Ep.85 Preventive restructuring in Germany, the Netherlands and India: a comparative of StaRuG, WOHA and CIIRP

Intro Music: INSOL international, in conjunction with the Early Researcher Academics Committee, presents INSOL Talks.

Ishana Tripathi (IT) (00.23): Hello and wilkommen to INSOL Talks. Today's discussion moves beyond the theory of insolvency law and into the practice of restructuring, and specifically, into how three very different legal systems are answering the same question: how do you rescue a business in distress? To unpack that, we have Dr Robert Haenel from Anchor, speaking to Germany's STARUG; Sid Pepels from Jones Day, speaking to the Netherlands WHOA and Saurav Panda from Shardul Amarchand Mangaldas and co speaking to India's creditor led insolvency framework. Over the course of this conversation, we'll walk through how each regime actually works, where they converge and diverge, and then put all three to the test against a case study involving a distressed group with operations in all three jurisdictions.

For our international listeners, let me just start with the basics. Could each of you briefly walk us through how your regime works, from trigger to exit? And we will, of course, cover the three regimes that are named, STARUG, WHOA and India's creditor led restructuring process, which has been newly introduced. Now specifically for India, it would be great if we could also address what the existing framework is. How much does each of your regime offer substantive flexibility to shape the restructuring in practice versus the specific statute itself. And just because there's a bit of a scuffle in terms of STARUG and WHOA and the new preventive restructuring directive that we'll talk about later, let me start with you, Robert. Tell us what the STARUG is.

Robert Haenel (RH) (02.16): Thanks very much, Ishana. That is a quite challenging task to describe briefly what the German STARUG looks like, because, as you would expect from a German legislation, it's quite complicated, but I'll try to do my best. Now, the German STARUG proceeding and the Dutch WHOA have quite some similarities, due to the fact that they are both implementations of the European Union's 2019 Restructuring Directive, which provided member states with a framework for codifying pre insolvency restructuring proceedings. So it's a part of the design that they are supposed to be quite similar.

Before outlining the proceedings. It's worth mentioning that Germany also introduced a kind of a court supervised mediation for entrepreneurial debtors with economic or financial problems. The German term is *sanierungsmoderation*, and you could translate that as a rescue mediation. It's basically the attempt to copy the French Amicable Proceedings, the pre insolvency proceedings, *mandatoc conciliation*. Unlike in France, however, that kind of proceeding has not played a significant role so far in practice in Germany.

Now coming to the to the STARUG proceeding, a debtor can make use of that proceeding, or rather of that framework in the state of imminent insolvency. That means that the debtor is still able to pay his due debts, but liquidity is likely to run out within the next twenty four months. To start the proceeding, the debtor notifies the competent court, and the notification must contain comprehensive details about the debtor and its current state and the restructuring concept. Now, within that STARUG framework, the debtor can then apply for certain instruments, as the law calls it, and that is a stabilizing order, which is basically a stay of execution and/or stay of collateral

realization. Then a judicial pre-check of plan related questions. So you're allowed to approach the judge and speak to him about what you intend to write into your plan. And then you have the possibility to have a court supervised voting process for the plan or a out of court voting process. And in both cases you can, after voting on the plan, apply for the court approval of the restructuring plan.

Now, under certain circumstances and upon request of the debtor, the court will appoint a restructuring appointee, would be the translation of the German term, which is an expert who then assists the court, assists the debtor and supervises the whole process. The court may at any time lift the proceeding, in particular if the debtor becomes insolvent or breaches any of his duties, mainly duties to cooperate and provide information constantly, or if the restructuring concept has no further prospect of success.

Coming to the restructuring plan under the restructuring plan, claims and collateral, including intragroup third party collateral can be restructured and measures under company law can be taken. In particular, changes in the shareholder structure. Claims by employees, tort claims or fines cannot be restructured and subject to the restructuring plan. The author of the plan can classify the creditors, or rather the rights of the creditors. And so the creditors vote in different classes of rights on the restructuring plan and to accept the plan or to get to the acceptance of the plan. That requires a simple majority of the classes who vote on the plan, and within each class, a 75% approval of the affected parties. So not just of the voting creditors, but of the affected parties, because in the STARUG proceedings. You don't necessarily have to include all your creditors, but just the ones you need to get your plan through.

Dissenting classes can be overruled, overruled by way of a cross-class cramdown if there is no better alternative, and if the overruled class participates adequately. And then individual debtors can also try to challenge the plan, but that is quite tricky with regard to the formalities. In Germany, we already had within insolvency proceedings an insolvency plan, and the STARUG restructuring plan is kind of designed according to the template we had with that insolvency plan. And so we have been quite familiar with any kind of measures you can take or you can pack into such kind of plan. So it's nothing totally new. The new thing is the proceeding and particularly the majorities of course are a different. And that you don't necessarily have to include all the creditors into that proceeding. That's basically a very brief overview without going into the complexities.

IT (07.59) Thanks, Robert. Now let's see if the Dutch made it easier. Sid, tell us a little bit about WHOA.

Sid Pepels (SP) (08.07): Yeah. Thanks. Thanks. Um, well, as Robert mentioned, WHOA and the STARUG have quite some similarities. So the Dutch law, a debtor, individual creditors, shareholders and the employee representative bodies that are constituted in larger Dutch companies can all initiate WHOA proceedings with the specialized Dutch WHOA courts. Our Dutch entry test is actually quite similar to the German STARUG, prescribing that it must be reasonably likely that the debtor cannot continue to pay its debts, and the Dutch law that presumes that the debtor at this point is still able to pay its due and payable debts, whilst at the same time there is no reasonable prospect of avoiding future insolvency if the debts are not restructured. And it provides a flexible test to judges with the notion that our legislator initially referenced a 12-month forecast period in the explanatory memorandum. But that isn't necessarily a requirement of the law itself.

So WHOA can be opened without a hearing? In contrast to, for instance, a scheme of arrangements in the UK and that that start of the process in the Netherlands can be through filing a start declaration with the court's registry. And that's 2-pager highlighting some details concerning the company and the choice. Choice for the proceeding. Hearings will only be held at the start of the proceedings if the application of any of the instruments is WHOA warranted. So a stay of enforcement actions or bankruptcy petitions, the appointment of restructuring expert who assists with the preparation of the plan. Or, for instance, the appointment of a of an observer, as we call them on the Dutch law, who monitors the overall process.

The content of the restructuring plan is quite flexible in the sense that the law requires that the plan alters the rights of some or all of the debtors creditors, but a secured, preferred unsecured and of the existing shareholders. As the WHOA takes a flexible approach to the underlying terms of restructuring plan, its content may be tailored to the circumstances at hand and can, for instance, and these are, I think, the examples that you will see in any jurisdiction, until a debt for equity swap an entire or partial write off, an extension of the debt, a sale of all or part of the debtor's assets, or a combination of these and other options. So there is not necessarily a reference on what the content of the plan should be.

So WHOA plan can additionally also provide for the release of guarantees, joint and several liability or collateral provided by group companies. That's similar, if I understand it correctly, to the STARUG. Employee claims are also similar to the STARUG, also exempted from the WHOA scope. But contrary to German law, we do not have a statutory exclusion for tort claims. So there's been some debate on what that in practice would actually mean. And the views of the US style mass tort litigation through a restructuring plan proceeding is a topic that is being discussed in the Netherlands, but it hasn't really been tested in fruition so far.

But the fact that we have a flexible approach to the content of the plan does not mean that there aren't guardrails on those aspects. And the first of them is the Dutch priority rule, which falls through the scope of the class division, so similar to Germany, stakeholders are divided into classes, voting classes on the basis of similarity of their rights against the debtor, and the restructuring plan has to be approved by 2/3 of a majority of the voting class, which in our case is 66.67% instead of 75 for a class to vote in favour of the plan. And under the WHOA, court approval can be requested if at least one impaired in the money class votes in favour of the plan, which basically means that not every class needs to vote in favour of the plan. So that also means that cross-class cramdown are possible in the Netherlands, in which case a dissenting creditor of a dissenting class can ask the court to deny confirmation of the plan if it does not comply with the pre-existing priorities.

So that basically means that in our Dutch version of the priority rule, which is often referenced as the absolute priority rule, but isn't necessarily that that absolute because it's flexible as it only comes into play in case of a cross-class cramdown and in case of a cross-class cramdown, only the dissenting creditors in dissenting classes can invoke the rule. And even if they do invoke the absolute priority rule, courts may deviate from the priority rule and confirm a plan nonetheless, if there are reasonable grounds to do so, so that in line with US law, that means new money exceptions, a director who has a very substantial role within the company, who's also a shareholder, keeping him in that sort of exemptions. So that's our first guardrail. We have that that priority rule that determines to some degree how value should be distributed.

And the second guardrail that's most important dimension is our best interests of creditors test, which is also a concept that is derived from the directive, the EU directive that Robert already

mentioned at the beginning, which in our Dutch interpretation, means that dissenting creditors may request the court to deny approval if they receive less than they would under in the case of a bankruptcy. So that sort of puts a floor underneath the distribution that creditors are entitled to in on the plan.

IT (13.56): So thanks, Sid. Clearly not simpler than this. So here I suppose the Dutch are not winning. I will, of course, now move to the jurisdiction that essentially has been touted as the new restructuring jurisdiction. And Saurav can tell us the processes that our creditor led and being introduced, and the existing corporate insolvency process in a very, very short form for the international audience.

Saurav Panda (PAN) (14.26): Thanks, Ishana. India's restructuring landscape, really speaking, sits on three pillars, and it's materially different from both Netherlands and Germany. We have the central regulator, Reserve Bank of India, which from time to time comes out with a set of regulations which govern restructuring of bank led debts, and these operate outside the formal insolvency processes, and, really speaking, apply only to those cases where you have consensual restructuring as a feasible option and are totally dependent on intercreditor agreements amongst the financial creditors.

The second pillar, and which has been the keystone of the insolvency resolution processes in India, is the Insolvency and Bankruptcy Code driven corporate insolvency resolution process. This is really a formal insolvency process that completely transformed the model of debt restructuring in India. It was introduced in 2016 and since then it's been the keystone of our resolution processes. The material difference for the insolvency process under IBC is that it is a completely creditor driven restructuring process, where the debtor management is replaced by an independent professional called the Resolution Professional.

The third pillar is the statutory restructuring, which is in a way the oldest because the Companies Act covered these schemes of arrangements. But now there is a recent IBC Amendment Act, and I think Ishana did allude to it, which is the introduction of the creditor initiated insolvency resolution process, which has been in the making for a while. And in a lot of ways, there are similarities with the hybrid restructuring models under the STARUG and WHOA.

I'll very briefly touch upon the key steps in the CIIRP process. It can only be initiated by a set of financial creditors, and the notification is not yet out in terms of who are the eligible financial creditors. So it's really speaking a work in progress at this stage. The financial creditors with 51% approval can initiate the insolvency process. The company and its existing management get about 30 days to make representations or to raise any objections to this initiation. And once it is initiated, there is a resolution professional who gets appointed as per the decision taken by the financial creditors and from the date of the appointment of this resolution professional, the insolvency process commences. The resolution professional then makes a public announcement, calls in for the claims and over a period of about 150 days. The intention is to come up with a resolution plan which meets the approval of 66% at least of the financial creditors, and takes into account the interest of the different stakeholders and comes up with a viable and feasible resolution plan.

Once the plan is approved by the Committee of Creditors, which is basically the Committee of Financial Creditors exclusively. In the Indian context, the corporate insolvency process also gives primacy to the financial creditors in the decision making, and the same process continues even in the creditor led insolvency resolution process. So once the approval is there, thereafter it goes to the National Company Law Tribunal, and once they have approved, the statutory cramdown is

available and you can actually have a cramdown on all the classes without really getting any inputs from those classes in the decision making process.

In the event, however, that the existing management is not supportive and it has not been cooperating during the process, the Committee of Creditors do have the ability to take the company directly into the formal insolvency process under the corporate insolvency resolution process. So that's really the key lever that the committee of creditors have to basically get the best cooperation from the existing management of the company.

Now, increasingly, what we are seeing in the Indian context is that there is a trend to move more and more towards informal workout solutions, such as through rescue financings and private credit. We are seeing more and more focus to try and move towards models such as the CIIRP, and the reason for that is our traditional form of insolvency resolution process has been a little slow in terms of delivering resolution plans. One of the key differences between the Indian CIIRP on one hand and the STARUG or WHOA on the other hand, is that we don't have the flexibility of initiation based on imminent financial stress. There has to be a trigger of an actual default to start the process. But this is going to be the key process going forward in the restructuring landscape in India. So we are all waiting as practitioners to see how it pans out over the next few years.

IT (20.20): Thanks so much, Saurav and Sid and Robert for simplifying what is not really an easy process in any jurisdiction. But what I'm going to do now is flip the order of jurisdictions. I'm going to stick with India because it is still a regime in implementation, and then go back to Germany and the Netherlands and how it has been implemented.

So Saurav, India has two distinct roots. They established CIRP under the IBC and the newer creditor initiated insolvency resolution process, the CIIRP. Can you clarify the core difference between the two? What problem was the newer process designed to solve that the CIRP didn't already address? How does the CIRP compare to who can initiate under the newer creditor initiated route, and does it change the balance of power?

PAN (21.16): So let me first deal with the core issue why CIIRP was felt to be the need of the hour in India. Under the CIRP, you need the interference of the tribunal pretty much at every stage. But importantly, to formally admit any case and to have the moratorium available to the process, you first need the NCLT initiation, the Company Law Tribunal initiation process. Now, debtors routinely exploited this trigger point, and they would mount several challenges to delay the admission process, while the company and its assets continue to deteriorate. The 2023 IBBI Expert Committee, in fact, identified this as a critical structural vulnerability, and they proposed decoupling the protections from the tribunal admission. That really became the trigger for the introduction of CIIRP.

The key benefit of CIIRP is that it will hopefully speed things up very significantly. One of the key things that it addresses is that you really don't have any major roadblock to initiating the process. Once 51% of the financial creditors have agreed, and unless the corporate debtor is seeking to delay the process, it will happen, it will be initiated, and the corporate debtor ordinarily will not want to block this process, because it gets to continue to remain in the management and to find a resolution, as opposed to a formal insolvency resolution process where the corporate debtors existing management risk being alienated from the process entirely.

The critical safety net is that if CIRP doesn't produce a resolution process, resolution plan within a defined period of time, the existing management completely loses its leverage and it can lose the entire company because once the company moves into a CIRP, the existing management is

practically out. They have a very limited window of getting back in through the Section 12A route which is which requires a much higher threshold of about 90% of the financial creditors agreeing. And ordinarily, any sensible promoter would not want to take that risk.

So there is an inherent sense of protection built into the CIIRP process, which will hopefully encourage good behaviour by the existing management to fast track a resolution process. That seems to be the intention of introducing CIIRP, and we'll see in time to come once the rules and regulations come in. And once this is implemented, how it practically plays out. But it will critically change the balance of power because so far it was entirely a creditor driven game under the formal insolvency process under IBC. But going forward, it kind of balances the power between the existing management and the creditors, which will hopefully fast track resolutions without significant change or disruption in the ongoing business operations and the existing management.

IT (24.40): Now, having said that, one of the key features of the Indian regime is what is called a stay in different jurisdictions or what is known as a moratorium in India. Now, once either process kicks in, as you've explained to us, moratorium kicks in and both Robert and Sid have spoken about the position of a secured creditor. So I want to understand from you and so does our audience, what enforcement options do secure creditors immediately lose when a CIRP or a CIIRP kick in and r the moratorium provisions the same in both routes, or is it handled differently?

PAN (25.23): So this is where it gets a little distinct and interesting. Under a traditional CIRP, the moratorium is automatic. The moment the process is initiated, the moratorium kicks in. But in case of CIIRP the moratorium is completely optional. The creditors need to approve and thereafter file an application to seek a moratorium. It is not an automatic effect of the initiation of the process. The resolution professional has to basically go to the tribunal file separately for the moratorium based on the approval.

Now, this creates a little bit of a gap between the start of the CIIRP and any moratorium application, the debtors assets technically continue to remain unprotected. A secured creditor, in theory, could in fact enforce during this particular window. But here's the flip side that retained enforcement leverage can actually produce far more genuine negotiations in the early stages. And under CIRP, the secured creditors completely lose all their leverage the moment the moratorium kicks in, because there is an automatic protection that is available, but under CIIRP that they keep that leverage until the moratorium is actually obtained. Of course, if the process ultimately moves into CIRP, the moratorium is available. But that's really the key distinction between the both the processes.

IT (27.04): So as these regimes now sit side by side and you seem to be excited about the introduction of one of them. How would you advise a creditor on which one to use? Do you expect one to eventually eclipse the other?

PAN (27.21): See, CIIRP is designed to supplement the CIRP. It's definitely not intended to replace it. Both of them serve completely different purposes. A CIIRP, in fact, has a far broader role in the sense that it is available to also the operational creditors and the company itself to initiate a traditional CIRP as opposed to a CIIRP, which is only available to a certain set of notified financial creditors. Moreover, the CIIRP is also available only to certain eligible classes of debtors. The eligible class of debtors is yet to be notified, but will know in due course what it intends to really cover. CIRP according to me, will continue to remain a workhorse of the Indian insolvency landscape. But CIIRP will offer a much faster on ramp, especially in those cases where the existing management inspires confidence for a consensual restructuring to be arrived at. With the

transparency and fairness of the process being ensured by an independent resolution professional. Decision making continuing to be driven by financial creditors, you have the ability to not disrupt the existing management, continue with the ongoing business operations and try to find a resolution in a quick, say, 150 day time period, which is what is contemplated in a CIIRP.

If I had to choose, in any case between CIRP and CIIRP, I would look at the management first because under CIRP the board is out immediately. CIIRP keeps the management with the RP oversight, which will perhaps work much better when the cause of distress is not really linked with any concerns on corporate governance. CIIRP definitely promises a much more expeditious route. You do not have the typical roadblocks of initiation, which are sometimes observed in a CIRP. You also have to look at what the creditor composition really is. CIRP requires 51% approval from the notified financial creditors.

It may be a lot more attractive for those holding a sizeable piece in the overall debt profile in the company, but it may not really appeal to those who perhaps are will fall in the category of the non-notified debt holders, such as bondholders or in certain cases, certain foreign creditors as well. One of the other aspects why I think CIIRP will definitely dominate in certain sectors is because of the ease with which you can find a resolution in certain sectors through the debtor cooperation. For instance, uh, service based sectors such as EPCs, it is far easier to find a resolution with the existing management continuing as opposed to formal insolvency processes. India has had a very difficult experience in the last 10 years of the insolvency processes in several of these EPC resolutions, aircraft resolutions, or, you know, for that matter, even retail service resolutions. These are some of the triggers, in fact, which precipitated the, uh, CIIRP to come into the statute.

IT (30.58): Now. Thank you for that answer, Saurav. And here because we are speaking too international restructuring as potential future for India, and also looking at India as perhaps a potential primary opening of proceedings jurisdiction. The question arises is what is the misconception that international lawyers have, particularly about who can initiate an insolvency proceeding in India and what happens when they do? Could you tell us a little bit about this perspective, or perhaps remove any misconceptions that international lawyers have about the Indian restructuring landscape?

PAN (31.43): Sure. One of the major misconceptions that I've seen is that people think that you need to prove insolvency before commencement of insolvency process in India. You really do not. All that you need to establish is that there has been a default. If there is a debt and there has been a default, that is enough to trigger an insolvency resolution process whether CIIRP or a formal CIRP. You don't need to show balance sheet insolvency. You don't need to show a net worth. You don't need to show cash flow insolvency.

The second aspect is that a lot of people have seen assume that only banks can initiate insolvency processes in India, perhaps driven by the fact that there is this perception of financial creditors holding a very significant seat in the whole insolvency resolution process. But that is not correct. Not just financial creditors, but also the operational creditors can initiate insolvency. But yes, it's true that in a CIIRP, as of now, it's contemplated that only the notified financial creditors can initiate it.

Thirdly, and I've seen this play out very often that a lot of stakeholders end up negotiating with the ex-management, not knowing that the ex-management is completely outside the decision making process in a formal insolvency process of the corporate insolvency resolution process. It is only in a CIIRP or some of these RBI led restructuring frameworks that the ex-management

continues to have any ability to influence decisions. Otherwise, you would be better served to have the negotiation, have the conversation with the creditors, the financial creditors, who are truly the key decision makers. These are some of the critical misconceptions that I've seen. The other misconception, perhaps, is the perception about the legal system in India that sometimes it is a little too slow. I would say that it depends. It is only in certain cases that the processes are slower, but in most cases there is a degree of certainty in our judgments.

IT (34.06): Now, with that very positive response, I will now fly to Germany and see what the STARUG has to offer. So question to you now, Robert is, unlike where India ended, that its different types of creditor initiated, STARUG is debtor initiated, and it actually doesn't require formal insolvency. How do you, under this regime, assess whether a company is imminently illiquid enough to qualify?

RH (34.43): Yes, I found it quite interesting that in India, only creditors or mainly creditors can initiate restructuring proceedings, because in Germany it's just the other way around. Creditors can only initiate proceedings that may lead to liquidation not to restructuring. Now, as you might expect, Germans love sophisticated definitions. So our triggers for an insolvency proceedings, illiquidity and overindebtedness have a huge case law and whatever about how to define it in in the detail. To initiate a STARUG proceedings you have to be imminent insolvent. And that requires that I explain first at least a little bit what is illiquidity under German law.

Illiquidity simplified means that a debtor is not able to pay at least 90% of the due debts within the next 3 weeks. And in order to assess imminent illiquidity, you need some kind of liquidity planning. And if, according to that planning, the debtor is not yet illiquid at the moment, but will be illiquid within the next 24 months. Then you are in the state of imminent illiquidity and you're eligible to initiate STARUG proceedings. You can also initiate a regular insolvency proceedings in that state, but that is the trigger for STARUG proceedings.

We did have some cases, in fact, where the court questions whether the debtor company has already arrived at the state of imminent insolvency, because in some of the German cases, you have the impression that it's rather about a fight among the shareholders. And one of the shareholders tries to squeeze out the other one. And so they kind of produce that imminent illiquidity in order to be eligible for the STARUG proceedings. And in order to check that, the court will either anyway appoint the restructuring appointee and ask him, ask him to check the liquidity planning and the preconditions. Or the court can also appoint just an expert who might be the same person who is eligible as the restructuring appointee, to just check that issue, is there imminent illiquidity or not?

Now, what can become a problem in Germany is that as soon as you have illiquidity or overindebtedness, there is an obligation for the management to file for insolvency, and that is quite severe for the management if they don't meet that obligation. So they are, of course supposed to observe whether they enter into that trigger for insolvency proceeding. And in case you have imminent insolvency within the next 12 months, you may already be in the state of overindebtedness because again, very basically the definition of overindebtedness is more or less, you have a forecast whether you can continue with your business for the next 12 months. And if that forecasts turns negative, which basically means you get illiquid within the next 12 months, then you have to compare the value of your assets to the debts. And if the value of the assets is lower than the debts, then you're overindebted and have to file for insolvency. If you apply for a for a STARUG proceedings, however, and you have a certain prospect of success there, then you may value your assets with going concern values, not liquidation values. And then

you may not yet be overindebted, but it's a very thin line, I would say, to to be imminent, illiquid, and not yet overindebted.

IT (38.45): Now understood. But it is important also to compare. Walk us through how the automatic stay under STARUG compares to the moratorium or as it is called in Europe, stay under the Indian processes, particularly for secured creditors looking to enforce is different.

RH (39.09): The STARUG of proceedings offers two possibilities of stay. As I already mentioned, one is with regard to execution, which is hardly ever used because if there is any creditor already executing against the debtor, then it is quite likely that the debtor is already insolvent and has to file for a regular insolvency proceedings. But the second possibility is a stay for collateral realization. And that applies particularly, I would say, for creditors who have a mortgage on real estate, because they can, in case of a default, and in case of a waiting time after notification of the data, they can trigger a court auction of the real estate and that can be halted or freezed, let's say that possibility by the restructuring court in German STARUG proceedings. I haven't seen that very often because as soon as you enter into STARUG proceedings, or let's say normally the debtors enter quite early into STARUG proceedings where there is no execution or collateral realization pending. And if you include the secured creditors, they regularly will abstain just because of the threat, let's say that the court may order a stay. And so this instrument that the star offers is hardly ever used.

IT (40.39): Now, my last question to you here, Robert, is on cramdown because obviously no conversation is complete without talking about cramdown or cross-class cramdown. Now to venture into this area and taking the liberty to talk about India again, which has a simple majority cramdown. How does cramdown and cross-class cramdown actually work in practice when say you have a dissenting creditor?

RH (410.7): Now there is, there is a difference in Germany to many of the other jurisdictions who implemented the restructuring directive. The European Commission granted options for the Member States what the majority's should be, and in the German insolvency proceeding, when you have an insolvency plan, then it's sufficient to have a simple majority, like 50% plus within a class of creditors or claims, and a majority in relation to the voting creditors. Now, when our legislator introduced the STARUG proceedings. He thought that if you have the possibility in the STARUG proceeding to select the participants as the debtor, then you should be able to motivate the participants to vote and therefore the majority is not counted in relation to the to the creditors who vote on the plan, but to the creditors who participate. So even non-voting are counted within the 100%, and you need 75% within a class to get the approval of the class for the plan.

So if you have a dissenting class where you don't need that majority, then the debtor can apply to the court for a cross-class cramdown. And that requires normally a majority of classes having voted in favour of the plan except for the case that you have only two classes, then the approval of one of the classes is sufficient if it's not a shareholder class, because even the shareholders can vote on the plan if you restructure their rights. Normally it's by squeeze out, let's say.

Now, if the court is asked to initiate the cross-class cramdown or to approve the plan, even though not all classes voted in favour of the plan, the court checks whether the dissenting classes are put in a worse position, basically. And so they will take a look at whether the members of the dissenting group are not worse off than the next best alternative scenario. And that is also something that might be different in other jurisdictions. You might only compare to the insolvency or liquidation scenario, but in Germany it's the next best alternative. That may be

insolvency proceedings, but it may also be a different kind of restructuring. If that's likely to be implemented. Implemented.

Then the second filter, let's say, is whether that group or the members of that group participate appropriately in the economic value that is accrued among the affected to the to the affected parties. And definition of appropriate participation in principle means the champagne pyramid, let's say among the classes and the absolute priority with a certain liberality, let's say just a, the kind of flexibility they also have in the, in the WHOA, like, for example, you may treat members in the same rank differently, if that is appropriate under the given circumstances, and you might leave some kind of value to the shareholders or to the debtor itself if it's an individual. If that is necessary to continue the business, and if they contribute to the realization of the plan, and if the impact on the creditor's rights is minimal. So a relative absolute priority rule, let's say as the filter for the cross-class cramdown.

IT (44.59): Now on that note, let's just take the train to Netherlands. And here Sid to you. India said creditors, we favour you. Germany said debtors, let's have you front and centre. But Netherlands said, why discriminate? Let's have them all. WHOA allows creditors, shareholders to initiate, and of course the debtor. How common is that in practice that you have different types of stakeholders initiating WHOA proceedings, and does it change the dynamic compared to, say, an Indian creditor driven route?

SP (45.42): Yeah, yeah, yeah, that's a good question. I think generally speaking, there are some examples of creditor initiated processes, albeit that they're limited. I think to a large degree. This is a comment up front that in the larger cases, you'll tend to see parties having agreed to a form of a restructuring by majority ahead of actually filing. Which often means that whilst on paper a process is debtor led, in practice it will often be multi stakeholder process that has already been precooked to some degree. So I think even if you look at the big number of cases that are perceived as debtor led in the Netherlands, you'll behind that see a lot of creditors who have already agreed to that process. But I think if we look at actual creditor led processes or shareholders for that matter, which I don't think we have an example. It can only be where they can only actually request for the opening of proceedings through the appointment of a restructuring expert, which is a court appointed insolvency practitioner who has a mandate, has to negotiate and prepare a restructuring itself, replacing the debtor.

So that has been perceived by the market and in cases also by the judges, as a relatively intrusive mandate. Because the idea behind the restructuring directive, the EU restructuring directive and the WHOA is in principle that the company holds the power to negotiate the plan. It's a DIP process. So we've therefore seen the practice develop over the last years towards a scenario where debtors, when confronted with a creditor led request, a request for the appointment of a restructuring expert. For debtors to seek to prevent such an appointment by filing for the other type of insolvency practitioner that we have in Dutch was the observer.

So the observer is a second type of insolvency practitioner whose mandate is substantially lighter than that of a restructuring expert, because it only comprises of monitoring the process and advising the court on elements, whilst the debtor itself remains in charge of the WHOA process. So in the in the couple of cases, recent cases where we've seen a WHOA being commenced on the initiative of creditors, the debtor tried to keep control over the process by countering that with the appointment of a court observer. Then you have a court appointed insolvency practitioner who monitors but who doesn't take control. And the *InterCement* case, Brazilian case is a well-known cross-border example. What had happened where a Dutch process was

commenced by creditors requesting for the appointment of a restructuring expert pending proceedings in Brazil, New York, because that group of bondholders was unhappy with the developments in Brazil and New York, particularly, in their view, the lack thereof. So they requested the appointment of restructuring expert in the Netherlands in respect of the Dutch debtor. And then the Dutch WHOA court chose for the appointment of the more light touch monitor in order to facilitate the international process.

IT (48.55): Now Sid, in that very favourable to restructuring pro resolution background that seems to project, might I remind you that Germany still has more World Cup titles than the Netherlands? However, whats driven companies with no Dutch nexus to choose WHOA. And how do enforcement rights for foreign secured creditors play out once the proceedings start?

SP (49.28): I do have a sense that that lead in wasn't necessary to get to the question, but we'll we'll see past that one. Um, so one of the Dutch schemes most important benefits is that it's available both to Dutch companies that have their centre of main interest in the Netherlands or are domiciled in the Netherlands on the one hand, and foreign companies on the other hand. So if a debtor is located in the Netherlands, principally meaning it's COMI is in the Netherlands, a public Dutch scheme, proceedings may be opened that is public in the sense that the name of the debtor is publicized and registered in the Insolvency Register and the Dutch or the court decisions actually reference the name of the debtor as well.

And those Dutch public proceedings are part of the European Insolvency Framework, which means that a decision in a public WHOA is automatically recognized throughout the EU because it's included in the list of insolvency proceedings that is annexed to the insolvency regulation. But that's a public proceeding. That's the European framework. And that basically means you can only have access to the WHOA, to the public WHOA, if as long as you're a European company, if you have your COMI in the Netherlands.

But we also opted for an alternative mechanism that debtors can choose for, which is a non-public Dutch scheme, non-public in the sense that the name of the debtor will not be referenced in any public register and will not be included on the court judgments as well. And access to that non-public type of proceeding is open to any debtor with sufficient connection to the Netherlands. So that's mirroring the UK scheme of arrangements, which, for example, under Dutch law, is already sufficient if a substantial part of the debtor's assets are located in the Netherlands, or if one or more of the restructured group companies are located in the Netherlands, which will often be the case with multinational group companies. Or third, if the relevant finance documents are governed by Dutch law or include a foreign choice for Dutch court. And so in those and other circumstances, the Dutch court has jurisdiction to open WHOA proceedings, not only in relation to Dutch companies but also to foreign companies.

Because that private type proceeding, that non-public proceeding doesn't necessarily fall within the scope of the European, and so it doesn't fall within the scope of the European Insolvency Regulation. For recognition of court confirmed restructuring plans, parties will have to rely, if it's a non-public proceeding on recognition under UNCITRAL Model Law Implementations. Other types of domestic laws of states where recognition is necessary. And if it's in the EU, potentially based on the European Brussels One regulation. But that will depend, that's an analysis that you will have to make depending on the individual jurisdictions. And through that, that broad jurisdictional opening of insolvency, or WHOA proceedings for foreign companies, the WHOA provides for an easily accessible platform for the financial restructuring for multinational groups of companies.

IT (52.33): Now Sid, clearly the WHOA is setting a benchmark in terms of optionality with respect to restructuring, whether public or private, and with these two tracks that are available, the curiosity lies on how it treats the dissenting creditor. So what does choosing one of these tracks mean for a dissenting creditors options under the WHOA?

SP (53.00): Yeah, I think that's, uh that's a very good question. I think largely speaking, there's one point that I have to make upfront is if you're going through a non-public track, the effects of that proceeding only impact the dissenting creditor if they've been informed and they've been notified. So they, whether you go through a public or private track for any creditor who's actually affected by the plan doesn't necessarily matter. They will have to be notified of the proceedings. They will have to be allowed the option to participate in the proceedings, and they will only be bound by, for instance, the moratorium if they've actually been informed on the existence of that.

But in terms of deciding between public and private tracks, I think there are two main aspects. And one of them is the level of impact that the publicity will bring. We've seen in practice that I think most debtors, the vast, vast, vast majority of debtors preferred and non-public track as that just simply substantially limits the negative impact on the business.

And the second one, and that's more technical, the non-public track provides for more jurisdictional flexibility, as I just mentioned, because that public track requires confirmation to the European Insolvency Regulations COMI requirement, where under the non-public track, the sufficient connection standard applies. So if the restructuring, for instance, concerns a multinational group of companies, including both Dutch and Non-Dutch EU companies, that non-public track will allow you to centralize restructuring in a single jurisdiction in a manner that the public proceedings simply will not due to that COMI requirement.

So what we've in terms of dissenting creditors options, what we've seen in practice so far is that regardless of recognition and enforcement questions that you can have in the difference between, on the one hand, the public and on the other hand, the non-public proceedings, is that creditors just generally tend to comply with Dutch judgments, which is to a large degree what we've seen in the past happen in the UK in respect of schemes of arrangements as well. To the extent that creditors, for instance, object to the plan or want to make filings in the plan, those objections are generally filed within the context of those proceedings. And alternatively, in cases where additional safeguards are necessary, we, for instance, have worked with parallel processes. So in the restructuring of *Diebold Nixdorf*, for instance, that we've been involved in, which was a group of companies with heavy US component and heavy European component with group companies throughout the EU as well. We did a parallel process in the US and in the Netherlands to ensure global coverage of the restructuring. So where necessary. That's sort of the default mode is in case of WHOA, was to make sure that we stitch all of it together.

IT (55.52): Now, thanks for covering all aspects of the WHOA for us Sid, especially with respect to the fact that there are more use case scenarios in WHOA than the STARUG at this moment. Having said that, you do have the much talked about preventive restructuring directive that's on the horizon that affects both Germany and the Netherlands. And I do want to know is how has the STARUG and WHOA helped the enactment of the Preventive Restructuring Directive? Because the intention of these two legislations was to be able to implement the EU directive. But they've been transposed very differently. And what are the most significant cases that you could discuss today under the STARUG and under the WHOA, where judicial interpretation, court interpretation has been seen for the best interest test or cross-class cramdown safeguards. And if you could give us examples of the different ways in which both these laws are operating with this

umbrella legislation that is meant to harmonize. It would really give us insights as an audience in terms of the way forward and the future of preventive restructuring in the EU at large and specific to your jurisdictions. And I would like to first invite Robert to provide us his thoughts with respect to the STARUG and the preventive restructuring directive.

RH (57.40): Okay, maybe just a few words in advance for non EU people. We would certainly like to advertise the system that there is a quite harmonised pre insolvency system now in the European Union wherever you go. Of course when you look at the details there are some differences. And just to maybe avoid one misunderstanding, the restructuring directive was the first step of the European Legislator. To my knowledge, the Dutch already were on the way to make something like the WHOA, and they just tweaked it a little bit to fit into the restructuring directive.

But Germany was not very keen on implementing or inventing a pre insolvency proceeding, because we like to think of our insolvency proceeding as a very good restructuring tool. So we were we were more or less forced to do it. But of course we wanted not to be second to the Dutch, and that's why we implemented it very quickly. At the same date, 1st of January 2021.

If you like clichés, I once heard somebody say that when you look at the STARUG and the WHOA, then you see that the Dutch are a people of merchants and the Germans are a people of bureaucrats. And there may be some truth in that, because I have the impression that the Dutch WHOA is a bit more flexible, a bit more user friendly than the German one, but the German one is, I would say, the gold standard of bureaucracy, and formality and everything. So if you go through that, you're really safe.

There are some built in differences, I would say, and that is that in the WHOA you have the possibility to terminate certain contracts, which Germany did not allow in the implementation. Apart from that, the WHOA was very popular in the Netherlands right from the start. There were hundreds of proceedings within the first 2 years while in Germany. Well, the Germans treat new things like the Catholic Church. We just reject it for a couple of hundred years and then we start getting familiar with them. And so we had very few cases in the beginning. And then after the first, bigger cases came in like Leoni, Gary Weber, Varta, Bywar. Now we're familiar with that, and we use it as a tool. Before that, it was very useful as a threat to the creditors and the banks, but not so much as a real proceeding that that should be used.

The development in Germany or the discussion in Germany is, as I already mentioned, about can it really be used as a instrument to squeeze out minority creditors, bondholders or whatever? And so there are pending cases at the German Constitutional Court to tell us about where is the limit or the border. And that may be a particular German thing that we discuss shareholder rights mainly in these kinds of proceedings.

SP (1.00.57): And I think that's an interesting, interesting point of reference. I think where we've looked at the WHOA and the large cases where that was actually put in place. It is usually focused mainly on the creditors. And I think our implementation of the WHOA is quite clear on taking away rights of shareholders, if need be, and if all the requirements are complied with. So, for instance, a judgment from the WHOA judge can replace a shareholders resolution where necessary for the issuance of new shares, all that sort of stuff. So that's for us. I think that's substantially less of a discussion, aside from one of the earlier cases that we've done, which is the vroon matter, a well-known case involving a Dutch shipping company, where the relationship between the shareholder and the and the creditors was one of the main focal points.

Other significant cases include the already referenced *Diebold Nixdorf* case. *Mercom*, a South American coffee Company, *Steinhoff, Royal ESA*, also shipping and the *BioCity*, which was a real estate development company. And all those cases have shown different type of discussions. Discussions on parallel multinational effect of restructuring proceedings, liquidation type proceedings. *Steinhoff* was a case involving shareholder liability. *Royal ESA* concerned the manner in which a restructuring plan could impact ongoing financing obligations and ongoing finance facilities in a relationship between banks and debtors.

Biocity was the first example where instead of the English importing a non-English case to the UK and restructuring a foreign company through a through a scheme of arrangements or a Part 26A plan proceedings. This was the first example where we did it the other way around, and a company that had English law governance that was restructured through a WHOA. So that's one that the Dutch practice was particularly proud of.

But those are those are all sort of cases on their own with their own discussions, which to my amazement, didn't necessarily involve a lot of discussion on how the WHOA actually interplays with the restructuring directive. I think that's something that I expect to start arising more often in the next couple of years. Questions on that relationship between those two documents. So I think for now, the main difference that I see with the STARUG and the WHOA, which plays probably in with our slightly mercantile nature as Dutchies and our Protestant, uh, composition is that um, we have made the proceeding available widely for foreign debtors. And I think that's, that's a major difference with the, with the STARUG, which also means that all those cases that I just mentioned, to a large degree, contain cases where we see the WHOA being used particularly effectively in a cross-border context. That isn't to say that it isn't used with SMEs. There has been some debate on whether or not the WHOA actually functions for SME type companies. I think it should, and in most cases it does, depending on where you put the threshold. But it's used in cross-border context is probably the biggest difference now.

IT (1.04.26): Saurav, Robert, Sid, thank you very much for bringing complex processes and various stakeholder considerations to the table for our listeners. Now that we've learned about these three distinct restructuring processes, let's put them to test through a case study, which is our next episode. With that, I'm going to bid you adieu and say tot ziens. Till we meet next time. Thank you very much for introducing our listeners to STARUG, CIIRP and the WHOA and the practical realities of these restructuring regimes.

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