INSOL INTERNATIONAL

ASSET TRACING AND RECOVERY HANDBOOK: JURISDICTIONAL PERSPECTIVES

SPECIAL PROJECT

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ASSET TRACING AND RECOVERY HANDBOOK: JURISDICTIONAL PERSPECTIVES

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INSOL International, 29-30 Ely Place, London, EC1N 6TD
Tel: +44 (0) 20 7248 3333

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CONTRIBUTORS

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Cayman Islands	Nienke Lillington, INSOL Fellow Conyers Dill & Pearman
	Yvonne Plamondon R&H Trust & Corporate
Singapore	Sheila Ng, INSOL Fellow Jason Lim Rajah & Tann Singapore LLP
	Adrian Chan KPMG
	Ashok Kumar (Editor) Bird & Bird ATMD
The Netherlands	Kees van de Meent Jurgen van den Heuvel Merijn Moeliker Florent
	Christiaan Zijderveld, INSOL Fellow Houthoff
	Cathalijne van der Plas JahaeRaymakers
	Peter Wolterman Lou Rougie Carla Matthews PWC
United Kingdom	Louise Brittain Azets
	Paul Fleming Winston & Strawn
United States of America	Daniel Saval, INSOL Fellow Kobre & Kim
	Ann Gittleman CPA, CFF, ABV, CIRA, Esq. Kroll

ACKNOWLEDGEMENT

INSOL International is pleased to present this new publication, "Asset Tracing and Recovery Handbook: Jurisdictional Perspectives".

This handbook sets out the range of options available to an insolvency practitioner in seeking to identify, value, trace and recover a company's assets. These issues are increasingly important, with asset structures growing in sophistication - including the rise of crypto and other digital assets.

These issues are explored in 5 jurisdictions: the Cayman Islands, Singapore, the Netherlands, the United Kingdom and the United States.

It is intended that further jurisdictions will be added to the handbook over time.

The country chapters were written by the committee members of the Asset Tracing and Recovery Committee and the overall project was managed by the two co- chairs Mr Ashok Kumar of Bird & Bird ATMD and Ann Gittleman of Kroll USA.

INSOL thanks the project leaders, and the contributors for each jurisdiction, for their time and expertise in bringing this project to fruition.

INSOL International

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FOREWORD

This Asset Tracing and Recovery Handbook provides a cross-jurisdictional guide of the range of options available to an insolvency practitioner in seeking to identify, collect, value, trace and recover a company's assets in certain countries.

The first publication provides for our members a guide in 5 jurisdictions: the Cayman Islands, Singapore, the Netherlands, the United Kingdom and the United States. The list of countries to be included in the guide will be expanded.

Some of the key "tools" available to an insolvency practitioner in seeking to trace and recover a company's assets include examination powers, freezing and seizure orders, and legislative provisions enabling the recovery of antecedent transactions (such as fraudulent conveyances, transactions that are not considered commercial and unfair preferences). These options are important in achieving one of the core goals of an insolvency administration: to maximise the pool of assets available for distribution to creditors.

In a cross-border context, the jurisdictional guides identify the means for asset tracing and recovery available including the Model Law framework, and court-to-court cooperation protocols, for example the Judicial Insolvency Network (JIN) Guidelines.

The reports also consider the complexities of privacy laws and regulations which an insolvency practitioner must consider in the asset tracing and recovery process, and the interplay with criminal law in the investigation of fraudulent and illicit transactions.

Significantly, the guide provides an overview of the distinct issues that arise in the context of digital and crypto assets – which continue to evolve in a technological age, and can give rise to several, and potentially conflicting laws involving creditors and commingled assets in multiple jurisdictions.

Asset tracing and recovery is currently one of the key priorities of UNCITRAL's Working Group V, which is continuing its work on a draft toolkit that sets out steps that could expedite civil asset tracing and recovery in insolvency proceedings, both domestically and across borders.

This INSOL publication provides an important addition to the discourse on asset tracing and recovery in an insolvency scenario. It serves as a useful compilation and "ready reckoner" for practitioners in seeking to understand the mechanisms that may be available to them in discharging their duties, and maximising returns for creditors, in the course of an appointment.

The publication also highlights key "gaps" that may be areas for law reform and greater consistency in cross-border asset tracing and recovery processes in future.

Ashok Kumar
Bird & Bird ATMD
Co-Chair Asset Tracing & Recovery Committee

Ann Gittleman
Kroll, USA
Co-Chair Asset Tracing & Recovery Committee

THE NETHERLANDS

1. Before commencement of insolvency and restructuring proceedings (pre-order for insolvency and restructuring proceedings)

1.1 What are the relevant laws or rules and relevant provisional measures available in connection with the identification, tracing, recovery and preservation of assets before an application for an insolvency or restructuring proceeding is made?

Pursuant to the Dutch Code of Civil Procedure (DCCP), a creditor is able to levy pre-judgment attachments (*conservatoire beslagen*) on certain assets of a debtor. In order to be able to levy a pre-judgment attachment, a creditor needs to obtain leave from the judge in preliminary relief proceedings (*voorzieningenrechter*). Generally speaking, such leave is easily obtained in the Netherlands. However, if the attachment proves to be wrongful, the creditor who has levied the pre-judgment attachment is in principle liable for the damages that have been incurred by the debtor as a result of the attachment. Once a pre-judgment attachment has been levied, the creditor will have to initiate court proceedings on the merits within a period that is specified by the judge in preliminary relief proceedings. If the creditor is successful in such proceedings and obtains an enforceable judgment against the debtor, the pre-judgment attachment is automatically converted into an attachment in execution (*executoriaal beslag*).

The ability to secure assets in the preliminary stage is a powerful tool in the armoury of the insolvency practitioner. It allows a degree of certainty regarding the potential recovery which assists with determining the commerciality of the action as well as the potential recovery for the creditors within the estate.

As with all powerful tools they must be wielded with caution. The fact that there could be a considerable amount of cost in the event that the action fails should always be borne in mind. It is therefore essential to ensure that both the claim and the asset base on which to attach the claim are evidentially strong.

Article 194 DCCP allows for a party that has a legitimate interest to request a copy, an extract or the inspection of certain documents from another party. On 1 January 2025, the right to make such a request was transferred from article 843a DCCP (which no longer exists) to article 194 DCCP. With the introduction of article 194 DCCP, the legislator has intended to make it easier to gain access to documents outside of court. As a result, the right of inspection now has a more prominent position, and is now on more equal footing with other means of gathering evidence instead of being seen as an *ultimum remedium*.

Article 194 DCCP can potentially assist in identifying and tracing assets. Based on case law in conjunction with article 194 DCCP, it is also possible to file an application for the seizure of specific documents in order to safeguard them as evidence. For intellectual property cases, this possibility follows explicitly from article 1019b et seq. DCCP.

Pursuant to Regulation (EU) 655/2014, it is also possible for a creditor to request a Dutch court for permission to levy a pre-judgment attachment on a bank account of a debtor in a different Member State of the European Union (with the exception of Denmark). This is known as the European Account Preservation Order.

The ability for recognition and assistance within the EU again assists the insolvency practitioner by allowing to have a far easier reach into the bank accounts of those have potentially received assets that need repatriation. This should deter parties from merely picking another EU country to move their assets to with an expectation that the process to recover them will be more difficult or impossible.

As previously stated, a strong evidential basis for the claim, by carrying out a full investigation and evidence collection, will mitigate the risks of action in this regard. This should always be the key focus alongside securing assets in the first instance.

2. Summary of corporate insolvency and restructuring proceedings

2.1 Formal insolvency legislation for corporations

2.1.1 Does your jurisdiction have formal insolvency and restructuring legislation or a framework for corporations? What legislation(s), laws or rules govern the insolvency and restructuring of corporations? Does specific legislation, laws or rules exist for the identification, tracing, recovery and preservation of assets?

As the Netherlands is a member of the European Union, Regulation (EU) 2015/848 on insolvency proceedings (recast) applies in the Netherlands. The Dutch Bankruptcy Act provides for the following insolvency proceedings for corporations:

(1) bankruptcy (*faillissement*);

(2) suspension of payments (*surseance van betaling*); and

(3) private restructuring plans under the Act on the Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord*; – WHOA or Dutch Scheme).

In addition, there are special proceedings for banks, insurance companies and investment firms. For these special proceedings, in addition to the Dutch Bankruptcy Act, the Financial Supervision Act (*Wet op het Financieel Toezicht*) contains applicable provisions.

While there is no statutory basis (yet), pre-packs are allowed by some courts in the Netherlands in order to attempt a silent restructuring of the business of the debtor.

There is no specific legislation for the identification, tracing, recovery and preservation of assets. The creditors should rely on the options generally available under the Dutch law, while bankruptcy trustees have certain special powers under the Dutch Bankruptcy Act.

In specific cases, it can be relevant for the insolvency practitioner to engage a financial advisor (this can also be a forensic accountant) and for them to work alongside, focusing on the recovery angles. The right team with the right expertise will ensure that the right advice is given. It is not necessary to have specific laws for the identification, tracing, recovery and preservation if the functionality of this process can be achieved through domestic legislation. By being one team, it is possible to ensure a cohesive litigation strategy that allows all parties to work together to achieve a common goal for creditors.

2.2 Appointment of insolvency representative, provisional insolvency representative or authorised person

2.2.1 Upon the application of the insolvency or restructuring proceedings, does your jurisdiction have a legislative framework for the appointment of an authorised person or provisional insolvency representative who is entrusted with the administration or supervision of the debtor company's business or assets, or the realisation of all or part of the debtor company's assets?

2.2.2 Where an application for an insolvency or restructuring proceeding is not made, is there a similar legislative framework for the appointment of such an authorised person for the identification, tracing, recovery and preservation of the company's assets?

In bankruptcy proceedings, a bankruptcy trustee (*curator*) is appointed by the court to take charge of the liquidation of the debtor's assets. In view of maximising the value becoming available for distribution to the creditors as well as general interests such as the preservation of employment, the bankruptcy trustee will generally investigate a possible transfer of the business as a going concern. The bankruptcy trustee will shortly after his or her appointment inventorise the assets of the debtor and preserve these as much as possible. The bankruptcy trustee acts under the general supervision of a supervisory judge. The bankruptcy trustee requires the prior authorisation of the supervisory judge for certain acts, such as the continuation of activities, reaching amicable settlements, initiating legal proceedings, transferring (part of) the business as a going concern and terminating agreements with employees and landlords.

In the course of a pre-pack, without a statutory basis being present, a silent bankruptcy trustee (*beoogd curator*) can be appointed by the court in order to attempt a silent restructuring of the business of the debtor. Due to a lack of statutory basis, courts are unwilling or reluctant to appoint a silent bankruptcy trustee.

In suspension of payment proceedings, which is automatically granted by the court upon the filing of the application and can later be declared to be definitive after a hearing is held, an administrator (*bewindvoerder*) will be appointed by the court. During the suspension of payments, the business of the debtor is managed by the directors as usual, but the co-operation (approval / authorisation) of the administrator is required for acts binding / impacting the debtor. A suspension of payments can be converted by the court into a bankruptcy at its own initiative or at the request of the supervisory judge, the administrator or one or more creditors. As a straightforward restructuring tool, suspension of payments is rarely successful, as secured and preferred creditors (such as the tax authorities and employees) cannot be bound by a composition plan that is offered during suspension of payments proceedings.

The WHOA is a debtor in possession proceeding in which a restructuring officer (*herstructureringsdeskundige*) or an observer (*observator*) may be appointed. While both roles are different, both officers are required to look after the interests of the creditors but do not have authorisation to dispose of assets nor is the co-operation required for acts binding / impacting the debtor.

Dutch law does not specifically provide for representatives or authorised persons to be appointed for the identification, tracing, recovery and preservation of the debtor's assets. In case of mismanagement however, the Enterprise Chamber of the Amsterdam Court of Appeal can be requested to e.g. suspend directors or supervisory board members and / or (instead) appoint new directors and / or supervisory board members which will participate in decision-making regarding or take charge of the debtor's affairs. The Enterprise Chamber is able to order such steps as a preliminary measure, which is common in practice.

It is important to recognise the different roles and responsibilities to ensure that all parties are aware of their obligations. Directors should get very specific advice so as not fall foul of the current legislation and to ensure that asset disposals are not contrary to the current legislation. It is always imperative to understanding how assets are treated and who has the authority to deal with them in order to determine the right strategy in the right circumstances, ensuring that creditor interests are protected.

2.3 Effects and duties imposed on the debtor company

2.3.1 What are the effect(s) and duties imposed on the debtor's company upon the application of insolvency or restructuring proceedings in relation to the identification, tracing, recovery and preservation of assets? Is there a similar duty imposed on any party or company where an application for an insolvency or restructuring proceeding is not made?

Bankruptcy proceedings impose an obligation on the debtor and its officers (including shadow directors) to provide information and cooperate with the handling of the bankruptcy by the bankruptcy trustee. The books and records of the debtor should be handed over to the bankruptcy trustee. The debtor and its officers are obliged to disclose to the bankruptcy trustee information on all assets of the debtor. There is a similar right to information for the administrator in suspension of payments and the restructuring officer and observer in WHOA proceedings.

The collection of the books and records of the company forms an important part of the evidence gathering. It allows the insolvency practitioner and its financial advisors to review the affairs of the company during the period of time that it operated. It allows them to see both what happened to the assets in the company, how it functioned and what the thinking was behind the processes. This evidentially allows potential claims to be based on contemporaneous records and primary evidence. It forms a compelling evidence trail for where assets were sent and the beneficiary. In the event these have been misappropriated in some way, it provides the starting point to trace those assets through and potentially seize and return them or bring any other applicable claim against those that have unlawfully benefited.

There is no similar duty on the debtor or third parties outside of insolvency proceedings. Creditors should then rely on the regular framework under the Dutch Civil Code.

2.4 Stay of execution of assets

2.4.1 Upon the application of the insolvency or restructuring proceeding, is an automatic stay imposed on any existing, or the commencement of any new legal proceedings, or the realisation of assets (moveable and immoveable property) of the debtor company?

In bankruptcy, the basic principle under Dutch law is that creditors with pre-insolvency claims can only exercise rights against the debtor's estate through filing their claim. The bankruptcy trustee is solely authorised to dispose of the debtor's assets. Existing legal proceedings regarding pre-insolvency claims on the debtor are suspended and are only to be continued if a distribution on the claim is expected and the claim is disputed by the bankruptcy trustee. Suspension of payments and WHOA proceedings do not affect existing legal proceedings vis-à-vis the debtor or the commencement of new legal proceedings. However, actual enforcement can be prohibited, in case a cooling-off period (*afkoelingsperiode*) is imposed by the court. A cooling-off period prevents third parties from enforcing their rights.

Secured creditors are able to exercise their rights as if there were no bankruptcy, subject to a possible cooling-off period and / or a reasonable term set by the bankruptcy trustee for the enforcement to be completed. Suspension of payments does not affect creditors with preferential claims nor secured creditors. All three types of bankruptcy proceedings under Dutch law do not provide for an automatic stay regarding the debtor's assets applicable to secured creditors, but the court, or in bankruptcy the supervisory judge, can impose a cooling-off period of up to 2 months in bankruptcy or suspension of payments or of up to 4 months in WHOA proceedings. The maximum term in WHOA proceedings is 8 months. In bankruptcy or suspension of payments, the term can be extended once with up to 2months, which makes a maximum of 4 months in total.

During the cooling-off period, rights of third parties to take recourse against the assets of the debtor or bankrupt estate or to hand over assets that are in the possession of the debtor or bankrupt estate may only be exercised with the authorisation of the court (in WHOA proceedings) or the supervisory judge (in bankruptcy or suspension of payments), which is rarely granted. In WHOA proceedings, the debtor is obliged to ensure that the interests of secured parties or third parties are adequately protected.

Dutch law does not provide for a general stay or cooling-off period outside of insolvency proceedings. Creditors should rely on the options generally available under Dutch law to attach assets.

2.5 Power to restrain or order the transfer of assets

2.5.1 Does the insolvency representative, provisional insolvency representative or authorised person have the authority to limit the powers of the debtor company in respect of the transfer of its assets, or to issue a restraining order or injunction to any third party for the preservation or protection of assets of the debtor company?

Officers appointed in Dutch bankruptcy proceedings do not have the authority to (further) limit the powers of the debtor to dispose of its assets or to issue orders or injunctions to third parties.

In bankruptcy proceedings, the debtor automatically loses the right to dispose of its assets with effect from and including the day on which the bankruptcy is declared. In suspension of payments, the the co-operation (approval / authorisation) of the administrator is required for acts binding / impacting the debtor. If acts are taken in absence thereof, the administrator can request the conversion by the court into a bankruptcy. As a debtor in possession proceeding, under the WHOA neither the restructuring expert nor the observer can prevent the debtor from disposing of its assets. If acts detrimental to the creditors are taken by the debtor, the restructuring expert or observer can request with the court the repeal of its appointment.

From the perspective of the insolvency practitioner, it is important to ensure that an assessment of the assets is done quickly either by the insolvency practitioner or their financial advisor and those that may be removed are secured as soon as possible. This is especially important in circumstances where further authority is needed to do so.

Outside of bankruptcy proceedings, there are no specific options to have an officer appointed with the authority to measures to have the limit the powers of the debtor to dispose of its assets or to issue orders or injunctions to third parties. Creditors should rely on the options generally available under Dutch law, e.g. by requesting the preliminary relief judge (*voorzieningenrechter*) to issue a prohibition for the debtor or third parties to dispose of (certain) assets or to have these assets attached.

2.6 Safeguards, checks and balances

2.6.1 Does the insolvency representative, provisional insolvency representative or authorised person have to satisfy any test or legal threshold in order to obtain any reliefs in relation to the assets of the debtor company?

This is addressed collectively in the section below.

2.6.2 Is there a notice requirement by the provisional insolvency representative or authorised person to publicise any application for any provisional measures to be imposed against the debtor company, its creditors or any other third party? Is there an avenue for the debtor company, its officers, or any other third party to terminate or challenge the application for or imposition of any provisional measures? Is there a duration for which the provisional measures would be imposed?

In bankruptcy, the assets of the debtor are subject to a general bankruptcy attachment. All attachments made by individual creditors of the debtor expire. All assets of the debtor become part of the debtor's estate. This requires no further actions or applications by relief by the bankruptcy trustee, except of course where the title of the debtor to specific assets is disputed. The bankruptcy trustee should make use of the options generally available under Dutch law to, for example, attach assets or have assets handed over to the debtor's estate.

In WHOA proceedings, and in suspension of payments subject to the cooperation (approval / authorisation) of the administrator in suspension of payments, the debtor remains authorised to dispose of its assets.

3. Identification of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

3.1 Notice of insolvency proceedings

3.1.1 What effect(s) and duties imposed on the debtor's company upon the commencement of insolvency or restructuring proceedings in relation to the identification of assets?

Under Dutch law, there is no obligation on the debtor to notify creditors of a pending application for bankruptcy proceedings or bankruptcy proceedings being declared. Since bankruptcies and suspensions of payment are published in the central insolvency register (which is interconnected to the insolvency registers of other Member States of the European Union), it is assumed that third parties could have been aware of the bankruptcy proceedings. Therefore, such parties cannot invoke that they were unaware of the bankruptcy when dealing with a debtor which is subject to bankruptcy proceedings. Further to bankruptcy being declared, the bankruptcy trustee will generally address all creditors to request that they file their claims on the debtor. In suspension of payments, the creditors will be addressed by the administrator if a meeting of creditors is convened.

In WHOA proceedings, there is a difference between public and non-public WHOA proceedings. Public WHOA proceedings are published on the website of the judiciary while non-public WHOA proceedings should remain unknown to the public. While less relevant for the entering into transactions by the debtor (since the debtor remains in possession), the creditors will generally be addressed in WHOA proceedings to have their claims recorded properly and to be informed on the restructuring plan that is presented by the debtor or, if appointed, by the restructuring expert.

3.2 Identifying assets

3.2.1 How does your jurisdiction identify assets if the books and records are unreliable?

If the books and records of the debtor are not available or unreliable, assets could be traced through searches in public registers (land registry, vehicle registry, IP registers, etc). Other options are in general: (1) enquiries with third parties such as the tax authorities or banks (if necessary with the use of article 194 DCCP); or (2) obtaining information from (other) creditors which may generate new leads for investigations. In this respect, the EU Proposal for a Directive Harmonising Certain Aspects of Insolvency Law (COM(2022) 702 Final) provides insolvency practitioners with new instruments to recover assets belonging to the debtor's estate.

Being able to obtain, review and / or secure as much information as possible is vital to create a picture of the operation of the company and the ability to trace and identify assets within the estate. The longer it takes to obtain the records, the higher the chance that they can be destroyed or go missing.

3.3 Asset location

3.3.1 What legislation(s), laws or rules govern the insolvency and restructuring of asset location?

Under the Dutch Bankruptcy Act, the property of the insolvency estate includes all of the debtor's non-exempt assets, including the assets located on foreign territory. Some assets are excluded from the insolvency estate (see section 3.4 below).

If the non-exempt assets are located in a EU Member State (with the exception of Denmark), the European Regulation on Insolvency Proceedings (2015/848) applies. According to article 20 paragraph 1 of this Regulation, the effects of an insolvency procedure cannot be contested in other Member States and the bankruptcy trustee may exercise all powers granted by the law of the Member State where the procedure was opened, as long as no other insolvency procedure has been opened in that other Member State, and no conflicting protective measure has been taken following a request to open an insolvency procedure in that Member State. In exercising its powers, the bankruptcy trustee must respect the law of the Member State on the territory of which they intend to act.

In other cases, where the non-exempt assets are located in territories outside the European Union, in spite of the principle in the Dutch Bankruptcy Act that the bankruptcy trustee can exclusively dispose of all non-exempt assets that are part of the bankruptcy estate, the relevant foreign laws and regulations determine the extent to which a Dutch bankruptcy has effect in that jurisdiction and the extent to which the bankruptcy trustee can actually exercise its powers abroad.

3.4 Asset exclusions

3.4.1 What assets may be considered exempt property?

In case of bankruptcy proceedings, section 21 Dutch Bankruptcy Act stipulates that, in short, the following assets are considered exempt property:

(i) to the extent they are not excessive:

  (a) the household effects of the residence occupied by the debtor;

  (b) the clothing of the debtor and the debtor's family;

  (c) the stock of foodstuffs present in the residence of the debtor;

  (d) property which the debtor and the debtor's family reasonably need for personal care and the general daily necessities of life;

  (e) property present in the residence which the debtor and the debtor's family reasonably need to acquire the necessary means of living or for their education or study;

  (f) highly personal property (such as wedding rings, photobooks, etc); and

  (g) pet animals of the debtor and his family, as well as the items necessary for the care of these animals;

(ii) the income of the debtor, if and insofar the supervisory judge determines this to be exempt;

(iii) funds that are provided to the debtor in compliance with a legal maintenance obligation;

(iv) an amount determined by the supervisory judge relating to the proceeds of a parental usufruct, in order to meet the charges attached to such a usufruct and to pay the costs for the care and upbringing of the child;

(v) the amount paid into judicial consignment in connection with limited ship liability;

(vi) the debtor's assets that are placed under a fiduciary administration of property, if no creditors have presented themselves who can recover these assets unencumbered by the fiduciary administration; and

(vii) an entitlement to the balance of a life annuity savings account.

In addition, section 22a of the Dutch Bankruptcy Act stipulates that with respect to a life insurance agreement, the following falls outside of the bankruptcy estate:

(1) the right to surrender a life insurance in return for the surrender value if the beneficiary or policy holder is unreasonably disadvantaged by the surrender;

(2) the right to change the beneficiary of the life insurance, unless such a change is made on behalf of the bankruptcy estate and the beneficiary or policy holder is not unreasonably disadvantaged by the change; and

(3) the right to borrow money on the life insurance policy.

3.5 Collecting assets

3.5.1 Once assets included in the books and records or outside the books and records have been identified, what methodologies are in place to collect those assets? Does an insolvency representative need to have possession of the assets? Is the insolvency representative required to put a lien on the assets? How does the insolvency representative collect assets outside the jurisdiction?

The declaration of bankruptcy is considered as a judicial attachment of all the debtor's assets for the benefit of the collective creditors, thereby nullifying all prior attachments. Non-exempt assets can no longer be disposed of or managed by the debtor or any other third party. The authority to dispose of and manage these identified non-exempt assets is vested in the bankruptcy trustee. The bankruptcy trustee is also granted the power to annul certain legal acts performed by the debtor prior to the declaration of the bankruptcy if these acts have prejudiced the collective creditors by attempting to hide their assets or making preference payments to particular creditors.

To prevent the debtor from misappropriating assets from the estate or altering records, the bankruptcy trustee ensures that the non-exempt assets belonging to the estate are secured. If business activities are not continued, the bankruptcy trustee may take possession of documents and other data carriers, funds, securities and other valuable papers. Some assets will remain in the possession of the debtor or third parties until the bankruptcy trustee has sold them. The bankruptcy trustee may access any location to the extent reasonably necessary for the execution of their duties.

The bankruptcy trustee may proceed immediately with the liquidation and monetisation of all non-exempt assets belonging to the estate without requiring the debtor's or creditor's consent or cooperation. The assets are sold either publicly through an auction or privately with the approval of the supervisory judge.

Creditors with a right of retention over an asset belonging to the estate do not lose this right as a result of the bankruptcy declaration. The bankruptcy trustee may claim and sell the asset, without affecting the priority granted to the creditor. If it is in the interest of the estate, the bankruptcy trustee may also return the asset to the estate by satisfying the claim against which the right of retention can be exercised.

For non-exempt assets located on foreign territory, the bankruptcy trustee will only pursue and liquidate these assets if this is in terms of value beneficial to the bankruptcy estate. The costs associated with identifying and liquidating these assets should not exceed the proceeds.

If the foreign assets are located on territory of an EU Member State, the European Regulation on Insolvency Proceedings (2015/848) applies. This Regulation allows the bankruptcy trustee to exercise all powers granted to him by the law of the Member State, permitting the removal and / or liquidation of the debtor's non-exempt assets located there. In exercising these powers, the bankruptcy trustee must respect the law of the Member State on the territory of which they intend to act, particularly the regulations concerning the liquidation of assets.

In other cases, where the assets are located in territories outside the European Union, in spite of the principle in the Dutch Bankruptcy Act that the bankruptcy trustee can exclusively dispose of all non-exempt assets that are part of the bankruptcy estate, the relevant foreign laws and regulations determine the extent to which a Dutch bankruptcy trustee can remove from and / or liquidate the debtor's assets in the territory where they are located.

The main objective will always be to collect in as much of the property in the estate as possible and to maximise the realisations for creditors. This means very carefully considering the disposal strategy and understanding the market for the property, consulting with sector experts and subject matter experts where appropriate.

3.6 Asset inventory and valuation

3.6.1 How does an insolvency representative ensure that the value of the assets on the books and records is accurate?

The bankruptcy trustee has to prepare an inventory of the bankruptcy estate (article 94 para 1 of the Dutch Bankruptcy Act). The Dutch Bankruptcy Act does not contain any provisions with regard to the valuation of the assets belonging to the bankruptcy estate.

In most cases, the bankruptcy estate will make use of the services of a valuation firm to determine the value of the assets. The most common valuation methods used in this regard are the liquidation value (*liquidatiewaarde*) and the private sale value (*onderhandse verkoopwaarde*).

In order to be able to offer a restructuring plan under the WHOA, the reorganisation value and the expected proceeds in case of a bankruptcy of the debtor have to be determined (article 375 paragraph 1 under (e) and (f) of the Dutch Bankruptcy Act). The principles and assumptions that were used in calculating these values also have to be stated in the restructuring plan (article 375 paragraph 1 under (g) of the Dutch Bankruptcy Act). While it is not mandatory to make use of an independent valuator to determine the reorganisation value and / or the expected proceeds in case of a bankruptcy, this is generally preferred, especially when there is discussion with regard to these values. In most cases, the discounted cash flow method will be used to determine the reorganisation value. When it comes to the expected proceeds in case of a bankruptcy, different scenarios will have to be evaluated, such as a sale of the assets separately, the sale of the business activities, or a combination of these two approaches.

In certain circumstances, it will be important to get a number of valuations to determine the veracity of valuation given and ensure that creditors are obtaining the best possible return. In certain circumstances, this might not be possible due to speed affecting the market value of the property for example or the sensitive nature of the property in a particular sector or industry. Confidentiality and market sensitivity should be considered too.

4. Recovery of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

4.1 Court-based remedies

4.1.1 What tools are available to recover assets e.g. freezing orders, seizure orders or orders for judicial sale?

The declaration of bankruptcy is considered as a judicial attachment of all the debtor's assets for the benefit of their collective creditors, thereby nullifying all prior attachments. This enables the bankruptcy trustee, using the powers granted to him by law, to locate and recover assets, without the need for court intervention. However, at times the bankruptcy trustee must seek recourse through the court to secure certain assets, for instance, by initiating summary proceedings.

- Injunction or order in summary proceedings

  Under article 3:296 paragraph 1 of the Dutch Civil Code, the bankruptcy trustee may seek an injunction or order from the court in summary proceedings against a third party who is intending to transfer assets belonging to the estate to another party.

- Surrender or delivery of assets in summary proceedings

  If a third party refuses to return assets to the estate, the bankruptcy trustee may, under article 730 DCCP, request the surrender or delivery of the assets that belong to the estate.

In these circumstances, identifying the assets you intend to recover is absolutely key to ensuring the most effective solution is enacted for the recovery.

4.1.2 Do all or only some insolvency representatives have powers to use these tools? Which ones?

The ability to file a claim for an injunction or for the surrender of an asset in in summary proceedings is not an exclusive power of the bankruptcy trustee. Any insolvency representative or any other party with a sufficient urgent interest may initiate such a procedure.

This allows all those with an interest to seek redress by assisting in the process of securing assets that could be dissipated.

4.1.3 Can a party approach the court on a confidential, ex parte basis? What notice is required to be given to the holder of the assets (or potential defendant)?

A summary proceeding is not an *ex parte* procedure. Both parties will be given the opportunity to present their views.

Under Dutch law, in cases where the urgency is so pressing, it is possible to initiate an *ex parte* procedure. However, *ex parte* orders are very rare and are primarily used in cases involving infringements of intellectual property rights. The preliminary relief judge must set a reasonable time frame for instituting the claim in main proceedings.

4.1.4 *If applying on an ex parte basis, is there a duty to make full and frank disclosure?*

A request for an *ex parte* procedure must meet the same requirements as an application in main proceedings, but there is no formal duty of full and frank disclosure.

4.1.5 *What elements are required to be proven, and to what standard of proof, in order to succeed? Is this a more onerous standard than usual?*

Under the Dutch Bankruptcy Act, the bankruptcy trustee can annul legal actions without court intervention in order to recover assets *(actio pauliana*). Under article 42 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul voluntary legal actions performed by the debtor if the debtor knew or should have known that these actions would result in prejudice to creditors.

Under article 47 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul compulsory legal actions performed by the debtor if it is demonstrated that the party receiving the payment knew that the debtor's bankruptcy had already been filed or if there was collusion between the parties intended to favour the receiving party over other creditors.

According to article 3:296 paragraph 1 of the Dutch Civil Code, the following requirements must be met for the issuance of a court injunction or order:

- there must be a threat of a violation of a legal obligation;
- the order or injunction must be requested by a party to whom the respondent is obligated to give, do, or refrain from doing something; and
- the order or injunction must align with the legal obligation in question (the so-called requirement of congruence (*congruentie-vereiste*).

According to article 730 DCCP, anyone who has the right to the surrender of a movable asset or delivery of a property, or who can obtain such a right through a court ruling for annulment or dissolution, may seize the asset or property to safeguard this right.

By reviewing the records, interviewing interested parties and speaking to the debtor, the insolvency practitioner and the financial advisor will be in a position to evidence what the state of knowledge was in the relevant person(s) at the relevant time. This is the key test to allow for the successful annulment.

4.1.6 *Are there any other requirements in order to obtain the orders? For example, an undertaking to pay damages associated with the freezing of assets and, if required, security for such an undertaking.*

To initiate a claim in summary proceedings, it is required that the claimant has an urgent interest in filing the claim. If there is no urgent interest, the claim can be filed in regular main proceedings.

4.1.7 *What safeguards can the court require to be in place?*

The court in summary proceedings will decide independently on a claim issued by the claimant. However, if such a claim is granted by the court, a main proceeding must be initiated within a reasonable period in which the claim will be examined in full by the designated court.

4.1.8 *What mechanisms are available to expedite claims against non-responsive or other defendants? For example, summary judgments or judgment in default. Is a final judgment required to enforce against a defendant?*

If a defendant fails to appear, the judge will issue a default judgement. The defendant may file an opposition to the default judgement. If a timely opposition is filed, the case will be reconsidered, with the opportunity for a hearing on the merits, by the same court that issued the default judgment. If the defendant fails to file an opposition, the default judgement will become final and irrevocable.

4.1.9 *What ancillary orders may be available?*

Under article 194 DCCP, access to or copies of documents and files that are generally known to the claimant but not in their possession can be requested. The article grants an independent right to those who have a legitimate interest. This can be done either in a separate proceeding or (for example, as a preliminary claim) within an ongoing proceeding.

4.1.10 *In your jurisdiction, who enforces against assets?*

Under the Dutch Bankruptcy Act, it is the responsibility of the bankruptcy trustee to enforce against assets. In some cases, a bailiff will be involved – for example, to serve a writ.

4.1.11 Are there specific causes of action or remedies that are only available to insolvency representatives to recover assets and / or books and records of the company? Do all or only some insolvency representatives have these powers?

Under article 92 of the Dutch Bankruptcy Act, the bankruptcy trustee immediately takes possession of the documents and other data carriers, funds, valuables, securities, and other papers of value. The debtor is obliged to surrender the administration and accounting records to the appointed bankruptcy trustee. This obligation also extends to third parties, such as accountants, who hold these documents in their possession. If the debtor refuses to surrender these documents, their delivery can be enforced through legal proceedings.

If these documents reveal that there have been fraudulent transfers and preferential payments, the bankruptcy trustee is authorised to annul the transactions. Under the Dutch Bankruptcy Act, the bankruptcy trustee can annul legal actions without court intervention in order to recover assets *(actio pauliana*). Under article 42 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul voluntary legal actions performed by the debtor if the debtor knew or should have known that these actions would result in prejudice to creditors.

Under article 47 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul compulsory legal actions performed by the debtor if it is demonstrated that the party receiving the payment knew that the debtor's bankruptcy had already been filed or if there was collusion between the parties intended to favour the receiving party over other creditors

Outside of bankruptcy proceedings, creditors can, under article 3:45 of the Dutch Civil Code, also annual such fraudulent transactions.

4.2 Out-of-court assistance

4.2.1 What mechanisms are available to the insolvency representative to identify and secure assets without court assistance?

4.2.2 What is required to utilise these mechanisms? Are there costs or time barriers involved?

No court intervention is required for the bankruptcy trustee to identify and secure the assets. The debtor is obligated to share all requested information with the bankruptcy trustee, and to inform the bankruptcy trustee of his own volition of all relevant facts and circumstances with regard to the bankruptcy estate, including all assets (article 105 paragraph 1 of the Dutch Bankruptcy Act). The debtor is also obligated to inform the bankruptcy trustee of all foreign assets, and to provide cooperation to allow the bankruptcy take possession of these foreign assets (article 105 paragraph 2 of the Dutch Bankruptcy Act). In addition, the debtor is obligated to provide the books and records of the company to the bankruptcy trustee (article 105a of the Dutch Bankruptcy Act). These mechanisms allow the bankruptcy trustee to identify the assets.

There is no specific provision in the Dutch Bankruptcy Act that states that parties holding assets that are a part of the bankruptcy estate will have to relinquish these assets to the bankruptcy trustee, but this follows from general property law. If parties do not relinquish the assets in question, court intervention may be required.

4.3 Powers to examine and investigate

4.3.1 What powers are available to investigate the affairs of the company to identify and recover assets? Do these extend to individuals involved in the company or recipients of funds? What tools are available for the liquidator to investigate the location and nature of assets to satisfy a judgment?

4.3.2 What criteria are required to be satisfied before activating any powers of investigation regarding assets?

The debtor has to provide all requested information to the bankruptcy trustee and also has to inform the bankruptcy trustee of all relevant facts and circumstances regarding the estate (see section 4.2 above). In case of a bankrupt company, these duties extend to the management board and supervisory directors of the company (article 106 of the Dutch Bankruptcy Act).

If the debtor (or in the case of a company, its managing directors and / or supervisory directors) does not comply with the obligations imposed by law due to the bankruptcy, which includes the aforementioned duty to provide requested information to and to inform the bankruptcy trustee, the court can be requested to hold the debtor (or in the case of a company, its managing directors and / or supervisory directors) in custody.

The ultimate penalty of custody is a strong impetus for those with knowledge to provide it to the insolvency practitioner and to comply with them.

5. Tracing of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

5.1 Verification of assets

5.1.1 Has the Model Law been implemented or enacted as part of local legislation? What remedies can be obtained under the Model Law for the verification of assets?

Although it is in the crosshairs of the Dutch legislator, the Netherlands has not (yet) enacted UNCITRAL Model Law. A draft bill focusing on international insolvency law is expected, but it is uncertain when it will be published.

5.2 Completeness of books and records

5.2.1 What criminal offences (if any) have been implemented for misrepresentation or incomplete information?

In the bankruptcy of a debtor, one of the statutory duties of the bankruptcy trustee is to investigate whether there are "irregularities" at hand which caused or contributed to the bankruptcy of the debtor being declared, have complicated the handling of the bankruptcy or have increased the deficit and therefore were detrimental to the creditors. The bankruptcy trustee is obliged to report to the supervisory judge. If the bankruptcy trustee or the supervisory judge deems it necessary, the bankruptcy trustee will report or declare the irregularities to the competent authorities. The absence or incompleteness of books and records is one of the grounds for the bankruptcy trustee reporting to the fiscal intelligence and investigation service (FIOD).

The irregularities themselves constitute criminal offences under Dutch law, including the failure to supply information to the bankruptcy trustee, the failure to provide or keep books and records in compliance with applicable laws and committing actions that were detrimental to the creditors.

5.3 Avoidable transactions – fraudulent conveyances and preference actions

5.3.1 What are the rules governing transaction avoidance?

For the protection of creditors, in a bankruptcy the bankruptcy trustee may – if certain requirements are met – by notice in writing or in court avoid any transaction pursuant to which other creditors' rights are prejudiced (*actio pauliana* – comparable to fraudulent preference / conveyance).

Firstly, the bankruptcy trustee may void a transaction entered into by the debtor without a prior legal obligation to do so if the interests of the other creditors are prejudiced by that transaction and if both the debtor and its counterparty to the transaction were aware or should have been aware that the transaction was prejudicial to the interest of the other creditors. The burden of proof rests upon the bankruptcy trustee, but the aforementioned knowledge is assumed if the transaction is entered into within one year prior to the bankruptcy of the debtor and, among others:

(1) the value of the obligation of the creditor is substantially exceeded by the value of the obligation of the debtor;

(2) payment has been made of, or security has been granted for, a debt which is not due and payable; or

(3) the debtor and creditor are related parties / entities.

Secondly, the bankruptcy trustee may void transactions that are entered into with the legal obligation to do so if the other party at the time the transaction was entered into knew that an application had been made for the bankruptcy of the debtor, or where the transaction is the result of discussions between the company and the other party with the purpose to prefer the latter to the detriment of the debtor's other creditors.

EU Proposal for a Directive Harmonising Certain Aspects of Insolvency Law (COM(2022) 702 Final) intends to harmonise the criteria on transaction avoidance in alle member states of the European Union.

In order to prove any case, the collection of data and evidence to support the position of knowledge at the time of the transactions will be key to successfully voiding these types of transactions.

5.4 Time limits for commencement of avoidance actions

5.4.1 Is there a limitation period for the commencement of avoidance action? Are there different limitation periods for concealed transactions?

There is no real look-back period under Dutch law, but in connection with the test for avoidance (see section 5.3 above), there are evidentiary presumptions in relation to certain types of transactions entered into within 1 year prior to the bankruptcy. The limitation period for voidable preference claims is 3 years from the date on which the bankruptcy trustee discovered the detrimental effect of the relevant transaction. Interruption of the limitation period is possible and as such there is no real time limit in relation to, for example. commencement of avoidance actions in court.

6. Recognition of judgments in relation to asset tracing and recovery

6.1 UNCITRAL Model Law on cross-border insolvency

6.1.1 Has the Model Law been implemented or enacted as part of its local legislation, and what remedies can be obtained under the Model Law for the identification, tracing, recovery and preservation of assets?

As noted, the Netherlands has not (yet) enacted UNCITRAL Model Law. A draft bill focusing on international insolvency law is expected, but it is uncertain when it will be published.

6.2 Judicial insolvency network

6.2.1 Have the JIN Guidelines been adopted, and what tools are available under the JIN Guidelines to facilitate court-to-court communication in respect of any recognition application made to court or any court filings for the purpose of identifying, tracing, recovering and preserving assets?

The Judicial Insolvency Network (JIN) Guidelines have not been adopted in the Netherlands, except by the District Court Midden-Nederland (one of the 11 district courts in the Netherlands). The JIN Modalities have also not been adopted in the Netherlands.

Neither Dutch law nor regulations provide for a framework or tools for court-to-court communication by the other 10 courts. Regulation (EU) 2015/848 on insolvency proceedings (recast) provides for conditional intentions for cooperation in insolvencies with debtors in different member states between the judges in such member states.

In WHOA proceedings, courts are in practice facilitating international parallel proceedings when scheduling hearings and in view of sharing information and documents.[1] In bankruptcies and suspensions of payment, it is practice that there are informal contacts between courts in different jurisdictions regarding bankruptcy proceedings with bankrupt debtors in multiple jurisdictions.

6.3 Other forms for recognition of judgments and reliefs granted under common law or any other legislations

6.3.1 How do foreign judgments become recognised? What relief may be granted upon recognition of the foreign judgments in relation to the identification, tracing, recovery and preservation of assets of the debtor company which the foreign judgment relates to?

Within the EU (except for Denmark), Regulation (EU) 2015/848 on insolvency proceedings (recast) provides for automatic recognition in the Netherlands of foreign insolvency proceedings (listed in the aforementioned regulation) opened on or after 26 June 2017. If the matter involves the recognition foreign non-EU insolvency proceedings, domestic Dutch law is applicable.

The Dutch Bankruptcy Act contains no provisions with regard to the recognition of a foreign insolvency. UNCITRAL Model Law or (other) rules based on comity have not been implemented in the Netherlands. The Dutch Bankruptcy Act dates back to 1893, at which time it was considered undesirable to include rules that would allow for the recognition of foreign insolvencies. As a consequence of this, the Dutch Supreme Court applied the "territoriality principle" in its case law, so an insolvency from a country with which the Netherlands has no relevant treaty (such treaties are exceptionally rare) does not include any assets in the Netherlands, and a foreign insolvency practitioner may not act on the basis of it with respect to such assets to the extent doing so would result in the deterioration of the position of (individual) creditors and their (individual) recourse rights.

However, softening this principle of territoriality somewhat and relevant to the relief that may be granted, the Dutch Supreme Court has ruled, in short, that a foreign insolvency practitioner can effectively exercise their powers in the Netherlands if they act within the scope of the lex concursus (i.e. the law of the country of the opening of the insolvency proceedings) and if such exercise does not lead to a deterioration of the position of the creditors of the insolvent company as described above. When exercising their powers, the foreign bankruptcy trustee must respect all existing attachments on Dutch assets by individual creditors. No prior court decision on recognition or relief (as required under the UNCITRAL Model Law) or exequatur is required for such exercise of powers. If an interested party believes that a foreign insolvency order violates Dutch public policy, it is up to that party to prevent the foreign bankruptcy trustee from exercising their powers by initiating court proceedings in the Netherlands in order to obtain an injunction in that respect.

1 See e.g. District Court Amsterdam 4 April 2024, ECLI:NL:RBAMS:2024:3806.

7. Privacy related issues when investigating and tracing assets

7.1 Privacy law issues related to assets of the insolvent company

7.1.1 Which (privacy) laws and regulations govern the processing of personal data in asset tracing investigations within your jurisdiction?

Until 25 May 2018, privacy legislation in the Netherlands was governed by the *Wet bescherming persoonsgegevens* (Personal Data Protection Act) (Wbp). Since then, the General Data Protection Regulation (GDPR) of the EU, has been in effect. In the Netherlands, this is implemented through the *Uitvoeringswet AVG* (GDPR Implementation Act). This privacy legislation regulates, among other things, when personal data may be processed, the rights of the data subject, and how compliance with the law is monitored.

7.1.2 Who is considered the controller within the meaning of article 4 par. 7 of the General Data Protection Regulation (GDPR) (e.g. for keeping the books and administration or processing personal data) during insolvency proceedings?

The Dutch Bankruptcy Act regulates the procedures for

(1) bankruptcy;

(2) suspension of payments;

(3) the WHOA; and

(4) debt restructuring of natural persons (Wsnp).

Article 68 of the Dutch Bankruptcy Act assigns the bankruptcy trustee the responsibility for managing and liquidating the bankrupt estate. Article 215 of the Dutch Bankruptcy Act states that, during a suspension of payments, the administrator manages the debtor's affairs together with the debtor. Article 316 of the Dutch Bankruptcy Act gives the Wsnp administrator the duty to oversee the debtor's compliance with Wsnp obligations and to manage and liquidate the estate.

The bankruptcy trustee, the administrator during suspension of payments, and the Wsnp administrator often process personal data while performing their legal duties. This data includes information about the bankrupt individual or, if the bankrupt entity is a company, its directors; employees of the bankrupt company; customers of the company; and creditors involved in the bankruptcy. The GDPR applies to this processing.

The bankruptcy trustee is the data controller during bankruptcy. The same applies to the administrator during the suspension of payments if they process personal data independently, and to the Wsnp administrator during a Wsnp process.

7.1.3 If the GDPR is not applicable within your jurisdiction, who is considered the person (natural person or entity) responsible for compliance with privacy laws (e.g. for keeping the books and administration or processing personal data) during the insolvency proceedings?

The GDPR is applicable in the Netherlands.

7.1.4 Are there any legal requirements or obligations for obtaining and processing personal data, including sensitive data (e.g. criminal records), during the asset tracing process?

The GDPR applies, so every processing of personal data needs a legal basis as stated in article 6 of the GDPR. According to article 9 of the GDPR, it is generally forbidden to process personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership. It is also forbidden to process genetic data, biometric data for identifying a person, health data, or data about a person's sexual behavior or orientation.

Article 11 of the GDPR states that personal data related to criminal convictions and offences, or related security measures, can only be processed under the supervision of the government or if allowed by EU or national law that provides appropriate safeguards for the rights and freedoms of the individuals concerned. Comprehensive registers of criminal convictions can only be maintained under government supervision.

7.1.5 Are there any other relevant obligations in relation to the processing of personal data in the course of insolvency proceedings?

A bankruptcy trustee, as a data controller, must be able to demonstrate the lawfulness and fairness of the processing of personal data in accordance with article 5, paragraph 2 of the GDPR (accountability obligation).

7.1.6 Are there restrictions on sharing personal data with third parties (e.g. law enforcement or creditors) involved in the insolvency proceedings?

The GDPR is also guiding: personal data must be collected for specific, explicitly stated, and legitimate purposes. Insolvency officers must not further process the data in a manner that is incompatible with the original purpose of collection (purpose limitation principle).

7.1.7 If the GDPR is not applicable, are there any restrictions for transfers of personal data to countries outside your jurisdiction?

The GDPR is applicable in the Netherlands.

7.1.8 Are there pending legislative proposals or amendments that may impact the processing of personal data during asset tracing in insolvency proceedings?

Under the EU Proposal for a Directive Harmonising Certain Aspects of Insolvency Law, it is proposed that insolvency practitioners: (1) can gain indirect access to bank account information by making a request to designated courts in the EU Member State; (2) direct access to beneficial ownership information; and (3) direct access to national asset registers (where available). There is also a national proposal for new legislation pending that involves the processing of personal data in insolvency proceedings, but it does not directly affect asset tracing.

7.2 Privacy law issues related to assets of directors or other parties

7.2.1 What legal grounds or exemptions allow the processing of personal data of directors or other parties during asset tracing, particularly when the insolvency representative considers actions or has initiated actions against them?

The bankruptcy trustee has a legal duty to address irregularities (article 68 of the Dutch Bankruptcy Act). This duty involves, on one hand, the obligation to investigate any irregularities that may have contributed to the bankruptcy, complicated the liquidation, or increased the shortfall in the estate (the causes investigation) and, on the other hand, the obligation to report identified irregularities to the supervisory judge. If the bankruptcy trustee and / or the supervisory judge deem it necessary, the bankruptcy trustee can take civil legal action against the directors or supervisory board members.

In this context, the Tax Authorities can, based on article 36.2 of the Collection Guidelines 2008, provide the bankruptcy trustee with information at no cost regarding recourse against the directors and / or supervisory board members of the bankrupt company. This specifically includes access to the most recent tax returns of these individuals, revealing their income and assets.

The government agency "Dienst Justis" manages a database to support the handling of irregularities, containing information on all public limited companies (NVs) and private limited companies (BVs) in the Netherlands. The bankruptcy trustee can use this database to request a network diagram showing the relationships between a legal entity or multiple legal entities and the associated individuals and companies. This network diagram provides important leads for the bankruptcy trustee's recovery investigation, as it reveals which legal and natural persons are involved with the legal entity.

7.2.2 Do these legal grounds or exemptions only apply to a (court appointed) insolvency representative, or also to other parties?

The aforementioned powers are exclusively granted to the insolvency practitioner in the performance of their duties.

8. Considerations when criminal law is involved

8.1 How should the insolvency representative or provisional insolvency representative or other authorised person deal with the authorities when criminal law is involved?

Article 68 paragraph 2 under (c) of the Dutch Bankruptcy Act stipulates that the bankruptcy trustee shall report irregularities to the competent authorities if either the bankruptcy trustee or the supervisory judge considers this necessary.

In case of (suspected) bankruptcy fraud, the bankruptcy trustee can file a report with the Central Bankruptcy Fraud Reporting Point of the fiscal intelligence and investigation service (FIOD) through a standard form.

8.2 Are there any relevant laws, authorities and considerations under criminal law which may be applicable in relation to an application made by the provisional insolvency representative or authorized person for any provisional measures?

The Dutch Criminal Code contains several provisions regarding crimes that are related to bankruptcies, such as excessive spending prior to a bankruptcy (articles 340 and 342 of the Dutch Criminal Code), intentional prejudice to the creditors prior or during the bankruptcy (articles 341 and 343 of the Dutch Criminal Code), the failure to

comply with disclosure obligations during insolvency proceedings (article 194 of the Dutch Criminal Code), the failure to provide the books and records to the insolvency practitioner (article 344a of the Dutch Criminal Code) and the failure to keep books and records (article 344b of the Dutch Civil Code).

9. Digital assets and crypto assets

9.1 Crypto as an asset and ownership issues

9.1.1 How is cryptocurrency classified?

Under Dutch law, property is comprised of all things (*zaken*), defined under Dutch law as corporeal objects which can be subject to human control, and of all proprietary rights and interests (*vermogensrechten*). While it is clear that cryptocurrencies do not fall under the definition of a "thing", there is discussion in legal literature whether cryptocurrencies can be considered a proprietary right or interest pursuant to Dutch law. No definitive case law exists on this issue.

From a regulatory perspective, it is clear that cryptocurrencies do not qualify as money (*geldmiddelen*) or as legal tender (*wettig betaalmiddel*). Whether a cryptocurrency qualifies as a financial instrument (*financieel instrument*), a participation right in an alternative investment fund (*alternatieve beleggingsinstelling*) or an investment object (*beleggingsobject*) has to be determined on a case by case basis.

As far as the Dutch tax authorities are concerned, cryptocurrencies are considered savings and investments, and are taxable as such.

9.1.2 What rights and interest do cryptocurrency exchanges or trading platforms have in the cryptocurrency held in accounts at the exchange or platforms?

Generally speaking, this will depend on the agreement (including the general terms and conditions) between the cryptocurrency exchange / trading platform and the customer. If no specific arrangements are made in this regard, the cryptocurrency held in accounts by customers will likely fall within the bankruptcy estate in the case of a bankruptcy.

9.1.3 Is cryptocurrency capable of being subject to a trust, secured creditor interest or custody arrangement?

Dutch law does not provide for the creation of trusts, which means that cryptocurrency are not capable of being subject to a trust. Due to the uncertainty of the legal classification of cryptocurrencies under Dutch law, it is also uncertain whether cryptocurrencies can serve as collateral for secured creditors. For example, it is possible for a cryptocurrency exchange to establish a foundation (*stichting*) to act as a bankruptcy-remote vehicle that safeguards the funds of its users.

9.2 Core issues in insolvency

9.2.1 When a cryptocurrency exchange / platform is subject to insolvency proceedings, what are the applicable legal standards for determining whether the exchange / platform or the accountholder owns the cryptocurrency held at the exchange / platform?

In principle, in the case of insolvency of a cryptocurrency exchange / platform where the cryptocurrency is being held and controlled by the legal entity that has become insolvent, the exchange / platform would be considered the owner of the cryptocurrency from a legal perspective.

9.2.2 Have there been any significant legal decisions in your jurisdiction regarding ownership of cryptocurrency in insolvency proceedings?

There have been no significant legal decisions in the Netherlands in this regard.

9.2.3 How is cryptocurrency valued in insolvency proceedings?

Generally speaking, if a bankruptcy estate contains cryptocurrency, the bankruptcy trustee is able to liquidate the cryptocurrency by selling it for the market value. If a creditor has a claim based on cryptocurrency holdings, in principle, this claim is valued in bankruptcy proceedings at the euro equivalent on the date the bankruptcy of the debtor was declared.

9.2.4 When a cryptocurrency / platform goes into insolvency, do customers have any special priority or are they treated as general unsecured creditors?

Customers do not have any special priority in case of insolvency of a cryptocurrency platform, and are treated as general unsecured creditors. If the cryptocurrency is not held by the bankrupt entity but by a separate, bankruptcy-remote vehicle, the customers would in principle be able to claim their cryptocurrency from this separate vehicle.

9.2.5 *If the UNCITRAL Model Law on Cross-Border Insolvency has been enacted in your jurisdiction, how can that law be used to assist with the tracing and recovery of cryptocurrency assets? Are there other laws or rules dealing with cross-border insolvency that can be used to assist with the tracing and recovery of cryptocurrency assets?*

The UNCITRAL Model Law on Cross-Border Insolvency has not been enacted in the Netherlands, nor are there any other laws or rules related to cross-border insolvency that can be used to assist specifically with the tracing and recovery of cryptocurrency assets.

9.3 Clawback / recovery of cryptocurrency assets

9.3.1 *What types of non-insolvency claims are available to recover stolen / misappropriated cryptocurrency?*

A claim could be based on – for example – tort, unjust enrichment or breach of contract. This would depend on the specific facts and circumstances at hand.

9.3.2 *Are there any clawback or avoidance claims under insolvency law that can be brought to recover cryptocurrency transferred from the debtor prior to commencement of insolvency proceedings?*

It is possible that such transfers can be avoided based on the *actio pauliana* (see section 5.3 above).

9.3.3 *Are there any special or unique issues in bringing a clawback / avoidance claim to recover cryptocurrency? Have there been any significant decisions in this area?*

There have been no significant decisions in this area in the Netherlands. From a legal perspective, there are no special or unique issues in bringing an avoidance claim to recover cryptocurrency. In a practical sense, issues can arise, due to the decentralized nature of cryptocurrencies. For example, cryptocurrency that have been transferred to a third party may have been sent to a cryptocurrency tumbler such as Tornado Cash, obfuscating the end location of the cryptocurrency that have been sent there.

9.3.4 *What remedies are available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency assets? What are the legal standards / requirements for obtaining those remedies?*

Although there is uncertainty when it comes to the exact legal qualification of cryptocurrency (see section 9.1 above), it has been argued in legal literature that it is possible to levy a pre-judgment attachment on cryptocurrency. If that is indeed the case, in principle, the legal standards / requirements would be the same as for other pre-judgment attachments (see paragraph, chapter 1).

9.4 Tracing of cryptocurrency

9.4.1 *What discovery or information gathering tools are available, under insolvency and non-insolvency law, to obtain information on the location of cryptocurrency and the owner of that cryptocurrency?*

Both in and out of bankruptcy it is possible to request a copy, an extract or the inspection of certain documents from another party pursuant to article 194 DCCP. This provision could be used to obtain information regarding the location and owner of cryptocurrency.

9.4.2 *What type of information are cryptocurrency exchanges / platforms required to collect from customers (including KYC information) when they open an account?*

Centralised cryptocurrency exchanges / platforms have to adhere to Know-Your-Customer (KYC) protocols under Dutch law. As decentralised cryptocurrency exchanges facilitate peer-to-peer exchanges without an intermediary authority, such decentralised exchanges generally will not do any KYC checks.

9.4.3 *Can the KYC information about accountholders collected by a cryptocurrency exchange / platform be obtained through a formal discovery process? Are there any special issues to navigate in your jurisdiction in order to obtain such information?*

There is no case law in the Netherlands on this issue. As there is no formal discovery process in the Netherlands, a request for KYC information with a cryptocurrency exchange / platform based in the Netherlands would have to be obtained through a request pursuant to article 194 DCCP. If the cryptocurrency exchange / platform does not comply with the request, legal proceedings may be required. Whether such proceedings would be successful, depends heavily on the specific facts and circumstances of the case.

9.4.4 What type of forensic or tracing tools are available to assist with the tracing and recovery of cryptocurrency?

As cryptocurrencies do not fall within the borders of a certain jurisdiction, the same forensic and tracing tools are available in the Netherlands as in any other jurisdiction. Examples are wallet.dat files, blockchain explorers, blockchain analysis software (such as Chainalysis), hardware devices and seed phrases and passwords.

9.4.5 What type of expert evidence is necessary in your jurisdiction to establish the tracing of stolen or misappropriated cryptocurrency to a particular account / wallet?

There is no case law on this point, but generally speaking no specific type of expert evidence is necessary. It is possible to make use of certain cryptocurrency tracing software.

9.5 Government / regulatory Intervention

9.5.1 What governmental bodies or agencies have oversight over fraud or theft of cryptocurrency?

In principle, such matters would have to be reported with the police. In addition, the fiscal intelligence and investigation service (FIOD) has a department focused on cybercrime, the Financial Advanced Cyber Team (FACT). It is possible to report cryptocurrency fraud directly with the FIOD.

9.5.2 Are there remedies available to law enforcement that could lead to the recovery or forfeiture of stolen / misappropriated cryptocurrency and the return of that cryptocurrency to the victims?

Generally speaking, law enforcement will have more possibilities to request information from third parties than private parties, such as cryptocurrency exchanges / platforms.

INSOL INTERNATIONAL

INSOL International
29-30 Ely Place
London
EC1N 6TD
Tel: +44 (0) 20 7248 3333