WHOA in short

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What is the WHOA?

The WHOA is a new legislation that provides court confirmation of private restructuring plans for companies on the verge of insolvency (in Dutch "Wet Homologatie Onderhands Akkoord" or "WHOA"). In essence, it allows for a restructuring plan to become binding on all parties involved, including those who oppose the plan. The company can decide whose rights it wants to change as part of the restructuring plan. It is the Dutch equivalent of the UK Scheme of Arrangement and the US Chapter 11. The draft bill is approved by parliament and will become effective in Q4 2020 or early Q1 2021.

Why do we need the WHOA?

A financial restructuring of a company currently requires the consent of everyone involved. This grants disproportionate influence (and therefore value) to stakeholders with minimal economic interest, but who need to cooperate to effectuate the plan, such as shareholders of a company with no equity value. The alternative to an all-party agreement is an insolvency proceeding, such as a bankruptcy. The disadvantage is that this takes away control from management, is public and is often value destructive for the company and its stakeholders. The WHOA offers a new alternative to implement a restructuring plan. This will preserve value and ensure that this value is distributed 'fairly', i.e. in line with the economic interest of the parties involved.

What will the WHOA change?

Subject to certain 'fairness' principles, the court may confirm a restructuring plan that affects the rights of certain (classes of) creditors or shareholders, even if they vote against the plan ('cram down'). Also within a class of creditors or shareholders, the majority (>2/3rd) can bind a dissenting minority. These elements reduce the nuisance value of a dissenting stakeholders compared to the current situation, and put more focus on restructuring negotiations on each party's economic position. It is not an insolvency procedure, which means that management remains in charge of the company throughout the WHOA process ('debtor-in-possession').

Who can apply for a WHOA procedure?

Any company with 'sufficient connection' to the Netherlands is eligible for a WHOA procedure, if it expects that it will be unable to pay its debt. The company may initiate the WHOA procedure and prepare the restructuring plan. Alternatively, any of the company's creditors, shareholders, works council or even the company itself may ask the court to appoint an independent restructuring expert to prepare a restructuring plan on the company's behalf. Additional rules apply for SMEs.

How is a restructuring plan confirmed?

Voting takes place in different classes. Each creditor or shareholder whose rights are amended in the plan must be assigned to a class and given the opportunity to vote. A class consents to the plan if at least 2/3rd of the voting members in value vote in favour. The court may confirm the restructuring plan when at least one class votes in favour of the plan. In general, this should be a class that would receive cash if the company were to go bankrupt.

What protects parties against unfair treatment?

The court, on its own initiative, will reject a restructuring plan if certain conditions are not met. The WHOA also provides grounds for creditors and shareholders to object against a restructuring plan that prejudices their interests. The most important are:

Best interest of creditors test - the plan cannot assign less value to a creditor than its expected recovery if the company were to go bankrupt.

Cash-out option - the plan must enable any creditor that is part of a dissenting class to opt for an immediate cash-out for the amount of its expected recovery if the company were to go bankrupt. Secured lenders are excluded from this cash-out option.

Dutch Absolute priority rule - Distribution of value in the plan must follow the ranking of creditors as prescribed by law (outside insolvency) or contractual agreement, unless there is reasonable ground to deviate. Secured claims benefit from priority only for that part of the claim which is covered based on the liquidation value of the underlying security.

Restructuring expert / observer - the court can appoint an independent restructuring expert or observer to drive or oversee the process.

Small unsecured creditors - in principle, unsecured creditors who classify as micro or small SME should be offered at least 20% of their existing claim under the restructuring plan.

What does a restructuring plan look like?

The restructuring plan, at a minimum, should specify (i) class formation; (ii) financial impact of the plan for each class; (iii) expected value of the company after reorganisation; (iv) expected proceeds in a liquidation; (v) assumptions and valuation methods applied; (vi) terms of new money; (vii) voting procedure.

What other new features does the WHOA bring?

(Interim) financing - as part of the WHOA new (interim) financing can be provided without the risk of annulment based on voidable preference.

Onerous contracts - under the WHOA, and subject to court approval, the company has the possibility to terminate contracts (e.g. rental agreements) with a maximum notice period of three months. Any penalty associated with termination can be reduced as part of the restructuring plan.

Moratorium - similar to an insolvency situation, the company can request a stay or moratorium against executionary actions from creditors. The company can either request a moratorium covering all creditors, or a specific stay with respect to an individual creditor.

Public vs non-public - there are two WHOA tracks: a public track and a non-public track to prevent market unrest. The company can choose either, but cannot switch after a choice has been made.

Example of a WHOA process (1/2)

Informal process

1) Preparations begin
A company finds itself in financial distress. Without a restructuring, an insolvency appears inevitable. As for any restructuring, the company analyses its position and considers what is required to prevent an insolvency. The company's efforts to arrive at a consensual deal has failed. It initiates the WHOA process to implement an alternative restructuring plan.

2) Written declaration to court
The company informs the court that it is preparing for a restructuring under the WHOA. As the company wants to prevent market unrest, it decides on a non-public WHOA procedure. The declaration is not made public.

3) Developing the plan
The company must be very thorough in preparing the restructuring plan. The company identifies three classes that it wants to include in the plan (i) shareholders; (ii) secured lenders for the covered part of their loans based on liquidation value of their security; and (iii) unsecured creditors, including the secured lenders for the uncovered part of their claim. The company works out the expected value of assets in insolvency and reorganisation value after execution of the restructuring plan. It also decides on the ask towards each class to come to a sustainable capital structure (e.g. who needs to write-off what amount).

4) Stakeholder negotiations
The company engages with its relevant stakeholders at an early stage to test their appetite for parts of the plan and agreement on key fundamentals, such as the estimated liquidation and reorganisation value.

5) Raise issues with the company
The unsecured creditor considers the company's reorganisation value overly conservative. Based on the valuation, the unsecured creditor would be largely out of the money, which makes it vulnerable to a (partial) write-off or debt-to-equity swap in the plan. In order not to lose its right to object to the plan on the basis that the reorganisation value is incorrect, the unsecured creditor raises a complaint with the company.

(6) Intermediary rulings
Because the reorganisation value is fundamental to value distribution under the restructuring plan, the company doesn't want to wait until the confirmation hearing to understand the court's position on whether the company's or the unsecured creditor's valuation is correct. Therefore, the company seeks an intermediary ruling on the reorganisation value to increase deal certainty. After consultation of a court-appointed expert, the court considers the company's reorganisation value equitable.

(7) Enforcing security
The lessor of a key piece of equipment is losing faith in the going concern of the company, and takes steps towards appropriation of the operating asset.

(8) Request for moratorium
The company applies to the court for a specific stay against this creditor to prevent the lessor from foreclosing on the key piece of equipment. The court grants the stay.

(9) Creditor unsatisfied with the process
The unsecured creditor voices its discontent with the way the company runs the restructuring process and threatens to go to court to request for the appointment of an independent restructuring expert.

(10) Appointment observer
The company expects the unsecured creditor to vote against the plan. As the court has to appoint an observer or restructuring expert if a class votes against, the company requests the court to appoint an observer, to prevent delays after the unsecured creditor (or any other class) indeed votes against the plan. The court appoints an observer and the unsecured creditor withdraws its threat to request for a restructuring expert.

Formal procedural steps

Example of a WHOA process (2/2)

Informal process

(11) (Temporary) financing
The restructuring process is taking too long, and cash is running out. The syndicate is willing to provide a bridge financing, if secured through some unencumbered assets.

Implementation of the restructuring plan
The company starts executing its restructuring plan and successfully avoids insolvency.

(12) Court confirmation of security
The court approves the request to secure the bridge financing with encumbered assets. Now, the security cannot be annulled in an insolvency.

(13) The plan
The company distributes its restructuring plan to the creditors and shareholders at least 8 day before the voting. In this plan the company proposes (i) shareholders to lose their existing equity rights; (ii) unsecured creditors to convert to equity; and (iii) the secured debt to amend and extend the existing financing for the part covered by the security against liquidation value. The company attaches other information, as required by law, to enable the stakeholder to form a view on the plan.

(14) Voting day
Each creditor and shareholder that is affected by the plan is assigned to a class, and given the right to vote. A class supports the plan if >2/3rd of the voters in value in that class, have voted in favour. The voting takes place electronically.

(15) Voting results
Voting results are shared with the stakeholders. The class of shareholders has voted down the plan with 50%. The unsecured creditor, a class of its own, has also voted against the plan. The class of secured creditors has voted in favour of the plan by 80%.

(16) Court confirmation hearing
Within 14 days from court confirmation request, the court will hear parties affected by the plan. The unsecured creditor argues that the liquidation value was too low, which left it no cash-out option. As the unsecured creditor was long aware of the estimated liquidation value without raising a complaint, the court dismisses this argument on the basis that the unsecured creditor should have brought this forward at an earlier stage.

(17) Court decision
As soon as practicable after the hearing, the court issues its decision. In this case, the court confirms the plan on the basis that the class of secured creditors has consented to the plan, no valid grounds for dismissal have been raised by the dissenting classes, and all procedural requirements have been met. There is no possibility to appeal against the court's decision.

Solution

Formal procedural steps

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