

LEGAL UPDATE

Dutch Senate passes landmark restructuring bill

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On Tuesday 6th October 2020, the Dutch Senate passed the Act on Court Confirmation of Extrajudicial Restructuring Plans (CERP) also known in Dutch as the: *Wet Homologatie Onderhands Akkoord* (WHOA). The Dutch 'scheme' will provide businesses with a sufficiently strong connection to The Netherlands access to a flexible restructuring regime that is similar to the United Kingdom's Scheme of Arrangements and the United States' Chapter 11 restructuring plan. The framework is expected to enter into force without undue delay to aid in COVID-19 related recovery of the economy.

Private / public procedure and international recognition

The CERP will offer two distinct procedures for debtors for whom it is foreseeable that they will not be able to continue making payments on their debts. It will be possible for parties to initiate private (undisclosed) or public (disclosed) proceedings. Private schemes will take place in conformity with Dutch civil procedural rules and will take place out of the public eye. The aim is to negate the potential impact of media attention on negotiations and preserve as much of the reorganization value as possible. The private scheme will not only be open to businesses with their center of main commercial interests (COMI) in The Netherlands, but also to foreign businesses with a sufficient connection to The Netherlands. Whether a nexus can be established will likely depend on the following factors:

- The proportion of the business's debt that effectuates from contracts to which Dutch law is applicable.
- The value of the business's Dutch assets.
- Whether subsidiaries or affiliates of the group are domiciled in The Netherlands

A court-approved, privately negotiated restructuring plan will not qualify for automatic recognition in EU Member States on the basis of the Recast Insolvency Regulation (EU) 2015/848 (EIR). It is however expected that court-approved plans will be recognized in foreign jurisdictions on the basis of: 1) international treaties such as the UNCITRAL Model Law, the Lugano Convention and Recast Brussels Regulation (EU) 1215/2012, 2) bilateral agreements or 3) domestic provisions of international private law. It is also expected that the CERP will be recognized as a 'foreign proceeding' in conformity with Chapter 15 of the US Bankruptcy Code.

If the public scheme is chosen, a notice signifying the commencement of proceedings will be published in official papers. Subsequent proceedings will be held in open court and the final judgement shall be published in the national insolvency registry, the company registry and the Government Gazette. In contrast to the private scheme, a court-approved plan negotiated by means of the public scheme will be fit for automatic recognition in the EU on the basis of the EIR.

The plan

The CERP can be characterized by its flexibility. Restructuring efforts under the CERP may be initiated by all: debtors, creditors, shareholders, and authorized staff representative groups (e.g. the Works Council). The CERP will offer a debtor-in-possession scheme (DIP) where the courts have the power to put a temporary stay on legal action taken by creditors. The debtor – or the court appointed restructuring expert (if the scheme has been initiated by one the other aforementioned stakeholders) – have the discretion as to whether to incorporate all of the debt and share capital of the company into the restructuring plan or only to include specific elements of the debtor's balance sheet. The CERP also provides a mechanism for the termination of contracts. In line with provisions of the Transfer of

Undertakings Directive 2001/23/EC, it will not be possible to terminate employment contracts. Group companies may also include the obligations of subsidiaries and affiliates in their plan.

The creditors and shareholders will be divided into classes depending on the nature of their claims and their rank in the event of bankruptcy. Security holders can have their claim split into a secured and an unsecured portion if the size of their claim exceeds the liquidation value of the encumbered assets. Under the CERP, priority for secured creditors is capped at the liquidation value of the secured assets to promote flexibility and carve-out a portion of the reorganization value for SMEs.

The classes of creditors and shareholders will subsequently vote on the proposed plan. If a supermajority of two-thirds of the total claim value (or share value) within a class – taking into consideration only the claims of creditors in a class that participate in the vote – vote in favour of the plan, the class will have given their consent to the plan. The plan can subsequently be passed on to the court for approval if at least one class has voted in favour of the plan. However, if the plan proposes to amend the rights of creditors who are expected to be compensated in full or in part if the debtor is liquidated in bankruptcy (which will often be the case), then it can only be passed on to the court if one of these classes happens to consent. This ensures that in-the-money classes shall only be forced to accept adverse amendments to their rights if they – or another class facing a similar prospect – vote in favour of the plan.

Court approval

Before adjudicating on the matter, the court will scrutinize the process to make sure that the procedural rules have been followed. For instance, the court will ensure that:

- the debtor (still) meets entry requirements of the CERP;
- the creditors have been appropriately arranged in their respective classes; and
- the restructuring plan comprised of adequate (financial) information for creditors to make a well-informed decision.

In principal, the judge will subsequently approve of the plan unless one (or more) of the creditors invoke(s) additional grounds for refusal. Additional grounds for refusal are:

- if the rules of absolute priority have not been respected;
- if a creditor claims to be worse-off than in bankruptcy; and
- If a dissenting class proves that they are set to receive less than 20% on the value of their claim.

A dissenting class may only come forward if the plan fails to provide a compelling justification as to why they have been assigned a portion of the reorganization value that amounts to less than 20% of the value of their claim.

The judgement is not open to appeal which enhances legal certainty and contributes to an efficient process.

Summary

The CERP is expected to offer a flexible, cost-effective and efficient alternative to foreign restructuring schemes thus preserving business value and continuity. The framework should offer a feasible alternative to foreign restructuring schemes for businesses that are active in The Netherlands.

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