

The Dutch Scheme (Wet Homologatie Onderhands Akkoord - WHOA)

Background

- Entered into force on 1 January 2021
- 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 proceedings
- Debtor in possession, potentially with involvement of a courtappointed 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

Preparatory phase p	.m. Proposed scheme 8 days	Voting	8-14 days Confirmation
 Pre-insolvency Filing of undisclosed court declaration Valuation proposed scheme (reorganisation value) vs proceeds bankruptcy Court intervention possible to address uncertainties 	 Board/restructuring expert proposes scheme to classes of creditors Flexibility re division of classes Expected returns (scheme vs bankruptcy scenario) to be explained to creditors 	 Physically or electron Loss of vote in the exno-show <u>BASE SCENARIO</u>: 2/2 within each class (val) <u>HOWEVER</u>: option for class cram down if at 1 class approves school 	vent of 3 majority lue test) br cross t least vent of Board/restructuring expert report on voting process May be rejected if process has not been duly followed or if scheme is

4-6 weeks

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 reasonable ground and 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

Should you have any questions please feel free to contact one of our restructuring experts or visit www.windtlegal.com