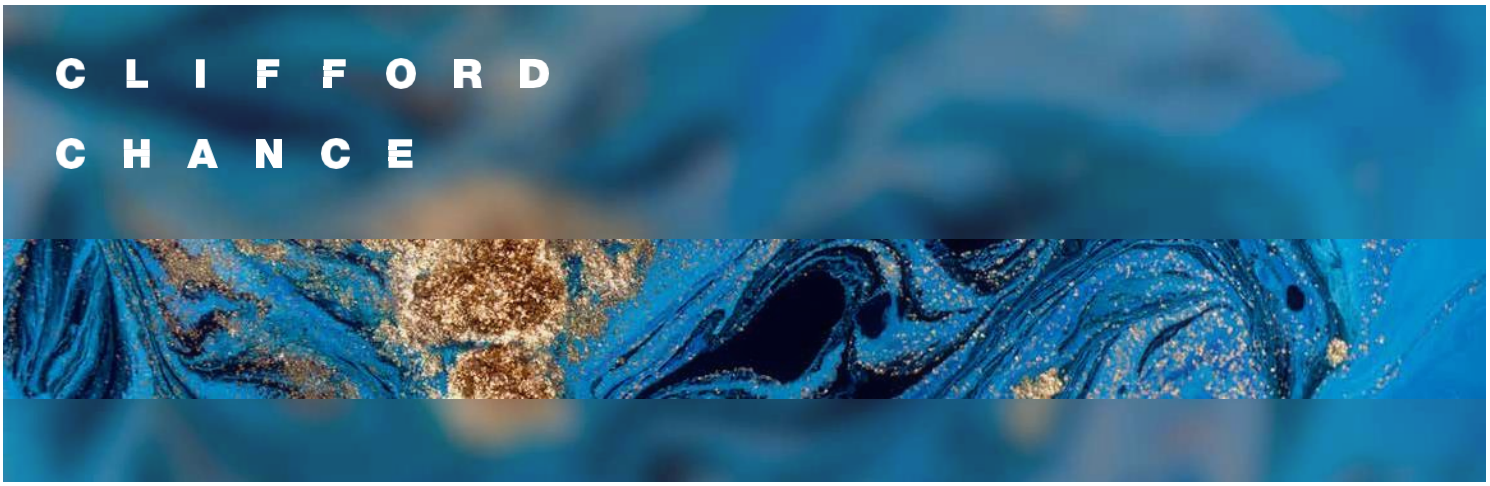

DUTCH SCHEME (WHOA) UPDATE – APPROVAL AND NEW AMENDMENTS

On 26 May 2020, the Dutch House of Representatives (*Tweede Kamer*) has approved the legislative proposal for the Dutch Scheme (also called the WHOA).

The Dutch Scheme will be an important tool to implement restructurings in an effective manner, most importantly because it provides a tool to cram-down hold out creditors. This is currently not possible under Dutch law outside of insolvency, which frequently complicates finding solutions for companies in distress.

Below we have set out the recent changes made by the Dutch House of Representatives as well as a reminder of the highlights of the (amended) Dutch Scheme itself.

Key amendments to Dutch Scheme

- Separate "in the money" class for secured creditors
- Cash-out option for liquidation value limited for secured creditors
- 20%-Rule: minimum threshold of 20% in cross class cram down for smaller creditors

Update Dutch Scheme legislation process

Timing of implementation of the Dutch Scheme

On 26 May 2020 the Dutch House of Representatives (*Tweede Kamer*) voted in favour of the legislative approval for the Dutch Scheme. The draft law now requires approval from the Dutch Senate (*Eerste Kamer*), where no further amendments will be possible. The envisaged timing of the implementation of the Dutch Scheme is between now and 1 January 2021.

Final changes

Below we have summarized the three final changes to the Dutch Scheme made by the Dutch House of Representatives, which all relate to the cross-class cram down option included in the draft law. However, the most important change in the Dutch bankruptcy law provided by the Dutch Scheme is the option to cram down dissenting creditors within a class. This, and we expect also the cross class cram down, will be extremely valuable in finding restructuring solutions going forward.

1. Secured creditors will be placed into two classes

Secured creditors will be placed in two separate classes: one separate class for the amount of their claims which is covered by their security (i.e. the amount for which they are "in the money"), and for the unsecured part of their debt these

creditors will be placed in the class of unsecured creditors (i.e. their fictive residual claim after enforcement/liquidation of the underlying asset). This is only different if the split in those two classes would not have any impact on the way the total value of the composition is divided between all classes.

The value of the "in the money" part will be determined by the value attributed to the secured creditors in an insolvency in accordance with their ranking, i.e. liquidation value. The House of Representatives considers that by including this amendment parties will be encouraged to come to a consensual solution. Furthermore, this amendment ensures that more creditors will benefit from the going concern surplus resulting from the success of the Dutch Scheme, and not only the secured creditors.

2. A 20% minimum threshold for "smaller" creditors in a cross-class cramdown

To protect the interests of "smaller" unsecured creditors the following amendment was made. If "smaller" creditors are offered less than 20% in a cross class cram down, there is a requirement to submit an explanation of the relevant compelling reasons to do so together with the scheme proposal. If those compelling reasons are not sufficient, then the "smaller creditor" who (i) voted against the proposal and (ii) has been offered less than 20%, can request the Dutch court to reject the Scheme (the "**20%-Rule**"). A "smaller creditor" is a creditor who is (i) a micro- or small-size company within the meaning of articles 2:395a and 2:396 Dutch Civil Code or (ii) a company with no more than 50 employees. The relevant creditors will for this purpose be placed in a separate class, and application of the 20%-Rule can only be requested if the relevant class has not voted in favor of the proposal.

Furthermore, the 20%-Rule does, according to the explanatory statement issued with this amendment, not apply if (A) there are compelling reasons not to do so or (B) it concerns creditors which (i) are subordinated vis-à-vis one or more other creditors subject to the Scheme (without security rights), (ii) have purchased their claim for less than 20%, (iii) are also shareholders and have an unsecured claim, (iv) group companies or (v) bondholders (the "**20%-Exceptions**").

3. Limitation for cash-out option for liquidation value

The House of Representatives has decided to amend the so-called cash out option included in the Dutch Scheme. Based on the amended provision, non-consenting creditors in a non-consenting class are able to request the Dutch court to reject the Scheme if they were not offered the choice to receive a cash distribution of the liquidation value of their claims. This cash-out option is not available to secured creditors, unless they have been offered shares (debt-for-equity) and were not given the choice to opt for another form of distribution.

A summary of the amended Dutch Scheme

The Dutch Scheme provides for: a cram down of creditors or shareholders with 2/3 majority, possibilities for a cross-class cram down, debtor-in-possession, a court-ordered stay period, protection of DIP financing, amendment or termination of erroneous contracts and a clear set of grounds for refusal. Below we have summarized how some of the key features of how the Dutch Scheme will work in practice.

Key elements Dutch Scheme

- Cram down of creditors or shareholders with 2/3 majority
- Horizontal cram down as well as cross class cram down option
- Grounds for refusal including a form of absolute priority rule
- Possibility of a stay on enforcement for 8 months max
- Choice between a non-public or a public procedure
- Implementation between now and 1 January 2021

Proposing a restructuring plan

A company that "foresees that it will be unable to pay its debts as they fall due" may offer a restructuring plan to its creditors and shareholders in order to restructure its problematic debts. In addition, creditors, shareholders and even works councils may ask the relevant court to appoint an independent restructuring expert who can offer a restructuring plan to a debtor's creditors. The Dutch Scheme can apply to creditors as well as shareholders.

Dual track

Under the Dutch Scheme, a restructuring plan can be prepared and offered through a non-public or a public procedure (both outside bankruptcy proceedings). In short, a non-public procedure is kept privy to those involved. A public procedure is registered in the Dutch trade register and the Dutch Central Insolvency Register, and all court hearing and judgements are public. Once the company (or restructuring expert) has formally chosen a non-public or public procedure, it cannot switch between non-public and public. The rules regarding jurisdiction are different for a non-public and public procedure.

Jurisdiction

Before the relevant court is allowed to decide on any matter regarding the Dutch Scheme, it first needs to test if it has jurisdiction. Non-public restructuring plans require "sufficient connection" with The Netherlands (e.g. the company has substantial assets in The Netherlands, debt is largely governed by Dutch law, the company's statutory seat is in The Netherlands, etc.). Public restructuring plans require that the company's centre of main interests (within the meaning of the Recast EU Insolvency Regulation) is located in The Netherlands.

Class composition

Under the Dutch Scheme, creditors and shareholders will be divided into separate classes based on their position (i.e. ranking) in an insolvency and/or the rights they will have under the restructuring plan. A creditor's or shareholders' position will be determined on the basis of Dutch law or contractual agreements (e.g. an intercreditor agreement).

Secured creditors will be placed in two separate classes: one separate class for the amount of their claims which is covered by their security (i.e. the amount for which they are "in the money"), and for the unsecured part of their debt these creditors will be placed in the class of unsecured creditors. This is only different if the split in those two classes would not have any impact on the way the total value of the composition is divided between all classes. The value of the "in the money" part will be determined by the value attributed to the secured creditors in an insolvency in accordance with their ranking, i.e. liquidation value.

Furthermore, the "smaller" creditors who qualify as creditors who can potentially benefit from the 20%-Rule (as explained above) and who have been offered less than 20%, will be placed in a separate class.

Voting

Voting takes place per class and all creditors and shareholders whose rights are affected as part of the restructuring plan must be given the opportunity to vote. A class votes in favour when at least 2/3 of the value that has voted in that class, supports the restructuring plan. The value is based on the outstanding claims for the creditors or the issued share capital for the shareholders. If a restructuring plan is proposed to one class and a majority of 2/3 votes in favour,

then the Dutch court will approve the plan unless, basically, the Scheme rules have not been properly complied with. This fairly simple cram-down option within one class will be a useful tool to cut through deadlock situations within groups of creditors or shareholders who are within the same class in terms of ranking.

Furthermore, a restructuring plan can be proposed to multiple classes at the same time. If at least one 'in-the-money' class has voted in favour of the restructuring plan, the company or, if appointed, the restructuring expert can request the court to approve the plan and bind all classes. This system of cross-class cram-down of dissenting creditors or shareholders is subject to a number of protective rules, which are discussed further below under "grounds for refusal".

Court approval

Upon the court approving the restructuring plan, it becomes binding towards the company and all creditors and shareholders affected by the restructuring plan that were entitled to vote. The Dutch Scheme therefore allows for both intra-class (or 'horizontal') cram down as well as cross-class (or 'vertical') cram down, meaning that the restructuring agreement will be binding on all classes of creditors and stakeholders who voted in favour (including individual creditors or shareholders within that class who may have voted against), and can also be binding on classes of creditors that voted against. The restructuring plan is also binding irrespective of any security rights. It is not possible to appeal the court confirmation ruling.

Grounds for refusal

Once the court has been requested to approve the restructuring plan, creditors can request the court to reject the plan until the day of the court hearing subject to the following rules.

Firstly, the court will refuse confirmation at its own motion or at the request of any creditor or shareholder eligible to vote if certain "general" or "procedural" grounds for refusal have been met (e.g. formal requirements have not been met, the restructuring plan contained insufficient information, proper performance of the restructuring plan is not guaranteed, etc.).

Secondly, the court may refuse confirmation at the request of a creditor of shareholder who voted against the restructuring plan, or who was unfairly not admitted to the vote if the restructuring plan does not meet the best interest of creditors test. The purpose of the best interest of creditors test is to make sure that each creditor or shareholder will receive or retain under the plan on account of its claim property of a value, as of the effective date of the restructuring plan, that is not less than the amount that such creditor or shareholder would so receive or retain if the debtor were liquidated on such date.

Thirdly, in respect of cross-class cram down proposals only, the following applies. On the request of a creditor or shareholder who voted against the restructuring plan and who is in a class that voted against the plan, the court will also refuse confirmation if:

1. the distribution of the value in the restructuring plan deviates from the ranking as prescribed by law of contractual arrangements, unless there is a reasonable justification for the deviation and this creditor or shareholder is not harmed as a result thereof;
2. the relevant creditor is a "smaller creditor" within the meaning of the 20%-Rule and has not been offered an amount of cash or rights representing a value of at least 20% of its outstanding clais, unless one of the 20%-Exceptions apply; or
3. as an alternative to the restructuring plan, the creditor – not being a secured creditor - is not offered a cash out option representing a value of at least its expected recovery in an insolvency scenario; or
4. as an alternative to the restructuring plan, a secured creditor who is offered shares (debt-for-equity) and has not been offered an alternative type of distribution.

Specific requests to the court

To prevent creditors from taking corrective action (e.g. collect the goods they delivered or enforce security rights), the company (or restructuring expert) can request the court to order a stay-period. During this (maximum 8 month) stay-period, the company is allowed to continue to use, consume or dispose assets in the normal course of its business, as long as the interests of the respective creditors are safeguarded.

As part of the restructuring plan, the company can propose to amend or terminate onerous contracts (e.g. rent or supplier contracts). If the counterparty refuses such proposal, the contract can be terminated taking into account a reasonable notice period. This requires court approval.

The court can be requested to pronounce any stipulation or preliminary injunction that is necessary to safeguard the interests of the creditors and shareholders. This can be requested by the company after filing a statement in which it is declared that efforts to negotiate a plan have commenced, or by a restructuring expert after being appointed by the court. The court can do so ex officio as well.

The company can request the court to pre-approve new contractual arrangements it enters into while working towards a restructuring plan (e.g. bridge financings and related rights in rem). If the court has given its approval, such contractual arrangements cannot be annulled at a later stage if the plan were to fail and the company becomes insolvent (i.e. protection against potential challenge actions).

At any time before the restructuring plan has been submitted to the relevant stakeholders for their vote, the company may petition to the court to rule on matters relating to the restructuring plan (e.g. decide on valuation disputes).

Enforceability and recognition

The public procedure is a procedure in the public domain and will be reported by the Dutch government to the European Commission with the request for it to be listed in Annex A of the Recast EU Insolvency Regulation ("**Insolvency Regulation**"). If the public procedure is indeed placed on the list, a court judgment confirming the plan will have to be recognised and enforced in all other Member States (except Denmark), albeit subject to the exceptions of the Insolvency Regulation.

The non-public procedure may be recognised under the UNCITRAL Model Law, international treaties or private international law but is, however, excluded from the scope of the Recast Brussels Regulation (and the Lugano Convention) now "bankruptcy, compositions and analogous proceedings" are excluded from the scope of this regulation.

CLIFFORD
CHANCE

CONTACTS

Ilse van Gasteren
Partner
Financial Markets Group

T +31 20 711 9272
E ilse.vangasteren@cliffordchance.com

Jelle Hofland
Partner
Financial Markets Group

T +31 20 711 9256
E jelle.hofland@cliffordchance.com

Jeroen Kolthof
Associate
Financial Markets Group

T +31 20 711 9490
E jeroen.kolthof@cliffordchance.com

Dirk Jan Duynstee
Partner
Litigation & Dispute Resolution

T +31 20 711 9120
E dirkjan.duynstee@cliffordchance.com

Evert Verwey
Counsel
Litigation & Dispute Resolution

T +31 20 711 9681
E evert.verwey@cliffordchance.com

Guido Bergervoet
Counsel
Litigation & Dispute Resolution

T +31 20 711 9534
E guido.bergervoet@cliffordchance.com

Charlotte Spierings
Associate
Litigation & Dispute Resolution

T +31 20 711 9600
E charlotte.spierings@cliffordchance.com