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Recent Developments in the International Restructuring Market from a Dutch Law Perspective

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Editor's note: *Even before "COVID" or "pandemic" had become common parlance, many European countries spent considerable time sharpening their restructuring toolkits — none more so perhaps than the Netherlands, whose much-talked-about "scheme" finally came into being earlier this year. The timing might not be entirely coincidental with the U.K.'s "Brexit" from the European Union (EU), with many practitioners hoping to take a bigger slice of the European restructuring pie at the U.K.'s expense. Whether that will actually turn out to be the case remains to be seen (although there is presently no evidence that the U.K. will be on a diet). However, there is also no doubt that the Dutch scheme offers something new and interesting for corporates to consider. Vincent Vroom and Kim de Bruijn write about how the early pioneers of the Dutch scheme have begun to shape its practical application both within the Netherlands and potentially internationally.*

It has been more than a half year now since the new Dutch "Act on court sanctioning private composition to avoid bankruptcy" (the so-called "Dutch scheme") entered into force, and this article looks back on the first half-year of this Dutch scheme. Remarkably, recent developments in the Dutch restructuring market are not mainly characterized by the Dutch scheme, but notably by international topics: Brexit, the introduction of the restructuring plan in England and the English *Gategroup* decision. This article will also discuss relevant recent aspects of recognition of foreign (insolvency) proceedings in the Netherlands. As the Netherlands is an important jurisdiction for international holding structures, these aspects are relevant for the broader restructuring market, and the Dutch scheme equally aims at promoting the Netherlands' as a future restructuring forum.

First Half-Year of the Dutch Scheme

On Jan. 1, 2021, the Dutch scheme introduced a debtor-in-possession (DIP) proceeding that aims to achieve a debt restructuring outside of a formal Dutch bankruptcy process (a bankruptcy or a suspension of payments). The Dutch scheme was heavily inspired by U.S. chapter 11 and English scheme processes. In a Dutch scheme process, a debtor can offer a composition to its creditors, thereby having flexibility on the content of the composition. For example, it is possible to offer a debt-for-equity swap, maturity extension or partial payment. It is also possible to amend contractual arrangements going forward (subject to an opt-out)[1] and affect guarantees of group companies.[2] In preparing the composition, the debtor must divide its creditors in classes, and all the creditors in the classes are entitled to vote on the composition. If two-thirds of the amount of creditors in a class vote in favor of the composition, the class of creditors has adopted the plan.[3] If one in the money class of creditors votes in favor of the composition, the composition can be ratified by the court, which could result in the composition being binding on all the creditors (*i.e.*, a cross-class cramdown).[4]

When introducing the Dutch scheme, the expectation in the market was that it would be used mainly to force creditors to agree upon a consensual restructuring of the relevant debtor (*i.e.*, as a stick behind the door). In spite of these expectations, the good news is that there are already a handful of court judgments so the Dutch Scheme is more than just a stick behind the door. These judgments have been widely covered in the legal press, but it is relevant to note that the large majority of the cases so far contain small and medium-sized enterprises. It is important to be careful in drawing conclusions from the judgments for the international restructuring practice, but from the judgments it can be derived that the Dutch courts are receptive toward the Dutch scheme cases.

In addition, the courts apply short timelines. A Dutch scheme can be completed in approximately one month, provided that no issues arise. It is further relevant to mention that although creditors, shareholders and/or the works council (if one exists) of the debtor have the possibility to initiate a Dutch scheme by requesting the court to appoint a restructuring expert,[5] all cases so far have been initiated by the debtor itself.[6] Some particular aspects of the Dutch scheme and court judgments are described in this article.[7]

1 Article 373(1) Dutch Bankruptcy Act (DBA). There is currently no reliable up-to-date translation available of the Dutch Bankruptcy Code.
2 Article 372 DBA.
3 Section 381(7) DBA.
4 Section 383 and 384 DBA.
5 Section 371 DBA.

In a Dutch scheme process, it is possible — but not mandatory — to request the court to appoint a restructuring expert who will impartially and independently lead the scheme process and offer a composition on behalf of the debtor to the creditors.[8] If no restructuring expert is appointed, the court can (at its own discretion) appoint an observer in order to monitor the debtor's scheme process in the interest of the joint creditors.[9] From the case law, it can be derived that both restructuring experts (10 so far) and observers (four so far) are bankruptcy trustees, but it is generally assumed that other advisors or specialists, such as chief restructuring officers, can also fulfill the role of restructuring expert.

The Dutch scheme further provides for the possibility for the debtor or restructuring expert (if appointed) to request a cooling-off period of four months, which could be extended once for an additional four months.[10] During this period, third parties will not be able to take recourse against the debtor's goods, and the court may on request lift attachments and defer an application for a suspension of payments or a bankruptcy. This also applies to secured creditors, and in one particular matter, the court ruled that it is not possible to request additional limitations of the rights of secured creditors via the cooling-off period. From the 14 known requests for a cooling-off period, four requests were rejected because in those matters, there was (in summary) no prospect that the debtor would offer an acceptable composition to its creditors and it could not reasonably be assumed that a composition would result in a better outcome than a bankruptcy.

To enhance the chance of a successful restructuring by the debtor, the Dutch scheme provides for a safe harbor for (effectively) "DIP" financing. The debtor can request that the court authorize certain legal acts, such as providing credit support for emergency funding, required for the debtor to continue trading while working on the implementation of a composition. In the three available judgments, it is clarified that such emergency funding can be provided for the continuance of the debtor's business, but also for the costs related to preparing the composition. If the court authorizes the company entering into a transaction (or more specifically the performance of a legal act), this results in such transaction being exempted from annulment based on fraudulent conveyance in case of bankruptcy.[11] No special priority applies to emergency funding provided in this context (*e.g.*, no priming liens) and solely relates to funding provided *during* the Dutch scheme process (and hence not to funding that will be provided *on closing*).

One of the main characteristics of the Dutch scheme is that court involvement is as limited as possible. In principle, the court is only involved in the ultimate ratification of the composition. However, it is possible for the debtor or restructuring expert to ask the court to rule on aspects that are important in the context of offering a composition, such as the class formation.[12] From case law on this point, it can be derived that a debtor is in principle authorized to make a distinction in its composition between (the rights of) unsecured creditors.

As previously described, if one in the money class of creditors votes in favor of the composition, the composition can be ratified by the court. There are three published judgments in which the court ratified a composition.

First, the court could reject the ratification of a composition at its own discretion. In one known judgment, the court rejected a composition on this ground and judged that the debtor submitted supporting documents that were unclear and incomplete, and that it was evidently implausible that a viable business would exist after the composition. Second, the court could reject the ratification of the composition if all classes voted in favor of the composition, but an opposing creditor successfully invokes the no-creditors-worse-off rule (*i.e.*, if the creditor is able to prove that it would be better off in bankruptcy).[13] Although valuation reports are not mandatory,[14] it is expected that they will be customary in the bigger cases to substantiate the liquidation comparator analysis.[15] Last, if not all classes voted in favor of the composition, the court could reject the ratification of the composition if an opposing creditor in an opposing class successfully invokes the absolute-priority rule or successfully argues that it has not been offered the so-called cash-out option.[16] The latter two grounds for rejecting the ratification of a composition have not yet been tested in case law.

The available case law shows that the Dutch scheme can be a useful restructuring tool, but we still await the first large Dutch scheme with international aspects. It is relevant to characterize the Dutch scheme: Is it an insolvency proceeding, and how will that impact recognition abroad? In that respect, it is worth noting that there are two different types of Dutch scheme proceedings: a public and a private proceeding.

The *public* proceeding will be listed on Annex A to the Insolvency Regulation,[17] which means automatic recognition in other EU member states, but it also means that the Dutch court only has jurisdiction where the debtor's center of main interest (COMI) is in the Netherlands. It is expected that recognition in the U.K. (it no longer being a member of the EU) and U.S. would be possible. For the *private* proceeding of a Dutch scheme, Dutch courts have jurisdiction, provided there is a sufficient connection with the Netherlands.

The private proceeding will not be listed on Annex A to the Insolvency Regulation, but it might still qualify as an insolvency proceeding in the same way as the (quite similar) English restructuring plan. Therefore, it might face recognition issues abroad, in the same way that foreign insolvency proceedings face such issues when it comes to recognition in the

6 In one of the largest recent and ongoing restructurings in the Netherlands, an individual creditor tried to start a Dutch scheme against the will of the debtor (and the majority creditors), but this was resolved amicably (and confidentially) before it came to court.

7 This article was finalized on July 23, 2021. It could be that after this date new judgments are published, which would not be not reflected in this article. As the judgments are only available in the Dutch language and the cases are relatively small in nature (*i.e.*, no landmark judgments yet), this article does not include references to specific judgments on the Dutch scheme.

8 Section 371 DBA.

9 Section 380 DBA.

10 Section 376 DBA.

11 Section 42a DBA.

12 Section 378 DBA.

13 Section 384(3) DBA.

14 Parliamentary documents II 2018/19, 35 249, Nr. 3 (explanatory memorandum), p. 51.

15 For the sake of completeness, the authors note that "liquidation comparator" is a term used in restructurings to (in short) compare the offer made to creditors under the composition plan to the return that creditors would obtain in liquidation/bankruptcy.

16 Section 384(4) DBA. Each creditor, except for secured creditors who have provided financing to the debtor on a commercial basis, must be offered the right to demand payment in cash equal to the liquidation value of its claim.

17 Council Regulation (EC) No. 2015/848 of May 20, 2015, on insolvency proceedings (recast), *available at* eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848 (unless otherwise specified, all links in this article were last visited on Aug. 12, 2021).

continued on page 40

from page 23

Netherlands. The next paragraph discusses recognition issues in respect of such foreign proceedings in the Netherlands.

Recognition of Foreign Restructuring Procedures in the Netherlands

Over the last few years, many European entities have been able successfully to restructure their debts via an English scheme of arrangement under Part 26 of the Companies Act. This statement also rings true for Dutch entities; some recent examples are the restructurings of one of the most famous retailers in the Netherlands, Hema,[18] and the global supply chain service provider Syncreon.[19] Although Hema's and Syncreon's main holding or operating entities were located in the Netherlands, it was possible to "create" sufficient connection with England in order to ensure that English courts could assume jurisdiction by, for example, ensuring that an English entity became a co-issuer to the relevant debt and/or by amending the governing law of the relevant debt documents to English law.

An important element in the success of a restructuring tool or instrument is the potential recognition of such instrument in other countries. In case a "foreign" restructuring proceeding is not recognized by the "receiving country" (in this case, the Netherlands), this may entail amongst others that the claims of creditors are not affected in the receiving country in spite of the foreign proceedings. Relevant in this respect is that Dutch law, in principle, does not recognize *insolvency* proceedings outside of the Insolvency Regulation.[20] The Netherlands has no equivalent to chapter 15 or the U.K. cross-border insolvency regulations (and has not adopted the UNCITRAL Model law). This means that creditors of an entity subject to non-EU *insolvency* proceedings might be able to continue to pursue their full claims against a Dutch debtor on assets located in the Netherlands (and potentially other countries).

Although perhaps surprising to some U.S. restructuring professionals, a U.S. chapter 11 is, for the aforementioned reasons, not recognized in full in the Netherlands, even if the debtor's COMI is in the U.S.[21] However, the consequences of this point are limited for most chapter 11 cases with a Dutch element: To the extent that international creditors have a nexus in the U.S., they will most likely act in accordance with chapter 11 because they would want to avoid being in contempt of the U.S. bankruptcy court. Local creditors in the Netherlands, however, without direct ties to the U.S. might continue to demand payment in the Netherlands for their original claims.

Where it concerns the English Scheme of Arrangement, it was generally assumed that prior to Brexit the scheme of arrangement would likely be recognized by Dutch courts on the basis of the Brussels I Regulation.[22] Post-Brexit, recognition on the basis of Dutch private international law has become increasingly relevant.[23] However, recognition of a scheme of arrangement on the basis of Dutch private international law has not yet been confirmed in Dutch case law, hence there remains some uncertainty on this point. This is evidenced by the fact that recently there has been more discussion on matters and attention in the market on this topic.

In a recent example, the DTEK matter, there were competing Dutch law expert opinions in place. The English court ultimately approved the scheme of arrangement in a reasoned judgment,[24] but the market tends to observe a more nuanced position where it concerns a scheme of arrangement for companies that are technically insolvent. The recent *Gategroup* judgment has opened the door to the argument that if the debtor is technically insolvent, the traditional scheme of arrangement could constitute an insolvency proceeding.[25] This argument was used by creditors in the Malaysia Airlines scheme of arrangement for the purposes of the Cape Town Convention.[26]

The possible qualification of a scheme of arrangement (for an insolvent company) as an "insolvency proceeding" is of importance for the reason outlined herein — *i.e.*, it limits recognition possibilities in other countries. This applies even more to the U.K. restructuring plan. The legal regime in the Netherlands therefore entails that a U.K. restructuring plan, in accordance with Part 26A of the U.K. Companies Act, is in principle not recognized in the Netherlands, as the key message from the *Gategroup* judgment is that the restructuring plan constitutes an insolvency proceeding.[27] It remains to be seen how these recognition issues, especially where it concerns the U.K. restructuring plan, could have an effect on its success in international restructurings.

18 Cristina Brooks, "Dutch Hema Plots €600 Million Debt for Equity Scheme in England," *Global Restructuring Review* (July 20, 2021), *available at* globalrestructuringreview.com/scheme-of-arrangement/dutch-hema-plots-eu600-million-debt-equity-scheme-in-england (subscription required to view article).

19 Declan Bush, "Syncreon Scheme Approved in England," *Global Restructuring Review* (Sept. 10, 2019), *available at* globalrestructuringreview.com/syncreon-scheme-approved-in-england (subscription required to view article).

20 Dutch Supreme Court, May 31, 1996, ECLI:NL:HR:1996:ZC2091, NJ 1998/108 (Coppoolse/De Vleeschmeesters) and Dutch Supreme Court Dec. 19, 2008, ECLI:NL:HR:BG3573, NJ 2009/456 (Yukos). In the latter judgment, the Supreme Court clarified among others that creditors who have attached assets in the Netherlands can continue to take recourse on such assets in spite of a foreign bankruptcy proceeding.

21 *Id.*

22 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of Dec. 12, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *available at* eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1215. *See, e.g.*, L.P. Kortmann & P.M. Veder, "The Uneasy Case for Schemes of Arrangement under English Law in relation to non-UK Companies in Financial Distress: Pushing the Envelope?," P. Omar (ed.), Festschrift in Honour of Professor Ian Fletcher QC, Special edition of the *Nottingham Insolvency and Business Law e-Journal*, 2015 (3) NIBLeJ 13, p. 259-60, and N.E.D. Faber and others (eds.), *Overeenkomsten en insolventie*, Kluwer 2012, p. 259-60.

23 In short, in order to obtain a judgment that is enforceable in the Netherlands, according to Dutch private international law the claim must be relitigated before a competent Dutch court. A Dutch court will, under current practice, generally grant the same judgment without relitigation on the merits if the following three minimum criteria are met: (1) the English court had jurisdiction to apply the scheme of arrangement on the basis of international legal grounds; (2) the judgment approving the scheme of arrangement resulted from careful consideration/court process (principles of fair trial); and (3) there is no conflict with Dutch public policy rules.

24 Ben Clarke, "DTEK Schemes Sanctioned in England," *Global Restructuring Review* (May 19, 2021), *available at* globalrestructuringreview.com/financial-restructuring/dtek-schemes-sanctioned (subscription required to view article).

25 *Re Gategroup Guarantee Ltd.*, [2021] EWHC 304 (Ch), ¶ 118.

26 *Re MAB Leasing Ltd.*, [2021] EWHC 152 (Ch), ¶ 49. Ultimately Mr. Justice Snowden did not have to address this argument as all scheme creditors had consented to the scheme of arrangement. In this respect, it is further relevant that the Malaysian court ruled in the Air Asia X judgment that the Malaysian scheme of arrangement (similar to the Part 26 scheme of arrangement) is an "insolvency-related event" in light of the Cape Town Convention (*Re AirAsia X Berhad v BOC Aviation Ltd.* & 14 Ors (Originating Summons No. WA-24NCC-467-10/2020), ¶ 280).

27 *Re Gategroup Guarantee Ltd.*, [2021] EWHC 304 (Ch), ¶ 137.

Conclusion

The Dutch restructuring market has recently seen a number of successful restructurings by means of English schemes of arrangement, which are in principle recognized in the Netherlands. In light of these developments, this position is more nuanced or at least more difficult where it concerns a scheme of arrangement for companies that are technically insolvent. A U.K. restructuring plan and chapter 11 are in principle not recognized in the Netherlands, which entails that creditors may continue to pursue their full claims against the debtor on assets located in the Netherlands, basically ignoring the restructuring plan or chapter 11.

A potential solution for recognition issues could be to run a Dutch scheme process in parallel with a scheme of arrangement, a restructuring plan or a chapter 11. Although the Dutch scheme has not yet been tested in a substantial case in the international restructuring market, the Dutch scheme proves to be useful so far. It is expected that the Dutch scheme will become an important tool in international restructurings. abi