Dutch Supreme Court sets precedent in landmark WHOA-ruling

Noor Zetteler and Anne Mennens report on how a WHOA plan cannot impose new financing obligations on lenders, but may change the order of priority among creditors

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> *The WHOA has recently proven to be effective tool in large, complex, cross-border restructurings*

Royal IHC ("IHC") is a Dutch company with a rich history in the maritime and offshore industry. Headquartered in the Netherlands, it operates in more than 20 countries. In 2023, IHC used a Dutch WHOA plan to undergo a major and complex financial restructuring.

While this relatively new restructuring tool was initially used primarily by smaller, purely Dutch companies, the WHOA has recently proven to be effective tool in large, complex, cross-border restructurings. In addition to IHC, Diebold Nixdorf, McDermott, Steinhoff and Vroon have now also been restructured with the help of the WHOA, whether or not 'twinned' with a foreign restructuring tool such as the UK Scheme of Restructuring Plan, US Chapter 11 and/or a South African composition plan procedure.

The facts

IHC was financed by a syndicate of nine financial institutions. The (secured) financing consisted of various components, including a drawn loan for the construction of the ship the Amazon ("**Loan**") and a multi-part credit facility, as laid down in a Senior Facilities Agreement ("**SFA**"). In January 2023, IHC defaulted on its Loan repayments, at which point the Loan and the entire credit facility became due and payable. Moreover, this default precluded IHC from drawing any undrawn credit lines and commitments under the SFA, such as guarantee lines.

In essence, the WHOA plan proposed three specific changes to the rights of the secured lenders. First, the maturity date of the Loan was extended. Second, a change to the 'waterfall' in the intercreditor agreement was proposed. Third, the agreement provided that the shares in a major subsidiary pledged to the financiers would be sold without the entire proceeds accruing to the financiers in repayment of the financing. These changes could only be effected by the WHOA plan because, under the SFA, they could only be passed unanimously by all lenders and no unanimous agreement could be reached. The amendments proposed in the WHOA plan would force the syndicate to continue financing IHC's working capital, but on different terms than those initially agreed.

Opposition to the plan

Six of the nine lenders supported the plan, with two lenders voting against and one abstaining. After IHC had petitioned the court to confirm the WHOA plan, the dissenting lender requested the court not to do so, arguing that the proposed amendments boiled down to the imposition of new financing and other obligations, which is not provided for by the WHOA. While section 370 of the Dutch Bankruptcy Code ("**DBC**") stipulates that a WHOA plan may include a "change to the rights of creditors", the opposing lender pointed out that section 373 of the DBC entails a specific provision governing amendments made to agreements. Under that provision, a debtor may propose amendments to an agreement to its contracting party, but WHOA proceedings cannot be used to impose such amendments, if the contracting party refuses. In that case, the WHOA only enables the debtor to unilaterally terminate the agreement, damage claims arising from which can then be restructured in the WHOA plan.

Plan confirmation by the Court

The District Court ("Court") of Rotterdam confirmed the proposed WHOA plan on 9 March 2023.[1] In its decision, the Court ruled that - in principle – the WHOA may be used to force creditors to continue financing a company's working capital under existing credit facilities. Whether that is possible in a specific case depends – according to the Court - on (i) the extent to which the underlying conditions are being changed 'substantially' and (ii) the extent to which changes to the credit documentation under the WHOA plan remain consistent with section 370 DBC, which allows for the amendment of 'rights'. In addition, the Court ruled that a WHOA plan may alter the waterfall in an intercreditor agreement in case such amendments are essential to the success of the restructuring.

Cassation in the interest of the law

The confirmation decision raised some eyebrows and was criticized in Dutch legal literature. The Court decision could not be

appealed due to the statutory ban on appeals in WHOA proceedings, in order to provide parties to the restructuring with deal certainty and finality. In view of this ban, the Procurator General at the Dutch Supreme Court initiated a Supreme Court appeal "in the interest of the law".[2] This extraordinary legal remedy is an instrument for obtaining the Supreme Court's decision on a legal question which must be answered in the interest of legal uniformity and which cannot be put before the Supreme Court via an ordinary appeal in cassation. The Supreme Court's decision does not impact the parties in the IHC restructuring, but is solely intended to provide guidance to the WHOA restructuring practice.

The Supreme Court's view

On 25 October 2024, the Supreme Court delivered a ground-breaking judgment providing clarity on two important topics.[3]

1. A WHOA plan cannot oblige lenders to provide new financing or to honour existing credit commitments under amended terms.

With this judgment, the Supreme Court has squashed the idea of forced financing, ruling that the DBC provides no basis for requiring financiers to provide new credit or to honour an existing credit commitment under amended conditions. The WHOA allows for the non-consensual adjustment of existing rights of creditors in section 370 of the DBC, but amending agreements is regulated in section 373 of the DBC. As discussed above, section 373 only allows the debtor to terminate the agreement in case the contractual party is not willing to accept the amended terms of the agreement.

The Supreme Court notes that – without the amendments to the SFA as provided for in the WHOA plan – the secured lenders were not obliged to provide IHC any additional funding, as IHC was in default. Therefore, the three changes to the SFA proposed by IHC amounted to requiring the secured lenders to provide financing on different terms than they had originally agreed to in the SFA. The Supreme Court concluded that the WHOA plan therefore aimed to change the obligations of the lenders, for which the WHOA does not provide.

It is important to note WHOA plans can be used to amend existing creditor rights. Moreover, consensual amendments to financing agreements are not affected by this Supreme Court judgment.

2. A WHOA plan can be used to amend the order of priority amongst creditors, provided that the plan itself meets the requirements for confirmation.

In an *obiter dictum*, the Supreme Court confirmed that WHOA plans could be used to change the order of creditors. Although the Rotterdam District Court implied that only the *contractual ranking* could be modified (e.g. in intercreditor agreements), the Supreme Court ruled that WHOA plans may also change the order of priority arising from in rem rights. The fact that the Dutch legislature deliberately chose *not* to introduce any form of 'superpriority' for new financing in the WHOA, while this would be allowed under the EU Directive on Restructuring and Insolvency (2019), was not deemed relevant by the Supreme Court. The judgment indicates that providing a security interest to a new financier while *lowering* the rank of the security interests of existing creditors is simply allowed under a WHOA plan. Finally, the Supreme Court clarifies that the WHOA does not apply to financial collateral agreements and settlement clauses. Security rights arising from such agreements and clauses cannot therefore be modified as a result of the confirmation a WHOA plan.

The Supreme Court stresses that (non-consensual) alterations to the order of priority can only be made if the WHOA plan meets the requirements for confirmation, with the Dutch priority rule ("**DPR**") stipulating the circumstances under which a cross-class cramdown is allowed. The DPR may only be invoked by dissenting creditors that are part of a dissenting class. The DPR guarantees that the reorganization value is distributed fairly amongst classes, thus – in principle – respecting the existing ranking of claims. However, the DPR stipulates that deviations of the order of priority are allowed if i) there are 'reasonable grounds' for such deviations and ii) doing so does not harm the interests of the creditors concerned. The Dutch restructuring practice will explore the scope and limits of this two-limb test. In his conclusion, the Procurator General indicated that this test is probably only met in case there are (objectively) good prospects for the success of the restructuring, which implies that the creditors are not expected to receive less than in case of a plan that does respect the existing ranking order.

Interestingly, both the Supreme Court and the Procurator General only mention the DPR as a safeguard for creditors facing alterations in the order of priority. The DPR does not safeguard the interests of lenders who are 'overruled' in their respective creditor class. We believe that lenders may always rely on the no-creditor-worse-off test, as this test can be invoked by all dissenting creditors, regardless of whether their class votes in favour of the plan. We expect a lively debate both in practice and in academia about the situations in which a creditor is worse off as a result of the downwards adjustment of its position in the order of priority. The concept of 'adequate protection', well-known in the US restructuring scene, will likely be influential in exploring the boundaries of adjustments in the ranking of claims.

Conclusion

We expect this landmark decision to occupy practitioners, lenders and WHOA courts for the foreseeable future, as they figure out what amendments WHOA plans can make an what exactly is off-limits. We can imagine this decision might also spark or influence debate in other EU member states about the scope and limits of 'preventive restructuring plans'. ■

Footnotes:

1 ECLI:NL:RBROT:2023:2800.
2 ECLI:NL:PHR:2024:346.
3 ECLI:NL:HR:2024:1533.

> *A WHOA plan cannot impose new financing obligations on lenders, nor can it force lenders to honour existing credit commitments under amended conditions*