****

**Inside Story – January 2021**

**The Dutch Scheme is in Force:**

**European Restructuring Practice on the Move!**

*Jasper Berkenbosch, Partner, Business Restructuring and Reorganization Practice, Jones Day, Amsterdam, The Netherlands, <jberkenbosch@jonesday.com>; and*

*Sid Pepels, Associate, Business Restructuring and Reorganization Practice, Jones Day, Amsterdam, The Netherlands; Doctoral Researcher, Radboud University Nijmegen, The Netherlands <spepels@jonesday.com>.*

*Introduction*

Recently, on 1 January 2021, the Dutch interpretation of the “debtor-in-possession proceedings”: The *Wet Homologatie Onderhands Akkoord* (**WHOA**), came into force. The WHOA provides for a brand-new restructuring tool, which, in our view, is a very welcome addition to the Dutch Bankruptcy Code, which dates back to 1896 and basically consists of only two types of formal insolvency proceedings for enterprises: suspension of payments and bankruptcy. The WHOA, also referred to in some circles as the “Dutch Scheme”, enables viable enterprises in financial distress to restructure their liabilities on a going concern basis via a restructuring plan. The below will briefly touch upon several of the Dutch Scheme’s key features, and contemplates on the role that this new Dutch proceeding may play in the European restructuring practice. Will it turn the Netherlands into the new restructuring hub?

*The WHOA in a Nutshell*

The Dutch Scheme combines features of the US Chapter 11 procedure as well as the English Scheme of Arrangement. It has also drawn ample inspiration from the EU Restructuring Directive (Directive (EU) 2019/1023) (**PRD**).

Access to the Dutch Scheme is provided early on, where it is “reasonably likely that the debtor cannot continue to pay its debts”. That will be the case if the debtor is still able to pay its due and payable debts, whilst at the same time there is no realistic prospect of avoiding future insolvency if its debts are not restructured (looking as much as a year ahead). The debtor itself can initiate Dutch Scheme proceedings, but the opening of proceedings may also be petitioned for by individual creditors, shareholders and employee representative bodies, via a request to the court to appoint a restructuring expert. The restructuring expert is tasked with independently developing and proposing a restructuring plan on behalf of the debtor. Whether initiated by the debtor or one of the other parties, the debtor maintains control over its business for the duration of the process.

Although court involvement may be limited to a confirmation request at the end of the proceedings, the Dutch Scheme allows the debtor or the restructuring expert (if appointed) an array of tools in order to support the restructuring. They may, for instance, request a moratorium on creditors’ actions and insolvency proceedings for a period of four months, with the option to extend to a total of eight months. Debtors may also petition the court to insulate new financing required for the implementation of a restructuring plan from claw-back provisions or, in order to promote deal certainty, to approve certain aspects of the plan in advance. As an additional tool, the Dutch Scheme sidelines any contractual provisions purporting to unilaterally or automatically terminate, amend, or suspend contract rights (i.e., “ipso facto” clauses) for the duration of the proceedings.

The Dutch Scheme is flexible in relation to the contents of the restructuring plan and allows for the alteration of rights of all or some creditors (e.g., secured, preferential, ordinary, subordinated), and of shareholders. The plan may, for example, entail a debt-for-equity swap, a (partial) write-off or extension of debt, a sale of all (or part) of the debtor’s assets, or a combination of these options. The plan may also alter certain claims that the debtor’s creditors may have against group companies of the debtor (e.g., guarantees), without those group companies being subjected to separate proceedings. The Dutch Scheme also provides for a mechanism to amend or terminate burdensome contacts under certain conditions and, where necessary, include claims in relation to such terminations in the restructuring plan. Employees’ contracts and claims are in any event excluded from the Dutch Scheme and should be dealt with under the regular insolvency laws.

Once developed, voting on the restructuring plan may take place in separate classes, which are formed on the basis of similarity of existing and prospective rights granted under the plan *vis-à-vis* the debtor. Contrary to many other European jurisdictions that require a 75% consent rate (e.g., under the recent German *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen* (StaRUG), the UK Scheme of Arrangements and the new UK Restructuring Plan), the acceptance of the plan by a class only requires a two-third majority in the amount of the total debt or equity of participating stakeholders in the relevant class. There is no numerosity-test.

The court may be requested to confirm the plan if at least one class of impaired creditors has voted in favour of the restructuring plan. If all classes have done so, the court will only deny confirmation on limited grounds, e.g., because dissenting creditors or shareholders would receive less value than they would expect to receive in a liquidation scenario (the “best interest of creditors test”). If one or more classes have voted against the restructuring plan, the court may still confirm it and impose a “cross-class cram-down”.

However, the court may be asked to deny confirmation of the plan, if small trade creditors receive less than 20% distribution on certain claims, if the reorganization value is not distributed to the dissenting class in accordance with the relevant priorities (absent a reasonable ground for such deviation and where the deviation does not disadvantage affected stakeholders: i.e., a reasonable “absolute priority rule”) or if stakeholders are not offered a cash distribution to the amount they would receive in case of liquidation or, in the case of secured financial creditors, they are only entitled to a distribution in the form of (certificates of) shares.

If the court confirms the restructuring plan, it is binding on all stakeholders qualified to vote. Once confirmed by the court, the plan confirmation order may not be appealed.

*Broad Jurisdiction – Will that lead to Forum Shopping?*

The Dutch Scheme comes in two distinct types:

(1) public proceedings, which will be publicized by registration in the insolvency register, in which court decisions are public and which is expected to be included on Annex A to Regulation (EU) 2015/848 (recast) (**EIR)**; and

(2) private proceedings, which will not be registered in the insolvency register, in which court proceedings will take place in judges’ chambers (i.e., anonymized decisions) and which lacks the required characteristics of an insolvency proceedings under the EIR and will thus not fall within the EIR’s scope.

This dual-track approach, which has also inspired the German legislator when developing the StaRUG, combines the benefits the EIR with the flexibility of domestic international private law. Dutch companies with their Centre of Main Interest (**COMI**) or establishment in the Netherlands can open public proceedings within the EIR’s framework, allowing for automatic recognition throughout the EU (Denmark excluded).[[1]](#footnote-1) They, together with companies that have their COMI elsewhere, can also petition for private proceedings, access to which is open to any debtor with a “sufficient connection” to the Netherlands.

A sufficient connection may, for example, be established or otherwise evidenced, if a (substantial) part of:

* the debtor’s assets or group companies are located in the Netherlands; and/or
* the relevant finance documents are governed by Dutch law or include a choice of forum in favour of the Dutch courts.

As private proceedings will not be automatically recognized in the EU on the basis of the EIR, foreign recognition may only potentially be available under the UNCITRAL Model Law (if implemented), the EU Brussels I Regulation and/or Rome I Regulation or domestic private international law rules.

*Summary*

This broad and flexible approach, enabling Dutch courts to assume jurisdiction in relation to both Dutch and foreign debtors, allows the Dutch Scheme to become an interesting addition to the toolbox of the international restructuring practice. Where, in the last decade or so, larger European companies have often moved to London for purposes of restructuring their debt, many Dutch practitioners expect that the Dutch Scheme potentially may take over (part of) that central role. This may be the case, particularly now that, as a result of Brexit, UK court decisions can no longer rely on EU law for (automatic) recognition in Member States. There is definitely some merit to those expectations, particularly as many international groups of companies have organized part of their corporate structure via the Netherlands.[[2]](#footnote-2)

The Dutch Scheme offers significant flexibility (limited required court involvement and ample autonomy to determine the course of the proceedings), has a broad array of supportive instruments (e.g. the option to centralize proceedings concerning an entire multinational group of companies in the Netherlands, to restructure group guarantees and to get rid of burdensome contracts – an instrument which was, for instance, excluded from the StaRUG) and will include limited costs compare to the current often-used restructuring proceedings. The limited two-third majority consent requirement may also prove an interesting feature for foreign debtors compared to other proceedings in other Member States that prescribe a 75% consent threshold.

Whilst these and other advantages have the potential to incentivize foreign debtors to restructure via a Dutch Scheme, only time will tell as to what extent the Netherlands will become an interesting harbour for companies in distress. Firstly, with all other EU Member States being required to include similar restructuring proceedings in their national legislation by July this year, the need for (groups of) companies to divert to foreign jurisdictions in order to restructure their debt may decrease in comparison to the pre-PRD era.

Moreover, notwithstanding the effects of Brexit, English restructuring practice may be expected to uphold its role in the years to come. Firstly, as a result of the often discussed “Gibbs Rule” (as it currently stands), English law-governed debt can only be discharged in relation to dissenting creditors via English law insolvency proceedings. A restructuring via a Dutch Scheme, or similar continental European proceedings, will thus not always be sufficient where English law-governed debt is concerned. Secondly, with deal certainty being an important aspect of restructuring proceedings, the UK Scheme of Arrangements and, in its wake, the UK Restructuring Plan (as first applied in the Virgin restructuring), may remain interesting in some cases because of the established practice and case law.

If the Dutch (and other Member State) courts, however, can showcase that they are willing to lean on well-established cross-border market practices, the dominance of UK practice may prove to be only of limited effect. Nonetheless, as anything new creates uncertainty, a company might also consider opening – in addition to a Dutch Scheme - a parallel procedure in the UK to use the tried and tested UK Scheme as a predictable back up.

1. Debtors whose COMI is located outside the EU may also apply for public Dutch Scheme proceedings. The EIR then does not apply and does not limit jurisdiction to open Dutch public Scheme proceedings to cases where the debtor’s COMI or establishment is located in the Netherlands. As the EIR does not apply to such proceedings, they do not benefit from automatic recognition under the EIR. [↑](#footnote-ref-1)
2. The Netherlands is for instance home to roughly 14.000 financing companies. [↑](#footnote-ref-2)