

# International Corporate Rescue



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## Good News for Lenders in the Netherlands

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### Introduction

On 1 October 2012, the financial assistance prohibition for BVs (private companies with limited liability) was repealed. Under the new regime, a BV is in principle free to provide financial assistance to third parties for the acquisition of its shares provided that the management board determines that the assistance is in the company's interest and subject to the usual restrictions (primarily the voidable preference rules and the *ultra vires* rules). The assistance can take the form of, for example, granting guarantees, security or loans.

Two recent judgments, *Roeffen q.q. v Jaya BV* and *ING Commercial Finance v Aukema q.q.*, limit the scope of, and provide more clarity on, the two abovementioned restrictions and on the duty of care of lenders in the Netherlands more generally, in particular where the financing is granted in the context of a leveraged buyout.

### Voidable preference rules

If a company is in bankruptcy in the Netherlands, the voidable preference rules enable the bankruptcy trustee to avoid certain pre-bankruptcy transactions between the company and third parties which are prejudicial to the company's creditors. (Outside bankruptcy proceedings, a similar procedure is available to individual creditors.) Such transactions can include the granting of security and/or guarantees by the company in the context of a financing deal, where there was no pre-existing obligation to do so. In short, the requirements for invalidating these types of transactions based on the voidable preference rules are that the creditors' possibility of recovery has been prejudiced and the debtor and the counterparty to the contested transaction knew or should have known this (the so-called 'knowledge requirement'). The Dutch Supreme Court has ruled that the knowledge requirement is fulfilled if the bankruptcy trustee can demonstrate that, at the time of the transaction, the debtor and the counterparty could, with a reasonable degree of probability,

foresee the bankruptcy and the fact that there would be a shortfall in the bankruptcy estate.

In practice, it is difficult for a bankruptcy trustee to meet this burden of proof. In the Netherlands, there are no rules under which transactions are voidable or void merely because they took place during a particular period prior to bankruptcy; there are no absolute hardening periods. There is, however, a 'suspect period', which is one year prior to the issuance of the bankruptcy order. In certain circumstances the knowledge requirement is presumed to have been fulfilled if the transaction was performed during this period. Such circumstances include a sale for far below fair market value, a transaction with a related party such as a group company or a (direct or indirect) management board member, and the payment of a debt or the giving of security for a debt that is not yet due and payable.

It has been unclear whether the suspect period also applies to the granting of guarantees and security by an obligor in the context of a 'new money' financing transaction. In a recent decision, the Dutch Supreme Court ruled that the shifting of the burden of proof for transactions performed during the suspect period does not apply to 'new money' financing transactions,<sup>1</sup> thereby limiting the scope of the voidable preference restriction on a BV's ability to provide guarantees and security in the context of a financing (including an acquisition finance).

### *Ultra vires* rules

The second restriction on a BV's ability to provide financial assistance stems from the *ultra vires* rules, which entail that a transaction entered into by a company may be annulled by the company itself or its bankruptcy trustee if the transaction exceeded the company's objects and the counterparty knew or should have known this without independent investigation. The Dutch Supreme Court has ruled on more than one occasion that when determining whether a company's objects have been exceeded, account must be taken not only of the objects clause in its articles of

### Notes

1 HR 29 November 2013, ECLI:NL:HR:2013:CA3762, (*Roeffen q.q./Jaya BV*).

association but also of all (relevant) circumstances, in particular whether the company's interests are served by the transaction.<sup>2</sup> The company's relationships with other group companies must also be considered.<sup>3</sup>

On the basis of these judgments it seems clear that a transaction is not necessarily *ultra vires* where the company's articles do not specifically allow it as long as there are 'justifying' circumstances. However, in legal literature and in practice these judgments are often interpreted as also implying the reverse: that, based on all (relevant) circumstances, a transaction can be *ultra vires* even if the company's articles specifically allow it. For instance if entering into the transaction is not in the company's interest. Additionally, some legal writers have even argued that (although the *ultra vires* rules explicitly provide that third parties generally do not have duty to investigate) financial institutions, given their financial expertise, should be able to determine whether a transaction is *ultra vires* (in the above broad sense) and that they do have an obligation to investigate this.

The above uncertainty and lack of hard and fast rules are obviously problematic for lenders. In practice, however, the *ultra vires* rules are something of a paper tiger; we are not aware of any authoritative case law in which a transaction that was explicitly permitted under a company's articles of association was invalidated based on the *ultra vires* rules.

Nevertheless, a recent judgment of the Arnhem-Leeuwarden Court of Appeal has ended the above uncertainty.<sup>4</sup> In that judgment the Court of Appeal made very clear that a transaction that is explicitly permitted under a company's articles of association in principle cannot be invalidated on the ground of *ultra vires*. It also ruled that lenders do not have a duty to determine whether a transaction is *ultra vires* (i.e. complies with the objects clause in the company's articles of association).

## More good news: no duty of care for lenders generally

In the same judgment, the Court of Appeal also ruled on a lender's duty of care more generally. The court held that, as a general rule, a lender is not required to consider the interests of third parties (such as other creditors) provided that the borrower is a professional party which, at the time of the loan, is not in financial difficulties and a bankruptcy is not expected. According to the court, in this situation the lender is not under a duty to investigate the effects of the financing structure on the recourse position of the other creditors or the risk of insolvency. There is no obligation to verify whether financial information provided by the borrower is accurate or whether its projections are realistic. For this purpose, the court considered it irrelevant whether the financing in question is granted in the context of a leveraged buyout, despite the increased risk of financial difficulties often resulting from the target's debt service obligations following the buyout.<sup>5</sup>

## A view to the future

The *Roeffen q.q. v Jaya BV* and *ING Commercial Finance v Aukema q.q.* judgments are thus good news for creditors lending to, or obtaining guarantees and security from, a Dutch obligor (including BVs) that are professional parties and, at the time of the loan, are not in financial difficulties, and improve the already very strong position of secured creditors in the Netherlands. The judgments provide clear guidance on the concepts of voidable preference rules, *ultra vires* rules and the duty of care of lenders in the Netherlands more generally, where such guidance was previously not available.

### Notes

2 For instance, HR 20 September 1996, NJ 1997, 149 (*Playland*).

3 HR 7 February 1992, 438 (*Astro*). See D.A. Viëtor, 'Persoonlijke aansprakelijkheid en doeloverschrijding bij het verlenen van financiële steun', *Ondernemingsrecht*, 2007-13, p. 493 et seq. for an explanation on *ultra vires* rules within the context of financial assistance transactions.

4 Arnhem-Leeuwarden Court of Appeal 26 August 2014, ECLI:NL:GHARL:2014:6668 (*ING Commercial Finance/Aukema q.q.*).

5 See for a detailed explanation on the judgment in the first instance D.A. Viëtor and D.A. Scheenjes, 'Bestuurdersaansprakelijkheid en bancaire aansprakelijkheid in het kader van een acquisitiefinanciering', *TFR* 2012-6, p. 192 et seq.

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