This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

Rethinking the Goal of Bankruptcy Proceedings

Maximizing Value Versus Sustainable Liquidation

Jessie M.W. Pool*

Abstract

Bankruptcy proceedings are mainly aimed at recovering the assets of the debtor in order to satisfy the creditors. In recent years, some jurisdictions, such as the Netherlands, tried to make their insolvency frameworks more stakeholder-friendly to promote sustainable liquidation. Usually, these changes give bankruptcy trustees the discretionary power to take into account the interests of all stakeholders involved. Based on empirical evidence from the Netherlands, this article shows that the mere obligation to take into account the interests of stakeholders other than creditors is insufficient to promote sustainable liquidation. In order to promote sustainable liquidation, this article suggests implementing a multistakeholder perspective in bankruptcy proceedings. In addition, the article explores whether the aim of bankruptcy proceedings should be changed because the creditor's primacy impedes bankruptcy trustees from promoting interests other than that of the creditors.

Keywords: insolvency law, sustainability, balancing interests, stakeholder theory, empirical legal studies.

1 Introduction

The emerging field of sustainability is one of the most topical areas of law, especially in light of the convergence of the societal, environmental and economic crises the world is facing. In particular, in the area of company law, balancing the interests of shareholders (i.e. maximising profits) and the interests of other stakeholders (e.g. employees, the environment or other societal or public interests) to promote sustainability has been a subject of concern.[1] The need to reform the legal system to promote the (societal) interests of all stakeholders has become apparent.[2]

The balancing act between conflicting interests of stakeholders is challenging, even more so in bankruptcy[3] proceedings.[4] Traditionally, the purpose of bankruptcy proceedings is to recover the assets of the debtor in order to satisfy the creditors according to their rank as much as possible, in such a way that value for creditors is maximised.[5] Bankruptcy trustees,[6] therefore, are expected to achieve the highest possible yield at the lowest possible cost. Consequently, legal systems seem to discourage bankruptcy trustees to take other interests into account and thus to liquidate in a sustainable manner, because this usually impedes value maximalisation. In recent years, however, there has been a shift towards a more stakeholder-friendly insolvency law.[7] Bankruptcy trustees, therefore, are increasingly being confronted with obligations that do not focus on merely maximising value but also on promoting societal interests, such as cleaning up hazardous waste sites or combatting fraud.[8] Despite these obligations, the traditional purpose of bankruptcy proceedings has remained unchanged. Bankruptcy trustees, therefore, do not always have the tools to take the interests of all stakeholders into account. In addition, in some situations, it might not be possible to take all interests involved into ac-

* Jessie Pool, PhD, is Assistant Professor of Company and Insolvency Law at Leiden University in the Netherlands.

1 *See* J. C. Dembach et al., 'The Growing Importance of Sustainability to Lawyers and the ABA, ABA TRENDS', at 21, 24 (2013).

2 The introduction and part of the second paragraph is based on previous work of the author that is published in Dutch: J.M.W. Pool, 'Maatschappelijk verantwoord vereffenen: belangenpluralisme bij de maatschappelijke taakuitoefening van de curator', 4 *Tijdschrift voor Insolventierecht* 134 (2022).

3 This article focuses on bankruptcy proceedings that are (traditionally) aimed at liquidation of the assets of the company, such as the Dutch bankruptcy proceeding ("faillissement"). Proceedings that are aimed at restructuring and/or reorganisation such as Chapter 11 or the Dutch reorganisation scheme (WHOA) do not fall under the scope of this article.

4 T. Linna, 'Insolvency Proceedings from a Sustainability Perspective', 28 *International Insolvency Review* 210 at 212 (2019); L. Coordes, 'Harmonizing Insolvency and Sustainability in the Courtroom and the Boardroom', *University of Oslo Faculty of Law Research Paper No. 2018-20*. SSRN (2018). https://ssrn.com/abstract=3198547. *See also*: Pool (2022), above n. 2.

5 *See* A. Keay, 'Insolvency Law: A Matter of Public Interest?' 51 *Northern Ireland Legal Quarterly* 509 (2000); K. Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (1997), at 23, 137, 193.

6 Bankruptcy trustees are insolvency practitioners who are appointed to administer a debtor's estate, such as Dutch trustees (curatoren).

7 J.M.G.J. Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders', 27 *International Insolvency Review* 150, at 160-1 (2018). *See also* Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), article 19 (directors' duties).

8 *See also* B. Wessels, 'Performance of Insolvency Administrator Activities in EU Member States: A Dutch View', 19/6 *International Corporate Rescue* 314 (2022).

 doi: 10.5553/ELR.000247

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

count due to conflicting interests (see also Sections 2 and 3).

In order to promote sustainable liquidation, however, it is essential that bankruptcy trustees are facilitated and encouraged to take the interests of all stakeholders into account. It is unclear, however, how bankruptcy trustees deal with the potential conflict of interests between the traditional purpose of bankruptcy proceedings (i.e., maximising value) and obligations that focus on promoting societal interests and taking into account the interests of stakeholders other than creditors. This article explores a multistakeholder perspective in bankruptcy proceedings, including the results of a survey study amongst Dutch bankruptcy trustees about the way they deal with pluralism of interests in bankruptcy proceedings.

The article is structured as follows. In Section 2, I will briefly demonstrate how pluralism of interests emerges in bankruptcy proceedings. Subsequently, I will take the Dutch practice as an example (Section 3.1) and report more elaborately on the findings of my empirical survey study amongst Dutch bankruptcy trustees (Section 3.2). In Section 4, I will discuss possible suggestions for dealing with pluralism of interests and present a multistakeholder perspective for bankruptcy proceedings. The article concludes with an overview of some fundamental changes in the legal system that may be deemed necessary to promote sustainable liquidation (Section 5).

2 Pluralism of Interests in Bankruptcy Proceedings

The primary task of the bankruptcy trustee is to liquidate the assets of the bankrupt company and divide the (remaining) assets amongst the creditors. This task finds its origin in the main purpose of bankruptcy proceedings, being the recovery of the assets of the debtor in order to satisfy the creditors according to their rank as much as possible.

Traditionally, the bankruptcy trustee has not been assigned a specific societal task, other than settling the bankruptcy. What is expected from bankruptcy trustees, however, can change depending on the social context. With the shift in thinking, the interests of a more diverse group of stakeholders have gained ground in bankruptcy proceedings. Bankruptcy trustees are increasingly expected for example to take into account the interests of employees.[9] In addition, they are being confronted with obligations to comply with rules that aim to protect societal interests, such as environmental and privacy legislation. The traditional purpose of bankruptcy proceedings, however, has remained unchanged and the primacy of creditors is still one of the foundations of insolvency laws around the globe.

The interests of stakeholders (other than creditors) and complying with rules that aim to protect societal interests can, however, conflict with the interests of the joint creditors.[10] From the perspective of the bankruptcy trustee, these (potentially) conflicting interests can be difficult to deal with. Consider, for example, the simplified situation of a going concern sale in which two potential buyers place a bid. One candidate offers 400 and is willing to provide 200 employees with a contract, while another candidate offers 100 and is willing to provide 300 employees with a contract. In this case, the societal interest of the protection of jobs conflicts with the interest of the joint creditors (payment of their claims). Another example of a conflict of interest between satisfying the creditors and societal interest is whenever a bankruptcy with some funds in the estate is threatened with an acute environmental hazard – who should pay for the damages?[11] In this case, again, the societal interests of resolving the effects of the environmental hazard conflict with the interests of the joint creditors, since the funds that are used to take care of the effects of the environmental hazard are deducted from the funds that are available to pay the claims of the creditors. The tension between bankruptcy law and promoting societal interests is also reflected in the widespread ambition to combat bankruptcy fraud.[12] In some jurisdictions, such as the Netherlands, bankruptcy trustees are obliged to take actions in case they are confronted with fraudulent behaviour prior to or during bankruptcies.[13] These actions can, however, conflict with the interests of the joint creditors when the costs of these actions exceed the yields.

It is unclear what bankruptcy trustees ought to do in these or similar situations. In the Netherlands, bankruptcy trustees have a large degree of discretionary powers and discretion in the performance of their duties, especially when it comes to weighing (conflicting) interests. Bankruptcy trustees can decide on a case-to-case basis whether and how they are taking into account the interests of stakeholders other than creditors. Although the interests of stakeholders (other than creditors) have gained ground in bankruptcy proceedings, it is up to the bankruptcy trustee that settles the bankruptcy to what extent their interests will be taken into account. It is important, therefore, to get insight into the way bankruptcy trustees exercise their discretionary powers with regard to taking into account the interests of other stakeholders. In the next paragraph, I will use

9 *See also* Linna (2019), above n. 4, at 224-5; Hilpert C., Pool J.M.W., Matsui E., Schiff D., Weinberg Crocco F. & Wolf A., 'Looking Ahead: How ESG May Affect Investing, Refinancing and Restructuring', 31(5) *Norton Journal of Bankruptcy Law* 660 (2022).

10 *See also* K. Bauer and J. Krasodomska, 'The Premises for Corporate Social Responsibility in Insolvency Proceedings', *Research Papers of Wroclaw University of Economics* nr. 387, at 25-6 (2015). www.researchgate.net/publication/283006318_The_premises_for_corporate_social_responsibility_in_insolvency_proceedings; Coordes (2018), above n. 4; Gross (1997), above n. 5, at 208; A. Grossman, 'Conflict of Laws in the Discharge of Debts in Bankruptcy', 33 *International Insolvency Review* 1.

11 Linna (2019), above n. 4, at 214; Gross (1997), above n. 5, at 20.

12 *See also* Keay (2000), above n. 5, at 513.

13 *See* for example the Dutch 'Wet versterking positie curator' *Stb.* 2017, 176. *Kamerstukken* 34253.

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

the Dutch practice as an example of why these discretionary powers may not encourage bankruptcy trustees to liquidate in a sustainable manner.

3 Empirical Insights on the Dutch Practice of Balancing (Conflicting) Interests

3.1 The Dutch Example

In recent decades, an explicit consideration of stakeholder interests has become a cornerstone of Dutch company law.[14] Originally, the traditional Dutch view on the company was that it (solely) was an agreement between shareholders. This view gradually changed into a more stakeholder-friendly view in which companies must avoid unnecessarily or disproportionately damaging the interests of those involved.[15] The current Dutch governance model is based on the stakeholder model in which stakeholder rights and claims are recognised and inserted into the relevant institutions.[16]

Initially and similar to Dutch company law, the Dutch Bankruptcy Act was focused primarily on maximising the profits for the joint creditors. In line with the developments in Dutch company law, Dutch insolvency law has changed into a more stakeholder-friendly system. The shift made headway when the Dutch Supreme Court stated in three landmark cases that 'the bankruptcy trustee has to take into account societal interests' and that 'societal interests can, under circumstances, prevail above the interests of an *individual* creditor'.[17] Furthermore, the past few years, bankruptcy trustees are increasingly being given obligations that aim to protect societal interests, such as the task to combat bankruptcy fraud.[18]

The shift in focus towards a more stakeholder-friendly bankruptcy proceeding, however, is not without controversy and has caused a heated discussion about the (desired) place of societal interests in bankruptcy proceedings.[19] It is still undecided how far the obligation to take into account societal interest reaches, given the unchanged obligation of the bankruptcy trustee to act primarily in the interests of the joint creditors. What is meant by 'taking into account societal interests'? One the one hand, 'taking into account' can be interpreted strictly by arguing that bankruptcy trustees can only take into account societal interests when those interests do not conflict with the interests of the joint creditors.[20] 'Taking into account', however, can also be interpreted broadly. Supporters of this broad interpretation believe that trustees should fulfil their duties in a 'socially responsible manner' and should give more weight to societal interests by means of a 'socially responsible liquidation'.[21] Some are of the opinion that, in some situations, societal interests can outweigh the interests of the joint creditors.

The interpretation of 'taking into account' is not the only ambiguity in this context. The Dutch Supreme Court has not clarified what is meant by 'societal interests'. In the *Sigmacon II* case, the Dutch Supreme Court provided the continuity of the company and employment as examples of societal interests, but the judgment clearly leaves room for other societal interests.[22]

These ambiguities on the (desired) role of societal interests in bankruptcy proceedings seem to also exist amongst bankruptcy trustees. Even though the Dutch case law states that they should take into account the interests of stakeholders other than creditors, recent empirical research shows that bankruptcy trustees take into account the interests of stakeholders other than creditors in various ways.[23] It is unclear, therefore, whether Dutch bankruptcy proceedings, in practice, provide ample room for the interests of stakeholders other than creditors. In the next paragraph, I will report the results of a survey study I conducted amongst Dutch bankruptcy trustees to give insight into the way they balance interests.

3.2 Results of a Survey Study: How Do Bankruptcy Trustees Deal with Pluralism of Interests in Bankruptcy Proceedings?

3.2.1 Sample

The objects of my research are Dutch bankruptcy trustees. It is unclear how large the total population of bankruptcy trustees is, because there is no public list with an overview of all bankruptcy trustees. In order to make such an overview, I manually compiled a list with

14 *See* more elaborately: M. Lokin and J. Veldman, 'The Potential of the Dutch Corporate Governance Model for Sustainable Governance and Long Term Stakeholder Value' 12 *Erasmus Law Review* 50 (2019).

15 Dutch Supreme Court 4 April 2014, ECLI:NL:HR:2014:797, NJ 2014/286, m.nt. PvS (Cancun). *See also* A.C. Jansen, 'De positie van (externe) stakeholders in het vennootschapsrecht: een historische schets', to be published forthcoming 2023.

16 Lokin and Veldman (2019), above n. 14, at para. 8. *See also* A.C. Jansen, 'De positie van (externe) stakeholders in het vennootschapsrecht: een historische schets', to be published forthcoming 2023.

17 Dutch Supreme Court 24 February 1995, ECLI:NL:HR:1995:ZC1643, *NJ* 1996/472 (Sigmacon II), Dutch Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047, *NJ* 1996/727 (Maclou) and Dutch Supreme Court 19 December 2003, ECLI:NL:HR:2003:AN7817, *NJ* 2004/293 (Curatoren Mobell/Interplan).

18 'Wet versterking positie curator', above n. 13.

19 *See* for example Pool (2022), above n. 2; en M. van Eekelen-Atema, 'Reactie op Maatschappelijk verantwoord vereffenen: belangenpluralisme bij de maatschappelijke taakuitoefening van de curator', 5 *Tijdschrift voor Insolventierecht* 188 (2022).

20 R.D. Vriesendorp, '[**]it happens; then and now', 4 *Tijdschrift voor insolventierecht* 23 (2017), para. 6.

21 A. van Hees, 'Maatschappelijk verantwoord vereffenen', 1 *Tijdschrift voor Insolventierecht* 1 (2015); F. Kemp, 'Gezocht: kranige curatoren met maatschappelijk besef', in P.W. Schreurs e.a. (red.), *De Gereedschapskist van de Curator. Insolad Jaarboek 2015* (2015) 503.

22 Dutch Supreme Court 24 februari 1995, ECLI:NL:HR:1995:ZC1643, *NJ* 1996/472 (Sigmacon II),

23 J.M.W. Pool, *De rol van de curator bij de aanpak van onregelmatigheden* (2022), https://hdl.handle.net/1887/3464369; M. van Eekelen-Atema, 'De faillissementscurator en maatschappelijke belangen', in Enneking e.a. (red), *Publiek privaatrecht. Over publieke doelen en belangen in privaatrechtelijke verhoudingen* (2021) 293.

 doi: 10.5553/ELR.000247

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

Table 1 Characteristics of the Respondents

District	***Size of the office***	***Kind of bankruptcies ("benoemingslijst")***
Amsterdam (*n* = 55)	1 lawyer (*n* = 6)	Natural persons (*n* = 39)
Den Haag (*n* = 49)	2-5 lawyers (*n* = 24)	Small companies (*n* = 54)
Gelderland (*n* = 30)	6-20 lawyers (*n* = 84)	Medium-sized companies (*n* = 78)
Limburg (*n* = 12)	21-50 lawyers (*n* = 42)	Big or complex bankruptcies (*n* = 47)
Midden-Nederland (*n* = 42)	51-100 lawyers (*n* = 25)	Other (*n* = 23)
Noord-Holland (*n* = 24)	101 or more lawyers (*n* = 16)	I do not know (*n* = 37)
Noord-Nederland (*n* = 22)		
Oost-Brabant (*n* =17)		
Overijssel (*n* = 24)		
Rotterdam (*n* = 35)		
Zeeland-West-Brabant (*n* = 17)		

Dutch bankruptcy trustees.[24] Based on that list, I expect that around 511 bankruptcy trustees were active in the Netherlands during the research period. I approached these bankruptcy trustees in various ways. First, I have approached all Dutch bankruptcy trustees by e-mail and via messages on public websites such as LinkedIn. Second, the bankruptcy trustees have been made aware of the survey via newsletters of various professional associations (INSOLAD, the Dutch association for insolvency lawyers and JIRA, the Dutch association for younger insolvency lawyers).

A total number of 197 respondents completed the survey. I have excluded from the sample responses from respondents that did not work as a bankruptcy trustee, and responses with a large number of missing values.[25] The final sample consists of 177 Dutch bankruptcy trustees, and 139 respondents completed the full survey (*n* = 511). This means that over 27% of the total population has completed the entire survey.

The respondents were between 25 and 71 years old, with an average age of 46 years. Most of the respondents were male (*n* = 153), a smaller proportion were female (*n* = 37) or non-binary (*n* = 1). Six respondents did not answer the question about their gender. The respondents had an average of 20 years of experience as a lawyer (varying between 1 and 44 years (*SD* = 10.8)) and 17 years of experience as a bankruptcy trustee (varying between 0 and 43 years (*SD* = 11.2)). The majority (79%) of the respondents are members of INSOLAD (*n* = 156). Table 1 provides an overview of the district(s) in which the respondents are appointed as bankruptcy trustees, the size of the office where the respondents work and the kind of bankruptcies that are usually assigned to them.

The respondents are responsible for a varying number of bankruptcies. For example, at the time of completing the survey, the respondents were actively involved as trustee in between 0 and 100 bankruptcies, with an average of 11 bankruptcies (*SD* = 10.9). The respondents indicated that (on average) they handle between 0 and 30 bankruptcies per year, with an average of 7 (*SD* = 4.7). The type of bankruptcy that the respondents usually deal with is also different. The most common types of bankruptcies discussed by the respondents are retail (*n* = 99), hospitality (*n* = 91), industry (*n* = 89), construction (*n* = 81) and services (*n* = 74). A number of the respondents indicated that they were sometimes named in fraudulent bankruptcies (*n* = 88).

3.2.2 Results

Bankruptcy trustees are expected to take into account the interests of different (groups of) stakeholders. As mentioned, all bankruptcy trustees seem to have their own thoughts about the interests they should serve. It could be that the interests of some stakeholders are overlooked by some bankruptcy trustees. To better understand the way bankruptcy trustees think about the interests they should serve, I asked the respondents about their perspective on the different interests that play a role in bankruptcy proceedings. Table 2 shows the results. It is striking that the trustees are of the opinion that they are to serve almost all interests, except for the interests of the debtor and the shareholders.

24 To compile the list, I used the website curatoren.nl and websites of Dutch law firms.

25 I have excluded responses from respondents who answered less than 11 of 46 questions.

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

*Table 2 What Interests Do Bankruptcy Trustees Serve?**

	Strongly disagree	*Disagree*	*Neutral*	*Agree*	*Strongly agree*
The bankruptcy trustee serves the interests of the unsecured creditors	1% (*n* = 2)	1% (*n* = 2)	5% (*n* = 9)	52% (*n* = 89)	41% (*n* = 70)
The bankruptcy trustee serves the interests of the secured creditors	1% (*n* = 2)	2% (*n* = 3)	7% (*n* = 12)	58% (*n* = 100)	32% (*n* = 55)
The bankruptcy trustee serves the interests of the estate creditors	1% (*n* = 2)	4% (*n* = 7)	10% (*n* =17)	49% (*n* = 85)	35% (*n* = 61)
The bankruptcy trustee serves the interests of the tax authorities	1% (*n* = 2)	4% (*n* = 7)	12% (*n* = 20)	61% (*n* = 105)	22% (*n* = 38)
The bankruptcy trustee serves the interests of the employees	1% (*n* = 2)	8% (*n* =14)	24% (*n* = 41)	53% (*n* = 92)	13% (*n* = 23)
The bankruptcy trustee serves societal interests	2% (*n* = 3)	4% (*n* = 7)	29% (*n* = 50)	58% (*n* = 99)	8% (*n* = 13)
The curator *must* take environmental effects into account	1% (*n* = 2)	9% (*n* = 15)	33% (*n* = 56)	50% (*n* = 86)	8% (*n* = 13)
The bankruptcy trustee serves the interests of the debtor	13% (*n* = 22)	34% (*n* = 59)	34% (*n* = 58)	17% (*n* = 29)	2% (*n* = 4)
The bankruptcy trustee serves the interests of the shareholders	24% (*n* = 42)	42% (*n* = 72)	23% (*n* = 40)	9% (*n* = 15)	2% (*n* = 3)

* *n* = 172. The percentages do not add up to 100% due to rounding of percentages.

However, as I explained earlier, the interests of the different stakeholders can conflict in some situations. It is interesting to find out, therefore, which interests they consider most important. To get a better understanding of the way bankruptcy trustees balance interests in bankruptcy proceedings, I asked the respondents to rank the different interests they have to deal with in bankruptcy proceedings. Table 3 shows the results of that balancing act.

*Table 3 Balancing Interests by the Bankruptcy Trustee**

	Average rank	*Most frequent rank*	*SD*
Payment of estate creditors	2.03	1 (55%)	1.45
Payment of secured creditors	3.20	2 (48%)	1.74
Payment of unsecured creditors	3.78	3 (40%)	1.81
Maintaining employment	4.19	4 (26%)	2.11
Fraud prevention	5.48	6 (22%)	1.98
Protecting the environment	5.59	6 (21%)	2.11
Effective / optimal tax collection	6.52	7 (21%)	2.00
Other societal interests	7.39	10 (37%)	2.86
Non-monetary interests of the debtor	7.85	8 (29%)	1.66
Value retention for existing shareholders	8.97	10 (44%)	1.49

* *n* = 155. The percentages do not add up to 100% due to rounding of percentages.

It is not surprising, given the purpose of bankruptcy proceedings that bankruptcy trustees first and foremost take into account the interests of the creditors. Bankruptcy trustees consider societal interests, such as maintaining employment or combatting insolvency fraud, less important than the interests of the creditors.

doi: 10.5553/ELR.000247

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

The results suggest that bankruptcy trustees, when confronted with a situation in which the interests of the joint creditors conflict with the interests of any other stakeholder, will choose the direction that is best for the joint creditors.

To find out whether bankruptcy trustees are indeed mainly focused on the interests of the joint creditors, I have asked the respondents two additional questions on this topic. Table 4 shows the results.

*Table 4 How Do Bankruptcy Trustees Perceive Their Main Task?**

	Strongly disagree	*Disagree*	*Neutral*	*Agree*	*Strongly agree*
The bankruptcy trustee primarily performs his activities for the benefit of the joint creditors	1% (*n* = 2)	0% (*n* = 0)	3% (n = 5)	48% (*n* = 82)	48% (*n* = 83)
The interests of the joint creditors always take precedence over societal interests	3% (*n* = 5)	37% (*n* = 64)	24% (*n* = 42)	28% (*n* = 49)	7% (*n* = 12)

* *n* = 172. The percentages do not add up to 100% due to rounding of percentages.

The first question was to find out how bankruptcy trustees perceived their task. As expected, bankruptcy trustees generally agree with the statement that they perform their duties primarily for the benefit of the joint creditors. This broadly supported view is in line with the traditional goal of the bankruptcy proceeding, being to maximise the value for creditors.

Remarkably, however, are the wide-ranging opinions about the question whether the interests of the joint creditors always take precedence over societal interests. The results of the survey show that roughly as many trustees agree (40%) as disagree (35%) with this statement. This implies that some bankruptcy trustees are not willing to take into account societal interests when these interests conflict with the interests of the joint creditors.

3.2.3 Exploration of the Different Views

Although it is intriguing to see that bankruptcy trustees have varying views on the role of societal interests and the role of stakeholders in insolvency proceedings, it is even more interesting to find out why these views vary so much. To explore possible explanations for the variation in views, I investigated correlations between two statements about societal interests and some characteristics of the respondents. The correlation Table 5 shows a couple of interesting significant correlations.

Table 5 Correlations†

Item	*M*	*SD*	1.	2.	3.	4.	5.
1. The bankruptcy trustee serves societal interests	3.66	0.75	(1)				
2. The interests of the joint creditors always take precedence over societal interests	2.99	1.03	-0.267**	(1)			
3. Age	46.12	11.98	-0.008	0.149*	(1)		
4. Years of experience as a lawyer	19.83	11.00	0.025*	0.153*	0.911**	(1)	
5. Years of experience as a trustee	17.00	11.30	-0.012	0.126	0.886**	0.966**	(1)

† *$p < 0.05$; ** $p < 0.01$

In the first place, there is a negative correlation between the answer to the statement that the bankruptcy trustee serves societal interests and the answer to the statement that the interests of the joint creditors always take precedence over societal interests. Bankruptcy trustees who consider it their task to serve societal interests seem to be more likely to believe that societal interests may take precedence over joint creditors.

Secondly, there is a positive correlation between age and the answer to the statement that the interests of the joint creditors always take precedence over societal interests. It seems that older bankruptcy trustees are more likely to prioritise the interests of the joint creditors, while younger bankruptcy trustees seem to believe that societal interests can take precedence over the interests of the joint creditors.

3.3 Conclusion and Take-Aways

The results of the survey study show that even in a stakeholder-friendly jurisdiction such as the Nether-

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

lands, bankruptcy trustees are not always willing (or able) to promote the interests of all stakeholders in bankruptcy proceedings. The results show that Dutch bankruptcy trustees are willing to consider the interests of most stakeholders in bankruptcy proceedings. However, their willingness seems to change when they have to rank different (conflicting) interests. This means that the interests of the joint creditors seem to be decisive and the interests of other stakeholders will not be promoted when they conflict with the interests of the joint creditors.

The results of the survey seem to suggest that in practice, most bankruptcy trustees interpret 'taking into account' in a strict manner, meaning that they only take into account societal interests when those interests do not conflict with the interests of the joint creditors. Although these outcomes are in line with the traditional goal of the bankruptcy proceeding (being maximising value for creditors), they seem to be less compatible with the notion of those that argue for socially responsible liquidation that the interests of stakeholders other than creditors should be given more attention.

The obligation to 'take into account' the interest of all stakeholders does not seem to result in a practice in which the interests of stakeholders other than creditors are given more priority. Bankruptcy trustees are not encouraged to take interests other than that of the creditors into account. Even if bankruptcy trustees are willing to take those interests into account, they are reluctant to let those other interests outweigh the interests of the joint creditors. That means that the interests of stakeholders other than creditors will only be served if they do not compete with the interests of the creditors, while those interests are usually divergent. Since the Dutch Supreme Court does not require bankruptcy trustees to give priority to societal interests, this practice is completely legitimate. If the ambition, however, is to incentivise bankruptcy trustees to liquidate in a sustainable manner by paying more attention to the interests of stakeholders other than creditors, this vague obligation might not be sufficient.

In addition, bankruptcy trustees interpret the obligation to take into account societal interests very differently. That means that it depends on the bankruptcy trustee that settles the bankruptcy whether and to what extent societal interests will be taken into account. As a consequence, there is an evident risk of inequality and legal uncertainty in bankruptcy proceedings.

In my opinion, both the need for providing room for the interests of stakeholders other than creditors in bankruptcy proceedings and the risk of inequality and legal uncertainty, indicate that a method for dealing with the interests of stakeholders other than creditors is needed. Therefore, in the next paragraphs, I suggest implementing a multistakeholder perspective in insolvency laws.

4 Towards a Multistakeholder Perspective in Insolvency Proceedings

4.1 Defining Stakeholders in Insolvency Proceedings

First and foremost, in order to implement a multistakeholder perspective in insolvency law, it is important to define which stakeholders should be taken into account in bankruptcy proceedings. Traditionally, bankruptcy proceedings are aimed at limiting the common pool problem amongst creditors by introducing a collective procedure.[26] In short, the common pool problem can arise because without a collective insolvency proceeding, a race for assets in the common pool is encouraged. This race may encourage individual creditors to take actions that are not beneficial for the creditors as a group, only because these actions are beneficial for that individual creditor. Bankruptcy proceedings provide for collective processes that can minimise common pool problems and hence maximise value for the joint creditors. Some argue, therefore, that bankruptcy proceedings are exclusively a creditor–debtor issue.[27] This law and economics approach argues that the way to encourage capital investment is to decrease the risk of loss. Considering any other interests than that of the creditors in bankruptcy proceedings may discourage investments.[28]

Nevertheless, it goes without doubt that insolvency has a much broader effect. The bankruptcy of a debtor almost always affects other stakeholders such as employees who may lose their jobs. In addition, bankruptcy proceedings can affect society as a whole.[29] The comparison with a pebble in a river by Gross illustrates the far-reaching effects of bankruptcy clearly:

> These various communities are like the ripples that occur when a stone is thrown into water. Every debtor is a pebble, and when the pebble hits the water, concentric circles are formed. The circles closest to the pebble are the smallest but the strongest. The outermost circles are the largest in size but weakest in form. In fact, there are an infinite number of ripples, but we can see only those closest to us. Moreover, the circles eventually hit the opposite shore, affecting the bank of the pond, even if the impact is imperceptible to the naked eye. Many people, including a significant number of bankruptcy scholars, think about bankruptcy as addressing only the circles closest in – creditors and the economic welfare of society based on that creditor's recovery. Seeing the other ripples

26 *See* T.H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986).

27 *See* Keay, (2000), above n. 5, at 533-4; J.A. Veach, 'On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers', 72 *Indiana Law Journal* 1211, at 1211-1212 (1997).

28 Veach (1997), above n. 27, at 1212.

29 Keay (2000), above n. 5, at 533-4.

doi: 10.5553/ELR.000247

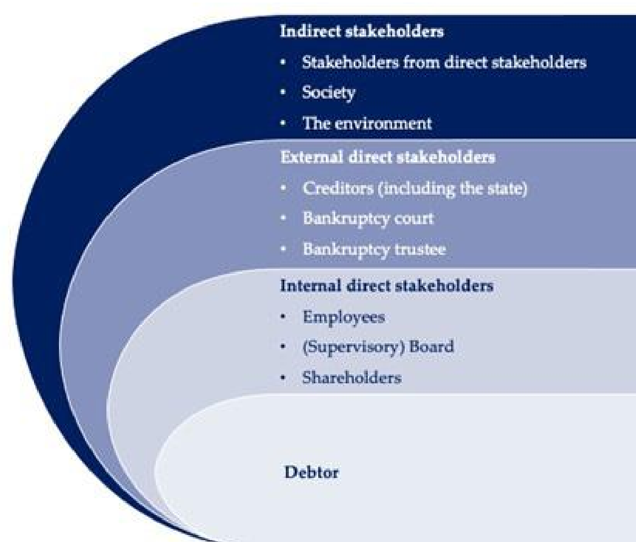
This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

requires a shift from the narrow to the broad, from the short term to the longer term.[30]

The question is which ripples are to be considered as stakeholders in bankruptcy proceedings. Stakeholder theory may help answering this question. In stakeholder theory, diverse opinions exist about the definition of a stakeholder.[31] The broad view defines stakeholders as any group or (legal) person 'who can affect or is affected by the achievement of the organization's objectives'.[32] In this broad view, stakeholders can be anyone. The narrow view, however, defines stakeholders 'based on whether the relevant group takes a risk, often a financial one, due to business activity.'[33]
Given the societal movement towards a more sustainable world, I would say that implementing a multistakeholder perspective in bankruptcy proceedings will ensure the necessary shift towards a broader view regarding stakeholders. In Figure 1, I tried to draft a first attempt to a multistakeholder model for bankruptcy proceedings, based on the pebble parallel of Gross.[34] The bankruptcy of the debtor represents the pebble. First and foremost, the bankruptcy has an effect on the debtor himself. The second ripple that is affected by the bankruptcy of the debtor is what I call the internal direct stakeholders. These stakeholders are internal groups or (legal) persons directly affected by the insolvency of the debtor, such as (but not limited to) employees, the board of directors and the shareholders. The third ripple is the external direct stakeholders. Although they are directly affected by the bankruptcy of the debtor, these particular stakeholders are not internal groups or (legal) persons. Creditors are obvious examples of external direct stakeholders, but bankruptcy courts and bankruptcy trustees are also directly affected by the bankruptcy of a debtor.

30 Gross (1997), above n. 5, at 207.
31 *See also* S.I. Akin, 'Why Can't Stakeholder Theory Save the Planet and What Can Corporate Law Do Instead?", 3 *Erasmus Law Review* (2022).
32 R.E. Freeman, *Strategic Management: A Stakeholder Approach* (1984). *See also* Akin (2022), above n. 31.
33 Akin (2022), above 31, at 3. *See also* E.W. Orts and A. Strudler, 'The Ethical and Environmental Limits of Stake- holder Theory', 12 *Business Ethics Quarterly* 215 (2002).
34 The idea for a visual model comes from B. Prusak et al., 'The Role of Stakeholders on Rejection of Bankruptcy Applications in the Case of "Poverty" of the Estate: A Polish Case Study', 28 *International Insolvency Review* 63, at 79 (2019).

Figure 1 A Multistakeholder Approach to Bankruptcy Proceedings



To be considered a direct stakeholder, the bankruptcy of the debtor should have a direct impact on that group or (legal) person, whereas the bankruptcy of the debtor only indirectly impacts the indirect stakeholders, for example because they are affected by the impact of the bankruptcy on (and thus via) the direct stakeholders.[35]
The fourth ripple represents the indirect stakeholders, whereby I distinguish two types of indirect stakeholders. On the one hand, the indirect stakeholders are groups or (legal) persons that are affected by the bankruptcy of the debtor as a result of the direct effects of the bankruptcy on other (direct) stakeholders. The employees of the creditors of the debtor are considered indirect stakeholders, because the employees of the creditors could be affected by the impact of the bankruptcy on the creditor (third ripple). On the other hand, society as a whole can be considered an indirect stakeholder, because the indirect effects of bankruptcy proceedings are potentially unlimited.[36]
In this model, I used a broad definition of stakeholders and therefore did include stakeholders that do not necessarily have anything 'material to lose'.[37] Most bankruptcy proceedings, however, are based on the law and

35 *See also* J. Girgis, 'Corporate Restructuring, the Evolution of Corporate Assets and the Public Interest', 22 *International Insolvency Review* 29 (2013).
36 Keay (2000), above n. 5, at 533-4.
37 *See* for a different view: D.R. Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' 71 *Texas Law Review Association* 541 (1992-1993), at 584-9.

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

economics approach and therefore seem to utilise a narrow view regarding stakeholders. Usually, bankruptcy proceedings are very creditor-friendly, especially towards the secured creditors. These stakeholders are given the most powers. In addition, bankruptcy proceedings seem to be supportive of the recovery of their losses. These proceedings are less impressive in taking into account the interests of other stakeholders.[38]

Considering the multistakeholder perspective in Figure 1, it is surprising that most of the powers in bankruptcy proceedings are given to the external direct stakeholders, even though it could be argued that the internal direct stakeholders are affected by the bankruptcy by a greater extent. In addition, bankruptcy proceedings tend to exclude indirect stakeholders from using the powers that are given to creditors, even though these stakeholders are usually involuntary parties to a bankruptcy and unable to adjust their risk accordingly.[39] Thus, although the burden is shared, the powers to control over processes in bankruptcy proceedings are not shared equally.[40] The indirect stakeholders that are not contractually connected to the company do not have as much powers as others.[41] Given the urge to promote sustainable liquidation, it could be useful to come up with a framework that gives power to all stakeholders.[42]

One of the difficulties of designing such a framework is the decision that groups or (legal) persons fall under the definition of (indirect) stakeholders. Especially regarding society or public interests as a stakeholder, frameworks should determine what interests ought to be protected in bankruptcy proceedings to delineate the scope of the (indirect) stakeholder. It is difficult, however, to define the concept of the public interest, and there is no general consensus what public interest in bankruptcy proceedings involves.[43] Some argue that it is only possible to define stakeholders with a public interest in specific circumstances, because its meaning is derived from the context in which it exists.[44] Keay states that, for the purposes of insolvency law, 'the public interest involves taking into account interests which society has regard for and which are wider than the interests of those parties directly involved in any given insolvency situation, that is, the debtor and the creditors'.[45]

Interestingly, there are not a lot of publications on the topic of sustainability in bankruptcy proceedings and therefore not a lot of guidance in determining what stakeholders should be included in bankruptcy proceedings.[46] In addition, there tends to be a focus on sustainability aspects of human capital. Even legislation tends to be in line with sustainability aspects of human capital, but very narrow regarding other fields of sustainability.[47] Given the effects of insolvency are much broader than these categories, there needs to be a more elaborate discussion on the definition of stakeholders in bankruptcy proceedings. The multistakeholder perspective in Figure 1 could be a good starting point.

To sum things up, in order to promote sustainable liquidation, it is essential to implement a multistakeholder perspective in insolvency frameworks by giving powers to both direct and indirect stakeholders, while paying attention to the definition of indirect stakeholders and more specifically, determine what (public) interests ought to be protected in bankruptcy proceedings.

4.2 Balancing Conflicting Interests

The second step in promoting sustainable liquidation is adjusting the way that the interests of the different stakeholders are balanced in bankruptcy proceedings. In most insolvency frameworks, the interests of the joint creditors are decisive unless the law stipulates otherwise.[48] Sustainable liquidation is therefore not preferred or intrinsically valued in bankruptcy proceedings.[49] Only when it is in the interest of the creditors, the interests of other stakeholders have to be taken into account.[50]

As societal interests become more important and more diverse, the question arises how the different interests in bankruptcy procedures should be balanced to promote sustainable liquidation. In my opinion, there is a need for a regulatory framework that protect the interests of stakeholders other than creditors by explaining what interests should be taken into account.[51] Most insolvency frameworks do not provide for such a clear set of rules that explain when to take into account which interests. As a result, it depends largely on the appointed bankruptcy trustee whether and to what extent interests other than those of the creditors are taken into account. There is a risk that this open interpretation leads to arbitrariness, which promotes legal uncertainty and inequality.[52] In addition, leaving the decision to take into account societal interests to bankruptcy trustees, while holding on to the creditor's primacy, may not be very effective in encouraging trustees to actually take societal interests into account.

The time is here to think about which interests count in bankruptcy proceedings.[53] A strict approach to the goal of bankruptcy proceedings eliminates the need to think about bankruptcy's impact on public matters.[54] There is no reason to suggest that creditors' interests should ex-

38 J. Gant, 'Optimising Fairness in Insolvency and Restructuring: A Spotlight on Vulnerable Stakeholders', 31 *International Insolvency Review*, at 3 (2022).

39 *Ibid.*, at 4.

40 *Ibid.*, at 3.

41 *Ibid.*.

42 Veach (1997), above n. 27, at 1277.

43 Keay (2000), above n. 5, at 533.

44 Girgis (2013), above n. 35.

45 Keay (2000), above n. 5, at 525.

46 Bauer and Krasodomska (2015), above n. 10, at 25-6; Linna (2019) above n. 4, at 229.

47 Linna (2019) above n. 4, at 229.

48 *Ibid.*, at 217-18.

49 *Ibid.*.

50 *Ibid.*, at 218.

51 *See also* J. Zhao, 'Promoting More Socially Responsible Corporations Through a Corporate Law Regulatory Framework', 37 *Legal Studies* 103-36 (2017).

52 *See* J.C. Dernbach, 'Sustainable Development in Law Practice: A Lens for Addressing All Legal Problems', 95 *Denver Law Review* 141 (2017).

53 R. Mitchell et al., 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts', 22(4) *Academy of Management Review* 853, at 858 (1997).

54 Gross (1997), above n. 5, at 5.

doi: 10.5553/ELR.000247

This article from Erasmus Law Review is published by Eleven international publishing and made available to anonieme bezoeker

clude all interests of other stakeholders.[55] Ultimately, a decision-making model has to be introduced based on which bankruptcy trustees can decide between the different interests, since stakeholders may have competing interests in certain situations.[56]

The question is whether creditors' right for their claims should override sustainability.[57] I lean towards a negative answer. It could be imaginable that the claims of creditors have to step aside for certain other stakeholders, such as employees or the environment. Gant, for example, advocates a framework that focuses on the impact of insolvency on the less powerful stakeholders or the vulnerable stakeholders.[58] In her view, the treatment of stakeholders in insolvency frameworks can be viewed differently by considering the broader social implications of their role in society and the impact that the insolvency of a debtor may have on them, along with how resilient they may be to the exercise of rights held by more powerful stakeholders.[59] It could be that by implementing a framework that deals with stakeholders based on their level of vulnerability, societal interests could outweigh the interests of creditors. This broader view on balancing interests in bankruptcy proceedings is necessary to permit social responsibility to trump private interests.[60]

Implementing the mere possibility for the interests of other stakeholders to outweigh the interests of creditors, as has been done in the Netherlands, is not sufficient (see Section 3). In order to effectively include the interests of other stakeholders in bankruptcy proceedings, a mechanism should be developed that can guide bankruptcy trustees to balance interests. There should be a more elaborate discussion on the place of the interests of the different stakeholders in insolvency frameworks, and to what extent public interests should be taken into account.[61]

In conclusion, to promote sustainable liquidation, it should be possible that the interests of other stakeholders can override the interests of the creditors. In addition, to minimise the risk of legal uncertainty and unequally, a mechanism should be developed that can guide bankruptcy trustees in balancing conflicting interests in bankruptcy proceedings.

In order to create such a mechanism, the legislator should regulate which stakeholders can override the interests of the creditors and to what extent those interests can override the interests of the creditors.[62] Although this is mainly a political decision, using a multistakeholder model based on a broad stakeholder view can be helpful in getting insight into the discrepancy between stakeholders who are affected by a bankruptcy and stakeholders who can have a say in bankruptcy proceedings.

5 Rethinking the Goal of Bankruptcy Proceedings

A diverse and broad group of both direct and indirect stakeholders are affected by bankruptcy proceedings. Traditionally, however, bankruptcy proceedings are designed to focus mostly on one particular stakeholder, being the creditor. In recent years, some jurisdictions, such as the Netherlands, tried to implement changes in their legal system to try to make their insolvency frameworks more stakeholder-friendly to promote sustainable liquidation. Usually, these changes give bankruptcy trustees the discretionary power to take into account the interests of all stakeholders involved.

Based on empirical evidence from the Netherlands, I conclude that the mere obligation to take into account the interests of stakeholders other than creditors is insufficient to promote sustainable liquidation. The discretionary powers of bankruptcy trustees to balance all interests involved leads to inequality and legal uncertainty, and does not encourage all trustees to liquidate in a sustainable manner. In order to promote sustainable liquidation, I suggest implementing a multistakeholder perspective in bankruptcy proceedings. One of the key factors of a successful multistakeholder perspective is that it should be possible that the interests of other stakeholders can override the interests of the creditors. It might be that the creditor's primacy impedes bankruptcy trustees from promoting interests other than that of the creditors. Should we reconsider the goal of bankruptcy proceedings in order to promote sustainable liquidation?

55 *Ibid.*, at 145.
56 *See* for an overview of the competing interests: B. Prusak et al. (2019), above n. 34, at 80-1. *See* for another overview Boon (2018), above n. 7, at 157-60.
57 Linna (2019), above n. 4, at 231 (2019).
58 Gant (2022), above n. 38.
59 *Ibid.*, at 6.
60 Gross (1997), above n. 5, at 195.
61 Keay (2000), above n. 5, at 530.
62 Linna (2019), above n. 4.

doi: 10.5553/ELR.000247