Chapter 16

The Cooling-off Period of the Undisclosed WHOA in European Perspective

D.J. (Dennis) Helmons
Turnaround Advocaten
The Netherlands

1 Introduction

Dutch insolvency law is dynamic and subject to continuous renewal, due to Dutch legislature and due to Europe[1]. The changes and innovations have followed each other in rapid succession in recent years, which is good news: it is and remains a relevant and dynamic area of law. But these changes can also have international consequences. This is particularly the case with the new *Wet Homologatie Onderhands Akkoord* (hereinafter referred to as the 'WHOA'), which became law on 1 January 2021[2]. The WHOA is widely published in Dutch literature, case law is thoroughly analysed and much is still being discovered by practitioners.

The WHOA provides food for thought in the Netherlands, but the international aspects of, for instance, the cooling-off period have been discussed rather briefly or only to a limited extent so far. The intent of this article is to further flesh out the debate on the (international) consequences of a mechanism under the WHOA: the 'cooling-off period'. First, I will explain the WHOA in broad outline, then the cooling-off period under the WHOA and its requirements will be discussed. Furthermore, the discussion of the status of the undisclosed WHOA procedure in Europe, whether it falls under the Insolvency Regulation or under Brussels I *bis*, or whether it falls under neither, will be briefly presented and addressed. Finally, the cooling-off period that is granted to a debtor with Dutch assets/properties versus a European creditor is discussed. What also will be discussed is the situation that a debtor has assets/commodities outside the

[1] HvJ EU 28 April 2022, ECLI:EU:C:2022:321 (*Heiploeg*).
[2] *Kamerstukken II* 2018/2019, 35 249, nr. 3.

Netherlands, but inside Europe, and the consequences of the cooling-off period on those assets/commodities[3].

2 Introduction to the WHOA

Until 1 January 2021, it was not yet possible under Dutch law to offer an undisclosed out of court restructuring plan to creditors outside of bankruptcy, whereby dissenting creditors could also be bound by that agreement. Exceptions are cases in a suspension of payments or bankruptcy situation, where this was and is possible[4]. Until 1 January 2021, the foregoing implied a gap for companies for their restructure abilities outside of bankruptcy. Outside a bankruptcy situation they could offer an amicable agreement, but a single creditor could then reject this offer in principle and thus make an agreement impossible. This was the case because all creditors had to agree to the agreement, which gave a single creditor a hold-out position and secure a higher payment, or to (unreasonably) improve his position compared to his actual position above other creditors.

Central to civil law in the Netherlands is the principle of freedom of contract (apart from some mandatory provisions in the Dutch Civil Code). Based on this principle a creditor who wants full payment of his claim and who can reasonably be expected to do so, cannot be blamed for not accepting an offer or discount and thereby making a consensual agreement impossible. Only if there is abuse of right by the creditor to not agree with the agreement, while he could reasonably have been expected to do so, can this constitute as abuse of rights on the grounds of Article 3:13 Dutch Civil Code[5]. Under such (specific circumstances) a creditor may be ordered by the court to agree with the proposed agreement. However, this is applied with restraint due to the principle of contractual freedom between the parties. Therefore, it was (and still is) possible for one sole creditor to block an consensual agreement, subject to the aforementioned exception that that creditor could still be forced by the court to agree to the proposed agreement.

The legislator's intention was to give the legal practice an extra instrument to better deal with this situation in certain cases, also to meet the developments on European level through the Restructuring Directive. Due to the introduction of

[3] The article is therefore limited to companies that are going through a Dutch WHOA with assets in the Netherlands, or that have assets in Europe for which a cooling-off period (under Dutch law) has been declared.

[4] Article 138 Dutch Bankruptcy Act (hereafter: 'DBA'), Article 153 DBA, Article 252 DBA and Article 272 DBA.

[5] Article 3:13 DCC.

the WHOA, it is possible to offer a different solution for these cases as well, thus preventing bankruptcy, or at least making an attempt to do so. The introduction of the WHOA came at a 'favourable' time when the Netherlands was hit hard by the Corona crisis. More than a year later, 120 published (interim-)decisions (and ditto amount of unpublished decisions) regarding the WHOA can be found, mainly concerning SMEs.

When introducing the WHOA, the legislator sought a link with the Restructuring Directive[6]. The WHOA makes it possible for a debtor to bind dissenting creditors to his offered agreement, because the court can confirm the proposed plan[7].

The WHOA consists of two parts: the public WHOA procedure and the undisclosed WHOA procedure (hereafter referred to as 'the undisclosed WHOA procedure'). The two WHOA procedures differ substantially from each other, but then again they do not. The only difference is that the public WHOA procedure is published, the proceedings are public and the public WHOA procedure falls under the Insolvency Regulation and is included in Annex A.

The undisclosed WHOA procedure is not published and the proceedings take place behind closed doors, the undisclosed WHOA procedure is not included in Annex A to the Insolvency Regulation and according to the Dutch government this WHOA procedure does not fall under the Insolvency Regulation or under Brussels I *bis*[8]. This statement has been the subject of discussion in the literature. I will discuss this in more detail in section 4 of this article.

When can a debtor apply for the WHOA? The WHOA is available to debtors who expect to be unable to meet their obligations in the long (or short) term, but who are fundamentally viable as a company[9]. It is up to the (board of the) debtor to decide which creditors and/or shareholders he wants to include in the agreement. These can be all creditors and shareholders, but it can also be a (select) part thereof or even one specific creditor or shareholder. The agreement may be offered by the debtor himself or by a restructuring expert appointed by the court at the request of the debtor, at the request of the debtor's works

[6] *Kamerstukken II* 2018/2019, 35 249, nr. 3, pp 3–4, Regulation (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).

[7] Article 383 DBA and Article 384 DBA.

[8] *Kamerstukken II* 2018/2019, 35 249, nr. 3, pp 6–7.

[9] Article 370 DBA.

council or staff representation or at the request of creditors. Once a restructuring expert has been appointed, only the restructuring expert can offer an agreement. The debtor can prepare an agreement and submit it to the restructuring expert with the request to offer it to the creditors. However, the restructuring expert may disregard this request if the agreement offered by the debtor is not in the interest of the joint creditors[10]. The WHOA also offers the possibility of appointing an observer at the request of the debtor, or ex officio by the court[11]. The observer's task is to monitor the interests of the creditors in the WHOA procedure. If no restructuring expert has been appointed, an observer can be appointed; these positions are mutually exclusive. There cannot be a restructuring expert and an observer in one WHOA procedure at the same time[12]. In practice we see more appointments of restructuring experts and less appointments of observers.

What is the further course of a WHOA procedure? The 'goal' is to offer an agreement that is eventually approved and confirmed by the court. The proposed agreement has to classify the different creditors and/or shareholders whose rights are affected by the WHOA[13]. Examples include SME creditors, creditors with retention of title, creditors with security rights, preferential creditors and so on. It is up to the debtor (or the restructuring expert if appointed) to make the classification and to classify the creditors into the various classes. The draft of the proposed agreement has to be offered to all classes of creditors and shareholders and they have to vote on it. A class will agree to the proposed agreement if there is a two-thirds majority in that class.

The WHOA agreement can be submitted to the court for approval if at least one in-the-money creditor has agreed to the WHOA agreement. An in-the-money creditor is a creditor that would also receive a (partial) payment in the event of bankruptcy. It is therefore very important in a WHOA procedure to have an in-the-money class agree to the agreement. This class can then also bind any dissenting classes to the WHOA agreement once it is confirmed by the court[14]. Requesting the court to confirm the WHOA agreement is not without risk. A hearing will be ordered and the court will have to examine the grounds for rejection mentioned in the law to determine whether the WHOA agreement offered meets all the conditions[15]. These are both (i) general mandatory grounds for rejection and (ii) specific grounds for rejection. During and prior to

[10] Article 371 DBA.
[11] Article 380 DBA.
[12] Articla 380 DBA.
[13] Article 374 DBA.
[14] Article 385 DBA.
[15] Article 384 DBA.

the hearing, individual creditors can submit a substantiated request to the court to reject the confirmation of the proposed WHOA agreement[16].

The unique feature (for the Dutch landscape) of the WHOA procedure is that the debtor remains in full control over the company (the so-called debtor in possession)[17]. This is also the case if a restructuring expert or an observer is appointed at the company. In other Dutch insolvency proceedings, such as bankruptcy or suspension of payments, the debtor is not a debtor in possession and a trustee or administrator is appointed by the court. The debtor then loses the management of the company (in case of bankruptcy) or he has to request permission from the administrator to perform legal acts (in case of suspension of payments)[18].

The WHOA also has various instruments that the debtor or the restructuring expert can use. An especially important and interesting instrument, with possible international consequences, is the cooling-off period.

3 The cooling-off period

For this article, only the cooling-off period in an undisclosed WHOA will be addressed in European aspects. Firstly, the European aspects of a Dutch cooling-off period in the Netherlands by a Dutch debtor will be addressed. Secondly, the international aspects of a Dutch cooling-off period where the debtor has assets which are not located in the Netherlands will be addressed.

The debtor or the restructuring expert can apply for a cooling-off period if the following requirements are (summarily) met, which is not a guarantee that the court will actually grant the cooling-off period[19]:

- The cooling-off period is necessary to be able to continue the business conducted by the debtor during the preparation and negotiation of a settlement agreement, and
- At the time of the announcement of the cooling-off period, it can be reasonably assumed that the interests of the joint creditors of the debtor will be served and that the interests of third parties, garnishers and any creditors who have filed for bankruptcy will not be substantially prejudiced.

[16] Article 383 DBA and Article 384 DBA.
[17] *Kamerstukken II* 2018/2019, 35 249, nr. 3, p 27.
[18] Article 68 DBA and Article 228 DBA.
[19] Article 376 DBA.

The cooling-off period is valid for a period of four months and can be extended once by a maximum of four months, so that the total duration of a cooling-off period is eight months[20]. This maximum period of eight months cannot be extended or exceeded.

During the cooling-off period, any third-party right of recourse against assets belonging to the debtor, or if creditors wish to enforce against assets under the debtor's control cannot be exercised without authorisation from the court[21]. The court may also lift attachments at the request of the debtor or the restructuring expert. Under a cooling off period, pending bankruptcy requests, requests for suspension of payments or a petition for the debtor's own bankruptcy are suspended. All this is intended to allow the debtor to prepare and offer a WHOA agreement in relative peace.

The crux of the matter lies in the provision that, under Dutch law, the cooling-off period extends to any third-party right of recourse in respect of goods that are part of the debtor's assets, or third-party goods that are in the debtor's control. Any (international) exclusion of rights is not mentioned. The question is therefore: does a cooling-off period declared in the Netherlands in an undisclosed WHOA procedure extend to goods that are not located in the Netherlands but in Europe, and will European creditors also be confronted with the declared Dutch cooling-off period in respect of their goods with a debtor that falls under the WHOA? Before I get to that question, I will first discuss and explain a current discussion in Dutch literature.

4 Discussion Brussel I *bis* and European Insolvency Regulation

Prior to introducing this discussion in Dutch literature, I will introduce a problem statement in order to make the (reasons for the) discussion clearer. Suppose that the undisclosed WHOA procedure falls under the Insolvency Regulation. In that case, the judgment of the Dutch court, in which the undisclosed WHOA procedure is opened, would be recognised in Europe under the Insolvency Regulation, including the cooling-off period and the exception provided for in the Insolvency Regulation (art. 8 Insolvency Regulation). Due to this exception from the Insolvency Regulation it is for secured creditors possible to ignore the cooling-off period for goods which are situated in another Member State[22].

[20] Article 376 para 5 DBA.

[21] Article 376 para 2 DBA.

[22] PM Veder, 'Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement', *FIP* 2019/219, p 59.

If the undisclosed WHOA procedure is not covered by the Insolvency Regulation, but by Brussels I *bis*, the judgment would also be recognised in the European Member States, but the exception of the Insolvency Regulation would not apply. Therefore, the cooling-off period could possibly have a broader scope in European Member States. There is a substantial difference in the consequences of declaring a cooling-off period and its recognition in the European Member States if the undisclosed WHOA procedure would fall under the Insolvency Regulation or under Brussels I *bis*.

What is the situation if the undisclosed WHOA procedure is not covered by neither the Insolvency Regulation nor by Brussels I *bis*? Then the specific European Member State will have to determine the recognition of the Dutch court order in which the undisclosed WHOA procedure with cooling-off period is pronounced, on the basis of any underlying treaties with the Netherlands or private international law. This makes the discussion per Member State different.

An interesting debate is currently taking place between two camps: does the undisclosed WHOA procedure fall under the Insolvency Regulation, does it fall under Brussels I *bis* or under neither? Orbán explained the discussion in detail in his article from the Inside Story of Insol Europe in April 2022, for which I warmly recommend his article[23]. Hereafter, first the history of this discussion will be discussed, then the positions will be briefly presented and a side will be chosen by the author in this discussion.

The Dutch legislator has opted not to apply the undisclosed WHOA procedure to Annex A of the Insolvency Regulation, because, according to the legislator, the undisclosed WHOA procedure does not meet the requirements for admission to Annex A. This is because the undisclosed WHOA procedure is not a public procedure. Therefore, the legislator is of the opinion that the jurisdiction of the Dutch court for opening or deciding on the WHOA procedure must be determined on the basis of our own Dutch private law (in example art. 3 Rv). The legislator argues that because the undisclosed WHOA procedure has so many similarities with the public WHOA procedure, but despite these similarities the undisclosed WHOA procedure does not fall under the Insolvency Regulation, the consequence is that the undisclosed WHOA procedure cannot fall under Brussels I *bis* either[24]. As the public WHOA procedure is admitted to Annex A of the Insolvency Regulation, it is not covered by Brussels I *bis*. This

[23] Géza Orbán, 'Dull rerun or succesful spin-off? Is the new 'private' version of the Dutch Scheme covered by the EU Judgments Regulation?', *Insol Europe Inside Story*, April 2022.

[24] *Kamerstukken II* 2018/2019, 35 249, nr. 3, pp 6–7.

would mean that the undisclosed WHOA procedure would not fall under the Insolvency Regulation and not under Brussels I *bis*. I quote Orbán:

> 'At the same time, however, by virtue of it being almost identical to a proceeding that is included on Annex A, the argument goes that the 'private' version cannot possibly be brought under the scope of the EU Judgments Regulation either. After all, the EU Judgments Regulation explicitly excludes: "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". Or in other words, excluded are procedures (similar to those) included, or capable of being included, on Annex A of the EU Insolvency Regulation. And with that, the Dutch legislator allegedly succeeded in puncturing the 'dovetail' and squeezing through a procedure covered by neither EU regulation . . . [25]'

Vriesendorp et al. and Nijnens are of the opinion that the undisclosed WHOA procedure falls under Brussels I *bis*, despite the fact that the legislator is of the opinion (and intended) that this is not the case. Vriesendorp et al. are of the opinion that the Insolvency Regulation is only applicable if these insolvency proceedings also fall within the material scope of the Insolvency Regulation and are included in Annex A. If this is not the case, the insolvency proceedings (like the undisclosed WHOA procedure) do not fall under the Insolvency Regulation but under Brussels I *bis* because the European legislator did not intend to leave any room between these two regulations. Brussels I *bis* can be seen as an umbrella regulation, determines the recognition and enforcement of proceedings if no specific regulation for this purpose exists[26]. Nijnens points to the case law of the Court of Justice of the European Union from which it appears, according to Nijnens, that the Court has determined that 'any overlap between Brussels I *bis* and the Insolvency Regulation must be avoided. The same applies to any vacuum between the two regulations' (*Translated from Dutch to English by the author*)[27]. Welling-Steffens argues that the undisclosed WHOA procedure falls within the scope of Brussels I *bis*, whether or not with the addition that Chapter II of Brussels I *bis* might not formally apply[28]. Welling-Steffens takes the view that in any event Chapter III of Brussels I *bis* would apply to the

[25] Géza Orbán, 'Dull rerun or succesful spin-off? Is the new "private" version of the Dutch Scheme covered by the EU Judgments Regulation?', *Insol Europe Inside Story* April 2022.

[26] RD Vriesendorp, W van Kesteren, E Vilarin-Seivane and S Hinse, 'Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union', *NIPR* 2021(1), p 13 and WJE Nijnens, 'Internationaal privaatrechtelijke aspecten van de WHOA', *TvI* 2019/34, p 264.

[27] WJE Nijnens, 'Internationaal privaatrechtelijke aspecten van de WHOA', *TvI* 2019/34, p 264.

[28] LFA Welling-Steffens, 'Het internationaal privaatrecht en het merkwaardige verhaal van de WHOA', in: RF Feenstra e.a. (ed), Wet Homologatie Onderhands Akkoord (Insolad Jaarboek 2021), Deventer: Wolters Kluwer 2021.

undisclosed WHOA procedure[29]. Vriesendorp subsequently further advocated his position during the debate held at the University of Amsterdam on this issue; for a more detailed account of this debate, I refer to Orbán's article of April 2022.

On the other side are (mainly) Veder[30] and Mennens[31]. Mennens writes that although the Court of Justice has ruled more than once that there may be no gaps or overlaps between Brussels I *bis* and the Insolvency Regulation[32], and that this is also included in recital 7 of the Insolvency Regulation. Recital 7 also states that it cannot be concluded from the mere fact that a procedure is not included in Annex A and that that procedure should by definition fall under Brussels I *bis*[33]. Veder is of the view that, although the undisclosed WHOA procedure has the characteristics of an insolvency proceeding, and although the undisclosed WHOA procedure also falls within the material scope of the Insolvency Regulation, it cannot be included in Annex A and is not fully covered by the Insolvency Regulation because of its private nature[34]. According to Veder, the undisclosed WHOA procedure does not fall under Brussels I *bis* because the undisclosed WHOA procedure falls under the exception of Article 1(2)(b) of Brussels I *bis*. Veder and Orbán also refer to recitals 12 and 13 of the Insolvency Regulation, from which it follows, in their opinion, that the European legislator deliberately chose that private insolvency proceedings will not fall under the Insolvency Regulation and not under Brussels I *bis*[35]. The European legislator was aware that this choice will ensure that recognition of these proceedings and their components will not be easy in Europe.

I believe that recognition of the undisclosed WHOA procedure and therefore the cooling-off period that has been announced within the undisclosed WHOA

[29] LFA Welling-Steffens, 'Het internationaal privaatrecht en het merkwaardige verhaal van de WHOA', in: RF Feenstra e.a. (ed), Wet Homologatie Onderhands Akkoord (Insolad Jaarboek 2021), Deventer: Wolters Kluwer 2021.

[30] PM Veder, 'Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement', *FIP* 2019/219, p 60, PM Veder and JJ van Hees, 'Internationale aspecten van het dwangakkoord ter voorkoming van faillissement', in ACP Bobeldijk e.a., *Het dwangakkoord buiten faillissement, Beschouwingen over het Voorontwerp Wet homologatie onderhands akkoord ter voorkoming van faillissement*, Preadvies van de Vereeniging Handelsrecht, Zutphen: Uitgeverij Paris 2017, pp 169–203.

[31] AM Mennens, *Het dwangakkoord buiten surseance en faillissement, Onderneming en Recht, nr. 118*, Deventer: Wolters Kluwer 2020, pp 790–791.

[32] HvJ-EU, 11 June 2015, ECLI:EU:C:2015:384 (*Nortel*), HvJ-EU, 6 February 2019, ECLI:EU:C:2019:96 (*BNP Paribas Fortis*).

[33] AM Mennens, *Het dwangakkoord buiten surseance en faillissement, Onderneming en Recht, nr. 118*, Deventer: Wolters Kluwer 2020, p 790.

[34] PM Veder, 'Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement', *FIP* 2019/219, p 60.

[35] Géza Orbán, 'Dull rerun or succesful spin-off? Is the new 'private' version of the Dutch Scheme covered by the EU Judgments Regulation?', *Insol Europe Inside Story*, April 2022, paragraph C.

procedure should – for the time being – be determined according to the rules of international private law. I agree with the reading of Veder et al. to the extent that, although the intention was that the Insolvency Regulation and Brussels I *bis* should not permit any gaps or overlaps, such a thing is possible with due regard for recital 7 of the Insolvency Regulation. Recitals 12 and 13 also indicate that the European legislator made a conscious choice to exclude private insolvency proceedings from the Insolvency Regulation, noting that recognition of those legal effects in the European Union will be difficult. Per EU Member State it will therefore have to be examined, according to the rules of international private law, whether the cooling-off period declared in the Netherlands extends to the goods located in that EU Member State.

5 Cooling-off period in The Nederlands with a European creditor

What about the cooling-off period declared in the Netherlands in an undisclosed WHOA procedure under the WHOA, which extends to the debtor's assets and goods present in the Netherlands? In my opinion, this situation is (quite) simple. The Dutch court has jurisdiction by virtue of art. 3 Rv and, by virtue of Article 376 DBA, pronounces the cooling-off period over the assets and any goods that are in the power of the debtor. To narrow the scope of this article only the perspective of the European creditor is discussed. With the term 'European creditor' the following is meant. The European creditor is a creditor originating from one of the Member States and falls therefore within the scope of Brussels I *bis* or the Insolvency Regulation. For example a Belgian creditor.

European creditors will have to comply with the Dutch ruling on declaring a cooling-off period over the assets in the Netherlands, because the assets are on Dutch soil where the ruling of the Dutch court is recognised and enforced. In order for the debtor to 'use' the cooling-off period he has to inform the affected creditors of the judgment.

The creditor can, of course, turn to the Dutch court with a request to lift the cooling-off period if there are good grounds for doing so. Examples are requesting the court to limit the effect of the moratorium (in time or with regards to specific assets) or to request the appointment of the observer (to oversee the progress made within the WHOA procedure). However, the creditor can also request the Dutch court to grant authorisation to recover the debtor's assets/property despite the cooling-off period[36].

[36] Article 376 para 2 DBA and Article 376 para 10 DBA.

6 Cooling-off period regarding assets/goods located in another Member State of a Dutch debtor

What about the cooling-off period of a debtor who has started a WHOA procedure in the Netherlands, whereby a cooling-off period has been declared which extends to goods belonging to the debtor or which are in the power of the debtor abroad?

According to established Dutch case law, a Dutch bankruptcy, and thus also a cooling-off period in a bankruptcy, has effect abroad and on goods located abroad[37]. Whether an actual trustee in bankruptcy can derive any rights from this depends on the recognition of the bankruptcy proceedings and their effects abroad. I would think that the same principle applies to the undisclosed WHOA procedure under the WHOA. The WHOA has been incorporated into the Dutch Bankruptcy Act and from a Dutch perspective Dutch insolvency proceedings have universal effect.

In fact, it depends on the recognition by the foreign court of the decision of the Dutch court declaring a cooling-off period. If a judge in another EU Member State disregards that ruling because that judge does not recognise the Dutch ruling, the answer is simple. A Dutch cooling-off period will then not extend to the assets located in that specific EU Member State.

Due to the dilemma of the undisclosed WHOA procedure, as explained in the previous section, it is actually speculation as to how the cooling-off period will be recognised in the European Union. It is up to the Court of Justice (and before that it is up to the local courts) to determine whether the undisclosed WHOA procedure falls under the Insolvency Regulation, Brussels I *bis* or neither.

Veder believes that in the case of the public WHOA procedure, which is automatically recognised in the European Union on the basis of the Insolvency Regulation, the cooling-off period has no effect on (secured) creditors who have a right under property law to assets located in another Member State[38].

I believe that in the event that a Member State of the European Union under Brussels I *bis* or under international private law recognises the judgments of the Dutch court, the judgment in which the cooling-off period is pronounced also extends to goods located in other Member States. The court in that Member State recognises the effect of the WHOA procedure and the cooling-off

[37] HR, 15 April 1955, *NJ* 1955, 542 (*Comfin*) and AJ Berends, 'Heeft de Nederlandse afkoelingsperiode werking in het buitenland?', *WPNR* 2005/6646, pp 966–967.

[38] PM Veder, 'Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement', *FIP* 2019/219, p 59.

period, so that the effect of the cooling-off period as it applies in the Netherlands also applies, in my opinion, to goods that are subject to the cooling-off period in another EU Member State. A limitation such as that in the public WHOA procedure under the Insolvency Regulation does not apply, because the Insolvency Regulation does not apply to the undisclosed WHOA procedure.

An interesting question is if we in the Netherlands would accept a foreign moratorium on Dutch soil from – an example – Spanish proceedings. If the foreign insolvency procedure falls under the scope of the Insolvency Regulation then – in principle – the moratorium will be recognized, but the exception of secured creditors following art. 8 Insolvency Regulation will apply. If the Spanish proceedings would fall neither under the Insolvency Regulation or Brussels I *bis*, the moratorium will not be recognized for goods situated on Dutch soil. This is due to the established case law from the Dutch Supreme Court. According to the Dutch Supreme Court foreign insolvency proceedings, if not obligated by closed treaties with other countries, will have (in principle) no effect on (goods located on) Dutch soil, due to the territoriality principle of Dutch Insolvency Law for foreign insolvency proceedings[39].

7 Conclusion

The WHOA is a new, current and interesting instrument that has been added to Dutch bankruptcy law and gives debtors the option of avoiding bankruptcy by offering an (undisclosed) WHOA agreement. The possibilities offered by the WHOA and the control exercised by the court, the restructuring expert or the observer make it a useful instrument for both the debtor and the creditors. By avoiding bankruptcy, better value is realised for the creditors.

The undisclosed WHOA procedure is a 'separate' procedure about which much is still unclear, especially with regards to the international aspects. However, the undisclosed WHOA procedure makes it quite easy for international debtors to start a WHOA in the Netherlands, as long as the interested party is domiciled in the Netherlands or if there is sufficient connection with the Netherlands.

Currently it is still speculation on which grounds the recognition of a WHOA procedure will take place, this is ultimately up to the Court of Justice. The Dutch literature does not agree on a solution regarding this matter, yet. There are authors who believe that on the basis of Brussels I *bis* the undisclosed WHOA procedure (and therefore the cooling-off period) is recognised by other

[39] HR, 13 September 2013, ECLI:NL:HR:2013:BZ5668, *NJ* 2014/454 (*Yukos*) and HR, 29 June 2012, ECLI:NL:HR:2012:BU5630, *NJ* 2012/424 (*Yukos*).

EU Member States. On the other hand, there are authors who are of the opinion that Brussels I *bis* is not applicable, that the Insolvency Regulation is not applicable either and that recognition should take place on the basis of international private law. A clear answer to this question has not yet been found, but I believe that the recognition of the undisclosed WHOA procedure and the cooling-off period takes place on the basis of international private law and that therefore it must be assessed on a case-by-case basis per EU Member State whether the undisclosed WHOA procedure is recognized or not. If the undisclosed WHOA procedure is recognised in that EU Member State, the consequence, in my view, is that the cooling-off period is also recognised and can extend to goods located in that EU Member State.