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Practical cross-border insights into lending and secured finance

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Netherlands


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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

We have seen the following recent trends and developments:

(a) The excess supply of credit continued to drive up competition for transactions and has pushed private equity players to increase origination sourcing capabilities, and where necessary, improve underwriting processes. This in turn has put pressure on pricing and debt terms, especially in the mid-market LBO space, where terms that were a few years ago reserved for large-cap and prime sponsor deals are now commonplace and considered the norm.

(b) The growth of green and sustainable lending, driven by investors, lenders and borrowers, has continued in 2021 and will likely only move higher up the agenda in 2022.

(c) Firms in the Dutch market that have international platforms and that are not just local players are continuing to flourish and work on truly international banking mandates.

(d) In line with global developments, the Dutch market is transitioning to LIBOR discontinuation.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Without singling out particular names, the use of Term Loan B and high yield bonds remains commonplace. ESG-driven deals are now the norm. Traditional bank lenders are finding it difficult to compete with credit funds who have deeper pockets, can offer more flexible terms, can act faster and in some cases can show more business expertise. Asset-based lending alongside traditional cash deals is becoming more important as businesses seek to monetise their assets for more competitive financing.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

In principle, yes, a Dutch company can guarantee borrowings of one or more other members of its corporate group, provided that the objects clause in the guarantor's articles of association covers the issuing of guarantees. Restrictions apply; please refer to the responses to questions 2.2–2.5 and 4.1.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Under Dutch law, (the directors of) a Dutch company should in principle act in the interests of the company and its business. Additionally, the interest of the group to which the company belongs may be considered. In a group context, the common rationale as supported in case law is that the guarantor, as a shareholder or affiliated (group) entity, will benefit from the credit facility for which it assumes liability. In this context, it is generally held that group guarantees, and in particular parent guarantees, for debt of a group entity and/or subsidiary, serve the interests of an individual group company.

For purposes of establishing whether or not a guarantee granted in the context of a group financing serves the individual corporate interest of the guarantor, the following factors play a role: (i) whether the guarantor benefits from the loan (i.e., whether it will have access to the credit, either directly or indirectly); (ii) how much risk will be taken by entering into the guarantee and whether the group will be able to comply with its obligations for which the guarantee is provided; (iii) whether other group companies also provide a guarantee and/or accept joint and several liability; and (iv) what the consequences for the company would be if the loan was not granted to the group.

Finally, although there is no balance sheet insolvency test in the Netherlands, directors of a guarantor may be personally liable towards a creditor or a group of creditors of such company if they decided to continue the business past a certain point in time and such a decision resulted in damages to the creditors as a result of the company having insufficient assets against which the creditors can take recourse for the damages incurred. This may also lead to the guarantee being voided by creditors or the bankruptcy trustee of the guarantor on the basis of fraudulent preference.

2.3 Is lack of corporate power an issue?

Pursuant to Article 2:7 of the Dutch Civil Code, any guarantee given by a legal entity may be nullified by the legal entity itself or its liquidator in bankruptcy proceedings if the legal act was outside the company's objects and the other party to such legal act was or should – without investigation – have been aware of this. The determination of whether a legal act is within the objects of the company may not be based solely on the description of these objects in the company's articles of association, but must take into account all relevant circumstances, including in

particular the question of whether the interests of the company are served by the relevant legal act.

In any event, if the contemplated transactions in the light of the benefits, if any, derived by the company from such transactions, would have a disproportionate adverse effect on the interests of the company, these transactions may be found to be outside the objects of the company and the counterparty may be held to have been aware of this.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental consents or filings are required for issuing a corporate guarantee. In principle, the only formalities are at the level of the guarantor and are limited to board approval and, if required on the basis of the articles of association, shareholder approval and approval of the supervisory board. Finally, if there is a works council with jurisdiction over the guarantor, it may have the right to advise on entering into the guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

If the guarantor is a legal entity, no net worth, solvency or similar limitations apply to the amount of a guarantee. However, please refer to our response to question 2.2.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Dutch law does not provide for any exchange control or similar obstacles to enforcement of a guarantee.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Collateral security can be taken pursuant to a right of pledge (*pandrecht*) or mortgage (*hypotheek*). The most common collateral being pledged are movable assets, shares and receivables. Bank accounts, insurance policies, intellectual property rights and certain subsidy grants are also capable of being pledged. Mortgages can only be established on property subject to registration, i.e. real estate or registered property (for example, seagoing vessels and aircraft). In addition, security over financial collateral can be created through a financial collateral arrangement (*financiëlezekerheidsovereenkomst*).

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In practice, omnibus pledges are used for creating non-notarial security documents (i.e., security over receivables, bank accounts, insurance policies, intellectual property rights). Please also see question 3.4. It is not possible to conclude a general security agreement for all types of assets in the Netherlands; a separate notarial deed of pledge or notarial deed of mortgage is required for creating security over shares or real estate. The specific requirements for creating a right of pledge or mortgage depend on the (type of) asset.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral security can be taken over real property located in the Netherlands. This security is created pursuant to a notarial deed of mortgage executed before a Dutch civil law notary. This notarial deed must be registered with the Dutch Land Registry Office (*kadaster*).

Collateral security over plant, machinery and equipment (movable assets) located in the Netherlands can be taken by way of a:

- possessory pledge, where possession of the collateral is transferred from the pledgor to the pledgee or to a particular third party agreed upon by the pledgor and the pledgee. A possessory pledge does not require notarisation or registration; or
- a non-possessory pledge, where possession of the collateral remains with the pledgor. The deed of non-possessory pledge must either be drawn up in notarial form or registered with the tax authorities for the pledge to be valid.

As a possessory pledge requires the pledgor to hand over his collateral to the pledgee, non-possessory pledges are more usual. It is common practice to create a non-possessory pledge by way of a private deed of pledge to be subsequently registered with the Dutch tax authorities.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables is created by means of a right of pledge. There are two types of pledges over receivables: a disclosed right of pledge; and an undisclosed right of pledge, depending on whether the debtor of the receivable has been notified of the pledge. A disclosed pledge does not require notarisation or registration. An undisclosed right of pledge must either be drawn up in notarial form or registered with the Dutch tax authorities for the pledge to be valid.

When taking security over receivables by way of an undisclosed pledge, the pledge will only capture receivables arising directly from existing legal relationships. Receivables arising from a legal relationship that comes into existence after the execution of the deed of pledge fall outside the scope of the original (undisclosed) pledge. For purposes of creating an up-to-date security package, parties will need to 'repeat' the creation of the pledge by way of executing a supplemental pledge (which is to be registered with the Dutch tax authorities). For efficiency purposes, Dutch banks have established a practice whereby a master deed of pledge (*stampandakte*) is created, in which the bank agrees with the pledgor that all its current and future receivables are pledged to the bank and in which the pledgor grants an irrevocable power of attorney to the bank, authorising the bank to create (on behalf of the pledgor) and register one daily supplemental pledge (*verzamelpandakte*) on behalf of all pledgors that granted such power of attorney.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Cash deposited in a bank account qualifies as a personal claim, capable of being pledged. Personal claims are in principle pledged by deed and notification of the pledge to the debtor of

the pledged claim (disclosed pledge). However, it is also possible to create an undisclosed right of pledge by way of (i) a private deed of pledge registered with the Dutch tax authorities, or (ii) a notarial deed of pledge.

Pursuant to the Dutch general banking conditions, a Dutch account bank has security interests in the bank account of the pledgor (for example, a right of set-off and a right of pledge) and needs to provide consent for the creation of a right of pledge. It is therefore recommended to involve the account bank in the creation of such a disclosed pledge on a bank account.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

It is possible to take security over shares. In principle, shares in a Dutch private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and a Dutch public company (*naamloze vennootschap*) are registered shares (*aandelen op naam*).

To create a right of pledge over registered shares, a notarial deed is required. The articles of association may prohibit or restrict the encumbering of the shares and/or the transfer of voting rights attached to the shares. It is common that the rights to collect dividends and to exercise voting rights remain with the shareholder/pledgor until the occurrence of an event of default (which is continuing) and notice given thereof by the pledgee. A right of pledge over shares in a listed company can be created pursuant to a non-notarial deed and acknowledgment by the company.

To the extent shares in a Dutch public company are deposited in a securities account, they can be pledged accordingly. A right of pledge over securities which are transferable through book entries under the Dutch Securities (Bank Giro Transactions) Act (*Wet giraal effectenverkeer*) is created by a book entry in the name of the pledgee by the custodian bank or intermediary.

The shares are not in certificated form, but registered in the shareholders' register of the BV or NV. Any right of pledge over the shares should be duly recorded in the shareholder's register.

Security over shares in Dutch companies cannot be validly granted under a New York or English law-governed document.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Inventory qualifies as a movable asset. It is therefore possible to take security over inventory located in the Netherlands by way of a possessory or non-possessory pledge. Please see question 3.3 for a description of the procedure.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

This is possible if and to the extent that such transaction is within the corporate interest of the company and the corporate objects of the company allows such transaction. For Dutch public limited liability companies, financial assistance rules should be complied with (see question 4.1).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarial fees are charged for all security created pursuant to a notarial deed, executed before a Dutch civil law notary. Notarial costs are normally charged in a manner consistent with legal fees; i.e., an hourly rate or a fixed-fee arrangement can be agreed upon. Compared to other jurisdictions, Dutch notarial fees are generally considered reasonable.

Registration fees are charged by the Dutch Land Registry Office for the registration of mortgages.

No stamp duties are levied on security rights over assets.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

This is a straightforward process, which does not involve a significant amount of time or expense.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally, negative pledge provisions may apply with respect to receivables, movables and shares, requiring the consent of the debtor/owner for creation of the security. In case of real estate that is to be encumbered with a mortgage, it is possible that the landowner will have to give its consent.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, such claims rank *pari passu* with any other secured facilities.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Security over real estate can only be created pursuant to a notarial deed, and for share pledges this is generally also the case (although exceptions apply, see question 3.6).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Pursuant to Article 2:98c(1) of the Dutch Civil Code, a Dutch public company (an NV (*naamloze vennootschap*)) may not provide collateral, guarantee the price, act as surety or otherwise bind itself jointly or severally for the benefit of third parties, for the purpose of the subscription for or the acquisition of shares by third parties in its own capital

or of depositary receipts issued therefor. The limitation does not apply to Dutch private companies (BVs), although the articles of a BV may still include provisions regarding financial assistance as a remnant of the financial assistance prohibition that used to apply to a BV (prior to 2012) on the basis of a provision equivalent to Article 2:98(c)(1) of the Dutch Civil Code. Where the text in the articles of association of a BV still includes a provision regarding financial assistance, it is advisable to amend the articles of association prior to the entering into of a transaction that may qualify as a violation of such provision.

(b) Shares of any company which directly or indirectly owns shares in the company

It is expressly provided that the prohibition set out above also applies to the (Dutch and foreign) subsidiaries of the NV, even if the subsidiary is a BV.

(c) Shares in a sister subsidiary

The financial assistance prohibition does not apply to sister companies.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Dutch law does not have an identical concept or doctrine to the concept of a trust. However, any trust validly created under its governing law is recognised by the Dutch courts pursuant to legislation implementing the Hague Trusts Convention. The agency concept, as a contractual arrangement, is recognised under Dutch law and is also a common feature in Dutch syndicated lending transactions. Under Dutch law, security can in principle only be created for the benefit of the creditor(s) of the claim. As such, for purposes of enabling a security agent to enforce security created under Dutch law and subsequently apply the proceeds from the collateral to the claims of all the lenders, a parallel debt structure is used.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

In the Netherlands, a parallel debt structure is the standard mechanism in financing transactions to ensure that security interests governed by Dutch law can be held by a security agent for the benefit of the lenders. In a parallel debt structure, a borrower/guarantor at any time owes to the security agent in its individual capacity (i.e., acting in its own name and not as agent or representative of the lenders) an amount equal to the aggregate amounts owed by such loan borrower/guarantor to the syndicate of lenders under the loan documents (the 'parallel debt'). All security interests governed by Dutch law vest in the security agent as security for the parallel debt claim. No security interests are created in the name of the individual lenders. Each lender has a contractual claim against the security agent for payment of the amounts owed by the security agent to each of the lenders, as catered for in the loan documentation/intercreditor agreement.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

When transferring all rights and obligations under a contract (*contractsoverneming*) for the purposes of establishing the transfer requirements, Dutch private international law in principle follows the governing law of the contract. If Dutch law applies, the consent of the debtor to the transfer is required. No formalities apply to such consent, and the consent can also be implied or granted in advance. This form of transfer does not lead to a novation, and as such the same contract continues to be in place between the borrower/guarantor and the transferee.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No, subject to the following exceptions.

As of 1 January 2021, interest paid by Dutch companies (or Dutch branches of non-Dutch companies) is subject to an interest withholding tax if the interest is paid to an entity that is (cumulatively) (i) related to the payer of the interest, and (ii) resident in, or lending through, a low-tax jurisdiction (which includes, amongst others, the United Arab Emirates, Jersey, Guernsey and the Cayman Islands) or a jurisdiction that is on the EU list of non-cooperative tax jurisdictions. Two parties are 'related' for these purposes if one party has influence over the activities of the other party (which is in any case assumed to be the case for any shareholders owning at least 50% of statutory voting rights), or if a third person has such influence over both parties. The rate is equal to the highest bracket Dutch corporate income tax rate (25.8% in 2022).

Interest paid on loans with certain hybrid elements (such as subordinate profit-sharing loans that are perpetual or have a maturity of more than 50 years) may be subject to dividend withholding tax (at a rate of 15% in 2022).

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no specific tax incentives for foreign lenders and no registration taxes or duties (or similar taxes or duties) apply in the Netherlands (irrespective of whether (secured or unsecured) loans are provided by domestic or foreign lenders).

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

No. If, however, a foreign lender (alone or together with affiliates) (i) owns a direct or indirect equity interest in the borrower of at least 5% (or has the option to acquire such interest), and (ii)

holds the equity interest through a legal structure that is considered 'abusive', the income/gains derived by such lender from the debt funding provided to the Dutch borrower may become subject to Dutch corporate income tax.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are no other significant costs for foreign lenders.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for the purposes of this question.

There are no such adverse consequences.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The choice of a foreign governing law governing contractual obligations will, in principle, be upheld by Dutch courts, on the basis of and subject to the limitations imposed by Regulation (EC) 593/2008 of 17 June 2008 ('Rome I').

The choice of a foreign governing law governing non-contractual obligations will in principle be upheld by Dutch courts, on the basis of and subject to the limitations imposed by Regulation (EC) 864/2007 of 11 July 2007 ('Rome II').

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

In the absence of an applicable treaty between New York and the Netherlands, a judgment obtained in the courts of New York will not be directly enforced by the courts in the Netherlands. In order to obtain a judgment that is enforceable in the Netherlands, the claim must be relitigated before a competent court of the Netherlands; the relevant Dutch court has discretion to attach such weight to a judgment of the courts of New York as it deems appropriate. Based on case law, the Dutch courts may be expected to recognise the binding effect of a final, conclusive and enforceable money judgment of a court of competent jurisdiction in New York without re-examination or relitigation of the substantive matters adjudicated thereby, provided that: (i) the relevant court in New York had jurisdiction in the matter in accordance with standards which are generally accepted internationally; (ii) the proceedings before such court complied with principles of proper procedure; and (iii) such judgment does not conflict with the public policy of the Netherlands.

A judgment obtained in the English courts is enforceable in the Netherlands on the basis of, and subject to the limitations and formalities imposed by, either:

- the Convention on Choice of Court Agreements of 30 June 2005 (the Hague Choice of Court Convention) (in case of claims related to payment of sums of money and exclusive jurisdiction clauses, which are not customary in standard international loan contracts as these often leave room for jurisdiction of other courts ('asymmetric jurisdiction clauses')); or
- in case the Hague Choice of Court Convention does not apply, relitigation in Dutch courts on the basis of the method set out above in relation to New York judgments (i.e., in the absence of an applicable treaty).

The impact of Brexit has yet to crystallise in Dutch case law regarding the enforceability of judgments given by English courts.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Court proceedings on the merits take from at least six months up to multiple years before the judgment can be enforced against the assets of the company. It should be noted that the lender may be liable for any damages when enforcing a judgment that is overruled in appeal at a later stage.

If the lender has an urgent interest to enforce against the assets (*spoedeisend belang*), the lender can institute preliminary relief proceedings (*kort geding*). In such proceedings the lender can also ask for provisional measures to be imposed by the court on the company by way of an injunctive relief. Such measures can be executed directly against the company. These proceedings (which usually include a court hearing) take only about two to eight weeks before a judgment is obtained. If successful, the company may appeal or start proceedings on the merits to overrule the judgment.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

A holder of security that intends to enforce its security has several options. The main rule is enforcement by way of a public auction, which has to be effected in accordance with the applicable provisions of the Dutch Civil Code and the Dutch Civil Procedures Code, and whereby the security holder may also bid for the secured asset. A sale by public auction may be cancelled at any time before the auction is held.

To the extent not excluded in a security agreement, enforcement can also be effected by way of a private sale. The terms of such private sale have to be approved by the competent Dutch court and subject to the terms of the security agreement; both the security holder and the security provider can request for such approval any time after the security has become enforceable.

With respect to a right of pledge (and to the extent it is not excluded in the pledge agreement), the pledgee can request the competent Dutch court to determine that the pledged asset, for a cost to be determined by the competent Dutch court, will stay with the pledgee. Furthermore, it is possible for the pledgee and pledgor to agree to an alternative enforcement procedure after the right of pledge has become enforceable. This option is not available in the context of real estate security.

Appropriation of a pledged asset is not permitted until the pledgee is authorised to sell that pledged asset. Appropriation of a mortgaged real property is never permitted.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

In principle, no restrictions apply to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Under the Dutch Bankruptcy Act, the court may allow a general cooling-off period during a suspension of payments or bankruptcy for a period of up to two months, which can be extended by another two months. During the cooling-off period, the (collateral) security rights of lenders are suspended and cannot be foreclosed without court permission.

Under the Dutch private restructuring plan procedure (the 'Dutch scheme'), there is in principle no automatic stay. However, the debtor has the possibility to request the court to allow a stay for a maximum of four months, with the possibility of an extension of up to eight months in total. The stay, when granted upon request, prevents all parties from claiming or taking recourse (which includes enforcing security) against the debtor's assets, unless they have court consent. Dutch companies have applied for a stay under the Dutch scheme legislation to prevent lenders from enforcing.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

An arbitral award issued in a dispute with respect to which the relevant parties have validly agreed in writing that it shall be settled by arbitration will be recognised and enforced by the Dutch courts without examination of the merits of the case, pursuant to and subject to the conditions of and limitations of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and/or Book IV of the Dutch Civil Procedures Code (*Wetboek van Burgerlijke Rechtsvordering*).

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

During bankruptcy, there is a general moratorium and ordinary and preferential creditors may no longer enforce their claims against the debtor's assets. However, secured creditors are not affected by the moratorium, unless a cooling-off period applies. Please also refer to question 7.6.

The rights of the holder of financial collateral are not affected by insolvency proceedings and it can act as if there were no insolvency proceedings, allowing the security holder to liquidate the assets over which it has security or, if agreed as part of the conditions of the security arrangement, retain ownership of the assets provided as security. Any cooling-off period ordered does not apply to assets subject to a financial collateral arrangement (*financiëlezekerheidsovereenkomst*).

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In bankruptcy, the bankruptcy trustee may challenge voluntary legal acts (i.e., acts where there was no prior legal obligation to perform them) for consideration, and legal acts without consideration that were performed by the debtor. In addition, set-off rights and general preference claims may apply, including from the Dutch tax authorities and from employees (both pre- and post-insolvency), subject to certain conditions.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Although the Dutch Bankruptcy Act does not contain exceptions, it is unlikely that insolvency proceedings could be opened against the Dutch state and local authorities, such as municipalities and provinces. Also, Dutch courts cannot open insolvency proceedings against a foreign state.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Unsecured creditors may levy an attachment (*beslag*) on assets of the debtor to ensure that the creditor can take recourse on assets of the debtor if a successful order is awarded. To levy such attachment, the creditor needs prior court approval, which can in general be obtained quite easily, and the attachment is levied by a bailiff, being a government-appointed person.

Also, suppliers may have a retention of title (*eigendomsvoorbehoud*) on assets supplied to a debtor. However, the supplier cannot reclaim the goods when these have been used in a manufacturing process resulting in accession of the goods, in which case the supplier does not have a right to the newly created goods. In addition, Dutch law provides for a statutory reclaim right for the supplier of a movable asset, which it can invoke until both (i) six weeks have passed after payment was due, and (ii) 60 days have passed since delivery has taken place. During a cooling-off period, a supplier cannot retake possession of the goods without court permission.

Finally, the beneficiary of a non-possessory pledge over movable assets can see its rights frustrated by means of a seizure by the tax authorities of pledged assets located on the premises of the debtor (*bodemzaken*).

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Under Dutch law, the submission by a party to a foreign jurisdiction is binding upon such party. This submission does not preclude that claims for provisional measures in summary proceedings may be brought before a competent court in the Netherlands. Also, we note that certain proceedings are subject to an exclusive jurisdiction (e.g. as regards real estate or consumer contracts).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

From a Dutch law perspective, there is some uncertainty as to whether a party can waive its immunity, to the extent it enjoys immunity. In principle, the State has the sole authority to waive the immunity granted to its nationals.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

No licence requirements apply to foreign lenders solely as a result of offering a loan to Dutch companies (i.e., professionals). Lending to consumers is, in principle, a licensed activity. An existing (loan) agreement is not void or voidable as a result of a lender not meeting the applicable licence requirements. There are no additional licence requirements for a party acting as an agent under a loan (other than those applicable to a lender).

11 LIBOR Replacement

11.1 Please provide a short summary of any regulatory rules and market practice in your jurisdiction with respect to transitioning loans from LIBOR pricing.

The Dutch authority for financial markets (*Autoriteit Financiele Marketen*) (the 'AFM') published a report setting out recommendations regarding risks for market participants in the benchmark transition. The report includes recommendations by the AFM, among others, encouraging market participants to actively amend their contracts to replace the IBOR references with risk-free rate references, or include fallback language.

In terms of market practice, the transition in the Dutch market has so far to a large extent been in line with the European and international loan markets. That means that all new loan issuances are on alternative rates in place of LIBOR and there is an active transition of legacy contracts, driven by continued engagement between borrowers and lenders.

12 Other Matters

12.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2021 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020/2021 due to COVID-19 to continue into 2022 and beyond?

Given the lockdowns imposed during COVID-19, the Dutch market saw an increase in the number of documents signed electronically. From a legal perspective, the EU eIDAS Regulation forms a part of the regulatory landscape for electronic signing under Dutch law, and article 3:15a of the Dutch Civil Code provides that electronic signatures shall have the same legal effect as a wet-ink signature, if the method used for signing is sufficiently reliable, having regard to the purpose for which the electronic signature is used and to all other circumstances of the case. This is an open norm and hence the use of electronic signatures should be considered on a case-by-case basis.

Any deeds executed before the civil law notary in the Netherlands, such as notarial deeds of amendment of articles of association/incorporation/conversion or (de)merger, transfer of shares or real estate and deeds of pledge, are required to be paper-based.

We anticipate an increased use of electronic signatures that are in compliance with the applicable legal framework.

12.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Pursuant to a recent judgment of the Dutch Supreme Court, Dutch law now provides for the possibility of a change in priority if multiple rights of pledge are granted and the order in which they have been established does not lead to the desired priority. Pledgees can contractually agree upon a change in priority in a deed of pledge or deed of ranking. All pledgees whose priority will change due to the new right of pledge must consent to such change in priority. This deviates from the statutory default rule for rights of pledge, which is the *prior tempore* rule (order of execution rule). For Dutch law mortgages over real estate, a statutory mechanism is available to change the priority of such mortgages, and the Supreme Court's judgment has not affected that mechanism.

Mandeep Lotay has worked in the UK and European markets for 18 years, advising on banking and structured finance transactions. He advises clients on various products across jurisdictions and the entire credit spectrum. Mandeep's unique specialism in banking and structured finance means that he is often chosen to lead projects that have both these features such as bank loan bridge financings with subsequent capital markets refinancings.

He is experienced in a number of banking products, including acquisition finance, asset-based lending, corporate syndicated loans and secondary debt-trading. His acquisition finance experience includes underwritten deals, Term Loan B as well as club financings, and acting for sponsors, underwriters and lenders. Often the acquisitions are highly leveraged, and involve an auction process and debt advisors.

Mandeep regularly heads up teams made up of lawyers in Amsterdam, London and other jurisdictions. As well as being technically sharp, he is commercial and focused on providing the best client service. He is an English law-qualified lawyer and registered as an overseas lawyer with the Dutch Bar.

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