

The Dutch Scheme (Wet Homologatie Onderhanden Akkoord - WHOA)

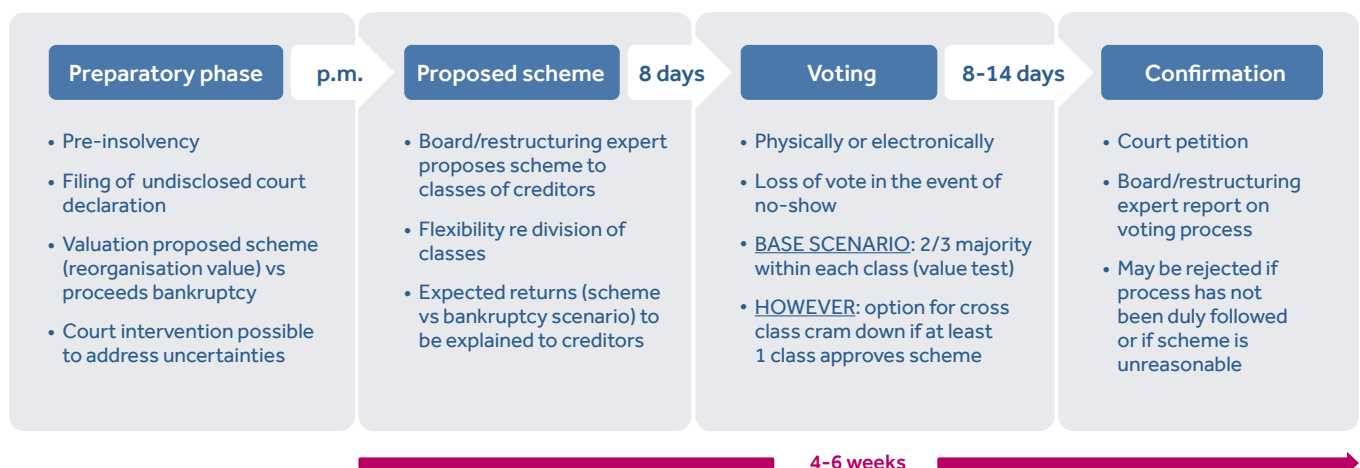
Background

- Expected to enter into force on 1 October 2020
- Aimed at maximising value of businesses in times of crisis
- Tool for (i) overleveraged companies, and/or (ii) companies with burdensome agreements that prevent viability
- Framework inspired by UK 'Scheme of arrangement' and US 'Chapter 11'-procedure
- Leveling the playing field, as it can potentially be used as leverage in consensual restructurings or transactions

Key aspects

- Framework allowing businesses to restructure their debt outside formal insolvency
- Debtor in possession, potentially with involvement of a court-appointed observer or restructuring expert
- Possible to amend rights of creditors, shareholders and contractual counterparties (but not employees)
- No unanimity required: upon confirmation by the court, the scheme is binding on all affected creditors and shareholders

Process



Requirements & preparation

- Access when it is reasonably likely that the business cannot continue to pay its debt
- Process can be initiated by board, creditors, shareholders or employee representative body
- Mandatory court-appointed restructuring expert if the board does not take the lead
- Set-off and netting protection for bridge/emergency-financing after filing WHOA declaration
- Generally no court involvement during preparatory phase, except for e.g.:
 - standstill period (max 4 + 4 months)
 - preliminary judgments on questions / disputes (e.g., division of classes)
 - appointment of observer or restructuring expert
 - preliminary judgment on detrimental acts
- Public or private process; choice affects international recognition and enforcement
- Works council to be timely involved if scheme would trigger consultation rights

Classes & rules

- Flexibility on involving creditors
- Creditors / shareholders with rights that materially differ are generally placed in separate classes (e.g., senior / junior creditors, tax authorities, unsecured creditors). Deviations possible on reasonable grounds and to be motivated
- Consent of (involved) senior class is required to exclude a more junior class from the scheme except if the senior class is not prejudiced
- Debt for equity swap possible
- Various shareholder' protection and corporate governance provisions set aside
- Small unsecured creditors to typically receive at least 20% payment
- Termination of burdensome agreements possible after bilateral proposal. Termination and termination penalty can be included in scheme
- Only 1 consenting class? Then such class needs to consist of affected creditors that would receive a cash distribution in bankruptcy, if such class exists

Court confirmation

- Petition to be filed with the Dutch court
- In case of cross class cram down: appointment observer if no restructuring expert was involved in preparation
- Court tests due process at its own motion
- Dissenting creditor / shareholder of dissenting class may request court to reject confirmation of scheme on the basis of special circumstances, provided it timely raised its objections

Main grounds for rejection:

- No pre-insolvency situation
- Reorganisation value is not 'fairly' distributed over classes (absolute & relative priority rule)
- Dissenting creditor / shareholder would be better off in bankruptcy ('best interest test')
- Procedural errors, incorrect class division and/or failure in information provision