

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and
the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

NETHERLANDS INSOLVENCY LAW

**The Netherlands Bankruptcy Act
and the Most Important Legal Concepts**

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and
the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

NETHERLANDS INSOLVENCY LAW

The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J.M. Declercq

T•M•C•ASSER PRESS

The Hague

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and
the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

Published by T.M.C. ASSER PRESS,
P.O.Box 16163, 2500 BD The Hague, The Netherlands

Sold and distributed in the U.S.A. and Canada
by Kluwer Law International,
101 Philip Drive, Norwell, MA 02061, U.S.A.

In all other countries, sold and distributed
by Kluwer Law International,
P.O.Box 85889, 2508 CN The Hague, The Netherlands.

ISBN 90-6704-144-0

All rights reserved

© 2002, T.M.C. ASSER PRESS, The Hague, The Netherlands

*No part of the material protected by the copyright notice may be reproduced or utilized in any form
or by any means, electronic or mechanical, including photocopying, recording, or by any
information storage and retrieval system, without written permission from the copyright owner.*

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

V

PREFACE

The great novelty of *Netherlands Insolvency Law* is that it is the first book in the English language covering the Netherlands insolvency law as a whole. It is a practical book for use by internal and external legal counsel, Dutch and non-Dutch companies, students, academics and practitioners alike, presenting not only the principal concepts but also the current state of affairs of the Netherlands insolvency law. The reader is offered not only the black letter law, but also impartial discussions presenting differing views on particular aspects of the insolvency law. Furthermore, *Netherlands Insolvency Law* briefly addresses recent developments such as the EU Insolvency Regulation and the progress made on the ongoing total revision of the Netherlands Bankruptcy Act in the “*Marktwerking, Deregulering en Wetgevingskwaliteit (MDW)*”-project.

Declercq has successfully managed to strike such a balance that, on the one hand, the book offers the reader more than an average introduction, while on the other hand, it is not weighed down in a quagmire of technical detail. Declercq’s experience and international exposure as an insolvency lawyer in one of the most reputable law firms in the Netherlands has probably contributed in this respect.

Netherlands Insolvency Law promises to become a standard textbook to a wide-ranging audience.

January 2002

ANTONIUS I.M. VAN MIERLO
Professor of Law
Erasmus University Rotterdam

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

VII

TABLE OF CONTENTS

Preface	V
Abbreviations	XIII
Introduction	XVII
CHAPTER 1 – THE NETHERLANDS BANKRUPTCY ACT	1
1.1 The three insolvency regimes	2
SUMMARY – THREE INSOLVENCY REGIMES	3
1.2 The leading principles underlying the Netherlands Bankruptcy Act	4
1.2.1 The principle of fixation	4
1.2.1.1 Application of the principle of fixation in article 35 Netherlands Bankruptcy Act	6
1.2.1.2 Exceptions to the principle of fixation	8
1.2.1.2.1 Exception pursuant to the <i>Ontvanger/Mr Hamm q.q.</i> -case	9
1.2.1.2.2 Exception pursuant to the Finality Directive	9
1.2.2 The principle of <i>paritas creditorum</i>	11
1.2.3 The principle of universality	13
1.2.4 The principle of territoriality	15
SUMMARY – LEADING PRINCIPLES	16
1.3 Recent developments	18
1.3.1 The EU Insolvency Regulation	18
1.3.1.1 The scope of the EU Insolvency Regulation	19
1.3.1.2 The most important features of the EU Insolvency Regulation	21
1.3.1.3 The consequences of the EU Insolvency Regulation for the Netherlands insolvency practice	25
SUMMARY – EU INSOLVENCY REGULATION	30
CHAPTER 2 – SUSPENSION OF PAYMENT	33
2.1 Purpose, nature, scope and consequences	34
SUMMARY – PURPOSE, NATURE, SCOPE AND CONSEQUENCES OF SUSPENSION OF PAYMENT	37
2.2 Steps for requesting suspension of payment	37
2.2.1 The applicable test(s)	39
2.2.2 Legal remedies	40
2.2.3 The insolvency stay	40
SUMMARY – THE STEPS FOR REQUESTING SUSPENSION OF PAYMENT	41
2.3 The (appointment of the) administrator and the supervisory judge	42
2.3.1 The administrator	42
2.3.2 The supervisory judge	44
SUMMARY – ADMINISTRATOR AND SUPERVISORY JUDGE	45

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

VIII

TABLE OF CONTENTS

2.4	The different stages in suspension of payment	45
2.4.1	Provisional suspension of payment	45
2.4.2	Final suspension of payment	46
SUMMARY – DIFFERENT STAGES IN SUSPENSION OF PAYMENT		46
2.5	The end of a suspension of payment	47
2.5.1	Revocation followed by bankruptcy	47
2.5.2	Termination by composition	48
SUMMARY – THE END OF A SUSPENSION OF PAYMENT		49
2.6	Recent developments	50
2.6.1	The MDW-Project	50
2.6.1.1	The most important changes to suspension of payment suggested by Bill 27 244	51
2.6.1.2	The most important issues covered by the MDW-Discussion Paper in respect of suspension of payment	56
SUMMARY – THE MDW-PROJECT		56
CHAPTER 3 – BANKRUPTCY		59
3.1	Purpose, nature, scope and consequences	59
SUMMARY – PURPOSE, NATURE, SCOPE AND CONSEQUENCES OF BANKRUPTCY		62
3.2	Steps for filing bankruptcy	62
3.2.1	The applicable test(s)	63
3.2.1.1	Filing for bankruptcy as an abuse of right	64
3.2.1.1.1	The Municipality of Dantumadeel and Provinsje Fryslân-case	65
3.2.1.1.2	The Ammerlaan-case	66
3.2.1.1.3	The Multi-Terminal Waalhaven-case	67
3.2.2	The legal remedies	68
SUMMARY – STEPS FOR FILING BANKRUPTCY		70
3.3	The (appointment of the) trustee in bankruptcy and the supervisory judge in bankruptcy	71
3.3.1	The trustee in bankruptcy	71
3.3.2	The supervisory judge in bankruptcy	73
SUMMARY – THE TRUSTEE IN BANKRUPTCY AND THE SUPERVISORY JUDGE		74
3.4	The different stages in a bankruptcy	75
3.4.1	The preservation stage	75
3.4.1.1	The insolvency stay	76
3.4.1.2	The duty to render information	78
SUMMARY – THE PRESERVATION STAGE		79
3.4.2	The executorial stage	80
3.4.2.1	Recollection of goods by third parties	81
3.4.2.2	Liquidation of the assets of the debtor	82
SUMMARY – THE EXECUTORIAL STAGE		85

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

TABLE OF CONTENTS		IX
3.4.3	The verification or closing stage	85
3.4.3.1	Liquidation without a verification meeting for creditors	86
3.4.3.2	Liquidation with a verification meeting for creditors	87
3.4.3.3	Liquidation by way of composition	90
SUMMARY – THE VERIFICATION AND CLOSING STAGE		94
3.5	The rights and duties of a trustee in bankruptcy	94
3.5.1	Liability of the trustee in bankruptcy for his acts	95
3.5.2	Common situations facing a trustee in bankruptcy	96
3.5.2.1	Lawsuits	96
3.5.2.2	Agreements with mutual performances	98
3.5.2.3	Hire-purchase agreements	102
3.5.2.4	Rental agreements and lease agreements	105
3.5.2.5	Employment agreements and agencies	107
3.5.2.6	Right of retention	111
SUMMARY – RIGHTS AND DUTIES OF A TRUSTEE IN BANKRUPTCY		113
3.6	Creditors in a bankruptcy	115
3.6.1	The secured creditors	116
3.6.2	The estate creditors	118
3.6.3	The pre-bankruptcy creditors	120
3.6.3.1	Preferential creditors	121
3.6.3.2	Non-preferential or ordinary creditors	121
3.6.3.3	Subordinated creditors	122
3.6.4	Commission of creditors	123
SUMMARY – THE CREDITORS IN A BANKRUPTCY		125
3.7	Recent developments	126
3.7.1	MDW-Project	126
3.7.1.1	The most important changes to bankruptcy suggested by Bill 27 244	127
3.7.1.2	The most important issues covered by the MDW-Discussion Paper in respect of bankruptcy.	130
SUMMARY – THE MDW-PROJECT		133
CHAPTER 4 – IMPORTANT LEGAL CONCEPTS IN INSOLVENCY LAW		135
4.1	The <i>actio pauliana</i>	135
4.1.1	The <i>actio pauliana</i> in respect of voluntary legal acts by the debtor	136
4.1.1.1	The requirements for a valid <i>actio pauliana</i>	137
4.1.1.2	Situations in which knowledge of prejudice is presumed by virtue of law	140
4.1.1.3	The legal consequences of the <i>actio pauliana</i>	142
4.1.1.3.1	The obligation to restore the original situation	143
4.1.1.3.2	The Kuijsters/Mr Gaalman q.q.-case	143
4.1.1.4	Obligation of the trustee in bankruptcy	144
4.1.1.5	Liquidation by way of composition and <i>actio pauliana</i>	144
4.1.1.6	Statute of limitations	145
4.1.2	The <i>actio pauliana</i> in respect of obligatory legal acts by the debtor	145
4.1.2.1	Restrictive application	146
4.1.2.2	Knowledge about the request for bankruptcy	147

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

X

TABLE OF CONTENTS

4.1.2.3	Consultation between debtor and creditor	147
4.1.2.4	The legal consequences of the <i>actio pauliana</i>	148
SUMMARY – THE ACTIO PAULIANA		148
4.2	The legal concept of set-off in a bankruptcy	150
4.2.1	The right to set-off pursuant to article 53 Netherlands Bankruptcy Act	151
4.2.1.1	Some case law in respect of set-off pursuant to article 53 Netherlands Bankruptcy Act	153
4.2.1.1.1	The Mr Tiethoff q.q./NMB-case	153
4.2.1.1.2	The Mr Verhagen q.q./INB-case	155
4.2.1.1.3	The Girodienst/Mr Voûte q.q.-case	156
4.2.1.1.4	The Otex/Mr Steenbergen q.q.	157
4.2.1.1.5	The Mr Mulder q.q./CLBN-case	158
4.2.1.1.6	The Mr Van Gorp q.q./Rabobank-case	162
SUMMARY – THE RIGHT OF SET-OFF		164
4.2.2	The prohibition pursuant to article 54 Netherlands Bankruptcy Act to use the right of set-off	166
4.2.2.1	The Amro/Trustees in bankruptcy THB-case	167
4.2.2.2	The NCM/Mr Knottenbelt q.q.-case	168
SUMMARY – ARTICLE 54 NETHERLANDS BANKRUPTCY ACT		170
4.3	Corporate liabilities in a bankruptcy	171
4.3.1	Liability of directors	171
4.3.1.1	Internal liability of directors	171
4.3.1.1.1	Statute of limitations	173
4.3.1.1.2	Discharge	173
4.3.1.1.3	The Staleman/Van de Ven-case	174
4.3.1.2	External liability of directors	175
4.3.1.2.1	Article 2:248 Netherlands Civil Code	176
4.3.1.2.2	The requirements for liability pursuant to article 2:248 Netherlands Civil Code	178
4.3.1.2.2.1	Bankruptcy of a company	178
4.3.1.2.2.2	Apparent mismanagement	179
4.3.1.2.2.2.1	Legal presumptions in article 2:248 Netherlands Civil Code	180
4.3.1.2.2.2.2	Immaterial default	180
4.3.1.2.2.2.3	Three year limit	181
4.3.1.2.2.3	Apparent mismanagement is an important cause of the bankruptcy	181
4.3.1.2.3	Exculpation and mitigation under article 2:248 Netherlands Civil Code	182
4.3.1.2.4	The scope of article 2:248 Netherlands Civil Code	183
4.3.1.2.4.1	(Co-)policy-determinator	183
4.3.1.2.4.2	Policy	184
4.3.1.2.4.3	Acting as if one were a director	184
SUMMARY – LIABILITY OF DIRECTORS		185
4.3.2	Liability of directors of a supervisory board	187
4.3.2.1	The Bodam Yachtservice-case	188
SUMMARY – LIABILITY OF DIRECTORS OF A SUPERVISORY BOARD		188
4.3.3	Liability of shareholders	189

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

TABLE OF CONTENTS

XI

4.3.3.1	Extended liability pursuant to the 403-declaration	190
4.3.3.2	Extended liability pursuant to article 2:248 paragraph 7 Netherlands Civil Code	191
4.3.3.3	Extended liability based on specific circumstances derived from case law	192
4.3.3.3.1	The Osby-case	192
4.3.3.3.2	The Albada Jelgersma-case	193
4.3.3.3.3	The Nimox/Mr Van den End q.q.-case	194
4.3.3.3.4	The NBM/Securicor-case	195
4.3.3.3.5	The Bato's Erf-case	196
4.3.3.3.6	The Roco/Staat der Nederlanden-case	197
4.3.3.3.7	The Coral/Stalt-case	198
SUMMARY – LIABILITY OF SHAREHOLDERS		199
4.4	The concept of the wrongful act	201
4.4.1	The Mr Peeters q.q./Gatzen-case	201
4.4.2	The Romme/Bakker-case	203
SUMMARY – THE CONCEPT OF WRONGFUL ACT		204
CHAPTER 5 – PLEDGES AND MORTGAGES		207
5.1	General aspects of pledges and mortgages	207
SUMMARY – GENERAL ASPECTS COMMON TO PLEDGES AND MORTGAGES		211
5.2	Pledges	212
5.2.1	The legal requirements	212
5.2.1.1	Moveable, non-registered goods	213
5.2.1.2	Bearer or order rights	218
5.2.1.3	Shares	218
5.2.1.4	Claims	220
SUMMARY – PLEDGES		224
5.2.2	Repledge, double pledge and reserved pledge	225
5.2.2.1	Repledge	225
5.2.2.2	Double pledge	226
5.2.2.3	Reserved pledge	227
SUMMARY – REPLEDGE, DOUBLE PLEDGE AND RESERVED PLEDGE		228
5.2.3	Situations of concurrence of rights	228
5.2.3.1	Concurrence between a non-possessory pledge and the fiscal privileged ground right	229
5.2.3.2	Concurrence between a pledge and a right of retention	231
5.2.3.3	Concurrence between a (non-possessory) pledge and a privileged right based on article 3:284 Netherlands Civil Code or article 3:285 Netherlands Civil Code or article 3:287 Netherlands Civil Code	232
5.2.3.4	Concurrence between a pledge and a right following from an earlier precautionary arrest or arrest in execution	233
SUMMARY – SITUATIONS OF CONCURRENCE OF RIGHTS		234
5.3	Mortgages	235
5.3.1	The legal requirements	235

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)**XII****TABLE OF CONTENTS**

5.3.1.1	A valid deed of establishment	235
5.3.1.2	A valid title or cause	237
5.3.1.3	The right to administer and dispose of the collateral	237
	SUMMARY – MORTGAGES	238
5.3.2	Foreclosure of a mortgage	238
	SUMMARY – FORECLOSURE OF A MORTGAGE	241
5.3.3	Situations of concurrence of rights	242
5.3.3.1	Concurrence between a mortgage and a right of retention	242
5.3.3.2	Concurrence between a mortgage and a right following from an earlier precautionary arrest or arrest in execution	243
	SUMMARY – SITUATIONS OF CONCURRENCE OF RIGHTS	244
	Further reading	245
	Bibliography	248
	Table of cases	251
	Translated terms	254
	English into Dutch	254
	Dutch into English	258
	Annex – English version of EU Insolvency Regulation	263
	Index	285

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)**ABBREVIATIONS**

AB	Algemene Bepalingen (<i>General Provisions</i>)
BBA	Buitengewoon Besluit Arbeidsverhoudingen 1945 (<i>Extraordinary Resolution Employment-Relations 1945</i>)
Bill 27 244	Wetsvoorstel 27 244 inzake wijziging van de Faillissementswet in verband met het bevorderen van de effectiviteit van surséance van betaling en faillissement (<i>Bill 27 244 concerning the amendment of the Netherlands Bankruptcy Act in respect of enhancement of the effectiveness of suspension of payment and bankruptcy</i>)
BV	Besloten vennootschap met beperkte aansprakelijkheid (<i>a private or closed company with limited liability</i>)
BW	Burgerlijk Wetboek (<i>Netherlands Civil Code</i>)
DEM	German marks (local currency of Germany prior to the introduction of the Euro)
EU Insolvency Regulation	The Council Regulation (EC) No. 1346/2000 on insolvency proceedings adopted on 29 May 2000
Finality Directive	Directive number 98/26/EU, dated May 19, 1998, Pb EG Number L 166/45
Fw	Faillissementswet (<i>Netherlands Bankruptcy Act</i>)
HR	Hoge Raad der Nederlanden (<i>Netherlands supreme court</i>)
Hw	Huurwet (<i>Rent Act</i>)

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

XIV

ABBREVIATIONS

Inv	Invorderingswet 1990 (<i>Tax Recovery Act 1990</i>)
JOR	Jurisprudentie Onderneming & Recht
MDW-Project	Marktwerking, Deregulering en Wetgevingskwaliteit-project (<i>Competition, Deregulation and Legislative Quality-project</i>)
MvA	Memorie van Antwoord (<i>Memorandum of reply</i>)
MvT	Memorie van Toelichting (<i>Explanatory memorandum</i>)
NbBW	Nieuwsbrief Burgerlijk Wetboek
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NLG	Netherlands guilders (local currency of the Netherlands prior to the introduction of the Euro)
NV	Naamloze vennootschap (<i>public company with limited liability</i>)
Ow	Overgangswet (<i>Transitional Act</i>)
Pw	Pachtwet (<i>Lease Act</i>)
q.q.	<i>qualitate qua</i>
RvdW	Rechtspraak van de Week
Rv	Wetboek van burgerlijke rechtsvordering (<i>Netherlands Code of Civil Procedure</i>)
Sv	Wetboek van strafvordering (<i>Netherlands Code of Criminal Procedure</i>)

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

ABBREVIATIONS

XV

TvI	Tijdschrift voor Insolventierecht
TVVS	Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen
TWHOZ	Tijdelijke wet huurkoop onroerend goed (<i>Temporary Act on the hire-purchase of immoveable goods</i>)
US	American dollars (local currency of the United States of America)
WBA	Wet Bestuurdersaansprakelijkheid (<i>Act on the Liability of Directors</i>)
WBF	Wet Bestuurdersaansprakelijkheid in geval van faillissement (<i>Act on Liability of Directors in case of Bankruptcy</i>)
WFR	Weekblad voor Fiscaal Recht
WMCO	Wet melding collectief ontslag (<i>Act on the notification of collective dismissal</i>)
WOR	Wet op de ondernemingsraden (<i>Act on the Works Councils</i>)
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
Wtk	Wet toezicht kredietwezen 1992 (<i>1992 Act on the supervision of the credit system</i>)
WW	Werkeloosheidswet (<i>Unemployment Act</i>)

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

INTRODUCTION

Bankruptcy is considered to be a litmus-test of legal devices. Therefore, in legal counseling the question of whether or not a legal device will survive bankruptcy is of an utmost importance. Bearing that in mind, it is striking to note that general interest among a broader group of people as to what insolvency really is and how to deal with cases of insolvency has only developed in the last decade and a half in the Netherlands. Some larger bankruptcies in the Netherlands like OGEM, BCCI, DAF, FOKKER, TULIP and AIR HOLLAND (for the second time) have added to this “revival” of insolvency law in the Netherlands because they received a substantial amount of media-attention. At the same time, a fair number of lawyers seem to have (re)discovered the (legal) challenges the field of insolvency law presents. Insolvency law has also been positively (re)valued in the academic world, with some universities deciding to commence their own departments of insolvency law¹.

Along with the increased attention and interest in insolvency law, there has also been a shift in how bankruptcy is viewed: while in the past, bankruptcy was considered to be something which one was struck with involuntarily, it now seems that people often consider an insolvency proceeding as a tool one could (and should), in certain circumstances, choose voluntarily. To companies faced with the need to reorganize their business, the threshold for seriously considering (the existence of) the option of a bankruptcy (possibly also followed by a subsequent restart²) or another insolvency proceeding, has been lowered considerably

-
- 1 Further evidence of this revival of insolvency law in the Netherlands are (i) the more frequent publications of articles on insolvency law related topics by law professors and legal practitioners alike, (ii) the foundation in 1995 of the legal magazine *TvI* focusing entirely on insolvency law and insolvency law related topics, and (iii) the decision made by Netherlands attorneys specialized in insolvency law in 1991 to found an association called “INSOLAD”. In close co-operation with the “Grotius Academy”, INSOLAD designed its own specialization courses in insolvency law. The successful completion of these specialization courses is one of the mandatory requirements for a full membership of INSOLAD.
 - 2 For the purposes of this book, a restart is described as a continuation of (a part of) the business activity of the debtor by another legal entity - which could, but does not necessarily have to, be related to the debtor - whereby:
 - (1) the debtor ceases to exist after a bankruptcy;
 - (2) a part of the debts of the debtor remain unpaid; and/or
 - (3) a part of the employees of the debtor, after their employment agreements have been terminated by the trustee in bankruptcy, remain unemployed and thus are not taken over by the other legal entity.

The term “restart” will appear a number of times throughout this book, but will not be discussed further in this book. For a selection of books dealing with “restart”, see the Further Reading section in the back.

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

in recent years. However, in considering the option it is evident that both proper knowledge and legal counseling on the subject are essential.

The revival of insolvency law in the Netherlands has further resulted in a flow of information on the subject, from which it is hard to sift out information that is pertinent to one's needs. My aim is to provide the reader with an understanding of the Netherlands Bankruptcy Act ("Fw"), which is the main source of insolvency law in the Netherlands, by laying out the primary law in an order and manner which is logical and comprehensible. Where necessary, I have looked for guidance primarily in the parliamentary notes to the rules and the interpretation of the rules in landmark cases. Where grey areas and/or where differing views exist, I have indicated them. I have tried to avoid displaying my own opinion about insolvency issues as much as possible.

Structure of the book

As of 1 December 1998, three insolvency proceedings exist under Netherlands law, namely:

- (1) suspension of payment or moratorium;
- (2) bankruptcy; and
- (3) debt reorganization of natural persons.

The focus will be on bankruptcy in the Netherlands and the most important legal concepts pertaining to bankruptcy. In comparison, the discussion of suspension of payment will be relatively brief. The topic of debt reorganization of natural persons has been left out entirely.

CHAPTER 1 is a discussion of the Fw together with its most important underlying principles. At the end of Chapter 1 the most important recent development, the EU Insolvency Regulation, is discussed. The EU Insolvency Regulation will become effective in the Netherlands from 31 May 2002 and some of its consequences for the Netherlands insolvency practice are briefly touched upon. An English version of the EU Insolvency Regulation is included as an Annex.

Unlike the order in which the different insolvency proceedings are dealt with in the Fw, I have elected to first address the procedure of suspension of payment in Chapter 2 and subsequently move to a (more detailed) discussion of the procedure of bankruptcy under Netherlands law in Chapter 3. The reason for this is that, in reality, suspension of payment comes before bankruptcy; it is not possible to have it the other way around³.

3 This odd order in the Fw whereby the procedure of bankruptcy is dealt with prior to the procedure of suspension of payment can be explained by the fact that, originally, the procedure of suspension of payment was regulated in the Netherlands Code of Commerce ("*Wetboek van Koophandel*") and was transferred to the Fw only at a later stage.

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

CHAPTERS 2 AND 3 will touch upon the steps that need to be taken to file for the insolvency proceeding concerned. These chapters will further identify who the main players are in each insolvency proceeding and which rights and duties they have. There are two stages in a suspension of payment:

- (1) the provisional suspension of payment; and
- (2) the final suspension of payment.

In a bankruptcy three different stages will be distinguished:

- (1) the preservation stage;
- (2) the executorial stage; and
- (3) the verification or closing stage.

For each stage there will be a discussion of what can generally be expected. At the end of each chapter the Competition, Deregulation and Legislative Quality-project (“MDW-Project”) will be discussed as the most relevant recent development. The MDW-Working Group investigates if, how and when the current Netherlands insolvency laws need to be amended. For both suspension of payment and bankruptcy the most important consequences that may result from the MDW-Project will be looked into.

The most important (legal) concepts under Netherlands law that present themselves (especially) in a bankruptcy, will be addressed in CHAPTER 4. These are:

- (1) the *actio pauliana*;
- (2) set-off;
- (3) the corporate liability concepts of:
 - (i) liability of directors;
 - (ii) liability of supervisory directors; and
 - (iii) liability of shareholders; and
- (4) the concept of wrongful act.

A number of landmark cases will be briefly discussed in order to make (the consequences and application of) these concepts in practice more accessible to the reader.

In CHAPTER 5, the last chapter of the book, the two most important security rights in the Netherlands are discussed:

- (1) pledges; and
- (2) mortgages.

Here the general aspects of pledges and mortgages will be described, together with the legal requirements to create them and exercise rights of foreclosure. Different types of pledges will be addressed and some situations of concurrence – both involving pledges and mortgages – will be touched upon.

Throughout the book SUMMARIES are included after certain sections or subsections to highlight the key points. A FURTHER READING section with a selection of recommended reading materials for further research can be found in the back of the

Cambridge University Press

978-9-067-04144-7 - Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts

Peter J. M. Declercq

Frontmatter

[More information](#)

book. This selection is a personal one and is by no means aiming at being exhaustive. As well as an INDEX, a table of cases and a bibliography, the book also has a section TRANSLATED TERMS in the back in which English terms are translated into the original Netherlands terms and *vice versa*. The idea behind the two lists is to avoid littering the body of the book with Netherlands terms and to provide the reader with the possibility to verify which translations have been used.

Acknowledgements

Finally, I would like to take this opportunity to thank the following people for their indispensable support in completing the manuscript of this book and getting it published: my colleague Jan Willem de Boer for his essential help in developing the idea for this book; Michael Veder and my colleagues Symen de Ranitz and Jako van Hees for their constructive comments; my firm De Brauw Blackstone Westbroek for their general support; Professor Van Mierlo for his expertise, practical tips, trust and enthusiasm; my publishers Philip van Tongeren and Marjolijn Bastiaans of T.M.C. Asser Press for their professionalism in publishing this book; and, last but not least, my wife Sun-Hee for her angelic patience and her uncompromising editing of earlier drafts.

London, December 2001

PETER J.M. DECLERCQ