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ARTICLE

Zinc or Swim? The Restructuring of the Nyrstar Group

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Synopsis

In July 2019, the multi-jurisdictional Nyrstar group announced the completion of its complex restructuring, reducing the group's total indebtedness by over EUR 1 billion and involving:

– the incorporation of English NewCos facilitating the restructuring of Dutch issued high yield bonds and Belgian issued convertible bonds through an English scheme of arrangement;

– the issuance of three new bond instruments;

– the provision of a EUR 160 million new money facility; and

– the transfer of 98% of the operating group to Trafigura.

This article provides an overview of the restructuring and explains why a Chapter 11 process was not a viable option for the Nyrstar group.

Background

The Nyrstar group is a global multi-metals business, with a market leading position in zinc and lead. It is one of the world's largest zinc smelting groups based on production levels with mining, smelting and other operations located in Europe, the Americas and, as would prove relevant to the conditions to complete the restructuring, Australia. Pre-restructuring, Nyrstar NV, a Belgian listed company, was the group's ultimate parent (the 'Parent').

As at October 2018, the group's indebtedness broadly fell into the following categories:

(a) EUR 115 million convertible bonds issued by the Parent due in 2022 (the 'Convertible Bonds');

(b) two series of New York high yield notes issued by a Dutch special purpose direct subsidiary of the Parent, Nyrstar Netherlands (Holdings) BV ('NNH'):

  (i) EUR 350 million of 8.500% unsecured senior notes due in 2019 (the '2019 Notes'); and

  (ii) EUR 500 million of 6.875% unsecured senior notes due in 2024 (the '2024 Notes', and the 2019 Notes and 2024 Notes together, the 'Notes'); and

(c) various finance facilities provided to, among other operating group entities, a Swiss direct subsidiary of NNH, Nyrstar Sales & Marketing AG ('NSM'), including:

  (i) an English law EUR 600 million secured revolving structured commodity trade finance facility (effectively a borrowing base facility) provided by a syndicate of lenders and maturing in December 2021 (the 'SCTF'); and

  (ii) a large number of bilateral and syndicated, mainly unsecured, facilities provided by various different lenders (the 'Unsecured Facilities').

Events leading up to the start of the restructuring in October/November 2018

In autumn 2018, the Parent issued press releases advising that the group's projected underlying EBITDA result for H2 2018 would be materially below that achieved in H1 2018, and subsequently announcing a review of its capital structure to explore options to address upcoming debt maturities (the 'Capital Structure Review').

In November 2018, the group experienced increased working capital requirements as its liquidity position suddenly and unexpectedly deteriorated following, amongst other things, negative press and analyst coverage surrounding the Capital Structure Review, the group's worsening performance and upcoming maturities. In particular, a significant portion of the group's uncommitted letter of credit lines were terminated or required to be cash collateralised.

In advance of a wider restructuring and given the acute liquidity and time pressure, the group had to seek urgent interim financing, which was provided by Trafigura Pte. Ltd. ('Trafigura'), a commercial counterparty and 24% shareholder of the group. A binding term sheet was announced on 21 November 2018 and, on 6 December 2018, a secured USD 650 million trade finance framework agreement was entered into (the 'TFFA').

Lock-up agreements and work fee

Early in 2019, intense negotiations with the creditors began, including, among others, certain holders of the Notes ('Noteholders') and holders of the Convertible Bonds ('Convertible Bondholders'). On 22 March 2019, Nyrstar, Trafigura and a representative group of the Noteholders and Convertible Bondholders (the 'Ad-hoc Group') entered into a short-term lock-up agreement on most of the key commercial terms for a consensual restructuring of the Notes and Convertible Bonds (the 'Short-Term Lock-Up Agreement'). This helped provide stability for the group whilst restructuring negotiations continued with the group's other key financial creditors, especially the lenders under the SCTF and Unsecured Facilities.

Under the Short-Term Lock-Up Agreement, on the restructuring effective date, Trafigura agreed to pay a transaction work fee to each member of the Ad-hoc Group. This was 1.5% of the face value of the Notes and/or Convertible Bonds held by the relevant Ad-hoc Group holder as of 18 March 2019 (the 'Work Fee').

As discussions between the various financial stakeholders progressed, on 14 April 2019, a full form lock-up agreement was entered into by, among others, Nyrstar, Trafigura and representative lenders across each of the group's key financial creditor groups setting out the agreed commercial terms of the restructuring (the 'Lock-Up Agreement').

Bond timely consent fee and further bridge financing

Pursuant to the Lock-Up Agreement, to secure an early indication as to restructuring support levels from the group's diverse and extensive Convertible Bondholders/Noteholders, Nyrstar agreed to pay a fee to locked-up Bondholders/Noteholders equal to 1.5% of the debt they held which was locked-up on or before the relevant deadline (the 'Bond Timely Consent Fee').

In conjunction with entering into the Lock-Up Agreement, and to provide the group with necessary liquidity to complete the restructuring, on 16 April 2019, Trafigura (through an affiliate) provided Nyrstar with a further USD 250 million bridge finance facility agreement (the 'BFFA'). (This USD 250 million was in addition to the USD 650 million which Trafigura continued to make available to the group.)

The restructuring

Commercially, the key parts of the restructuring were as follows:

(a) Trafigura becoming the 98% owner of the operating group with the Parent retaining a 2% equity stake;

(b) Trafigura releasing the security and guarantees for the USD 650 million TFFA and the USD 250 million BFFA, and subordinating these;

(c) the provision of a guaranteed EUR 160 million new money facility by participating lenders under the SCTF and Unsecured Facilities (and also guaranteed by Trafigura);

(d) the consensual reinstatement of the SCTF and the Unsecured Facilities broadly as follows:

   (i) SCTF – all SCTF lenders were entitled to 85% reinstatement, and those choosing to participate in their pro rata share of the EUR 160 million new money facility were reinstated at 100%; and

   (ii) Unsecured Facilities – on a blended basis across the different facilities, lenders were entitled to a 35% reinstatement, and those choosing to participate in their pro rata share of the EUR 160 million new money facility were reinstated up to 47.5% (on a blended basis),

   both of the above reinstated facilities were also guaranteed by Trafigura;

(e) by way of a scheme of arrangement, the Convertible Bonds and the Notes were fully released and cancelled and, in exchange, the Convertible Bondholders and the Noteholders received a pro rata share in three new instruments issued by the Trafigura group (and not guaranteed by the Nyrstar group) (the 'New Instruments'):

   (i) EUR 262.5 million of perpetual resettable step-up subordinated securities which form a single series with Trafigura's existing perpetual resettable step-up subordinated securities issued in 2017;

   (ii) USD equivalent of EUR 80.6 million of guaranteed senior notes under Trafigura's existing EUR 3 billion Euro Medium Term Note Programme; and

   (iii) USD equivalent of EUR 225 million of guaranteed zero coupon commodity-linked principal amortising instruments, which include an early repayment schedule that is linked to the average price of zinc during the relevant quarter (no early repayment is permitted where the average zinc price is equal to or less than the prescribed minimum),

   with the total value of the New Instruments representing 43-51% of the aggregate principal outstanding and accrued interest under the Convertible Bonds and Notes.

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Restructuring condition - FIRB approval

Australia's foreign investment approval regime regulates foreign persons' acquisitions of interests in certain Australian land and businesses. As such, among other things, the restructuring was conditional upon receiving the Australian Foreign Investment Review Board ('FIRB') approval for Trafigura's acquisition of 98% of the shares of the newly incorporated English subsidiary. Any foreign person making an acquisition requiring approval under the Australian Foreign Acquisitions and Takeovers Act 1975, must apply to the FIRB before completing the acquisition, and any acquisition agreement must be subject to receiving FIRB approval where the acquisition exceeds the relevant threshold.

In general, acquiring an interest of 20% or more in any business valued at over AUD 266 million (or the higher threshold of AUD 1.154 billion for investors from Canada, Chile, China, Japan, Korea, Mexico, New Zealand, Singapore, and the US) requires prior approval. The Australian Treasurer can impose conditions on an investment or prohibit foreign investment proposals found to be contrary to the national interest.

The regime is far-reaching and includes the granting of security (directly or indirectly) and, perhaps somewhat surprisingly, intra-group transfers. FIRB approval was needed (and ultimately granted) as Nyrstar had two large sites in Hobart and Port Pirie which were over the threshold for FIRB approval.

Minimum denomination trusts

The New Instruments issued by Trafigura had minimum denominations of EUR 100,000 and USD 200,000. Some Convertible Bondholders and Noteholders (the 'Fractional Holders') held insufficient Convertible Bonds or Notes such that their resulting scheme entitlement was less than the minimum denomination of the New Instruments to be issued. This meant that the Fractional Holders would not be able to hold their share of the New Instruments without a new mechanism being devised. This risked fracturing the classes if the treatment of those Fractional Holders was different to other holders for whom the minimum denomination was not a problem.

The solution to ensure that Fractional Holders were in a position akin to the other holders and received their share of the New Instruments was to set up bare trusts in respect of each type of New Instrument pursuant to which the Fractional Holders would hold beneficial interests in the fractional amounts of such New Instruments. The bare trusts provided for, among other things:

(a) Fractional Holders to receive their pro rata share of payments of interest and principal;

(b) Fractional Holders to freely transfer all, but not part of, their beneficial interests to any person;

(c) a number of Fractional Holders together to direct the trustee to sell their beneficial interests and distribute the net proceeds to holders; and

(d) the trustee to procure an arms' length sale of any remaining New Instruments in the trusts 2 years after the date of the trust with the proceeds being distributed to the relevant holders.

In addition to this, holding trusts were also put in place in respect of each New Instrument for those holders who had not yet come forward to receive their entitlements or were not qualifying holders as is usual in such restructurings.

Scheme of arrangement

As a precursor to launching the scheme and to help establish the necessary links with the English Courts, between April 2019 and May 2019, various consent solicitations were launched to seek consents from the Noteholders and a meeting of the Convertible Bondholders took place to, among other things:

(a) amend the relevant governing documents to permit the insertion of a newly incorporated English company (the 'NewCo Scheme Company') as an additional intermediate holding company into the group, together with the NewCo Scheme Company's parent (being a second newly incorporated English company);

(b) permit the accession of the NewCo Scheme Company as co-issuer of the Notes and co-obligor of the Convertible Bonds;

(c) amend the governing law of the Notes to English law; and

(d) ensure that the Courts of England and Wales have jurisdiction in respect of the Notes and Convertible Bonds.

The requisite contractual majorities of Noteholders and Convertible Bondholders voted in favour of all of these amendments.

The above steps were designed to strengthen a connection with the English courts for the scheme. In respect of the New York law amendments, an expert opinion was provided by an independent New York law expert as to their effectiveness. The NewCo Scheme Company was incorporated in June 2019 and acceded as co-issuer of the Notes and co-obligor of the Convertible Bonds. Having assumed primary, joint and several liability in respect of the Notes and Convertible Bonds, the NewCo Scheme Company formally proposed the scheme to effect the restructuring.

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Two scheme classes were constituted - one class for the Noteholders and a separate class for the Convertible Bondholders. In keeping with precedents, neither the Work Fee nor the Bond Timely Consent Fee was found to fracture the classes. The judge was satisfied that these fees did not have any bearing on voting and did not raise fairness issues. The scheme was approved by an overwhelming majority of Noteholders representing 99.96% by value and 98.93% in number of those Noteholders who voted, and 100% by value and 100% in number of those Convertible Bondholders who voted.

Chapter 15 recognition

Recognising that some Noteholders and Convertible Bondholders were US persons or had a US presence, Nyrstar sought US Chapter 15 recognition of the scheme in the Southern District of New York. Whilst this Chapter 15 recognition was a waivable condition to the restructuring, a US order was successfully obtained on 30 July 2019 and the restructuring effective date occurred the following day.

Why not a global Chapter 11?

It has become common practice for global corporations in financial stress or distress to consider restructuring pursuant to US Chapter 11 to take advantage of the wide ranging automatic stay of proceedings and the perceived debtor-friendly nature of the US process. For the Nyrstar group, however, it became apparent that Chapter 11 was not a viable option.

In the eyes of the US Courts, US Chapter 11 has worldwide effect and, as most commercial parties have connections with the US, generally commercial parties abide by the Chapter 11 regime and its orders. However, in certain key jurisdictions in which Nyrstar operates, Chapter 11 is either not recognised or, to be fully effective, would require a local insolvency process to run in parallel, bringing associated timing and cost implications. Further and importantly, the filing of any Nyrstar Swiss entities for Chapter 11 would have raised difficult questions for the relevant Swiss Boards under various statutory provisions. In the extreme, this could have led to potential personal issues for the directors of the Swiss companies under the Swiss Penal Code.

As a separate factor and has been discussed in other situations, whilst a very powerful regime, Chapter 11 is also a costly regime; therefore, identifying a source of funding is imperative. For Nyrstar, given the group's very serious and urgent liquidity position, sourcing what would have been a very large amount of debtor-in-possession funding for a Chapter 11 process presented another hurdle to a Chapter 11.

Contingency planning

Alongside negotiating and planning for a restructuring, the group needed to engage in contingency planning. This was particularly complicated given that all group entities were dependant on two key Swiss entities in the group: NSM and Nyrstar Finance International AG ('NFI'). NSM acted as the main Nyrstar counterparty to the group's external financing arrangements and sales and purchasing contracts, and NFI operated as the group internal treasury.

Pursuant to various tolling agreements between NSM and the group's smelting subsidiaries, the smelting subsidiaries would process raw materials for NSM (in exchange for payments made by NSM), and NSM would then sell the final metal product. Throughout the processing cycle, NSM retained ownership of all raw materials, work in progress and processed metals. Given the dependency created by the intra-group arrangements, should NSM and NFI have entered into insolvency, the asset-holding subsidiaries would have almost immediately followed suit.

Absent the availability of a global insolvency process for the group, individual processes for each jurisdiction needed to be considered. This made coordinating an orderly wind-down of the group exceptionally complex (particularly as the ownership and the possession of the assets were split between various jurisdictions given the tolling agreement structure).

A key part of contingency planning is ensuring there is sufficient funding for each company to be run by an officeholder. For Nyrstar, the funding requirements were significant. Smelters take time and are costly to mothball. The environmental risks associated with an insolvency were also significant due to the potentially hazardous materials in use. Given the complexities described above, it was particularly welcome that the restructuring was successful.

Conclusion

The restructuring of the Nyrstar group successfully navigated through the many individual jurisdictional issues, a very diverse and wide creditor group and very material environmental risks, resulting in the safeguarding of over 4,000 jobs and rightsizing the balance sheet to provide a more stable platform for the business. The restructuring demonstrates the power of the cost-effective English scheme of arrangement as a restructuring tool and that, with the insertion of English intermediate holding companies, English schemes may continue to be used by non-UK groups irrespective of the outcome of Brexit.

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International Corporate Rescue

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