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Law Alert

Insolvency & Restructuring

Legislation for a Dutch Scheme (WHOA)

The Dutch Scheme

New legislation for a Dutch Scheme of Arrangement / Chapter 11 procedure -the act on the Confirmation of Private Restructuring Plans (*in Dutch: the WHOA*) enters into force on 1 January 2021.
The purpose of the legislation is to provide the Netherlands with an effective and flexible tool to restructure viable enterprises and to prevent their bankruptcies. Such in line with the European directive regarding preventive restructurings (2019/1023). The WHOA can also be used for a controlled liquidation of a company.

Basic outline

Basically, the WHOA enables a company in distress with the opportunity of offering a debt restructuring agreement to its shareholders and/or creditors, which can subsequently be submitted to the court for approval to bind all affected parties. Even if not all creditors / shareholders have approved the agreement. The economic principle is that out of the money stakeholders can no longer frustrate a debt restructuring. The WHOA procedure can be initiated by the company itself, or -through a court appointed restructuring expert- by its financers, creditors, shareholders or works council. Contractual commitments, such as lease obligations, can also be restructured. Rights of employees may not be affected.

All parties affected by the compulsory arrangement should be included in the restructuring plan, but it is allowed not to affect certain parties, for instance trade creditors. Creditors and shareholders may be divided in classes. The classes should follow the ranking of such creditor in a bankruptcy situation.

To ensure effectiveness, a stand still period, in which creditors may not enforce any security rights and in which the court will hold off any requests for bankruptcy, may be ordered by the court. Furthermore, provisions are in place to prevent claw back risks in relation to new financing. Guarantees provided for liabilities of the debtor can also be restructured. A WHOA procedure can be public or private.

The above allows for quite some flexibility to ensure an effective reorganization. This allows for the usual restructuring options such as cram downs, debt for equity swaps and new investors joining with dilution of existing shareholders.

Who can use it and conditions
The WHOA is intended for companies that have their COMI (Centre of Main Interest) in the Netherlands or that are sufficiently connected to the Netherlands, for instance by having a branch or assets in the Netherlands. To be eligible for the WHOA procedure the debtor should be in a position that it is not able to continue to pay its debts now or in the (near) future. Further conditions are amongst others:

- The compulsory arrangement is necessary and sufficient to prevent a bankruptcy;
- Compared to the situation of a bankruptcy, the affected parties should benefit from the compulsory arrangement, meaning that their position does not become worse compared to a bankruptcy situation;
- Sufficient information should be provided to the parties affected, such as the class formation, procedures and financial information of the company. Furthermore, a valuation of the expected liquidation value and going concern value (after restructuring) should be included.

Confirmation or rejection of the compulsory arrangement

The WHOA contains an intra-class cram down and cross class cram down. A compulsory arrangement can be court approved if at least one class votes in favor. Such requires the affirmative vote in that class of 2/3 in amount.

Creditors and shareholders may oppose to a confirmation by stating for instance:

- A lower ranked creditor receives a distribution while higher ranked creditors are not paid in full
- That without any justification, equal ranked creditors are not treated equally
- That procedures were not followed correctly
- That the creditor receives less compared to a bankruptcy situation
- That the implementation of the arrangement is not sufficiently secured

Why is it useful?

Overall, the WHOA provides companies a very effective tool to enable business in distress to prevent a bankruptcy. It seeks to combine the best aspects of the UK Scheme of Arrangement and the US Chapter 11 procedure. Main features of the WHOA are:

- A limited disruption a companies' operation
- Flexibility
- Restricted blocking options for opposing parties
- Deal certainty
- Debtor protection
- International recognition on the basis of the European Insolvency Regulation in the public WHOA procedure or on the basis of international laws in the private WHOA procedure

Should you have any questions regarding the above or other restructuring matters, please do not hesitate to contact:

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HVG Law

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At our offices in Amsterdam, Rotterdam, Utrecht, Den Haag, Eindhoven, New York, Chicago and San Jose (i.e., Donahue & Partners LLP in the USA), we are able to offer our legal services to national and international clients. HVG Law is part of the global EY Law network and we have a strategic alliance in the Netherlands with Ernst & Young Belastingadviseurs LLP.

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