New Dutch bankruptcy legislation, Part II

Evert Verwey reports on the new Dutch laws set to help the continuity of companies

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Introduction

In 2013 the Dutch legislature announced that an amendment of the Dutch Bankruptcy Act was necessary and that the "*continuity of companies*" was a priority.

It was announced that three new acts would be drafted:

- *Act on the Continuity of Companies I: Pre-pack proceedings (See: Eurofenix, Spring 2014, p. 33-35.)*
- *Act on the Continuity of Companies II: Composition outside bankruptcy proceedings.*
- *Act on the Continuity of Companies III: Duty for suppliers to continue to supply in bankruptcy.*

The main goal of these new acts is to preserve the value of an insolvent company and to provide more restructuring options in order to achieve a higher return for creditors.

On 14 August 2014, the Dutch Minister of Security and Justice presented a draft bill for an Act on the Continuity of Companies II, which provides a statutory basis for a composition outside of insolvency proceedings. Interested parties have been given until 11 November 2014 to comment on the draft bill, after which it will be submitted, possibly in amended form, to the Dutch parliament.

Dutch Bankruptcy Act

There are currently two main insolvency proceedings for companies which may be commenced under the Dutch Bankruptcy Act; (i) bankruptcy (*faillissement*) and (ii) suspension of payments (*surseance van betaling*).

In these proceedings a composition (*akkoord*) (hereafter: a "**Restructuring Plan**") with the creditors is already possible. Such a Restructuring Plan is an agreement between the debtor and his or her creditors which provides for (partial) payment of the creditors. The debtor has the ability to restructure unsecured, non-preferential debts by implementing a Restructuring Plan through a mechanism by which a majority of the creditors can bind a dissenting minority (*cram down*). If the Restructuring Plan is accepted by the creditors and sanctioned by the court, then the estate will not be liquidated and the insolvency proceedings will be terminated.

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In these insolvency proceedings a secured or preferred creditor is not bound by a proposed Restructuring Plan and may enforce his or her security during the insolvency proceedings not being obliged in any way to negotiate with the debtor on the Restructuring Plan. Furthermore, during insolvency proceedings the ongoing business and contracts of the company often cease as the estate cannot guarantee payments of the ongoing costs.

(Draft) Act on the Continuity of Companies II (the "Act")

A Restructuring Plan between the debtor and his or her creditors outside insolvency proceedings is currently not regulated. Consequently, when a debtor does want to propose a Restructuring Plan outside insolvency proceedings, the creditor is free to decline any proposal and is not obliged to cooperate. Furthermore unanimous creditor consent is required to implement the proposal. Consequently there are no recent examples of a successful Restructuring Plan outside of insolvency proceedings.

Under the (statutory) provisions of the Act, debtors will have the ability to offer a Restructuring Plan to their creditors and/or shareholders outside of formal insolvency proceedings. This means that no insolvency administrator will be appointed to, for example, investigate the feasibility and viability of the proposed Restructuring Plan.

If the debtor is not willing to propose a Restructuring Plan and it is foreseeable that the debtor cannot pay his or her debts, the Act creates a right for a single creditor of the debtor to propose a Restructuring Plan to the (other) creditors and/or shareholder(s).

Content of the Restructuring Plan and formal requirements

Under the Act a Restructuring Plan can be drafted under which creditors and shareholders can be divided in different classes and their respective rights can be amended. In the Restructuring Plan it is also possible to amend the articles of association of the debtor. This means that the debtor has various restructuring methods available (such as a debt-for-equity-swap) and is allowed the flexibility to achieve a successful restructuring.

The draft Restructuring Plan must set out the financial consequences for each class of creditors, inform the creditors about the value of the company and contain an explanation of the Restructuring Plan itself. The Restructuring Plan must also set out a step-by-step plan that the debtor will follow post-implementation.

The next step is that each creditor will have to be informed of the draft Restructuring Plan. If the creditors and debtor differ upon the content of the Restructuring Plan, it is possible that a supervisory judge will be appointed. The supervisory judge is entitled to give his view on the payment system to the creditors and the composition of the creditor classes. Furthermore the supervisory judge is entitled to order the Restructuring Plan to be amended or expanded to enable the creditors to make a decision.

The Restructuring Plan is accepted by the creditors and/or shareholders only if all classes of creditors and/or shareholders have accepted it. A class accepts the Restructuring Plan when; (i) a simple majority in number of the creditors and/or shareholders that took part in the voting votes in favour of the Restructuring Plan and (ii) this simple majority represents at least 75% in value of the total value of claims or issued capital held by the shareholders (in the respective classes).

Court confirmation

Once the Restructuring Plan has been accepted by the requisite majority of the creditors, the court must sanction the Restructuring Plan, for which purpose a separate court hearing is held. Creditors may inform the court in writing of any reasons why sanction of the Restructuring Plan should be considered undesirable.

If a class of creditors voted against the Restructuring Plan, the court can cram down that class if the dissenting class could not have reasonably voted against the Restructuring Plan. The dissenting class can only be crammed-down where the Restructuring Plan does not provide that the creditors or shareholders will receive a distribution that is at least equal to what they would have received if the company were to be liquidated in insolvency proceedings. Secured creditors are entitled to a distribution that is at least equal to the value of the encumbered asset in a private sale.

The court will refuse to sanction the Restructuring Plan in case; (i) the performance of the Restructuring Plan is not adequately warranted; (ii) the rights of the creditors or shareholders are prejudiced disproportionally; (iii) the Restructuring Plan is the result of fraud; or (iv) the court, in its discretion, considers that there are other important reasons to refuse sanction.

If the court confirms the Restructuring Plan and the decision becomes final, the Restructuring Plan becomes binding.

Conclusion

The Act creates various options for a debtor to propose a Restructuring Plan to its creditors and shareholders in order to restructure its debt outside formal insolvency proceedings in a more flexible way. The availability of a debt-for-equity-swap and cram down for dissenting creditors are additional benefits to the debtor. ■

"THERE ARE NO RECENT EXAMPLES OF A SUCCESSFUL RESTRUCTURING PLAN OUTSIDE OF INSOLVENCY PROCEEDINGS"