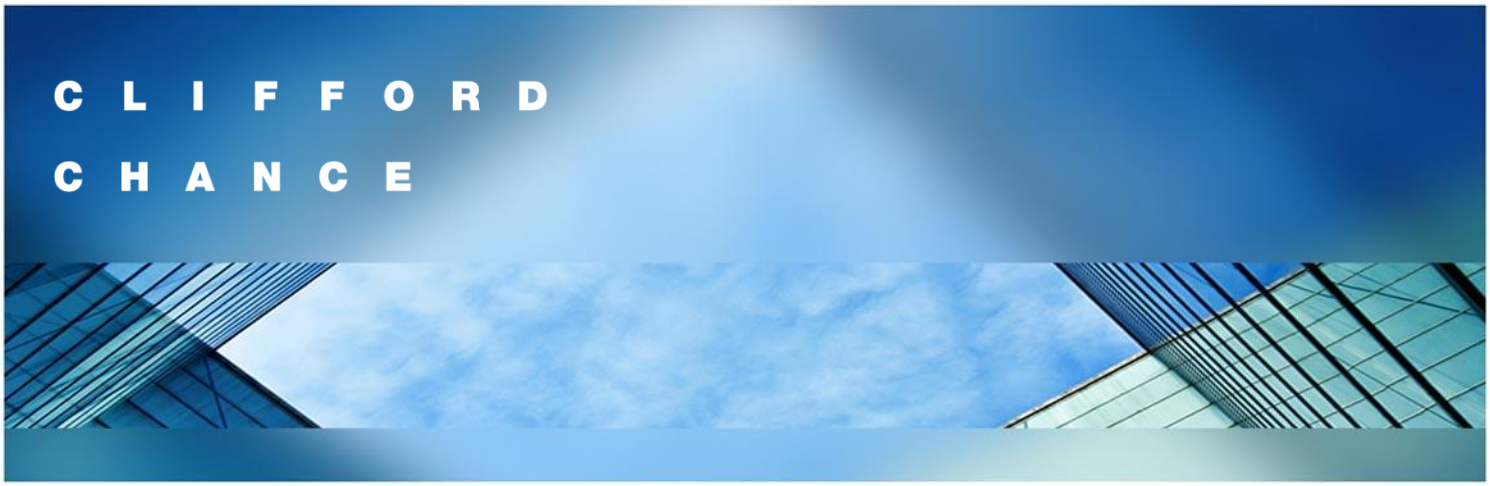

'GOING DUTCH' – RESTRUCTURING OF INTERNATIONAL SHIPPING GROUP VROON SEES DUTCH 'WHOA' COMBINED WITH ENGLISH SCHEME OF ARRANGEMENT

The much-awaited decisions of the Dutch and English courts in the *Vroon* case are an example of cross-border restructuring at its best, facilitating the restructuring of the 123 companies that together form the entire Vroon group. Both the Dutch and English proceedings were far from plain sailing – each of the Scheme and WHOA plan were met with challenges, in both courts. The main challenge stemmed from the shareholders, who were concerned that they had not fared well as a result of the restructuring and the allocation of the value in the restructured group. The courts in both jurisdictions dismissed the challenges and upheld the valuation evidence.

"*This case is an important major test for the new WHOA. Its flexibility and in this case, the use of the WHOA with the interrelated English Scheme, demonstrates the range of different options available to companies with complex international capital and finance structures. 'Going Dutch' perfectly encapsulates the coupling of the two procedures*." Ilse van Gasteren, Partner (Clifford Chance, Amsterdam).

Introduction

Given its complex capital and organisational structure, the restructuring of the Vroon Group could not be achieved through a single compromise alone. While this case (***In the matter of Lamo Holding B.V*. [2023] EWHC 1558 (Ch)**) is certainly not the first to make use of parallel processes in different jurisdictions, it is the first time that the relatively new Dutch WHOA has joined forces with the more established English Scheme of Arrangement.

Key issues

- Complex restructurings often require an international toolkit, drawing on mechanisms from multiple jurisdictions in order to achieve their desired economic effect
- The coupling of the Dutch WHOA and English Scheme offered the best restructuring solution for *Vroon*
- The Dutch WHOA was used to transfer the Group to a STAK – a demonstration of the WHOA's ability to successfully deal with dissenting (out of the money) shareholders
- The English court's role is not to achieve the 'best' compromise for creditors - only one that meets the relevant tests
- Some useful general guidance from the English courts:
  - the courts are laser-focussed on valuation evidence following the recent cases of *Nasmyth and Adler* - arguments focussed on the relevant comparator (schemes) or relevant alternative (plans) need to marshal sophisticated expert evidence in support
  - English Courts will not 'sandbox' evidence when parallel proceedings are ongoing, even where those proceedings are in different jurisdictions
  - There is no absolute rule that the English court will hear live evidence challenging a compromise, although dissenting stakeholders are more likely to be given standing when the nature and outcome of a compromise is heavily contested

Background to the proceedings

The Dutch WHOA proceedings were issued on behalf of the Vroon Group BV (Group) and its subsidiaries, and the English Scheme of Arrangement proceedings were issued by Lamo Holding BV (Holdings) (the holding company of the Group).

The Group is an international shipping company which operates and manages a fleet of 101 vessels, comprising 123 separate legal entities. Faced with various factors including the headwinds of the COVID-19 pandemic and an associated fall in demand for shipping, the Group found its liquidity squeezed from 2016, and since 30 June 2020 has been in default of an English law governed framework agreement (itself a prior step to attempt to rationalise and simplify its financial obligations, many of which had been structured on a vessel-by-vessel basis). Despite its failure to repay, the Group had been able to maintain the support of its lenders, effectively by way of a consensual standstill.

This changed in 2022, however, when various lenders of the Group did take enforcement action – exercising their rights over certain of the Group's bank accounts and vessels. The Group then looked to consummate a more formal restructuring solution in the form of an orderly disposal of certain of its assets and a debt-to-equity swap.

In order to implement the restructuring, the Group promoted interdependent processes: an English Scheme of Arrangement and Dutch WHOA. The restructuring could only take place if both the WHOA and the Scheme were given the green light by the Dutch and English courts, respectively.

The Scheme essentially allows for certain debts of the Group to be written-off / adjusted and confers Holdings, the scheme company, with the authority to enter into various restructuring documents to implement the restructuring. The WHOA, on the other hand, provides for a transfer of shares in Holdings to a newly established *Stitchting Administratiekantoor Vroon* (STAK) which will issue shares to those stakeholders otherwise entitled to a slice of the equity in Holdings as part of the restructuring.

Dutch WHOA

Under the Dutch WHOA, a company may ask the court to sanction a compromise with its stakeholders provided that at least one class of 'in the money creditors' has approved the arrangement (in case of a cross-class cramdown).

Out of the 10 classes of stakeholders of the Group who were invited to vote under the WHOA proceedings, two classes voted against the WHOA plan. The other 8 classes were supportive of the restructuring.

Shareholder challenge in the Dutch court

The more interesting (and robust) challenge of the two was from the Group's shareholders, who challenged the WHOA plan mainly on the basis that the proposed compromise did not represent a fair distribution of the value to be realised from the restructuring. Arguments around disclosure and consultation were also made.

The shareholders' submissions focused mainly on the arrangement not allocating a fair amount of value to the Group's assets – they believed that the percentage of shares attributed to them in the restructured company should be

higher than the offered 4.91%. They argued that the Group was artificially undervalued as a result of the Group's debt being attributed a value that was too high, and the value of the reorganisation being too low.

Much like the arguments they advanced in the English proceedings (see below), the shareholders also rejected management's characterisation of the Group's distress, contending that the Group was a solvent enterprise and there were ready alternatives to the solution that was being proposed (in effect a solvent winddown).

The Dutch court roundly accepted the Group's evidence in relation to valuation and rejected the shareholders' arguments.

In approving the WHOA, the Dutch court relied upon the cross-class cram down provisions, effectively binding the two dissenting classes to the restructuring.

English scheme

For a scheme of arrangement to be approved by the court, it first requires the approval by at least 75% in value of each class of members or creditors who vote on the scheme. The court will then decide (at a further hearing) whether to sanction the scheme, considering whether, among other things, the statutory test for approving the scheme (see below) is met. Unlike the WHOA (or an English Restructuring Plan), a Scheme of Arrangement does not have the ability to effect a cross class cram down: if a Scheme fails to get the approval of each class of members/creditors, it cannot proceed to sanction.

The terms of the Scheme in this case were broadly as follows:

- certain of the creditors' present loans and guarantee structures would be replaced by participation in a new, guaranteed facility;
- certain vessels of the group would be sold, with proceeds remitted to creditors who enjoyed security over those vessels, but those creditors would enjoy no additional recourse over and above the proceeds from those sales; and
- Holdings (the Scheme company) would be conferred with the authority to enter into a series of documents and instruments on behalf of itself and the Scheme creditors to effect the restructuring.

At the scheme meetings in May 2023, the Scheme (which only included two classes of creditors, organised based on creditors' exposure to assets being sold within and outside the scheme, respectively) was successful in achieving well over the statutory majority, with only one creditor not voting in favour. The only parties to oppose the scheme were the Group's shareholders.

Shareholders' objections given short shrift

The shareholders' main objections were to management's characterisation of the 'relevant comparator' as a value-destructive insolvent liquidation, believing that a solvent wind down was possible and liquidation not inevitable. They also argued that the restructuring did not provide them with a fair share of the equity of the restructured group. Evidence on valuation, approach and methodology were scrutinised but, on both counts, management's arguments prevailed.

It helped that the Scheme enjoyed overwhelming support from the Group's creditors, who had been trying to negotiate a deal for almost 7 years. The

Group had only managed to secure creditor support for a Scheme under a byzantine structure of bilateral 'support agreements' – the court accepted that it was unlikely that creditors would be willing to reopen these agreements to entertain an alternative restructuring solution should sanction for the Scheme not be forthcoming.

The court was also satisfied by the Company's argument that there was no obvious 'plan B', and – in the event the Scheme was not sanctioned – the Group's members would be forced into uncontrolled bankruptcy proceedings in various jurisdictions. This was because the Dutch court-imposed stay (which had been in place during the course of the negotiations with creditors) would automatically terminate if the Scheme failed - without a stay in place, there was nothing to stop the Group's creditors from bringing individual enforcement action under each of the Group's 33 separate facility agreements.

For these reasons, the court was not convinced that an orderly sale of the Group's assets was possible, as argued by the shareholders, nor was it convinced that this should be the 'relevant comparator' the court should use when deciding whether to sanction the scheme. The shareholders' arguments in support of their characterisation of a solvent wind-down as the most-likely alternative to the Scheme (they argued that creditors would balk at an enforcement process given the expenses associated with individual enforcement and the difficulty of enforcing security over the Group's assets) ignored the fact that creditors had been unpaid in some cases for several years, and some creditors' exposures meant they stood to do pretty well from bilateral enforcement action – costs notwithstanding.

English Court prepared to give dissenting shareholders 'their day in [English] court'…

On the evidence, the court was satisfied that the shareholders (who were not party to the Scheme) were out of the money and not willing to put any further new monies into the mix. Nevertheless, the shareholders were still given an opportunity to raise objections as to the fairness of the scheme, even though they had already been afforded an opportunity to do so under the Dutch WHOA proceedings. This decision to give the shareholders standing was particularly surprising given the court's finding that the shareholders' concerns were not with the Scheme itself, but with the WHOA plan and the transfer of the shares in STAK contemplated thereunder. The court explained that ultimately it was comfortable giving the shareholders a hearing on the basis that the Scheme, in combination with the WHOA plan, had a material effect on the shareholders which gave them a 'sufficient interest' to be heard.

The import of this finding should not be overstated, however, and careful attention should be paid to the court's assurances that it was not attempting to create an absolute rule requiring that out of the money parties be given a hearing. Further, the arguments ultimately raised by the shareholders – that management had attributed a value to its assets which was too low and not allocated a fair proportion of the equity to them – did go to the nature of the 'relevant comparator', so would need to be heard by the court for it to make an informed finding.

The court accepted that, under different circumstances, it was open to the court to refuse to give standing to an interested party who wasn't a party to the scheme (or place little weight on any objections made by an out of the money creditor who was), especially where that party had already been given the

chance to raise its objections in another forum (in this case the Dutch Court). In the event, the court was able to relist the sanction hearing to allow time for the shareholders to make their arguments, although the court accepted under different time constraints this would not be feasible. The court stressed however that there were no procedural rules obliging the court to allow such parties to adduce evidence or cross examine witnesses and, ultimately, it was a matter of court discretion as to whether such objections should be heard.

English Court careful to circumscribe its role

Much like the approach taken by the court in other recent cases concerned with restructuring plans, the court was keen to stress that it was not its role to assess whether the Scheme was the 'best' compromise achievable with creditors – only that the usual tests were met. In the event, the court was satisfied that they were for the following reasons:

- The statutory requirements had been complied with;
- The scheme meetings were a fair representation of a bona fide majority;
- The scheme was one which an intelligent and honest creditor acting reasonably might approve;
- There was no blot or defect on the Scheme – it was not unfair to the shareholders;
- The Dutch Court had approved the WHOA, it had rejected the same valuation argument proffered by the shareholders and it applied the absolute priority rule with 4.9% of the equity instruments allocated to the shareholders;
- There was sufficient connection with the English Court based on the English law governed framework agreement which formed the subject matter of the compromise; and
- Expert evidence indicated that the scheme would have substantial effect in the Netherlands, Scotland, and Singapore and that the foreign representative appointed (CFO) would be recognised in the relevant jurisdictions.

Importantly, to refuse to sanction the scheme in circumstances where the usual tests were met would be to force the parties into further negotiations, which would strengthen the negotiating power of the shareholders (clearly an improper exercise of the court's powers).

Undertaking by the parties not to challenge the scheme further gave them the finality they were after

This undertaking is likely to be of interest from a practical perspective – although English schemes are rarely the subject of the appeals, the undertaking gives all parties the added comfort that the proceedings are at an end. We may well see more requests for such undertakings in future restructurings.

Philip Hertz, Global Head of our Restructuring and Insolvency team comments: "*The restructuring of the Vroon Group is a great example of how restructuring techniques in different jurisdictions can sometimes be coupled together to offer a joint solution for complex international cases. We have of course seen it before, and we have used it before several times to capitalise*

upon the tried and tested English Scheme which can be used in parallel with other restructuring mechanisms, either within the UK, or in other jurisdictions. But it is great to see the relatively new WHOA being used in tandem".

What is a 'WHOA'?

The WHOA supports the swift creation of a restructuring plan through a procedure outside of formal insolvency proceedings, which involves: a cram down of creditors or shareholders with a $^{2}/_{3}$ majority, possibilities for a cross-class cram down, debtor-in-possession, a court-ordered stay period, protection of DIP financing, amendment or termination of erroneous contracts and a set of grounds for refusal.

Under the WHOA, creditors and shareholders are divided into separate classes based on their position (i.e. ranking) in an insolvency and/or the rights they will enjoy under the restructuring plan. A creditor's or shareholders' position will be determined on the basis of Dutch law or contract (e.g. an intercreditor agreement).

Voting takes place on a class-by-class basis and all creditors and shareholders whose rights are affected as part of the restructuring plan must be given the opportunity to vote. A class votes in favour when at least $^{2}/_{3}$ of the value that has voted in that class supports the restructuring plan. The value is based on the outstanding claims for the creditors, and the issued share capital for the shareholders. If at least one 'in-the-money' class has voted in favour of the restructuring plan, the company or, if appointed, the restructuring expert can request the court to approve a cross class cram down.

What is a Scheme of arrangement?

A creditors' scheme of arrangement is a statutory contract or arrangement between a company and its creditors (or any class of them) made pursuant to the Companies Act 2006. It is not an insolvency proceeding but can be implemented in conjunction with formal insolvency proceedings (such as administration or liquidation), on a standalone basis or in parallel with restructuring processes in other jurisdictions.

The scheme becomes legally binding on the company and such creditors (or any class of them) if:

- a majority in number representing not less than three-fourths in value of creditors (or any class of them) present and voting in person or by proxy at meetings summoned pursuant to an order of the court, vote in favour of the scheme;
- the scheme is sanctioned by a further order of the court after the creditors' meetings; and
- an office copy of the order sanctioning the scheme is delivered to the Registrar of Companies for registration.

If the requisite majorities and court sanction as set out above are obtained, the scheme will bind all the relevant company's creditors as at the date of the scheme (or the relevant class or classes of them) whether they were notified of the scheme and/or whether they voted in favour of the scheme or not. Notwithstanding this, the court will need to be satisfied that every effort has been made to contact all creditors and that the scheme is fair.

A scheme provides a useful mechanism for: (i) overcoming the impossibility or impracticality of obtaining the individual consent of every creditor to be bound to a proposed course of action, and (ii) for preventing, in appropriate circumstances, a minority of creditors from frustrating what is otherwise in the interests of a company's creditors generally (where, for example, the alternative is an insolvency process which may destroy value). It can be used for implementing almost any compromise or arrangement a company or its creditors and members may agree amongst themselves (i.e. a debt-to-equity swap, moratorium or amendments to existing agreements).

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