The Netherlands – cross-border banking and finance guide

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Loan market and developments

Please provide a brief overview of the current state of the loan markets in your jurisdiction and any significant recent market developments

The on-going credit crisis continues to provide for reduced numbers and size of transactions in the Dutch loan market, particularly leveraged buy-out transactions. In addition, foreign banks who used to lend to Dutch borrowers on a frequent basis are generally less inclined to do so in the current climate. Dutch banks are increasingly domestically orientated and prefer to extend credits as part of a club or syndicate where previously similar-sized credits were extended on a bilateral basis. Funding from banks in Europe and the Netherlands by way of loans is therefore still restricted. They are also perceived increasingly to aim to cross-sell when they lend. Borrowers, on the other hand, are increasingly looking for alternatives to bank financing. As a consequence, with respect to large companies, there has been an increase in US-funded financing transactions, asset-based lending financings and high yield bonds often in combination with revolvers, private placements and other forms of funding. Small to medium based enterprises look at other alternatives, such as debt listings, credit unions and crowd-funding. Bank financing has, in our view, remained predominant.

Please provide a brief overview of forthcoming changes to the law or other matters that may affect the loan markets or the responses to the questions below

Several legislative initiatives and new pieces of legislation are notable because these are generally expected to raise banks' funding costs and, for this reason, to have an adverse effect on the availability of bank credit. The (further) implementation of Basel 3 capital framework and several EU Directives (such as the Financial Conglomerate Directive (2011/89/EU) and the Capital Requirements Directive and Regulation (CRD IV 2013/36/EU & CRR 575/2013/EU) are expected to increase Dutch (and EU) based banks' mandatory capital buffers, especially for system relevant banks, and increase the level of oversight by regulatory institutions. In addition, as of 1 October 2012, a banking tax has been introduced. Further, it is expected that as of 1 July 2015, the Dutch deposit insurance scheme shall need to be pre-funded by banks operating in the Dutch market instead of contributing to the fund after a pay-out has occurred.

Civil laws are not expected to change in the near future. With respect to the 19th century bankruptcy code, however, recent developments suggest that this will be modernised in the coming years and that such modernisation is to include a pre-packaged insolvency possibility, the appointment of a non-publicly disclosed administrator and the possibility of a conclusive and enforceable court-ordered settlement. This is not expected to influence the Dutch lending market significantly, except secured lenders will perhaps be forced to share in the liquidation costs more than they normally do now.

In the field of Dutch company law, the following effects of two recent pieces of legislation are notable. As of 1 October 2012, the specific financial assistance restrictions in relation to private limited liability companies have been abolished. This does not mean that such companies can provide unlimited financial assistance; the management board members are personally liable in case such actions are not in the interest of the company or its financial position. Another amendment has entered into force as of 1 January 2013, pursuant to which (personal) conflicts of interest between a member of the managing board of a Dutch public or private limited liability company will, in principle, no longer affect the ability of such member to validly represent the company.

Lending

Is it necessary to obtain any consents or licenses in order to lend in your jurisdiction or enforce rights under a loan agreement and if so what is the process for obtaining the consent or license? Are there any other restrictions on lending that foreign lenders should be aware of?

Under Dutch law there are no licence, consent or registration requirements in relation to lending, except in the case of consumer credit.

Sanction laws may prohibit lending to certain borrowers. Most sanctions are introduced by regulations of the Council of the European Union. Based on the Dutch Sanction Act 1977 and the Dutch Act on Economic Offences violation of such sanction regulations is punishable. Furthermore, the Dutch Act on the financing of decentralised governments (Wet financiering decentrale overheden) restricts the ability of certain public bodies to borrow. Other than such sanction and public finance laws there are no general regulatory restrictions under Dutch law in relation to lending.

Are there any taxes, duties or other charges associated with making loans to entities that are incorporated in your jurisdiction?

There are generally no taxes, duties or other charges associated with making loans to unaffiliated entities incorporated in the Netherlands, and there is in principle no withholding tax on interest payments under loan agreements. Exceptions apply where a loan is re-qualified as equity for Dutch tax purposes or as an interest in real estate located in the Netherlands.

Are there any restrictions, controls, fees, taxes or charges on foreign exchange in your jurisdiction?

No, except that in the case of a payment transaction, payment service providers shall disclose to the payment service user, where applicable, the actual or reference exchange rate to be applied to the relevant payment transaction. This obligation is based on the EEA Payment Services Directive. Certain services rendered by agents appointed under a credit facility agreement or lenders participating in the syndicate may be categorised as payment services.

How is debt normally transferred in your jurisdiction?

Normally, a debt is transferred by disclosed assignment (openbare cessie). This requires a legal cause for transfer (eg sale), a deed of transfer and notice to the debtor. Since 2004 undisclosed assignment is possible as well, but this is not frequently used in loan markets.

Security and guarantees

Is it possible to take security over each of the following types of assets in your jurisdiction (including future assets), and what form does that security usually take?

In the Netherlands, security is usually provided over assets in the form of a right of mortgage or a right of pledge depending on the type of asset. A security transfer or assignment is, in principle, not permitted under Netherlands law unless it is categorised as a title transfer, financial collateral arrangement in relation to certain eligible collateral (being cash), certain securities and certain credit claims as set out in Title 7.2 (Financial Collateral Arrangements) of Book 7 of the Dutch Civil Code (this exception transposes Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended). Sale-and-lease-back and hire-purchase arrangements are in principle permitted.

A right of mortgage must be used to encumber registered goods ('registergoederen'), such as real estate and rights in relation thereto (eg a right of long lease 'erfpacht') or a right of superficies ('opstal')), but also registered ships or registered aircraft. A mortgage must be in the form of a registered mortgage.

A right of pledge will generally be used for movables and receivables (including contractual rights). The pledge can either be possessory or non-possessory in the case of movables, and disclosed or undisclosed in the case of receivables. Receivables can only be pledged by means of an undisclosed pledge to the extent such receivables exist when the pledge is created or will arise under legal relationships existing at that time.

Land

Lenders often take security over land (and similar rights, such as registered rights of long lease ('erpacht') or a registered right of superficies) ('optstal') and do so in the form of a registered mortgage.

Shares and other securities

Lenders increasingly take security over (registered) shares in the form of a right of pledge to enable them to sell the shares in a forced sale without having to enforce collateral on the company's assets separately. The share pledge is usually in addition to security over the assets of the company in which the shares are pledged.

Pledgees often stipulate that they will acquire the voting rights attaching to the pledged shares upon the occurrence of an event of default and notice thereof given by the pledgee to the pledgor and the company. Provided the pledgee acquires sufficient voting rights in this manner, it will be able to replace the management of the company. Lenders are, however, generally reluctant to actually acquire the voting rights for fear of shareholder liability. In addition, if a fiscal unity exists between the pledgor and the company in which the shares are pledged, the fiscal unity will be breached if the lenders acquire the voting rights attached to the shares, which may have material tax consequences. A fiscal unity is a consolidated tax regime involving affiliated enterprises or bodies which are, for the purposes of Dutch value added tax or corporate income tax (depending on the type of fiscal unity), treated as one single tax payer.

Unless the company's articles of association provide otherwise, shares in the company are capable of being pledged, and the attached voting rights can be attributed to the pledgee. Both are subject to further conditions laid down in the articles of association and Dutch law. The articles of association of a public limited liability company cannot limit or restrict the right to pledge bearer shares.

There are good arguments to conclude that a pledgor can validly grant a pledge on shares yet to be acquired by it, but there is no statutory law or published case law confirming this.

Lenders can also take security on securities held in book-entry form, in which case a financial collateral arrangement to establish a pledge as set out in Title 7.2 (Financial Collateral Arrangements) of Book 7 of the Dutch Civil Code is possible in certain situations providing certain benefits to lenders on enforcement.

Repurchase agreements (repos) and securities lending transactions are uncommon for ordinary, non-interbank lending purposes.

Cash deposits in bank accounts

A cash deposit or current account with a bank is normally pledged by means of a disclosed right of pledge. An undisclosed right of pledge would in principle only attach to the credit balance existing on the date the pledge is created. Lenders must be aware that Dutch bank accounts will, pursuant to general banking conditions, invariably be subject to a first ranking right of pledge in favour of the account bank and the relevant banking conditions may prohibit a pledge in favour of another party. This account bank's right of pledge and restriction will need to be waived by the account bank in question in order to enable a lender to obtain a first ranking right of pledge.

Receivables (non-contractual and contractual rights, including rights under insurance policies)

Contractual rights in project or asset-based finance, rights under insurance policies, rights under share purchase agreements and inter-company rights are usually made subject to a disclosed right of pledge on receivables. Trade receivables are normally pledged by means of an undisclosed pledge whereby the pledgee stipulates the right to convert it into a disclosed right of pledge by notice to the debtor(s) upon the occurrence of an event of default (as defined under the credit agreement), or simply whenever the pledgee desires to do so. When exercising this right a pledgee is advised to consider the possible harmful consequences to the perceived credit standing of the pledgor of disclosing the right of

pledge to the trade debtor(s). Dutch law only permits future receivables to be pledged by means of an undisclosed right of pledge, if these arise under a legal relationship which exists at the time of the registration of the deed of pledge. For this reason lenders generally stipulate that the pledgor shall pledge receivables arising under new legal relationships by a supplemental deed of pledge and that the pledgor authorises the lenders by power of attorney to sign a supplemental deed of pledge on the former's behalf on a daily basis. Lenders make use of these stipulations on a daily basis. A recent judgment of the Dutch Supreme Court in principle validated this practice.

An important aspect of Dutch property law is that Dutch law governed receivables are in principle transferrable and can therefore be made subject to a right of pledge. However, there are exceptions to this rule. The most important one is that it is possible to make receivables incapable of transfer by contract. In principle, this will render the receivable incapable of being pledged as well. Such a stipulation can be contained in general conditions. For example, if a bank takes a right of pledge on all receivables of its client while one of the customers of that client uses general purchase conditions containing a transfer blocking provision, the receivables out of sales in relation to that customer will in principle be incapable of being pledged.

Intellectual property

In larger transactions, intellectual property rights are usually made subject to a right of pledge. Generally, the various kinds of intellectual property rights (ie copyrights, database rights, patent rights, trademarks and trade names etc) are governed by laws that specifically apply to that kind of intellectual property right and, consequently, the legal basis for creation of a right of pledge on such intellectual property rights varies as well. In addition, the pledging of intellectual property rights registered in foreign registries sometimes requires a further right of pledge to be established pursuant to the law of the jurisdiction in which such foreign registry is based.

Tangible assets such as ships, aircraft, machinery etc

Most financed ships and aircraft will be registered and lenders financing such assets will usually take a registered mortgage on such assets. Hire-purchase or sale-and-lease-back arrangements are used as well. However, such arrangements are uncommon in relation to inland waterway vessels; these are typically mortgaged because of restrictive laws on hire-purchase and sale-and-lease back arrangements in relation to inland waterway vessels. Machinery is more often made subject to hire-purchase and sale-and-lease-back arrangements.

Stock and inventory

Lenders often take a non-possessory right of pledge on stock and inventory.

In relation to each type of asset listed above: What formalities are necessary or desirable to perfect the security, and what is the effect of the formalities not being carried out?

A mortgage requires a notarial deed which is registered in the public registers.

An undisclosed right of pledge on receivables requires a private deed which is date-stamped by the Dutch tax authorities or an authentic (eg notarial) deed. A disclosed right of pledge on a receivable requires a private deed and notice to the debtor of the pledged receivable.

A non-possessory right of pledge on movables requires a private deed which is date-stamped by the Dutch tax authorities or an authentic (eg notarial) deed. There are in principle no formal requirements to create a disclosed possessory right of pledge on movables other than transferring possession to the pledgee or a third party acting for it, but it is advisable for evidentiary reasons to record the pledge in a private deed.

A right of pledge on shares in a private or public limited liability company incorporated under Dutch law requires a notarial deed, unless these are shares in a public limited liability company and the shares are listed, in which case a private deed suffices.

Securities in book-entry form are usually pledged by creating a pledge on the securities account in which these securities are administered, or in a segregated account created specifically for the right of pledge. If the securities account is held by an authorised bank or investment firm, a right of pledge is created by crediting the shares in the records of the account provider in the name of the pledgee. If the securities account is held by another entity, such as a special custody company, the account is categorised as a receivable and should be pledged accordingly.

In principle, a right of pledge on most intellectual property rights requires a private deed which, although generally not legally required, is preferably date-stamped by the Dutch tax authorities. Recording the rights of pledge in the respective registers, such as the trademark register and the patent register, is required in order to obtain third party effect of such rights of pledge (meaning that a third party cannot maintain that it had no knowledge of the existence of the security right once the security right has been recorded in the register), and also to secure the priority of the rights of pledge. In the absence of relevant statutory laws and case law, it is not always certain that a valid right of pledge on intellectual property rights has been created (especially if a right of pledge is intended to be created on entitlements, applications or future intellectual property rights).

There are no formal requirements to create a disclosed possessory right of pledge on bearer securities or other rights to bearer other than transferring possession to the pledgee or a third party acting for it (the provisions for bearer securities follow the regime applicable to movables), but it is advisable for evidentiary reasons to record the pledge in a private deed. A pledge of rights to order will only be effective upon proper endorsement in accordance with applicable legal requirements and transfer of the order instrument into the control of the pledgee or an agreed third party in accordance with the terms governing these rights.

Generally, if the foregoing formalities are not carried out, no valid security right will have been created.

Security (including rights of mortgages, pledge, guarantees or other forms of quasi-security) given by an individual who is married or who has a registered partner will typically require permission of the spouse or registered partner. The relevant rights of mortgage or pledge will not come into existence unless the respective formalities have been fulfilled. In the case where permission of a spouse or registered partner had not been given when required, the spouse or registered partner can in principle annul the security granted.

A works council is intended to function as a corporate body enabling employees to participate in the process of making certain decisions and must in principle be established when at least 50 persons work at an enterprise. If established (or in the process of being established), a works council has the legal right to advise on certain transactions of the employer, such as providing security or entering into a loan agreement. An employer must give the works council the opportunity to advise on any projected decision in respect of such transactions. The works council's advice must be requested in writing together with a substantiated statement at such a time that the works council advice can have a material effect on the decision to be taken. Unless the employer's decision is in conformity with the works council's advice, the employer is obliged to suspend its implementation for a period of one month. During this period, the works council may lodge an appeal against the decision with the Enterprise Chamber of the Amsterdam Court of Appeal. Although it is debated in literature whether violating a works council's advisory right will affect the ensuing transaction, it may in practice lead to social unrest within the relevant company, negative publicity and orders of the Enterprise Chamber of the Amsterdam Court of Appeal.

What costs are involved in taking security over each asset, including notarial fees, registration fees and taxes and are there any ways to minimize these costs?

Notarial fees are not set by law and depend on the fee arrangement agreed with the notary (eg time spent or capped fees). Large law firms usually have in-house notaries. A time date stamp by the Dutch tax authorities is free of charge. Registration fees for deeds of mortgage depend on the form of the deed offered for registration; EUR 154 for hard copy, EUR 132 for digital copy, and EUR 73 in case the digital copy enables the registry to process it electronically in accordance with the provisions with respect to such registration. Registration of security rights on intellectual property rights with the relevant offices requires the payment of fees, the amount of which depends on a variety of circumstances, such as the kind of intellectual property right and the office.

Does your jurisdiction recognize the concept of a trust? If not, is there an accepted method of ensuring all lenders get the benefit of security? Are there any limits on action a security agent could take on behalf of the secured parties?

The Netherlands have ratified the Hague Convention on the Law Applicable to Trusts and their Recognition of 1985 but a trust cannot be established under (non-Caribbean) Dutch law. The Dutch Civil Code is not clear on whether or not a right of mortgage or pledge can be granted to a party other than the creditor of the claim to be secured, and there is no published decisive case law of the Dutch Supreme Court on this subject either. Even though a growing number of legal authors accept the view that this should be possible, uncertainty remains, as a consequence of which the parallel debt is invariably used to avoid unnecessary uncertainty. The Dutch parallel debt is a contractual arrangement which, briefly put, typically provides that amounts equal to the amounts owed to the lenders are also owed to the security agent/trustee (it being noted that this

is not an actual trustee since there is usually not an actual trust within the meaning of, for example, English law) as a creditor in its own right of such parallel debt obligations and not as a lender or as a representative of the lenders. Payment to any of the lenders reduces the parallel debt and payment to the security agent/trustee reduces the debt owed to the lenders.

Will changes to the group of lenders adversely affect the security or require any steps to be taken as regards the security package in your jurisdiction?

No, not if the parallel debt has been properly executed and provided that the security agent/trustee in favour of which the security has been established remains the same.

How is security commonly released in your jurisdiction?

Most deeds of mortgage or pledge afford the mortgagee or pledgee the right to cancel or terminate the security unilaterally. A release can then be documented by a relatively short release letter by which the secured party exercises its right of cancellation. If the security rights have been registered, also the relevant registers must be informed in order to cancel the security right. If debtors of receivables have been informed of a disclosed right of pledge, they should be informed of the cancellation as well.

What forms of quasi-security are common in your jurisdiction?

Guarantees are a common type of quasi-security (company or bank guarantees). Comfort letters are less common but are used from time to time. Set-off or netting arrangements are particularly relied on in the case of zero-balancing and interest compensation arrangements offered by banks to their corporate clients, but also in the form of cash collateral deposited in blocked accounts.

Can entities in your jurisdiction give guarantees? If so, are there any restrictions or limitations on an entity incorporated in your jurisdiction granting such guarantees, and are there any common ways of minimising the impact of these?

Ultra vires

Legal entities incorporated under Dutch law can in principle give guarantees. However, 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 objects of that entity were transgressed by the giving of the guarantee, and the other party to the transaction knew or should have known this without independent investigation. The Dutch Supreme Court has ruled that in determining whether the objects of a legal entity are transgressed, not only the description of the objects in that legal entity's articles of association is decisive, but all (relevant) circumstances must be taken into account, in particular whether the interests of the legal entity were served by the transaction.

This risk can be minimised (but not eliminated) by ensuring that the objects clause in the articles of association expressly permits the giving of guarantees and by procuring that the management board of the legal entity certifies that in their view the giving of the guarantee is in the best corporate interest of the legal entity and conducive to the realisation of its corporate objects.

Financial assistance

Pursuant to Article 2:98c of the Dutch Civil Code, a public limited liability company may grant loans only in accordance with the restrictions set out therein, and may not provide security, give a price guarantee or otherwise bind itself, whether jointly and severally or otherwise with or for third parties with a view to the subscription or acquisition by third parties of shares in its share capital or depository receipts. This prohibition also applies to its subsidiaries. It is generally assumed that a transaction entered into in violation of Article 2:98c of the Dutch Civil Code is null and void.

This risk can be minimised (but not eliminated) by procuring that the relevant transaction complies with the relevant provisions of the law and the articles of association. This will in certain cases require a lender to verify in the balance sheet of the relevant obligor whether or not there are sufficient freely distributable reserves.

As of 1 October 2012, the specific financial assistance restrictions (Article 2:207c of the Dutch Civil Code) in relation to private limited companies have been abolished. This, however, does not mean that such companies can provide unlimited financial assistance. The management board members are personally liable where such actions are not in the interest of the company or its financial position.

Conflict of interest

If any of the managing directors ('bestuurders') of a legal entity incorporated under Netherlands law has a personal conflict of interest with that entity with respect to the entering into of credit or security documents, this will in principle not affect his or her authority to represent that entity. It will, however, entail that such a managing director is no longer allowed to participate in the relevant board meeting and the adopting of the relevant resolutions.

Notwithstanding the above, lenders will generally ask for a personal confirmation to be included in the relevant board resolutions with respect to the absence of any personal (direct or indirect) conflict of interest to minimise the risk of a breach of internal procedures within the relevant entity.

Works council

As with other security to be granted, the works council of the intended guarantor may have the right to advise on the giving on the guarantee (see above in relation to works councils).

Would there be any concerns in terms of validity or enforceability for an entity in your jurisdiction to grant an English law guarantee, as typically included in syndicated loan agreements governed by English law?

No, such a guarantee would in principle be treated in the same way as a similar guarantee under Dutch law. This is because a Dutch court must recognise and give effect to a choice for English law in a contract subject to the limitations provided under the Rome I Regulation (No. 593/2008) and, if the relevant clause includes a choice of law with respect to any non-contractual obligations as well, the Rome II Regulation (No. 864/2007).

Enforcement

When in your jurisdiction would a lender be entitled to enforce its security or guarantees?

In the case of a first priority right of mortgage or a first priority right of pledge, a lender would normally be entitled to enforce upon the occurrence of an event of default as defined in the relevant credit agreement and notice having been given thereof by the lender, provided that a default ('verzuim') in the fulfilment of the payment of the secured obligations has occurred under Dutch law, which would normally be the case. In principle, enforcement should take place by means of a public sale and appropriation of the mortgaged or pledged assets is not allowed. However, with approval from the pledgor, obtained after the moment that the pledgee may enforce, or from the interim relief judge, deviations from such a public sale are possible.

A guarantee will in principle be enforceable in accordance with its terms, it being in principle a contract which is subject to the Dutch law principle of contractual freedom. Under Dutch law, lenders will have a duty of care to, where reasonably possible and appropriate, take other proportionate measures before they accelerate a loan and enforce any security on collateral.

In brief, for each type of asset referred to in 'Securities and guarantees' above, what are the procedures for enforcing security and guarantees in your jurisdiction?

Inside insolvency

There are three formal standard insolvency proceedings under Dutch law: (a) bankruptcy, (b) suspension of payments and (c) debt restructuring of individuals. Under Dutch law certain financial undertakings, such as a bank or insurance undertaking, cannot be granted suspension of payments. In relation to such undertakings a similar regime can be applied which are called emergency regulations. Banks and insurance companies can also be made subject to special measures under the Dutch Intervention Act, which entered into force in 2012. Below we will only discuss the effects of the first three formal standard insolvency proceedings applicable to non-financial institutions.

Within each of these insolvency proceedings, a pledgee, mortgagee or lessor can in principle enforce or repossess as if there were no insolvency proceedings, subject to the following five exceptions:

- during bankruptcy proceedings the supervisory judge can declare a cooling down period of no more than four months including extension. During that time, a mortgagee, pledgee or lessor cannot in principle enforce or repossess
- the liquidator (in bankruptcy proceedings) can set a reasonable term within which the mortgagee or pledgee must enforce, failing which the bankruptcy trustee may sell the mortgaged or pledged collateral. If the sale of such collateral is left to the liquidator, the mortgagee or pledgee will retain a preferred claim on the sale proceeds but will need to share in the bankruptcy costs, and will have to wait for payment until a distribution list has been made up by the liquidator and payments are being made by him; a share in these costs may be high or even as high as the sale proceeds of the collateral
- if receivables on which an undisclosed right of pledge has been created are paid by the debtor to the pledgor in bankruptcy proceedings, then (similar to the situation described in the second exception) the pledgee has a preferred claim on these payments, but must share in the bankruptcy costs and wait for payment until the distribution list has been made up and payments are made by the liquidator. In order to avoid this, debtors of the receivables on which an undisclosed pledge has been established, should be notified in a timely manner thereof by the pledgee and instructed to directly pay the relevant receivables to the pledgee. It should also be noted that, as a rule of thumb, a liquidator may not, within fourteen days following his appointment, actively seek to collect receivables which are subject to an undisclosed right of pledge in favour of a bank. As a result, a pledgee is advised to provide notification of any pledges within that period of fourteen days to the relevant debtors or to at least notify the liquidator within that period that the pledgee intends to notify the relevant debtors (the latter will, however, not prevent the relevant debtors from paying to the bankrupt pledgor)
- a liquidator may cause the release of the relevant collateral against payment of the secured obligations and the enforcement expenses of the holder of the security right (if any) and
- the liquidator can annul security if the conditions for an action on the basis of fraudulent preference or conveyance have been met with respect to the creation of such security. It will generally be more difficult for a liquidator to annul security if it has been given on the basis of a valid obligation to provide security (such an obligation is commonly referred to as a 'positive pledge' in the Netherlands)

Furthermore, a pledge on an asset which is not owned by the pledgor at the time of creating a right of pledge will not come into existence if such asset is acquired by the relevant pledgor on (the '00.00 hours rule') or after the day on which the pledgor has been declared bankrupt or been granted a suspension of payments under the Dutch Bankruptcy Code. To the extent such a future asset consists of claims with respect to payment of rent under a lease agreement, it should be noted that there is specific case law according to which, under Dutch law, such claims are considered to arise only as the relevant use of the leased property has in fact been provided to the tenant unless the rent is prepaid.

The cooling down period or the 00.00 hours rule does not affect a pledge in relation to collateral established pursuant to a financial collateral arrangement establishing a right of pledge on certain eligible collateral, being cash, certain securities and certain credit claims as set out in Title 7.2 (Financial Collateral Arrangements) of Book 7 of the Dutch Civil Code (this exception transposes Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended). The cooling down period also does not affect the right of a central bank to have recourse or to repossess or, in connection with participating in a designated system, another participant of such system (this exception transposes Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, as amended).

A guarantee given for the debts of an insolvent party will normally (depending on the contract governing the guarantee) remain unaffected by the insolvency proceedings and be enforceable against the guarantor. A guarantee given by the insolvent party will normally not be enforceable in the sense that the beneficiary will not be able to have recourse to assets which are subject to the bankruptcy estate.

Outside insolvency

Outside insolvency proceedings, a pledgee, mortgagee or lessor can in principle enforce or repossess in accordance with Dutch law and the relevant deed of pledge or mortgage, or lease agreement.

When foreclosing on a pledge of shares in a private or public company with limited liability incorporated under Netherlands law, the share transfer restrictions included in the relevant Articles of Association will have to be observed. Additionally, the offering of shares in the context of enforcement could be prohibited without an approved prospectus being published and may also involve the rendering of regulated investment services.

Outside insolvency, a creditor can annul security if the conditions for an action on the basis of fraudulent preference or conveyance have been met with respect to the creation of such security. However, a security which had been provided on the basis of a valid obligation to provide security can in principle not be annulled. This is also why a positive pledge is generally useful both in and outside insolvency.

Lenders should be aware that certain assets (such as inventory but not stock) which are situated relatively permanently on premises controlled by the debtor will in principle be subject to a lien of the Dutch State for certain tax claims. This lien ranks ahead of a non-possessory right of pledge on such assets and will disregard any security retention of title arrangements or sale-and-lease-back arrangements. If the lenders remove such assets from the premises or gain exclusive control over such premises instead of the pledgor (before formal insolvency proceedings are opened or before the Dutch tax authorities have seized the relevant assets), the Dutch State will no longer have the above lien. However, as of 1 January 2013, the pledgee is obliged to notify the Dutch tax authorities beforehand of its intention to take any such actions and to refrain therefrom during a period of four weeks from the date of notification.

Outside insolvency a guarantee will be enforceable in accordance with its terms. If a beneficiary is aware of any unencumbered material assets or encumbered assets with a material surplus value (ie where the value of the encumbered asset exceeds the debt secured by the encumbrance), such beneficiary could decide to arrest those assets with authorisation of a Dutch court if, for example, there is a realistic threat that these assets will be embezzled or encumbered or further encumbered. The arrested assets may in certain cases also be taken into custody by a third party. Transfers or encumbrances created during such arrest may in principle not be invoked against the arrestor. An arrest will, however, lapse in principle if the owner of the arrested asset is declared bankrupt or granted suspension of payments.

Intercreditor issues

In brief, how will security interests over the same asset (where the priority is not contractually regulated) rank as against each other in your jurisdiction?

In principle, 'prior tempore potior iure' applies. Consequently, the time of the creation of the right of mortgage or right of pledge determines the rank and not the time that the claim arises, which is secured by such right of mortgage or pledge. An exception applies where the first created right of pledge is non-possessory if the pledgee of a later-created possessory right of pledge in good faith at the time of the creation of his right of pledge believes there is no other right of pledge.

Other exceptions apply in relation to certain statutory liens. Examples of the most common statutory liens are a repairer's or contractor's lien, the lien afforded to injured parties on claims under the liability insurance of the injuring party, liens attaching to the right of retention, the above discussed lien for certain Dutch tax claims or liens for certain other public charges.

What method(s) of subordination are commonly used in your jurisdiction?

Structured finance transactions could include structural subordination. In more run-of-the-mill finance transactions contractual subordination is used, for example where shareholders or sponsors subordinate a loan to the claims of the lenders. A receivable can be subordinated by contract between the senior creditor and the junior creditor. Lenders sometimes stipulate that a tripartite agreement is made between the debtor, the junior creditor and the lenders, as senior creditors, so that the lenders, as senior creditors, can also stipulate covenants from the debtor.

Will local courts in your jurisdiction give effect to the contractual terms of an English law-governed intercreditor agreement (which may include limitations on enforcement, rights to receive payment and turnover clauses)? Would an English law-governed intercreditor agreement survive the insolvency of a borrower incorporated in your jurisdiction?

A Dutch court must recognise and give effect to the choice of English law in an intercreditor agreement subject to the limitations provided under the Rome I Regulation (No. 593/2008) and, if the relevant clause includes a choice of law with respect to any non-contractual obligations as well, the Rome II Regulation (No.864/2007). The insolvency of a borrower will in principle not affect an English law-governed intercreditor agreement, albeit the insolvent borrower will no longer have the power to dispose of and encumber its assets.

Governing law and disputes

Will a choice of English law as the governing law of the documents and the English courts as the jurisdiction for disputes be upheld in your jurisdiction? Would a judgment given by the courts of England and Wales be enforceable in your jurisdiction without a retrial of the merits of the case?

A Dutch court must recognise and give effect to the choice of English law and English courts subject to the limitations provided under the EU Rome I Regulation (No. 593/2008) and, if the relevant clause includes a choice of law with respect to any non-contractual obligations as well, the Rome II Regulation (No. 864/2007) and the EU Enforcement Regulation (No. 44/2001), as amended, respectively. A judgment given by the courts of England and Wales in a commercial dispute will be enforceable in the Netherlands subject to the limitations provided under the EU Enforcement Regulation (No. 44/2001), as amended. However, if (i) a judgment expressed in a foreign currency is enforced against a debtor's assets located in the Netherlands and (ii) the proceeds of any such asset following enforcement are to be distributed among several creditors and (iii) a statement of distribution is made by a competent Dutch judge, any claim expressed in a foreign currency will be converted to the lawful currency of the Netherlands at the exchange rate prevailing at the time that statement of distribution is made.

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Roderick de Roo and Erik Vermeulen of NautaDutilh N.V.

NautaDutilh is an independent law firm in the Benelux. It is among the largest law firms in Europe, with over 400 lawyers, civil law notaries and tax advisers in offices in Amsterdam, Brussels, London, Luxembourg, New York and Rotterdam. Although NautaDutilh specialises mainly in corporate, banking and finance law, it is also known for expertise in the areas of tax, intellectual property, competition, telecoms and media, commercial property and insurance. Its partners have a long-standing tradition of public service and working in academia. NautaDutilh is ranked high by legal directories and has won various awards, such as Law Firm of the Year: The Netherlands (IFLR Europe Awards 2011 and 2012 and Chambers Europe Awards 2010 and 2013).

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