

WHOA: Landmark decision in the District Court of Amsterdam

Emma Buchanan and Siert Klinkhamer explore the legal techniques used in the first-of-its-kind restructuring of Bio City



EMMA BUCHANAN
Clifford Chance



SIERT KLINKHAMER
Clifford Chance



The Dutch procedure can support the swift implementation of restructuring with a range of helpful features



The District Court of Amsterdam has, for the first time, sanctioned a Dutch Restructuring Plan (WHOA) of bonds that were originally governed by English law. The restructuring also included a number of “firsts” in relation to the techniques used to implement a complex bond restructuring through a Dutch WHOA proceeding.

Introduction

Following implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks in the Netherlands, a Dutch procedure (akin to the English Scheme of Arrangement) under the *Wet homologatie onderhands akkoord* (“WHOA”) became available in the Netherlands on 1 January 2021.

The Dutch procedure can support the swift implementation of restructuring with a range of helpful features, including: a possible cram-down of creditors or shareholders within the same class with a two-thirds consenting majority, cross-class cram-down, a court-ordered stay period, debtor-in possession (“DIP”) and DIP financing, the ability to amend or terminate erroneous contracts and a clear set of grounds for refusal. The Dutch procedure can offer a high degree of certainty as the sanction judgment under the WHOA cannot be appealed. It is also an efficient process as only one court hearing is required, which is held two weeks after the documents are submitted.

This article explores the legal techniques that were utilised to implement a first-of-its-kind



restructuring by Bio City Development Company B.V., further expanding the body of case-law precedent in respect of complex cross-border restructurings utilising the Dutch WHOA process.

Background

Bio City Development Company B.V. (“BCDC”) is the holding company for a planned real estate development in Istanbul. BCDC had issued USD 207.4 million (the original principal amount) of English law governed bonds, which, with accumulated interest, had grown to c. USD 900 million (the “bonds”). The value of the bonds exceeded the value of BCDC’s assets, as the development of the real estate did not take place in accordance with initial expectations.

BCDC therefore entered into

a commercial arrangement with the bondholders and shareholders whereby BCDC would be sold by its parent entity (the “parent”) to one of the bondholders (the “purchaser”) for cash. The cash proceeds of the sale would be combined with the resources on BCDC’s balance sheet and used to redeem the bonds at a discount from par value.

The practical effect of the redemption was that the bondholders transferred the bonds to the parent, releasing their beneficial interest in the bonds in return for a cash payment. The parent would subsequently contribute the bonds to BCDC by way of a share premium contribution in kind, so that the bonds would be nullified by way of amalgamation. The terms and conditions of the bonds needed to be amended to insert a call option

to allow the bonds to be redeemed at discount from par by the parent. This amendment required the consent of 100% of the bondholders.

The bonds were held through the main European clearing systems, Euroclear and Clearstream. Therefore, BCDC did not have full visibility on who the ultimate beneficial holders of the bonds were. Following a process of outreach and discussions, BCDC was able to identify and obtain support from approximately 98% of the bondholders by value. However, the consent of 100% of the bondholders was required to amend the bonds to insert a call option. To mitigate any litigation risk, the purchaser also required the support, either of 100% of the bondholders or the certainty of a court order, to proceed with the transaction. Without the required consents, BCDC had to consider a court process(es) to implement the transaction, with the WHOA forming an attractive alternate restructuring process.

Accessing a Dutch restructuring process

A long-established rule of English law (the rule in *Gibbs*) holds that an English law debt can only be compromised using an English law process, unless the creditor submits to a foreign process. BCDC's bonds were governed by English law and so the effect of the rule in *Gibbs* would have been to render a procedure under the WHOA ineffective to amend the bonds as a matter of their governing law.

The solution was to change the governing law of the bonds from English law to Dutch law. This amendment could be effected contractually with the consent of the holders of 75% of the bonds (in accordance with their terms). Sufficient support was obtained to change the governing law from 98% of the bondholders, i.e., all those identifiable to BCDC.

BCDC had effected a deliberate change to the governing law of its debt for the

purposes of accessing a restructuring process. This is the first time a company has changed the governing law of its debt to Dutch law to support a WHOA process. The District Court of Amsterdam did not find anything improper in this action, demonstrating the Dutch Court's flexibility and capacity to implement cross-border restructurings.

However, this solution may not always be available in instances where it is of fundamental importance to the parties that a contract is governed by English law (or any other law), which may therefore result in a 100% consent threshold being required to contractually amend the governing law. In such cases, the debtor company may have no choice but to use the restructuring process(es) available to it in the governing law of the contract.

Inaugural appointment of an independent expert

The Dutch Court carefully considered the implementation steps and handed down an interim judgment appointing an independent expert to provide a report confirming that certain steps (which were designed to ensure that the transaction as whole would remain tax neutral) were not contrary to the purpose and purport of tax laws and regulations.

The independent expert recognised that the restructuring plan being proposed by BCDC was a variant of a debt-to-equity agreement, which has been regularly used and, moreover, has been recognised in guidelines published by the Dutch Tax Authorities to the effect that the authorities are willing to cooperate with a debt-to-equity restructuring plan. The independent expert confirmed BCDC's reasoning and recognised that the restructuring plan was motivated by the desire to structure the transaction as whole in a tax neutral manner and thus to be able to successfully restructure the debts through the

Dutch WHOA proceeding.

This was the first time that an independent subject matter expert has been appointed by the Dutch Court as part of a WHOA proceeding. In this instance, the Dutch Court followed the expert's opinion, agreeing with the expert's point of view. Also, the appointment of an independent expert did not significantly delay the timetable, as a sanction judgment was still rendered within 7 weeks of the start of the voting period, demonstrating the efficiency of the WHOA process.

Implementation by way of new legal techniques

The restructuring was implemented by granting BCDC certain powers of attorney, enabling it to enter into a number of agreements and take decisions on behalf of the bondholders. The legal effect of these agreements would be that the bondholders would relinquish their present and future rights against BCDC and its subsidiaries in return for a payment of cash.

Powers of attorney are a common legal technique used in English Schemes of Arrangement and Restructuring Plans to confer powers on the debtor company to issue the necessary instructions on the creditors' behalf at the appropriate time, with the assurance that the steps have been court-approved. However, this legal technique has not explicitly been considered or approved before by a Dutch Court. In this case, the Dutch Court found that the power of attorney was a suitable instrument to implement the transaction, recognising that it is customary in international restructuring practice for a restructuring plan to provide, by means of a power of attorney, for obligations to be imposed on creditors or shareholders in the context of the implementation of the restructuring plan. ■

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