Restructuring of Royal IHC: new developments under the Dutch WHOA

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Citation

Salah, O., Lozeman, J. N., & Wit, J. de. (2023). Restructuring of Royal IHC: new developments under the Dutch WHOA. *Herstructurering & Recovery Online*, *2023*, 1-8. Retrieved from https://hdl.handle.net/1887/3718549

Version:	Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

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Restructuring of Royal IHC: new developments under the Dutch WHOA

HERO 2023 / B-037
1 augustus 2023

Blog

In its first two years, the Dutch Act on Court Confirmation of a Restructuring Plan (Wet homologatie onderhands akkoord) (the **WHOA** also known as the **Dutch Scheme**) was mainly used for the restructuring of SMEs (See International Restructuring Newswire Q2 2022, The Dutch Scheme (WHOA) in practice: First two large restructuring plans confirmed by the Dutch courts. In the last twelve months, large multinational companies have successfully used the WHOA in complex cross-border restructurings. In 2023, the restructurings of Vroon, Steinhoff and Royal IHC were implemented using the WHOA.[1] In this article, we will focus on the latter and discuss various novelties in this WHOA proceeding, which has resulted in ground-breaking case law with far-reaching consequences for the restructuring landscape.

Introduction

On 9 March 2023, the District Court of Rotterdam (the **Dutch Court**) sanctioned the restructuring plan of Royal IHC (the **Company**), a large international shipbuilder headquartered in the Netherlands.[2] The Company filed for the WHOA proceeding on 2 January 2023, which means that the WHOA proceeding was completed within an expedited timeline of less than three months. This EUR 950 million restructuring marks one of the largest restructuring plans under the WHOA to date and the first one involving a syndicate of lenders. The Dutch Court set new precedents across a range of issues. We will start by providing background regarding the Company's restructuring. Then, we will discuss the WHOA stay (afkoelingsperiode) and its impact on cash management and hedging agreements. We will address key issues that follow from the Dutch Court's order on the confirmation of the restructuring plan. More specifically, we will address: (i) the Dutch Court's decision on the scope of the WHOA and the extent to which (contractual) rights can be amended under a restructuring plan under the WHOA, in particular with respect to commitments under facilities agreements; (ii) court imposed amendments to the waterfall in an intercreditor agreement and their impact on super priority for rescue financing; (iii) the impact of the WHOA on hedging liabilities; and (iv) how debtors may deal with the sale of assets in an M&A transaction as well as claw-back protections under the WHOA. We will end this article with concluding takeaways and observations.

Background

The Company had been in distress since 2018 and had completed two restructurings already. Following the two restructurings in 2018 and 2020, it again ran into financial difficulties in 2021. The Company and its secured lenders, an international syndicate of nine financial institutions, started negotiating a (financial) restructuring. The parties were not able to reach a consensual deal, given that three out of the nine secured lenders did not agree to the solution proposed by the Company.

As a result, the Company commenced a WHOA proceeding. The Company requested the Dutch Court issue a stay to freeze any enforcement action or bankruptcy filing, arguing that it needed time to prepare and offer its restructuring plan under the WHOA.

On 2 February 2023, the Company offered its secured lenders a restructuring plan under the WHOA for voting which, amongst other things, provided for (i) the divestment of one of the Company's most well-performing business units to a third party, and (ii) various amendments to its senior facilities agreement and intercreditor agreement. The Company intended to use the sale proceeds of the divestment partially to repay its secured lenders and partially to address its liquidity constrains. In essence, the Company proposed the implementation of both an M&A transaction and a financial restructuring under the WHOA. From the secured lending syndicate, six lenders supported these plans while three lenders did not. Two of the three dissenting lenders voted against the restructuring plan with one abstaining. One of the lenders that voted against the restructuring plan also formally objected to confirmation of the plan. The Dutch Court granted its court order confirming the restructuring plan on 9 March 2023 despite the dissenting lenders' negative votes and objections.[3] The reasoned judgment followed on 30 March 2023.[4] The WHOA courts have developed a practice whereby they grant court orders within a short timeframe followed by a subsequently issued reasoned judgment. This facilitates expedition in restructurings, where time is often of the essence. In the process of confirming the restructuring plan, the Dutch Court decided various new and highly relevant issues. We will discuss these below but will first address the stay under this WHOA proceeding.

The WHOA Stay and its impact on cash management and hedging agreements

The WHOA provides debtors the option to petition for a stay of up to four months, with the option for extension(s) up to a maximum of eight months total. The WHOA stay (i) prevents parties from taking enforcement action against the assets of the debtor or taking possession of assets that are under the control of the debtor (unless this occurs with court relief), (ii) allows for court relief for lifting of attachments on the assets of the debtor, and (iii) suspends the filing for a suspension of payments or bankruptcy proceeding. In this case, the Company commenced the WHOA proceeding on 2 January 2023 and immediately petitioned for a stay of three months. On 3 January 2023, the Dutch Court granted—on an *ex parte* basis—the stay temporary by way of interim relief and ordered a hearing. The hearing took place on 18 January 2023 and the stay was granted for a period of three months.

Under the WHOA, a practice had developed where courts would invite only the debtor to the hearing and would grant the stay on an *ex parte* basis. Whilst certain forms of relief and decisions under the WHOA are suited for an *ex parte* hearing, a stay typically is not as it directly affects the rights of third parties (by definition). Obviously, affected parties could approach the court subsequently with a request to lift the stay, but this puts them at a disadvantage. In this case, the Dutch Court initially granted the stay *ex parte* on a temporary basis pending a hearing to which the secured lenders were invited. This approach—where affected parties are heard first before the stay is granted, whilst a solution is provided for the interim period—leads to a better-balanced weighing of interests.

The syndicate of secured lenders did not object to the petition for the stay, but raised various concerns and questions. Some of the consenting lenders were concerned about the impact of the stay on cash management agreements (e.g. a cash pool), ancillary agreements (e.g. an overdraft facility) and hedging agreements (e.g. currency swap derivatives), whilst one of the dissenting

lenders was concerned about the ability of the Company to continue paying its due debt and raised questions on outstanding derivatives. This dissenting lender also petitioned for the appointment of an observer. The Dutch Court granted this petition and appointed an observer on 18 January 2023. The WHOA provides the debtor with the option to petition for the appointment of an observer who will (passively) monitor the WHOA proceeding and provide its views to the court throughout the WHOA proceeding. Other parties (e.g., creditors and shareholders) cannot petition for the appointment of an observer, unless they are affected by a stay. In this case, the secured lenders were affected by the stay, which opened the door for them to petition for the appointment of an observer—an outcome that debtors should consider when seeking a stay.

At the hearing on the stay, the Company amended and partially withdrew its petition for a stay. Prior to the hearing, the Company had signed a lock-up and standstill agreement with its consenting lenders, which included a contractual standstill. Thus, there was no longer a need for a statutory stay with respect to those lenders. As a result, the Company withdrew the stay as it related to the consenting lenders. Further, the Company amended its petition such that the stay would not affect the acts performed under the cash management, ancillary and hedging agreements. The Dutch Court noted that based on its parliamentary history it appears that the WHOA is not intended to affect financial master agreements (in relation to hedging liabilities) and close-out netting provisions, but in any event granted the Company's requested clarification that the stay did not affect the cash management, ancillary and hedging agreements. Whilst the Dutch Court did not provide a legally clear ruling on the position of hedging liabilities under the WHOA, its relief protecting cash pooling arrangements, overdraft facilities and derivatives illustrates that the courts are willing to take a pragmatic approach and provide bespoke solutions for a stay tailored to the specific needs of a debtor under the WHOA.

Confirmation of the WHOA restructuring plan

Under the supervision of the observer, the Company prepared its restructuring plan with seven classes of creditors based on the various facilities under the senior facilities agreement. Hence, the restructuring plan was offered only to the nine secured lenders since the rights of only those creditors were affected by the plan. As mentioned above, six lenders voted in favor, two lenders voted against, and one lender abstained. The plan was adopted in all classes by the majority required under the WHOA (i.e., at least two-thirds in value of the total claims for which votes were cast). One of the lenders objected to confirmation. The Dutch Court, nevertheless, confirmed the restructuring plan, making it binding on all affected creditors. We will discuss key considerations below.

Non-consensual amendments to commitments under facilities agreements

One of the key questions in this WHOA proceeding was to what extent a restructuring plan under the WHOA could be used to amend commitments under a senior facilities agreement, in particular with respect to revolving credit facilities and bank guarantee facilities. The secured lenders had made available working capital facilities as well as cash and bank guarantee facilities to the Company, which were not fully drawn. The opposing lender argued that the lenders were being forced to continue financing to a new and economically different borrower group given the significant impact of the divestment that was a part of the plan and, in addition, since the committed working capital and guarantee lines were not fully drawn, this exposed the secured lenders to being forced to provide 'new credit'. Section 370 of the Dutch Bankruptcy Act (the **DBA**) states that a restructuring

plan under the WHOA may result in changes to the rights of creditors and shareholders. According to the opposing lender, the WHOA allows the debtor to amend and restructure only the creditor's existing claims. Based on established case law in the Dutch Supreme Court, a lender's obligation to provide financing under a credit facility only creates a claim after it is drawn by the borrower; until then, the claim is non-existent (and not susceptible for attachment).[5] Hence, the opposing lender argued that the undrawn commitments under the senior facilities agreement qualified as a future (i.e. non-existent) claim that could not be affected by a restructuring plan under the WHOA.

The Dutch Court, however, decided that—in principle—the WHOA may be used to force creditors to continue financing a company's working capital under existing credit facilities. Whether that is possible in a specific case depends on two factors: (i) the extent to which the financing obligations materially change; and (ii) the extent to which the changes to the facilities agreement fall within the scope of section 370 DBA. With respect to point (i) above, the Dutch Court noted that the secured lenders were already obliged to provide financing to the Company. The restructuring plan did not materially change this obligation, but rather it only reduced the amount of the total commitment under the facilities agreement. With respect to point (ii) above, the restructuring plan provided for the amendment of the waterfall in the intercreditor agreement and the maturity date of one of the facilities under the facilities agreement. The Dutch Court noted that, taking into account the flexibility and purposes that the WHOA is aimed to achieve, the language 'changes to rights' of creditors in section 370 DBA should be interpreted broadly. Both the extension of the maturity date and the amendment to the waterfall in the intercreditor agreement were necessary for a successful restructuring and closely related to the creditor's claims. Therefore, the Dutch Court ruled that such extensions and amendments fall within the scope of the WHOA. By sanctioning this restructuring plan, the Dutch Court set a precedent for the extension and amendment of commitments in facilities agreements. This is a new and important decision for the Dutch restructuring arena, given its impact on undrawn credit lines and commitments under working capital facilities, revolving credit facilities and bank guarantee facilities. Lenders should consider this new reality when entering into (syndicated) loans where a Dutch WHOA may be a relevant restructuring tool in the future.

Non-consensual amendments to the waterfall in an intercreditor agreement and a harbinger to super priority for rescue financings

Another significant issue in this WHOA proceeding was whether it was possible to amend the waterfall in the intercreditor agreement under the restructuring plan. The restructuring plan proposed the following amendments: (i) it purported to amend the waterfall such that priority was given to secured lenders under an uncovered bank guarantee facility and the counterparties with hedging liabilities; (ii) it purported to give priority to a third party—the buyer of the Company's subsidiary—that would enter the waterfall as a top-up guarantee provider; and (iii) secured lenders of the covered bank guarantee facility were given a higher ranking than secured lenders under certain other facilities. The opposing lender argued that such changes in priority of ranking were not possible under the WHOA, given that the Dutch legislature—despite being given the option to do so under the EU Restructuring Directive—had intentionally declined to allow for any form of imposed super priority debtor-in-possession (DIP) financing under the WHOA, regardless of whether it was part of new rescue financing or not.

The Dutch Court decided otherwise and found that the secured lenders were not adversely affected by the amendments to the intercreditor agreement. Further, the Dutch Court ruled that—whilst the Dutch legislature had not allowed for an *in rem* change in ranking of security rights under the WHOA

—a contractual change of ranking is possible. The WHOA does not allow for the creation of, or changes to, the ranking of security rights, which would have property law effect. Interestingly, the same court had ruled in an earlier decision in December 2022 in a different WHOA proceeding that the WHOA does not permit changes to the priority of pledges on receivables (i.e. a new financier could not obtain a first ranking receivables pledge lowering the ranking of existing pledgees).[6] Whilst the opposing lender referred to this case—arguing that the changes to the waterfall in the intercreditor agreement should not be permitted—the Dutch Court dismissed this argument, distinguishing the prior case as involving the property law nature of changes to security.

The decision that contractual changes to the ranking in priority may be imposed by a restructuring plan under the WHOA is a particularly important feature for the Dutch restructuring landscape for two reasons. First, in larger financings involving two or more lenders, the security rights are often held by a security agent whereas the actual distribution of proceeds amongst lenders takes place under a (contractual) waterfall in the intercreditor agreement. The ranking among creditors often occurs through the waterfall in the intercreditor agreement and not necessarily through the creation of tiered security packages. This is not the case for smaller financings. As a result, the decision of the Dutch Court may lead to the situation where debtors with smaller financings that lack intercreditor agreements may not benefit from this ruling since any changes to ranking of security could only occur with property law effect whilst larger financings involving an intercreditor agreement may be able to benefit from such flexibility. Second, this decision may re-open the possibility for super priority in rescue financing through the backdoor, as rescue financing and DIP financing are not always structured through the creation of new security rights but may also be created through changes to the waterfall in an intercreditor agreement. The Dutch Court may have (possibly unintentionally) introduced the ability to achieve a super priority and priming rescue financing whereby a senior creditor obtains a first ranking position through changes in the intercreditor agreement under a WHOA restructuring plan.

The WHOA does not impact hedging liabilities

In this WHOA proceeding, the position of hedging liabilities was addressed at various stages. As discussed above, there were various issues raised at the hearing on the stay regarding the impact of the WHOA stay on hedging liabilities. The impact on hedging liabilities was also debated at the plan confirmation hearing. The opposing lender had entered into currency swap transactions with the Company under ISDA master agreements. As part of the amendments to the intercreditor agreement proposed by the Company under the restructuring plan, the Company sought to change the ranking of the hedging liabilities. The opposing lender, however, argued that the WHOA cannot affect hedging liabilities under financial collateral arrangements (financiëlezekerheidsovereenkomsten).

Rejecting these arguments, the Dutch Court ruled that no changes were made under the plan to financial collateral arrangements since the changes proposed did not amend the ISDA master agreements, but rather the priority of the hedging counterparties under the intercreditor agreement. This ruling is remarkable as it implies that changes to financial collateral arrangements are possible if such changes occur through amendments to an intercreditor agreement or the senior facilities agreement and not through changes to the ISDA master agreement itself. This is not in line with the text of the DBA that excludes financial collateral arrangements from the scope of the WHOA. Alternatively, the Dutch Court may have attempted to make a distinction between the claim right (*vorderingsrecht*) and right of recourse (*verhaalsrecht*) under financial collateral arrangements.

Whether rights of creditors can be separated in such a way is debatable itself; but in addition, such a distinction is not relevant since *all* rights under financial collateral arrangements are excluded under the WHOA.

With the further implementation of the EU Restructuring Directive[7] in the Netherlands, legislative amendments were made to the WHOA as of 1 January 2023 that resulted in the exclusion of financial collateral arrangements and close-out netting provisions from the scope of the WHOA in section 369(4)(c) DBA. These changes were necessary to ensure that the WHOA is compliant with the EU Restructuring Directive, and the EU Financial Collateral Directive.[8] It is of paramount importance to the stability in the financial markets that these financial collateral arrangements and close-out netting provisions remain outside the scope of the WHOA. Consequently, changes to financial collateral arrangements and close-out netting provisions are not possible under the WHOA. The ruling of the Dutch Court on this point raises questions and potential uncertainty. However, the statutory text of the DBA is clear and leaves no doubt that financial collateral arrangements and close-out netting provisions are excluded under the WHOA. We would expect that the WHOA courts will respect this exclusion in future WHOA cases—despite the ruling in this WHOA proceeding.

The sale of assets in and claw-back protection under the WHOA

As part of additional amendments to the WHOA that took effect on 1 January 2023, debtors may seek protection under the WHOA to implement (i) a new financing required by the debtor for the performance of its restructuring plan, and (ii) a transaction that the debtor intends to enter into or which it requires for the performance of its restructuring plan. Once the restructuring plan has been confirmed by the court, such new financing and/or transaction will be protected against claw-back risks in a subsequent bankruptcy if the WHOA plan fails.

In this matter, the Company requested the Dutch Court to approve under the plan the sale of the shares in a business unit to a third party. The Dutch Court assessed whether it was reasonably likely that (i) the transaction was immediately necessary for the performance of the restructuring plan, and (ii) the interests of the joint creditors were materially prejudiced by the transaction. It concluded that the transaction should be approved under these tests. This proceeding illustrates how (distressed) M&A transactions can be implemented in a restructuring plan under the WHOA and protected against claw-back action (in a subsequent bankruptcy). This is a helpful feature which can also be successfully used for protection of rescue financing or other transactions under the WHOA.

Conclusion: Takeaways

The Royal IHC proceeding is a landmark case that has further stretched the boundaries of the WHOA. The decisions made by the Dutch Court are highly relevant for the Dutch restructuring market and will definitely change the dynamics within syndicated financings. This WHOA proceeding shows the strength of the WHOA as a tool to bind dissenting creditors and implement a restructuring successfully within an expedited timeline. The confirmation of the restructuring plan also illustrates the ability under the WHOA to impose amendments to commitments under facilities agreements and obligate secured lenders to continue financing. It also illustrates that changes to the waterfall under an intercreditor agreement may be implemented as work arounds to collateral priorities. This opens the door for super priority rescue financings, which will facilitate the further development of the WHOA restructuring process in the Netherlands. We are convinced that we will see more creativity in this space. Furthermore, the sale of assets as part of a WHOA proceeding, as

well as protection against claw-back risks, will facilitate the implementation of (distressed) M&A transactions. Finally, although certain restrictions under the WHOA related to derivative contracts came under pressure in this WHOA proceeding, we expect that that the WHOA courts in future will not follow the same approach, given that the WHOA cannot affect financial collateral arrangements such as currency swap transactions and other derivates and close-out netting provisions.

This article was previously published by the authors on the website of Norton Rose Fulbright.

[1] Norton Rose Fulbright has been in the lead in most of these high-profile restructurings under the WHOA. We acted as counsel to the secured creditors committee in the Vroon WHOA proceeding—with a parallel English scheme of arrangement—and as counsel to the dissenting secured creditor in the Royal IHC WHOA proceeding.

[2] We acted as counsel to the dissenting secured creditor in the Royal IHC WHOA proceeding. However, the views expressed in this article are the views of the authors and not of any of the parties to the WHOA proceeding. Further, the authors have expressed their views with the aim to contribute to the development of the WHOA and not with the intention to (again) plead their case. Therefore, any views represented in this article should be regarded as the opinions of the authors with respect to the development of the WHOA in general.

[3] Rb. Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2716.

[4] Rb. Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2800, as delivered no 30 March 2023.

[5] HR 29 October 2004, ECLI:NL:HR:2004:AP4504 (*Van den Berg/Van der Walle*).

[6] Rb. Rotterdam 15 December 2022, ECLI:NL:RBROT:2022:11016.

[7] 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 (Directive on restructuring and insolvency).

[8] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

Keywords

Distressed M
IHC
WHOA

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