Distressed M&A 2021

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LEXOLOGY
Getting The Deal Through

Netherlands

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MARKET CLIMATE AND LEGAL FRAMEWORK

Market climate

1 | How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

Relief measures that have been taken by the Dutch authorities have had a mitigating influence on the number of companies facing financial distress, and as a consequence on the number of distressed M&A transactions. The bigger picture, however, is that the economic consequences of covid-19 have had a major impact on European M&A and Dutch transactions, given the fact that the Netherlands play a major part in and is heavily dependent on the European market. Dutch M&A transactions dropped by as much as 40 per cent in the first half of 2020, according to a recent KPMG study (277 deals against 433 in the first six months of 2019). Total deal value dropped to €27 billion, a decrease of 25 per cent compared to the same period in 2019.

Legal framework

2 | What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

Before a Dutch company or other legal entity becomes subject to any type of insolvency proceedings provided for it in the Dutch Bankruptcy Act, being preliminary and definitive suspension of payments or bankruptcy, a distressed M&A transaction would generally move along the lines of a 'healthy' one, albeit that the conditions will most likely be different:

- stakeholders (eg, lenders, security rights holders, (key-)distributors) may have leverage or a seat at the negotiation table; and
- diligence and time frames will change.

In a suspension of payments or bankruptcy proceedings, the Dutch Bankruptcy Act will apply and, in principle, the 'ordinary' M&A procedures as set out above also apply.

Main risk in distressed M&A transactions

3 | Summarise the main risks to all parties involved.

Sales are increasingly conducted on an 'as is, where is' basis with limited warranties and representations. This will most likely lead to a higher number of post-closing disputes between sellers and purchasers relating to the valuation of the enterprise and breaches of the reps and warranties that have been included.

As companies are in financial distress, their stakeholders (such as senior and junior lenders, distributors and other creditors) would like to have a seat at the table during negotiations or would have special rights if they qualify as an essential creditor pursuant to which they may enforce payment effectively. Stakeholders could also have contractual veto rights based on change of control or insolvency clauses included in (loan) documentation or otherwise. This will most likely have two consequences:

- continuing the business operations might prove impossible if these parties are not on board; and
- these stakeholders might hamper the negotiation process.

As time is of the essence in distressed M&A, due diligence will be limited. Furthermore, documentation might prove to be inaccessible and key persons that normally would be interviewed are working from home due to covid-19. As purchasers are able to acquire companies against a discount, sellers will be inclined to insist on a limited due diligence as a compromise. This means that fewer contractual protection in the form of the typical representations, warranties or indemnities will be included in the relevant transaction documentation. In addition, it will not always be possible to 'bridge the gap' by taking out a W&I insurance that normally would provide for a certain degree of deal comfort on a synthetic basis.

Director and officer liability and duties

4 | What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

Directors must fulfil their duties by observing due care and taking into account the interests of the company and its affiliated enterprise. If it is established that the relevant director has not fulfilled its duties, the company and or third parties such as creditors can hold the director liable for the improper performance thereof. A director will in principle only be liable if it becomes clear that he or she has manifestly and improperly performed the duties and if a sufficiently serious or severe accusation can be substantiated. This means that the liability threshold is relatively high.

Directors and officers of a company in financial distress should comply with the applicable standards as described above. Furthermore, in the case of a foreseen insolvency, directors and officers in general must take even greater care when performing certain (legal) actions that could be detrimental to creditors, to prevent from being held liable for damages by creditors or the trustee in bankruptcy – for example, when entering into new contracts on behalf of the company in times of financial distress or making selective payments in such a situation to certain creditors.

Differences from non-distressed M&A

5 | In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

Legally, distressed M&A situations do not differ materially from non-distressed ones, assuming the target company has not yet entered into insolvency proceedings.

Dynamics shift, however, if the company enters into insolvency proceedings. As information relating to these proceedings is publicly available through the Netherlands Chamber of Commerce, confidentiality regarding the financial situation of the company can no longer be guaranteed, possibly leading to devaluation or reputational damage. Another adverse consequence would be that parties no longer have full control over the transaction as an administrator (suspension of payments) or bankruptcy trustee (bankruptcy) will be involved and have authority in the process.

Timing of transactions

6 What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

If the acquisition of a distressed company does not close within a relatively short time period, the company could be granted suspension of payment or declared bankrupt, which means that all legal acts entered into by the company (such as transactions) would need to be approved by an administrator or executed by a bankruptcy trustee with prior approval of a supervisory judge.

If an asset deal involves the transfer of employees, the purchaser might – under certain circumstances – be obliged to take over all employment agreements by honouring agreements that have previously been made without being able to reorganise. To determine whether employees can invoke such rights, all specifics of the transaction should be taken into account (eg, what type of undertaking is involved). An asset transaction out of bankruptcy will, in principle, not lead to a transfer of undertaking that will cause that the employees will not automatically transfer to the purchaser by operation of law. There is, however, pending case law that could impact this principle in the future.

TRANSACTION STRUCTURES AND SALE PROCESS

Common structures

7 What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

Both share sales and asset sales are the most typically used in distressed M&A transactions in the Netherlands. Loan-to-own transactions and convertibles are two other ways of structuring deals that are seen on the Dutch distressed M&A market.

Pros share sale

In terms of documentation, transferring shares is relatively easy as only the shares will have to be transferred and all assets and liabilities of the target will transfer by operation of law, as opposed to an asset deal where all these would need to be identified and transferred separately).

Cons share sale

A share sale involving a distressed company does not provide the seller with ample time to perform a full diligence, unlike in 'ordinary' M&A. This means that companies are acquired on an 'as is, where is' basis, with the protection of limited representations, warranties or corresponding W&I insurance (if it is possible to negotiate a policy within the applicable time frames at all).

Pros asset sale

An asset sale provides a possibility to carve out certain assets and (tax) liabilities, which in case of a distressed company is a material advantage and would be an important reason to opt for a distressed asset sale. The purchaser needs to spend less time and money, and fewer resources, on conducting due diligence, which, especially in 'pressure cooker M&A', is a another convenience.

Cons asset sale

All assets that are to be transferred would need to be identified separately, which could be time-consuming. If agreements are transferred, they may need to be renegotiated or renovated by the purchaser, especially agreements entered into with customers and suppliers. This could put the continuation of the business at risk. Furthermore, some assets may be encumbered, which would hamper a swift and clean transfer.

Pros loan-to-own strategy

A loan-to-own strategy could provide a party with the opportunity to eventually take greater control of a target by converting (distressed) debt obligations that were acquired at a discount into equity, as an equity holder would have more influence over a target through voting rights (compared to a lender).

Cons loan-to-own strategy

If the distressed debt would eventually be converted into equity, a lender would then transform into an equity holder. The shareholder would no longer be protected by any securities it might have had when it was still in a secured senior position. If the target company would go into bankruptcy, under certain circumstances a senior lender, whose debt has not been converted into equity, can invoke its security rights against the target as if no insolvency procedure exists. An equity holder will not have such a privilege under Dutch law.

Pros convertible loan

A convertible provides a lender with flexibility that might prove an asset when it concerns a distressed company. If the target is financially solvent, the loan will be repaid and other financial conditions will be met. If the target is no longer able to meet its financial obligations under the loan, it will be converted into equity, providing the lender with greater control (and visibility) over the target as it is able to exercise its voting rights as a shareholder.

Cons convertible loan

Typically, a target company would also take out bank financing, which would mean that (prior to conversion) the convertible would be subordinated to any bank debt through regular intercreditor arrangements, meaning that the investors would not rank as highly in the event of insolvency.

Packaging and transferring assets

8 How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

Shares in Dutch companies are transferred through the execution of a notarial deed to that effect. In addition, an underlying agreement (ie, a share purchase agreement) would need to be negotiated between the parties.

Assets are transferred by way of an asset purchase agreement that identifies all assets that will be included in the transfer. When drafting such documentation, all relevant transfer restrictions that might apply to the specific types of assets should be taken into account. A transfer of contract might, for instance, involve third-party consent, while other assets might prove non-transferable (eg, due to certain security rights that third parties can exercise).

As one would assume, 'cherry picked' assets could be carved out into a special purpose vehicle, the shares of which are subsequently transferred to the purchaser. It would depend on the structuring of the deal and tax considerations whether that route is chosen or not. If accounts receivables are transferred, the debtor would need to be notified that it now has to deal with a different creditor. Other procedural and documentary requirements differ depending on which specific type of asset is transferred.

The number of pre-pack administrations in the Netherlands has come to a standstill as a consequence of recent case law of the European Court of Justice in which it was decided that the former Dutch pre-pack procedure, as applied informally by certain Dutch district courts, does not qualify as a procedure upon which the insolvency exception to the rules concerning the transfer of undertakings (TUPE) applies.

Another way of structuring distressed M&A transactions is through the 'warehousing' of certain assets. These assets would be transferred to a bankruptcy remote foundation (ie, isolated from mandatory or voluntary insolvency proceedings).

Transfer of liabilities

9 What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

As a share transfer would encompass the transfer of both assets and liabilities, it is pivotal for a potential purchaser to assess whether it is willing to accept these, especially given the financial situation of the distressed company involved. If, for instance, a target company has not been able to meet its obligations versus the tax authorities, a purchaser could be faced with (material) tax claims post-closing. The limited amount of due diligence makes it difficult to get an adequate view of the risks involved.

A prospective purchaser must be aware of the possibility of successor liability. If, for instance, the American Foreign Corrupt Practices Act (FCPA) would apply, a purchaser could be held liable for bribery that has taken place in the target, even if such bribery took place before the transfer.

In the case of an asset transfer, no liabilities, debts, etc, will be transferred unintentionally. A purchaser will therefore not be confronted with any undesired liabilities attached to the distressed company.

Consent and involvement of third parties

10 What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

In bankruptcy and suspension of payments, a trustee in bankruptcy and an administrator will be involved, respectively. In bankruptcy, the trustee in bankruptcy will have full administration and disposition of all the assets. In the case of suspension of payments, there is an administrator who is authorised jointly with the management. Thus, in insolvency proceedings, the management of the company does not have full discretion to dispose of the assets and therefore cannot independently enter into a transaction. Secured creditors are, in general, not affected by bankruptcy or suspension of payments, except during a cooling-off period, and are – in principle – authorised to execute the secured assets. Furthermore, in practice, suppliers of essential goods may also have a powerful voice.

Time frame

11 How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

Generally, an asset transfer would be more time-consuming than a transfer of shares, given the fact that in order for the assets to be transferred correctly they would need to be identified separately. Additionally, the number of counterparts involved in an asset transfer is significantly higher, which will have an impact on timing as reaching an agreement with these third parties will take more time.

The time advantage of a share sale over one involving assets would disappear, however, if a prospective purchaser decides to conduct a (limited) due diligence on the target company in a relatively short time frame (regardless of the fact that documentation or key persons might prove to be inaccessible).

Tax treatment

12 What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

In the case of share transactions, typical tax liabilities and connected considerations relate to the availability of net operating losses, tax consequences connected to debt modifications (like debt for equity swaps), debt cancellations or settlements. Other topics include the potential tax effects of intercompany transactions, such as liquidations of subsidiaries or transfers of intra-group debt positions. Transfers of shares in companies whose assets predominantly consist of real estate may also trigger Dutch real estate transfer tax.

In asset transactions, tax considerations typically relate to the overall allocation of the purchase price between the different assets, whether or not the asset transaction qualifies as a transfer of a going concern for VAT purposes. Transactions involving real estate may trigger VAT or Dutch real estate transfer tax.

Auction versus single-buyer sale process

13 What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

If a company has entered into a bankruptcy, an auction scenario would be the starting point. If a company has not yet entered into a formal bankruptcy, the time involved with an auction could lead to a loss of the value the company represents and might eventually compromise the continuity of the company and lead to its bankruptcy. A trustee in bankruptcy would 'test the waters' by inviting potential purchasers to enter into a bidding procedure in order for the trustee to realise the highest possible purchase price for the business.

DUE DILIGENCE

Key areas

14 What are the most critical areas of due diligence in a distressed M&A transaction?

The most critical areas are:
- payment terms of the debtors of the company;
- material contracts pivotal for the continuity of the business;
- financing and security documentation; and
- financial information (such as interim balance sheets).

Searches

15 | What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

It is possible to verify with the Netherlands Chamber of Commerce if the target company has been granted suspension of payments, or is insolvent and as such has been included in the insolvency register. The Netherlands Chamber of Commerce also provides information if a director has been banned from managing companies based on a court order, if such a director has acted fraudulently during the bankruptcy.

Governmental registries also have information on licences held by a company (eg, licences from financial authorities), depending on the business of the company. If the M&A transaction would involve real estate, part of the due diligence investigation could be verifying documentation available at the Land Registry Office.

Contractual protections and risk mitigation

16 | What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

Contractual provisions

Bring-down condition

In order for a purchaser to get comfortable with a diligence gap, it could consider including a bring-down condition: a condition to closing in which the seller would reconfirm the accuracy of the reps and warranties on the closing date (eg, in addition to confirming that they are accurate on signing).

MAC

It may be possible to include closing conditions pursuant to which closing will not take place if certain disclosures (in disclosure letter or otherwise) give rise to a material adverse change (MAC) or if a MAC itself takes place before completion. MACs are still being included in transaction documentation, but parties might struggle to determine and agree on which effects of covid-19 should fall within the MAC scope.

Other strategies

(Limited) due diligence

Although this might prove impossible or limited given the timetable involved for distressed M&A transactions, it would be advisable to conduct a due diligence investigation, however limited it may be. Under Dutch law, a seller would be obliged to proactively disclose certain information and a purchaser would be required to perform its own assessment of the target (regardless of whether a due diligence investigation is set up or not).

Management warranty deed

Asking directors to issue a management warranty deed may provide another source of comfort when it comes to mitigating diligence gaps (if management is also selling its stake). This letter will set out the (business) warranties to be given by the management of the target and provides the purchaser with an additional source of recourse.

In theory there is no reason why the areas of focus for a buyer's due diligence in a distressed M&A process should vary significantly from an ordinary M&A process. However, in a distressed M&A process information is likely to be limited and, given the accelerated timetable for most distressed M&A processes, there is also likely to be less time for due diligence even if information is available. That means less time to address any risks or information gaps identified as part of due diligence. It is, therefore, particularly important to identify key issues early on and prioritise due diligence on areas that are most proximate to value.

W&I

Taking out a W&I insurance could also mitigate risks that arise from diligence gaps, albeit that certain exclusions on the policy would need to be negotiated. Parties would need to assess whether the insurance will provide cover in the case of any covid-19-related issues.

VALUATION AND FINANCING

Pricing mechanisms and adjustments

17 | What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

The use of earn-outs in transaction documentation has been increasingly on the rise during the covid-19 pandemic. Earn out mechanisms provide all parties involved with the opportunity to calculate the actual value of the company with the benefit of hindsight. If the company has performed well, the purchase price will be higher. Furthermore, an earn-out mechanism will keep current management incentivised. In terms of financial distress, the assurance that key persons will remain at the helm might prove valuable.

Using a reverse earn-out mechanism is also possible, whereby a seller would receive the 'full' purchase price at closing, but would then need to make payments to the purchaser if certain milestones or targets are not met.

The use of a 'locked box' or 'closing accounts' mechanism greatly depends on the bargaining power of each side (if either seller or purchaser has the upper hand). Buyers will be inclined to lean towards completion accounts mechanisms where the purchase price mirrors the current state of the business at closing (to make sure there are paying the actual value of the company at the moment they become owner), whereas sellers might prefer opting for a locked boxed pricing mechanism and base the purchase price on historical accounts that do not yet reflect the effects that covid-19 has had on the business as a whole.

Additionally, it is possible to opt for a net asset valuation (eg, of €1) if setting of the company's assets against its liabilities would lead to a valuation close to nil.

Fraudulent conveyance

18 | What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

Creditors and, in bankruptcy, the bankruptcy trustee can invoke the nullity of an M&A transaction whereby assets are sold for less than their value on the basis that such transaction is prejudicial to the creditors of the company. A legal act performed by a Dutch company that is prejudicial to the interest of its creditors can be contested by the creditors or the receiver in bankruptcy if, in short, all of the following apply:

- the transaction is entered into without a legal obligation to do so;
- the transaction is prejudicial to the interests of the other creditors; and
- both the company and the counterparty to the transaction were aware or should have been aware that the transaction was prejudicial to the other creditors.

With respect to certain specified transactions, this awareness is deemed to exist, subject to evidence to the contrary, if the transaction was entered into within a year of the date of the bankruptcy.

In order to mitigate the clawback risks ascribed above, key is that the transaction cannot be considered to be detrimental to the creditors of the company. This could, among other things, be achieved by selling the assets against fair market value whereby the assets' proceeds are distributed among the joint creditors of the company in conformity with the ranking of their respective claims.

Financing

19 What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

Negotiating a bridge loan whereby the lender would have a pledge on the shares of the target company is a common way of financially structuring distressed M&A transactions. After the company has been transferred, its debt will then be restructured.

Private debt funds (raising money from investors) provide for another form of financing that is not uncommon in these types of transactions.

Pre-closing funding

20 What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

Depending on the type of funding that is sought or the nature of the transaction itself, it is possible to negotiate and attach a debt term sheet or equity commitment letter to the transaction documentation to make sure lenders and sponsors (depending on the type of deal) commit to supplying debt or investing equity at the closing of the transaction, which might provide for greater deal certainty. To provide for additional certainty, (a part of) the purchase price could be wired to a third-party notary account that is bankruptcy remote. If one of the parties involved becomes insolvent the funds will not fall into the bankruptcy estate, providing certainty to a prospective purchaser.

DOCUMENTATION

Closing conditions

21 What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

In distressed M&A transactions, ideally the same set of completion conditions (merger clearance, other approvals, etc) would be included as in 'normal' deals, it being understood that the issues that normally would be identified during a due diligence investigation now remain below the radar. This means that only the most elementary completion conditions will be included, such as:

- approval by governmental authorities;
- MACs; and
- mandatory third-party consents.

The company's stakeholders (such as senior and junior lenders, distributors and other creditors) would like to have a seat at the table during negotiations. Therefore, their consents will usually also be included as a condition to closing (or in a separate signing protocol), because if they are not in on the deal, the continuation of the company might come to a standstill post-closing. In the case of an M&A transaction out of insolvency proceedings, the transaction will also be subject to approval for such transaction by the supervisory judge.

Including conditions precedent might impede the competitiveness of the bid as other purchasers might be willing to sign the deal unconditionally (or with a limited number of conditions).

Representations, warranties and indemnities

22 What representations, warranties and indemnities are commonly given in distressed M&A transactions?

In traditional M&A processes there are 'fundamental' and 'business' warranties; both can be relatively extensive. In distressed M&A processes the warranties are often limited to fundamental warranties, and even then are often fairly limited. Business warranties are often not provided, and even if they are, the liability is likely to be limited, especially if the consideration payable is non-cash or nominal. Warranties that are included would now refer to the title to certain assets or shares. If a trustee is involved, a warranty stating that the trustee is entitled to transfer the assets or shares will typically have to be included.

Remedies for breach

23 What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

In the case of a breach of warranty under an share purchase agreement, a purchaser can claim damages. Typically, these damages would be limited to the statutory definition thereof. If other contractual obligations are not met, the other party can claim fulfilment thereof. All other termination rights will typically be excluded, except if termination is based on the non-fulfilment of the conditions precedent. These available remedies do not differ substantially from any non-distressed M&A transactions.

Insurance

24 Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

As a 'top-up', it may be considered to take out W&I on a synthetic basis. This is where warranties are contained in the W&I policy rather than the share purchase agreement. Accordingly, they are negotiated with the insurer rather than the seller. A prescribed minimum level of due diligence is typically required to facilitate a synthetic W&I policy. Premiums are also higher and coverage is likely to be more limited than under an ordinary, mainstream policy. However, they have the potential to offer significant comfort to a buyer and may be a viable means of addressing risk in a distressed M&A process where adequate protection might otherwise be unavailable.

REGULATORY AND JUDICIAL APPROVALS

Merger control

25 What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the 'failing firm' defence recognised in your jurisdiction?

In principle, the competition authority has four weeks to render a decision on a merger filing – a period during which the parties cannot implement their transaction. In the case of urgent reasons (which can include – under certain circumstances – distressed business and assets) the parties can request dispensation from this standstill period.

The failing firm defence is indeed recognised but it in practice it is seldomly used and accepted by the competition authority.

Foreign investment review

26 | Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

Under the Screening Regulation (Regulation 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union), the member states themselves have the authority to determine a screening mechanism for foreign investments. Such a mechanism is currently being prepared in the Netherlands. As it has not yet entered into force, there is no difference in foreign investment review between mainstream and distressed M&A.

Bankruptcy court

27 | What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

In the case of a bankruptcy, only the bankruptcy trustee can dispose of the debtor's assets. The sale of assets can take place by way of a public sale or a private sale. For a private sale of assets, the bankruptcy trustee needs the approval of the supervisory judge. Also, a bankrupt company that has a works council installed must respect the consultation rights of the works council (in accordance with the Dutch Works Council Act) if it regards a sale of assets with a view to continue or relaunch (part of) the business of the insolvent company.

DISPUTE RESOLUTION

Common disputes and settlement

28 | What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

Issues that give rise to disputes commonly relate to the breach of:

- financial warranties;
- the tax deed;
- disclosure warranties; and
- balance sheet warranties.

Recent disputes that have been brought to litigation relate to the question of whether or not a transaction was entered into (pursuant to which parties would have been obliged to go ahead with it) and if it was possible to retroactively reflect the financial effects covid-19 had on a target company by amending the purchase price based on a change-of-circumstances defence.

Litigation and alternative dispute resolution

29 | What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

Typically, this would be the court of Amsterdam as it is the judicial institution with the most experience on corporate M&A issues. Its court of appeal has a special Enterprise Division. The Enterprise Division is also entitled to suspend or put in place directors that will temporarily manage companies in turmoil to put affairs in order. Furthermore, works councils can bring proceedings before the Enterprise Division if they are of the opinion that their interests have not been taken into account in the M&A process.

If ADR is used, parties commonly choose to have their disputes settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute of 1 January 2015.

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The Netherlands Commercial Court (the NCC District Court and NCC Court of Appeal) can also swiftly and effectively resolve international business disputes that started on 1 January 2019. NCC proceedings and judgments are in English. The NCC has already settled covid-19-related disputes.

UPDATE AND TRENDS

Recent developments and outlook

30 | What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

It is envisaged that on 1 January 2021 a new statutory pre-insolvency procedure for a compulsory composition will become effective in the Netherlands: the Dutch Scheme. The act includes elements of a UK scheme of arrangement and the US Chapter 11, but also has some distinct features. The Dutch Scheme provides an instrument to Dutch and foreign debtors to efficiently restructure their debts (including debts owed to secured creditors and shareholders) quickly and at relatively low cost. Owing to its broad range of jurisdiction and easy access, the Dutch Scheme provides an interesting option for cross-border restructurings. The procedure can be a swift, final and effective one, with effective measures to guarantee deal certainty and protection of the restructuring scheme put in place, while creditors' rights are protected in a balanced way.

Recent case law shows that parties need to act diligently when involved in Dutch distressed M&A transactions, by considering all possible consequences of the covid-19 pandemic. Dutch courts can be requested to amend or partially or completely terminate contracts, based on an unforeseen circumstances defence. In determining whether or not to do so, the courts would need to exercise caution, leading to a broad array of outcomes as these decisions are tailored to the specifics of each individual case. In some cases, the court decided the parties had to share the pain of the pandemic, in case the balance in the value of the parties' respective rights and obligations under the agreement was heavily disturbed. We have also seen courts deciding that parties were obliged to proceed with acquisitions and transactions that were agreed upon for a certain price before the pandemic hit, regardless of a subsequent drop in value.

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