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A New European Restructuring Landscape

A comparison of the new Dutch Scheme and the new UK Restructuring Plan.

Introduction

The European restructuring landscape continues to evolve with the recent introduction of a new restructuring procedure (UK Restructuring Plan) into the United Kingdom's restructuring tool kit. The UK Restructuring Plan was enacted as part of the Corporate Insolvency and Governance Act 2020 (CIG Act) which became effective on 26 June 2020; it is closely based on the UK scheme of arrangement procedure (UK Scheme) which debtors in the UK and abroad have utilised to restructure their financial indebtedness for decades.

On the same day, the Dutch Senate prepared its preliminary report on the Act on the Confirmation of Private Plans (*Wet homologatie onderhands akkoord*) which is intended to introduce a new pre-insolvency procedure in the Netherlands for the confirmation of restructuring plans (Dutch Scheme). The Dutch Parliament approved the Dutch Scheme on 26 May 2020, so the Dutch Senate's report is one of the final steps before the Dutch Scheme potentially becomes law in the Netherlands later in 2020 or in early 2021.

The Dutch Scheme and the UK Restructuring Plan are the latest of a series of significant developments in European restructuring law which may provide corporate debtors and their stakeholders with an improved restructuring tool kit to address financial distress and, ultimately, to preserve value by avoiding formal insolvency procedures.

This GT Alert compares the Dutch Scheme with the UK Restructuring Plan. The two have similarities but also significant differences which will be important to consider for stakeholders of debtors that propose European financial restructurings. This is due to the broad application of both procedures in a cross-border restructuring context and the fact that neither the Dutch Scheme nor the UK Restructuring Plan is a purely domestic process confined to use by locally incorporated companies. Both procedures should be available for use by foreign companies provided that they have a ‘sufficient connection’ to the Netherlands or to the UK (as applicable). In some situations, this may mean that a debtor has the option to choose between either of the two procedures to implement its financial restructuring.

The Dutch Scheme and the UK Restructuring Plan reflect the current drive by lawmakers in some jurisdictions to modernise their laws to encourage the rescue of viable businesses which are financially distressed, outside of a formal insolvency procedure.¹ Whilst the UK had well-developed restructuring tools prior to the recent changes, these were often perceived to have limitations compared to the significant flexibility available to debtors under the Chapter 11 reorganisation procedure in the United States. In the case of the Netherlands, the Dutch Scheme is intended to fill a big gap in its restructuring tool kit, given that existing laws are rarely utilised successfully to restructure financially distressed companies. Historically, other than in fully consensual scenarios, Dutch financial restructurings have had to be undertaken in formal and public insolvency proceedings and could only be used to compromise ordinary unsecured creditors.

Both the Dutch Scheme and the UK Restructuring Plan² have adopted certain key features of Chapter 11, with the result being that the divergence between restructuring tools available to debtors in Europe and the United States has been greatly reduced. Similarly, elements of the UK Scheme have been adopted in both the Dutch Scheme and the UK Restructuring Plan. In particular, the implementation steps for a UK Restructuring Plan closely resemble the steps that apply to a UK Scheme; UK courts may draw heavily on existing case law on UK Schemes when considering questions in relation to the UK Restructuring Plan.

One of the most interesting developments introduced by the Dutch Scheme and the UK Restructuring Plan is the ability for cross-class cram-downs³, which is a key feature of Chapter 11 proceedings, but which had previously been unavailable in the UK and the Netherlands outside of formal insolvency proceedings (or, at the least, simultaneous security enforcement).⁴

Whilst these new developments in relation to the Dutch Scheme and the UK Restructuring Plan have taken place during the Coronavirus Disease 2019 (COVID-19) crisis and the accompanying financial downturn, both procedures were being considered long before the pandemic began. The COVID-19 crisis has, however, accelerated the enactment of the UK Restructuring Plan. Although an acceleration of the enactment of the Dutch Scheme was strongly advocated in the Netherlands due to COVID-19, several substantive amendments were submitted in the Dutch Parliament which has resulted in delays to its implementation into Dutch law.

¹ In particular, the European Restructuring Directive (EU 2019/1023) on preventative restructuring frameworks seeks to harmonise certain (but not all) aspects of member states’ insolvency laws with a key focus on measures which prevent formal insolvency.

² The UK Restructuring Plan is complemented by other reforms introduced by the CIG Act, including a moratorium preventing certain creditor actions and a ban on *ipso facto* clauses.

³ A cross-class cram-down is the ability of the vote of one approving class of stakeholders to bind other classes – please see the section below entitled ‘Cross-class cram-down’.

⁴ It is possible to cram-down dissenting classes of creditors and shareholders using a ‘pre-pack’ administration sale or, subject to some limitations in terms of international recognition, other security enforcement in the UK. Whilst pre-pack bankruptcy sales have been undertaken in the past in the Netherlands, their use has been suspended pending clarification from the Dutch Supreme Court and the European Court of Justice.

In both the UK and the Netherlands, the COVID-19 crisis has led to other temporary emergency regulations – which in the UK also includes changes to company and insolvency laws – to help businesses survive in the face of a global slump in demand for goods and services.

In the Netherlands, new emergency regulations permit virtual annual general meetings and grant companies additional time to prepare annual accounts. They also temporarily limit the presumption of proof for board member liability in the event of bankruptcy when the filing of the annual accounts is delayed as a result of COVID-19. Dutch courts have also indicated that in bankruptcy cases they will take all relevant circumstances into account, including the COVID-19 pandemic and the associated economic situation.

Similarly, the UK has also introduced a temporary relaxation of company meeting and filing requirements, as well as temporary changes to 'wrongful trading' laws (thereby reducing the scope for director liability in the event of formal insolvency) and a suspension of the ability to petition for the winding-up of a company except in circumstances where the business would have been insolvent regardless of any deterioration resulting from COVID-19. Please refer to our previous GT Alerts for further information on these temporary measures in the [UK](#) and [the Netherlands](#).

Overview of Collective Decision-Making Procedures

The Dutch Scheme and the UK Restructuring Plan are collective decision-making procedures that can be used where contractual mechanics for majority decisions of groups of creditors or shareholders are not available to a distressed debtor or are inadequate to meet its needs. Under a Dutch Scheme or a UK Restructuring Plan, provided that the necessary majorities are obtained in the voting process and procedural formalities are complied with, the decision can be binding on all the creditors and/or shareholders who are subject to the relevant procedure. These procedures may be useful in dealing with hold-out stakeholders whose consent would otherwise be required in order to implement a fully consensual restructuring transaction.

A Dutch Scheme or a UK Restructuring Plan can be used to implement a wide variety of restructuring transactions. These range from relatively simple 'amend and extend' transactions of bank debt or bonds (involving both secured and unsecured debt), through to more complex debt-for-equity conversions and other liability management exercises. Like a UK Scheme, both the Dutch Scheme and the UK Restructuring Plan have a certain level of court supervision, but the management and control of the debtor remains with the directors throughout the process (unless, in the case of a UK Restructuring Plan, the debtor is already or becomes subject to formal insolvency proceedings).

This ability to restructure the financial indebtedness of a company outside of an insolvency process is useful in terms of stakeholder management. For example, customers and suppliers may be less likely to stop dealing with the company in one of these 'pre-insolvency' procedures compared to where the debtor was in bankruptcy proceedings in the Netherlands or administration in the UK (subject to the operation of a ban on *ipso facto* clauses, as discussed below).

Eligibility

Both the Dutch Scheme and the UK Restructuring Plan are aimed at debtors who are in, or are approaching, a financially distressed situation.

To be eligible for the Dutch Scheme, it must reasonably be expected that the debtor will not be able to continue paying its debts as they fall due: i.e. the debtor is either insolvent or reasonably expected to become insolvent within a certain period of time, which may be as long as 12 months.

Similarly, a UK Restructuring Plan requires the debtor to have encountered, or be likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern (there is no fixed time horizon for determining that, however). The purpose of the UK Restructuring Plan must be to eliminate, reduce or prevent, or mitigate the effect of, any of those financial difficulties.

The above criteria can be contrasted with the UK Scheme, which does not require the debtor to be insolvent or otherwise in financial difficulties. A UK Scheme can therefore be used for entirely solvent as well as insolvent restructuring transactions.

Like a UK Scheme, a UK Restructuring Plan does not require the relevant debtor to have its 'centre of main interests' located in the UK; therefore, debtors incorporated in other jurisdictions can be eligible. All that would be required is for the foreign debtor to demonstrate a 'sufficient connection' to England. Like a UK Scheme, it is expected that this may in many cases be achieved by having English law as the governing law of the relevant debt documents (including where parties have amended the governing law of their debt documents for this purpose).

There are two versions of a Dutch Scheme available to debtors.⁵ The first is a 'public' Dutch Scheme, meaning that the debtor must request the clerk of the competent court (immediately after the court has taken its first decision under the Dutch Scheme) to publish certain technical information as set forth in article 24 of the Recast Insolvency Regulation. This version of the Dutch Scheme will be included in Annex A of the Recast Insolvency Regulation; this means that it is only available to debtors who have their centre of main interests in the Netherlands and provides for automatic recognition in all EU member states other than Denmark.⁶

The second version of the Dutch Scheme is a 'private' Dutch Scheme, which remains confidential between the parties and court decisions are not published or registered. Whilst this version will not be included in Annex A of the Recast Insolvency Regulation (and therefore will not benefit from automatic recognition), there is no requirement that the debtor's centre of main interests be located in the Netherlands and, like the UK Restructuring Plan, the debtor simply needs to demonstrate a 'sufficient connection' to the Netherlands.⁷ That said, a 'sufficient connection' may not be so readily found in the case of non-Dutch

⁵ The Dutch Scheme is not available to banks and insurance companies, or any companies which have proposed a previous Dutch Scheme which was rejected in the prior three years.

⁶ As is the case with the UK Scheme, international recognition of the private version of the Dutch Scheme and the UK Restructuring Plan is less straightforward, but applicants may point to recognition on other grounds, for example on the basis of private international law and/or the UNICITRAL Model Law in relation to those countries that have adopted it.

⁷ A 'sufficient connection' to the Netherlands will be demonstrated if the debtor has substantial assets or business activities in the Netherlands, or if a substantial part of the debtor's group companies are domiciled in the Netherlands, or if a substantial part of the debtor's obligations to be amended under the Dutch Scheme are governed by Dutch law or include a submission to the jurisdiction of the Dutch courts. Another ground for jurisdiction is if the applicant or one of the interested parties specified in the originating document for the Dutch Scheme has its domicile or habitual residence in the Netherlands. The question is whether a creditor or shareholder entitled to vote would qualify as an interested party within the meaning of this provision, but if so, the Dutch court could claim jurisdiction if one or more creditors or shareholders entitled to vote have their domicile or habitual residence in the Netherlands.

companies, given that there are fewer financing arrangements governed by Dutch law. However, debtors wishing to avail themselves of the Dutch Scheme may potentially propose to change the governing law of their finance documents to Dutch law in order to generate a ‘sufficient connection’ to the extent that one does not already exist.

Who Can Initiate?

A UK Restructuring Plan is a compromise or arrangement proposed between its creditors, or any class of them, or its members, or any class of them. Whilst it would be technically possible for a stakeholder other than the debtor itself to initiate a UK Restructuring Plan, in the case of a UK Scheme this is not typically seen in practice; as such, the same outcome may follow for the UK Restructuring Plan, not least because a UK Scheme and a UK Restructuring Plan require significant disclosure, and only the directors of the debtor will be a position to prepare the necessary explanatory statement. Furthermore, the UK courts may not sanction a UK Scheme or (it is expected) a Restructuring Plan if it has not been approved by the debtor.

However, a Dutch Scheme is set up to allow other stakeholders (in addition to the debtor) to initiate the procedure, applying the same eligibility criteria. Any creditor, shareholder or employee works’ council or other employee representative may request the court to appoint a ‘restructuring expert’ who is then entitled to propose a plan to the exclusion of the debtor. There are exemptions for debtors which are small or medium sized enterprises, whose consent will be required before the restructuring expert may present a plan to the creditors and shareholders entitled to vote. The debtor also may request the appointment of a restructuring expert to propose the plan, should it be unable to do so. Furthermore, if a restructuring expert is appointed, the debtor may submit a plan to the restructuring expert, requesting that he/she proposes the debtor’s plan to the creditors and shareholders entitled to vote.

The restructuring expert’s role in a Dutch Scheme is to develop the restructuring plan so that it can be voted on by the debtor’s creditors and shareholders and submit the plan to the court for confirmation, although the directors of the debtor will continue to remain in control of the debtor’s business throughout the procedure. The restructuring expert can require a debtor to provide all relevant information necessary to develop the plan. If the debtor is unwilling to cooperate, the restructuring expert may request the court to force the debtor to cooperate. The restructuring expert does not have to be a licenced insolvency practitioner. He/she must be independent and may be any person with ample knowledge of (corporate) finance and insolvency law. Further he/she must have ample experience in debt restructuring. In cross-border cases this may also be an insolvency practitioner appointed in a foreign insolvency procedure.

Class Formation and Voting

Whilst a Dutch Scheme and a UK Restructuring Plan can be proposed in relation to all levels of a debtor’s capital structure in a multi-class plan, they can also be targeted at specific classes of creditors and shareholders. As with a UK Scheme, class formation for both procedures is an important first step.

In a UK Restructuring Plan, creditors are divided into classes depending on their existing contractual rights (for example, whether they are secured or unsecured) and the rights obtained as a result of the UK Restructuring Plan (for example, whether they receive debt or equity upon completion of the restructuring).

Similarly, creditors are divided into classes in a Dutch Scheme based on their existing rights in a liquidation and new rights obtained under the plan. In a Dutch Scheme, small trade creditors and tort

claimants are to be placed in one or more separate classes for them to be subject to the terms of the Dutch Scheme.

Class members are then required to vote on the relevant Dutch Scheme or UK Restructuring Plan. In a UK Restructuring Plan, class meetings are convened by the UK court and are typically held as physical meetings, although during the COVID-19 crisis these meetings have been permitted to be held remotely. Voting for a Dutch Scheme can be undertaken via a physical meeting, electronic voting or postal voting, without the need for a court hearing to obtain a determination in relation to composition of classes or convening a class meeting.

The voting threshold for a successful UK Restructuring Plan is the approval of at least 75% in value of claims of members of each class which are present and vote in the relevant class meeting. There is a lower voting threshold for a Dutch Scheme, which is two-thirds in value of claims of members of each class which are present and vote at the relevant class meeting. Unlike a UK Scheme, there is no numerosity or headcount requirement for voting in either a Dutch Scheme or a UK Restructuring Plan.

Court Involvement

In addition to the convening hearing mentioned above in relation to the UK Restructuring Plan, after a successful class meeting (or meetings), the debtor will return to the court to obtain a sanction order at a second court hearing, being the sanction hearing. Amongst other matters, the court will consider if all procedural formalities have been complied with and, notwithstanding that the various classes voted in favour of the scheme, whether the terms of the scheme are otherwise fair. The court ultimately has discretion as to whether to sanction the UK Restructuring Plan. In the case of UK Schemes, the court has avoided second-guessing the commercial decision of the voting classes in most situations. In the case of UK Restructuring Plans, though, there may be more challenges as, for the first time, cross-class cram-down⁸ is possible, so a UK Restructuring Plan could affect the rights of an entire crammed-down class in the absence of approval from that class.

Similarly, following a successful class vote (or votes) in a Dutch Scheme, the debtor (or the restructuring expert, if appointed⁹) will seek a confirmation decision from the court. The court will look at whether various criteria have been satisfied in relation to the Dutch Scheme, which include procedural requirements and more substantive requirements in relation to the effect of the plan. If all classes have approved the plan by a two-thirds majority, the court will confirm the plan, provided that no dissenting creditor may receive substantially less in value, whether in cash or in non-cash consideration, than it would expect to receive in a liquidation of the debtor.

Dutch Scheme cases will be heard by a small team of specialised judges specifically trained for this purpose. Once the court makes its decision (which is expected within two weeks of the hearing), the legislation provides that there is no possibility of an appeal. Whilst harsh relative to other jurisdictions, this does at least provide some certainty of outcome to stakeholders involved in the restructuring. It is of course possible that an unhappy creditor could seek to challenge the absence of an appeal process itself as a breach of applicable human rights.¹⁰

⁸ Please see the section below entitled 'Cross-class cram-down'.

⁹ There are exemptions for SME debtors, whose consent will be required before the restructuring expert may submit a restructuring plan to the court for confirmation. The court can, however, overrule the debtor if it withholds such consent without good reason.

¹⁰ The explanatory report on the Dutch Scheme provides the rationale behind the no-appeal provision, i.e., that it is justified because the restructuring plan is proposed in a distress situation that may lead to bankruptcy. To be able to prevent the debtor from being declared bankrupt, the plan must be implemented quickly after confirmation. This not only requires quick decision-making by the court but also that this decision is final. This does not mean, however, that in the public version of the Dutch Scheme stakeholders

Cross-Class Cram-Down

The majority voting described above binds class members within classes and reflects what has previously been achievable in a UK Scheme. As mentioned above, one of the benefits of both the Dutch Scheme and the UK Restructuring Plan is the ability of one approving class of stakeholders to bind other classes. This is known as a ‘cram-down’ in the event a senior ranking class binds a junior ranking class to the terms of the relevant plan.

Given the significance of this change in law, there are key protections for dissenting classes which are crammed-down in both the Dutch Scheme and the UK Restructuring Plan as follows:

- In a Dutch Scheme:
 - none of the members of the dissenting classes can receive their share of the consideration distributed under the plan otherwise than in accordance with their pre-plan ranking;
 - at least one ‘in-the-money’ class must have approved the plan;
 - if the dissenting class consists of secured creditors¹¹, the members of the class must have the option to receive a distribution under the plan in a different form than equity (e.g., a debt instrument). There is, however, no requirement that secured creditors are offered cash consideration under the plan¹²; and
 - if the dissenting class is a separate class of small trade creditors and tort claimants, the members of that class may not receive a distribution (in cash or otherwise) that is less than 20% of the value of their pre-plan claim, unless there is an imperative reason for offering a lower distribution.
- In a UK Restructuring Plan:
 - none of the members of the dissenting class can be any worse off than they would be in the event of the ‘relevant alternative’ (see below);
 - at least one class whose members would have received a payment, or who have a genuine economic interest, in the relevant alternative, has approved the plan; and
 - if it can be demonstrated that a class has ‘no genuine economic interest’ in the debtor, the entire class can be excluded from the voting process but still be bound by the terms of the UK Restructuring plan.

The ‘relevant alternative’ in the UK Restructuring Plan is whatever the court considers would be most likely to occur in relation to the debtor if the plan was not sanctioned (for example, this could be a liquidation of the debtor or a sale of the debtor’s business as a going concern in an administration, amongst other possible scenarios). Similarly, for the court to be able to provide its confirmation of a Dutch Scheme, it will need to be demonstrated that dissenting creditors will not receive substantially less in value, whether in cash or in non-cash consideration, than they would expect to receive in a liquidation of the debtor.

cannot appeal the decision by the court that it has international jurisdiction on the basis of the Insolvency Regulation. Furthermore, the court may, of its own accord or upon request of the debtor or any other interested party, request the Dutch Supreme Court (*Hoge Raad*) to rule on preliminary questions regarding the correct application of the provisions of the Dutch Scheme.

¹¹ Secured creditors include those creditors with a right of pledge or a right of mortgage. It does not include trade creditors with retention of title claims.

¹² There is a cash-out option for unsecured creditors and trade creditors who have retained title to goods or who have financed through a sale and lease back construction, for example. The no cash-out option is solely limited to creditors who have been granted a right of pledge or mortgage.

Therefore, analysis will be required in relation to a cram-down under:

- a UK Restructuring Plan, for example, to determine whether a dissenting creditor is receiving at least as much value in the plan as it would receive in a liquidation (in the event insolvency is the likely outcome if the relevant plan failed); and
- a Dutch Scheme, to determine that dissenting creditors will not receive substantially less in value than they would expect to receive in a liquidation.

Such analysis will also be required to determine whether the approving creditors are truly ‘in-the-money’ (in the case of the Dutch Scheme) or have a ‘genuine economic interest’ in the relevant alternative (in the case of the UK Restructuring Plan).

Whilst a debtor may consider that this assessment is obvious in particular cases, if experience of debtors launching UK Schemes is used as guidance, valuation evidence provided by professional advisers (and, potentially, market testing of value by way of a sale process) will be useful from an evidentiary perspective in both procedures. Valuation disputes may arise if a dissenting creditor or class of creditors disputes the valuation methodology adopted by the debtor for this purpose, potentially causing delays and additional costs for the debtor proposing the plan.

Cross-Class Cram-Up?

Under the Dutch Scheme, it not possible for lower ranking creditors to ‘cram-down’ higher ranking creditors without their consent (i.e., a ‘cram-up’), where the distribution of value under the plan deviates from the ranking that would have applied in a bankruptcy, unless there are reasonable grounds for such deviation, and the interests of such higher ranking creditors are not prejudiced by it. However, the court can only deny a request for confirmation on this basis if the request is from a creditor in a class that rejected the plan, and the creditor itself also voted against the plan.

A cram-up procedure is technically possible under a UK Restructuring Plan, provided that the protections for dissenting classes referred to above in the section on ‘*cross-class cram-down*’ are maintained.

There are various practical difficulties in achieving a cram-up of senior creditors, including for example that they often control the security enforcement process and could simply enforce security if they did not agree to the terms of the plan. Similarly, senior creditors may object to being forced to re-invest their exposure in a new capital structure given that in the ‘relevant alternative’ (in the case of a UK Restructuring Plan) they may have received a cash payment for the full or a substantial amount of their debt. These and similar issues may be raised in the future in the event a junior class seeks to use a UK Restructuring Plan or a Dutch Scheme to cram up a senior class.

Interim Measures in Support of a Dutch Scheme and UK Restructuring Plan

Moratorium protection

Debtors launching a Dutch Scheme or a UK Restructuring Plan (or, following the CIG Act, a UK Scheme) will have the option of supporting the implementation of the relevant procedure via the use of a moratorium against the commencement of insolvency proceedings, security enforcement and commencement of other legal proceedings.

The UK moratorium under the CIG Act (UK Moratorium) will be helpful for debtors seeking a stable platform to restructure their obligations using a UK Restructuring Plan (or a UK Scheme). The UK

Moratorium also provides for payment holidays of certain ‘pre-moratorium’ debts during the moratorium period, but there are significant exceptions to the types of creditors which will be subject to the payment holiday, including certain financial creditors such as lenders of bank debt.

Whilst the Dutch Scheme has a more comprehensive moratorium protection available, there are protections for creditors’ rights. Creditors may submit a request to the court to grant them permission to enforce their rights against assets belonging to the debtor’s estate or require the repossession of assets from the debtor during the moratorium, but the debtor and (if appointed) the restructuring expert will have the opportunity to challenge such request.

Ban on *Ipsa Facto* Clauses

The CIG Act also introduces a ban on the use of *ipso facto* clauses in supplier contracts which prevent suppliers from terminating contracts solely because the counterparty becomes subject to an insolvency procedure or a restructuring procedure (including the UK Restructuring Plan). Again, whilst there are a number of significant carve-outs to this ban, it is useful in creating some stability for a debtor seeking to use a UK Restructuring Plan to restructure its debts.

A Dutch Scheme will also prevent the operation of *ipso facto* clauses. Under the Dutch Scheme, the preparation and proposal of a plan, the appointment of a restructuring expert, and events and acts that are directly related and reasonably required for the implementation of the plan do not constitute grounds for amending commitments or obligations to the debtor, for suspending performance of an obligation to the debtor, or for terminating an agreement concluded with the debtor. In the event a moratorium has been granted, a default by the debtor prior to the moratorium will not constitute a ground during the moratorium for amending commitments or obligations to the debtor, for suspending performance of an obligation to the debtor or for terminating an agreement concluded with the debtor. In the case of performance of new obligations that arise during the moratorium, the debtor may need to provide security to the counterparty to obtain the benefit of the ban on *ipso facto* clauses.

Rescue financing

Whilst the reforms in the UK and the Netherlands did not include a mechanic for super-senior rescue financing similar to that available to debtors under a Chapter 11 procedure, the Dutch Scheme does provide additional protection against fraudulent conveyance challenges (i.e., claw-back) for new secured financing arrangements entered into connection with the implementation of the plan (including loans and delivery of goods against credit).

Such arrangements will first need to be approved by the Dutch Court, which is required to grant approval if (i) the arrangement is necessary for the continuation of the debtor’s business during the preparation of a plan and (ii) it could reasonably be assumed at the time approval is granted that the arrangement would be in the interests of the general body of creditors and would not materially prejudice the interests of any individual creditors.

Conclusion

The Dutch Scheme and the UK Restructuring Plan are significant additions to the restructuring tool kits of the Netherlands and the UK. The new procedures provide debtors and their stakeholders with more options to address financial distress and encourage rescue of viable companies. They can be used for companies needing temporary breathing space to allow more time to repay indebtedness, as well as for wholesale changes to a company’s capital structure. Importantly, the ability of hold-out creditors to

disrupt a company's restructuring exercise has been greatly reduced by the cram-down features in both the Dutch Scheme and the UK Restructuring Plan.

Whilst both procedures require a certain level of court involvement which typically adds cost and delays to the implementation process, it also demonstrates a level of oversight in the process which will give comfort to stakeholders that their rights are being respected. Hopefully this will lead to more certainty in terms of outcome given that challenges should be minimised (and indeed the Dutch Scheme does not permit appeals in any event).

Whilst there may be situations whereby a debtor has an option to choose between either the Dutch Scheme or a UK Restructuring Plan, only one of the procedures may be appropriate. In particular, where the relevant indebtedness being restructured is governed by English law and the debtor requires its restructuring to be enforceable in the UK, as a matter of English law the debtor will potentially be unable to compromise or restructure that debt other than by using an English procedure like a UK Scheme or a UK Restructuring Plan (unless the creditors have submitted to the jurisdiction of the Dutch courts).¹³

Whilst both procedures are new and involve significant complexities which may provide grounds for disputes between creditors (for example, in relation to valuation), there is no reason to suggest that the courts and practitioners in both jurisdictions will not quickly address these complexities and embrace the new restructuring tools provided to them in order to provide even more certainty of outcome to debtors and their stakeholders in European restructuring transactions.

** This GT Advisory is limited to non-U.S. matters and law.*

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¹³ Notwithstanding the U.K.'s departure from the EU pursuant to Brexit, the UK remains subject to the Recast Insolvency Regulation until 31 December 2020, pursuant to the terms of the Withdrawal Agreement entered into between the UK and the EU. If the UK is still required to automatically recognise European insolvency proceedings under reciprocal arrangements reflecting the Recast Insolvency Regulation (which may possibly be put in place following the UK's exit from the EU on 31 December 2020), the public version of the Dutch Scheme should be able to be used to compromise English law governed debt. Whilst any continued application of the Recast Insolvency Regulation may require reciprocity such that UK insolvency procedures will be recognised throughout the EU, UK Schemes are not considered under the Recast Insolvency Regulation to qualify as a relevant procedure such that the effects of UK Schemes have never been recognised under that regulation. However, the rationale for the exclusion of UK Schemes from that Regulation should, arguably, not apply so readily in the case of the UK Restructuring Plan, given the entry requirement of actual or likely financial difficulties. In this regard, the UK Restructuring Plan would more closely conform to the types of procedures already covered by the Recast Insolvency Regulation; therefore, there is potential scope for it to obtain recognition automatically throughout the EU in the case of companies with their COMI in the UK. However, there is no certainty as to what (if any) reciprocal arrangements will be put in place in respect of the Recast Insolvency Regulation following 31 December 2020.

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