



DUTCH SCHEME FINALLY ADOPTED

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On 6 October 2020, the Dutch Senate (Eerste Kamer) adopted the Act on Court Confirmation of Extrajudicial Restructuring Plans (CERP or WHOA in Dutch). This adoption is an important step towards the early entry into force - possibly this year even - of an important instrument for companies to prevent bankruptcy and restructure and restructure debts through a private settlement. The details of this new Dutch Scheme took a long time to work out and the time when the legislator would proceed with implementation was highly anticipated. Expectations are therefore high.

It is generally assumed that under current Dutch law it is not feasible to reach an out-of-court settlement with creditors. In principle, all creditors must accept the restructuring plan offered to achieve this. Freedom of contract is currently still the starting point under Dutch law and therefore creditors cannot be forced to accept a restructuring plan. In practice, a private restructuring plan is therefore almost impossible to achieve and – as a result - bankruptcies are difficult to prevent.

For that reason, the Dutch Scheme has been introduced. The WHOA aims at creating a statutory basis for a compulsory settlement outside bankruptcy and its approval by the court. The restructuring plan is intended as a preventive restructuring tool for entrepreneurs who are still able to meet their current obligations, but at the same time acknowledges that there is no realistic prospect of averting future insolvency without debt restructuring. The WHOA also aims at preventing creditors from refusing to cooperate on unreasonable grounds and to enforce full payment of their claims. Creditors or shareholders who have not agreed to the plan may still be bound by the plan. In this way acceptance of the plan is compulsory.

Contents of the WHOA

How does the WHOA work? This new scheme is quite extensive and offers various options for offering a tailor-made restructuring plan. The WHOA will be incorporated into the Dutch Bankruptcy Act and applies to all legal persons and all natural persons. Debtors themselves may take the initiative to offer a private restructuring plan. Creditors, shareholders, the works council

(ondernemingsraad) or employee representation of the debtor can also initiate restructuring plans.

They may ask the judge to appoint a so-called restructuring expert - usually someone experienced in insolvency law and restructuring - who can then prepare a restructuring plan and offer it to the relevant creditors and shareholders. Debtors may also choose to request the appointment of a restructuring expert to assist them in drawing up a restructuring plan. The debtor remains in possession.

The WHOA provides for two procedures by which a restructuring plan can be reached: i) a private procedure and ii) a public procedure.

The creditors and shareholders involved in the plan must be divided into classes. Creditors and shareholders are divided into different classes if the rights they have in the event of a liquidation of the debtor's assets in bankruptcy or the rights offered to them on the basis of the composition are so different that their positions are not comparable. In any case, creditors or shareholders who have different rankings as regards the debtor's assets are put in different classes.

After the creditors have been divided into different classes and the restructuring plan has been worked out, the plan will have to be voted on. Votes on the plan are held by class of creditors or shareholders. A class of creditors has accepted the plan if the decision of acceptance has been taken by a group of creditors who together represent at least two-thirds of the total amount of claims belonging to the creditors in that particular class. A

class of shareholders has accepted the plan if the decision to accept has been taken by a group of shareholders who together represent at least two thirds of the total amount of issued capital belonging to the shareholders in that class who cast a vote.

The debtor or restructuring expert will file a petition for approval of the plan with the court if at least one class has agreed to the plan. The judge must test the plan against various grounds for refusal and reject approval of the agreement if one of those grounds applies.



The plan must be fair and reasonable, especially as opposing creditors and shareholders can still be bound by that plan. A number of provisions are partly inspired by the American Chapter 11 procedure and the English Scheme of Arrangement. An example is the Absolute Priority Rule, which means that no deviation from the legal ranking may be made to the detriment of a non-consenting class. The exception to this main rule is that deviations from the legal ranking are possible on a reasonable ground and the interests of the creditors in the opposing class are not harmed as a result.

The plan does not only have to concern the payment of part of, for example, a sum of money. Parties are free to choose another variant, for example conversion into subordinated loans, conversion into shares (debt for equity swaps), waivers, etcetera.

Concluding remarks

The WHOA provides various preconditions, provisions and safeguards for both debtors and their creditors and shareholders.

The WHOA is expected to enter into force before this summer. In the coming period we will provide you with regular updates about the WHOA and how this scheme may be of significance to you.

Good advice and guidance from BUREN contribute to successful restructuring outside bankruptcy. Please do not hesitate to contact us.

Key contacts



Ruud Brunninkhuis

Senior Associate | Lawyer
E r.brunninkhuis@burenlegal.com
T +31 (0) 6 5084 6428



Laurens Prickartz

Senior Associate | Lawyer
E l.prickartz@burenlegal.com
T + 31 (0) 6 3197 9230



Ashley Snel

Associate | Lawyer
E a.snel@burenlegal.com
T + 31 (0)6 4688 9855