**Global Insolvency Practice Course 2023/2024**

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**Case Study II – Part I**

**“Formula 1”**

**A. Objectives:**

1. In order to preserve the Formula 1 team “Maximov” and to avoid a loss of reputation for Mr. Maximov, it is particularly necessary that Efwon Trading B.V. is financially restructured.
2. It is also crucial that the license for the Formula 1 team is not revoked as a result of the insolvency of Efwon Romania or the move to Malaysia.
3. In return, the financing banks and the financial investor from Monaco must receive a better rate on their claim compared to liquidation. In addition, the lenders security interests must be regulated within the scope of insolvency law. In this respect, consideration must be given to the amount that may be distributed to creditors from the continuation of the Formula 1 team. It is helpful that the annual budget for the teams is limited to USD 135 million.
4. It is being considered whether KuasaNas will acquire 51 per cent of the shares in Efwon Trading B.V. from Efwon Investmenst Inc.

**B. Analysis of the restructuring of the Efwon Group:**

The Efwon-Group consists of the following companies and important stakeholders:



**C. Options for financial restructuring under Dutch insolvency law:**

Since 1 January 2021, insolvency law in the Netherlands has undergone a profound change. The *Wet homologatie onderhands akkoord* (“WOAH”), a preventive restructuring framework, was introduced.

With the WOAH, the Dutch legislator has for the first time introduced a legal regulation for a compulsory settlement outside of insolvency, i.e. a settlement reached can be established by court judgement as binding for all creditors and shareholders involved.

The new instrument has been integrated into the Dutch Insolvency Act (*Faillissementswet*). In addition to the standard insolvency proceedings (*faillissement*) and the court-ordered suspension of payments (*surseance van betaling*), there is now another official procedure in the Insolvency Act.

In terms of time, the WOAH proceedings take place before the standard insolvency proceedings.

The WHOA has two types of proceedings:

* confidential WHOA proceedings and
* public WHOA proceedings.

Confidential WHOA proceedings are handled behind closed chambers, and the Dutch courts have jurisdiction in these proceedings if there is a sufficient connection with the Netherlands (e.g. if the debtor has assets in the Netherlands or it has Dutch law governed debt).

Public WHOA proceedings have public hearings, and the Dutch courts have jurisdiction in these proceedings if the debtor has its centre of main interest (COMI) in the Netherlands.

The public version of the WHOA proceeding is listed in Annex A of the EU Insolvency Regulation (Recast) and benefits from automatic recognition throughout the EU.

The WOAH is considered a very modern restructuring instrument and is characterised by flexibility and low costs, among other things. The Dutch legislator has modelled this on the American Chapter 11 procedure and the English scheme of arrangement.

The aim of restructuring proceedings is to restructure a company's debts by means of a private settlement (*onderhands akkoord*) with creditors and shareholders. In principle, the settlement is aimed at the continuation of the company, but the objective can also be its liquidation. An important element is the possibility of having a composition accepted by some of the creditors (more precisely: a class of creditors) approved by a court judgement (*homologeren*) and thus binding for all creditors involved in the composition proceedings.

**D. Proceedings:**

The WHOA is a debtor-in-possession proceeding. The debtor stays in control of its business and will also take the lead in preparing and offering the restructuring plan, but creditors and shareholders have the possibility to petition for the appointment of a restructuring expert who will – if appointed by the court – prepare and offer the restructuring plan (whilst the debtor still remains in control of the business itself).

The court will assess two requirements for the appointment of a restructuring expert.

The first requirement is that the debtor needs to be in financial distress, i.e. the court will assess whether it is reasonably likely that the debtor will cease to pay its debts.

The second requirement is whether the appointment of a restructuring expert is in the interests of its creditors.

Furthermore, the restructuring plan proposes an extension of the maturity date of the finance documents in order to facilitate a controlled wind-down as well as a write-off of any residual outstanding debt

The debtor can start the restructuring process by filing a corresponding declaration with the court. However, creditors and shareholders can also initiate restructuring proceedings by having the court appoint a restructuring expert, who will then draw up and submit a settlement proposal.

In this way, a settlement proposal can also be submitted to the creditors without or against the debtor. This is particularly helpful in view of the fact that the director of Efwon Trading B.V. may not wish to provide support ("blood-sucking strawmen").

The composition may consist of a debt waiver, a deferral of payment or a conversion of claims into shares in the company (debt to equity).

The creditors are divided into creditor classes for the decision on the settlement proposal as well as for the allocation of the quota distribution. Employees and employee rights are generally excluded from the composition.

The composition can be submitted to all creditors or only some of them. The settlement proposal shows, on the one hand, the so-called reorganisation value that can probably be achieved if the settlement is reached and, on the other hand, the liquidation value in the event of insolvency.

For more details:

One of the key provisions of the Dutch Scheme is that the debtor must not yet be insolvent, but must be in a situation in which it is sufficiently likely that he will no longer be able to pay his debts, Art. 370 para.1 Faillissementswet (“Fw”).

The debtor may propose the restructuring plan as long as no restructuring officer has been appointed (Art. 371 para. 1 sentence 4 Fw). At the time the plan offer is submitted, the court does not yet review the conditions for entry. The plan can bind secured creditors and shareholders. Third-party security, as in this case, can also be structured (Art. 372 Fw).

A hearing must be held within two weeks before the plan is confirmed (Art. 383 para. 4 sentence 1, para. 6 Fw). A decision on the plan confirmation must be made as soon as possible (Art. 384 para. 1 Fw).

This court decision is not subject to appeal (Art. 369 para. 10 Fw).

The Dutch scheme offers the practitioner two different alternatives (*Fox/Hoogenboezem* CRI 3/2020, 75: "*Most innovative feature of the WHOA*"), a public alternative, which is entered in Annex A of the EU Insolvency Regulation, and a non-public alternative, which is not covered by the EU Insolvency Regulation (Art. 369 para. 6 and 7 Fw).

The proceedings are initiated by notification to the court (Art. 370 para. 3 Fw.). In addition to the debtor (natural or legal persons), any creditor and the works council are also entitled to file an application; however, a third-party application must be aimed at the appointment of a restructuring expert who draws up a plan instead of the debtor (Art. 371 para. 1 of the Insolvency Regulation).

The court can only refuse to confirm the restructuring plan if the plan fails the best-interest-of-creditors test, i.e. puts creditors in a worse position than without the plan. In addition to creditors, shareholders are also covered by the prohibition on disadvantaging creditors.

The cross-class majority decision is possible if at least one group that is still in the money has agreed to the plan offer (Art. 383 para. 1 Fw).

Like the StaRUG, but unlike the English Scheme of Arrangement, the procedure only requires one court decision (Art. 383 Fw).

As with the Scheme of Arrangement or the StaRUG, the restructuring plan is the heart of the procedure. With the help of the restructuring plan, obstructive minorities, free riders and piecework disruptors are to be included in a compulsory settlement supported by the broad majority. This requires the formation of adequate voting groups as a first step. In terms of group formation and voting, the Dutch Scheme largely follows its model, the Scheme of Arrangement, with the special feature that no separate court decision is required to convene the formed groups for voting.

The Dutch Scheme provides for a cross-class cramdown if at least one group that would receive value in a liquidation has consented to the plan (Art. 383 para. 1 Fw).

In this case, the court sets a date within fourteen days at the latest (Art. 383 para. 6 Fw) and confirms the plan without delay, i.e. generally within five court working days thereafter, unless a creditor or shareholder who has voted against the plan and proven that he is worse off as a result of the plan than he would be in a liquidation (Art. 384 para. 3 Fw) objects to the plan.

In this case, confirmation must be denied if the plan violates the rule of relative priority, whereby contractual ranking agreements, for example in creditor agreements, may also be relevant (Art. 384 para. 4 lit. b Fw, whereby partial exceptions to the rule remain permissible) or the plan does not grant the less favorable creditors the right to payment of a cash quota in the amount of their share of the hypothetical liquidation proceeds (Art. 384 para. 4 lit. c and d Fw, whereby secured bank and financial creditors are excluded) or, in the case of small creditors, a minimum cash quota of 20% (Art. 384 para. 4 lit. a Fw, whereby justified exceptions remain possible).

A moratorium (*afkoelingsperiode*) is available for the Dutch Scheme, which can be requested from the court by the debtor or the restructuring expert, but only if a plan has already been submitted or an obligation has been assumed to submit the plan within two months (Art. 376 para. 1 Fw). According to the latest case law, the moratorium can also include third-party guarantees as part of the group.

The court imposes the moratorium if it is satisfied that it is necessary for the continuation of business operations (Art. 376 para. 1 Fw), is in the common interest of the creditors and third-party interests are not significantly disadvantaged (Art. 376 para. 4 lit. b Fw).

The standard duration of the moratorium is four months (Art. 376 para. 2 Fw.). An extension of up to eight months is possible if it can be demonstrated that significant progress has been made in the preparation of the plan during the moratorium (Art. 376 para. 2 Fw).

An extension is excluded if the debtor had relocated its COMI to the Netherlands for the purpose of using the public procedure option within three months prior to the first enactment of the moratorium (Art. 376 para. 6 Fw).

Relocations of the COMI with the aim of restricting the rights of creditors by means of a moratorium are thus prevented to a certain extent. During the moratorium, enforcement actions of any kind, including the surrender of debtor assets, such as evictions, are excluded (Art. 376 para. 2 lit. a Fw), as are insolvency applications (Art. 376 para. 2 lit. c Fw).

Items of the debtor's assets that are encumbered with collateral may continue to be used during the moratorium or sold in the ordinary course of business (Art. 377 para. 1 Fw).

With the Dutch Scheme, it is possible to include claims against group companies that have provided security for the debtor, e.g. in the form of guarantees or joint liability declarations or through collateral security, directly in the debtor's plan (Art. 372 para. 1 lit. a Fw).

This is only permitted if the group-affiliated third party would also meet the requirements for the initiation of proceedings (Art. 372 para. 1 lit. b Fw), it has consented to the inclusion of its liabilities in the plan (Art. 372 para. 1 lit. c Fw) and the court has jurisdiction over the third party (Art. 372 para. 1 lit. d Fw). In the case of group companies without COMI in the Netherlands, involvement in public proceedings reaches its limits.

In non-public proceedings, however, it should be sufficient if the group company included is jointly liable for a debtor with COMI in the Netherlands (*Fox/Hoogenboezem* CRI 3/2020, 75).

The Dutch Scheme does not provide for priority of new funds. However, protection against avoidance of collateral provided for new funds is possible if the court has previously approved the collateralization (Art. 42a Fw).

The public alternative procedure is to be entered in Annex A of the EU Insolvency Regulation so that foreign companies with COMI in the Netherlands can use the procedure and recognition under Art. 19 and 20 of the EU Insolvency Regulation is guaranteed (*Walters Company Lawyer* 41(5)/2020, 121 (122)).

In the non-public variant, the Dutch courts declare themselves competent if there is a sufficient connection consisting of local COMI, substantial assets, substantial claims subject to Dutch law, group affiliation or joint liability for a debtor with local COMI (*Fox/Hoogenboezem* CRI 3/2020, 75). Recognition could result from Art. 36 Brussels I Regulation.

For the duration of the restructuring proceedings, the suspension of creditors' rights can be applied for within a so-called "cooling-off period" (*afkoelingsperiode*) of four to a maximum of eight months. During this phase, enforcement proceedings and the assertion of claims for restitution can be suspended, among other things. Insolvency applications are also suspended.

Another important element of the WOAH is the contract termination option. The debtor can also apply for the unilateral termination of a contract with the application for approval of the settlement proposal. If the court agrees, the contract is terminated by operation of law with a maximum notice period of three months from the approval of the settlement proposal.

The WHOA contains specific provisions for group restructuring making it possible, amongst other things, to restructure (future) rights of recourse, suretyships, third party guarantees and claims on co-debtors. A restructuring plan could also amend creditors rights against group companies of the debtor if, amongst other things, these group companies would be likely to go insolvent if they are not included in the restructuring plan and if these group companies have agreed to the proposed restructuring plan.

As a result, only one WHOA procedure is required for the Efwon Group.

KuasaNas is calling for swift and binding clarification.

This can be guaranteed by the WHOA. The entire restructuring process under the WHOA, which can be carried out either non-publicly or publicly, is expected to take just a few months.

**E. Application on Efwon Trading B.V.**

The Efwon group is a multinational company with assets and activities predominantly in Texas, the Netherlands, Romania and Singapur. However, there are good arguments in favor of the COMI being in the Netherlands. The Dutch Scheme is also open to foreign debtors, provided there is a sufficient connection with the Netherlands.

It could be problematic that the lawyers of the drivers have already filed for insolvency for Efwon Romania.

According to the information available to me, however, the insolvency proceedings have not yet been opened, so that Efwon Romania may be included in the WHOA as secondary proceedings due to its relationship with the Dutch company Efwon Trading B.V. This also applies to Efwon Investments Inc.

If the drivers prevail with their claim, Efwon Romania must be liquidated.

This would mean that the Formula 1 license would also no longer be available.

In addition, court decisions handed down in public WHOA proceedings are also automatically recognized in other member states of the European Union. This automatic recognition offers a major advantage if the restructuring debtor's creditors are located outside the Netherlands but within the European Union.

WHOA agreements reached in a non-public procedure are not automatically recognized in other Member States.

I would therefore also recommend carrying out the public procedure.

Finally, additional payments cannot be contested in the event of subsequent insolvency.

The aim should therefore be to financially restructure Efwon Trading B.V. and Efwon Romania in the WHOA and to provide KuasaNas with a 51% stake in Efwon Trading B.V.

I propose that KuasaNas does not pay a purchase price for the shares in Efwon Trading B.V. It can be assumed that a budget of USD 100 million for the Team is sufficient for a fundamental basis, especially as the team has consistently improved in sporting terms and therefore also in terms of revenue since 2014. In this respect, you could consider that the sponsorship money is used for the budget of the respective season and the income from the recordings is paid to a large extent to the banking consortium and the investor from Monaco, due to their liens

The creditors will be satisfied via the restructuring plan, considering the security interests as follows:

* Income from sponsoring for 2024
* plus planned income from TV rights for 2024
* less budget of the teams (maximum USD 135 million)
* less procedural costs
* (If necessary, a debtor warrant could also be agreed)

This amount is available for distribution to the creditors, whereby the secured creditors receive a quota of 25 percent of their security interest in advance and otherwise waive their security interest. The restructuring plan should also include dealing with the secured creditors with Maximov private real estate. If this is not possible, Maximov must agree a side letter with the secured creditors about his private real estate.

It can therefore be assumed that the secured creditors receive an added value in relation to the unsecured creditors and waive their security interest in return.

The remaining amount is then divided equally among all creditors included in the restructuring plan.

The creditors will not be worse off as a result of the proposal, as in the event of liquidation the purchase price for the shares in the Formula 1 team will be very low at best.

In addition, the condition of KuasaNas for an investment is that the Efwon Group has been restored to a stable platform and through or into a structure that ensures that their investment is safe from the current turmoil.

In the present case, the creditors could be divided into two classes:

1. secured banks and the secured lender from Monaco.

2. all others including the creditors from class 1 with their remaining claim.

When voting within the creditor classes, a 2/3 threshold applies to the majority result.

The creditors in favour must represent 2/3 of the capital for which a vote was cast. The voting protocol is drawn up and made available within seven days. If at least one creditor class has approved the settlement, it can then be submitted to the court for approval. Among other things, the court examines whether the settlement complies with the statutory order of priority of creditors (absolute priority rule). The composition can be binding for individual dissenting creditors or shareholders within a creditor class as well as for an entire dissenting creditor class against their objection (cram-down and cross-class cram-down).

All creditors are treated equally in the distribution to the detriment of the creditors entitled to separate satisfaction. In principle, there is no right of appeal against the court judgement or other court decisions in the context of restructuring.

The quota will be paid after the 2024 season. Alternatively, the quota can also be split into two payments, of which a small portion will be paid immediately after approval of the restructuring plan. The second quota payment will then be made immediately after settlement of the 2024 season.

The restructuring plan should then also regulate the takeover of the shares by KuasaNas.

With this approach, the holding company, Efwin Investment Inc, is also spared from the insolvency proceedings. Nevertheless, Maximov must write off his contribution of USD 100 million and reach an agreement with the secured creditors on how to deal with the pledging of his private real estate.

Another condition for the deal with KuasaNas is that the Formula 1 team moves to Malaysia. It is important for the team's relocation to Malaysia that there is no threat to its license. This must be agreed with the FIA, although I assume that relocation is less problematic than setting up a new team.

Particularly in view of the fact that races are to be held in Malaysia in the future maybe, it is of interest to the FIA that there is also a racing team from Malaysia.