

LEGAL AND TAX ALERT

LEGAL ALERT: REFORM IN DUTCH BANKRUPTCY LAW

Oct. 13, 2020

THE WHOA. Act on Court Approved Debt Restructuring Plans approved

On October 6, 2020, the Dutch Senate adopted the Act on court approved debt restructuring plans (in Dutch: “*Wet homologatie onderhands akkoord*” or “*WHOA*”). The Act, which was adopted by the Dutch House of Parliament on May 26, 2020, marks a long-awaited reform in Dutch bankruptcy law. The WHOA is expected to come into force by the end of 2020, or first quarter 2021.

This Legal Alert sets out the goals of the WHOA, and its main characteristics.

The WHOA

The main objective of the WHOA is to improve the ability of entities to restructure and settle their debts. The WHOA allows for the same by introducing a new pre-insolvency restructuring procedure which could in principle be completed within a period of several months. The new procedure is meant to protect companies that are in financial distress, yet economically viable and which can be profitable, while simultaneously protecting creditors’ rights in a balanced way.

Currently, the options that companies in the Netherlands have to successfully restructure are limited. This is because, generally speaking, all creditors must accept the restructuring plan offered to them to achieve this. Outside of formal insolvency proceedings, it is virtually impossible to compel creditors to accept a plan on financial restructuring. It needed to be unanimous. Because of this, bankruptcies were often difficult to prevent and any restructuring was likely to fail. The WHOA now creates a more effective mechanism, aiming to prevent creditors from refusing to cooperate with a financial restructuring on unreasonable grounds, holding on to a position settlement in full of their claims. The WHOA is in effect a new alternative to implement a restructuring plan.

The WHOA amends the Dutch Bankruptcy Act (in Dutch: “*Faillissementswet*”) and combines elements of the UK Scheme of Arrangement, the US Chapter 11 procedure and EU Directive 2019/1023 (i.e. the Restructuring Directive), but also has some unique features. Companies that are not ‘Dutch’ (i.e. incorporated under the laws of the Netherlands) may also use the WHOA procedure, as long as they are sufficiently connected to the Netherlands. We understand this to mean that such entity conducts a business in the Netherlands, in accordance with applicable Dutch law.

Important to note is that that the company in financial distress (or the restructuring expert, if appointed) has the power to unilaterally terminate agreements as part of the restructuring plan. Furthermore, financial institutions can lend new funds to the company in financial distress in the context of the debt restructuring plan, and obtain security. Under current law, providing security for new loans in that stage will in almost all cases be seen as disadvantageous to creditors. This is therefore a new legal exception to that rule.

Preparation of a Restructuring Plan

A company in financial distress with ‘sufficient connection’ to the Netherlands, may propose a debt restructuring plan (also referred to as: a ‘*restructuring agreement*’) to its creditors and shareholders. Alternatively, the company itself, any of its creditors or shareholders, or its works council (if established) can initiate the WHOA procedure by requesting the competent court to appoint a ‘restructuring expert’, in which case the expert prepares a restructuring plan. The company is required to provide the restructuring expert with all necessary documentation and information, and to cover the expert fees. The company or restructuring agent, if appointed, is -to a large extent- permitted in its discretion to decide the contents of the restructuring agreement.

Creditors and shareholders may be divided into separate classes following the ranking they would respectively have if the company were bankrupt. This dividing into classes is largely left to the discretion of the company or the restructuring agent, but creditors and shareholders with dissimilar, incomparable rights under the restructuring plan cannot be placed within the same class.

Voting process

The company or restructuring agent must present the final restructuring plan to the creditors and shareholders of the company at least 8 (eight) days before it is voted on. Only creditors and shareholders whose rights will be amended or changed by the restructuring plan (compared to the rights they would have *if* the company had gone bankrupt) have the right to vote on the plan. Voting will take place in the respective classes of creditors or shareholders. For a class of creditors to vote in favor of the restructuring plan a two-thirds majority *in value* of outstanding claims is required. For shareholders such is a two-thirds majority in value of the outstanding capital.

Court approval

The company or the restructuring agent may request the court to approve (or, as the case may be, confirm) the restructuring plan, if at least one class of creditors has voted in favor of the plan (which class, in general, would receive cash if the company were to go bankrupt). Creditors and shareholders that voted against the restructuring plan, can request the Court to reject the restructuring plan up until the day of the court hearing, which must be scheduled by the court within 8 (eight) to 14 (fourteen) days after the final restructuring plan is presented to all known creditors. The Court will render its decision as soon as possible after the hearing.

The request for approval of the restructuring plan may be denied for various reasons. E.g. if procedural requirements have not been met, if implementation of the restructuring plan by the company is not sufficiently guaranteed, or if equally ranked creditors are, without any justification, treated unequally.

Once the restructuring plan is confirmed by the Court, it is *binding* on the company and all creditors and shareholders who were entitled to vote, including those opposing creditors. The WHOA does *not* provide for a possibility to appeal the approval of the restructuring plan.

Entry into force of the WHOA

The WHOA is expected to come into effect by the end of 2020 or early 2021.

QUESTIONS OR FURTHER INFORMATION

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