Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union

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Abstract

On 1 January 2021, the Act on Court Confirmation of Extrajudicial Restructuring Plans ('WHOA') was introduced into the Dutch legal framework. It allows for extrajudicial debt restructuring outside of insolvency proceedings, a novelty in the Netherlands. If certain requirements – mostly relating to due process and voting – are met, court confirmation of the restructuring plan can be requested. A court-confirmed restructuring plan is binding on all creditors and shareholders whose claims are part of that plan, regardless of their approval of the plan. WHOA is available in two distinct versions: one public and the other undisclosed. This article assesses on what basis a Dutch court may assume jurisdiction and if there is a basis for automatic recognition within the EU of a court order handed down in either a public or an undisclosed WHOA procedure.

1. Introduction

Under Dutch law, the principle of freedom of contract applies. This means that the parties to a contract, such as a creditor and its debtor,[1] determine the content of their legal relationship together. In times of financial distress, this principle remains in place. Consequently, parties can agree to amend the debtor's obligations under the contract, for instance by agreeing on an extension of the maturity of the debt, a partial discharge of the amount due or, if the debtor is a company, a so-called debt-for-equity swap whereby outstanding debt is converted into equity. The option for the parties to amend their contract however they see fit is one aspect of the principle of freedom of contract. On the flipside, the principle implies that no party can be forced to agree to an amendment if it does not want to. Principally, any creditor is entitled to demand the full recovery of his claim; he does not have to accept an offer for anything less. However, until recently, there have been two exceptions to this general rule.

First, a statutory exception applies in case the debtor enters formal insolvency proceedings. The Dutch Bankruptcy Act (*Faillissementswet*; 'DBA') provides for a compulsory composition (*dwangakkoord*, Arts. 138 et seq. DBA for bankruptcy, Arts. 252 et seq. DBA for suspension of

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1 In this article we limit ourselves to debtors that are either natural persons (sole proprietors) or legal entities that conduct a business or a profession. We do not discuss natural persons (individuals) who do not conduct any business.

payments and Arts. 329 et seq. for individuals' debt rescheduling schemes). That is, a composition plan proposed by the debtor to its unsecured creditors, that can be confirmed by the court if a majority of creditors, representing at least 50% of the unsecured claims represented at the meeting (both in head count and in value), vote in favour of the plan (and all other statutory requirements are met).

Second, another exception to the rule that a creditor is entitled to demand full payment has been developed in case law. The Dutch Supreme Court has held that a creditor can be forced to accept a composition plan if his refusal to do so results in abuse of power (Art. 3:13 Dutch Civil Code).[2] However, an order to a creditor to accept a composition plan may be given only under exceptional circumstances since, as a basic rule, he is allowed to demand full payment. As a result, outside of insolvency proceedings, a hold-out creditor can profit from nuisance value by refusing to cooperate with a consensual debt restructuring and trying to leverage his position in exchange for accepting the composition plan.

This thus far limited infringement on the strong position of creditors in the Netherlands has been expanded per 1 January 2021 due to the enactment of the Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet homologatie onderhands akkoord,* 'WHOA'). WHOA introduces extrajudicial restructurings for businesses,[3] whereby non-cooperating creditors and shareholders can become bound by a court-confirmed restructuring plan despite not voting in favour of that plan.

The use of WHOA is not limited to Dutch debtors; it is also available to foreign entities, provided there is a sufficient connection with the Netherlands (see section 2.2). As a result, issues of private international law may arise. Due to editorial limitations, we restrict the discussion in this article to the issue of jurisdiction and the recognition of court orders under WHOA within the European Union ('EU'). First, we provide a global outline of WHOA and its two versions: the public (disclosed) version and the undisclosed (non-public) version (section 2). Subsequently, we investigate the issue of the automatic recognition of a court order based on the EIR recast[4] (section 3) and the Recast Brussels Regulation[5] (section 4). We leave aside other possible routes to the recognition of court orders under the WHOA, such as based on the order constituting an enforceable title and perhaps even a contract. Our final remarks conclude this article (section 5).

2. The WHOA restructuring procedure

2.1 The mechanics of a WHOA restructuring procedure

Once it is reasonably foreseeable that a debtor cannot continue to pay its debt, a restructuring plan can be offered to some or all creditors and shareholders. The restructuring plan does not

2 Dutch Supreme Court (*Hoge Raad der Nederlanden*) 12 August 2005, *NJ* 2006/230 (*Groenemeijer/Payroll*) and Dutch Supreme Court 24 May 2017, *NJ* 2017/466 (*Mondia/V&D*).

3 Whether conducted by legal entities or natural persons (Art. 369(1) DBA).

4 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), *OJ* 2015, L 141/19-72 ('EIR recast').

5 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1-32 ('Recast Brussels Regulation').

have to include all debt and equity; it may apply to only a part thereof. A debtor can make the offer himself or through a court-appointed plan expert (*herstructureringsdeskundige*). A restructuring can also be initiated by a creditor, shareholder, works council or employees' representative by way of requesting the appointment of a plan expert (Arts. 370(1) and 371(1) DBA). The plan expert's sole duty and authority are to design and negotiate a restructuring plan on behalf of the debtor and to offer it to the affected creditors and shareholders (Art. 371(1) DBA).

The debtor remains in full control over its business (debtor-in-possession).[6] This is different from Dutch insolvency proceedings (bankruptcy (*faillissement*) and suspension of payments (*surseance van betaling*)) in which a court-appointed insolvency practitioner (a bankruptcy trustee (*curator*) or administrator (*bewindvoerder*)) gains control to the detriment of the debtor (in the case of bankruptcy, Art. 68 DBA), or must approve all of the debtor's managerial and disposal acts (in the case of suspension of payments, Art. 228 DBA). Instead of a plan expert, the court can – of its own motion or at the request of the debtor – appoint an observer (*observator*), whose sole purpose is to monitor the restructuring in the interests of the joint creditors (Art. 380(1) DBA). As is the case for the plan expert, the appointment of an observer does not limit the debtor in managing its business in any way.

Creditors and shareholders whose rights are affected by the restructuring plan are placed in different classes if the rights they would be able to enforce in case of the debtor's bankruptcy, or the rights they will obtain in accordance with the restructuring plan, are dissimilar in such a way that their legal position is not comparable (Art. 374(1) DBA). A restructuring plan has to be submitted to the affected creditors and shareholders for a vote (Art. 381(3) DBA). A restructuring plan is approved by a class of creditors, representing at least two thirds of the total claims on which a vote is cast in that class, who vote in favour of the plan (Art. 381(7) DBA). For approval by a class of shareholders, the requirement is linked to the represented subscribed capital (Art. 381(8) DBA).

If at least one class of in-the-money creditors, or the class in which the value breaks, have approved the plan, it can be submitted to the Dutch court for confirmation (Art. 383(1) DBA). In this context, a creditor is in-the-money if he is likely to receive payment on his claim in case the debtor becomes bankrupt. The class of creditors whose claim would likely be repaid only in part is the class in which the value breaks. In other words, the threshold for submitting a restructuring plan for court confirmation relates only to the result of the votes by those creditors who have an actual financial interest in the restructuring. This leaves creditors without any financial motive out of the picture, and makes it much easier to procure a restructuring when confronted with hold-out creditors who lack any economic interest.

When a restructuring plan is submitted for court confirmation, a hearing will be held (Art. 383(4) DBA). The court will confirm the plan unless a statutory ground for refusal applies (Art. 384 DBA). There are general grounds for refusal to be applied by the court at its own discretion or at the request of a creditor or shareholder eligible to vote, and specific additional grounds that are applied only at the request of an opposing creditor or shareholder and some grounds only if the opposing creditor or shareholder was part of an opposing class. A court-confirmed restructuring plan binds all affected creditors and shareholders regardless of their vote on the plan (Art. 385 DBA).

6 Parliamentary documents (*Kamerstukken II*) 2018/19, 35 249, no. 3, p. 60.

Unlike in formal insolvency proceedings, court involvement under WHOA can be limited to only confirming the restructuring plan. In case the debtor and the appropriate threshold of affected creditors and shareholders have agreed on the restructuring, there is no need for any other court involvement than a confirmation of the plan to make it binding and enforceable. However, if the plan is controversial or some affected parties are litigious, WHOA contains a broad scope of possible court interventions to support the process. All of the court's decisions, including the one confirming the restructuring plan, are final and not subject to any appeal (Art. 369(10) DBA).

Irrespective of what phase the restructuring is in and who approaches the court (the debtor or another party), the first time the court is engaged in connection with the WHOA, the approaching party must inform the court which version of the WHOA procedure it wishes to apply (Art. 369(6) DBA): will it be a public (disclosed) procedure or an undisclosed (non-public) procedure? Art. 369(9) DBA states that all requests made to the Dutch court in accordance with WHOA will be heard in chambers unless a public WHOA procedure has been chosen. Furthermore, public WHOA procedures are subject to the publication requirements that apply to Dutch insolvency proceedings (Art. 370(4) DBA). The undisclosed version of WHOA is exempt from publication requirements, allowing parties to negotiate a restructuring plan without any negative side effects caused by the debtor's distress becoming publicly known. The choice for either procedure has to be made upon the court's first involvement and is final for any further court involvement.[7]

2.2 WHOA as a tool for cross-border restructuring: which EU regulation applies?

In the context of this article, it is important to note that the use of WHOA is not restricted to purely domestic Dutch restructurings. One of the key drivers behind the creation of WHOA was to cater for cross-border restructurings as well.[8] Quite a few globally operating groups of companies tend to incorporate Dutch legal entities as finance companies for the group, mostly for tax considerations.[9] These Dutch companies will typically attract funds by issuing bonds or other debt instruments listed at a foreign stock exchange or by attracting a loan or facility from international bank syndicates, often secured by assets all over the world or by a parent guarantee of a foreign entity. Those funds will then be lent-on to the finance company's group members. Considering the international character of these arrangements, the finance documentation is often governed by English or New York law.

If the Dutch financing company and (parts of) the group encounter financial difficulties, a restructuring using WHOA could be an option. This gives rise to questions concerning jurisdiction and recognition. Which court would have jurisdiction to hear WHOA issues in the context of a cross-border restructuring? And if the restructuring would result in court confirmation of a restructuring plan, would that confirmation order and other related orders be

7 Parliamentary documents (*Kamerstukken II*) 2018/19, 35 249, no. 3, p. 7.

8 Parliamentary documents (*Kamerstukken II*) 2019/20, 35 249, no. 6, pp. 4 et seq.

9 See R.D. Vriesendorp & F.J.M. Hengst et al., *Restructuring Cross-border Groups: Key Considerations Around Foreign Tax and Finance-driven SPVs*, INSOL Special Report 2020, INSOL International 2020, i-iii + 1-24 pp.

(automatically) recognized abroad? Generally speaking, two approaches can be followed: the EIR recast (section 3) and the Recast Brussels Regulation (section 4).

3. The EIR recast

3.1 The scope requirements of the EIR recast

The EIR recast is expressly limited to *public* collective proceedings, based on laws relating to insolvency and listed in annex A to the regulation (Art. 1(1) EIR recast). This follows also from recital 9 EIR recast, stating that the EIR recast should apply to insolvency proceedings which meet the conditions of the EIR recast, and that those proceedings are listed exhaustively in annex A with the view of saving courts of other member states the trouble of examining whether or not the conditions of the EIR recast are met for specific proceedings. According to the last sentence of recital 9, any procedure that is not listed in annex A should not be covered by the EIR recast.[10]

3.2 Public WHOA procedure

There has been little discussion on whether the public WHOA meets the material scope requirements of the EIR recast as it is a public collective procedure, based on the DBA. The Dutch legislature intends to have the public WHOA listed in annex A to the EIR recast in order for it to be automatically recognised in the EU.[11] Once the public WHOA is listed, the formal scope requirement is also met. Consequently, the EIR recast will apply to the public WHOA procedure.

WHOA's preliminary draft[12] provided for one procedure only, which some found did not meet the publicity requirement of Art. 1(1) EIR recast.[13] At least one of these authors is, however, in favour of applying the EIR recast to the public WHOA procedure.[14] Currently, we are aware of only one author who finds that the public WHOA procedure is not within the EIR recast's material scope. In his opinion, the WHOA's additional goal to facilitate the wind-down of non-viable businesses does not meet the EIR recast's requirement for procedures that can be initiated at only a risk of insolvency to be aimed at either preventing insolvency or the termi-

10 CJEU 8 November 2012, *Ulf Kazimierz Radziejewksi* v. *Kronofogdemyndigheten i Stockholm*, C-461/11, ECLI:EU:C:2012:704, *NIPR* 2013, 151, para. 24.

11 Parliamentary documents (*Kamerstukken II*) 2018/19, 35 249, no. 3, p. 6.

12 *Voorontwerp Wet homologatie onderhands akkoord ter voorkoming van faillissement*, published on 5 September 2017, www.internetconsultatie/wethomologatie.

13 Prof. P.M. Veder and Prof. J.J. van Hees, *Internationale aspecten dwangakkoord ter voorkoming van faillissement* (International Aspects of Compulsory Restructurings to Prevent Bankruptcy), in: Het dwangakkoord buiten faillissement (Compulsory Restructuring Outside of Banktruptcy), Vereeniging 'Handelsrecht' Preadviezen 2017 (Preliminary Reports by the Association of Commercial Law 2017), Zutphen: Uitgeverij Paris 2017, p. 178

14 Prof. P.M. Veder, 'Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement' (International Aspects of the WHOA: the public and the undisclosed restructuring procedure outside of bankruptcy), *FIP* 2019/219, para. 3.1.

nation of the business.[15] We do not agree because we believe that it is indeed the legislature's intention to wind-down non-viable business to prevent insolvency.[16]

Once the public WHOA procedure meets the scope requirements of the EIR recast, jurisdiction over any request made in a public WHOA procedure will have to be assessed in accordance with that regulation (Art. 3(1) EIR recast and Art. 369(7)(a) in conjunction with Art. 5 DBA). Moreover, a court order handed down in accordance with a public WHOA procedure (and any other judgments deriving directly from this procedure and which are closely linked therewith or relating to preservation measures taken in connection with it) will be automatically recognised pursuant to Article 32(1) EIR recast.

As long as the public WHOA procedure has not been listed in annex A to the EIR recast, it currently falls outside of that regulation's scope. Since it is within the EIR recast's material scope, the Recast Brussels Regulation does not apply either (see section 4.2.4). This being the case, Article 369(7) DBA stipulates that in the meantime jurisdiction has to be assessed in accordance with Article 3 Dutch Code of Civil Procedure ('DCCP'). Consequently, until the listing in annex A to the EIR recast is effectuated, the recognition of an order handed down in accordance with a public WHOA procedure will have to be assessed in exequatur proceedings in every individual member state based on its domestic general provisions of private international law.

3.3 Undisclosed WHOA procedure

The undisclosed WHOA procedure is by definition not a public procedure and, although it does meet the other material scope requirements of Article 1(1) EIR recast, falls outside the material scope of the EIR recast due to a lack of that crucial element of publicity. This is compliant with the EIR recast's recitals:

> Recital 12 EIR recast: 'This Regulation should apply to proceedings the opening of which is subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings.'

> Recital 13 EIR recast: 'Accordingly, insolvency proceedings which are confidential should be excluded from the scope of this Regulation. While such proceedings may play an important role in some Member States, their confidential nature makes it impossible for a creditor or a court located in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the Union.'

15 W.J.E. Nijnens, 'Internationaal privaatrechtelijke aspecten van de WHOA' (Private International Law Aspects of the WHOA), *TvI* 2019/34.

16 Parliamentary documents (*Kamerstukken II*) 2018/19, 35 249, no. 3, pp. 5 and 23. Also, Veder 2019, para. 3.1 (*supra* n. 14).

The lack of publicity of the undisclosed WHOA version means that it cannot be added to annex A of the EIR recast.[17] It does not therefore meet the regulation's formal scope requirement and, as a result, the EIR recast does not and will not apply to the undisclosed WHOA procedure. In the next section, we will assess whether the undisclosed WHOA is within the scope of the Recast Brussels Regulation.

4. Recast Brussels Regulation

4.1 The scope requirements of the Recast Brussels Regulation

The first step is that, according to Article 1(1) Recast Brussels Regulation, the regulation applies to all civil and commercial matters in general, whatever the nature of the court or tribunal, except for revenue, customs and administrative matters or *acta iure imperii*. The material scope of the Recast Brussels Regulation extends to all civil and commercial matters in general. It excludes only certain well-defined matters which are either dealt with in other regulations (such as family maintenance obligations or insolvency proceedings) or which are deemed to have to be considered in accordance with national law (such as arbitration).[18]

The qualification of WHOA as a civil matter is undisputed.[19] The only exclusionary provision which seems to be potentially relevant is Article 1(2)(b) Recast Brussels Regulation, which excludes from its scope 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. This provision is called the 'insolvency exception'.[20]

4.2 Analysis of the insolvency exception

4.2.1 History of the insolvency exception

The insolvency exception has been included from the very beginning of EU legislation on jurisdiction and enforcement of judgments in civil and commercial matters, starting with the Brussels Convention.[21] The historic rationale for including the insolvency exception was that, at the time, a separate EEC bankruptcy convention to deal with insolvency proceedings was being

17 As argued by Veder and Van Hees for the WHOA's preliminary draft (*preadvies*, *supra* n. 13, p. 178), which was even more of a public procedure than the current undisclosed WHOA. W.J.E. Nijnens shares our view with regard to the undisclosed WHOA (see Nijnens 2019, *supra* n. 15, para. 3.4.1).

18 Art. 1 and recital (10) Recast Brussels Regulation.

19 See L.P. Kortmann and P.M. Veder, 'The Uneasy Case for Schemes of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?', *Nottingham Business and Insolvency Law e-Journal* (3/13) 2015, para. 63 and H.L.E. Verhagen and J.J. Kuipers, 'De erkenning van een Engelse Scheme of Arrangement door de Nederlandse rechter' (The Recognition of an English Scheme of Arrangement by the Dutch Courts), *Overeenkomsten en Insolventie* 2012/72, para. 4.17.4.

20 See for instance Veder who rejects the application of the Recast Brussels Regulation because the undisclosed WHOA procedure is excluded pursuant to the insolvency exception in Art. 1(2)(b) Recast Brussels Regulation, Veder 2019 (*supra* n. 14).

21 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ('Brussels Convention').

discussed, and the two conventions were intended to supplement and dovetail each other.[22] Therefore, both conventions deliberately used the same language in their scope provisions. The desire to prevent any void between the scope of the two conventions by making clear which procedures are governed by the EIR recast was also the main reason for adopting the document currently known as annex A to the EIR recast.[23]

Furthermore, it is clear that the insolvency exception was intended to be interpreted narrowly. The Brussels Convention was considered to be the general convention, whereas the upcoming bankruptcy convention was considered a *lex specialis*, aimed at governing only a very specific field of expertise: insolvency proceedings, as these required provisions specifically tailored to such proceedings.[24] Insolvency proceedings within the meaning of the insolvency exception and the scope of the new bankruptcy convention were interpreted as those proceedings based on the condition of cessation of payments, insolvency or a lack of creditworthiness, that implied court intervention aimed at a forced collective realization of the debtor's assets. Any other proceedings, even those relating to bankruptcy, were not necessarily excluded from the Brussels Convention (nor necessarily included in the new bankruptcy convention).[25] This interpretation of insolvency proceedings as follows from the Jenard Report, the Noël-Lemontey Report and the Schlosser Report was confirmed by the Court of Justice of the EU in 1979 in *re Gourdain*.[26]

4.2.2 Current interpretation of the insolvency exception

Ever since, the insolvency exception has not changed, except that it was included in Article 1(2) Brussels I Regulation[27] when that regulation succeeded the Brussels Convention. The Court of Justice of the EU held that any interpretation given to the Brussels Convention also applies to the Brussels I Regulation where the provisions in question may be treated as equivalent, which is true for the insolvency exception.[28] The insolvency exception remained in Article 1(2) when the Brussels I Regulation was recast in 2012. Considering that the provision has not changed with the Recast Brussels Regulation, it is safe to say that any case law relating to the exception under the Brussels Convention and the Brussels I Regulation still applies to the current – unchanged – insolvency exception in Article 1(2)(b) Recast Brussels Regulation.

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22 Report on the Brussels Convention by Mr. P. Jenard, *OJ* 1979, C 59/1-65) ('Jenard Report'), p. 11 and Report on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol on its interpretation by the Court of Justice by Professor Dr. P. Schlosser, *OJ* 1979, C 59/71-151) ('Schlosser Report'), para. 53. Report on the Convention relating to Bankruptcies, Compositions and Analogous Procedures by Mr. J. Noël and Mr. J. Lemontey ('Noël-Lemontey Report'), p. 1.

23 Noël-Lemontey Report, p. 18 and Schlosser Report, para. 53.

24 This reading is also implied in CJEU 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, *NIPR* 2009, 284.

25 Jenard Report, p. 12, Noël-Lemontey Report, p. 19 and Schlosser Report, para. 54.

26 CJEU 22 February 1979, *Gourdain*, ECLI:EU:C:1979:49.

27 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001, L 12/1-23 ('Brussels I Regulation').

28 CJEU 19 April 2012, *F-Tex*, C-213/10, ECLI:EU:C:2012:215, *NIPR* 2012, 349.

Whereas the scope of Brussels I did not change in the Recast Brussels Regulation, this was different for the European Insolvency Regulation[29] when it was succeeded by the EIR recast in 2015. The rationale for this change was to include newly emerging legislation in the member states addressing business rescue.[30] An initial step in the direction that the Restructuring Directive[31] continued on. However, there is no indication that the change in the scope of the EIR recast has affected the insolvency exception in the scope of the Recast Brussels Regulation. On the contrary, the relevant recitals in the EIR regulation and the EIR recast (both recital 7) demarcating the Brussels I Regulation and recast are very similar. Both refer to the insolvency exception using language similar thereto:

> Recital 7 EIR regulation: 'Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (3), as amended by the Conventions on Accession to this Convention (4).'

Or even using the exact same wording as the Recast Brussels Regulation:

> Recital 7 EIR recast: 'Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (4). Those proceedings should be covered by this Regulation. […]'

A difference between the two recitals is that two sentences have been added in the EIR recast:

> Recital 7 EIR recast: '[…] The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.'

The first additional sentence is a clear reference to the historical intention of the original conventions (the Brussels Convention and the draft EEC bankruptcy convention) to supplement and dovetail each other as much as possible (see section 4.2.1).[32] The interpretation of the Brus-

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29 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ* 2000, L 160/1-18 ('EIR regulation').

30 Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) no. 1346/2000 on insolvency proceedings of 20 December 2012, p. 48.

31 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), *OJ* 2019, L 172/18-55 ('Restructuring Directive').

32 G. van Calster, 'COMIng and Here to Stay: The Review of the European Insolvency Regulation', *European Business Law Review* (27) 2016, p. 735 at pp. 741-743. The Schlosser Report, speaking about the predecessors of both regulations, states that these predecessors were intended to dovetail almost completely with each other.

sels I Regulation and recast and of the EIR regulation and recast so as to avoid any overlap and any vacuum has been consequently and repetitively supported by the Court of Justice of the EU in its rulings following *re Gourdain*.[33]

The second and last additional sentence of recital 7 EIR recast does not affect the above. It refers to the considerations of the Court of Justice of the EU in the case of *German Graphics Graphische Maschinen GmbH* v. *Alice van der Schee*.[34] It aims to warrant that a procedure is not automatically within the scope of the Recast Brussels Regulation by the mere reason that it is not within scope of the EIR recast as the Recast Brussels Regulation only applies to such a procedure if its scope requirements are met. The last sentence is intended to discourage member states from subjectively excluding national procedures which objectively fall within the scope of the EIR recast, by deliberately not listing them in annex A.[35] Recital 7 EIR recast warns the member states that this may lead to such national procedures falling in a vacuum between the EIR recast and the Recast Brussels Regulation. It is to judgments handed down in such proceedings that the Court of Justice of the EU refers in its decision in *re German Graphics Graphische Maschinen*,[36] where it held that it is conceivable that some judgments are neither within the scope of the EIR recast nor the Recast Brussels Regulation.[37]

As to the concurrence of the – generic – Recast Brussels Regulation and the – specific – EIR recast, the Court of Justice of the EU made clear that the underlying principles of judicial cooperation in civil and commercial matters in the EU cannot be compromised. In this respect, the court referred to the principles of the free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, the sound administration of justice, a minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the EU (recitals 6, 11, 12 and 15 to 17

33 CJEU 19 April 2012, *F-Tex*, C-213/10, ECLI:EU:C:2012:215, *NIPR* 2012, 349, paras. 21, 29 and 48; CJEU 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, ECLI:EU:C:2014:2145, *NIPR* 2014, 376, para. 21; CJEU 9 November 2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, ECLI:EU:C:2017:847, *NIPR* 2018, 55, para. 17 and most recently CJEU 6 February 2019, *NK*, C-535/17, ECLI:EU:C:2019:96, *NIPR* 2019, 58, para. 24.

34 CJEU 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, *NIPR* 2009, 284, paras. 17-20.

35 F. Garcimartín, 'The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction', https://ssrn.com/abstract=2752412 (29 May 2019). See also the reasoning of the German Delegation in Document from the German Delegation, Interinstitutional file 2012/0360 (COD), No. 8666/14, http://data.consilium.europa.eu/doc/document/ST-8666-2014-INIT/en/pdf (accessed 21 January 2021).

36 CJEU 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, *NIPR* 2009, 284, paras. 17 and 18.

37 It has also been argued that the last sentence of recital 7 pertains to procedures that meet the criteria to be included in annex A EIR recast but is, by the choice of the relevant member state, not included. Such procedures should also not automatically be governed by the Recast Brussels Regulation. See Nijnens 2019 (*supra* n. 15). We do not agree, as we are of the opinion that the history, as set out above, shows that annex A was drafted to make clear beyond any doubt which procedures are within scope of the EIR recast and, as a result, any procedure that is not on that list is consequently not within its scope.

to Regulation No. 44/2001).[38] These principles are laid down in recitals 6, 15, 16, 21 and 26-28 Recast Brussels Regulation. They relate to the core elements of judicial cooperation in the EU.

Where, in the interests of the harmonious administration of justice, the purpose of Recast Brussels Regulation on the one hand is to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different member states (recital 21 Recast Brussels Regulation), it should on the other hand prevent 'black holes' and a vacuum where recognition in other member states would be impossible due to a certain reading of an exception, such as the insolvency exception. As recital 10 Recast Brussels Regulation[39] reiterates, the scope of this regulation should cover all the main civil and commercial matters apart from certain 'well-defined' matters. It appears that a broad reading of the insolvency exception would not be 'well-defined' in view of the principles of predictability as to the courts having jurisdiction and therefore legal certainty for litigants, and the sound administration of justice. As the Court of Justice of the EU has repeatedly[40] considered, exceptions (such as the EIR recast) should not be broadly interpreted. Consequently, the same would apply to an exception in the Recast Brussels Regulation, such as this insolvency exception. This exception should therefore be narrowly read as being restricted to only 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' that are subject to the EIR recast.

As follows from the above, it is our view that the insolvency exception applies to those procedures that are within the material scope of the EIR recast (as *lex specialis*), regardless of their meeting the formal scope requirement of being listed in annex A. Any procedure that does not meet the material scope requirements of the EIR recast does not fall within the insolvency exception. In other words, the Recast Brussels Regulation only intends to exclude those insolvency proceedings (including judicial arrangements and compositions) to the extent that they fall within the material scope of the EIR recast.[41] Consequently, if a procedure is outside the EIR recast's material scope and meets all of the other scope requirements of the Recast Brussels Regulation, the latter regulation applies to the procedure.

We believe that, currently, the public WHOA procedure is a procedure within the meaning of the last sentence of recital 7 EIR recast. The EIR recast formally does not apply to the public WHOA procedure because it is not yet listed in annex A but as it is otherwise completely within the EIR recast's material scope, it is excluded from the Recast Brussels Regulation.

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38 CJEU 4 May 2010, *TNT Express Nederland*, C-533/08, ECLI:EU:C:2010:243, *NIPR* 2010, 324, para. 49; CJEU 19 December 2013, *Nipponkoa Insurance Co. (Europe)*, C-452/12, ECLI:EU:C:2013:858, *NIPR* 2014, 49, para. 36; CJEU 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, ECLI:EU:C:2014:2145, *NIPR* 2014, 376, para. 38.

39 As recital 7 Brussels I Regulation did.

40 CJEU 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, *NIPR* 2009, 284, paras. 23-25; CJEU 9 November 2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, ECLI:EU:C:2017:847, *NIPR* 2018, 55, para. 18; CJEU 6 February 2019, *NK*, C-535/17, ECLI:EU:C:2019:96, *NIPR* 2019, 58, para. 25.

41 See CJEU 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, *NIPR* 2009, 284, paras. 23-25, where the CJEU considered that the Recast Brussels Regulation should be interpreted extensively whereas the EIR recast should be interpreted restrictively. Our view is shared by W.J.E. Nijnens (see Nijnens 2019, *supra* n. 15, para. 3.5), although he is of the opinion that both WHOA procedures are within the scope of the Recast Brussels Regulation.

4.2.3 Opposing opinions

The applicability of Recast Brussels Regulation with respect to the WHOA, whether public or undisclosed, is opposed by some authors. Van Hees and Veder wrote – without further substantiation – with regard to the WHOA's preliminary draft (where no distinction between a public and undisclosed version was made):[42]

> '*Het lijdt naar onze mening geen twijfel dat de akkoordprocedure onder de uitsluiting van artikel 1 lid 2 onder b EEX-Vo valt.*'
> In English: In our opinion, there is no doubt that the restructuring procedure falls under the exception of Article 1(2)(b) Recast Brussels Regulation.

Veder has repeated his position, arguing that:[43]

> '*Afgezien van het gebrek aan publiciteit voldoet de besloten akkoordprocedure materieel echter volledig aan de omschrijving van wat voor de toepassing van de EU Insolventieverordening heeft te gelden als een insolventieprocedure.*'
> In English: Apart from a lack of publicity, the undisclosed restructuring procedure materially completely fulfils the description of an insolvency procedure within the meaning of the EIR recast.

We do not share his view that the lack of publicity can be disregarded. We believe that the required publicity is essential for any procedure to fall within the material scope of the EIR recast (see section 3.3). Due to this lack of publicity, the undisclosed WHOA is not within the EIR recast's scope and, consequently, is not covered by the insolvency exception of the Recast Brussels Regulation.

Another opposing opinion is held by Mennens, who claims that:[44]

> *'Erkenning op basis van de herziene EEX-Verordening is immers niet mogelijk, nu art. 1 lid 2 sub b van deze verordening bepaalt dat zij niet van toepassing is op "het faillissement, akkoorden en andere soortgelijke procedures". De besloten akkoordprocedure is in alle opzichten gelijk te stellen met een faillissementsprocedure. Er geldt immers een (pre-)insolventietoets, er is een afkoelingsperiode mogelijk, en vermogensverschaffers kunnen tegen hun wil gebonden worden aan een akkoord.'*
> In English: Recognition based on the Recast Brussels Regulation is not possible because Article 1(2)(b) of this regulation provides that it does not apply to 'bankruptcies, arrangements and similar procedures'. The undisclosed procedure is in every aspect equal to a bankruptcy procedure. A (pre-) insolvency test applies, a cooling-off period can be declared, and capital providers can be bound by a restructuring plan against their free will.

For the same reason, however, we do not agree that the undisclosed WHOA should be considered as the equivalent of a bankruptcy within the meaning of the insolvency exception. The

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42 Veder and van Hees 2017, pp. 173 and 184 (*supra* n. 13).

43 Veder 2019, para. 4.1 (*supra* n. 14).

44 A.M. Mennens, *Het dwangakkoord buiten surseance en faillissement* (Compulsory Restructuring Outside Suspension of Payments and Bankruptcy), Deventer: Wolters Kluwer 2020, p. 790.

concurring elements that Mennens mentions are not decisive. Firstly, the (pre-)insolvency test with regard to proceedings referred to in Article 1(1) EIR recast in situations where there is only a likelihood of insolvency, aiming to avoid the debtor's insolvency or the cessation of the debtor's business activities, is expressly restricted to *public* proceedings, which the undisclosed version of the WHOA is not. Secondly, a cooling-off period is in essence nothing more than an injunction, prohibiting certain parties such as (secured) creditors from enforcing their rights or filing for the debtor's bankruptcy. Such an order falls typically under the broad scope of the Recast Brussels Regulation where it can also be based on tort or other general principles of civil or commercial law. Thirdly, the same applies to judicial orders leading to a (legal) person being bound by a contract against its will. It is our view that only those procedures that are within the material scope of the EIR recast are procedures governed by the insolvency exception. As the undisclosed WHOA is not within the EIR recast's material scope, it is not a procedure within the meaning of the insolvency exception and is therefore not excluded from the applicability of the Recast Brussels Regulation (see section 4.2.2).

4.2.4 Result of the analysis: the Recast Brussels Regulation applies to the undisclosed WHOA procedure

As follows from the above, the Recast Brussels Regulation is intended as a general regulation, covering a broad range of judgments, whereas the EIR recast is intended as *lex specialis* and covers only insolvency proceedings that are within its material and formal scope. The two regulations are intended to supplement each other and to dovetail their scope. The insolvency exception aims to only exclude those insolvency proceedings which are materially governed by the EIR recast. That comes down to two general types of insolvency proceedings: (i) those that are within the EIR recast's material *and* formal scope so the EIR recast applies, and (ii) those that are within the EIR recast's material scope but outside its formal scope (as they are not listed in annex A) so the EIR recast does not apply. The public WHOA currently falls within the second category and is therefore, at this point in time, a procedure that is within the scope of neither the EIR recast nor the Recast Brussels Regulation. As such, it is an example of a procedure that falls within a vacuum as referred to in *re German Graphics Graphische Maschinen*.[45] The undisclosed WHOA procedure, which is by definition outside of the EIR recast's material scope (and can therefore never meet its formal scope requirement and be listed in annex A) is not covered by the insolvency exception of the Recast Brussels Regulation. As it meets all other scope requirements of the Recast Brussels Regulation,[46] that regulation applies to the undisclosed WHOA procedure.

4.3 Effect: jurisdiction and automatic recognition for the undisclosed WHOA

As the undisclosed WHOA procedure meets the scope requirements of the Recast Brussels Regulation, jurisdiction over any request made in an undisclosed WHOA procedure will have to be assessed in accordance with that regulation (Arts. 4 et seq. Recast Brussels Regulation).

45 CJEU 10 September 2009, *German Graphics Graphische Maschinen*, C-292/08, ECLI:EU:C:2009:544, *NIPR* 2009, 284, paras. 17 and 18.

46 See section 4.1 above and section 4.3 below.

Article 369(7) DBA refers to Article 3 DCCP for the jurisdiction of the Dutch courts with regard to an undisclosed WHOA procedure (and public WHOA procedures that are outside the EIR recast's scope). It is our view that the Dutch legislature has overlooked the applicability of the Recast Brussels Regulation, as it has overlooked some other aspects of private international law.[47] Apparently, the legislature has focused solely on the public WHOA procedure, without giving much thought to the private international law aspects of the undisclosed WHOA procedure (and the public WHOA procedure outside of the EIR recast's scope). In our view, this oversight can be remedied by applying Article 3 DCCP in a way that reflects the jurisdiction provisions of the Recast Brussels Regulation. After all, the Recast Brussels Regulation is Dutch law as the regulations of the EU are directly applicable in the Netherlands.

Moreover, considering that the Recast Brussels Regulation applies, any decision that may be handed down in an undisclosed WHOA procedure falls within the broad definition of a judgment pursuant to Article 2(a) Recast Brussels Regulation.[48] As a result, such decisions are likely to be automatically recognized in other EU member states in accordance with Article 36(1) Recast Brussels Regulation, unless recognition must be refused because one of the exhaustive list of grounds for refusal in Article 45 in conjunction with Article 46 Recast Brussels Regulation applies.

A refusal to recognise a foreign judgment pursuant to Article 45(1)(a) Recast Brussels Regulation because it is considered manifestly contrary to the public policy of the recognizing member state requires a high threshold to be met.[49] This is unlikely if the undisclosed WHOA procedure will be conducted in accordance with the fundamental principles of the fair administration of justice. Given that WHOA is in line with the Restructuring Directive,[50] it is highly unlikely that the recognition of any court order in an undisclosed WHOA procedure would be manifestly contrary to the public policy of another member state. If all interested parties that will be affected by the undisclosed WHOA procedure will have been given timely notice and a fair and proper opportunity to meaningfully participate in the procedure in accordance with applicable laws and fair trial principles, the grounds for refusing recognition under Article 45(1)(b) Recast Brussels Regulation will likely not apply either. The WHOA procedure provides for affected parties to submit their views on any request[51] or, where it does not, makes the enforce-

47 For example how the undisclosed WHOA procedure relates to Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, *OJ* 2014, L 173/1-61.

48 According to Art. 2(a) Recast Brussels Regulation a judgment means, in short, any judgment given by a court or tribunal of a member state, regardless of its name. The European Court of Justice has also ruled against a restrictive interpretation of the concept of a judgment as this would be incompatible with the principle of the unimpeded recognition of judgments; see CJEU 15 November 2012, *Gothaer/Samskip*, C-456/11, ECLI:EU:C:2012:719, *NIPR* 2013, 49, paras. 22-32. The Recast Brussels Regulation provides for a limited number of exceptions to that principle and those exceptions must be interpreted restrictively. In the court's reasoning, a restrictive interpretation of the concept of a judgment would give rise to an additional category of judicial decisions which, although not included among the exhaustively-listed exceptions, would not be recognised. The principle of mutual trust between the courts of the member states requires that disputes as to what constitutes a judgment should be avoided.

49 CJEU 16 July 2015, *Diageo/Simiramida*, C-681/13, ECLI:EU:C:2015:471, *NIPR* 2015, 398, para. 44 and CJEU 25 May 2016, *Meroni/Recoletos*, C-559/14, ECLI:EU:C:2016:349, *NIPR* 2017, 51, para. 42.

50 Parliamentary documents (*Kamerstukken II*) 2018/19, 35 249, no. 3, p. 4.

51 Arts. 371(5), 376(11), 377(3), 378(8), 380(2) and 384(7) DBA.

ment of any WHOA order subject to notification of the affected parties.[52] Assuming further the absence of any irreconcilable judgments between the same parties, the grounds for refusing recognition in Article 45(1)(c)-(d) Recast Brussels Regulation will also not apply. The other refusal grounds in Article 45 Recast Brussels Regulation are unrelated to the characteristics of the undisclosed WHOA procedure. The applicability of a ground for refusal will depend on the circumstances of the specific case and will have to be assessed on a case-by-case basis.

5. Final remarks

Which regulation – the EIR recast or the Recast Brussels Regulation – covers either or both versions (public and undisclosed) of the recently enacted Dutch WHOA procedure needs ultimately to be decided by the Court of Justice of the EU. Its interpretation will determine how to approach the jurisdiction issue and that of recognition and enforcement of court orders rendered in each version. Only that judgment will provide us with final guidance. Until a decision on the applicability of either (or none) of the regulations is handed down, we have argued the following line of reasoning.

First, we found that the public WHOA procedure meets the material scope requirements of the EIR recast. Once it has been added to annex A to the EIR recast, it will also meet this regulation's formal scope requirement and be fully covered by it. As a result, jurisdiction over a request made on the basis of a public WHOA procedure will have to be assessed in accordance with the EIR recast. Consequently, any order in a public WHOA procedure will be automatically recognised under the EIR recast. However, for the time being, as the WHOA procedure has not yet been listed in annex A, the public WHOA version shall not be covered by the EIR recast and the jurisdiction of the Dutch courts must be based on Article 3 DCCP. Questions of recognition abroad within the EU (and beyond) will have to be assessed in accordance with general provisions of the domestic private international law of the individual (member) states.

Further, with regard to the undisclosed WHOA procedure, it is our view that this procedure does not meet the material scope requirements of the EIR recast because it lacks the crucial requirement of being a 'public collective proceeding' and, therefore, cannot be added to annex A. Consequently, the EIR recast in its current wording does not and will not apply to the undisclosed WHOA. We have argued that the insolvency exception of the Recast Brussels Regulation must be interpreted narrowly and should not prevent the application of the Recast Brussels Regulation to the undisclosed WHOA procedure. We believe that the insolvency exception should be interpreted so as to concern only those insolvency proceedings that are within the material scope of the EIR recast. Considering our determination that the undisclosed WHOA is not within the EIR recast's scope, it is not a procedure within the meaning of the insolvency exception. Therefore, we conclude that the undisclosed WHOA procedure does meet the scope requirements of the Recast Brussels Regulation and, consequently, jurisdiction over any court request pursuant to an undisclosed WHOA procedure will have to be assessed in view of the Recast Brussels Regulation. Any resulting order based on such a request will be automatically recognised and enforceable in accordance with the Recast Brussels Regulation.

52 Art. 376(2)(a) DBA.