WHOA! Experiences with a new restructuring tool (the Dutch Scheme)

Marjon Lok interviewing
Wieneke Lisman, Ruben Berghuis and Erwin Bos

Introduction

The Dutch Scheme (WHOA) was introduced as a new restructuring tool on 1 January 2021. Since then, the floodgates have opened in terms of cases and case law involving the WHOA. Time to pull in the net and ask our experts about their experiences and the lessons learned. I asked *Erwin* (partner), *Wieneke* (senior associate) and *Ruben* (junior associate) for their thoughts on the main benefits, the greatest challenges, the alternatives and useful tips for shareholders and creditors.

The main benefits of the WHOA

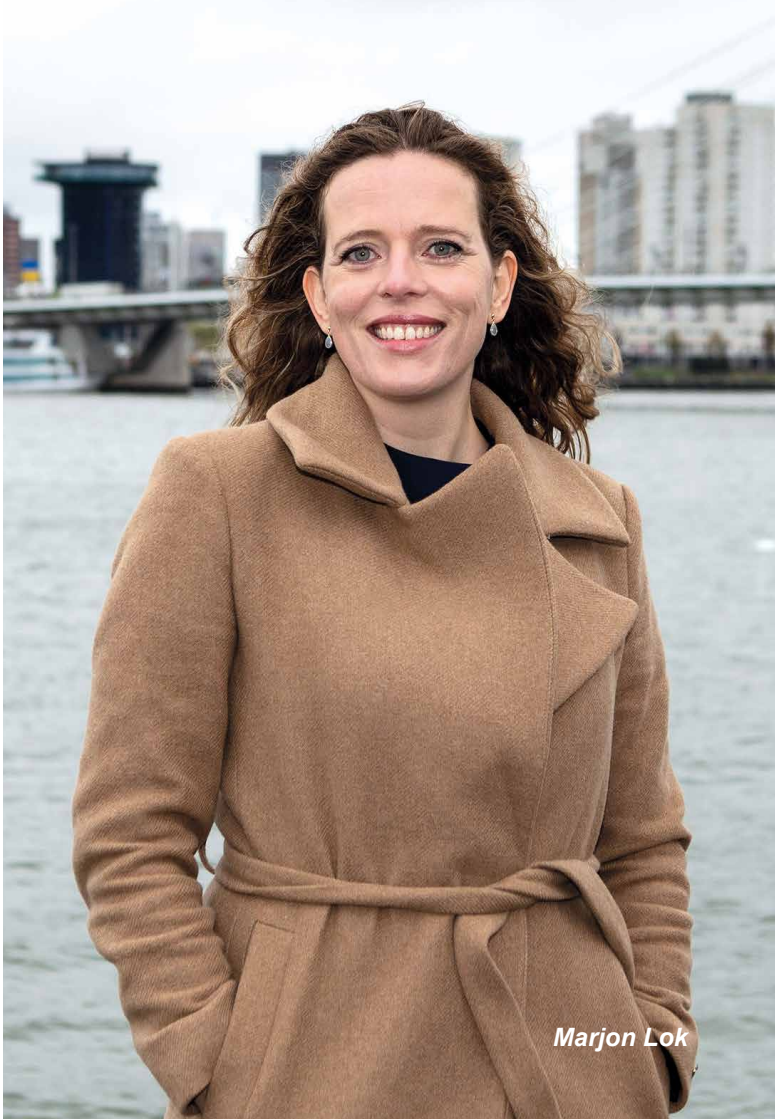
The WHOA seems to offer benefits aplenty: a debtor-in-possession restructuring tool outside of bankruptcy, with possibilities for creditor cramdown, binding power on shareholders, a cooling-off period, amendment of onerous contracts, the appointment of a restructuring expert and special court powers that allow debtors to obtain a degree of deal certainty prior to submitting the final composition. Everything that was needed in the Netherlands to offer a viable but distressed company a second chance at life, or alternatively to offer an unsalvageable enterprise the opportunity to put in place a structured liquidation plan that benefits its creditors. I put the question to *Ruben*, *Erwin* and *Wieneke*: in your experience, what is the main benefit of the WHOA?

Ruben: I believe that it is generally accepted that the main advantage of a WHOA composition is that it is a compulsory composition by which even uncooperative creditors can

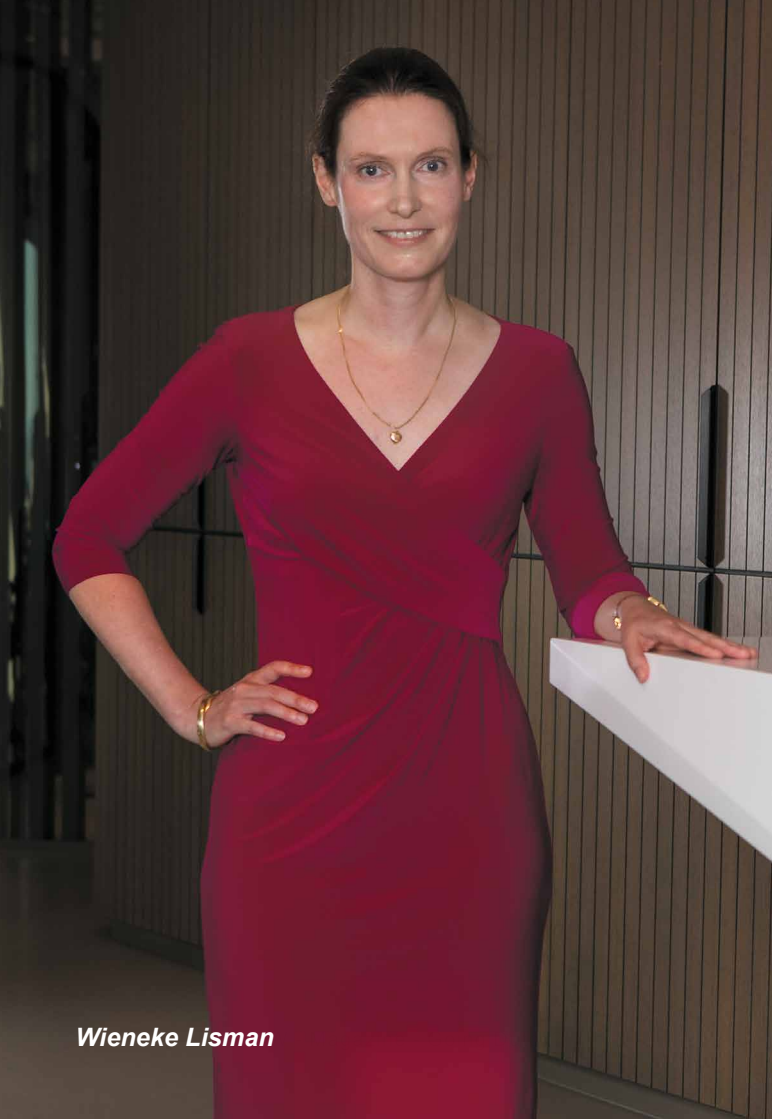
be bound. The WHOA is therefore a big stick in respect of creditors (whether one or a few) who do not want to cooperate towards finding a solution.

Erwin: The WHOA offers companies with a Dutch COMI (Centre of Main Interests) the opportunity to restructure their debts outside of insolvency proceedings. Though a relatively new legal instrument, the WHOA provides shareholders and creditors (or at least secured creditors) with a viable opportunity for restructuring distressed portfolio companies in the Netherlands. One of its selling points is the possibility of automatic EU-wide recognition of a WHOA composition under the Amended Recast EU Insolvency Regulation (EU) 2021/2260 of 15 December 2021, where the WHOA has been added to Annex A of the original Regulation. This is an attractive feature for Dutch companies operating in the wider EU.

Wieneke: During the preparations for a WHOA composition, the debtor retains management and disposal of its assets (debtor in possession). This is different with compositions prepared within a moratorium or bankruptcy. In a moratorium, the debtor is only permitted to perform acts of administration or disposal together with the trustee. As soon as bankruptcy



Marjon Lok



Wieneke Lisman

is declared, by operation of law the debtor loses the power of disposition and management of its assets and the trustee is independently charged with managing and disposing of those assets. Because in a WHOA procedure the debtor retains control of the day-to-day running of its business, and because the procedure may, if desired, be prepared in silence, a WHOA composition generally does not cause much disruption to the debtor's business processes and minimizes market unrest (e.g. among suppliers and customers). This way, the going-concern value of the company is preserved as much as possible. That added value can then benefit the creditors/shareholders.

Points of attention and challenges

A year and a half in, some peculiarities have started to emerge that could pose challenges or points of attention. One example is the ongoing debate about whether WHOA ratification judgments in private (undisclosed) proceedings could be recognized in other EU Member States, and if so how. Another example is the fact that waiver of all debts through the composition could lead to a tax gain and therefore, depending on the available losses, a tax liability after the composition is settled. This principle in itself is not new, but as a result of new tax legislation the possibility to

compensate loss for tax purposes is limited to EUR 1 million. As this might result in a serious claim, this should have the parties' attention. A third point of attention for shareholders, at least, to keep in mind is that courts may restrict the shareholders when exercising their voting rights to facilitate an ongoing restructuring.

In my experience, an ongoing challenge is the practicality of making all the necessary arrangements with the individual creditors to make the composition successful, and at the same time uphold the equality of how the creditors are treated, or alternatively sufficiently explain why unequal treatment is necessary if, for example, specific creditors might otherwise be worse off. This is especially a challenge where a liquidation composition is involved, as in that case every single legal relationship needs to be terminated. I asked *Wieneke, Ruben and Erwin* what they considered to be the biggest point of attention or challenge.

Wieneke: Whereas the debtor can take plenty of time to thoroughly prepare a WHOA composition, creditors will often only find out at a late stage that the composition is being offered. It is then important to act quickly. After all, a creditor/shareholder with voting rights only has a short time to decide how to vote. The minimum period between submitting (or otherwise making known) a composition and taking the vote on that composition is only 8 days (Article 381(1) of the Dutch Bankruptcy Act). That does not leave much time for creditors and shareholders with some distance between themselves and the company. The creditors and shareholders entitled to vote must therefore act swiftly to form a reliable opinion of the proposed arrangement. And for that they need sufficient information.

Article 375 of the Dutch Bankruptcy Act stipulates that the composition must contain all the information that the voter needs in order to be able to form a well-founded opinion about the composition, e.g. in order to assess (i) whether they want to vote in favour of the composition, (ii) whether there are any grounds for refusing to approve the composition, (iii) whether they need to have any interim provisions imposed (such as a cooling-off period/lifting of an attachment), (iv) whether there are grounds for refusal on the court's initiative, (v) what the financial consequences of the composition are for each class of creditors and shareholders, what value is expected to be realised if the composition is put into effect, and what proceeds are expected to be realised in the event of liquidation.

The creditors/shareholders are only entitled to this information once the composition is offered. So the amount of time for assessing the information and taking action if the information provided is insufficient or unclear is short. It is also important for the creditor/shareholder to lodge a complaint in time if the information is incomplete or if they suspect that there are other grounds for opposing ratification of the composition. A creditor/shareholder that fails to do so loses the right to rely on this ground for refusing approval if the composition is submitted for approval at a later date.

Erwin: As with any restructuring, the challenge in successfully implementing the WHOA is to initiate the restructuring efforts at the right time and in a timely manner. The WHOA is aimed at forcing a scheme on creditors in an otherwise consensual process. In our experience, starting the process too late, without sufficient preparation or without sufficient support from major stakeholders creates very significant risks to successful implementation.

Ruben: Preparing and offering a WHOA composition is time-consuming and can therefore be an expensive procedure. The procedure demands a great deal not only of the experts (lawyers and accountants engaged by the debtor), but certainly also of the debtor (and their organization). One way to limit costs and work effectively would be to appoint an internal WHOA coordinator/officer (see the tips below).

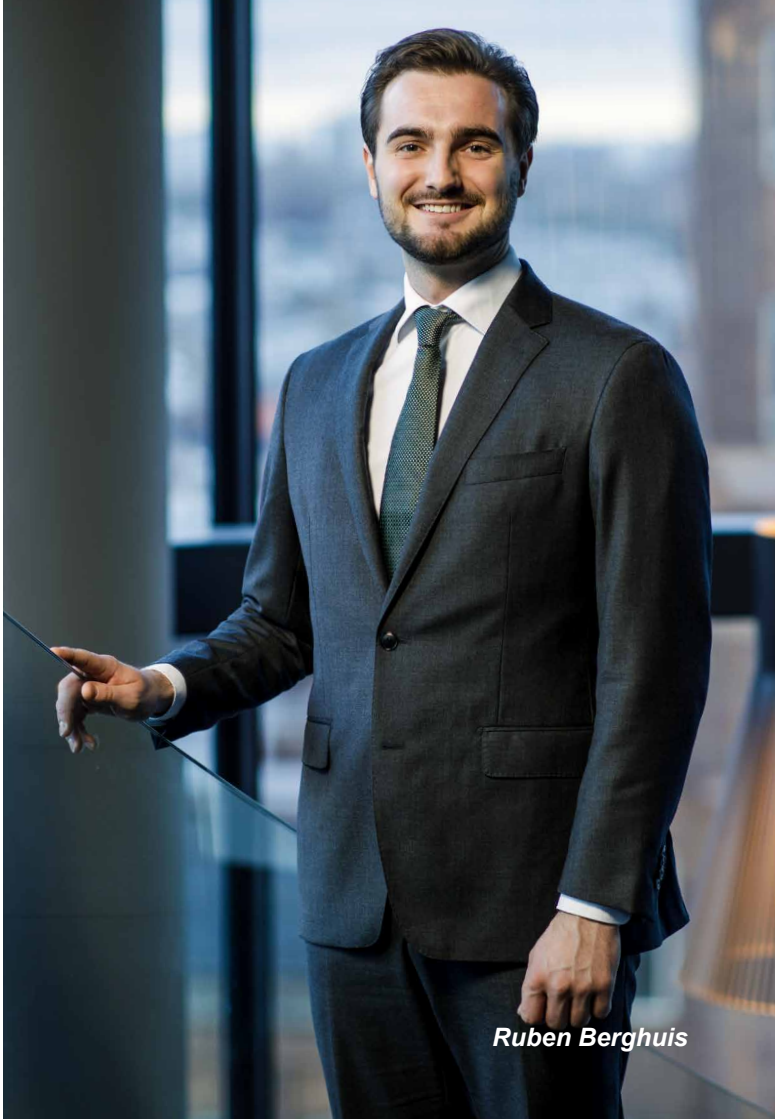
A second point is international recognition of a Dutch composition procedure outside bankruptcy. Now that the public arrangement procedure outside bankruptcy has been included in Annex A of the EU Insolvency Regulation, the choice between a public and a private (i.e. undisclosed) WHOA procedure has become more topical than ever. Especially when it comes to restructuring international groups, a great deal might hinge on the choice between preparing the composition in relative silence or in public. The automatic recognition of a public procedure means that, if the debtor is domiciled in the EU, all its creditors are bound by (among other factors) cooling-off periods and changes to their rights that are decreed and confirmed by the court in the Netherlands. This makes the WHOA an effective tool to bind creditors from other Member States to a composition.

A final point that comes to mind is that restructuring through the WHOA has become slightly less attractive due to the Dutch Supreme Court's recent ruling (ECLI:NL:HR:2022:328)

that arrears in pension contributions cannot be included in a WHOA composition. Therefore, in principle, the overdue pension contributions must be paid in full. For future obligations, the employer will continue to rely on regular Dutch employment law, for instance by asking the Employee Insurance Agency (UWV) for permission to terminate employment contracts if jobs become redundant due to economic circumstances (Article 669(3)(a) of Book 7 of the Dutch Civil Code).

Alternative restructuring tools in the Netherlands besides the WHOA

The sheer amount of case law that has been produced in a year and a half shows that the restructuring tool is being used creatively and pragmatically. One might ask whether there is still a need for other restructuring tools in the Netherlands. However, ratification has also been withheld for a substantial number of WHOA compositions since 1 January 2021. In the insolvency landscape, it has been whispered that the WHOA is perhaps not the answer to everything after all, and that perhaps a prepack (a tool that is once more seeing the light of day, following the European Court of Justice's Heiploeg ruling on 28 April 2022) or the existing older restructuring alternatives under the Dutch



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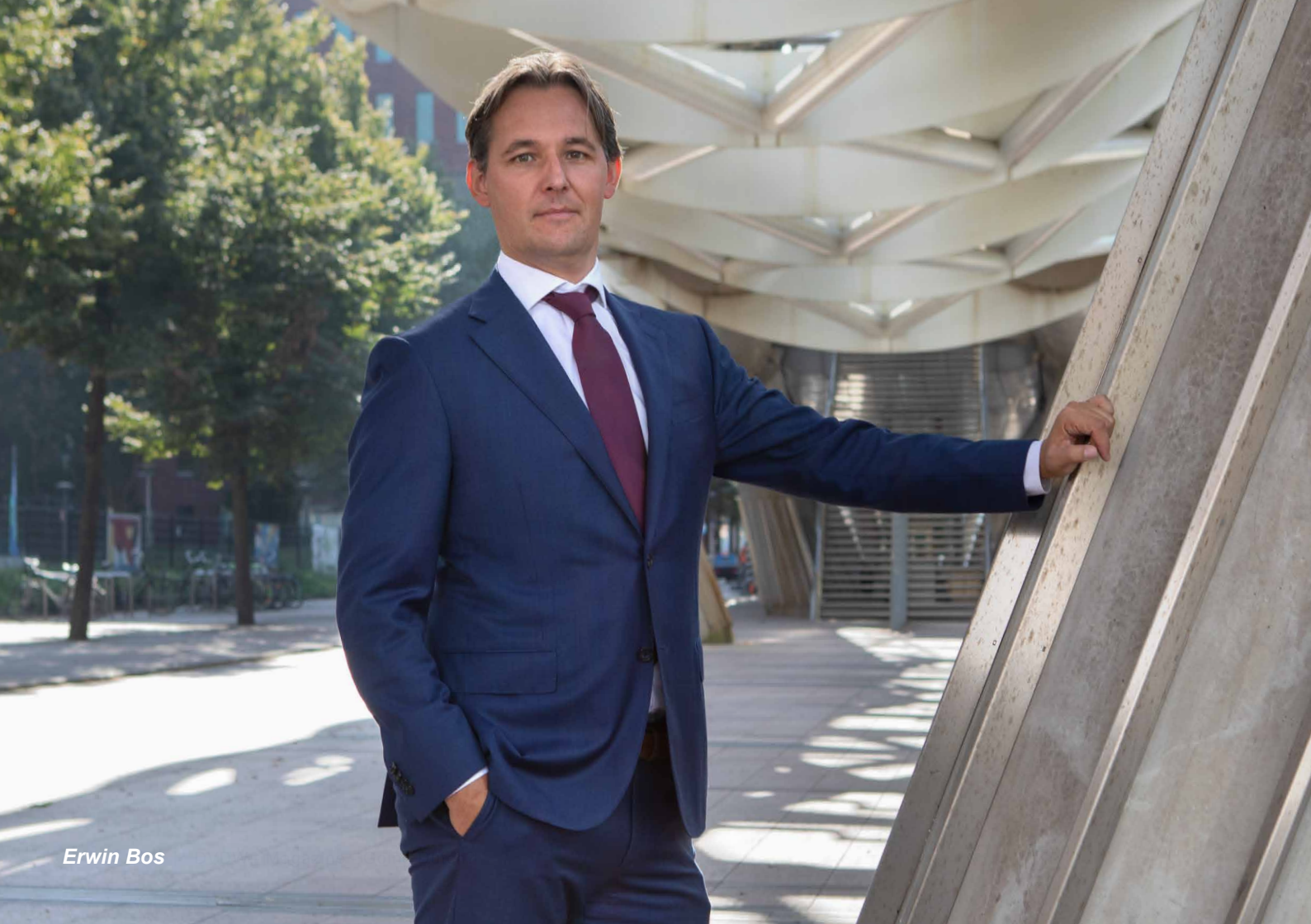

Erwin Bos

Bankruptcy Act offer more feasible solutions. I asked *Erwin*, *Ruben* and *Wieneke* whether they see any possibilities remaining for alternative restructuring tools.

Wieneke: Employment contracts are not affected by the WHOA. This means that, if the cause of the financial problems is based in part on too many employees or overly high employee costs (including pension charges), the route of bankruptcy will often be necessary. In bankruptcy, the staff can then be dismissed and a settlement offered that also includes the employee costs. Even if a thorough investigation into possible irregularities is necessary, for example because there are clear indications that funds have been withdrawn or damaging actions or legal acts have been carried out, it might in some situations be preferable to declare bankruptcy, so that the trustee can investigate the matter and redress the harm, for example by annulling legal acts in respect of fraudulent conveyance or holding directors liable. Although WHOA case law shows that the courts are also alert to such aspects and takes a critical view of them, the courts depend greatly on whatever information that comes to their attention. The bankruptcy trustee, on the other hand, has more possibilities – using the powers at their disposal – for uncovering harmful legal acts that have taken place and of redressing the loss or damage resulting from them.

Ruben: Like I mentioned, offering a composition based on the WHOA can be a process that consumes substantial amounts of time and resources. Therefore, other restructuring tools can still be very useful. What tool to engage depends to a large extent on the circumstances and on the severity of the financial or organisational distress facing the company. At a minimum, it is vital to seek legal and financial advice at an early stage, to make optimal use of the broad range of restructuring and insolvency proceedings available. Voluntary arrangements with creditors are a first step, while selling part of the company to save other parts is also an option. In situations of distress requiring temporary relief against the company's ordinary, unsecured creditors, a company might find a safe harbour in suspension of payments – although suspension of payments is not known for its effectiveness. In fact, the opposite is true, as mostly it ends in bankruptcy. If bankruptcy is approaching, the prepack procedure might regain its once prominent position in the insolvency landscape. So there are plenty of options besides the WHOA that should not be ruled out.

Erwin: As the English saying goes: horses for courses. Sometimes you need a restructuring expert, other times a bankruptcy trustee is inevitable. The WHOA is indeed

just one of the instruments available for restructuring in the Netherlands, and it suits specific situations and needs. The potential of the prepack coming back into play is a welcome one, because is suits other specific situations and needs. In my view, these and other Dutch legal instruments complement rather than exclude each other. If bankruptcy is inevitable or even necessary, the prepack is likely best suited. Conversely, if bankruptcy can and should be avoided, the WHOA is much better suited. This is not surprising, given that the lack of an enforceable instrument for that situation was sorely lacking before the WHOA was introduced and bankruptcy was too often the only solution. In that sense, the WHOA very much fills a void and complements existing, alternative restructuring tools.

Tips and tricks when considering a Dutch Scheme

Looking at the numerous WHOA cases that we have worked on ourselves at DVDW, as well as the vast amount of case law already in existence, one of the main tips that I would give a debtor and its shareholders is to provide as much transparency as possible to creditors about why the company is in distress, what choices it has made, what settlements it has entered into and what payments have been made. Keep this as simple as possible and deviate from the norm only where absolutely necessary. The court and the creditors generally require a straightforward and understandable document that is carefully and clearly substantiated by underlying documents. You need to be absolutely candid and transparent. If the court or affected creditors have a gut feeling that side deals are being made, or that their information does not represent the full picture, it is likely that a composition will be rejected. In addition, I would advise limiting contact with potential candidates for restructuring experts prior to the court hearing, as the court may otherwise question their suitability and independence. I asked *Ruben*, *Wieneke* and *Erwin* for useful tips based on their own experience.

Wieneke: WHOA procedures involve countless rules and deadlines, which it is important to be aware of as a creditor/ shareholder. The WHOA is still relatively new and the interpretation of its rules is still being crystallized every day in case law. The consequences of a successful WHOA settlement for a creditor can be far-reaching. For example, as a creditor you might be confronted with the forced termination of current agreements, forced discharge of claims and a cooling-off period that could severely curtail your possibilities for recovery. When confronted with a WHOA composition

as a foreign creditor/shareholder, it is therefore wise to engage a Dutch lawyer who understands the WHOA. This will ensure that you can make the best possible use of your rights to counter any adverse effects, and that you do not unnecessarily forfeit any rights.

Ruben: This would be the appointment of a WHOA coordinator within the debtor's own organization, as mentioned above. This could be a board member, but also someone from senior management. Preferably, it should be someone with financial, legal and operational expertise and a knowledge of the organization/group. This person will then act as the point of contact for the advisors, third parties, creditors, and possibly other entities within the group.

Erwin: Our significant experience with the instrument over the past year has taught us several invaluable lessons, some of which should be mentioned here. Firstly, although the WHOA was envisaged as a debtor-in-possession process with very limited court involvement until the final stages, in practice the opposite holds true. We highly recommend involving the court at the earliest possible stage and on material aspects of the WHOA composition. Secondly, extensive due diligence prior to initiating the

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process is inevitable. Stakeholders that are overlooked will obtain critical hold-out leverage that should be avoided. And lastly, rigorous preparation for the WHOA composition as a worst-case restructuring scenario creates the best understanding of how viable the restructuring will be, because it forces the company and its stakeholders to flush out all potential risks and holdout positions standing in the way of a successful restructuring.

Conclusion

The conclusion is short and sweet. Although not a universal panacea, the Dutch Scheme certainly appears to be living up to its potential, and it offers an effective and expedient restructuring tool. However, the process can be harrowing, and professional guidance from an experienced law firm and a good accountant is indispensable.

If you have any questions about this contribution, please contact *Marjon Lok*, *Wieneke Lisman*, *Ruben Berghuis* or *Erwin Bos*

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For more information about the WHOA, visit our WHOA portal. You can also visit our website to find out more about the Restructuring & Insolvency team at DVDW.