



# Debt collection during COVID-19

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## Introduction

### Debt collection through bankruptcy filing before COVID-19

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## Introduction

Under Dutch law, the creditor of a claim has various measures at its disposal to collect a debt or ensure recourse, including:

- debt collection through a bankruptcy filing; and
- pre-judgment attachment.

The execution of these measures requires only a marginal assessment by a judge, which is why they can be effective and efficient but are sometimes criticised.

The COVID-19 outbreak is greatly affecting legal matters and company wellbeing. Some companies can no longer comply with their contractual obligations, while others have become financially distressed. To ensure that creditors do not make improper use of the above measures during these unprecedented times, the question has arisen as to whether the courts should change the way in which they assess them.

## Debt collection through bankruptcy filing before COVID-19

Under Dutch law, if a debtor fails to pay an undisputed debt, the creditor can file for the debtor's bankruptcy through a lawyer (for further details please see "[No more Mr Nice Guy! Collecting claims through bankruptcy filings in court](#)"). Within one month of filing, a bankruptcy hearing will be scheduled to assess whether the debtor:

- has ceased to pay its debts; and
- has at least two creditors, including one to which the debtor owes a due and payable debt.

If the court rules that both of the above requirements have been met, the debtor will be declared bankrupt at the bankruptcy hearing unless the creditor postpones or withdraws the bankruptcy petition. Given this consequence, debtors are often willing to pay their debt, negotiate a payment arrangement or provide security for proper payment in time, making this collection method an efficient tool for creditors.

## Pre-judgment attachment before COVID-19

If the merit of a creditor's claim is disputed during a bankruptcy hearing, the court will generally not declare the debtor bankrupt. To collect the claim, the creditor must normally initiate proceedings on the claim's merits. These proceedings can take up to two years. As a lot can happen in two years, creditors may wish to ensure recourse. This can be done through a pre-judgment attachment on the debtor's assets. Nearly every asset of the debtor can be attached, including bank accounts, immovable property and furniture and equipment. Attachment generally makes it impossible for the debtor to dispose of the assets before the end of the proceedings on the merits.

Although the term 'pre-judgment attachment' may suggest otherwise, it requires the prior permission of the preliminary relief judge. Such permission is granted based on a petition by the creditor through a lawyer, which shows that the petitioner has a viable claim and that other minor formalities have been met. This is only marginally assessed by the court. In most cases, the court will grant the permission within one day and without the debtor having the right to be heard.

## Changes due to COVID-19



When COVID-19 began to spread through Europe and the first COVID-19 response measures were announced, many companies were not expected to survive the unfolding crisis. Accordingly, it was suggested that bankruptcy declarations stop for a period – an approach similar to the measures taken in Germany and Switzerland.

On 3 April 2020 the Dutch courts published a set of temporary rules that will remain in force for as long as all other COVID-19 measures remain in force in the Netherlands. The principle underlying these temporary rules is that cases regarded as urgent and very urgent will still be heard – if possible, without a physical hearing, but rather in writing or by phone or videoconference. Creditors' petitions for bankruptcy were not among the cases classified as urgent or very urgent.

On 29 April 2020 the courts published additional temporary rules for insolvency cases, classifying insolvency cases in five categories based on their urgency. Cases classified in category one are the first to be considered for a physical hearing. Creditors' petitions for bankruptcy are classified in category three, implying that most of these cases should be dealt with in writing.

These temporary rules appear to give companies in financial distress some temporary breathing room, as a written procedure generally takes more time than the regular procedure in which the debtor can be declared bankrupt at the end of the physical hearing.

However, an enquiry among the courts has made it clear that most courts are still dealing with bankruptcy petitions in the same way as before the pandemic, with the only difference being that hearings are held over the phone or via videoconference. As regards content, the same requirements continue to apply and, in practice, the processing time for bankruptcy filings remains the same. Within one month of the creditor filing the petition, the debtor can be declared bankrupt. This overall picture has been confirmed by media reports. In recent weeks, various publications have concerned lessors which have – by means of a bankruptcy filing – successfully dealt with unpaid rent by retailers whose shops are closed due to COVID-19.

As regards pre-judgment attachment, the temporary rules state that it is still possible to obtain permission for an attachment. In addition, it is explicitly stated that the preliminary relief judge will consider the effects of the COVID-19 outbreak and the associated economic situation, implying that the petitioner may be requested to provide further substantiation or answer any questions posed by the judge.

In general, this is not new, as preliminary relief judges have seemed to exercise more restraint in the assessment of petitions for permission to attach before judgment for some time, including before COVID-19.<sup>(1)</sup> However, this does not mean that pre-judgment attachment is prohibited. Rather, it primarily means that creditors should take the time to properly substantiate their petition, which should contain supporting arguments that all required formalities have been met.

## **Comment**

Despite the impact of COVID-19 on legal matters, creditors arguably have the same measures at their disposal to recover unpaid debts. Judges will consider all of the circumstances of a case and can be critical – but this is not new. Debt collection through a bankruptcy filing and pre-judgment attachment remains a quick and effective measure to collect a claim and to ensure recourse during the COVID-19 pandemic.

*For further information on this topic please contact [Ben Reinders](mailto:Ben.Reinders@akd.nl) at AKD by telephone (+31 88 253 5000) or email ([breinders@akd.nl](mailto:breinders@akd.nl)). The AKD website can be accessed at [www.akd.eu](http://www.akd.eu).*

## **Endnotes**

(1) For an example, please see Court of North Holland, 7 February 2018, ECLI:NL:RBNHO:2018:910.

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