The New Dutch Scheme: Valuations Emerge as Main Battleground Between Stakeholders Under the WHOA

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In January 2021, the WHOA (Wet Homologatie Onderhands Akkoord), also referred to as the Dutch Scheme, introduced a new feature to the country's insolvency regime that allows tailor-made restructuring plans to be implemented outside of formal proceedings. Combining elements of the English Scheme of Arrangement, the U.S. Chapter 11 and the EU Restructuring Directive, the legislation was designed to streamline restructuring processes and ultimately avoid unnecessary bankruptcies.

A key element of the WHOA is the possibility of imposing the restructuring plan on individual creditors and/or shareholders that have voted against it, the so-called cross-class cramdown. When implemented successfully, this mechanism limits the ability of stakeholders that may not have a genuine economic interest in the company – so called "holdouts" – to block a restructuring proposal. The intention is to preserve more of the company's value in a going concern assumption, with the support of the majority of the "in the money" stakeholders.

After a first year dominated by restructurings of small and medium businesses, the new Dutch scheme finally gained some traction with a string of large cases recently sanctioned by local courts. They represent the first significant test for the regime, providing market participants with more clarity on some of the critical elements of the law.

Recent large cases highlight successes and complexities of new regime

In June, an Amsterdam court confirmed the implementation of the WHOA for Steinhoff, a global retail conglomerate with more than €10.4 billion of debt. The plan provided a conversion and maturity extension of Steinhoff's debt, the transfer of the holding's assets and liabilities to a new "topco" entity and the issuance, by the "topco," of contingent value rights to the "out of the money" shareholders. The plan also included the delisting of the parent company from the German and South African stock exchanges.

All three classes of creditors voted in favour of the debtor-proposed plan, but only a tenth of the group's shareholders approved it. One of the shareholders has directly opposed the proposal, arguing that it wrongly assumed a too low valuation for the businesses. The holdout shareholder submitted its own valuation report to the proceeding, sustaining that shareholders were "in the money" either in a liquidation or in a going concern continuation scenario. The objection was rejected by the court and the WHOA was sanctioned.

Steinhoff was not the only high-profile WHOA case to face shareholders' opposition in relation to valuation. In May, Vroon group's $900 million cross-border restructuring plan was met with challenges in both the Dutch and English courts, with shareholders claiming that the company undervalued its assets, overstated its debt position and did not require a debt conversion. As a result of that, according to the shareholders, the company did not propose a fair distribution of the value to be realised from the restructuring among stakeholders.

Seeing an uncontrolled bankruptcy as a real threat, the court eventually rejected these arguments and sanctioned the WHOA based on the valuation put forward by the debtor. Another valuation dispute emerged in the context of the WHOA private proceeding of a fitness centre chain last year. The company's term loan B lenders contested both the liquidation and the reorganisation value presented by the financial advisers retained by the restructuring expert. In this case too, the court has dismissed this view and sanctioned the WHOA.

Although not directly related to a valuation issue, another case involving dissenting stakeholders was the WHOA proceeding for the dredging vessel manufacturer IHC, which was confirmed by a Dutch court last March.

Three out of nine secured lenders did not fully agree with the restructuring solution proposed by the company, which included the disposal of a subsidiary and the extension of a financing package. Yet, with the support of the majority of the lenders, the debtor was able to convince the court that if successfully implemented, the WHOA would allow for going concern.

This decision meant that, for the first time, a minority in a syndicate of financial institutions was forced to continue to finance, extend maturities, allow the disposal of a subsidiary and accept the release of the related security and guarantees, regardless of their perceived “all lender consent” protection. This is a new development for the Dutch restructuring market that creditors should consider when entering into loan agreements in the future.

Valuation emerges as hot issue in WHOA restructurings

Based on the complex cases we have discussed here, and where A&M have contributed, we can conclude that the WHOA has proved a very powerful restructuring tool. Liquidation and reorganisation value are central concepts within the framework, ultimately determining how much value will be distributed to each creditor group and potentially even the shareholders. They provide room for challenging discussions and arguments among stakeholders, especially given the possibility of cross-class cramdown introduced by the law.

With more restructuring cases expected to reach the courts as businesses grapple with difficult macroeconomic conditions, we could see more valuation issues arising within WHOA proceedings in the coming months and years.

How A&M can help?

Both A&M’s Restructuring & Turnaround and Valuation Services practices in the Netherlands haves the expertise to help creditors and debtors capitalise on the innovations brought about by the new Dutch scheme. With over 20 years of restructuring, transformation, tax and valuation expertise across different industries and jurisdictions, our team can help stakeholders navigate the complexities of the new insolvency regime in a timely manner to achieve a successful outcome.

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