



DUTCH FOUNDATION (STICHTING)

HOW DOES A DUTCH FOUNDATION DIFFER TO THOSE IN OTHER JURISDICTIONS?

The Dutch foundation, or Stichting as its known, has been a unique tool since its implementation in Dutch law in 1956. Being the structure of choice in the estate planning space in the Netherlands and across Europe for decades, during the past few years its use for financial institutions, institutional investors, private equity and multinational corporates has become more apparent. Although there are several other foundation models to be found in common law jurisdictions and Anglo-Saxon law trust vehicles that share some of its features, the Dutch foundation legal framework and its distinct characteristics make it a top choice for transactions involving orphan structures and should be a key structuring tool employed by international capital markets, corporate or debt restructuring and securitization specialists.

A Dutch foundation is an autonomous corporate vehicle that has full legal personality and constitutes an orphan structure. It is represented by a board of directors and is not controlled by shareholders, partners or members. This main feature in conjunction with the possibility of separating the economic interest in, and the control of an asset, makes the Stichting a preferred solution that should be part of each restructuring toolkit in light of off-balance, merger control, insolvency remoteness and asset protection considerations.

Other contestants in the orphan structure space are the foundation models that have been embedded in several civil law countries more recently. The Stichting is different because, it can be established to hold assets without predetermined beneficiaries or restrictions in respect to the asset class. Furthermore, the Stichting is an “orphan” structure, in the corporate space there are in principle no ties to beneficiaries or other third parties and there is no accountability or duty to inform third parties in respect to its activities which is the case for other types of foundations.

Other differentiators include the fact that a Stichting does not require a governmental approval for its establishment or to operate for charitable purposes. Also its establishment is straightforward and can be achieved within one business day which is a good fit for the fast-moving corporate structuring space.

WHAT MAKES IT SO SUITABLE FOR CORPORATE AND DEBT STRUCTURING?

The features that make a Stichting so suitable for corporate and debt structuring are its orphan nature and the possibility to separate the economic interest and control of an asset. Furthermore, it is not restricted to domestic assets only – it is able to hold and dispose of Dutch and non-Dutch assets or a combination of both as in the case of pan-European CLOs, and to grant security or provide guarantees in respect to such assets.

As already mentioned, the orphan nature of a Stichting ensues from the absence of shareholders, partners and members or other bodies to which it would have fiduciary duties. In principle there are no other parties in control of the foundation besides the board of directors (unless catered for, meaning that for example a supervisory board or third party body with certain rights – such as the power to dismiss or appoint the board of the foundation – can be implemented if required.) Precisely because the asset originator or sponsor does not have control, it is an effective tool for off-balance and insolvency remote structures in the securitization and asset protection or warehousing space.

For other structures it is important to maintain the orphan nature whilst proceeds from the asset should flow to the asset originator or sponsor. To that effect, the Stichting has the possibility to issue depositary receipts that give the holders of such receipts the rights to the economic interests of the orphaned asset. This arrangement also offers flexibility as variations are straightforward to implement, for example with respect to profit distribution timing and specific economic rights.

In addition, we typically see the use of the Stichting in debt restructuring or security enforcement transactions for merger control and regulatory reasons, and to avoid a fire sale of a distressed asset. However there are many more types of structures and transactions in which a Stichting offers a restructuring solution, again proving to be an efficient legal vehicle for such purpose.

WHAT ROLE DOES IT PLAY IN THE TRADITIONAL PRIVATE FUND SPACE?

Stichtings are versatile vehicles and also have their purpose in the investment fund space. The purpose for debt funds for instance is apparent in light of the debt restructuring or security enforcement transactions as mentioned before.

We have also encountered structures in which the foundations act as fund continuation vehicles for funds that are at the end of their lifecycle and still have some residual assets that hold substantial value however do not justify fund restructuring and high associated unwinding costs.

Moreover, foundations are also being used to effectively implement management participation at the portfolio company level.

IS JTC SEEING A STRONG APPETITE FOR STICHTINGS AS PART OF STRUCTURING?

There is currently a strong appetite for the Stichting. Due to the current need for liquidity in the market there remains a high demand for foundations with respect to securitization structures.

Moreover, due to the COVID-19 crisis and the distressed environment it has created, the number of non-performing loans is on the rise. As a result we note an influx of debt restructuring transactions for which the foundations are being used to warehouse assets in light of security enforcement considerations.

The Dutch foundation or Stichting is a true multi-purpose vehicle that offers a variety of solutions. We expect the high demand to remain and our team would be happy to assist in this respect.

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