

New state-of-the-art Dutch restructuring scheme

Will enter into force on 1 January 2021



The highly anticipated Dutch legislation regarding Court Confirmation of Extrajudicial Restructuring Plans (CERP) has been confirmed by the Dutch Senate. The current circumstances regarding the (COVID-19) coronavirus increased pressure on the Dutch legislator to implement the scheme. It will enter into force on 1 January 2021. CERP is designed for companies that are in itself profitable, but suffer from over-indebtedness or high structural costs and thus need to have their debts and obligations reassessed.

Legal professionals envision that CERP will provide a unique and highly effective restructuring tool. The goal of the new legislation is to allow companies to restructure without utilizing traditional formal insolvency proceedings. This leaflet will provide a short overview of the new legislation and its groundbreaking features.

In the Netherlands, there are currently no alternatives that provide a legally binding restructuring agreement other than either obtaining consent from all creditors, or through formal bankruptcy proceedings. Creditors rarely unanimously agree on how to solve outstanding obligations, which frequently prevents effective restructuring. The current system incentivizes individual creditors to make use of their 'hold out' position, which often results in a debtors insolvency. With the implementation of CERP legislation creditors will be incentivized to reach an agreement because the binding nature of court approved restructuring agreements may have adverse effects on the creditors interest if they do not participate in the agreement.

The CERP legislation makes it possible for the court to approve an agreement on the restructuring of debts without unanimous creditor support or formal insolvency proceedings. Court approval can bind all creditors and shareholders to the agreement, including those who voted against it. The CERP legislation was inspired by the UK's scheme of arrangement as well as the US Chapter 11 insolvency procedure. CERP is the

first regulation that gives effect to the new EU Restructuring Directive (EU 2019/1023).

When implemented CERP will be Europe's most state-of-the-art restructuring tool.

It's benefits include:

- Cross-class cram-down;
- Debtor In Possession (DIP) procedure;
- Absolute priority rule;
- Speedy, efficient and largely form free process;
- Electronic voting;
- Class voting;
- Low costs;
- Deal certainty;
- Wide range of COMI & non-COMI jurisdictions;
- Expert pool of judges;
- Optional invalidation of ipso facto and change of control clauses;
- Issuing equity without shareholder consent;
- Possibility to strike off parent guarantees or other group company obligations;
- Initiation for plan by creditors, workers-council, workplace representation or shareholders;
- Public and confidential variant;
- Also binds preferential and secured creditors;
- Optional rejection of onerous contracts.
- Group can restructure its global debts using a Dutch finance or intermediate holding company, and apply for recognition in its home jurisdiction instead of utilizing the insolvency laws of its home jurisdiction.

Scope of the bill

The scope of CERP extends to companies, regardless of their legal form. The bill seeks to introduce a streamlined procedure that can be utilized by both large companies and small to medium-sized enterprises (SME's). For companies classified as a SME the debtor

must cooperate in the formation to the agreement. CERP does not apply to banks, insurance companies and individuals who do not pursue a profession or business.

The CERP legislation was drafted with collaboration between the government and legal practitioners that specialize in the restructuring of companies. This legislation gives the court the authority to approve legally binding restructuring plans. The debtor or a designated restructuring expert can propose agreements that modify a creditors rights. The parties involved vote on the proposed agreement in classes. Only then does the court get involved as it can approve the agreement. Under certain conditions, the Court can impose the agreement on a voting minority within a class. Under stricter conditions, the court can also impose the agreement on one or more entire classes that have not agreed to the agreement (the so called cross-class cram down). The bill also provides for a number of supporting provisions to help establish an agreement such as a moratorium and suspension of insolvency proceedings. The debtor remains fully authorized to manage and dispose his assets during the entire process (debtor-in-possession).

Initiation of the procedure

A CERP procedure can be initiated when a debtor is, or can reasonably be expected to become insolvent. The procedure starts with a request to appoint a restructuring expert. Appointment of a restructuring expert may be requested by a creditor, a shareholder, the workers-council or the workplace representation. The debtor himself may propose a plan as long as no restructuring expert has been appointed.

Public and non-public version

CERP will be available in a public and a non-public version. The public version falls under the European Insolvency Regulation Recast (EIR), while the non public version does not. This means the public EIR version will be legally recognized throughout EU member states. A Dutch court can assume jurisdiction in an EIR covered CERP procedure when the debtor has its Centre Of Main Interest (COMI) in the Netherlands. For the non-public

version a Dutch court will assume jurisdiction if the procedure holds a sufficient link to the Netherlands. This means that under the right circumstances foreign entities can restructure under CERP when its plan has a sufficient nexus to the Netherlands.

In the non-public procedure the court operates in closed chambers allowing the debtor to draft a plan in a relatively calm environment. This version of CERP is effective if a debtor intends to address a plan to only a limited number of creditors. Whereas in the public version the draft of a plan is public and the CERP procedure is published in the Insolvency Register and registered in the Trade Register.

An effective plan and efficient procedure

The process of drafting a plan is largely form free and can for example be limited to a subset of equity providers. A plan can affect any kind of obligation and creditor with the exception of obligations arising from employment contracts. A plan can entail a full or partial cancellation of outstanding claims, a deferment of payments or a 'debt for equity swap' whereby the claim of a creditor is wholly or partially converted into shares in the company. Existing debts can be absolved or adjusted accordingly.

Additionally, CERP offers parties the opportunity to restructure onerous contracts with court approval in the event that the other party does not facilitate appropriate adjustments such as reducing the rent in a lease agreement. The other party will generally still be entitled to compensation for this (partial) termination of the contract but the restructuring plan can also change these (future) rights to compensation. CERP also takes into account common provisions in contracts that automatically trigger certain consequences in the event of an insolvency. These so-called 'ipso facto clauses' cannot provide grounds for contract termination as far as they relate to a CERP-like restructuring. In general, events and actions that are necessary to successfully implement and execute the plan cannot justify the change of obligations towards the debtor.

As soon as a restructuring plan is drafted, it can be submitted to the creditors. The soonest that creditors may vote is eight days after its submission. The debtor has seven days from the date of the vote to make a report which is then submitted to the court registry for inspection. The court will hold a “confirmation session” between eight to fourteen days after the report has been filed to the registry and the debtor has submitted a request for confirmation. The court decides on the confirmation request as soon as possible. Its decision is not open to appeal. This entire process is expected to last up to four to five weeks.

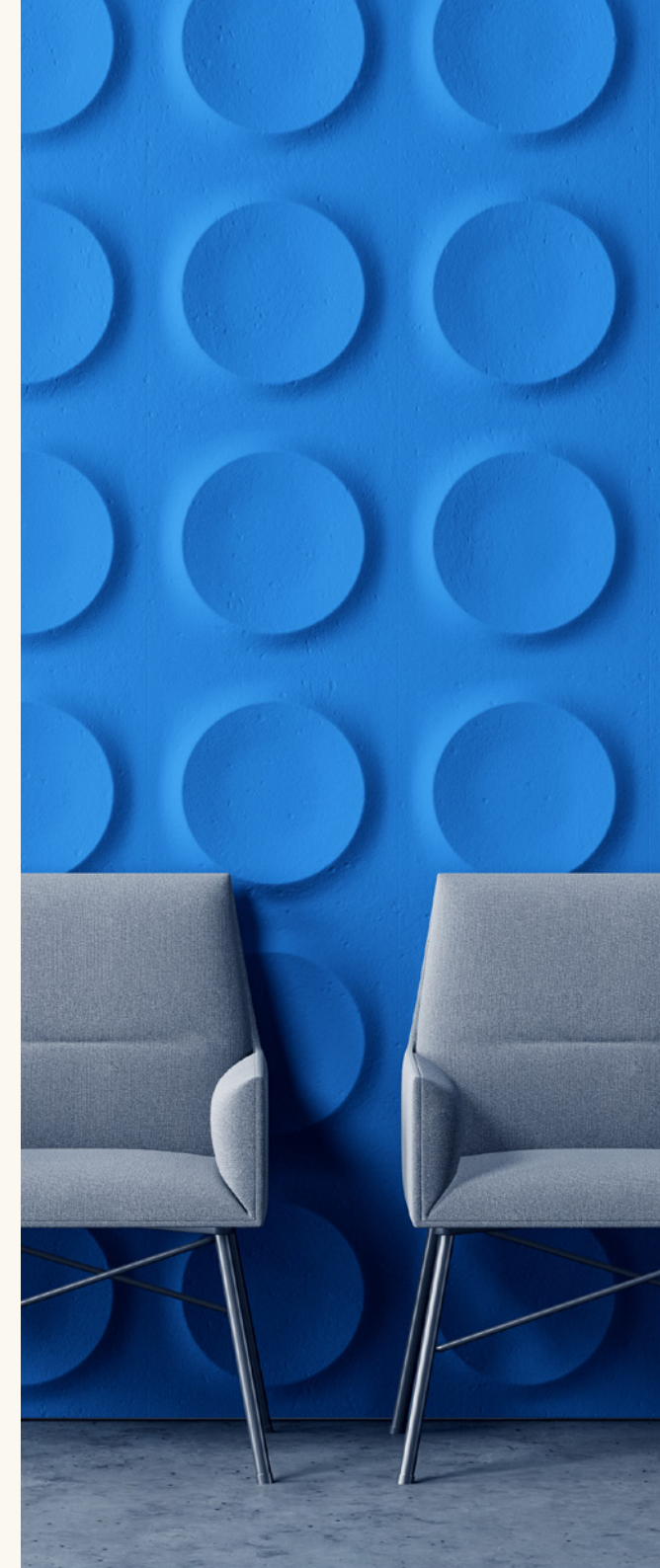
Only the classes of creditors and shareholders whose rights will be affected by the agreement are allowed to vote. A plan may only be submitted by the debtor if creditors who represent two thirds of the total value of claims in that class agree to it. The same threshold applies to shareholders, but becomes based on the subscribed capital. It is not relevant if a majority of creditors within a class votes in favor of the agreement as long as the aforementioned equity benchmark is reached.

Classes

The debtor can involve all categories of creditors and shareholders in the restructuring plan (creditors with security rights or any kind of preference can also be involved). The court will approve a plan if a sufficient number of creditors/ shareholders agree to it and the plan is deemed ‘reasonable’. Reasonableness is determined by whether creditors or shareholders benefit from the agreement or at least that their position will not deteriorate in lieu of a bankruptcy scenario (the so-called ‘best interest of creditors test’). The subsequent realized reorganization value must be distributed amongst creditors according to their rank (the so-called ‘absolute priority rule’). A creditor can never receive less than he would in an insolvency scenario.

If the plan involves multiple categories of creditors those categories of creditors and shareholders must be divided into different classes. These classes will be created based on a creditors rank and/or type. This may lead to separate classes for preferred creditors, mortgage holders, pledgees, unsecured creditors and shareholders. The division in classes is essential to the realization and success of a CERP-plan. Each class receives a separate tailor made debt-restructuring proposal on which it votes.

If at least one of the classes votes for the agreement, the court can approve the agreement. During the CERP procedure the Court looks at certain confirmation criteria stated in the new bill. As mentioned before CERP allows for a cross class



cram down according to which an entire opposing class can be bound to the plan. This requires stricter court confirmation conditions.

Debtor in Possession procedure

CERP acknowledges that it is important for a debtor to continue his business operations while a restructuring plan is drafted. Therefore during CERP procedures, the debtor retains the power to dispose and manage its assets, no receiver or administrator is appointed. The restructuring expert has a strictly supportive and advisory function. Furthermore, CERP offers the debtor a number of methods to maintain a business's status quo, such as a stay (moratorium) for up to 8 months, as well as the right of the debtor to continue using and transferring assets and supplies, even if they are subject to security rights. Third parties are protected by the principle of 'adequate protection'.

An additional protection built into CERP is the possibility of obtaining interim credit, which might be necessary for a restructuring plan to succeed. In pre-insolvency situations, financiers are generally reluctant to provide financing and will only do so if they are provided credit that is secured. Given the risk that a bankruptcy trustee may attempt to annul these newly obtained lines of secured credit by appealing to the means of transaction avoidance (*actio pauliana*), CERP ensures that these actions or other legal acts for the benefit of the restructuring plan cannot be annulled as far as the court authorized them. The debtor may request the court to grant this authorization during the settlement procedure.

SME exceptions

SME debtors have special rights under CERP. This includes that when a creditor requests a designated restructuring expert, he needs the explicit approval of the SME debtor in order to submit a confirmation request. This makes it more difficult for creditors of an SME to successfully complete the approval process. CERP contains a provision that prohibits shareholders of an SME from impeding a boards consent on unreasonable

grounds. The restructuring expert can request a court determination on the reasonableness of conduct.

The drafters of the CERP SME exception have broadly defined the term SME to encompass a wide variety of different entities. To fall within the SME scope the enterprise must have fewer than 250 employees and the annual turnover in the previous financial year amounted to € 50 million or the balance sheet total in the previous financial year did not exceed € 43 million. The aforementioned EU Restructuring Directive shows that 99% of all companies in Europe fall into this classification.

CERP vs the UK scheme and US Chapter 11

Schemes of arrangement under the English Companies Act 2006, company voluntary arrangements under the English Insolvency Act 1986 and Chapter 11 proceedings under the U.S. Bankruptcy Reform Act of 1978 have served as the most utilized restructuring tools for international companies. Notable differences include:

- The UK Scheme offers no stay on enforcement;
- The UK Scheme offers no ban on ipso-facto clauses;
- The Dutch scheme involves a more balanced court involvement;
- The UK scheme and Chapter 11 are not automatically recognized in the EU;
- The UK scheme offers no cross-class cram down;
- UK's CVA cannot impede shareholder rights or the rights of secured and preferential creditors;
- CERP will be a low cost procedure that can be completed in a relatively limited timespan.

International aspects

As mentioned above, a debtor or restructuring expert can choose to draft and offer the plan in a public or non-public procedure. This choice determines whether the approval procedure falls under the EIR or not, since only public procedures fall within its scope.

The disclosed procedure

The Dutch court has jurisdiction if a debtors COMI lies in the Netherlands. The CERP procedures is recognized in all EU countries with the exception of Denmark as the disclosed version of CERP will become an EIR acknowledged procedure. The disclosed version may be recognized outside the EU under UNCITRAL Model Law, which has already been adopted by 46 jurisdictions.

The undisclosed procedure

In an undisclosed CERP procedure, the Dutch court must base jurisdiction on art. 3 of the Code of Civil Procedure (Dutch). This article provides jurisdiction rules for petitions and gives the court a lot of room to assume authority. Art. 3 of the Dutch Code of Civil Procedure determines among other things, that the Dutch court has jurisdiction if the applicant or one of the stakeholders in the petition has his or her habitual residence in the Netherlands. The court can also have jurisdiction if the case is otherwise sufficiently connected with the legal sphere of the Netherlands. The government has listed explicit criteria for demonstrating a sufficient nexus to the Netherlands in the bills explanatory memorandum. The following circumstances are considered sufficient to assume a connection with the Dutch legal sphere:

- The debtor has its center of principal interests or a branch in the Netherlands.
- The debtor has substantial assets in the Netherlands.
- A (substantial) part of the debts to be restructured through the plan arise from commitments that are subject to Dutch law or that entail a forum choice for Dutch courts.

- A (substantial) part of the group of which the debtor belongs, consists of companies established in the Netherlands.
- The debtor is liable for debts of another debtor in respect of which the Dutch court has jurisdiction.

An undisclosed procedure does not qualify for automatic recognition within the EU.

Recognition of the agreement therefore depends on the international private law of the individual state in which recognition is requested. This may for instance also be possible under UNCITRAL Model Law, the Recast Brussel Regulation or any individual international treaties and private international law. Within the EU, recognition is expected to be possible based on the Recast Brussels Regulation.

Expert judges

The court gets involved at a late stage in the proceedings, after a plan has been drafted. Although court involvement is limited, its role is of great importance. The council for the judiciary will therefore train specialized judges and legal support staff who will conduct the CERP cases (the so-called CERP-pool).

Why AKD Benelux Lawyers?

AKD's Restructuring and Insolvency team has time and again proven a reliable and experienced partner in complex situations. We have been involved in nearly all major insolvencies in the Netherlands, either as trustees (in the bankruptcy of Imtech, for example) or as advisors, and our practical approach has proven to achieve good results.

Our team's expertise covers the following areas:

Restructuring, financing and security

We assist and advise companies that are in dire straits, or their stakeholders, such as shareholders or financiers. Thanks to their in-depth knowledge, our specialists are able to offer companies a range of solutions to stave off bankruptcy, such as restructuring or refinancing.

We also assist companies in negotiations with various stakeholders such as creditors, banks, shareholders and the tax authorities. Companies needing risk analyses – when designing financing and security structures, for example – can also rely on our specialists to come through for them.

Cross-border bankruptcies

When a bankruptcy cannot be prevented, we advise creditors, shareholders, directors and officers and employees on their position vis-à-vis the trustee. In addition to litigating on behalf of creditors in disputes with trustees, we also advise on asset transactions and relaunch scenarios.

In cross-border insolvency proceedings, we work together with other global law firms in our network and can provide you with cross-border advice at an international level.

If a trustee, the tax authorities or creditors hold directors and supervisory directors of a bankrupt company liable, the joint expertise of our lawyers puts them in a unique position to assist these officers in and out of court.

Our team collaborates closely with lawyers and tax advisers from our M&A and Banking & Finance teams.

Contact us

AKD is happy to advise you further on the implementation of CERP and any related questions you may have. For more information on CERP and the potential benefits it may have for your organization, contact any of AKD's restructuring specialists.



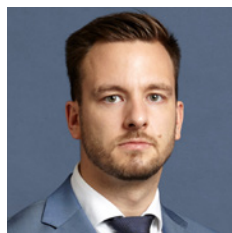
Fouad el Houzi
Lawyer
M: +31 6 52 61 58 10
T: +31 88 253 5129
E: felhouzi@akd.eu



Barend de Roy van Zuidewijn
Partner, Lawyer
T: +31 88 253 5102
E: bderoyvanzuidewijn@akd.eu



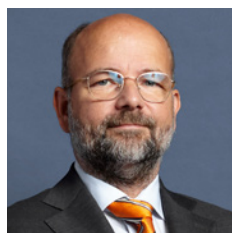
Thijs Hekman
Lawyer
T: +31 88 253 5171
E: thekman@akd.eu



Wouter Nieuwesteeg
Paralegal
M: +31 6 27 96 56 05
T: +31 88 253 5344
E: wnieuwesteeg@akd.eu



Paul Peters
Partner, Lawyer
T: +31 88 253 5563
E: ppeters@akd.eu



Ward Aerts
Partner, Lawyer
M: +31 6 46 10 14 02
T: +31 88 253 5721
E: waerts@akd.eu

T: +31 88 253 5000

E: info@akd.eu

akd.eu