

CHANGE OF GOVERNING LAW, FOLLOWED BY DUTCH SCHEME PROCEEDINGS IN MAJOR BOND RESTRUCTURING

In a landmark decision, 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 plan also saw the first judicial consideration in the Netherlands of restructuring techniques pioneered on UK schemes, and demonstrates the pragmatism and rigour of the Dutch WHOA process. Clifford Chance advised the plan company.

- **BCDC:** Bio City Development Company (**BCDC**) is the holding company for a proposed real estate development in Istanbul.
- **Bonds:** BCDC had issued USD 207 million in 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 BCDC's assets.
- **Restructuring:** The commercial terms of the restructuring included a sale of BCDC to one of the Bondholders for cash, and a mandatory redemption of the Bonds at a discount to par value to allow BCDC and its corporate group to operationally restructure on a solvent basis. The restructuring enjoyed overwhelming, but not quite universal, support from Bondholders.
- **Governing law and "rule in Gibbs":** A long-established rule of English law holds (in summary) that an English law debt can only be compromised using an English law process, unless the creditor submits to a foreign process. BCDC overcame this issue by contractually amending the governing law of the Bonds, which could be done with >50% consent. This is the first time a company has changed the governing law of its debt to Dutch law to support a WHOA. The Dutch court found nothing objectionable in this.
- **Other "firsts":** The restructuring included a number of other "firsts" for Dutch WHOA proceedings in a complex bond debt restructuring:
 - The restructuring was implemented using powers of attorney granted under the Restructuring Plan. This is common in UK schemes / restructuring plans but has not explicitly been considered or approved before by the Dutch Court. The Court found that the powers of attorney were a suitable instrument to implement the transaction and has

Key issues

- On 15 May 2024 the Dutch court approved Bio City's WHOA restructuring plan
- This restructuring marks the first time a WHOA Restructuring Plan is implemented after a change of governing law
- Several complex and new legal features have been sanctioned by the Dutch court without parallel proceedings

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sanctioned the restructuring plan that included all transaction documents in draft.

- The Court also looked carefully at the implementation steps, which were designed to avoid a tax disadvantage (although using a series of steps that are "tried and tested" in practice). In another "first", the Dutch Court appointed an independent expert to provide a report confirming certain tax aspects of the restructuring. The expert confirmed there was nothing wrong in the structure. The Court followed the expert's opinion.
- More broadly, the court recognised that this was a more complex transaction than has been implemented previously using a WHOA on its own. Previous complex WHOA restructurings have been implemented in parallel with a foreign process.
- **Rigorous process:** No appeal against the sanctioning judgment is possible under the Dutch WHOA. Perhaps because of this, the Dutch court is particularly rigorous in considering whether it can and should sanction the plan - even when (as was the case here) the restructuring has overwhelming creditor support. In its decision the Court also paid attention to a pending case at the Dutch Supreme Court. A decision is expected later this year from the Dutch Supreme Court on whether undrawn commitments can be extended using a WHOA. The Court reasoned that in BCDC's matter this was not relevant as BCDC's restructuring deals only with debts that are already due and are being restructured by a fixed pay out and therefore redeemed. The Court clearly explained that BCDC's case was different from the situation currently under consideration by the Supreme Court.
- **Timing considerations:** The Dutch WHOA has also proven to be time-efficient. Between the start of the voting period and the sanction hearing 4 weeks lapsed and within 7 weeks a sanctioning judgment was rendered. Dutch courts have become familiar with complex restructuring matters in which international documentation is filed. Future restructurings may be even faster if expert evidence is no longer required on implementation steps.
- **Language considerations:** As has been the case with other restructuring processes, the sanctioning hearing was held in Dutch, through video-conference with real-time translation. However, all of the restructuring documentation was in English – with no need for translation.

The Clifford Chance team was led by Tim Lees (Partner) in London and Guido Bergervoet (Partner) and Evert Verwey (Senior Counsel) in the Netherlands. Restructuring and litigation associates Siert Klinkhamer and Annefloor Frentz also advised in the Netherlands. All members of the Dutch restructuring and litigation team appeared before the Amsterdam Court. In London the team included Katelyn Ewart, Emma Buchanan, and Nicole Georgiou. Michiel Sunderman (Partner) and Nolan Groenland (Counsel) provided Dutch law tax advice.

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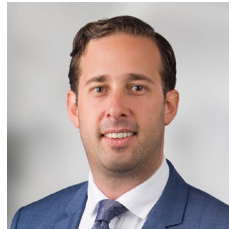
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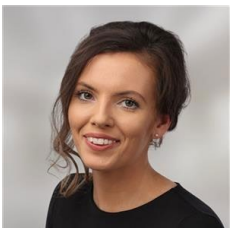
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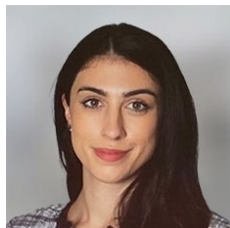
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