

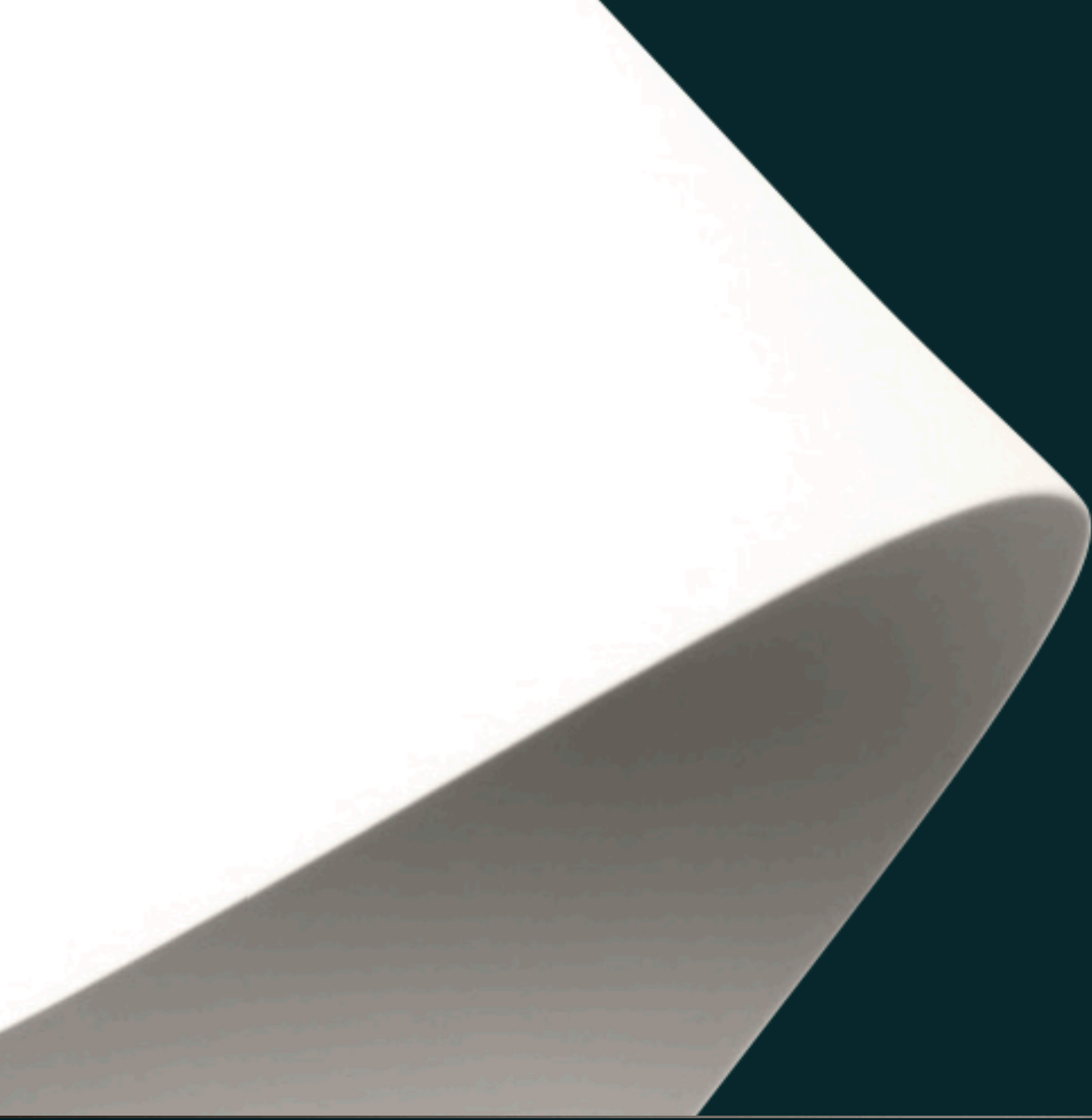


DE BRAUW  
BLACKSTONE  
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# **COURT CONFIRMATION OF EXTRAJUDICIAL RESTRUCTURING PLANS**

What you need to know about the new  
Dutch act

JANUARY 2023



# INTRODUCTION

The Netherlands' long-awaited initiative for a new restructuring law, featuring elements of the UK Scheme of Arrangements and US Chapter 11 procedure, has entered into force on 1 January 2021. The Act on Court Confirmation of Extrajudicial Restructuring Plans (WHOA) is a major milestone which supports business continuity and recovery.

Corporate recovery, protection of business continuity and retention of going-concern value are global trends. In many cross-border restructurings, Dutch special purpose vehicles play a role as existing finance or intermediate holding companies. This state-of-the-art law allows for global restructurings with the flexibility of the UK's Scheme of Arrangement combined with the moratorium and certainty of the US' Chapter 11, but at a much lower cost and within a short timeframe.

Under the WHOA, a debtor may offer an extrajudicial restructuring plan to all or some of its creditors or shareholders. If certain requirements are met, the restructuring plan can be confirmed by the court, making it binding on all affected parties. The restructuring plan may include a cross-class cram-down and group company obligations (even if the group companies are non-Dutch). It can also terminate onerous contracts. Only rights arising from employment contracts and financial collateral agreements cannot be included in the restructuring plan.

The WHOA supports the swift creation of a restructuring plan through a debtor-in-possession (DIP) procedure, which includes among others a court-ordered stay with global effect; protection of DIP financing; and short statutory periods that apply as of voting day. At the same time, the WHOA offers deal certainty. A court order - without any possibility of appeal - can be requested on any procedural or substantial matter before a vote is held. Furthermore, an expert pool of judges issues final decisions, and court confirmation can be refused only on limited grounds.

Another interesting feature for debtors outside the Netherlands, and their creditors, is that the WHOA is available in two distinct versions: a public version and an undisclosed version. The public version is a procedure in the public domain and has been added to annex A of the European Insolvency Regulation recast (EIR recast). As such, it benefits from automatic recognition throughout the EU. For non-EU debtors, the public version is governed by Dutch law and may be recognised under the UNCITRAL Model Law; international treaties or private international law. The other version of the WHOA is not in the public domain and exempt from publication requirements. It is likely to be governed by the Recast Brussels Regulation. Finally, what makes the WHOA one of the most advanced tools for cross-border group restructurings is that a group of companies may combine the public version and the undisclosed version of the WHOA.

For their part, creditors as well as a works council, employee representation or shareholders may initiate a restructuring process themselves, and their interests are protected by a type of absolute priority rule and a best interest of creditors' test. In addition, the court may order protective provisions, including appointing an observer to monitor the forming of the restructuring plan on behalf of the joint creditors.

This booklet discusses the high lights of the WHOA for debtors, creditors and shareholders. Further information about the act, including drafts and explanatory memoranda (in English and Dutch), can be found on our special website [www.debrauw.com/whoa](http://www.debrauw.com/whoa) dedicated to the subject.



**WHAT THE WHOA MEANS  
FOR THE DUTCH LEGAL  
RESTRUCTURING  
FRAMEWORK**

## MAJOR CHANGE TO THE RESTRUCTURING FRAMEWORK

The WHOA is an important addition to the Dutch restructuring framework. With its option to obtain court confirmation of a tailor-made extrajudicial restructuring plan through a process that supports the restructuring effort in many ways, the WHOA is the first of its kind throughout continental Europe.

Before enactment of the WHOA, Dutch law did not provide for court confirmation of extrajudicial (out of court or informal) restructuring plans. Court confirmation can be obtained for restructuring plans effected through formal insolvency proceedings (suspension of payments or bankruptcy). Outside of insolvency proceedings, the principle of freedom of contract applies under Dutch law. This means that a restructuring plan requires the consent of all affected creditors. A single creditor could interfere with a restructuring effort by simply refusing to accept the plan. There is little a debtor could do about a 'hold out creditor'; the debtor's only option was to enter formal insolvency proceedings. On the flipside, a creditor facing a debtor on the brink of bankruptcy had no way of forcing the debtor to restructure, other than by filing for its bankruptcy.

The WHOA changed all of this by allowing a debtor or its creditors (as well as a work council, employee representation or shareholders) to initiate an extrajudicial restructuring plan; if needed, with the assistance of a court-appointed plan expert. Once the plan is approved by at least one in-the-money creditor class, the debtor or plan expert can request that the court bind all affected creditors, regardless of their consent, through a court confirmation of the restructuring plan.

## WHOA HIGHLIGHTS

- Broad range of jurisdiction: COMI and non-COMI
- Debtor-in-possession (DIP) proceedings with easy access
- Protection of restructuring efforts, including DIP financing
- Power for creditors; works council or employee representation; and shareholders to initiate a restructuring plan (in case of an SME, subject to the debtor's consent), in addition to debtor's power to do so
- Cross-class cram-down
- Absolute priority rule with reasonableness exception
- Option of including equity in the restructuring and setting it aside, and option of issuing new equity, without shareholder consent
- Termination of onerous contracts at the option of the debtor, whereas ipso facto clauses are deactivated
- Possibility to strike off parent guarantees or other group company obligations
- Deal certainty: any procedural or substantial matter can be cleared in a court order before the voting process; all WHOA-issues are dealt with by an expert pool of judges; decisions cannot be appealed; and court confirmation can be refused only on limited grounds in line with international market practice
- Supporting court measures such as a stay (moratorium with global effect); suspension of insolvency proceedings; and interim measures
- Safeguards for creditors' interests
- Quick turnaround and relatively low costs



# JURISDICTION

## WHOA FOR COMI AND NON-COMI

The WHOA offers debtors two types of restructuring proceedings: a public version and an undisclosed version. The undisclosed version will likely be governed by the Recast Brussels Regulation. This means that Dutch courts will assume jurisdiction if the debtor (or one of the debtors if the restructuring relates to a group of companies) or any other party involved, is domiciled in the Netherlands. The public version of the WHOA has been added to annex A of the EIR recast, so Dutch courts have jurisdiction if this is the case under the EIR recast, meaning that the debtor has its COMI in the Netherlands. In case of a non-EU debtor, the Dutch courts will assume jurisdiction if any of the parties affected by the restructuring plan - debtor, creditor or shareholder, or affected third-party - is located in the Netherlands. In addition, Dutch courts may assume jurisdiction if any other aspect of the WHOA proceedings has sufficient links to the Dutch jurisdiction. This means that even non-Dutch entities with no COMI or domicile in the Netherlands can use the WHOA to restructure their debt as long as the restructuring plan (either through the parties involved or for any other reason) has a sufficient nexus with the Netherlands.

The definition of a sufficient connection has yet to be determined, but the explanatory memorandum contains a wide range of possible nexus, including:

- The debtor has its COMI or a branch in the Netherlands;
- The debtor has significant activities or assets in the Netherlands;
- The debtor is a member of a group of companies, of which a substantial number is located in the Netherlands;
- A substantial portion of the debt subject to the restructuring is governed by Dutch law or contains a choice of forum for the Dutch courts; and
- The debtor is liable for debts of another entity in relation to which the Dutch courts have jurisdiction.

## WHOA RECOGNITION

A court-confirmed restructuring plan resulting from either version of the WHOA will likely be automatically recognised within the EU except in Denmark and Ireland. For the public version, the basis is the EIR recast. For the undisclosed version, the basis will arguably be the Recast Brussels Regulation. Outside of the EU, based on US Chapter 15 case law – which is often looked to by courts in other jurisdictions when applying the Model Law – the WHOA is likely to be recognised under the Model Law, provided that the relevant jurisdiction does not require reciprocity (as the Netherlands has yet to adopt the Model Law). Since the Model Law has been adopted by 50 jurisdictions (and counting), including most major jurisdictions outside the EU, including the US, Canada and Singapore, the WHOA may be useful in international restructuring processes.

## PUBLIC VS UNDISCLOSED PROCEEDINGS

A key difference between the public version and the undisclosed version of the WHOA is that the first is public, whereas the latter is exempt from any publication requirement arising from EU law and Dutch law itself. All court matters in these proceedings are heard in chambers. It is the lack of publicity that makes the undisclosed WHOA version outside of the EIR recast's material scope and, in our view, governed by the Recast Brussels Regulation.

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# DEBTOR-IN-POSSESSION



## **DIP PROCEDURE WITH EASY ACCESS**

The WHOA provides for a DIP procedure, allowing the debtor to remain in full control throughout the entire procedure. No administrator or supervisor is involved, besides the court itself and then only in limited circumstances. At the request of the debtor or creditors, employee representation and shareholders, a plan expert may be appointed by the court. The plan expert's task is to design, negotiate and file a restructuring plan on behalf of the debtor. However, this does not limit the debtor's authority to offer a concurrent plan. If no plan expert is requested, an observer may be appointed by the court to safeguard the interests of the joint creditors. The observer's authority is limited to supervising the restructuring process without any capacity to interfere other than to inform the court that, in their view, the restructuring is not feasible.

The debtor's management board does not require the consent of shareholders when offering a restructuring plan which adheres to the WHOA. Any other stipulation or agreement requiring shareholder consent, whether in law, articles of association or a shareholders agreement, is void. The same applies when executing a restructuring plan that has been confirmed by the court: no shareholder consent is needed and the court confirmation supersedes any stipulation on the same. Finally, shareholders may not unreasonably prevent the board of an SME-undertaking from consenting to the appointment of a plan expert, or from consenting to the presentation by the plan expert of a restructuring plan to the creditors and shareholders or to the plan expert submitting a plan for court confirmation.

WHOA is available to a debtor who considers it reasonably plausible that it will be unable to pay its future debts as they fall due ('light insolvency test').

## **PROTECTION OF RESTRUCTURING EFFORTS, INCLUDING DIP FINANCING**

The WHOA preparatory process starts with a filing of an undisclosed restructuring statement by the debtor with the court. As of that moment, the restructuring efforts are protected from avoidance based on fraudulent preference. The same applies once the court appoints a plan expert to develop a restructuring plan on behalf of the debtor. In both situations, the only requirement is that the debtor enter into the specific legal act with court authorisation; which will be granted for any act that is necessary to continue the debtor's business during the restructuring process, as long as this serves the interests of the joint creditors without detriment to any individual creditor's interest.

The protection is meant to advance the furnishing of fresh money required for the restructuring. Without an exemption, the debtor's entering into finance obligations and all related legal acts, such as the provision of security, would risk becoming annulled if the restructuring attempt failed and the debtor went bankrupt. This could result in a claw-back action by a trustee based on fraudulent preference and directors' liability.

DIP financing also has specific rights which protect a set-off that takes place after the debtor files a restructuring statement with the court, or a plan expert is appointed. A new provision prevents bankruptcy trustees from claiming that a set-off performed during the restructuring process took place in bad faith and should consequently be undone. This safeguard especially serves DIP financing through an overdraft facility that includes a set-off in a current account. The only requirements are that the set-off take place in connection with the financing of the continuation of the debtor's business and that it is not meant to limit the existing financing arrangement.



# **THE PLAN AND PLAN MECHANISM**

## POWER TO INITIATE A RESTRUCTURING PLAN

Under the WHOA, individual creditors, shareholders and employees through the works council or other representation, have the authority to initiate the debtor's restructuring. Any of the aforementioned parties may make a case and request that the court appoint a plan expert who negotiates and proposes a restructuring plan (thereby acting on behalf of the debtor). The request will be granted if the light insolvency test described above is met unless the appointment does not serve the interests of the joint creditors. If the request is filed by a majority of creditors (or the debtor itself), the request will be granted anyway. However, even if the initiative comes from only an individual creditor or a group of creditors but not all creditors, the appointment of a plan expert will easily be in the interest of the joint creditors: there is likely to be some form of deadlock and, at the same time, a desire to try and negotiate a deal. Apart from the initiative, the restructuring procedure and the potential contents of the plan are similar to situations where the debtor itself initiates the restructuring. For instance, the restructuring plan can involve all or just a selection of the debtor's creditors and shareholders; it may be offered through the public version or the undisclosed version; and the court may assume jurisdiction on the same grounds as if the debtor itself offered the restructuring plan. A restriction applies if the debtor is a SME and the plan expert has been appointed at the request of a creditor, works council or employee representation. In that case, the plan expert may only submit a restructuring plan for voting and for court confirmation with consent of the debtor. However, if such consent is withheld by the debtor without good reasons, it can be replaced with a court order at the plan expert's request.

## CROSS-CLASS CRAM-DOWN

The debtor is at liberty to determine which groups of creditors or shareholders it will include in the restructuring plan. The only exemption regards employees to the extent it relates to claims stemming from their employment contracts and financial collateral agreements.

If the debtor offers the restructuring plan to a selection of its creditors or shareholders, only that selection is entitled to invoke rights under the WHOA. The debtor does not need to inform any other creditor or shareholder in any way. Moreover, anyone whose rights are not affected by the plan is not entitled to contest a request for confirmation of the restructuring plan.

The excluded creditors and shareholders are not bound by the restructuring plan.

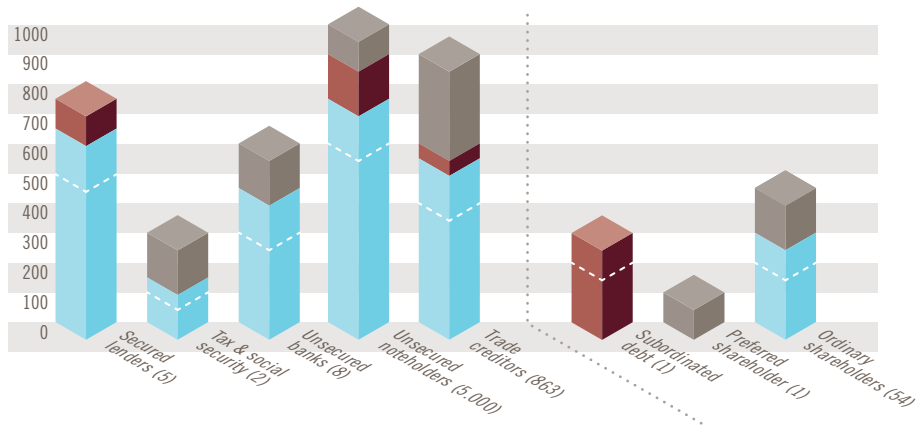
All creditors and shareholders whose rights are affected by the restructuring plan are entitled to vote. If the beneficial interest of a claim lies (partially or in full) with persons other than the formal creditor, as will typically be the case in New York law or English law governed indentures or trust deeds, the beneficiary instead of the formal creditor may be invited to vote. The beneficiary may vote at its own discretion. The same applies to the holder of depositary receipts, who may be invited to vote instead of the shareholder itself. There is already substantial Dutch case law about using foreign law governed voting mechanics for the purpose of voting within a class on a restructuring plan, and we expect such case law to also apply in the WHOA voting.

In terms of voting, creditors and shareholders are placed in different classes. Creditors or shareholders may not be in the same class if their rights at liquidation or after adoption of the plan will differ so much that their exposure is not comparable. In any case, creditors or shareholders with a different (statutory or contractual) ranking will be placed in different classes. Secured creditors may only be in the same class for the part of their secured claim which is covered by the underlying collateral based on the value of the collateral in a bankruptcy liquidation. A separate class is mandatory for trade creditors, that are SME-enterprises, which in principle need to receive a 20% recovery on their claims under the restructuring plan. The plan is subsequently voted on by each class. Voting may take place in a physical meeting or by electronic means. Approval is obtained only if creditors or shareholders, representing at least two-third of the total debt (or in the case of shareholders, subscribed capital) exercising their voting rights within their class, vote in favour of the plan. (visualized on page 12)

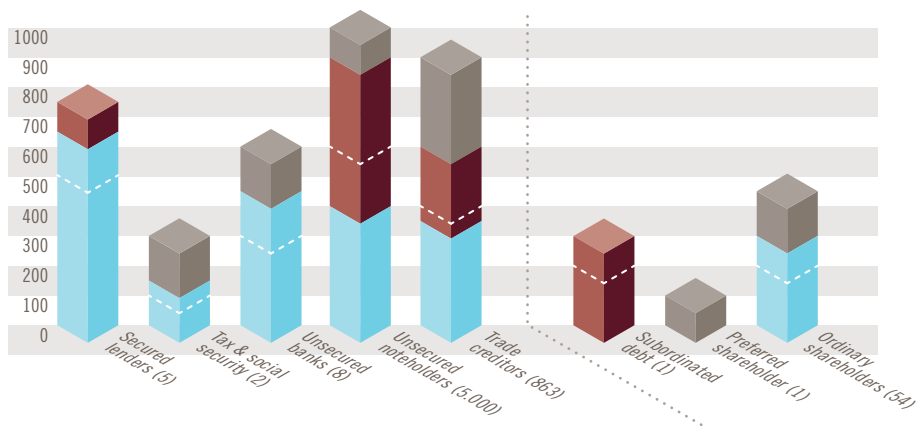
The debtor is authorized to submit the restructuring plan for court confirmation if the plan is approved by at least one of the 'in-the-money' classes of creditors or the class in which the value breaks (the class of creditors who, in the alternate bankruptcy scenario, would likely recover some or all of their claim). The approval by other classes of creditors or shareholders is not required. If a plan expert is appointed, they are solely authorised to submit a restructuring plan for court confirmation. If both the debtor and the plan expert have put a restructuring plan to the vote and both plans meet the requirements for court confirmation, the debtor's plan is firstly submitted to the court. Only if the request for confirmation of that plan is rejected by the court, will the plan expert's plan be submitted.

Once the court confirms the restructuring plan, it becomes binding on all creditors and shareholders that were eligible to vote, including the 'out-of-the-money' classes.

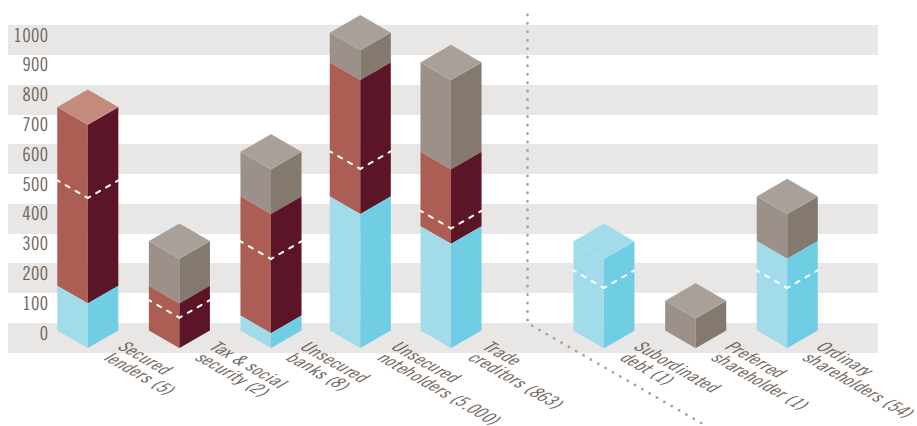
Example where cross-class cram down is possible



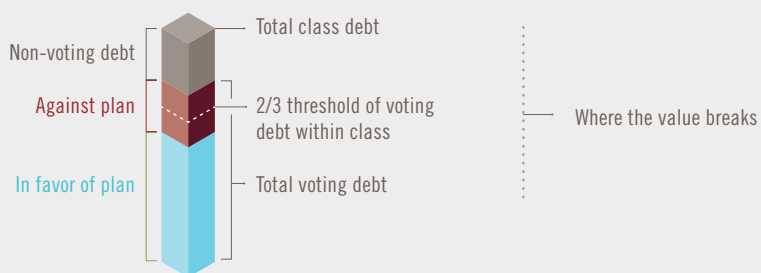
Example where cross-class cram down is possible



Example where cross-class cram down is not possible



**Legend**



## **ABSOLUTE PRIORITY RULE**

The WHOA adopts the absolute priority rule contained in Chapter 11 requirements common in the US, qualified in its absoluteness with a reasonableness test. Upon request of an opposing creditor or shareholder, the court will not confirm a restructuring plan that deviates from statutory or contractual priority rules to the detriment of a class of creditors or shareholders that has not voted in favour of the plan. In accordance with the reasonableness exception, a deviation (as a kind of limited relative priority rule) is allowed only if there is a justification for it and the deviation is not detrimental to the interests of the relevant creditors or shareholders. In addition to the absolute priority rule, the WHOA protects the interests of unsecured creditors by stipulating that court confirmation will be rejected if the nay-voting class is not allowed to claim the cash amount it would have received in a bankruptcy scenario. The court will also reject confirmation if the nay-voting class is a class of professional secured creditors which is not offered a form of recovery other than shares.

## **INCLUDING EQUITY IN THE RESTRUCTURING WITHOUT SHAREHOLDER CONSENT**

The WHOA is not only available to restructure debt, but also for any restructuring that targets, or may otherwise adversely affect, the rights of existing shareholders. Also, the WHOA may provide for the issuing of new shares to financiers or others, for example in a debt-for-equity swap. Contrary to many other restructuring regimes globally, the WHOA sets aside any stipulation requiring shareholder consent for a restructuring, for the amendment of shareholder rights or for implementation of the plan with an issuance of new shares. For limited liability companies, provisions regarding obligations to offer shares to existing shareholders do not apply either.

## **TERMINATION OF ONEROUS CONTRACTS AND DEACTIVATION OF IPSO FACTO CLAUSES**

If a debtor is eligible to offer a restructuring plan under the WHOA, it may at the same time seek to amend or terminate any contract with its contractual counterparty. If the counterparty rejects the proposal, the debtor can request that the court allow unilateral termination. The court will decide on the termination request at the same time that it decides on the confirmation request. The court may only refuse the termination if the light insolvency test is not met.

If the court allows for termination, the debtor's counterparty is entitled to damages. These damages, however, can be integrated in the restructuring plan by including them as a

debt and adding the contractual counterparty to one of the creditor classes. This may prove a practical tool for any necessary down-sizing of the business as part of a restructuring.

On the other hand, contractual provisions allowing the debtor's counterparty to unilaterally terminate, amend or suspend a contract, or providing for automatic termination (ipso facto clauses), cannot be triggered by a restructuring procedure under the WHOA or any other act in connection thereto. This includes offering a restructuring plan, requesting court confirmation and even appointing a plan expert. Moreover, it means that change of control clauses will no longer be triggered by a debt-for-equity swap which is the result of a restructuring plan under the WHOA. The scope of the provision is broad: the deactivation of ipso facto clauses applies to all contracts, regardless of whether the counterparty to that contract is affected by the restructuring plan.

## **TERMINATION OF GROUP COMPANY OBLIGATIONS**

The obligations of other group members towards the debtor's creditors can be integrated into one restructuring plan if those group companies also meet the light insolvency test described above, and the Dutch courts would have jurisdiction if those group companies would themselves offer a restructuring plan under the WHOA. As a result, group finance obligations, such as parent guarantees or sureties, can be included in the restructuring plan without the guarantors themselves going through a WHOA-restructuring.

Also, as set out above, even a group company without a COMI in the Netherlands may offer a restructuring plan under the WHOA provided there is a sufficient nexus between the restructuring and the Dutch jurisdiction. Dutch courts generally try to align group restructurings, especially if they take place within, or are somehow related to, their own jurisdiction. That way, if a group's financing structure contains a Dutch debtor, even if all other debtors are located elsewhere, or the group issued bonds through a Dutch financing vehicle, the entire debt may be restructured through the Dutch plan. This prevents bondholders from 'double dipping' (filing a claim twice for the same pool of assets, first against the issuer and then against the guarantor), and allows for the restructuring of related obligations through one restructuring plan. The result can then be automatically implemented outside the Dutch jurisdiction under the EIR recast (in case of the public version), likely under the Recast Brussels Regulation (in case of the undisclosed version) or under private international law (in case of either version).





**DEAL CERTAINTY**

## DEAL CERTAINTY

One of the main goals of the WHOA is to provide as much deal certainty as possible. This is facilitated in various ways. The most important ones are discussed below.

## COURT ORDERS FOR ANY PROCEDURAL AND SUBSTANTIAL MATTER PRIOR TO VOTING

Any procedural or substantial matter may be presented for a court order, before submitting the plan to a vote. Both the debtor and the plan expert may do so. The WHOA allows any topic for which the parties need clarity to be brought before the court, such as:

- which information needs to be included in the restructuring plan;
- estimated restructuring value and liquidation value, and the principles, basis and assumptions used to calculate these values;
- classification of the creditors and shareholders;
- admissibility or non-admissibility of a certain creditor or shareholder, a specific claim or the amount of a claim to the vote;
- voting procedure and timing; and
- if certain statutory grounds for refusal of court confirmation would impede the confirmation if requested.

## EXPERT POOL OF JUDGES THAT RENDER FINAL DECISIONS

Deal certainty is enhanced by the installation of an expert pool of judges, who hears all WHOA-issues exclusively. Apart from the advantage of having experienced judges, these judges have access to specialised resources to deal with restructuring matters, both legally and from an accounting and valuation perspective. Furthermore, decisions handed down by a court within the legal framework of the WHOA cannot be appealed. This speeds up the WHOA-process and provides for a steady flow of uniform decisions, which furthers deal certainty.

## LIMITED GROUNDS FOR REFUSAL

The WHOA only provides for limited grounds of refusal of court confirmation. All of these grounds are in line with international market practice. The WHOA starts from the basic principle that the court will hand down a decision to confirm the restructuring plan as soon as possible, especially

if all classes voted in favour. Accordingly, the WHOA lists a limited number of grounds for refusal, rather than conditions for approval.

There are general grounds for refusal which may be applied by the court at its own discretion or at the request of a creditor or shareholder eligible to vote, and additional grounds which may only be applied by the court at the request of an opposing creditor or shareholder eligible to invoke those specific grounds. However, a creditor or shareholder may not base a request for refusal of court confirmation on specific grounds if it could have challenged the restructuring plan earlier in the process, but failed to do so. This feature may be helpful in dealing with parties that pursue litigation strategies in order to create 'nuisance value'.

The framework regarding grounds for refusal of court confirmation is as follows:

## GENERAL GROUNDS FOR REFUSAL

The court will refuse confirmation at its own motion or at the request of any creditor or shareholder eligible to vote if:

- Formal requirements have not been met;
- The debtor wishes to attract new financing or enter into a certain transaction that is not necessary for the execution of the plan or does material harm to the interests of the joint creditors;
- The restructuring plan contains insufficient information, the creditor classification or voting procedure does not meet the statutory requirements, or a creditor or shareholder should have been admitted for a different claim amount unless any of this would not have affected the outcome of the vote;
- Proper performance of the restructuring plan is not guaranteed, or payment of the court-appointed officials has not been made or secured;
- The restructuring plan came into existence through false means, regardless of the debtor's involvement;
- Any other reason prevents court confirmation (escape provision).

## ADDITIONAL GROUNDS FOR REFUSAL

The court may refuse confirmation at the request of a creditor or shareholder (i) who voted against the restructuring plan, or (ii) who was unfairly not admitted to the vote if the restructuring plan does not meet the best interest of creditors' test.

The court will refuse confirmation of a restructuring plan that has not been accepted by all classes at the request of a creditor or shareholder (i) who itself and whose class voted against the restructuring plan, or (ii) who was unfairly not admitted to the vote and should have been placed in a class that voted against the restructuring plan, if:

- A the plan does not offer the class of trade creditors, that are SME-enterprises, with 20% recovery on their claims and no compelling reasons have been put forward therefor,
- B the plan does not fulfil the absolute priority rule (APR) unless there is a justification for this and the deviation from the APR is not detrimental to the interests of the relevant unsecured creditor (reasonableness test),
- C the plan does not allow an unsecured creditor to claim a cash distribution in the amount it would likely receive in a liquidation of the debtor's assets in bankruptcy proceedings, or
- D the plan does not allow a professional secured creditor a form of recovery other than shares (but not being cash).

## SUPPORTING COURT MEASURES

The WHOA is designed to provide a debtor with a true opportunity to restructure its debt. This is reflected in the various supporting measures and provisions that a court can decide. Much support will be derived from the option to present the court with any procedural or substantial matter, as discussed above in the paragraph on deal certainty. Additional support includes the following:

- A general or specific stay (moratorium with global effect)
- Tailored court provisions
- Lifting attachments and suspension of a request for the opening of insolvency proceedings

At request of the debtor or plan expert, the court can allow a stay for a maximum of four months, with a possibility of extensions, in aggregate up to a maximum of eight months. A stay can be granted in two situations: (i) the debtor files a restructuring statement with the court and offers or intends to offer a restructuring plan within two months, or (ii) a plan expert is appointed. The stay will be granted if it appears to be necessary for the continuation of the debtor's business during the preparation and negotiation of the restructuring plan, or for the controlled wind-up of the debtor's business, provided the stay seems to serve the interests of the joint creditors while, at the same time, the stay is not detrimental to the interests of the parties affected by it. An observer may be appointed if the court deems this necessary to protect the interests of the creditors or shareholders.

A stay prevents all parties - or in case of a specific stay: the targeted party - from claiming or taking recourse against the debtor's assets without court consent (provided they have been informed of the stay or are aware of the ongoing WHOA process); attachments may be lifted and any request to open insolvency proceedings against the debtor will be suspended. The stay affects all types of claims, secured and unsecured, and has a global effect. The debtor, on the other hand, remains authorised to use, consume and dispose of goods and to collect claims during the stay, as long as this is part of the debtor's regular business operations and the interests of the affected parties are sufficiently protected.

The WHOA also stipulates that any default which occurred before the stay cannot result in termination, amendment or suspension of executory contracts during the stay if the debtor provides security for new obligations incurred during the stay.

The court may make any tailored provisions it deems necessary to further the restructuring plan. This allows the court to add any stipulation as the case may merit. This can include the determination that certain provisions are inoperative.

The court may suspend a request for the opening of insolvency proceedings if the debtor has filed a restructuring statement with the court and has offered a restructuring plan or is planning to do so within two months' time. The only additional requirement is that the suspension must appear to serve the joint creditors' interests.

## SAFEGUARDS FOR CREDITORS' INTERESTS

The WHOA offers several measures to safeguard the interests of creditors and shareholders affected by the debtor's restructuring.

- If a request to appoint a plan expert is filed simultaneously with a bankruptcy petition, the appointment request will receive priority and will be heard first. This applies regardless of whether the debtor or any other party filed for bankruptcy. The bankruptcy request will be suspended until the court decides on the request to appoint a plan expert. If the request is granted, the court will order a general stay whereby the suspension remains in place. This way, neither the debtor nor any other party can obstruct a restructuring attempt by filing for the debtor's bankruptcy
- The court can order interim measures and make provisions for the protection of the interests of the creditors or shareholders. The WHOA contains both a general provision allowing for interim measures, as well as specific provisions relating to specific situations such as, for example, a stay. The court has full discretion to order every measure and make any provision it deems appropriate at its own motion or at the request of the debtor or the plan expert. Appeal against such a court order is not possible.
- A possible interim measure explicitly provided for in the WHOA is the appointment of an observer who supervises the drafting and negotiation of the restructuring plan for the benefit of the joint creditors. The observer will be heard on all matters presented to court; any request to appoint a plan expert; and on any request for court confirmation of a restructuring plan. Also, if a restructuring plan that has not been accepted

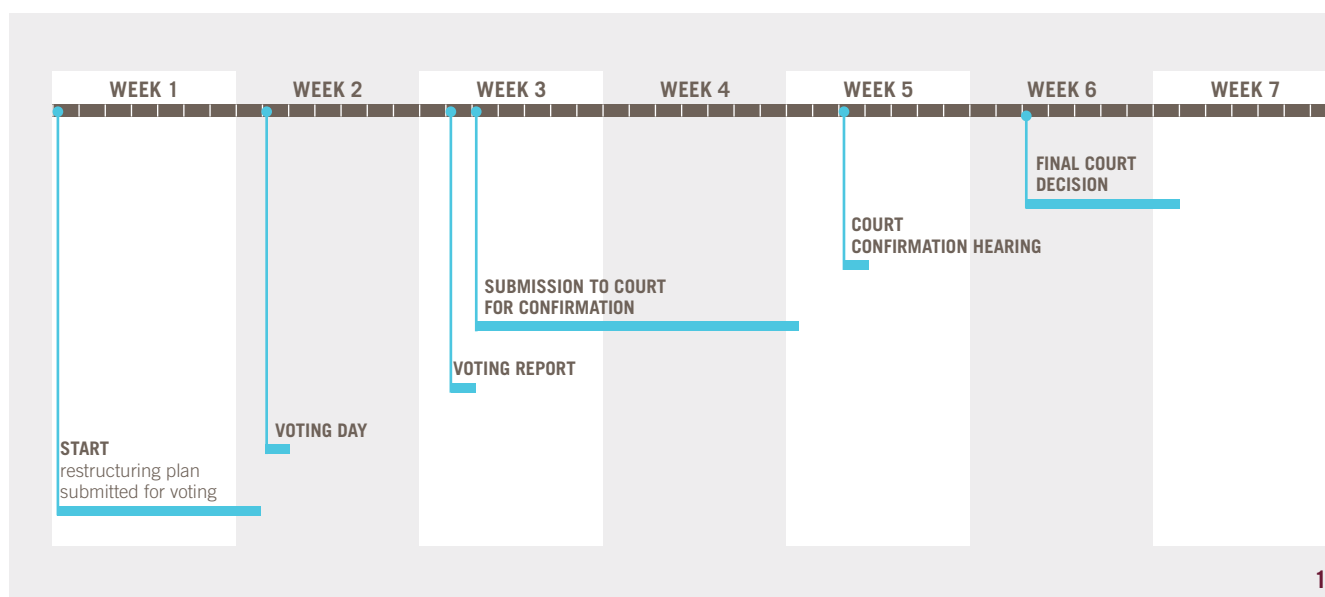
by all classes is submitted for court confirmation and no plan expert has been appointed, the court will appoint an observer when setting a date for the court confirmation hearing.

- Before deciding on any issue, the court will hear those debtors and shareholders affected by the decision. The court will only decide on certain matters after hearing the affected parties, for example, on requests for the appointment of a plan expert or an observer; matters presented to court; requests for court confirmation; stay extensions after expiration of its initial period; interim measures; etc.

## QUICK TURNAROUND AND RELATIVELY LOW COSTS

In terms of the restructuring plan, there is no set timeframe either for the drafting process or for negotiations regarding the restructuring plan or trying to achieve the required majorities for the plan. However, once the voting process starts, strict deadlines apply. At least eight days before a vote is set to take place, the restructuring plan needs to be made available to creditors and shareholders eligible to vote. Within seven days after the vote, a voting report must be presented to those same creditors and shareholders. If the restructuring plan is approved and submitted for court confirmation, the court will hear the request within 14 days. The court's decision will follow as soon as possible. None of the court's decisions under the WHOA are open to appeal. This results in a strict timeframe, allowing for a speedy restructuring process as well as for deal certainty.

Compared to the widely used Scheme of Arrangement under the English Companies Act 2006 and the Chapter 11 procedure under the US Bankruptcy Code, the costs of executing a restructuring through the WHOA are moderate.





# **HIGHLIGHTS FOR SHAREHOLDERS**



In a restructuring scenario, shareholders may have interests which are largely aligned with those of the debtor, but may also identify with some creditors. In particular, private equity sponsors may hold a hybrid interest in the debtor. Each of the key elements of the WHOA described above will be relevant for shareholders to consider as well, not only for their own specific interests, but also to prepare for what the debtor and its creditors may be up against. Most notably, highlights for shareholders include:

- The possibility for the entire group to use the flexible WHOA and restructure its global debts using the Dutch finance or intermediate holding company, and apply for recognition in its home jurisdiction rather than using (potentially less flexible) the insolvency laws of the home jurisdiction;
- The possibility to include parent guarantees and sureties in the subsidiary's restructuring despite a possible lack of a Dutch COMI or domicile for the parent;
- Ability to keep the restructuring efforts undisclosed and outside the public domain;
- Given that the shareholder is the financier of risk-bearing capital: relatively high deal certainty, professional courts, limited costs;
- No subordination of shareholder debt, but protection of DIP financing, also if provided by shareholders.

# THE FUTURE

## THE NETHERLANDS' FUTURE AS A RESTRUCTURING HUB

Protection of business continuity and the value in going concern enterprises is a hot topic. The EU 2019/1023 Directive on restructuring and insolvency, the Singapore Companies (Amendment) Act 2017 and Omnibus Bill and the new Part 26A Plan in the United Kingdom are good examples of jurisdictions looking for ways to increase the ability to safeguard and recover enterprise value; increase the recovery rate for financiers; and improve business continuity.

We expect the WHOA to be a practical tool for cross-border restructurings because of the valuable key elements for debtors: the flexibility to use either public proceedings or undisclosed proceedings; the optionality of including equity and group company obligations; and many future debtors in and outside the Netherlands will have a new option on the table – a court confirmed restructuring plan from the expert pool of predictable, sophisticated Dutch judges that will be binding on all creditors and shareholders involved. The tailor-made support offered by court measures, such as a stay with global effect, protection of DIP financing and the possibility to let any procedural or substantial matter be decided upfront, added to the quick turnaround in a sophisticated and highly experienced professional business rescue environment and relatively limited legal spend, provide for ideal restructuring circumstances, while at the same time enhancing deal certainty.

We expect this new Dutch legal framework to meet the demand for more flexible restructuring regimes in Europe. Being available to debtors and creditors from outside the Netherlands may provide such parties with a compelling option similar to, or even better than, the restructuring toolkit currently available in the United Kingdom, the United States, Singapore and Hong Kong.

We are happy to further discuss how the WHOA and the restructuring framework in the Netherlands might impact your organisation or any pending matter. For this or any other restructuring question, please reach out to your main contact at De Brauw or to our core group of restructuring experts.



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# NOTES





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