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White Paper:

- Evaluation of one year WHOA
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- Qualification of employment agreements

April 2022, Natascha van Duuren, Ernst van Win and Sacha Krekel

DE CLERCQ
Lawyers and Notary
in Leiden and The Hague

www.declercq.com

One year WHOA

Sacha Krekel and Eveline Bakker

On the first of January 2021 the Financial Restructuring Act, known in Dutch as the Wet Homologatie Onderhands Akkoord (hereafter: WHOA), entered in to force. The goal of the WHOA is to prevent bankruptcies of successful yet almost insolvent business entities. Expectations were high, as experts considered the WHOA as a major development in the Dutch insolvency practice. After a year it is time to evaluate, what were the effects of the WHOA, which developments stood out, and did it fulfil the expectations?

The WHOA proceedings

The WHOA enables businesses that are in financial distress, but nevertheless can survive after a debt restructuring, to offer a reorganization scheme to its creditors and shareholders in order to avoid an impending bankruptcy. It is comparable to a Chapter 11 or Scheme of arrangement procedure. If a company is still (partly) viable and the restructuring plan is ratified, the Court can declare the reorganization scheme binding to all creditors of the company, even to the ones who refuse to cooperate.

The impact of the WHOA in 2021

During the first 9 months of the WHOA no less than 134 initial statements were filed at several Courts across the Netherlands, with a request to start a procedure. The Court published 81 rulings, from which 10 reorganization schemes got approved and 5 got denied.

Although, it is difficult to draw a conclusion from these figures, we see that depositing a statement is not a guarantee for a successful approval. The Court will be very precise and strict in the examination of a reorganization scheme. Given that the approval will restrict the right of the creditors. Therefore, it is important to prepare a reorganization scheme with careful and professional attention. The debtor must thoroughly inform the creditor

about his position, the financial situation, and the necessity of restructuring the company. Only then will the Court approve a scheme and bind the creditors to it.

On the other hand we see that a 'cooling off period' is granted relatively often. From the 31 request, 25 were granted. During this period no creditor can take enforcement action, receive any payments or set off.

Recognition of the WHOA in Europe

Due to a recent change in the European Union (EU) Insolvency Regulation, the WHOA has now been admitted to the list of insolvency proceedings. This means that a WHOA procedures (a public procedure) will have jurisdiction in other European member states, binding all European creditors to the arrangements of the reorganization scheme. On the other hand, foreign group entities with at least one entity based in or with close ties to the Netherlands can also use a WHOA procedure for their reorganization.

Importance

In the end it is fair to say that the WHOA has not, yet, made the impact as was expected. However, this could very well be calm before the storm. When the pandemic is over, companies could realize that restructuring is necessary and also the Europeanization of the WHOA could be a huge influence in the coming years. At least for now we can conclude that the WHOA is not an easy instrument to use. A simple deposition of your debts will not be enough. Therefore we advise to always come with a careful and well prepared plan in order to have a successful procedure.

Would you like to know more about the WHOA or do you have any questions about the aforementioned? Feel free to contact Sacha Krekel, attorney-at-law / partner at De Clercq.

First case law on agile IT projects

Natascha van Duuren and Jeroen van Helden

In 2001, the authors of the Agile Manifesto probably could not foresee what flight the concept of 'agile' would take. Most software developers nowadays work on the basis of some form of lightweight development method and there are organisations that set up their entire (non-IT) organisation 'agile'. Much has been written in the legal literature about the nature of software development agreements based on agile principles.

This literature usually amounts to a warning for the client who does business with an agile developer: if you do not make agreements about the end result to be achieved, you cannot hold a supplier liable for poor quality software.

We are now seeing the first case law on agile IT projects in the Netherlands. Do these rulings confirm the warnings in the literature?

Agile vs Waterfall

When applying the traditional waterfall method, the emphasis is on the design phase. In the design phase, all the technical and functional requirements for the software are drawn up. After this phase has been completed, the software is realized in its entirety, possibly divided into a handful of large components. This sounds logical, and makes contracting relatively easy, but in practice it poses a number of problems. During the building process, new wishes and insights often arise. The waterfall method can then be experienced as a straitjacket, in which there is insufficient space for flexibility and manoeuvrability. In an extreme case, the software is delivered at the end of the project in accordance with design and planning, but the software does not meet the (actual) wishes of the customer. The agile approach offers a solution here.

In an agile working method, the emphasis is not on the design phase and formulating an end-result upfront, but on the process. Above all, there is an iterative, flexible process of

software development. This usually means working with a central list of desired functionalities that have yet to be developed. These tasks are estimated by hours and prioritized. Within a fixed period of one or more weeks, the tasks with the highest priority are then taken up, with the intention that working software is delivered at the end of each sprint. By indicating the prioritization, the customer has a grip on what will be carried out and can easily adjust during the process. What the customer gains in flexibility, however, the customer may lose in terms of certainty about the end-result to be achieved.

Auction platform

Developer DPDK spends almost three years building an online auction platform for client Dream Bid on the basis of the agile method. The launch of the platform is delayed several times due to issues with the system's performance. After go-live, these problems persist and it turns out that a definitive fix would require a complete "rebuild" of the platform's architecture. Dream Bid wants to wait nor pay for this rebuild and sues DPDK for damages.

In court, DPDK defends itself stating that the parties agreed on an agile approach. The functionality to be delivered was not predetermined and therefore whatever issues existed they do not amount to breach of contract. Moreover, according to DPDK, the fact that the architecture is not suitable for the desired number of users is the result of Dream Bid's changes during the course of the project, which incidentally fits with the agile approach, but again cannot result in breach of contract.

The court finds the defense unconvincing and rules in favor of Dream Bid. The court bases this conclusion on DPDK's duty of care. A software development agreement qualifies as a contract for services (Article 7:400 Civil Code). The developer must therefore observe the care of a good contractor (Article 7:401 Civil Code). In other words, DPDK must behave as a reasonably competent and reasonably skilled IT service provider. According to the court, a reasonably competent IT service provider can be expected to have provided a platform with an acceptable performance. If that were no longer possible due to changing requirements, DPDK should have explicitly warned about this. The fact that work is done on an agile basis does not in any way affect this warning obligation, according to the court.

Investment platform

A somewhat similar project ended up before the district court in The Hague (the judgment has not been published, but I represented the supplier). For several years, a software developer works on an investment platform. At the start of the project, only the basic outline of the platform is clear and development takes place on the basis of agile principles, with many changes along the way. When go-live comes into view the performance does not meet the expectations of the customer. Go-live is delayed several times, the customer loses faith in the project and eventually terminates the agreement for cause.

The customer argues, among other things, that it was not sufficiently informed about the agile method and what that would mean for the project. It is also argued that the supplier has not warned sufficiently about the consequences of the customer's changes during the project, resulting in long project duration and potentially inappropriate underlying architecture.

In this case, the court dismisses the customer's claims. The assertion that the system was not working properly and that on that basis there would be a shortcoming is dismissed on formal grounds without touching on the substantive issues. With regard to the duty of care, the supplier is able to demonstrate, in the form of emails and other documents, that they have indeed informed the customer about the nature of agile projects and have warned the customer about the potential impact of certain changes in the project. The multi-million euro claim is therefore dismissed.

Provisional conclusion

The above judgments only come from lower courts and, moreover, strongly depend on the specific facts of those projects. One should caution to draw general conclusions too quickly on this basis. Nevertheless, a provisional conclusion may be appropriate.

The cases seem to underline that while it is relatively difficult to successfully hold a supplier liable in an agile project, this is by no means impossible. The most promising base will generally be the duty of care of the IT service provider. In particular, a supplier must clearly warn the customer when the customer (in its role of product owner) changes the course of the project in ways that affect the progress of the project or the suitability of the underlying architecture. As is evident from other IT cases, under certain

circumstances, this could mean that a supplier must warn insistently, suggest alternatives or even refuse to proceed on a certain course.

In my opinion, both cases also illustrate a specific vulnerability of agile projects, in which, as mentioned, the emphasis is not on the design phase. There is therefore a chance that the actual wishes of the customer in terms of functionality and performance, which become clear during the project, ultimately do not match the underlying architecture of the solution. This is an important point to consider when starting an agile project.

Would you like to know more about the legal aspects of (agile) software development or IT projects? Please contact Natascha van Duuren attorney at law / partner at De Clercq.

Qualification of an employment agreement: even if parties intended otherwise!

Ernst van Win and Jaouad Seghrouchni

Given the fact that employees are well protected from a Dutch employment law perspective an agreement being qualified as an employment agreement will have legal implications. You may think of payment during illness, minimum wages, holiday allowance and protection against dismissal. Whether parties intended to enter into an employment agreement is not relevant for the question if their agreement qualifies as an employment agreement!

Definition employment agreement

Under Dutch law an employment agreement is defined as an agreement under which one of the parties (the employee) obliges him- or herself towards the other party (the employer) to perform work for a certain period of time. This work is performed in service of the other party and in exchange for payment (article 7:610 Dutch Civil Code).Especially the following conditions are relevant for the qualification of an employment agreement: 'work', 'wages' and 'authority' (in service).

Once it has been determined what parties agreed upon in terms of rights and obligations (the explanation phase), it must be assessed if these rights and obligations meet the definition of an employment agreement (the qualification phase).

The qualification phase

In the qualification phase it is determined if the determined rights and obligations meet the definition of an employment agreement. Whether parties intended to enter into an employment agreement is not relevant for the qualification. This means that clauses such

as '*Parties did not wish to enter into an employment agreement*' or '*This agreement qualifies as a services agreement*' will not be helpful to prevent the agreement of being qualified as an employment agreement. Instead, the actual performance of the agreement by the parties is important.

When determining if parties entered into an employment agreement not one circumstance is decisive. The different rights and obligations that parties entered into should be assessed in relation to each other.

Labour — Labour concerns the work that is performed, which can be mentally of physically. Labour could be active or passive. Sleep shifts may also fall under the definition of labour.

Wages — Wages concern the payment the worker receives for the labour that is performed. Tips do not fall under this definition.

Authority — Whether there is 'authority' leads to most of the discussions as this distinguishes the employment agreement from other agreements pursuant to which work is performed, such as the services agreement.

An important characteristic of authority is that the employee performs his or her work in service of the employer or according to the instructions of the employer. The employer should have the possibility to further specify the work task. It is not required that the employer makes use of such authority. The following circumstances could be relevant for the presence of authority:

- prohibition to work for third parties and not having other clients;
- obligation to work at set times;
- not having the possibility to be replaced by a third party;
- obligation to work at a certain place;
- the amount of the payment is not decided by the worker;
- receiving financial incentives related to the (amount of) work performed;
- requirement to use company goods; and
- the work performed concerns the core business of the company.

The foregoing means that even if parties thought to be entered into for instance a services agreement, their relationship could afterwards still be qualified as an employment agreement. This will have legal implications given the fact that in such case the person performing the work (the employee), will be entitled to minimum wags, holiday allowance, holidays, salary during sickness and dismissal protection.

(European) legislation

Legal presumption employment agreement

On 9 December 2021 the European Commission published a proposal for a directive on improving working conditions in platform work. The proposal includes, amongst others, a legal presumption with respect to platform work(article 4). Under the legal presumption it is assumed that parties entered into an employment agreement if at least two of the circumstances as included in the proposal are met, such as the platform determining the level of remuneration, the platform restricting the freedom to accept or to refuse tasks or the platform limiting the possibility for the worker to work for third parties. Once the European Parliament and the Council of the EU accepted this proposal, member states should implement the directive within two years.

Webmodule

The Dutch government intents to implement a so-called 'webmodule', which includes online questions that companies could fill in before hiring freelancers. The goal is to give more certainty of whether a certain assignment can be performed without having an employment agreement. After the questions are answered there are three possible outcomes: i) the service may be conducted outside of an employment relationship, ii) no judgment can be given or iii) indication that there is an employment relationship. The webmodule can be found here. Given the fact that the webmodule is currently in pilot no rights can be derived from the outcome.

Practice

If parties do not intend to enter into an employment agreement it would be advisable to agree on rights and obligations that are not typical to an employment agreement and to make sure that there is no authority over the person that will be performing the work. Including that parties do not intent to enter into an employment agreement is not relevant.

Would you like to know more about the qualification of an employment agreement or do you have any questions about the aforementioned? Please feel free to contact Ernst van Win, attorney at law / partner at De Clercq.

Sacha Krekel
s.krekel@declercq.com

Eveline Bakker
e.bakker@declercq.com

Natascha van Duuren
n.vanduuren@declercq.com

Jeroen van Helden
j.vanhelden@declercq.com

Ernst van Win
e.vanwin@declercq.com

Jaouad Seghrouchni
j.seghrouchni@declercq.com