

Mapping Preventive Restructuring Frameworks and the EU Preventive Restructuring Directive for the JCOERE Project

Country Report

The Netherlands

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The Dutch Perspective on Restructuring²

The Dutch suspension of payments is a formal insolvency proceeding, in place since the late 19th century, with the aim of restructuring viable but distressed companies and businesses. Currently, a legislative process is on-going for adopting the *Wet homologatie onderhands akkoord* (Act on confirmation of extrajudicial restructuring plans, hereafter referred to as the “WHOA”), legislation that represents a significant reform of the current corporate restructuring proceeding. The WHOA has been drafted in anticipation of the Preventive Restructuring Directive 2019/1023 (hereafter referred to as the “PRD”) and is inspired by both Chapter 11 of the US Bankruptcy Code and the UK Scheme of Arrangement. It has been prepared not only in view of and in line with the PRD, but also represents a shift in policymaking in the Netherlands with the aim of promoting the possibilities for restructuring economically viable but financially distressed businesses. The WHOA includes a distinction between a non-public restructuring process, where there is no notification of the proceeding in the insolvency and trade registers, and a public restructuring process, which does involve such notifications. Only the latter will be included in Annex A of the EIR Recast. The restructuring plan may regard the rights of both creditors and shareholders, although it does not include workers’ claims.³ The WHOA provides for a cross-class cram-down for the first time in Dutch insolvency law.

PART 1: The General Context of Preventive Restructuring

Function and Aims of Insolvency and Rescue

In the Netherlands, restructuring and insolvency are primarily, but not exclusively, dealt with in the *Faillissementswet* (Dutch Bankruptcy Act, hereafter referred to as the “Dutch BA”). The Dutch BA was originally adopted in 1893 but has undergone numerous reforms during the intervening period. In 2012, the Dutch Minister of Security and Justice presented a legislative agenda for a reform of the Dutch BA,

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² This chapter states the law and legislative developments as at 1 January 2020, all sources have been checked at the same date. An English translation of the Dutch Bankruptcy Act is provided, for instance, by Warendorf Dutch Civil and Commercial Law Legislation, The Dutch Bankruptcy Act, available at: www.wolterskluwer.nl/shop/online/warendorf-dutch-civil-and-commercial-law-legislation/NPWDCCLLL/. Citations of the DBA have been taken from this translation.

³ WHOA, art 369(4).



which included a proposal for the WHOA.⁴ On 5th July 2019, the bill for the WHOA was presented to Parliament.⁵ Parliament and the Senate may adopt the WHOA in 2020 with it entering into force some time in 2020/2021, but its fate at the time of writing is still uncertain. The WHOA provides for a proceeding inspired by both the US Chapter 11 Bankruptcy Code and the UK Scheme of Arrangement. While the WHOA was drafted to align with the PRD, a separate legislative proposal will be prepared to implement the PRD in full. Following the Minister's announcement it appears that this implementation will be achieved by amending the Dutch *surseance van betaling* (suspension of payments proceeding).⁶

The WHOA applies to both creditors and shareholders. However, it excludes employees from its scope, so the ordinary provisions of labour law continue to apply to employees.⁷ This exception to article 10(1)(c) of the PRD is also in line with recital 48 PRD and means that the protection afforded to workers by virtue of the requirements in article 13 of the PRD is already met.

A notable characteristic of the WHOA is that it provides for two variations: a public and a non-public WHOA.⁸ Only the public WHOA is envisaged to be included in Annex A of the European Insolvency Regulation 2015/848 (hereafter referred to as the "EIR Recast") and benefit from automatic recognition in the EU.⁹ For the public WHOA, once the court issues a decision in the proceeding for the first time, notification of proceeding in the insolvency register and trade register are mandatory.¹⁰ In contrast, with a non-public WHOA there is no requirement for public notification of the proceeding. Furthermore, all requests to the court during the WHOA will be handled in chambers.¹¹

Existing Legislative Frameworks

Currently, the Dutch BA provides for three types of formal insolvency proceedings: (i) *faillissement* (bankruptcy), (ii) *surseance van betaling* (suspension of payments) and (iii) *schuldsanering natuurlijke personen* (debt restructuring for natural persons). Of those, only the suspension of payments can be considered a preventive restructuring proceeding. With that said, it is worth noting that, in practice, the Dutch bankruptcy proceeding is often used to facilitate the restructuring of the businesses of insolvent debtors.

The suspension of payments procedure aims to facilitate the continuation of imminently insolvent, but viable, companies. It is only available at the request of the debtor¹² and provides the debtor with the time needed to reorganise its business by staying ordinary non-secured creditors, thereby allowing the debtor to regain its viability. The suspension of payments can be requested when the debtor expects (or foresees) an inability to continue paying its debts.¹³ Upon receipt of the request by the court, the suspension is automatically granted for a provisional period, provided certain formal requirements are

⁴ The first draft bill was presented in 2014 – the *Wet Continuïteit Ondernemingen II* (Business Continuation Act II) – and after extensive public consultation, it was revised, becoming the *Wet homologatie onderhands akkoord ter voorkoming van faillissement*, which was also made available for a public consultation. This draft bill and an accompanying explanatory memorandum are available here: www.internetconsultatie.nl/wethomologatie.

⁵ The bill WHOA (*Kamerstukken II* 2018/19 35 249, nr. 2) is available here: www.tweedekamer.nl/downloads/document?id=95d6b9b1-1762-43cb-9ea7-05d22932c749&title=Voorstel%20van%20wet.pdf. The explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249, nr. 3) is available here: www.tweedekamer.nl/downloads/document?id=acb25efc-c34d-4e46-ba6e-c2df8917b3eb&title=Memorie%20van%20toelichting.pdf. Unofficial translations have been prepared by several law firms, see for instance: www.debrauw.com/cerp. The translated provisions of the WHOA in this report have been taken from this translation. See for further developments on the legislative process of the bill with Parliament: www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35249.

⁶ Besides the suspension of payments, there are no specific formal or pre-insolvency restructuring proceedings available in the Netherlands.

⁷ WHOA, art 369(4).

⁸ WHOA, art 369(6): "On the basis of this section, a restructuring plan can be prepared and offered through a non-public procedure outside bankruptcy or through a public procedure outside bankruptcy."

⁹ With the exception of Denmark.

¹⁰ WHOA, art 370(4) and 371(2).

¹¹ WHOA, art 369(9) and 383(1). In case of a non-public WHOA, it is a more private proceeding, but not necessarily a fully confidential proceeding. By law, parties are not bound to confidentiality on a non-public WHOA.

¹² The suspension of payments is not available to natural persons who do not conduct an independent profession or business (Dutch BA, art 214(4)).

¹³ Article 214(1) Dutch BA states that (provisional) suspension of payments can be granted to the debtor who expects (foresees) that he will be unable to continue the payment of his debts.

met.¹⁴ Following this provisional period, the court will decide¹⁵ if granting a final suspension of payments is warranted in the circumstances. The maximum duration of the final suspension is 1.5 years, subject to extensions.¹⁶ Upon granting the provisional suspension of payments, the court will appoint a joint administrator and, although optional, in practice also a supervisory judge.¹⁷

In a suspension of payments, the debtor will prepare and offer a restructuring plan, or *composition*, to the ordinary non-secured creditors. This plan must be adopted by the creditors and be confirmed by the court, which results in it being binding also on the dissenting ordinary non-secured creditors. In practice, however, this proceeding is perceived to be a forerunner for requesting the opening of bankruptcy proceedings.¹⁸

In addition to formal insolvency proceedings, in certain circumstances it is possible to bind a dissenting creditor in an out-of-court composition. A debtor may propose the composition to its creditors (*buitengerechtelijk akkoord*). In practice, adoption of such a composition would require the full support of the affected creditors, resulting in it often being frustrated by hold-out creditors and thereby significantly limiting its use. Limited exceptions to the consensual nature of an out-of-court composition have been accepted when the rejection an out-of-court composition constitutes abuse of power.¹⁹ The Supreme Court has ruled that this criterion also applies when the creditor pursues payment of a larger part of his claim from the debtor than what other creditors obtained in the out-of-court composition, which the creditor rejected.²⁰

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the PRD

The Stay of Individual Enforcement Actions

Outside formal insolvency proceedings, there is no stay available for debtors, except where parties voluntarily agree to an informal standstill. The Dutch suspension of payments is, in effect, a stay.²¹ It functions as outlined above and is provisionally granted on receipt of a court application and granted in the longer term on court adjudication of that application. The stay is, for a variety of reasons, outside of the terms of the PRD. First, the duration of the suspension is not limited to a maximum of 12 months. Second, the Dutch BA excludes certain classes of creditors from being covered by the suspension of payments, namely secured and preferential creditors.²²

Affected creditors can apply to have the provisional suspension of payments set it aside within 8 days of the judgment, however the only accepted ground for this application is that the court lacks

¹⁴ The Dutch BA gives no specified time for this provisional suspension of payments. Court procedural rules state that within two to four months after granting the provisional suspension of payments, a hearing will be held regarding granting the final suspension of payments. See Dutch BA, art 215(2) and *Procesreglement verzoekschriftprocedures insolventiezaken rechtbanken* (2019), at 2.3.1, available at: www.rechtspraak.nl/SiteCollectionDocuments/Procesreglement-verzoekschriftprocedures-insolventiezaken-rechtbanken-2019.pdf.

¹⁵ Before deciding, the court will hear in chambers the debtor, supervisory judge (if appointed), the joint administrator, and creditors (Dutch BA, art 218(1)).

¹⁶ Dutch BA, art 223(1) and (2).

¹⁷ Dutch BA, art 215(2).

¹⁸ See for instance *Kamerstukken II* 2001/02, 24 036, nr. 238, p. 1.

¹⁹ Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7799 (*Payroll*), at 3.5.2 and 3.5.3. The abuse of power exception is available under exceptional circumstances only. The situation that a creditor is aware of the pressing financial situation of the debtor or an imminent bankruptcy will in general not justify the exception. Neither is a majority of creditors that are willing to accept the out-of-court composition sufficient to characterize the rejection of another creditor as abuse of power.

²⁰ Supreme Court 24 March 2017, ECLI:NL:HR:2017:485 (*Mondia/V&D*) at 3.4.3 and 3.4.4.

²¹ Dutch BA, art 214.

²² Dutch BA, art 232. This appears to conflict with Article 6(2) of the PRD, unless in line with Article 6(4) of the PRD a justification can be made, which is questionable. However, Article 241a DBA allows the court, at the request of any interested party or ex officio, to order an additional stay (*afkoelingsperiode*, a so-called ‘cooling-off’ period) against third parties preventing the exercise of rights against the debtor’s estate. Also, at the request of the debtor, the court granting the suspension of payments may order for this additional stay. The additional stay regards, in particular, those creditors that are not affected by the (automatic) stay, with the exception of the *boedelschuldeisers* (creditors of claims due by the insolvent debtor’s estate, also referred to as ‘post-commencement claims’). The additional stay can be granted for a maximum of two months, and can be extended for a maximum of two months

international jurisdiction under the EIR Recast.²³ Dissenting creditors in the final suspension of payments can appeal the relevant judgment, again within a timeframe of 8 days. Otherwise, the stay ends when the suspension is withdrawn at the recommendation of the supervisory judge, or at the request of the joint administrator, or at the creditors' request or by the court *ex officio*.²⁴ For the latter, the court can exercise its power to end the suspension of payments for a number of reasons, including bad faith, prejudice to creditors, or that the continuation of the suspension of payments is no longer desirable.

The WHOA provides for a stay in line with the provisions contained in the PRD. Article 376 of the WHOA provides for a temporary stay, which is applicable when the debtor or the court appointed *herstructureringsdeskundige* (hereafter referred to as the “plan expert”)²⁵ has proposed a restructuring plan. The debtor or plan expert may request a temporary stay of individual enforcement actions, which will be initially granted for no more than four months with the possibility of extension. The maximum duration of the stay is no more than eight months and the WHOA also provides for the stay to be lifted.²⁶

The Adoption of Restructuring Plans

In the out-of-court composition, all affected creditors are entitled to vote. By its very nature as an out-of-court procedure, the verification of the claims in the out-of-court composition is done by the debtor and creditors themselves. In the event of a dispute, the matter is referred to dispute resolution, either in- or out-of-court.

In the suspension of payments, the restructuring plan will be offered to all creditors against whom the suspension is effective.²⁷ Those creditors are all entitled to vote on the plan, which is not limited to only the affected creditors. Accordingly, the WHOA proposes that – in line with the PRD – all creditors and shareholders whose rights are amended on the basis of the restructuring plan shall be eligible to vote.²⁸

Currently, in the suspension of payments, the entitlement of a creditor to vote is contingent on their claim being submitted to the joint administrator and accepted to the list of claims.²⁹ When a claim and consequently the right of the creditor to vote is disputed, in the first instance, the joint administrator will confer with the creditor.³⁰ If the matter remains unresolved, the supervisory court (if appointed) or the court will adjudicate on the validity of claim.³¹ In general, the admission of claims for the purpose of voting is not performed by a judicial or an administrative authority. Furthermore, it should be noted that the Netherlands does not provide for the separation of creditors into classes for the purpose of voting in a suspension of payments. The WHOA addresses this issue with article 374:

“Creditors and shareholders are allocated in different classes if the rights they would have in the event of liquidation of the debtor's assets in bankruptcy or the rights they are offered on the

²³ Dutch BA, art 215a(1).

²⁴ Dutch BA, art 242(1).

²⁵ Also sometimes referred to as ‘restructuring expert’.

²⁶ Article 376(10) WHOA provides: “If the first and fourth paragraphs are no longer complied with, the court will terminate the stay. It may do so *ex officio* or at the request of the debtor, the plan expert if appointed, or the third parties, attaching party and creditor who filed the bankruptcy petition as referred to in paragraph 2.”

The stay will also be lifted if it is not extended per Articles 376(5) and (6) of the WHOA: “5. If the debtor or the plan expert, if appointed, requests this before the maximum period of the stay, as referred to in paragraph 2, has expired, the court may extend the period for a term to be determined by it, provided that the total period, including extensions, may not exceed eight months. In its request, the debtor or the plan expert has to argue convincingly that important progress has been made with regard to the creation of the restructuring plan. This is deemed to be the case in any event if a request for court confirmation of the restructuring plan, as referred to in Article 383(1), has been filed.

6. Notwithstanding paragraph 5, the stay will be not extended if: (a) the stay has been requested in relation to a non-public procedure outside bankruptcy, and (b) the debtor's centre of main interest, as referred to in Article 3(1) of the regulation as referred to in Article 5(3), has been moved from another member state within three months prior to the moment the court has handed down a decision on the basis of this section for the first time.”

²⁷ Dutch BA, art 252, this includes, in principle, only the ordinary unsecured creditors.

²⁸ WHOA, art 381(3).

²⁹ Dutch BA, art 257-263 and 266-267. A creditor that is not affected by the suspension of payments may not submit his claim. If the claim is still submitted, the suspension of payments will also apply to this claim. Any priority, lien, pledge or mortgage related to this claim will be forfeited if the claim is not withdrawn before voting (Dutch BA, art 257(2)).

³⁰ Dutch BA, art 258.

³¹ Dutch BA, art 267.

basis of the restructuring plan are so different that there is no comparable position. In any event, creditors or shareholders who, in accordance with Title 10 of Book 3 of the Civil Code, another law, or a set of rules or agreement based thereon rank differently in relation to the recovery of the debtor's assets, are allocated in different classes.”

In the suspension of payments, an official report (*proces-verbaal*) of the meeting at which creditors vote is prepared. This report includes, but is not limited to, a list of the creditors in attendance and their votes. It is then authenticated by the supervisory judge or interim relief judge (*voorzieningenrechter*) and the registrar.³² This does not, even when applying the derogation of the second paragraph of article 9(5) of the PRD, provide for a general examination of the voting rights by a judicial or administrative authority.³³ The WHOA provides for *ex officio* examination of class formation by a relevant authority in line with the PRD.³⁴ The debtor or the plan expert can also request the court to assess, among other things, the validity of the class formation and voting rights prior to putting the restructuring plan to a vote,³⁵ which is designed to create plan certainty early on in the process.³⁶

In the suspension of payments, a vote in favour will be carried when at least a simple majority of the relevant accepted creditors representing not less than half of the accepted claims, vote in its favour.³⁷ Even where the requisite majority is not achieved, a court can still confirm the plan if two requirements are met:³⁸

- (i) three quarters of the relevant creditors who appeared, voted in favour of the restructuring plan; and
- (ii) the rejection of the restructuring plan results from one or more creditors having voted against it in a manner constituting conduct without good reason, taking into consideration all circumstances, in particular the amount that they may be expected to receive if the debtor were liquidated instead.

Under the WHOA, a class will have adopted the restructuring plan when a group of creditors representing at least two-thirds of the total amount of claims belonging to the creditors who have cast a vote in that class voted in favour.³⁹

Confirmation of Restructuring Plans

In both the suspension of payments and the WHOA, court confirmation is a requirement in order to bind the relevant parties. Articles 269b-273 of the Dutch BA govern the confirmation of the restructuring plan in the suspension of payments. In it, the court will consider the composition for confirmation, referred to as *homologatie*, once the composition has been accepted by the creditors in accordance with article 268s or 268a of the Dutch BA.⁴⁰

When confirming or rejecting a plan in the suspension of payments, the court should consider a number of factors, namely:

- (i) if the assets of the estate exceed the amount stipulated in the composition;

³² Dutch BA, art 269(1).

³³ Compare also: B. Wessels, *Insolventierecht, Surseance van betaling (Deel VIII)*, 2014 (4th edition), para. 8322 et seq and 8351.

³⁴ Explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249, nr. 3, p. 76).

³⁵ WHOA, art 378(1)(b) and (c). Creditors and shareholders do not have this right, however, they are obliged to notify the debtor or plan expert of any grounds of refusal he has become aware of (WHOA, art 383(9)). This will allow the debtor, possibly with a request based on Article 378(1) of the WHOA, to find a solution.

³⁶ This should prevent that when the plan has been submitted for court confirmation it can still be rejected on the grounds related to class formation and voting rights. See WHOA, art 384(2)(c) and explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249, nr. 3, p. 6, 19 and 57).

³⁷ Dutch BA, art 268. ‘Relevant creditors’ refers to recognised and admitted creditors.

³⁸ Dutch BA, art 268a.

³⁹ WHOA, art 383(7). A class of shareholders has approved the restructuring plan when a group of shareholders together representing at least two-thirds of the total amount of issued capital belonging to the shareholders who have cast a vote in that class, voted in favour (WHOA, art 381(8)).

⁴⁰ Dutch BA, art 269b(1) and 271.

- (ii) if performance of the composition is insufficiently secured;
- (iii) if the composition was realized by fraudulent acts or undue preference of one or more creditors or other unfair means, regardless of whether the debtor or any other party co-operated therein; and
- (iv) if the remuneration and disbursements of the experts and the joint administrator have not been paid to the joint administrator or if no security has been provided for.⁴¹

Although the suspension of payments does not specifically provide for the separation of classes, the court can reject a plan if it is unfair to creditors on the basis of article 272(3) of the Dutch BA.⁴² The Dutch BA does not provide an explicit best-interest-of-creditors test for the suspension of payments, however, putting forward a composition that violates this test may be a reason for its rejection on the basis of the same article.⁴³ The regulations pertaining to the suspension of payments do not specify what must be included in the plan. Where relevant, the plan may include new finance to facilitate the restructuring. The fact that the interests of (certain) creditors are unfairly prejudiced can be a ground for refusal according to article 272(3) of the Dutch BA.⁴⁴ The legislation does not refer to the prospect of preventing insolvency as a condition for confirmation, however, the court may reject the plan if performance of the composition is insufficiently secured as stated in article 272(2)(2) of the Dutch BA.⁴⁵

Article 386 of the WHOA requires court confirmation of a plan in order to make it binding on all affected (dissenting) creditors and shareholders. Article 383(1) of the WHOA enables the debtor, or where relevant the plan expert, to submit the restructuring plan for court confirmation, when at least one class of creditors has adopted it. Articles 383 and 384 of the WHOA regulate the confirmation of a restructuring plan.

The WHOA provides several grounds for refusal of confirmation of the restructuring plan, which correspond to article 10(2) of the PRD. Article 384(2) WHOA provides for general grounds for refusal that are aimed at securing a just decision-making process, which the court will examine *ex officio*⁴⁶ or upon the request of creditors or shareholders.⁴⁷ In addition, article 384(3) and (4) WHOA provides for additional grounds for refusal of confirmation based on infringements of the fairness of the restructuring plan. These grounds will be examined by the court only when put forward by a dissenting creditor or shareholder, and for article 383(4) WHOA (non-adherence to the best-interest-of-creditor test), only if this creditor or shareholder is allocated to a class that did not approve the restructuring plan.⁴⁸ In short, they provide that the court will examine *ex officio* whether the restructuring plan has been adopted by the required majority and class(es).⁴⁹ Further grounds for its refusal include, but are not limited to, that:

- (i) Creditors with sufficient commonality of interest (rank) have been treated unequally;⁵⁰
- (ii) Notification of the restructuring plan has not been given in accordance with national law;⁵¹

⁴¹ Dutch BA, art 272(2). Per art 272(3), the court can refuse the confirmation of a composition on any other ground either upon request or *ex officio*.

⁴² The Dutch BA has specific rules for informing creditors of the suspension of payments and the proposed restructuring plan. The rules are laid out in Dutch BA, art 215, 253, 256(1-2). Failure to adhere to these rules can be a reason for rejecting the confirmation on the basis of Dutch BA, art 272(3).

⁴³ This has been argued, for instance, by RD Vriesendorp and FMJ Verstijlen, ‘Enige opmerkingen over Polak-Wessels, Insolventierecht’ (2004) 6603 WPNR 1020.

⁴⁴ See for instance Court of Appeal Amsterdam 8 November 1938, ECLI:NL:RBAMS:1938:69, in which it is stated that a request for confirmation can be rejected when the composition would bring great unfairness to creditors.

⁴⁵ It may also be a ground for refusal under Dutch BA, art 272(3).

⁴⁶ The explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249 nr. 3, p. 76) states that this *ex officio* refusal to confirm the restructuring plan will take place only when it is immediately clear for the court that one or more of the general grounds for refusal apply.

⁴⁷ Explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249 nr. 3, p. 17 and 76-77).

⁴⁸ Explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249 nr. 3, p. 78 et seq).

⁴⁹ WHOA, art 384(2)(b) and 383(1).

⁵⁰ WHOA, art 384(2)(c), (d) and (g), WHOA, art 384(2)(c) refers to Article 374 of the WHOA dealing with the formation of classes.

⁵¹ WHOA, art 384(2)(b) and (c).

- (iii) There is a lack of adherence to the best-interest-of-creditor test;⁵² or
- (iv) The performance of the restructuring plan is insufficiently secured.⁵³

Where the plan contains necessary new financing, the court may reject it on that basis that it unfairly prejudices the interests of creditors.⁵⁴ It also appears that the WHOA provides for the rejection of a plan when it would not have a reasonable prospect of success.⁵⁵

Cross-Class Cram-Down

At present, neither the out-of-court composition, nor the suspension of payments, includes a cross-class cram-down. The WHOA will, however, introduce the relevant provisions and implement the criteria of article 11(1)(b) of the PRD.⁵⁶ The WHOA also provides for the circumstances in which a court should reject a plan. These primarily relate to issues of fairness in the treatment of creditors under the plan, with a clear connection to the importance of preserving priority of entitlements. It is inspired on the Absolute Priority Rule applied in the US Chapter 11 Bankruptcy Code, allowing, however, for some deviation.⁵⁷

According to article 384(4)(a) of the WHOA, the court can refuse to confirm a plan, if:

“At the request of one or more creditors or shareholders eligible to vote, who did not themselves approve the restructuring plan and were allocated in a class which did not approve the restructuring plan or whose admittance to the vote was wrongfully refused and who should have been allocated in a class which did not approve the restructuring plan, the court will refuse a request for court confirmation of a restructuring plan which was not approved by all classes, or if

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(a) the distribution of the value realised with the restructuring plan deviates from the ranking in the case of recourse against the debtor's assets in accordance with Title 10 of Book 3 of the Civil Code; another law; or a set of rules or agreements based thereon, to the detriment of the class that did not approve unless there are reasonable grounds for such deviation and the creditors or shareholders concerned are not harmed in their interests as a result; (...).”⁵⁸

Thus, the proposed WHOA already complies with the tests offered for plan confirmation with a cross-class cram-down from the PRD.

Protection of New and Interim Financing

There is no special protection for interim finance in the suspension of payments framework; accordingly, interim finance provided during the suspension of payments may be subject to transaction avoidance actions in subsequent bankruptcy proceedings.⁵⁹ The WHOA, if passed, will not grant super priority status to new and interim financing. It will, however, increase protection for interim financing by ensuring that it is not considered prejudicial to the general body of creditors, assuming certain conditions are satisfied. Article 42a of the WHOA states:

“A legal act performed after the debtor has filed a statement with the court registry as referred to in Article 370(3), or a plan expert has been appointed by the court in accordance with Article 371, may not be annulled on the grounds of the previous article, if the court has granted authorisation for that legal act at the request of the debtor. The court honours this request if:

⁵² WHOA, art 384(3).

⁵³ See for instance WHOA, art 384(2)(e).

⁵⁴ WHOA, art Article 384(2)(f).

⁵⁵ WHOA, art 384(2)(e) and (i).

⁵⁶ WHOA, art 383(1) WHOA.

⁵⁷ Explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249, nr. 3, p. 17).

⁵⁸ WHOA, art 384(4)(a).

⁵⁹ During the suspension of payments, it is the responsibility of the (existing) financiers, the debtor and the joint administrator to decide on the payment of such debts.

- (a) the performance of the legal act is necessary for the debtor's business to continue during the preparation of a restructuring plan as referred to in the said Articles, and
- (b) at the time the authorisation is granted, it is reasonable to assume that the interests of the debtor's joint creditors would be served by such an act, while none of the individual creditors would be materially harmed in their interests.”

The proposed article 42a of the WHOA aims to prevent the application of transaction avoidance in bankruptcy proceedings, which is contained in article 42 *et seq* of the Dutch BA.⁶⁰

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the PRD

The Threshold of Insolvency

The relevant threshold for insolvency is dependent on the particular insolvency proceeding in question. In bankruptcy, a liquidity test is applied. It should be summarily proven that the debtor is unable to pay its debts in order to be declared bankrupt.⁶¹ In practice, as a part of this test there should also be plurality of creditors (at least two outstanding debts), and at least one of the debts should be due and payable. Where requested by a creditor, the creditor must have a claim against the debtor. For the suspension of payments, a liquidity test is also applied. The threshold is identified as the debtor being in such circumstances as it foresees that it will be unable to continue paying its debts as and when they become due and payable.⁶²

Debtor in Possession

In the Netherlands, the suspension of payments procedure always requires the appointment of a *bewindvoerder* (hereafter referred to as a “joint administrator”), whose role it is to conduct the administration of the debtor’s affairs together with the debtor itself.⁶³ For any act of disposal related to the estate, the debtor must have the co-operation, authorisation, or assistance of the joint administrator.⁶⁴ Should the debtor fail to appropriately include the joint administrator in its decision-making after commencement of the suspension of payments, the joint administrator can act to prevent any loss in the estate.⁶⁵ The estate will not be liable for unauthorised obligations entered into by the debtor.⁶⁶ Arguably, the suspension of payments could be considered a debtor in possession proceeding since it leaves the debtor partially in possession.

The WHOA provides for a proceeding in which, in principle, no involvement of an insolvency practitioner is required, except for certain situations.⁶⁷ A creditor, shareholder, works council, or the debtor may request the appointment of a so-called plan expert to propose a restructuring plan. The plan expert will negotiate a restructuring plan with the creditors and shareholders on behalf of the debtor.⁶⁸ There is also a provision that empowers the court upon request or at its own discretion to take specific measures necessary for the protection of the interests of the creditors and shareholders.⁶⁹ This could

⁶⁰ As new finance provided under a confirmed restructuring plan is exempted from the paulian action (application of transaction avoidance), the amendment does not apply to it.

⁶¹ Dutch BA, art 1 and 6(3).

⁶² Dutch BA, art 214(1).

⁶³ Dutch BA, Art 215(2) and 228.

⁶⁴ Dutch BA, Art 228.

⁶⁵ Dutch BA, art 228(1).

⁶⁶ Dutch BA, art 228(2).

⁶⁷ This is in line with the requirements of the PRD, art 5(3).

⁶⁸ WHOA, art 371(1).

⁶⁹ WHOA, art 379(1).

include the appointment of a specific practitioner in the field of restructuring referred to as an ‘observer’, in case no plan expert has been appointed yet.⁷⁰

When the suspension of payments proceeding is commenced, a joint administrator is appointed by the court.⁷¹ When the debtor is no longer capable of meeting current and new obligations as they fall due, the joint administrator will ask for conversion of the suspension of payments proceedings in bankruptcy proceedings, which ends the phase where the debtor is in possession. As stated in the WHOA, appointment of either an observer or a plan expert is possible in certain circumstances, including those situations where the PRD requires involvement of a ‘practitioner in the field of restructuring’. Such an appointment is not obligatory. When the WHOA is commenced at the request of a creditor, shareholder or works council, the court will always and from the commencement onwards appoint a plan expert who will be involved for the full proceeding. The request to appoint a plan expert may also be made at a later stage in the proceeding in those cases where the debtor commenced the WHOA. This request can also be made by the debtor.⁷²

Rights *in Rem* under the EIR Recast and the PRD

Rights *in rem* are generally described as rights on a property subject that cannot be infringed by a third party. The rights *in rem* of third parties are understood primarily in Dutch law as secured rights, including the right of mortgage (vested on immovables) and a right of pledge (vested on movables), but next to that also the right of usufruct.

For the right of mortgage and pledge, see article 3:227 *et seq* of the Dutch Civil Code:

- “1. The right of pledge and the right of mortgage are limited rights intended to provide recourse against the property subject thereto for a claim for payment of a sum of money, with preference over other creditors. Where such a right has been established over registered property, it is a mortgage; where it has been established upon other property, it is a pledge.
2. A right of pledge or mortgage upon a thing attaches to all that the ownership of the thing encompasses.”

In Dutch law, a right of retention does not qualify as a right *in rem*. Therefore, it is argued that a Dutch right of retention falls outside the scope of article 8 of the EIR Recast.

⁷⁰ WHOA, art 379(1) and 389. See also the explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249 nr. 3, p. 40-41 and 66-67). In accordance with WHOA, art 381(1), the observer’s task is to supervise the realization of the restructuring plan and, in so doing, to take into account the interests of all creditors. Once the court appoints a plan expert, the observer will be removed (WHOA, art 380(3)).

⁷¹ Dutch BA, art 215(2).

⁷² WHOA, art 371(1) and 370(5). See also the explanatory memorandum to the WHOA (*Kamerstukken II* 2018/19, 35 249 nr. 3, p. 21). In *Kamerstukken II* 2019/20, 35 249, nr. 7, p. 1, Article 371(1) WHOA has been amended such that that the debtor may – when a plan expert has been appointed – prepare a restructuring plan and request the plan expert to present it to the creditors and shareholders.