European Insolvency and Restructuring Journal
Academic Article
EIRJ 2021-7
www.eirjournal.com

EIRJ
European Insolvency and Restructuring Journal

Enterprise Group Restructuring: Dutch Options and United States Enforcement

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Abstract

On 1 January 2021 the Dutch *Wet Homologatie Onderhands Akoord*, also referred to as the Dutch scheme, entered into force. The Dutch scheme represents a robust restructuring framework that incorporates many of the main restructuring concepts from both the English scheme of arrangement and US chapter 11. It also adds a few new restructuring tools that will make it easier to restructure enterprise group debt by expressly providing that a restructuring plan may include the release of group guarantees and by adopting liberal jurisdictional rules that should permit proceedings to be opened in the Netherlands for all members of an enterprise group. This paper analyses the recognition and enforcement in the United States of restructuring plans adopted and confirmed in the Netherlands under the new Dutch scheme legislation, with a particular focus on the release of group guarantees. Our conclusion is that the US chapter 15 recognition and enforcement rules are very liberal and should provide little difficulty in obtaining recognition and enforcement of group restructuring plans. The very flexible US rules on COMI may result in the US courts treating the Netherlands as the COMI of all group members, thereby making the proceedings involving the non-Dutch group members foreign main proceedings. But even absent a Netherlands COMI, a Dutch scheme and its affiliate release provisions could be enforced for the benefit of all group members in a chapter 15 proceeding.

1. Introduction

1. The global insolvency system suffers from a critical mismatch. An effective restructuring aims to preserve the value of the business, but the national and cross-border legal tools available to achieve that result instead focus on the separate legal entities that make up the business. Since virtually every significant business enterprise is divided up into multiple different legal entities, the business cannot be restructured unless all critical enterprise group members adopt consistent rescue plans.

2. This is a problem under most national financial restructuring regimes even if all members of the enterprise group are located in the same jurisdiction. But at least at the national level, local procedural mechanisms can be used to assign all related cases to a single court or otherwise co-ordinate the multiple proceedings. Some jurisdictions, like the United States, go further and facilitate a group restructuring by permitting substantive consolidation of the estates of the disparate entities or using group-wide voting to achieve a group solution.[1]

3. The challenge of developing a group-wide solution to financial distress is

1 See William H. Widen, Report to the American Bankruptcy Institute: Prevalence of Substantive Consolidation in Large Public Company Bankruptcies from 2000 to 2005, 16 ABI Law Review 1 (2008) (documenting the use of substantive consolidation in the majority of large chapter 11 cases).

exacerbated if the restructuring proceedings of different critical group members must take place in different jurisdictions under differing legal regimes. The primary international tool for dealing with multi-jurisdictional insolvencies is the UNCITRAL Model Law on Cross-Border Insolvency.[2] It provides, among other things, a mechanism for coordinating multiple national proceedings and for giving local effect to an insolvency proceeding pending in a foreign jurisdiction. It attempts to identify which proceeding is the "main" insolvency proceeding by determining where the entity has its centre of main interests ("COMI"). The Model Law then encourages all other national proceedings to defer to the "main" proceeding so that an effective global restructuring of the entity might be accomplished.

4. But, just like most national insolvency laws, the Model Law focuses on the entity and not the enterprise. Thus, in an enterprise group setting, where different critical group members have their COMIs in different jurisdictions, the Model Law provides no direction for managing an enterprise group restructuring. Indeed, the Model Law's emphasis on entity COMI, adds a serious hurdle to achieving a group solution. International insolvency instruments reflect the largely unsuccessful struggle to come up with a coherent theory that can honor the separate legal entity status of each group member while achieving an enterprise-level group restructuring. The idea of a group planning proceeding was advanced in the 2015 recast of the EU Insolvency Regulation[3] and in UNCITRAL's latest cross-border insolvency product – the Model Law on Enterprise Group Insolvency.[4] While it remains to be seen whether such planning proceedings can help solve the problem, practice has already moved well beyond the theory.

5. The evolving cross-border practice has largely ignored entity-specific COMI in favor of producing value-preserving enterprise-level solutions. Courts in many nations have approved the restructuring of enterprise group debt even though several group members had foreign COMIs. One approach is to use broad jurisdictional rules to open proceedings for all group members in a single jurisdiction and develop a group plan that restructures the group debt, even though some members have little local connection. Another approach is for a single group member to open a proceeding, usually in its COMI, and restructure the entire group debt by using third-party releases to modify the enterprise group debt obligations of the non-filing group members. While these approaches may be permissible under the local law of the restructuring jurisdiction, the group restructuring must have a multi-national effect in order to be successful.[5]

6. One option for achieving a multi-national restructuring is to file the proceedings in a "control country" where most major creditors can be

2 UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf ("Model Law").

3 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ("EU Insolvency Regulation" or "EIR").

4 UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2020): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf.

5 See Oscar Couwenberg & Stephen J. Lubben, Corporate Bankruptcy Tourists, 70 Bus. Law. 719, 740 (2015). (noting "the importance of a restructuring proceeding that can achieve a result that will hold throughout the global economy").

enjoined.[6] One reason for the popularity of US chapter 11 as a global restructuring tool is the power of the US courts to exercise jurisdiction over most major creditors and thereby force them to comply with the restructuring solution.[7] The other main option is to use international legal tools to make a restructuring solution achieved in one nation effective in another. The Model Law is such a tool, as is the EU Insolvency Regulation. However, the emphasis that both instruments place on COMI limits their usefulness in a global enterprise group restructuring.

7. London's success as a global restructuring center was in part based on the use of international legal tools. By combining the Model Law with the EU Insolvency Regulation and the Brussels I Regulation,[8] English restructuring outcomes could be made effective in most important commercial jurisdictions. For entities either with an English COMI, or where the COMI could be shifted to England, the EU Insolvency Regulation made an English insolvency proceeding immediately effective for most purposes in other EU Member States.[9] While an English COMI is helpful, the absence of COMI is not a limitation on the use of English courts for global restructurings. The most popular English restructuring tool is the scheme of arrangement, which is part of English company law. English schemes of arrangement fell outside the scope of the EU Insolvency Regulation and thus they were not subject to the EU Insolvency Regulation and its COMI-based limitations on jurisdiction. The English courts exercise a much broader jurisdiction over schemes and will entertain a scheme if there is a "sufficient connection" with England. It is very likely that schemes enjoyed recognition and were enforceable throughout the EU under the Brussels I Regulation (recast).[10] Both English schemes and insolvency proceedings can be recognized and enforced in the US through chapter 15 of the US Bankruptcy Code, the US version of the Model Law.

8. While global familiarity and comfort with English law and procedure may help London remain a popular jurisdiction for global restructurings, the UK's departure from the EU deprives English restructurings of the automatic EU-wide enforcement they previously enjoyed. The UK-EU Trade and Cooperation Agreement does not address insolvency law and thus there has been a "hard Brexit" for the English restructuring practice.[11] With the UK out of the EU with no agreement in place, the tools that gave English restructurings EU-wide effect are no longer available: the EU Insolvency Regulation no longer applies to English insolvency proceedings and the Brussels I Regulation no longer applies to English schemes.[12] While it remains

6 See Jay L. Westbrook, Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court, 96 Tex. L. Rev. 1473, 1479-81 (2018) (discussing "control countries" where creditors can be enjoined).
7 See G. Ray Warner, Conflicting Norms: Impact of the Model Law on Chapter 11's Global Restructuring Role, 28 Int'l Insol. R. 273 (2019)
8 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation").
9 The EU Insolvency Regulation does not apply to Denmark. We have not repeated this throughout the text. When reference is made to Member States in relation to the EIR, this should be read as excluding Denmark.
10 See L.P. Kortmann and P.M. Veder, The Uneasy Case for Schemes of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?, (2015) 3 NIBLeJ 13.
11 Katharina Crinson & Nicholas Cooper, Ouch, it's a hard Brexit for UK restructuring and insolvency – but life goes on (Freshfields Bruckhaus Deringer 2021), https://transactions.freshfields.com/post/102gof4/ouch-its-a-hard-brexit-for-uk-restructuring-and-insolvency-but-life-goes-on (last visited 5 October 2021).
12 Ibid.

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to be seen whether creative solutions can preserve London's prominent role in global restructuring, the early indications are not encouraging.[13]

9. The Dutch are poised to enter the void created by Brexit. On 1 January 2021 the Dutch Act on the Confirmation of Private Plans[14] (hereinafter sometimes referred to as the "Dutch scheme"). The Dutch scheme represents a robust restructuring framework. It incorporates many of the main restructuring concepts from both the English scheme of arrangement and US chapter 11. By pulling together features from both systems, the Dutch have attempted to preserve the effective restructuring features of each system while remedying the perceived defects of each.

10. For example, the Dutch scheme incorporates variations of the debtor-in-possession, post-commencement financing and moratorium features of chapter 11, but replaces chapter 11's heavy judicial involvement and expensive, time-consuming features with the speed and efficiency of the English scheme. The Dutch scheme is a more versatile restructuring tool than the English scheme. Whereas the English scheme requires an affirmative vote of any class of debt that is restructured, the Dutch scheme adopts chapter 11's cross-class cram down mechanism that permits debt to be restructured over a class' objection.[15]

11. In addition, the Dutch legislation adds a few new restructuring tools that will make it easier to restructure enterprise group debt. While both the English and US systems have developed work arounds that permit some level of enterprise group restructurings, the Dutch scheme addresses the issue head on and expressly provides that a restructuring plan may, under certain conditions, include the release of group guarantees. In addition, the Dutch scheme adopts liberal jurisdictional rules that should permit proceedings to be opened in the Netherlands for all members of an enterprise group.

12. While the modern features of the Dutch scheme should make it an attractive global restructuring tool, it has an additional advantage over the competing English restructuring devices because a Dutch restructuring will have some of the EU recognition

13 Other international instruments will not be available to fill the void created by Brexit. For example, the UK's departure from the EU also removed it from the Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters. On 4 May 2021 the EU Commission has expressed the view that the European Union should not give its consent to the accession of the United Kingdom to the 2007 Lugano Convention (Communication from the Commission to the European Parliament and the Council of 4 May 2021, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, COM(2021) 222 final). Further, the insolvency exceptions to both the Lugano Convention and the Hague Convention on Choice of Court Agreements limit the enforceability of English restructuring plans. John D. Magnin & Jonathan A. Graham, No-deal Brexit for Dispute Resolution, Nat'l L. Rev. (16 February 2021) https://www.natlawreview.com/article/no-deal-brexit-dispute-resolution (last visited 5 October 2021); see also Re Gategroup Guarantee Ltd. [2021] EWHC 304 (Ch) (holding that proceedings relating to a restructuring plan under part 26A of the Companies Act, introduced by the English Corporate Insolvency and Governance Act of 2020 (n. 15 below) are excluded from the Lugano Convention pursuant to Article 1(2)(b) of the convention, which excludes 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' from its scope of application).

14 Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord (Wet homologatie onderhands akkoord), Staatsblad 2020, 414. An (unofficial) English translation of the Act and the legislative explanatory notes, as well as a bullet point summary, can be found at: www.resor.nl. The Dutch scheme legislation is incorporated in the Dutch Bankruptcy Act (Faillissementswet) ("DBA").

15 As part of its response to the economic effects of the COVID 19 pandemic, the UK adopted a new restructuring device the Corporate Insolvency and Governance Act of 2020 that came into force in June 2020. This may become a popular restructuring device because, unlike a scheme of arrangement, it provides mechanisms for rescue financing, a cross-class cram down and a creditor stay. See The UK Corporate Insolvency and Governance Act 2020: A Move to a More Debtor-Friendly Restructuring Regime? (Norton Rose Fulbright 2020), https://www.nortonrosefulbright.com/en/knowledge/publications/5ac21a15/the-uk-corporate-insolvency-and-governance-act-2020 (last visited 5 October 2021).

and enforcement advantages that English restructurings lost as a result of Brexit. However, the European focus on requiring a state of insolvency or pre-insolvency for the availability of restructuring tools,[16] which is also reflected in the Dutch scheme, both limits the scheme's enforceability in the EU and makes it unattractive for cases where it is necessary to include solvent, or potentially solvent, group members in the restructuring plan.

13. The EU enforcement problem for Dutch schemes stems from the exclusion of insolvency judgments from the Brussels I Regulation.[17] Insolvency judgments are, instead, governed by the EU Insolvency Regulation. The English scheme, not being limited to insolvency situations, took advantage of that distinction to use the Brussels I Regulation to achieve EU-wide enforcement of English judgments sanctioning schemes. Since the Dutch scheme is limited to situations of imminent insolvency,[18] Dutch orders sanctioning schemes will most likely not be enforceable in the EU under the Brussels I Regulation,[19] although they might be enforceable in other EU states using that state's domestic judgment recognition laws.

14. The tension between the Dutch commitment to the insolvency principle and the desire to create a workable enterprise group restructuring law that would be enforceable elsewhere makes the Dutch system more complicated than it would otherwise be and presents some challenges to an enterprise group restructuring. It is not uncommon that Dutch entities are included in globally operating groups of companies. There may be a variety of reasons why Dutch companies are used in multinational groups. Of course, the group may operate out of the Netherlands or a foreign group may have Dutch operating companies. Particularly relevant to the type of financial restructurings that may be effected through the Dutch scheme is that Dutch companies may be used in global groups for tax and financing purposes. While many global enterprise groups contain Dutch members, few consist solely of members having Dutch COMIs. This presents a dilemma because the EU Insolvency Regulation permits a Dutch court to exercise broad insolvency restructuring powers only over entities with a Dutch COMI. The Dutch solution is to give entities the choice of restructuring either within or outside of the EU Insolvency Regulation framework. As will be set out below in more detail, the Dutch scheme legislation creates two alternative restructuring tracks that are virtually

16 See, for example, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172, 26.6.2019, p. 18–55.

17 Art. 1(2)(b) Brussels I Regulation provides that the regulation shall not apply to: "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings".

18 Pursuant to Art. 370 DBA, a debtor may propose a plan to its creditors and shareholders (or any number of them) that can be confirmed by the court, if it can reasonably be assumed that the debtor will not be able to continue paying its debts as they fall due.

19 The Dutch scheme legislation is based on the – in our view, correct – assumption that the proceedings concerned are in fact insolvency proceedings that are excluded from the scope of application of the Brussels I Regulation. See P.M. Veder, Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement, Tijdschrift Financiering, Zekerheden en Insolventierechtpraktijk (FIP) 2019/219. Some authors argue that the Brussels I Regulation does apply to Dutch schemes, see, for example, R. Vriesendorp et al., Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union, Nederlands Internationaal Privaatrecht 2021/1, p. 3-17, W.J.E. Nijnens, Internationaal privaatrechtelijke aspecten van de WHOA, Tijdschrift voor Insolventierecht 2019/34. The view that proceedings of the type of the Dutch scheme are excluded from the scope of the Brussels I Regulation is supported by the recent decision of the English High Court in Gategroup Guarantee, n. 13 above, holding that proceedings relating to a restructuring plan under part 26A of the Companies Act are excluded from the Lugano Convention.

identical except that one is a public proceeding while the other is a non-public proceeding. The public proceeding will be subject to the EU Insolvency Regulation, once listed in Annex A. It will therefore have EU-wide effect but will also be subject to the EU Insolvency Regulation's COMI-based jurisdictional limitations. The non-public proceeding will not be subject to the EU Insolvency Regulation. Thus, the Dutch court can exercise broad jurisdiction over group members with COMIs in other EU states, but the restructuring effected through a non-public scheme will not automatically be enforceable in other EU states under the EU Insolvency Regulation. And, because of the insolvency focus of the Dutch scheme, it is very likely that it will also not automatically be enforceable in other EU states under the Brussels I Regulation.

15. In order to be useful to multi-national businesses, the results of a restructuring must be recognized and enforceable in all major jurisdictions where the business operates. While recognition and enforcement in the EU is important, the most important commercial jurisdiction for most multinational enterprises is the US. As discussed below, the US courts have adopted a very liberal approach under chapter 15 of the US Bankruptcy Code to the recognition and enforcement of non-US restructuring plans. Principles developed in cases involving English schemes of arrangement support the view that Dutch schemes involving entities with Dutch COMIs should face little difficulty being recognized and enforced by US courts. While the restructuring of an enterprise group presents a more difficult question, the US courts appear receptive to the enforcement of value-preserving group restructuring plans even in cases that adjust the liabilities of entities with little connection to the foreign forum. Thus, Dutch restructurings of enterprise groups should be enforceable in the US with respect to all group members.

16. This article is structured as follows. Section 2 addresses the core features of the Dutch scheme and provides the relevant backdrop for the analysis of the recognition of Dutch schemes in the US. It will notably deal with the jurisdiction that Dutch courts may exercise in respect of public and non-public plan procedures (section 2.3, par. 33 et seq.) and the statutory conditions for restructuring group guarantees (section 2.4, par. 42 et seq.).[20] Section 3 provides an introduction to the approach of the Model Law to recognition and enforcement and lays the groundwork for the analysis of the recognition of Dutch schemes in the US. Section 4 (par. 57 et seq.) discusses the general conditions for recognition of foreign insolvency proceedings under Chapter 15 of the US Bankruptcy Code and links these to the Dutch scheme. Section 5 then addresses the recognition of Dutch schemes that include provisions for the restructuring of group guarantees. It discusses the design of an enterprise group scheme, setting out certain restructuring scenario's (section 5.1, par. 103 et seq.)

20 In this article, we do not address the question whether and, if so, under which conditions the release or amendment of group guarantees should be allowed. The focus of the article is on the recognition of such releases in the US, in particular under the conditions as provided for under the Dutch scheme legislation, and in that respect has a more practical focus. The policy options underlying the release of group guarantees is discussed in, inter alia, I. Kokorin, Third-Party Releases in Insolvency of Multinational Enterprise Groups, European Company and Financial Review (ECFR) 2021, p. 107-140; P.M. Veder and A. Thery, The release of third party guarantees in pre-insolvency restructuring plans, in: N.E.D. Faber, B.A. Schuijling and N. Vermunt (eds.) Trust and good faith across borders, Liber amicorum prof. dr. S.C.J.J Kortmann, Wolters Kluwer 2017, p. 259-274.

that lead to three chapter 15 recognition options that will be analyzed (section 5.3, par. 114 et seq.) after the complex jurisdictional matrix that follows from the dual track approach of the Dutch scheme has been discussed (section 5.2, par. 108 et seq.). Finally, section 6 (par. 136 et seq.) analyzes the options for enforcement of a Dutch group restructuring in the US.

2. The Dutch Scheme

2.1 Introduction

17. The Dutch scheme legislation is intended to facilitate work outs between financially distressed companies and their creditors and shareholders. It is the result of a lengthy process that started in 2012, ran in parallel to the work of the European institutions on the EU Directive on restructuring and insolvency and saw two rounds of public consultations.

18. The Dutch scheme is an important and welcome addition to the Dutch restructuring toolkit. Until the introduction of the Dutch scheme, a restructuring plan that was negotiated outside of formal and comprehensive insolvency proceedings in principle required unanimous consent of all affected parties. Such informal workouts are governed by general rules and principles of contract law, which allow creditors to reject a proposal for an amendment of their rights under a plan. Such plans could only be imposed on dissenting creditors in exceptional circumstances, i.e. if the rejection of the plan constituted an 'abuse of power' in terms of art. 3:13 of the Dutch Civil Code by the dissenting creditor(s).[21] That is a difficult hurdle to overcome. The Dutch Supreme Court has underlined that the fact that a creditor is or ought to be aware of the debtor's financial distress or imminent bankruptcy, will generally not be sufficient to support the conclusion that a creditor's rejection of the debtor's proposal constituted such an abuse of power. In taking that approach, the Dutch Supreme Court acknowledged that such informal workouts lack the safeguards that formal insolvency proceedings have with respect to the determination and the supervision of the debtor's estate. Furthermore, the new Dutch scheme is a welcome addition to the available restructuring options, because the rules on restructuring plans available in the existing formal and comprehensive insolvency proceedings (*faillissement* and *surseance van betaling*) are outdated and defective in many respects.[22] As a result of these shortcomings, numerous Dutch companies have used the English scheme of arrangement or US Chapter 11 proceedings to restructure their capital structure.[23] This should no longer be necessary with the introduction of the Dutch scheme. The Dutch scheme provides for a modern, fast and flexible plan procedure with the necessary 'checks and balances' that may be used to restructure the entire capital structure of the company,

21 See, for example, HR 12 August 2005, ECLI:NL:HR:2005:AT7799, Nederlandse Jurisprudentie (NJ) 2006/230, Jurisprudentie Onderneming en Recht (JOR) 2005/257 (Payroll), and HR 24 March 2017, ECLI:NL:HR:2017:485, Nederlandse Jurisprudentie (NJ) 2017/466, Jurisprudentie Onderneming en Recht (JOR) 2017/209 (Mondia/V&D).

22 See, for example, the analysis of these proceedings in para. 3.3 of A.M. Mennens, Het dwangakkoord buiten surseance en faillissement, Onderneming en Recht, nr. 118, Deventer: Wolters Kluwer 2020.

23 Examples include: Van Gansewinkel Groep B.V. (English scheme), New World Resources (English scheme), DAP Holdings N.V. (English scheme), NEF Telecom B.V. (English scheme), Magyar Telecom B.V. (English scheme), Almatis B.V. (US Ch. 11), Marco Polo Seatrade B.V. (US Ch. 11), Global Telesystems Europe B.V. (US Ch. 11), Versatel Telecom International N.V. (US Ch. 11), and United Pan-Europe Communications N.V. (Us Ch. 11).

including group guarantees. The introduction of the Dutch scheme is not intended to replace the existing practice of informal workouts. Rather, it seeks to reinforce that practice by introducing the proverbial 'stick' that will form the backdrop of the negotiations between the interested parties.[24]

19. The design of the Dutch scheme has been strongly influenced by both the English scheme of arrangement and US Chapter 11.[25] It combines elements of the English scheme of arrangement, such as the ability to implement a non-collective plan outside formal and comprehensive insolvency proceedings, with elements of US Chapter 11 proceedings, such as a cram down mechanism, whilst innovating on both. The Dutch scheme is compliant with the EU Directive on insolvency and restructuring.

20. We will not discuss the Dutch scheme in any detail here.[26] After an overview of its core features, we will focus on two elements of the Dutch scheme that may impact on the recognition and enforcement in the United States: (i) the dual track process, and (ii) the ability to restructure group guarantees.

2.2 Core features of the Dutch scheme

21. The Dutch scheme legislation introduces into the Dutch Bankruptcy Act ("DBA") a procedure for court confirmation of a restructuring plan outside the framework of the existing insolvency proceedings. It is set up as framework legislation intended to provide as much flexibility as possible to adapt the process and the restructuring plan to the needs of a particular case.[27] In essence, it provides for a framework that facilitates the negotiations on a restructuring plan with the court intervening only where necessary and relevant. The court need not get involved until the final stages of the process when a request for sanctioning of the plan is submitted to the court. In addition to flexibility, the Dutch scheme seeks to facilitate speed and deal certainty. In that respect, the debtor may request the court to provide a determination on any issues that are relevant in the context of putting a plan into effect (such as class formation, the admission of creditors or shareholders for voting purposes, adherence to the 'best interest of creditors' test, adherence to the criteria that must be met for a so called cross-class cram down, etcetera), thereby providing clarification on areas of uncertainty at an early stage in the process rather than at the end.[28]

22. As noted earlier and in line with the EU Directive on restructuring and insolvency, the Dutch scheme requires the debtor to be in a state of insolvency or pre-insolvency: a debtor is eligible for this procedure if it can reasonably be assumed that it will not be able to

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24 See Explanatory Memorandum, p. 2.
25 This is acknowledged by the Dutch government in the explanatory memorandum to the original bill, see Kamerstukken II 2018/19, 35 249, 3, p. 3 et seq.
26 For more extensive discussions of the Dutch scheme (in Dutch), see, inter alia, A.M. Mennens, Het dwangakkoord buiten surseance en faillissement, Onderneming en Recht, nr. 118, Deventer: Wolters Kluwer 2020; S.C.E.F. Moulen Janssen, De positie van aandeelhouders bij preventieve herstructureringen (Serie Van der Heijden Instituut nr. 163, Deventer: Wolters Kluwer 2020; L.J.J. Kerstens, B. Rikkert , M.A. Broeders and R.F. Feenstra (eds.), Wet Homologatie Onderhands Akkoord (Insolad-bundel, Deventer: Wolters Kluwer 2021) and S. Renssen, De herijking van het faillissementsrecht – De WHOA (Recht en Praktijk – Insolventierecht, Deventer: Wolters Kluwer 2021). For an overview of the Dutch scheme legislation in English see, for example,T. Bil, An Overview of the Upcoming Dutch Scheme, (2020) 33 Insolvency Intelligence, p. 99 et seq.
27 See Explanatory Memorandum, p. 6.
28 Art. 378 DBA.

continue paying its debts as they fall due.[29]

23. The procedure can be initiated by the debtor. There is no court test at entry. However, as soon as the debtor starts to prepare a plan, it must submit a notification to that effect with the clerk of the court.[30] The main significance of this requirement lies in the fact that, from that moment, the debtor can ask the court to order certain measures to help it put a plan into effect, such as a stay.[31] Once the debtor has presented the plan to creditors and shareholders with voting rights, the declaration is available for their inspection, free of charge, until the court has decided on the request to sanction the plan or, following the vote, the debtor gives notice that it will not submit a request for confirmation.

24. The procedure can also be initiated by other stakeholders through a request to the court for the appointment of a restructuring expert. Pursuant to art. 371(1) DBA, each creditor, shareholder or statutory works council or workplace representation that is set up in the debtor's business may submit a request to the court for the appointment of a restructuring expert who may prepare and propose a plan to the debtor's creditors and shareholders, or any subset of them.[32] The debtor may also submit such a request. If the request is granted and the restructuring expert is appointed, the debtor itself may not propose a plan as long as the restructuring expert remains in place. However, the debtor may submit a plan to the restructuring expert with the request that he propose it to the creditors and shareholders who are entitled to vote. Importantly, the role of the restructuring expert is limited to the development of a plan. The debtor remains in full control of its assets and the ordinary management of its business throughout the process.

25. The Dutch scheme legislation does not prescribe nor restrict the substantive content of the plan, thereby leaving a high degree of flexibility as to the commercial content of the plan. It may, for example, be used for the extension or reduction of debt, debt for equity swaps, the sale of assets or a controlled wind-down. The plan can bind all types of capital providers, including secured and preferential creditors and shareholders. The plan does not have to be offered to all capital providers. The debtor may choose to limit the plan to a subset of the capital providers. Creditors whose rights are not affected by the restructuring plan must be paid in full in accordance with the terms applicable to their claims.

26. The plan must contain all information that creditors and shareholders with voting rights, i.e. creditors and shareholders whose rights are to be affected by the plan, need to make an informed decision on the proposed restructuring before the vote on the plan takes place. Art. 375 (1) and (2) DBA contain a non-exhaustive list of the information that must always be included in or appended to the plan. The

29 Art. 370(1) DBA.

30 Art. 370(3) DBA

31 Explanatory Memorandum, p. 36.

32 In order to comply with art. 4(8) of the EU Directive on restructuring and insolvency, the Dutch government has recently suggested to require the debtor's consent for the court to order the appointment of a restructuring expert at the request of a creditor, shareholder or statutory works council or workplace representation where the debtor is an SME (see section DD, amending article 371 DBA, of the draft bill that recently was released for public consultation and seeks to transpose the directive into Dutch law (https://www.internetconsultatie.nl/herstructurering). Where the debtor is a legal entity, the shareholders may not unreasonably prevent the debtor's board from consenting to such a request. If the court finds that the board does not have a valid reason to withhold its consent, it may order that the court's decision in fact replaces the debtor's consent.

essence of these information requirements is that creditors and shareholders with voting rights must be able to: (i) understand what consequences the plan will have for them, (ii) estimate whether it is *necessary* to put the plan into effect to avert an imminent bankruptcy and whether the plan is *reasonable,* and (iii) learn how they can obtain further information and how and when they will be able to cast their vote on the plan. Creditors and shareholders with voting rights must be given sufficient opportunity to study the final draft of the plan. To this end, the debtor or the restructuring expert, if appointed, must make the plan available to creditors and shareholders with voting rights for a reasonable period of at least eight days before the vote, or inform them how it can be accessed.[33] Precisely how much time is needed will depend on the specific circumstances of the case.

27. Voting on the proposed plan takes place in classes.[34] Creditors and shareholders are placed in different classes if the rights they have in the liquidation of the debtor's assets in bankruptcy or the rights they are offered under the plan are so different that they are not in a similar position.[35] In any event, creditors or shareholders shall be placed in different classes if, upon enforcement against the debtor's assets they have a different ranking under general private law, any other law or instrument based on it or under an agreement (e.g. a subordination agreement). This entails that creditors with a statutory preference, creditors who benefit from retention of title, creditors with a security interest (such as a right of pledge or mortgage) and ordinary unsecured creditors should all be placed in different classes.[36]

28. Once confirmed by the court, the plan is binding on all creditors and shareholders who are affected by it, including creditors or shareholders who have not accepted the plan or haven't voted at all. An important condition for court confirmation of a plan is that the decision-making process and the content of the plan meet certain requirements, in particular that affected creditors and shareholders must have been properly informed and given the opportunity to express their opinion on the plan in a vote.

29. A restructuring plan that does not have the unanimous support of the affected creditors and shareholders can be confirmed by the court only if the state of the company is such that it can reasonably be assumed that it will not be able unable to continue to pay its debts as they fall due.

30. The vote on the plan must show that at least one class of creditors or shareholders[37] supports the plan with

33 Art. 381(1) DBA.
34 Unlike the English scheme of arrangement, there is no convening hearing before the plan may be put to vote of the affected parties. Also, unlike in US Chapter 11 proceedings, there is no compulsory prior approval of a disclosure statement.
35 Art. 374(1) DBA.
36 During the final stages of the parliamentary process in the House of Representatives, a number of amendments were adopted that impact class formation. Firstly, bifurcation is now explicitly provided for in respect of secured creditors. Secured creditors with a right of pledge or mortgage are only placed in a class of secured creditors for the secured portion of their claim (to be determined by the value that they would expectedly receive in the event of bankruptcy in accordance with the statutory ranking on the basis of their right of pledge or mortgage), unless this does not affect the distribution of the value that is realized under the plan. For the remainder of their claim they shall be placed in a class of ordinary unsecured creditors (art. 374(3) DBA). Secondly, a separate class was introduced for ordinary unsecured creditors that run a small business (as further defined in statute) and that have a claim based on the delivery of goods or services, or a claim based on tort, and under the plan are offered less than 20% of the nominal amount of their claims (art. 374(2) DBA). The purport of the amendment is that such small creditors should in principle receive at least 20% of the value of their claims. If that class votes against the plan, the court should only confirm the plan by way of a cross-class cram-down, if there is a compelling reason for not meeting the 20% threshold (see art. 384 (4)(a) DBA).
37 If the plan seeks to amend the rights of creditors whose claims would be expected to be at least partially satisfied in a liquidation of

EIRJ
European Insolvency and Restructuring Journal

the required majority. A class of creditors has accepted the plan if, within the class, a group of creditors that together represent two-thirds of the total amount of the claims of the creditors who cast a vote in that class has voted in favour.[38] A class of shareholders has accepted the plan if a group of shareholders that together represent two-thirds of the total amount of the issued capital of the shareholders who cast a vote in that class has voted in favour.[39] There is no head count requirement.

31. The plan must also be reasonable, in the sense that the creditors and shareholders involved in the plan will be better off, or in any event not worse off, if the plan is put into effect. This entails that, at the very least, dissenting creditors and shareholders will not be worse off under the plan than in case of a liquidation in bankruptcy. Furthermore, in cases where a cross-class cram-down is required, the value that can be retained or realized under the plan (the 'reorganisation value') must be distributed fairly amongst the creditors and shareholders. This entails that the reorganization value is, in principle,[40] distributed in accordance with the applicable priority rules. A limited "right to exit" must be provided to the creditors in a class that has not accepted the plan. Such creditors, with the exception of commercial secured lenders (notably banks),[41] must be able to opt for an immediate cash payment equal to the amount, if any, that they would have received in a bankruptcy of the debtor.

32. The Dutch scheme legislation further seeks to facilitate restructurings by introducing a number of supportive measures, such as a temporary discretionary stay,[42] protection of security rights in relation to new funding,[43] a mechanism to amend or reject onerous contracts,[44] the ability to continue essential contracts during a stay despite an existing default by providing security for the performance of new obligations,[45] the invalidation of ipso facto and change of control clauses[46] and the option for the court to make bespoke provisions in deviation from statutory provisions to facilitate tailor made solutions.[47]

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the debtor's assets in bankruptcy, the plan must be accepted by at least one such 'in the money' class (art. 383 (1) DBA).

38 Art. 381 (7) DBA.

39 Art. 381 (8) DBA.

40 The court may confirm a plan pursuant to which the reorganization value is not distributed in accordance with the applicable priority rules, if there is reasonable ground for such deviation and the dissenting class is not prejudiced as a result thereof (cf. article 384(4)(b) DBA).

41 Cf. article 384(4)(c) DBA, inserted by the House of Representatives. Commercial secured lenders that have been offered shares (or certificates of shares) under the plan must, however, have the option to choose for a distribution in another form than shares (article 384(4)(d) DBA, also introduced by the House of Representatives).

42 Art. 376 DBA. Unlike the stay in US Chapter 11 proceedings, the stay is not automatic, but ordered by the court upon a request by the debtor (or a court appointed restructuring expert) and it need not be a general stay that affects all creditors. The stay can be tailored to the needs of the individual case and may be targeted at one or more individual (groups of) creditors. Initially, the stay may not exceed four months. However, it may be extended by the court up to a maximum of eight months if the court finds that significant progress has been made in the preparations of the restructuring plan.

43 Art. 42a DBA, providing a safe harbour from transaction avoidance in relation to legal acts performed with the prior approval of the court.

44 Art. 373 DBA. The amendment or rejection of such contracts is not part of the restructuring plan itself. The debtor (or the court appointed restructuring expert) may propose to a counterparty that an agreement it has concluded with the debtor be amended or terminated. If the counterparty does not agree to the proposal, the debtor or restructuring expert may have the agreement prematurely terminated, provided that a plan is confirmed by the court and the court grants leave for this unilateral termination in the confirmation. A rejected contract is converted into a monetary damages claim that can be restructured under the terms of the plan. Employment contracts are excluded.

45 Art. 373(4) DBA.

46 Art. 373(3) DBA.

47 Art. 379 DBA.

2.3 Dual track: public and non-public plan procedure

33. An important and innovative element of the Dutch scheme legislation is that it provides for two procedures within which a restructuring plan can be put into place: (i) a public plan procedure and (ii) a non-public plan procedure.[48] The difference between the two types of procedures has to do with the publicity that is given to the process. That difference in publicity has an impact on the jurisdiction of the Dutch courts to sanction restructuring plans and the recognition and enforcement of restructuring plans outside the Netherlands.

34. In case a restructuring plan is put into place in a non-public plan procedure, no general publicity is given to the process. No public notice of the proceeding is published in the Dutch Central Insolvency Register (*Centraal Insolventieregister*), Commercial Register (*Handelsregister*) or the official Government Gazette (*Staatscourant*). All requests to the court are heard in the judge's chambers and not filed in the publicly available judicial records. Of course, creditors and shareholders that are to be affected by the plan must be given notice and must be involved in the process.

35. In contrast, if a restructuring plan is put into place in a public plan procedure, general publicity is given to the process by way of a notification in the Dutch Central Insolvency Register, the Commercial Register and the official Government Gazette. Requests to the court are heard in public.

36. A choice for either the public or the non-public plan procedure must be taken as soon as the court becomes involved in the process. At that moment, the court will have to determine whether it has jurisdiction in respect of the type of procedure that is opted for. Once a choice has been made, the process of putting a restructuring plan in place must be implemented entirely within the framework of the type of procedure that was opted for. Once underway, it is not possible to shift from the non-public to the public plan procedure or vice versa (although the latter in practical terms does not seem to be an option anyway).

37. One of the factors that will drive the choice for the use of either the public or the non-public plan procedure is the extent to which publicity that is given to the financial difficulties of the company will harm its business. The non-public plan procedure in that respect offers companies the opportunity to negotiate a restructuring plan with key stakeholders more or less behind closed doors. But also the applicable regime of jurisdiction, choice of law, recognition and enforcement is a factor that will be taken into consideration. The Dutch government takes the view that the public plan procedure falls within the ambit of the EU Insolvency Regulation.[49] It has been notified to the European Commission with a request that the procedure be included in Annex A and the European Commission has recently published a proposal to amend Annex A to include the Dutch public plan procedure.[50] Once listed in Annex

48 Art. 369(6) DBA. The non-public plan procedure is sometimes referred to as 'confidential plan procedure'. This may create the false impression that the process is conducted in secret without the knowledge and involvement of the stakeholders that are to be affected by the plan. Stakeholders that are to be affected by the plan are always notified of and involved in the plan procedure.

49 Kamerstukken II 2018/19, 35 249, 3, p. 6/7 and 32.

50 Proposal for a Regulation of the European Parliament and of the Council replacing Annexes A and B to Regulation (EU) 2015/848 on

A, the EU Insolvency Regulation will apply to the public plan procedure, which would limit the Dutch court's jurisdiction over companies with a COMI in another Member State of the EU, but also provide automatic recognition of restructuring plans within the EU.[51] In contrast, the non-public plan procedure cannot be placed on Annex A because of the lack of publicity required by the EU Insolvency Regulation, and would thus operate outside the EU Insolvency Regulation. As the non-public plan procedure is substantively identical to the public plan procedure, with the exception of the publicity required by the EU Insolvency Regulation, it is in fact an insolvency proceeding that is excluded from the scope of application of the Brussels I Regulation.[52] Consequently, jurisdiction in relation to the non-public plan procedure will be governed by Dutch law and recognition in other jurisdictions will be governed by domestic rules on private international law.

38. Before giving a decision on requests submitted during the preparation of the plan, the court must first establish whether it has jurisdiction to hear those requests. This is determined in the non-public plan procedure on the basis of Article 3 of the Dutch Code of Civil Procedure ("DCCP"). In the public plan procedure jurisdiction is determined by whether the debtor's COMI is in one of the EU Member States (other than Denmark). If that is the case, the jurisdiction of the Dutch court can be determined on the basis of Article 3 of the EU Insolvency Regulation. Where the debtor's COMI is outside the EU or in Denmark, the jurisdiction of the Dutch court in respect of the public plan procedure must also be determined on the basis of Article 3 DCCP.[53]

39. Insofar as relevant here, Article 3 DCCP provides that the Dutch court has jurisdiction in cases that are instituted by the submission of a request if:

    a. the requesting party or, in case there are multiple requesting parties, one of them, or one of the interested parties named in the request is domiciled or has its habitual residence in the Netherlands, or

    b. the case otherwise has sufficient connection with the jurisdiction of the Netherlands.

40. The first ground (referred to under a above) entails that Dutch courts will have jurisdiction if the company proposing the plan has its domicile, i.e. corporate seat, in the Netherlands. In addition, if multiple companies propose a joint restructuring plan, the Dutch courts will have jurisdiction in respect of all companies, if at least one of them is domiciled in the Netherlands. Further, the Dutch courts will have jurisdiction even if none of the companies proposing the plan are domiciled in the Netherlands as long as one of the creditors or shareholders to be affected by the plan – the 'interested parties

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insolvency proceedings, Brussels 11 May 2021, COM(2021) 231 final. The proposal also includes new types of insolvency proceedings or insolvency practitioners in Italy, Lithuania, Cyprus and Poland.

51 The EU Insolvency Regulation also presents a number of obstacles to restructurings., e.g. art. 8 and 11 EIR. Pursuant to art. 8 EIR the rights of secured creditors with security rights over assets situated in other Member States are not affected (arguably rendering a stay and the adjustment of debt in accordance with the restructuring plan ineffective in relation to creditors that can invoke the protection of art. 8 EIR). Whereas in general the effects on current contracts to which the debtor is a party are governed by the law of the Member State where the proceedings have been opened (art. 7(2)(e) EIR), this is different in respect to contracts that relate to the use or acquisition of immoveable property. Pursuant to art. 11 EIR, the effects of the restructuring on such contracts are governed exclusively by the law of the Member State within the territory of which the immoveable property is situated. See P.M. Veder, Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement, Tijdschrift Financiering, Zekerheden en Insolventierechtpraktijk (FIP) 2019/219, par. 3.2.

52 See sec. 1, par. 13, above, and n. 19.

53 Art. 369 (7) DBA.

named in the request' – is domiciled or has its habitual residence in the Netherlands.

41. The latter ground (referred to under b above), bears some resemblance to the 'sufficient connection' test that courts in England and Wales apply when determining their jurisdiction in relation to schemes of arrangement under part 26 of the Companies Act 2006. The explanatory memorandum to the bill of the Dutch scheme provides guidance in respect of the circumstances which, in the absence of a debtor company or affected stakeholder with domicile or habitual residence in the Netherlands, (individually) constitute a sufficient connection with the jurisdiction of the Netherlands.[54] These circumstances include (but are not limited to):

(i) the debtor proposing the plan – or, in case of multiple group companies proposing a plan, at least one of those group companies – has its COMI or an establishment in the Netherlands;

(ii) the debtor that proposes the plan has substantial assets in the Netherlands;

(iii) a substantial part of the debts restructured under the plan stem from obligations that are governed by Dutch law or where the Dutch court was the chosen forum;

(iv) a substantial part of the group of which the debtor forms a part consists of companies that are domiciled in the Netherlands; or

(v) the debtor is liable for debts of another debtor over which the Dutch court has jurisdiction.

2.4 Restructuring of group guarantees

42. Unlike the EU Restructuring Directive, which does not include a mechanism for the amendment or release of third party guarantees in the context of a group restructuring, the Dutch scheme does include the option to release or amend guarantees provided by companies in the same group as the company that proposes the plan

43. The rule is quite different from that applicable in schemes that do not involve group restructurings. The general approach in a Dutch scheme is that guarantees that have been provided by others than the company that is subject to a restructuring, are not affected by a sanctioned restructuring plan.[55] Where a creditor's right of action is amended as a consequence of a plan, the creditor retains the right to take action for payment of its original claim, in the manner stipulated and at the time agreed before the plan was confirmed, against a third party (that may include a guarantor or a joint debtor) that is liable for a debt of the debtor or has provided any form of security for payment of that debt. The creditor may, for example, do so if the plan resulted in a partial waiver of its claim, if the claim is not paid at the time originally agreed or if the form of payment is different (for example, in a debt for equity swap). This is in line with Article 160 DBA, which contains the same rule for plans in bankruptcy proceedings. The provision ensures that guarantees are not undermined by the confirmation of a plan. Without this provision, changes to the original claim under the plan would frequently result in changes to rights under a surety or another form of joint liability or security, which would pose a serious threat to the

54 Kamerstukken II 2018/19, 35 249, 3, p. 32.

55 Art. 370 (2) DBA.

value of such guarantees given to creditors.

44. However, a specific provision has been included in the Dutch scheme that allows for the restructuring of guarantees that have been provided by group companies. Article 372 DBA provides that a plan may amend the rights of creditors against legal entities that form a group[56] with the debtor. It seeks to address cases in which the company that proposes a plan is part of an economic and organizational unit with other legal entities that are jointly liable for or have guaranteed the liabilities of that company, i.e. group guarantees, and these guarantees may be restructured without each liable entity proposing its own plan.[57] The provision does not allow a restructuring plan to include the amendment or release of any debts of such group companies other than those to which the guarantees relate.

45. If the following four conditions are fulfilled, the plan can also provide for amendment of the rights of creditors against a guarantor:

   a. the rights of those creditors against the relevant legal entities entail payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;

   b. these legal entities, like the principal debtor, are in a state such that it is reasonable to assume that they cannot continue to pay their debts;

   c. the relevant legal entities have approved the proposed amendment or the plan is proposed by a restructuring expert; and

   d. the court would have jurisdiction if these legal entities were to propose their own restructuring plan and submit a request for confirmation of such a plan.

46. In determining the jurisdiction of the court as referred to under d above, the type of procedure in which the plan is proposed is decisive. This, for example, means that, in case of a plan proposed in a public plan procedure, the jurisdiction in respect of a guarantor/co-obligor with COMI in an EU Member State (with the exception of Denmark) must be determined in accordance with art. 3 of the EU Insolvency Regulation. If, however, the guarantor/co-obligor has its COMI outside the EU (or in Denmark), jurisdiction may be determined on the basis of art. 3 DCCP. In case of a non-public plan procedure, the basis for establishing the jurisdiction of the Dutch courts is always to be found in art. 3 DCCP. As we discussed in section 2.3 above, art. 3 DCCP provides the Dutch courts with a quite flexible basis for assuming jurisdiction.

47. In section 6.2 below, we will take a closer look at some of elements of the complex jurisdictional matrix that the release of group guarantees under the Dutch scheme may give rise to. During the legislative process little to no attention was paid to the operation of the release of group guarantees in a cross-border context. In particular, the condition that a plan may only release guarantees of group companies that would be subject to the jurisdiction of the court had they proposed their own restructuring plan may raise issues when trying to develop a group solution in a cross-border context. It will often be the case that members of a group of

56 As referred to in art. 2:24b Dutch Civil Code.

57 Art. 372 DBA permits a company to include in the plan the obligations of group companies stemming from guarantees only if those group companies have not already proposed their own restructuring plan for the obligations in question.

companies do not all meet the same jurisdictional criteria. Achieving a group solution may particularly raise issues in the case of plans offered in a public plan procedure because such a plan cannot be used to release or amend guarantees of group companies that have their COMI in some other EU Member State (with the exception of Denmark). The non-public plan procedure is not very problematic in that respect, as the jurisdictional rules of art. 3 DCCP are very flexible and the Dutch courts may assume jurisdiction in a wide variety of cases.[58]

3. The Model Law Approach to Recognition and Enforcement

48. The UNICTRAL Model Law on Cross Border Insolvency is the primary international instrument relating to multi-national insolvency matters. Unlike a treaty or convention, the Model Law is designed to achieve international uniformity by having multiple jurisdictions enact compatible provisions as part of their domestic insolvency laws. While this approach makes it easier to achieve widespread adoption of an international instrument, the level of uniformity achieved may be less than with a treaty or convention because of local deviations from the model text.[59] This approach has allowed the Model Law to achieve a wide level of international acceptance. It has been adopted in some form in 49 States (for a total of 53 jurisdictions) as of mid-2021.[60]

49. The goals of the Model Law are modest. There is no attempt to harmonize the substantive insolvency law of different jurisdictions.[61] Instead, the Model Law is designed to provide a legal framework to permit cooperation and coordination among multiple jurisdictions when a proceeding pending in one jurisdiction requires assistance in another. The primary features of the Model Law for present purposes are the recognition and relief provisions. The Model Law provides a procedure whereby the local court can recognize the representative of a pending foreign insolvency proceeding. Recognition is little more than a judicial declaration that the applicant is the proper representative of an entity subject to a qualifying insolvency proceeding in another jurisdiction. Some limited relief flows from the act of recognition, but once recognized, the representative may seek a wide range of relief from the recognizing court.

50. The Model Law uses some of the same terminology and incorporates concepts similar to the other principal international insolvency instrument, the EU Insolvency Regulation. Both focus on a single legal entity[62] with cross-border interests and both attempt to identify a single jurisdiction as the entity's centre of main interest. The COMI is of critical importance in the EU Insolvency Regulation because it is used to determine jurisdiction and, to a

58 See above, sec. 2.3.

59 See the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency [hereinafter "Interpretation Guide"], par. 20. While the Interpretation Guide has no official status as part of the US law, the courts frequently rely upon it and legislative history to chapter 15 indicates that it should be considered in interpreting chapter 15. See H.R. Rep. No. 109-31, pt. 1, at 105-06 n. 101 (2005).

60 https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited 5 October 2021).

61 See Interpretation Guide, par. 3 (p. 19).

62 Unlike the original EU Insolvency Regulation (1346/2000), the 2015 recast regulation explicitly recognizes that an entity might be part of an enterprise group and seeks to address group issues through rules of cooperation and coordination of proceedings pending in respect of individual group members with the option of using a group coordination proceeding (EU Insolvency Regulation, Chapter V ('Insolvency Proceedings of Members of a Group of Companies')).

large extent, the applicable law in addition to giving automatic cross-border effect to most outcomes of the COMI-jurisdiction proceeding.[63] In contrast, the Model Law provides no jurisdictional or choice of law rules and no foreign jurisdiction outcomes have automatic effect in the Model Law forum jurisdiction. The COMI is, nonetheless, important under the Model Law. Certain outcomes, such as a stay and the suspension of local asset transfers, flow automatically from the recognition of a proceeding as a "foreign main proceeding."[64] In addition, several provisions of the Model Law provide greater deference to a proceeding pending in the COMI than to proceedings pending elsewhere. For example, where multiple proceedings are recognized, preference is given to the main proceeding.[65]

51. In addition to a main proceeding pending in the entity's COMI, there are two other classes of proceedings under the Model Law. Insolvency proceedings pending in a non-COMI jurisdiction where the entity has an establishment[66] are designated as "foreign non-main proceedings" by the Model Law.[67] While there is no automatic relief, a foreign non-main proceeding can be recognized and relief can be granted that is almost identical to that available for a main proceeding.

52. The third type of proceeding is the residual class. This would include proceedings that fail to meet one or more of the requirements of the foreign main and foreign non-main proceeding definitions. Such proceedings have no status under the Model Law.[68] Examples would include a secured creditor-driven liquidation proceeding that is not collective in nature.[69] However, an important group of collective insolvency proceedings also falls into this category. These are insolvency proceedings pending in a jurisdiction that lacks an "establishment." The similar "establishment" limitation in the EU Insolvency Regulation does not present a significant problem because the main proceeding encompasses assets that may be located in such a jurisdiction. It does, however, present problems under the Model Law. For example, where important assets or the entity's registered office[70] is located in a jurisdiction lacking an establishment, the text of the Model Law provides no route to recognize or assist a legitimate and value-preserving proceeding pending in such a locale.

53. While the Model Law permits cooperation with a foreign insolvency proceeding, the relief granted to the foreign representative is largely discretionary.[71] There are several

63 See, for example, art. 3, 7, 19, 20 EIR.
64 Model Law art. 20(1); see also Interpretation Guide, par. 176 (p. 83).
65 See Interpretation Guide, par. 234 (p. 105).
66 The Model Law's definition of "establishment" was inspired by the EU Insolvency Regulation definition and uses similar wording, except that the Model Law requires that the economic activity be carried on in the forum "with human means and goods or services" whereas the EU Insolvency Regulation uses the phrasing "with human means and assets". Compare Model Law art. 2(f) with art. 2(10) EIR. The US version in chapter 15 requires merely nontransitory economic activity and deletes the "with human means and assets/goods and services" qualification. See 11 U.S.C. § 1502(2).
67 The EU Insolvency Regulation defines a similar category of insolvency proceedings as "territorial proceedings". Where main insolvency proceedings have been opened in the Member State of the debtor's COMI, such territorial proceedings are referred to as secondary insolvency proceedings, see art. 3(3) EIR. Territorial insolvency proceedings may only be opened prior to the opening of main insolvency proceedings under the conditions referred to in art. 3(4) EIR.
68 See Interpretation Guide, par. 64 (p. 38).
69 See Interpretation Guide, par. 69 (p. 39).
70 A "letterbox" company may be established under the laws of a jurisdiction where it has no presence other than its registered office. Local law may require a local insolvency proceeding even though that jurisdiction is neither the entity's COMI nor the location of an establishment.
71 See Interpretation Guide, par. 176 (p. 83).

features of the Model Law that operate as limitations on recognition and relief. First, both recognition[72] and assistance are limited by local public policy considerations. The public policy exception appears in article 6 of the Model Law and permits the local court to decline to take any action that is "manifestly contrary" to the State's public policy.[73] This exception should apply only in exceptional circumstances involving matters of fundamental importance to the State,[74] but, in those rare cases, it establishes an overarching limitation on the Model Law.

54. Several other limitations apply to the relief that might be granted. Although the Model Law authorizes a very broad range of potential relief, only the moratorium and suspension that flow from recognition of a foreign main proceeding are mandatory.[75] Article 21 is the primary source of authority for other types of assistance.[76] The terms of Article 21 authorizing relief are phrased in a permissive fashion and the relief available is discretionary.[77] Unlike article 20, article 21 reads "the court *may* … grant any *appropriate* relief …."[78] In addition to the discretion given to the court, the Model Law imposes a few other limitations on relief. Article 21 itself imposes two such limitations. In cases where assets are entrusted to the foreign representative for distribution, the court must be satisfied that the interests of local creditors are adequately protected.[79] And, if a proceeding is recognized as a foreign non-main proceeding, Article 21 cautions that relief should reflect the more limited deference given to non-main proceedings.[80]

55. Finally, Article 22 confirms the flexible nature of Model Law assistance. Not only does article 22 authorize the court to impose "appropriate conditions" on the relief granted,[81] but it also clarifies that the decision whether to grant relief requires balancing the interests of all affected parties.[82]

56. Because adoption of the Model Law is designed to enhance cross-border cooperation, the relief authorized by the Model Law supplements, but does not replace, whatever assistance might be available to a foreign representative under other local law. This principle is embodied in article 7, which operates as a savings clause by authorizing the court to provide assistance to the foreign representative under local laws other than the Model Law.[83]

72 See Interpretation Guide, par. 150 (p. 73).
73 Model Law art. 6 states, "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."
74 See Interpretation Guide, par. 103-104 (p. 52).
75 However, even though the stay and suspension flow automatically from recognition of a foreign main proceeding, the Model Law recognizes that they may be modified or terminated if necessary to protect the legitimate interests of a party in interest. See Interpretation Guide, par. 178 (p. 83).
76 While Article 19 authorizes similar assistance on an interim basis, the limitations discussed in the text also apply to such preliminary relief.
77 Interpretation Guide, par. 176 (p. 83): "[R]elief under articles 19 and 21 is discretionary." See also Interpretation Guide, par. 189 (p. 87).
78 Model Law art. 21(1) (emphasis added).
79 Model Law art. 21(2).
80 Model Law art. 21(3) states, "In granting relief under this article to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding."; see Interpretation Guide par. 193 (p. 88). A similar restriction appears in Model Law art. 29(c).
81 Model Law art. 22(2).
82 As the Interpretation Guide (par. 196 (p. 90)) explains: "The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. This balance is essential to achieve the objectives of cross-border insolvency legislation."
83 Model Law art. 7. See Interpretation Guide, par. 105 (p. 53).

EIRJ European Insolvency and Restructuring Journal

4. US Recognition of Dutch Schemes

4.1 US Enforcement of Foreign Insolvency Orders

57. The Dutch scheme incorporates many useful modern restructuring concepts. In addition, its very relaxed jurisdictional rules and innovative mechanisms for restructuring group guarantees may make it a useful tool for resolving the financial problems of multi-national enterprise groups. That will depend, in part, on the degree to which the plans approved by a Dutch court can be enforced in other major commercial jurisdictions. As noted at the outset, the US is a critical jurisdiction where such plans may need to be enforced. Although the Dutch scheme raises some interesting issues that may present problems in some situations, it is likely that plans resulting from both the public and non-public plan proceedings will be recognized and enforced by US courts.

58. The US courts historically have been willing to assist with foreign insolvency proceedings and to enforce foreign insolvency orders and foreign restructuring plans. The US courts were authorized to do so by former section 304 of the Bankruptcy Code, which set forth a multi-factor test for determining whether assistance should be provided to a foreign proceeding.[84] The standard for relief was very liberal, with the courts "guided by what will best assure an economical and expeditious administration of such estate."[85] While just treatment, lack of prejudice to US claimants, and distribution substantially in accordance with US bankruptcy law were important factors, the decision to assist a foreign insolvency proceeding turned largely on "comity" – a principle of respect for other sovereigns.[86]

59. In 2005, the US replaced former section 304 with the Model Law.[87] The US version of the Model Law, chapter 15 of its Bankruptcy Code, largely follows the Model Law, but deviates from it in two ways that affect the analysis of Dutch schemes. The first deviation expands the types of proceedings that can be recognized. The second expands the scope of relief that can be granted following recognition.

60. First, chapter 15 adopts a broader definition of "foreign proceeding" than the Model Law. The Model Law limits recognition to proceedings "pursuant to a law relating to insolvency".[88] Chapter 15's definition expands this to include proceedings under laws relating to the "adjustment of debt" as well as those relating to "insolvency."[89] This change clarifies that chapter 15 recognition extends to proceedings like the English scheme that are used to address financial difficulty but are not technically "insolvency" laws.[90]

61. The second deviation expands the assistance available to the foreign representative by converting article 7 of the Model Law from a passive "savings clause" into an active tool for enforcing foreign insolvency orders. In the Model

84 11 U.S.C. § 304 (repealed), Pub. L. 95-598, 92 Stat. 2560.
85 11 U.S.C. § 304(c) (repealed).
86 The early US Supreme Court case of Hilton v. Guyot, 159 U.S. 113 (1895), adopted the comity approach to the enforcement of foreign court orders.
87 Pub.L. 109-8, Title VIII, § 801 et. seq., 119 Stat. 135 (2005); see also, H.R. REP. 109-31(I), 109, 2005 U.S.C.C.A.N. 88, 172 (noting repeal of former section 304 and incorporation of its standards into section 1507).
88 Model Law art. 2(a).
89 See 11 U.S.C. § 101(23).
90 As the House Report accompanying the legislation states, "The new definitions are nearly identical to those contained in the Model Law but add to the phrase 'under a law relating to insolvency' the words 'or debt adjustment.' This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24)." H.R. Rep. 109-31(I), 118, 2005 U.S.C.C.A.N. 88, 180.

Law, article 7 merely provides that adoption of the Model Law does not prevent the use of other domestic laws that authorize the courts to provide assistance to a foreign representative. Article 7 works as intended if the Model Law is simply added to a state's existing law, because any pre-existing provisions that authorized relief before adoption of the Model Law would continue to function fully after adoption. The US chose, instead, to consolidate all provisions relating to cross-border relief into chapter 15 and repeal the pre-existing section 304.[91] Thus, in order to give full effect to the "savings clause" concept of article 7, it was necessary to add to article 7 an express grant of authority to enforce foreign insolvency orders under the standards similar to those established under former section 304.[92] While there is some doubt whether the Model Law authorizes the enforcement of foreign insolvency orders or the provisions of a foreign scheme,[93] the US version of article 7 clearly permits the enforcement of foreign insolvency orders by US courts.

4.2 Insolvency and Public Notice as Prerequisites for Recognition

62. The liberality of the US approach leaves little doubt that both public and non-public Dutch plan proceedings can be recognized under chapter 15. Since the Dutch scheme is based in part on the English scheme, the US decisions involving recognition of English schemes provide strong support for recognition of Dutch schemes.

63. As noted above, the US adopted a nonuniform definition of foreign proceeding that facilitates recognition of English schemes. Consequently, the US courts have had no difficulty including English schemes in the types of proceedings that can be recognized. As noted in the recent *Avanti Communications* decision, "Schemes of arrangement under UK law have routinely been recognized as foreign proceedings in chapter 15 cases."[94] The *Avanti Communications* opinion lists more than a dozen US cases recognizing English schemes under chapter 15.[95] While many recognition opinions rely upon conclusory declarations that English schemes meet the foreign proceedings definition, the *Avanti* opinion spells out the analysis of each required element for recognition under chapter 15 and provides an excellent roadmap for analyzing Dutch schemes. That analysis easily pulls Dutch schemes into the scope of

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91 See H.R. Rep. 109-31(I), 109, 2005 U.S.C.C.A.N. 88, 172 (discussing incorporation of prior section 304 standards into section 1507).

92 Compare Model Law art. 7 with 11 U.S.C. § 1507; see H.R. Rep., at 109.

93 See, e.g., Sandeep Gopalan & Michael Guihot, Recognition and Enforcement in CrossBorder Insolvency Law: A Proposal for Judicial Gap-Filling, 48 Vand. J. Transnat'l L. 1225 (2015), see also, Lia Metreveli, Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt Uncitral's Recent Amendment to Its Model Law on Cross-Border Insolvency, 51 Colum. J.L. & Soc. Probs. 315, 327 (2017).

94 In re Avanti Communications Group, PLC., 582 B.R. 603, 613 (Bankr. S.D. N.Y. 2018).

95 Most recognition decisions do not appear in published case report systems and thus it is difficult to determine how many English schemes have been recognized under chapter 15. The Avanti list provides an indication of how routine recognition of English schemes has become. Avanti lists the following decisions recognizing English schemes: "In re Metinvest B.V., No. 17–10130–LSS (Bankr. D. Del. Feb. 8, 2017); In re DTK Finance (plc), No. 16–13521–shl (Bankr. S.D.N.Y. Jan. 18, 2017); In re Metinvest B.V., No. 16– 11424–LSS (Bankr. D. Del. Jun. 30, 2016); In re Abengoa Concessions Investments Limited, No. 16–12590–kjc (Bankr. D. Del. Dec. 6, 2016); In re YH Limited, No. 16–12262 (Bankr. S.D.N.Y. Sep. 8, 2016); In re Metinvest B.V., No. 16–10105–LSS (Bankr. D. Del. Jan. 29, 2016); In re OIC Run–Off Limited, No. 15–13054–scc (Bankr. S.D.N.Y. Jan. 11, 2016); In re Codere Finance (UK) Limited, No. 15–13017–jig (Bankr. S.D.N.Y. Dec. 22, 2015); In re Towergate Finance, plc, Case No. 15–10509 (SMB) (Bankr. S.D.N.Y. Mar. 27, 2015); In re New World Resources N.V., Case No. 14– 12226 (SMB) (Bankr. S.D.N.Y. Sept. 9, 2014); In re Zlomrex International Finance S.A., No. 13–14138 (Bankr. S.D.N.Y. Jan. 31, 2014); In re Magyar Telecom B.V., No 13–13508, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013); In re Tokio Marine Europe Insurance Ltd., No. 11–13420 (MG) (Bankr. S.D.N.Y. Sept. 08, 2011); In re Highlands Ins. Co. (UK), No. 07–13970 (MG) (Bankr. S.D.N.Y. Aug. 18, 2009); In re Castle Holdco 4, Ltd., No. 09–11761 (REG) (Bankr. S.D.N.Y. May 7, 2009)." Avanti, 582 B.R. at 613.

EIRJ European Insolvency and Restructuring Journal

proceedings capable of recognition under chapter 15.

64. Before analyzing the detailed requirements of chapter 15, it is important to note the differences between the coverage of the EU Insolvency Regulation and chapter 15. The Dutch public plan proceeding will be listed in Annex A of the EU Insolvency Regulation and will therefore qualify as an "insolvency proceeding" under the EU Insolvency Regulation.[96] Thus, readers familiar with the EU Insolvency Regulation would expect that a Dutch public plan proceeding can be recognized under the Model Law and chapter 15. The Dutch non-public plan proceeding will not be listed in Annex A and will not qualify as an "insolvency proceeding" under the EU Insolvency Regulation.[97] That, however, will not prevent it from qualifying for recognition under the Model Law or chapter 15. In this regard, treatment of the non-public plan proceeding is similar to the treatment of the English scheme. Like the Dutch non-public scheme, the English scheme was not listed in Annex A and did not qualify an "insolvency proceeding" under the EU Insolvency Regulation. Yet, as discussed above, the US courts regularly recognize English schemes under chapter 15.

65. Confusion may arise because both the Model Law and the EU Insolvency Regulation use similar language to describe the types of proceedings they cover. Under the Model Law, recognition is limited to proceedings "under a law relating to insolvency." Similarly, the EU Insolvency Regulation applies only to proceedings "based on laws relating to insolvency."[98] However, unlike the EU Insolvency Regulation, where the fact that the proceeding is listed in Annex A is conclusive on the question whether a particular proceeding constitutes an "insolvency proceeding" that falls within the scope of the regulation,[99] the determination under the Model Law requires scrutiny of the underlying nature of the proceeding in each single case.

66. Traditionally, insolvency has been a central feature of bankruptcy laws, with many jurisdictions requiring that entities meet an insolvency test in order to institute a proceeding. Indeed, the EU Directive on restructuring and insolvency is a response to this tradition and is designed to force Member States to establish proceedings that can be utilized before a state of insolvency has been reached. However, the EU Directive on restructuring and insolvency retains the focus on insolvency because the systems it mandates are not simply procedures that can be used regardless of solvency, but rather systems designed to prevent an insolvency that is imminent.[100] Unlike the English scheme, the Dutch scheme is a process that can be used only in situations involving imminent insolvency.[101] This continuing focus on insolvency should allow new European pre-insolvency laws, like the Dutch scheme, to qualify as laws relating to insolvency under both the Model Law and the EU Insolvency

96 See sec. 2.3 above.
97 See sec. 2.3 above.
98 Art. 1(1) EIR. See also Recitals, par. 16 ("This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency.").
99 Art. 1(1) and 2(4) EIR. See also Recitals, par. 9.
100 See art. 4(1) EU Directive on restructuring and insolvency ("Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability (…)").
101 The Dutch scheme can be accessed if the state of the company is such that it can reasonably be assumed that it will become unable to pay its debts as they fall due (art. 370(1) DBA).

Regulation.[102] And the Dutch non-public proceeding could be recognized as a foreign proceeding under the Model Law even though the non-public proceeding is not an insolvency proceeding under the EU Insolvency Regulation because it is not listed in Annex A. Under the even more liberal US approach, both types of Dutch schemes should be recognized under chapter 15. Even if the Dutch scheme were not limited to situations of imminent insolvency, it would in any event satisfy the more relaxed chapter 15 standard that includes laws relating to the adjustment of debt, which the Dutch scheme legislation clearly is.

67. A second question is whether the lack of public notice and public scrutiny in the non-public plan proceeding would prevent its recognition under chapter 15. This feature excludes the Dutch non-public scheme from the scope of the EU Insolvency Regulation, because the EU Insolvency Regulation requires that insolvency proceedings subject to it be public proceedings with notice published in an insolvency register.[103] The same is not true of the Model Law. Unlike the EU Insolvency Regulation, neither the Model Law nor chapter 15 require that foreign proceedings be subject to public notice in order to be recognized.

68. While the confidential nature of the non-public plan proceeding will not, by itself, prevent recognition in the US under chapter 15, notice to creditors and an opportunity for affected creditors to participate in the proceedings is a factor that might be considered as part of the recognition process. For example, at the extreme, lack of notice and an opportunity to participate may justify a refusal to recognize the proceeding under the public policy exception.[104] In addition, notice to creditors is one of the factors considered in determining whether the proceeding is sufficiently "collective" to qualify as a foreign proceeding.[105] Since the non-public Dutch scheme requires notice to affected creditors and permits them to participate in the process,[106] neither of these issues should prevent recognition.

4.3 Statutory Requirements for Recognition

4.3.1 In General

69. The statutory requirements for recognition under chapter 15 should easily be satisfied by both types of Dutch schemes. Prior to the adoption of chapter 15, recognition of foreign insolvency proceedings would have been based on the flexible concept of comity, which was the touchstone of the American approach to foreign civil judicial actions of all types. The adoption of chapter 15 is viewed as having changed that in the bankruptcy area. While comity had been the guiding principle both for recognition of a foreign bankruptcy case and for the relief granted, the prevailing view under chapter 15 is that specific statutory factors have replaced comity in the

102 With respect to the characterization of the Dutch scheme and the determination whether it falls within the scope of the EU Insolvency Regulation and the Brussels I Regulation, see, inter alia, P.M. Veder, Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement, Tijdschrift Financiering, Zekerheden en Insolventierechtpraktijk (FIP) 2019/219.
103 See art. 1(1) and art. 24 EIR.
104 See sec. 6.3, par. 146 et seq., below.
105 See sec. 4.3.3.4.3, par. 95 et seq., below.
106 See sec. 2.2 above. The plan must be made available to creditors and shareholders with voting rights so that they are able to make an informed decision as to how to vote. Creditors and shareholders with voting rights are the creditors and shareholders whose rights are amended under the plan (art. 381(3) DBA). Furthermore, a court ordered (general or limited) stay can only be effective in relation to parties that were notified of the stay or are aware that a restructuring plan is being prepared (art. 376(2)(a) DBA).

EIRJ European Insolvency and Restructuring Journal

recognition phase. Thus, the US courts can no longer rely upon general comity principles in determining whether recognition should be granted. Instead, they should apply the statutory factors, without exercising discretion.[107]

70. There are seven statutory elements that must be satisfied for a foreign case to qualify as a type of proceeding that can be recognized under chapter 15. In addition, US case authority imposes two additional conditions: (i) an eligibility requirement, and (ii) the requirement that the debtor's COMI or an establishment be in the jurisdiction where the foreign case is pending.

4.3.2 Property in the US

71. The eligibility limitation is drawn not from chapter 15, but from the general US eligibility requirements for filing a domestic bankruptcy case. Although those requirements probably should not apply to a petition for recognition under chapter 15,[108] a major US appellate level court has imposed them.[109] Thus, a business entity that is the subject of the foreign proceeding for which recognition is sought must have a domicile, a place of business, or property located in the US.[110] Fortunately, the "property in the US" requirement is so easy to satisfy that this condition is not an impediment to recognition.[111] In most cases where recognition under chapter 15 is important, the debtor likely will have a place of business or significant assets and interests in the US. However, the "property" definition is so broad that even the debtor's intangible contract rights under a debt instrument governed by US law are sufficient.[112] Further, a retainer deposited with the US lawyer hired to seek recognition is also sufficient, even though the funds were deposited for the purpose of obtaining recognition.[113] In the enterprise group context, recognition will likely be sought to enforce the multi-debtor elements of the scheme such as the release of all affiliates from a group debt obligation. Inclusion of intangible contract rights and lawyer retainers in the property definition will permit chapter 15 recognition of all enterprise group members, even those with no other US connection.[114]

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107 As the court in In re ABC Learning Centres Ltd., 728 F.3d 301, 306 (3d Cir. 2013), stated: "Section 304 relief was largely discretionary." See In re Treco, 240 F.3d 148, 155 (2d Cir.2001) (explaining that Section 304 "by its terms requires an exercise of judicial discretion"). Chapter 15 improved predictability by mandating recognition when a foreign proceeding meets Section 1517 recognition requirements. Leif M. Clark, Ancillary and Other Cross–Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code 10–11 (2008). "Mandatory recognition when an insolvency proceeding meets the criteria fosters comity and predictability, and benefits bankruptcy proceedings in the United States that seek to administer property located in foreign countries that have adopted the Model Law."

108 See, e.g., Collier on Bankruptcy 1517.01 at 1517-3 (16th ed. 2019) (stating "The ruling in Barnet clearly misconstrues the intent of the statute ….").

109 Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet), 737 F.3d 238, 247 (2d Cir. 2013).

110 Section 109(a) of the Bankruptcy Code reads, "Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under this title." 11 U.S.C. § 109(a). Only a natural person can "reside" in the United States so a business entity would need to satisfy one of the other three options. See generally, Daniel J. Glosband & Jay L. Westbrook, Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?, 24 Int'l Insolv. Rev. 28 (2015).

111 See Note, All's Fair in Love and Bankruptcy - Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts, 12 Am. Bankr. Inst. L. Rev. 535 (2004).

112 In re PT Bakrie Telecom Tbk, 601 B.R. 707, 715 (Bankr. S.D.N.Y. 2019); In re Berau Capital Resources Pte Ltd., 540 B.R. 80, 83–84 (Bankr. S.D.N.Y. 2015).

113 PT Bakrie, 601 B.R. at 714 – 16 (rejecting inquiry into debtor's purpose); see also In re B.C.I. Finances Pty Ltd., 583 B.R. 288, 293 - 94 (Bankr. S.D.N.Y. 2018) (rejecting "manufactured eligibility" argument).

114 See In re Global Ocean Carriers, Ltd., 251 B.R. 31 (Bankr. D. Del. 2000) (three of the sixteen related corporate entities had no other US connection).

4.3.3 "Foreign Proceeding" Requirements

4.3.3.1 In General

72. The definition of "foreign proceeding" imposes several additional requirements. While the US definition of foreign proceeding deviates from the Model Law by adding "adjustment of debt" to the types of laws under which the foreign case may be conducted, it otherwise tracks the Model Law's definition.[115] As the court in *ABC Learning Centres* explained: "This definition can be broken down into seven elements: (i) a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation."[116]

73. Dutch plan proceedings easily satisfy most of these criteria. Clearly a Dutch plan proceeding is a proceeding that, from a US perspective, is pending in a foreign country. The remaining factors require more analysis but, with the exception of the collectivity requirement, also are easily satisfied. The collectivity prong presents more of a challenge. If that requirement is interpreted strictly, some Dutch schemes might not qualify for recognition. The US courts, however, have adopted a very relaxed interpretation of the requirement that should allow recognition of Dutch plan proceedings.[117] Since recognition is mandatory where the definitional requirements are met, Dutch schemes likely will be recognized by US courts – at least where the debtor has an establishment or its COMI in the Netherlands.[118]

4.3.3.2 Debtor in Possession

74. The Dutch scheme adopts a version of chapter 11's debtor in possession concept, where the debtor remains in control of its assets and continues to manage its business during the plan proceeding. The court's involvement in the process is minimal. There is no court test for entry and the court might not be involved until the plan is submitted to the court for confirmation. Although a restructuring expert may be appointed, that is not required in every case. Further, the restructuring expert's role is limited to developing the plan and it has no control over the assets or the business.

75. While this concept is new to Dutch insolvency law, it does not present a barrier to chapter 15 recognition of plan proceedings. The level of judicial involvement required by items (ii) and (iv) of the foreign proceeding test is minimal and does not exclude proceedings where the debtor remains largely in control of its assets and affairs. As the Interpretation Guide explains:

> "The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains

115 See 11 U.S.C. § 101(23).
116 ABC Learning Centres, n. 107 above, 728 F.3d at 308.
117 See sec. 4.3.3.4, par. 81 et seq..
118 While the courts have no discretion to refuse recognition, even recognition is subject to the public policy exception. See 11 U.S.C. § 1506.

some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement."[119]

76. Nor does the timing of the judicial involvement matter. For example, recognition under chapter 15 might be sought in order to enforce the terms of an approved and confirmed plan after the court's active supervisory role has concluded. This would not prevent recognition so long as the judicial proceeding remains open.[120]

4.3.3.3 Insolvency

77. In line with the EU Directive on restructuring and insolvency, the Dutch scheme can be used by debtors that have not yet reached the point of insolvency, but where insolvency is imminent. Although the Model Law is designed to deal with insolvency proceedings, the pre-insolvency process embodied in the Dutch scheme easily meets the relaxed financial distress standard of chapter 15.

78. The Model Law's formulation of the insolvency requirement, "pursuant to a law relating to insolvency," is designed to be flexible and does not require that the law be labeled an insolvency law or limited in its application to insolvency cases.[121] For example, at least when used to address severe financial distress, an English scheme of arrangement should be capable of recognition under the Model Law even though it is based on company law that can be used by both solvent and insolvent entities.[122] The language of Chapter 15 deviates from the Model Law to make it even clearer that proceedings under laws like the English scheme, that are not insolvency laws, can be recognized.[123] The US non-uniform formulation "under a law relating to insolvency *or adjustment of debt*" (emphasis added) removes any doubt that proceedings like English schemes should be recognized.

79. There is some dispute how much this change dilutes the insolvency restriction on recognition. While it clearly extends chapter 15 recognition to proceedings involving entities in severe financial distress, that would add nothing because the Model Law's "relating to insolvency" formulation already reached that far. The amended language has meaning only if it extends chapter 15's scope further. If the analysis focuses only on the plain language of the resulting law, then a proceeding under any law that adjusts debt should qualify, regardless of the financial condition of the debtor. This would allow chapter 15 to be used in cases of solvent entities not experiencing severe financial problems.

119 Interpretation Guide, par. 74 (p. 41).

120 "Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed." Interpretation Guide, par. 75 (p. 41).

121 As the Interpretation Guide states: "This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labeled as insolvency law (e.g., company law), but which nevertheless addresses insolvency or severe financial distress." Interpretation Guide, par. 73 (p. 41); see also Report of the Working Group on Insolvency Law on the Work of its Nineteenth Session, par. 49 (p. 12) (New York 1-12 April 1996). However, the Preamble of the Model Law states an intent to limit recognition to proceedings involving debtors that are in severe financial distress or insolvent. As the Interpretation Guide states, "Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress." Interpretation Guide, par. 48 (p. 33); see also Interpretation Guide, par. 65 (p. 39).

122 See Interpretation Guide, par. 48 (p. 32 – 33).

123 As the House Report accompanying the legislation states, "The new definitions are nearly identical to those contained in the Model Law but add to the phrase 'under a law relating to insolvency' the words 'or debt adjustment.' This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24)." H.R. Rep. 109-31(I), 118, 2005 U.S.C.C.A.N. 88, 180.

EIRJ European Insolvency and Restructuring Journal

Indeed, solvent schemes of arrangement were routinely recognized under former section 304,[124] and have been recognized under chapter 15.[125] This apparently was what the person who wrote the non-uniform language intended.[126] But this intention has limited relevance under the dominant "plain language" style of US statutory interpretation.[127]

80. Nonetheless, the adjustment of debt language probably does not extend chapter 15 recognition to debt adjustment proceedings that do not involve some level of financial distress. This is because chapter 15 incorporates the language of the Model Law's preamble into the text of the statute.[128] That language states that the purpose of chapter 15 is to provide effective mechanisms "for dealing with cases of cross-border insolvency" and lists as two of the act's objectives "fair and efficient administration of cross-border insolvencies" and "facilitation of the rescue of financially troubled businesses."[129] It seems unlikely that US courts would use the preamble's references to "insolvency" cases and "insolvencies" to read the "adjustment of debt" expansion out of the statute, but the courts might rely upon the reference to the "rescue of financially troubled businesses" to require some financial distress. Thus, chapter 15's non-uniform formulation may represent a modest expansion of covered proceedings to those relating to financial distress in addition to those involving insolvency or severe financial distress. This would be consistent with cases under the US Bankruptcy Code, where insolvency is not required for opening a proceeding, but a legitimate purpose related to financial distress is.[130] Regardless, this issue should not present any problem for Dutch schemes because the Dutch legislation both is an insolvency law and requires that all entities using the procedure or benefiting from a release included in a Dutch scheme be either insolvent or at risk of imminent insolvency.[131]

4.3.3.4 The Collectivity Requirement

4.3.3.4.1 In General

81. The collectivity requirement in item (iii) is more challenging but should not prevent the recognition of Dutch schemes. The Model Law focuses on whether the proceeding is collective in nature – in the sense that substantially all of the debtor's assets and liabilities are dealt with.[132] This requirement, together with the "for the purpose of reorganization or liquidation" requirement in item (vii), distinguishes insolvency proceedings that the Model Law was intended to cover from other types of debt collection or winding up

124 Howard Seife & Francisco Vazquez, U.S. Courts Should Continue to Grant Recognition to Schemes of Arrangement of Solvent Insurance Companies, 17 J. Bankr. L. & Prac. 4 Art. 4 (July 2008); see also Jennifer D. Morton, Jennifer D. Morton, Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15, 29 Fordham Int'l L.J. 1312, 1332 (2006).

125 Morton at 1352 – 54.

126 See Seife & Vasquez (discussing correspondence leading to the addition of the "adjustment of debt" language).

127 See Susan Power Johnston & Martin Beeker, Solvent Insurance Schemes Should Not Be Recognized [Reprised], 17 J. Bankr. L. & Prac. 6 Art. 5 (Sept. 2008).

128 That language from the Preamble is recited in section 1501(a) of chapter 15. 11 U.S.C. § 1501(a).

129 See 11 U.S.C. §1501(a)(3 & 5).

130 The text of the United States Bankruptcy Code does not impose any financial condition limitation on filing a voluntary bankruptcy case. See 11 U.S.C. §§ 109 and 301. The courts, however, have imposed a "good faith" requirement that includes, inter alia, a valid restructuring objective. See In re SGL Carbon Corp., 200 F.3d 154, 169 (3d Cir. 1999). While such a purpose does not require insolvency, imminent insolvency, or even current financial distress, it does require at least prospective financial distress. Presumably the US courts would apply a similar standard to proceedings instituted under chapter 15.

131 See sec. 2.2, par. 21, above.

132 Interpretation Guide, par. 70 (p. 40).

EIRJ
European Insolvency and Restructuring Journal

processes. As the Interpretation Guide states:

"For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding." [133]

82. Thus, recognition is limited to proceedings that benefit creditors generally[134] and is not available for collection actions by a single creditor or class of creditors.[135] Complete collectivity is not necessary and proceedings can be recognized even though certain classes of assets and claims, such as secured claims, are excluded or given priority over ordinary unsecured creditors.[136]

83. The Model Law's approach to collectivity presents no problem for traditional liquidation regimes. It does not work as neatly with modern restructuring regimes like the Dutch scheme that permit proceedings that restructure only one or a few classes of financial debt, do not include distributional processes, do not include general creditors, and may not permit unaffected creditors to participate in or even have notice of the proceeding.[137] Unfortunately, the language used in the US cases reflects the Model Law approach and presents a challenge for Dutch schemes involving only one or a few classes of creditors, especially when the non-public plan procedure is used. In contrast, the application of the collectivity standard by most US courts is so relaxed that a Dutch scheme either meets it or easily could meet it by modifying the procedure in the particular case.

84. The US courts evaluate a number of factors in determining collectivity, but the primary stated criterion is whether the proceeding considers the rights and obligations of all creditors.[138] The analysis considers the features of the law governing the proceeding, the general practices of the jurisdiction, and the manner in which the particular proceeding was conducted.[139] The US courts are very flexible in their approach and tend to favor recognition. Thus, even where the law governing a particular proceeding does not grant ordinary unsecured creditors adequate rights, collectivity can be satisfied if the local practice is to permit them to participate.[140]

85. If the focus is on the governing law, the Dutch legislation should meet the

133 Interpretation Guide, par. 69 (p.39).
134 See In re British American Ins. Co. Ltd., 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010).
135 Interpretation Guide, par. 69 (p. 39).
136 The exclusion of certain groups of creditors, like secured creditors, does not destroy collectivity. As the Interpretation Guide (par. 70 (p.40)) states: "A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see Legislative Guide on Insolvency Law, part two, chap. II, paras. 7-9)."
137 See Horst Eidenmüller, What Is An Insolvency Proceeding?," 92 Am. Bankr. L.J. 53, 61 (2018) (noting the Model Law's approach did not reflect the increasing popularity of pre-insolvency DIP proceedings that restructure only some creditor classes).
138 In re Ashapura Minechem Ltd., 480 B.R. 129, 140 (S.D.N.Y. 2012), In re Betcorp Ltd., 400 B.R. 266, 281 (Bankr. D. Nev. 2009).
139 The US courts may be "moving to a more holistic, factual analysis of the circumstances of the cases." Eugenio Vaccari, The Ammanati Affair: Seven Centuries Old, and Not Feeling the Age, 93 Chi. K. L.R. 831, 844 (2018).
140 For example, British American held that the appointments of judicial managers for an insolvent insurance company in the Bahamas and Saint Vincent and the Grenadines [SVG] were collective proceedings. British American, n. 134 above, 425 B.R. at 902 - 03. The purpose of the proceedings was protection of the policyholders and no excess funds were expected to be available for general creditors. Id. In the SVG proceeding, the governing law had no provision for general creditors, but the Court relied upon a few stray references to creditors in the petition and orders and on testimony about local practices to hold that the proceeding was collective. Id. at 904. Similarly, in Ashapura Minechem the court relied upon testimony about local practice and found collectivity because "in practice unsecured creditors were given a voice" even though there was no formal mechanism for unsecured creditors to participate. Ashapura Minechem, 480 B.R. at 140 – 41.

collectivity test. The Dutch scheme can be used to address the claims of all stakeholders, including subordinated, ordinary, secured and preferential creditors and shareholders.[141] In such a case, the rights and obligations of all creditors would be considered and the Model Law's collectivity standard easily satisfied. Thus, the Dutch law is collective in nature and can subject virtually all of the debtor's assets and creditors to the plan process.

86. It may be sufficient that the Dutch law is collective in nature. The US cases, however, also focus on whether the particular proceeding was conducted in a collective manner.[142] The structure of the definition supports this view because only item (v) of the test focuses solely on the law under which the proceeding is conducted.[143] Nonetheless, opinions that focus on the actions taken in the particular case to establish collectivity involve situations where the governing law was not otherwise collective.

87. The Dutch scheme is very flexible. Because of its similarity to the English scheme, it can be used to restructure only one or a few classes of financial creditors and investors. In such a case, the particular proceeding may consider only the interests of the schemed creditors, i.e. the class whose claims are being restructured, and not the interests of creditors in general. The challenge that modern restructuring laws present under the Model Law is whether a proceeding brought under a law that is collective in nature is rendered non-collective if the outcome of the plan process adjusts the claims of only one class and leaves intact the rights of all other stakeholders. The recast EU Insolvency Regulation modifies the collectivity requirement to address this problem by redefining collectivity to require that the proceeding include "all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them."[144] As discussed below, the collectivity requirement should also not prevent the recognition of a Dutch scheme that restructures only one or a few classes of claims.

4.3.3.4.2 Single Class Schemes

88. The collectivity requirement should not present an obstacle to recognition of Dutch schemes because US courts routinely recognize English schemes that affect only one class of creditors. The classic English scheme for which recognition is sought restructures only one class, yet the US courts have had no difficulty recognizing them as foreign

141 Although art. 369(4) DBA excludes the rights of employees of the debtor under employment contracts from the restructuring, that would not destroy collectivity. See sec. 4.3.3.4.1, par. 81, above.
142 As the court in Ashapura Minechem stated, "What matters is not just what statutory mechanisms exist but also how involved creditors are in practice. Therefore, the fact that other SICA proceedings may not fairly involve all creditors does not diminish the collective nature of the proceeding being evaluated here." Ashapura Minechem, 480 B.R. at 141.
143 See 11 U.S.C. § 101(23) (referring to "a law relating to insolvency or adjustment of debt"). There is no clear statement in the Interpretation Guide on this question. Two statements in paragraph 69 of the Interpretation Guide could be read to prohibit single class plans. First, the Interpretation Guide states that a foreign proceeding "must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding." (Emphasis added.) While this might require that "all stakeholders" be involved, the "of an insolvency proceeding" language arguably recognizes that a restructuring might be limited in its scope to only some creditors. That language is followed by the statement. "It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State." While the "a particular … group of creditors" language cuts against single class proceedings, the references to "merely as a collection device" and "collection proceedings" initiated by that group suggest that the comment does not apply to restructurings, especially those instituted by the debtor.
144 Art. 2(1) EIR.

proceedings.[145] The collectivity issue apparently has not been raised in connection with English schemes[146] and the reported cases recognizing them do not discuss the issue.[147]

89. This point has generated little scholarly attention in the US. A comparative article on collectivity states that "the notion of collectivity 'can encompass a proceeding in which not every class of claim is subject to compromise where significant amount of financial debt, like issuance of bond debt or syndicated or bilateral bank debt alone, are subject to compromise in a foreign insolvency proceeding.'"[148] That claim is based on a practitioner's commentary so is more a statement of existing practice than of theory.[149] A theoretical basis for collectivity is stated in an article by two leading US practitioners. They assert: "A scheme affects creditors generally. Upon becoming effective, a scheme is binding on all scheme creditors; as such, a scheme is a 'collective proceeding.'"[150] This analysis ignores all non-scheme creditors and is a bit circular - single class schemes are collective because they bind the creditors they bind. However, the principle that can be extracted from these comments is similar to the EU Insolvency Regulation's approach – collectivity does not require inclusion of all creditors as long as a significant amount of debt is restructured and all creditors whose rights are altered can participate in the proceeding.

90. Some support for this approach can be drawn from US cases that emphasize the Model Law's exclusion from its scope of a "collection action" by a single creditor or group of creditors.[151] Unlike the excluded proceedings, a single class scheme typically is instituted by the debtor, although the Dutch scheme could be instituted by creditors. In addition, a scheme is not a collection action in the traditional sense. Normal collection remedies may be suspended by the moratorium/stay and are replaced by a negotiation that usually results in the modification of the debt instrument. While it is possible that the negotiated plan might provide for an asset sale followed by distribution, even that is not a "collection action."

91. It seems unlikely that the US courts will alter their long-standing practice of recognizing single class schemes, even if the practice violates the traditional view of collectivity.[152] Recognition of single class schemes furthers chapter 15's broader goals of efficiency, fairness, value maximization, and the

145 For example, in Avanti only a single bond issuance was schemed. Avanti, n. 94 above, 582 B.R. at 607.
146 This may be because generally there is no opposition to the petition for recognition. That was the case in Avanti, where the scheme creditors overwhelmingly approved the scheme and recognition was sought to bind the two percent of bondholders who failed to vote. Ibid. at 606. This is likely to change as schemes are used more aggressively, especially if a Dutch scheme employs the new "cross class cram down" power against a dissenting class.
147 The Ashapura Minechem opinion suggests that single class plans might not be collective. In finding that the proceeding at issue was collective, the District Court relied, in part, on the fact that the proceeding did not involve a single class. The court stated, "Further, as the Bankruptcy Court stated during the hearing, 'even if there were no opportunity by practice and custom for unsecured creditors to participate, I think this may still be a collective proceeding, because it involves parties other than just one class of creditor or just one party-in-interest.'" Ashapura Minechem, 480 B.R. at 141 (emphasis added).
148 See Vaccari, n. 139 above, 93 Chi. K. L.R. at 844.
149 The Vaccari article quotes from Craig Martin, United States, in 1 Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law 613 (Look Chan Ho ed., 4th ed. 2017).
150 Howard Seife & Francisco Vazquez, U.S. Courts Should Continue to Grant Recognition to Schemes of Arrangement of Solvent Insurance Companies, 17 Norton J. Bankr. L. & P. 571, 576 (2008).
151 See, e.g., In re Stanford Int'l Bank Ltd., 2012 WL 13093940 *8 n. 20 (N.D. Tex. 07/30/12) (contrasting excluded receiverships as remedies instituted by and for the benefit of a single creditor); Betcorp, n. 138 above, 400 B.R. at 281; In re Gold & Honey, Ltd., 410 B.R. 357, 368 (Bankr. E.D.N.Y. 2009); see also, Interpretation Guide, par. 69 (p. 39).
152 See Eidenmuller, n. 137 above, 92 Am. Bankr. L.J. at 70 (asserting that English schemes are not collective proceedings). While Eidenmuller discusses chapter 15 cases, his focus is on developing a normative theory of insolvency and not the interpretation of particular international insolvency instruments. See Ibid. at 54.

rescue of financially troubled businesses.[153] There is no strong policy ground for refusing recognition on technical grounds, especially of schemes garnering overwhelming creditor support. Even if a scheme lacks strong support or is problematic in some other way, those issues could be addressed by limiting the assistance provided after recognition.

92. Perhaps more importantly, single class reorganizations are possible under US chapter 11. A chapter 11 plan can be tailored to exclude creditors by leaving them "unimpaired;" i.e., "leav[ing] unaltered [their] legal, equitable, and contractual rights."[154] Such creditors have no voting rights and receive no distribution in the proceeding.[155] A single class chapter 11 restructuring is achieved by leaving all stakeholders other than the restructured class unimpaired. It is unlikely that US courts would adopt a reading of the Model Law that would not permit recognition of a common type of US chapter 11 reorganization. There are differences in participation rights that make it easier for US single class reorganizations to meet the collectivity test than English schemes.[156] However, the bar is low enough that Dutch schemes should easily qualify.

93. Further, the Dutch law incorporates chapter 11 features that might make Dutch single class schemes collective even if English schemes were not. Unlike traditional English schemes, both chapter 11 and the Dutch scheme have provisions for a moratorium/stay that applies to general creditors.[157] The Dutch scheme allows the court to order a stay that prevents insolvency proceedings from being opened for the duration of the stay. In addition, the court may lift attachments affecting any of the debtor's assets and may prevent all creditors (including those that will not be affected by the restructuring plan) from enforcing their rights against any of the assets of the debtor.[158] This is a collective feature of the Dutch scheme that is lacking in the English scheme.[159]

94. Other features of the Dutch scheme support collectivity even where the plan may only affect one or a few groups of creditors. For example the restructuring plan must identify which groups of creditors are not included in the plan and explain why there were excluded.[160] Further, all of the debtor's assets will be taken into consideration when assessing whether the best interest of creditors test has been met and whether, in case of a cross-class cram-down, the reorganization value is fairly distributed among the affected classes of creditors. Additionally, creditors whose rights are not affected by the restructuring plan must be paid in full in accordance with the terms applicable to their claims. Given the above, we take the view that there is little doubt that the Dutch scheme sufficiently takes the rights of all creditors into consideration

153 See 11 U.S.C. § 1501(a). Recognition of single class schemes also furthers the other policies listed in the section: cooperation between courts and greater legal certainty for trade and investment.
154 11 U.S.C. § 1124(1).
155 See 11 U.S.C. § 1126(f).
156 All creditors, even unaffected creditors, are "parties in interest" who may appear and be heard on any issue in the case. See 11 U.S.C. § 1109(b).
157 See 11 U.S.C. § 362(a) (imposing automatic stay) and art. 376 DBA (court ordered discretionary stay).
158 See art. 376 DBA. Stayed creditors have the right to address the court to request permission to enforce their rights notwithstanding the stay (art. 376(2(a) DBA), oppose a request for extension of the stay (art. 376(11) DBA), request the court to lift the stay (art. 376(10) DBA or request the court to make such determinations or provisions as it deems necessary to safeguard the interests of the creditors or shareholders (art. 376(9) & art. 379 DBA).
159 See Eidenmüller, n. 137 above, 92 Am. Bankr. L.J. at 68-70. Professor Eidenmüller suggests using the common pool problem as the touchstone for collectivity. Ibid. at 68. Under that approach either a stay affecting all creditors or a procedure that in theory could force a modification of creditor rights qualifies. Ibid. at 68-69. The Dutch scheme would satisfy both of these conditions.
160 Art. 375(2)(c) DBA.

to meet the collectivity requirement under US Chapter 15.

4.3.3.4.3 Participation by Ordinary Unsecured Creditors

95. Cases decided outside of the scheme context identify a number of factors relevant to the collectivity determination. The most important are that the interests of ordinary non-priority unsecured creditors be considered[161] and that they have some ability to participate in the proceedings and the claims treatment process.[162] For public plan proceedings that include ordinary unsecured creditors and adjust their rights, none of these factors present any difficulty. The challenge is presented by schemes that adjust the claims of only one or a few classes of creditors but do not affect the rights of creditors generally. While these factors pose similar problems in the context of English schemes, the lack of challenges to recognition means that collectivity issues have not been addressed. The cross-class cramdown feature of the Dutch scheme or its use in enterprise group restructurings may generate opposition to recognition where the issue must be confronted. Fortunately, the US cases set a low threshold for satisfying each of these three requirements.

96. Looking first at the asset allocation process, while the Model Law requires that a collective proceeding includes some mechanism addressing the claims of creditors,[163] it is not necessary that they receive a distribution.[164] The US cases do not even require a formal claims resolution process, but accept systems that include some type of treatment of general unsecured claims, even if it is informal.[165] Further, since reorganization systems are covered by the Model Law, a process that addresses the rights of creditors without providing a distribution should qualify as collective.

97. A restructuring process can provide for the treatment of general unsecured creditors either expressly by including them in the plan and adjusting their rights or implicitly by excluding them from the plan but leaving their rights unaffected. For example, an English scheme addresses and provides for the claims of schemed creditors by modifying their rights in some way. But a scheme also addresses and provides for the claims of non-scheme creditors. It does this by leaving their rights to payment and their claims against the debtor's assets unaltered. US chapter 11 provides a similar method for the treatment of creditor classes not included in a restructuring. The US procedure is collective in the sense that such creditors' claims are addressed in the plan process even though the plan does not change their rights. A Dutch plan proceeding that excludes general creditors similarly provides for the non-scheme creditors by leaving their rights unaltered.[166]

98. The US cases also set a low threshold for general creditor participation. While notice is a factor for consideration, the standard for notice is quite low.[167] In fact, the absence of notice to creditors

161 See Eidenmüller, ibid. at 63, pointing out that it is "quite unclear" what considering such creditors requires.
162 See British American, n. 134 above, 425 B.R. at 902.
163 Interpretation Guide, par. 69 (p. 39) (excluding proceedings lacking a provision for addressing the claims of creditors).
164 See British American, 425 B.R. at 903.
165 See Ibid. at 903-04.
166 The restructuring plan must identify which (groups of) creditors are not included in the plan and why (art. 375(2)(c) DBA. Creditors whose rights are not affected by the restructuring plan must be paid in full in accordance with the terms applicable to their claims.
167 See Ashapura Minechem, n. 138 above, 480 B.R. at 140-41.

does not bar recognition of a proceeding.[168] Similarly the law governing the proceeding need not provide any formal right of creditor participation to satisfy the collectivity requirement. Nonetheless, there must be at least the possibility of general creditor participation. This can be shown by testimony that creditors who wish to participate are permitted to do so based on informal local practices.[169] In fact, even where the ability to participate lies within the discretion of the tribunal, the requirement is satisfied.[170] Arguably, this minimal participation standard should be even lower where the limited impact of a scheme on excluded creditors means they have no interests that need to be protected by their participation.

99. A Dutch public plan proceeding should easily meet the US participation standard, even if only a single class of debt is being restructured, given the general publicity and participation rights provide for under Dutch law. The non-public plan proceeding presents a harder case but should still qualify for recognition. Notice is given to all creditors subject to the scheme and they are allowed to vote and otherwise participate in the process. But no individual notice is given to non-scheme creditors and no public notice is given of the scheme. While this feature presents a challenge to recognition, notice and participation are merely factors considered as part of the collectivity analysis and proceedings can be collective even if there is no general notice.[171] Further the US cases analyzing general creditor participation and notice involved proceedings where the rights of ordinary unsecured creditors to reach the debtor's assets were affected. Thus, those cases may not stand for the broad proposition that notice to and participation by *ordinary unsecured* creditors is relevant in all cases, but rather the narrower principle that some level of notice to and participation by *affected* creditors is a feature of a collective proceeding. Even the non-public plan process grants notice and participation rights to all creditors affected by the process and this may meet the very low US standard.

100. Similarly, the consideration of general creditor interests factor presents a challenge in schemes that adjust only one or a few classes of claims. Fortunately, this standard is an exceedingly low one. In *British American,* the governing law had no provision for general creditors, but the Court relied upon a few stray references to creditors in the petition and orders and on testimony about local practices to hold that the proceeding was nevertheless collective.[172] Factors such as a duty owed to ordinary unsecured creditors by the insolvency administrator are enough.[173] Given that under the Dutch scheme legislation the restructuring plan must identify the groups of creditors that will not be affected by the plan and provide an explanation why they have not been included in the plan, this requirement appears satisfied. Moreover, the directors of Dutch companies must be

168 See In re ENNIA Caribe Holding N.V., 594 B.R. 631, 639 (Bankr. S.D.N.Y. 2018); British American, 425 B.R. at 902.
169 See Ashapura Minechem, 480 B.R. at 141.
170 See Ibid. at 140.
171 See ENNIA Caribe, 594 B.R. at 639; British American, n. 134 above, 425 B.R. at 902. The Interpretation Guide also mentions notice to creditors as a factor. Interpretation Guide, par. 70 (p. 40). At least one court elevates notice from a mere factor to an independent requirement and takes the position that all creditors must receive notice and have the ability to participate in order for the proceeding to qualify as a foreign proceeding. See In re O'Reilly, 598 B.R. 784, 792 (Bankr. W.D. Pa. 2019).
172 British American, n. 134 above, 425 B.R. at 904.
173 See British American, 425 B.R. at 903.

guided by the interests of the company and its business.[174] This means that they must take the interests of all stakeholders, both those included in the scheme and those excluded from it, into consideration in a restructuring.[175]

101. None of these factors is dispositive and a proceeding might be found to be collective notwithstanding their absence. Indeed, the underlying trend in the US cases is the strong preference for granting recognition and dismissing collectivity challenges. This suggests that the US courts will find even non-public single class schemes to be collective. However, the US cases set the collectivity bar so low that it would be easy to create collectivity simply by adjusting the process in the particular proceeding. Thus, where US recognition is critical and likely to be challenged, the proposed scheme can easily be made more collective simply by adding to the procedure some provision for notice to creditors generally and some opportunity for them to be heard and their interests considered. If the Court is unable or unwilling to vary the procedure, the flexibility of the plan process should permit the proposed plan to address any missing collectivity factor informally.

4.3.4 Debtors Lacking a Dutch COMI or Establishment

102. The final potential hurdle to recognition is the determination whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.[176] The US cases are divided on the issue of whether this determination is a pre-requisite for recognition, although most cases hold that it is. That issue is important in cases involving "letter box" companies because treating the main/non-main question as a post-recognition determination permits recognition of such proceedings.[177] While this will present no problem where the entity subject to the Dutch plan proceeding has either its COMI or an establishment in the Netherlands, it could prevent recognition of a Dutch scheme involving an entity with neither. In enterprise group restructurings, this could be an issue for some of the related entities where Dutch jurisdiction is based on sufficient connection factors like jointly-owed or guaranteed debt. However, as discussed below, recognition and enforcement in the US of a Dutch group scheme will be possible as long as at least one of the affiliated entities has either a Dutch COMI or a Dutch establishment.

5. Recognition of a Dutch Group Restructuring

5.1 Designing an Enterprise Group Scheme

103. US recognition and enforcement of a Dutch group restructuring requires a much more complex analysis. Depending on the nature of the restructuring needed and the COMI of the group members, a group restructuring using the Dutch scheme might be achieved through a single plan proceeding by only one group member. Alternatively, two or more plan proceedings may be required in order to apply the scheme's solution to all relevant group members. It may even

174 Art. 2:129(5) and 2:239(5) of the Dutch Civil Code.
175 See, for example, Asser/Van Solinge & Nieuwe Weme 2-IIb 2019/2.2.II.
176 See 11 U.S.C. § 1517(b).
177 Compare In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, 389 B.R. 325, 333 (S.D.N.Y. 2008) (refusing to recognize "letter box" case) with In re SPhinX, Ltd, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), aff'd, 371 B.R. 10 (S.D.N.Y. 2007) (recognizing "letter box" case).

be necessary to institute Dutch plan proceedings for every group member in need of relief.[178]

104. The Dutch scheme's flexibility means that it can be used to address a wide range of restructuring needs. While the Dutch scheme will be most attractive for a purely financial restructuring, provisions adapted from chapter 11 allow it be used where limited operational restructuring is needed. For example, the restructuring may require various group members to modify or terminate contracts or, conversely, to preserve important contracts that might be subject to termination under an *ipso facto* provision. In such a situation, Dutch plan proceedings might be needed for each member of the enterprise group. Even in a purely financial restructuring, multiple group members might need their own plan proceedings to deal with debts not subject to affiliate guarantees.[179] Since this use of the Dutch scheme is most likely for businesses that would be considered Dutch, i.e., enterprise groups headquartered in the Netherlands, the chapter 15 analysis of such a restructuring is limited to such groups.

105. The more likely cross-border context in which the Dutch scheme will be used by an enterprise group is a purely financial restructuring where affiliate-guaranteed debt must be adjusted. This is the situation where the English scheme had been a popular tool for a global restructuring. Here the Dutch scheme operates much like an English scheme, but several helpful features patterned on chapter 11 have been added. The primary new tools are provisions for a moratorium/stay, additional financing and, most importantly, a cross-class cramdown. Two enterprise group scenarios are analyzed in the group debt context: (1) group debt owed by an enterprise group headquartered in the Netherlands but issued through a special purpose financing entity located in some other country, and (2) group debt issued through a Dutch special purpose financing entity and guaranteed by other affiliates.[180]

106. These enterprise group restructuring scenarios lead to three chapter 15 recognition options that will be analyzed below. The first option is to enforce the group restructuring plan in the United States through the filing of multiple chapter 15 cases, one by each entity that needs US assistance to effectuate its scheme. This option could apply to either an operational or financial restructuring and could be used where the scheme deals only with affiliate-guaranteed debt. The second and third options focus only on affiliate-guaranteed debt. In the second option, the group scheme is enforced through a chapter 15 case filed by an operating company or holding company that has a Dutch COMI. The final option is to enforce the group scheme through a chapter 15 case filed by the Dutch special purpose financing entity through

178 It may even be necessary to institute both Dutch proceedings and proceedings in one or more other countries, but this paper limits the analysis to options using only Dutch proceedings.

179 This has been confirmed by a recent Dutch court decision, in fact the first court order sanctioning a restructuring plan under the new law, see Rb. Noord-Holland 19 February 2021, ECLI:NL:RBNHO:2021:1398 (Jurlights). In this decision the court stressed that only if the requirements for the release or amendment of group guarantees provided for in art. 372 DBA are met, one plan may suffice. If other debts of group entities must also be restructured, the relevant group companies must all submit their own plans to restructure such debts. Procedural consolidation is possible. Pursuant to art. 369(8) DBA, these multiple plans in relation to various group companies may all be dealt with by the same court.

180 Some of the analysis below applies equally well to other group structures that might wish to use the Dutch scheme.

which the affiliate-guaranteed debt was issued.[181]

107. From the US chapter 15 perspective, the choice between filing a single chapter 15 case, two chapter 15 cases or dozens of related cases is not complicated. The complication in a group scheme context arises when the Dutch law and the EU Insolvency Regulation are added to the mix. Separate Dutch plan proceedings would be required for each affiliate involved in an operational restructuring or a financial restructuring involving non-group debt because the non-group debt of one member cannot be restructured in a Dutch scheme filed by a different member. This entity-separateness aspect of Dutch law is common to most restructuring regimes. However, even a restructuring involving only affiliate-guaranteed obligations may require multiple Dutch plan proceedings if the group restructuring involves both members with a COMI in the Netherlands and members with a COMI in another EU Member State. Such a group restructuring would require both public plan proceedings and non-public plan proceedings in order to gain the benefit of EU Insolvency Regulation's EU-wide enforcement or avoid the Regulation's jurisdictional restrictions. The US chapter 15 approach flows from the Dutch options. If separate Dutch plan proceedings are required to achieve the group restructuring, then separate chapter 15 cases are required to enforce that result in the US. Conversely, if a single Dutch plan proceeding can achieve a group-wide restructuring, then a single chapter 15 case can enforce it in the US.

5.2 The Dutch Jurisdictional Matrix

108. Little to no attention was paid to the operation of affiliate releases in the cross-border context during the Dutch legislative process. Unfortunately, one consequence of the EU Insolvency Regulation applying to a public plan proceeding is that the Dutch court lacks jurisdiction to adjust the guarantee obligation of an affiliate whose COMI is in another EU Member State.[182] The Dutch law embodies this limitation and a scheme involving one group member can release other group members who are co-obligors only where the Dutch court could have exercised jurisdiction over the co-obligor had it filed the same type of proceeding.[183] This creates a cleavage between public and non-public plan proceedings. Thus, a scheme resulting from a public plan proceeding involving one group member can release the jointly owed debt of other members, but only those members with COMI in the Netherlands or in a non-EU jurisdiction (or Denmark).[184] However, a scheme resulting from a non-public plan proceeding of a single group member could release the jointly owed debt of all group members because the relaxed jurisdiction rules would encompass the entire group. Unfortunately, a non-public plan proceeding would not receive the EU-wide recognition that comes from inclusion in the EU Insolvency Regulation.

181 The second and third options might be combined, or the second option might be combined with a chapter 15 case filed by a group member who used the Dutch non-public plan proceeding. That member may have had its COMI in another EU Member State and may or may not have had an establishment in the Netherlands. Although this paper only addresses the stated scenarios, the principles discussed apply to other variations.

182 Pursuant to art. 3(2) EIR, Dutch insolvency jurisdiction in such cases is limited to the assets located in the Netherlands where the affiliate has a Dutch establishment and there is no jurisdiction at all if there is no Dutch establishment.

183 See sec. 2.4 above.

184 The existence of group debt is a sufficient jurisdictional ground under art. 3 DCCP, see sec. 2.3 above.

109. This feature of the Dutch scheme creates no problem where all affected group members have their COMI in the Netherlands or in non-EU jurisdictions (and Denmark). A group wide restructuring of group debt could be achieved in a single plan proceeding by including an affiliate release provision in the resulting scheme. Presumably this would be a public plan proceeding filed by a group member with COMI in the Netherlands in order to maximize the EU-wide effectiveness of the scheme. However, it could be a non-public proceeding if confidentiality were important, or even a scheme filed for an enterprise group with no members with COMI in the Netherlands if the Dutch scheme becomes a popular global restructuring tool.

110. But, where the enterprise group includes affected members with COMI in other EU Member States, then multiple Dutch plan proceedings may be required in order to get the benefits of both types of proceedings and still achieve a group-wide resolution. One solution would be to ignore the affiliate release option and file separate Dutch schemes for all affected group members: public plan proceedings for all groups members with COMI in the Netherlands, non-public plan proceedings for all group members with COMI in other EU Member States, and public or non-public proceedings for all group members with COMI in non-EU jurisdictions (and Denmark). While this approach seems cumbersome, it works well in the US where the practice is to file concurrent chapter 11 cases for all group members. While technically multiple separate cases, these group restructurings are consolidated procedurally before a single judge and a single joint plan covers all debtors.[185] Dutch law similarly permits procedural consolidation. Pursuant to art. 369(8) DBA, multiple plans in relation to various group companies may all be dealt with by the same court.

111. It is not clear whether the same result can be obtained with only two Dutch schemes: one public and one non-public so that all group members can be included through affiliate releases included in the plans. Could a borrower with COMI in the Netherlands proceed on the public and private paths concurrently in order to get both the benefit of EU-wide enforcement and group-wide effect? The restructuring plans would be identical in substance but interdependent and proposed on the condition that neither becomes effective unless both plans are sanctioned by the court. There is nothing in the Dutch scheme legislation that would prohibit such an approach. No express statutory provision bars this approach. There is no limit on the number of restructuring plans that a debtor may propose to its creditors and, in particular, this approach does not violate the prohibition on switching between the public and private options after the court becomes involved.[186] Indeed, flexibility and creativity is supported by section 379 of the DBA, which gives the court authority to create bespoke solutions as necessary to safeguard the interests of creditors and shareholders.[187] There would be two proceedings and two restructuring plans in this scenario. While the plans are interconnected, the restructuring plan proposed in the public plan procedure is different from the one proposed in the non-public plan

185 See Fed. R. Bankr. Proc. 1015(b); see also Laura B. Bartell, A Guide to the Judicial Management of Bankruptcy Mega-Cases 30-31 (Fed. Jud. Cntr. 2d ed. 2009) (discussing joint administration).

186 See sec. 2.3 above.

187 Art. 379 DBA.

procedure because they concern and seek to affect the rights of creditors against different affiliated entities. Both plans can be voted on and put before the court for confirmation at the same time.[188]

112. The advantages of using an entity with COMI in the Netherlands as the anchor debtor for a group scheme raises the question whether the group debt can be adjusted only in a scheme instituted by the borrower or also in one instituted by one of the affiliated guarantors. This issue is one of interpretation of the substantive requirements of Dutch law. Can a guarantor present a plan that not only restructures the rights of creditors against the guarantor under the guarantee, but at the same time restructures the rights of those creditors against the borrower that the guarantee secures? This is probably not a scenario that was considered when the provisions on group guarantees in the Dutch scheme legislation were drafted. Indeed, the law facilitates the more usual scenario whereby guarantees are released or amended in a plan that is proposed by the principal debtor. But at the same time, a verbatim reading of art. 372(1) DBA suggests that a Dutch scheme can be used by a Dutch guarantor to also release or adjust the debt owed by the borrower. An informal translation of the relevant parts of that provision reads:

"A plan (…) may also amend the rights of creditors against legal entities that form a group with the debtor (…), provided that:

a. the rights of those creditors against the relevant legal entities entail payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;"[189]

113. The requirement that the restructured obligation be one for which the affiliate obligor be "liable together with or alongside the [scheme] debtor" applies equally well whether the scheme debtor is the borrower (primary obligor) or a guarantor (secondary obligor). This is not only a plausible reading of the statute but also the only reading that permits the Dutch scheme to operate effectively. The capital structures of global enterprise groups can be complex and the choice of the borrower entity for a group debt may have little to do with the reality of the business operation. It may be that the borrowing occurs through a Dutch holding company or through a major Dutch operating company and the Dutch scheme can work as expected. But more likely, each issuance of group debt will be run through a different special purpose entity set up in jurisdictions with no other relationship to the business enterprise. An interpretation that permitted only the principal borrower to scheme a group debt would undermine the purpose of the Dutch scheme legislation.[190] Thus, any group member obligated on the

188 The voting process is not determined by statute, giving the plan proponent a large degree of flexibility in designing the voting process (cf. art. 375(1)(k) DBA).

189 In Dutch: "Een akkoord (…) kan ook voorzien in de wijziging van rechten van schuldeisers jegens rechtspersonen die samen met de schuldenaar een groep vormen (…), mits: a. de rechten van die schuldeisers jegens de betrokken rechtspersonen strekken tot voldoening of tot zekerheid voor de nakoming van verbintenissen van de schuldenaar of van verbintenissen waarvoor die rechtspersonen met of naast de schuldenaar aansprakelijk zijn".

190 For example, if group debt could be released only in a plan by the primary obligor, then the cross-class cramdown provision could not be used in the common scenario where two classes of group debt were issued through different special purpose borrower entities. Both entities would need to file separate Dutch schemes in order to restructure both classes of group debt. But each entity's plan could scheme only one of the group debts and there would be no plan that could utilize the cross-class cramdown to use the acceptance of one class to cram down the other.

group debt can serve as the anchor debtor for a Dutch scheme that restructures the group debt.

5.3 Obtaining US Recognition

5.3.1 In General

114. While an entity's COMI is critical under the EU Insolvency Regulation, it is far less important under the Model Law and chapter 15. Like the EU Insolvency Regulation, chapter 15 defines a proceeding pending in the entity's COMI as a "main proceeding." A proceeding pending in the COMI will be given greater deference than one pending elsewhere, but a Dutch group scheme could be recognized and enforced in the US even if none of the group members has a Dutch COMI. Nonetheless, having a Dutch COMI is advantageous under chapter 15. Fortunately, it is relatively easy to establish a Dutch COMI for US chapter 15 purposes.

115. While both the EU Insolvency Regulation and chapter 15 use the same term, COMI has a very different meaning under chapter 15 than under the EU Insolvency Regulation. The EU has adopted a fairly mechanical test for COMI based on a series of objective factual criteria (hereafter referred to as "EU/COMI").[191] In contrast, the US approach under chapter 15 is far more pragmatic and flexible (hereafter referred to as "US/COMI").

116. The liberal US approach to COMI helps the Dutch scheme become an effective global restructuring regime by making US enforcement more likely. The Dutch scheme is designed to attract both Dutch and non-Dutch entities with its exceedingly broad jurisdictional grant. In addition to a "sufficient connection" jurisdictional grant similar to that used for English schemes of arrangement, the Dutch scheme can be used in situations extending well beyond those that an English court might entertain.[192] The jurisdiction provision accommodates enterprise group restructurings in two important ways. It extends jurisdiction to non-Dutch entities if a substantial part of the group is domiciled in the Netherlands or if the non-Dutch entity is liable for the debts of another debtor that is subject to a Dutch scheme. Thus, it could be used to restructure a Dutch-centered enterprise group or to scheme the group debt of almost any global enterprise group.[193] Chapter 15's relaxed COMI standard makes it easier for a Dutch scheme to receive the benefits of recognition in the US as a main proceeding even if the scheme debtor is an entity that does not have its EU/COMI in the Netherlands.

117. As discussed below, confirmed plans resulting from Dutch plan proceedings could be recognized and enforced under chapter 15 whether the enterprise group is centered in the Netherlands or merely has a single affiliate with a sufficient Dutch connection. Proceedings filed by group members having neither a Dutch US/COMI or a Dutch establishment present more difficulty under chapter 15 because there is no clear mechanism in chapter 15 for recognition of insolvency proceedings pending in a jurisdiction where there is not even an

191 See, with references to case law, W.-G. Ringe, Art. 3, in: R. Bork and K. van Zwieten (red.), Commentary on the European Insolvency Regulation, Oxford: Oxford University Press 2016.
192 See sec. 2.3, above.
193 The additional alternative jurisdictional grounds in article 3 of the DCCP make it hard to imagine a significant global enterprise group that could not use the Dutch scheme. For example, even if no group member is Dutch, a Dutch scheme could be used to restructure the group debt if a single affected creditor or shareholder of any group member is domiciled or has its habitual residence in the Netherlands. See sec. 2.3, above.

establishment. However, even in those cases, it may be possible to enforce the group restructuring in the US.

5.3.2 Creating a Dutch "Group COMI"

118. Two of the three scenarios noted above involve Dutch enterprise groups, in the sense that the group is operated out of the Netherlands. The analysis assumes that there would be a holding company or a major operating company with a Dutch COMI that could use either the public or the non-public plan proceeding. Several other group members have Dutch COMIs and the remaining group members are COMIed in other jurisdictions. Thus, the Dutch scheme could be used to restructure the entire group under at least one of the Dutch jurisdictional grounds. It may be possible to restructure the entire group with only one or two Dutch plan proceedings, but it might be necessary to institute multiple plan proceedings to achieve a group wide restructuring, maybe even a separate plan proceeding for each group member.

119. The first and easiest scenario involves a financial restructuring of group debt that was borrowed through a non-Dutch financing affiliate and guaranteed by all members of the group. This scenario assumes that a Dutch plan proceeding is instituted by a group member with a Dutch COMI (the holding company or a major operating company) and that the resulting scheme includes a provision restructuring the group debt. If this can be achieved with a single Dutch plan proceeding the chapter 15 recognition analysis is simple. The scheme would be recognized as a foreign main proceeding because the Dutch proceeding is in the COMI of the debtor. If plan proceedings must be filed by two different group members in order to achieve a group wide restructuring, both proceedings would also be recognized as foreign main proceedings as long as both anchor debtors had Dutch COMIs.

120. A novel chapter 15 recognition issue is presented if a single Dutch COMIed group member uses both public and private plan proceedings concurrently to achieve a group wide restructuring. There is nothing in chapter 15 that addresses this possibility. Both of the proceedings would qualify for recognition as foreign main proceedings under the statutory language. While the Model Law and chapter 15 anticipate multiple simultaneous insolvency proceedings involving a single debtor, the law only addresses the possibility of simultaneous foreign non-main proceedings and of simultaneous foreign main and non-main proceedings.[194] The statute does not address multiple concurrent foreign main proceedings. The situation could not arise where different jurisdictions are involved because a debtor can have only one COMI.[195] That principle is not violated by two concurrent proceedings in the COMI. The generally pragmatic approach of US courts also suggests that, although unusual, concurrent Dutch public and non-public plan proceedings probably would both be recognized as foreign main proceedings under chapter 15.

121. It may not be possible to restructure the entire enterprise group using only one or two Dutch plan proceedings. While the adjustment of group debt can be

194 See 11 U.S.C. § 1530. Section 1530 deals with the co-ordination of cases where both a foreign main proceeding and a foreign non-main proceeding are recognized or where multiple foreign non-main proceedings are recognized. The section does not address the possibility of two foreign proceedings from the same jurisdiction.

195 See In re Servicos de Petroleo Constellation S.A., 600 B.R. 237, 276 (Bankr. S.D.N.Y. 2019).

effected through a single plan proceeding involving only one group member, restructurings involving the non-group debt of individual group members, and situations where valuable contracts of specific group members must be preserved are examples of situations where separate Dutch plan proceedings will be required for each group member in need of restructuring. In addition, even in a purely financial restructuring of group debt, plan proceedings could be instituted for each affected guarantor and may even be required in some cases. In such cases, each such plan proceeding might need to be recognized under chapter 15 in order to obtain US enforcement of the group restructuring. While it would be advantageous to have all the plan proceedings recognized as foreign main proceedings, this presents a problem because several of the group members do not have a Dutch EU/COMI. Some group members may lack a Dutch establishment, which might prevent recognition for those without a Dutch COMI.

122. This scenario, multiple chapter 15 petitions by many members of an enterprise group centered in the Netherlands, raises the question whether there can be a group COMI for an enterprise group. Since both the EU Insolvency Regulation and chapter 15 start with a presumption that the COMI is located at the entity's registered office, there could be no group COMI where group members' registered offices are in different jurisdictions unless the presumption is rebutted.[196] One approach to rebutting the presumption would be to focus internally on the group's governance structure and set the COMI of a subsidiary at the location of the group headquarters if the decision-making for the subsidiary takes place there. This would place many, if not all, of the members' COMIs in a single jurisdiction and permit a group restructuring.

123. Early on, the European Court of Justice rejected that approach under the EU Insolvency Regulation and instead focused externally on the creditors of each subsidiary by adopting what may be referred to as a "head office functions" test.[197] In this respect, reference can be made to, for example, the judgment of the Court of Justice of the EU in the *Interedil* case198 where it is observed that

> "a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be

196 The possibility of a group COMI is explicitly acknowledged in par. 53 of the recitals to the EU Insolvency Regulation: "The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. (…)"

197 See CJ EU 2 May 2006, Case C-341/04, ECLI:EU:C:2006:281, E.C.R. 2006 I-03813 (Eurofood); CJ EU 20 October 2011, Case C-396/09, ECLI:EU:C:2011:671, E.C.R. 2011 I-09915 (Interedil).

198 See CJ EU 20 October 2011, Case C-396/09, ECLI:EU:C:2011:671, E.C.R. 2011 I-09915 (Interedil), answer to the third question referred to the court.

regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State;".

124. The US approach under chapter 15 is more liberal. While the US approach evaluates each debtor and does not recognize a "group COMI" concept,[199] it is much easier under US law to establish that the COMI of all group members is in the same jurisdiction. This is because the US courts have rejected a rigid approach in favor of a multi-factor approach. Unlike the rigid EU approach to COMI, the US approach could place the COMI in any of a number of alternative locations.[200] In addition to the registered office, those locations might include "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes."[201]

125. Thus, in contrast to the EU approach, chapter 15 permits use of a command and control test that focuses on the "nerve center" of the entity.[202] Consequently, in the scenario where group members are controlled from an enterprise headquarters located in the Netherlands,[203] the Dutch plan proceedings involving each of the members could be recognized as foreign main proceedings under chapter 15, even for members without a Netherlands EU/COMI[204] or a Dutch establishment.[205] An example of this approach is the *OAS* case, where the court applied the nerve center test to hold that the US/COMI of the Austrian finance subsidiary of a Brazilian enterprise group was in Brazil and that the Brazilian insolvency proceeding involving the Austrian entity was a main proceeding under chapter 15.[206]

126. Even if the group headquarters is not located in the Netherlands, it may be possible to shift the COMI of the group in order to obtain chapter 15 foreign main recognition of a Dutch scheme that achieves a group restructuring. Even under the fairly rigid EU Insolvency Regulation test, it is possible to shift the COMI of an entity prior to instituting an insolvency proceeding. However, since this involves either changing the registered office (with serious implications) or shifting head office functions and notifying creditors of the change, EU/COMI-shifting all of the important members of an enterprise

199 See Servicos de Petroleo, n. 195 above, 600 B.R. at 244 (stating that even in an integrated enterprise group setting "recognition is granted on an individual debtor by debtor basis").
200 While the US cases assert that an entity has "one and only one COMI," the test is rather indeterminate. See Servicos de Petroleo, ibid. at 276.
201 Morning Mist Holdings Ltd v. Krys (In re Fairfield Sentry Ltd), 714 F.3d 127, 137 (2d Cir. 2013) (quoting In re SPhinX, Ltd., 351 B.R. 103, 117 (Bankr.S.D.N.Y.2006), aff'd, 371 B.R. 10 (S.D.N.Y.2007)).
202 Fairfield Sentry, 714 F.3d at 138 n.10.
203 See Servicos Petroleo, n. 195 above, 600 B.R. at 276 & 277 (noting that the nerve center test "is not at all a straightforward standard when applied to most international conglomerates" and cautioning about relying on management so senior that it may have no active role in the subsidiary at issue).
204 This approach could also be used in the first scenario if it were necessary to use a public plan proceeding to restructure group members with EU/COMIs in the Netherlands and a non-public plan proceeding for those without. The irony is that the anchor debtor for the non-public plan proceeding would not have a Netherlands COMI for purposes of the EU Insolvency Regulation, but might for chapter 15 purposes.
205 If the US/COMI is located in the Netherlands, there is no requirement that the debtor have an establishment there. Compare 11 U.S.C. § 1502(4) with § 1502(5).
206 In re OAS S.A., 533 B.R. 83, 101 (Bankr. S.D.N.Y. 2015).

group would be a significant and challenging undertaking.

127. Under the relaxed approach of chapter 15, however, a US/COMI shift for the group would be much easier because only the group headquarters, and not the head office functions of all subsidiaries, would need to be moved to the Netherlands. Here another difference between the EU and US approaches makes a COMI shift easier. While the EU measures COMI as of the time the initial insolvency proceeding is instituted,[207] and not at the time that recognition is sought, chapter 15 measures COMI at the time the chapter 15 petition is filed.[208] Thus the US/COMI-shift could occur either before or after the Dutch proceeding is commenced. This means that aspects of the restructuring itself could be relied upon as the basis for the US/COMI shift. For example, consolidation of control into the Dutch office as part of the restructuring process might shift the US/COMI of group members to the Netherlands. Further, in some cases the Dutch proceeding may itself cause the COMI to shift to the Netherlands if the insolvency proceeding becomes the main interest of the entity, as it had in the *Fairfield Sentry* case.[209]

128. As discussed above, the flexibility of the US recognition analysis makes it theoretically possible to enforce a group restructuring in the US by obtaining foreign main recognition of multiple Dutch schemes involving each enterprise group member, even those with no prior Dutch connection other than their relationship to the Dutch affiliate used to anchor the proceedings in the Netherlands. Nonetheless, the very flexibility that permits recognition carries with it the risk that such a strategy may be unsuccessful. While the US rules would permit recognition as a foreign main proceeding of a Dutch scheme involving an affiliate with no other Dutch connection, they do not compel it and easily could be applied to deny recognition of one or more of the members' plan proceedings.

129. This will present a serious problem only if the group member lacks a Dutch establishment. While the presence of a Dutch establishment is not required for foreign main recognition of the Dutch proceeding, a Dutch establishment is needed for recognition of Dutch plan proceedings, as foreign non-main proceedings,[210] the chapter 15 term for a secondary proceeding. While the chapter 15 definition of establishment is more relaxed than the EU Insolvency Regulation's definition of that term, it still requires that the entity have a "place of operations" in the forum jurisdiction where it "carries out a nontransitory economic activity."[211] However, even this test may not be applied rigidly. For example, in *Servicos de Petroleo* the court relied upon Brazilian assets indirectly held through subsidiaries to recognize as a non-main proceeding a Brazilian restructuring of a Luxembourg holding company.[212]

130. For a non-Dutch group member with a Dutch establishment, the member's Dutch plan proceeding could be recognized as a foreign non-main proceeding. While recognition as a

207 Art. 3(1) EIR.
208 See Fairfield Sentry, n. 201 above, 714 F.3d at 137.
209 Ibid. 714 F.3d at 137 (stating "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis").
210 11 U.S.C. § 1502(5).
211 11 U.S.C. § 1502(2). The EU Insolvency Regulation adds a requirement that the economic activity be carried out with human means and assets (Art. 2 (10)).
212 See Servicos Petroleo, n. 195 above, 600 B.R. at 259 & 281 -82 (relying upon the business operations of the holding company's subsidiaries).

EIRJ European Insolvency and Restructuring Journal

foreign non-main proceeding does not carry with it all the benefits that flow from recognition as a foreign main proceeding, it should be sufficient for US enforcement of the Dutch group restructuring. Unlike the EU Insolvency Regulation, where the effects of a secondary proceeding are limited to assets situated in the territory of that forum, chapter 15 permits the US court in a foreign non-main proceeding to grant almost all relief that could have been granted in a foreign main proceeding.[213] Since it is so easy to establish a US/COMI in the forum jurisdiction, few US cases discuss the relief that can be granted in a chapter 15 case involving a foreign non-main proceeding. However, those that do indicate that a foreign non-main proceeding may be granted nearly identical relief as a foreign main proceeding.[214] While the courts may be more reluctant to grant broad relief in connection with a foreign non-main proceeding,[215] available relief includes staying enforcement actions against the debtor and the enforcement of foreign insolvency orders, including restructuring plans.[216] Indeed, the US courts have enforced a foreign scheme in a non-main proceeding, including enforcing terms providing for affiliate-guarantor releases.[217] In the first scenario discussed above, this means that Dutch affiliate-guarantor releases could be recognized and enforced in the US even if the anchor debtor for the non-public scheme could not establish a Dutch US/COMI. For the scenario involving multiple plan proceedings, it means that the terms of a Dutch group restructuring plan could be enforced under chapter 15 as long as the relevant group member entity maintains a Dutch establishment.[218]

5.3.3 Using a Dutch SPV to Anchor the Group Restructuring

131. While the scenarios just discussed assume that a Dutch enterprise group is using the Dutch scheme to achieve a group wide restructuring, the Dutch scheme is designed to also be used by groups that are not centered in the Netherlands. For example, it is common for major global enterprise groups to have Dutch members, often used for financing purposes. The third scenario analyzes this situation: an enterprise group centered elsewhere but using the Dutch scheme to restructure group debt that was issued through a Dutch special purpose financing entity ("SPE" or "SPV")[219] and guaranteed by the other group members. The analysis assumes that only the Dutch SPV institutes a plan proceeding[220] and that the resulting scheme restructures the affiliate guarantees of the group debt.

132. The flexible US approach to COMI would permit the SPV's Dutch plan proceeding to be recognized as a

213 See 11 U.S.C. § 1521.
214 Ibid. at 272 & 293; SPhinX, n. 177 above, 351 B.R. at 122.
215 Section 1521(c) embodies this cautious approach by requiring that the court "be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding…." 11 U.S.C. § 1521(c). With cases like OAS that broadly interpret COMI, the question of what relief should be awarded in non-main proceedings rarely arises.
216 See 11 U.S.C. §§ 1507 & 1521(a).
217 See Servicos de Petroleo, n. 195 above, 600 B.R. at 293 – 94. The bankruptcy judge cited as authority his own earlier unpublished order recognizing as a non-main foreign proceeding the scheme of arrangement that was entered by the Hong Kong court in Winsway Enterprises Holdings Limited, Case No. 16-10833, ECF Doc. # 22.
218 Recognition may be possible even where the entity lacks a Dutch establishment. This is discussed below in the context of Dutch SPV's. See sec. 5.3.3.
219 The affiliate used as the anchor debtor for a Dutch plan proceeding to restructure group debt need not be the financing entity or even have a Dutch COMI. The possibility of enforcing the scheme in chapter 15 as a non-main proceeding is discussed in par. 5.3.2, above.
220 As noted earlier, additional plan proceedings might be needed if the group includes members with a COMI in other EU Member States.

foreign main proceeding. As a Dutch SPV, the financing subsidiary's registered office would be in the Netherlands and its EU/COMI likely also would be there. Chapter 15, like the Model Law and the EU Insolvency Regulation, establishes a presumption that the COMI is at the debtor's registered office, absent evidence to the contrary.[221] Thus, the chapter 15 registered office presumption would place the SPV's US/COMI in the Netherlands, at least initially. If the presumption were challenged, the US multi-factor approach would permit a US court to select some other location, like the enterprise group's headquarters, as the US/COMI of the SPV. However, the flexible nature of the US approach also permits a US court to find the US/COMI at the SPV's registered office in the Netherlands.

133. Several of the COMI factors point to the Netherlands. Among the factors that may be considered in determining COMI is the "expectation of creditors."[222] The combination of the registered office presumption and the creditors' expectation that the restructuring of debt incurred by a Dutch SPV would occur in the Netherlands under Dutch insolvency law might be sufficient to support a Dutch US/COMI for the Dutch SPV.[223] Another COMI factor is the jurisdiction whose law would apply to most disputes. An SPV is designed to owe only one debt - the debt that is the subject of the restructuring effort. If that debt were governed by Dutch law, that factor would favor a Dutch US/COMI. Further, even if Dutch law did not govern the debt, it would determine the corporate powers and duties of the SPV and that may be more important for COMI purposes than the law governing the debt.[224] The argument that COMI should be placed in the Netherlands could be augmented by adding other factors, like having directors and board meetings in the Netherlands. These factors were enough in the *Ascot Fund* case.[225]

134. If the COMI presumption is challenged and the US/COMI of the Dutch financing SPV cannot be placed in the Netherlands, then obtaining recognition will be a challenge. While a Dutch establishment is not needed for the COMI to be in the Netherlands, it is necessary in order to recognize a Dutch plan proceeding as a foreign non-main proceeding under chapter 15.[226] The establishment requirement likely would be difficult for the typical Dutch financing SPV to meet because many Dutch financing SPV's have no operations in the Netherlands. A Dutch proceeding involving an entity without a Dutch COMI or a Dutch establishment might not be eligible for recognition.227 The US courts have struggled with this problem in the context of "letter box" companies, where the debtor's registered office is in a jurisdiction where it has no operations. The US courts are pragmatic and generally receptive to beneficial insolvency resolutions, especially if there is no other proceeding pending in a debtor's COMI. This tendency clashes with chapter 15's apparent exclusion of "letter box" companies and other entities lacking an establishment in the

221 11 U.S.C. § 1516(c).
222 See In re Ascot Fund Ltd., 603 B.R. 271, 279 - 80 (Bankr. S.D.N.Y. 2019).
223 See Servicos de Petroleo, n. 195 above, 600 BR at 261 (creditors' expectations favored Luxembourg where issuer of debt was Luxembourg holding company).
224 See Ibid. 600 B.R. at 261.
225 Ascot Fund, n. 225 above, 603 B.R. at 279 & 86.
226 See Servicos de Petroleo, n. 195 above, 600 B.R. at 278; Bear Stearns, n. 177 above, 374 B.R. at 126 – 27 & 131 – 32.
227 This analysis would apply to any other group member without a Dutch establishment.

jurisdiction of the non-main proceeding. The US cases are split on this issue. On one side, the *Bear Stearns* court adopted a literal reading of chapter 15 to refuse recognition of a Cayman proceeding involving a Cayman "letter box" company.[228] At the other extreme is the *SPhinX* case, where the court relied in part on pragmatic concerns to grant recognition as a foreign non-main proceeding to a Cayman proceeding involving a Cayman "letter box" company.[229] Most US cases follow the *Bear Stearns* approach.

135. The *Fairfield Sentry* opinion discussed earlier provides an option that could be used for a Dutch SPV lacking a Dutch establishment.[230] The commencement of the Dutch plan proceedings may shift the SPV's US/COMI to the Netherlands if it were not already there. This is because, unlike the EU Insolvency Regulation, chapter 15 measures COMI as of the time the chapter 15 petition is filed.[231] By design, a special purpose financing vehicle has no interest other than issuing and repaying the group debt that was channeled through it. Thus, a Dutch plan proceeding that restructures the group debt arguably becomes the SPV's main interest and causes its US/COMI to shift to the Netherlands once the Dutch plan proceeding is commenced.[232] For example, the *Suntech Power* case involved a Cayman Islands provisional liquidation proceeding that, according to the court, is a restructuring process and much like a chapter 11.[233] Although the company was incorporated in Cayman, it had not conducted any activities in Cayman prior to filing the provisional liquidation.[234] The court found that COMI had shifted from China to Cayman based largely on the impact of the insolvency filing and appointment of provisional liquidators to manage the process.[235] The extremely limited purpose of a financing SPV makes the argument that the restructuring proceeding is the SPV's main interest stronger than for an operating company.[236] The Dutch scheme is a debtor-in-possession proceeding. An office holder comparable to one that may be appointed in the other Dutch insolvency proceedings is not available. However, the Dutch scheme legislation provides for the possible appointment of a restructuring expert, whose task is to develop a restructuring plan, or the appointment of a monitor, whose task is

228 Bear Stearns, n. 177 above, 374 B.R. at 126 – 27 & 131 – 32; accord, In re Ran, 607 F.3d 1017, 1022 (5th Cir. 2010).

229 In re SPhinX, Ltd, n. 177 above, 351 B.R. at 119 – 22. The District Court noted in its opinion affirming the Bankruptcy Court that the Bankruptcy Court's decision was pragmatic. 371 B.R. at 18 – 19. The Bankruptcy Court in SPhinX noted that the Cayman proceeding was fair and that there was no other insolvency proceeding pending elsewhere. 351 B.R. at 120.

230 See par. 5.3.2, above. See Fairfield Sentry, n. 201 above, 714 F.3d at 137.

231 Compare art. 3(1) EIR with Fairfield Sentry, 714 F.3d at 137.

232 Ibid. 714 F.3d at 137 (stating "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis"). See also, In re Creative Finance Ltd., 543 B.R. 498, 501 (Bankr. S.D.N.Y. 2016) (noting that "a COMI can (and not infrequently does) change from the jurisdiction in which a foreign debtor actually did business to a 'letterbox' jurisdiction").

233 In re Suntech Power Holdings Co, Ltd., 520 B.R. 399, 417 (Bankr. S.D.N.Y. 2014).

234 Ibid. 520 B.R. at 416.

235 After noting that the debtor in such a proceeding continues to operate, subject to supervision and control of the provisional liquidator, the Court stated: "Nevertheless, the commencement of a provisional liquidation may have a profound effect on the business of the debtor. It triggers a restructuring process on which the survival of the debtor's traditional business may depend, and it may shift the duties and responsibilities of running the business from the debtor's management to the provisional liquidators."
Id. 520 B.R. at 417.

236 In the OAS case, the Court found that Brazil was the COMI of an Austrian SPV because the SPV "had no other business except to pay [the debt] off. This was the very business it and the other Brazilian Debtors were engaged in through the Brazilian Bankruptcy Proceedings." OAS, n. 206 above, 533 B.R. at 101; accord, Oi Brasil Holdings Coop U.A., 578 B.R. 169, 225 - 26 (Bankr. S.D.N.Y. 2017) (involving Dutch SPV). The Oi Court's refusal to recognize a Dutch COMI for the Dutch SPV demonstrates this point. No Dutch insolvency proceeding was pending when the chapter 15 case was filed so there was no Dutch COMI shift yet. Later, when the Dutch proceeding was filed, the Court refused to reconsider its finding of a Brazilian COMI in part because the Brazilian proceedings were more significant, and the Dutch insolvency trustee's role was very minor. Oi Brasil, 578 B.R. at 222 – 33. In addition, the Court found that the Dutch filing was part of a creditor's inappropriate strategy to overturn the prior COMI determination. Ibid. 578 B.R. at 235 – 44.

EIRJ European Insolvency and Restructuring Journal

to look after the interests of the creditors (in case the court has ordered a stay). The appointment of either one of these officials may be more than enough for the US court to consider that the COMI of the entity concerned is in the Netherlands. For example, in *Olinda Star* a "light touch" British Virgin Island's provisional liquidation was sufficient to shift COMI from Brazil to the BVI even though the only BVI activity was the debt restructuring.[237] While the Dutch restructuring advisor's role may be more limited than the provisional liquidator's role in *Olinda Star*, the restructuring advisor does control plan formulation. Thus, in the case of a financing SPV the Dutch restructuring advisor, acting in the Netherlands, will be managing the entity's main interest during the plan process.[238] Further, there is no minimum time period for such a COMI shift. The focus is on the entity's activities at or around the time the chapter 15 petition is filed.[239] Thus, this concept could be applied to Dutch plan proceedings even though they should be completed in only a few months.[240]

6. Enforcement of a Dutch Group Restructuring

6.1 US Enforcement of Foreign Restructuring Plans

136. Recognition is only the first step. If the goal is a group restructuring that is effective in the US, the terms of the restructuring plan must be enforceable there. While there is some question whether the Model Law authorizes the enforcement of foreign insolvency judgments or foreign restructuring plans, there is no doubt that chapter 15 permits it. The US cases find this authority in two different provisions of chapter 15: sections 1507(a) and 1521(a).[241]

137. First, as noted earlier, the non-uniform US version of article 7 is not merely a savings clause, but an affirmative authorization of relief.[242] That section largely incorporates prior section 304 of the US Bankruptcy Code, which permitted US courts to provide assistance to foreign insolvency proceedings up to and including the enforcement of foreign restructuring schemes. The operative language of section 1507(a) states that the US courts "may provide additional assistance to a foreign representative under this title."[243] The "additional assistance" that may be provided includes enforcing the terms of a foreign restructuring scheme.[244] The standard

237 See In re Olinda Star, Ltd., 614 B.R. 28, 34 – 35 (Bankr. S.D.N.Y. 2020). Under the "light touch" approach, the company's management continued to control all operations from Brazil, with the BVIA liquidator's role limited to proposing the scheme and approving transactions outside the ordinary course of business.
238 While other factors were involved, the limited nature of the Dutch restructuring advisor under prior Dutch law was not enough to shift the US/COMI in Oi Brasil. See Oi Brasil,, 578 B.R. at 232-33.
239 Fairfield Sentry, n. 201 above, 714 F.3d at 137. Fairfield Sentry rejects the earlier view of some courts that COMI only shifted after the insolvency proceeding had been pending for a lengthy period. See, e.g., British American¸ n. 134 above, 425 B.R. at 941.
240 In Suntech Power the chapter 15 case was filed three months after the Cayman proceeding, but the Court suggested that COMI shifted shortly after the insolvency proceeding commenced. Suntech Power, n. 233 above, 520 B.R. at 406 & 417 – 19.
241 See Avanti, n. 94 above, 582 B.R at 616; In re U.S. Steel Canada Inc., 571 B.R. 600, 609 (Bankr. S.D.N.Y. 2017); In re Cell C Proprietary Ltd., 571 B.R. 542, 551 (Bankr. S.D.N.Y. 2017); In re Rede Energia S.A., 515 B.R. 69, 89 (Bankr. S.D.N.Y. 2014); see also In re Condor Flugdienst GMBH, 627 B.R. 366, 374 – 75 (Bankr. N.D. Ill. 2021) (noting overlap between sections 1507 and 1521 and suggesting that section 105 of the U.S. Bankruptcy Code [grant of general equity powers] provides a third option).
242 See par. 4.1 above.
243 11 U.S.C. § 1507(a).
244 See In re Vitro S.A.B. de C.V., 701 F.3d 1031, 1061-62 (5th Cir. 2012).

applied is a flexible, discretionary one.[245] While section 1507 is based on prior section 304 and retains its list of factors that should be considered, it moved the concept of comity out of the list of factors and into the introductory clause, thereby elevating comity from merely one of several factors for consideration into an overarching principle.[246] Thus, while the court has wide discretion to enforce or refuse to enforce particular terms of a Dutch scheme, both comity and the factors listed in section 1507 inform the exercise of that discretion and are important issues to consider in evaluating whether a particular scheme will be given effect in the US.

138. The US cases also find authority for enforcement of foreign restructuring schemes in section 1521,[247] the US version of article 21 of the Model Law. That section enumerates seven specific types of relief that can be granted to a foreign representative following recognition. The list does not include the enforcement of a foreign insolvency order or a foreign plan. Nonetheless, the US courts find that power in the introductory clause to the list, which authorizes "any appropriate relief, including [the listed categories]."[248] The term "including" is not a limiting term under US bankruptcy law,[249] so the listed factors are merely examples of available relief and not a restriction on the general power to grant "any appropriate relief." Under this provision, the questions for the court are whether enforcement of a reorganization plan that differs from US law is "appropriate" and whether "the interests of creditors and other interested entities, including the debtor, are sufficiently protected."[250]

139. This is different from the "comity plus factors" analysis under section 1507. While there is some confusion in the cases about how these two authorizations, with different standards, should be reconciled;[251] there is no doubt that the US courts have the authority to enforce the terms of a Dutch scheme. Further, both provisions apply regardless whether the foreign proceeding is recognized as a foreign main proceeding or as a foreign non-main proceeding. Thus, a Dutch scheme involving an enterprise group can be recognized and its terms enforced in the US whether or not the entity that serves as the Dutch anchor for the restructuring has a Dutch COMI.

140. The overarching comity focus of US law makes the US courts very receptive to foreign restructuring plans that advance the Model Law's fairness and efficiency goals. Indeed, the US courts are so receptive to efficient foreign restructurings, that they have even recognized a foreign proceeding involving the US law governed debt of a US entity.[252] In *Karhoo,* the enterprise group's parent company, Karhoo U.S., was incorporated in the US. The group's debt was issued by the US parent and was governed by US law. In addition, critical group contracts were with the US

245 See, e.g., Rede Energia, n. 241 above, 515 B.R. at 101; In re Petroforte Brasileiro de Petroloe Ltda., 542 B.R. 899, 909 (Bankr. S.D. Fla. 2015).
246 See H.R. Rep. 109-31(I), 109, 2005 U.S.C.C.A.N. 88, 172.
247 11 U.S.C. § 1521.
248 11 U. S.C. § 1522(a). As the Avanti court stated, "The discretion that is granted is 'exceedingly broad,' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors. Avanti, n. 94 above, 582 B.R. at 612.
249 11 U.S.C. § 102(3).
250 11 U.S.C. § 1521(a). The US version of article 22 of the Model Law replaced the Model Law term "adequately protected" with the term "sufficiently protected" to avoid confusion with the pre-existing US bankruptcy doctrine of "adequate protection."
251 "The interplay between the relief available under sections 1507 and 1521 is far from clear." Avanti, n. 94 above, 582 B.R. at 615–16.
252 See George W. Shuster, Jr. & Benjamin W. Loveland, Upside Down in Chapter 15: Can U.S. Entities Qualify as "Foreign Debtors" in the U.S.?, 36 Am. Bankr. Inst. J. 22 (May 2017) (discussing the unpublished recognition decision in Karhoo U.S.).

parent. While the group had business operations in the US, most of its business was in the UK and the group's senior management operated out of London. All of the UK subsidiaries entered into an English administration, with the US parent added shortly thereafter. The administrators sought chapter 15 recognition of both the UK subsidiary cases and the US parent's UK administration in order to enjoin lawsuits by US creditors and prevent the termination of important contracts. Recognition of the *Karhoo* restructuring bodes well for achieving an enforceable enterprise group restructuring using a Dutch scheme because it demonstrates the flexibility of chapter 15 for dealing with complex multinational-debtor situations.[253]

6.2 Application to the Dutch Scheme

141. The terms of a Dutch plan proceeding could be enforced in the US under either the "appropriate relief" analysis of section 1521 or the "additional relief" analysis of section 1507. Turning first to the more detailed factor-based analysis of section 1507, the standard set forth in that section requires that:

a. [T]he court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure –

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[254]

142. Factor five has no application to corporate cases. Similarly, factors two and three should not be triggered by the typical Dutch scheme. The item one focus on reasonable assurance of just treatment of stakeholders should present no problem for the typical Dutch scheme either. Indeed, this factor would strongly favor enforcement because the requirements for plan approval under Dutch law provide affected stakeholders a voice in the process and include several provisions designed to ensure that the plan treats stakeholders fairly.

143. The final factor requires a comparison of the distributional aspects of a Dutch scheme to US chapter 11. That should present no obstacle to enforcement of Dutch schemes. The foreign law need not be identical to US law and can include very different distributional rules.255 Indeed, this factor should support the enforcement of Dutch schemes because the Dutch process is patterned, in part, on chapter 11. The differences in creditor treatment are minor, with the Dutch distributional standards being similar to those imposed by chapter 11. Both regimes include analogous concepts of claim classification and class acceptance of

253 See Upside Down in Chapter 15, ibid.
254 11 U.S.C. § 1507(b).

255 See PT Bakrie, n. 112 above, 601 B.R. at 724; Rede Energia, n. 241 above, 515 B.R. at 91.

the plan.256 The Dutch scheme legislation uses the same two-thirds majority of class debt as the US to determine whether a class has accepted the plan.[257]

144. A novel feature of the Dutch scheme is the cross-class cram down, where a plan can be imposed on a class of claims even though the class has not accepted it.[258] This feature presents no problem. Indeed, since that feature was drawn from chapter 11 it favors enforcement. The key creditor protections under Dutch law are comparable to US law, and possibly more protective. A few features exceed the requirements of US law. If the plan lacks unanimous support, the court must find that the circumstances justify it and that the company faces an imminent inability to pay debts as they fall due,[259] neither of which are required by chapter 11. The Dutch "reasonableness" requirement is virtually identical to the US "best interest of creditors" test. Both guarantee non-consenting creditors a liquidation-value distribution.[260] In addition to the liquidation value requirement, both laws require that at least one affected class accept the plan. Here the Dutch law is slightly harder to satisfy by requiring that the accepting class be an "in the money" class, whereas the US law counts any class whose rights are altered.[261]

145. Both systems generally require that distribution of the reorganization value follow non-bankruptcy priority rules. The Dutch requirement is similar to the US "absolute priority rule."[262] The US rule does not permit any property to be distributed to a class junior to the dissenting crammed downed class that is not paid the full value of its claims.[263] In both systems this would prevent the present shareholders from retaining their ownership interests over the objection of an unpaid unsecured class.[264] The Dutch rule is not absolute, but neither is the US rule. While the Dutch law permits deviation if there is a reasonable ground for it, US exceptions for critical vendors and capital infusions operate similarly.[265] Even if the Dutch law dispensed with the absolute priority rule altogether, that would not present a problem because restructuring plans that do not honor it have routinely been enforced.[266] Whatever minor distributional issues a Dutch scheme might present are not as significant as that.

6.3 Novel Features of the Dutch Scheme

146. While the US courts can enforce Dutch schemes, a few features require further

256 See sec. 2.2 above.
257 Compare 11 U.S.C. § 1126(c). US law also imposes a numerosity test ("head count") that requires more than half of the holders accept the plan, without regard to the amount of their claims. Id. This is a minor variation and has not presented an issue in cases involving English schemes, where there is no numerosity requirement.
258 Art. 384 DBA. See sec. 2.2 above.
259 See sec. 2.2 above
260 For Dutch law, see sec. 2.2 above.
261 Compare 11 U.S.C. § 1129(a)(10) with 383(1) DBA.
262 Art. 384(4) DBA, see sec. 2.2 above.
263 See Bank of America National Trust and Savings Assn. v. 203 North LaSalle Street Partnership, 526 U.S. 434, 444 (1999).
264 In case the debtor is an SME, a restructuring expert that is appointed at the request of one or more creditors or of the works council or workplace representation that is set up in the debtor's business may only submit a request to confirm the plan with consent of the debtor (art. 383(2) DBA. This is in line with art. 11(1) of the EU Directive on restructuring and insolvency.
265 The absolute priority rule may no longer be a bedrock principle of US law. A recent COVID-19 related amendment to chapter 11 eliminates the absolute priority rule in "small business cases." See 11 U.S.C. §1181(a) & 1191. While that would ordinarily limit the exception to debtors having less than about $2.7 million in debt, the threshold is temporarily set at $7.5 million, a number that includes the majority of US chapter 11 cases. 11 U.S.C. § 1182(1)(A); see generally Matthew J. Razzano, A Chapter 11 Makeover: Timely Revisions to the Bankruptcy Code to Assist Small Businesses Through Crisis, 57 Harv. J. Legis. On Line #2 at https://harvardjol.com/2020/06/28/a-chapter-11-makeover-timely-revisions-to-the-bankruptcy-code-to-assist-small-businesses-through-crises/ (last visited 5 October 2021).
266 See e.g. Rede Energia, n. 241 above, 515 B.R. at 104.

EIRJ
European Insolvency and Restructuring Journal

discussion. The confidential nature of the Dutch non-public plan proceedings may raise an issue about fairness or due process. In addition, the third-party release option under Dutch law may be challenged in a chapter 15 case involving a Dutch scheme. US cases have addressed these issues and suggest that they will not present an obstacle to the enforcement of Dutch schemes.

147. First, although notice to creditors and an opportunity to participate were factors that presented a challenge in the collectivity prong of the foreign proceeding definition,267 those issues arise independently as part of the recognition and relief process. Here, however, the focus is on the participation rights of parties affected by the restructuring rather than on whether the proceeding includes creditors in general.

148. The US courts require adherence to minimal standards of fairness and due process, which requires creditors receive notice and have an opportunity to appear and defend their rights.[268] Whether viewed as a public policy problem under section 1506, a just treatment concern under the section 1507(b) factors, an appropriateness concern under section 1521(a), or a sufficient protection inquiry under section 1522(a) the Dutch scheme easily satisfies the notice and participation requirements. Both the Dutch public and non-public plan proceedings not only require that all affected parties be given notice of the proceeding, but also give them the right to vote on the plan proposal and to appear and be heard at critical points, notably the confirmation stage of the process.[269]

149. Similarly, the confidential nature of the Dutch non-public plan proceeding should not present a problem. Despite the strong and long-standing US tradition of public judicial proceedings,[270] the US courts have not imposed that as a condition to recognition or relief under chapter 15. *Ex parte* proceedings with no notice and no opportunity to appear are not *per se* violative of fairness and due process as long as affected parties later receive an opportunity to appear and defend.[271] For example, use of an *ex parte* process to extend one entity's bankruptcy to include additional entities was not a bar to chapter 15 relief.[272] Nor are *ex parte* hearings.[273] The Dutch process does not even approach these limits because it fully involves all affected parties and gives them access to needed information and an opportunity to be heard in a meaningful manner before action is taken.[274] The fact that the non-public plan proceeding is not open to the general public and hearings are conducted privately should not prevent recognition or enforcement of non-public schemes.

150. The most important, and controversial, tool likely to be needed for a Dutch enterprise group restructuring is the release of affiliate-guaranteed debt obligations. For example, where group debt incurred by one group member is

267 See sec. 4.3.3.4.3, par. 95 et seq. above.
268 See In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 116 (Bankr. S.D.N.Y. 2012) (accepting Mexican "precautionary measures" that were obtained ex parte).
269 See, for example, art. 383 and 384 DBA
270 See, e.g., Publicker Industries, Inc. v Cohen, 733 F.2d 1059, 1069 – 70 (3d Cir. 1984).
271 See In re Neves, 570 B.R. 420, 429 – 30 (Bankr. S.D. Fla. 2017), aff'd, 2019 WL 11288450 (S.D. Fla. 2019); aff'd, 783 Fed.Appx. 995 (iith Cir. 2019) (involving enforcement of an Italian sequestration order obtained ex parte).
272 See Petroforte Brasileiro, n. 245 above, 542 B.R. at 908 – 09.
273 See OAS, n. 206 above, 533 B.R. at 105.
274 See Rede Energia, n. 241 above, 515 B.R. at 95 (stating those requirements).

owed jointly or guaranteed by other members, a group restructuring requires that the debt adjustments made with respect to one member be effective as to all co-obligors. While this could be achieved by filing separate proceedings for all co-obligors and approving identical plans in each case, that approach can be cumbersome, expensive, risky, and sometimes not possible. While it would be possible to co-ordinate the restructuring of multiple group members by using the expansive Dutch jurisdictional rules to file proceedings for all of them in a single Dutch court, it is simpler and more efficient to file only one or two Dutch plan proceedings and include terms in the resulting scheme that adjust the rights of the joint creditors against both the filing entity and all of its co-obligor affiliates.[275] No issue is presented if all affected creditors vote for the scheme or otherwise consent to the release of their claims against the non-filing entities.

151. However, where some creditors object to the affiliate release, or fail to affirmatively consent through voting or otherwise, such non-consensual third-party releases are controversial. The US courts are divided on the question whether third-party releases are permitted in chapter 11 plans and, if permitted, under what circumstances. Some of the regional circuit courts of appeal permit them, while others prohibit them.[276] However, even courts that do not permit non-consensual third-party releases in domestic chapter 11 cases will enforce such releases under chapter 15 if they are included in a foreign restructuring plan.[277]

152. Perhaps the broadest application of this principle is the case of *In re Metcalfe & Mansfield Alternative Investments*.[278] That case arose out of the collapse of the Canadian asset backed commercial paper (ABCP) market during the 2007 global financial crisis and involved the restructuring of the entire Canadian ABCP market, bonds in the face amount of approximately CAN$ 32 billion.[279] Each bond issuer was a separate legal entity and not part of an integrated corporate group.[280] The restructuring was achieved through a single plan involving only one debtor entity, but its terms included a global release of all participants in the Canadian ABCP market.[281] Notwithstanding the breadth of the releases or the fact that they exceeded anything available in a US chapter 11, the court relied upon the comity principle of chapter 15 to enforce plan's release and injunction provisions.[282]

153. In the more routine enterprise group context, third-party releases favoring affiliates are regularly approved. Since the Dutch scheme is partly patterned on the English scheme, cases involving English schemes provide a good analogy. US judges have no difficulty enforcing affiliate releases contained in English schemes.[283] While the decision

275 See sec. 5.2 above.
276 See Vitro, n. 244 above, 701 F.3d at 1061-62 (discussing conflicting circuit court views).
277 Ibid. 701 F.3d at 1060-61. Vitro was decided by the Fifth Circuit Court of Appeals, a court that does not permit third party releases in domestic cases. While the Vitro court did not enforce the third-party releases because of the circumstances of that case, its opinion confirmed that such releases could be enforced under section 1507 in an appropriate case. The Court stated, "We conclude that, although our court has firmly pronounced its opposition to such releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law." Ibid. at 1062.
278 421 B.R. 685 (Bankr. S.D.N.Y. 2010).
279 Ibid. 421 B.R. at 687 & 91.
280 Ibid. 421 B.R. at 690.
281 Ibid. 421 B.R. at 692.
282 Ibid. 421 B.R. at 696 & 700.
283 See, e.g., Avanti, n. 94 above, 582 B.R. at 617 (listing examples of both published and unpublished New York decisions enforcing releases); see also, In re Magyar Telecom B.V., 2013 WL 10399944

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European Insolvency and Restructuring Journal

to enforce an affiliate release in a particular case remains discretionary and might be refused on the basis of one of the statutory factors, there is no general obstacle to enforcing affiliate releases contained in Dutch schemes. Therefore, it is possible to enforce in the US a restructuring of the debt of an enterprise group through a chapter 15 case involving only one group member.

7. Conclusion

154. The chapter 15 recognition and enforcement rules are very liberal and should provide little difficulty in obtaining recognition and enforcement of group restructuring plans developed using the Dutch scheme legislation. The very flexible US/COMI rules may even result in the US courts recognizing, in effect, a group COMI in the Netherlands that would make the proceedings involving the non-Dutch group members foreign main proceedings. Even absent a Netherlands group COMI, a group scheme and its affiliate release provisions could be enforced for the benefit of all group members in a chapter 15 proceeding relating to a Dutch plan proceeding involving a single group member having its COMI or an establishment in the Netherlands.

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*4 (Bankr. S.D.N.Y. Dec. 11, 2013) (enforcing English scheme injunction protecting non-debtor entities).