shall be cancelled. The tax authorities' current strong position is insufficiently justified. Cancellation of the preferential right of seizure and the right of seizure and further reduction of the number of preferential rights will also lead to a substantial reduction of the number of complications related to the winding-up of a debtor's insolvency (and the number of procedures to be instituted);
5. under current law, a supplier may make continued supplies subject to the condition of payment of the debts of the debtor that arose prior to the bankruptcy. That constitutes an infringement of the principle of equality of creditors. We believe that there is insufficient justification for such an infringement. We do believe, however, that the supplier should be allowed to make new deliveries subject to payment of those deliveries. But there is no justification why those new deliveries should be made dependent on payment of old debts. Bill 27 244 annuls the actual priority of the utility company approved by the Supreme Court, to the extent that the supply of gas, water, electricity and/or heating are required for the continuation of the enterprise conducted by the debtor. Suspension of the deliveries or dissolution of the agreement for failure to pay old debts is excluded in the bill. The proposal also sets restrictions on clauses pursuant to which the dissolution of the agreement is linked to the insolvency of the debtor. We believe that the regulation proposed in bill 27 244 requires textual and substantial amendments, however.¹²⁹ The proposed regulation, currently only pertaining to utility companies, shall furthermore be expanded to include suppliers in general;
6. a major reason behind the lack of success of the current regulation of the scheme of arrangement within the framework of bankruptcy and suspension is the fact that the scheme of arrangement is

¹²⁸ S.C.J.J. Kortmann, N.E.D. Faber, R.G.J. Nowak en P.M. Veder, WPNR 01/6463, p. 900 et seq.

only binding on common unsecured creditors. We believe that there is insufficient ground for such a restriction. A regulation of the scheme of arrangement shall obviously take into account the difference between common unsecured creditors and preferential creditors, in the sense that the percentage to be spent on preferential creditors shall exceed the percentage to be spent on common unsecured creditors. But there is insufficient reason to keep preferential creditors completely out of the scheme of arrangement;

7. an insolvency procedure shall contain a new regulation with regard to the scheme of arrangement. The provisions pertaining to the scheme of arrangement within the framework of the debt restructuring arrangement for private individuals could serve as a model. Common unsecured creditors and preferential creditors shall each vote in separate groups on the scheme of arrangement proposed. Acceptance of the scheme of arrangement shall require a simple majority of (the amount of) the preferential creditors and a simple majority of (the amount of) the common unsecured creditors. The bankruptcy judge may be granted authorisation, under circumstances, to adopt a proposed scheme of arrangement as if it had been accepted. The proposals to amend the regulation of the scheme of arrangement as set out in bill 27 244 are not enough. The scheme of arrangement thus unjustly continues to be restricted to common unsecured creditors.

¹²⁹ Zie S.C.J.J. Kortmann e.a., p. 903.

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