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Financing a restructuring in the Netherlands after *IHC v. Rabobank*[1]

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Abstract

This case-note examines the Dutch Supreme Court's ('Hoge Raad') landmark decision in IHC v. Rabobank, its second ruling to date on the interpretation the Act on Court Confirmation of Extrajudicial Restructuring Plans (WHOA). The Hoge Raad held that the WHOA cannot be used to compel incumbent lenders to maintain credit facilities or extend new funding in breach of existing agreements, reinforcing their negotiated rights. It also clarified – in obiter dictum – that Article 384(4) of the Dutch Bankruptcy Act allows value to be reallocated across creditor classes and, in appropriate cases, permits higher-ranking security for new-money providers via cross-class cram down, subject to statutory safeguards. Taken together, the ruling strengthens the contractual position of secured lenders while preserving a constrained route to attract fresh financing, particularly where class consent is obtainable.

Keywords: Preventive restructuring; Cramdown; Secured creditor; WHOA; Compulsory modification of existing credit facilities; Priming lien.

1 Hoge Raad 25 October 2024, ECLI:NL:HR:2024:1533. This annotation is an adaptation of the author's case note in *NJ* 2024/322.

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1. The Netherlands was at the forefront of the wave of pre-insolvency proceedings. The legislative process for the Act on Court Confirmation of Extrajudicial Restructuring Plans ('Wet Homologatie Onderhands Akkoord', generally referred to as 'WHOA') began before the proposal for the Directive on restructuring and insolvency was introduced.[3] The WHOA introduced an out-of-court restructuring plan and was incorporated into the Bankruptcy Act ('BA'). As the legislator anticipated the Directive, only minor amendments were required when it came into force.

One of the WHOA's characteristics is that the decision of the District Court ('rechtbank') – the court of first instance – is not open to appeal. Consequently, the Dutch Supreme Court ('Hoge Raad') has few opportunities to fulfil its role of ensuring legal unity and developing the law. The Supreme Court can only rule on a WHOA case if the District Court asks for a preliminary ruling or if the Procurator General brings an appeal to the Supreme Court in the interest of the law. In the four and a half years that the WHOA has been in force, this has happened twice.

This annotation relates to the second case, which is by far the most significant. The decision addresses two key factors in restructuring practice: (i) the possibility of continuing to use credit facilities under the WHOA plan despite breaching the financing agreement; and (ii) the possibility of offering a new financier security that takes precedence over that of existing financiers.

2. The debtor was IHC Merwede Holding B.V. ('IHC'). IHC was financed by a consortium of banks, including Rabobank. IHC was experiencing financial difficulties. It had developed a plan to resolve these issues. Although this plan was rather complex, the majority of its provisions could be implemented on the basis of the intercreditor agreement, which contained a majority decision-making mechanism. IHC was able to reach an agreement with a sufficient majority of creditors. However, the intercreditor agreement required unanimity on three issues, regarding which IHC had to resort to the WHOA:
(i) the sale of a subsidiary;
(ii) the inclusion of the purchaser, HAL Investments B.V. ('HAL'), which would provide new financing, in 'the waterfall' for the distribution of the collateral's proceeds to the consortium of banks; and

3 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.

(iii) the extension of the term loan maturity date. Only the first two issues were addressed in the Supreme Court's decision.

3. Although the plan was accepted by all classes of creditors, the vote was not unanimous. Rabobank, among others, voted against the plan and objected to its confirmation. It argued that it could not be forced to continue providing financing if, through the plan, IHC acted contrary to the financing agreement by selling the subsidiary without Rabobank's consent. Furthermore, it was of the opinion that it was not possible to impose a change in the priority of the creditor's security positions.

4. The District Court confirmed the plan.[4] The court deemed it feasible to impose the above three amendments on dissenting creditors. Its reasoning will be addressed in more detail below, when I analyse the Supreme Court's judgment. However, I would like to point out that the court placed great importance on the flexibility and purpose of the WHOA, as well as the necessity of the proposed amendments for the restructuring to be successful. 'Any other view [than that expressed in the judgment; author] would […] render the intended restructuring process meaningless.'

This must be seen in the light of the importance of financing to restructuring success. If a company is cut off from its existing financing, as IHC was in danger of being, it can often seal the fate of both the restructuring and the company itself. It is difficult for a company that is already in trouble to obtain new financing. Even if it finds a party that is willing to provide new financing, that party will want collateral, but all existing and future assets are already in the clutches of incumbent financiers.

The District Court's decision was in favour of IHC on all points. The reluctant financiers had to continue providing finance and accept that HAL, as the new financier, could share in the proceeds of the collateral. The term loan's maturity date was extended.

5. As mentioned previously, it is not possible to appeal against the District Court's decision. However, the Procurator General lodged an appeal in cassation in the interest of the law. This appeal was directed only against the first element of the decision: the obligation of Rabobank to continue the credit facilities despite the fact that IHC had sold the subsidiary without the consent of Rabobank. The District Court based its decision on Article 370 BA, even though the WHOA

4 Rechtbank Rotterdam 9 March 2023, ECLI:NL:RBROT:2023:2800.

contains a specific provision on the amendment of contracts. Article 370 BA merely introduces the possibility of a compulsory settlement that provides for a change in the rights of creditors and shareholders, under conditions that are regulated elsewhere. The obligation to continue financing does not concern the rights of the financiers as creditors, but rather their obligations arising from the financing agreement.

Article 373 BA deals specifically with contracts. Unlike the change to the rights of creditors, which is central to the WHOA, Article 373 BA does not provide for the imposition of a change to the obligations of a counterparty, regardless of whether they are a creditor. The debtor may only propose an amendment to the contract; if the proposal is rejected, it cannot be imposed. In that case, Article 373 BA only empowers the debtor to terminate the agreement, subject to prior court approval. If this power is exercised, the counterparty acquires a claim for damages, which can be included in the WHOA plan.

6. The Supreme Court overturns the District Courts' decision in the interest of the law. It begins by providing a general overview of the characteristics of the WHOA, concluding that it 'does not contain any instruments to compel financiers to make new funds available'. Referring to the Districts Court's argument, the Supreme Court considers that 'the fact that the WHOA is intended to be a flexible and effective restructuring instrument is not sufficient grounds to assume that a compulsory restructuring plan can be used to force a financier to increase its obligations towards the debtor'. In this case, the plan does increase the financiers' obligations, because they are required to continue financing the debtor, even though they would not be obliged to do so under the finance agreement. This is because the subsidiary was sold, the waterfall amended and the maturity date extended, without the required consent of all financiers. The WHOA provides for a change of the rights of creditors, not of the obligations of financiers.

7. This decision of the Supreme Court deserves approval. It is one thing to restrict the rights of creditors if this is necessary to keep the business going and improve the position of all the creditors in terms of recourse. It is quite another matter to force a counterparty to provide new funds and increase its exposure on terms it has never been willing to accept. The present case is an example of this. Rabobank considered the subsidiary to be a vital part of the business. Rabobank was unwilling to finance the group without this subsidiary. Consequently, IHC was prohibited from selling the subsidiary without the consent of all the financiers. If it were possible to rewrite the financing agreement, banks and other financiers would take this into account when deciding whether to

finance a business. They would either not finance at all, or they would discount the risk they would take on the agreed terms, as well as the risks they would be subjected to if the terms were changed in an unfavourable way.

8. The other side of the coin is that the decision will complicate restructuring efforts. The debtor must align their restructuring efforts with the conditions of the financing agreement and either come to an agreement with the financier or find a new financier willing to replace the incumbent. That is not always possible.

In this respect, the second part of the Supreme Court's decision may be relevant. Although the Procurator General did not lodge a complaint regarding the decision on the change in the waterfall, the Supreme Court did consider this issue obiter dictum. The District Court held that amending the distribution waterfall was permissible. However, the same court had previously ruled that it was *not* possible to provide a new financier with a security that is superior to that of the incumbent financier, because the Dutch legislator had chosen not to exercise the option set out in Article 17(4) of the Directive on restructuring and insolvency.[5] This states that 'Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims'.

In the case of IHC, however, the District Court distinguished it from the earlier one. The earlier case concerned the possibility of granting a superior right of pledge to that of the incumbent financier. A new financier wanted a first right of pledge on future receivables, which would downgrade the previously granted rights of pledge of the incumbent financiers to second and third rank. In the present case, however, the priority of the incumbent financiers was contractual: the distribution of the collateral proceeds had been agreed upon between the financiers in the consortium in the intercreditor agreement.

This argument is not very convincing, as the WHOA does not differentiate between priorities based on proprietary security or contractual arrangements. Introducing a new financier into the contractual arrangement for the distribution of the proceeds of the collateral is tantamount to granting a proprietary security of a higher rank.

9. The Supreme Court does not make the distinction between proprietary and contractual priority. It rules that Article 384(4) BA can be used to give a new

5 Rechtbank Rotterdam 15 December 2022, ECLI:NL:RBROT:2022:11016.

financier a higher ranking than an incumbent financier – or rather, an incumbent financier a lower ranking in favour of a new financier – in both contract law and property law. Article 384 BA implements Article 11(1)(d) of the Directive on restructuring and insolvency and deals with the cross-class cram down. This differs from Article 17(4) of the Directive. The Dutch legislator's decision not to award a 'priming lien' or a similar device to a new or interim financier, does not preclude the possibility of cramming down a plan that awards a similar position.

Article 384(4) BA deals with the 'fair' distribution of the available value among the different classes. It contains a mild version of the absolute priority rule. 'Fair' means that, in principle, the regular order of ranking must be followed; however, if the class agrees to it with the required two-thirds majority, this can be deviated from. Value can then be allocated to a lower-ranking class, even if the higher-ranking class has not been paid in full. The idea is that with the consent of the majority, this deviation is democratically legitimised.[6] A class comprises creditors in a similar position.[7] As they are best placed to judge what is in their own financial interest, it can be assumed that if the vast majority votes in favour, the deviation will be in their interest.

10. This decision clarifies that value can be assigned to 'outsiders' who do not or not yet have any claims on the debtor's assets and who are not included in the class division. Naturally, the class at whose expense this occurs will only agree to this with the necessary qualified majority if it believes that it will be better off or at least no worse off, for example if the 'outsider' is investing new money. The downgrading accepted by the existing financiers in granting a security interest of equal or higher rank to a new financier is offset by the fact that the company is enabled to continue its business operations and create added value.

11. It should be noted that Article 384(4) of the Bankruptcy Act provides not only for a class to step down by its own (majority) choice, but also for coercion. The ranking can be deviated from to the detriment of the class without the consent of the class, if (i) there are reasonable grounds for doing so; and (ii) the creditors concerned are not harmed.

The Supreme Court's decision implies that this option can also be used to favour a new financier (or another 'outsider'). Surely, this is not so far removed

6 See Nicolaes Tollenaar, *Pre-insolvency Proceedings*, 2019, para. 3.4.6 and A.M. Mennens, *Het dwangakkoord buiten surseance en faillissement* (diss. RU), no. 138.

7 Article 374(1) BA.

from the arrangement envisaged by Article 17(4) of the Directive on restructuring and insolvency, which the legislator purposely did not implement.

It would appear that the above conditions for a cram-down on a non-consenting class of one or more secured creditors are not easily met. However, I would argue that a new financier could be awarded superior security rights over collateral that the debtor would be unable to acquire without the financier's funds,[8] despite the regular rules for ranking claims, favouring the incumbent financiers who acquired a right of pledge in advance.[9]

12. In conclusion, the first part of the decision strengthens the position of the incumbent financiers. They cannot be forced to provide funds for a longer period, in greater quantities, or on different terms than agreed. If a reorganisation cannot be carried out in accordance with these terms and the funders are not willing to cooperate, alternative funding will have to be found. This will be difficult if all collateral has already been given to the incumbent financiers.

In this respect, the second part of the decision provides some relief to restructuring debtors, although it does not negate the disadvantages of the first part of the decision. There is scope for the financiers within a class to step down in favour of a new funder. This turned out to be possible in the present case: the class consisted of the financiers in a consortium and the vast majority agreed. A more common scenario is where a company is financed by a single financier with security rights, typically a bank. In that case, the class consists of a single financier. This financier cannot then be outvoted, as there are no other creditors in the class. The only way to lower their ranking is on the basis of reasonable cause and absence of harm, as outlined above.

For the parties in the present case, however, the decision makes no difference because cassation in the interest of the law does not prejudice the rights acquired by the parties.[10] The District Court's sanctioning of IHC's restructuring plan remains valid, despite the Supreme Court's decision.

8 For a different opinion see F.A. van de Wakker's annotation of the *IHC v. Rabobank* judgment in *TvI* 2025/10, pp. 87-88.

9 Article 3:97(2) jo. Article 3:98 Civil Code states that establishing a right of pledge on future property in advance has no effect against a person who has acquired a right of pledge as a result of an earlier establishment. However, an exception exists if the right of pledge concerns a movable thing that comes into the subsequent pledgee's actual possession.

10 Article 78 Judiciary (Organization) Act.