

## Dutch suspension of bankruptcy requests and limitations on other recovery measures *Temporary Payment Deferral Act COVID-19*



On 24 November 2020, the Dutch Upper House approved the COVID-19 Amendment Act, which seeks to amend the Temporary Act COVID-19. The act will enter into force shortly, most likely on 1 January 2021 at the latest. The act is of a temporary nature, and will remain in effect until 1 February 2021. However, it can be extended by consecutive two months' periods.

The bill aims to protect companies, who would normally not have seen their continuity threatened but who have liquidity problems due to the corona crisis, from creditors taking strategic recourse actions and filing bankruptcy petitions to enforce payment. The act provides the debtor with the option to request the court to suspend an application for its bankruptcy by a creditor. This also results in a temporary stay of payments against that creditor. The bill also provides an option to suspend other recovery measures taken by creditors.

The act may have a very material impact on your current financings and investments, as the act also extends to the enforcement of security and bankruptcy requests by secured creditors. The act does not apply to enforcement actions and bankruptcy requests by the Dutch Tax Authorities.

### Suspension of a request for bankruptcy - conditions

A debtor, that is confronted with a request for its bankruptcy by one of its creditors, may ask the court to suspend that request for a period of two months (with a maximum extension to six months), subject to the following cumulative conditions:

1. The debtor is unable to pay its debts due to a temporary liquidity shortage.
2. That liquidity shortage is primarily or exclusively due to debtor not having been able to continue its business operations (in full) as a result of the coronavirus outbreak or the restrictions imposed by the Dutch government in connection therewith.
  - Loss of revenue of at least 20% is required.
3. Before the pandemic and the restrictive measures, the debtor was not in distress.
4. The debtor's business has earning capacity and future prospects.
5. The creditor who petitioned for the debtor's bankruptcy is not substantially and unreasonably prejudiced by the suspension.

The court will review the suspension request summarily. In case of a request for an extension, the court repeats its test. In case the court denies the request, the debtor is offered the chance to file for a suspension of payments.

### Suspension of a request for bankruptcy - consequences

- The bankruptcy application is suspended for a period of two months (with a maximum extension to six months).
- A moratorium is granted for the same term in respect of the already due debts owed to the creditor who requested the debtor's bankruptcy. No general moratorium.
  - However, the debtor must be able to meet obligations that become due and payable towards that creditor during the suspension period (e.g. interest or rental obligations).
- During the term of suspension, the creditor may not terminate, suspend or rescind the agreement with the debtor on the basis of a default existing prior to the suspension.
- At the debtor's request, the court may decide that the relevant creditor (who filed the bankruptcy petition) may not seek recourse or enforce security over the debtor's assets, or assets with the debtor's control, without court approval.
  - This includes security (rights of mortgage, pledges) in favour of financiers.
- Attachments made by that creditor during the suspension period are lifted.

- An attachment that was lifted on this basis is revived as soon as the court decides that the grounds for lifting the attachment no longer exist.
- The mere fact that the suspension is granted does not change the debt being due and payable nor the creditor's rank.

#### Provisions to safeguard the interests of the creditor that applied for the debtor's bankruptcy

- If, after the suspension is granted
  - a) the debtor no longer meets the required conditions, or
  - b) the debtor has prejudiced the creditor or attempted to do so, or there is a well-founded fear that the debtor will attempt to do so,
 the suspension is lifted at the creditor's request or at the court's own initiative, and the bankruptcy request shall be heard with the greatest urgency.
- Debts owed to other creditors that arose prior to the bankruptcy application may only be paid by the debtor if there is sufficient justification.
- If any other creditor takes recourse or enforces security against an asset of the debtor, the latter is obliged to inform the court and the suspended creditor without delay. The suspended creditor may then request the court to revive its prior right on that asset, in order to retain its claim on the proceeds thereof of the execution. The court will hear the debtor and the creditor before making a decision.
- At the creditor's request or on its own initiative, the court can make such provisions as it deems necessary to safeguard the interests of the said creditor.

#### Limitations on other recovery measures

A debtor may request the court to lift or suspend an attachment or enforcement of security on assets of the debtor, subject to the following cumulative conditions:

- The temporary measure is required for the debtor to be able to continue its business.
- It is not required that a bankruptcy application is suspended, however, the same cumulative conditions apply (see above).
- A term of two months applies, with possible extensions until a maximum of six months.
- A lifted attachment revives if the grounds for suspension thereof no longer apply.
- This request may also be made by the debtor in the event a creditor aims to recover goods held by the debtor but owned by the creditor (e.g. in case of a retention of title).

#### Deviations from the Dutch Bankruptcy Act: Limitation on claw back by the bankruptcy trustee

- The Dutch Bankruptcy Act provides the bankruptcy trustee with the power to nullify and claw back payments of due and payable debts if the creditor at the time of receiving the payment was aware of the bankruptcy application, or if the payment was made as a result of collusion between the creditor and the debtor with the aim of prejudicing other creditors.
- Deviation The temporary act provides that the payment of a due and payable debt during the suspension of the bankruptcy application cannot be annulled during a later bankruptcy on the basis of fraudulent conveyance, based on the mere fact that the creditor who received the payment knew that the debtor's bankruptcy had been applied for.

#### Deviations from the Dutch Bankruptcy Act: Limitation of set off restrictions

- The Dutch Bankruptcy Act provides that where a party has acquired, prior to the debtor's bankruptcy, a claim against the debtor from a third party, he is not entitled to set-off this claim against a debt payable by it to the bankrupt debtor if he did not acquire this claim in good faith. The same applies in case of the assumptions of debts. This section is of particular importance to banks, as this rule also applies to the settlement of claims and debts on a current account held by the debtor with its bank. Those automatic settlements are avoided if the current account is credited at a time when the bank was no longer acting in good faith.

- Deviation A party who, after the suspension request has been granted, set-offs claims and debts towards the debtor acts in good faith within the context referred to above if this set-off (i) takes place in the context of financing the continuation of the debtor's business and (ii) does not restrict that financing. This avoids the bank being forced to freeze the accounts.

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