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WHOA

The Dutch Scheme



The Dutch Scheme in cross-border restructurings

Since its enactment on 1 January 2021, the Dutch Scheme (or WHOA) has emerged as a useful tool for cross-border restructurings. In this note we will briefly describe seven prominent Dutch Scheme cases and highlight what we can learn from them.

In short, the Dutch Scheme provides a useful tool against non-consenting creditors and shareholders and a robust legal framework to conduct cross-border restructurings.

Fit For Free: amendment of a credit agreement without undrawn commitments

The first case concerns a chain of fitness centres, Fit For Free. This private equity owned company was in financial distress due to COVID-19 lockdowns. The court appointed restructuring expert proposed a restructuring plan that extended the company's tax liabilities and amended its credit facility agreement under which all commitments were drawn. The amendments to the facility agreement included a covenant holiday and covenant reset, and payment in kind at an increased interest rate. Despite fierce resistance from the lenders (debt funds), the court sanctioned the plan.

Of note: the Dutch Scheme can be used to impose amendments in a syndicated credit facility agreement on non-consenting lenders if all commitments are drawn.

Royal IHC: forced amendments to available commitment debated

The second case concerns a shipyard, Royal IHC. The shipyard proposed a restructuring plan which was rejected by a minority of lenders. The plan involved the sale of a subsidiary that was pledged. The non-consenting lenders blocked the sale for which all lenders consent was required. The shipyard offered a plan that in fact only amended the credit facility agreement and permitted the sale of the subsidiary without allowing the non-consenting lenders to exit.

Of note: the Dutch Scheme was used to impose amendments of a syndicated credit facility agreement on non-consenting lenders that had available commitment. The judgment to force the lenders to remain committed has been debated and this issue has been referred to the Dutch Supreme Court by the prosecutor-general who concludes the judgment should be annulled.

Steinhoff: creating a stable unlisted runoff platform

Steinhoff used the Dutch Scheme to wind down its business in a controlled manner. Steinhoff had secured support from its lenders to transfer its assets to a private company to enable the delisting of the public holding company. The private holding structure, held by trust foundations, would provide a stable platform for the intended runoff by selling the businesses. The majority of Steinhoff's shareholders opposed the restructuring plan but it was sanctioned nonetheless.

Of note: the Dutch Scheme was used to facilitate a runoff of a listed company and the termination of the dual listing in Germany and South-Africa.

Vroon: Dutch Scheme combined with English Scheme

Vroon is the first in a series of four cross-border restructurings conducted through a Dutch Scheme. Shipowner Vroon, operating a fleet of around 100 sea-going vessels, had agreed with the majority of its lenders on a restructuring that would split its fleet in a non-core legacy fleet to be sold and a core fleet to be operated by Vroon. The shareholder resisted the restructuring plan, claiming bankruptcy was not the relevant alternative and that the equity stake allocated to the shareholder was too small. The relevant credit facilities agreement was governed by English law. To be able to enforce the restructuring plan under English law, a parallel process was conducted under an English Scheme proceeding. The English court sanctioned the English Scheme an hour after the Dutch court sanctioned the Dutch Scheme.

Of note: the Dutch Scheme proceeding was combined seamlessly with a parallel English Scheme proceeding.

Diebold: a combination with Chapter 11 and UNCITRAL Recognition

Diebold Nixdorf, the ATM maker, filed under Chapter 11 of the US Bankruptcy Code and used the Dutch Scheme as point of entry into the EU. Diebold's Dutch Scheme is the first to be recognised in the US under Chapter 15 of the US Bankruptcy Code by which the UNCITRAL Model Law on Cross-Border Insolvency has been implemented by the US. The Dutch Plan cross-referenced the US Plan in that payments under the Dutch Plan were effectively made under the US Plan.

Of note: the Dutch Scheme proceeding was combined seamlessly with a US Chapter 11 proceeding and the Dutch Scheme was recognised in the US under the UNCITRAL Model Law on Cross-Border Insolvency legislation.

McDermott: a Dutch Scheme combined with a UK Restructuring Plan

The offshore contractor McDermott conducted a cross-border restructuring in the UK based on a restructuring plan under Part 26A Companies Act 2006 combined with a Dutch Scheme. Despite McDermott's objection, the Dutch court appointed a restructuring expert. The court appeared concerned that McDermott showed little willingness to negotiate the plan. The restructuring expert amended the plan to address objections and the Dutch court sanctioned the plan. McDermott has obtained recognition in the US under Chapter 15.

Of note: even though a restructuring support agreement may leave the debtor little room to negotiate a plan during the Dutch Scheme proceeding, this may provide ground for the Dutch court to appoint a restructuring expert to examine whether concerns raised by non-consenting creditors can be addressed in an alternative or amended plan.

Mercon: the Dutch Court is in principle willing to communicate with foreign courts in parallel restructuring proceedings

The global coffee trader Mercon conducts a Chapter 11 proceeding combined with a Dutch Scheme and requests recognition of the Chapter 11 proceeding in Brazil. The US court has adopted the JIN Guidelines and JIN Modalities* to communicate with the courts in the Netherlands and Brazil, including supplemental provisions made by the US court itself (together the Protocol). Mercon requests that the Dutch court applies the Protocol in the Dutch Scheme proceeding. The Dutch court denies the request because some of the supplemental provisions are not compatible with the Dutch rules of civil procedure. Under these supplemental provisions the Dutch court would receive documents regardless of whether a request has been filed with the Dutch court. The Dutch court did, however, expressly consider that it does not have a principal objection against applying the JIN Guidelines and JIN Modalities in parallel restructuring proceedings.

* The Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and the Modalities of Court-to-Court Communication.

Of note: the Dutch Court is in principle willing to conduct court-to-court communication. Care should however be taken the proposed communication protocol is compatible with the Dutch rules of civil procedure.

Meanwhile the US Court has approved a modified protocol which provides that any reports or documents filed in any of the other proceedings shall not be submitted to the Dutch Court in the Dutch Scheme proceeding other than as an annex to, or in the context of, a petition filed with the Dutch Court in the Dutch Scheme Proceeding upon the determination of counsel for the filing party that such Reports are relevant to the Dutch Court's consideration of the subject petition.

Closing remarks

The Dutch Scheme track record over as little as three years showcases its ability to be used in cross-border restructurings. We have already seen four parallel proceedings (Vroon, Diebold, McDermott and Mercon) and expect many more to come.

Our firm

Windt Le Grand Leeuwenburgh has been involved in over a dozen of Dutch Scheme proceedings, including Steinhoff. Marcel Windt and Richard le Grand have acted as court appointed restructuring experts in Dutch Scheme proceedings and Ruben Leeuwenburgh, Michiel Bindels and Mark Mouthaan have advised debtors, shareholders and creditors during Dutch Scheme proceedings.

We would be happy to answer any questions you may have.



Michiel Bindels

Partner
+31 6 1320 6960
m.bindels@windtlegal.com



Ruben Leeuwenburgh

Partner
+31 6 4355 0980
r.leeuwenburgh@windtlegal.com



Mark Mouthaan

Counsel
+31 6 8274 1694
m.mouthaan@windtlegal.com



Job Bijloo

Counsel
+31 6 2334 1140
j.bijloo@windtlegal.com



Yvette Sevink

Senior associate
+31 6 4692 9233
y.sevink@windtlegal.com

