



One Firm Worldwide®



## WHITE PAPER

February 2020

### The Dutch Scheme: A Valuable Addition to Cross-Border Restructuring Toolbox

The Netherlands is planning to adopt new restructuring legislation, allowing for court confirmation of extrajudicial restructuring plans (*Wet Homologatie Onderhands Akkoord*, or WHOA). The bill combines features of the U.S. chapter 11 procedure and the English Scheme of Arrangement. With its broad range of jurisdiction and flexibility, the “Dutch Scheme” will prove to be an effective addition to the restructuring toolbox for both Dutch and non-Dutch entities, for groups of companies, and with the possibility of automatic recognition throughout the European Union.

In this *White Paper*, we discuss the key features of this new Dutch restructuring bill.

## TABLE OF CONTENTS

KEY FEATURES .....	1
EARLY ACCESS TO THE DUTCH SCHEME .....	1
A BROAD BASIS FOR INTERNATIONAL JURISDICTION AND RECOGNITION .....	1
FLEXIBLE CONTENT OF THE RESTRUCTURING PLAN .....	2
THE VOTING PROCESS .....	2
COURT CONFIRMATION AND THE CROSS-CLASS CRAM DOWN .....	2
AN EFFECTIVE GROUP RESTRUCTURING TOOL .....	3
SUPPORTIVE TOOLS TO PROMOTE THE RESTRUCTURING .....	3
LAWYER CONTACTS .....	4
ADDITIONAL CONTACTS .....	4
ENDNOTES .....	4

Presently, Dutch law does not provide a mechanism for imposing a restructuring plan on dissenting creditors outside of formal insolvency proceedings. As a result, a restructuring plan currently requires the consent of all creditors and shareholders whose rights are affected by the plan. This has made restructurings outside of a formal insolvency proceeding very difficult and provides stakeholders with ample opportunity to monetize on nuisance value. With the Dutch Scheme, the Dutch legislature is aiming to effectively allow debtors to propose restructuring plans to their creditors and shareholders outside of formal insolvency proceedings, with the prospect of the debtor being preserved on a going-concern basis.

The Dutch Scheme is aimed at (partially) implementing the EU-wide initiative to promote “debtor-in-possession” restructuring, as recently formalized in the EU Harmonisation Directive<sup>1</sup> (EU 2019/1023), which requires EU Member States to include such instruments in their national legislation. The bill is currently being discussed in the Dutch Parliament and is expected to take effect later in 2020.

## KEY FEATURES

The key features of the Dutch Scheme include:

- **Restructuring Plan:** Debtors or a court-appointed restructuring expert will be permitted to propose a restructuring plan for approval by creditors (secured, preferential, and unsecured) and shareholders.
- **Voting Threshold:** Stakeholders may be split into voting classes divided on the basis of the similarity of their rights vis-à-vis the debtor. The restructuring plan has to be approved by a two-thirds majority of each voting class, with the possibility of requesting a cross-class cram down in certain circumstances.
- **Debtor-in-Possession Proceeding:** The debtor remains in control of the company's affairs throughout the Dutch Scheme proceeding.
- **Stay of Individual Enforcement Actions:** Debtors will be permitted to apply for a stay of individual enforcement actions and bankruptcy requests for a period of four months (extendable to a total of eight months in certain circumstances).
- **Broad Basis for Jurisdiction and Group Restructurings:** Subject to certain qualifying criteria, the Dutch courts will

have jurisdiction to confirm restructuring plans for both Dutch and non-Dutch companies, allowing for cross-border group restructurings to be centralized in the Netherlands.

## EARLY ACCESS TO THE DUTCH SCHEME

The proposed bill is aimed at granting viable enterprises in financial distress early access to a restructuring tool that will enable the debtor to restructure its liabilities and to survive on a going-concern basis. To be eligible to use the Dutch Scheme, it must be “reasonably likely that the debtor cannot continue to pay its debts.” This will be the case if the debtor is still able to pay its due and payable debts, while 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). Unlike a UK scheme of arrangement, there will not necessarily be a court hearing prior to the meeting of the debtor's creditors and shareholders to vote on the restructuring plan. Whether the debtor complies with the eligibility criteria for the plan and has properly constituted creditor classes for voting on the plan will in principle be tested only at the confirmation hearing. In principle, a debtor need not obtain shareholder consent to initiate the process and propose a restructuring plan.

Individual creditors, shareholders, and employee representative bodies are also permitted to commence restructuring proceedings by requesting the court to appoint a restructuring expert, who is tasked with independently developing and proposing a restructuring plan on behalf of the debtor. This request will be granted if it is reasonably likely that the debtor cannot continue to pay its debts, unless the stakeholders as a whole will be disadvantaged by the appointment of an independent restructuring expert. Since the Dutch Scheme is a debtor-in-possession procedure, the restructuring expert is not authorized to take control of the debtor's business. However, the debtor is not permitted to propose a restructuring plan during the duration of the expert's appointment.

## A BROAD BASIS FOR INTERNATIONAL JURISDICTION AND RECOGNITION

One of the Dutch Scheme's most important benefits is that it will be available both to Dutch companies that have a Centre of Main Interest (“COMI”) in the Netherlands and foreign companies. If a

debtor's COMI is located in the Netherlands, a "public" Dutch Scheme proceeding may be opened, which will be publicized by registration in the insolvency register and in which court decisions are public. Dutch "public" proceedings will benefit from automatic recognition throughout the European Union pursuant to the EU Regulation on Insolvency Proceedings.<sup>2</sup>

In the alternative, debtors may also apply for "non-public" Dutch Scheme proceedings, which will not be registered in the insolvency register and in which court proceedings will take place in judges' chambers (i.e., anonymized decisions). This type of proceeding will fall outside the scope of the EU Regulation on Insolvency Proceedings and thus is not limited to debtors with either a COMI or an "establishment" in the Netherlands. Access to this non-public proceeding is open to any debtor with a "sufficient connection" to the Netherlands, which, for example, may 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 forum choice for the Dutch courts.

A court-confirmed restructuring plan in a non-public proceeding, however, will not be automatically recognized in the European Union on the basis of the European Insolvency Regulation. Recognition under UNCITRAL Model Law implementations,<sup>3</sup> the EU Brussels I Regulation, or domestic laws may be available, however.

## **FLEXIBLE CONTENT OF THE RESTRUCTURING PLAN**

The plan may alter rights of all or some of the debtor's creditors, whether secured, preferred, or unsecured, and of existing shareholders. As the bill takes a flexible approach to the underlying terms of the restructuring plan, its content may be tailored to the circumstances at hand. The restructuring 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. To the extent that the implementation of a restructuring plan requires a shareholder resolution, the court-confirmed restructuring plan will act as a substitute for such a resolution.

Employees' claims that arise from employment contracts will, however, be excepted from the Dutch Scheme's scope, as the Dutch legislature is currently considering separate legislation addressing the effect of insolvency on employment contracts.

## **THE VOTING PROCESS**

Once the final restructuring plan has been negotiated, the debtor (or the restructuring expert if appointed) will have to present the plan to the affected creditors and shareholders at least eight days prior to voting. All creditors and shareholders whose rights will be affected under the plan are entitled to vote. Voting may take place in classes formed on the basis of similarity of existing and prospective rights with respect to the debtor. The voting procedure may be determined by the debtor, is flexible, and allows voting to take place electronically, in writing, or in person.

Voting will take place per stakeholder class. Acceptance of the restructuring plan by a class requires a two-third majority in the amount of the total debt or equity of the class' stakeholders participating in the vote. Contrary to the UK Scheme and the current Dutch plan offering instruments in formal insolvency proceedings, the Dutch Scheme does not require a qualified majority in headcount.

## **COURT CONFIRMATION AND THE CROSS-CLASS CRAM DOWN**

The debtor (or restructuring expert) may request that the court confirm the plan if at least one class of impaired creditors has voted in favor of the restructuring plan. The court will in principle hold a confirmation hearing following the creditor vote within eight to 14 days following the confirmation request.

On the court-tested requirements for confirmation, the bill distinguishes between cases where the voting requirement has been met in all classes, and those where one or more classes have voted against the plan.

If all classes have voted in favor of the plan, the court will deny confirmation of a restructuring plan—either on its own motion or on request of an affected creditor or shareholder—when, *inter alia*:

- It is reasonably unlikely that the debtor could continue to pay its debts if the plan were implemented;
- One of the prescribed formal requirements of the bill has not been met;
- Performance of the restructuring plan is not properly guaranteed; or
- The debtor wants to attract new financing as part of its restructuring efforts and incurring such financing would materially disadvantage creditors.

Dissenting creditors may also request that the court refuse confirmation if, under the plan, they will receive less value, whether in cash or in non-cash consideration, than they would expect to receive in a liquidation scenario (“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, dissenting stakeholders in a dissenting class may ask the court to refuse confirmation of the plan, if:

- The reorganization value is not distributed to the dissenting class in accordance with statutory and contractual priorities—unless there is a reasonable ground for such deviation and the deviation does not disadvantage affected stakeholders (i.e., the “absolute priority rule” combined with a reasonableness exception); or
- Dissenting stakeholders in a dissenting class are not entitled to a distribution in the form of cash for the amount that they would expect to receive if the debtor’s assets were liquidated.

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

## AN EFFECTIVE GROUP RESTRUCTURING TOOL

A restructuring plan in a Dutch Scheme proceeding may also alter certain claims that the debtor’s creditors may have against group companies (e.g., guarantees), even though those group companies are not themselves subject to restructuring proceedings. With cross guarantees being the rule rather than exception within multinational groups of companies, it will now be possible to restructure group guarantees within a single cross-border Dutch Scheme proceeding.

Moreover, as the Dutch Scheme permits courts to assert broad jurisdiction over foreign companies in non-public proceedings (see above), insolvency proceedings regarding multinational groups of companies may readily be centralized in the Netherlands. Jurisdiction for non-public proceedings may be asserted by a Dutch court if the foreign group companies have a “sufficient connection” to the Netherlands. Thus, the Dutch Scheme will permit multinational groups of companies to centralize their restructurings in the Netherlands by combining public proceedings for companies with a COMI in the Netherlands with non-public proceedings for foreign companies. This is particularly true if combined with instruments that provide for international recognition, such as the UNCITRAL Model Law, which has been enacted in more than 40 countries.

## SUPPORTIVE TOOLS TO PROMOTE THE RESTRUCTURING

The Dutch Scheme provides for several additional tools that may be used to further promote the development and implementation of the restructuring plan:

- A moratorium on creditors’ actions and insolvency proceedings upon the debtor’s (or the restructuring expert’s) request for a period of four months, with the option to extend to a total of eight months;
- Contractual provisions purporting to unilaterally or automatically terminate, amend, or suspend contract rights (i.e., “ipso facto” clauses) cannot be enforced during Dutch Scheme proceedings;
- Debtors may propose amendments to burdensome contracts (e.g., lowering periodic lease payments or interest payments) or terminate such contracts if the counterparty does not accept the proposed amendments. Damage claims resulting from termination may be included in the restructuring plan;
- To promote deal certainty, the debtor (or the restructuring expert), as it is developing a restructuring plan, may request that the court approve certain aspects of the plan in advance, including the proposed classification of stakeholders, voting procedures, stakeholder voting eligibility, and whether certain grounds to refuse confirmation (as discussed above) exist;
- The court may issue injunctive relief to protect stakeholders’ interests; and

- The court may insulate new financing required for the implementation of a restructuring plan from claw-back provisions. Court approval will be granted if the relevant transaction is necessary to continue the debtor's business during the preparation of the restructuring plan (i.e., financing during the plan development period), if the transaction is in the interest of the debtor's creditor body as a whole, and if no individual creditor will be substantially damaged.

## LAWYER CONTACTS

### Jasper Berkenbosch

Amsterdam

+31.20.305.4200

[jberkenbosch@jonesday.com](mailto:jberkenbosch@jonesday.com)

### Erik Schuurs

Amsterdam

+31.20.305.4276

[eschuurs@jonesday.com](mailto:eschuurs@jonesday.com)

### Sid Pepels

Amsterdam

+31.20.305.4244

[spepels@jonesday.com](mailto:spepels@jonesday.com)

## ADDITIONAL CONTACTS

### Kay Morley

London

+44.20.7039.5156

[kmorley@jonesday.com](mailto:kmorley@jonesday.com)

### Ben Larkin

London

+44.20.7039.5825

[blarkin@jonesday.com](mailto:blarkin@jonesday.com)

### Juan Ferré

Madrid

+34.91.520.3904

[jferre@jonesday.com](mailto:jferre@jonesday.com)

### Fabienne Beuzit

Paris

+33.1.56.59.39.39

[fbeuzit@jonesday.com](mailto:fbeuzit@jonesday.com)

### Bruce Bennett

Los Angeles/New York

+1.213.243.2382/+1.212.326.3680

[bbennett@jonesday.com](mailto:bbennett@jonesday.com)

## ENDNOTES

- 1 Formally known as the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventative 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). See the [Jones Day White Paper on the Harmonisation Directive](#).
- 2 Regulation (EU) 2015/848 on insolvency proceedings.
- 3 Several EU Member States have currently implemented the UNCITRAL Model Law on Cross-Border Insolvency within their national legislation (e.g. the UK, Poland, Greece and Romania). The Dutch legislature has recently announced that a Dutch expert committee will be established and tasked with investigating the possibility of implementing the UNCITRAL Model Law in the Dutch Bankruptcy Act as well.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.