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INSOLVENCY PRACTITIONERS GROUP

INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

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FOREWORD

INSOL International's Insolvency Practitioners Group (IPG) has decided to prepare a publication that explores the roles and tasks of insolvency practitioners in various jurisdictions. The result of IPG's research is contained in this publication.

Worldwide, insolvency practitioners have similar objectives: to provide all stakeholders with the best possible outcome from the restructuring / insolvency mandate. Interestingly, however, in practice, the manner in which insolvency practitioners operate can vary significantly from jurisdiction to jurisdiction. For instance, many jurisdictions have a myriad of options available which are geared to achieving a maximum payout to creditors. The question to address is whether these procedures are used regularly and are they effective in practice?

Other distinguishing factors include, the manner in which insolvency practitioners are appointed, to whom these office holders must report and how regularly, the effect that a restructuring would have on employees, suppliers and other related parties, the extent and ability to investigate the management and directors, the manner in which claims are dealt with both locally and cross-border and many other aspects which an insolvency practitioner must deal with in the fulfillment of his / her mandate. Other important aspects include what qualifications an insolvency practitioner must have to be able to practice, the need to belong to an accredited member association and the manner in which practitioners are remunerated.

This publication strives to provide a comprehensive overview of the issues stated above and provide answers to these questions in multiple jurisdictions. We hope the readers will find the information useful in their daily work.

Through its excellent network, INSOL International has identified seasoned experts around the globe who have been willing to contribute to this publication. This publication is the product of their hard work and efforts. A big thank you goes out to all the contributors for making this publication come to fruition. Much gratitude is also owed to Dr Sonali Abeyratne, Sarah Mylott and Jelena Wenlock for their invaluable support and assistance in getting this publication completed.

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INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

THE NETHERLANDS

1. Insolvency procedures

1.1 What drives the decision in your jurisdiction to use certain insolvency procedures?

In the Dutch context, there are three corporate insolvency procedures:

- the so-called Dutch Scheme (WHOA), introduced in 2021;
- suspension of payments proceedings; and
- bankruptcy proceedings.

The choice for any type of insolvency proceedings is primarily driven by liquidity events and the potential of the company to satisfy incurred debts on a short term or near term basis. All of these proceedings are used regularly depending on the outlook and nature of the distress of the enterprise.

If the company is in a state in which it can reasonably be assumed that the company cannot continue to pay its due and payable debts but has not yet encountered a liquidity event (the so-called pre-insolvency test), WHOA proceedings can be used for debt restructuring. These proceedings, inspired by the United States Chapter 11 proceedings and the United Kingdom scheme of arrangement (introduced in 2020), aim to establish a court-approved composition plan that, among other things, can entail a cross-class cram down of claims and thereby provide financial relief to the company. These proceedings provide a flexible framework for the conclusion of pre-insolvency schemes with a high degree of deal certainty. WHOA proceedings require that the debtor has liquidity to continue to trade and to cover the costs of the WHOA process itself. Accordingly, WHOA proceedings need to be commenced while there is still a prospect of future viability for the company.

If WHOA proceedings are not feasible, or if the debtor is in need of interim protection against its unsecured creditors, a company may file a request for suspension of payments proceedings. The opening test is that the debtor should foresee it cannot continue to pay its debts if and when they fall due. Suspension of payments proceedings are aimed at concluding a court approved composition plan. Only in cases where unsecured creditors need to have their claims compromised can suspension of payments be used – secured creditors and preferred creditors cannot be crammed down.

If a company is unsuccessful in offering a composition plan, then almost always the case is converted into regular bankruptcy proceedings. Suspension of payment proceedings require that the debtor has liquidity to fund the process itself and the essential operations of the business (if any). In practice, these proceedings are used to restructure holding or finance companies that have unsecured debt outstanding (e.g. unsecured bonds).

Regular bankruptcy proceedings are the go-to option if a company is beyond the point of being able to satisfy due and payable debts and has ceased paying its debts. Dutch insolvency law does not require a debtor, or in case of a corporate entity its board, to file for insolvency proceedings in case it is "over-indebted". Bankruptcy is usually opted for if there is no liquidity to continue to trade or to fund a process.

1.2 Are certain procedures listed but hardly ever used for a corporate insolvency? If so, what are the reasons for non use of these procedures?

All three procedures are regularly used. While the use of this new tool did not immediately gain a lot of traction just after it was introduced in January 2021, which to a large extent can be explained by a certain reluctance of eligible parties to be a first mover and lack of familiarity with the proceedings (especially in relation to the restructuring of larger enterprises), pre-insolvency scheme proceedings

(WHOA) are now regularly used by a wide range of enterprises (including SMEs as well as larger tickets) Most suspension of payment proceedings end up in bankruptcy. This is the case because of poor planning and / or insufficient liquidity or because the value breaks in the secured debt (and secured debt cannot be crammed down in suspension of payments).

1.3 For those procedures that are used more often, what are the foremost reasons to use the procedures?

- Is it an immediate liquidity event;
- a foreseeable liquidity event (but not yet immediate); or
- do you see other drivers (e.g. incentives for directors to file for dministration to avoid insolvent trading liability)?

The main driver to determine what insolvency proceedings to initiate is the ability to satisfy incurred debts in the near future. There are no mandatory insolvency filing requirements under Dutch law. If a liquidity event is foreseeable, but not yet immediate, the company may file for WHOA proceedings. If the liquidity situation is more dire (and there is no secured debt or there is no issue with the secured debt), the company can file for suspension of payments. In case of immediate liquidity issues that cannot be resolved, a filing for bankruptcy is the last resort.

In addition to liquidity, an important driver to file for insolvency proceedings is to mitigate the risk of directors' liability. As long as there is a rational, going concern outlook and the company is able to satisfy its most pressing debts incurred, the board can continue business "as usual", albeit against the backdrop of a reasonable outlook to survive or achieve a turnaround. The board has a duty under Dutch law to ensure that it does not enter into new obligations at a moment in time the board could reasonably ascertain that the company cannot meet those obligations or beyond the point that it can no longer satisfy its creditors. If either of these tipping points are reached, the board is not allowed to selectively pay certain creditors while it leaves others unpaid. Otherwise, there will be a risk of personal director liability.

1.4 In practice, is the role that the IP has or can play a factor that is of relevance when determining whether or not to apply for certain types of insolvency procedures?

The role that an IP has or can play is certainly factored in when determining to apply for insolvency proceedings. For instance, IPs in WHOA proceedings, so-called "restructuring experts" or "observers" (the difference being that the former are authorised to file a composition plan on behalf of creditors while the latter are not) are appointed to safeguard the plan-offering process, while the administrator in suspension of payment proceedings and bankruptcy trustees in regular bankruptcy proceedings have a more executive role. The latter is especially true for IPs in the case of bankruptcy. The IP takes possession of the estate, and the IP is obliged by operation of law to investigate the causes for bankruptcy, a process which is of an inquisitory nature. Therefore, preferences can vary among different stakeholders depending on the aim of the proceedings. That said, and as previously pointed out, the main drivers for a filing remain liquidity and managing liability risks.

2. Appointment

2.1 Aside from formal qualifications, are there any "soft" requirements in order to be able to take appointments as an IP? For instance, does an IP need to have gained prior experience in another field or under the supervision of a more seasoned IP?

In suspension of payment proceedings and bankruptcy proceedings, IPs are appointed by the competent bankruptcy court from a fairly limited pool of qualified IPs. The supervisory judges in insolvency matters are organised in a panel (referred to as *Recofa*, the Dutch acronym for supervisory judges in bankruptcy). This panel has produced a guideline which sets out the general requirements for the selection and appointment of lawyers as IPs. These guidelines are generic and the courts can deviate from it.

In general, IPs need to have experience in civil law / insolvency related matters, need to be employed at a firm where other IPs are employed, the firm needs to have sufficient insurance and the IP should be clear of any doubt as to his / her integrity. In the latter regard, information in respect of disciplinary convictions is relevant.

More exact requirements may also vary across districts, but most districts tend to distinguish separate categories of bankruptcy cases (small to large) and will often raise the bar in terms of experience depending on the size of the insolvency matter.

For instance, the bankruptcy court in the Amsterdam district includes IPs on four different lists in accordance with their level of experience and will appoint the IP accordingly. To be listed on the third and fourth list, which would allow for appointment in the bigger ticket cases, it is "softly" required that the IP is a member of the Dutch association for bankruptcy lawyers (INSOLAD) and has finished a post-graduate education in this field. However, there is no hard and fast rule.

IPs in WHOA proceedings (i.e. restructuring experts and observers) are also appointed by the bankruptcy court. Restructuring experts, tasked to establish a court approved composition plan, are appointed at the request of the debtor or eligible stakeholders. Observers on the other hand, more narrowly burdened to safeguard the interests of the creditors in the restructuring process, may be appointed ex officio as well as at the request of the debtor. Observers are generally lawyers who are also eligible to be appointed as IP in bankruptcies and suspension of payment proceedings. Restructuring experts can also be lawyers, but the pool is broad and also includes other professionals, such as banking professionals and consultants. Given the nature of the proceedings – i.e. to establish a court approved composition plan – the courts are mindful of appointing professionals with a broad skill set, who are familiar in the fields of bankruptcy law and finance, and with restructuring experience. This is evidenced by public guidelines on the appointment of IPs in WHOA matters established by Recofa and case law.

There are pending regulations under which IPs will need to be properly qualified, in accordance with clear, equitable and transparent criteria.

2.2 Does the appointing body take prior experience into consideration when appointing an IP?

When appointing IPs, courts will certainly factor in prior experience and the track record of the relevant individual, and they may also look at affinity with the field of business or even staffing / human resource considerations on the side of the IP, especially in larger cases. However, ultimately there is no formal checklist and as such the appointing process remains somewhat of a black box.

2.3 If stakeholders do not appoint the IP, can stakeholders influence who gets appointed?

If so, how does this work in practice?

IPs in suspension of payments and bankruptcy proceedings are appointed at the sole discretion of the court. That said, creditors can always submit a suggestion as to who should be appointed, which may be taken into account by the bankruptcy court when making the appointment decision. Courts are not bound by a submission from creditors. The same applies for the appointment of IPs in WHOA proceedings. In that case, the applicant can propose up to three candidates for the IP position of "restructuring expert" and the court usually will appoint one of the proposed candidates.

2.4 How does your jurisdiction safeguard that an IP is impartial? Are there any conflict rules and independence requirements, or restrictions on accepting an appointment? If so, how do they work in practice?

Rules to safeguard impartiality in the Dutch context are limited. The main points of reference are the guidelines issued by the association of bankruptcy professionals (INSOLAD praktijkregels), the guidelines on designation and appointment of restructuring experts and observers in the WHOA (Richtlijnen herstructureringsdeskundigen en observatoren in de WHOA) established by Recofa as well as the guidance for observers in WHOA proceedings (Leidraad Voor Observatoren In Procedures Op Grond Van De Wet Homologatie Onderhands Akkoord) constituted by a selection of Dutch judges who jointly form the WHOA pool and attend to all the WHOA cases in the Netherlands. All of these guidelines require an IP to be impartial. In addition, the guidance for observers in WHOA proceedings specifically articulates that

observers need to inform the court if they are free to accept an appointment and a concise framework to deal with a conflict of interest arising following any appointment. Under the guidelines, this requires the IP to ensure that neither he / she nor the law firm are conflicted. These rules, however, do not have any formal status.

Generally speaking, an IP needs to ascertain that he / she has no conflict of interests and should also ensure that no conflicts will arise in the future. In practice, this will at least mean that a person cannot become an IP of one's own client or if a person has assisted the applicant in a meaningful manner prior to insolvency. Prior dealings with directors can form a conflict of interest.

To be appointed as IP in WHOA proceedings, the court will actively assess whether candidate IPs included in the petition have any apparent conflicts of interest. The applicant needs to provide information in this respect. Also for this reason, the courts ask petitioners to include two or three names of candidates in the application for the appointment of an IP. Only when a candidate IP already has broad support across all stakeholders may the court allow for one proposed candidate.

3. Dismissal

3.1 Assuming that an IP can be dismissed upon the request of a creditor (or the debtor), in what circumstances can a request be made and how does this practically work?

IPs in suspension of payments and bankruptcy proceedings can be dismissed upon their own request, or that of a committee of creditors, the debtor or the supervisory judge.

A request for dismissal is heard and decided by a bankruptcy court. In practice, a request for dismissal can sometimes be used as a means to put an IP under pressure but has a limited chance of success as case law shows that the bar for dismissal is quite high. A dismissal will require a manifest breach of duties by the IP.

Case law evidences that the guidelines issued by the association of bankruptcy professionals (INSOLAD *praktijkregels*) can be relevant for assessing whether this is the case. As an example, dismissal has been granted in the past in a case where an IP requested and was granted a warrant to enter a private residence belonging to the debtor. In exercising the warrant, the IP did not precisely follow the rules accompanying the warrant and she was removed by the court, upon request by the debtor.

3.2 Does dismissal occur often? If so, what are the consequences (if any) for the IP being dismissed?

A dismissal request is not often successful. In the rare exceptions that a dismissal request is granted, an IP is under the obligation to provide account and accountability to the successor IP.

3.3 How easy or difficult is it to hold an IP accountable in your jurisdiction and what other measures are available to do so?

Generally, it is not easy to hold an IP accountable in the Netherlands. One could pursue civil liability of the IP (personal liability), but thresholds for personal liability are generally deemed to be quite high. This will require a manifest breach of duty by the IP.

Other measures are to file a request for an injunction by the supervisory judge or to start summary proceedings. Generally speaking, such actions are only rarely successful. Courts tend to give the IP the benefit of the doubt.

4. Role of the IP

4.1 Aside from the formal / statutory requirements, how does an IP– in practice – perform their role? Is the IP "self-starting" with a focus on (for instance) realising assets, or is the IP more prone to await and act upon instructions by creditors or the court?

While IPs in suspension of payments or bankruptcy proceedings in the Netherlands are primarily appointed to act in the interest of the joint creditors, IPs tend to be rather autonomous and self-starting.

In a bankruptcy, the IP will try to liquidate the estate (either through a sale of the business as a whole or a fire sale of separate assets) as soon as he / she is appointed. It is not required to await instructions by the court or any other stakeholder, but an IP does need supervisory judge approval for an actual transaction to be effectuated. Moreover, assets are generally secured, which to a certain extent will also require alignment with the secured creditor(s) to achieve liquidation of the secured assets. Quite a lot of IPs take a commercial approach in liquidating the estate (i.e. they attempt to realise the highest value).

4.2 Do IPs have much leeway to determine the manner in which they perform their tasks?

An IP in bankruptcy proceedings has a great deal of leeway to perform his / her role as he / she deems fit within the accountability framework as reflected above. The IP will, however, periodically publish a report to inform stakeholders about the progress of the liquidation and the envisaged actions in order to wind down the bankrupt estate. These public reports, however, are in a fixed format and do not always provide much detail.

An IP in WHOA proceedings similarly has quite some leeway to perform his / her role. The restructuring expert will independently attempt to draw up a composition plan in the interests of all parties involved, which also requires that he / she cannot be bound by instructions from any of the parties. Observers have similar discretion, albeit within the remit of the aforementioned guidance for observers in WHOA proceedings as established by Dutch judiciary.

5. Investigations

5.1 Does an IP also have an inquisitive role?

An IP in Dutch bankruptcies is under a statutory obligation to investigate the causes of the bankruptcy and assess whether there were any potential wrongdoings leading up to it. As such, any bankruptcy will to a certain extent be investigated.

If an IP finds there were irregularities that qualify as a criminal offence, he / she is under the statutory obligation to notify the relevant authorities in this respect. But more often, irregularities will form the starting point of civil law proceedings. Not only is an IP entitled to institute claims in the interests of the bankrupt estate, such as avoidance actions in relation to preferential transactions as well as directors' (personal) liability claims, an IP is also entrusted to institute claims directly on behalf of joint creditors (as established by Dutch case law).

5.2 Does an IP have an obligation to conduct investigations, or is the IP otherwise generally prone to investigate issues surrounding the insolvency and institute claims as a matter of practice? If so, how often does this occur and is an IP often successful?

As the IP is statutorily required to conduct an investigation into causes of the bankruptcy, this happens in virtually any bankruptcy and is also regularly successful. It should be noted that an IP requires prior approval by the supervisory judge before initiating legal proceedings on the aforementioned basis (but approval is often given).

6. Supervision

6.1 How on a practical level is supervision of an IP organised?

IPs in suspension of payments and bankruptcy proceedings are under the supervision of so-called supervisory judges that get appointed by the bankruptcy court together with the IPs. An IP is under a general obligation to keep the supervisory judge informed. The supervisory judge also needs to give approval for certain specific actions, such as initiating court proceedings or the sale of assets. Supervisory judges are specially trained judges only operating in the field of bankruptcy law and as such are equipped to supervise the performance of the IP. These judges act independently and are quite esteemed, as the quality of their supervision is generally deemed to be quite high, albeit their case load is quite significant.

For the sake of completeness, it should also be mentioned that the court may, immediately or at a later stage, also appoint a provisional creditors' committee. This tends to be done in larger bankruptcies. The creditors' committee advises the IP and may demand inspection of the books, records and other data carriers relating to the bankruptcy at any time. The IP must also seek the advice of the creditors' committee before instituting or pursuing any legal proceedings or defending any proceedings. The IP must also obtain the advice of the creditors' committee in relation to his / her policy regarding the liquidation of the company's assets and the time and amounts of any distribution.

6.2 Is the supervising body sufficiently equipped to perform its role and do IPs experience that they are genuinely supervised?

The quality of supervision is generally deemed quite high. At the same time, the case load for supervisory judges can be rather substantial, which may impact the supervision involvement from time to time. The general sense is nevertheless that IPs are supervised in a meaningful manner.

6.3 Do stakeholders have sufficient ability to act against or correct the IP if and when this is deemed necessary? If so, how is this achieved?

Stakeholders can act against an IP in bankruptcy proceedings by instituting a request for an injunction against the IP with the supervisory judge. These proceedings are fairly informal and of summary nature. They can be initiated by a request and can often be followed by a hearing before the supervisory judge within a short timeframe. A request will be denied if it merely serves the personal interests of the petitioner. It is required that the request is in the interests of the joint creditors or the performance of the IP's task in general to be eligible for the grant of an injunction. In practice, it is difficult to get this type of relief. Supervisory judges tend to err on the safe side and not grant an injunction.

7. Disclosure obligations

7.1 Assuming that an IP is obliged to make (periodic) public disclosures for the benefit of creditors / interested parties, do these public disclosures provide sufficient insight into how the insolvency matter is developing? Are they sufficiently detailed and accurate?

IPs in suspension of payment and bankruptcy proceedings are under the statutory obligation to make periodic public disclosures. These public disclosures, containing financial information as well as information of a more general nature regarding the wind down of an insolvency, are generally made on the basis of a standardised format. These do the job, but are fairly high level and as such are not often suitable to be used, for instance, in court proceedings.

8. Influence by creditors

8.1 Assuming that creditors' committees can be formed, do they in practice have sufficient ability to oversee and / or influence the process? If so, how?

A creditors' committee can be formed at the discretion of the court in case of a bankruptcy or a suspension of payments. This tends to happen in rather sizeable bankruptcy and suspension of payment proceedings.

Creditors' committees, once instituted, have important rights to supervise the IP as reflected above. These committees are also taken seriously by IPs. Outside creditors' committees, possibilities to influence the process are fairly limited and taking on the IP as a creditor can be a steep uphill battle, given the leeway IPs have in performing their role.

In WHOA proceedings, creditors can make their objections known, ask the court to appoint an IP (restructuring expert) or vote against the plan and object to the confirmation of the plan. Creditors in WHOA proceedings do not have other meaningful ways to influence the process.

9. Remuneration

9.1 Is IP remuneration an issue in your jurisdiction? If so, are IPs insufficiently remunerated?

IP remuneration in bankruptcy proceedings is an issue, as IPs are remunerated from the bankrupt estate. While the remuneration of the IP is the highest-ranking claim among the creditors, in a significant amount of bankruptcies there are no assets available whatsoever to settle the IP's expenses. This is a problem in the winddown of smaller bankruptcies, as IPs are still under the statutory obligations to perform their role, while not getting remunerated.

Hourly rates for IPs are fixed based on the experience of the IP and the nature of the insolvency and are generally revised on an annual basis by the court. The courts may determine higher hourly rates in exceptional cases.

9.2 Are IP fees something stakeholders can object to? If so, does this occur often (and successfully)?

The fees of an IP are ultimately established by the bankruptcy court, in the process of which it will hear the supervisory judge. As such, in practice, fee declarations are submitted to and reviewed by the supervisory judge. Other stakeholders do not have standing to contest the decision, in or out of court. Only when the supervisory judge has advised the court to limit the fees is the IP in question heard. Unlike IPs in bankruptcies and suspension of payment proceedings, IPs in WHOA proceedings in principle have to present a fee quote to the bankruptcy court prior to their appointment. Said fee quote is the driver of the fees awarded to the IP in the context of the WHOA proceedings, and may be updated / expanded in the course of the proceedings subject to the permission of the court.

9.3 Are there any means for an IP to obtain state funding for remuneration and / or investigations?

In general, there is no state funding of lost remuneration resulting from so-called "empty estates". The only exception is the guarantee framework that has been set up for IPs to perform their statutory investigations into the causes of the bankruptcy and any potential wrongdoing, including pursuing any associated claims. IPs can apply for such state funding, but the application process can be quite cumbersome, and the guaranteed amount of fees often falls short compared to the actual expenses associated with performing the inquiries and pursuing associated litigation. Also, the guarantee scheme requires that the IP proves that if litigation is successful, the IP will have meaningful recourse.