Authors Ian Fox and Krijn Hoogenboezem

WHOA: English creditors and the new Dutch scheme of arrangement – a two horse race?

KEY POINTS

- In response to the current pandemic, the Dutch government has selected the Dutch scheme of arrangement (otherwise referred to as 'the WHOA') for an accelerated implementation by the Dutch Parliament. This will be a welcome addition to the range of global restructuring procedures available for struggling companies.
- The attractiveness of the WHOA stems from its amalgamation of some of the 'best parts' of the US Chapter 11 procedure and the English scheme of arrangement, but also introduces some new features. Further, it can be implemented at a fairly rapid pace.
- However, English creditors (ie creditors of companies with debts governed by English law) may face an initial conundrum as to whether to engage with the Dutch procedure in its private form; knowing that, if they do, they will lose the protection afforded to them under English law following the rule in *Gibbs*.

INTRODUCTION

The acceleration of the planned implementation date for the process referred to as the 'Dutch scheme of arrangement', which is colloquially known by its Dutch acronym 'WHOA', will be welcomed by a number of global clients who, in the current pandemic, are considering their restructuring options. The Dutch legislators' aim is for the WHOA to enter into force as early as 1 July 2020.

The speed at which the process can be implemented will be a big attraction. However, this speed could represent an unwary trap for affected English creditors (ie creditors who have debts governed by English law) who will need to make a quick decision on how/when to engage with the process: too much engagement and any protection afforded under English law following the rule in *Gibbs* would be lost. However, if there are viable objections, an English creditor may struggle to sit on their hands and wait for the process to complete in the Netherlands before making any subsequent challenge in England. In such uncertain times, English creditors may prefer to have the certainty of some returns now, rather than greater returns at an unknown time in the future.

In addition, with the anticipated implementation of a restructuring plan, including cramdown, into English law to respond to COVID-19 and the Restructuring Frameworks Directive, English creditors will soon have a further option to consider.

OVERVIEW OF THE WHOA MECHANICS

The WHOA aims to protect business continuity and the value of going concern enterprises, and incorporates a number of points from both the English scheme of arrangement and the US Chapter 11 process, as well as introducing new features. The new restructuring framework follows the US Chapter 11 'debtor in possession' approach by enabling a debtor to offer a tailor-made extrajudicial restructuring plan ('the Plan') to all or some of its creditors and shareholders while remaining in control of the company. The Plan can then be confirmed by the court, provided certain essential requirements are met, making it binding on all affected parties, including those who oppose the Plan.

Public v private plan

One of the most innovative features of the WHOA is that it in fact provides for two procedures: a public and a private one.

The 'public WHOA' is available to debtors who have their Centre of Main Interests (or COMI) in the Netherlands. The public WHOA will be subject to the European Insolvency Regulation (EIR) and will be automatically recognised throughout the member states of the European Union (with the exception of Denmark). As suggested in its name, once approved, any public WHOA will be publicly announced.

The 'private WHOA' by contrast will be heard in chambers. Further, the private WHOA has a wider scope and potentially allows a large number of foreign companies to benefit from the new WHOA procedure. The private WHOA is available to debtors who have their COMI in the Netherlands as well, but also to debtors who do not have their COMI in the Netherlands but have a registered office there, or to debtors who have a sufficient connection with the Netherlands. Examples of a 'sufficient connection' are provided in the explanatory memorandum to the draft bill and include:

- the debtor has significant assets in the Netherlands;
- a substantial portion of the debt that is to be restructured is governed by Dutch law or includes the choice of the Dutch courts;
- the debtor is part of a group of companies, a substantial part of which are companies established in the Netherlands; or
- the debtor is liable for the debts of another debtor (most likely a group company) in respect of which the Dutch courts have jurisdiction.

Feature

Biog box
Ian Fox is a Partner in Dentons' Restructuring and Insolvency practice (London office), focusing on all areas of contentious insolvency and asset recovery work, including major commercial litigation. Email: ian.fox@dentons.com

The private WHOA is not subject to the EIR and automatic recognition in other jurisdictions. Recognition in other jurisdictions will therefore be on the basis of the general recognition principles of private international law.

Contents of the plan

Debtors have a lot of flexibility in terms of what the Plan includes and who is bound by the Plan. A Plan can be offered to creditors or shareholders and can alter the rights of any creditor or shareholder, including secured and preferential creditors, co-debtors and guarantors. However, employee rights cannot be included in a Plan.

As with English schemes, creditors can be divided into different classes at the debtor's choosing. The overriding theme is that creditors and shareholders who have or will have dissimilar or incomparable rights against the debtor have to be placed in different classes.

Under certain circumstances, creditors, shareholders and employees (through the works council or trade union) may request the court to appoint a *restructuring expert* if it is reasonably likely that the debtor will not be able to continue to pay its liabilities (referred to as a 'light insolvency test'). In this way, these aforementioned parties are able to initiate a restructuring plan without the debtor's cooperation. However, if the debtor is an SME, a Plan can only be proposed with the cooperation of the debtor.

Approval of the plan

The ethos of the WHOA is that a minority group of dissenting creditors, as well as shareholders of a distressed debtor, are bound to an agreement (the Plan) that the debtor has concluded with the majority of its creditors.

There are two key ways in which dissenting creditors can be crammed down by the Plan.

First, the Plan is approved within a class when creditors representing a two-thirds majority in value of the outstanding claims consent to the Plan. Unlike English schemes, there is no additional requirement that the Plan also be approved by a majority in number of creditors. This leaves open the possibility of one large creditor swaying the vote of a particular class.

Second, even if a class votes (or several classes vote) against the Plan, the court can nonetheless approve the Plan if, in short, (i) at least one class has voted in favour of the Plan, and (ii) the statutory order of priority remains the same, unless there is a justifiable business reason to deviate from this ('the Absolute Priority Rule').

In addition to the Absolute Priority Rule, the court will reject confirmation of the Plan if a rejecting class is not allowed to claim the cash equivalent of what it would have received in a bankruptcy scenario. On the face of it, this will be appealing to a number of affected creditors who want cash in the short term (especially under current circumstances). However, the value attributed in a 'bankruptcy scenario' will be a hotbed for disputes.

Court engagement throughout the process

The WHOA process is designed to be 'debtor friendly' in order to encourage its use. Colloquially, it is suggested that a Plan could be approved within five weeks of its commencement. In order to assist with the proposed rapid implementation and provide deal certainty, the Dutch courts have a number of tools available to them to assist with reviewing and considering the approval of a Plan, including, amongst others:

- the court may appoint an observer of the debtor whose tasks include safeguarding the interests of creditors during the accomplishment of the Plan;
- both the debtor and the restructuring expert (but not any creditor or shareholder!) may approach the court for an order for clarification on issues of interest such as class formation, information provision, valuation principles etc at any stage. These orders cannot be appealed;
- the court can take interim measures such as imposing a stay (moratorium) for a maximum of four months, which can be extended up to a maximum of eight months, plus any further 'orders it deems necessary to protect the rights of creditors'; and
- a pool of expert judges will be installed, who will exclusively handle WHOA matters.

Additional tools to assist debtors

In order to help a business with putting itself on a successful footing following implementation of the Plan, there are a number of additional elements that can be incorporated into a Plan to help restructure the underlying business:

- emergency funding or other legal acts performed to enable the debtor to continue its business is protected from annulment actions by a bankruptcy trustee in the event the Plan fails;
- liabilities of sureties, jointly liable parties and co-debtors can be included within the Plan;
- onerous contracts may be terminated on three months' notice and damages following such termination can be dealt with in the Plan; and
- *ipso facto* clauses (contractual provisions allowing termination of contracts upon insolvency) are deactivated.

A REPLACEMENT FOR ENGLISH SCHEMES?

The WHOA undoubtedly has a number of key aspects that will appeal to international groups seeking to restructure, not least since it incorporates points from two frequently used insolvency processes globally.

Its cramdown mechanism will be an attractive option for larger groups with one or two hold-out creditors. In addition, the examples of 'sufficient connection' are wide and so larger groups could propose a (private) Plan to take a holistic approach to restructuring its debts group-wide. It would not be surprising to see an English company included within a Plan which, for example, is part of a wider Dutch group of companies; crucially even where the obligations of the English company are governed by English law (provided a *substantial proportion* of the restructured debts are governed by Dutch law).

Biog box
Krijn Hoogenboezem is a Partner in Dentons' Restructuring and Insolvency practice (Amsterdam office), specialising in restructuring and complex litigation. Krijn is regularly appointed as a bankruptcy trustee. Email: krijn.hoogenboezem@dentons.com

The rule in *Gibbs*

However, the effectiveness of the (private) Plan against said English company in England would only be of limited assistance unless further steps are taken, such as by the use of a parallel English scheme because of the rule in *Gibbs*.

By way of a reminder, the rule in *Gibbs* prevents foreign insolvency proceedings from discharging an English law debt. It dates from an 1890 Court of Appeal case (*Gibbs*) and holds that the discharge of a debt is a contractual issue: an English law debt can only be discharged by agreement or by the English court. In the cross-border restructuring arena, the English court will only recognise the discharge of a debt under a foreign procedure if it is effected under the governing law of the contract.

At its most basic position, in the context therefore of the Dutch WHOA, an English law debt cannot be discharged by a Dutch restructuring process. However, there is a crucial exception to this rule: the *Gibbs* principle will not apply if a creditor has 'agreed to' the compromise (for example, if a creditor has participated in a foreign insolvency procedure). What constitutes a 'step' is heavily fact dependent but case law has declared that submitting a proof of debt in wider insolvency proceedings is a 'step'; by contrast, refusing to engage in the foreign proceedings at all (unsurprisingly) did not class as a 'step'.

Next steps conundrum for affected English creditors

Noting the speed at which a Plan could potentially be approved, the steps that any English creditor takes when it receives notice of a Plan will need careful thought (which is easier said than done when matters are moving at speed).

Suppose the Dutch debtor is unsure about class compositions and makes an application to the Dutch court for an early ruling on this point (with the Dutch court inviting the English creditor to join the application on the basis that they are part of the affected class). Further, assume that the English creditor wants to retain the protection of *Gibbs* but can see that the classes are not properly constituted. If the Dutch ruling on this point cannot be appealed, should the English creditor make an appearance in the Dutch hearing, seek to reserve their rights to dispute jurisdiction and note the class composition issues? If the English creditor succeeds, the Plan might be amended and re-issued. Would the English creditor be bound by the new Plan or have they only submitted to the 'old' Plan? Further, if the English creditor fails to defeat the debtor's application, have they now submitted to the jurisdiction of the courts of the Netherlands and lost the protection of *Gibbs* in England?

With the myriad of permutations and combinations that result from one 'simple' scenario above, it is not possible to answer these posed questions in a short article. However, the authors came across these very conundrums in a recent matter, which considered the interaction of the rule in *Gibbs* and 'steps' taken in relation to an Australian scheme of arrangement. The points raised (and debated at length in that matter) were never tested in any hearing but, needless to say, there were plenty of 'grey areas' that meant careful decisions had to be taken at every stage. Indeed, it will be a brave creditor (but not necessarily unwise) who can steady their nerves and simply refuse to engage with a foreign process, especially when they feel aggrieved to have been joined to it in the first place.

Public WHOA – rights *in rem*

The above analysis is in relation to a private WHOA, which will most likely be used the most, given the breadth of debtors that can be included within it. However, any English creditor joined to a public WHOA should note one important exception under the EIR (Article 8) which states that a creditor who has a right *in rem* in a member state other than that which opened main proceedings cannot have these rights affected without the opening of secondary proceedings.

Therefore, if a creditor holds security over property in England, some commentators have suggested that enforcement against this property could be for 100% of the debt value, even if the debt has been reduced, for example, to 80% of its original value under a Plan.

Whilst this exception may only be relevant in England until the end of 2020 (or any extended implementation period), it will remain relevant in other member states throughout.

AN EVEN (NEWER) ALTERNATIVE: THE NEW ENGLISH RESTRUCTURING MORATORIUM

Any current article would be remiss to not at least mention the chaos that is being experienced as a result of the COVID-19 pandemic.

Helpfully, the pandemic has brought forward a number of restructuring initiatives. The WHOA is included in this list; the Ministry of Justice has now marked the draft bill as urgent with a target implementation date of 1 July 2020.

England is no different. On 28 March 2020, the UK government announced plans to introduce the new 'moratorium' and 'restructuring plan': two permanent rescue procedures which have now been included in the Corporate Insolvency and Governance Bill currently before the UK Parliament, and are expected to come into force in early July as well. As the proposed restructuring plan includes an ability to cram down creditors, it will help to plug some of the gaps in the range of restructuring options under English law. Commentators to date have pitched the Dutch WHOA against English schemes and compared and contrasted the two alternatives. With the new English restructuring plan thrown into the mix, debtors will have even more options to choose from. In such unprecedented times, this is welcome news. ■

Further reading

- Lending against Dutch assets: a 'safe harbour' in turbulent times (2020) 5 JIBFL 334
- WHOA! The state-of-the-art Dutch scheme of arrangement: the best of both worlds? (2020) 1 JIBFL 50
- Fighting on: the rule in *Gibbs* survives another day (2019) 2 CRI 47