INSOLVENCY & RESTRUCTURING - NETHERLANDS

Dutch scheme of arrangement: new pre-insolvency restructuring instrument

19 June 2020 | Contributed by AKD NV

AUTHORS

Mike van de Graaf

Ward Aerts

Introduction
Current mechanism
Key elements of WHOA
Comment

Introduction

The government has been working on a reform of Dutch bankruptcy law for several years. On 5 July 2019 the legislative proposal on the Court Approval of a Private Composition (Prevention of Insolvency) Act (WHOA) was submitted to the House of Representatives. Inspired by the UK scheme of arrangement and US Chapter 11 proceedings, the WHOA will introduce to the Netherlands a legal framework that enables debtors to restructure their debts outside formal insolvency proceedings by means of a court-approved restructuring plan.

On 26 May 2020 the House of Representatives voted in favour of the proposed WHOA, which now awaits final approval by the Senate. Given the economic impact of the COVID-19 pandemic on many businesses in the Netherlands, the government aims to implement the WHOA in the near future (ie, on 1 July 2020 or shortly thereafter).

Current mechanism

Under the current mechanism for debt restructuring outside formal insolvency proceedings, debtors may offer their creditors a composition in the form of an agreement. However, in principle, the creditors cannot be forced to accept such agreement and may refuse to sign it without loss of rights. As such, the success ratio is limited in practice. According to settled Dutch case law, a creditor's refusal to accept such an agreement will be considered wrongful only when such behaviour qualifies as an abuse of law or contravenes the principles of reasonableness and fairness. However, in most Dutch case law, this condition was not met.

Key elements of WHOA

Restructuring plan

The WHOA enables a company that foresees that it will be unable to pay its debts as they fall due to offer a restructuring plan to (some of) its creditors and shareholders in order to restructure its debts.(1) Not all creditors and shareholders need to be involved in the restructuring plan. In practice, this means that the restructuring plan can – for example – be limited to a certain group of creditors, such as trade or secured creditors. In addition, pursuant to the WHOA, each creditor, shareholder, statutory works council and workplace representation may submit a request to the court to appoint an independent restructuring expert who can offer a restructuring plan to the company's creditors and shareholders on the debtor's behalf.

The WHOA offers a wide range of options for restructuring a debtor's obligations, including:

- postponing or partially releasing payment obligations;
- offering debt-for-equity swaps; and
- amending the terms of debt instruments.

Under the WHOA, debtors can also amend the terms of contracts, such as lease or supply agreements. An important exemption to this wide range of options is that the rights of a debtor's employees cannot be amended under the WHOA.

Besides the restructuring plan route, the purpose of a restructuring under the WHOA can also be a controlled wind-down of the company and the distribution of the proceeds among the creditors.

Confidential or public

One of the choices to be made at the start of the process is whether the procedure will be confidential or public.

Classes of creditor and shareholder

The shareholders and creditors of a debtor with dissimilar rights (eg, preferential and ordinary shareholders or secured and unsecured creditors) will be divided into separate classes based on the rights that they will have under the proposed restructuring plan and their position in a bankruptcy.

The secured creditors will be placed into two classes. The first class equals the amount of the creditors' claims covered by their security rights, which will be determined by the value attributed to the secured creditors in a bankruptcy in accordance with their position under Dutch law. To the extent that a secured creditor's claim also concerns an unsecured part, the creditor will be placed in the class of the unsecured creditors – the so-called 'second class'. This is based on the idea that unsecured creditors, as well as secured creditors, should benefit from any surplus which can be achieved by the WHOA mechanism to restructure a company outside a formal insolvency proceeding instead of pursuing its liquidation.

Voting

Debtors must provide the final restructuring plan to their creditors and shareholders at least eight days before a vote. Only the creditors and shareholders whose rights are amended under the proposed restructuring plan are entitled to vote, and the debtor must give them the opportunity to do so.

The vote will be done per class at a physical meeting or electronically.

A class of creditors will be considered to have accepted a restructuring plan if a group of creditors that together represent two-thirds of the total amount of the claims of the creditors which cast a vote in that class votes in favour thereof. The same applies for a class of shareholders – the value of their vote relates to the total amount of the issued capital of the shareholders which cast a vote in that class.

If the restructuring plan is proposed to a class and a majority of two-thirds votes in favour thereof, the debtor can request the court to approve the plan (the so-called 'intra class cram-down'). The same applies *mutatis mutandis* when a restructuring plan is proposed to multiple classes at the same time and at least one class vote in favour of the plan (the so-called 'cross-class cram-down').

Once the court approves a restructuring plan, it becomes binding on:

- the company;
- the creditors and shareholders involved in the plan (including individual creditors and shareholders within a specific class which voted against the plan); and
- other classes of creditor which voted against the plan.

Court confirmation of restructuring plan

In principal, the competent Dutch court must confirm a restructuring plan within eight to 14 days of a request to confirm the plan unless the WHOA rules have not been (properly) complied with. The court will provide its decision as soon as possible after the hearing. It is not possible to lodge an appeal against the court's decision.

The court will deny a request to confirm a restructuring plan if any of the general and procedural refusal grounds apply, including if:

- the debtor is not in a position where it can reasonably be assumed that it will be unable to continue paying its debts as they fall due;
- procedural requirements have not been met;
- the restructuring plan contains insufficient information;
- the restructuring plan was procured by deception, by favouring one or more creditors or shareholders with voting rights or by other unfair means; and
- the restructuring plan's performance is inadequately safeguarded.

In addition, the courts may refuse to confirm a restructuring plan at the request of one or more creditors or shareholders which rejected the plan or were wrongly excluded from the vote if there is *prima facie* evidence that such creditors or shareholders will be worse off under the plan than they would have been in a liquidation of the debtor's assets in bankruptcy.

In a cross-class cram-down scenario, the courts will refuse the confirmation of a restructuring plan at the request of a creditor or shareholder which voted against it and is in a class that voted against it if:

- the distribution of the value realised with the restructuring plan deviates to the disadvantage of the class that did not accept the plan from the ranking that applies on enforcement against the debtor's assets under the applicable law or a contractual arrangement, unless there are reasonable grounds for such deviation and the interests of said creditors or shareholders are not prejudiced;
- the unsecured creditor is not offered a cash-out option representing a value of at least the amount that it would have expected to receive in a bankruptcy;
- a secured creditor is offered shares (debt for equity) and has not been offered an alternative type of distribution; or
- the so-called 'smaller creditor' – defined in the WHOA as a creditor which is a micro or small-sized company within the meaning of Articles 2:395a and 2:396 of the Civil Code(2) or a company with no more than 50 employees – voted against the proposed restructuring plan and has not been offered an amount of cash or rights representing a value of at least 20% of its claim in a cross-class cram-down situation. However, this rule – which aims to protect small and medium-sized enterprises – does not apply if:
  - there are compelling reasons for the debtor to provide the creditor with less than 20% of its claim in cash or rights;
  - it concerns a creditor without security rights whose claim is subordinated with regard to one or more other creditors;
  - the creditor purchased its claim for less than 20% of its value;
  - the creditor is also a shareholder of the company and has an unsecured claim;
  - the creditor is a group company; or
  - the creditor is a bondholder.

Comment

The WHOA offers a fast and flexible restructuring procedure. Fast because – apart from preparation – it can be finalised within three to five weeks and flexible because there are several options, such as:

- confidential or public;
- all creditors and shareholders or only specific ones; and
- at the request of the debtor or initiated by a creditor or shareholder.

There is also a range of options with regard to the commercial contents of the restructuring plan.

Given the current situation, the WHOA is likely to be a game changer in the field of Dutch bankruptcy law, whereby it also offers tools for cross-border group restructurings.

For further information on this topic please contact Mike van de Graaf or Ward Aerts at AKD by telephone (+31 88 253 50 00) or email (mvandegraaf@akd.nl or waerts@akd.nl). The AKD website can be accessed at www.akd.nl.

Endnotes

(1) Debtors whose restructuring plans have been voted down or rejected by the court within three years before the initiation of a restructuring plan under the WHOA are excluded from the scope of the WHOA. Banks and insurers are also excluded as they are covered by specific Dutch legislation.

(2) A company will qualify as 'micro-sized' when at least two of the following conditions are met:

- the value of the assets according to the balance sheet and notes, on the basis of acquisition and production costs, does not exceed €350,000;
- the net turnover for the financial year does not exceed €700,000; and
- the average number of employees during the financial year is fewer than 10.

A 'small-sized company' is a company with:

- an asset value of no more than €6 million;
- a net turnover of no more than €12 million; or
- fewer than 50 employees on an average basis.
