

# Insol Europe Survey

## Insolvency Regulation in the Netherlands

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## 1 Types of Insolvency Office Holder (IOH)

The Dutch Bankruptcy Act (**DBA**) distinguishes the three following three types of insolvency proceedings:

- (i) Bankruptcy;
- (ii) Suspension of payments;
- (iii) Debt relief arrangement.

### *Bankruptcy*

Bankruptcy is a full-fledged liquidation procedure. Any debtor can be declared bankrupt by a Dutch court provided that:

- the debtor resides or has its centre of main interest in the Netherlands; and
- the debtor is in a state of having ceased to pay its debts.

Generally a debtor will be declared bankrupt by request of one of his creditors. For that purpose, a lawyer (*advocaat*) – on behalf of the creditor – has to file a written petition with the court of the place where the debtor has his residence or, in the event the debtor is a company, its statutory seat. By means of the petition the creditor has to demonstrate that:

- (i) the debtor has at least two creditors;
- (ii) of which at least one has due and payable claim; and
- (iii) the debtor is in a state of having ceased to pay its debts.

Furthermore, a debtor can be declared bankrupt on its own request.

If the debtor is declared bankrupt, the court appoints a supervisory judge (*rechter-commissaris*) and a trustee (*curator*). A trustee in the Netherlands is virtually always a Dutch qualified lawyer. If specific knowledge or experience is required, e.g. in the insolvency of a financial institution, the court may appoint a (second) trustee who is not a lawyer.

After the bankruptcy proceedings have been opened by the court, the trustee is solely authorised to dispose of the bankrupt estate's assets. The management board of a bankrupt company is no longer authorised to represent the company or to dispose of the company's assets.

All assets of the bankrupt estate at the time of the bankruptcy, as well as the assets that are acquired in the bankruptcy, are covered by the bankruptcy.

The trustee acts in the interests of the joint creditors and (i) will try to sell the estate's assets for the highest possible price, and (ii) investigates the causes of the bankruptcy. The supervisory judge is charged with the supervision of the management and liquidation of the bankrupt estate.

If justified by the importance or by the complexity of the estate, the court may appoint from the known creditors a provisional creditors committee in order to advise the trustee.

### *Suspension of payments*

A debtor who expects not to be able to continue to discharge his liabilities as and when they fall due may apply for suspension of payments. No suspension of payments shall be granted to a private individual who does not conduct an independent profession or business.

In suspension of payments the debtor is given temporary relief against its creditors in order to reorganise and continue its business, ultimately to satisfy (part of) the creditors' claims. The suspension of payments does not take effect in respect of:

1. Claims with a priority interest (such as right of preference, pledge, mortgage or lien), except insofar as they cannot be recovered from the assets subject to the priority interest;
2. Claims for maintenance and care or upbringing costs constituting legal obligations determined by a contract or by a judgement;
3. Instalments due under hire-purchase contracts and hire-purchase contracts relating to ships.

If suspension of payments is granted, the court appoints an administrator (*bewindvoerder*) and a supervisory judge (*rechter-commissaris*). An administrator in the Netherlands is usually a Dutch qualified lawyer.

After the suspension of payments, the trustee and the debtor are jointly authorised to dispose the debtor's assets.

### *Debt relief arrangement*

A private individual may apply for a debt relief arrangement if it is reasonably foreseeable that he (or she) will be unable to pay his (or her) debts as they fall due or if he (or she) is in a situation in which he (or she) has ceased to pay his (or her) debts as they fall due.

If a debt relief arrangement is declared applicable, the court appoints an administrator (*bewindvoerder*) and a supervisory judge (*rechter-commissaris*)

During the debt relief arrangement, the debtor has to meet certain financial requirements for a three year period (or five years if required). In this period, the administrator will liquidate the debtor's estate and debts are repaid to the extent possible. After this period, the remainder of its debt is released (resulting in a 'clean slate' for the debtor).

This response will **not** take into account administrators in debt relief arrangements. The duties of debt relief administrators, the required qualifications and the appointment procedure differ significantly from those in bankruptcies and suspension of payments (lawyers are generally not

appointed as administrators in debt relief arrangements). Moreover, debt relief arrangements are for individual natural persons only who typically have very limited assets, which makes the subject of limited interest in an international setting.

## 2 Size of the profession

Each individual district court independently appoints lawyers who practice in that district as trustee or administrator. Each individual district court for that purpose has drawn up a list or several lists of persons who are eligible for appointment. These lists are not public. For this reason, there are no reliable public figures available on the size of the profession.

We would estimate that at 1 January 2015, there were approximately 800 insolvency practitioners actively taking insolvency appointments. There are no restrictions on the size of the profession, other than the appointment policies of the individual district courts.

## 3 Practicing norms

Dutch IOHs range from senior partners of large law firms to sole practitioners. In between these extremes, there are many medium sized firms, either specialising in restructuring and insolvency work, or providing such services as part of a range of legal services.

## 4 Qualification, training and entry into the profession

Bankruptcy trustees and administrators in suspension of payment procedures are usually Dutch qualified lawyers. These lawyers are registered with the district courts as eligible for appointment. Most district courts require that these lawyers (i) have completed one or more specialist courses on insolvency law provided by the Dutch Association of Insolvency Practitioners (*INSOLAD*), and (ii) can demonstrate proven experience in dealing with insolvency law. Requirements for appointment can and do differ between the district courts.

## 5 Professional bodies

The district courts have absolute discretion in appointing a bankruptcy trustee and as such, regulatory activity by professional bodies therefore has no direct influence on appointments.

In a joint effort, supervisory judges throughout the Netherlands have jointly drawn up principles that apply to supervisory judges and trustees in insolvencies (**Recofa**).

Most (or perhaps even: all) insolvency practitioners who are eligible for appointment in the larger bankruptcies or suspension of payment procedures are member of INSOLAD. Next to the Recofa principles, INSOLAD has produced common principles and codes which set out the basic principles that its members are expected to comply with.

In each of the Dutch insolvency proceedings a supervisory judge is appointed. The supervisory judge is a member of the district court and is charged with the supervision of the management and liquidation of the bankrupt estate. Each creditor may lodge a petition with the supervisory judge to object against any act of the trustee or to instigate that the supervisory judge order the trustee to perform or refrain from performing any contemplated act.

Finally, as generally only lawyers are appointed as trustees or administrators, Dutch lawyers are admitted to the Dutch Bar Association (**DBA**) and subject to disciplinary law. The DBA has produced rules of conduct. Complaints regarding the conduct of lawyers can be filed with the local or national Dean. The Dutch Board of Discipline (**DBD**) is charged with disciplinary proceedings. Where the DBD finds that the conduct of an IOH has failed to meet the professional standards, the DBD may sanction the IOH. Such sanction may range from a written warning to being disqualified for practicing law. The sanctions imposed are published, naming the IOH, the sanction, and the action or omission that led to it.

## **6 Continuing professional education**

All the aforementioned professional bodies require their members to continually demonstrate that they are maintaining continuing professional education. As part of their monitoring framework, the professional bodies audit such confirmations.

INSOLAD, more in particular, requires its members to follow courses on the latest developments in insolvency law. As (most) district courts require IOH's to be a member of INSOLAD, continuing professional education is a requirement by incorporation.

## **7 Body corporate or individual**

IOHs are in all cases individuals, and take appointments either singly or jointly in a personal capacity, but they may be employees or partners of a corporate entity or partnership.

## **8 Sanction for acting as an IOH without proper authorisation**

The district courts have sole and absolute discretion in appointing IOH's. It is easily verifiable whether a certain person has been appointed by the court as the IOH in a specific insolvency. This issue is therefore unknown in the Netherlands.

## **9 Bonding and insurance**

It is a requirement of the DBA that lawyers hold professional indemnity insurance (**PII**). As IOH's are generally lawyers, this applies *mutatis mutandis* to IOH's. PII cover is provided by a number of insurance firms.

## **10 Appointment of IOHs**

IOH's are appointed by the court in its sole discretion. Typically an IOH is chosen by the court because of his or her experience and reputation. In general an IOH will be appointed who practices law in the same court district as where the debtor resides.

## **11 Remuneration**

The remuneration of an IOH, and indeed the costs of the insolvency procedure, are paid out of the proceeds of the assets of the insolvent estate. Authorisation and approval of the IOH's remuneration is dictated by guidelines produced by the courts, which places responsibility for such approval in the hands of the court.

The remuneration of the IOH is determined by the court on the basis of time spent in dealing with the case and hourly rates determined by the courts.

## **12 Personal liability of IOHs**

As stated above, IOHs act in personal capacity, and are therefore potentially personally liable for their actions in relation to the insolvent estate. The Dutch Supreme Court formulated a specific criterion for personal liability of an IOH. Personal liability may apply if the IOH did not act as may be expected from an experienced IOH acting reasonably and performing his tasks meticulously. The cases in which a trustee is held personally liable by the court are (very) rare.

## **13 Release of IOHs from liability**

Under Dutch insolvency law an IOH cannot be discharged from liability.

## **14 Independence**

IOH's, generally being lawyers, are subject to rules of conduct and ethics which requires them to identify and avoid mitigate threats to their objectivity or integrity. Before accepting an insolvency appointment the IOH must perform a conflict check. Moreover, the district court may decide in its absolute discretion not to appoint, or to discharge, an IOH if a conflict becomes apparent.