The Netherlands's new Insolvency Act

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The current Dutch Bankruptcy Act came into force in 1896 and since then it has not been thoroughly revised. On 1 November 2007 the parliamentary advisory commission on insolvency law presented a first draft for a new Insolvency Act (the "New Insolvency Act"). The New Insolvency Act (once it has passed through parliament) will replace the Dutch Bankruptcy Act. Even though it is a complete new act, it is still based on the same main principles as the current Dutch Bankruptcy Act. It is for that reason that the parliamentary advisory commission considers the New Insolvency Act to be a thorough renovation and modernisation of the current Dutch Bankruptcy Act. The changes both in content and in structure are very substantial, however.

In general, the New Insolvency Act does not try to cover every detail; its aim is to govern the average type of insolvencies while at the same time it aims to be flexible in accommodating special cases. The New Insolvency Act tries to enhance the possibilities of a reorganisation instead of a liquidation. It also aims to improve the chances of success for informal reorganisations (i.e. reorganisation out outside insolvency proceedings). Furthermore, the New Insolvency Act should improve the position of unsecured pre-insolvency creditors.

Main novelties

Unitary proceedings

At present, under Dutch law there are three types of insolvency proceedings, only two of which are of relevance for legal entities and commercial enterprises. The aim of these two proceedings is different. In general, bankruptcy proceedings (*faillissement*) are aimed at liquidating the debtor's assets for the benefit of its creditors. The suspension of payments proceedings (*surseance van betaling*) is aimed at restructuring the debtor's business by offering a plan of composition to the creditors.

The New Insolvency Act will introduce unitary insolvency proceedings and with it a new set of terminology. It implies that every debtor will start out in the same kind of insolvency proceedings and only during the course of the insolvency proceedings will a choice be made between liquidating the debtor or reorganising the debtor.

Role of the administrator and the debtor

Upon opening of the insolvency proceedings, an independent administrator will be appointed by the court. The administrator is in charge of the debtor's insolvent estate. However, the debtor may ask the court to be appointed as co-administrator so that the administrator and the debtor jointly administer the insolvent estate. In case of a dispute between the two, the independent administrator will be able to instruct the debtor/co-administrator. The administrator has the primary task to look after the interests of the joint body of creditors, but he (or she) may also need to take the debtor's interests into account. The latter will especially be the case if the debtor is a natural person. Finally, an administrator may need to consider interests which are of a

social nature (e.g. employment, environmental issues, etc.). Shortly after the opening of the insolvency proceedings, the administrator will need to form his opinion on the question whether or not the business of the debtor should be continued and the insolvent estate can be reorganised or whether it should be liquidated.

Strengthening the position of creditors
The position of secured creditors will change because – unlike the present situation – they will have to accept that the insolvency administrator is allowed to liquidate secured assets in case the debtor's business is continued during the insolvency proceedings. The secured creditors will receive the proceeds, minus a pre-determined fee for the administrator.

The position of unsecured preferential creditors (i.e. most often the Dutch tax authorities) will deteriorate in favour of unsecured non preferential creditors. Under the New Insolvency Act, preferred creditors will receive a pay out percentage that is twice as high as the pay out percentage for non-preferential creditors.

Especially relevant for pre-insolvency restructurings is the proposed enlargement of the scope of claw back actions (i.e. reversibility of certain legal acts). The existing distinction between the reversibility of obligatory and voluntary legal acts will remain. At present obligatory legal acts are only reversible in case the debtor conspired with the counterparty or in case the counterparty knew of the application for bankruptcy. Under the New Insolvency Act, obligatory legal acts are reversible in case they took place in a three month period prior to the request for insolvency. Also, the counterparty to such legal act knew or should have known at that time that the debtor's insolvency was inevitable and that as a result the creditors would be prejudiced. The counterparty may however argue that the legal act was justified.

The New Insolvency Act presumes that creditors will need to – an probably also will want to – take a closer interest in the insolvency proceedings. For that reason, creditor's rights will improve. The administrator is obliged to inform the public of important steps which may be taken during the course of the insolvency proceedings. For instance, the administrator's intention to liquidate assets by means of a private sale or entering into settlement agreements require the administrator to publish his intentions 7 days prior to execution. It gives creditors the opportunity to file an objection with the supervisory judge who will then need to take a decision on the intended sale or settlement agreement. If a creditors' committee is in place it is not necessary to publish the administrator's intentions; instead the creditors' committee needs to pre-approve the relevant steps.

Plan of composition outside formal insolvency proceedings
Under the New Insolvency Act, debtors will have the ability to offer plan of composition outside of formal insolvency proceedings. In principle, the same rules apply as for offering a plan of composition in insolvency proceedings. The main difference is that there is no insolvency administrator although the court may appoint a 'tacit' administrator who will have to investigate the viability of the proposed plan of composition.

The creditors are allowed to vote on the plan of composition and a simple majority is sufficient to accept it, however, in certain circumstances, the plan can be subject to a

cram down by the judge who chairs the creditors' meeting in which the vote takes place. After acceptance by the creditors or a cram down, formal court approval will need to follow.

International insolvency proceedings
At present foreign insolvency proceedings (not being insolvency proceedings which have been opened on the basis of the EU Insolvency Regulation) are formally not recognised in the Netherlands. As a result, creditors of a foreign debtor are in principle able to take recourse on the foreign debtor's assets in the Netherlands without having regard for the foreign insolvency proceedings. The New Insolvency Act will tie in with the system as is set out in the UNCITRAL Model Law; therefore in the future foreign insolvency proceedings may get recognition in the Netherlands. A request for recognition may be made by the debtor, its insolvency administrator or a creditor. The New Insolvency Act also contains relevant provisions for the consequences of the recognition of the foreign insolvency proceedings; in this context the New Insolvency Act ties in with the EU Insolvency Regulation.

Conclusion
The aim of the parliamentary advisory commission was to present a New Insolvency Act, which will contribute to the reliability and attractiveness of the Dutch jurisdiction. In all, the commission succeeded in its aim; the new Insolvency Act will certainly provide a more enhanced basis for future insolvency cases. Having said that, it is also necessary to consider that in the coming months numerous parties in the Dutch jurisdiction will prepare comments which undoubtedly may affect the draft for the New Insolvency Act. The big question will be whether future refinements, adjustments and restatements will render the Dutch jurisdiction a workable New Insolvency Act.