

# Netherlands

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## 1. Overview

### 1.1 Relevant legislation governing intellectual property and bankruptcy

Intellectual property rights in the Netherlands are governed by various acts, the most relevant of which are the Patents Act 1995, the Benelux Convention on Intellectual Property, the Databank Act, the Copyright Act and the Neighbouring Rights Act.

The Insolvency Act governs the insolvency proceedings in the Netherlands. It came into force in 1896 and was amended from time to time, but was never revised as a whole. Neither the respective acts on intellectual property, nor the Insolvency Act contain any specific provisions for intellectual property rights or licence agreements in a case of insolvency.

### 1.2 Types of insolvency procedure

The Insolvency Act differentiates between three types of insolvency: bankruptcy, suspension of payments, and debt reorganisation of a natural person. The last in the list is of less relevance for this chapter.

Bankruptcy aims at liquidation of the estate – ie, the sale of any or all assets of the debtor, whether as a going concern or piecemeal, and the distribution of the proceeds to the creditors in accordance with their ranks. The main goal of a suspension of payments is to keep the debtor's business alive by overcoming temporary liquidity issues and avoiding a reorganisation or restructuring (including the possibility of offering a scheme of arrangement to the creditors).

### 1.3 Grounds of bankruptcy

A debtor who is unable to pay its debts as they become due may be declared bankrupt, either at its own request or upon petition of its creditors. If a creditor petitions for bankruptcy, the petitioning creditor must show to the court that at least one other creditor is left unpaid. The public prosecutor is also permitted to request that a debtor be declared bankrupt, but only for public interest reasons.

A debtor who foresees that he will not be able to pay his debts as and when they fall due may request to be granted a suspension of payments. Suspension of payments can be requested only by the debtor himself.

#### 1.4 Filing for bankruptcy

If a debtor is a company, the management of that company may file for insolvency. However, there is no statutory obligation to do so – not even in the event that the company becomes insolvent. If the company is a limited liability company, the management of the company may request a declaration of bankruptcy only if the general meeting of the shareholders has resolved to file for bankruptcy. The management is then entitled to request a suspension of payments, unless the articles of association of the company require prior approval by the general meeting of shareholders.

The competent court in both cases (bankruptcy and suspension of payments) is the district court of the statutory seat of the company.

#### 1.5 Administrators and other appointed persons

The court will process a request for suspension of payments immediately, without a hearing. This means that the suspension is (in most cases) granted within hours after filing. No administrator (In Dutch, *bewindvoerder*) is appointed in the meantime.

The court decides on a petition for bankruptcy only after a hearing (in principle a hearing *ex parte* – ie, without the creditor who filed the petition). A bankruptcy hearing takes place within weeks after the filing. In the event that the creditor files the petition, it will usually be within three weeks, because the debtor has to be notified of the petition and the hearing. If the debtor itself files for bankruptcy, the hearing will be on the first Tuesday after the filing.

In bankruptcy cases, a trustee is appointed by the court upon the declaration of bankruptcy (and not before).

## 2. Licence agreements in the phase between filing and declaration of bankruptcy

#### 2.1 Effects on licence agreements in the licensor's bankruptcy

The filing for insolvency in itself has, in principle, no impact on the licence agreement; it is still enforceable. The grant of rights stays in place and the licensee continues to be obligated to pay the licence fee. Neither a termination nor a reversion of rights occurs.

This is different, however, in the event that the parties to the licence agreement have agreed that, either upon filing for or upon declaration of insolvency, the licence agreement automatically terminates or may be terminated by one of the parties. Such a provision is valid under Dutch law and is common licensing practice in the Netherlands.

#### 2.2 Powers of administrators, receivers or trustees in the licensor's bankruptcy

As indicated in section 1.5 above, no administrator or trustee is appointed in the phase between filing and declaration of insolvency.

#### 2.3 Effects on licence agreements in the licensee's bankruptcy

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#### **2.4 Powers of administrators, receivers or trustees in the licensee's bankruptcy**

As indicated in section 1.5 above, no administrator or trustee is appointed in the phase between filing and declaration of insolvency.

#### **2.5 Impact of registration**

While licence agreements for some intellectual property (IP) rights, particularly patents and trademarks, can be – and usually are – registered, this has no effect on how they are treated in the phase between the filing and opening of insolvency proceedings.

### **3. Licence agreements in the phase after declaration of bankruptcy**

#### **3.1 Treatment of intellectual property rights**

There is no distinction between different intellectual property rights in terms of how they are treated in the insolvency of either the licensor or the licensee.

#### **3.2 Effects on licence agreements in the licensor's bankruptcy**

Unless agreed otherwise, in a suspension of payments all contracts remain in full force and effect. This means that the licensor must continue the licence and the licensee must pay the licence fee.

In bankruptcy, a distinction has to be made between 'executory' and 'non-executory' contracts, whereby executory contracts are those that have not been completely performed by either of the parties (eg, the licence term is still continuing and licence fee payments are still due) and non-executory contracts are contracts that have been fully performed by either party or both parties.

In an executory contract, the licensee may demand that the trustee declares within a reasonable time (in writing) whether or not he will continue to live up to the contractual obligations. If the trustee declares he will not do so, or in the event that he does not declare to do so within a reasonable time period, the trustee loses the right to demand from the creditor that he complies with the agreement. In other words, the agreement does not become void, but no party can any longer demand performance from the other party. Should the trustee declare that he is going to continue (on behalf of the estate) to fulfil the obligations of the debtor under the agreement, he has to provide suitable security to the other party (eg, a bank guarantee or, uncommonly, a personal suretyship). Should the trustee declare (or not make the declaration within a reasonable time) that he is not going to perform

according to the licence agreement, the licensee will have an unsecured claim in the bankruptcy for damages.

In a non-executory contract, whereby the licensee has fulfilled its obligations prior to the bankruptcy of the licensor, the situation is unclear. Until 2006 the general opinion was that the trustee would step into the shoes of the debtor and thus would be bound by any and all contractual obligations of the debtor, unless the Insolvency Act provided otherwise. In 2006, however, the Dutch Supreme Court rendered a judgment that seemed to imply a sea change in this respect.<sup>1</sup> Although the judgment was in respect of the lease of real estate and did not refer to licences, the attorney-general of the Supreme Court in his advice to the court expressly mentioned licences by way of analogy. If this analogy were to be followed, it would mean that the trustee in the bankruptcy of the licensor could simply disregard any rights that the licensee might have under the licence agreement. There has been much discussion among legal scholars in the Netherlands about the implications of this judgment. Further, the CJEU (the Court of Justice of the European Union) ruled in the *UsedSoft case*<sup>2</sup> that licensors to a certain extent exhaust their copyrights when offering software for download and including a perpetual licence. This implies that a trustee is also bound by this limitation when it comes to software licences.

### 3.3 Powers of an administrator, receiver or trustee in the licensor's bankruptcy

As mentioned in section 3.2 above, the trustee is basically bound by the position that the debtor was in at the moment the debtor was declared bankrupt. Other than as mentioned in that section, the trustee does not have special powers.

### 3.4 Powers and rights of creditors in a licensor's bankruptcy

Under the Insolvency Act the creditors have hardly any say in what happens. The Insolvency Act provides for the possibility of appointing a creditors' committee in bankruptcies, but this hardly ever happens. Besides, even in the event that the trustee consults the creditors' committee, he is not bound by their advice. Individual creditors, on the other hand, may at all times address the supervisory judge in the bankruptcy with a request to order the trustee to take a specific action or to abstain from an action envisaged by him. However, creditors often do not know what is going on in the bankruptcy on a day-to-day basis, because a trustee is not obliged to inform them individually. The only obligation the trustee has is to report to the court (which report is publicly available) periodically (ie, every 3–6 months) about the status and the progress of the insolvency.

### 3.5 Effects on licence agreements in the licensee's bankruptcy

As explained in section 3.2 above, in a suspension of payments, unless agreed otherwise, all contracts remain in full force and effect. This means that the licensor must continue the licence and the licensee must pay the licence fee. In the event that the administrator finds that it has insufficient funds in the estate to do so, he must

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1 HR 3 November 2006, ECLI:NL:HR:2006:AX8838

2 *UsedSoft GmbH v Oracle International Corp*, CJEU case C-128/11, judgment of July 3 2013.

request the court to convert the suspension of payments into bankruptcy. If he does not request for conversion and the estate would not be able to pay the licence fee as of the date of the suspension of payments, the administrator might be held personally liable for those fees.

### **3.6 Powers of an administrator, receiver or trustee in the licensee's bankruptcy**

A trustee in a bankruptcy of a licensee has limited powers. If the licensor has performed and is performing his obligations, there is no issue: the licence remains valid unless the parties have agreed otherwise. Should, however, the licensee be in default (and this default not being able to be cured to the benefit of the estate), the trustee has no option but to request conversion of the suspension of payments into bankruptcy or, in the event the licensee was in bankruptcy already, to terminate the licence agreement (or, when being asked by the licensor, to declare that he will not comply with the contractual obligations any more). In these circumstances the licensor has an unsecured claim for damages in the bankruptcy.

### **3.7 Powers and rights of creditors in a licensee's bankruptcy**

As set out in section 3.4 above, the creditors have no, or hardly any, direct influence on the fate of a licence agreement. The insolvency administrator is under no obligation to consult with the creditors about the decision to continue or discontinue a licence agreement.

### **3.8 Exclusive and non-exclusive licences**

Under Dutch law there is no distinction between exclusive and non-exclusive licences in insolvency scenarios.

### **3.9 Perpetual and non-perpetual licences**

If an agreement has not yet been fully performed by both parties, the other party (ie, not the debtor or the trustee) may demand that the trustee declares within a reasonable time whether or not he will continue to live up to the contractual obligations. If the trustee declares he will not do so or in the event that he does not declare to do so within a reasonable time period, the trustee loses the right to demand from the creditor that he complies with the agreement. In other words, the agreement does not become void but no party can demand performance from the other party any more. Should the trustee declare that he is going to continue (on behalf of the estate) to fulfil the obligations of the debtor under the agreement, he has to provide suitable security to the other party (eg, a bank guarantee or, uncommonly, a personal suretyship).

### **3.10 Effects on a sub-licence in a licensor's bankruptcy**

A licensor's bankruptcy can have an effect on a sub-licence. This depends on what has been agreed and how far the licensor was involved in the sub-licence agreement.

If a sub-licence was granted with the explicit approval of the licensor, all depends on what was provided in the licence agreement as regards the sub-licence. If the licensor accepted the grant of a sub-licence by the licensee under the condition that

the sub-licence would end the moment the (head) licence terminates, the sub-licence will end at the same time that the main licence ends. If nothing to this effect is expressly agreed upon, the question is what the parties to the licence agreement have expressed and what parties reasonably could have expected from each other. In other words, the question is whether the licensee could reasonably have expected to be granted the right to sub-licence. If this is not the case, the sub-licensee may have a claim against the sub-licensor, but not against the licensor. Should, however, the sub-licensee in good faith have entered into the sub-licence agreement, it may have a claim against the estate of the licensor, but this will still be an unsecured claim.

### **3.11 Effects on a sub-licence in a licensee's bankruptcy**

As described in section 3.10 above, what has been agreed and how far the licensor was involved in a sub-licence agreement will be decisive in relation to the effects on the sub-licence in a licensee's bankruptcy.

If a sub-licence was granted with the explicit approval of the licensor, all depends on what was agreed upon by the licensor as regards the sub-licence. In the event that the licensor accepted the grant of a sub-licence by the licensee but under the condition that the sub-licence would end the moment the (head) licence terminated, the sub-licence will end at the same time as the main licence ends. If nothing to this effect is expressly agreed upon, the question is basically what the parties to the licence agreement have expressed and what the parties reasonably could have expected from each other. In other words, the question is whether the licensee reasonably could have expected to be granted the right to sub-licence. If this is not the case, the sub-licensee may have a claim against the sub-licensor, but not against the licensor. Should, however, the sub-licensee in good faith have entered into the sub-licence agreement, it may have a claim against the estate of the licensor, but this will still be an unsecured claim. If the licensee had granted a sub-licence without the consent of the licensor, the sub-licence will terminate at the same time as the termination of the licence of the licensee, and the sub-licensee will principally have a claim against the sub-licensor only.

### **3.12 Impact of registration**

While licence agreements for some intellectual property rights may be registered, this has no effect on how they are treated in an insolvency scenario.

## **4. Contractual arrangements in deviation from the law**

### **4.1 Exceptions**

In essence, Dutch law provides that a security right may be vested in a good (being a receivable or movable/immovable asset) only if it can be transferred freely. As a bankruptcy is considered an attachment on any and all goods of the debtor (the 'estate'), this means that only an asset that is transferable can form part of the bankrupt estate that the trustee has any say about. A copyright is considered a purely personal right. So if someone has written a book, the trustee of the author is not entitled to sell the copyrights to that specific book. This is only different after the