WHOA: the basics

A brief overview of the main characteristics of the Dutch WHOA

The WHOA (Wet Homologatie Onderhands Akkoord, or Law on the Confirmation of Out-of-Court Restructuring Plans[1]) is a practical tool introduced into Dutch law on 1 January 2021 to prevent the bankruptcy of viable enterprises in financial distress. Since its introduction, many cases, both large and small, have successfully undergone restructuring under the WHOA. In practice, the WHOA has an even greater effect, as the mere possibility of a WHOA – including its cramdown options – incentivises creditors to agree to a restructuring, since holdout positions may no longer have any value in a WHOA process. The WHOA is a highly flexible instrument that can contribute to a high degree of deal certainty. However, this requires a well-considered approach and thorough knowledge of all strategic options. This document aims to provide a brief overview of the WHOA in practice.[2]

Initiation

There are several ways in which a WHOA can be initiated:

1. by the debtor: by submitting a statement with the court;
   The proceedings are active immediately.
2. by the debtor: by requesting the court to appoint a Restructuring expert;
   The court will set a hearing and will take a decision following that hearing. In practice, the time between submitting the request and the court's decision is two to three weeks.
3. by a creditor, shareholder or works council/employees representative: by requesting the court to appoint a Restructuring expert.
   The court will set a hearing and will take a decision following that hearing. In practice, the time between submitting the request and the court's decision is two to three weeks.

The WHOA is available to enterprises (typically legal persons such as BVs or NVs, but also natural persons/individuals) for which it can reasonably be assumed that they will be unable to continue to pay their debts. The court will assess whether this is the case at the first opportunity: in the situations under 2 and 3 above this will be at the opening hearing. If the WHOA is initiated by submission of a statement by the debtor (as described under 1), the court will conduct the assessment if any court measures are requested prior to the plan being voted on or confirmed, or at the confirmation hearing if no other court hearing has taken place before.

Public or private

The party initiating the procedure can choose whether to make it public or private. In the case of a private WHOA, all court applications are dealt with behind closed doors. While there is no statutory confidentiality obligation for the parties involved, an NDA is common practice. A public WHOA is available if the debtor's centre of main interests (COMI) is located in the Netherlands. A private WHOA is available if the debtor's COMI is located in the Netherlands, or if there is a sufficient connection with

[1] As the Dutch acronym WHOA has become quite well known also internationally, we will continue to use that term here.
[2] This Handbook is not legal advice and may not be relied upon for anything other than a brief and practical introduction of the WHOA in practice.

the Netherlands. The choice of public or private WHOA may be relevant for the cross-border effects of the court's decisions (see below under 'Cross-border issues').

In the case of a public WHOA, all hearings will be held in open court. Please note that court filings will not be publicly available through the court system, and published court decisions will be anonymised (except for company names).

Restructuring expert and Observer

The court can appoint a Restructuring expert at the request of the debtor, one or more creditors, shareholders, or the works council/employees' representative. The applicant must present candidates to the court, providing their credentials and an estimate of their fees. If appointed, the Restructuring expert has exclusive authority to offer a WHOA plan to the relevant parties (the debtor cannot do so themselves, although they can present a draft plan to the Restructuring expert for offering to creditors/shareholders). The Restructuring expert must be given access to all the debtor's books and records necessary to fulfil their task, and the debtor (and its directors/officers) must provide all the information required by the Restructuring expert. The fees of the Restructuring expert are set by the court and paid by the debtor. If the Restructuring expert finds that it will not be possible to reach a confirmable plan, they shall request the court to terminate the appointment.

The court may also appoint an Observer whose task will be to supervise the preparation of the restructuring plan and act in the interest of the joint creditors. The court will not appoint an Observer if a Restructuring expert has been appointed (or vice versa). An Observer may also be appointed solely to ensure fair treatment during the confirmation process of the restructuring plan.

Plan: contents

There are few substantive requirements as to the contents of the restructuring plan.[3] While the plan may address all or some of the creditors/shareholders, it cannot affect the rights of any employees. The plan can affect rights of creditors/shareholders, but it cannot impose new obligations. This was determined in the IHC case, in which the Dutch Supreme Court ruled that the WHOA does not permit a plan that obliges a lender to provide additional financing under amended conditions. However, the WHOA does allow the debtor to request a contracting party to agree to an amendment of the terms of their contract. Should the contracting party refuse, the debtor can terminate the contract, provided the court grants permission in its decision to confirm the plan. Any damages resulting from the premature termination of the contract can be included (and crammed down) in the restructuring plan.

Plan: formalities

The WHOA contains detailed provisions about the information that must be included in the restructuring plan and more generally the information that must be provided to parties that have a right to vote on the plan. The plan must include all relevant financial details, as well as information about the voting process, any valuations performed, and the basis on which they were conducted. In short, the plan must provide voting creditors/shareholders with all the information necessary to make an informed decision about the plan.

[3] Certain minimum requirements for small creditors may apply; they should in principle receive no less than 20% of the value of their claim (see also below under Grounds for refusal).

Classes

Creditors/shareholders may be divided into classes. Creditors or shareholders must be divided into separate classes if their rights – in or out – are different to such an extent that they are not in an equivalent position. In or out means that the difference may lie either in the type, ranking or nature of the claim, or because of the treatment under the plan. Accordingly, for example secured creditors cannot be in the same class as unsecured creditors. And creditors who receive a distribution in cash of 15% of their claim must be in a different class from creditors who receive 25%, or who receive a distribution in the form of equity. The rules on class composition under the WHOA are highly flexible and allow for sophisticated planning.

Request for explanatory decision

The debtor (or the Restructuring expert, if appointed) can request that the court issue a decision on any aspect relevant to the plan. For example, the court can be asked to clarify whether the information in the plan, the division into classes and the admission (or non-admission) of one or more creditors comply with the requirements under the WHOA. If the decision affects one or more creditors or shareholders, they will be invited to the hearing to present their views. The court’s decision will be binding on all such parties, and they will not be able to object to the plan's confirmation on grounds that have been decided in the court's explanatory decision.

Cooling off period

If a Restructuring expert has been appointed or the debtor has initiated WHOA proceedings and offered a plan to their creditors/shareholders, or committed to doing so within the next two months, the court may, at the debtor's or the Restructuring expert's request, order a cooling-off period of up to four months (extendable to a maximum total of eight months). During this period, some or all creditors cannot take action against the debtor's assets. The court may also lift any attachment or suspend a request for suspension of payments against the debtor.

Bespoke measures

At the request of the debtor or the Restructuring expert, the court may also take any measures it deems necessary in the interests of the creditors or shareholders. This provision further enhances the flexibility of the WHOA, enabling it to be adapted to the specific needs and circumstances of an individual case to achieve the best possible outcome for successful restructuring.

Protection from future clawback

Once a WHOA has been initiated, the debtor can request that the court grant permission for certain actions which would otherwise be subject to clawback if the restructuring were to fail and the debtor were to end up bankrupt. Such permission shall be granted if it can reasonably be assumed that the action was necessary to continue the debtor's operations during the period required to prepare a restructuring plan, or for such a plan to be voted on or confirmed. The action must also be in the interest of the joint creditors, and no individual creditor must suffer any significant harm as a result. This provision protects new financing and the provision of security during the preparation and negotiation of the restructuring plan from future clawback.

Voting procedure

A plan can be voted on just once – this is to ensure that the plan contains the best possible outcome for the creditors. Any creditor or shareholder whose rights will be affected by the plan is entitled to vote. The plan must be made available to parties with voting rights for at least eight days prior to the vote. The debtor or Restructuring expert decides on the voting procedure and must inform all eligible voters of it. Voting can take place in person, online or in writing. Voting takes place per class; a class has voted in favour of the plan if members representing two-thirds of the total amount of voting members have voted in favour (non-voting members are not counted).

Confirmation process

If at least one class of in-the-money creditors has approved the plan, the debtor or the Restructuring expert[4] can request that the court confirm the plan. The court will hold a confirmation hearing within eight to fourteen days of the request being filed. During this hearing, the court will assess whether all formal requirements have been met, including the provision of information. It will also check that the execution of the plan is safeguarded. Dissenting creditors may oppose confirmation on a number of grounds (see below). If the court confirms the plan, it becomes binding on the debtor and all affected creditors/shareholders, regardless of how they voted. The court's decision on confirmation is not open to appeal.[5]

Grounds for refusal

There are three categories of grounds for refusal. Two of these categories can only constitute grounds for refusal if invoked by a creditor or shareholder with the necessary standing.

Firstly, the court can refuse to confirm a plan ex officio if certain requirements have not been met. These are mostly formal requirements and include checking that the conditions for a WHOA apply, that proper and sufficient information has been provided and that the class composition was in accordance with the rules.

The second category can be invoked by a dissenting creditor or shareholder and provides that confirmation may be refused if the creditor/shareholder would be worse off than they would be in the event of the debtor's bankruptcy (best interest test).

The third category can only be invoked by a dissenting creditor in a dissenting class and consists of four separate grounds. For each of these grounds, the court may refuse confirmation, but is not obliged

[4] If there is also one or more dissenting class, and the debtor is a small or medium sized enterprise, then the Restructuring expert can only request confirmation of the plan with permission of the debtor.

[5] A non-appealable decision under Dutch law can be appealed nonetheless if basic principles of fair trial have been violated, or if the court has gone beyond the scope of the applicable statute. This applies also to decisions under the WHOA. The court can, however, request the Dutch Supreme Court for a clarification of a certain statutory provision (which it has done in a WHOA case once). Also, the Procurator General of the Supreme Court can initiate cassation proceedings "in the interest of the law" to get a decision of the Supreme Court (which happened in the IHC case). In such case, however, the outcome will not affect the parties but will only serve as a clarifying precedent for future cases.

to do so; it can confirm a plan even if a ground for refusal is present, on the basis of, briefly put, reasons why in the case at hand confirmation should be granted. Firstly, confirmation may be refused if a class of unsecured SME creditors receives less than 20% of the value of their claim. Secondly, confirmation may be refused if the plan contains a deviation from the statutory ranking, unless there is reasonable grounds for deviation (absolute priority test). Thirdly, confirmation may be refused if non-financier creditors are not offered a cash alternative equivalent to what they would receive in the event of the debtor's bankruptcy. Fourthly, the court may refuse confirmation if a secured financing party is forced to accept equity with no alternative.

Post WHOA issues

If a restructuring plan has been voted down, or if the court has refused to confirm a plan, the debtor may not offer a new plan for three years from the date on which the original plan was offered. However, a new WHOA plan may be offered by a restructuring expert if one has been appointed following the failed attempt.

Cross-border issues: recognition and combining procedures

A public WHOA procedure is on list A of the European Insolvency Regulation and as such will be recognised in all EU member states, except Denmark. Recognition outside the EU (or in Denmark) depends on the applicable rules in the receiving state. The same applies to a private WHOA procedure: recognition will depend on the receiving state's rules. Although the rules for recognising foreign insolvency decisions in the Netherlands are based on case law and can be complex, the Netherlands has a long-standing history of coordinating with proceedings elsewhere to achieve a coordinated outcome. Several cases have involved the combination of a WHOA plan with an English Restructuring Plan and/or a US Chapter 11 plan. The WHOA was originally inspired by a combination of an English scheme of arrangement and a US Chapter 11 plan, and as such it combines the flexibility of both.

Costs

The costs of a WHOA procedure can be high, especially if there are many stakeholders and several court hearings. A well-thought-out strategy that considers not only the details of the plan to be offered to creditors, but also the most effective way to navigate the process (for example, determining at which stages court involvement would be beneficial or detrimental), will help to keep costs under control. Costs include, on the one hand, the fees of legal and financial advisors and, on the other hand, court fees. Court fees have been significantly reduced as of 1 July 2025, standing at EUR 714 for legal persons and EUR 331 for natural persons/individuals per request.

More information

If you are considering a WHOA or would like to explore alternatives, please do not hesitate to contact us. If you are looking for a candidate to act as a restructuring expert or observer, please also feel free to contact us.

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