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**Dull *rerun* or successful *spin-off*? Is the new ‘private’ version of the Dutch Scheme covered by the EU Judgments Regulation?**

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*Introduction*

Prior to Brexit, much ink was spilled by English jurists debating whether the English *scheme of arrangement* was covered by the EU Insolvency Regulation, the EU Judgments Regulation, or neither regime. Whenever the issue was brought before the English courts, however, they would generally reach the conclusion that it actually did not matter that much: the court would apply domestic law regardless. And with that, the English courts never reached a solid landing on the issue of whether either EU regulation applied or not. *Season one* of the ‘EU regulations-show’ essentially ended with a nail-biting *cliff-hanger* in England, and as Brexit is unlikely to be reversed in the foreseeable future, there seems to be little hope for a *sequel*…

Enter the Dutch! While Brexit has made the issue in England largely moot, the underlying discussion has recently got its own *spin-off* show in the Netherlands. On the 1 January 2021, the Dutch *scheme* – similar to the English *scheme of arrangement* and English *restructuring plan* – finally entered into force in the Netherlands (after having been in the works for close to eight years). Perhaps with the aim of avoiding the same discussions that preoccupied English jurists for many years, the Dutch legislator decided to forgo typical English politeness about the subject, choosing instead to be typically Dutch and blunt about it. The Dutch legislator simply *declared* that the ‘private’ version of its Dutch scheme would not be covered by *either* EU regulation.[[1]](#footnote-1) Instead, the ‘private’ version would be exclusively covered by domestic law (whereas a separate ‘public’ version would eventually be submitted for inclusion on Annex A of the EU Insolvency Regulation).

Unsurprisingly, this bold move has been met with a certain degree of criticism, with some Dutch (and foreign) legal scholars arguing that the Dutch legislator cannot just *declare* that EU law no longer applies and that the EU Judgments Regulation must apply regardless of any such declaration. With the legal debate on this topic having become somewhat ‘heated’ recently, the *Netherlands Association for Comparative and International Insolvency Law* (NACIIL) decided to organize a seminar specifically dedicated to this topic. The aim? To settle the score once and for all in the Netherlands (and abroad). No one was to leave the room until the following question was definitively answered: “*does the private version of the Dutch scheme fall under the scope of the EU Judgments Regulation or not?*” I was fortunate enough to be invited to this seminar and have put together the following report.

*Some (mainly English law) Background to the Debate*

Before crossing the North-Sea to the Netherlands, we should first set out some background to the debate. Historically, the English courts generally have held that the two EU regulations are meant to “*dovetail*”[[2]](#footnote-2) each other and that there “*can be no gap between the Judgments Regulation and the Insolvency Regulation*”.[[3]](#footnote-3) Taking this position to its natural conclusion, one might have expected the English courts to conclude that the *scheme of arrangement* is covered by the EU Judgments Regulation.[[4]](#footnote-4) After all, the EU Insolvency Regulation expressly provides that only proceedings listed in its Annex A fall within its scope, whereas the *scheme of arrangement* has never been included on that list (arguably on purpose).[[5]](#footnote-5) Surely, therefore, the EU Judgments Regulation must apply? Right? Well, the English courts were not so sure...

Despite the suggestion of ‘dovetailing’, the English courts have generally refrained from drawing decisive conclusions as to the scope of the EU Judgments Regulation in connection with the *scheme of arrangement*.[[6]](#footnote-6) Instead, the English courts would often put forward a hypothesis that it *did* apply, and then conclude that in that hypothetical scenario the EU Judgments Regulation would (most likely) *not* restrict their jurisdictional powers in any meaningful way (even with respect to creditors domiciled outside of the UK). On that basis the English courts could then maintain that irrespective of whether the EU Judgments Regulation’s applied or not, there would (still) be jurisdiction in relation to the debtor on the basis of domestic law (in short by applying the so-called ‘sufficient connection’-test).[[7]](#footnote-7) Or in other words, the English courts are open for business! Relying on this line of argument, many foreign companies with mere ‘sufficient connection’ to the English legal sphere have in the past successfully restructured their debts as part of a *scheme of arrangement* (including quite a few Dutch ones).[[8]](#footnote-8)

The question of whether other jurisdictions would subsequently also *recognize* those English judgments sanctioning such schemes has not really proven to be an issue in practice. Counsel presenting before the English courts often produced enough foreign law opinions to defend the position that, come what may, the relevant foreign jurisdiction would recognise the sanctioned scheme in all its glory (be that as a matter of EU law, domestic law or otherwise).[[9]](#footnote-9) As far as recognition goes, *schemes of arrangement* involving foreign companies have therefore never been sanctioned “*in vain*”![[10]](#footnote-10) Or at least that has been the working assumption of the English courts.

But let us pause here for a second. I am aware that my English law analysis might come across as a *bit* cynical. If so, I want to make clear that my cynicism does not come from a place of resentment. As a Dutch lawyer, it perhaps stems from a place of mild envy. And I am arguably not alone in this. As already alluded to in my introduction, these envious views may also have been held by the Dutch legislator, who was well aware of, and also explicitly referred to, this widespread phenomenon of ‘forum shopping’ (in particular in favour of the English courts).[[11]](#footnote-11)

It is perhaps for that reason that the Dutch legislator, while drafting the bill for a Dutch (improved) version of the English *scheme of arrangement*, the so-called *Wet homologatie onderhands akkoord* (or the WHOA to its friends),[[12]](#footnote-12) decided to echo the English law ambiguity on both regulations’ applicability, and in fact made that ambiguity even more concrete. Concluding that it would be helpful to have a version of the Dutch scheme listed on Annex A of the EU Insolvency Regulation, the Dutch legislator decided that it would probably be *even more* helpful to also have a version of the Dutch scheme that is not covered by either regulation. In other words, one ‘public’ version that can utilize the ‘automatic recognition’ provisions of the EU Insolvency Regulation across the EU (if so required) and one ‘private’ version that is freed from the restrictive jurisdictional shackles of either EU regulation and which is instead covered by domestic laws (if so desired).

And indeed, so it came to pass that the Dutch scheme now consists of two separate versions: a ‘public’ version, which has recently been included on Annex A of the EU Insolvency Regulation,[[13]](#footnote-13) and a ‘private’ version, which will not be submitted to that list. The ‘private’ version of the Dutch scheme is virtually identical to its ‘public’ counterpart with the only noticeable difference being that the process itself will not be registered in any public insolvency register. As such, it is argued that the ‘private’ version is not even capable of being included in Annex A of the EU Insolvency Regulation, which only applies to “*public collective proceedings*”.

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

*The Netherlands Association for Comparative and International Insolvency Law Seminar*

A. Introduction

The position that the Dutch legislator took in this respect is undeniably a bold one. Whether this will hold up in the EU courts (who are the ultimate arbiters in this respect) and/or the courts of the various EU member states (where recognition will need to be sought) remains to be seen. But what is clear is that the Dutch have rekindled a discussion previously debated, but left unsettled, in the English courts. Various papers and articles have been published in Dutch and International journals regarding this issue,[[14]](#footnote-14) and the discussion came to a boiling point during a seminar organized by the *Netherlands Association for Comparative and International Insolvency Law* (in Dutch: *Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht*) held on 15 February 2022 at the University of Amsterdam. Under expert supervision of senior judge Elsbeth de Vos of the Amsterdam District Court, who carefully introduced the topic and expressed her “*desire for advice*”, proponents on both sides of the debate defended their respective positions.

Prior to the discussion, chairman of NACIIL and moderator of the panel, Professor Rolef de Weijs of the University of Amsterdam, had the (yet to be persuaded) attendees vote on the main question (and some related questions).[[15]](#footnote-15) The initial outcome of the vote: approximately 30% of those (digitally) present, some forty academics and practitioners, were of the opinion that the ‘private’ version of the Dutch scheme fell within the scope of the EU Judgments Regulation. The remaining attendees seemingly agreed with the views of the Dutch legislator: the procedure has slipped through the ‘dovetail’ and neither regulation applies. It was up to the first speaker to persuade the majority otherwise.

B. The ‘dovetail’ remains watertight

Kicking off the debate, and spearheading what one might call the ‘dovetail’ camp, was Professor Reinout Vriesendorp of Leiden University – a self-proclaimed ‘WHOA-warrior’ – who advocated in support of the seamless connection between the EU Insolvency Regulation and the EU Judgments Regulation. To Professor Vriesendorp, it is abundantly clear that the drafters of both regulations (and their predecessors)[[16]](#footnote-16) intended these regimes to ‘dovetail’. This follows not only from their recitals; it is also a common theme in the case law of the European Court of Justice. These factors make it obvious that the scope of the EU Judgments Regulation should be interpreted *widely*, and that, by extension, the ‘bankruptcy’ exception included in Article 1(2)(b) of that regulation should be interpreted *narrowly*. Or as Professor Vriesendorp aptly put it: “*if it looks like a duck, swims like a duck, but doesn’t quack like a duck, it should not necessarily be called a duck.”*[[17]](#footnote-17)

In other words, the ‘main rule’ is provided by the EU Judgments Regulation, covering that which is not explicitly covered by the EU Insolvency Regulation. Where procedures do not fall within the scope of the EU Insolvency Regulation, coverage is then *ipso facto* provided by the EU Judgments Regulation. Vacua should be avoided. Only where a procedure is materially within the scope of the EU Insolvency Regulation, but for whatever reason is not (yet) included on Annex A, is Professor Vriesendorp willing to concede that there is a small (temporal) gap between the two regulations (albeit foreseen and intended by their drafters).

Any (further) perceived gap between the two regulations is inconsistent with the express intentions of the EU legislator to have ‘clarity and predictability’ and to streamline the process of recognition of judgments across the EU. While it is true, Professor Vriesendorp admitted, that the EU Judgment Regulation is not exactly tailored towards collective insolvency proceedings, such as the Dutch scheme, that does not change his position. On that basis, one could perhaps advocate for a new EU regulation specifically designed for ‘confidential’ insolvency proceedings, but in the absence of any such regulation, one should not conclude that the EU Judgments Regulation does not apply to the ‘private’ version of the Dutch scheme. The ‘dovetail’ remains watertight!

C. The ‘dovetail’ has been punctured

Leading the opposition was Professor Michael Veder of the Radboud University in Nijmegen. To Professor Veder, it is not at all clear that the interplay between both regulations suggests that the ‘private’ version of the Dutch scheme should *ipso facto* be covered by the EU Judgments Regulation. The ‘dovetail’ is perhaps better considered to be an aspiration, rather than some hard and fast rule. Recital 7 of the EU Insolvency Regulation makes that clear: *“*[t]*he interpretation of this* [EU Insolvency] *Regulation* [that certain insolvency proceedings that are excluded from the EU Judgment Regulation should be covered by the EU Insolvency Regulation] *should as much as possible avoid regulatory loopholes between the two instruments*” as well as “*the mere fact that a national procedure is not listed in Annex A to this* [EU Insolvency] *Regulation should not imply that it is covered by* [the EU Judgment] *Regulation (…)*”. No ambiguity there.

In addition, it follows from recitals 12 and 13 of the EU Insolvency Regulation that the EU legislator purposely intended for ‘confidential’ insolvency procedures, such as the ‘private’ version of the Dutch scheme, to be excluded from both the EU Insolvency Regulation as well as the EU Judgments Regulation. They did so with the understanding that such exclusion would indeed make it “*difficult to provide for the recognition of their effects throughout the Union*”, which can be interpreted as a reference to the EU Judgment Regulation failing to provide coverage in that scenario. The non-applicability of the EU Judgments Regulation is therefore a deliberate decision of the EU legislator, that should not be overridden by extensively or restrictively interpreting either regulation to that effect.

Furthermore, the case law of the European Court of Justice relating to the principle of ‘dovetailing’ arguably only dealt with conflicts or disputes arising out of already pending insolvency proceedings. It is indeed more appropriate for these more ‘contentious’ judgments not to ‘fall between the cracks’, but the same cannot be said of all insolvency proceedings as such. In fact, in the case of German Graphics, the European Court of Justice explicitly considered that there were instances where neither regulation would apply. The European Court of Justice held that “*before it can be concluded*” that the (now) EU Judgments Regulation applies to judgments other than those referred to in the (now) EU Insolvency Regulation “*it is necessary to determine whether such judgments fall outside the material scope of* [the (now) EU Judgments Regulation]”.[[18]](#footnote-18)

An expansive interpretation of the EU Judgments Regulation would also suggest that a ‘confidential’ insolvency procedure, despite not falling within the scope of the EU Insolvency Regulation, could still be recognized relatively easily across the EU under the EU Judgments Regulation, perhaps even more easily than under the EU Insolvency Regulation. To Professor Veder, that is frankly absurd. This could lead to a bizarre situation where ‘foreign’ security rights are not carved-out when ‘confidential’ insolvency procedures are to be recognized under the EU Judgments Regulation, whereas those restrictions would and do exist under Article 8 of the EU Insolvency Regulation. It would also mean that for ‘public’ insolvency procedures, courts of a certain EU Member State are *only* allowed to accept jurisdiction if a debtor has its centre-of-main-interest (COMI) there, whereas the EU Judgments Regulation (arguably) provides much more relaxed jurisdictional grounds (e.g. mere domicile of a debtor). That *“can’t be true*!” The EU Judgments Regulation is not tailored towards those cases and therefore should not, and does not, apply to the ‘private’ version of the Dutch scheme

Interestingly, this exact argument raised by Professor Veder also played a prominent role in Zacaroli J’s recent reasoning in the English Gategroup judgment (which dealt with the ‘bankruptcy’ exception found in the Lugano Convention, the EU Judgments Regulation’s older cousin).[[19]](#footnote-19) In that case, Zacaroli J suggested that ‘collective’ procedures – whether confidential or not – simply require different rules on jurisdiction and recognition. Referring to the jurisdictional provisions of the Lugano Convention, which closely resemble those found in the EU Judgments Regulation, Zacaroli J wrote that: “*Each of the* [jurisdictional provisions] *provides a basis or bases for assuming jurisdiction against a person by reference either to that person’s place of domicile or the nature of the claim made against that particular person. There are special rules, for example, where the claim is in contract, or tort, or relates to insurance or consumer contracts, or employment. If applied to an insolvency proceeding concerning a debtor with a cross-border business, these rules would inevitably routinely establish a multiplicity of jurisdictions because of the differing locations of creditors and the differing attributes of their claims. (…) rules which allocate jurisdiction by reference to the domicile of each creditor, or the legal nature of each creditor’s claim, or by reference to bi-lateral contractual provisions with different creditors, are as inapposite and impractical in the context of Part 26A* [restructuring plan] *proceedings, which are premised on the financial difficulties of the company, as they are for traditional insolvency proceedings.*”

D. Round Two and Concluding Remarks

Finishing up the first round of the debate, and as tensions started to rise across the room, Judge De Vos asked the room for any questions or remarks arising at that point in time. Lilian Welling-Steffens, who recently wrote a piece on this very topic,[[20]](#footnote-20) bravely stepped forward to be the first audience member to contribute to the discussion. Welling-Steffens began by agreeing with Professor Vriesendorp that it is indeed not up to the Dutch legislator to declare whether either regulation applies or not. Ultimately, she said, one should not forget that this is a not a matter of Dutch law, but a question for the European Court of Justice to decide. At the same time, she continued, Professor Veder was, in her view, correct in pointing out that strictly relying on a ‘dovetail’ is not necessarily the best outcome either. The jurisdictional rules found in the EU Judgments Regulation are indeed ill-tailored for these kinds of procedures and specific rules on applicable law are in fact wholly absent. With this in mind, Welling-Steffens humbly admitted that she was also yet to conclude what the ‘right’ or ‘preferred’ answer was.

With the ball rolling, other participants stepped forward to direct some critical questions at the panel. Lucas Kortmann was first to address the elephant in the room. Whilst we were seemingly having a technical legal debate, he “*could not escape the impression*” that the Dutch legislator purposely designed the ‘private’ version of the Dutch scheme with the clear aim of avoiding the Dutch courts having to apply a COMI-test when accepting jurisdiction. Surely that is something that will (and has to) influence the debate.

In his second term, Professor Vriesendorp – slightly tongue in cheek – wondered whether his esteemed colleague had perhaps been living under a rock for the last five years. With the EU directive on restructuring and insolvency,[[21]](#footnote-21) the EU legislator has made it eminently clear what its intentions are, or rather, what they have been all along. This directive unambiguously states that while it “*does not require that procedures within its scope fulfil all the conditions for notification under* [Annex A of the EU Insolvency Regulation]” it does aim *“to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments*.”

Furthermore – perhaps in reference to the point raised by Mr. Kortmann – this directive also makes clear that “*certain restrictions*” found in the EU Insolvency Regulation, such as the “*safeguards against abusive relocation of the debtor’s centre of main interests during cross-border insolvency proceedings*” should “*also apply to procedures not covered by that Regulation*”. At the same time, this directive emphasizes the importance of lowering costs of restructuring procedures and enhancing “*greater transparency, legal certainty and predictability across the Union*”, all elements which are heavily influenced by how insolvency procedures are recognized across the EU. In conclusion, Professor Vriesendorp continued, while pulling two – seemingly similar – yellow rubber duckies from his backpack: “*ceci n’est pas une pipe: one of these is not a ‘duck’!”*

For his response, Professor Veder briefly reiterated and reaffirmed his stance. Yes, he aware of what the restructuring directive said, and no, it did not change his mind. Or to keep with ornithological terms: no, both of the procedures were indeed still to be regarded as ‘ducks’.

*Another Cliff-hanger?*

With all (similar) ducks in a row it was time for the second and final vote. Had the attendees changed their minds? Could we finally expect a definitive answer to this question? Was I allowed to leave the room? You guessed it: no, not really. Although some attendees had apparently changed their minds during the course of the seminar, the overall outcome of the vote stayed roughly the same. Of the initial 70% that rallied behind the Dutch legislator, at the end of the seminar, just over 75% of the attendees concluded that the EU Judgments Regulation did not apply to the ‘private’ version of the Dutch scheme. A small victory for Professor Veder, but certainly no suggestion of a proper *communis opinio* amongst Dutch lawyers. I guess, for the denouement, we will have to wait and see how the EU and Member State courts will react to the new Dutch scheme. I’m sure a *third season* of sorts is already in the making somewhere, so it only remains for me to say: to be continued…

1. Legislative explanatory notes to the Dutch Scheme Act (unofficial translation), at page 7: “*Before giving a decision on requests submitted during the preparation of the plan, the court must first establish whether it has jurisdiction to hear those requests. This is determined in the confidential pre-insolvency plan procedure on the basis of Article 3 of the Dutch Code of Civil Procedure (DCCP). It is determined in the public plan procedure by whether the debtor’s centre of main interests (COMI) is in one of the EU Member States (other than Denmark). If that is the case, the jurisdiction of the Dutch court can be determined on the basis of the Insolvency Regulation, by registering the public pre-insolvency plan procedure on Annex A. Where the debtor’s COMI is outside the EU or in Denmark, the jurisdiction of the Dutch court must once again be determined on the basis of Article 3 DCCP*” (https://resor.nl/wp-content/uploads/2020/03/WHOA\_ENG.pdf). [↑](#footnote-ref-1)
2. Report of Professor Dr Peter Schlosser on the Convention (October 1987) (No C59/71), at. 53: “*Leaving aside special bankruptcy rules for very specific types of business undertakings, the two Conventions were intended to dovetail almost completely with each other*”. [↑](#footnote-ref-2)
3. *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), at 44. [↑](#footnote-ref-3)
4. Which some justices have actually found to be the case. See for instance Briggs J in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), at 47-51 which, however, involved a *solvent* scheme. In *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), David Richards J, at 28-29, held this to apply to *insolvent* schemes as well, at least if the company is not subject to insolvency proceedings to which the EU Insolvency Regulation applies. [↑](#footnote-ref-4)
5. The *scheme of arrangement* was, however, originally intended to be included in this list of proceedings that was to be annexed to the then draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings, but that draft convention was never finalised. [↑](#footnote-ref-5)
6. See e.g. Snowden J in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), at 45: “*This point is of some difficulty and, in order to avoid having to decide it, in a number of scheme cases the court has simply gone on to look at the question of whether, on the assumption that the Judgments Regulation does apply, jurisdiction to entertain the scheme could in fact be found within its provisions*.” and also in *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch), at 28-29: “*On the basis of that evidence and those submissions, I am persuaded that if the recast Judgments Regulation was applicable, jurisdiction could be established (…). That conclusion makes it unnecessary for me to consider the central question of whether the recast Judgments Regulation does apply to schemes of arrangement at all, or to consider whether, if it did, jurisdiction could be established under any of the other articles of that Regulation.*” [↑](#footnote-ref-6)
7. This is in reference to the requirement that the company proposing the *scheme of arrangement* must be liable to be wound up under the Insolvency Act 1986, whereas English courts have been found to have jurisdiction to wind up a foreign company if, among other things, the company has “*sufficient connection*” with England to justify the court exercising its jurisdiction, see e.g. *Re Real Estate Development Co* [1991] BCLC 210 (Ch). [↑](#footnote-ref-7)
8. See e.g. *Re Dap Holding NV* [2005] EWHC 2092 (Ch); *Re NEF Telecom Co BV* [2012] EWHC 2944 (Ch); *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch); *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch); *Re DTEK Finance BV* [2015] EWHC 1164 (Ch); *Re Metinvest BV* [2016] EWHC 372 (Ch); *Re Metinvest BV* [2016] EWHC 1868 (Ch); *Re Indah Kiat International Finance Company BV* [2016] EWHC 246 (Ch); *Re Frigoglass* [2017] EWHC 3869 (Ch); *Re DTEK Energy BV* [2021] EWHC 1551 (Ch). [↑](#footnote-ref-8)
9. See with respect to the Netherlands e.g. *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), at 71-76; *Re HEMA UK 1 Ltd* [2020] EWHC 2558 (Ch), 26; *Re Selecta Finance UK Ltd* [2020] EWHC 3220 (Ch), at 17 and *Re DTEK Energy BV* [2021] EWHC 1551 (Ch), at 31. [↑](#footnote-ref-9)
10. *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch), at 34. [↑](#footnote-ref-10)
11. See legislative explanatory notes to the Dutch Scheme Act (unofficial translation), at page 3: “*numerous companies from all corners of the world have looked to the United Kingdom or the United States to resolve their financial problems. They used the ‘Scheme of Arrangement’ and the ‘Chapter 11’ procedures in those respective countries. Amongst them were a number of Dutch companies.*” (https://resor.nl/wp-content/uploads/2020/03/WHOA\_ENG.pdf). [↑](#footnote-ref-11)
12. The Dutch scheme is currently more comparable to the English *restructuring plan*. [↑](#footnote-ref-12)
13. Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B. [↑](#footnote-ref-13)
14. See among others: P.M. Veder & J.J. van Hees, ‘Internationale aspecten dwangakkoord ter voorkoming van faillissement’, in: A.C.P. Bobeldijk e.a. (red.), Het dwangakkoord buiten faillissement, Vereeniging ‘Handelsrecht’ Preadviezen 2017, Zutphen: Uitgeverij Paris 2017; W.J.E. Nijnens, ‘Internationaal privaatrechtelijke aspecten van de WHOA’, *TvI* 2019/34; P.M. Veder, ‘Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement’, *FIP* 2019/219; S.C. Pepels, ‘De WHOA als instrument voor (grensoverschrijdende) groepsherstructureringen’, *MvO* 2020/1&2; R.D. Vriesendorp & O. Salah, ‘De WHOA: een nieuw herstructureringsinstrument’, *MvO* 2020/6; R.D. Vriesendorp e.a., ‘Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union’, *NIPR* 2021/1; L.F.A. Welling-Steffens, ‘Het internationaal privaatrecht en het merkwaardige verhaal van de WHOA’, in: R. F. Feenstra e.a., (red.), Wet Homologatie Onderhands Akkoord (Insolad Jaarboek 2021), Deventer: Wolters Kluwer 2021. [↑](#footnote-ref-14)
15. The questions were ancillary to the main question and will not be further discussed in this report. [↑](#footnote-ref-15)
16. These regulations have their origins in the Brussels Convention of 1968 and the draft Bankruptcy convention (as referred to above). [↑](#footnote-ref-16)
17. In reference to N.W.A. Tollenaar, ‘The European Commission’s Proposal for a Directive on Preventive Restructuring Proceedings’, *Insolvency Intelligence*, 2017: “*On the other hand, in terms of its consequences, the procedure is nothing but an insolvency procedure (“if it’s not called a duck, but looks like a duck, swims like a duck and quacks like a duck, it probably is a duck”)”* [↑](#footnote-ref-17)
18. After some back-and-forth, Professor Vriesendorp would eventually respond to this by saying that this ‘duty to examine’ the scope of either regulation was likely promulgated bearing in mind that, among other things, there is (also) an exception for ‘financial institutions’. Professor Veder disagreed, pointing out this case was not in any way related to ‘financial institution’ and in fact (only) dealt with the ‘bankruptcy’ exception. [↑](#footnote-ref-18)
19. *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), at 91-103. [↑](#footnote-ref-19)
20. L.F.A. Welling-Steffens, ‘Het internationaal privaatrecht en het merkwaardige verhaal van de WHOA’, in: R. F. Feenstra e.a., (red.), Wet Homologatie Onderhands Akkoord (Insolad Jaarboek 2021), Deventer: Wolters Kluwer 2021. [↑](#footnote-ref-20)
21. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). [↑](#footnote-ref-21)