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# THE NEW DUTCH ACT ON THE CONFIRMATION OF OUT-OF-COURT RESTRUCTURING PLANS

**On 6 October 2020, a bill for a new Dutch pre-insolvency procedure was enacted into law. Inspired by the scheme of arrangement in the UK Companies Act 2006 and Chapter 11 of Title 11 of the US Bankruptcy Code, the new Dutch Act on the Confirmation of Out-of-Court Restructuring Plans (*Wet Homologatie Onderhands Akkoord or the "Act"*) will enable debtors to propose a plan and restructure their debts outside of formal insolvency proceedings. The Act combines a fast and flexible framework for concluding pre-insolvency schemes with a high degree of deal certainty. This avoids unnecessary liquidations and conserves a debtor's going concern value as much as possible.**

## KEY FEATURES:

Debtor in possession: The debtor retains possession of its property and the authority to manage and dispose of its assets during the proceedings (i.e. no administrator or supervisor is involved besides the court itself). The debtor can continue to conduct its business as usual.

**Cooling-off period/moratorium:** Initiating plan proceedings can be paired with seeking a court-ordered stay for a maximum of eight months. This stay will stop creditors enforcing their rights, including the right to invoke termination clauses in contracts. Attachments can also be lifted.

Plan proposal by the debtor or by a restructuring expert: By default, the debtor is in charge of offering a plan. Creditors, shareholders and works council representatives are not allowed to offer a plan themselves, but they can petition the court to appoint a restructuring expert. Once appointed, the restructuring expert is in charge of preparing and offering a plan. The debtor retains the right to offer a competing plan via the restructuring expert. When a plan is offered by a restructuring expert, the debtor's consent is only required if the debtor qualifies as a small or medium-sized enterprise ("**SME**").

**Dual track:** The Act provides two different tracks:

- 'Public' track: suitable for complex multiple class restructurings. In the future, if a plan is presented in a public track, the plan will automatically be recognised in each EU Member State by virtue of the public track's intended inclusion in Annex A of the EU Insolvency Regulation. The public track has not been added to Annex A yet. '
- Non-public' track: more suitable for targeted single class restructurings. A non-public track is not recognised under the EU Insolvency Regulation (but perhaps can be recognised abroad by other means).

**Maximum flexibility:** The Act does not prescribe the contents of a plan. Proponents can draft a plan as they deem fit (e.g. extension and/or reduction of debt, debt for equity swap, sale of assets, limited to only a subset of the capital structure, etc.). The Act also provides a high degree of flexibility for structuring the process (e.g. timing, electronic voting, etc.).

**Amending/terminating onerous contracts:** The Act allows long-term contracts to be amended or terminated. Employment contracts, however, are exempt. Claims for damages in relation to amendment or termination can be also restructured under the terms of a plan.

**Class voting:** Only creditors or shareholders whose rights are affected by a plan may vote. A two-thirds majority in total amount of the claims of all class participants who have cast a vote is required for class acceptance. Class formation is based on the similarity of new and existing rights of class participants.

**Cross-class cram down:** If the plan is approved by at least one class of affected creditors, the plan may be confirmed by the court. Once the court has confirmed a plan, it will bind all creditors regardless of their rank and whether or not they have voted in favour of the plan. It is possible to object to the court confirmation. However, the court may confirm a plan despite the objections by opposing creditors or an opposing class.

**Absolute priority rule:** Creditors of an opposing class may object to the court confirming a plan if the value realised by a plan is distributed in a way that deviates from statutory or contractual priority and, as such, impairs the opposing class. In that case, the court may reject a plan unless it considers that there are reasonable grounds to justify a deviation. In the case of a class of SME creditors, absence of reasonable grounds is assumed if the SME creditors receive less than 20% on their claims. This assumption can be rebutted if the value is such that an allocation of at least 20% to the SME creditors is not feasible.

Additionally, if the reorganisation value is distributed in deviation from priority, non-secured creditors of a dissenting class who have voted against the plan may insist on a cash pay-out equal to the value they would have received in a liquidation scenario.

**Court involvement:** The court can be petitioned to provide interim relief on procedural issues and substantive issues (e.g. class formation, voting procedures, etc.) to promote deal certainty. A dedicated team of specialised judges will deal with petitions under this Act. To ensure a quick turnaround, most decisions cannot be appealed.

The Dutch Act on the Confirmation of Out-of-court Restructuring Plans was accepted by the Dutch parliament on 6 October 2020 and will enter into force on 1 January 2021.

If you have got any questions, please contact Frédéric Verhoeven - f.verhoeven@houthoff.com and/or Christiaan Zijderveld - c.zijderveld@houthoff.com.