

A faint, light blue background image of a scale of justice, symbolizing law and equity. The scale is positioned on the right side of the slide, with its pans hanging from a horizontal beam. The overall background is a gradient of light purple to white.

# **RESTRUCTURING IN THE NETHERLANDS DURING ECONOMIC AND FINANCIAL CRISIS**

Johan Jol

March 2010

Legal Houdini

To straighten out  
the legal hitch

# Topics

- The economic and financial crisis
- Some legal issues in restructuring



Legal Houdini

To straighten out  
the legal hitch

# Economic and Financial Crisis

- Bubbles arise out of collective madness (Geert Noels, Econoshock)
- Naturally occurring Ponzi schemes, the positive feedback loop (Robert Shiller, Irrational Exuberance)
- Unstable tower of debt (Charles Morris, the Two Trillion Dollar Meltdown)
- The trigger, the subprime mortgage crisis (Mark Zandi, Financial Shock)
- The negative feedback loop (Robert Shiller, Irrational Exuberance)
- The financial crisis becomes an economic crisis (De grote recessie, het Centraal Planbureau over de kredietcrisis)
- See for further resources: [www.legalhoudini.nl](http://www.legalhoudini.nl)

# Effects of Economic and Financial Crisis on Companies

- Too much leverage, no or not enough equity value
- Refinancing of outstanding debt difficult if not impossible; even fresh money quite often hard to get
- Results of companies under pressure
- Financial restructuring required, some creditors and all equity holders are out of the money
- FD 15022010: Congressional Oversight Panel US: Commercial Real Estate Losses and the Risk to Financial Stability. Is the worse yet to come, refinancing issues
- If without success: bankruptcies

Legal Houdini

To straighten out  
the legal hitch

# Issues in restructuring

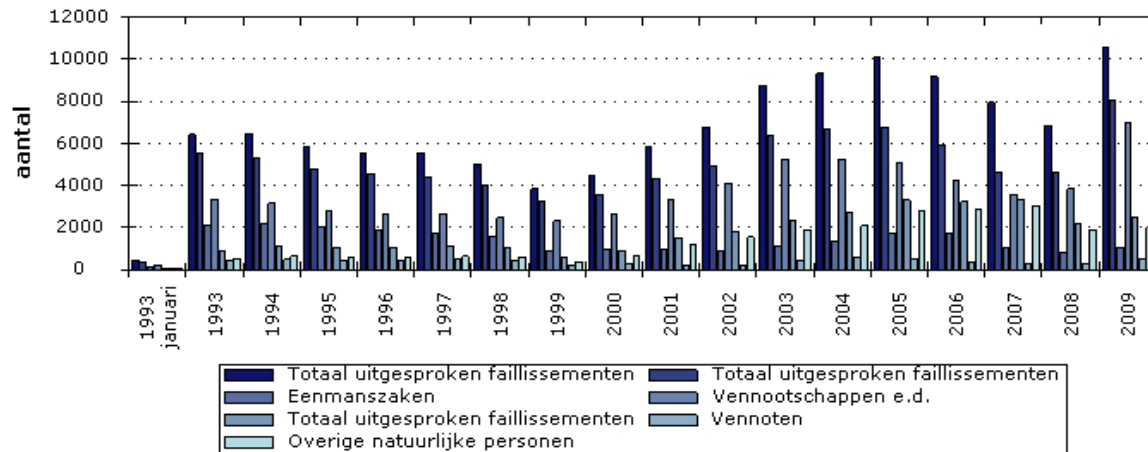
- Capital structure, different layers of debt (and cross ownership in these layers), different policies, complexity and costs of restructuring
- Where does the value break? Which value is relevant, the fire sale value of the assets or the going concern? And in case of going concern, the market comparison or the comparable transaction?
- Do we want to restructure the balance sheet or extend and pretend?
- If we want to restructure: how to squeeze out those creditors and equity holders which are out of the money without bankruptcy proceedings?
  - Sources: the Valuation of distressed companies, a conceptual framework, Michael Crystal QC and Rizwaan Jameel Mokal in International Corporate Rescue 2006, issue 2 and 3;
  - Valuation Disputes in Restructuring, Barney Whiter, in International Corporate Rescue 2010, issue and
  - An update on current restructuring issues and trends in Europe, Alain le Berre in Interational Corporate Rescue 2009, issue 6
- Position of servicers in deals (agent, servicers and special servicers) some only just bankrupt but some also unreachable.

Legal Houdini

To straighten out  
the legal hitch

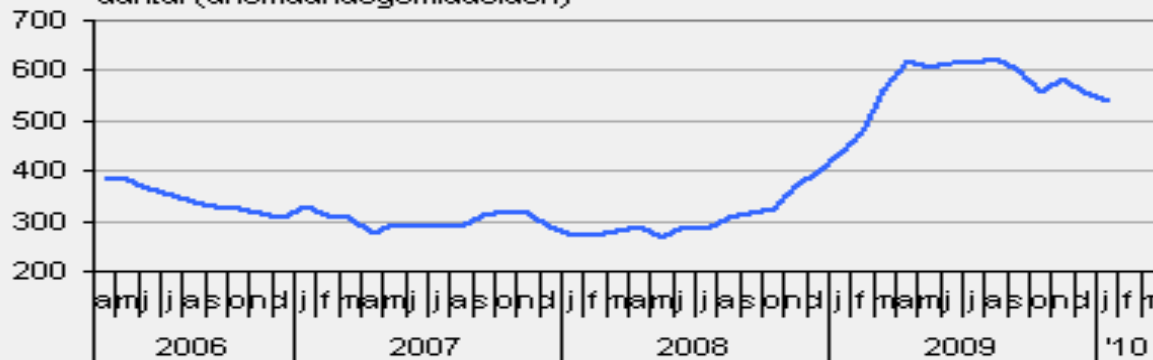
# Bankruptcies, Dutch Landscape

Faillissementen en schuldsaneringen



© Centraal Bureau voor de Statistiek, Den Haag/Heerlen 14-2-2010

aantal (driemaandsgemiddelden)



Bron: CBS

## Failliet Kernproblemen

- Er is niet één huisbank met Oranjegevoel meer, maar een syndicaat van binnen- en buitenlandse banken
- Rechter kan minderheid van schuldeisers niet in akkoord dwingen waardoor strijd ontstaat met negatieve afloop
- Curator heeft vaak te weinig tijd om succesvolle doorstart te organiseren

2009 Huge amount of bankruptcies  
both growth stops end 2009

FD 19012010 Resor

Legal Houdini

To straighten out  
the legal hitch

# Some legal Issues in Restructuring

1. Prelude, playing with COMI
2. Restructuring Debt
3. Debt to Equity Swap
4. Suspension of payment with composition
5. Enforcement of security rights



Legal Houdini

To straighten out  
the legal hitch

# Playing with Comi

- Insolvency Regulation 2002 (Regulation)
- If debtor has its COMI (center of main interest) in a EU Member State
  1. Courts of that Member State have the ability to open main insolvency proceedings
  2. Scope of proceedings is EU territory
  3. Governed by the law of that Member State
  4. Automatic recognition throughout the EU
  5. Unless public policy exception (narrow)
- Forum Shopping, seeking the most favorable restructuring jurisdiction

Legal Houdini

To straighten out  
the legal hitch



# Restructuring debt

- Extend and pretend: Consent required of *all* relevant creditors, unless:
- art. 287a Bankruptcy Code: Natural persons: the creditors unreasonably withheld its permission to a restructuring, taking into account the disproportionality between its interest to refuse and the interest of the debtor and/or of the other creditors; how to apply to companies?
- Supreme Court February 6, 2004, JOR 2005, 257, Bb 2004, 36 Hectic Illusions/Payroll: Creditor admits that his interest is not served better in a bankruptcy; no other assets exist; abuse of right
- Bonds Dutch law: often amendments of bonds with consent of  $\frac{2}{3}$  (or  $\frac{3}{4}$ ) majority representing  $\frac{2}{3}$  (or  $\frac{3}{4}$ ) of the nominal value of the bonds

# Restructuring debt

## Syndicate lending (a)

- Majority versus Unanimity
- LMA: Unanimity:
  - Extension of date of payment any amount
  - Reduction of Margin or, principal, interest, fee or commission
  - Increase in commitment

Legal Houdini

To straighten out  
the legal hitch

# Restructuring debt

## Syndicate lending (b)

- New parties on the block: Derivatives counterparties
- Position 2nd Lien and Mezzanine lenders: secured but often out of the money
- Position Sponsors:
  - Fresh money suppliers
  - Try to get in control by debt buy back, no debt buy back or in any event loss of voting rights
- Snooze you loose and Yank the bank, do they help?
- The Yell case, creative restructuring of debt

Legal Houdini

To straighten out  
the legal hitch

# Debt to equity swap I

- How much debt is swapped
  - conditions of the debt to equity swap, what kind of equity - common equity of preferred - , if preferred: fixed or variable dividend, control yes/no, lock-up agreement, exit rules, drag along and tag along rights
- Consent of **all** creditors whose claims are converted is required unless documentation of claim provides otherwise
- Decision to issue stock is required, normally simple majority vote of general meeting of shareholders but articles of association may provide otherwise
- Change of control if 50% or more of equity

# Debt to equity swap II

- Recent Example: Dutch Enterprise Court December 31, 2009, LJN BL3680: Inter Access Groep B.V.
- Inter Access Groep B.V. (IA Groep) was in a state of financial distress,
- No equity left and the accountant refused to approve the annual accounts 2008 due to lack of certainty of continuity.
- Minority shareholder, also being one of the biggest creditors, was willing to convert its debt into equity; Majority shareholder failed to agree.
- Enterprise Chamber decided debt to equity swap should take place

## Aandeelhouders Grenzen aan macht

- Meerderheidsaandeelhouders kunnen gedwongen worden tot verwatering
- Eerder gebeurde dat al wel bij minderheidsaandeelhouders die de feitelijke macht hadden
- Alleen wanneer het voortbestaan van de onderneming in gevaar is en de aandeelhouder weigert mee te werken aan een oplossing

FD 11022010

Legal Houdini

To straighten out  
the legal hitch

# Suspension of payment with composition

- No unanimity, as of January 15, 2005 (art. 268 en 268 a Bankruptcy Act):
  - Either majority of the votes of the creditors attending the meeting, representing a simple majority of the creditors admitted to vote
  - Or forced composition if 75% majority of the votes of the creditors attending the meeting agreed and the other creditors could not reasonably vote otherwise
- Before January 15, 2005: 2/3 of the admitted creditors representing  $\frac{3}{4}$  of the amount (art. 268 old Bankruptcy Act)
- No solution for preferred and secured creditors (unless all agree)
- Versatel and UPC: Short track proceedings, old law criteria (thus 2/3 of the admitted creditors representing  $\frac{3}{4}$  of the amount, art. 268 old)

# Enforcement of security rights

- “Majority Lenders” consent versus “Supermajority Lenders” consent versus “unanimity”
- Majority Lenders give instruction to foreclose.



Legal Houdini

To straighten out  
the legal hitch

# Recent example SAS I

- District Court Amsterdam September 23, 2009, LJN: BJ 8848, JOR 2009, 340
- Multilayered financing structure, Senior en Bridge Facilities
- Value of group breaks within the Bridge, i.e. value is more than Senior debt but less than sum of Senior debt and Bridge debt
- Additional funding was required, only Sponsor/Investor was willing to provide this funding both during the restructuring (thus bearing execution risk) and also thereafter
- Non consensual deal: Minority of Senior Lenders and the Bridge Lenders are of the opinion that value of exceeds assessment of value by Senior
- How do we force the Minority Senior Lenders and the Bridge lenders to agree?

Legal Houdini

To straighten out  
the legal hitch



# Recent example SAS II

- Minority Senior Lenders were yanked, taken out at par, thanks to so called yank the bank clause
- Enforcement of pledge on shares of sub holding is Majority Senior Lenders decision
- Purchase price of enforcement sale is part debt (effectively Senior lenders relend that part of purchase price to Newco), part of purchase price is cash, this cash goes to bridge lenders
- District Court allows for the execution sale

Legal Houdini

To straighten out  
the legal hitch

# Future trends, short run

- More enforcement proceedings
- The purchase price of the foreclosure might also be debt (even if relevant creditors don't agree but the Majority Senior Lenders do) instead of cash and – perhaps – even equity in Newco
- Enforcement process could then be used to ensure restructuring debt (and perhaps even debt to equity swap) without all Senior and Junior Lenders consent
- But be ware: no legal precedent in Netherlands, other than the SAS example (in which non-consenting Senior Lenders were take out at par and non consenting Junior received cash)

Legal Houdini

To straighten out  
the legal hitch

# Future trends, Lex Kortmann, letter dated July 23, 2009

Een suggestie die gedaan is en nadere overweging verdient, betreft het betrekken van separatisten in het akkoord. Dit zou dan zowel van belang zijn voor het 'gewone' akkoord in insolventie als voor het akkoord buiten insolventie. Mits goed uitgewerkt, zou deze mogelijkheid kunnen passen in de strekking van het Voorontwerp om het reorganiserend vermogen te vergroten door een passende balans tussen de belangen van separatisten en van de overige betrokkenen. Daarbij zou voorop moeten staan dat een separatist in geval van een akkoord niet minder ontvangt dan zonder akkoord het geval zou zijn.

Legal Houdini

To straighten out  
the legal hitch