Letter from the Editor

How important are judges? Very important, when it comes to setting up and running a new system of restructuring businesses.

This is just one early conclusion to be drawn from the performance of The Netherlands' WHOA 'Dutch Scheme' which launched on 1 January.

Much of the reasons the Dutch were keen to introduce a restructuring mechanism was to replace the need for Dutch companies to 'go to London' to use its more user friendly restructuring regime, exemplified by the UK Scheme of Arrangement.

There was added interest to the launch of the Dutch Scheme as it coincided with Brexit, and an expected shift of cross-border cases away from London, due to recognition issues.

Whether Amsterdam will succeed in attracting this kind of work is too early to say. But it is already clear that the decision by the Dutch to introduce eleven specialist judges for all Scheme cases has been a success (see Page 3).

From a 'standing start' of no experience with Schemes, the eleven judges have been able to build up a body of expertise which they have shared between them.

Contrast this with the experience of Germany, which introduced its own new restructuring mechanism, the StaRUG, on the same day. Stakeholders are faced with over 100 local courts in Germany, each with a non-specialist judge who may have minimal experience of any insolvency or restructuring cases.

The Dutch experience is closer to the UK, where a small handful of specialist judges deal with all complex insolvency and restructuring cases. In fact Mr Justice Zacaroli has been hyper-busy this month, having presided over the New Look and Regis CVA challenges and the Hurricane Energy Restructuring Plan (see pages 10-12).

Mr Justice Snowden, meanwhile, has dealt with the Virgin Active Part 26A Restructuring Plan.

One of the few crumbs of comfort UK-based restructuring professionals can take from Brexit, which largely ignored the needs of the service sector and legal recognition issues, is the quality of the UK's judges.

Their expertise in cross-border matters and the relative speed with which they can hand down a decision are still attractive factors to international stakeholders.

The lesson here seems clear. If the World Bank, INSOL International and other bodies are serious in helping countries around the world to improve their company rescue regimes, a small body of well-trained, specialist judges seems a good place to start.

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The Dutch Scheme: The story so far

Since the introduction of the 'Dutch Scheme' or WHOA restructuring mechanism on 1 January, six points have emerged:

1 Known unofficially as the 'Dutch Scheme' after the English Scheme of Arrangement which it was aimed to supersede, the WHOA procedure has proved a big hit with small and medium-sized enterprises (SMEs). The affordability and accessibility of the new procedure for smaller businesses are big wins.

Consider, for instance, the challenges that the US has faced in making Chapter 11 affordable for any but the biggest companies.

One difficulty in commenting on the Dutch Scheme is that so many of them are completely confidential. While the courts have published some decisions on the Scheme, many other cases have remained invisible, making it difficult to analyse the overall success or otherwise of the new legislation.

2 One of the aims of the Dutch WHOA legislation was to attract cross-border restructuring cases that would previously have gone to London-before Brexit made the recognition of UK procedures and judgments in the EU more problematic.

For the reasons that local professionals find hard to explain, three separate international cases since December all appeared to be tailor-made for the Dutch Scheme – and instead all three ended up using an English Scheme of Arrangement.

This is despite the fact that the new Dutch system uses English-speaking courts, and that all three cases involved Dutch companies.

Why this happened, and whether this trend will continue, remains to be seen.

3 One part of the new system which Dutch professionals are delighted with is the performance of the 11-strong team of specialist commercial judges who are tasked with dealing with all Dutch Scheme cases.

These judges have learnt rapidly about the new legislation and how it works in practice, and have pooled their experience between them. "It's working brilliantly," said one Dutch lawyer. "This has obvious lessons for other jurisdictions. If you want to get a new system or procedure up and running quickly, having a specialist team of judges really helps."

The judges were geographically spread about The Netherlands amongst the country's eleven district courts, but this did not handicap their communication online.

This is a contrast with Germany's network of over one hundred local courts, for instance. Important restructuring or insolvency cases may be heard by a judge with little or no experience of the topic.

4 "We will soon see 'twinning' of English and Dutch Schemes," said one professional. Running these two procedures in parallel in order to restructure an international company would solve two challenges; Firstly, the UK's 'Gibbs Rule' which states that a discharge of debt under the insolvency law of a foreign country is only recognised in England if it is a discharge under the law applicable to the contract.

This means that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. The Dutch Scheme is generally recognised as an insolvency proceeding, for instance.

Secondly, UK procedures no longer automatically enjoy recognition by courts in the EU following Brexit. Using a Dutch Scheme would overcome this problem.

"When it comes to twinning Dutch and English Schemes, it's a case of when, not if," said the professional.

5 The fifth point is really an amplification of the fourth one. Brexit has increased uncertainty over international restructurings generally. For instance, lawyers now face increased uncertainty over issuing legal opinions for refinancings, particularly on whether restructurings will be recognised by local courts or not. The English Scheme of Arrangement relied heavily for recognition on the Brussels Regulation before Brexit, which now falls away.

Moreover, the English Scheme is increasingly perceived within the EU as an insolvency mechanism, both because the Dutch equivalent is defined as such, and also following the UK court judgment in gategroup.

6 Lastly, in order to help develop new expertise in restructuring, and enable discussions between advisors on tackling the problems listed above, The Netherlands is about to launch its own restructuring association. Further details will be given when it goes live next month.

Four things that need fixing in **Germany's new StaRUG**

One German operational turnaround manager – who preferred to remain anonymous – welcomed the new restructuring tool, but warned it would never achieve its potential without some crucial modifications.

"My gut feeling is that StaRUG is designed primarily for domestic German cases, rather than cross-border restructurings.

"It's not the framers' fault. It's mostly timing. StaRUG has arrived post Brexit, which has prompted a certain 'Balkanisation' of big cross-border restructuring cases in Europe (not that there are many at the moment).

"Where previously the majority of complex cases would tend to be managed from London, now there are a number of competing restructuring frameworks and hence a greater risk of cases being split up between a number of different centres, because of recognition issues of UK judgments (less so for Schemes, more so for Part 26A Restructuring Plans) and mechanisms within the EU."

1 The first problem is recognition of the StaRUG in other jurisdictions, outside Germany. You can't use StaRUG for non-German borrowers, albeit there should at least be automatic recognition within the EU from July next year.

2 Germany still has no CVA. The StaRUG has many useful powers, but amending contracts is not one of them, unlike the UK's CVA. The UK's new Part 26A Restructuring Plan is even more powerful. The Virgin Active Plan (which has just received court approval) is the first of its kind to bind landlords and bind creditors at the same time.

3 The StaRUG still leaves the directors of a distressed company owing their primary duty to the existing shareholders rather than creditors, even as the company approaches insolvency.

4 The UK has a picked group of specialist judges with expertise in commercial, restructuring and insolvency matters. All key questions regarding CVAs, Schemes of Arrangement and Restructuring Plans are directed towards them. Just look at the procession of timely judgments in the last two weeks.

In contrast, in Germany, over 100 district courts (in practice around two dozen), with a non-specialist judge, can end up hearing an important insolvency or restructuring case. "It's still partially the luck of the draw," said the operational manager.