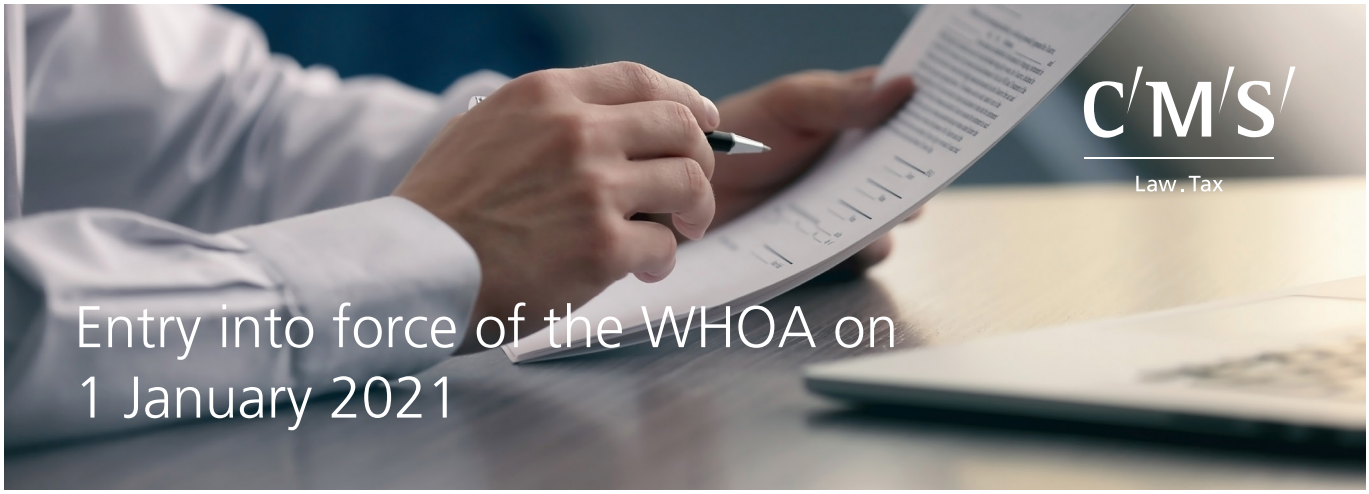

Entry into force of the WHOA on 1 January 2021

On 6 October 2020, the Act on the confirmation of private restructuring plans (Wet homologatie onderhands akkoord or WHOA) was approved by the Dutch Senate (Eerste Kamer) and the WHOA will enter into force on 1 January 2021.

The WHOA will introduce a framework under which tailor-made (financial) restructuring plans can be implemented outside formal insolvency proceedings. The WHOA combines elements of the English Scheme of Arrangements, US Chapter 11 and the EU Restructuring Directive (EU 2019/1023).

In the Netherlands, the introduction of a new restructuring tool outside formal insolvency proceedings is a long awaited development as it will significantly improve the possibilities to restructure viable enterprises in financial distress. The WHOA provides for a fast and efficient form-free restructuring procedure with limited court involvement and outside of formal insolvency, which in principle can be completed within a matter of months. The restructuring plan may bind (a selection of) secured, unsecured and preferential creditors as well as shareholders, while at the same time adequately protecting the interests of any dissenting party.

The WHOA enables both the debtor and other important stakeholders the opportunity to – at an early stage and outside the public domain – avoid an uncontrolled insolvency and preserve the debtor's value.

In addition, the WHOA provides for a high level of deal certainty as a result of, amongst others, the various supportive measures. It also offers flexibility on the contents of the restructuring plan and has the option to be (automatically) recognised throughout the EU.

The WHOA also explicitly provides for group restructurings, a feature that may significantly benefit enterprises being part of larger corporate group structures. With the Dutch courts assuming jurisdiction in a wide variety of cases, the WHOA offers a world-class platform for international debt restructurings.

The following is an overview of the WHOA's most important features.

1.1 The procedure

Under the WHOA, a debtor (that is not an insurer or bank) can present a restructuring plan to (certain of) its creditors or shareholders if it can reasonably be assumed that the debtor will not be able to continue to pay its debts as they fall due in the near future.

A debtor whose restructuring plan has been rejected under the WHOA within three years prior

to the initiation of that restructuring plan, may not present another restructuring plan under the WHOA. In addition, any creditor, shareholder or, if established, the debtors' works council (or other employee representative body) can request the appointment of a restructuring expert to prepare a restructuring plan on the debtor's behalf. A debtor can also request the appointment of a restructuring expert to avoid the appearance of a conflict of interests or to increase confidence in the process. The appointment of a restructuring expert rules out a proposal from the debtor to ensure that the parties' efforts are always concentrated in a single process.

The WHOA allows for the restructuring plan to be proposed in a confidential or public procedure and debtors may choose whether or not the European Insolvency Regulation will apply to the restructuring plan.

The public procedure is available to a debtor having its center of main interests (COMI) in the Netherlands. The procedure is made public by publishing a notice in the insolvency register and the Dutch trade register and the court-approved plan resulting from the public procedure will be (automatically) recognised throughout the EU with the exception of Denmark.

For the confidential procedure, Dutch courts will have jurisdiction in cases where any relevant party (e.g. debtor, creditor, shareholder or affected third party) is located in the Netherlands. In addition, Dutch courts may assume jurisdiction if the case has "sufficient connection" with the Netherlands. This will be the case if, amongst others, the debtor has substantial assets or activities in the Netherlands, a substantial part of the debtor's group consists of companies do miciled in the Netherlands, or if a substantial part of the debtor's obligations to be amended under the plan are governed by Dutch law.

The court-approved plan resulting from the confidential procedure will not be recognised throughout the EU and will be subject to the recognition principles of the relevant jurisdiction.

1.2 Contents of the restructuring plan and supportive measures

The debtor may determine which (secured) creditors or shareholders will be included in the restructuring plan. Excluded creditors and shareholders fully retain their rights and the rights of employees under employment contracts cannot be amended under the WHOA.

The debtor may also mainly determine the form and the content of the restructuring plan. However, the restructuring plan must include all the key information the creditors and shareholders need to effectively evaluate the restructuring plan, such as the expected value of the debtor's assets, the applicable valuation method(s), the formation of the classes and the financial implications of the plan for each class, the procedure and the expected proceeds of liquidation.

The restructuring plan can include the following elements:

(a) a write-off or deferral of the (payment) obligations of the debtor;
(b) an amendment of the rights of (third) parties having recourse against the debtor (such as guarantors or jointly liable parties);
(c) a debt-for-equity swap (including, if required, amending the debtor's articles of association or any applicable shareholders agreement);
(d) the termination or amendment of the terms of onerous contracts and any claims for damages resulting therefrom may be included in the plan;

(e) a general or individual stay (moratorium) of a maximum of two times four months; and
(f) ipso facto and change of control clauses may not be invoked.

Emergency funding provided to the debtor during the process (and any security granted in connection therewith) can be protected against claw-back actions by a bankruptcy trustee in the event the restructuring plan is not implemented successfully and the debtor is subsequently declared bankrupt.

To limit the risk of a court rejection of the restructuring plan at a later stage, the debtor and the restructuring expert can ask the court to make binding determinations on any element of the restructuring (such as the voting procedure, the class formation and valuation issues). A court ruling may be requested at any time during the process before the restructuring plan is put to vote. These court determinations are not subject to appeal, but before deciding on any issue the court will hear those parties affected and, if appointed, the restructuring expert or the observer.

A specific measure, which the court can take, is the appointment of an observer. The task of the observer is to monitor the preparation and negotiation of the restructuring plan, with due regard to the interests of the general body of creditors.

1.3 Classes and voting

Parties must be placed in different classes if their rights are so different they are not in a comparable position. This will be the case if, amongst others, in an enforcement against the debtor's assets the parties have a different ranking under Dutch law.

The WHOA furthermore provides that secured creditors' claims will be split. A separate class is required for the part of a claim which is covered by the security right (i.e. for amount for which the claim is "in the money") and another class for that part of the claim which is unsecured (i.e. the residual claim after enforcement or liquidation of the underlying asset). For the residual part of the claim the secured creditor will be placed in class of unsecured creditors. The value of the claim to be allocated to the secured ("in the money") class is determined on the basis of the amount that would be paid-out as liquidation value to that secured creditor in a bankruptcy scenario.

Small creditors (that provided goods or services) must be placed in a separate class if the restructuring plan envisages that less than 20% of their claims will be paid (see below under 1.7).

All creditors or shareholders whose rights are affected by the restructuring plan are entitled to vote. If, however, the legal title is split from beneficial ownership of a claim, only the beneficial owner can vote. The vote can take place in a meeting held physically, electronically or via written votes.

A class will have accepted the restructuring plan if a two-thirds majority in value of its outstanding claim or capital votes in favour of the plan. No head-count requirement applies.

1.4 Court confirmation and safeguards

The debtor or the restructuring expert may submit a request to confirm the restructuring plan to the court if at least one class of creditors has voted in favour of the plan. If the debtor is an SME, the restructuring expert can only seek court confirmation with the consent of the debtor.

After submission of the restructuring plan, the court will schedule a hearing date. The hearing has to take place in the period within eight and fourteen days after the submission of the final plan. During this period, opposing creditors and/or shareholders may submit to the court a substantiated request for dismissal of the restructuring plan.

Upon court confirmation, the restructuring plan is binding on the debtor and on all creditors and shareholders whose rights are affected by the plan. It is not possible to appeal against a restructuring plan or against the confirmation thereof.

1.5 General grounds for refusal

The court must, on its own initiative, refuse confirmation of the restructuring plan if:

(a) the debtor is not likely to be able to continue paying his liabilities;
(b) the formal or procedural requirements have not been observed;
(c) a party should have been admitted to the vote for a different amount, unless that decision could not reasonably have led to a different outcome of the vote;
(d) the performance of the plan is not adequately safeguarded;
(e) the debtor wishes to obtain new financing to implement the plan, which financing will materially prejudice the interests of the joint creditors;
(f) the plan is the result of fraud or deception;
(g) the fees and expenses of the restructuring expert or other court-appointed parties are not paid or no security for payment has been provided; or
(h) there are other compelling reasons against the confirmation of the plan.

1.6 Supplementary grounds for refusal

The supplementary grounds for refusal are largely inspired by the US Chapter 11 "best interest of creditors test" and the "absolute priority rule".

At the request of one or more creditors or shareholders who rejected the restructuring plan or who were wrongly excluded from the vote, the court may refuse to confirm the plan if a party receives less in value than it would receive in the liquidation of the debtor's assets in bankruptcy (i.e. the "best interest of creditors test").

At the request of one or more creditors or shareholders (who rejected the restructuring plan and were placed in a class that did not accept the plan or were wrongly excluded from the vote and should have been placed in a class that did not accept the plan), the court must refuse to confirm a plan if:

(i) the distribution of the realised value deviates to the disadvantage of the class that did not accept the plan from the ranking that applies upon enforcement against the debtor's assets under Dutch law or any other law, instrument or contractual arrangement binding on the debtor, unless there are reasonable

grounds for such deviation and the interests of the relevant parties are not pre judiced by it; or

(ii) the plan does not give the relevant party a right to opt for a cash payment in the amount that party would have expected to receive in cash in a liquidation of the debtor's assets in bankruptcy (the "cash-out option"), as provided for under the WHOA.

The cash-out option is not available to secured creditors, unless they have been offered shares and were not given the option of another form of distribution.

1.7 "Cram-down"

Following court approval of the restructuring plan, the plan becomes binding on all relevant parties, including any dissenting parties, in accordance with the provisions of the WHOA. As a result, the court will have the power to "cram-down" dissenting classes who voted against the restructuring plan, provided that lower-ranking classes cannot "cram-up" higher ranking classes.

However, the rights of small creditors in a "cram-down" scenario are protected. Small creditors are smaller-entity (unsecured) creditors that count 50 or less employees or that qualify as micro- or small-size companies within the meaning of articles 2:395a and 2:396 of the Dutch Civil Code.

Small creditors that have either an unsecured claim for supplied goods or services or an unsecured claim based on tort, will receive a minimum distribution of 20% as a rule, unless there is a compelling ground for a lower distribution. Small creditors are placed in a separate class of creditors and the rule only applies if that class has voted against the restructuring plan. The exception does furthermore not apply if it concerns small creditors which (i) are subordinated vis-à-vis one or more other unsecured creditors subject to the restructuring plan, (ii); have acquired their claim for less than 20%, (iii) are (unsecured) shareholders, group companies or bondholders.

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