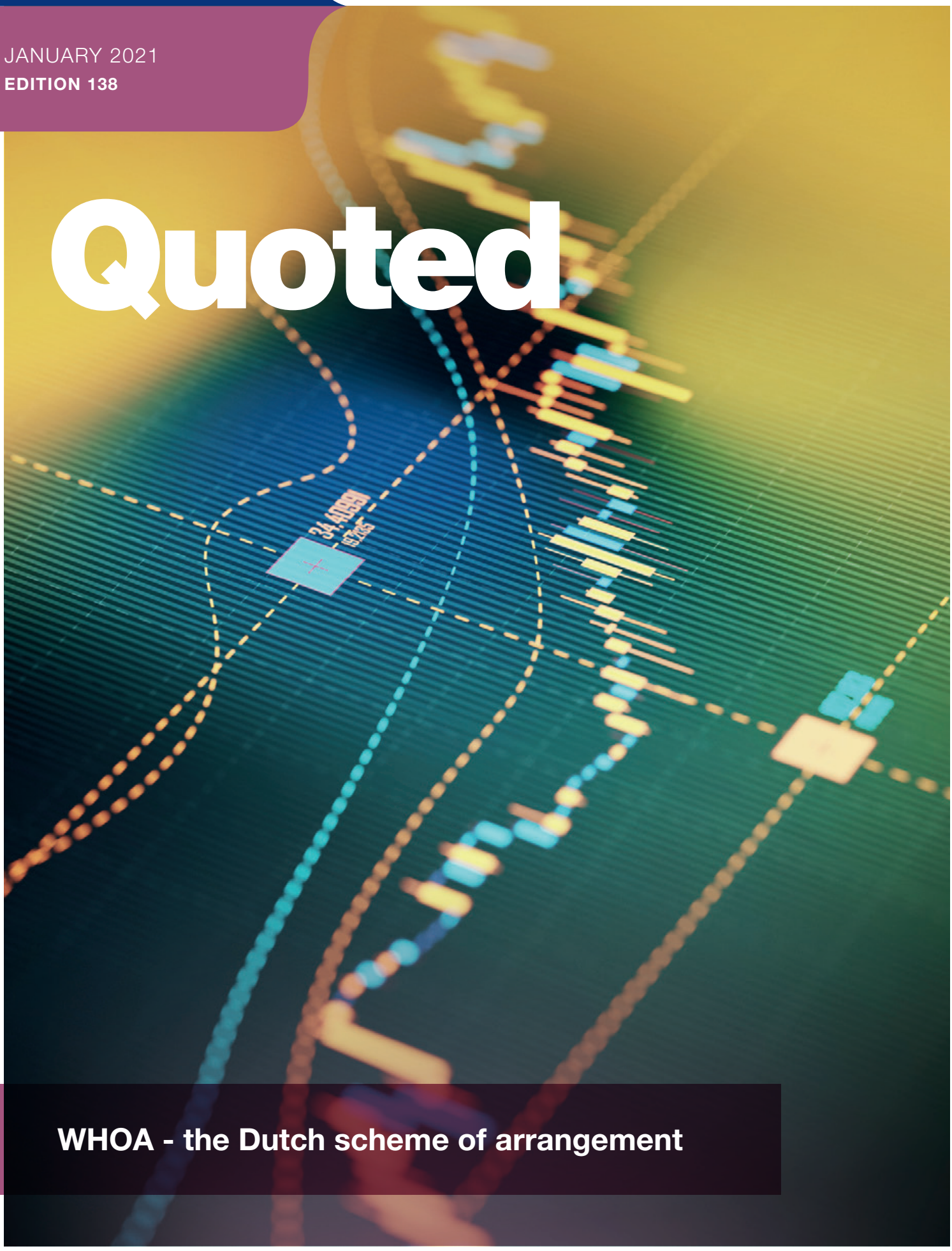
LOYENS & LOEFF

JANUARY 2021
EDITION 138

Quoted



WHOA - the Dutch scheme of arrangement

LOYENS & LOEFF

In this edition

1 Introduction

1.1 On 1 January 2021 the draft bill on 'court sanctioning private composition to avoid bankruptcy" (*wet homologatie onderhands akkoord* – **WHOA**, also known as the "Dutch scheme of arrangement") has been enacted. This – at least for the time being – marks the end of a prolonged, comprehensive, and at the last moment fairly turbulent legislative process that started back in 2012.[1] The primary goal of the WHOA is to strengthen the restructuring capacity of businesses that are in financial difficulties but are at their core still wholly or partially viable.[2]

1.2 The addition of this tool to the Dutch restructuring toolkit was much needed: the existing composition procedures in suspension of payments (*surseance van betaling*) and bankruptcy (*faillissement*) have proved to be unsuitable for restructuring distressed businesses, particularly due to the fact that rights of preferential and secured creditors cannot be impaired.[3] Before the enactment of the WHOA, if a composition was offered outside formal insolvency proceedings, its success depended on the consent of (virtually) all individual creditors.[4] This resulted in hold-out positions for certain creditors with all of the associated undesirable consequences: an unnecessarily large degree of value destruction for the debtor's stakeholders and (for the financially stronger businesses) seeking protection under foreign restructuring procedures.

1.3 The Dutch legislator clearly drew its inspiration from the tried and tested English scheme of arrangement and the American Chapter 11 in drafting the WHOA. The result is a pre-insolvency debtor-in-possession proceeding, offering the debtor protection against enforcement actions during the negotiation process.[5] If approved by the court, a composition can be imposed on dissenting (classes of) creditors and shareholders. The procedure is designed in such a way that court involvement is in principle minimal and can be completed in a relatively short timeframe. If necessary, (specialized) judges can be involved before the vote on the composition in order to obtain clarity on any issues that might stand in the way of a successful implementation of the composition and the intended restructuring.

1.4 Although the idea behind the WHOA in and of itself is fairly straightforward, the act itself is complex and constitutes a fundamental departure from the existing Dutch practice. Where the Netherlands was always known internationally as a relatively creditor-friendly jurisdiction, debtors (and under certain circumstances, their group companies) now have the ability to restructure existing as well as future (secured) obligations. This change to the Dutch 'restructuring playing field' justifies that we use this edition of *Quoted* to provide an overview of the WHOA's main features and consider some of its more far-reaching elements in more detail.

2 WHOA – main features

2.1 When can a composition be offered?

2.1.1 The WHOA can be used for the following objectives:
(i) to avoid bankruptcy by means of a restructuring;
(ii) to solvently liquidate the debtor's business, if that is likely to yield a better result than liquidation in bankruptcy; or
(iii) a combination of (i) and (ii).

2.1.2 A composition under the WHOA can only be offered if the debtor is in a situation where it can be reasonably expected that it will be unable to continue to pay its debts (hereinafter also referred to as: unavoidably insolvent). This will be the case if there is no realistic prospect of the debtor avoiding

1 The act stipulates that 3 years after the introduction of the WHOA the minister will provide the legislator with a report on the effectiveness and the effects of the WHOA in practice, on the basis of which an evaluation will take place.

2 It is also possible to liquidate the debtor as a whole if such liquidation will most likely have a better outcome than a liquidation in bankruptcy.

3 Exceptions are the compositions that were achieved in respect of certain special purpose vehicles which had attracted financing and on-lent such within their group (e.g. in the insolvencies of the Oi Group and Lehmann Brothers).

4 The exception to the rule is that a single dissenting creditor can abuse the law by withholding its consent. This is the case if refusal is unreasonable in view of the fact that its position in a potential bankruptcy will not be significantly better than it would be under the private composition offered.

5 The first two decisions in WHOA-proceedings, which were rendered within two weeks of enactment, revolve around protective measures such as moratoriums, lifting of attachments and appointment of observers to safeguard the interests of the debtor's joint creditors (see further under paragraph 3 below).

insolvency without restructuring its debts. This situation is the justification demanded by the WHOA for the sweeping consequences of its potential application. Using the procedure merely to rid itself of 'difficult' creditors therefore isn't an option for a debtor.

2.2 Who can offer a composition: the debtor and the restructuring expert

2.2.1 It goes without saying that the debtor itself can offer a composition. However, the debtor can also opt to ask the court to appoint a 'restructuring expert' to offer a composition on its behalf.

2.2.2 This choice may be motivated, for example, by the debtor's desire to maximise transparency during the composition process, thereby inspiring confidence among its stakeholders. A restructuring expert is an independent, court-appointed specialist who, once appointed, has exclusive authority to prepare and offer a composition on the debtor's behalf.

2.2.3 Since the WHOA is above all focused on the interests of the joint creditors and other stakeholders of the debtor('s business), its individual creditors, shareholders, the works council or employee representative body have also been given the right to request to the court the appointment of a restructuring expert who can prepare and offer a composition on the debtor's behalf. With this, stakeholders have been given a powerful tool to take over the initiative in offering a composition and for example thereby spurring an unnecessarily passive debtor into action. The condition for allowing a request to appoint a restructuring expert is that the debtor is unavoidably insolvent. Once that has been established (the court can engage an external expert to establish this), the court will honour the request unless it summarily appears that the appointment of a restructuring expert is not in the interests of the joint creditors.[6]

2.2.4 The restructuring expert has virtually all the powers the debtor has with regard to the composition process (more on this later). However, even though the restructuring expert has exclusive authority to offer a composition, the debtor remains a 'debtor-in-possession': it retains full powers of disposition and the restructuring expert will not take over the debtor's management.[7] It should be noted that if (i) the restructuring expert has been appointed at the request of stakeholders and (ii) the debtor qualifies as an SME-enterprise, the restructuring expert may only submit the composition for voting with the consent of (the management of) the debtor.[8] On the other hand, the debtor's shareholders may not prevent its management from giving its approval on unreasonable grounds.[9]

2.2.5 The court has discretionary powers to decide who to appoint as restructuring expert.[10] Creditors may at any moment ask the court to dismiss or replace the restructuring expert.[11]

2.3 To whom can a composition be offered?

2.3.1 In principle, the debtor is free to offer the composition to all its creditors, or only to certain (classes of) creditors and shareholders. The debtor can for example decide to carry out a financial restructuring, leaving its trade creditors unaffected.

6 This is the case, for example, if the request by a stakeholder is prompted by the apparent wish to delay an ongoing and promising process and to create a better negotiating position for itself. The request for appointment will – if the debtor finds itself in the required situation – in any case be allowed if it is made by the debtor or is supported by the majority of its creditors.

7 Meanwhile, management and supervisory board members, shareholders and employees of the debtor are required to (pro-actively) provide the expert with all relevant information and provide all necessary cooperation.

8 The vast majority of Dutch businesses qualify as SMEs under the applicable EU criteria. It concerns enterprises (i) which employ fewer than 250 persons and (ii) whose annual turnover in the previous financial year did not exceed € 50 million or the balance sheet total at the end of the previous financial year did not exceed € 43 million.

9 Disputes on this can be submitted to the court, see further under 3.5.

10 The procedural rules for WHOA cases dictate that a request for an appointment contains the names of at least 2 and no more than 3 potential restructuring experts, together with offers for the costs involved in their appointment. Only when all parties involved in the request agree on who the restructuring expert will be, it will suffice to nominate just one restructuring expert.

11 Our expectation is that – just as is currently the case with requests to dismiss or replace a trustee in bankruptcy – such requests will not be readily allowed in practice. The criterion for the liability of a restructuring expert is the same as that for a trustee in bankruptcy.

2.3.2 As already mentioned, one of the most important new features of the WHOA for the Dutch legal practice is that on the basis of the composition, the rights of all creditors – therefore also those with security rights or preferential claims – can be altered with regard to the debtor.

2.3.3 A very important exception to the principle that the composition allows alteration of all claims of creditors on the debtor is that rights stemming from employment agreements cannot be impaired on the basis of the WHOA.

2.4 Contents of the composition

2.4.1 In principle, the debtor is free to design the composition as it deems fit. For example, the composition could involve a deferral or reduction of the debtor's payment obligations and debt-for-equity swaps, whereby claims are converted into equity in the debtor.

2.4.2 The debtor can also alter future obligations by proposing amendments to or termination of an agreement to its counterpart(y)(ies) to a reciprocal agreement (think, for example, of leases that are no longer on market terms). The debtor's counterparty cannot be forced by the court to accept such proposal. In case of refusal the debtor can however, simultaneously with the request to ratify the composition, request the court to be permitted to terminate the agreement with due observance of a reasonable notice period.[12] The only ground on which the counterparty can oppose termination is (by demonstrating) that the debtor is not in a state of unavoidable insolvency, which will then also lead to the request for ratification being denied. Damage claims of the counterparty arising as a result of the amendment to or termination of an agreement may be included in the composition by the debtor. This mechanism therefore provides a powerful tool to the debtor with which to free itself from onerous future obligations.

2.4.3 Under certain circumstances it is also possible for the debtor – by offering a so-called 'broad composition'– to affect the claims of its creditors on its group companies that are jointly or severally liable with or alongside it.[13]

2.4.4 Despite the high degree of flexibility, the composition must comply with certain provisions that the WHOA imposes with a view to protect creditors and shareholders. For example, all creditors and shareholders whose rights will be altered as a result of the composition must have been given the opportunity to express their opinion by means of a vote. With that in mind, the composition needs to at least contain the information that they need to be able to form a well-founded opinion of the debtor's offer. This among others includes:

i) the class division and the criteria applied in that respect;
ii) the financial consequences for the different classes;
iii) the (substantiation of the) expected value that will be achieved by a liquidation in bankruptcy proceedings (the liquidation value);
iv) the (substantiation of the) expected value that will be achieved by the composition (the reorganisation value); and
v) if applicable, the new financing arrangements that the debtor will enter into in order to effect the composition.

2.4.5 The liquidation value and reorganisation value are central concepts within the WHOA. They are determinative as regards the distribution of the value of the debtor's business among the various stakeholders and where relevant, the assessment of the reasonableness and fairness of the composition towards dissenting (classes of) creditors and shareholders (safeguarded by, amongst other things, the *'no creditor worse off rule'* and the *'absolute priority rule'*, to be discussed further in paragraph 2.6). The expectation is therefore that within the context of the WHOA there will be much debate regarding valuation issues, with the various

12 This period commences from the moment the request is allowed. If the court deems the proposed period unreasonable, it may extend it up to a maximum of 3 months.

13 This requires that (i) it concerns rights arising from group guarantees issued or from undertakings for which the group company is liable with or alongside the debtor, (ii) the group company is unavoidably insolvent or will become so if claims on it remain unchanged, (iii) the group company has agreed to the change or the composition is offered by a restructuring expert, (iv) the Dutch court has jurisdiction with regard to the group company and (v) WHOA proceedings have not already been opened with respect to the group company.

groups of creditors being able to submit their own valuation reports and judges engaging external experts to assist them in assessing the reports in case of doubts.

2.4.6 In addition the WHOA gives a creditor who has voted against the composition and is also part of a class that has voted against the composition, the right to demand payment in cash, equal to the liquidation value of its claim (also known as the *'cash out option'*). When drafting the composition this right will therefore have to be catered for. The cash out option is not given to creditors with a right of pledge or mortgage who have provided financing to the debtor on a commercial basis (hereinafter also referred to as: the business financiers). The idea behind this exception is to prevent too great a reliance on the cash out option and as a result failure of a composition process due to liquidity shortfalls, as in most cases it will be the business financiers who can expect a distribution on their claims in bankruptcy. In the meantime, the debtor is not entirely free in its offer to the business financiers: they cannot be forced to accept shares or depositary receipts. Therefore, the most likely scenario is that this group of financiers will be forced to accept an extension to the payment term or that an entirely new debt instrument will be granted.[14]

2.4.7 Another safeguard is that, under the composition, creditors with a small or micro-enterprise[15] have to receive at least 20% of the value of claims relating to (i) the provision of services or goods or (ii) an unlawful act of the debtor. This rule may be deviated from if there is a sufficiently compelling ground to do so. Since the legislator omitted to provide criteria for determining what will qualify as sufficiently compelling, the courts will have to give substance to these criteria. It is however expected that most compositions will provide for financial restructurings, and therefore that this mechanism will play a relatively minor role in practice.

2.5 Class division and voting

2.5.1 Where with compositions in suspension of payments and bankruptcies only one class of (non-preferential) creditors is involved, under the WHOA the debtor can – and under certain circumstances must – place creditors in different classes.

2.5.2 Only creditors and/or shareholders whose rights are affected by the composition are entitled to vote and must therefore be placed in a class. In principle the debtor is free to determine class division. However, creditors and shareholders must be placed in different classes if (i) their rights in liquidation are so different, or (ii) as a result of the composition will become so different, that they do not constitute comparable positions. Positions of creditors are in any case different if they have different ranking on basis of the law (such as creditors with a right of pledge or mortgage, retention of title, right of retention or statutory preference). The offeror of the composition is free to place creditors with the same ranking (e.g. trade creditors and financiers without security rights) in different classes. The idea behind this, is that the interests of these groups of creditors can vary widely, as well as the level of the debtor's dependency on these creditors.[16]

2.5.3 A class approves a composition if the creditors or shareholders in favour represent at least two-thirds of the total value of claims or the subscribed capital within the class. Only the claims or the capital of creditors or shareholders who have voted will count, this to mitigate the consequences of absenteeism. Other than through a composition in bankruptcy and suspension of payments, a majority in number of creditors or shareholders is not required.

2.5.4 It is not necessary for all classes, or even the majority of the different classes, to agree to the composition. The WHOA introduces the option of what is known as the *'cross-class-cram down'*:

14 It follows from legislative history that the no creditor worse off' principle and the absolute priority rule discussed in paragraph 2.6 will protect the business financiers against the imposition of unreasonable conditions: for example, these must be on market terms and the business financier must be sufficiently compensated for the postponed payment.

15 It then concerns undertakings (i) which employed fewer than 50 persons and (ii) whose annual turnover in the previous financial year did not exceed € 10 million or whose balance sheet total at the end of the previous financial year did not exceed € 10 million.

16 If the composition envisages differential treatment of creditors which essentially have equal rights, then either the less favoured class must agree to the composition, or a reasonable ground must exist for the distinction made and the interests of the creditors in the less favoured class aren't prejudiced as a result.

the court can be asked for ratification if at least one class has voted in favour of the composition, and this class is also expected to receive a cash distribution in case of bankruptcy (is *"in-the-money"*).[17]

2.5.5 Secured creditors will only be placed in a separate class for the secured part of their claim, unless this produces no change in the distribution of the value that is achieved by the composition. For the remainder, these creditors will be put in a class of unsecured creditors. When determining the value of the collateral, the liquidation value is used as starting point.[18] Furthermore, a separate class will have to be created for the 'small creditors' as already discussed in paragraph 2.4.7.

2.6 Ratification of the composition

2.6.1 If the has been adopted composition (by at least one in the money class) it can be submitted for ratification, after which the court will set a date for the court hearing during which the ratification request will be heard. The court will have to ratify the composition unless one or more grounds for refusal exist.

2.6.2 There are a number of so-called mandatory grounds for refusal which require the court to reject ratification of its own motion, because (among others): (i) the debtor is not unavoidably insolvent, (ii) the voting procedure is defective or the class composition is incorrect, (iii) performance of the composition has not been sufficiently safeguarded, (iv) within the context of the composition the debtor wishes to enter into a new financing arrangement which would be detrimental to the interests of its joint creditors, (v) the approval of the composition has been reached by means of fraud, by favouring one or more creditors or shareholders eligible to vote or by other unfair means and (vi) other reasons oppose to ratification. This latter ground for refusal provides the court with discretionary powers to reject unfair compositions.

2.6.3 In addition, the court can refuse ratification upon request of a dissenting creditor or shareholder if such creditor or shareholder would be worse off than in a bankruptcy scenario: the so-called *'no creditor worse-off rule'*.

2.6.4 Furthermore, at the request of a dissenting creditor forming part of a dissenting class, the court will also refuse ratification if:

(i) when distributing the reorganisation value under the composition, the statutory or contractually agreed ranking is deviated from to the detriment of this class, unless there is a reasonable ground for doing so and the interests of the creditors or shareholders involved are not prejudiced: this is the ('relative') 'absolute priority rule'; or

(ii) these creditors (with the exception of business financiers) are not offered a cash-out option under the composition.

2.7 Consequences of the composition

2.7.1 The composition is binding on the debtor and all creditors and shareholders with voting rights as soon as it has been ratified: no appeal against the court's decision is possible. The justification for this is that the composition is brought about under the threat of a possible bankruptcy. In order to avoid such, a composition has to be readily implementable. For creditors who are entitled to a distribution under the composition, the ratified composition is an enforceable title.

2.7.2 In this regard, it is good to briefly reflect on the position of third parties who have granted some form of guarantee on behalf of the debtor. Just as with a composition in a suspension of payments or bankruptcy, under the WHOA creditors retain their full claim against a third party acting as guarantor (leaving aside the debtor's group companies in the event as described above in paragraph 2.4.3). This third party in turn cannot seek recourse from the debtor: the WHOA denies it its right of recourse. The guarantor only takes over any rights of the creditor under a composition if and to the extent that the creditor of the guarantor receives more in value in total (under the composition and from the guarantor together) than the amount of its original claim.

17 The 'in the money' requirement is of course dropped if the composition is only offered to 'out of the money' creditors or shareholders.

18 Whether this should then be determined on the basis of a piecemeal sale or the sale of the undertaking as a going concern will depend on which scenario is most likely in bankruptcy.

2.8 Public proceedings versus private proceedings

2.8.1 The debtor has the option to start either private or public proceedings. Both proceedings are initiated by submitting a so-called initiation declaration (*startverklaring*) to the court, in which the choice for private or public proceedings has to be made.[19] The question as to which proceedings must be chosen is one of jurisdiction, as well as strategy.

2.8.2 The public proceedings will be added to the list of insolvency proceedings of the Insolvency Regulation.[20] This among others entails that the Dutch court only has jurisdiction with regard to – and is therefore only available to – debtors whose centre of main interests (COMI) is located in the Netherlands or who have an establishment in the Netherlands.[21] The start of public proceedings is registered in the Central Insolvency Register and court hearings are in principle public. An advantage is that pursuant to the Insolvency Regulation the public proceedings are automatically recognised within the EU. A disadvantage is that rights *in rem* with respect to assets of the debtor located in another Member State are respected in full: a cooling-off period (see further under paragraph 3.3) or the composition will therefore not have effect with respect to the rights to these assets.

2.8.3 Private proceedings are not subject to the Insolvency Regulation, are not published in any register and the court hearings are not public.[22] The Dutch court will assume jurisdiction if the debtor or a stakeholder named in the petition has residence in the Netherlands, or if the matter is otherwise sufficiently connected to Dutch jurisdiction.[23] Private proceedings therefore offer the option of initiating WHOA proceedings with respect to a foreign debtor with a COMI outside the Netherlands. The recognition of private proceedings abroad depends on the international private law of the countries where this is being sought.[24]

2.9 Duration of WHOA proceedings

2.9.1 The WHOA proceedings itself can in principle be completed very quickly. In principle, a composition can be offered at the same time as the initiation declaration. There must be a reasonable period of time between offering the composition and the vote on it: this period depends on the circumstances of the case but has to be at least eight days. After the vote, the offeror must draft a report within seven days, which should include (i) the result of the vote and (ii) the decision whether the offeror will submit the composition to court for ratification. If the composition is submitted for ratification, the hearing on the matter will take place within eight to fourteen days after the composition has been submitted. No strict deadline is set for the court to render its decision on the ratification request, but the expectation is that a ruling will be issued within one to two weeks following the hearing.

2.9.2 The actual duration of the proceedings will in part depend on whether the need exists to involve the court at an earlier stage, for example because a cooling-off period is required or a discussion arises on elements that are important to bring about a composition, such as the class division or the valuation of the debtor's business (see paragraph 3.5). We expect that – as is already market practice, certainly in respect of financial restructurings – creditor groups will enter into negotiations with each other and the debtor at an early stage, and

19 If stakeholders request the court to appoint a restructuring expert, they must also make a choice for one of the two types of proceedings in that same request. The debtor will be given the opportunity to give its views on the choice before the court renders its decision.

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

21 In respect of the public process, it is argued in Dutch legal literature that – similar to private proceedings (see paragraph 2.8.3) – the Dutch courts have jurisdiction in respect of debtors with their COMI outside the EU if such debtors have sufficient connection with the Dutch jurisdiction.

22 Decisions in private proceedings are of course publicly available, albeit on an anonymized basis.

23 The Explanatory Memorandum lists a number of (non-exhaustive) grounds, each of which provides a sufficient link with the Dutch legal jurisdiction: (i) the debtor has its COMI or an establishment in the Netherlands, (ii) the debtor has (substantial) assets in the Netherlands, (iii) a (substantial) part of the debts to be restructured by means of the composition result from obligations that are subject to Dutch law or in which a choice of jurisdiction has been made before a Dutch court, (iv) a (substantial) part of the group to which the debtor belongs consists of companies established in the Netherlands, or (v) the debtor is liable for debts of another debtor in respect of which the Dutch court has jurisdiction.

24 Recognition of the private procedure on the grounds of Regulation (EU) 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 cannot be excluded.

by making use of so-called 'lock-up agreements' will apply the WHOA as a tool to quickly bind obstructionist minorities to an already negotiated composition.

3 WHOA – protection of the debtor and creditors during the ratification process

3.1 In order to successfully complete a ratification process once it has been started, the WHOA provides the debtor access to protective measures that are necessary for the continuation of its business. On the other hand, the WHOA contains safeguards to prevent the rights of creditors from being unnecessarily affected. In addition, it is possible to request the court to render decisions that are important for the success of the composition.

3.2 The observer

3.2.1 Next to the restructuring expert, the WHOA introduces another new officer: the observer. The court may – as long as a restructuring expert has not yet been appointed – appoint an observer on its own initiative if it deems such to be in the interests of the joint creditors.[25]

3.2.2 An observer supervises the drafting of the composition and represents the interests of the joint creditors. The observer reviews the composition and reports his views to the court. He will inform the court immediately if it becomes clear to him that the debtor will be unable to bring about a composition or if the interests of the joint creditors will be adversely affected by the actions of the debtor. The court will then decide on the next steps.

3.3 Cooling-off period and protective measures

3.3.1 The WHOA does not provide for an automatic moratorium that prevents creditors from exercising their rights against the debtor, such as is the case with the US Chapter 11. Both the debtor – once it has filed the initiation declaration and offered a composition or has promised to do this within two months – and the restructuring expert can however request the court to declare a cooling-off period. This can either be a general (effective against all creditors) or a partial (effective against certain creditors) cooling-off period.

3.3.2 The court will approve a request for a cooling-off period if it summarily appears that (i) a cooling-off period is necessary to enable the debtor to continue its business during the composition process, (ii) it is in the interests of the joint creditors and (iii) the interests of individual creditors are not adversely affected. The cooling-off period in principle applies for four months, with the option of an extension of no more than four months. The applicant will then have to convince the court that there is a prospect of reaching a composition.

3.3.3 During the cooling-off period: (i) third parties who have been informed of the cooling-off period or the composition process may not take recourse on assets of the debtor (other than with leave from the court) or proceed to reclaim assets controlled by the debtor, (ii) the court can lift attachments on request and (iii) the hearing of a petition to grant a suspension of payments or to issue a bankruptcy order will be suspended. During the cooling-off period, the financier with security rights (usually a bank) may not disclose and collect pledged claims.

3.3.4 The debtor's powers to use, consume or sell any asset it already possessed before the start of the cooling-off period are retained during the cooling-off period as long as they are exercised as part of normal business operations and the interests of the third parties concerned are sufficiently safeguarded.[26] Defaults that have occurred before the start of the cooling-off period give no grounds to change, suspend or terminate contracts or obligations and as long as security is provided by the debtor this will also not be the case for new obligations arising during the cooling-off period.

3.3.5 If a composition process fails and the debtor is declared bankrupt, a bankruptcy trustee could try to challenge any setoff made by the debtor's

25 An appropriate moment, according to the legislator, would be in the context of a general cooling-off period. In any event, the court will appoint an observer if (i) it has been requested to approve a cross-class cramdown and (ii) no restructuring expert has been appointed.

26 It is unclear when rights are sufficiently safeguarded. In practice, this will probably amount to payment in advance or provision of security.

counterparty on the grounds that these were made in bad faith, given that a bankruptcy was foreseeable. After the initiation declaration has been filed however, setoff will be deemed to have been made in good faith if it takes place within the context of financing the continuation of the business and is not used to curtail unused credit. The aim of this is to enable the debtor to retain control over its current account facility during the composition process.

3.3.6 In addition, the WHOA renders so-called ipso-facto clauses inoperative: contractual provisions that impose legal consequences on starting a composition process, offering a composition or implementing it give no grounds for termination, suspension or cancellation.[27]

3.4 Protection of emergency financing

3.4.1 Under certain circumstances the debtor will require additional financing to enable it to continue its business operations during the composition process. In view thereof the debtor, after it has filed an initiation declaration, can request the court for authorisation to perform necessary legal acts in connection therewith (such as credit support for additional financing). If the debtor subsequently is declared bankrupt, a legal act that has been performed with authorisation cannot be nullified on the basis of fraudulent conveyance (*actio pauliana*). In the context of such request the court will have to establish that the legal act (i) is necessary to enable the debtor to continue its business during the composition process, (ii) serves the interests of the joint creditors and (iii) does not materially prejudice the interests of individual creditors. According to the legislator this essentially requires that at the time authorisation is requested, no knowledge exists that the envisaged legal act will prejudice creditors.[28] It is remarkable that, contrary to the other powers of the debtor within the context of the composition process, the restructuring expert has not been given the power to request authorisation for such legal acts.

3.5 Preliminary decisions and tailor-made provisions by the court

3.5.1 A very important tool for the debtor or the restructuring expert to increase the chance of a successful composition process, is the option to request the court to render a decision on matters that are important within the context of effecting a composition. Relevant aspects include, for example, the division into classes, the admission of creditors to the vote and the determination of the liquidation and reorganisation value. This mechanism offers the possibility to take away uncertainties and to adjust the composition where necessary, as a result of which a very large degree of deal certainty can be achieved.[29]

3.5.2 Furthermore, at the request of the debtor, the restructuring expert or of its own motion, the court may make such provisions and take such measures as it deems necessary to safeguard the interests of the creditors or the shareholders. Next to the appointment of an observer, this may for example include the court requiring that the vote on the composition will take place within a certain period of time or that the debtor informs the court and the creditors on a regular basis of the progress of the composition process.

4 In conclusion

4.1 All in all, the WHOA appears to be a powerful instrument pursuant to which a restructuring can be implemented within a relatively short timeframe and at relatively low cost, especially when compared to the currently available foreign restructuring procedures. The high degree of flexibility, efficiency and up-front deal certainty this framework legislation offers could therefore well lead to the WHOA playing an important role not only in national but also in international restructuring practice.

27 One could think of change-of-control provisions that would stand in the way of a debt-for-equity-swap or a right of termination that is linked to the start of a composition process.

28 The exact parameters of the test to be applied by the court are somewhat unclear. Here too, case law will have to provide a definitive answer. The court will furthermore likely have to engage an expert to assess the information provided by the debtor in this respect.

29 Parties who have not timely made their objections known to the debtor regarding elements of the agreement already known to them, can no longer raise objections within the context of ratification.

About Loyens & Loeff

Loyens & Loeff N.V. is an independent full service firm of civil lawyers, tax advisors and notaries, where civil law and tax services are provided on an integrated basis. The civil lawyers and notaries on the one hand and the tax advisors on the other hand have an equal position within the firm. This size and purpose make Loyens & Loeff N.V. unique in the Benelux countries and Switzerland.

The practice is primarily focused on the business sector (national and international) and the public sector. Loyens & Loeff N.V. is seen as a firm with extensive knowledge and experience in the area of, inter alia, tax law, corporate law, mergers and acquisitions, stock exchange listings, privatisations, banking and securities law, commercial real estate, employment law, administrative law, technology, media and procedural law, EU and competition, construction law, energy law, insolvency, environmental law, pensions law and spatial planning.

loyensloeff.com

Quoted

Quoted is a periodical newsletter for contacts of Loyens & Loeff N.V. Quoted has been published since October 2001.

The authors of this issue are:
Gief de Gruijter (gief.de.gruijter@loyensloeff.com) and
Joris Dunki Jacobs (joris.dunki.jacobs@loyensloeff.com).

Editors

You can of course also approach your own contact person within Loyens & Loeff N.V.

LOYENS & LOEFF

LOYENSLOEFF.COM

As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

Amsterdam, Brussels, Hong Kong, London, Luxembourg, New York, Paris, Rotterdam, Singapore, Tokyo, Zurich