Rapidly Implemented Amidst COVID Crisis, New Dutch Restructuring Procedure Offers Relief to Businesses and Organizations Struggling with High Debts

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A recently enacted Dutch law enables businesses and organizations to avoid bankruptcy through a court-approved restructuring plan. As an implementation of the 2019 European Restructuring Directive, the so-called Dutch Scheme can be used to restructure debts and improve profitability, for example by applying forced debt reduction or debt-for-equity swaps. This new legislation entered into force on 1 January 2021 and is already proving to be an effective tool for business in financial distress. In this article, the authors describe its main characteristics.

Keywords: insolvency proceedings, restructuring plan, WHOA, Dutch Scheme, restructuring expert, debtor-in-possession

1 INTRODUCTION

In the summer of 2019 – well before the Coronavirus disease 2019 (COVID-19) pandemic started to affect the global economy – the Dutch Government proposed new legislation referred to as '*Wet homologatie onderhands akkoord*' (**WHOA**) or *Dutch Scheme*.[1] The intention of the draft legislation was to offer debtors a possibility to restructure their debts in a flexible and efficient manner, in order to avoid bankruptcy. Given the current economic circumstances, this new restructuring option is now more relevant than ever, and we expect its impact will not stay limited only to companies who are established in the Netherlands.[2] In this article, we provide a basic introduction of the WHOA and we summarize the lessons that can be learned from the first published court judgements in which the WHOA has been applied in practice.

The draft legislation for the WHOA was the result of a longer period of preparation in which (in 2014 and 2017) public consultations were organized.[3] In those consultations, many parties pointed out that under Dutch law at the time, it was (extremely) difficult to effectuate financial restructurings without going through the formal insolvency procedures which – in almost all cases – resulted in large (financial) losses for all stakeholders. In practice, a Dutch debtor who wanted to restructure his debts without applying for bankruptcy or a court-ordered suspension of payments (*surseance van betaling*) was highly dependent on the willingness of *all* affected creditors to agree with an out-of-court restructuring plan.[4] The WHOA intends to offer a solution for this problem, by allowing a restructuring plan to be imposed upon dissenting creditors – under certain conditions, of course.

In 2019, the draft legislation for the WHOA was received favourably by most insolvency specialists.[5] When the COVID-19 pandemic shocked the world early 2020 and anxiety about its economic impact grew, many prominent insolvency specialists in the Netherlands collectively and publicly urged the Dutch government and parliament to enact the WHOA as soon as possible.[6] According to these specialists, the WHOA could be an effective tool to prevent bankruptcies resulting from the economic downturn, and this tool was now urgently needed.

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1 The full title of the law, which would result in a change of the existing Dutch Bankruptcy Act (**DBA**), was 'Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord', *Parliamentary Papers* 35 249, no. 3 session 2018–2019.

2 For a brief summary of some international aspects of the WHOA legislation, *see* para. 2.11 of this article.

3 *Parliamentary Papers* 35 249, no. 3, at 23, session 2018–2019.

4 Y. G. Blei Weissmann, *Groene Serie Verbintenissenrecht* (Deventer: Kluwer 2018), n. 1.75.1.4 to Art. 6:217 DCC with referral to Dutch Supreme Court 24 Mar. 2017, ECLI:NL:HR:2017:485, *Rechtspraak van de Week* 2017/444.

5 *See* e.g., the mostly favourable discussions of the WHOA law proposal in *Tijdschrift voor Insolventierecht* and *Tijdschrift Financiering, Zekerheden en Insolventiepraktijk* (both special editions of Oct. 2019). Critical remarks and suggestions for improvement were made *also see* e.g., N. W. A. Tollenaar, *Het Wetsvoorstel Homologatie Onderhands Akkoord onder de loep genomen*, Tijdschrift voor Insolventierecht 2019/32.

6 Experts: 'Voer zo snel mogelijk nieuwe faillissementswet in' (*NRC* 18 Mar. 2020).

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After the adoption of a small number of amendments – which amendments initially were not too popular with some insolvency specialists, especially since they were aimed at protecting unsecured creditors and reduced protections for some professional lenders (such as banks)[7] – the WHOA was swiftly enacted and is now in force as of 1 January 2021. In this article, we will discuss the law's main principles, also taking into account the published judgements in which the WHOA was applied in practice so far.[8]

2 BASICS OF WHOA PROCEDURE

By way of general introduction, the basic characteristics of the WHOA can be summarized as follows.

2.1 Application Scope

The WHOA can be used to restructure all possible debtors with an establishment in the Netherlands, except (1) natural persons who are not exercising a profession or business as an independent entrepreneur (2) banks and (3) insurers.[9] Therefore, not only all Dutch companies (B.V. or N.V.) can use the WHOA, but other Dutch entities (e.g., foundations, associations, etc.) can also do this. In some cases, the WHOA may even be used by entities that have a foreign legal form (e.g., GmbH, BVBA, SARL, Ltd) or European legal form (e.g., EESV, SE).[10]

The WHOA can be invoked either (a) to restructure accumulated debts, with the aim of continuing the activities of the debtor in a sustainable way or (b) to restructure debts in preparation of a permanent winding-down of the debtors' activities, thereby avoiding the negative consequences of outright bankruptcy for all parties involved.[11]

2.2 Initiating Parties

The initiative to start a WHOA procedure can be undertaken by the debtor itself (hereafter referred to as a 'debtor-initiated WHOA procedure') or by a creditor, shareholder or works council (hereafter referred to as a 'third party-initiated WHOA procedure').[12] The Dutch courts have updated their court regulations and developed standard forms which can be used to initiate a WHOA procedure.[13]

The law does not mandate a minimal number of creditors or shareholders to support a third party-initiated WHOA procedure. Therefore, in principle, even a sole creditor with a (very) small claim against the debtor or a small minority shareholder can request the court to initiate a WHOA procedure.

2.3 Entrance Criteria

The court will grant the request by the debtor or a third party to start a WHOA procedure when it can reasonably be assumed that the debtor will not be able to continue to fulfil its obligations vis-à-vis its creditors unless a restructuring is effectuated.[14] In this article, this situation is referred to as 'financial distress'. Especially in cases when the WHOA procedure is initiated by a third party, we expect that there will regularly be a debate over whether the debtor is in a situation of financial distress. Since this issue is not extensively covered during parliamentary debate, future case law will have to provide clarity about what the exact criteria for 'financial distress' are.[15]

In a debtor-initiated WHOA procedure with the aim of continuing the activities of the debtor, the debtor will have to be able to convince the court that after a successful implementation of a restructuring plan, the debtor's financial position will be sustainable again. Such expectations must be based on verifiable and realistic calculations.[16]

2.4 Debtor in Possession

A key feature of the WHOA procedure is that the debtor remains in possession of its property. Therefore, the debtor remains competent to acquire and sell goods, to conclude contracts and to accumulate or pay off debts. If the debtor is a legal entity, its (board of) director (s), possible supervisory board, shareholders and works council(s) retain all authorities and obligations they had before the WHOA procedure was initiated.[17]

7 N.W.A. Tollenaar, *Amendementen op de WHOA – tikkeltje onbesuisd*, Tijdschrift voor Insolventierecht 2020/23. These amendments themselves were amended during the course of the parliamentarian process, in order to address the position of small businesses more specifically.

8 All Dutch case law up and until 1 Apr. 2021 relating to WHOA proceedings has been processed.

9 Article 369 DBA. Independent entrepreneurs cannot use the WHOA procedure to restructure private debts or to restructure debts after the enterprise has already been discontinued, *see* District Court Midden-Nederland 26 Mar. 2021, ECLI:NL:RBMNE:2021:1255.

10 For a brief summary of some international aspects of the WHOA legislation, *see* para. 2.11 of this article.

11 *Parliamentary Papers* 35 249, no. 3, at 2 and 23, session 2018–2019.

12 Article 370 Subs. 1 and 371 Subs. 1 DBA.

13 Procesreglement Wet homologatie onderhands akkoord (WHOA) zaken rechtbanken, 24 Nov. 2020, *Staatscourant* 2020, 63319.

14 Article 370 Subs. 1 DBA.

15 In parliamentary papers, the situation of financial distress has been defined as 'looming insolvency' and it has been explained that some difference will exist between a situation of 'looming insolvency' and real insolvency situation, in which a regular bankruptcy procedure would normally be applied. *See Parliamentary Papers* 35 249, no. 3, at 33–34, session 2018–2019. In our view, this seems to indicate that case law around the existence of a real insolvency situation in which a debtor has 'ceased to pay his debts' as it has been developed over the past decades by Dutch courts, does not (directly) apply to the existence of a situation of financial distress. For an example, *see* District Court The Hague 1 Apr. 2021, ECLI:NL:RBDHA:2021:3228.

16 District Court The Hague 5 Mar. 2021, ECLI:NL:RBDHA:2021:2033.

17 According to the law, with regard to (1) the use and/or sale of goods that have been delivered to the debtor with a retention of title by the supplier and (2) receivables with the debtor's customers that have been pledged to a lender, some additional rules should be observed. When a court-ordered cooling-off period is applied (*see* para. 2.7 of this article), the debtor should only use his rights to (i) use and/or sell such goods or (i) collect those receivables when the interests of the involved third parties (i.e., suppliers or lenders) are '*sufficiently guaranteed*'. The law does not stipulate in what form this 'guarantee' should be offered. As a company in a financial distress situation will normally not be able to provide much 'guarantee' to these third parties, this rule could pose significant practical problems in practice.

2.5 Restructuring Expert

In a third party-initiated WHOA procedure, the court will appoint a so-called restructuring expert. In those cases, the restructuring expert will have the sole authority to develop a restructuring plan.[18] The restructuring expert should carry out his assignment '*effectively, impartially and independently*'.[19] The restructuring expert can, for example, be a lawyer, registered accountant or financial specialist. In practice, Dutch courts require the applicant to provide multiple fee proposals by potential restructuring experts, from which the court may decide to choose one.[20] From the first published judgements, we can conclude that the Dutch courts attach great importance to the restructuring expert's independence, especially when the expert has been involved substantively in the run-up to and preparation of the request for his appointment.[21]

The debtor (as well as his possible corporate officers, shareholders and employees) is obliged to provide the restructuring expert with all information he or she needs in order to perform his or her tasks, and to grant the restructuring expert access to all the debtor's (financial) records.[22]

As a general rule, the restructuring expert is paid by the debtor. As an exception to this general rule, the restructuring expert will be paid by the creditors when a plurality of creditors supports his or her appointment.[23] The court will determine the expert's (maximum) salary, which may be increased by the court from time to time, and the court may demand an advance payment for the restructuring expert to be paid into the court's account.[24]

In a debtor-initiated WHOA procedure, the appointment of a restructuring expert is not standard. Such an expert will only be appointed by the court if a creditor, shareholder and/or works council expressly requests the court to do so. The court will normally grant such a request if the debtor's 'financial distress' can be assumed. Only when it is evident that the interests of the collective creditors would be harmed by the appointment of a restructuring expert, the court may reject the request – for example, when the debtor itself is already in an advanced stage of the development of a viable restructuring plan and the appointment of a restructuring expert would only add costs and delay the procedure.[25]

2.6 Observer

In a debtor-initiated WHOA procedure where no restructuring expert is appointed (yet) by the court, each creditor, shareholder and/or the works council may request the court to appoint an observer. The observer's task is to monitor the development of the restructuring plan by the debtor, and to oversee that the collective creditors' interests are being respected.[26] Various provisions that apply to the restructuring expert – e.g., regarding salary, rights to information etc. – apply to the observer analogously.[27]

In the process of developing the restructuring plan and discussing options with stakeholders, the observer has a less active role than the restructuring expert does when he or she is appointed. However, we think it is wise for a debtor who is developing a restructuring plan to actively inform the observer about ongoing discussions and the options being considered in connection to the restructuring plan, as the observer will need such information to adequately fulfil his task and developing a good working relationship with the observer may be helpful later in the process. Even though the law only states that the interests of the collective creditors should be looked out for by the observer, in our view, the observer should also take into account possible rights and interest of shareholders and the works council, since ignoring their rights could diminish the chances of the restructuring plan being approved by the court.

The appointment of an observer by the court is mandatory when, in a debtor-initiated WHOA procedure where no restructuring expert is appointed (yet), a restructuring plan is proposed that would entail a so-called *cross-class cram down*.[28]

18 Article 371 Subs. 1 DBA. In a third-party initiated WHOA procedure, the debtor himself does not have the right to directly put his own (alternative) restructuring plan up for a vote to his creditors and shareholders (*see* para. 2.9), but the debtor may request the restructuring expert to bring this (alternative) plan up for a vote. R. van den Sigtenhorst, *Tekst & Commentaar Insolventierecht* (Deventer: Kluwer 2021), n. 2 to Art. 371 DBA.

19 Article 371 Subs. 6 DBA.

20 The court is not bound by the provided fee quotes and may also, ex officio, select an expert not proposed by the requesting party.

21 For examples, *see* District Court Noord-Nederland 26 Jan. 2021, ECLI:NL:RBBNE:2021:244, District Court Noord-Nederland 29 Jan. 2021, ECLI:NL:RBBNE:2021:285 and District Court Midden-Nederland 26 Mar. 2021, ECLI:NL:RBMNE:2021:1255 and District Court The Hague 5 Mar. 2021, ECLI:NL:RDHA:2021:2033.

22 Article 371 Subss 7 and 8 DBA.

23 The law does not stipulate how this 'majority' should be calculated (weighed by the amount of debt or by number of creditors) nor how the 'vote' among creditors over this issue should be organized. At the start of a third-party initiated WHOA procedure, the third party requesting the procedure will rarely possess a complete list of creditors. Even if the requesting party possesses such a list, we expect the requesting party will normally be hesitant to contact all of the creditors in advance of filing the request, to ask whether they support the initiation of the procedure, as this may trigger a 'rat race' of creditors scrambling to secure their own positions. Therefore, we expect this exception to be applied rarely in practice.

24 Article 371 Subs. 10 DBA. The consequences of a debtor refusing (or being unable) to pay this advance, e.g., in a WHOA procedure initiated by a creditor, are not stipulated in law. In such a case, the restructuring expert will logically conclude that it will not be possible to effectuate a successful restructuring under the WHOA procedure, which can lead the court to end his appointment (Art. 371 Subs. 13 DBA). In our view, such a refusal (or inability) to pay an advance by (or of) the debtor could justify to the conclusion that the debtor is in a state of 'real' insolvency (provided that there are multiple creditors). Unfortunately for the creditor that requested the WHOA procedure in this example, the creditor will have to file a separate request (and pay additional court fees) in order to have the debtor declared bankrupt.

25 *Parliamentary Papers* 35 249, no. 3, at 40, session 2018–2019.

26 Article 380 Subs. 1 DBA.

27 Article 380 Subs. 4 DBA.

28 Article 383 Subs. 4 DBA. *See* paras 2.8 and 2.10 of this article.

As soon as a restructuring expert is appointed – at the request of the debtor or an authorized third party – the observer will be discharged.[29] The person who acted as observer can be 'promoted' to restructuring expert at the court's discretion, but the restructuring expert can also be another person.[30]

2.7 Interim Measures & Ipso Facto Clauses

In order to prevent the initiation of a WHOA procedure causing a 'domino effect' for the debtor – in which suppliers can, for example, invoke their retention of title and/or a pledgee can start monetizing pledged assets – the court can order any kind of measure that the court may find to be in the interests of creditors or shareholders. When applying these interim measures, the court will have to strike a balance between the interests of the affected creditor(s) on one side and the interests of the debtor's business continuity and the interests of the collective creditors on the other side.[31] The court may require the debtor to inform the court within a few weeks after the application of the interim measures on the progress of the development of the restructuring plan or on other details.[32]

Some examples of these measures include a court-ordered cooling-off period (moratorium) for a number of months[33] which may be aimed at all creditors or only a limited number of creditors and the lifting of attachments.[34] A consequence of a court-ordered cooling-off period is (always) that, by operation of law, any new or pending requests by the debtor or third parties for bankruptcy or for a court-ordered suspension of payment in Dutch courts will be suspended and pledgees are not authorized to begin enforcement of their undisclosed right of pledge against the debtor's receivables by disclosing the right of pledge and collecting those receivables directly.[35]

A request by the debtor for measures such as a general cooling-off period and/or the lifting of attachments can only be granted when the debtor (1) has offered a restructuring plan; (2) has committed to offer such a plan within two months; and/or (3) also requests the appointment of a restructuring expert.[36] In practice, the cooling-off period can also been applied in cases where the WHOA is intended to facilitate a permanent winding-down of the debtor.[37]

By virtue of the WHOA, so-called *ipso facto* clauses in contracts, which grant a contracting party certain rights (for example: the right to terminate the contract or suspend certain obligations) when an insolvency procedure (such as the WHOA) is applied, have no legal effect.[38] According to the Minister's Explanatory Memorandum during the legislative process, the sole fact that a WHOA procedure is initiated cannot be used by the debtor's contractual partners as an argument to suspend performances (also known as *exeptio non adimpleti contractus*).[39] In our view, all legal consequences that would normally follow from the debtors' failure to comply with its contractual obligations, can still be invoked by the contractual counterparty, as long as the contract does not connect those legal consequences specifically to the opening of an insolvency procedure (such as the WHOA) as such.[40]

2.8 Contents of Restructuring Plan

The party that develops the restructuring plan – being the debtor or the restructuring expert, when such an expert is appointed – has great liberty in tailoring the restructuring plan to the individual debtor's specific situation.[41] For example, the restructuring plan may include writing off large parts of debts and/or *debt for equity swaps*.[42] As part of the restructuring plan, guarantees given by other members of the debtor's corporate group can also be restructured (provided that the group member is also in financial distress).[43]

In the course of developing the restructuring plan, the debtor can propose changes to individual ongoing agreements with third parties, such as rental agreements (e.g., by changing the rental

29 Article 380 Subs. 3 DBA.

30 *Parliamentary Papers* 35 249, no. 3, at 59, session 2018–2019.

31 *See* e.g., District Court Gelderland 4 Mar. 2021, ECLI:NL:RBGEL:2021:1126.

32 For examples, *see* District Court The Hague 15 Jan. 2021, ECLI:NL:RBDHA:2021:198 and District Court Gelderland 21 Jan. 2021, ECLI:NL:RBGEL:2021:363.

33 The initial period of a cooling-off period can be four months at maximum. The initial period can be extended at the request of the debtor or the restructuring expert, as long as the total cooling-off period as a result of the extension is no longer than eight months, *see* Art. 376 Subs. 5 DBA.

34 The law does not stipulate what happens to such attachments that have been lifted by the court during the WHOA procedure when the restructuring effort fails. In our view, the law should be amended to make sure that when the WHOA procedure is terminated without a restructuring plan being approved by the court, all attachments that were lifted by the court during that procedure should be considered reinstated by operation of law (to the extent that the seized assets are still owned by the debtor at that later time – if the debtor has sold the assets in the meantime or when the assets have been extinguished, we think it would be fair that the party levying the attachment should at least be entitled to claim (additional) damages from the debtor).

35 Article 380 Subss 2 and 7 DBA.

36 District Court Noord-Nederland 29 Jan. 2021, ECLI:NL:RBBNE:2021:509.

37 *See* District Court Amsterdam 15 Jan. 2021, ECLI:NL:RBAMS:2021:84.

38 Article 373 Subs. 3 DBA.

39 *Parliamentary Papers* 35 249, no. 3, at 46, session 2018–2019. This passage has been criticized in Tollenaar, *supra* n. 5.

40 An exception to this general rule applies when a court-ordered cooling-off period is ordered.

41 Sigtenhorst, *supra* n. 18, n. 4 to Art. 340 DBA.

42 According to the WHOA legislation, as a rule of mandatory law, when the debtor is a party to a contract which includes a *change of control*-clause that grants the other party additional rights (e.g., the right to terminate the contract early or to suspend performance) in case of a change in the debtor's shareholder(s), those clauses will not be enforceable. *See* Art. 373 Subs. 3 DBA.

43 Article 372 DBA. In such a case, the Dutch court will have to assess whether it (also) has jurisdiction over the group company, *see* Art. 369 Subss 7 and 8 DBA. *See also* S. C. Pepels, *De WHOA als instrument voor (grensoverschrijdende) groepsherstructureringen*, Maandblad voor Vermogensrecht 2020/1&2. According to R.D. Vriesendorp & O. Salah, *De WHOA: een nieuw herstructureringsinstrument*, Maandblad voor Vermogensrecht 2020, at 205–2016, group guarantees (including so-called 403-statements by a parent company that under Dutch law enables the parent company to consolidate financial statements) can also be restructured.

amount, duration), licence agreements (e.g., by changing the licence fees) or other contractual arrangements.[44] When the affected third parties decline the proposed changes, the debtor has the right to terminate the relevant contract, taking into account a reasonable notice period.[45] In that case, the third party will be entitled to damages as a result of the early termination, which claim for damages can also be restructured as part of the broader restructuring plan.[46] Third parties can only prevent the changes being imposed on them if they are able to persuade the court that the debtor is not in financial distress.[47] In most cases, we believe this will be very difficult to demonstrate, as the third party has no direct access to the debtor's financial records and may have reasons to doubt the veracity of the financial information provided by the debtor.[48]

While designing the restructuring plan, a number of minimal requirements and limitations should always be observed. The most important ones are listed below:

- The restructuring plan cannot be used to change worker's rights (at least, not without their unanimous consent).[49] During the course of the WHOA procedure, the works council preserves its rights in accordance with the Dutch Works Councils Act. As a result of this, depending on the contents of the restructuring plan, it may be necessary to involve the works council on certain decisions in a timely fashion.[50]
- An individual party (creditor or shareholder) that voted against the restructuring plan may not be worse off under the restructuring plan than it would be in a bankruptcy.[51] This is also called the *best interest of creditors test*. In order to assess whether this requirement is met, valuations will have to be made in order to compare the creditor's or shareholder's receipts in a bankruptcy scenario with the value of what that party will receive under the restructuring plan. Since the restructuring plan may also include *debt for equity swaps* or amendments to a loan conditions, these comparisons and valuations will not always be easy to draw up and may raise debates over the assumptions on which the valuations are based.
- In addition to the *best interest of creditors test*, the WHOA provides further protections for creditors that voted against the restructuring plan themselves and who are part of a class of creditors that have not agreed with the restructuring plan by voting in favour with a two-thirds majority. When the court is asked to impose the restructuring plan on all creditors in such a case – also called a *cross class cram down* – the court may refuse to approve the restructuring plan when the so-called *reorganization value* is distributed in deviation from the legal and/or contractual preferences that would apply in a liquidation scenario.[52] However, under the WHOA, some exceptions to this principle – which is also referred to as the *absolute priority rule* – may be deemed justified.[53] In most cases, creditors or shareholders facing a *cross class cram down* against their will should at least be offered payment in cash of the amount they would otherwise receive in a liquidation scenario.[54]
- If, under the restructuring plan, unsecured creditors would receive a payment of less than 20% with the application of a *cross-class cram down*, some unsecured creditors who are a microbusiness or small business (**MSB's**) are entitled to special protection.[55] In such a case, a separate class of those unsecured MSB's creditors should be instituted, and the creditors in that MSB class should, in principle, be offered payment of at least 20% of their claim.[56] An exception to this protective rule can only be made when there is a 'compelling interest' to do so or when the special MSB class nevertheless votes (by a two-third majority) to approve the restructuring plan.[57]

44 Article 373 DBA.

45 The notice period will start at the moment the court approves the restructuring plan. The court may extend the notice period proposed by the debtor if the court finds the proposed notice period too short. According to Art. 373 Subs. 1 DBA, a notice period of three months will always be sufficient.

46 Article 373 Subs. 2 DBA.

47 Article 384 Subs. 5 DBA.

48 When presenting the restructuring plan to the affected creditors and shareholders, the plan should be accompanied by specific information as described in Art. 375 of the DBA. Also, the affected creditors and shareholders should have the right to request additional information (Art. 375 Subs. 1 under j DBA). When the information provided to the creditors is incorrect or incomplete, this may lead to the plan being rejected by the court, *see* e.g., District Court The Hague 2 Mar. 2021, ECLI:NL:RBDHA:2021:1798.

49 Article 369 DBA.

50 *Parliamentary Papers* 35 249, no. 3, at 12–13 and 30, session 2018–2019.

51 Article 384 Subs. 3 DBA.

52 For details on the calculation of reorganization value, *see* S. W. van den Berg, W. G. M. Holterman & H. T. Haanappel, *De reorganisatiewaarde onder de WHOA*, Tijdschrift voor Insolventierecht 2019/10.

53 The WHOA legislation offers the possibility of deviating from the rule when a 'reasonable ground' for the deviation is in play and the affected creditors' interests are not being harmed in such a way that they receive less than the amount they would receive in a bankruptcy scenario. The WHOA-version of the absolute priority rule is therefore called 'modified'. *See* Sigtenhorst, *supra* n. 18, n. 8 to Art. 384 DBA.

54 In principle, this so-called *cash option* does not apply for professional lenders such as banks. Professional lenders are only entitled to a *cash option* when, under the restructuring plan, they would receive no other compensation than shares or certificates of shares. *See* Art. 383 Subs. 4 under c and d DBA. For a more detailed analysis, *see* G.Á.C. Orbán & S. Jansen, *WHOA: de cashoptie is dood, lang leve de cashoptie?*, Tijdschrift Financiering, Zekerheden en Insolventieprakijk 2020/224.

55 Article 374 Subs. 2 DBA. Whether a creditor qualifies as a microbusiness or small business should be examined based upon Arts 2:395a and 2:396 of the Dutch Civil Code (DCC) or by looking at its number of employees (maximum: 50). The special protection also applies when such creditors are being offered a right (such as shares or certificates of shares) that represents a value of less than 20% of their claim. According to the text of the law, the special protection only applies when the MSB creditor has a claim on the debtor based on delivered goods or services and/or based on civil liability (and not, e.g., based on a loan or undue payment).

56 Article 384 Subs. 4 under a DBA.

57 The law does not specify what such a 'compelling interest' would be. It will be up to the courts to develop further criteria for this.

2.9 Voting Rights and Voting Procedure

The debtor (or, when a restructuring expert is appointed: the restructuring expert) can put the restructuring plan up for a vote by all affected classes creditors and/or shareholders, who will be divided in voting classes based on their relative preference.[58] Creditors may also be divided in different classes based on the age of their claim by applying a 'cut-off date' when there is a reasonable ground for such a differentiation.[59]

Each creditor's and each shareholder's voting share in the relevant class is determined relative to the amount if its claim (a vote-by-amount) or his share in the company's equity (a vote-by-share), respectively.[60] The vote can take place at a physical meeting, but other forms of voting (e.g., in writing or though telephone or video conferencing) are also allowed.[61]

Creditors and/or shareholders whose rights are not affected by the restructuring plan, are not invited to vote on the restructuring plan.[62] Such creditors and/or shareholders also do not have the right to object to the court's approval of the restructuring plan.

When the debtor in the WHOA proceeding is a Small or Medium size Enterprise (**SME**) and the restructuring expert was appointed at the request of a creditor or works council, the restructuring plan can only be put up for a vote when the debtor (in case of a legal entity: its board) agrees with having that vote.[63]

2.10 Court Approval of the Restructuring Plan

When (I) at least two-thirds of any voting class votes in favour of the restructuring plan and (II) the class voting in favour of the restructuring plan would (partially) be *in the money* in a bankruptcy scenario, the debtor (in a debtor-initiated WHOA procedure without restructuring expert) or restructuring expert (in all other WHOA procedures) can request the court to approve the restructuring plan.[64] If the court indeed approves the restructuring plan, the restructuring plan will become binding for all affected creditors and shareholders, including those (classes) who may have voted against the restructuring plan.[65]

When the debtor in the WHOA proceeding is an SME, the court's approval of the restructuring plan can only be requested by the restructuring expert when the debtor (in case of a legal entity: its board) agrees with that request.[66] If the SME debtors does not agree with this, the restructuring expert will have to request the court to dismiss him. In such a cases, a bankruptcy of the debtor will likely follow shortly after.

2.11 International Aspects

An important aim of the WHOA is to allow qualifying debtors to restructure their debts in an early stage, in order to prevent insolvency. In that respect, the WHOA aligns with the European Restructuring Directive that entered into force in the summer of 2019.[67] Through the WHOA, all relevant aspects of the Restructuring Directive have now been implemented into Dutch law.

In order to ensure the effectiveness of the WHOA for debtors with foreign creditors or with assets in other EU Member States, the Dutch government has announced it will ask the European Commission to include the WHOA procedure in Annex A of the Recast Insolvency Directive.[68] When this request is processed, the decisions taken in public WHOA proceedings by Dutch courts will have to be acknowledged in all EU Member States (except Denmark).[69] When the WHOA is included in Annex A of the Recast Insolvency Directive, we can imagine some (large) companies that currently have their centre of main interest (**COMI**) in EU countries which do not offer a comparable restructuring facility (yet), may want to consider moving their COMI to the Netherlands in order to restructure their debts using the WHOA.[70]

For Dutch debtors for whom the international acknowledgement of the court's decision is not relevant – for example, SME's without

58 Article 374 Subs. 1 DBA.

59 District Court Rotterdam 3 Mar. 2021, ECLI:NL:RBROT:2021:1769.

60 Creditors whose claim is secured by a right of pledge or a right of mortgage will normally be classified in a separate class of secured creditors, but only for the collateral's liquidation value that would be paid to the creditor under his collateral position in a bankruptcy scenario. To the extent those creditors' claims are not (entirely) covered by pledged or mortgaged assets, the non-secured part of the claims will be classified in the voting class with other non-secured creditors. *See* Art. 374 Subs. 3 DBA.

61 Article 381 Subs. 6 DBA.

62 Article 381 Subs. 3 DBA. In our view, a shareholder should only be considered 'affected' by the restructuring plan when the restructuring plan entails direct changes to the shareholders' positions (e.g., when a *debt for equity swap* is applied or when new shares are being issued in order to obtain new funding while ignoring the existing shareholders' pre-emptive rights).

63 Article 381 Subs. 2 DBA. A debtor qualifies as an SME when the debtor (or the group of companies of which the debtor is a member) runs a business that employs less than 250 persons and has accounted for either (1) a turnover of not more than EUR 50 million or (2) a balance sheet total of not more than EUR 43 million.

64 In order to determine whether a voting class would be *in the money* in a bankruptcy scenario, the debtor or restructuring expert will have to assess the maximum net liquidation proceeds of the debtor's assets (taking into account costs of an auction etc.) and predict how those proceeds would be distributed amongst creditors in accordance with relevant (bankruptcy) law. For this assessment, the use of official valuation reports is not prescribed by law. In the documents that go along with the restructuring plan proposal, it should at least be explained how the liquidation value was calculated and what assumptions were used.

65 Article 385 DBA.

66 Article 383 Subs. 2 DBA.

67 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

68 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

69 For a more detailed analysis of international aspects of the 'public' and 'private' WHOA procedures, *see* P. M. Veder, *Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement*, Tijdschrift Financiering, Zekerheden en Insolventiepraktijk 2019/219.

70 Of course, such a move could have significant corporate and fiscal (and therefore: financial) consequences as well.

foreign creditors or assets – a so-called 'private' WHOA procedure is available. The 'private' WHOA procedure requires less information to be provided publicly and the judgement in such a procedure therefore will not qualify for direct acknowledgement in other EU Member States under the Recast Insolvency Directive.[71]

2.12 Procedural Characteristics

A distinctive characteristic of the WHOA is that the procedure is designed to work swiftly and efficiently. If all steps of the WHOA procedure are prepared in detail, the entire procedure can be completed within a matter of weeks. In practice however, most procedures require several months rather than weeks to complete from start to finish. During the course of a WHOA procedure – for example when a discussion arises around the division of creditors in classes – the court can be asked to take interim decisions on a short term and provide clarity on certain issues.[72] This should increase 'deal certainty' for all parties involved in the development of the restructuring plan.

In principle, decisions of the court in WHOA proceedings – which includes the decision to approve the restructuring plan – cannot be appealed against by any of the parties.[73] An opposition procedure (*verzet*) can only be successful when the court has ruled it has jurisdiction in a public WHOA procedure, while this is not the case in accordance with the Recast Insolvency Regulation.[74] Such opposition procedures must be filed within eight days of the public announcement of the initiation of the WHOA procedure.[75]

A third procedural characteristic that deserves mentioning is that a creditor cannot successfully object to the court's approval of the restructuring plan at the last stage of the WHOA procedure when the creditor has not complained with the debtor or the restructuring expert 'in a timely fashion' about its objections.[76] Therefore, when an individual creditor is faced with a debtor who is applying a WHOA procedure, the creditor should attentively study all information it receives from the debtor or the restructuring expert during the process. By not objecting to displeasing proposals quickly enough, the creditor may lose the right to raise those objections later.

3 CONCLUSIONS AND EXPECTATIONS

With the WHOA, we believe the Dutch legislator provided debtors with a powerful instrument to restructure debts in an efficient manner. Especially for debtors facing (too) high rental costs or financing burdens accumulated in the past, using the WHOA procedure – or just threatening to do so – may also prove to be an effective way of renegotiating contracts that significantly impact the financial situation of the debtor.

In most cases, a restructuring expert will probably (have to) be appointed by the court, whose salary will have to be paid by the debtor.[77] In many cases the involvement of financial experts and/or valuators – at the expense of the debtor – will be necessary. Therefore, initiating a WHOA procedure will generally only be advisable when the debtor still has sufficient financial reserves (or when the debtor can attract external funding) to cover these costs.

In our view, the question is justified whether the WHOA procedure provides sufficient protections to creditors or business partners whose rights may be affected by a WHOA procedure in a far-reaching and definitive way. Plus, specific aspects of the legislation (such as the possibility of a long cooling-off period in which important creditors' rights are set aside or pending requests to start a normal bankruptcy proceeding are suspended) could lead to abusive situations in which the debtor is merely misusing the WHOA in order to avoid risks associated with bankruptcy (including investigations by a liquidator into possible mismanagement or fraudulent transactions).[78]

Aside from its advantages, the almost complete lack of appeals procedures within the WHOA legislation may have adverse consequences in individual cases. When a single wrong decision is made by a court, for example by incorrectly applying the various complex rules described in paragraph 2.8 of this article or by relying on inaccurate valuation reports, there will often be no adequate remedy for disadvantaged creditors.[79]

We think the WHOA has great potential to prevent many unnecessary bankruptcies. In practice, we are already seeing that the WHOA indeed helps entrepreneurs to drastically improve their financial situations.[80] For many business in The Netherlands, this new law offers much-needed perspective on a brighter financial future. We expect many other European counties will soon take similar steps with their own implementations of the Restructuring Directive.

71 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

72 *See* e.g., District Court Rotterdam 3 Mar. 2021, ECLI:NL:RBROT:2021:1768 and District Court Noord-Nederland 26 Mar. 2021, ECLI:NL:RBNNE:2021:1100.

73 Article 369 Subs. 10 DBA.

74 Article 371 Subs. 14 DBA.

75 This announcement is made in the Dutch government's 'Staatscourant' public newspaper and the Dutch insolvency register. In most cases, foreign creditors will probably only realize that a Dutch WHOA procedure is underway well after the eight days term.

76 Article 383 Subs. 9 DBA.

77 For exceptions to this principle, *see* para. 2.5 of this article.

78 Similar concerns were raised in J. A. van der Meer, *Misbruik van de WHOA*, Tijdschrift Financiering, Zekerheden en Insolventierechtpraktijk 2021/2. In W. J. B. van Nielen et al., *Onderzoek naar en recuperatie van onregelmatigheden onder de WHOA*, Tijdschrift Financiering, Zekerheden en Insolventierechtpraktijk 2021/3 proposals are made to improve the legislation in this respect.

79 For example, invoking civil liability of the restructuring expert will not be easy, *see* D. M. van Geel, *De aansprakelijkheid van de herstructureringsdeskundige*, Tijdschrift Financiering, Zekerheden en Insolventiepraktijk 2021/1.5.

80 The first published approval of a restructuring plan was ordered on 19 Feb. 2021, *see* District Court Noord-Holland 19 Feb. 2021, ECLI:NL:RBNHA:2021:1398.