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**Parallel Dutch Schemes: New Possibilities for Cross-Border Group Restructurings**

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*Introduction***[[1]](#footnote-1)**

As has been extensively reported, on 1 January 2021, the *wet homologatie onderhands akkoord* (**WHOA**) went into effect in the Netherlands, and with it the ‘Dutch Scheme’ as the first Dutch restructuring plan. Surprisingly, the Dutch Scheme was initially used principally by small corporations. During the last year, however, larger national and multinational businesses have started using the Dutch Scheme as a vehicle for reorganization. Dutch Schemes have been increasingly used as parallel proceedings in multinational group restructurings, pending simultaneously with, for instance, proceedings in the United Kingdom and/or the United States. With the recent restructurings of Dutch shipping company Vroon Group (in which Jones Day advised the shareholders) and American-German Diebold Nixdorf and its subsidiaries (**Diebold**—in which Jones Day was involved as debtors’ counsel), case law on parallel proceedings is developing quickly. In this update, we discuss some recent developments regarding parallel Dutch Schemes.

*1. Reasons for implementing restructurings through parallel proceedings in a group context*

Most of the issues that practitioners considering options to restructure multinational groups of companies will encounter relate to jurisdiction to open proceedings and recognition of such proceedings and related court orders in the relevant States where the group has a presence. As a first step, debtors will generally seek to minimize the number of parallel pending restructuring and/or insolvency proceedings. Multiplicity of proceedings increases, among other things:

1. the risk that differences between applicable States’ laws will render a coordinated restructuring practically impossible;
2. the likelihood of materially deviating court decisions in the various jurisdictions involved; and
3. the costs and effort related to coordination between proceedings.

There are States that specifically accommodate multinational group restructurings, allowing for centralization of a group’s restructuring proceedings in a single jurisdiction. As a result of the jurisdictional rules included in Article 3 of E.U. Regulation 2015/848 on insolvency proceedings (**Recast EIR**), however, centralized group restructurings will generally have to take place outside the framework of the Recast EIR. The United States and the United Kingdom are traditionally well known for their facilitating approach on jurisdiction over Chapter 11 cases and Schemes of Arrangement, respectively, relating to foreign companies. With the enactment of the Dutch Scheme, the Netherlands now similarly allows multinational groups to centralize their international group restructuring before a single Dutch court.[[2]](#footnote-2)

If, however, a restructuring is being implemented through a jurisdiction where an individual group company does not have its registered office and/or where the bulk of its assets are not located, questions concerning recognition of the effects of foreign proceedings come into play. If, for instance, a restructuring concerning a multinational group of companies is implemented through a single jurisdiction, it is important that a stay of individual enforcement actions is effective not only in that jurisdiction, but also in other States where the group companies conduct business, own assets or have their registered offices. Also, once the court confirms a scheme, the provisions of the scheme should be recognized in those other States as well.

Although some States have well-designed frameworks for recognition of foreign restructuring and insolvency proceedings, often based on the UNCITRAL Model Law on Cross-Border Insolvency (1997) (**Model Law**), others do not (such as the Netherlands). Also, as a condition to recognition of foreign restructuring or bankruptcy proceedings, States’ national laws may require that those proceedings emanate from a jurisdiction in which the relevant debtor have some form of local presence in the jurisdiction (either the *centre of main interest*, or **COMI** or an establishment).[[3]](#footnote-3) As a result, recognition of a centralized multinational group restructuring in a group company’s ‘home jurisdiction’ might be problematic, if that group company did not have its COMI or an establishment in the jurisdiction in which the centralized restructuring was completed. The Rule in *Gibbs* adds a further layer of difficulty if the debt to be restructured is governed by English law. Under this Rule, English courts have denied recognition and enforcement of foreign court judgments and -proceedings that discharge or compromise debts governed by English law since 1890.[[4]](#footnote-4)

These considerations present a quandary. On the one hand, a minimum number of proceedings benefits deal certainty. On the other hand, to be effective, the restructuring must be recognized and enforced in all jurisdictions where the relevant group companies have substantial presence.

In the Vroon group restructuring, for instance, the relevant debt was governed by English law, even though the group’s parent company was Dutch and headquartered in the Netherlands. Under English law (*i.e.*, the Rule in *Gibbs*), the restructuring had to be implemented through an English restructuring proceeding to be binding on English creditors. However, there was no legislative mechanism under Dutch law for recognition of an English restructuring in the Netherlands. The Vroon group therefore opted to implement the restructuring through parallel and interlocked English and Dutch schemes. According to the company’s counsel, the parent company’s debt-for-equity exchange was implemented through a Dutch Scheme, which also provided for a release of the group’s global subsidiaries’ obligations in respect of the financial debt. The English proceeding was used in concert to modify and discharge the debt in compliance with the Rule in *Gibbs*.

*2. A practical example: Diebold*

The Diebold restructuring presented a similar challenge. In the beginning of 2023, it became clear that the debt of automatic teller machine manufacturer Diebold needed to be restructured to safeguard Diebold’s financial stability. More than US$ 2.7 billion in debt was to be restructured in just over two months through coordinated cross-border restructurings. Diebold had a heavy presence both in the United States and in Europe, and entities from both the America’s and Europe were liable for the group’s financial debt.

A Chapter 11 case and a Dutch Scheme were selected to implement a global restructuring for Diebold in parallel. Chapter 11 offered a tried and tested procedure to restructure the American group companies, including Diebold’s parent company. A Dutch Scheme was used to restructure the European group companies’ liabilities. In the Netherlands, proceedings had to be commenced for only a single Dutch company (the issuer of bonds), but the financial obligations of all relevant European Diebold entities were discharged through the ‘group debt-release mechanism’ included in the Dutch Scheme.

As noted, parallel restructuring proceedings need to be coordinated strictly to ensure successful implementation of the Diebold reorganization. Various mechanisms were implemented to coordinate both proceedings and plans, which were interdependent. For example, the U.S. Chapter 11 Plan and the Dutch Scheme included a condition precedent that each plan had to be approved in the other jurisdiction. In addition, creditor distributions under the Dutch Scheme mirrored distributions to creditors under the U.S. Chapter 11 Plan and reflected creditors’ overall claims against Diebold as a whole. In most cases, in exchange for their release of claims against Diebold’s European group companies, creditors received stock in Diebold’s U.S. parent company pursuant to the Chapter 11 Plan. Creditors were also asked to vote simultaneously on both the Chapter 11 Plan and the Dutch Scheme by casting a single ‘yes’ or ‘no’ ballot either accepting or rejecting both plans. As indicated in the Amsterdam District Court’s confirmation order of 2 August 2023, the court sanctioned this ‘holistic approach’.[[5]](#footnote-5)

As another manifestation of this holistic approach, the debt-for-equity exchange to be implemented through the parallel proceedings entailed, among other things, that part of the claims against the Dutch and European group entities was exchanged for equity at the level of the U.S. parent company. Because the creditors would ultimately become the owners of the group, it made no sense to disentangle the group structure and intercompany loans. The confirmed Dutch Scheme therefore provided that the Dutch Scheme debtor’s stock would remain in place and intercompany claims would be unaffected, even though various classes of creditors were required to accept a write down.[[6]](#footnote-6)

Despite the efforts to align and coordinate the Dutch and U.S. proceedings, differences in both proceedings did warrant attention. For example, a Dutch Scheme allows for the exclusion of certain groups of creditors from a scheme when there are reasonable grounds to do so, whereas Chapter 11 of the U.S. Bankruptcy Code demands that all creditor claims and shareholder interests be treated under a Chapter 11 Plan. In addition, the U.S. Bankruptcy Code under certain circumstances permits amendments to a Chapter 11 Plan after it has been put to a vote, whereas the in principle WHOA does not. Potential differences in the rules governing class composition may also significantly impact the potential for alignment of parallel proceedings. Moreover, whereas a group’s financial information can be provided to stakeholders and the court on a consolidated basis in a Chapter 11 case, Dutch law to a large extent requires disclosure to creditors and the court of such information for each individual group company debtor to determine (notwithstanding the court’s holistic approach) whether a Dutch Scheme can be approved on an entity-by-entity basis.

Timing is also important when deciding which elements of a restructuring are put to the test first, and in which court. By sequencing the order in which those elements are dealt with, practitioners can help courts involved in parallel proceedings to rely on each other’s findings, particularly where the schemes or plans are interdependent.

As a final piece of the puzzle, the approved Dutch Scheme was “recognized” and enforced in the United States in a cross-border restructuring case under Chapter 15 of the Bankruptcy Code—the U.S.’s version of the Model Law—to fully lock-in creditor compliance. It represented the first time that a Dutch Scheme was recognized in the United States under Chapter 15.

*Conclusion*

As both the Vroon and Diebold restructurings have shown, international restructuring practice has found its way to the Netherlands by means of the Dutch Scheme. The option of combining a Dutch Scheme with either a U.S. Chapter 11 Plan or a U.K. Scheme of Arrangement has proven successful. We are curious to see how this practice will further develop in the near future, with potentially new combinations of proceedings seeing the light of day.

1. The authors of this article are lawyers in Jones Day’s Business Restructuring and Reorganization practice. The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated. [↑](#footnote-ref-1)
2. If private Dutch Schemes are involved or if the relevant non-Dutch group companies are not domiciled in another E.U. Member State, the jurisdictional rules of the Recast EIR do not apply. In such cases, Dutch courts turn to the Dutch jurisdictional rules which, *inter alia*, allow Dutch courts to adjudicate requests related to Dutch Schemes if those requests have “*sufficient connection to the Dutch legal sphere*”. For Dutch courts to find such a *sufficient connection* in relation to Dutch Scheme requests concerning a non-Dutch entity, it is sufficient that at least one of the scheme debtors has its centre of main interest or establishment in the Netherlands (see Amsterdam District Court 8 June 2023, ECLI:NL:RBAMS:2023:6159 (Diebold) para 4.14). If the jurisdictional rules of the Recast EIR (Article 3 of that Regulation) do apply, the Dutch courts are entitled to open main insolvency proceedings only in relation to companies whose COMI are located in the Netherlands. Alternatively, secondary or territorial insolvency proceedings can be opened if such companies have an establishment in the Netherlands. [↑](#footnote-ref-2)
3. For an extensive discussion of recognition of insolvency and restructuring proceedings in E.U. Member States outside the framework of the Recast EIR, refer to the INSOL Europe and Lexis PSL joint project on ‘How EU Member States recognise insolvency and restructuring proceedings of a third country’, available at: <<https://www.insol-europe.org/technical-content/recognition-in-third-states>>. [↑](#footnote-ref-3)
4. See *Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux* (1890) 25 QBD 399 (Court of Appeal). [↑](#footnote-ref-4)
5. Available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBAMS:2023:6160>. [↑](#footnote-ref-5)
6. Note, however, that the Amsterdam District Court did not have to rule on the ‘absolute priority rule’ (*i.e.*, whether junior creditors could receive distributions without paying dissenting senior creditors being paid in full) in this specific case, as no creditors invoked that rule. [↑](#footnote-ref-6)