The Dutch 'Stichting'

An effective and flexible tool in global structuring

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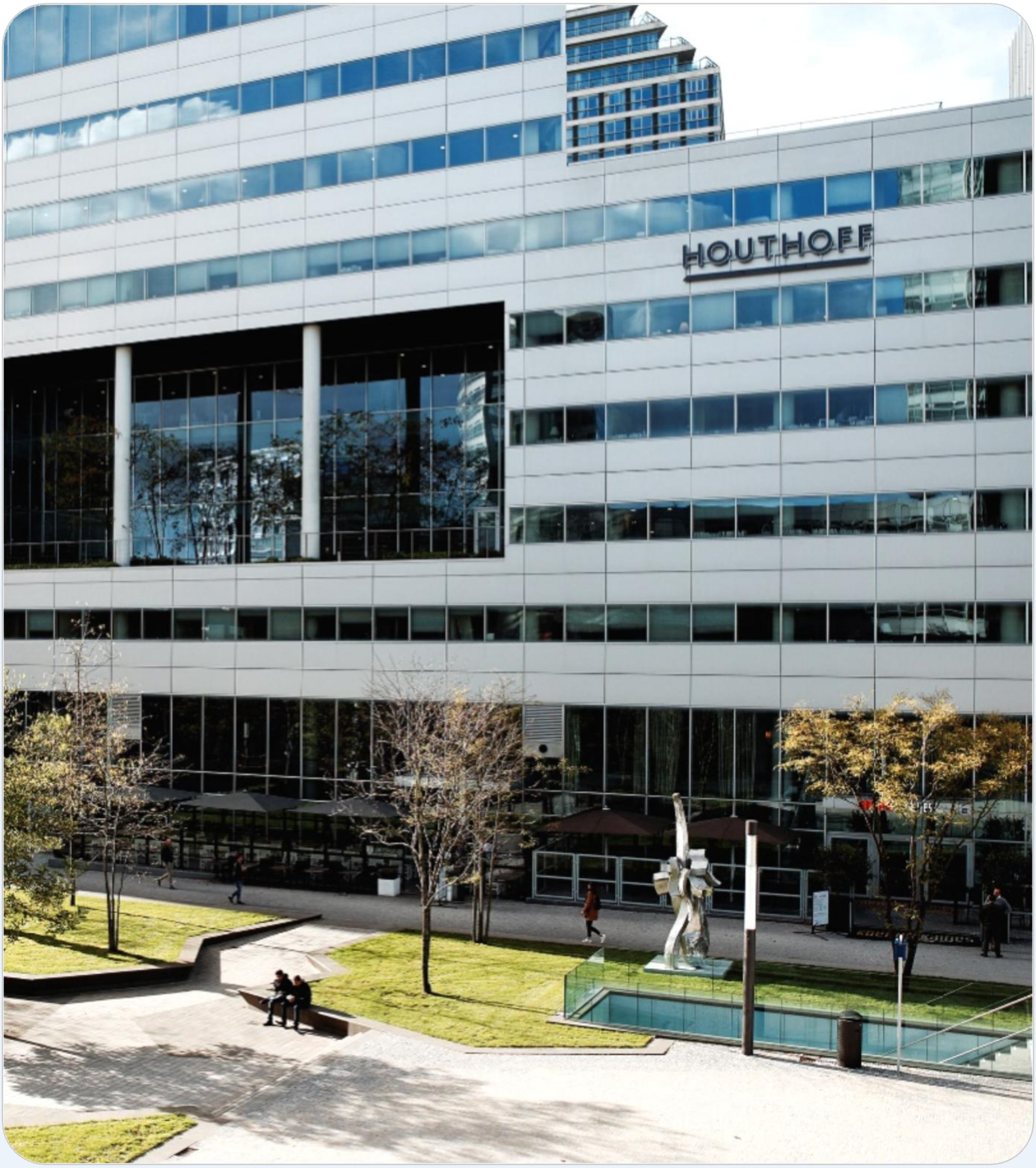

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The Dutch 'Stichting', an Effective and Useful Tool in Global Structuring

The Dutch 'stichting', also referred to as 'foundation', is an already widely used type of legal entity, allowing major corporates, investors and others around the globe to separate economic interest and control (whether permanently or temporarily) in ways they do not manage to do effectively through structures available in other jurisdictions. We believe that the stichting could be used even more extensively in international deal making and governance situations in years to come.

A stichting is an orphan entity that only needs to have a board of directors, which has full control of the entity. It does not have, and is therefore not controlled by, any member or shareholder. Different from foundations in many other jurisdictions, the incorporation of a stichting does not require governmental approval, nor does it have to operate for charitable purposes (in fact, most don't). This makes the stichting an effective and useful tool in corporate structuring. In this white paper, we provide a brief description of the main characteristics of the stichting under Dutch law, followed by the most typical business structures in which stichtings are used: (i) as a structural measure to split legal and beneficial ownership of shares, and to concentrate voting control on such shares at the board of the stichting, and (ii) in international transactions for strategic or defensive purposes.

Main characteristics of a stichting

The stichting is a self-contained legal entity with separate legal personality that has no (and cannot have) members or shareholders. Accordingly, no one "owns" a stichting.

Currently, there are more than 200,000 Dutch entities set up in the form of a stichting. Traditionally, like foundations or trusts in other countries, a stichting was utilized for charitable purposes, or as a private foundation. Although still used as such, the majority of stichtings are nowadays used for economic, social or even purely business purposes. A stichting can be a shareholder in a corporation and may develop business activities through subsidiaries. In addition, stichtings are used as a special purpose vehicle in a broad range of matters, which may be related to corporate governance, anti-takeover protection or otherwise.

In principle, the board of directors is the only mandatory corporate body.[1] In general, all powers within the stichting are vested in its board. The stichting is governed and, by default, represented solely by its board. The authority to appoint and dismiss board members can be attributed to outside parties, but is also frequently attributed to the board itself in a system of co-optation. Also, in well-defined circumstances, the board members can be dismissed by a court. In addition to a board of directors, the stichting may also have a supervisory board.

A stichting is created solely for the purpose of clearly defined objectives as included in the objectives clause to be laid down in the articles of association of the stichting. As a result of this objectives clause, the articles of association provide the context in which the stichting operates. The objectives clause cannot contain any

1 This may be different in specific regulated sectors. For instance, healthcare institutions may in fact be required to set up a supervisory board.

provision allowing payments to be made to the stichting's founders, except for salary (for work done on behalf of the stichting, where applicable) or reimbursements.

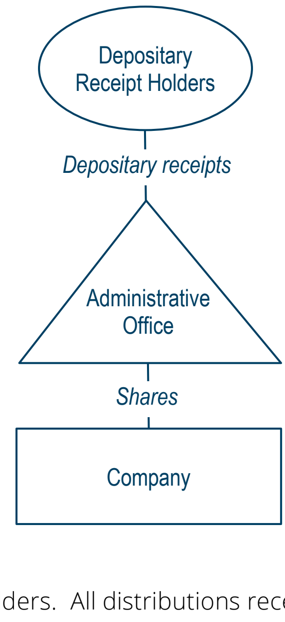
The stichting is established through the execution of a deed of incorporation before a Dutch civil-law notary and must be registered with the Dutch trade register. Neither any governmental approval or authorization, nor the contribution of any capital is required for such incorporation. Once incorporated, a stichting can attract funding by way of fundraising, governmental or other subsidies, donations, reimbursement of costs or otherwise. The stichting must have its seat in the Netherlands, but can have a registered address anywhere outside of the Netherlands.

Currently, a stichting is not required to publicly file annual accounts, unless it operates a business with a turnover in excess of €7.5 million per year. In short, any person who receives over 25% of net distributions made by a stichting in a certain financial year, will be listed in a public register for Ultimate Beneficial Owners ("UBOs") during the following year. Any person who holds at least 25% of the voting rights with respect to a resolution to amend the stichting's articles of association will likewise be listed in that register. If the stichting has no such UBO, each of its directors must be listed as 'pseudo UBO'. Each stichting is also required to keep an up-to-date and non-public list of all donations made by the stichting. Importantly though, the listing as a stichting's UBO will be a purely *pro forma* matter, as a stichting clearly does not have any owner.

As a general matter, the founders and board members of a stichting are not personally liable for debts and other obligations and liabilities of the stichting. This may be different in the event of tortuous acts or in the event of mismanagement.

Stichting Administrative Office

By interposing a special type of stichting, commonly referred to as an administrative office, it is possible to make a perfect split between the beneficial (or economic) ownership of any type of assets (for instance, shares) and the legal ownership thereof. Although this measure is widely used for both non-listed and listed shares in Dutch and non-Dutch companies, it can also be used for any other type of valuable assets.



An administrative office that is used for shares is set up as follows: In exchange for the issuance of shares by the relevant company to the stichting administrative office, the stichting will issue one depositary receipt for each underlying share to third parties (which third parties pay up for the securities, and whose payment is directly passed on by the stichting to the company). As a result, the legal ownership of the shares will be held by the stichting, but the economic interest in the shares will be held by the depositary receipt holders. All distributions received by the stichting, in its capacity as the legal owner of the shares (i.e., the shareholder of the relevant company), will typically be passed on directly to the holders of depository receipts, securing tax transparency and economic ownership of the underlying shares with the holders of the depository receipts. However, depending on the purpose of the stichting, different arrangements are possible (e.g., not passing on (any or all) economic benefits if so desired for a limited or longer period of time, or otherwise, all as laid down in the stichting's constitutive documents). Rather than directly upon issuance of new shares, it is also possible for a shareholder to contribute existing shares to a stichting against the issuance to it by the stichting of depositary receipts.

The stichting is the legal owner of the shares and will in that regard (i) exercise the voting rights and other shareholders' rights in relation to the shares, and (ii) collect any distributions made in relation to the shares. The stichting must exercise these rights in accordance with the stichting's articles of association and the document governing the relationship between the depository receipt holders and the stichting (the administrative conditions). Consequently, the stichting will be able to exercise control over the company by exercising its shareholders rights, such as voting rights. If the constitutive documents provide that the stichting board should exercise voting rights in accordance with the instructions of the holders of depositary receipts, the board must at all times do so. However, the administrative conditions may also determine that the stichting board can (for instance) exercise voting rights at its sole discretion (at any time, or (e.g.) following certain specified triggering events), allowing the voting rights (and/or the economic rights) attached to the shares to be removed, for any period of time, from the holder of the depositary receipts. When structured properly, the powers vested in the stichting board cannot be challenged successfully in court (the court will respect the independent legal personality and capacity of the stichting under and in accordance with its constitutive documents). The appropriate composition of the board of directors of the stichting is therefore of great importance. Typically, in family-owned companies, the founder of the company will (continue to) control the voting rights in the general meeting of the company through a stichting, usually by controlling the board of directors of that stichting or by having a seat on that board, while (other) family members receive depositary receipts that entitle them to profits.

Since a stichting is subject to limited legal constraints, the governance of a stichting can be designed in a tailor-made manner, through tailoring the articles of association and administrative conditions. For instance, the administrative conditions may include provisions on depositary receipt holders' information rights (or, reversely, that they don't have any), transfer restrictions, drag-along and tag-along provisions, good leaver and bad leaver provisions and all kinds of arrangements that are typically found in shareholders' agreements.

In case of a publicly traded company, depositary receipts (as opposed to the underlying shares) may be admitted to public trading. In that case, the holders of depositary receipts have to be granted a power of attorney by the stichting to vote on the underlying shares, which power of attorney can typically only be withheld, limited or revoked in the event of, amongst other matters, a non-solicited bid (or the like).

Strategic and Defensive Stichtings

Stichting preference shares

The articles of association of a publicly traded company may (and many in the Netherlands do) provide for the creation of a separate class of preference shares that can be called (pursuant to a separately entered into call option agreement) at nominal value by an independently managed stichting. It is, in principle, at the discretion of the board of the relevant stichting (which will be set up for that specific purpose; a "stichting preference shares") if and when to exercise the call option. Such stichting preference shares' sole purpose will be to act in the best interests of the company concerned and its business. When deciding whether to exercise the call option at any time, the stichting board would need to determine that the continuity of the company is threatened and seek to protect such continuity. Such 'protection of continuity' would typically refer to a hostile bid situation, but could potentially include other non-solicited activity such as non-solicited stake building (combined with an effort to seek to obtain 'creeping control' or the like). Currently, this is the most popular defensive measure used for Dutch listed companies. Case law has shown that the structure is solid, effective and not subject to successful challenge in court when properly structured.

Dutch law requires a resolution of the relevant company's general meeting to issue shares, or to grant the right for a limited period of time to another corporate body (typically, the board of a company) to issue shares. In line therewith, a call option that is granted to a stichting requires approval by the company's general meeting of shareholders, whereby such a call option is frequently already granted prior to the initial public offering of the relevant company. Preference shares, when issued through exercise of the call option, are typically non-listed, non-transferable and will have equal voting rights to the publicly traded (ordinary) shares. The stichting will only need to pay up 25% of the nominal value per preference share, and arrangements to (temporarily) cover such payment from a non-distributable reserve of the company are allowed, thus allowing conferring a significant amount of voting rights to the stichting for limited funding.

Typically, the mere presence of these stichting/call option structures appears to have a 'preventive effect'; there have only been a couple of instances in which a stichting actually exercised its call option, whether in the context of a non-solicited bid (KPN (2013) and Mylan (2015)) or in an activist scenario (Stork (2007) and ASMI (2010)). Examples of other corporates that have implemented stichting preference shares structures include Aegon, AholdDelhaize, ASML, Boskalis, DSM, Fugro, ING, Philips, Randstad, SBM Offshore, Vopak, Wolters Kluwer, Signify and TomTom.

In the Stork situation (2007), two activist shareholders of Stork, seeking to force Stork to divest its non-core businesses, challenged the composition of Stork's supervisory board. In the ASMI case (2010), activist shareholders that pursued the implementation of a fundamental corporate restructuring (i.e., splitting the company's 'front-end' business from its 'back-end' business, and, therewith, arguably a change of strategy) also sought to change the composition of that company's board. Both the stichting preference shares in the Stork situation and the one in the ASMI situation responded by exercising the call option they held on preference shares of the respective companies, which call option exercise –in both cases- was challenged by the activist shareholders concerned before the Enterprise Chamber at the Amsterdam Court of Appeals (a specialized Dutch court dealing with corporate disputes). In the Stork case, the court held that the call option agreement entered into between Stork and the stichting preference shares only permitted the exercise of the call option in case of a hostile bid scenario. Accordingly, the Enterprise Chamber ordered the cancellation of the preference shares. In the ASMI case, the legality of the exercise of the call option could ultimately not be reviewed as the Dutch Supreme Court held that the Enterprise Chamber had no jurisdiction to rule on such legality. In both cases, the parties used the time created by the call option exercises, and subsequent litigation, to implement alternative corporate strategies that the respective boards deemed preferable from an overall stakeholders' interest point of view (while, partially, addressing the activists' concerns). Both cases underscored that when a stichting structure is implemented well and the stichting acts in accordance with its constitutive documents, the structure will in principle not be penetrable.

In July 2015, Mylan's stichting preference shares exercised its call option to acquire preference shares, even before Teva formally confirmed its proposed non-solicited USD 40 billion bid for Mylan. As a result, the stichting acquired 50% of the issued capital (and voting rights) in Mylan, and thereby successfully blocked Teva's bid. A similar situation occurred in 2013, when América Móvil ultimately did not pursue its intended bid for Royal KPN N.V. after the KPN stichting responded to the announced bid by exercising its call option. As the latter two exercised call options were never litigated, the legitimacy of the respective stichtings' actions was never tested, while in both events the non-solicited bidders ultimately did not proceed in making the bid they had previously announced.

Stichting administrative office at a publicly listed context

The creation of depositary receipts in respect of a publicly traded Dutch company (whereby the depositary receipts issued by a stichting will be the publicly traded securities, rather than the underlying shares held by the stichting) is a frequently used structure. In these instances, a system of appointment of directors of the relevant stichting by co-optation largely insulates the stichting (and, therewith, the publicly traded company) from non-solicited bids (as well as from activist shareholder approaches).

In 2015, ABN AMRO put in place a stichting administrative office in the context of its IPO on Euronext Amsterdam. The depositary receipts issued by the stichting and that represented the ordinary shares in the capital ABN AMRO (on a 1:1-basis) were listed on Euronext Amsterdam. Indeed, the stichting that holds the shares in the capital of ABN AMRO (and issued the depositary receipts that are now publicly traded) is entitled to vote the shares itself, at its discretion but in accordance with its stated corporate purpose, in the event that any of a number of specified threats to the continuity of ABN AMRO materializes. In the absence of any such threat, the stichting consistently exercises its voting rights in accordance with the instructions of the holders of depositary receipts. For a financial institution like ABN AMRO, this structure (as opposed to *e.g.*, a preference shares option structure) means that the stichting as existing controlling shareholder' has been precleared from an (ECB) regulatory point of view, while it can become 'active' at any time when a 'threat' actually arises.

Some examples of other Dutch companies that have a similar or different stichting administrative office structure in place include Fugro, KLM and Euronext.

Stichting priority shares

Most material shareholders' resolutions (e.g. the appointment of board members or the amendment of the articles of association) can, if so desired, be made subject to the prior approval of a meeting of holders of priority shares. In such a case, a structure could be set up so that the priority shares are held by an independent stichting. If so, the relevant stichting will typically have the objective to serve the best interests of the relevant company and all of its stakeholders (including employees, customers, suppliers, *etc*.). Accordingly, although not a strict anti-takeover device, the implementation of a priority share structure may substantially deter hostile takeover activity, as – in the absence of an agreement with the holder of priority shares – the existence of the priority shares may substantially affect a bidder's ability to gain full control over the Company within a predictable period of time (in particular, where the acquiror would require the stichting's cooperation for effecting envisaged board changes). When a company that has implemented a stichting priority shares is acquired, the acquiror might not be in a position to secure full control unless it secures support of the stichting's board, *de facto* forcing a negotiated offer.

Dutch companies that have a stichting priority shares in place include AkzoNobel, Arcadis and Aalberts Industries. However, priority share structures have lost popularity over the years, as listed companies have tended to want to show the 'openness' of their corporate structures (but, in doing so, have mostly (by far) retained their stichting preference shares or stichting administrative office structures (each, as described above)).

Other Examples of the use of a Stichting

- A stichting can be used for a wide range of other purposes. Without being exhaustive, other examples of the use of a stichting are the following:
- a stichting, that may be set up as an administrative office, the purpose of which it is to ensure that a particular asset cannot be sold, while the owner of the depository receipts will keep full economic ownership and, if necessary, operational control over the asset. This is a structure that is often referred to as a “crown jewel lock up.” Such a "lock up" can, for instance, be done to create an “antitrust road-block,” to otherwise frustrate an unsolicited offer, or to ensure that a corporate group cannot be dismantled (a version of which was implemented in the Arcelor/Mittal situation);
- a stichting that acts as an escrow agent in a corporate M&A transaction;
- a stichting that holds the shares in a vehicle that issues bonds or notes or holds collateral (orphan structure);
- a stichting that acts as an independent entity holding certain licenses, permits or IP rights that are essential to the business of a certain company or group of companies; and
- a stichting that acts as a liquidator in case of sale of any and all assets and liabilities of a target in a public takeover, immediately followed by a liquidation of the target and distribution to the remaining minority shareholders of an amount per share that equals the bid price.

We believe that the world is about to see more Dutch stichting structures used in more (non-Dutch) international and cross border situations. Not every country needs to (or, for that matter, will) implement its own 'stichting legislation.' The Dutch structure works, can rely on a proven body of case law, and has already been implemented in many international structures.

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