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THE CRUCIAL DIFFERENCE IS THAT THE INTENDED BANKRUPTCY TRUSTEE IS APPOINTED PRIOR TO AN ACTUAL BANKRUPTCY ORDER

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The Netherlands: Pre-Packs, Recalibration of Bankruptcy Law

As part of the legislative programme called 'Recalibration of Bankruptcy Law' the Dutch legislator has provided a statutory footing to the practice of pre-packs (also known as "silent administration").

On 21 June 2016 the Dutch Lower House has adopted the legislative proposal Continuity of Enterprises Act I (the "Act"). The purpose of a pre-pack is to be able to prepare a possible upcoming bankruptcy in relative calm with the parties directly involved.

With this Act a regulation is introduced in the Dutch Bankruptcy Act in which the court is given the possibility to privately appoint, at the request of a debtor and prior to a possible upcoming bankruptcy, an intended bankruptcy trustee. The intended bankruptcy trustee is the person whom the court will appoint as bankruptcy trustee if there should be a bankruptcy. The chances of a sale and the subsequent restart of viable parts of the business of the debtor may be increased with a pre-pack. The Dutch Upper House now needs to approve the Act as well. The expectation is that the Act will come into force after this.

Definition of a pre-pack

A pre-pack means a proceedings in which the court, at the request of a debtor and prior to a possible upcoming bankruptcy, appoints an intended bankruptcy trustee. The crucial difference with a bankruptcy is that the intended bankruptcy trustee is appointed prior to an actual bankruptcy order.

The purpose of a pre-pack is to determine – during the relatively silent preparation phase – whether an enterprise that is close to becoming bankrupt may still be saved and/or whether there are possibilities for a restart after a bankruptcy. The most important task of the intended bankruptcy trustee is to represent the interests of the joint creditors; he does not take over the management of the debtor, but will monitor the silent preparation with a critical eye.

Preparation through a pre-pack needs to have added value

When requesting a pre-pack the debtor also has to demonstrate that in its specific situation it is likely that the silent preparation has added value when compared to an ordinary bankruptcy. Added value is assumed to be present if it can be demonstrated that the preparation can limit the damages for those affected by a possible bankruptcy.

The added value is also assumed to be present when the preparation may increase the possibility of a sale of viable parts of the debtor's enterprise.

No abuse

The Act has several safeguards against abusing the use of pre-pack arrangements. The debtor needs to inform the court correctly about the added value of the private preparations prior to actual bankruptcy. If it turns out that the director of the debtor-company has provided incorrect information about this added value with the intention of using the pre-pack on improper grounds, the Act makes it easier for the bankruptcy trustee to hold the director of the debtor liable for improper management. The bankruptcy may then also start proceedings to disqualify the involved director(s) of the debtor-company.

Participation of employees

When the company has an employees' council or an employee representative body the court will – due to an approved amendment to the Act – stipulate its participation during the 'silent preparation phase' prior to the bankruptcy order, when appointing an intended bankruptcy trustee. In the event that the business of the company is incompatible with this participation, the involvement of the employees is not a precondition in the application of the pre-pack.