



Universiteit
Leiden
The Netherlands

The Netherlands

Boon, J.M.G.J.; Vriesendorp, R.D.; Koster, H.

Citation

Boon, J. M. G. J., Vriesendorp, R. D., & Koster, H. (2024). The Netherlands. In *Business and Law Research Network Series* (pp. 111-140). Den Haag: Eleven. Retrieved from <https://hdl.handle.net/1887/4170262>

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/4170262>

Note: To cite this publication please use the final published version (if applicable).

IMPLEMENTATION OF THE EU PREVENTIVE RESTRUCTURING DIRECTIVE

EDITED BY:
J.M.G.J. BOON
H. KOSTER
R.D. VRIESENDORP

eløven

Recommended short citation: Boon, Koster & Vriesendorp, *Implementation of the EU Preventive Restructuring Directive, Part I, BLRN No 1*, 2023.

Recommended full citation: J.M.G.J. Boon, H. Koster & R.D. Vriesendorp, *Implementation of the EU Preventive Restructuring Directive, Part I, Business and Law Research Network Series No 1*, Den Haag: Eleven, 2023.

Published, sold and distributed by Eleven

P.O. Box 85576

2508 CG The Hague

The Netherlands

Tel.: +31 70 33 070 33

Fax: +31 70 33 070 30

e-mail: sales@elevenpub.nl

www.elevenpub.com

Sold and distributed in USA and Canada

Independent Publishers Group

814 N. Franklin Street

Chicago, IL 60610, USA

Order Placement: +1 800 888 4741

Fax: +1 312 337 5985

orders@ipgbook.com

www.ipgbook.com

Eleven is an imprint of Boom (Den Haag).

ISBN 978-90-4730-186-8

ISBN 978-94-0011-359-6 (E-book)

© 2023 Business and Law Research Network, Leiden Law School, Department of Company Law, Leiden, The Netherlands | Eleven

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

TABLE OF CONTENTS

Editors' Preface	vii
Contributors	ix
1 Introduction <i>Bob Wessels</i>	1
2 Austria <i>Georg Wabl and Martin Trenker</i>	7
3 Denmark <i>Line Langkjaer</i>	33
4 France <i>Emilie Ghio</i>	45
5 Germany <i>Stephan Madaus and David Ehmke</i>	69
6 Greece <i>Yiannis Bazinas and Athanasios Paizis</i>	89
7 The Netherlands <i>Gert-Jan Boon, Reinout Vriesendorp and Harold Koster</i>	111
8 United Kingdom <i>Eugenio Vaccari and Jennifer Gant</i>	141
9 Conclusion <i>Gert-Jan Boon, Harold Koster and Reinout Vriesendorp</i>	175
Annex: Preventive Restructuring Directive	219

7 THE NETHERLANDS

*Gert-Jan Boon, Reinout Vriesendorp and Harold Koster**

1 INTRODUCTION

Dutch restructuring and insolvency law has long been characterized by the absence of an effective preventive restructuring framework. Consequently, restructurings had to take place either in an out-of-court debt restructuring or – especially when creditor holdouts could not be resolved – a going-concern sale in *faillissement* (bankruptcy). Whereas bankruptcy has been used to restructure successfully in many cases, it also leaves ample room for hold-out strategies hindering timely restructurings to prevent debtors from bankruptcy.⁴⁸² Only abuse of law could deter creditors from pursuing a hold-out strategy. This has changed with the entry into force of the *Wet homologatie onderhands akkoord* (Act on the confirmation of a private restructuring plan, WHOA) on 1 January 2021. This Act introduced a flexible framework for proposing restructuring or liquidating plans to (a part of) the debtors' creditors and shareholders, which upon court confirmation will also be binding on the absent or dissenting creditors and shareholders who were included in the plan.

The WHOA, the result of a long-running legislative process, has been characterized to not only be flexible but also to introduce an effective tool for both domestic and cross-border restructurings.⁴⁸³ The Dutch legislator has developed the WHOA in particular in line with Chapter 2 of the Preventive Restructuring Directive 2019 (PRD 2019).⁴⁸⁴ Within the parameters of the PRD 2019, the Dutch legislator has developed a flexible framework apt to the restructuring needs of a case at hand. Furthermore, the WHOA process could

* This chapter states the law as per 1 January 2023, all sources have been checked on the same date.

482 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 1-3.

483 Dominic Lawson, 'New Dutch Scheme Hailed as "Perfect"', *GRR*, 2019, available at: <https://globalrestructuringreview.com/new-dutch-scheme-bill-hailed-perfect>.

484 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), O.J. L 172/18. Several remaining discrepancies with the PRD 2019 have been addressed with Act Implementing the PRD 2019 (*Implementatiewet richtlijn herstructurering en insolventie*), which entered into force on 1 January 2023. See *Implementatiewet richtlijn herstructurering en insolventie* (Stb. 2022, 491); *Besluit van 5 december 2022 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn herstructurering en insolventie* (Stb. 2022, 492).

take form as a light-touch corporate restructuring where the court is only involved once confirmation of a plan is requested. However, given the modular approach of the WHOA, a process may come with features such as a temporary stay, interim decisions, bespoke measures, a safe harbour for interim financing and/or involvement of a restructuring expert to draft a plan. Moreover, a statute provides for a WHOA process to be either public or private; this allows for amendments or termination of executory contracts and accommodates for restructuring of enterprise group financing arrangements.

This chapter discusses the current Dutch corporate restructuring framework, with a focus on the WHOA. Section 2 provides an overview of the domestic restructuring and insolvency regime as it was available before the WHOA entered into force. Section 3 discusses the legislative background of the WHOA. Section 4 provides an overview of the key features of this new restructuring framework. Section 5 discusses some experiences with the WHOA, along with an outlook on furthering the WHOA process. Section 6 concludes with some observations on what the future may hold for this new instrument in the Dutch restructuring toolbox.

2 OVERVIEW OF THE PRE-REFORM DUTCH RESTRUCTURING AND INSOLVENCY REGIME

In the Netherlands, matters of restructuring and insolvency are dealt with primarily in the *Faillissementswet* (Dutch Bankruptcy Act, DBA). The DBA provides two corporate restructuring and insolvency proceedings: bankruptcy⁴⁸⁵ and *surseance van betaling* (suspension of payments).⁴⁸⁶ As opposed to bankruptcy, which is a liquidation-oriented proceeding, suspension of payments can be considered a preventive restructuring proceeding. Both proceedings come in addition to the limited possibilities that Dutch contract law used to offer to bind dissenting creditors in an out-of-court debt restructuring, before the WHOA entered into force.

485 Art. 1 DBA et seq. The DBA is in force since 1 September 1896. Subsequently, various amendments have been included in the DBA, see further: B. Wessels, *Insolventierecht, Faillietverklaring (Deel I)* (5th ed.), Deventer: Wolters Kluwer, 2019, Paras. 1051-1053c.

486 Art. 214 DBA et seq. The DBA also provides for the *schuldsanering natuurlijke personen* (debt restructuring for natural persons) which is open only to natural persons who do not exercise a business (Art. 284 DBA et seq.).

2.1 Suspension of Payments

Suspension of payments – a proceeding that is available to both corporate debtors and natural persons running a business⁴⁸⁷ – aims at facilitating the continuation of imminent insolvent, but viable companies.⁴⁸⁸ A suspension of payments is a public and voluntary proceeding, which is only available at the debtor's request.⁴⁸⁹ Commencement of a proceeding, in principle, brings about only an automatic stay of the unsecured and non-preferred creditors,⁴⁹⁰ and provides debtors with time to prepare a restructuring plan and/or to reorganize the business in order to regain viability. The suspension of payments can be requested when debtors expect (or foresee) an inability to continue paying the debts as they fall due.⁴⁹¹

In a suspension of payments, a court will appoint a *bewindvoerder* (joint administrator) and a *rechter-commissaris* (supervisory judge). Joint administrators are tasked with the joint administration – together with a debtor – of a debtor's assets and affairs.⁴⁹² In particular, debtors require the consent of joint administrators in every part of administering their assets and affairs.⁴⁹³ Debtors are not rendered legally incompetent in a suspension of payments. As opposed to bankruptcy, they continue the business and do not lose their power to dispose of assets belonging to the estate, albeit subject to the authorization of the joint administrator. When debtors act without or in violation of this consent, their actions can be reversed by joint administrators.⁴⁹⁴ Consequently, debtors are effectively partially in possession in suspension of payments. Furthermore, proceedings will typically involve a supervisory judge, who in suspension of payments is tasked only with advising a joint administrator and to hear – at the request of a joint administrator – witnesses and experts.⁴⁹⁵

Upon filing for suspension of payments, a court will readily grant debtors a temporary suspension. This can later be converted in a permanent suspension of payments, which, in principle, can run for up to 1.5 years.⁴⁹⁶ In addition to creating a breathing space for a

487 Compare Art. 214(4) DBA.

488 B. Wessels, *Insolventierecht, Surseance van betaling* (5th ed.), Deventer: Wolters Kluwer, 2021, Para. 8003 and 8005.

489 Arts. 214(1) and 22a(1) DBA.

490 Arts. 230(1) and 231 DBA. An additional stay (*afkoelingsperiode*) may be requested to stay enforcement actions of secured creditors (Art. 241a DBA).

491 Art. 214(1) DBA.

492 Art. 215(2) DBA.

493 Art. 228 DBA.

494 Art. 228(1) DBA. Furthermore, Art. 228(2) DBA determines that a debtor's estate is not bound by a legal act as long as a joint administrator does cooperate, unless the legal act is in the interest of the debtor's estate.

495 Arts. 223a and 223b DBA.

496 Arts. 215(2) and 223 DBA, from which it follows that a suspension can also be extended also after the first 1,5 years.

debtor by suspending payments and suspending attachments, a suspension of payments provides a framework to adopt a restructuring plan (also referred to as a composition). A restructuring plan affects, in principle, only claims of unsecured and non-preferred creditors. It must be adopted in a creditors' meeting by a majority of the affected creditors that are present, which represents a majority of the claims in value. Confirmation by a court will make a restructuring plan binding on all absent or dissenting unsecured and non-preferred creditors.⁴⁹⁷

Although a suspension of payments is designed as a preventive restructuring proceeding, in practice, it is often perceived as a forerunner of filing for bankruptcy proceedings.⁴⁹⁸ In particular, different from bankruptcy, there is no statutory law requiring a board of directors to obtain prior approval of the General Assembly before applying for suspension of payments.⁴⁹⁹ This proceeding may therefore be an alternative option for the board of directors to deal with financial distress in a situation that shareholders are unwilling to approve a bankruptcy filing. Typically, such debtors are in too much financial distress to be able to continue paying debts as they fall due. In turn, this is a mandatory ground for joint administrators to request a court to terminate a suspension of payments and declare a debtor bankrupt.⁵⁰⁰

2.2 *Bankruptcy*

Bankruptcy – the most used proceeding in the DBA – is primarily aimed at liquidation of a debtor's assets. It is open to all debtors who are unable to pay their debts as they fall due, including legal and natural persons, whether or not they run a business or profession.⁵⁰¹ A bankruptcy proceeding can be voluntary when a debtor himself requests for commencing the proceeding, or involuntarily when a request for bankruptcy is made by one or more creditors.⁵⁰² In either case, upon declaring a debtor bankrupt, the court will appoint a *curator* (liquidator) and a supervisory judge. In a bankruptcy proceeding, debtors are out of possession while liquidators are tasked with the administration and liquidation of the debtor's assets.⁵⁰³ Supervisory judges are appointed to supervise the liquidator's conduct during the proceeding.⁵⁰⁴

497 Art. 252 DBA et seq.

498 See for instance *Kamerstukken II* 2001/02, 24 036, nr. 238, p. 1.

499 See Arts. 2:136 (public companies) and 2:246 (limited liability companies) DCC.

500 Art. 242(1), (2) and (4) DBA.

501 Arts. 1 and 6(3) DBA.

502 Art. 1(1) DBA.

503 Arts. 23 and 68(1) DBA.

504 Art. 64 DBA.

In practice, liquidators will consider the opportunities for restructuring in bankruptcy as this may result in maximizing the value of the estate. For instance, liquidators will pursue a (partial) going-concern sale when the business is still (partially) viable and when this is in the best interest of the general body of creditors. This can also be pursued by means of pre-packaged bankruptcy.⁵⁰⁵ Also, the involved debtor and creditors could agree to a restructuring plan in bankruptcy. When the quorum is met (a majority of the creditors present, representing at least 50% of the value of the claims), and the restructuring plan is confirmed by the court, it becomes binding on all ordinary, unsecured creditors, also those absent or dissenting.⁵⁰⁶

2.3 Out-of-Court Debt Restructuring

Before filing for suspension of payments or bankruptcy proceedings, viable debtors will typically propose to (a part of) their creditors a *buitengerechtelijk akkoord* (composition). In principle, this out-of-court debt restructuring takes places informally without any court involvement. In practice, this will require the support of all affected creditors, which may easily be interfered with by creditors taking a hold-out position to the proposed composition, whether for rational or strategic reasons.⁵⁰⁷

In case law, a small window has emerged to bind dissenting creditors to an otherwise out-of-court composition. When a hold-out strategy constitutes abuse of power, the court may overrule the decisions of creditors to reject the proposed composition. The abuse of law exception is only available under exceptional circumstances. A situation in which a creditor is aware of a pressing financial situation of a debtor, or an imminent bankruptcy will, in general, not constitute abuse of power. The fact that a majority of creditors accept

505 The Dutch pre-pack has been developed in practice, however, in recent years it has been used limitedly. This was due to growing legal uncertainty on the position of employees in such cases, in particular following preliminary questions raised to the CJEU. The most recent decision (CJEU 22 April 2022, ECLI:EU:C:2022:321 (*Heiploeg*)) has brought some clarity in this regard. Currently, a legislative proposal is pending to establish a legal basis for the pre-pack, see bill for the *Wet continuïteit ondernemingen I* (Business Continuation Act I; WCO I), which is pending with the Senate, available at: https://www.eerstekamer.nl/wetsvoorstel/34218_wet_continuiteit.

506 See Art. 138 DBA et seq. This concerns only unsecured creditors, in addition, a debtor may pursue a consensual agreement with secured or preferential creditors. Upon confirmation of a restructuring plan, a (corporate) debtor will not be dissolved (Art. 2:19(1)(c) Dutch Civil Code (DCC)) and its creditors will not regain their rights of foreclosure (Art. 195 DBA is not applicable in case of a restructuring plan).

507 See further also European Law Institute (ed Part I) and B. Wessels, S. Madaus & J.M.G.J. Boon (eds Part II), *Rescue of Business in Europe*, Oxford: Oxford University Press, 2020, p. 153 et seq.

an out-of-court composition is not sufficient reason to characterize the rejection of the composition by a creditor as an abuse of power.⁵⁰⁸

3 TOWARDS THE DUTCH WHOA

3.1 *Historic Views on Plan Proceedings*

The introduction of the WHOA is preceded by a long-running discussion on the introduction of a legal instrument that provides for confirmation of extrajudicial restructuring plans (plan proceedings). Although such plans were forbidden in 1540, over time local statutes and practices evolved which increased the scope for adoption of a restructuring plan.⁵⁰⁹ With the introduction of the so-called *Desolate boedelskamers* (Chambers of Empty Estates) in several Dutch cities such as Amsterdam, Dordrecht and Middelburg, debtors could apply for sequestration (*sekwestratie*). This was a proceeding in which a plan could be negotiated with the creditors in order to avoid bankruptcy.⁵¹⁰ Later, when the Netherlands had been annexed to France, the French Code de Commerce as applicable from 1811 and subsequently the Dutch Code of Commerce of 1838 introduced uniform insolvency proceedings in the Netherlands. Consequently, this removed the prior local frameworks for plan proceedings.⁵¹¹

Discussions on whether statutory provisions on a plan proceeding should be introduced have since continued, including by means of several (draft) legislative texts. This was the case in the late 19th century in the parliamentary discussion prior to the adoption of the DBA in 1893 and continued in the 20th and 21st centuries.⁵¹² A plan proceeding was argued for to avoid bankruptcy proceedings for honest but unfortunate debtors, and as a

508 Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7799 (*Payroll*), at 3.5.2 and 3.5.3.

Furthermore, the Supreme Court has ruled that the abuse of power standard also applies when a creditor (whilst rejecting the composition) seeks to obtain payment of a larger part of his claim from the debtor than what other creditors obtained under the out-of-court composition (Supreme Court 24 March 2017, ECLI:NL:HR:2017:485 (*Mondia/V D*), at 3.4.3 and 3.4.4).

509 A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, p. 41 et seq.

510 A. Noordam, *Schuldsanering en goede trouw* (diss. VU Amsterdam), 2007, p. 131 (footnote 92). See for a legal historic analysis of this proceeding: M. den Hollander, *Stay of Execution. Institutions and Insolvency Legislation in Amsterdam* (diss. Tilburg), 2021, Chapters 3-5. See also B. Wessels, *Rembrandt's Money: The Legal and Financial Life of an Artist-entrepreneur in the 17th Century Holland*, Deventer: Wolters Kluwer, 2021, pp. 389-390.

511 A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, p. 42.

512 N.W.A. Tollenaar, *Het pre-insolventieakkoord. Grondslagen en raamwerk* (diss. Groningen), Deventer: Wolters Kluwer, 2016, Para. 1.2; A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, p. 43 et seq.

consequence, not only to prevent the detrimental effects of collective liquidation but also to prevent creditors from pursuing hold-out strategies. However, successive academic and legislative proposals for plan proceedings were critiqued on substantive grounds. A plan proceeding would be unfair, violate ownership rights and be a source of legal uncertainty.⁵¹³ However, as was the case with the 2007 pre-draft for a new Dutch Insolvency Act (DIA) that included a proposal for a plan proceeding, it could also be macroeconomic and political reasons which prevented the adoption of such proposals.⁵¹⁴

3.2 *Towards a Dutch Plan Proceeding: The WHOA*

The initiative for what eventually became the WHOA was part of the 2012 Dutch legislative programme to recalibrate Dutch bankruptcy law (*wetgevingsprogramma herijking faillissementsrecht*).⁵¹⁵ One of the three so-called ‘pillars’ of this initiative deals with strengthening the restructuring capacity of businesses.⁵¹⁶ The legislative reforms in this pillar aim to promote that businesses will not enter bankruptcy proceedings unnecessarily, especially when creditors frustrate an out-of-court debt restructuring. The legislative reforms should ensure that a restructuring plan can also be adopted outside bankruptcy, while simultaneously providing for continuation of the debtor’s business.⁵¹⁷

Building on the Draft DIA 2007 and (comparative) studies,⁵¹⁸ the Minister proposed several legislative reforms. One of these reforms includes the introduction of a preventive restructuring framework enabling viable debtors to continue in possession while preparing a restructuring plan, which became the WHOA.⁵¹⁹ A golden thread for this pillar, and for

513 A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, p. 43 et seq.

514 S.C.J.J. Kortmann & N.E.D. Faber (eds), *Geschiedenis van de Faillissementswet, Deel 2-IV Voorontwerp insolventiewet*, Deventer: Kluwer, 2007. Part 7.1 introduces a framework for concluding a composition outside insolvency, for a debtor that faces impending insolvency, and with a view to prevent its insolvency. In 2010, it was announced that due to the 2008 Global Financial Crisis, an overhaul of the DBA with introduction of a new Insolvency Act was undesirable, see *Kamerstukken II* 2010/11, Aanhangsel nr. 1014, p. 5.

515 *Kamerstukken II* 2012/13, 29 911, nr. 74, p. 2 et seq.

516 *Kamerstukken II* 2012/13, 29 911, nr. 74, p. 2, the other pillars concern modernization of the DBA and prevention of fraud in insolvency.

517 *Kamerstukken II* 2012/13, 29 911, nr. 74, pp. 2-3; *Kamerstukken II* 2012/13, 33 695, nr. 1, pp. 2 and 4; *Kamerstukken II* 2013/14, 33 695, nr. 3, pp. 3-4.

518 See, for instance, P.M. Veder, T.E. Booms & N.B. Pannevis, *Rechtsvergelijkende verkenning in het kader van het programma herijking faillissementsrecht* (WODC Rapport 2315), Nijmegen: Radboud Universiteit Nijmegen – Onderzoekcentrum Onderneming & Recht 2013, available at: <http://hdl.handle.net/20.500.12832/2037>; R.M. Hermans & R.D. Vriesendorp, ‘Het dwangakkoord in het insolventierecht: vrijheid in gebondenheid?’, *TvI* 2014/10.

519 *Kamerstukken II* 2012/13, 33 695, nr. 1, p. 5. This pillar had three legislative proposals: (i) the Business Continuation Act (*Wet continuïteit ondernemingen*, WCO) I, for a codification of pre-packaged bankruptcies, (ii) the WCO II for a preventive restructuring framework, which was later called the WHOA,

the WHOA, has been the objective to strengthen the ability for businesses to restructure. In particular, individual creditors should be prevented from pursuing strategic hold-out positions which could frustrate the adoption of a plan and a timely attempt to prevent bankruptcy.⁵²⁰ Over the course of the lengthy legislative process, the Minister has drawn on the evolving EU initiatives, including a Commission Recommendation on a New Approach to Business Failure and Insolvency from 2014⁵²¹ and the PRD 2019.⁵²²

In July 2019, the WHOA bill was introduced in Parliament. This bill followed an extensive public consultation consisting of two prior draft bills.⁵²³ Although public consultations resulted in extensive responses with substantive critiques on parts of the draft bills, most of which were incorporated in subsequent drafts, it was also clear that – maybe for the first time in the Netherlands – there was broad support from practice and academia for introducing a plan proceeding. Consequently, the lengthy legislative process has also allowed for detailed consideration and refinement of the implications for (legal) practice.⁵²⁴

In the final stage of the drafting process, there were extensive discussions in Parliament on the position of secured and unsecured creditors and the distribution of reorganization value under a plan. Some parliamentarians raised concerns that under the relaxed Absolute Priority Rule (APR) and the so-called ‘cash-out option’, secured creditors had too much control over a WHOA process and would take a disproportionately high part of the (reorganization) value, leaving unsecured creditors basically empty-handed. On the one hand, amendments were adopted that improved the protection of unsecured small- and medium-sized enterprise (SME) creditors by requiring that they should receive at least 20% of their claim under the plan, even when higher ranking classes of creditors are not

and (iii) the WCO III for a more effective winding-up of a bankruptcy estate, which has later been called Act to further the effectiveness of bankruptcy procedural law (*Wet bevordering doelmatigheid van het faillissementsprocesrecht*) (*Kamerstukken II* 2013/14, 33 695, nr. 3, p. 3; *Kamerstukken II* 2016/17, 33 695, nr. 14, p. 2).

520 See, for instance, *Kamerstukken II* 2013/14, 33 695, nr. 5, pp. 4-5; *Kamerstukken II* 2015/16, 33 695, nr. 10, p. 2; *Kamerstukken II* 2016/17, 33 695, nr. 14, p. 2; *Kamerstukken II*, 35 249, 2018/19, nr. 3, p. 1.

521 Commission Recommendation on a new approach to business failure and insolvency, 12 March 2014, C(2014) 1500 final.

522 See *Kamerstukken II* 2012/13, 33 695, nr. 1, pp. 7-8; *Kamerstukken II* 2013/14, 33 695, nr. 5, pp. 4, 7-8; *Kamerstukken II* 2016/17, 33 695, nr. 14, pp. 6-7; *Kamerstukken II* 2018/19, 33 695, nr. 17, p. 4; *Kamerstukken II* 2018/19, 33 695, nr. 18, p. 3. See further Explanatory memorandum to draft bill WCO II, 2014, pp. 4-6; *Kamerstukken II*, 35 249, 2018/19, nr. 3, pp. 3-4. See also: N.W.A. Tollenaar, *Het pre-insolventieakkoord. Grondslagen en raamwerk* (diss. Groningen), Deventer: Wolters Kluwer, 2016, Para. 1.3.

523 In 2014 a first draft bill was presented, the *Wet continuïteit ondernemingen II* (Business Continuation Act II). The public consultation led to ample response and led to a revised draft bill – the WHOA – that was made available for a public consultation in 2017. This draft WHOA and an explanatory memorandum are available at: <https://www.internetconsultatie.nl/wethomologatie>.

524 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 3 and 23-25; A.M. Wolffram-van Doorn, ‘Inleiding ter gelegenheid van de indiening bij de Tweede Kamer van het wetsvoorstel betreffende de Wet homologatie onderhands akkoord’, *FIP* 2019/212, pp. 4 and 7.

satisfied in full.⁵²⁵ On the other hand, amendments have limited the rights of secured creditors in two respects. Firstly, contrary to other creditors, certain secured creditors are not entitled to a cash-out option, which allows a creditor to ask the debtor to pay in cash the liquidation value of its claim, instead of what has been offered under the plan.⁵²⁶ Secondly, an amendment introduced bifurcation of the claims of secured creditors. Their claims are placed in a class of secured creditors in accordance with the extent that their claim – in case of liquidation – is covered by security. For the remaining part of their claim, they are placed in a class of unsecured creditors.⁵²⁷

With these amendments,⁵²⁸ the House of Parliament and the Senate adopted the WHOA bill,⁵²⁹ which entered into force on 1 January 2021.⁵³⁰ Because the WHOA implemented the PRD 2019 only in part, the Act Implementing the PRD 2019 – which entered into force on 1 January 2023 – has implemented the remaining parts of the PRD 2019, which also introduced some changes to the WHOA.⁵³¹

4 MAIN FEATURES OF THE WHOA

4.1 *Objective and Scope of the Framework/Process*

The WHOA introduces a legal framework to the DBA, which provides for confirmation of extrajudicial plans.⁵³² The legislator has drawn inspiration from features of the US

525 *Kamerstukken II* 2019/20, 35 249, nr. 25; Art. 384(4)(a) DBA. SME creditors are in general small entities with no more than 50 employees.

526 *Kamerstukken II* 2019/20, 35 249, nr. 24; Art. 384(4)(d) DBA.

527 *Kamerstukken II* 2019/20, 35 249, nr. 14; Art. 374(3) DBA.

528 In addition to the aforementioned three amendments, a fourth amendment introduced a mandatory evaluation of the WHOA 3 years after its entry into force (*Kamerstukken II* 2019/20, 35 249, nr. 8. See Art. IIA Wet homologatie onderhands akkoord (Stb. 2020, 414).

529 *Handelingen II*, 2019/20, 74, item 17; *Handelingen I* 2020/21, nr. 4, item 5.

530 *Wet homologatie onderhands akkoord* (Stb. 2020, 414); *Besluit van 26 oktober 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Wet homologatie onderhands akkoord* (Stb. 2020, 415). Unofficial translations have been prepared by several law firms, see for instance: www.debrauw.com/cerp.

531 *Implementatiewet richtlijn herstructurering en insolventie* (Stb. 2022, 491); *Besluit van 5 december 2022 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn herstructurering en insolventie* (Stb. 2022, 492). With this act, the legislator deviates from the earlier plan where the PRD 2019 would be implemented primarily by amending the suspension of payment, see: *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 4. See also *Kamerstukken II* 2018/19, 33 695, nr. 18, p. 3. For a comparative review of the WHOA and the suspension of payments in light of the PRD 2019, see: Gert-Jan Boon, 'Mapping Preventive Restructuring Frameworks and the EU Preventive Restructuring Directive for the JCOERE Project, Country Report The Netherlands', JCOERE Project, May 2020, available at: http://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/TheNetherlands_FINAL_PDF.pdf.

532 This Section presents an overview of some of the main features of the WHOA, however, it does not yet include an extensive discussion with respect to the treatment of, in particular, *ipso facto* clauses, third-party

Chapter 11 Bankruptcy Code (Restructuring Proceeding) and the UK Scheme of Arrangement.⁵³³ However, first and foremost, the WHOA is a new Dutch pre-insolvency⁵³⁴ or also preventive restructuring framework implementing in part the PRD 2019. Although the WHOA has been introduced as a part of the DBA, it is not to be categorized as a ‘bankruptcy proceeding’. In fact, the WHOA has been subsumed under Title IV of the DBA, entitled “outside bankruptcy and suspension of payments”.⁵³⁵

The WHOA’s primary aim is to prevent financially distressed debtors from entering bankruptcy proceedings due to hold-out creditors that prevented debtors from successfully pursuing a plan. This can be done by means of either a restructuring or a liquidating plan. A restructuring plan is geared towards securing the viability of debtors and their business. A liquidating plan is aimed at the winding-up of debtors with unviable businesses. In comparison with bankruptcy proceedings, a liquidating plan should still result in a more favourable outcome for the affected creditors.⁵³⁶ Although statutory law hardly introduces any differences for either type of plan, unless stated otherwise, the following will focus on a WHOA process that is directed to confirmation of restructuring plans. Although it is a single framework, the legislator introduced a dual track for the WHOA processes, either public or private. In the case of public WHOA process, the hearings will be heard in public and registered in the public registers. By contrast, for private WHOA processes the hearings will be *in camera* and the process will not be registered in the public register. The choice regarding either track must be made at the start of the judicial process and cannot be changed afterwards.⁵³⁷

releases and enterprise groups. See also other publications in English reviewing aspects of the WHOA, including: M. Noldus, ‘Creditors’ Rights under the New “Dutch” Scheme’, *International Corporate Rescue*, 2021, 10(1), p. 17 et seq; R.A.G. de Vaan & G.J. de Bock, ‘Rapidly Implemented Amidst COVID Crisis, New Dutch Restructuring Procedure Offers Relief to Business and Organizations Struggling with High Debts’, *European Company Law Journal*, 2021, 18(3), pp. 106-112; V.J.M. van Hoof, ‘The Continue Use and Disposal of Encumbered Assets during the Restructuring Directive’s Stay’, *European Insolvency and Restructuring Journal*, 2021(4), Paras. 3.3.2-3.3.3, available at: <https://eirjournal.com/article/view/15087>; S. Pepels, ‘Third Party Releases under Dutch Law since the WHOA – a Warm Welcome for a Very Limited Number of Guests Only?’, in: *Third Party Releases by Means of Bankruptcy Law Guarantees and (Mass) Tort*. Preadviezen/Reports 2022 (Netherlands Association for Comparative and International Insolvency Law), Den Haag: Boom Juridisch (forthcoming).

533 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 3-4, 17 and 65; N.W.A. Tollenaar, *Het pre-insolventieakkoord. Grondslagen en raamwerk* (diss. Groningen), Deventer: Wolters Kluwer, 2016, Para. 1.3; A.M. Wolfram-van Doorn, ‘Inleiding ter gelegenheid van de indiening bij de Tweede Kamer van het wetsvoorstel betreffende de Wet homologatie onderhands akkoord’, *FIP* 2019/212, p. 6.

534 Compare European Law Institute (ed. Part I) and B. Wessels, S. Madaus & J.M.G.J. Boon (eds Part II), *Rescue of Business in Europe*, Oxford: Oxford University Press 2020, p. 160 et seq.

535 The heading of Title IV will be introduced to the DBA as part of the bill WCO I, see Art. I bill WCO I.

536 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 1-2.

537 Art. 369(6) AND (9) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 6-7 and 31-32.

The personal scope of the WHOA includes, in principle, debtors that are both natural and legal persons, regardless of their legal form. However, excluded from the scope are those natural persons that do not conduct a profession or business, and debtors that qualify as banks or insurers.⁵³⁸ Alternative debt restructuring or rescue mechanisms are available to these debtors; therefore, they are excluded from the scope of the WHOA.⁵³⁹ Furthermore, as is the case with other restructuring and insolvency processes, the WHOA also takes an entity-by-entity approach when debtors are part of an enterprise group.⁵⁴⁰ However, there are two exceptions to this default approach. When a restructuring plan involves adjustment of debts for which an enterprise group member provided a guarantee, subject to certain requirements, a debtor may extend a restructuring plan to also include this guarantee within its scope.⁵⁴¹ In addition, the WHOA provides for a form of procedural consolidation. In WHOA processes involving multiple members of an enterprise group, the debtors can file their petitions simultaneously to be heard by a single court in the Netherlands.⁵⁴²

In regard to the material scope of the WHOA, the framework can be accessed by debtors that are in a situation in which it may reasonably be assumed that they will become unable to pay their debts as they fall due (the so-called ‘pre-insolvency’ or ‘light insolvency’ test).⁵⁴³ Furthermore, the WHOA process is not necessarily collective. In fact, it is up to the proponent of a plan to determine which creditors and shareholders will be affected and who will accordingly be involved in the process and vote on the plan. This may involve all or just part of a debtor’s creditors and shareholders.⁵⁴⁴

The WHOA is designed as a time- and cost-efficient process and is characterized by a high degree of flexibility for debtors. Therefore, the statutory time frames are limited to promote a straightforward process. For instance, a stay can have a maximum duration of 8 months.⁵⁴⁵ Also, courts are required to act swiftly; they are urged to handle requests for interim decisions during one hearing, to decide as soon as possible when they will hear a

538 Art. 369(1), first sentence, DBA.

539 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 29-30; Arts. 212g et seq, 213 et seq and 284 et seq DBA.

540 Art. 370(1) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 10. Nonetheless, the WHOA gives certain consideration to groups in some provisions, compare in particular Arts. 369(8), 371(15) and 372 DBA.

541 Art. 372 DBA.

542 Art. 369(8) DBA. Although the legislator has argued that may also apply when some enterprise group members have their centre of main interests outside the Netherlands (*Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 32), this has been disputed (see for instance, W.J.E. Nijnsens, ‘De WHOA en het internationaal privaatrecht inclusief de herstructurering van groepen’, in: C.M. Harmsen & M.L.H. Reumers (eds), *De WHOA: van wet naar recht*, (*Recht & Praktijk*, nr. *InsR18*), Deventer: Wolters Kluwer, 2021, Paras. 12.3.5 and 12.6).

543 Arts. 370(1) and 371(3) DBA, see further Section 4.2 below.

544 Arts. 369(2) and 381(2) DBA. See further, Section 4.5 below, discussing the scope of a plan.

545 Art. 376(2) and (5) DBA.

request for confirmation of a plan (which should be within 8-14 days after the request for confirmation was submitted).⁵⁴⁶ Although there is no set duration for the completion of the WHOA process, it can be completed within 6 weeks.

4.2 *Commencing a WHOA Process*

A WHOA can be commenced by debtors as well as individual creditors, shareholders, Works Councils or an Employee Representative Body (*personeelsvertegenwoordiging*).⁵⁴⁷ Debtors can do so by submitting a commencement statement (*startverklaring*) with the registrar of the court, which indicates when debtors have commenced the process and whether it is a public or private process.⁵⁴⁸ When debtors are legal entities, their boards of directors do not require approval from the General Assembly or a specific class of shareholders to offer its creditors and shareholders a restructuring plan.⁵⁴⁹ Individual creditors, shareholders, a Works Council or an Employee Representative Body can commence a process by requesting courts to appoint a restructuring expert (*herstructureringsdeskundige*). This expert has the primary task of preparing a plan that will be submitted to the affected creditors and shareholders of a debtor.⁵⁵⁰ In addition to depositing a commencement statement, debtors may also request appointment of a restructuring expert at the start or later during the process.⁵⁵¹

Debtors can enter a WHOA process when they are in a situation in which it can reasonably be assumed that they will be unable to continue paying their debts. This pre-insolvency test also requires that debtors are still able to pay their current obligations,⁵⁵² while it is foreseeable that they will not be able to do so in future and that this – if debts would not be restructured – would result in their insolvency.⁵⁵³ The legislator has not given a specific definition or description of a time frame for determining the pre-insolvency situation; however, it has been indicated that this may include situations where debtors

⁵⁴⁶ Arts. 378(3), 383(4) and (5) DBA.

⁵⁴⁷ Arts. 370(1) and 371(1) DBA.

⁵⁴⁸ Art. 370(1) and (3) DBA. A uniform commencement statement has been drafted by the Dutch Judiciary and is annexed to the national court procedural rules for WHOA cases (*Landelijk Procesreglement WHOA zaken rechtbanken*, version of 1 February 2022, available at: <https://www.rechtspraak.nl/SiteCollectionDocuments/procesreglement-whoa-p-2022.pdf>). A commencement statement is not mandatory to commence preparations for a restructuring plan, except when debtors want to make to the court, such as for requesting a stay or a bespoke measure.

⁵⁴⁹ Art. 370(5) DBA. This also applies to the debtor's performance of the plan.

⁵⁵⁰ Art. 371(1) DBA.

⁵⁵¹ Art. 371(1) DBA.

⁵⁵² *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 33.

⁵⁵³ *Ibid.*, pp. 33-34.

foresee being unable to repay loans in the coming 6-12 months.⁵⁵⁴ The pre-insolvency test will be applied by a court when it is faced for the first time with a request in a WHOA case. This may be as early as a request to appoint a restructuring expert⁵⁵⁵ or a stay.⁵⁵⁶ However, this will not be reviewed by the court when debtors submit a commencement statement.⁵⁵⁷ Courts will ultimately examine the pre-insolvency test when they are presented with a request to confirm a restructuring plan.⁵⁵⁸

4.3 *Involved Actors*

The WHOA introduces new actors and roles in the DBA. The two new actors are the restructuring experts and observers, who can be appointed by courts on a case-by-case basis in WHOA processes. Furthermore, specific roles have been allocated to debtors and courts. The WHOA does not contain statutory provisions dealing with (creditor's) committees.

4.3.1 **Debtor-in-Possession**

In a WHOA process, a debtor remains in full control, and is therefore also referred to as 'debtor-in-possession' (DIP). However, statutory provisions do not refer to the debtor as a DIP. It is only in the parliamentary history that the legislator makes mention of a DIP, notably in conjunction with the respective provision on the DIP in the PRD 2019.⁵⁵⁹ The commencement of a process itself does not result in an automatic divestment of the debtor, nor does it create a separate estate as is common in bankruptcy proceedings. The WHOA introduces a process which, in principle, leaves debtors in the same situation as they were before the process was commenced. This is due to the fact that upon a successful restructuring, a debtor will also continue its business 'as usual'. Debtors maintain full

554 Ibid. Compare also Germany with a more articulated pre-insolvency test in the StaRUG, see Chapter 5, Sections 4.1 and 4.2.

555 Art. 371(3) DBA.

556 This does not follow literally from the DBA, but the pre-insolvency test has been applied by some courts, see for instance District Court Midden-Nederland 13 January 2021, ECLI:NL:RBMNE:2021:392, at 4.8; District Court Limburg 11 February 2021, ECLI:NL:RBLIM:2021:8854, at 3.2; District Court Zeeland-West-Brabant 12 February 2021, ECLI:NL:RBZWB:2021:6911, at 3.4; District Court Gelderland 4 March 2021, ECLI:NL:RBGEL:2021:1126, at 3.4-3.5; District Court Den Haag 5 August 2021, ECLI:NL:RBDHA:2021:15535, at 3.4; District Court Oost-Brabant 17 September 2021, ECLI:NL:RBOBR:2021:5058, at 3.4-3.5. Some courts have not done so, see for instance, District Court Rotterdam 8 March 2021, ECLI:NL:RBROT:2021:1887; District Court Amsterdam 26 May 2021, ECLI:NL:RBAMS:2021:2815; District Court Amsterdam 13 September 2021, ECLI:NL:RBAMS:2021:6771; District Court Overijssel 12 October 2021, ECLI:NL:RBOVE:2021:3891.

557 Art. 370(3) DBA.

558 Art. 384(2)(a) DBA.

559 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 27, 38 and 60; *Kamerstukken II* 2019/20, 35 249, nr. 6, p. 5; Art. 5 PRD 2019.

control over their assets and affairs.⁵⁶⁰ In a voluntary WHOA process, it will be the debtor – or if appointed, the restructuring expert – who will draft, negotiate, and offer its creditors and shareholders a restructuring plan.⁵⁶¹ As the Advocate General De Bock has stated (freely translated):

during the entire process, a debtor maintains its powers to administer the estate and take legal actions. A debtor undergoes an extrajudicial ... restructuring in which the WHOA merely facilitates the debtor where necessary.⁵⁶²

Still, debtors subject to a WHOA process may experience some impact on their duties. The severity of the debtor's financial distress will determine the extent to which debtors – in case of a sole proprietorship the entrepreneur and in case of a legal person primarily the directors – need to take into account the interests of creditors, which will limit the discretionary space for taking legal actions. They may risk liability claims based on tort, in particular for director's liability. Furthermore, measures adopted during a WHOA process may impact the debtor's role. In particular, a stay will impose restrictions on debtors to use the assets subject to a stay outside the ordinary course of business, and while safeguarding the interests of the third parties affected by the stay.⁵⁶³ In addition, courts may impose measures, which could limit the discretionary space of debtors during a WHOA process.⁵⁶⁴ Importantly, a court appointment of a restructuring expert or observer does not affect the formal rights and duties of debtors in a WHOA process; their appointment does not divest debtors.⁵⁶⁵

4.3.2 Restructuring Experts and Observers

In WHOA processes, courts may appoint either a restructuring expert or an observer (*observator*) on a case-by-case basis. Restructuring experts can be appointed not only at the request of individual creditors, shareholders, Works Councils or Employee Representative Bodies, but also – typically when debtors consider this helpful in

⁵⁶⁰ *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 27; J.M.G.J. Boon, 'Actoren in de WHOA: herstructureren met de schuldenaar (debtor in possession), herstructureringsdeskundige en observator', in: C.M. Harmsen & M.L.H. Reumers (eds), *De WHOA: van wet naar recht, (Recht & Praktijk, nr. InsR18)*, Deventer: Wolters Kluwer, 2021, Para. 5.3; Opinion AG De Bock 6 December 2021, ECLI:NL:PHR:2021:1152, at 3.16.

⁵⁶¹ Art. 370(1) DBA.

⁵⁶² Opinion AG De Bock 6 December 2021, ECLI:NL:PHR:2021:1152, at 3.16.

⁵⁶³ Art. 377(1) and (2) DBA.

⁵⁶⁴ Arts. 377(3) and 379(1) DBA.

⁵⁶⁵ Compare Art. 371(1) and 380(1) DBA; Opinion AG De Bock 6 December 2021, ECLI:NL:PHR:2021:1152, at 3.16.

strengthening the support of affected parties in the process – by debtors.⁵⁶⁶ To appoint restructuring experts, courts must be satisfied that the pre-insolvency test has been met and that such appointment will not be detrimental to the interests of the general body of creditors.⁵⁶⁷ In addition, the person to be appointed must be sufficiently qualified and possess a level of expertise.⁵⁶⁸ If the debtor is an SME debtor,⁵⁶⁹ and no WHOA process had been commenced yet, appointment of a restructuring expert also requires the approval of the debtor.⁵⁷⁰

Once appointed, restructuring experts are primarily tasked with drafting and negotiating a restructuring plan. They do this either to prepare a standalone plan – separately from the debtor – or to assist debtors who are preparing such a plan themselves.⁵⁷¹ When a restructuring expert is appointed, a debtor can only submit its plan to the affected creditors and shareholders through the restructuring expert. As such, during a WHOA process two competing restructuring plans may be put forward, one prepared by a debtor and one prepared by a restructuring expert. When both plans are adopted by the required majority,⁵⁷² confirmation can be requested by the restructuring expert for both plans.⁵⁷³ In these cases, the court will, in principle, first consider for confirmation the plan prepared by the debtor.⁵⁷⁴ Furthermore, restructuring experts are tasked with supervision of the debtor's conduct, which can be derived from their position in WHOA processes. Once a restructuring expert is appointed, courts can no longer appoint or continue the appointment of an observer, who has the explicit task to supervise

566 Art. 371(1) DBA; *Kamerstukken II* 2018-19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 40-41.

567 Art. 371(3), a similar provision applies to observers, see Art. 381(1) DBA.

568 See further: Art. 371(3) and (6) DBA; Guidelines on appointment of restructuring experts and observers in the WHOA (*Richtlijnen aanwijzen en aanstellen herstructureringsdeskundigen en observatoren in de WHOA*), version 1 January 2023, available at: <https://www.rechtspraak.nl/SiteCollectionDocuments/richtlijnen-aanwijzen-aanstellen-%20herstructureringsdeskundigen-observatoren-whoa-0101-2023.pdf>.

569 Art. 369(1), second sentence, DBA. The Dutch legislator has adopted the EU definition of an SME: ‘... enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million’ (Art. 2(1) of the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422)). See also: *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 66.

570 Art. 371(15) DBA. If the debtor has shareholders, they are not permitted from unreasonably preventing the board from giving such permission, neither is the board permitted to withhold its permission without good reasons.

571 Art. 371(1) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 38; *Kamerstukken II* 2019-20, 35 249, nr. 7, pp. 2-3; *Kamerstukken II* 2021/22, 36 040, nr. 3, p. 24.

572 See Section 4.6.2 below.

573 This is a deviation introduced by the Act Implementing the PRD 2019 and the common practice for suspension of payments and bankruptcy where confirmation can be requested only for one plan, that is prepared by the debtor.

574 Arts. 381(1), third sentence, and 384(1), third and fourth sentence, DBA; *Kamerstukken II* 2021/22, 36 040, nr. 3, pp. 25-28, 92-93 and 94.

debtors.⁵⁷⁵ In order to supervise debtors, restructuring experts have strong rights to acquire information from both debtors and their employees.⁵⁷⁶ Given their position in a WHOA process, courts will hear restructuring experts before taking most of their decisions.⁵⁷⁷

As previously mentioned, another actor introduced by the WHOA is the observer. An observer can be appointed by the court upon request of a debtor or *ex officio*.⁵⁷⁸ However, observers can only be appointed if no or as long as no restructuring expert is appointed.⁵⁷⁹ The observer's task is to supervise the preparation of a restructuring plan and consider the interests of the general body of creditors.⁵⁸⁰ In some cases the court may or must appoint an observer, for instance to secure the creditors' interests when a stay has been granted or prior to the confirmation hearing when the confirmation involves a cross-class cram-down.⁵⁸¹

Notably, both restructuring experts and observers have an auxiliary role in a WHOA process. They do not divest or replace debtors in WHOA processes; instead, they have a supportive role to promote a successful outcome of the process, by furthering adoption of a restructuring plan and/or consider the interests of affected parties.

4.3.3 Courts

The WHOA is considered an *ultimum remedium*, the legislator attempts to facilitate that debtors will be able to better succeed with out-of-court debt restructuring as parties will be aware that hold-out strategies can also be overcome in a subsequent WHOA process.⁵⁸² Also, a WHOA process is designed to promote negotiations between a debtor, the affected creditors, and shareholders, and – if appointed – a restructuring expert. In this context, the court's role is limited; it can be characterized as a remote facilitator (or the 'stick') to assist a fair restructuring plan when no consensus can be reached.⁵⁸³

575 Art. 380(1) and (3) DBA. See further J.M.G.J. Boon, 'Actoren in de WHOA: herstructureren met de schuldenaar (debtor in possession), herstructureringsdeskundige en observator', in: C.M. Harmsen & M.L.H. Reumers (eds), *De WHOA: van wet naar recht (Recht & Praktijk, nr. InsR18)*, Deventer: Wolters Kluwer, 2021, Para. 5.4.1; M.R. Schreurs, 'Het rechtskarakter van de herstructureringsdeskundige', in: L.J.J. Kerstens, B. Rikkert, M.A. Broeders & R.F. Feenstra (eds), *Wet Homologatie Onderhands Akkoord*, Insolad Jaarbundel, Deventer: Wolters Kluwer, 2021, p. 120 et seq.

576 Art. 371(7) DBA.

577 Arts. 371(5), 376(11), 377(3), 378(8), 379(2) and 384(7) DBA.

578 Art. 380(1) and 379(1) DBA.

579 Art. 380(3) DBA.

580 Art. 380(1) DBA.

581 Arts. 376(9) and 383(4) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 36 and 67.

582 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 1-2.

583 Although court involvement is limited, the Dutch Judiciary has formed a pool of judges and legal aids from all district courts who will exclusively deal with all WHOA cases. They will hear requests in a three-judge

At the very least, courts will be involved – when a WHOA process has been commenced by a debtor – when it is seized of a request for confirmation of a restructuring plan.⁵⁸⁴ However, there may be involvement at an earlier stage, for instance, courts may be seized of requests to appoint a restructuring expert or observer,⁵⁸⁵ grant a stay,⁵⁸⁶ take bespoke measures to secure the interests of creditors and shareholders,⁵⁸⁷ or give interim decisions on (potential) disputes in a WHOA process.⁵⁸⁸

Notably, court involvement is limited because of the general ban on legal remedies in WHOA processes, which prevents parties from appealing against court decisions.⁵⁸⁹ Courts may, however, at request or on their own initiative ask preliminary questions to the Dutch Supreme Court.⁵⁹⁰ In addition, court decisions may still be appealed in case of one or more specific grounds developed in case law to override this ban, such as when statutory provisions have been wrongly applied in WHOA processes.⁵⁹¹

4.4 Stay

Article 376 DBA provides for a temporary stay of individual enforcement actions by third parties during a WHOA process. This is a non-automatic stay that may be granted by courts solely at the request of a debtor or a restructuring expert. When a debtor requests a stay, a restructuring plan must have already been submitted to the affected creditors or shareholders, or a debtor must promise to do so within 2 months.⁵⁹² Courts may grant a stay only when two requirements are met. Firstly, a stay must be necessary to continue the debtor's business during the drafting and negotiations on a plan.⁵⁹³ Secondly, a court

panel and are an important pillar towards knowledge building by the judiciary to handle WHOA cases (*Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 20).

584 Arts. 383 and 384 DBA.

585 Arts. 371(1) and 380(1) DBA.

586 Art. 376 DBA.

587 Art. 379 DBA.

588 Art. 378 DBA allows a debtor or a restructuring expert to obtain prior approval of matters relevant for the adoption and confirmation of the restructuring plan, such as, the class formation and allocation of value under a plan.

589 Art. 369(10) DBA. There is one statutory exception to this ban on legal remedies, see Art. 371(14) DBA.

590 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 17-18. A preliminary question may delay continuation of a WHOA process and can hamper timely confirmation of the plan. However, in the first case where this was an issue, it was resolved by a settlement agreement entered into by the debtor and creditor involved in the dispute on how to deal with the possible consequences of a decision of the Dutch Supreme Court (District Court Amsterdam 21 December 2021, ECLI:NL:RBAMS:2021:7533, at 1.8-1.9, 2.3-2.4, 4.9-4.11). This enabled the district court to confirm the plan while the preliminary question was still pending with the Supreme Court.

591 See further A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, p. 595.

592 Art. 376(1) DBA.

593 Art. 376(4)(a) DBA.

should reasonably be convinced that a stay serves the interests of the general body of creditors while not substantially harming the interests of third parties affected by a stay.⁵⁹⁴

Courts will initially grant a stay for up to 4 months, which can be extended multiple times up to a maximum duration of 8 months.⁵⁹⁵ As far as third parties have been informed of a stay or that a debtor is subject to a WHOA process, they are not able to enforce their claims for the duration of the stay on a debtor's estate without prior approval of a court.⁵⁹⁶ If requested, a court may lift any attachments on assets belonging to a debtor's estate. Furthermore, a stay will suspend any pending and future requests for commencing suspension of payments and bankruptcy proceedings.⁵⁹⁷

Even though a stay has a limited duration, courts may authorize individual creditors to exercise their rights or lift a stay *ex officio* or at the request of a debtor, a restructuring expert or third parties.⁵⁹⁸ For instance, a stay can be terminated when it is no longer necessary to continue operating the business while preparing and negotiating the restructuring plan.⁵⁹⁹ Furthermore, a court may lift a stay for one or more affected third parties for reason of deteriorating the position of these parties.⁶⁰⁰

4.5 *The Plan*

At its core, a WHOA process facilitates the drafting, negotiation, adoption and confirmation of a plan. As previously discussed, unless restructuring experts are appointed, debtors have the exclusive right to propose a plan in a WHOA process. However, when restructuring experts are involved, both a debtor and a restructuring expert may propose a plan.⁶⁰¹

4.5.1 **Scope of a Plan**

A plan may be aimed at restructuring, in which case the legal entity will continue to exist, or liquidation, in which case it will involve a controlled winding-up upon which a legal entity will be dissolved.⁶⁰² Whether aimed at restructuring or liquidation, the proposer may determine which creditor and/or shareholder rights will be amended under a plan.⁶⁰³

The plan itself may modify obligations of a debtor towards creditors. A plan can do so with regard to creditors' claims, in particular either by deferring payment obligations,

594 Art. 376(4)(b) DBA.

595 Art. 376(2) and (5) DBA.

596 Art. 376(2)(a) DBA.

597 Art. 376(2)(b) and (c) DBA.

598 Art. 376(10) and (11) DBA.

599 Art. 376(11) DBA.

600 Art. 376(2)(a) DBA.

601 Arts. 370(1) and 371(1) DBA; *Kamerstukken II* 2019-20, 35 249, nr. 7, pp. 2-3. See also Section 4.3.2 above.

602 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 2.

603 Arts. 369(2), 370(1) and 381(2) DBA.

imposing a (partial) haircut releasing a debtor from payment obligations or by converting debts into equity (debt-for-equity swap). Furthermore, a plan may also modify the rights of shareholders, this can be done for instance by issuing new shares, which can be part of a debt-for-equity swap.⁶⁰⁴ The rights of employees are excluded from the scope of any plan. Their rights under the employment contract, including pension entitlements claimed by pension funds,⁶⁰⁵ cannot be affected by a plan.⁶⁰⁶ Also excluded from the scope of a plan are financial collateral agreements and close-out netting agreements, nor can a WHOA plan interfere with specific financial law regulations.⁶⁰⁷ However, other types of executory contracts can be affected during a WHOA process. Debtors may pursue to alter such contracts consensually or alternatively request termination simultaneous to requesting confirmation of a plan (see Section 4.8).⁶⁰⁸

4.5.2 Contents of Plan

A restructuring plan must include all information necessary to ensure that those creditors and shareholders that are affected by the plan and are eligible to vote can form an informed opinion on the plan.⁶⁰⁹ As a minimum requirement, the plan should include in particular the name and an email address of the debtor and (if appointed) the restructuring expert, the (criteria for) class formation, the financial consequences of the plan (per class of creditors and shareholders), the value that is expected to be realized under the restructuring plan as well as the proceeds expected in case of a liquidation in bankruptcy proceedings (along with the calculations and assumptions used), the procedure for voting on the plan, and how creditors and shareholders may obtain further information on the plan.⁶¹⁰ Furthermore, attached to the plan should be further detailed financial information on the debtor, the plan, and the affected creditors and shareholders. This involves financial statements of the debtor, a list of all claims and names of the affected creditors and shareholders, a description of the financial distress of the debtor and in what way and to what extent this is resolved under the plan.⁶¹¹

The plan and all annexes must be presented to the affected creditors and shareholders for a reasonable period of time. This will depend on the complexity of a plan as well as the prior involvement of creditors during negotiations. As a minimum, a plan must be

604 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 9-10, 34.

605 Dutch Supreme Court 25 February 2022, ECLI:NL:HR:2022:328 (*AHG/Pensioenfonds H C*), at 3.5. The bill on the Act Implementing the PRD 2019 has amended Art. 369(4), last sentence, DBA accordingly to include also pension claims and derivative contracts.

606 Art. 369(4)(a), (b) and last sentence DBA.

607 Art. 369(4)(b) and (11) DBA.

608 Art. 373(1) and (2) DBA.

609 Art. 381(1) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 12.

610 Art. 375(1) DBA.

611 Art. 375(2) DBA.

submitted to the affected creditors and shareholders 8 days before the voting takes place.⁶¹² When appointed, a restructuring expert will submit the plan or plans to the affected creditors and shareholders. Any conflicts concerning a debtor refusing to give such permission can be raised with the court, who might grant the permission if a debtor lacks reasonable grounds for refusing the permission.⁶¹³

In drafting and negotiating a plan, disputes may arise between a debtor or restructuring expert and the affected creditors and shareholders. Affected creditors and shareholders are required to raise any grounds for rejecting confirmation of a plan within a reasonable time, after they became aware or should have been aware of such matters.⁶¹⁴ This should promote that a debtor or restructuring expert is urged to timely resolve these issues before confirmation is requested.⁶¹⁵ When needed, debtors and restructuring experts can get certainty early on by asking the court for an interim decision, possibly leading to bespoke measures. This is limited to matters which are relevant to obtaining court confirmation of a plan.⁶¹⁶

4.6 *Adoption and Confirmation of a Plan*

4.6.1 **Class Formation**

Voting on a restructuring plan takes place in classes of affected creditors and shareholders. Separate classes of creditors and shareholders are formed when either their current rights in bankruptcy or their rights as offered under a restructuring plan are highly distinct.⁶¹⁷ This includes, in principle, a distinction between secured creditors, creditors with a right of retention of title, preferential creditors, ordinary unsecured creditors, subordinated creditors and shareholders, but may also be within the group of ordinary unsecured creditors, provided that the rights offered under the plan are sufficiently distinct. A restructuring plan should state how the rights of each class of affected creditors and shareholders are modified under the plan.⁶¹⁸ In case a restructuring plan modifies the rights of ordinary, unsecured SME creditors who have trade or tort claims, they must be placed in a separate class. This class should also receive at least 20% of the value of their original claim under the proposed plan, unless there are compelling grounds to refrain from doing so.⁶¹⁹

612 Art. 381(1) DBA.

613 Art. 378(1)(g) DBA.

614 Art. 383(9) DBA.

615 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 67.

616 Art. 378 DBA.

617 Art. 374(1) DBA.

618 Art. 375(1)(d) DBA.

619 Arts. 374(2) and 375(2)(f) DBA.

Furthermore, as discussed above, the WHOA introduced bifurcation of secured claims. To the extent that a claim of secured creditors – based on the liquidation value⁶²⁰ of their secured claim in a bankruptcy proceeding – is covered by the security, their claim will be placed in a class of secured creditors. The remaining part of their claim will be placed in the class of ordinary, unsecured claims.⁶²¹ As a consequence, for the secured part of their claim, they can receive no more than the liquidation value under a restructuring plan. This enables that the reorganization surplus realized under the plan is distributed among all parties involved in a plan, disregarding any pre-existing security rights.⁶²²

4.6.2 Voting and Adoption of a Plan by Creditors and Shareholders

The WHOA is rather flexible with its procedure for the actual voting on a plan. All affected creditors and shareholders have a right to vote, which will take place per class. The proposer of a plan may determine how the voting occurs; it can take place through different means, including a physical meeting, a digital meeting or in writing.⁶²³

A class of creditors has adopted a restructuring plan if a group representing at least two thirds of the total amount of claims of creditors who voted on the plan have voted in favour of the plan.⁶²⁴ Similarly, a class of shareholders has adopted a restructuring plan if a group representing at least two thirds of the total amount of issued capital of shareholders who voted on the plan have adopted the plan.⁶²⁵ Following the voting, a request for confirmation of a restructuring plan can be made when at least one class of creditors has approved the plan. However, unless all classes would be ‘out of the money’ in a liquidation in bankruptcy, this class should be an ‘in the money’ class of creditors.⁶²⁶

4.6.3 Court Confirmation of a Plan

A court will confirm a restructuring plan, unless it finds that there are grounds to reject confirmation pursuant to Article 384 DBA. For affected creditors or shareholders to invoke a specific ground for rejection of confirmation, it is required that they could not have reasonably discovered these grounds earlier on, in particular, once they were involved in the negotiations on a restructuring plan and/or the contents of a restructuring plan. If they were aware or could have reasonably been aware, they should also have notified these

620 The liquidation value should be established on the likeliness of either a piece meal liquidation or going-concern sale in bankruptcy.

621 Art. 374(3) DBA.

622 *Kamerstukken II* 2019/20, 35 249, nr. 25.

623 Art. 381(5) DBA.

624 Art. 381(6) DBA.

625 Art. 381(7) DBA.

626 Art. 383(1) DBA. Similar to requesting a restructuring expert (Art. 371(15) DBA), if not all classes approved the restructuring plan, a restructuring expert requires the consent of a debtor if he was not appointed at the request of a debtor and the debtor itself qualifies as an SME (Art. 383(2) DBA).

grounds to the debtor or restructuring expert within a reasonable time. If they have not done so, they lose their right to invoke the ground to request the court to reject confirmation.⁶²⁷ The legislator has introduced this rule to promote the efficiency of a WHOA process and to prevent affected creditors and shareholders from using rejection grounds strategically, and instead facilitating a debtor to timely resolve any disputes or issues with a plan.⁶²⁸

The legislator distinguishes between two sets of grounds for rejecting confirmation: general and additional grounds. The general grounds relate to a sound decision-making process. A court will reject confirmation on these grounds *ex officio* or at the request of creditors or shareholders. This is the case when it finds that the debtor does not or no longer meet the pre-insolvency test or affected creditors and shareholders have not been given sufficient time to vote or the date of the confirmation hearing.⁶²⁹ It is also the case when not all affected creditors or shareholders have been duly notified of a plan, a plan does not meet the information requirements of Article 375 DBA, the classes of affected creditors or shareholders have not been correctly formed, or when the vote of affected creditors or shareholders is based on an incorrect amount of their claim.⁶³⁰ Furthermore, a court will reject confirmation when the performance of a plan is not sufficiently guaranteed, when attracting new finance or entering into certain transactions is not (directly) necessary or is substantially detrimental to the interests of the general body of creditors. The plan will neither be confirmed when the plan has been concluded by deceit, preferential treatment or one or more creditors or shareholders or other unfair means.⁶³¹ Finally, there is a catch-all provision allowing a court to reject confirmation when it finds that there are any other reasons to do so.⁶³² In some cases a rejection ground will not automatically result in a court rejecting confirmation if the shortcoming did not result in a different outcome of the vote. For instance, this is the case when a court finds there has been a lack of information or the class formation was not correct.⁶³³

The additional rejection grounds relate to the substantive fairness of a plan. These grounds can be invoked only by dissenting creditors and shareholders, in some cases only when they are in a dissenting class. Firstly, confirmation can be rejected if the plan fails to meet the ‘best interest test’. A court may do so when it is summarily proven that dissenting creditors or shareholders will be worse off under a restructuring plan than they would be

627 Art. 383(9) DBA.

628 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 67-68.

629 Art. 384(2)(a)-(b) DBA.

630 Art. 384(2)(c)-(d) DBA.

631 Art. 384(2)(e)-(g) DBA.

632 Art. 384(2)(g) DBA.

633 Art. 384(2)(c) DBA.

in case of liquidation in bankruptcy.⁶³⁴ The liquidation value can be the value obtained with a piecemeal sale in bankruptcy; however, it might also be the value obtained in a (partial) going-concern sale in bankruptcy. Depending on the specifics of the case, a court – importantly – may reject confirmation when this liquidation value exceeds the reorganization value for this creditor or shareholder.⁶³⁵

Furthermore, dissenting creditors and shareholders in a class that rejected a restructuring plan may also oppose confirmation when the reorganization value is distributed unfairly under a restructuring plan. In principle, the WHOA adopts the APR, according to which the distribution of the reorganization value should follow the ranking of claims in bankruptcy. However, there are several exceptions to this rule which effectively turn it into a relaxed APR.⁶³⁶ Firstly, the Dutch legislator introduced that, as a minimum, ordinary SME creditors with a trade or tort claim should receive at least 20% in cash or a right to the value of their original claim. The court will reject confirmation if they receive less than 20%, unless a debtor or restructuring expert has compelling grounds to deviate from this threshold.⁶³⁷ Secondly, a plan may deviate from the APR if (i) there is a reasonable ground to do so and (ii) the affected creditors or shareholders are not harmed in their interests.⁶³⁸ Lastly, deviation from the APR is also permitted when all classes are consenting classes.

Another additional ground to reject confirmation is when dissenting creditors in a dissenting class do not have the right to a cash-out payment from the debtor of the liquidation value of their claim.⁶³⁹ However, this is different for secured creditors financing the debtor's business. They do not have such a statutory right at a cash-out option. Instead, they may request the court to reject confirmation if their rights are amended or they are offered shares or depositary receipts under the plan, but have not been given the right to

634 Art. 384(3) DBA. Furthermore, this rejection ground may also be invoked by creditors or shareholders who have wrongly been refused to vote on the restructuring plan.

635 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 50-51.

636 Compare Art. 11(2) PRD 2019.

637 Art. 384(4)(a) DBA, see also *Kamerstukken II* 2019/20, 35 249, nr. 23. There is more detail to this rule for ordinary SME creditors. For instance, it does not apply to claims from group companies, ordinary (subordinated) shareholder loans, unsecured subordinated claims of financiers and bondholders.

638 Art. 384(4)(b) DBA. The courts have decided on deviations from the APR a few times now, see for instance: District Court Amsterdam 28 February 2021, ECLI:NL:RBAMS:2021:886, at 6.15-6.15.1; District Court Rotterdam 3 March 2021, ECLI:NL:RBROT:2021:1769, at 3.9-3.11; District Court Den Haag 23 July 2021, ECLI:NL:RBDHA:2021:8121, at 4.8-4.13; District Court Limburg 22 November 2021, ECLI:NL:RBLIM:2021:8857, at 3.5.3-3.5.4; District Court Midden-Nederland 31 March 2022, ECLI:NL:RBMNE:2022:1329, 4.43-4.53; District Court Limburg 21 June 2022, ECLI:NL:RBLIM:2022:4990, at 4.5-4.7.

639 Art. 384(4)(c) DBA. A question pending with the Dutch Supreme Court relates to what extent this exception is applicable to the unsecured part – due to the bifurcation (Art. 374(3) DBA) – of the claims of secured creditors (District Court Noord-Nederland 31 March 2022, ECLI:NL:RBMNE:2022:1329, at 4.25-4.35).

choose an alternative form of distribution. This may still involve an option for deferral of payment, but it does not include choosing for a cash-out payment.⁶⁴⁰

Absent grounds to reject confirmation, a court will order the confirmation of a plan. This will make the plan binding on all affected creditors and shareholders.⁶⁴¹ The WHOA amends the rights of affected creditors and shareholders but does not provide for a discharge of a debtor. Typically, the plan will provide for this upon completion. Furthermore, in principle, it may be possible for a restructuring plan to be dissolved, for instance if it later appears to be the result of deceit or in case of default and breach of a plan. However, a restructuring plan may provide that dissolution of a plan is excluded; this will be particularly relevant in debt-for-equity swaps.

4.7 Possibilities for a Debt-for-Equity Swap

The Dutch legislator opted for the option in Article 12 PRD 2019 enabling that a restructuring plan can affect the rights of shareholders.⁶⁴² When shareholders' rights are affected, they must be involved in the WHOA process and have a right to vote on a plan.⁶⁴³ As discussed before, the WHOA allows for a debt-for-equity swap. This can take place in different ways, although generally involving the conversion of debt into equity. While the prior shareholders maintain their shares and rights, it does result in a dilution of the shareholding. It is generally held that shareholders therefore have a right to vote on a plan when new shares are issued in the course of such a swap.⁶⁴⁴

Since shareholders are not just capital providers but also part of the corporate structure of the debtor, they have specific corporate law rights. To prevent shareholders from interfering with a WHOA process by using their voting rights, the legislator has imposed limitations on their corporate law rights. For instance, a decision from the General Assembly is not required to issue new shares to execute the debt-for-equity-swap. The legislator argued that this is reasonable since affected shareholders – like affected creditors – have sufficient other options to be involved in a WHOA process. Therefore, at several instances, the legislator has limited shareholders and sometimes even prohibited shareholders from taking unreasonable steps to prevent adoption and confirmation of a

640 Art. 384(4)(d) DBA.

641 Art. 385 DBA.

642 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 4.

643 Art. 381(1) and (2) DBA.

644 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 62; S.C.E.F. Moulen Jansen, *De positie van aandeelhouders bij preventieve herstructurerings*, Serie Van der Heijden Instituut nr. 163 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, Para. 6.5.11.1. See A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, Para. 7.3.4.1 arguing that shareholders have no right to vote on a plan in this case.

restructuring plan.⁶⁴⁵ In addition, a debt-for-equity-swap may invoke certain change-of-control provisions. To prevent this and other types of *ipso facto* clauses from interfering with an envisaged restructuring, the legislator has provided that such clauses are rendered ineffective in the course of a WHOA process.⁶⁴⁶

4.8 *Executory Contracts*

Although treatment of executory contracts technically falls outside the scope of a restructuring plan, a debtor or restructuring expert may request termination of executory contracts (*lopende overeenkomsten*) along with the request for confirmation of a restructuring plan.⁶⁴⁷ This can be requested only after an informal proposal to modify or terminate the executory contract was rejected by the counterparty. The court will only terminate a contract when it will also confirm the restructuring plan itself.⁶⁴⁸ In principle, the termination of executory contracts will be effective upon the day when the court confirms the plan. However, there can be reasons to extend the termination with up to 3 months after the confirmation day.⁶⁴⁹

The unilateral termination of executory contracts may result in an obligation for a debtor to pay damages to the counterparty. The legislator has stated specifically that these claims for future damages under such executory contracts may be included in a plan and, for instance, be subject to a haircut or deferred payment.⁶⁵⁰

4.9 *Jurisdiction for and Recognition of Court Decisions in Europe*

4.9.1 *Jurisdiction for Dutch Courts*

As discussed before, a WHOA is designed as a dual-track process, which can be either public or private.⁶⁵¹ This distinction has particular relevance for international jurisdiction and, with respect to the court, decisions to be taken in the course of a WHOA process. Because the European Insolvency Regulation (EIR) 2015⁶⁵² includes only public insolvency

645 Arts. 370(5), 371(15) and 383(2) DBA. The bill on the Act Implementing the PRD 2019 introduces a further general rule prohibiting shareholders from unreasonably impeding the board of directors in a WHOA process (*Kamerstukken II* 2021/22, 36 040, nr. 3 (Explanatory memorandum to the bill on the Act Implementing the PRD 2019), p. 24; *Kamerstukken II* 2021/22, 36 040, nr. 7).

646 Art. 373(3) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 46.

647 Art. 383(7) DBA.

648 Arts. 383(7) and 384(5) DBA.

649 Art. 373(1) DBA.

650 Art. 373(2) DBA.

651 Art. 369(6) DBA; see also Section 4.1 above.

652 Regulation (EU) 2015/838 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), O.J. L 141/19.

proceedings within its scope, it cannot apply to private WHOA processes.⁶⁵³ This is different for the public WHOA processes, which were added to Annex A (insolvency proceedings) and the restructuring experts and observers in such processes to Annex B (insolvency practitioners).⁶⁵⁴ Since January 2022, in line with the EIR 2015,⁶⁵⁵ Dutch courts have jurisdiction to ‘open’ public WHOA processes when (a) debtors have their centre of main interests (COMI) in a European Union Member State (excluding Denmark),⁶⁵⁶ and (b)(i) for a main proceeding debtors have their COMI in the Netherlands or (ii) for a secondary proceeding debtors have an establishment in the Netherlands.⁶⁵⁷

In cases where the EIR 2015 is not applicable to a public WHOA process, for instance when a debtor’s COMI lies outside the EU, international jurisdiction is determined in the same way as for a private WHOA process. Because the EIR 2015 does not apply to a private WHOA, the legal basis for international jurisdiction is less clear. The Dutch legislator has taken the position that this is to be determined based on domestic private international law. It holds that a Dutch court can assume jurisdiction to take decisions during a private WHOA process when (a) an applicant (or at least one of the applicants) or one or more of the related parties has its (habitual) residence in the Netherlands or (b) that the case is otherwise sufficiently connected with the Netherlands.

The latter ground is the so-called Dutch sufficient-connection-test. This test is satisfied when, for instance, COMI or establishment of the debtor is in the Netherlands, when the debtor has (a substantial amount of its) assets in the Netherlands or a large part of the group of companies to which the debtor belongs are Dutch companies. Furthermore, the Dutch court can assume jurisdiction when a (substantial) part of the debt that is restructured under the plan arises from obligations subject to Dutch law or are subject to a forum choice for the Dutch courts. Jurisdiction can be assumed when a debtor is liable for debts owed to a party which is subject to the jurisdiction of Dutch courts.⁶⁵⁸

4.9.2 Foreign Recognition of Decisions in WHOA Processes

Similar to the matter of jurisdiction, the legal basis for foreign recognition of decisions of Dutch courts in a WHOA process depends on whether the EIR 2015 is applicable. When

⁶⁵³ Art. 1(1) EIR 2015.

⁶⁵⁴ Art. 369(7)(a) DBA; *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 7 and 32.

⁶⁵⁵ Regulation (EU) 2015/838 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), O.J. L 141/19.

⁶⁵⁶ Recital 25 EIR 2015.

⁶⁵⁷ Art. 3(1) and (2) EIR 2015.

⁶⁵⁸ Art. 369(7)(b) DBA and Art. 3 Dutch Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*); *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), pp. 7 and 32; Regulation (EU) 2021/2260 of the European Parliament and the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace Annexes A and B, O.J. L 455/20.

this is the case for a public WHOA process, the court decisions will be automatically recognized in the EU (except Denmark) without further formalities.⁶⁵⁹ This is different when the EIR 2015 does not apply, as is the case for private WHOA processes and outside the EU. Recognition of decisions of Dutch courts will in that case depend on – as far as they are available – bilateral agreements and treaties, but mostly the domestic private international law rules in the jurisdictions where recognition is sought.⁶⁶⁰

4.9.3 Discussion in Dutch Legal Doctrine

The approach of the Dutch legislator is based on the premise that public and private WHOA processes fall within the scope of the so-called ‘bankruptcy exception’ of the Brussels I bis Regulation, which therefore does not apply.⁶⁶¹ Adopting this approach to private WHOA processes has received some support,⁶⁶² but has also been criticized. There is general support that because of the lack of publicity in a private WHOA process, it cannot qualify as an ‘insolvency proceeding’ under the EIR 2015. However, some authors have argued – us included – that in line with case law of the CJEU, which reiterated the principle of dovetailing between the Brussels I bis Regulation and the EIR 2015, for a private WHOA process the bankruptcy exception should not apply. Consequently, decisions taken in the course of a private WHOA process should therefore fall within the scope of the Brussels I bis Regulation.⁶⁶³ Given the legal uncertainty, this will be a matter for the Court of Justice of the European Union to decide on or the EU legislator to take action on.⁶⁶⁴ So far, Dutch courts follow the approach discussed in Section 4.9.1 in case the EIR 2015 does not apply.⁶⁶⁵

659 Arts. 19, 20 and 32 EIR 2015. See further P.M. Veder, ‘Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement’, *FIP* 2019/219, p. 58 et seq.

660 See also P.M. Veder, ‘Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement’, *FIP* 2019/219, p. 62.

661 Art. 1(2)(b) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 351/20. Notably, the DBA nor the parliamentary history to the WHOA makes any reference to the Brussels I bis Regulation.

662 See, for instance, P.M. Veder, ‘Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement’, *FIP* 2019/219; A. Mennens, *Het dwangakkoord buiten surseance en faillissement*, Onderneming en Recht, nr. 118 (diss. Nijmegen), Deventer: Wolters Kluwer, 2020, p. 627.

663 See, for instance, W.J.E. Nijjens, ‘IPR aspecten van de WHOA’, *TvI* 2019/34, pp. 264-265; J.M.G.J. Boon, R.D. Vriesendorp & R. Sijbesma, ‘Netherlands Commercial Court als mogelijke WHOA-rechter bij internationale herstructureringen’, *HERO* 2021/W-001, Para. 3.1; R.D. Vriesendorp, W. van Kesteren, E. Vilarin-Seivane & S. Hinse, ‘Automatic recognition for the Dutch undisclosed WHOA procedure in the European Union’, *NIPR* 2021/1, at 4.2.4.

664 Consider also CERIL Statement and Report 202202 on Cross-Border Effects in European Preventive Restructuring, 6 July 2022, available at: www.ceril.eu/news/ceril-report-2022-2-on-cross-border-effects-in-european-preventive-restructuring.

665 For private WHOA process, see for instance, District Court Limburg 11 February 2021, ECLI:NL:RBLIM:2021:8854, at 3.1; District Court Zeeland-West-Brabant 17 February 2021, ECLI:NL:RBZWB:2021:6911, at

5 WHAT HAS THE WHOA BROUGHT US SO FAR?

Both academia and practice have anticipated the entry into force of the WHOA. Furthermore, the legislator also noted the importance of the WHOA as a tool to mitigate the financial distress faced by many debtors that was caused by the COVID-19 pandemic, and categorized the WHOA as part of the COVID-19 emergency legislation to be adopted in 2020.⁶⁶⁶ Since the WHOA entered into force, courts have published over 120 decisions, including over 10 confirmed plans.⁶⁶⁷ In all, it is reported that so far there have been over 100 cases;⁶⁶⁸ by far most are private WHOA cases.⁶⁶⁹ Although considered an *ultimum remedium*, the WHOA has surely established a foothold in the Dutch restructuring and insolvency practice. Whereas some expected WHOA processes to be of limited relevance for SME debtors, this was disproved by the various cases in the first year. WHOA processes have also been used for large debtors, including WHOA restructurings of enterprise groups, although they form a smaller part of the cases. Allegedly, large debtors involved in restructuring processes seem to benefit from the WHOA as a ‘stick’ to discipline non-cooperating creditors or shareholders.

Whereas the WHOA is designed as an expedient and efficient process, concerns have been raised over the costs involved, including the court fees.⁶⁷⁰ With the modular approach of the WHOA, a debtor might easily face a number of requests in a WHOA process, such as requests for granting and extending a stay, interim decisions and confirmation. Also, for affected creditors or shareholders with a limited claim, the court fees for raising grounds for rejection may easily exceed their financial interests in the case.⁶⁷¹ If the restructuring involves several enterprise group members, for debtors and affected creditors and shareholders, court fees may become considerable. To improve accessibility and therewith effectiveness of WHOA processes for more debtors, in its recently published draft bill

3.3; District Court Gelderland 31 May 2022, ECLI:NL:RBGEL:2022:3062, at 4.3; District Court Amsterdam 3 September 2021, ECLI:NL:RBAMS:2021:6770, at 3.2.

666 *Kamerstukken II* 2019/20, 35 300 VI, nr. 118 and Annex 930000.

667 Not all decisions are (instantly) published by the courts in the online repository of the Dutch judiciary, the actual number of decisions will therefore be higher. See also L.S.E. Prickartz & R.W.A. Brunninkhuis, ‘De WHOA: de stand van zaken na ruim één jaar’, *Bb* 2022/17 and M. Knapen, ‘Wow, de WHOA doet wat ie moet doen!’, *Mr.* 2022/3, reporting on the first year of WHOA cases.

668 M. Knapen, ‘Wow, de WHOA doet wat ie moet doen!’, *Mr.* 2022/3, p. 55.

669 To date, there have been six public WHOA processes, see the register of WHOA cases of the Dutch Judiciary, available at: www.rechtspraak.nl/Registers/Paginas/whoa.aspx.

670 M. Kroezen, ‘De toegankelijkheid van de WHOA voor het mkb: een beschouwing aan de hand van de Small Business Reorganization Act’, *TvI* 2021/4, at 4.2; H.J. de Kloe, ‘Het WHOA-akkoord en schuldeisers: een pleidooi voor meer zeggenschap’, *TvOB* 2022/2, at 5 and 7.

671 These court fees are circa EUR 2.000. See also District Court Noord-Holland 15 April 2021, ECLI:NL:RBNHO:2021:3085, at 2.2 and 3.5-3.7; District Court Midden-Nederland 11 May 2022, ECLI:NL:RBMNE:2022:1936, at 2.7-2.10.

amending court fees, the Dutch legislator has proposed to substantially reduce court fees for requests for confirmation in WHOA processes.⁶⁷²

Furthermore, the WHOA is premised to be a tool apt for cross-border application.⁶⁷³ This is reflected in several features of the WHOA, including (i) the dual-track nature of the WHOA,⁶⁷⁴ (ii) the procedural consolidation for restructuring of domestic and foreign members of an enterprise group,⁶⁷⁵ (iii) third-party releases in an enterprise group context⁶⁷⁶ and (iv) the possibilities for appointment of a foreign ‘insolvency practitioner’ (under the EIR 2015) as a restructuring expert.⁶⁷⁷ However, application in the cross-border context is still surrounded by legal uncertainty. To some extent, this is inherent in a new legal instrument which must be tried and tested. On the other hand, there are cross-border elements which have been criticized for their inconsistency with private international law. Consider for instance the above-mentioned discussion on the legal basis for assuming jurisdiction and recognition of court decisions in WHOA cases.⁶⁷⁸ However, this also relates to applying the rules on procedural consolidation in a cross-border context. In this respect, mere domestic legislation cannot overrule or interfere with jurisdictional rules of the EIR 2015 and Brussels I bis Regulation.⁶⁷⁹ Furthermore, the requisite use of Dutch language in court proceedings may impede the choice for the WHOA by foreign parties; in this regard the Netherlands Commercial Court (NCC) could play a more prominent role as it facilitates court cases to be conducted fully in the English language.⁶⁸⁰

The Dutch legislator has deliberately chosen to exclude rights deriving from employment contracts from a WHOA process.⁶⁸¹ During the first preliminary questioning on the WHOA, this was broadly interpreted, to also include the claims of pension funds

672 This would be reduced to EUR 676, see *Voorontwerp wet verlaging griffierechten* (draft bill on the Act reduction of court fees) available at: www.internetconsultatie.nl/wetverlaginggriffierechten. Notably, this draft bill does not yet reduce the court fees for affected creditors or shareholders requesting the court to reject confirmation of a restructuring plan. See also: H. Loonstein, ‘Griffierechten en WHOA-procedures’, *TvI* 2022/33.

673 *Kamerstukken II* 2019/20, 35 225, nr. 20, pp. 12 and 24.

674 Arts. 369(6)-(9), 370(4) and 371(1) DBA.

675 Art. 372 DBA.

676 Art. 370(2) DBA.

677 *Kamerstukken II* 2018/19, 35 249, nr. 3 (Explanatory memorandum to the WHOA), p. 42.

678 See above Section 4.9.3 above.

679 W.J.E. Nijmens, ‘De WHOA en het internationaal privaatrecht inclusief de herstructurering van groepen’, in: C.M. Harmsen & M.L.H. Reumers (eds), *De WHOA: van wet naar recht (Recht & Praktijk, nr. InsR18)*, Deventer: Wolters Kluwer, 2021, Para. 12.6.

680 See J.M.G.J. Boon, R.D. Vriesendorp & R. Sijbesma, ‘Netherlands Commercial Court als mogelijke WHOA-rechter bij internationale herstructureringen’, *HERO* 2021/W-001, arguing that the NCC is able to decide on requests in the course of both public and private WHOA cases, although procedural requirements of cases before the NCC will make it particularly well-suited for larger cross-border (financial) restructurings.

681 Art. 369(4)(a), (b), and last sentence, DBA.

for pension entitlements.⁶⁸² This has been received with mixed responses, as it may make not only restructuring more complicated, but might leave employees worse off in the end.⁶⁸³ At this point, it is up to the legislator to reconsider how the interest of employees is best kept in the context of restructuring and insolvency.⁶⁸⁴

6 CONCLUSION

The WHOA is a promising addition to the Dutch restructuring toolbox, and until now, it has lived up to the expectations. This preventive restructuring framework is designed in line with Chapter 2 of the PRD 2019, while also drawing on features of the Chapter 11 US Bankruptcy Code (reorganization) and UK Scheme of Arrangement. The result is a framework of its own kind, characterized by a high degree of flexibility, expediency and cost-efficiency. There has been an overall positive response to the WHOA. Although it is too early for any thorough conclusions, so far, the WHOA seems to function well and deliver on its promise: providing for an effective framework to prevent bankruptcy.

682 Dutch Supreme Court 25 February 2022, ECLI:NL:HR:2022:328 (*AHG/Pensioenfonds H C*), at 3.5. See also Art. 369(4), last sentence, DBA.

683 Dutch Supreme Court 25 February 2022, ECLI:NL:HR:2022:328 (*AHG/Pensioenfonds H C*), with annotation J. van der Pijl, *JAR* 2022/88, P.R.W. Schaink, *TvI* 2022/17, F.M.J. Verstijlen, *NJ* 2022/150, S.B.A. Heumakers, *JOR* 2022/163; J. van der Pijl, 'Tijd voor conclusies', *TvI* 2022/1. Prior to the decision of the Dutch Supreme Court it was discussed *inter alia* by G. de Gruijter, 'Prejudiciële vraag aan de Hoge Raad: vallen pensioenpremies van verplicht gestelde bedrijfstakpensioenfondsen onder de werknemersuitzondering van de WHOA?', *HERO* 2021/B-073; M. Mouthaan, 'WHOA en pensioenpremie', *HERO* 2021/B-055; M.H. Visscher, 'Van bange bestuurders naar creatieve bestuurders als het om pensioenschulden gaat?', *TvOB* 2020/6; R. van den Sigtenhorst & P. Jahan, 'Prejudiciële vragen over de reikwijdte van de WHOA: vorderingen van bedrijfspensioenfondsen uitgezonderd?', *TvI* 2021/49; R.J. van Gaal, T.H.D. Struycken & S.B.A. Heumakers, 'De WHOA, pensioen en de rechten van werknemers', *MvV* 2021/12.

684 This matter has also been raised in response to two preliminary decisions on the position of employees in pre-packaged bankruptcies, see CJEU 22 June 2017, ECLI:EU:C:2017:489 (*FNV c.s./Smallsteps*); CJEU 28 April 2022, ECLI:EU:C:2022:321 (*FNV/Heiploeg*). See for an introduction J.H. Plomp, 'Revival of the Dutch pre-pack by the CJEU', *Leiden Law Blog*, 16 May 2022, available at: www.leidenlawblog.nl/articles/revival-of-the-dutch-pre-pack-by-the-cjeu.