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BANKRUPTCY & PERSON(S) INVOLVED

Introduction

This brochure is intended for all those affected by a bankruptcy or involuntary liquidation, such as employees, parties owing amounts (debtors), parties owed amounts (creditors), contracting parties etc. It is not intended for the party being declared bankrupt or insolvent or for its director(s).

This brochure outlines a number of aspects relating to bankruptcy or involuntary liquidation that you may have to face as a third party.

Bankruptcy/Involuntary liquidation

The nature of bankruptcy/involuntary liquidation

A bankruptcy/involuntary liquidation is a legal seizure of a debtor's assets in order to protect the rights of the debtor's creditors. The debtor will lose control over the assets as a result of the bankruptcy/involuntary liquidation. Natural persons can be declared bankrupt, whereas legal persons can be declared insolvent and put into involuntary liquidation.

Bankruptcies/involuntary liquidations are announced in a Court judgment, generally following an order filed by the debtor or by one or more of its creditors. In the judgment the judge will appoint a trustee in bankruptcy/receiver and a bankruptcy judge. The trustee in bankruptcy/receiver will manage the debtor's estate and be charged with settling the debts. The bankruptcy judge will supervise the trustee in bankruptcy/receiver.

All bankruptcies/involuntary liquidations are reported in the Netherlands Government Gazette [*Nederlandse Staats-Courant*] and in one or more newspapers. Discharges from bankruptcy, closing of involuntary liquidations, announcements of creditors' meetings and filings of a list of dividends on involuntary liquidation will also be published. The involuntary liquidation will also be advised to and noted in the Trade Register.

Please note that you can also find and download all of the above information, as well as the periodical reports on bankruptcies/involuntary liquidations handled by Van Dijk Tilburg Advocaten on our website www.vandijktilburg.nl under the button "Faillissementen".

Trustee in bankruptcy/Receiver

As soon as debtors have had a bankruptcy/liquidation order filed against them, they lose control of their assets. The Court-appointed trustee in bankruptcy/receiver is then the only person allowed to take action.

The role of the trustee in bankruptcy/receiver is best described as the duty to "*maximise the assets and minimise the liabilities*". That means the trustee in bankruptcy/receiver must make sure that as much money as possible comes in



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and that the available assets are converted into cash, while also making sure that no new debts are incurred and that existing debts are minimised as far as possible.

The trustee in bankruptcy/receiver will also cast a critical eye on the period preceding the bankruptcy/involuntary liquidation. If the debtor has committed acts prior to being declared bankrupt/insolvent that harmed creditors, the trustee in bankruptcy/receiver may order these acts to be reversed (*pauliana = committing fraudulent acts vis-à-vis creditors*). And if the trustee in bankruptcy/receiver finds evidence to suggest that the directors have abused their powers in respect of the legal entity declared insolvent, the trustee may hold these directors personally liable for any shortfall (*directors' liability*).

Purpose of the bankruptcy/involuntary liquidation

The purpose of the involuntary liquidation is to wind up the debtor's assets and distribute these among the creditors. For this purpose, the trustee in bankruptcy/receiver will establish what the debts and receivables are. Only once this has been clarified can the involuntary liquidation be closed, whether following payment to the creditors (in the order of ranking stated below) or otherwise. The trustee in bankruptcy/receiver will then request the bankruptcy judge to declare the bankruptcy/involuntary liquidation closed. The latter will in turn propose this to the Court. If the Court agrees, the bankruptcy/involuntary liquidation will be declared closed. As a rule, the insolvent company will be wound up and thus cease to exist.

Ranking of creditors

Once the Court has announced its decision, the assets will be divided among the creditors. The law stipulates, however, a strict order of priority. In essence, this is as follows:

1. The administration costs incurred in settlement of the estate rank first. These are the costs of the trustee in bankruptcy/receiver, appraisers, insurance premiums as security for the assets of the estate, storage costs etc....
2. Other creditors that rank high, but after the costs referred to in 1 are the estate creditors. These are the creditors who came into existence **after** the bankruptcy and (in a sense) through the actions of the trustee in bankruptcy/receiver. They could include rent payable for the period of administration, employees' wages for the notice period (these costs will initially be paid by the sector board) etc...
3. Third in order of priority come the preferential creditors. These are creditors with preferential rights in law and include tax authorities and the sector board, but also employees if they are not estate creditors.
4. Finally, and lowest in order of ranking, are the ordinary creditors. This category includes ordinary trade creditors.

Creditors who are outside the bankruptcy/involuntary liquidation, such as creditors with a right of pledge, who can invoke retention of title or a right to claim back unpaid goods etc, are not considered in this summary.



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Possible distribution

On the basis of the above order of priority, a bankruptcy/involuntary liquidation may be closed as follows:

1. There are insufficient assets to pay the administration costs incurred in settlement of the estate and/or the estate creditors. This means that the bankruptcy/liquidation is closed without any distribution to preferential or ordinary creditors. (In Dutch: *eigenlijke opheffing*).
2. There are sufficient assets to pay the administration costs incurred in settlement of the estate and estate creditors and all or some of the preferential creditors. (In Dutch: *oneigenlijke opheffing*).

(Please note that the trustee in bankruptcy/receiver will in that case ask the Court to take the decision for simplified involuntary liquidation if it soon becomes clear that there will be no distribution for ordinary creditors. On the basis of this decision, ordinary creditors can reclaim VAT and write off the debt and take it as a loss. The bankruptcy/involuntary liquidation will then be settled for the estate creditors and preferential creditors only).

3. There are sufficient assets to pay the administration costs incurred in settlement of the estate, the estate debts, the preferential creditors (in their entirety) as well as the ordinary creditors (fully or partly). In that case a final distribution list will be published at the end of the bankruptcy/involuntary liquidation, stating precisely how much the creditors will receive. The creditors may object to this final distribution list. If no objection is made, the final distribution list will be binding and the bankruptcy/involuntary liquidation will be settled on that basis.

However, nearly 90% of bankruptcies/involuntary liquidations are settled in the manners outlined in 1 and 2 above.

The positions of the various parties

The positions of the debtor

The debtor may be a legal person or a natural person. As soon as an involuntary liquidation order/bankruptcy petition is filed against debtors, they lose control of their assets. This means that they can no longer access their assets. The trustee in bankruptcy/receiver is the only person allowed to take action. Any action taken by the debtor will not bind the estate, unless the estate benefits from it. As a rule, all business normally has to be done with the trustee in bankruptcy/receiver.

The position of the employees

As a result of the bankruptcy/involuntary liquidation, the trustee in bankruptcy/receiver will be forced in most cases to give notice that employment contracts are to be terminated. The Dutch Bankruptcy Act contains special provisions for that (Art. 40 Bankruptcy Act *et seq*). The trustee in bankruptcy/receiver needs to have authorisation for that from the bankruptcy judge. The maximum term of notice required to be given is 6 weeks.



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As a result of recently introduced anti-abuse legislation, employees may submit an appeal against the termination of their employment contracts to the bankruptcy judge (Article 67 Bankruptcy Act). As a rule, such an appeal only has a chance of succeeding if employees can prove that the Bankruptcy Act has been abused. Instituting an appeal is unrelated to and not a condition for the right to benefit. The appeal should be submitted by a lawyer. In addition to the lawyer's fees, such an appeal will also incur court registry fees of EUR 244 (price level for 2005).

Once the trustee in bankruptcy/receiver has given notice of termination, the employment contracts will end, subject to the applicable term of notice. Employment contracts do not, therefore, end automatically upon bankruptcy/involuntary liquidation or by the date of the trustee in bankruptcy/receiver's notice of termination. This also means that employees may still be obliged to carry out certain activities. After all, they are still employed until their term of notice has expired.

Wages due to employees after the date of the bankruptcy/involuntary liquidation are an estate debt. Employee wages that had already become payable prior to the bankruptcy/involuntary liquidation date and have not yet been paid are a preferential debt. This means that employees rank highly. In addition, employees are protected by the obligation for the sector board (UWV= uitvoeringsinstelling werknemersverzekeringen = employed persons' insurance administration agency) to take over responsibility. Briefly, the UWV is required, within certain limits, to do exactly what the employer/debtor should have done. This basically means that the UWV takes over the obligation of the employer/debtor to continue payment of wages. The UWV will take over payment of wages during the notice period, as well as payment of any wages due but not paid prior to the date of the bankruptcy/involuntary liquidation (subject to a maximum of 13 weeks with regard to the latter). The UWV also takes over responsibility for settling any unpaid holidays (up to a maximum of 1 year) and unpaid holiday pay. As a rule, therefore, employees will be paid all they are owed. They are required, however, to register immediately at the CWI [Centrum voor Werk en Inkomen = Centre for Work and Income] as a jobseeker.

After the petition for bankruptcy/involuntary liquidation order has been filed, it is important for employees to report to the sector board and the CWI as soon as possible. Van Dijk Tilburg Advocaten will usually arrange the relevant contacts for the employees with the sector board. Usually we can arrange to combine reporting to the sector board and CWI.

The position of the contracting parties

As a rule the trustee in bankruptcy/receiver will terminate any contracts the debtor had as soon as possible. The Bankruptcy Act offers a number of options in this respect.

Article 39 of the Bankruptcy Act stipulates, for instance, that the trustee in bankruptcy/receiver can terminate a lease subject to a maximum of 3-months' notice. Any leases expiring after declaration of the bankruptcy/involuntary liquidation but before its closing date will constitute an estate debt.



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The trustee in bankruptcy/receiver will try as much as possible to terminate all other agreements. Contracting parties have to submit any claims under such agreements to the trustee in bankruptcy/receiver.

The position of the creditors

The debtor's assets will be frozen as a result of the bankruptcy/involuntary liquidation (the general bankruptcy/involuntary liquidation proceedings). Proceedings already in progress will usually be suspended, while new proceedings cannot usually be instigated. Creditors have to submit their claim to the trustee in bankruptcy/receiver for verification.

The trustee in bankruptcy/receiver will then add the claims to the list of provisionally recognised creditors, which will also serve as a basis for a distribution list, if any.

It is important for the claim to be submitted as follows:

1. The claim is to be submitted on a totalised basis and with a breakdown of the VAT-component;
2. All documents substantiating the claim, such as invoices, credit notes and any correspondence, must be submitted;
3. If a claim is made for interest, costs or retention of title, the general terms and conditions must also be submitted;
4. If a preferential claim or any right to claim back unpaid goods or retention of title is made, such should be explicitly stated.

Retention of title

The creditor must inform the trustee in bankruptcy/receiver of any right of retention of title. The trustee in bankruptcy/receiver will take steps to enable creditors to exercise their right of retention of title. The same applies to claims for the return of unpaid goods and rights of retention.

Right of pledge

Creditors with a right of pledge must inform the trustee in bankruptcy/receiver of this. The way in which this will be settled will be agreed in consultation with the trustee in bankruptcy/receiver.

Parties owing amounts

The liquidation does not change anything for parties owing amounts. Their debt to the party facing bankruptcy/involuntary liquidation continues to exist. They are still required to pay the amount due, although their payment will now be made to the bankruptcy/liquidation account. If any amounts are not paid, the trustee in bankruptcy/receiver has the right to take legal action to recover these amounts.



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In conclusion

This was a short explanation of the aspects of bankruptcy/involuntary liquidation that you may have to face in a capacity other than that of the debtor. The summary is by no means complete. Please contact us if require any further information.

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