

# 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
<ul> <li>Pre-insolvency</li> <li>Filing of undisclosed court declaration</li> <li>Valuation proposed scheme (reorganisation value) vs proceeds bankruptcy</li> <li>Court intervention possible to address uncertainties</li> </ul>	<ul> <li>Board/restructuring expert proposes scheme to classes of creditors</li> <li>Flexibility re division of classes</li> <li>Expected returns (scheme vs bankruptcy scenario) to be explained to creditors</li> </ul>	<ul> <li>Physically or electron</li> <li>Loss of vote in the exno-show</li> <li><u>BASE SCENARIO</u>: 2/2 within each class (val)</li> <li><u>HOWEVER</u>: option for class cram down if at 1 class approves school</li> </ul>	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