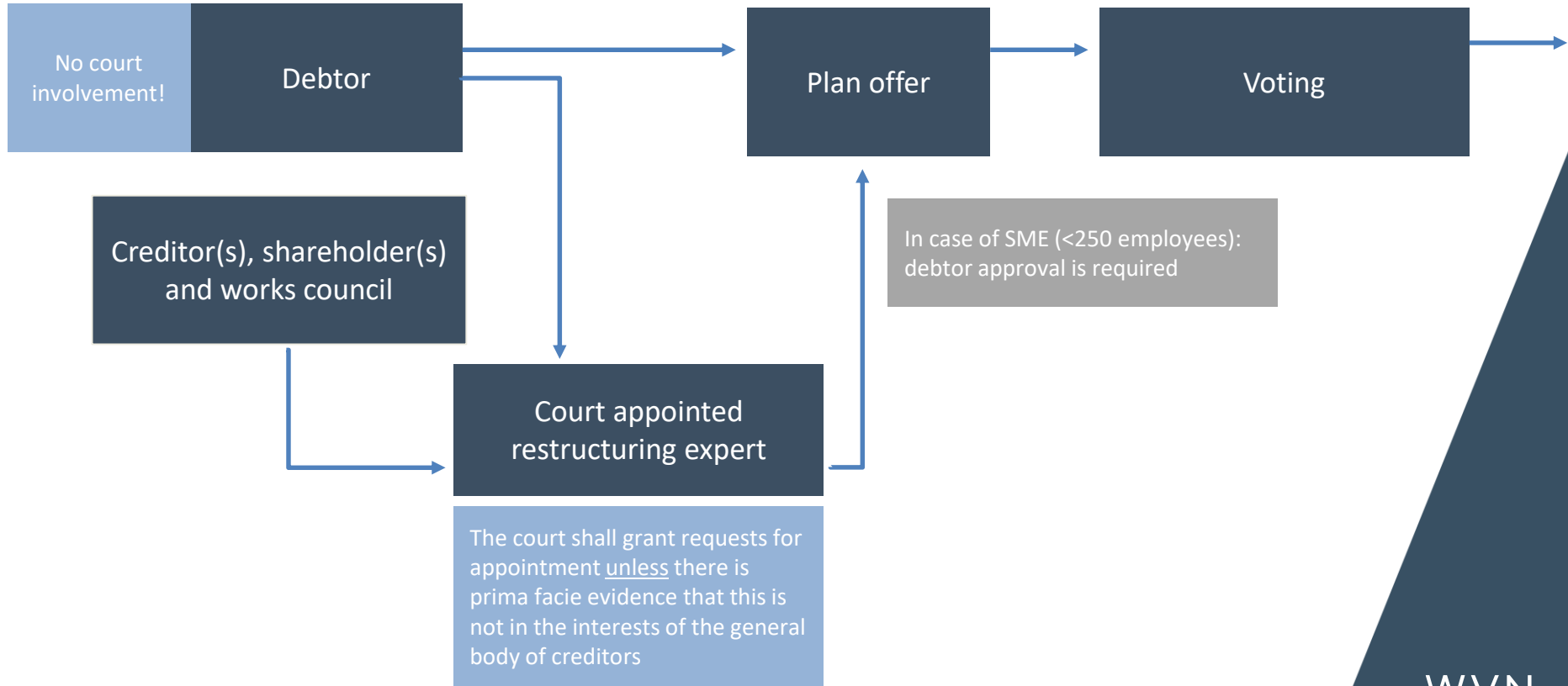




**Governance within the WHOA process:
balancing fairness, flexibility, speed & deal certainty**

Anne Mennens
24 February 2020



Intermezzo: early determinations

- Upon request of the plan offeror (debtor or restructuring expert):
- Courts can take a binding decision “on any issues that are relevant in the context of putting a plan into effect”, e.g.
 - whether, if the plan is not accepted by all classes, there would be a ground for refusal as meant in Article 384 (3) and (4) to prevent confirmation of the plan:
 - ✓ best interests-test
 - ✓ compliance with the WHOA-priority rule
- Affected creditors cannot request early determinations but should voice any objections “*promptly*”: if they do not do so, they lose the right to invoke that ground for refusal in the confirmation stage

No court involvement!

Debtor

Plan offer

Voting

Creditor(s), shareholder(s)
and works council

Court appointed
restructuring expert

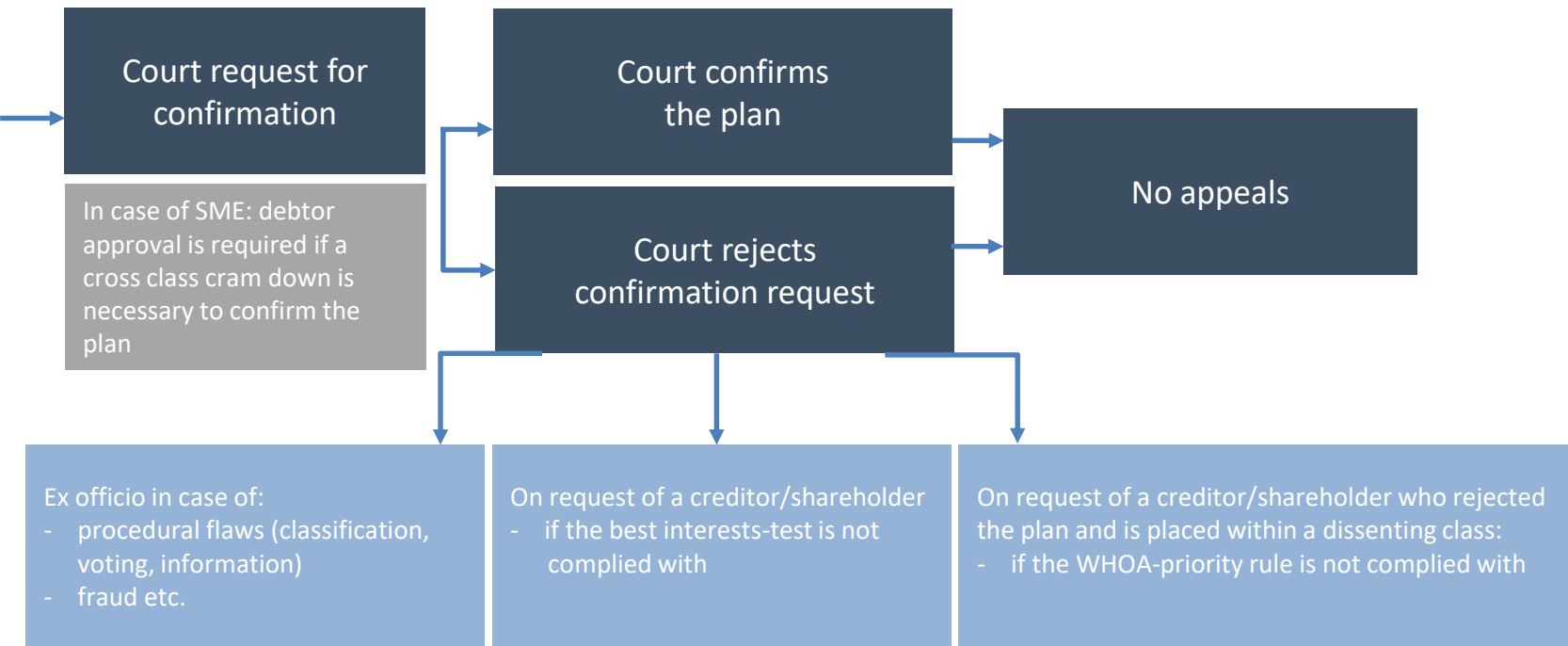
In case of SME (<250 employees): debtor approval is required

Early determinations: directions from the court

E.g.: does the debtor refuse approval on unreasonable grounds?

Court order may replace the required debtor's approval

The court shall grant requests for appointment unless there is prima facie evidence that this is not in the interests of the general body of creditors



Deviations from the WHOA-priority rule ...in light of the discussed governance structure

- **creditors** can (and should) actively involve judges if they foresee deviations that have no reasonable ground and/or that prejudice creditors:
 - by requesting the appointment of a restructuring expert
 - by filing their complaints with the debtor, leaving the debtor the choice to request early court directions
 - by (voting against the plan and) submitting a request for the court to deny confirmation
- **restructuring experts** should prepare plans that comply with the WHOA-priority rule and ensure that, in case of deviations, reasonable grounds exist and creditors are not unfairly prejudiced.
- **our judges** are crucial for a well-functioning 'ecosystem' for this new restructuring tool should therefor:
 - rule that a debtor's refusal to approve a plan is unreasonable if the shareholders are out of the money;
 - interpret both the 'reasonable ground' and the 'prejudice'-limb narrowly;
 - not be afraid to refuse a plan violating the WHOA-priority rule;
 - take their own view on valuation, appoint expert if valuations provided by the debtor (underpinning a plan that deviates from priority) cast doubts...