# Case Note – Dutch Scheme (WHOA) can be used to force lenders to continue credit lines

*Summary*

- A Dutch shipbuilding company is unable to repay one of the outstanding loans (the Amazon loan) under a senior facilities agreement (SFA), resulting in the entire outstanding amount becoming due and payable.
- The borrower offers a scheme that effectively overrides the voting requirements of the finance documents. All lenders' consent decisions were imposed on dissenting lenders by the scheme which was accepted by the required two-thirds majority. The decisions related to (i) the sale of a subsidiary, (ii) amendments to the waterfall in the intercreditor agreement and (iii) the extension of the Amazon loan.
- The scheme remedies certain defaults under the finance documents and, consequently, available commitments are no longer subject to cancellation on that basis. As a result, lenders are forced to fund working capital under the existing facilities – including Lenders who voted against the scheme.

*Facts*

Despite previous restructurings, a Dutch shipbuilding company faced financial difficulties due to a decrease in (anticipated) orders for new ships. The company was unable to repay an outstanding loan of €28 million, resulting in the entire outstanding amount under a senior facilities agreement (SFA) becoming due and payable. The SFA was entered into by a syndicate of nine secured lenders and consisted of revolving and bank guarantee facilities. The total committed facility amounts to €950 million and was not fully utilised. We assume the SFA and other finance documents are governed by Dutch law, noting that the Dutch Scheme also affords jurisdiction to the court to sanction schemes in relation to finance documents governed by foreign law.[1]

---

1 We understand. However, that under the 'Gibbs-rule' the sanctioning of a Dutch Scheme by the Dutch court may not in itself grant discharge of obligations governed by English law.

The Dutch scheme (WHOA) in this case is used by the company to offer a restructuring plan solely to the finance parties under the SFA. The restructuring plan sought to, among other things, (i) (obtain approval to) sell a wholly owned (profitable) subsidiary of the company, (ii) use part of the proceeds to repay part of the outstanding amounts under the Revolving Facility, to strengthen its liquidity position and for cash collateral, (iv) reduce the committed facility from €950 million to €503 million and consequently making and/or keep various facilities available under de SFA, (v) provide (additional) security to the secured lenders for certain facilities.

These intended changes as part of the restructuring plan involved an amendment of the SFA, the intercreditor agreement (ICA) and various ancillary facility agreements and as such required lenders' consent. For many changes a two-third majority consent was sufficient under the finance documents. However, selling the subsidiary and making changes to the waterfall provisions of the ICA required *all* lenders' consent under the finance documents. Because some lenders withheld consent, the company commenced Dutch scheme proceedings to impose the restructuring plan. In these proceedings two out of nine lenders voted against the plan and one lender withheld its vote.

For the purposes of voting on a Dutch scheme, creditors are divided into classes based on the similarity of their rights or what they are offered. A class is deemed to have accepted the restructuring plan if two-thirds (in terms of claim amounts) of creditors which have actually voted, vote in favour. In this case all classes agreed to the scheme (with an average of about 75% of votes within a class in favour) so in the end no cross-class-cram down was necessary.

*Notable rulings of the Court under this Dutch scheme*

In this scheme, the Court made several important decisions to take note of.

- **Forced continuation of undrawn commitments.** The Court considers that a scheme may in principle force banks to continue to finance the debtor's working capital based on existing credit facilities. The Court formulates two criteria to test whether this possible in a specific case:
    - the extent to which the financing conditions are materially amended and
    - whether such amendments or other amendments to the finance documents are still in line with the statutory provision enabling the amendment of creditors' rights under a scheme.

  The Court considers that if this would not be possible the obligation to provide financing would fall away if an amendment proposed in a restructuring plan would be rejected. The following two bullets detail how the Court tested the two criteria in this case.

- **Material amendment of financing conditions?** The Court considers the following. The obligation of the lenders to provide financing under a committed facility is an existing obligation and the scheme does not amend this obligation. In that respect the only amendment by the scheme is a reduction of the commitments in accordance with the SFA. The scheme does not impose a new obligation. The scheme cures an event of default, enabling the company to utilise the facilities again. The amendments to the SFA and ICA do not detract from this. These amendments are not such that they affect the conditions under which the commitments may be utilised in the future.

- **Impairment of rights?** A restructuring plan can amend the 'rights of creditors and shareholders'. The Dutch scheme proceedings also provide the possibility to unilaterally terminate individual 'contracts' early but not to force an amendment of a contract (proposing an amendment is, however, a prerequisite for such forced termination). In respect of the amendments to the waterfall and the maturity date of the Amazon loan, the Court holds that these amendments are crucial to the success of the restructuring. Citing a previous case (in which a covenant reset and covenant holiday was imposed through a Dutch Scheme) and given the envisaged flexibility and intended goal of the Dutch Scheme, and the ratio of the provision enabling the impairment of rights, the Court considers that a 'broad view' should be taken in respect of the impairment of 'rights' under the Dutch Scheme to the extent it concerns an existing right to claim payment. In light of the necessity of the amendments for the success of the restructuring and the fact that these amendments relate to a right to claim payment, the Court rules that these amendments can be effected through the restructuring plan.

- **Classes of creditors.** The main rule is that creditors should be in different classes if they do not have similar rights in bankruptcy or under the scheme. In this case the classes were essentially aligned with the waterfall in the ICA. The Court held that creditors under the uncovered bank guarantee facility and the hedge counterparties under the hedging agreement can therefore be placed in the same class, considering they have similar recovery rights under the ICA (same ranking / tier).

- **Amendments to waterfall provisions:** the Court builds on a previous case in which another Court had decided that it is not possible under the Dutch scheme to change the ranking of security rights as this is an *in rem* matter. With this judgment, the Court explains that this does not relate to amending contractual rights pertaining to the waterfall provisions under the ICA.
  Also, although the Dutch scheme cannot be used to amend rights under hedging agreements (financial collateral arrangements), the Court holds that this does not preclude amendments to the position of Hedge Counterparties under the SFA and the ICA in this respect.

We are happy to share our views on this judgement and to provide pointers to borrowers and lenders on how to deal with the rulings contained therein, when considering or when confronted with a Dutch Scheme.

More information is available at: www.windtlegal.com

Windt Le Grand Leeuwenburgh
ADVOCATEN