It is here: the Dutch Scheme of Arrangement

New legislation for restructuring and insolvency in the Netherlands

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The current Dutch Bankruptcy Code dates back to 1893 when it was first enacted, has aged nicely and still functions well despite the now existing international financial markets and complex financial instruments that could not have been imagined 127 years ago. Although many changes were made since its inception, the Dutch Bankruptcy Code has never had a major overhaul, even though many initiatives were launched over the years.

Partly because of developments in European law, partly because of the increasingly international nature of the financial markets and partly because it actually serves a need for the Dutch market, the Dutch legislature has now proposed a major addition to the Dutch Bankruptcy Code, the Dutch Scheme of Arrangement (the **"Dutch Scheme"**). The Dutch Scheme provides for an out-of-court debt restructuring process and is implemented via the WHOA ("Wet Homologatie Onderhands Akkoord").

The Dutch Scheme combines the best features of the US Chapter 11 and the English Scheme of Arrangement, and includes provisions that can be considered even more "debtor friendly", aimed at capturing as much value as early as possible in the restructuring process. The provisions of the Dutch Scheme are based on the assumption that restructuring earlier, and in an out-of-court process, captures value that may otherwise be lost for the debtor and its creditors.

With the introduction of the Dutch Scheme, Dutch medium size to large businesses now have an alternative to the formal insolvency proceedings of Bankruptcy and Suspension of Payment to restructure their debt. More importantly, the Dutch Scheme will also be an important tool for the restructuring of globally operating companies, many of which have holdings or operating, financing and other subsidiaries in the Netherlands.

The Dutch Senate's passing of the Dutch Scheme legislation on 6 October 2020 marks the completion of a long legislative process that was initiated long before the Covid-19 pandemic hit. The Dutch Scheme is a powerful tool that can help companies navigate the challenges they are currently facing as a result of Covid-19.

Below, we will highlight the key features of the Dutch Scheme and discuss those in more detail thereafter.

Key features

- **Easy to use, short and very flexible process**
  - Court not involved until approval is sought, unless issues need resolution earlier;
  - Short timelines in order to speed up the process;
  - The composition plan, information and voting process are flexible and can be tailored to the specific needs;
  - No appeal to ensure swift process.

- **Debtor In Possession (DIP)**
  - No court appointed officer overseeing this;
  - Possibility to involve a "restructuring expert";
  - Possibility of a court appointed monitor.

- **Broad jurisdiction of the Dutch courts**
  - Open to Dutch and foreign debtors;
  - Group restructurings, also multinational;
  - International recognition.

- **Competitive voting threshold of 2/3rd majority and cram down/up**
  - 2/3rd of amount of debt held by creditors that participate in the vote in their respective classes;
  - Cross class cram down and cross class cram up.

- **Balanced**
  - Best Interest of the Creditors test;
  - Absolute Priority Rule;
  - Creditors can object to Court sanctioning the voting outcome;
  - Shareholders are involved, but their rights largely suspended.

- **Protective measures available during the process**
  - Stay of enforcement;
  - Stay of Ipso Facto clauses;
  - Stay of bankruptcy and suspension of payment proceedings;
  - Fresh money protection;
  - Appointment of Restructuring Expert or Monitor.

- **Unilateral amendment or termination of onerous agreements**
  - Agreements that are onerous for the debtor can be amended or terminated;
  - Any compensation due to the creditor of that amended or terminated agreement can be accounted for (and thus reduced) in the composition plan.

Liquidity test - Article 370(1) DBC

To be permitted to offer a composition plan under the Dutch Scheme, a liquidity test applies: if a debtor on a reasonable basis assesses that it will not be able to continue paying its debts, it may offer a composition plan to its creditors. This effectively means that while a debtor can still service its debts and at the same time it foresees that there is no realistic chance insolvency can be avoided in the future without a debt restructuring, it can move for application of the Dutch Scheme.

As there is no fixed term within which the debtor expects to become insolvent in order to have access to the Dutch Scheme, while the aim of the Dutch Scheme legislation is to facilitate restructuring at the earliest possible moment, it may very well be that the debtor can move for application of the Dutch Scheme while it expects insolvency only 12 months (or even more) ahead.

Two approaches: public process and private process - Article 369(6) DBC

Debtors can elect for a public application of the Dutch Scheme or a private application. The public process for application of the Dutch Scheme is one that will be recorded in the public company registers (as is the case in liquidation, bankruptcy and suspension of payment). The private Dutch Scheme will not be registered. During the process, there is no option to change from one to the other, so thinking ahead is required.

International Recognition

The ***public Dutch Scheme*** enjoys the benefits of the EU Insolvency Regulation - Recast, that include automatic recognition throughout the EU (except Denmark).

For the ***private Dutch Scheme,*** the EU Insolvency Regulation does not apply, and other means of recognition abroad need to be used, such as UNCITRAL Model law adoption and other (local) mechanisms, generally governed by international private law rules in the jurisdiction where recognition is sought (i.e. where there are assets of the debtor that need to be protected by the Dutch Scheme). This also applies when recognition of a public Dutch Scheme is sought in non-EU member states (or in Denmark). The Brussels Regulation (EEX) does not apply to the (private and public) Dutch Scheme.

Jurisdiction of the Dutch Courts - Article 369(7) DBC

Access to both the private and public Dutch Scheme is - according to the black letter law - very broad. We will have to see how far the courts are willing to go along with that, which is also relevant for foreign courts when asked to recognize a Dutch Scheme.

The jurisdiction of the Dutch Courts regarding a ***private Dutch Scheme*** is governed by Article 3 of the Dutch Code of Civil Procedure (DCCP). Under Article 3 DCCP, the courts have jurisdiction if either one of the formal criteria is met: the applicant (the debtor or a creditor) has it corporate seat in the Netherlands or one or more of the affected creditors (not being an applicant) have their seat in the Netherlands.

In addition, the Dutch courts have jurisdiction regarding a private Dutch Scheme if there is a sufficient connection to the Netherlands. Sufficient connection exists if:

- The debtor's COMI (center of main interest) is in the Netherlands or a branch is established in the Netherlands; if a group of companies is jointly restructuring, there is sufficient connection if at least one of the group entities has its COMI in the Netherlands;
- A substantial part of its assets are in the Netherlands;
- A substantial part of its debt is governed by Dutch law or subject to jurisdiction of the Dutch courts;
- The debtor is part of a group of which a substantial part regards Netherlands domiciled entities;
- The debtor (for instance, as a guarantor) is liable for debts of a third party that are subject to the jurisdiction of the Dutch courts.

The ***public Dutch Scheme,*** which is included in Annex A to the EU Insolvency Regulation - Recast - is open to debtors:

- That have their COMI in the Netherlands; the EU Insolvency Regulation - Recast applies to the public Dutch Scheme and then allocates jurisdiction to the Dutch courts;
- That have their COMI outside the EU (or in Denmark), if there is sufficient connection to the Netherlands (see: private Dutch Scheme criteria that apply in the same way for the public Dutch Scheme).

Initiating a Dutch Scheme (Articles 370(3) and 371 DBC)

Debtor initiated Dutch Scheme

A debtor can initiate a Dutch Scheme by depositing a Scheme Declaration with the court. The Scheme Declaration will need to be filed as soon as preparations for offering a plan have started and is valid for one year. The debtor may elect for a public or private Dutch Scheme, but can also defer that decision to a later moment.

Creditor/Shareholder initiated Dutch Scheme

Also creditors, shareholders and a works council (if there is one) can initiate a Dutch Scheme. This is done by requesting the court to appoint a Restructuring Expert who will prepare a composition plan on behalf of the debtor. During the appointment of a Restructuring Expert, the debtor cannot offer a composition plan to its creditors (it can submit a plan to the Restructuring Expert though). In case the creditors, shareholder or works council initiate the Dutch Scheme, the court - having taken into account the debtor's position - will determine whether a private or public process will be followed if the parties do not agree.

It must be noted that the debtor who filed the Scheme Declaration can also apply for the appointment of a Restructuring Expert (Article 371(1)).

With the appointment of a Restructuring Expert, the Restructuring Expert will be driving the process, not the debtor. Creditors, shareholders and the works council cannot drive the process in any event, as they can only file for a Dutch Scheme driven by a Restructuring Expert. During the appointment of a Restructuring Expert, the Dutch Scheme process will remain a Debtor in Possession process.

The Composition Plan (Article 370 DBC)

Article 370 DBC establishes the possibility that a debtor that can reasonably assess it will not be able to continue paying its debts may offer a composition plan to (all or part of) its creditors and shareholders, which plan can "change their rights".

Change of rights: can be almost anything, and does not need to involve all creditors and/or shareholders, ranging from simply deferring debt to full release of debt, debt for equity swaps et cetera. There are, however, certain restrictions related to the "best interest of the creditors" and "absolute priority" rules, which we will touch on below.

All or part of creditors/shareholders: whatever works best under the circumstances, and a Dutch Scheme can be limited to one type of creditor (which can even be secured creditors, for instance, leaving unsecured suppliers unaffected). Only creditors whose rights are affected can vote on the composition plan.

Negotiations during the process: obviously, and as common any large restructuring, negotiations between the debtor and its creditors, whether bi-lateral or multi-lateral, can be expected. The Dutch Scheme allows for this to happen and a composition plan that was offered to creditors upon the filing of the Scheme Declaration (if any) may be amended during the negotiations. A final plan must be offered to the creditors ahead of the vote, observing a "reasonable period" that is no less than 8 days prior to the vote.

Information to be provided: the composition plan will have to include all information that voting creditors or shareholders will reasonably need to develop an informed understanding of the plan and its effects. This includes details on:

- The various classes of creditors and criteria for application of the classes;
- Financial consequences per class of creditors;
- The expected value that can be realized if the plan materializes ("reorganization value");
- The amount of proceeds that will likely be realized upon a bankruptcy liquidation;
- The assumptions on which the reorganization value and liquidation proceeds are based;
- Any fresh money required and a reasoning as to why that is necessary;
- The voting procedure;
- Works council advice solicited and provided during the process.

Also, a detailed breakdown and analysis of the financial situation and of the plan will have to be made available to the creditors, which includes:

- Overview of all assets and liabilities;
- Details of all affected creditors/shareholders and the debt/shares they hold;
- Details of all unaffected creditors/shareholders and an explanation why these are not included in the composition plan;
- Description of the causes of the financial difficulties and efforts undertaken to solve these;
- Description of the effects of the plan on the debtor;
- Timeline of implementation of the composition plan.

Small creditors protection: during the parliamentary discussions, an amendment was introduced to the proposed legislation in order to add protection for unsecured claims held by small businesses (typically: suppliers). If these small businesses are offered less than 20% of their claims, the composition plan should explicitly explain which important reasons exist to not offer 20% to those creditors ("comply or explain").

Classes of creditors (Article 374 DBC)

Creditors and shareholders will be classed differently if the rights they have upon liquidation of the company's assets or if the rights that they will get upon implementation of the composition plan are so different that these creditors are not in a comparable position. Each class will be proposed a separate composition plan to vote on.

Creditors that rank differently between them on the basis of their security or preferred position will in any event be classed separately. This regards mortgages, pledges, retention of title, preference, subordination of debt (for instance as a result of inter creditor agreements). Also, tax effects of the composition plan on the various creditors may be taken into account when determining whether creditors should be classed differently.

Potentially, a creditor can be classed in different classes for one and the same part of the debt, for instance if the security that the creditor has is insufficient to cover the full claim. The secured part will then be classed separately from the unsecured part.

In all, the classing of creditors aims to facilitate the fair distribution of the reorganization value over the creditors and shareholders by making it more apparent how the reorganization value will be distributed over the various classes of creditors/shareholders

Voting (Article 381 DBC)

Who can vote: creditors and shareholders whose rights are affected by the composition plan are eligible to vote on the proposed composition plan. Voting is done per class of creditors/shareholders.

If the economic interest of debt (bonds, notes) or shares (share certificates) is split from the legal title to the debt or shares, the debtor can elect to invite the economic beneficiary to vote instead of the legal holder of the debt or shares.

Threshold: the voting threshold for approval of the composition plan is a 2/3rd majority of the amount of debt (or nominal capital) actually voted per class of creditors (or shareholders). This is a competitive threshold in the international restructuring arena, for instance the English Scheme of Arrangement requires a 3/4th majority.

As mentioned above, each class of creditors/shareholders gets a separate (sub)composition plan to vote on for that class. The combination of the separate (sub)composition plans constitutes the full plan.

Procedure: the voting procedure on the composition plan can be fully designed by the debtor to fit the needs of the particular case at hand. Voting may be organized in a physical meeting, online or other digital form or in writing. The only requirement to be observed is that the affected creditors and shareholders must be provided with a reasonable notice period before the vote (of at least 8 days) in order to ensure that creditors can make an informed decision when they vote.

Voting outcome: the debtor will have to communicate the voting outcome as soon as possible (and in any event within 7 days) after the vote by means of minutes of the meeting/voting, indicating the names of creditors and shareholders that voted, the amount of debt/capital they hold and what they voted, as well as the overall result of the votes per class. Finally, the debtor should mention whether it intends to submit the voting result to the court for ratification.

Ratification of the Dutch Scheme by the court (Article 383 DBC)

Ratification of the composition plan by the Dutch court is necessary for the plan to become binding on all creditors.

If at least one class of creditors has approved the composition plan, the debtor can submit the composition plan to the court for ratification. If the plan includes one or more classes of creditors that is fully or partially ***"in the money",*** the composition plan needs to be approved by at least one of the "in the money" classes of creditors to be eligible for court ratification.

If not all classes of creditors have voted in favour of the composition plan (i.e. when cram down is applied) and if no Restructuring Expert or Monitor was appointed during the application of the Dutch Scheme, the court will during the ratification part of the process appoint a Monitor. This requirement stems from Article 5 of the EU Directive on Preventive Restructuring Frameworks and the tasks of the Monitor are not further explained by the Dutch legislature. The EU Directive identifies assistance with negotiations between a debtor and its creditors as one of the reasons for the appointment of a Monitor.

After the vote and communication of the voting result, the debtor can apply for ratification of the composition plan by the court. The court will swiftly schedule a hearing to provide the affected creditors and shareholders with an opportunity to submit a response to the requested ratification.

Ratification: the composition plan is ratified by the court if all creditors have approved the composition plan. Also, if all classes of creditors have approved the plan with the required 2/3rd majority of the amount of voting debt, the court will ratify the composition plan. In both instances, the court will review whether all due process requirements were observed in order for the voting creditors/shareholders to make an informed decision. If any creditor or shareholder objects during the ratification part of the Dutch Scheme proceedings, such objections are only heard if the relevant creditor or shareholder 1: has raised these objections towards the debtor as soon as possible during the application of the Dutch Scheme (i.e. prior to vote; this in order to avoid unnecessary delays) and 2: (cumulative) if the relevant creditor or shareholder itself voted against the plan.

Rejection of ratification - general grounds: the general grounds for rejection are related to - mainly - due process, information, classification, fresh money being part of the plan on terms that materially hurt the interests of the creditors.

Rejection of ratification - specific grounds: in cases of ***"cram down"*** and ***"cross class cram down",*** additional tests apply in the context of a requested ratification by the court and also here these need to be brought by creditors who voted against the plan.

Cram Down/up & Cross Class Cram Down/up

In case of ***cram down*** within a class, a court can reject the ratification of the composition plan if the relevant creditor (that must itself have voted against the plan) is worse off as compared to the recovery that creditor would have had in a bankruptcy liquidation scenario. Is the "no creditor worse off"-test (or: ***"best interest of the creditors-test"***) met, a court can proceed to ratify a composition plan despite lack of unanimity of creditors that would be required outside the application of the Dutch Scheme (and outside the application of the formal insolvency proceedings of Bankruptcy and Suspension of Payment).

This test effectively balances the interests of the debtor, senior creditors and junior creditors, and incentivizes the debtor to design a plan and negotiate with its creditors in order to come to a plan that is eligible for ratification by the court.

In case of ***cross class cram down,*** a court can reject the ratification of the composition plan where a relevant class of creditors - as a class - voted down the plan (i.e. ***less*** than 2/3rds of the amount of voting debt in that class voted in favour) if:

- the absolute priority rule was not observed (i.e. the reorganization value is not distributed in accordance with the ranking and priority of the affected creditors);
- the best interest of the creditors test was not met (i.e. receive less than in liquidation scenario).

These tests also ensure that the debtor designs a plan and seeks to negotiate with its creditors to come to a plan that meets the absolute priority rule, ensuring a court will ratify the composition plan.

In case of cross class cram down, a court can also reject a request for ratification if:

- the opposing creditors are not afforded the ***option to receive a cash payment*** of the amount they would likely have recovered in a bankruptcy liquidation scenario;
- professional lenders with security (in the form of mortgage of pledge) are not afforded the option to elect for ***other relief than debt-for-equity swaps;***
- the ***small businesses creditors protection*** is not afforded (i.e. these creditors receive less than 20% on their claim).

Termination of continuing contracts (Article 373 DBC)

If a debtor is a party to onerous continuing agreements (lease and other), it can request the other party to such contract for restatement of its terms or a partial or even full termination of such continuing agreement. This aims to facilitate cutting cost for the business. As such, it is more part of an operational restructuring rather than a debt restructuring, but it is made part of the Dutch Scheme legislation in order to ensure that any damages that the other party to such contracts may claim can immediately be taken into account when offering a composition plan to the creditors (i.e. the damages claim is also subject to the effects of the Dutch Scheme and can immediately be restructured).

Upon ratification of the plan, the court will also have to accept the amendment, partial or full termination of such continuing agreements.

Limited recourse for third parties such as guarantors (Article 370(2) DBC)

Creditors who enjoy the benefits of a third party acting as surety or guarantor, or creditors who can satisfy their claims against assets of third parties that have agreed to subject those assets to a security interest for the benefit of that creditor, continue to enjoy these benefits in full as if no Dutch Scheme had been initiated (unless these third parties are affiliates of the debtor and their liabilities as surety/guarantor et cetera are also restructured, see below).

Third parties that pay any amounts to these creditors are, however, faced with the consequences of the application of a Dutch Scheme: any amount they pay to such creditor ***cannot*** be recovered against the debtor (i.e. their recourse claims are extinguished by virtue of the Dutch Scheme application).

These third parties are, however, not always left without anything. In so far as the composition plan awards any rights to these creditors, such rights are, by operation of law, automatically transferred to the relevant third parties, but only in so far as the creditor would receive more than its original (i.e. pre-Scheme) claim.

Group guarantees/sureties (Article 372 DBC)

The Dutch Scheme also allows for the amendment of creditors' rights against the debtor's affiliates that have guaranteed the debtor's debts towards these creditors or act as sureties towards these creditors. The requirements for restructuring the guarantees and sureties by affiliates are that:

- these affiliates are within the same ***group*** as the debtor within the meaning of Article 2:24b of the Dutch Civil Code (i.e. organizationally connected via central leadership in a group that acts as an economic unity; there was a deliberate choice to opt for this instead of the more formal criteria such as control, majority shareholding et cetera);
- these affiliates can also reasonably assess they will not be able to continue paying their debts;
- the court has jurisdiction over these affiliates if they would file for a Dutch Scheme individually.

Stay (Articles 376 and 377 DBC)

The Dutch Scheme provides for the possibility of a stay of various aspects of the debtors' position and assets. A stay is not automatically granted, but the debtor can request a stay for the duration of 4 (+4) months as soon as the Scheme Declaration is filed, while the debtor needs to confirm it has already offered a composition plan to its creditors or will do so within 2 months.

During the stay, creditors cannot enforce their rights against the debtor, nor can third parties re-claim their own assets that are with the debtor, unless the court allows the creditors to do so. Also, the court can lift seizures that creditors put over the debtor's assets, while bankruptcy and suspension of payment petitions are also stayed (the latter is only relevant if creditors applied for the Dutch Scheme while the debtor wants to initiate suspension of payment proceedings, as only the debtor can request suspension of payment proceedings).

A stay can regard the debtor's assets as a whole, or be limited specific creditors being barred from taking action against the debtor and specific assets.

The requirements that must be met in order for a court to order a stay are that it is prima facie apparent that:

- a stay is required to protect the debtor's business during the Dutch Scheme proceedings; and
- it is reasonable to believe that the interests of the joint creditors are best served by the stay and the interests of any individual creditors (for instance those who put seizures over the debtor's assets or have requested bankruptcy proceedings to be initiated) are not materially affected.

A stay initially ordered for 4 months can be extended with another (maximum of) 4 months, unless

- the Dutch Scheme is applied for as a private Dutch Scheme;
- a COMI-shift from another EU member state to the Netherlands has taken place within 3 months prior to the involvement of the court in the Dutch Scheme proceedings.

A debtor who - prior to the stay - was authorized to use or sell any of the goods in its possession or collect its receivables, continues to be so authorized during the stay, as long as it is in the context of the ordinary course of its business. The debtor must ensure that the interests of the creditors are sufficiently protected.

Ipso Facto clauses (Article 373(3) and (4) DBC)

The Dutch Scheme also features a stay of ipso facto clauses. As is true in formal bankruptcy and suspension of payment proceedings, regular contract law continues to apply. This causes that the debtor will likely default under its contracts towards its suppliers (and perhaps its customers as well). In order to protect the going concern business of the debtor, ipso facto clauses are therefore ineffective during the application of the Dutch Scheme: the application of the Dutch Scheme will not entitle third parties to avail themselves of statutory or contractual provisions that allow for amendment or termination of contracts, nor can any third party suspend performance of its obligations towards the debtor on the basis of the debtor filing for Dutch Scheme proceedings.

If a stay is ordered by the court, Article 373(4) DBC provides that any pre-Scheme default by the debtor cannot be asserted by a third party to amend or terminate contracts, nor can suspension of performance be based on that pre-Scheme default. The debtor, however, must provide adequate security for any new obligations that materialize towards that third party during the stay as a condition to rely on this protection.

Fresh Money protections (Article 42a DBC)

During the Dutch Scheme process, one can imagine that liquidity is key. For this reason, and as explained above, certain provisions in the Dutch Scheme legislation protect the going concern business. That, however, might not be sufficient. During restructurings, it may also happen that the main financier wants out. If a new financier needs to be brought in, providing new liquidity for the business, obviously that new financier wants to see any liquidity provided in a risky situation protected.

The Dutch Scheme allows certain protections for fresh money. If a debtor can show that

- attracting fresh money and providing security is necessary to protect the going concern business during the Dutch Scheme process; and
- this is in the best interest of the joint creditors; and
- no individual creditor is materially affected,

the court can grant leave to the debtor to enter into transactions such as providing security interests over assets against being provided with fresh money. With the court providing such leave, these transactions cannot be subjected to an Actio Pauliana if the restructuring fails (where after it is likely a bankruptcy will follow).

The protection afforded under the black letter law is much broader than fresh money protection, as the protection is extended to any transaction entered into (even: every legal act performed) by the debtor. Fresh money protection is the most relevant in our view. Also, in certain instances, set-offs - that usually give rise to Actio Pauliana and claw back discussions as well - are permitted during the Dutch Scheme process if certain criteria are met. This mainly regards the issue of banks receiving revenue generated by the debtor on a current account, which - by definition - reduces the working capital facility extended by a bank.

No mandatory independent valuations

The Dutch Scheme would not be Dutch if there were no considerations (and concerns) regarding the cost of running a Dutch Scheme. And this does not only regard the legal fees the debtor will incur.

Typically, financial advisors and business valuators will be engaged by the debtor for various purposes (see below). In addition, ad hoc creditor groups and lenders usually will require the debtor to pay for the legal fees and cost of the financial advisors and business valuators they separately engage for the purposes of negotiating during the restructuring.

In a typical restructuring much of the discussion and negotiations, and sometimes even litigation, regards the assumptions underlying the various valuations. This is relevant because differences in the underlying assumptions can have significant effects on the various valuations. Not surprisingly, the advisors from different sides rarely agree on the valuations, and not by a small margin.

In order, for example, for creditors to assess whether the Absolute Priority Rule and the Best interest of the Creditors test, the reorganization value needs to be identified allowing creditors (and a court) to assess whether a proposed composition plan takes due account of how the reorganization value is distributed to the creditors.

All this requires particular expertise of financial advisors and business valuators:

- a post-restructuring business plan needs to be developed by the debtor's management and needs to be validated by financial advisors;
- on the basis of that validated business plan, business valuators need to determine a post restructuring value for the company, which can be done in various was (equity valuation, net asset value, discounted cash flow et cetera);
- also, a pre-restructuring liquidation value needs to be determined; this is not necessarily an absolute liquidation value, as healthy parts of the business could be sold as a going concern with higher values compared to absolute liquidation;

The delta between the post restructuring value and pre-restructuring liquidation value identifies the "reorganization value", that - in accordance with the Best Interest of the Creditors test and the Absolute Priority Rule needs to be distributed fairly between the various creditors, while it is also relevant for other aspects of the Dutch Scheme, for instance where certain creditors need to be presented with the option to elect for cash payment instead of other rights awarded to them under the composition plan.

As apparent from the above, valuations are important. Contrary to certain pre-insolvency restructuring regimes in other jurisdiction, the Dutch Scheme does not require valuations to be prepared by advisors. The information a debtor needs to provide to its creditors includes:

- The reorganization value
- The liquidation value
- The assumptions used to determine these values

When the draft legislation for the Dutch Scheme was proposed, a debate followed on the possibility to introduce the mandatory submission of an independent valuation. Such a requirement was rejected by the legislature, as it would cause "significant" cost, which would put the Dutch Scheme out of reach for smaller businesses. In addition, and as already mentioned above, it was argued that debtor-engaged financial advisors and business valuators are not really independent (as evidenced by the wide margins of difference between the various advisors engaged by the different stakeholders). The conflicting interests that cause this are, principally, the position of the shareholders and the positions of senior and junior creditors between themselves.

The Dutch Scheme does allow the court to engage experts to prepare a report for the benefit of the court. In addition, a Restructuring Expert, if appointed, can engage financial advisors to prepare valuations if deemed necessary.

Timeline

The Dutch Scheme is designed to facilitate a swift and efficient process, which is relevant if the restructuring is not that complicated (i.e. the debt structure is not that complicated). At the same time, the Dutch Scheme also allows for complex restructurings that require (a lot more) time to be completed, especially if extensive negotiations, litigation or foreign parallel proceedings are required.

Scheme Declaration (Article 370 DBC); generally, the debtor will start off the Dutch Scheme process by filing the Scheme Declaration with the court. If the debtor wants to benefit from a stay, the debtor also needs to confirm he has already offered, or will offer within 2 months, a composition plan to its creditors

Voting and calling for a vote (Article 381 DBC): After the filing of the Scheme Declaration, the process is fairly flexible and the next element relevant for timing, is the scheduling of the vote, which triggers a "reasonable notice period" (of no less than 8 days) to provide the details of the composition plan and all required information to the creditors.

In between the filing of the Scheme Declaration and the scheduling of the vote, the debtor can negotiate with its creditors and develop the plan up to a level that it carries sufficient support to be approved by - at least - one class of creditors. In order to ensure the court will ratify the composition plan if adopted by at least one class of creditors, the debtor will obviously need to take the relevant rules (Best Interest of the Creditors, Absolute Priority Rule) into account when negotiating the plan with its creditors.

The only real limitation for the duration of this period is the duration of the stay if one is requested. For a private Dutch Scheme, the stay will apply for 4 months only. For a public Dutch Scheme, that initial stay can be extended with another 4 months.

The second limitation to the timeline is the fact that a Scheme Declaration is only valid for 1 year after its filing (or, if later, after the first court decision during the Dutch Scheme process).

Communication of the voting result (article 382 DBC): as soon as possible after the vote, and no later than 7 days after the vote, the results of the vote will have to be captured in minutes, and the creditors need to be informed immediately thereafter.

Request for court ratification (Article 383 DBC): an approved plan (i.e. at least one class of creditors voted in favour with the 2/3rd required majority) can be submitted to the court for ratification. There is no fixed period within which a request for ratification by the court must be filed after the vote. Logic would dictate that a debtor would want the court to ratify the composition plan as soon as possible and will hence file a request for ratification as soon as possible after the vote.

Hearing Scheduling (Article 383(4) and (6) DBC): upon receiving a request to ratify a composition plan under the Dutch Scheme, the court will schedule a hearing with 8 to 14 days after submission of (i) the request to ratify the composition plan and (ii) the voting result.

Decision by the court (Article 384 DBC): the court will decide whether to ratify the composition plan or reject the request for ratification "soonest". There is no further guidance on what this actually means, but considering the practices of the Dutch courts in other insolvency procedures, it can be expected that "soonest" will mean within 7-14 days, depending also - of course - on whether any creditors have filed objections with the court to the request to ratify the composition plan. It may well be that a court takes longer in complicated restructurings.

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