Third-Party Releases under Dutch Law since the WHOA – A Warm Welcome for a Very Limited Number of Guests Only?

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1. Introduction

Although third-party releases in creditor schemes[1] have been a familiar sight under US and UK law for quite some time now, their occurrence under Dutch law has thus far been fairly limited. Prior to the enactment of the *Wet Homologatie Onderhands Akkoord* (the **WHOA**) on 1 January 2021, Dutch law only provided for court confirmation of creditor schemes in court supervised formal insolvency proceedings: the Dutch suspension of payments (*surseance van betaling*) and bankruptcy (*faillissement*) proceedings. Although there are examples where creditor schemes were successfully used to restructure companies' debts in either of the two formal proceedings,[2] they were rather rare in Dutch insolvency law. If this report had been written ten years ago, a couple of pages would have likely sufficed.[3]

With the introduction of the Dutch preventive scheme proceedings outside of formal insolvency under the WHOA (hereinafter also referred to as the **Dutch Preventive Scheme**), the discussion on third-party releases under Dutch law has also entered a new stage. The WHOA has significantly increased the (potential for) Dutch creditor schemes in relation to companies in distress. Debtors, creditors, insolvency professionals and judges alike will likely see themselves increasingly confronted with questions concerning the admissibility and appropriateness of third-party releases in creditor schemes.

This report (*preadvies*) aims to analyse the extent to which Dutch law allows the imposition of third-party releases included in creditor schemes on creditors. In doing so, the report starts by providing some background to the discussion in Section 2 and continues with a brief historical *tour d'horizon* of the legal landscape prior to the enactment of the WHOA in Section 3. Section 4 discusses the options to apply third-party releases in Dutch Preventive Schemes and concludes with a discussion on the (potential for) application of third-party releases outside the scope of the WHOA provisions in Section 5.

2. What Are Third-Party Releases and Why Are They Relevant?

But before diving into Dutch law, it is worthwhile to briefly discuss what should be understood by 'third-party releases' and what their relevance is in relation to creditor schemes.

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[1] The term 'creditor schemes' is used throughout this report as a reference to (*schuldeisers*)*akkoorden* both in- and outside of insolvency proceedings, depending on the context, also commonly referred to as 'composition plans', 'creditor compositions' or 'restructuring plans'.

[2] Creditor schemes in suspension of payment proceedings have proven particularly helpful to restructure bond (*obligatie*) debt; *see, e.g.*, the restructurings of Global Telecom Systems (GTS), Versatel, UPC, Plaza Centers and the Oi Group.

[3] *See, e.g.*, the 2011 dissertation of Anna Soedira on the creditor scheme under Dutch law, which required three pages to deal with this topic. Anna Soedira, Het Akkoord (Dissertation, Radboud University Nijmegen, 2011) 93-96.

Generally, only a single legal entity is the subject of (pre-)insolvency proceedings.[4] Creditor schemes prepared in such proceedings typically deal with the capital structure of that particular debtor, for example by allowing a (partial) write-down of its debt, possibly in exchange for an equity stake in the debtor. As a starting point, creditor schemes generally do not affect the liabilities that third parties may have incurred in connection with the relevant debtor.[5] However, for differing categories of liabilities and for differing reasons, the release of claims against third parties (also referred to as non-debtor parties) may be conducive or even necessary for the successful implementation of a creditor scheme.[6]

2.1 Category 1: Corporate Guarantees

Third-party releases will often be useful in relation to debt that already existed prior to the restructuring. The application of third-party releases within the context of groups of companies is a prime example thereof.[7] Group companies are often financially intertwined, for instance as a result of group financing facilities and pursuant to, in particular, guarantees, sureties, joint and several liabilities and cross-collateralization (e.g. *garanties*, *borgtocht*, *hoofdelijkheid* or *derdenzekerheid*, hereinafter, for ease of reference, all referred to as guarantees). The financial distress of one group company will often topple other companies within the group as well as a result of these entanglements.[8] Where, for instance, a distressed group company is only able to pay 60 per cent of the guaranteed claims against a release thereof, the remaining 40 per cent will have to come out of the other group companies' pockets. If those group companies have insufficient funds available to (immediately) repay those remaining amounts, they may end up in restructuring or liquidation proceedings themselves as well, constituting a domino effect.[9]

This effect is further magnified by the group companies' interdependency. While groups of companies comprise legally separate group members, they will often economically, financially, administratively and/or operationally function as integrated and interdependent businesses.[10] If one group company is restructured but other companies pertaining to the same

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[4] *See, e.g.*, CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*), para. 30; CJEU 15 December 2011, C-191/10 (*Rastelli*), paras. 13-29. *See* on the single entity approach, *e.g.*, Sid Pepels 'Cross-border CoCo in group insolvencies under the Recast EIR and the existence of an 'overriding group interest' – One for all, and all for one?' (2021) 5 EIRJ, para. 2.

[5] Michael Veder and Adrian Thery, 'The release of third party guarantees in pre-insolvency restructuring plans', in Faber and others (eds), Trust and Good Faith Across Borders (Liber Amicorum Prof. dr. S.C.J.J. Kortmann) (Wolters Kluwer 2017) 265-266. *See also* Ilya Kokorin, 'Third Part Releases in Insolvency of Multinational Enterprise Grounds' (2021) 18 ECFR 107, note 34.

[6] *Cf.* Christian Pilkington, Schemes of Arrangement in Corporate Restructuring (2 edn, Sweet & Maxwell 2020) para. 9-001 *ff*.

[7] *See, e.g.*, on this topic Veder and Thery (n 5) 259; Anne Mennens, Het Dwangakkoord buiten Surseance en Faillissement (Wolters Kluwer 2020) 495, 507-508; Kokorin (n 5); Sid Pepels, 'De WHOA als instrument voor (grensoverschrijdende) groepsherstructureringen' (2021) 1 MvO 1, para. 4.

[8] *See* for an extensive analysis on the specific problems relating to (cross-border) group insolvency proceedings: Irit Mevorach, Insolvency Within Multinational Enterprise Groups (Oxford University Press 2009), more in particular Chapter 2: *"To Link or not to Link?" The Problem of the Multinational Enterprise Group Business Structure*.

[9] *Cf.* Klaus Siemon and Frank Frind, 'Groups of Companies in Insolvency: A German Perspective: Overcoming the Domino Effect in an (International) Group Insolvency' (2013) 22(2) IIR 61, 68; Pepels (n 4) 5.

[10] *E.g.* because the group's back office functions or financial management is centralized (*e.g.* via cash pooling), because business units comprise employees of multiple group companies (which may, *e.g.*, be the case in groups where companies are separated along geographical lines) or because one group company depends on products or

group subsequently fail because they cannot pay their guaranteed obligations, that subsequent financial distress within the group will often again impact the restructured group company because of this interdependency, or even because event-of-default or acceleration clauses in group financing facilities may be retriggered.

Third-party release clauses allow the restructuring of certain cross-indebtedness among group companies, without having to open individual proceedings for all group companies involved with all the value destructive effects that such proceedings may have. This could, for instance, involve the restructuring only of not a company's liability but also of claims pursuant to guarantees provided by a parent company for (certain) debt of the subsidiary, as is demonstrated in Figure 1:

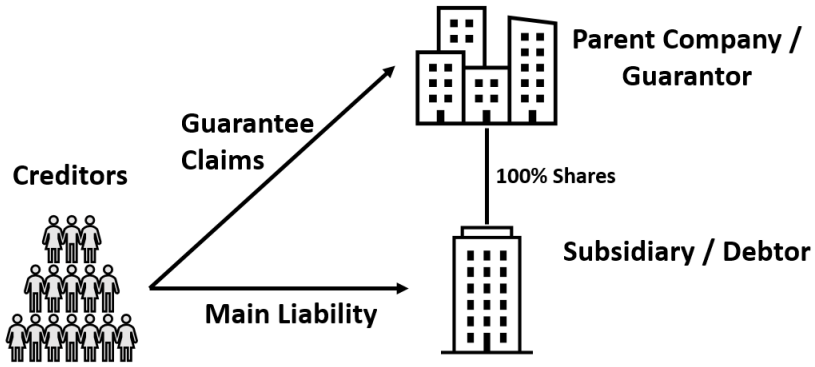

Figure 1 (Overview Third Parties - Guarantees)

Guarantees may also be provided by other legal entities than group companies, e.g. by the natural person who owns the relevant debtor company (and who, as such, may also be its director).

2.2 Category 2: Third Parties Liable under Tort Pre-Restructuring

The second category of pre-existing debt concerns the involvement of (*de facto*) directors, shareholders and other parties with the company (or their respective insurers) prior to the opening of the (pre) insolvency proceedings. They may see a creditor scheme as an opportunity for a release of their own liability against the company's creditors relating to (potentially) tortious acts prior to the restructuring.[11] This may incentivize (*de facto*) directors, shareholders or their insurers to (substantially) contribute to the insolvency estate to enable a creditor scheme in exchange for their release:

services provided by another group company in order to produce or service itself. *See* further on forms of integration within groups of companies: Mevorach (n 8) para. 5.3.2.

[11] *E.g.* as a result of (de facto) directors' or shareholders' liability or in relation to transaction avoidance claims or guarantees.

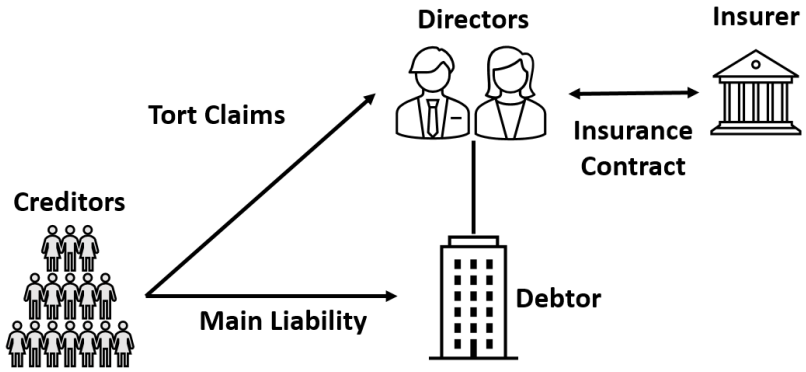

Figure 2 (Overview Third Parties – Pre-restructuring)

The creditor scheme may then even effectively be applied as an alternative mechanism to deal with mass harm (*massaschade*).[12] The American Chapter 11 bankruptcy proceeding of *Purdue Pharma LP*, discussed by co-reporters Simon and Brubaker in their reports, is a controversial example of this application of third-party releases.

Vriesendorp and Hermans argued during the legislative process concerning the WHOA that the application of creditor schemes in this manner may function as a driver for value maximization for the relevant creditors without the need for complex and costly litigation.[13]

2.3 Category 3: Decision Makers and Advisors Involved with the Restructuring or Insolvency

A third category of liability concerning which third-party release clauses may be useful concerns key decision-makers and advisors that partake in the relevant restructurings or insolvency proceedings, such as the debtor's directors, lawyers, financial advisors, insolvency practitioners and their firms and/or employees:

[12] Since the enactment of the *Wet collectieve afwikkeling massaschade* (WCAM) in 2005, replaced per 1 January 2020 by the *Wet Afwikkeling Massaschade in Collectieve Actie* (WAMCA), Dutch law provides for a general systematic approach to collectively deal with such mass harm claims outside the scope of restructuring or insolvency proceedings.

[13] Ruud Hermans and Reinout Vriesendorp, 'Het dwangakkoord in het insolventierecht: vrijheid in gebondenheid?' (2014) 10 TvI 94, para. 4.

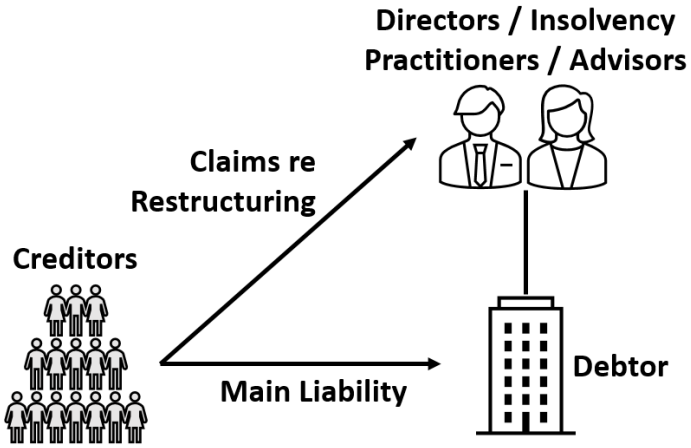

Figure 3 (Overview Third Parties – Decision-Makers)

Corporate financial restructurings and insolvencies often deal with large sums of money. The key decision makers and advisors involved therein thus expose themselves to substantial risks. Any decision that plays out wrongly, no matter how small, may result in insurmountable damages claims. The release of claims that creditors of the debtor may have against those decision makers involved in the negotiation, formalization and implementation of a creditor scheme and their advisors may, for instance, give them sufficient comfort to make key decisions for the restructuring.

It has been argued that key decision makers and their advisors may be reluctant to expose themselves to certain risks, absent such a release.[14] For the same reason, releases of such parties may also significantly lower the fees against which they are willing and able to contribute to the restructuring or insolvency.[15]

3. Third-Party Releases in the Netherlands Prior to the Dutch Preventive Scheme – Theory and Practice

3.1 The Legal Framework: A Conservative Approach

As will be further discussed later, the WHOA explicitly provides for the release of third-party liability, although the relevant statutory provision only deals with group guarantees and only allows a release under certain conditions. This report will further deal with the question of what those conditions are and to what extent third-party release clauses are admissible in relation to Categories 2 and 3 and for group guarantees outside the WHOA. But before doing so, the following will first provide some necessary historical background to the legal landscape prior to the enactment of the WHOA.

[14] Pilkington (n 6) para. 9-002-9-006. *Cf.* also Mennens (n 4) 503-504. *See*, in particular, her reference to the Lehman Brothers International (Europe) Scheme.
[15] *Ibid*.

Starting in the mid-nineties and spearheaded by Soedira[16] and Kortmann,[17] the majority of Dutch authors who have contributed on this topic have assumed that third-party releases in creditor schemes could only be invoked against creditors who voted in favour of that scheme but not against non-consenting creditors (which term refers to both rejecting and non-voting creditors).[18] Such 'extraneous scheme provisions' or '*akkoordvreemde bepalingen*' should not affect creditors' positions vis-à-vis non-debtor third parties without their explicit consent. These scholars generally base their position on the creditor scheme's nature as an agreement between the debtor and its creditors and thus only concerning the creditor-debtor relationship and the distribution of the debtor's estate.[19] Third-party release clauses would be a supplement to the creditor scheme, not a part of it.[20] As such, the binding effect of the court's confirmation decision would not extend to third-party release clauses. Creditors who voted in favour of the creditor scheme would not be bound to a third-party release clause included therein by virtue of the scheme's confirmation by the court but, rather, under general Dutch contract law as a result of their consent (*aanvaarding*).[21] Assuming the third-party releases would be drafted as a third-party stipulation (*derdenbeding*), the non-debtor party could invoke that third-party release from the moment it has accepted that stipulation.[22]

In addition to the creditor schemes' nature (the rationale behind) Article 160 of the Dutch Bankruptcy Act (*de Faillissementswet*, hereinafter also referred to as the **DBA**) is often referenced.[23] This provision prescribes that a creditor scheme offered in a bankruptcy proceeding does not affect the rights of creditors against providers of guarantees and co-debtors of the scheme debtor:

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[16] Anna Soedira 'De inhoud van een akkoord', in: Bas Kortmann and Dennis Faber (eds), De curator, een octopus (W.E.J. Tjeenk Willink 1996) 219, 223 ff.

[17] Bas Kortmann, 'Derden in het faillissementsrecht' (1997) 46 AA 5, 59-60.

[18] *See, e.g.,* Soedira (n 16); Soedira (n 3); Kortmann (n 17); Karen Harmsen, 'Lehman Brothers: een akkoord in strijd met de Faillissementswet' (2013) 28 TvI; W.J.M. van Andel in *JOR* 2013/191 with Amsterdam District Court 22 March 2013, ECLI:NL:RBAMS:2013:BZ5246; Dennis Faber, Frédéric Verhoeven and Niels Vermunt, 'The use of a composition plan as a valuation and distribution framework' in: Dennis Faber and Niels Vermunt (eds), Bank Failure: Lessons from Lehman Brothers (Oxford University Press 2017) para. 12.91-93; Mennens (n 14) 495 *ff*; Bob Wessels, Het Akkoord (Wessels Insolventierecht nr. VI) (5 edn, Wolters Kluwer 2020) para. 6159 *ff*. *See also* questioning the validity of third-party release clauses included in the Lehman Brothers Treasury Co B.V. creditor scheme: Opinion of the Advocate-General Timmerman dated 13 February 2013, *JOR* 2013/190 (Lehman Brothers Finance/Lehman Brothers Treasury cs), part 2.47. *See* more lenient towards allowing third-party releases: Christiaan Zijderveld and Ida Nylund, 'Reactie op 'Lehman Brothers: een akkoord in strijd met de Faillissementswet'' (2013) 28 TvI; Hermans and Vriesendorp (n 13) 49; Nicolaes Tollenaar, Het pre-insolventieakkoord, Grondslagen en raamwerk (Wolters Kluwer 2016) 300-302.

[19] *See* Soedira (n 16) 225-226; Soedira (n 3); Kortmann (n 17); Faber, Verhoeven and Vermunt (n 18) par. 12.92; Mennens (n 14) 498-499.

[20] *See* Soedira (n 16) 224; Soedira (n 3) 94-95.

[21] *See* Kortmann (n 17) 321-322; Soedira (n 16) 93-96; Faber, Verhoeven and Vermunt (n 18) para 12.92; Mennens (n 14) 497, in particular, note 278.

[22] *See* Art. 6:254(1) Dutch Civil Code. *See* Kortmann (n 17) 60; Soedira (n 16) 96; Faber, Verhoeven and Vermunt 2017 (n 18) para. 12.93.

[23] *See, e.g.,* Soedira (n 16) 225-226; Kortmann (n 17) 322; Faber, Verhoeven and Vermunt (n 18) para. 12.92; Mennens (n 14) 498-499. Note that Soedira and Mennens both state that the impossibility of imposing third-party releases on non-consenting creditors could be concluded without necessarily relying on Art. 160 DBA, but already follows from the nature of a Dutch creditor scheme. Kortmann also refers to Art. 160 DBA as an "additional argument".

> "Regardless of the creditor scheme, the creditors maintain all their rights against surety providers and other co-debtors of the debtor. The rights that they can exercise on assets of third parties are maintained as if no creditor scheme came about."[24]

With the implementation of the provisions on creditor schemes in suspension of payments proceedings (*surseance van betaling*) in 1935, Article 160 DBA was declared applicable to schemes in suspension of payments proceedings.[25]

Further support for this position is found in the 1990 Dutch Supreme Court judgment in the *De Maes Janssens* case.[26] In this judgment the Dutch Supreme Court ruled, referencing Article 160 DBA and the rationale behind it, that a creditor who had received payment of a percentage of its claim pursuant to a creditor scheme against release of its remaining claim on the debtor was not prohibited from claiming the remaining percentages of its claim on a third party on the basis of a tort claim (*onrechtmatige daadsvorderingen*):

> "The Bankruptcy Act considers the creditor scheme to be an agreement and there is no ground to have this agreement benefit a third party from whom the creditor has recourse concerning the non-payment of his claim on the debtor on account of a wrongful act committed against him by the third party. The latter would also not be in accordance with the system of the Bankruptcy Act and in particular with the provisions of article 160 DBA according to which a creditor, despite the fact that he receives percentages on his claim pursuant to the scheme, nevertheless retains all his rights against the guarantors and on the goods connected to him by third parties: accordingly, it must be assumed that the creditor also retains his right of recourse against the aforementioned third party."[27]

In other words, the Dutch Supreme Court also ruled out the (automatic) release of third-party liabilities in cases that are not directly covered by Article 160 DBA (i.e. tort claims instead of guarantees). The ruling is clear: creditor schemes are not intended to benefit third parties on whom a creditor may recover the unpaid portion of its claim.

The Attorney-General Hartkamp was equally clear in its wording:

> "The matter at hand concerns no joint and several liability or a related legal concept [...]: the claim of the [creditor] against [the bankrupt person] has an entirely different basis than the – alleged – claim against [the third party] (credit agreement vs. wrongful act). The solution chosen in article 160 DBA must apply in this case a fortiori. It is hard to see how the creditor scheme can lead to the

[24] Informal translation. In Dutch "Niettegenstaande het akkoord behouden de schuldeisers al hun rechten tegen de borgen en andere medeschuldenaren van de schuldenaar. De rechten, welke zij op goederen van derden kunnen uitoefenen, blijven bestaan als ware geen akkoord tot stand gekomen."

[25] *See* Art. 272(6) DBA, previously Section 5. *See* similarly on the provisions for debt relief for natural persons (*Wet schuldsanering natuurlijke personen*), Art. 340(4) DBA.

[26] *See, e.g.,* Kortmann (n 17) 59-60; Soedira (n 16); Soedira (n 3) 95; Mennens (n 14) 498.

[27] Dutch Supreme Court, 18 May 1990, *NJ* 1991, 412, m. nt. MMM, para 3.2. Informal translation. In Dutch: "De Faillissementswet beschouwt het akkoord als een overeenkomst en er is geen grond deze overeenkomst ten voordele te doen strekken van een derde op wie de schuldeiser verhaal heeft ter zake van het niet voldaan zijn van zijn vordering op de schuldenaar uit hoofde van een door de derde jegens hem gepleegde onrechtmatige daad. Dit laatste zou ook niet stroken met het stelsel van de Faillissementswet en met name niet met het bepaalde in artikel 160 Fw volgens hetwelk een schuldeiser, ondanks het feit dat hij de akkoordpercenten over zijn vordering ontvangt, niettemin al zijn rechten tegen de borgen en op het hem door derden verbonden goed behoudt: dienovereenkomstig moet worden aangenomen dat de schuldeiser ook zijn verhaalsrecht op evenbedoelde derde behoudt."

extinction of a right in tort against a third party (a capacity which, in this case, [the third party] can also be regarded).”[28]

3.2 Practice: Third-Party Release Clauses Used but Untested

Although the majority of legal scholars generally assumed that third-party release clauses would only work in relation to consenting creditors, Dutch creditor schemes have, in practice, often included third-party release clauses in some form or another. The creditor scheme for the *Stichting Wereldruiterspelen 1994* is an oft-cited example.[29] The scheme stipulated that by voting in favour of it, the creditors would irrevocably waive their ‘presumed claims’ (‘*vermeende vorderingsrechten*’) against the Stichting’s directors and their insurers.[30] It is not entirely clear whether the scheme is intended to only waive the consenting creditors’ claims against the directors and their insurers or whether a general waiver was assumed.[31] In any event, the scheme was confirmed by the Utrecht District Court.[32]

The creditor scheme in the Dutch bankruptcy of Lehman Brothers Treasury Co. B.V. (**LBT**) included a third-party release for, among others, LBT, its current and future directors and bankruptcy trustees (*curatoren*) in relation to – in short – liability resulting from the Dutch insolvency proceedings and the execution of the creditor scheme offered therein.[33] While criticized in the literature, partially in relation to the included third-party releases,[34] the LBT creditor scheme was confirmed by the Amsterdam District Court and not further effectively challenged.[35]

Similarly, the creditor schemes in the bankruptcy proceedings concerning Plaza Centers N.V., the two Dutch entities involved in the Brazilian Oi Group insolvency (Oi Brasil Holdings

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[28] Opinion A-G Hartkamp to the Dutch Supreme Court’s 18 May 1990 judgment (*NJ* 1991, 412), par. 2. Informal translation. In Dutch: “In het onderhavige geval is van hoofdelijkheid of een daarmee verwante rechtsfiguur […] geen sprake: de vordering van de [schuldeiser] jegens [de failliet] heeft een geheel andere grondslag dan de – gepretendeerde – vordering jegens [de derde] (kredietovereenkomst resp. onrechtmatige daad). Hier moet de in artikel 160 Fw gekozen oplossing a fortiori gelden. Niet valt in te zien hoe het faillissementsakkoord kan leiden tot het tenietgaan van een recht uit onrechtmatige daad jegens een derde (als hoedanigheid i.c. ook [de derde] is te beschouwen).”

[29] Utrecht District Court 6 April 1994, 02.02.671/94. Although unpublished, it is discussed in Soedira (n 16) 233; Soedira (n 3) 93 *ff*; Kortmann (n 17) 60; Mennens (n 14) 496.

[30] Soedira (n 3) 93, quoting Clause 3 of the respective creditor scheme: “Door voor het ontwerp van akkoord te stemmen doen de schuldeisers, doch uitsluitend voor het geval dat het akkoord wordt aanvaard en gehomologeerd, onherroepelijk afstand van hun vermeende vorderingsrechten op de bestuurders van de Stichting en hun verzekeraars, uit welke hoofde dan ook.” Informally translated into “By voting in favour of the draft creditor scheme, the creditors, but only in the event that the agreement is accepted and confirmed, irrevocably waive their alleged rights of action against the directors of the Foundation and their insurers, on any grounds whatsoever”.

[31] Soedira (n 3) 94.

[32] Soedira (n 16) 223 and in particular note 27.

[33] *See* ‘Composition Plan Lehman Brothers Treasury Co B.V.’ of 5 December 2012, Art. 8 and the definition for ‘Released Parties’ at p. 26. The LBT Composition Plan is available via www.lehmanbrotherstreasury.com. All links to webpages in this Report were last verified on 8 June 2022.

[34] *See, e.g.*, Harmsen (n 18), who argued, in line with Soedira and Kortmann, that a third-party release would not be able to bind non-consenting third parties. In the further back-and-forth that ensued between Harmsen and Zijderveld & Nylund (*see* TvI 2013/44 and 45), the validity of the third-party releases in the LBT creditor scheme remained undiscussed. *See also* the contribution of Faber, Verhoeven and Vermunt (18), who concluded, in para. 12.93, that only “eligible voting parties who have voted in favour of the adoption of the LBT composition plan are – in line with the prevailing opinion in legal literature and practice – bound to the third-party release clause contained in the LBT composition plan”. Verhoeven was one of LBT’s bankruptcy trustees.

[35] *See* Harmsen (n 18).

Coöperatief U.A.[36] and Portugal Telecom International Finance B.V.) and the Intertoys Group insolvency[37] all included broad third-party releases, for instance relating to all claims against relevant group companies; the current, former and future directors; direct and indirect shareholders; and the bankruptcy trustees and their firms. Each set of third-party releases was, however, limited "*to the extent permitted by law*".[38] The extent of this qualification has remained untested in court.

The creditor scheme that was confirmed in the suspension of payments proceedings concerning Steinhoff International Holdings N.V. in 2021 similarly included, among other things, certain third-party release clauses that released directors, group companies, their insurers and advisors from their potential liability vis-à-vis the creditors that were part of the Scheme.[39]

While the Dutch academy thus appears mostly united in its stance that third-party release in Dutch creditor schemes are not effective against non-consenting creditors, in practice it is not uncommon for such clauses to end up in schemes in some form or another, without their limits being tested.

4. The Dutch Preventive Scheme Enters the Stage: A Mechanism for Group Guarantee Releases

In response to the historically high number of bankruptcy proceedings that followed the 2007/2008 financial crisis and the subsequent economic crises, the Dutch legislature decided in 2012 to update the DBA and, among other things, include a statutory procedure for creditor schemes outside of suspension of payments or bankruptcy proceedings.[40] The discussion concerning third-party releases entered a new stage then, as the Dutch legislature, academy and practice were presented with a blank canvas to sketch a new form of proceeding. Several authors, including Vriesendorp, Hermans and De Vries,[41] as well as Tollenaar,[42] argued in

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[36] I was involved in the insolvency proceedings concerning Oi Brasil Holdings Coöperatief U.A. as lawyer to the bankruptcy trustee.

[37] Intertoys Holding B.V., Intertoys Holland B.V., Speelhoorn B.V. and Speelgoedpaleis Bart Smit B.V. I was involved in this bankruptcy proceeding as part of the insolvency trustees' team.

[38] *See, e.g.,* Art. 3.5.15 of the Plaza Centers creditor scheme "Each Plan Creditor hereby releases, to the extent permitted by law, the Company and all other companies of the Group, the current and former directors and officers of the Group, all direct and indirect shareholders of the Group (and their respective directors, officers, employees, agents, counsels or anyone acting on their behalf), from any and all liability under any applicable law other than with respect to claims or demands regarding which the grounds are fraud or malice or other ground for which a release is not permitted by law." The plan is available via http://plazacenters.com/index.php?p=debt_restructuring. *See* para. 65 of the Oi Coop creditor scheme, in conjunction with the definition for 'Released Parties' on p. 20 and for PTIF *see* para. 3.5 and the definition for 'Released Parties' on p. 6. *See* Art. 3.5.2 of the respective Intertoys creditor schemes and the definition for 'Released Parties' in Art. 1.2. The Intertoys Schemes did not include a waiver of claims concerning group companies.

[39] *See* 'Steinhoff International Holdings N.V. Composition Plan' (8 September 2021) www.steinhoffinternational.com/settlement-litigation-claims.php.

[40] *Kamerstukken II* 2010/11,29911 nr. 74, para. 2.

[41] *See* draft Art. 381 DBA in the legislative proposal on a Dutch extrajudicial creditors' scheme of Vriesendorp, Hermans and De Vries: Reinout Vriesendorp, Ruud Hermans and Klaas de Vries, 'Wetsvoorstel tot aanpassing van de Faillissementswet door uitbreiding met titel IV', 20 (2013) TvI 1. *See also* Hermans and Vriesendorp (n 13) para. 4.

[42] Tollenaar (n 18) 300-302.

favour of some form of third-party releases to be included in what ended up becoming the WHOA.

Inspired by the works of Hermans and Vriesendorp and referencing the benefits of third-party releases in the context of groups of companies,[43] the Dutch legislature opted to include a statutory mechanism for third-party releases explicitly related to claims of the principal debtor's creditors on companies that pertain to the same group as the debtor. Article 372(1) DBA, which entered into force on 1 January 2021, now reads:

> "A scheme as referred to in article 370(1) may also provide for the amendment of creditors' rights in respect of legal entities which form a group with the debtor as referred to in article 24b of Book 2 of the Dutch Civil Code…."[44]

In addition to the released non-debtor party pertaining to the same group of companies, the application of this provision requires that[45]

(a) the rights of the relevant creditors against that group company serve to pay or secure the payment of any obligations of the principal debtor, or of any obligations for which the group company is liable with or in addition to the principal debtor (which needs to be attributed broad meaning, e.g., also including abstract guarantees and group financing where not the group company offering the creditor scheme but the non-debtor group company is actually the main debtor under that financing);

(b) the group company – like the main debtor – is in a situation in which it may reasonably be expected that it will not be able to continue paying its debts;

(c) the relevant group company has either consented to the proposed amendment, or the creditor scheme is being offered by a restructuring expert (*herstructureringsdeskundige*);[46]

(d) the court would have (international) jurisdiction if the group company itself had offered a creditor scheme under the WHOA and applied for its approval itself;[47] and

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[43] *See* re the first legislative proposal for the *Wet continuïteit ondernemingen II*, the WHOA's predecessor: Explanatory Note (*Memorie van Toelichting*) 'Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot het algemeen verbindend verklaren van een buiten faillissement gesloten akkoord ter herstructurering van de schulden (Wet continuïteit ondernemingen II)', consultatievoorstel 14 augustus 2014, pp. 48-49. The legislator also references the European Commission's recommendations, including the recommendation to limit the costs of a reorganisation as much as possible. Available via www.internetconsultatie.nl/wco2/details.

[44] Informal translation. In Dutch: "Een akkoord als bedoeld in artikel 370, eerste lid, kan ook voorzien in de wijziging van rechten van schuldeisers jegens rechtspersonen die samen met de schuldenaar een groep vormen als bedoeld in artikel 24b van Boek 2 van het Burgerlijk Wetboek [...]."

[45] Art. 372(1) DBA. *See e.g.* on Art. 372 DBA Menens (n 14) 495 *ff*; Pepels (n 7), Rob van den Sigtenhorst, Herstructurering groepsgaranties: mini-akkoord voor aansprakelijke groepsmaatschappijen (Art. 372 Fw), in Karen Harmsen and Michelle Reumers (eds), De WHOA van wet naar recht (Serie Recht en Praktijk) (Wolters Kluwer 2021).

[46] The 'restructuring expert' is an independent court-appointed insolvency officer who, at the request of the debtor, any creditor, shareholder, the works council or staff representative, may be appointed by the court to prepare and submit a creditor scheme in the debtor's place. *See* Art. 371 DBA.

[47] Which will often be the case. According to the Explanatory Memorandum, the mere circumstance that a foreign group company has guaranteed the debts of a principal debtor over which the Dutch court has jurisdiction may already be sufficient for the Dutch court to also declare itself competent to assume jurisdiction. It may also be sufficient that, when one or more creditor schemes are offered with respect to several group companies, one of

(e) the relevant group company has not already offered a creditor scheme in respect of these obligations.[48]

Additionally,[49]

(f) the principal debtor (or restructuring expert) must supply all relevant 'scheme information' pursuant to Article 375 DBA also in relation to the non-debtor group companies, which includes, among other things, reorganization and liquidation valuations of the company;[50] and

(g) the court petitioned to confirm the scheme examines whether the scheme also complies with the confirmation requirements from Article 384 DBA in relation to those non-debtor group companies. This article most notably prescribes that non-consenting creditors or shareholders that are part of a non-consenting class may petition the court to deny confirmation of the creditor scheme if (i) they would be worse off under that scheme than they would be in case of a bankruptcy proceeding (the 'No Creditor Worse Off' or NCWO principle)[51] or if (ii) the legal ranking of rights of recourse is not maintained, prescribing that higher ranking classes creditors or shareholders should, in principle, be paid in full before other lower ranking classes receive any value (the 'Priority Rule').[52]

If these requirements are all met, a 'broad scheme' (or *breed akkoord*) may be offered and confirmed that also restructures creditors' rights arising out of group guarantees vis-à-vis non-debtor group companies, without the need to initiate separate proceedings concerning those group companies themselves.

Considering the requirements for the application of Article 372 DBA, the WHOA conceptually treats the non-debtor group companies as if they were subject to Dutch Preventive Scheme proceedings themselves: the group companies need to be in financial distress themselves, the court must be allowed to assume jurisdiction to open Dutch Preventive Scheme proceedings in relation to them if they would have opened proceedings themselves, all relevant scheme information concerning them needs to be provided, and the creditor scheme also needs to comply with the confirmation requirements in relation to the relevant non-debtor group companies.[53] Importantly, and a valuable safety valve to prevent opportunistic discarding of guarantees, the application of the NCWO principle and Priority Rule ensures that creditors receive a payment on their guarantee under the broad scheme that does justice to the economic value of those guarantees. If, in addition to their payment from the debtor, they do not receive a payment on the guarantee that is at least equal to what they would have received in the

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those group companies has its COMI or an establishment in the Netherlands. *See Kamerstukken II* 2018/19, 35249 nr. 3, p. 42 (MvT). *See also* Pepels (n 7).

[48] *Kamerstukken II* 2018/19, 35249 nr. 3, p. 42 (MvT).

[49] Art. 372(2) DBA.

[50] Art. 375(1)(d) and (e) in conjunction with Art. 372(2) DBA.

[51] *See* 384(4)(c) and (d) DBA.

[52] *See* 384(4)(b) DBA.

[53] *See* Van den Sigtenhorst, who, as a result of this conceptual approach, states that, although a broad scheme as such is a single creditor scheme, Art. 372 DBA boils down to a *mini scheme* (or *mini-akkoord*) in relation to each individual non-debtor group company. *See* Van den Sigtenhorst (n 45).

bankruptcy of the relevant non-debtor group company and in line with their ranking within that bankruptcy proceeding, the court may deny confirmation of the Dutch Preventive Scheme.
Despite this conceptual approach, the WHOA does not treat the non-debtor group companies as actual subjects of the Dutch Preventive Scheme proceedings.[54] The WHOA qualifies the broad scheme as a *single* creditor scheme[55] offered by the debtor (and not also by the non-debtor group companies).[56] The obligations and rights imposed on debtors under the WHOA, e.g., to provide the relevant information[57] or to petition the court,[58] remain exclusively with the debtor (or the restructuring expert, where relevant). If a restructuring expert is appointed, non-debtor group companies are not even required to agree to the restructuring of their guarantees.[59]

The inclusion of provisions on group guarantee releases should be applauded as a welcome addition to the restructuring toolbox: they can halt the domino effect that the insolvency of group companies will often have. They will, however, only work in cases where the financial distress of the non-debtor group companies is merely the effect of the group guarantees having become due and payable due to the debtor's financial difficulties. The restructuring of the group guarantees alone should reinstate that group company as a financially healthy company. In cases where a full-fledged restructuring of obligations and/or a business reorganization is required (e.g., the sale of certain company divisions), Article 372 DBA will offer no relief.[60] The non-debtor group company would then have to engage in a separate restructuring itself.

5 Third-Party Releases Outside the Group and/or Outside the WHOA

5.1 Limited to Group Companies?

As is apparent from the foregoing, the WHOA allows for the release of non-debtor group company's guarantees under certain conditions. In relation to all other third-party guarantees, the WHOA prescribes that the regime of Article 160 DBA applies in Dutch Preventive Scheme

[54] It should be noted, however, that to the extent that the EU Insolvency Regulation (Regulation (EU) 2015/848 on insolvency proceedings) applies, case law of the Court of Justice of the European Union indicates that even where national law treats proceedings that relate to multiple debtors (or at least debts and assets of multiple legal entities) as a single insolvency proceeding (as is the case with a broad scheme), EU insolvency law, in principle, treats those debtors on an individual basis for purposes of determining jurisdiction, except where the Centre of Main Interest (or COMI) of those multiple debtors is located in the same Member State. *See, e.g.,* Case C-191/10, ECLI:EU:C:2011:838, *JOR* 2012/93, annotated by P.M. Veder, para. 13-29.

[55] *See* Art. 372(1) DBA, which states that "a creditor scheme as mentioned in article 370, first subsection, can also prescribe the amendment of rights of creditors against [group companies]…." or in Dutch: "Een akkoord als bedoeld in artikel 370, eerste lid, kan ook voorzien in de wijziging van rechten van schuldeisers jegens [groepsmaatschappijen]…." (amendment and underlining SP).

[56] *See* Art. 372(1)(d) DBA, which prescribes as a requirement that "the court has jurisdiction if these [group companies] would offer a creditor scheme pursuant to this section themselves and would file a request as mentioned in article 383, first subsection." or in Dutch "de rechtbank rechtsmacht heeft als deze [groepsmaatschappijen] zelf een akkoord op grond van deze afdeling zouden aanbieden en een verzoek zouden indienen als bedoeld in artikel 383, eerste lid." (amendment and underlining SP).

[57] Art. 372(2)(a) DBA.

[58] Art. 372(3) DBA.

[59] Art. 372(1)(c) DBA.

[60] *See* Art. 384(2)(e) DBA, pursuant to which a court must deny confirmation of the creditor scheme if its implementation is insufficiently certain, which could arguably be the case if the non-debtor group company's financial distress is not solved by the restructuring. Art. 384 DBA applies *m.m.* in respect of non-debtor group companies' guarantee restructurings under Art. 372 DBA, as follows from Art. 372(2)(b) DBA.

proceedings.[61] Except for group guarantees in Dutch Preventive Scheme proceedings, the DBA thus prescribes a uniform approach for third-party releases in bankruptcy proceedings, suspension of payments proceedings and Dutch Preventive Scheme proceedings alike. Given the above described position of a majority of Dutch scholars on the nature of Dutch creditor schemes and (the rationale of) Article 160 DBA, i.e., that the release of third-party debt in a creditor scheme can only be imposed on *consenting* creditors, does that lead to the conclusion that Dutch law prohibits the imposition of third-party debt releases on non-consenting creditors in any type of (pre-)insolvency proceeding other than those releases exercised under Article 372 DBA?

I would argue that there is a good case for 'not necessarily'.[62] First, when reading the Explanatory Note to Article 160 DBA, it is apparent that the legislator explicitly did not envisage that only consenting creditors could be bound to third-party release clauses.[63] During the legislative process concerning the DBA in the 1890s, various Members of the Dutch Parliament had proposed amending Article 160 DBA to include an automatic statutory release of third-party guarantees concerning creditors who voted in favour of the scheme. As is described in the Explanatory Note, they argued that it would be unreasonable if creditors who consented to a creditor scheme could still recover the remainder of their claims on a guarantor:

> "Art. 160. Concerning the system, prescribed by this article, the opinions [of Members of Parliament, addition SP] appeared divided. According to some the provision was not fair and should parties, that have voted in favor of the creditor scheme, not have any recourse on surety providers. These Members proposed to formulate [article 160 DBA, addition SP] as follows: "Unless the creditors have consented to the creditor scheme, they shall retain all their rights against the guarantors and co-obligors of the bankrupt debtor."[64]

The Dutch Government rejected that proposition and responded, among other things, that such a provision would wrongly incentivize creditors to vote against the scheme, even if the scheme itself would result in a higher distribution than they would receive in a liquidation of the debtor. As a result, it would harm the interest of the guarantors rather than improve it:

> "Against the provision proposed by the opponents of the article ["Unless the creditors have consented to the creditor scheme, they shall retain all their rights against the guarantors and co-obligors of the bankrupt debtor", addition SP], in addition to the objection raised in the report, could be argued that, in many cases, it will be more damaging to the guarantors and co-obligors. The creditor, in order not to lose his rights vis-à-vis the guarantors and co-obligors of the bankrupt, will then in any case have to vote against the creditor scheme, even though the creditors would gain more

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[61] DBA, Art. 370(2). Informal translation: "If a third party, including a guarantor and co-obligor, is liable for a debt owed by the debtor to a creditor as referred to in the first paragraph or has provided security in any way for the payment of that debt, section 160 of the DBA shall apply mutatis mutandis, except insofar as it concerns an creditor scheme as referred to in section 372, first paragraph."

[62] *See* contrary Mennens (n 14) 520.

[63] Bas Kortmann and Dennis Faber, Geschiedenis van de Faillissementswet, Heruitgave Van der Feltz, II (Wolters Kluwer 2016) 188-190.

[64] Kortmann and Faber (n 63) 189. Informal translation. In Dutch: "Art. 160. Omtrent het stelsel, in dit artikel gevolgd, bleken de meeningen verdeeld. Volgens sommigen was de bepaling niet billijk en moisten zij, die vóór het akkoord hadden gestemd, geen verhaal hebben op de borgen. Deze leden wenschten het artikel aldus te formuleeren: "Tenzij de schuldeischers medegewerkt hebben tot het akkoord, behouden zij alle hunne rechten tegenover de borgen en medeschuldenaren van den gefailleerde"."

> than in the event of insolvency, to the detriment of those guarantors and co-obligors, who will then have to contribute more."[65]

It is thus clear that the Dutch legislator consciously and explicitly did not intend to include as a rule that only creditors who have voted in favour of a creditor scheme are bound to third-party release clauses included therein. Such a rule would undermine the purpose of the provision and could have a value destructive effect. As such, it appears difficult to maintain that pursuant to the general rules of contract law, creditors who have voted in favour of a creditor scheme are also bound by third-party releases included therein. The bankruptcy law *specialis* overrides the contract law *generalis*.

The question then becomes the following: should no, or all, creditors be bound? Admittedly, starting from the recent implementation of the WHOA, it is not obvious that the legislator intended to allow third-party releases in creditor schemes to extend beyond group guarantees in Dutch Preventive Scheme proceedings. The limitation of Article 372 DBA to group guarantees appears to be a deliberate choice. Prior drafts for the WHOA and its legislative predecessor (the *Wet Continuïteit Ondernemingen II*) both included third-party release mechanisms that were not limited to group guarantees but, for instance, also allowed a release of guarantees provided by a natural person who both owns and manages a company (a *directeur/grootaandeelhouder*, or *dga* in Dutch).[66] Mennens suggested that the legislator may have opted to limit the release mechanism of Article 372 DBA to group guarantees as it was only intended to prevent the above-described domino effect that may occur concerning distressed groups of companies and that may render the separate restructuring of individual group companies pointless.[67] Such problems are unlikely to arise when the liable third party is not a member of the same group of companies. The legislator thus appears to have seen insufficient reason to give Article 372 DBA a broader scope of application.

The legislator's limited approach is also made explicit in the WHOA's explanatory note, where the legislator states in relation to Article 372 DBA:

> "**An exception to the rule that the scheme leaves rights to third parties unaffected is made for the case of an agreement as referred to in Article 372**. In such an arrangement, the intention is to include the restructuring of guarantees, insofar as these have been issued by companies that are part

[65] Kortmann and Faber (n 63) 190. Informal translation. In Dutch: "Tegen de door de bestrijders van het artikel voorgestelde bepaling ["Tenzij de schuldeischers medegewerkt hebben tot het akkoord, behouden zij all hunne rechten tegenover de borgen en medeschuldenaren van de gefailleerde", addition SP] geldt, behalve het bezwaar, in het Verslag aangevoerd, nog dit, dat het in vele gevallen de borgen en medeschuldenaren meer nadeel zal berokkenen. De schuldeischer zal dan, om zijne rechten tegenover de borgen en medeschuldenaren van den gefailleerde niet te verliezen, in ieder geval tegen het akkoord moeten stemmen, ook al zouden de schuldeischers daardoor meer erlangen, dan bij insolventie, en dit ten nadeele van die borgen en medeschuldenaren, die dan meer zullen moeten bijpassen."

[66] *See* the Legislative Proposal (*Voorstel van Wet*) '*Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot het algemeen verbindend verklaren van een buiten faillissement gesloten akkoord ter herstructurering van de schulden (Wet continuïteit ondernemingen II)*', consultation version 14 August 2014, Art. 368(3) DBA and the Legislative Proposal (*Voorstel van Wet*) '*Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord om een dreigend faillissement af te wenden (Wet homologatie onderhands akkoord ter voorkoming van faillissement)*', consultation version 5 September 2017, Art. 370(2) DBA.

[67] Mennens (n 14) 518.

of the same group. **This can only be done if the conditions set out in that article are met**."[68] (emphasis SP)

5.2 Proposal for a More Tolerant Approach

There are, however, various reasons to allow a broader, more tolerant approach to third-party releases. The first of these reasons concerns the dogmatic argument that a creditor scheme, as an agreement between the principal debtor involved in the proceedings and its creditors, can only amend their rights in relation to that specific debtor. Vriesendorp and Hermans had already argued at the beginning of the WHOA's legislative process that the principle exclusion of claims on third parties from the scope of the creditor scheme and its confirmation was somewhat artificial. If the majority of creditors similarly positioned vote in favour of the scheme, there is little difference between imposing third-party releases on creditors who have not voted in favour of the plan and imposing the other arrangements from the creditor scheme (e.g., release of 50 per cent of the claim against payment of the remaining 50 per cent).[69]

In his 2016 dissertation, Tollenaar similarly argued:

> "[…] If the majority of creditors with a claim against a particular third party agree to waive or modify their claim against the third party and the decision-making process is sound, I would not know of a good reason why the democratic decision-making process should be denied binding effect. The above principles regarding class voting and cram down can be applied mutatis mutandis to the restructuring of claims against third parties."[70]

In line with Vriesendorp, Hermans and Tollenaar, I see no real distinction between the imposition of the general provisions of a creditor scheme on creditors or the imposition of third-party release clauses on those same creditors. In both cases, the creditor scheme cannot rely on creditors' consent (*aanvaarding*) but would have to derive its binding power on creditors from the court's decision that confirms the scheme.[71] In both cases, arrangements that normally

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[68] Explanatory Note (*Memorie van Toelichting*) 'Wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord om een dreigend faillissement af te wenden (Wet homologatie onderhands akkoord ter voorkoming van faillissement), consultatieversie 5 September 2017, p. 36. www.internetconsultatie.nl/wethomologatie. Informal translation. In Dutch: "Een uitzondering op de regel dat het akkoord rechten op derden onaangetast laat, wordt gemaakt voor het geval waarin sprake is van een akkoord als bedoeld in artikel 372. Bij een dergelijk akkoord is het de bedoeling om de herstructurering van garanties mee te nemen, voor zover die zijn afgegeven door vennootschappen die onderdeel vormen van dezelfde groep. Dit kan alleen als voldaan is aan de voorwaarden die in dat artikel zijn opgenomen."

[69] Hermans en Vriesendorp (n 13) para. 4.a-b.

[70] Informal translation. In Dutch: "[…] Indien de meerderheid van de crediteuren met een vordering op een bepaalde derde instemt met kwijtschelding of wijziging van hun vordering op de derde en de besluitvorming deugdelijk tot stand is gekomen, zou ik geen goede reden weten waarom aan de democratische besluitvorming bindende werking zou moeten worden onthouden. De bovenstaande principes ten aanzien van stemmen in klassen en cram down zijn mutatis mutandis toe te passen bij de herstructurering van vorderingen op derden." Differing from Hermans and Vriesendorp, Tollenaar argues that the relevant third party would have to comply with the same requirements as the main debtor, including the entry test concerning its (pre)insolvency ex Art. 370(1) DBA, *see* Tollenaar (n 18) 300-301.

[71] An agreement under Dutch law requires an offer (*aanbod*) *and* the acceptance (*aanvaarding*) thereof. *See* Art. 6:217 Dutch Civil Code. *Cf.* Art. 3:300 Dutch Civil Code.

could not be imposed on creditors under regular contract law would become binding by virtue of the court's decision.[72]

With the enactment of the WHOA, the DBA now also explicitly stipulates that a creditor scheme can amend creditors' rights in relation to third parties under certain circumstances. To the extent that a creditor scheme in Dutch Preventive Scheme proceedings also includes a third-party release under Article 372 DBA, that release undeniably impacts the contractual arrangements between the non-debtor group company and the relevant creditor(s), whether they consented to the scheme or not. The dogmatic argument that a creditor scheme is an agreement between a debtor and its creditors and may thus only relate to the creditor-debtor relationship and the distribution of the debtor's estate appears no longer convincing with the enactment of the WHOA.[73]

A second argument in favour of a broader approach to third-party releases in creditor schemes lies within the main rationale behind Article 160 DBA. As the legislator clarified in the Explanatory Note to the DBA, Article 160 DBA is intended to do justice to the economic function of guarantees. If the guarantor would be automatically released from its obligations as a result of a creditor scheme, the guarantee (or relevant other claim) would render it inoperative precisely at the time when that guarantee would be needed: when the debtor is unable to fulfil its obligations.[74] Moreover, as the legislator reasoned, a creditor scheme is intended not to dispose of rights but to assist creditors in attaining the maximum value on their claims and is a method of extrajudicial recovery.[75] The Explanatory Note to the WHOA similarly clarified the legislator's decision to apply the general rule from Article 160 DBA with the following example: if the debtor is granted a five-year stay of payment in the creditor scheme, without the reference to Article 160 DBA the due date for the claim against the guarantor would also shift by five years. The guarantee would then be rendered practically worthless.[76]

Although this rationale behind Article 160 DBA is rather convincing, it does not categorically prohibit third-party release clauses from being effectively included in creditor schemes. There would be no principle objection against such third-party effects, as long as the economic function of the relevant third-party debt (e.g. security for the original debt) would not be neglected and the release clause would assist creditors in attaining the maximum value on their claim. An automatic release of third-party debt (whether tort liability or a guarantee) by virtue of a creditor scheme without any explicit value contribution would obviously be

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[72] *Cf.* Aldous LJ in *British & Commonwealth Holdings Plc v. Barclays Bank Plc* in relation to the UK scheme of arrangements: "agreements which might be ultra vires and void become binding when approved by order of the court pursuant to section 425 of the Act of 1985." *See British & Commonwealth Holdings Plc v. Barclays Bank Plc* [1996] 1 W.L.R. 1 at 22; [1995] B.C.C. 1059 at [1078].

[73] One could alternatively argue, building on Van den Sigtenhorst in n 45, that the section of the broad scheme that deals with the group guarantees conceptually qualifies as a 'mini scheme', a separate arrangement within the broad scheme. The 'mini scheme' could qualify as its own arrangement that only governs the relationship between the non-debtor group company and its creditors. If that reasoning would hold, the argument could be made that the broad scheme as such does not impact the contractual relationship between the non-debtor group company and its creditors, but the effect rather comes from the 'mini scheme', its own agreement. As discussed previously, however, the WHOA simply approaches the broad scheme as a single creditor scheme, offered by a single debtor (*e.g.* not *on behalf of* non-debtor group companies), that may even be offered without the consent of the relevant non-debtor group company in case a restructuring expert is appointed; *see* Art. 372(1)(c) DBA.

[74] Kortmann and Faber (n 63) 189. *See also* Veder and Thery (n 5) 266 and Wessels (n 18) para. 6161.

[75] Kortmann and Faber (n 63) 189.

[76] *Kamerstukken II* 2018/19, 35249 nr. 3, p. 35 (MvT).

contrary thereto. If, for instance, however, the relevant third party would make a contribution in relation to the released guarantees that reflects the economic value of the guarantee, or for that matter, a tort claim, there appears to be no reason to withhold such a release from being effective. The economic value of the relevant claim(s) would depend on the actual amount of those claim(s) but also on the extent to which the non-debtor party provides recovery for those claims.

If executed correctly, third-party release clauses could even be conducive to the legislator's intentions with Article 160 DBA. As Hermans and Vriesendorp have stated, a contribution by a third party (such as group companies, directors or insurers) to a creditor scheme against release of certain liabilities may very well result in the creditors receiving better – or at least quicker – payment on their claims.[77] It also contributes to the restructuring and reorganizational capabilities of both debtors and non-debtor parties alike by allowing simpler solutions for financial distress outside of formal insolvency proceedings, one of the legislator's overarching goals with the WHOA.[78]

In light of the foregoing, the rule embedded in Article 160 DBA could be seen as the default option, not the definitive outcome, and preventing the *automatic* release of certain third-party obligations but not third-party releases in general.

Tollenaar and Mennens have both argued that for any third-party release to be imposed on (non-consenting) creditors, the relevant third party would have to meet the same (pre-)insolvency entry test as the debtor.[79] The (pre-)insolvent state of the relevant party is the justification for deviating from the general principle of *pacta sunt servanda* and imposing the consenting majority's acceptance of a certain discount or otherwise amendment of the contractual arrangements on the non-consenting minority. As is apparent from Article 372 DBA, the Dutch legislator holds the same view: the non-debtor group company should be pre-insolvent, and the creditors should not be worse off than they would be in case of the non-debtor group company's bankruptcy and should receive a contribution in accordance with the Priority Rule.[80]

Instead of limiting the application of third-party releases to pre-insolvent non-debtor parties, one could also refer to the aforementioned principle that third-party releases would require a value contribution that reflects the economic value of the relevant claim(s). By doing so, a similar result would be attained. A contribution that reflects less than the full amount of the relevant claim(s) would only be allowed if the non-debtor party would have insufficient assets to repay the relevant claims in full.

As opposed to requiring (pre-)insolvency, however, this value contribution test would simultaneously provide for a more broadly applicable and efficient mechanism to release non-debtor liabilities in creditor schemes. Third-party releases in creditor schemes could then not only be applied to prevent (imminent) insolvency of the relevant non-debtor parties but would also allow for an effective mechanism within the already existing collective preventive or court

[77] Hermans en Vriesendorp (n 13) para. 4.
[78] *Kamerstukken II* 2012/13, 29 911, nr. 74, p. 2.
[79] *See* Tollenaar (n 18) 300-301 and Mennens (n 14) 498-499 and the references to other parts of their dissertations included there. *See also* Veder and Thery and their substantiation as to why they only consider upstream guarantees, Veder and Thery (n 5) 263.
[80] *See* Art. 372(1)(b) in conjunction with Art. 370(1) DBA.

supervised formal insolvency proceeding to settle claims that relate to the debtor's (pre-)insolvency, but are owed by other, solvent non-debtor parties (such as shareholders, directors and/or their insurers).

5.3 A Tolerant Approach Would Fit Existing Case Law

While scholars have particularly referenced the aforementioned *De Maes Janssens* judgment[81] to argue that a creditor scheme cannot alter or waive claims of non-consenting creditors on non-debtor parties, that case would actually fit this more tolerant framework. Rather than understanding it as a general prohibition on any form of third-party effect to creditor schemes, it could also be understood to only prevent *automatic* release of third parties.

In that matter, the relevant creditor (Credit Lyonnais Bank Nederland N.V., the **Bank**) had consented to a creditor scheme offered in the bankruptcy proceeding concerning the husband of Mrs. De Maes Janssens, pursuant to which the Bank would receive a payment of 35 cents on the *Gulden*. Mrs. De Maes Janssens, the third-party debtor in that case, argued that as the Bank had consented to the creditor scheme, it could no longer claim any damages (the remaining 65 per cent of its claim) on the basis of Dutch tort law.[82]

If the Dutch Supreme Court had ruled in favour of Mrs. De Maes Janssens, she would have automatically been released from any potential tort liability and benefited from the creditor scheme without having made any payment in that regard or without the scheme even stipulating a release of claims against her. The Dutch Supreme Court rightfully reasoned that would be contrary to the rationale behind Article 160 DBA. That would not have done justice to the economic value of the Bank's claim on Mrs. De Maes Janssens.

But what if the Bank had received an additional payment that is reflective of the value of its claim on Mrs. De Maes Janssens? If, for instance, she had had insufficient assets to repay the remaining 65 per cent to the Bank, taking her total estate into account, it would have been reasonable to allow a discount on the payment that reflects the relevant deficit. If her estate had been sufficient to repay the bank in full and there was no reason why the Bank's claim on her was actually less than the remaining 65 per cent of the Bank's original claim, Article 160 DBA (and the ratio behind it) would have prescribed full payment of that remaining amount.

Case law on the WHOA's mechanism of dealing with third-party debt[83] also indicates that the more tolerant approach advocated in this report is not completely made out of thin air. In one of those cases, the District Court of Middle-Netherlands made an *obiter dictum* in relation to third-party releases outside the scope of Article 372 DBA. The District Court starts off by stating that it is uncertain whether such third-party releases are possible under the WHOA:

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[81] *See supra* n 27.
[82] Art. 6:162 ff Dutch Civil Code.
[83] *See* for cases on Art. 372 DBA and on other types of third-party release clauses: District Court of Amsterdam 5 August 2021, *JOR* 2022/102, m. nt. R. van den Sigtenhorst and in the same restructuring District Court of Amsterdam 15 February 2021, *JOR* 2022/100, m. nt. M.M. Hoving; District Court of Limburg 8 October 2021, *JOR* 2022/20, m. nt. Tekstra; District Court Middle-Netherlands, 10 November 2021, *JOR* 2022/21, m. nt. N.B. Pannevis.

> "In addition, [company 1], in addition to other parties, will receive a final discharge in the creditors composition of potential claims from other creditors. It is questionable whether that is possible, but the answer to this question is irrelevant to the outcome of this case. […]."[84]

The judgment, however, continues in a way that – to the open-minded reader – could be understood as a hint in favour of third-party releases outside the scope of Article 372 DBA, if the value attributed to that release and the particular position of the creditors vis-à-vis the non-debtor party are sufficiently accounted for:

> "[…] However, insofar as such a discharge is permitted, the value of this final discharge is not included in the determination of the liquidation value and the possible claims of creditors against [company 1] are not further explained in the plan."[85]

As is also apparent from this excerpt of the judgment, the advocated more tolerant approach to third-party releases does presume that the relevant creditors are enabled to make an informed and individual decision on the release. As part of the scheme information, those creditors should thus be provided with the required information (a valuation of the non-debtor, descriptions of the relevant claims and the impact of the creditor scheme thereon) to determine whether the contributed value reflects the economic value of the third-party debt. Similar to Article 372 DBA,[86] it would be sensible to impose the obligation to provide such information on the party proposing the creditor scheme. If insufficient information is provided, the court could, for example, defer its decision on the confirmation (*aanhouden*) and grant the opportunity to file additional information[87] or deny confirmation of the creditor scheme.[88]

5.4 A More Tolerant Approach, but Where Do We Draw the Line?

The final query then remains, assuming such a broad application of third-party releases, which third-party liabilities are eligible to be released via a creditor scheme, i.e., where do we draw the line?

In determining whether certain third-party release clauses included in English schemes of arrangement were admissible, English courts have used the phrase: "[…] a scheme which varies or releases creditors' claims against the company on terms which require them to bring into account and release **rights of action against third parties designed to recover the same loss** […]"[89] And, similarly, "… **rights of action [that] are designed to recover the same loss**

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[84] District Court Middle-Netherlands, 10 November 2021, *JOR* 2022/21, m. nt. N.B. Pannevis, para. 5.10. Informal translation. In Dutch: "Daar komt bij dat [onderneming 1], naast andere partijen, in het akkoord een finale kwijting ontvangt van eventuele aanspraken van andere schuldeisers. Het is de vraag of dat mogelijk is, maar het antwoord op deze vraag is niet van belang voor de uitkomst in deze zaak. […]."

[85] *Ibid*. Informal translation. In Dutch: "[…] Voor zover echter een dergelijke kwijting is toegestaan, geldt dat de waarde van deze finale kwijting niet is meegenomen bij bepaling van de liquidatiewaarde en de mogelijke aanspraken van schuldeisers jegens [onderneming 1] zijn in het akkoord niet verder toegelicht."

[86] Art. 372(2)(a) DBA.

[87] *See, e.g.,* for a recent matter concerning a Dutch suspension of payments proceeding where the judgment was deferred and the administrator was granted an additional term to further investigate the value of certain assets if confirmation was denied and the company would have gone bankrupt: District Court Middle-Netherlands, 3 August 2021, *JOR* 2022/15, m. nt. E.F. Groot.

[88] On the basis of Art. 153(3), in case of bankruptcy, Art. 272(3) in case of suspension of payments or Art. 384(2)(i) DBA in case of a Dutch Preventive Scheme proceeding.

[89] *Re Lehman Brothers* [2009] EWCA Civ 1161; [2010] B.C.C. 272 at [63].

as arises from the scheme creditors' claims against the company…."[90] Among other things, they have also taken into account that payment on the relevant third-party obligation "would have resulted in a reduction of the scheme creditors' claims against the company".[91]

Taking inspiration from this English case law, it could be proposed that a third-party release clause included in a Dutch creditor scheme can effectively be imposed on creditors only if their claims on the non-debtor parties are claims that concern the recovery of the loss that they incurred as a result of the debtor's non-payment (i.e., a claim on a non-debtor party that is the direct result of their claim on the debtor remaining unpaid). Effectively, if the non-debtor party had paid those obligations, that would have resulted in a reduction of the scheme creditors' claims against the debtor (and *vice versa*).

That threshold would obviously generally be met in relation to corporate guarantees for the debtor's obligations by group companies, directors, shareholders or other third parties (referred to in paragraph 2 as Category 1).

Where the relevant third-party debt concerns tort liabilities of (*de facto*) directors or shareholders (or their insurers) in relation to their involvement with the debtor prior to its insolvency (Category 2 in paragraph 2), that will often also be the case if those liabilities relate to the fact that the debtor does not provide sufficient recourse for its creditors, and/or its assets were unlawfully transferred prior to the proceedings (e.g., directors' or shareholders' liability based on the *Ontvanger/Roelofsen* formula or relating to unlawfully received dividend).

The release of claims against decision makers and/or advisors involved in a restructuring or insolvency process, such as directors or bankruptcy trustees (Category 3), may require a more thorough analysis, to the extent that those claims relate to actions in the execution of the restructuring or even post-restructuring. As Mennens has argued, minimizing the reluctance of advisors and decision makers to expose themselves to certain risks in large restructurings (and thus not taking optimal decisions) is, first and foremost, a matter of ensuring that the liability threshold for these parties reflects that risk, rather than a question of whether or not waivers of such claims via a third-party release in a creditor scheme are admissible.[92] It could be argued that liability in relation to the execution of the restructuring does not concern the recovery of the loss that arises from the debtor's unpaid debts but, rather, of the execution of the creditor scheme.[93]

In itself, however, creditor schemes will be the result of debtors' inability to meet their obligations (now or in the near future). And, if the release is deemed a precondition for the decision makers' and/or advisors' involvement in the restructuring, the economic value would arguably equal the value realized with the scheme. Moreover, by voting in majority in favour of the creditor scheme, the creditors will have also voted in support of the actions that have led to the development of that scheme and the subsequent envisaged actions for the implementation

[90] *Re La Seda* [2010] EWHC 1364 (Ch); [2011] 1 B.C.L.C. 555 at [21].
[91] *Re La Seda* [2010] EWHC 1364 (Ch); [2011] 1 B.C.L.C. 555 at [22].
[92] Mennens (n 14) 520.
[93] Mennens mentions in relation to the English Scheme of Arrangements that payment by any of these parties would generally not reduce the total outstanding debt of the debtor and therefore questions the validity of such releases but also states that release clauses in relation to advisors, directors and insolvency practitioners in scheme documentation are common practice and appear to be uncontested. *See* Mennens (n 14) 503-504.

thereof.[94] While there is something to be said for both sides, there would be a strong case in favour of allowing third-party releases in relation to decision makers and/or advisors.

6. Conclusion

A majority of Dutch scholars that have written on this topic have long assumed that a creditor scheme, being an agreement between a debtor and its creditors, cannot effectively impose third-party release clauses on creditors that have not voted in favour of the scheme. Such third-party release clauses were deemed 'extraneous scheme provisions' and, as such, outside the scope of the court's confirmation of the scheme. Only creditors that consent to a creditor scheme could be bound by third-party releases, on the basis of general contracting law (they accepted the offer to also amend certain third-party debt).

As has been outlined in the foregoing, there are, however, several arguments in favour of a more tolerant view of third-party release clauses in Dutch creditor schemes. *First*, the principle that only creditors that have voted in favour of the plan are bound by such extraneous scheme provisions is directly contrary to the intentions of the Dutch legislator; it would wrongly incentive creditors to vote against a creditor scheme, even where that scheme would result in a higher payment than they would receive in a liquidation scenario. In turn, that would harm the relevant third party, who would be confronted with a higher claim than it would be if the creditor scheme had been adopted and confirmed.

Second, with the recent implementation of the WHOA in the DBA, the dogmatic argument that a creditor scheme, being an agreement between the debtor and its creditors, can only amend rights in those relationships (absent explicit consent thereto) has become significantly less convincing. The WHOA explicitly offers the possibility of third-party releases, albeit only in the context of group guarantees.

Approaching it from a more positive perspective, if sufficient safeguards are taken into account, the permission of third-party releases outside the context of group guarantees in Dutch Preventive Scheme proceedings could actually benefit creditors. As long as the economic value of the relevant third-party obligation is taken into consideration, it could very well result in creditors receiving more, or at least quicker, payment on their claims. Additionally, it would be conducive to the restructuring capabilities of both debtors and non-debtors alike.

All in all, the time may very well have come to re-evaluate the Dutch stance on third-party releases in creditor schemes. Recent Dutch case law on the WHOA could be understood as a hint that the judges of the WHOA pool are considering doing just that.[95]

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[94] That would be different in relation to liability for actions concerning the subsequent implementation of the creditor scheme that are not provided for in the scheme or for fraudulent actions. A release of claims against decision makers and/or advisors involved in a restructuring or insolvency process could, as such, easily be compared with the Dutch practice of discharge (*décharge*) by the Shareholders' Meeting of the Members of the Board from their liabilities.

[95] The (near) future will have to prove whether it was a bad idea to extrapolate an *obiter dictum* to a prediction or whether Dutch court will, indeed, allow a more tolerant approach to third-party releases.