

Legal Alert: First rulings on the new Dutch Restructuring Act (WHOA)

May 25, 2021

Introduction

On October 6, 2020, the Dutch Senate adopted the Act on court approved debt restructuring plans (in Dutch: “Wet homologatie onderhands akkoord” or “WHOA”), an act that makes it easier for companies to reach a settlement with creditors and shareholders on debt restructuring and avoiding bankruptcy. The WHOA features elements of the UK Scheme of Arrangements and US Chapter 11 procedure, as we stated in our Legal Alert: Reform In Dutch Bankruptcy Law. In this Alert the first cases ever in Dutch case law are analyzed, where plaintiffs sought to invoke the WHOA.

Stay

The debtor who wishes to offer a settlement pursuant to the WHOA to (some of) her creditors is usually experiencing financial difficulties and its effects, such as seizures and requisitioning of property. This is problematic for exploring the possibilities of a settlement. Therefore, the debtor (or the restructuring expert), after opening WHOA proceedings, may petition the court to grant a stay (or cooling-off period) for a period of no more than four months. During this period, the court may limit creditors' options for recourse, such as the imposition of seizures. The court may also order that seizures already made expire and that pending bankruptcy and moratorium petitions be suspended.

The court will grant the petition to grant a stay if (i) this is considered necessary to be able to continue the business run by the debtor during the preparations for and negotiations of a settlement, (ii) it is in the best interests of the creditors, and (iii) the creditors' interests will not be substantially harmed.

1. Necessary to be able to continue the business

In the case of the Court of Gelderland dated March 4, 2021 (ECLI:NL:RBGEL:2021:1126), a lessor had requested the eviction of the business premises where the debtor operated her business activities. In addition, there was a risk that the leased printers would be repossessed. For the continuation of the debtor's business activities it was necessary that it could continue to use the business premises and the leased printers; after all, her main business activity was the delivery of printed matter. Therefore, the court ruled that the stay was necessary to continue the business of the debtor.

2. In the best interests of the creditors

In considering this requirement, the court will consider, among other things, whether a settlement will allow for a higher distribution to creditors than in the event of bankruptcy and whether the bankruptcy will be unavoidable without the establishment of a settlement. In its judgment of January 15, 2021 (ECLI:NL:RBSHA:2021:198), the District Court of The Hague ruled that this was the case. The court took into account that the debtor argued that its assets consisted mainly of business inventory and stock and that these were valued at a liquidation value of EUR 13,585. It is not implausible that in a bankruptcy situation such amounts would be entirely or largely absorbed by bankruptcy costs and the trustee's salary.

3. The interests of the creditors will not be substantially harmed

The court may also grant the petition to declare a stay with a restriction. In its judgment of January 21, 2021, the District Court of Gelderland declared a stay with the restriction that the pledgee, having a public pledge on a claim, may nevertheless recover on the basis of its pledge. In doing so, the court made a connection with the situation in bankruptcy; in that case, the pledgee can also rely on the agreements in the deed of pledge.

First successful settlement - Jurlights B.V.

In January 2020, multiple Dutch courts have issued a WHOA ruling in which the WHOA has been declared applicable and the debtor can try to enforce a settlement outside of bankruptcy.^[1] However, on February 19, 2021 the Court of North Holland (ECLI:NL:RBNHO:2021:1398) discussed and judged on the final element of the procedure, homologation (or not) by the court, whereby the settlement binds all creditors (and other stakeholders) involved in the settlement.

The company Jurlights B.V., in insolvency is the first to successfully appeal the WHOA, as a result of which his creditors are to agree to a [substantial] reduction in their outstanding claims.

The facts

Jurlights B.V. is an Amsterdam-based company that provides lighting and sound systems for major events such as Awakenings and the Amsterdam Dance Event. Jurlights B.V. and its shareholder Jurlights Holding B.V. will collectively be referred to as “Jurlights”. The consolidated financial statements for 2019 show that Jurlights had a turnover of €4,920,881.00 and a positive operating result. As a result of Covid-19 measures in the Netherlands, Jurlights' sales fell practically to zero in a matter of two months, with the company's debt reaching over one and a half million euros. Bankruptcy seemed unavoidable.

As Jurlights' offer to a debt reduction was refused by a majority of its creditors in June 2020, Jurlights decided to appeal to the WHOA. On December 29, 2020, Jurlights submitted to their creditors a proposal for a WHOA settlement. The company's creditors were divided into three different classes, namely (i) retentor, (ii) Dutch tax authorities and (iii) unsecured creditors. The content of the proposal consisted of several measures to lower the debt of the company and the percentages of claims to which the relevant creditors would be entitled for each class, after the settlement. In addition, a bank was willing to provide financing in the amount of €350,000.

Voting took place on a website, by email and by mail. Creditors were given the opportunity to cast their votes between December 29, 2020 and January 8, 2021. The retentor agreed to the proposal. Of the unsecured creditors, a percentage of 95.25% of the total unsecured debt agreed to the proposal. Finally, on January 21, 2021, the Dutch tax authorities also announced their settlement with the proposal.

Legal considerations

The court ruled that the applicants (Jurlights B.V. and its shareholder) duly argued on the facts presented that, as a result of the Covid-19 crisis and hence the complete shutdown of the business, it is reasonably plausible that the applicants will not be able to continue paying their debts and that, without a settlement, bankruptcy is the only alternative. In addition, the court found that there had been a clean decision-making process. The creditors were duly notified, had the opportunity to vote on the matter and were informed of the date on which the so-called homologation (the process whereby the settlement is enforced) request would be processed. The court also had no indication that the creditors were not properly divided into classes and/or not assigned to their relevant class.

Under article 383(3) of the Bankruptcy Law (in Dutch: *Faillissementswet*), the court may, at the request of one or more creditors or shareholders with voting rights (who have not themselves consented to the settlement or have been wrongfully excluded from the vote) reject a request for approval of a settlement if and when it is summarily apparent that, on the basis of the settlement, these creditors or shareholders would be worse off than in the event of a liquidation of the debtor's assets in bankruptcy. This was not the case in this ruling.

Furthermore, the court found that all classes voted in favor of the offered settlement and that there were no grounds for rejecting the request for homologation. Thus, the court approved and so enforced the settlement. This forced a small group of reluctant creditors to give up their resistance.

The court-approved rescue plan enables Jurlights to reduce its debt by more than eighty percent with its creditors only recovering sixteen percent of their debts. Even the tax authorities have to write off four fifths of a claim of half a million Euros as irrecoverable. In anticipation of better times, Jurlights can, however, continue to exist, albeit with a reduced workforce and de minimis assets.

Ongoing cases about the WHOA

There is a glimmer of hope for companies that are in payment difficulties but are unable to successfully come to terms with its creditors. This was the first ruling where the WHOA has been put into practice with more to come. Although it remains to be seen, at least the WHOA does appear to provide some alternative to the road to (forced) bankruptcy of a debtor.

QUESTIONS OR FURTHER INFORMATION

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[1] Among others: Court of the Hague, January 15, 2021, ECLI:NL:RBDHA:2021:198; and Court of Amsterdam, January 15, 2021, ECLI:NL:RBAMS:2021:84