Has Gategroup raised the gate for the WHOA?

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Not many in the restructuring community will have missed that the WHOA, also known as the Dutch scheme, entered into force at the beginning of this year. This new Dutch debtor-in-possession process, which is in many respects similar to the English Restructuring Plan, has already been used to great effect in the Netherlands. However, it is yet to see its first use in a truly international context. This article covers the potential impact the judgment following the convening hearing of Gategroup might have on the use of the WHOA as a tool for implementation of cross-border restructurings.

With the enactment of the *Wet homologatie onderhands akkoord ter voorkoming van faillissement* (the 'WHOA') on 1 January 2021, Dutch practitioners saw a long-cherished wish fulfilled. After a lengthy legislative process, the Netherlands now has its own debtor-in-possession (DIP) process. Its introduction was hastened by the Covid-19 pandemic, but was still long overdue in the view of the Dutch restructuring community. The available Dutch processes of suspension of payments (*surseance van betaling*) and bankruptcy (*faillissement*) both had proven largely ineffective because they do not offer the possibility to impair secured and preferential claims, and result in loss of control to court-appointed insolvency practitioners. Accordingly, financial restructurings of large Dutch companies in recent years were predominantly effected through the English scheme of arrangement (the 'English Scheme') and to a lesser extent the United States' Chapter 11 process.

Although the Dutch legislator's primary aim with the WHOA was to provide an accessible and efficient framework that could be used by both larger groups and small and medium-sized enterprises (SMEs), the process also has been clearly structured as an instrument to effect cross-border restructurings of international groups of companies.[1] Having arrived in the last quarter of its first year in operation, it can already be concluded that the WHOA has proven to be a powerful and efficient instrument – at least in a domestic context – with court processes being completed in a relatively short timeframe (four to five weeks from start to finish) and at relatively low cost (as compared to the UK Scheme and Chapter 11). We are however yet to see the WHOA's first true use as an implementation tool for a cross-border restructuring. Compared to its main competitors on the old continent – next to the tried and tested English Scheme and the relatively new English restructuring plan (the 'Restructuring Plan') – the WHOA is still relatively untested, leading parties to opt for more established methods of implementation.

However, Gategroup ruling has cast some doubt as to the effectiveness of the Restructuring Plan – and potentially also the English Scheme – as an implementation tool for restructurings with an European Union nexus. It has (again) become relevant to consider to what extent the WHOA has the potential to become one of the preferred tools for international (debt) restructurings. As to how the WHOA matches up with the English processes as regards flexibility of the instrument, the answer to that question lies in its potential for recognition. This article will first provide a high-level overview of the WHOA's main features, after which it will focus on (potential issues regarding) its recognition.

The WHOA at a glance

Save for banks and insurers, all debtors are eligible to commence WHOA proceedings. The 'entrance test' is whether, at the time the court is first addressed, the debtor is or can reasonably be expected to become insolvent. Creditors, shareholders or works councils

can also initiate proceedings by requesting the court to appoint a so-called 'restructuring expert', who is independent from the debtor and exclusively authorised to offer a composition on the debtor's behalf.

The WHOA is designed as a 'light touch' process, with court involvement in principle limited to a single court hearing on the ratification of an adopted composition. With a view to enhance deal certainty, the offeror can, however, request to render preliminary judgment on matters that are important within the context of effecting a composition (eg, class division, eligibility to vote).

Furthermore, while the WHOA does not provide for an automatic moratorium, the debtor may request the court to grant a general or specific moratorium against enforcement actions by creditors for a maximum period of eight months (extensions included). Once a moratorium has been granted, termination of contracts or suspension of performance thereunder is allowed neither for existing obligations nor for new obligations (if performance of the latter is sufficiently ensured). *Ipso facto* clauses providing for the termination of contracts based purely upon the commencement or implementation of restructuring proceedings are invalid.

The WHOA also provides for safe harbours for legal acts required for the debtor to continue trading while working on the implementation of a composition (eg, providing credit support for emergency funding). If upfront court approval is obtained, such acts cannot be nullified in case the debtor subsequently goes into bankruptcy. No special priority applies to emergency funding provided in this context (eg, no priming liens).

The debtor may offer a composition to all or some of its creditors. Ordinary, preferred and secured creditors, as well as shareholders, can be bound to the composition. The WHOA also allows for the restructuring of guarantees provided by the debtor's group companies (as long as these companies would otherwise also become insolvent). The only important exception is that employees' rights cannot be compromised through the composition.

The offeror can furthermore propose amendments to contractual arrangements going forward. If such a proposal is refused by its counterparty, the debtor can request the court to terminate the contract with observance of a reasonable notice period (with the debtor being able to compromise the resulting damages claims through the composition).

Creditors and shareholders can – and under certain circumstances must – be divided into different classes. It is left up to the offeror to introduce tailor-made classes. Creditors or shareholders that will have a different ranking in bankruptcy, however, must be placed in different classes. Secured creditors will only be placed in a secured class for the amount that they would have realised in case of a bankruptcy (ie, liquidation value).

Voting takes place per class. Approval of a composition by a class requires agreement of at least two-thirds by value of those voting. If at least one in-the-money class has voted in favour, the composition will be ratified by the court upon the debtor's application, unless certain refusal grounds apply, the most notable being:

- The best interest of creditors test: a dissenting creditor may not receive less under the composition than it would have received in bankruptcy.
- The relative absolute priority rule: a dissenting creditor that forms part of a dissenting class of creditors may not receive less under the composition than it would receive according to its ranking, unless there are reasonable grounds for deviation and if the interests of the creditors in this class are not prejudiced.

A dissenting creditor that forms part of a dissenting class of creditors may not lose the right to receive cash payments of at least the amount that it would have received in bankruptcy. This protection does not apply to secured creditors that have granted financing on a commercial basis; these creditors can, however, refuse a debt-for-equity swap. Small and micro creditors that have claims stemming from either tort, delivery of goods or services will have to receive at least 20 per cent of their claim value, unless there are compelling reasons not to.

Recognition

When ascertaining the WHOA's potential for recognition, it is important to distinguish between the two types of proceedings available to a debtor: the public proceedings and the private proceedings.

The (irreversible) choice between the two must be made once court involvement is required – either when the court is asked to ratify a composition, or when certain protective measures or preliminary decisions are sought. The choice is strategically important as it will be decisive for the manner in which jurisdiction is assumed and recognition can be obtained.

Public proceedings

The intention is to have the public proceedings added to the list of insolvency proceedings (Annex A) of the European Union Insolvency Regulation (EIR)[2], the main advantage being automatic recognition within the EU (save for Denmark). The listing process has already been initiated by the Dutch government and seems to be a formality, as the public proceedings meet the relevant material requirements under the EIR: it is a

public proceeding that is based in the Dutch Bankruptcy Act.[3] However, until public WHOA proceedings have been added to Annex A, the EIR will not apply and recognition will depend on the private international law of the relevant jurisdiction.[4] Recognition in non-EU jurisdictions that have incorporated United Nations Commission on International Trade Law (UNCITRAL) model law should be a relatively straightforward affair.

The start of public proceedings is registered in the Central Insolvency Register and court hearings are public (in principle). Based on the EIR, Dutch courts have jurisdiction regarding debtors whose centre of main interests (COMI) is located in the Netherlands or who have an establishment there.[5]

A distinct disadvantage of public proceedings is that, due to the EIR, rights *in rem* with respect to assets of the debtor located in another Member State are respected in full: neither a cooling-off period nor the composition itself will therefore have any effect with respect to such rights.[6]

Private proceedings

Private proceedings are not published in any register and the court hearings are not public – both reasons why they are not subject to the EIR. 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. The Dutch legislator has provided a (non-exhaustive) list of grounds, each of which provides a sufficient link with the Dutch legal jurisdiction:

- the debtor has its COMI or an establishment in the Netherlands;
- the debtor has (substantial) assets in the Netherlands;
- a (substantial) part of the to-be-restructured debts obligations are subject to Dutch law or a choice of jurisdiction has been made before a Dutch court;
- a (substantial) part of the debtor's group consists of companies established in the Netherlands; or
- the debtor is liable for debts of another debtor in respect of which the Dutch court has jurisdiction.

As opposed to public proceedings, private proceedings therefore offer the option of initiating WHOA proceedings with respect to a foreign debtor with its COMI outside the Netherlands (including EU Member States). Recognition of private proceedings will principally depend on the private international law of the relevant jurisdiction in which recognition is sought.

Comparison and conclusions

Although there are some important differences between the Restructuring Plan and the WHOA, both frameworks have a lot of similarities – unsurprisingly, as the WHOA was heavily inspired by the UK Scheme and the Restructuring Plan is an evolution thereof. Both are highly flexible instruments, offering cross-class cram-down mechanisms, moratoria on enforcement and bans on *ipso facto* clauses. The threshold for assuming jurisdiction in private WHOA proceedings also seems comparable to that of the English processes, relying on the concept of sufficient connection, although time will tell whether Dutch courts will be as flexible in this regard as their English counterparts. Given the similarities between the processes, the choice between either the WHOA or the Restructuring Plan will likely largely depend on their capacity for recognition.

Discussions in the restructuring space regarding the qualification of the Restructuring Plan have (for now) come to an end as a result of the judgment in the convening hearing on Gategroup's restructuring, in which it was effectively held that the Restructuring Plan constitutes an insolvency proceeding.[7] As a result, the Restructuring Plan falls outside of the scope of the Lugano Convention (to which the United Kingdom has requested to accede) and recognition in most of the EU Member States has become a complicated matter.

As regards recognition of the Restructuring Plan within the Dutch jurisdiction, this as such has now become impossible as Dutch law does not recognise insolvency proceedings outside of the EIR.[8] The Netherlands has no equivalent to the US Chapter 15 or the UK Cross Border Insolvency Regulations, and has not adopted the UNCITRAL Model Law.

In respect of the English Scheme, pre-Brexit Dutch practitioners generally assumed that it would likely be recognised by Dutch courts on the basis of the Brussels Regulation Recast and otherwise on the basis of general Dutch private international law.[9] A key factor in arriving at that conclusion was that it was generally held by English courts that the English Scheme wasn't an insolvency proceeding.[10] In *MAB Leasing*, the question was raised whether an English Scheme amounts to an insolvency-related event under the Cape Town Convention.[11] The matter ultimately did not have to be determined by the court, but it considered there was a very strong reason to think that this was not the case. However, it seems that, on the basis of the Gategroup judgment, it could be argued that the English Scheme constitutes an insolvency proceeding if the debtor is technically insolvent.[12] Together with the fact that that recognition of an English Scheme on the basis of Dutch

private international law has not yet been confirmed in case law, this creates uncertainty regarding its capacity for recognition in the Netherlands (and comparable jurisdictions) and it will be interesting to see how the market reacts.

Where it concerns recognition of WHOA proceedings, the distinction between public and private proceedings is of course most relevant. It seems that debtors with their COMI in the Netherlands will be incentivised to initiate public proceedings. Not only will these be automatically recognised in the EU, recognition in the US (Chapter 15) and UK (UK Cross Border Insolvency Regulations) – the most relevant jurisdictions given the governing law of most debt instruments – should also not cause any issues. The Gibbs Rule will, however, remain a potential impediment to the successful use of the WHOA for debt restructurings where English law governed debt is involved.

When looking at recognition of private proceedings, it seems likely that these will face the same issues as the Restructuring Plan. The question has been raised in Dutch literature whether private proceedings can be automatically recognised in the EU pursuant to the Brussels Regulation Recast. The majority consensus seems to be that private proceedings fall outside of the scope of the Brussels Regulation Recast,[13] but there are those who argue that this is not necessarily the case.[14] In essence, the question is whether private proceedings fall under the so-called 'insolvency exception' of the Brussels Regulation Recast. Ultimately, this will be a matter for the EU High Court of Justice to decide: until then, it would seem safer not to rely on this form of recognition in cross-border restructurings. At least for now, a practical solution to recognition issues faced by the available Dutch and English frameworks might be to run parallel processes.

Notes

1 During the WHOA's legislative process, the EU Directive (EU) 2019/1023, requiring Member States to implement a minimum framework for out-of-insolvency restructuring regimes, was issued. Although not its primary aim, the WHOA (largely) implements this directive.
2 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast).
3 Art 1.1, EIR
4 In a recent ruling regarding the ratification of a suspension of payments proceeding, the court explicitly considered that the WHOA was not a relevant alternative for the debtor given that it had not yet been added to Annex A.
5 Jurisdiction in public proceedings can in principle also be assumed in respect of a debtor with its COMI outside of the EU, based on the principle of sufficient connection with the Dutch jurisdiction, but these proceedings will not benefit from automatic recognition under the EIR.
6 Art 8, EIR
7 *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), paragraph 137.
8 Dutch Supreme Court, 31 May 1996, ECLI:NL:HR:1996:ZC2091, *NJ* 1998/108 (*Coppoolse/De Vleeschmeesters*) and Dutch Supreme Court 19 December 2008, ECLI:NL:HR:BG3573, NJ 2009/456 (Yukos). In the latter judgment, the Supreme Court clarified among others that creditors who have attached assets in the Netherlands can continue to take recourse on such assets in spite of a foreign bankruptcy proceeding. In practice, Chapter 11 rulings are, however, recognised by creditors with a US nexus given the contempt of court provisions.
9 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. See eg: LP Kortmann and PM Veder, 'The Uneasy Case for Schemes of Arrangement under English Law in relation to non-UK Companies in Financial Distress: Pushing the Envelope?', in: P Omar (ed), *Festschrift in Honour of Professor Ian Fletcher QC, Special edition of the Nottingham Insolvency and Business Law e-Journal*, 2015 (3) NIBLeJ 13, 259-260; and NED. Faber & others (eds.), *Overeenkomsten en insolventie*, Kluwer 2012, 259–260.
10 Eg, *Re Magyar Telecom BV* [2014] BCC 448; *Re Rodenstock GmbH* [2012] BCC 459; *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch).
11 *Re MAB Leasing Ltd* [2021] EWHC 152 (Ch) and [2021] EWHC 379 (Ch).
12 *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), paragraph 118.
13 AM Mennens, 'Het dwangakkoord buiten surseance en faillissement,' Deventer: (Wolters Kluwer, 2020), 790; PM Veder, 'Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement', (FIP, 2019/219), para 3.1.
14 RD Vriesendorp, W van Kesteren, E Vilarin-Seivane and S Hinse, 'Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union' (NIPR 2021) Afl.1, para 4.2.4.

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