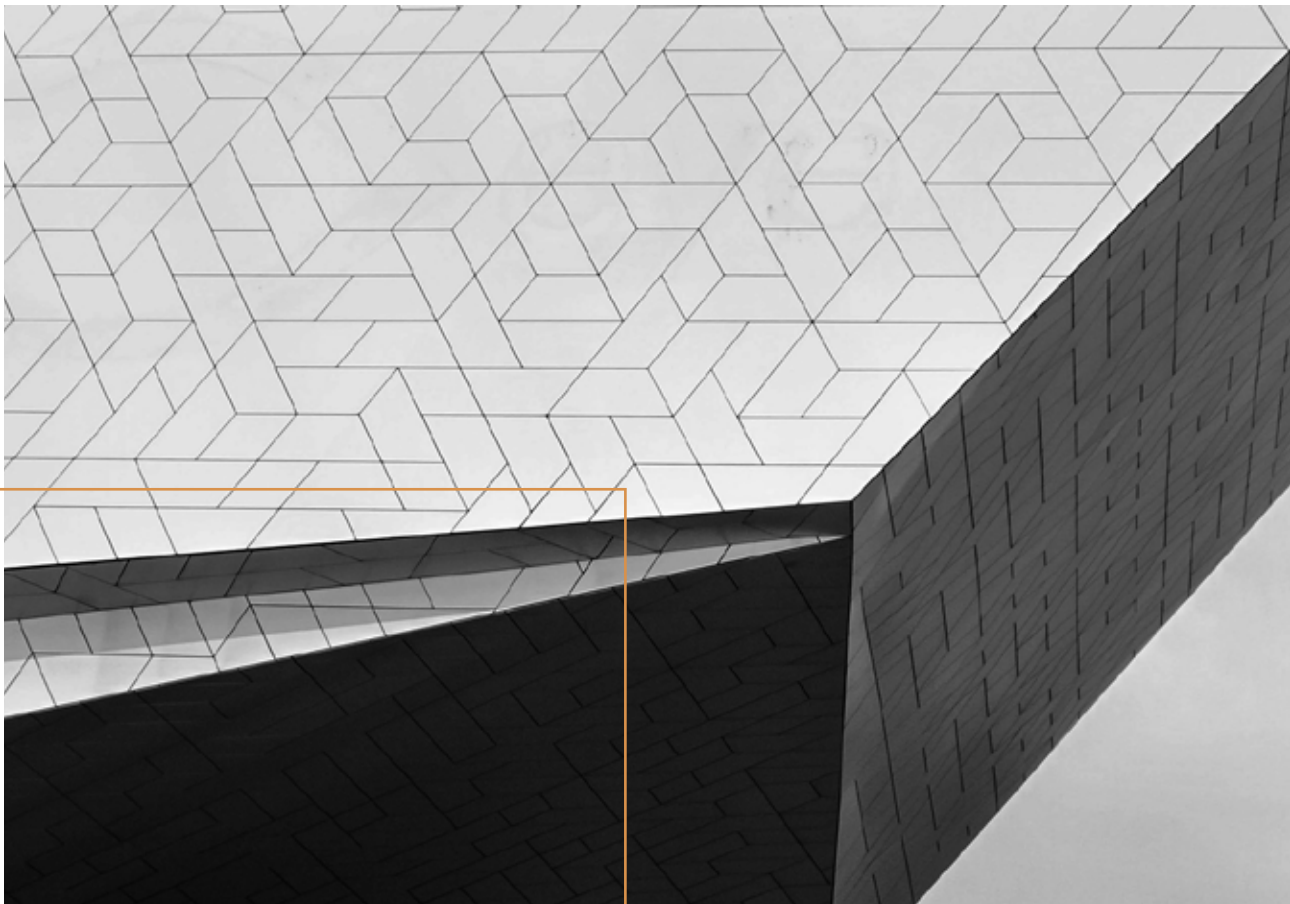


# RESOR

BULLET POINT SUMMARY

## THE DUTCH SCHEME



**DATE** 1 January 2023

# BULLET POINT SUMMARY OF THE DUTCH SCHEME

On 1 January 2021 the Dutch Act on the Confirmation of Private Plans, also known by its Dutch acronym "WHOA", came into force. This act introduces a pre-insolvency procedure in the Netherlands, which one might refer to as the "Dutch scheme". On 1 January 2023 the WHOA was amended on a number of points to make it fully compliant with the EU Restructuring Directive (EU 2019/1023).

The Dutch scheme combines elements of the UK scheme, such as the ability to implement a plan outside formal insolvency proceedings, with elements of Chapter 11, such as a cram down mechanism, whilst innovating on both. The result is a fast and flexible restructuring procedure containing all the powers needed to do the job.

Below we offer a short bullet point summary of the Bill in its form as per 1 January 2023.

## GENERAL CHARACTERISTICS – PLAN PROCEDURE OUTSIDE OF FORMAL INSOLVENCY

- Procedure in which a restructuring plan is put to vote, a majority can bind a minority within each class, and the court has the power to impose the plan on dissenting classes (cram down)
- Outside of formal insolvency proceedings
- Debtor-in-possession
- Can be limited to a subset of the capital providers (creditors and/or shareholders)
- Option to choose between a public variant and a confidential variant
- Minimal court involvement

## INITIATING THE PLAN – DEBTOR AND CREDITORS ALIKE

- When the debtor is or can reasonably be expected to become insolvent (could be a year ahead)
- The debtor may propose a plan as long as a restructuring expert has not been appointed
- A debtor, a creditor, a shareholder, the works council or the workplace representation may request the appointment of a restructuring expert, who is then entitled to propose a plan to the exclusion of the debtor
- The debtor may request the restructuring expert to propose a plan on its behalf, with which request the restructuring expert should comply. If both plans get sufficient support, the restructuring expert should first submit the plan of the debtor to the court, unless only his plan has support of all classes or the debtor supports his plan

- The restructuring expert is only concerned with the development of a plan. The debtor remains in full control of the ordinary course of business throughout the process
- The appointment of the restructuring expert and the confirmation request to the court by the restructuring expert require the consent of the debtor in case of an SME. Where the debtor withholds consent on unreasonable grounds, the court can grant consent on the debtor's behalf

### **CONTENT OF THE PLAN – MAXIMUM FLEXIBILITY**

- No prescriptions and a high degree of flexibility as to the commercial content of the plan (extension and/or reduction of debt, debt for equity swap, sale of assets, controlled wind-down, etc)
- Can bind all types of capital providers, including secured and preferential creditors and shareholders
- Can be limited to a subset of the capital providers
- Can include certain third party releases
- A plan cannot effect obligations arising out of employment contracts
- Can include request to the court to validate certain transactions required for implementation of the plan

### **HIGH-LEVEL PROCEDURE – FAST AND EFFICIENT, DEALT WITH BY SPECIALIZED JUDGES**

- No court test at entry where the debtor proposes the plan
- Electronic voting 8 days (may be more) after plan is proposed
- No convening hearing, not prior approval of disclosure statement and no formal creditors meetings
- Confirmation hearing within two weeks after vote
- Confirmation decision as soon as possible thereafter (within one or two weeks)
- No appeal – the entire procedure can be finalized within 3 – 5 weeks
- Cases dealt with by a small team of specialized judges specifically trained for the purpose

### **VOTING AND ACCEPTANCE**

- Voting takes place in classes
- Class formation on the basis of similarity of new and existing rights
- A separate class must be formed consisting of small trade creditors and tort claimants
- Where legal title is split from beneficial ownership, the beneficial owner is entitled to vote
- Class acceptance on the basis of two thirds (2/3) in amount of those participating; no head count

## CONFIRMATION AND CRAM DOWN

- • Where all classes have accepted the plan: no dissenting creditor may receive less in value, whether in cash or in non-cash, than it would expect to receive in liquidation (best interest of creditors test)
- Where one or more classes have rejected the plan (cram down):
  - consent of the debtor required in case of a SME (but the court can overrule the debtor if it withholds consent without good reason)
  - at least one in the money class must have accepted the plan
  - the members of the dissenting class must receive their share, in accordance with their rank, of the reorganization value (i.e. the value distributable if the plan comes about)
  - if the dissenting class consists of secured creditors, they must have the right to opt for a distribution in a different form than equity (e.g. a debt instrument)
  - if the dissenting class is the separate class of small trade creditors and tort claimants, the members of that class may not receive a distribution lower than 20% of their claim, unless there is an imperative reason for offering a lower distribution

## SUPPORTIVE MEASURES

- A tailored individual or general stay at the request of the proponent of the plan for a period of 4 months with the possibility of extension to a maximum of 8 months
- The stay can also be extended to protect guarantors
- Protection of security and/or other transactions required for new funding
- Ability to continue using encumbered working capital subject to adequate protection
- Ability to continue essential contracts despite default by providing security for the performance of new obligations (while pre-existing defaults continue)
- Invalidation of ipso facto and change of control clauses
- Ability to reject onerous contracts; rejected contract is converted into a monetary damages claim that can be restructured under the terms of the plan (employment contracts are exempted)
- Ability for court to make bespoke provisions in departure of statutory provisions to facilitate tailor made solutions
- Ability for court to make binding determinations on any difficult issues at an early stage (i.e. before the vote) so that uncertainty can be removed as quickly as possible. This includes issues such as eligibility, jurisdiction, admission to the vote, class formation, valuation, etc.

## INTERNATIONAL ASPECTS – JURISDICTION AND USE BY FOREIGN DEBTORS

- The public procedure is placed on Annex A of the European Insolvency Regulation
- The confidential procedure falls outside the European Insolvency Regulation
- Jurisdiction for the public procedure based on COMI or establishment
- Jurisdiction for the confidential procedure based on domicile of applicant or affected party or sufficient connection, which is very broad and does not require the COMI of the debtor to be located in the Netherlands
- An officeholder in foreign reorganization or insolvency proceedings can be appointed as a restructuring expert in Dutch scheme proceedings in respect of the same or a different member of the group

## ANALYSIS

- The act provides for a fast, efficient and highly flexible instrument with all the powers required to reconfigure the capital structure as appropriate whilst preserving the business throughout
- The instrument offers a highly effective business rescue tool
- The fact that also others than the debtor (controlled by out of the money equity) can initiate the procedure, enhances early intervention
- The instrument enables creditors to preserve and realize the value of the business on a non-distressed basis
- The instrument enables existing equity to inject new money into the business and thus to protect its investment by facilitating the elimination of unsupported debt
- The availability of a variant that falls within the European Insolvency Regulation and a variant that falls outside the European Insolvency Regulation, with very broad jurisdiction, makes the instrument particularly useful for dealing with cross-border groups. The variant that falls within the European Insolvency Regulation offers the benefit of automatic recognition. The variant that falls outside of the European Insolvency Regulation can be used where the European Insolvency Regulation is problematic because of the existence of security rights on foreign assets (rights in rem exception) or because of the COMI of guarantors or other group members being located in different jurisdictions. This enables a cross-border group to be restructured through proceedings in a single jurisdiction.



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