DE BRAUW BLACKSTONE WESTBROEK

Legal alert

14 AUGUST 2014

CORPORATE RECOVERY, RESTRUCTURING & INSOLVENCY

Draft bill to introduce state of the art restructuring legislation in the Netherlands

On 14 August 2014, the draft bill on the continuity of companies II (Wet continuïteit ondernemingen II) went into public consultation. The bill is based on a proposal in 2013 by Ruud Hermans and Reinout Vriesendorp of De Brauw Blackstone Westbroek and was extensively pre-discussed with experts from relevant market parties and other stakeholders. The bill provides for a restructuring procedure inspired by international restructuring practices, in particular English scheme of arrangement and US Chapter 11 proceedings. The bill will be one of the most significant amendments of the Dutch Bankruptcy Act in decades.

In short, the bill introduces a statutory procedure to bind creditors and/or shareholders, or any class of them, to a composition (akkoord) amending the rights of creditors and/or shareholders with the approval of a Dutch court. This can be done without having to initiate formal insolvency proceedings such as bankruptcy (faillissement) or suspension of payments (surseance van betaling). After enactment of the bill, expected on 1 January 2016, the Netherlands will have state of the art legislation to restructure companies and groups of companies.

Main characteristics

The bill offers a relatively cheap and quick procedure to restructure an enterprise through a composition between that enterprise and all or certain of its creditors and/or shareholders. If the composition is supported by the majority of the creditors and/or shareholders and is approved by a Dutch court, dissenting creditors and/or shareholders will be bound by the terms of the composition. Among other things, the composition can

amend the rights of creditors or shareholders, or any class of them. During the entire proceeding, the debtor remains in full control of the company.

Eligible debtors

Only legal entities and natural persons who practise an independent profession or carry on a business are eligible to offer a composition to their creditors. The bill focuses mainly on debtors having their centre of main interest in the Netherlands. Since the bill is aimed at rescuing companies and groups of companies in financial distress, there is no requirement that the debtor company be insolvent (or any other formal financial test tied to liquidity, solvency, or otherwise) for a composition to be offered.

Initiative

The starting point is that the debtor itself offers a composition to all or part of its creditors and/or shareholders. However, a creditor can also offer a composition to the other creditors if the debtor refuses to do so itself. This is to protect creditors against directors of a debtor company who intentionally do not propose a composition, for example, to protect the shareholders of the company against unwanted amendment of their rights.

The composition

The procedure introduced by the bill not only provides for the possibility to amend rights of creditors and shareholders against the company, but also to amend the articles of association of a company. For example, if a *debt for equity* swap for the benefit of creditors is intended, the composition can stipulate that pre-emptive rights of existing shareholders are bypassed and the articles of association are amended to provide for an increase in the nominal capital of the company to enable new shares being issued. Furthermore, the composition can, for example, provide for a division of the debtor company.

Discretionary stay

The bill does not provide for an automatic stay of proceedings or collection and enforcement actions against the debtor. However, if a composition is offered and bankruptcy proceedings against the debtor are initiated, the court can on request at its own discretion stay the bankruptcy proceedings. If the proceedings are indeed stayed, the court can additionally order all measures it deems necessary to adequately protect the interests of the debtor or the creditors. If a composition is offered, creditors in principle may take other individual measures against the debtor to protect their rights, for example levying an attachment. However, this can only be done within strict limits, since an individual creditor may not single-handedly interfere with and obstruct an envisaged restructuring via a composition.

Class constitution and voting

A composition does not have to be offered to all creditors and/or shareholders. Only creditors and shareholders whose rights are affected by the scheme are eligible to vote on the composition. They can be placed into separate classes for voting purposes. Creditors with dissimilar rights, however, may not be grouped into the same class. This also applies to shareholders.

If the economic interest in a claim or share rests with someone other than the creditor or shareholder, *i.e.* with a beneficial owner, the beneficial owner has the exclusive right to vote on the composition. For example, if depositary receipts for shares (*certificaten van aandelen*) are issued, the holders of the depositary receipts are entitled to vote with the exclusion of the holders of the share.

The composition is adopted by the creditors and/or shareholders if all classes of creditors and/or shareholders have approved the composition. A class has approved a composition if within that class:

- an absolute majority in number of the creditors or shareholders that took part in the vote, voted in favour of the composition; and
- that absolute majority represents at least two thirds of the total value of:
    - claims held by the creditors placed in the class and who voted, or
    - the issued capital held by the shareholders placed in the class and who voted.

Confirmation of the plan and cram down

If all classes have approved the composition, the court must declare the composition binding on all creditors and shareholders, including those who have dissented ('universally binding'). Only under certain circumstances can the court in that case decline to impose the composition on all affected parties. For example, the court must decline to declare the composition universally binding if it compromises the interests of one or more creditors or shareholders in a disproportionate manner or if fulfilment of the obligations of the debtor arising out of the composition is not sufficiently guaranteed.

If a class or multiple classes of creditors or shareholders voted against the composition, the court can disregard their rejection and cram down the class/classes by declaring the composition universally binding if it deems the composition to be fair taking into account all circumstances at hand. The Minister of Security and Justice explicitly notes in the Explanatory Memorandum to the bill that this is to prevent a class of creditors or shareholders from voting against the composition without a valid reason, consequently being able to single-handedly obstruct an envisaged restructuring that is accepted by the other classes. According to the Minister, a class of creditors or shareholders in principle has no valid reason to vote against a composition if the creditors or shareholders in this class are not expected to receive any payment in case of a bankruptcy of the debtor company, *i.e.* if they are *out of the money*. For this reason, shareholders will usually have no valid reason to reject a composition.

Effects of a composition being declared universally binding

If the court declares a composition universally binding, all creditors and shareholders are bound by its terms. Consequently, their rights against the company are amended in accordance with these terms. If the implementation of the composition requires a resolution by the shareholders' meeting, the declaration of the court replaces that resolution. This provides a solution if shareholders resist an intended restructuring on unfair or unreasonable grounds, since they will not be able to block the implementation of the composition by refusing to adopt the necessary resolutions. For example, if a *debt for equity* swap is intended, the resolution of the shareholders' meeting to issue new shares is replaced with the court order declaring the composition universally binding. The same applies if a restructuring consists of a withdrawal of existing shares.

Restructuring of groups of companies

The bill facilitates the restructuring of a group of companies through one composition since the composition may also amend the rights of creditors against guarantors and joint debtors of obligations entered into by the debtor company. Through the use of a composition, for example, a group of companies financed through bonds issued by its finance company and guaranteed by the other group companies, has the opportunity to restructure effectively by having the composition provide not only for an amendment of the rights of the bond holder creditors against the finance company, but also against other group companies. A restructuring of a group of companies through one *scheme of arrangement* is not possible in England and Wales.

All in all, if the bill is implemented on 1 January 2016, the Netherlands will offer companies and groups of companies in financial distress state of the art legislation to restructure that matches and possibly even outclasses English *scheme of arrangements* and US

Chapter 11 proceedings. The public consultation that started on 14 August 2014 means that the bill may yet be subject to some further amendment. But, given the support by the various interest groups and stakeholders, the framework and underlying principles are set in stone.

Contact

If you have any questions or require further information regarding this Legal alert please contact:

Ruud Hermans | T +31 20 577 1947 | E ruud.hermans@debrauw.com
Reinout Vriesendorp | T +31 20 577 1060 | E reinout.vriesendorp@debrauw.com
Berto Winters | T +31 20 577 1948 | E berto.winters@debrauw.com
Klaas de Vries | T +31 20 577 1909 | E klaas.devries@debrauw.com
Menno Stoffer | T +31 20 577 1601 | E menno.stoffer@debrauw.com
Niek Biegman | T +31 20 577 1497 | E niek.biegman@debrauw.com
Rob van den Sigtenhorst | T +31 20 577 1812 | E rob.vandensigtenhorst@debrauw.com