International Corporate Rescue

ChaseCambria
SOUTH SQUARE
Centre for Commercial Law
UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2014 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
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International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

A Response to the Financial Crisis: Recalibration of Bankruptcy Law

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1. Introduction

The current Dutch Bankruptcy Code (*Faillissementswet)* entered into force in 1896 and replaced the provision regarding bankruptcy in the Code of Commerce of 1838.[2] Over the years the Dutch Bankruptcy Code has undergone some changes, but it has fundamentally remained the same.[3]

The last few years, however, there have been calls for change. These calls primarily focus on increasing the availability of corporate rescue mechanisms.[4] The Dutch Secretary for Safety and Justice has taken an interest in these calls and by letter of November 26, 2012 has announced the legislative program 'Recalibration of Bankruptcy Law'.[5] At the same time the European Commission calls for a new approach to business failure and insolvency in its recent non-binding Recommendation.[6] As such, the overall tendency in bankruptcy reform in light of the financial crisis is towards more of a rescue culture.

This article gives an overview of both current Dutch bankruptcy law and the legislative program as announced by the Secretary. Some attention is also devoted to the recently presented non-binding Recommendation of the European Commission.

2. The current Dutch Bankruptcy Code

2.1 Bankruptcy

The Dutch Bankruptcy Code provides for three separate procedures: i) bankruptcy (*faillissement*), ii) suspension of payments (*surseance van betaling*) and; iii) Debt Restructuring Natural Persons.[7]

2.1.1 Bankruptcy: liquidation

The rules regarding a bankruptcy procedure are laid down in Section 1 through 213 DBC.[8] The procedure starts with the filing of petition at the relevant District Court.[9] A debtor will be declared bankrupt if he no longer pay his debts. This entails – in case of an involuntary bankruptcy – that there at least two claims that remain unpaid, of which at least one is due and payable.[10] After the debtor has been declared bankrupt by the court, a trustee (*curator*) will be appointed.[11] The task of the trustee is administering the estate.[12] The directors no longer have the authority to act on behalf of the debtor and will have to follow instructions from the trustee.[13] The duty of the trustee is to maximise the value of the estate for the benefit of the joint creditors.

Notes

1 PhD Candidate at the University of Groningen, the Netherlands. The author wishes to thank Rolef de Weijs for his comments on an earlier version of this paper.

2 I used the word 'bankruptcy' in this article in both a broad way – law that has to do with an insolvent debtor – as well as in a more narrow way – to denote the procedure known as *faillissement*. The meaning of the word should hereafter be derived from the context in which it is used.

3 The most notable changes were the introduction of the suspension of payments procedure in 1933 and the Debt Restructuring Natural Persons in 1998. See hereafter § 2.2 and 2.3. In 2007 the Insolvency Law Committee presented the Predesign Insolvency Law. This predesign offered a complete draft for a bill. The Dutch Minister has by letter of January 7, 2011, however, stated that he has no plans for a complete overhaul of the Dutch Bankruptcy Code.

4 See for example: N.W.A. Tollenaar, 'Faillissementsrechters van Nederland: geef ons de pre-pack!' (2011) *TvI* 23.

5 Parliamentary Documents 2012-2013, 29 2911, no. 74.

6 C (2014) 1500 final. Available at: <ec.europa.eu/justice/newsroom/civil/news/140312_en.htm>.

7 The Debt Restructuring Natural Persons is not available for corporate debtors and will not be discussed any further in this article, with the exception of Section 287a in § 3.3 hereafter.

8 There are separate procedures for banks (Section 212g et seq. DBC) and insurance companies (Section 213 et seq.). These procedures will not be discussed in this article.

9 According to Section 1 DBC the petition can be filed either voluntarily or involuntarily.

10 Groene Serie Faillissementswet, Section 1 DBC, Comment 1.

11 Section 14 DBC.

12 Section 68 DBC.

13 As such, the figure of the debtor-in-possession is unknown in the Netherlands. The directors will, however, formally remain directors.

However, he does sometimes have to take into account societal interests.[14]

The trustee is supervised by the Supervisory Judge and needs approval from this judge for most acts of administration.[15] There is no obligation to appoint a creditor committee, although the law provides for the possibility of installing one.[16]

Upon the declaration of bankruptcy an automatic stay enters into force.[17] This automatic stay is of a more limited character than the automatic stay of 11 U.S.C. § 362. For example, creditors with a right of mortgage or right of pledge can use their right of summary execution and enforce their claims as if there was no bankruptcy.[18] Such enforcement can only be stayed if a cooling-off period is promulgated by the Supervisory Judge.[19]

The idea of a *faillissement* is that the trustee liquidates the estate. This entails that – like a Chapter 7 procedure – the trustee will sell all assets of the debtor, either piecemeal or going-concern, and the proceeds are distributed among the creditors.

The leading principle for the distribution of proceeds among creditors in bankruptcy is the *paritas creditorum* principle. *Paritas creditorum* roughly translates to 'equality of creditors' and holds that every creditor has an equal right to proportional payment. It is laid down in § 3:276 and 3:277 Dutch Civil Code (DCC). The principle of equality creditors, however, is the exception rather than the rule. Dutch law includes a number of statutes that provide for preference for a certain creditor over another.[20] Examples of such preferences are the claims of employees and the taxing authorities.

2.1.2 Bankruptcy: reorganisation

The default method of administering the estate in bankruptcy, is liquidation of the assets and distributing the proceeds among the creditors. The debtor can, however, propose a reorganisation plan.[21] This reorganisation plan, however, is not very popular. In 168 of 8,719 bankruptcies that ended, ended by confirmation of a reorganisation plan.[22] Important limitations in this respect are that only the debtor – and not the trustee or creditors – can offer a reorganisation plan and that shareholders and creditors with a right of preference are not bound by it.[23] An important difference with the United States is that the Dutch Bankruptcy Code does not provide for an absolute priority rule under a reorganisation plan.[24]

If a debtor proposes a reorganisation plan, there is no requirement for him to file a disclosure statement. The trustee, however, – and the creditor committee if one is appointed – has an obligation to provide the creditors with a written advise regarding the proposed reorganisation plan.[25]

After the reorganisation plan is proposed, creditors get to vote on the plan. A proposed plan is accepted if more than half of the acknowledged and conditionally acknowledged ordinary creditors that are present at the meeting of creditors, representing at least half of the total amount of ordinary claims, approve.[26] Dutch statutory law does not provide for the possibility to categorise creditors in classes, although reorganisation plans that contain such classification of creditors are not unknown.

If the voting requirements are not met, the Supervisory Judge can cram-down the proposed plan. In order to be able to do so, it is required that three fourths of the acknowledged and conditionally acknowledged creditors present at the meeting of creditors have approved of the proposed plan and the rejection of the plan is the consequence of 'unreasonable voting behavior'.[27]

If the proposed plan is approved by the creditors or crammed down, the District Court will hold a

Notes

14 See: HR 24 February 1995, *NJ* 1996, 472 (*Sigmacon II*), HR 19 April 1996, *NJ* 1996, 727 (*Maclou en Prouvost*) and HR 19 December 2003, *NJ* 2004, 293 (*Mobell*).
15 Section 64 DBC. Dutch law rarely requires notice of certain events to creditors. This is especially true for requests the trustee makes for approval of the Supervisory Judge.
16 Section 74 and 75 DBC. A creditor committee can consist of a maximum of three members.
17 Section 26 DBC.
18 Section 57 DBC.
19 Section 63a DBC. This period lasts for two months and can be extended once for two more months.
20 Section 3:277 (1) DCC states that preference of a creditor can only follow from the law.
21 Section 138 DBC.
22 See: <statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=37463&D1=18,21&D2=0&D3=20-30&HDR=G1,G2&STB=T&VW=T>. 2011 is the most recent year for which numbers are available.
23 Section 138 and 157 DBC. Because they are not bound creditors with a right of preference and shareholders are also not allowed to vote on the proposed plan. I note that shareholders are often not eligible to vote on a proposed plan in the U.S. either. However, this is because they do not receive or retain any interest in the debtor under the plan and are, thus, presumed to reject it. See: 11 USC § 1126 (g).
24 See about the absolute priority rule in the context of Dutch bankruptcies: J.M. Hummelen, 'Efficient bankruptcy law in the U.S. and the Netherlands. Establishing an assessment framework', (2014) 2 EJCLG (forthcoming).
25 Section 140 DBC. The law does not provide what requirements should be met for this advise.
26 Under Dutch law the vote takes place at the meeting of creditors that directly follows the claims admission meeting (*verificatievergadering*). A reorganisation plan cannot be proposed after the claims admission meeting has ended.
27 Section 146 DBC.

confirmation meeting. The Dutch Bankruptcy Code contains four provisions that provide for an imperative ground for refusal of confirmation and one discretionary ground.[28] One imperative provision states that confirmation has to be refused if the execution of the reorganisation plan is not safeguarded sufficiently.[29]

After the plan is confirmed the reorganisation plan is binding on all creditors with a right to vote, even if creditors have not voted or have not submitted their claims for admission.

2.2 Suspension of payments

The procedure for suspension of payments is set out in Section 214 through 283 DBC.[30] Suspension of payments is meant as a temporary solution for an acute liquidity problem. It provides the debtor with a suspension of the obligation to perform payments, although preferential claims – such as those of a secured creditor – are not affected.[31]

A suspension of payments can be obtained after a request for such a procedure is filed at the relevant District Court and is meant for situations in which a debtor foresees that he will no longer be able to his due and payable debts.[32] A request can only be filed by the debtor. Immediately after the application the Court will grant a provisional suspension of payments and the Court will appoint one or more administrators.[33]

After the provisional suspension of payments is granted, the creditors will be given notice of the suspension of payments and a date for a hearing will be set.[34] At the hearing the Court may grant a definitive suspension of payments, unless creditors present at the hearing representing at least one fourth of the amount of outstanding claims or one third of the creditors present objects to this.[35] A request for a definitive suspension of payments cannot be granted if there is sufficient fear that the debtor will prejudice creditors or if no prospect exists that the creditors will be paid in due course.[36] The definitive suspension of payments is granted for a set amount of time. The suspension may be extended, but may last no longer than a total of eighteen months.[37]

Contrary to the bankruptcy procedure, the debtor does not lose the power to dispose of his assets. However, his powers are limited, as he is only allowed to act jointly with the administrator.[38]

During the suspension of payments, the debtor cannot be forced to pay his debts to unsecured creditors and commenced executions will be stayed.[39] Debts that are affected by the suspension of payments can only be paid pro rata to all creditors.[40] Earlier attachments with respect to assets of the debtor will no longer have effect.[41] However, *inter alia* creditors with a preferred claim are not affected by the suspension of payments and can execute their rights, although a cooling-off period can be promulgated for a maximum of four months.[42]

Over the years, the suspension of payments procedure has not succeeded in effectively preventing bankruptcy and is not very popular. It is often called 'the gateway to bankruptcy'.[43] In 1997, the most recent year for which numbers are available, 432

Notes

28 Section 153 DBC.
29 Section153(2)(2) DBC. This rule can roughly be compared to the American feasibility test.
30 The debtor can – like in bankruptcy – offer a reorganisation plan to its creditors during the suspension of payments. The rules for such a plan are materially the same as the rules that apply in a bankruptcy procedure. The Dutch Bankruptcy Code contains specific provisions, called the Brandaris-regeling, in case there are more than 10 000 creditors. In such a case there are also specific provisions for the adoption of a reorganisation plan. For this arrangement see sections 281a-281f DBC. However, since its entry into force in 1962 this procedure has only been used once.
31 Section 230 DBC.
32 Section 214 DBC. According to section 214(4) DBC, the procedure of suspension of payments cannot be applied to: i) an individual which is not a corporate debtor; ii) a finance company as mentioned in section 212g (1a) DBC; or iii) an insurance company as mentioned in section 213 DBC.
33 Section 215(2) DBC. The appointment of a Supervisory Judge is optional. Section 223a DBC.
34 Section 215(2) DBC.
35 Section 218(2) DBC.
36 Section 218(4) DBC . After a rejection of the application for suspension of payments, the court can of its ex officio declare the debtor bankrupt, according to Section 218(5) DBC.
37 Section 223 DBC.
38 Section 228(1) DBC. In practice, the administrator will take control over the debtor and its operations.
39 Section 230(1) DBC. The possibility of legal proceedings is, however, not stayed. Section 231 DBC.
40 Section 233 DBC. This can bes een as a consequence of the principle of *paritas creditorum*. See: Tekst & Commentaar Insolventierecht, Section 233 DBC.
41 Section 230(3) DBC.
42 See Section 232 DBC for a list of claims that are not affected. Secured claims are affected in so far as the creditor is undersecured. Section 241a DBC provides for the possibility of a cooling-off period.
43 See, for example: Polak, *Insolventierecht* (Kluwer, Deventer, 2011) p. 325; and E.R. Looyen, *Surseance van betaling* (Praktijkboek Insolventierecht; deel 8) (Kluwer, Deventer, 2010), p. 11.

requests for suspension of payments were filed and 326 suspension of payments ended in bankruptcy.[44] The reasons for this are generally considered to be: i) the fact that the suspension of payments does not affect secured claims; ii) often no proper plan of reorganisation is submitted when the suspension is requested; iii) due to the stigma of insolvency, suppliers only want to deliver in exchange for immediate payment[45] and; iv) the normal rules regarding employment contracts and the dismissal of employees apply.[46]

3. The legislative program 'Recalibration of Bankruptcy Law'

3.1 The legislative program

By letter of November 26, 2012 the Secretary for Safety and Justice launched the legislative program 'Recalibration of Bankruptcy Law'. The Secretary stated that he does not find if desirable if current restrictions of the statutory framework lead to a bankruptcy if this such a bankruptcy is unnecessary and preventable. This in light of both the social and economic consequences for the debtor, its employees and the creditors and the fact that this can lead to incorporation of businesses elsewhere in the European Union.[47]

In light of the goals of the Secretary the legislative program is based on three pillars: i) strengthening the possibilities for corporate restructuring, ii) modernisation of the bankruptcy procedure and; iii) tackling bankruptcy fraud.

The first pillar – strengthening the possibilities for corporate restructuring – consists of three proposals. The first proposal (§ 3.2) aims to facilitate pre-packaged asset sale; the second (§ 3.3) introduces a pre-bankruptcy reorganisation plan and the third (§ 3.4) contains miscellaneous provisions regarding bankruptcy procedure.

It is unknown when a draft bill regarding the second pillar will be published, but this will likely be somewhere in the coming months. It can be derived, however, from the letter of the Secretary that this draft bill will likely contain *inter alia* elimination of a need to hold a physical claims admission meeting, ii) more flexibility with regard to creditor committees and iii) the introduction of a bar date for the submission of claims.[48]

The third pillar – tackling bankruptcy fraud – consists of three separate bills. The first modernises the criminal liability for acts in relation to bankruptcy. A bill regarding this subject has been submitted to Parliament.[49] The second bill regards the Bill Civil Director Disqualification, which enables a trustee to claim that a director a bankrupt company cannot serve as a director in any other Dutch legal entity for a maximum period of five years. This Bill has been send to the Council of State (*Raad van State*) for advise. The third bill regards the position of the trustee and imposes on the trustee a duty to signal bankruptcy fraud and has been published for consultation.

3.2 Continuity of Enterprises Act I

The Continuity of Enterprises Act 1 (CEA 1) aims to provide a statutory basis for pre-packaged asset sales by means of introducing the figure of the silent trustee. The introduction of the figure of the silent trustee by the Secretary follows calls for reform in this respect.[50] The main task of the silent trustee is to bring about pre-packs.[51]

3.2.1 Standing practice: prepacks

Although without a statutory basis most District Courts in the Netherlands are already taking under consideration requests that entails that the District Court states which person or persons will be named trustee, if a debtor is declared bankrupt as to facilitate the preparation of an asset sale in the impending bankruptcy. The first reported case in this respect is from the District Court of 's-Hertogenbosch and dates back to 2011.[52] In this judgment the Court appointed an expert to explore whether the assets of the debtor can be sold in a going-concern sale and states that this expert will become the trustee if the debtor is declared

Notes

44 <statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=7503surs&D1=0-9,11,18-31&D2=(l-11)-l&VW=T>.

45 Suppliers with a claim dating from before the request for suspension of payments will generally also request that the outstanding account is first settled, before new goods will be supplied.

46 See: Looyen 2010, pp. 11-12.

47 Parliamentary Documents 2012-2013, 29 2911, no. 74, pp. 1-2. According to the Secretary the aim of this legislative program is 'to prevent unnecessary bankruptcies and to deal with bankruptcy fraud'.

48 Parliamentary Documents 2012-2013, 29 2911, no. 74, pp. 2-3.

49 Parliamentary Documents 2013-2014, 33 394, no. 2.

50 Calls for introduction of a silent trustee in earlier publications can be found in: B. Wessels, 'Faillissementswet gaat uit van onjuist uitgangspunt' FD 15 April 2000; J.J. van Hees, *Contouren van een nieuwe Insolventiewet*, Inaugural Address 26 June 2003 and the Predesign Insolvency Law (*Voorontwerp Insolventiewet*) from 2007. The publication that can be seen as the starting point of the current discussion is: N.W.A. Tollenaar, 'Faillissementsrechters van Nederland: geef ons de pre-pack!' (2011) *TvI* 23.

51 Draft Explanatory Memorandum CEA 1, p. 2.

52 District Court 's-Hertogenbosch, 22 February 2011, *JOR* 2011, 375 (*H/W*).

bankrupt. Other District Courts have later followed, but some District Courts refuse to name silent trustees as there is no statutory basis for doing so. The CEA 1 aims to provide this basis.

3.2.2 Proposed statutory regime

The proposed changes to the Dutch Bankruptcy Code under the CEA 1 enable a corporate debtor to request the Court to state which person or persons will be named trustee and who will be named Supervisory Judge if a bankruptcy follows.[53] The introduction of this figure is aimed – according to the Draft Explanatory Memorandum – to facilitate i) structured and efficient settlement of bankruptcies and; ii) continuation of viable business activities of the debtor, specifically by means of an asset sale.[54] In other words, CEA 1 provides a statutory basis for pre-packs.

In order for a request for the designation of a person as silent trustee to be granted the debtor will have to show that an appointment: i) serves the interest of the joint creditors or; ii) serves to the benefit of societal interests, such as public order and safety, the continuity of the entrepreneurial activities of the debtor and preservation of jobs.[55] The silent trustee is obligated to promptly file a public report on his findings in the period in which he was active after the debtor is declared bankrupt.[56]

Section 365 DBC (proposed) states that the silent trustee has to the task of a trustee as guiding principle. He is not an advisor of the debtor and has no obligations other than a duty to maintain confidentiality.[57] According to the proposed provision, he is therefore not obligated to follow instructions of the debtor or creditors of the debtor. At the same time, the appointment of a silent trustee does not limit the powers of the debtor.[58] The debtor cannot be forced to act in a certain way by the silent trustee.[59]

The second paragraph of Section 365 DBC (proposed) states that the silent trustee can *inter alia* make statements about: i) whether it can be reasonably expected that a certain legal act done in the ordinary course of business or with regard to repayment of loans, shall be avoided under preference law; ii) under which conditions it can be reasonably expected that a trustee will approve of an asset sale and iii) which preparations can be made to expedite the settlement of the estate.[60] Especially this second ground will be important in pre-packaged asset sales. In respect of the statements of the silent trustee the debtor is obligated to give all information necessary. Furthermore, the trustee can – with consent of the debtor – request information from third parties or request an expert to give advice.

3.2.3 Critical reception of proposal

The figure of the silent trustee – and especially its role in bringing about prepackaged asset sales – and the draft bill CEA 1 have not had a unequivocally positive reception. In the literature the main advantage of the silent trustee is seen as the possibility to prevent loss of value by disintegration of the debtor's business and as such the CEA1 is seen as an improvement.[61] However, there has also been significant criticism. This criticism is mainly aimed at the private nature of the preparation for the asset sale. As such, there is a perception that the trustee may not be able to reach all potential bidders. This may lead to a situation in which a former director or shareholder can take advantage of insider info and cause a distortion of the competition on a certain market.[62]

To what extent the Secretary will take this criticism into account in the drafting of the final bill is unclear. At this moment the bill has not been submitted to Parliament yet.

3.3 Continuity of Enterprises Act II

In August 2014 a draft bill for the Continuity of Enterprises Act II (CEA II) has been published.[63] This draft bill contains proposed provisions that will introduce a

Notes

53 Section 363(1) and 367(1) DBC (proposed). If a silent trustee is named, he will be made the trustee, absent compelling circumstances. Section 14a DBC (proposed). These compelling circumstances can, for example, be a breach of trust between the silent trustee and the debtor. See: Draft Explanatory Memorandum CEA 1, p. 15.

54 Draft Explanatory Memorandum CEA 1, p. 2.

55 Section 363(1) DBC (proposed).

56 Or earlier if he is relieved of his duties at an earlier moment. Section 364(3) DBC (proposed). This report will not be published if the silent trustee succeeds in keeping the debtor out of bankruptcy. See: Draft Explanatory Memorandum CEA 1, p. 3.

57 Draft Explanatory Memorandum CEA 1, p. 4.

58 Draft Explanatory Memorandum CEA 1, p. 4.

59 Draft Explanatory Memorandum CEA 1, p. 22.

60 And based on Section 365 DBC (proposed) so can the Supervisory Judge.

61 See *inter alia*: Reaction to the draft bill by the Committee Bankruptcy Law of the Dutch Bar Association. Available at: <www.internetconsultatie.nl/wet_continuiteit_ondernemingen_i/reacties>.

62 See *inter alia*: E. Loesberg, 'Pre-pack in het Nederlandse faillissementsrecht' (2013) 1 TOP, p. 31; and B. Tideman, 'Kritische kanttekeningen bij de pre-pack' (2013) 6 FIP, pp. 190-191.

63 See: <www.internetconsultatie.nl/wco2>.

statutory regime for reorganisations plans outside of a formal bankruptcy procedure.

3.3.1 Current legal framework

At this moment the Dutch Bankruptcy Code only has a provision in the context of natural persons – Section 287a DBC – making it possible to force a creditor to consent to a proposed reorganisation plan outside of a formal bankruptcy proceeding. Under this provision a judge is to cram-down dissenting creditors, if a creditor reasonably could not have decided to refuse to agree with the offered reorganisation plan, taking into account the disproportionality between his interests in exercising his right of refusal and the interests of the debtor or of the other creditors who are harmed by his refusal.[63]

In case of a corporate debtor, voting behaviour can only be prescribed under strict conditions. The leading Supreme Court judgment in this respect is *Groenemeijer/Payroll*.[64] In this judgment the Dutch Supreme Court states that a creditor is first and foremost free to decide whether he wants to consent to a proposed informal reorganisation plan. The creditor, however, does not have this freedom in case the creditor abuses his power and can reasonably not refuse to agree to the proposed plan.[65] As such, the Supreme Court advocates a reticent approach in cramming down creditors outside of an informal reorganisation plan.

3.3.2 Proposed statutory framework

The proposal for the CEA II aims to facilitate the possibility that a corporate debtor or a creditor of that debtor can present a binding reorganisation plan to selected classes of creditors and shareholders outside of a formal reorganisation procedure.[66] It is also possible that a plan concern several legal entities from within the same corporate group.[67]

Contrary to, for example, the American Chapter 11 offering an informal reorganisation plan does not lead to an automatic stay. Creditors are still allowed to seek recourse on an individual basis. However, the debtor can seek provisional relief from the court, effectively staying a certain creditor.[68] Furthermore, if a creditor files a bankruptcy petition after a plan has been offered, the court has the discretion to abstain from deciding on this petition. However, if *inter alia* there are reasons to assume that the debtor will not be able to pay its debts during the period of abstention, the court is to consider the filed petition.[69]

A plan does not have to include all creditors and shareholders.[70] Furthermore, creditors and shareholders can be divided into separate classes for voting purposes. The proposal does, however, require that creditors with similar claims respectively shareholders with similar rights are placed in the same class.[71]

For the adoption of a proposed plan it is necessary that all classes of creditors and/or shareholders vote in favour of the plan.[72] A class consents to the plan if: i) a majority of creditors or shareholders that participated in the voting process voted in favour of the plan; and ii) this majority represents at least two thirds of the amount of either the claims held by creditors that voted in that class or the issued capital held by the shareholders that voted in that class.[73] If these majorities are met dissenting shareholders and/or creditors within a class are crammed down.

To be binding a plan that is adopted by the creditors and/or shareholders needs to be confirmed by the court. The draft bill contains various mandatory grounds for denial of confirmation and a ground that gives the court the discretion to deny confirmation based on compelling circumstances.[74] After confirmation the plan is binding on the creditors and/or shareholders that have been included in the plan.

If not all classes of creditors and/or shareholders have voted in favour of the plan, the court can order an overall cram-down of the dissenting classes.[75] The

Notes

63 Section 287a (5) DBC.
64 HR 12 August 2005, NJ 2006, 230 (*Groenemeijer/Payroll*).
65 *Id.*, r.o. 3.5.2.
66 A creditor can only propose a plan after he has given the debtor a reasonable amount of time to do so. Section 368(2) DBC (proposed). It is also possibly that competing plans are offered. Draft Explanatory Memorandum CEA II, p. 48. The plan can also include preferred creditors, including creditors with a security interest.
67 Section 368(3) DBC (proposed). It follows from the proposal that a release of non-debtor guarantees is possible under a proposed informal reorganisation plan.
68 Draft Explanatory Memorandum CEA II, p. 26.
69 Section 3c BDC (proposed).
70 Section 368(1) DBC (proposed).
71 Section 369(1)(2) DBC (proposed).
72 Section 372(2) DBC (proposed).
73 Section 372(3) DBC (proposed). Due to the formulation of the proposed provisions creditors or shareholders cannot manipulate the outcome of the vote by not voting. See: Draft Explanatory Memorandum CEA II, p. 63.
74 Section 373(3) DBC (proposed).
75 Section 373(2) DBC (proposed).

relevant legal standard in this respect is whether or not the dissenting class or classes could have reasonably voted against the proposed plan.[76] Furthermore, it is required for a cram-down that the plan provides creditors and shareholders with a distribution that is at least equal to what they would receive in a liquidation procedure. Secured creditors have to be entitled to a distribution that is at least equal to the value of the encumbered asset in a private sale.[77] However, the proposal does not provide for an absolute priority rule.

3.4 Continuity of Enterprises Act III

A draft bill of the Continuity of Enterprises Act III is expected to be published somewhere in the coming months. It is expected that the CEA III is somewhat of a catch-all act to amend specific provisions of the Dutch Bankruptcy Code.

It can be derived from the letters of the Secretary that the CEA III possibly includes introduction of: i) a duty for suppliers to supply goods and services after the declaration of bankruptcy;[78] ii) the power of the trustee to use, consume and sell goods during the cooling-off period; iii) the power of the Supervisory Judge to extinguish non-compete clauses of employees; iv) the power of the Supervisory Judge to amend or dissolve existing contracts and; v) a limited carve-out or secured creditors.[79] To what extent the CEA III will really contain provisions to the extent set out above and whether Parliament will approve of them, is unclear at this moment.

4. EC Recommendation

On March 12, 2014 the European Commission published a Recommendation on a new approach to business failure.[80] Although this Recommendation is non-binding, it is the first time that Brussels tries to exert influence on national bankruptcy laws of Member States.[81]

The Recommendation will likely not have an immediate impact on the legislative program or Dutch bankruptcy law in general, but they may serve a role in the debate surrounding changes to the Bankruptcy Code.

The Recommendation provides that national bankruptcy laws of Member States should provide for: i) the availability of an pre-bankruptcy restructuring framework under which the debtor should remain in control over operations and individual creditors can be stayed, ii) the binding of secured creditors to a reorganisation plan, iii) voting on a reorganisation plan in classes; iv) confirmation requirements for a reorganisation plan including a best-interest-of-creditors test; v) the protection of new financing necessary for the implementation of the reorganisation plan from avoidance actions and; vi) a discharge of debts for entrepreneurs three years after the opening of the bankruptcy proceedings in case of liquidations or three years after the implementation of a repayment plan.

5. Conclusion

The legislative program 'Recalibration of Bankruptcy Law' is an effort by the Dutch Secretary of Safety and Justice to bring Dutch bankruptcy law up to speed with that of surrounding jurisdictions. For corporate debtors it will be especially interesting to see how the possibilities for corporate restructuring will be strengthened and how the bankruptcy procedure will be modernised. And although the first draft bill in this context has met some criticism, it is positive that steps are finally taken to take Dutch bankruptcy law from the nineteenth century to the twenty-first.

Notes

76 Section 373(2) DBC (proposed).
77 Section 373(2) DBC (proposed).
78 Section 37b DBC already has such a duty with regard to the supply of gas, water, electricity and heating.
79 Parliamentary Documents 2012-2013, 29 2911, no. 74, pp. 2-3 and Parliamentary Documents 2012-2013, 33 695, no. 1, pp. 5-6. Section 288 Treaty of the Functioning of the European Union provides the European Commission with the power to give non-binding recommendations.
80 C (2014) 1500 final. Available at: <ec.europa.eu/justice/newsroom/civil/news/140312_en.htm>.
81 The European Insolvency Regulation (1346/2000) also concerns bankruptcy law, but it merely deals with the recognition of cross-border insolvencies among Member States.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

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