ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co Advokatfirma
Advokatfirman Törngren Magnell
Alexander & Partner Rechtsanwaelte mbB
Ashurst Hong Kong
Atanaskovic Hartnell
Bär & Karrer Ltd.
BBA
Bech-Bruun
D. MOUKOURI AND PARTNERS
Debarliev Dameski & Kelesoska Attorneys at Law
Dittmar & Indrenius
E&G Economides LLC
ENSafrica
Ferraiuoli LLC
Gjika & Associates
GSK Stockmann
HAVEL & PARTNERS s.r.o.
Houthoff
Kelobang Godisang Attorneys
Kılınç Law & Consulting
Law firm Vukić and Partners
Loyens & Loeff
Maples Group
Matheson
MJM Limited
Moravčević Vojnović and Partners in cooperation with Schoenherr
Motta Fernandes Advogados
Nader, Hayaux & Goebel
Nishimura & Asahi
Nobles
NUNZIANTE MAGRONE
Oppenheim Law Firm
Popovici Nițu Stoica & Asociații
Ramón y Cajal Abogados
Schoenherr
SEUM Law
Shardul Amarchand Mangaldas & Co.
Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates
Škubla & Partneri s. r. o.
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Vieira de Almeida
Villey Girard Grolleaud
Wachtell, Lipton, Rosen & Katz
Walalangi & Partners (in association with Nishimura & Asahi)
WBW Weremczuk Bobeł & Partners Attorneys at Law
WH Partners
White & Case LLP
Zhong Lun Law Firm

glg
global legal group

glg
global legal group

Contributing Editors
Scott Hopkins and Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Jenna Feasey

Senior Editors
Caroline Collingwood
Rachel Williams

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
March 2019

ISBN 978-1-912509-60-7
ISSN 1752-3362

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

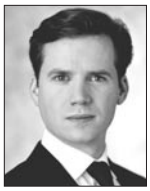
Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

The Dutch 'Stichting' – A Useful Tool in International Takeover Defences

Alexander J. Kaarls



Willem J.T. Liedenbaum

Houthoff

A good number of high-profile, cross-border, unsolicited takeover defence battles over the years, including the battles over control of Gucci, Rodamco North America, Arcelor, KPN and Mylan, to name a few, each time featured a Dutch entity with a name that can be hard to pronounce; a "*stichting*". What are those stichtings and how did they feature in those defence fights? We believe that the following brief discussion of their features and the manner in which they are used will show both how effective stichtings can be, and that they can still be used much more broadly also in other international situations.

A stichting is a private entity organised under Dutch law. Although often operating on a non-profit basis and for charitable purposes, a stichting may also carry out economic and social activities, and even pure business activities. A stichting can be a shareholder in companies and may develop business activities through subsidiaries. In practice, a stichting is often used as a special purpose vehicle in a variety of contexts, which may be related to corporate governance, anti-takeover protection or estate planning.

Although there was a move among a substantial number of Dutch listed companies some years ago to take down their stichting structures that they had previously put in place for anti-takeover defence purposes, many companies have left their structures in place. Moreover, these takeover defence structures appear to have gained popularity again in recent years, as M&A activity increased, while at the same time popular support appeared to somewhat increase for corporations defending themselves against unsolicited public takeover approaches based on broad stakeholder interest grounds.

Below, we provide a brief description of the main characteristics of the stichting under Dutch law, followed by the most typical structures in which stichtings are used in international transactions for strategic and defensive purposes. By way of further illustration, we also discuss several companies that have an anti-takeover stichting structure in place and, where relevant, Dutch case law relating to these stichting structures.

Main Characteristics of a Stichting

The Dutch 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. The board of directors is the only mandatory corporate body. 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 initial board members are named in the deed of formation. The articles of association (as initially laid down in the deed of formation) govern any subsequent board changes. The authority to appoint and dismiss board members is 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. The system of co-optation largely insulates the stichting from non-solicited bids (as well as activist shareholder approaches).

A stichting is created solely for the purpose of clearly defined objectives as laid down in its articles of association. As a result of this objective clause, the articles of association provide the context in which the stichting operates. The objectives clause may not contain any provisions that allow payments to be made to the stichting's founders, except for salary or reimbursements.

The stichting is established through the execution of a notarial deed of formation before a Dutch civil-law notary and must be registered with the trade register at the Dutch Chamber of Commerce. Neither any governmental approval or authorisation, nor the contribution of any capital is required for such establishment. Once established, a stichting can attract funding by way of fundraising, governmental or other subsidies, donations, gifts or otherwise.

In general, 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 tortious acts or in the event of bankruptcy as a result of mismanagement.

Certain Typical Defensive Stichting Structures

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; "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).

Dutch law requires a resolution of the relevant company's general meeting of shareholders 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 shares. The stichting will only need to pay 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.

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 pursued the implementation of a new corporate strategy by seeking to change the company's board. Both the stichting preference shares of Stork and ASMI, respectively, responded by exercising the call option it held, which action, in both cases, was challenged by the activist shareholders concerned before the Enterprise Chamber at the Amsterdam Court of Appeals (a specialised Dutch court for corporate disputes). In the *Stork* case, the court held that the call option agreement 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 get to solutions satisfactory to the respective boards.

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 both exercised call options were never litigated, the legitimacy of the respective stichting's actions was never tested, while in both events the non-solicited bidders ultimately did not proceed in making the announced bids.

Stichting administrative office

Through a stichting administrative office structure, one can split the economic ownership of shares from the legal ownership thereof (including the voting rights on the shares). In exchange for the issuance of shares by the company, the independent stichting concerned will issue depositary receipts for the underlying shares, which depositary receipts (as opposed to the underlying shares) will be admitted to (public) trading. As a result, the legal ownership of the relevant shares will be held by the stichting, but the economic ownership of the shares will be held by the depositary receipt holders. All distributions received by the stichting, in its capacity as legal owner of the shares (i.e., 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, the stichting's constitutive documents can, depending on the stichting's purpose, provide that economic and/or voting rights are completely or completely not, in whole or in part, temporarily or permanently passed on. Furthermore, the holders of depositary receipts are 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, for example, a non-solicited bid.

The creation of depositary receipts for shares in the share capital of a Dutch company is a common phenomenon in Dutch law and practice. In 2015, ABN AMRO put in place a stichting administrative office in the context of its IPO on Euronext Amsterdam. The depositary receipts that represented the ordinary shares in ABN AMRO were subsequently listed. 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, if any of a number of specified threats to the continuity of ABN AMRO materialises. In the absence of any such threat, the stichting consistently exercises its voting rights in accordance with the instructions of the relevant 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, Unilever and Euronext.

Stichting priority shares

Most material company resolutions (e.g. the appointment of board members or the amendment of the articles of association) can be made subject to the prior approval of the meeting of holders of priority shares. The priority shares may be held by an independent stichting, that typically has the objective to serve the best interests of the relevant company and all 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 of the company within a predictable period of time (in particular, where the acquirer would need the stichting for effecting envisaged board changes). When a company that has implemented a stichting priority shares is acquired, the acquirer 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 companies have tended to want to show the "openness" of their corporate structures.

Stichting crown jewel

A stichting was put in place in the face of the non-solicited public bid by Mittal Steel N.V. for Arcelor S.A., in early 2006. In this case, the key American asset of Arcelor S.A., the Canadian steel mill Dofasco, was placed in a stichting to ensure that Arcelor S.A. could no longer sell or be forced to sell Dofasco (while full operational control remained with Arcelor S.A.). This structure is often referred to as a "crown jewel lock up". As a result, Mittal Steel N.V. could no longer seek US antitrust approval on the condition that Dofasco would be sold off following the closing of its non-solicited bid. ArcelorMittal, indeed, ultimately, after negotiating an Arcelor board-supported deal, retained Dofasco and had to dispose of other American production assets that it already owned itself. The stichting structure was later unwound by the stichting board (in line with the stichting's own constitutive documents), when the hostile threat no longer existed.

Dutch criteria for protective measures

A stichting structure may, without restriction (and without realistic risk of challenge), be structured as an anti-takeover and protective device (including the exercise of a call option or issuing depositary receipts, as described above). However, when it involves a Dutch (listed) corporate, protective measures can be reviewed and, where appropriate, neutralised by the Enterprise Chamber upon the request of one or more shareholders who hold a sufficient amount of shares to have standing.

The criteria set out by the Dutch Supreme Court in its RNA case are considered to be the basis for the Enterprise Chamber to assess the permissibility of protective measures when so invoked. In short, the Enterprise Chamber must take into consideration all "relevant circumstances of the case". The Enterprise Chamber would in particular need to assess whether the management board could reasonably have come to the conclusion that invoking the protective measure was necessary to maintain a *status quo*, allowing the board to enter into discussions with the stakeholders involved without any changes being made to the composition of the board or to the strategy of the company (to the extent that the board would deem such changes to not be in the best interest of the company or its stakeholders). The relevant standard to assess whether invoking a protective measure is justified is whether that measure, under the given circumstances and applying a reasonable assessment of the interests of the stakeholders involved (i.e. not only the company's shareholders, but all stakeholders, including the company's employees, customers and suppliers), is an adequate and proportional response to the imminent threat(s).

Conclusion

The popularity of the type of stichting structures described above has varied within the Netherlands over the years. Currently, they appear to be gaining in popularity again. Although we believe it key that stichting boards, in their assessments and decision-making, truly and properly consider all stakeholder interests (so, including where appropriate those of shareholders), we continue to see these structures as uniquely strong from an international perspective. Moreover, we see a broad range of situations in which stichting structures can be successfully applied internationally, including non-takeover defence situations.

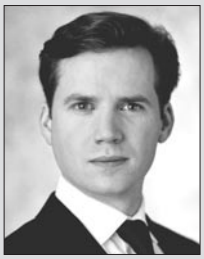
Alexander J. Kaarls

Houthoff
Gustav Mahlerplein 50
1082 MA, Amsterdam
Netherlands

Tel: +31 20 605 6110
Email: a.kaarls@houthoff.com
URL: www.houthoff.com

Alexander Kaarls' practice focuses on corporate and securities laws, with a particular focus on cross-border mergers, acquisitions and capital markets transactions. He also regularly advises clients on corporate governance, joint venture, securities laws compliance, and general cross-border matters. Alexander has been ranked as the Netherlands' "leading M&A lawyer" by the predominant Dutch M&A website and database OverFusies several times (based on total deal value).

Alexander has authored and co-authored articles published in, among others, *The International Financial Law Review*, *The International Comparative Legal Guide to: Mergers & Acquisitions*, *The International Law Practicum*, *The European Lawyer*, *Advocatenblad* (the Netherlands Bar periodical) and *Maandblad voor Vermogensrecht* (a leading Dutch periodical on contract law). Alexander is a member of the Netherlands Bar (since 1993) and the California Bar (since 2002). He joined Houthoff in 2004, after spending 10 years practising with Skadden, Arps, Slate, Meagher & Flom LLP in London, Brussels and Palo Alto (California).



Willem J.T. Liedenbaum

Houthoff
Gustav Mahlerplein 50
1082 MA, Amsterdam
Netherlands

Tel: +31 20 605 6136
Email: w.liedenbaum@houthoff.com
URL: www.houthoff.com

Willem Liedenbaum has extensive experience advising on transactions involving companies active in regulated markets. In addition, he regularly advises on corporate governance, public and private M&A, securities regulatory compliance and general cross-border matters.

Willem has co-authored articles published in *The International Comparative Legal Guide to: Mergers & Acquisitions* and *The International Comparative Legal Guide to: Private Equity*.

Willem graduated from Radboud University Nijmegen with a degree in law in 2012. That same year, Willem joined Houthoff and was admitted to the Bar in Amsterdam. In 2017, Willem worked as a legal counsel in Rabobank's Capital Markets and M&A department.

Willem represented leading participants in some of the contested public takeover situations that have recently taken place in the Netherlands, including the AkzoNobel/PPG situation where he advised key participants. His non-contested public M&A experience includes the recent acquisition of Mobileye by Intel.

HOUTHOFF

Houthoff is a leading Netherlands-based law firm with over 310 lawyers worldwide. Focusing on complex transactions and dispute resolution matters, the firm typically advises domestic and international corporations, financial institutions, private equity houses and governments on a wide variety of matters, including those that may have key strategic impact or present the most significant challenges to the organisation. In addition to its offices in Amsterdam and Rotterdam, Houthoff has offices in London, Brussels and New York, and representatives in Singapore, Houston and Tokyo. On cross-border matters, the firm frequently works jointly with leading New York and London-based firms, as well as major firms in other global economic centres. The firm's attorneys seek to deliver proactive, efficient and cost-effective advice of the highest quality in a timely manner, every day. Houthoff has strong ties with clients in emerging markets, including China and Brazil.

Houthoff is continuously highly ranked by international client guides, including *Chambers*, *IFLR1000* and *The Legal 500*. In addition, Houthoff consistently ranks as a top-tier firm for deal volume in the Benelux region.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com