Report on the inaugural meeting of the Dutch Restructuring Association

UNOFFICIAL TRANSLATION

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Introductions

On 4 November 2021, the Dutch Restructuring Association ("DRA") held its inaugural meeting at Deloitte in Amsterdam. All members of the DRA were welcomed at the meeting and, despite the COVID-19 measures, many turned up.

The reason for founding the association was the introduction of the WHOA ("the Dutch scheme") into Dutch law on 1 January 2021. Shortly before that, the six current board members of the association, Nico Tollenaar (chair), Sigrid Jansen, Frédéric Verhoeven, Koos Beke, Stefan Vansteenkiste and Christiaan Podt, came together to establish the association with a simple goal: to promote the quality of Dutch restructuring practice, particularly in terms of integrity, efficiency and effectiveness. The association is characterised by members who are active in the wider restructuring field: financial and legal advisors, judges and academics. The association's objective is also to contribute to continuous quality improvement of restructurings in the Netherlands. It does not advocate the interests of any particular (professional) group.

The association already has some 200 members, of whom just under 50% have a legal background, around a third are financial advisers and interim managers, approximately 9% is represented by financial institutions and investors and the remaining 9% by the judiciary, government and other professional groups.

The DRA has six committees which, through their respective chairmen, introduced themselves and introduced their plans for the future, namely: Education, Best practices, Post-academic developments, Current affairs, International and the Judicial wing.

Education
(Committee members: Wim Holterman, Reinout Vriesendorp, Gijs de Reuver, Jacomijn Vels and Sebastiaan van den Berg).

Wim Holterman, professor of Business Valuation at the Groningen University and partner at Value Insights, introduced the committee whose primary goal it is to set up a multidisciplinary, academic course in cooperation with one or more universities.

Best practices
(Committee members: Rutger Schimmelpenninck, Mincke Melissen and Pim Willems)

Rutger Schimmelpenninck, former attorney and currently working as an independent lawyer and insolvency practitioner, introduced the Best Practices committee. This committee will evaluate experiences with the WHOA and other restructuring cases in order to distil practical lessons.

Post-academic developments
(Committee members: Michael Veder, Teun Struycken, Anne Mennens, Axel Jacobs, Lennart Verhoef, Ilona Wolffram-van Doorn and Lilian Welling-Steffens).

Teun Struycken, professor of European Property Law and partner at NautaDutilh, discussed the Post-academic developments committee. The objective of this committee is to collect, initiate and facilitate research where necessary.

Current affairs
(Committee members: Karen Harmsen, Kaj Messelink, Jantine Hak, Johan Jol, Géza Orbán, Marlous de Groot, Gert-Jan Boon, Peter Wolterman and Floortje van Tilburg).

Karen Harmsen, professor of Corporate Law and Financial Reporting Law and partner at TOON advocaten, introduced the committee on Current affairs, which aims to inform the members of the DRA of news and current developments in relation to restructurings. In addition, the committee also initiates and facilitates debate among members.

International
(Committee members: Vincent Vroom, Bob Wessels, Peter Neuteboom, Jenny Davidson, Diederick van der Plas, Lucas Kortmann and Krijn Hoogenboezem.)

Vincent Vroom, partner Restructuring and Insolvency at Loyens & Loeff, touched upon the goals of the International committee. This committee aims to establish links with the restructuring community abroad and in particular with the international members of the DRA.

Judicial wing
(Committee members: Mark Bosch, Femke Damsteegt, Elsbeth de Vos, Marjette Wouters, Jacqueline Frima, Mincke Melissen and Ron Cats)

Finally, Mark Bosch, senior judge in Overijssel and chairman of the judicial WHOA pool, introduced the Judicial wing committee. This committee consists exclusively of members of the judiciary.

Financial disclosures under the WHOA

The first presentation of the meeting was given by Lennart Verhoef (EY) and Roelof van der Wielen (Uno Advies) and dealt with financial disclosure under the Dutch scheme, the WHOA. The lessons that can be drawn from the few WHOA rulings to date, is that inadequate provision of financial information can be an important reason for the court to refuse to grant approval.

Provision of information from a large business perspective

Verhoef and Van der Wielen explained that it is relevant from which perspective the providing of financial information is being looked at: from the perspective of a multinational or an SME. From a large business perspective, the disclosure is usually broad outside the WHOA, while within the framework of a WHOA procedure, in comparison, a relative minimum is provided for the adequate assessment of the position of creditors. This while the group to which this information is distributed is more limited than outside the WHOA. In addition, outside the WHOA, there is asymmetry in the provision of information, in the sense that banks usually receive more information than an unsecured creditor.

An important question is what can be expected from a debtor; is it justifiable that a professional, large corporate debtor should be subject to higher disclosure requirements than an SME? This cannot yet be determined on the basis of current case law. In addition, the question of the consolidated provision of information arises. Normally, the provision of information of a company as a whole is considered, but under the WHOA both the application for the opening of the proceedings, as the provision of information in principle assumes an entity by entity basis. For a multinational group with many operating companies, this can be very problematic. Bringing the different WHOA applications to one court does not eliminate the problem of having to make different applications.

Verhoef and Van der Wielen also expressed concerns about safeguarding confidentiality. By sharing information with all creditors involved, it is conceivable that this impacts the reorganisation value of the debtor, for example due to the sharing of sensitive information with competitors. This may be an incentive to keep the circle of creditors as small as possible. The question then immediately arises

whether this would be a justified exclusion of creditors - this will have to be assessed on a case-by-case basis.

Provision of information from the perspective of SMEs

For SME's it applies that - in contrast with the larger enterprises - a lot of information is shared with all creditors, such as the value development and the recovery plan. Again, this may contain competitively sensitive information. Outside the WHOA, a liquidity forecast and recovery plan would only be shared with the financial creditors to ensure continuity in the out-of-court reorganisation phase.

Restructuring policy of the Tax Authorities

Frits Gill (national coordinator Recovery) and Richard van Lambalgen (Recovery SME Hoofddorp/Horn) gave an interesting presentation on the tax waiver policy of the Tax Authorities with the following main question: *What do the Tax Authorities review for a waiver on the basis of Section 26 of the 1990 Debt Collection Act?*

The restructuring policy for entrepreneurs

Further regulations have elaborated the waiver scheme of Section 26 of the 1990 Debt Collection Act. A tax debtor may be granted a full or partial waiver if it is unable to pay certain taxes other than by means of an extraordinary objection. Grounds for an extraordinary objection can exist if the means to pay a certain tax assessment are lacking and cannot be expected within the foreseeable future.

The Tax Authorities have a restrained waiver policy for entrepreneurs. As, in theory, a waiver leads to unwanted competition effects. Also, the public interest in collecting tax play a major role in this restrained policy. After all, the taxes have been withheld from or charged to third parties with the intention of paying them to the Tax Authorities.

Also, the procedure with the Tax Authorities is strict when applying for a waiver: the application must be made in writing and with the correct form, otherwise it will automatically be rejected.

In addition, in certain situations, the Tax Authorities will not grant a waiver in any case. This is in the case of culpable behaviour, which also occurs when a refund has not been used to pay (other) tax debts, or when not (enough) has been set aside to pay the income or corporate tax. Furthermore, no waiver will be granted if the required tax return has not been filed. Additionally, no waiver is granted for motor vehicle taxes.

The restraint of the Tax Authorities' waiver policy is further reflected in the provisions that;

- A waiver is only possible in the context of a plan/agreement with all creditors;
- A waiver is not granted if it is possible to appeal to a third party for the tax debts in question;
- A waiver shall only be granted if the amount to be received by the Tax Authorities;
    - is at least double the percentage of what will be paid to unsecured creditors;
    - is the same as expected in an enforcement situation.

The restructuring policy of the WHOA

The Tax Authorities are more lenient when it comes to granting a waiver in the case of a WHOA. For example, it is not a requirement that the request be submitted by a specific form, but in writing as part of the agreement is sufficient. In addition, the Tax Authorities can in principle agree to the arrangement if they are placed in a class that sufficiently reflects their legal preference and it is likely that the scheme will be approved by the court. Furthermore, there is no requirement for a double percentage of that to be received by small SME creditors on their claims.

In certain situations where the Tax Authorities would not normally grant a waiver, the consent of the Tax Authorities is also possible under the WHOA, such as:

- the case that some creditors are not included in the scheme;
- a debt for equity swap-scheme; and,
- in the case of specific tax measures, such as motor vehicle tax.

Class division and tax preference

Gill and Van Lambalgen also paid attention to the division of classes and the tax preference of the Tax Authorities. The Tax Authorities' restructuring policy is based on the Tax Authorities' legal preference and the premise that all creditors are impaired by the scheme. Under the WHOA, however, it is not always the case that all creditors are subjected to the scheme, but the Tax Authorities may still agree to a WHOA scheme.

Temporarily loosened policy for corona debts

Finally, a discussion was held on the temporarily loosened policy of the Tax Authorities due to COVID-19, whereby the policy for the Tax Authorities is to be lenient to waiver requests. There was a discussion on how to interpret "lenience" and what the limits of this should be. It is clear that even with a certain relaxation of the rules, difficult situations can arise, as a result of which case-by-case solutions are still required.

Presentation by WHOA Judges

This was followed by a presentation by various judges from the so-called "WHOA pool", namely Mark Bosch, Elsbeth de Vos, Marjette Wouters and Femke Damsteegt-Molier. During this presentation, a number of different statements were made for discussion purposes.

"The WHOA is not suitable for SMEs".

The first statement seems to be incorrect based on initial experiences: the majority of WHOA cases to date have been filed by SMEs. The Tax Authorities confirmed that many WHOA cases have been filed by SMEs in the first months. However, the WHOA is still relatively expensive for smaller SMEs, as previously noted by Verhoef and Van der Wielen. What is also striking is that, up to now, a common reason for rejecting WHOA requests from SMEs is a lack of transparency with regard to the information provided.

The judges did not recognise the problem of sharing sensitive information as discussed earlier in the meeting: the solution is that certain documents do not have to be provided (at least in part) and that the court should be informed why these documents cannot be shared.

"Who will be heard in WHOA cases?"

In order to establish the positions of creditors, shareholders and other stakeholders, it is possible for these parties to put forward their views at various points in the WHOA proceedings. In the Explanatory Memorandum, little attention has been paid to this. Sharing the creditors' views mainly plays a role in the cooling-off period (article 376 DBA) or in the partial disputes (article 378 DBA). It is ultimately up to the court to determine whether an interested party is given the opportunity to share its view, although the court usually does give this opportunity (in writing).

If no restructuring expert or observer is appointed, there are no "ears and eyes" for the courts. Then the judges have to rely on these views as a means to inform themselves.

"The registry fee in WHOA cases is too high in parts"

The court fee in WHOA cases is paid per filing. This means that, for example, a holding company with one operating company has two applications to file, which means that court fees have to be paid twice for a request for a restructuring expert or a request for approval. The costs will then quickly exceed EUR 12,000. For a small company, this can be a problem. Also, it is remarkable that there is also a court fee (calculated on the claim held) for a creditor requesting rejection of the plan. This should perhaps better be a low threshold fixed fee. After all, in certain cases it is beneficial if there is a contrary view in order to have a full picture.

"Are WHOA cases handled in a timely and expeditious manner?"

In this statement, timeliness meant speedy treatment after the application was filed. It was noted that it is efficient for legal development that the WHOA procedure is organised nationally, but that it can be complicated to quickly assemble a multi-jurisdictional panel. Nevertheless, this does not have to get in the way of the speedy handling of cases, partly thanks to the fact that hearings can be held digitally. The judges gave the advice that when a lawyer expects to start WHOA proceedings, it is best to inform the court as early as possible.

Tension between publication and secrecy

In the context of the development of jurisprudence, it is important that rulings are published. However, most cases are often private WHOA-filings. Experience has shown that whilst the details of these cases are anonymised when published, often the specifics leak anyway. The judges advised to assume that WHOA cases will be published, and if parties object to this, to indicate this to the court in time and to consult with it.

First WHOA lessons from practice: a round table discussion with stakeholders

The final part of the opening meeting was a round table discussion with various experts from the field, chaired by Rutger Schimmelpenninck. The participants were Mark Bosch (Court of Overijssel), Michael Broeders (partner Freshfields Bruckhaus Deringer), Judith Renders (partner Bold Turnaround), Bas van Weert (Rabobank Nederland), Henri Bentfort van Valkenburg (partner DVDW) and Richard van Lambalgen (Tax Authorities).

The role of the restructuring expert

Bentfort van Valkenburg shared his experiences as a restructuring expert. In the specific case involving Bentfort van Valkenburg, the application for a restructuring expert was ultimately withdrawn. However, Bentfort van Valkenburg had a number of observations on the role of the restructuring expert, for example, that it is a bit unbalanced that the debtor requests the quotes for restructuring experts while the debtor does not choose the restructuring expert and the restructuring expert subsequently works in the interest of the joint creditors. As discussed earlier in the meeting, the costs of a restructuring expert for a smaller company can quickly mount up.

There was a discussion about the role of the restructuring expert, with Broeders raising the question of whether it was the role of the restructuring expert to mediate 'passively' or to actively look for financing options? This will differ from situation to situation. What is important is that the restructuring expert has a strategic feel for the business. Furthermore, the problem was raised that some parties misuse the WHOA as a means of postponement of foreclosure measures, rather than what it is intended for: to reach an agreement. One solution may be to amend the suspension of payment (*surseance van betaling*) to make it suitable for use when the WHOA is used for postponement.

Valuation principles

In order to determine what the reorganisation value is, and whether this is distributed fairly, valuation is required. Renders indicated that it in practice there is quite a range in the valuation values. For secured

auditors it is often important that the low mark prevails, and for the Tax Authorities it is important that the high point prevails. Ultimately, it is up to the court to assess whether the range is plausible. Case law on this point would be useful but is as yet lacking.

Opinions were divided on the extent to which the restructuring expert should be involved in the valuation. The restructuring expert's task is to bring about a settlement, so in a certain sense he cannot avoid taking a position on this. The judges indicated that they would rather receive one report on the valuation supported by the restructuring expert than four reports on which the judge would have to pass judgement.

Procedure

Finally, Broeders had some closing remarks on the procedural aspects of the WHOA proceedings. Under the WHOA, there is no right to appeal, which can have a significant impact, especially when major interests are involved. Since no appeal is possible, it would be helpful if there were more case law on the procedure, for example on the rules of play for submitting views. This would help parties to have more certainty. In addition, the development of standard rules on various procedural aspects, such as the submission of a view or a valuation, would be useful. These standard rules are partly formed by case law but could also be created through a dialogue between practice and the judiciary. Perhaps the DRA could play a useful role in this.

The meeting ended with informal drinks at Deloitte. The second meeting of the Dutch Restructuring Association is planned for the spring of 2022.

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