IEEI-members – From Bob Wessels – July 2019

**Legislative developments in the Netherlands**

The Dutch Bankruptcy Act (DBA) first entered into force in 1896. Over the first 100 years amendments were made over the years, the rules governing bankruptcy liquidation fundamentally remained the same. In 1998 special rules to deal with debt restructuring of natural persons have been included.

Early 2000, eight years after the entry into force of the New Civil Code, an attempt was made to revise the rather ineffective procedure of postponement of payment (*surseance van betaling*). The Commissions plans in 2007 were in general welcomes in practice and by courts, however were not prioritized in politics.

Some 6-7 years voices became louder that the DBA needed a revision, especially to create a functional procedure re restructuring of near to insolvent, but viable businesses. This ultimately led to the launch of the legislative program ‘Recalibration of Bankruptcy Law’ (*Herijking Faillissementsrecht*) in 2012.

The legislative program aims to improve Dutch insolvency law by way of three main pillars or focuses: (i) combatting insolvency fraud; (ii) introduction of the ability to restructure companies; and (iii) generally modernisation of Dutch bankruptcy law.

First pillar: insolvency fraud

With regard to insolvency fraud, two bills entered into force on 1 July 2016.

The first bill increases the possibility to use criminal law in cases of insolvency fraud. The second bill concerns the disqualification of directors for five years if they manifestly improperly performed their tasks during a period of three years before the insolvency.

A third and final bill in the pillar’s context focusses on the strengthening of the position of IPs, especially regarding fraud alert duties into force on 1 July 2017.

Art. 68 establishes the duties of the IP (‘curator’). His legal task is to manage and settle the estate. In 2017 a new paragraph 2 has been added:

‘The insolvency practitioner: a. examines in the management and settlement of the bankrupt estate whether there are any irregularities that have caused the bankruptcy, at least in part, complicating the liquidation of the bankrupt estate or have increased the deficit in the bankruptcy; b. informs the supervisory judge about this confidentially; and c. shall, if he or the supervisory judge deems it necessary, report or report irregularities to the competent authorities.’

Evidently in debate is how to reconcile the task to manage and administer the estate for the benefit of the collective group of the creditors and the specific task – for the general public interest – to report irregularities.

Second pillar: corporate restructuring

In 2013 the Dutch government introduced the first draft bill regarding the second focus of the aforementioned program, the draft Bill on Continuity of Undertakings I. This draft bill aims to regulate the pre-pack (Dutch variant of the English instrument) as it has developed in practice since 2011. The Bill should not take away its advantages, still granting restructuring practitioners sufficient leeway to apply the pre-pack to very different cases. The draft bill went to Dutch Parliament but was halted after the publication of the opinion of the attorney-general to the ECJ in the Estro case. A few weeks later followed the CJEU 22 June 2017, C-126/16, ECLI:EU:C:2017:489. The Court of Justice of the EU held (in short) that Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, and in particular Article 5(1) thereof, must be interpreted as meaning ‘… that the protection of workers guaranteed by Articles 3 and 4 of that directive applies in a situation, such as that at issue in the main proceedings, in which the transfer of an undertaking takes place following a declaration of insolvency and in the context of a ‘pre-pack’ where that ‘pre-pack’ is prepared before the declaration of insolvency and put into effect immediately after that declaration, and, in particular, a court-appointed prospective insolvency administrator investigates the possibilities for continuation of the activities of that undertaking by a third party and prepares for acts which must be carried out shortly after the insolvency to enable such continuation and, moreover, it is irrelevant in that regard that the ‘pre-pack’ is also aimed at maximising the proceeds of the transfer for all the creditors of the undertaking in question.’

Only in June 2019 a consultation of the Ministry has been published asking for view how to deal with employee protection in pre-insolvency situations.

In 5 September 2017, a draft bill named the ‘Act on the Confirmation of a Private Restructuring Plan in order to Prevent Bankruptcy’ was presented. This draft bill introduces a statutory framework for a pre-insolvency restructuring similar to the UK scheme of arrangements. Although the exact timing for implementation of these and other proposals remains uncertain, the draft bills show a clear trend in the Netherlands towards a more rescue-friendly environment and a more competitive formal insolvency law regime within Europe.

Finally, the third pillar: modernization

On 1 January 2019, the Modernisation of Bankruptcy Procedure Act (MBPA) (in Dutch: Wet Modernisering Faillissementsprocedure) entered into force. This act, which will apply to bankruptcies opened on or after 1 January 2019, is aimed at updating Dutch bankruptcy law to bring it more in line with modern practice.

The MBPA implements measures aimed at achieving four distinctive goals: (i) increased digitalisation and transparency increased digitalisation and transparency, (ii) increasing the speed of the bankruptcy procedure, (iii) providing for a more made-to-measure procedure; and (iv) increased specialisation and expertise. The latter goal has led to the possibility of a supervisory judge to appoint an expert – at the costs of the estate – to support the judge in cases that require particular expertise and the possibility for the appointment of more than one supervisory judge in a bankruptcy liquidation case.

Other pending possible future legislation are considered for the following topics: (i) consumers and (pre-paid) gift cards, (ii) secured rights in insolvency (hardly influenced by insolvency; ideas for paying IPs because of the many asset-less estates, (iii) security rights for loans given by a shareholder. The latter is normally subordinated, but its position is secured by other means, (iv) insolvency and privatised institutions (e.g. schools; hospitals)

Finally, to assist the Ministry a ‘Committee on Insolvency Law’ has been established for four years. Its chairman being prof. Michael Veder.

**International cooperation between courts**

The Netherlands takes into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law, and in particular the relevant guidelines prepared by UNCITRAL. For the European Union best practices have resulted in EU Cross-border Insolvency Court-to-Court Cooperation Principles and Guidelines (also ‘JudgeCo’ Principles and Guidelines. In October 2016 the Judicial Insolvency Network held its inaugural conference in Singapore, which concluded with the issuance of a set of guidelines titled ‘Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters’ also known as the JIN Guidelines. The JIN Guidelines address key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. On 1 May 2019 the District Court Midden-Nederland adopted its version of these JIN Guidelines.

Available via <https://www.rechtspraak.nl/English/Pages/International-Insolvency.aspx#cb01f363-fd8e-4073-8fe3-1113887a8b5a5a3194d6-d64d-45e7-929b-bc40836492a26>