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The Netherlands

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in The Netherlands.

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THE NETHERLANDS
LENDING & SECURED FINANCE

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Mere lending by non-Dutch lenders to companies that act in the course of business or professional activities (i.e. not consumers) or taking the benefit of security over assets located in the Netherlands does not require a licence or regulatory approval, provided that licences or regulatory approvals may be required in certain limited cases in which the pledgee would acquire ownership over the pledgor (e.g. a situation in which a share pledge is enforced and voting rights are exercised by the pledgee).

See below under item 21 for lenders which use the word bank in their name.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

No hard statutory restrictions apply for corporate loans. Normally, for tax purposes interest should be at arm's length for intra-group transactions.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Not applicable.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

i. real property (land), plant and machinery;

Security over real estate is created pursuant to a notarial deed of mortgage between the mortgagee and the mortgagor and registration of the right of mortgage in the Dutch Land Registry (*Kadaster*). The civil law notary executes the deed pursuant to powers of attorney granted by the mortgagor and the mortgagee. The mortgagor's power of attorney is a notarial deed and needs to be executed as such. The mortgagee's power of attorney is a power of attorney which should be legalised and if not executed in front of a civil law notary practicing in the Netherlands, furnished with an apostille. Security over plant and machinery can be created and the manner in which depends on the qualification of such assets as either real property (see above) or movables (see below under the heading "equipment").

ii. equipment;

Security over movables is created pursuant to a private deed between the pledgor and pledgee. There are two types of security rights over inventory: possessory or non-possessory. A possessory security right offers best protection against potential claims of third parties but provides less flexibility for the borrower. A non-possessory security right offers less protection but provides more flexibility. A requirement for a possessory security right is that the pledgee or a third party appointed by the pledgor and the pledgee and acting on behalf of the pledgee has effective and exclusive control over the movables and the control may not be held together with the pledgor. The requirement to control the movables does not apply to a non-possessory security rights and granting security is quite simple; parties will enter into a security agreement which only needs to be registered with the Dutch tax authorities (for date stamping).

iii. inventory;

See above under the heading “equipment”. Creating effective control works best if the inventory is in a third party warehouse. A creditor that controls assets (e.g. the landlord or a warehouse operator) may keep possession of the goods until its fees are paid. Normally, in asset-based lending transactions either the landlord is requested to waive such claims in a collateral access agreement or reserves are taken to pay off the creditor. Also, the security agreement will provide that the non-possessory security right may be converted into a possessory security right upon a trigger event.

iv. receivables; and

Dutch law security over receivables can be taken pursuant to a private deed between the pledgor and the pledgee. The security right can be either disclosed to the debtor or remain undisclosed. A disclosed security right is perfected by notification to the relevant debtors and an undisclosed security right by registration of the deed with the Dutch tax authorities. A Dutch undisclosed security right in a future receivable can only be created if such receivable directly results from an, at the time of creation of such right of pledge, existing legal relationship. Hence, if new receivables arise which are not pledged pursuant to a security agreement, the pledgor is obliged to enter into supplementals and arrange for registration thereof with the Dutch tax authorities. Depending on the frequency of such obligation, this might be burdensome for the pledgor. This restriction is not applicable for a Dutch disclosed right of pledge. This issue is less relevant if the security agent is a Dutch bank. The security agent will be appointed as attorney of the pledgor to enter on its behalf into any security over the receivables by means of a collective supplemental security agreement (*verzamelpandakte*), which will be registered automatically by the security agent on a daily basis.

Depending on the specific wording bans on assignment in a Dutch law governed contract can render a receivable incapable of being subject to a security right. The default position (following a judgment of the Supreme Court) is that the receivable can be pledged. Only if certain wording is used or it is clear that parties have intended that the receivable could not be subject to security, no security right can be created. Dutch account banks use general banking conditions which render the bank account receivables incapable of being pledged. In order to create security over the bank account receivables, the account bank needs to provide its consent to the creation of such security right in favour of a third party.

v. shares in companies incorporated in your jurisdiction.

Security over shares in a Dutch private limited liability company is created pursuant to a notarial deed of pledge of shares between the company in which the shares are pledged, the relevant shareholder(s) as pledgor(s) and the pledgee. A Dutch pledge of shares will be executed by a civil law notary based on powers of attorney granted by the parties thereto. The powers of attorney need to be legalised and if not executed in front of a civil law notary practicing in the Netherlands, furnished with an apostille. The right of pledge will be registered for third party effect (i.e. to inform third parties, for example other secured parties or someone who wants to levy an attachment, of the right of pledge), but registration is not a perfection requirement. Security over membership rights in a cooperative or partnership interest in a limited partnership can be created by means of a private deed.

If so, what is the procedure – and can such security be created under a foreign law governed document?

See above for the procedure. Under Dutch private international law:

a. the creation of a security right over real property and movable assets must be effected in accordance with the formalities of, and will be subject to, the laws of the state in which such property is located at the time of the creation of the security right;
b. the creation of a security right over registered shares must be effected in accordance with the formalities of, and will be subject to, the laws of the state by which the company that issued the registered shares is governed;
c. the creation of a security right over a receivable will be governed by the chosen law of, or the law otherwise applicable to, the agreement which contains the undertaking to assign that receivable or to grant a security right over that receivable.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Not for real estate. For the other asset classes this is possible but see restrictions on the creation of a Dutch undisclosed security right over future receivables above.

6. Can a single security agreement be used

to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Technically you can use one notarial deed, but normally private and notarial deeds are split so that security over (i) receivables and movables is granted in a private deed, (ii) registered shares (including related assets and dividends) is granted in a notarial deed of pledge of shares and (iii) real property (and related movables) is granted in a notarial deed of mortgage.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

Yes, see above under question 4.i. and 4.v.

8. Are there any security registration requirements in your jurisdiction?

Yes, see above under question 4.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

The grant of a loan does not attract any such taxes save where the loan represents an economic interest in real property (normally not the case if the loan is a commercial loan provided by a third party lender), deemed real property or a right over (deemed) real property which is situated in the Netherlands. Certain documents need to be executed before a Dutch civil law notary, as a result of which notarial fees may become due (which are not based on the secured amount). Furthermore, documents may require registration as a private deed with a special department of the Dutch Tax Authorities at no cost.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

In general, the board of directors of a company must always assess whether entering in a transaction has sufficient corporate benefit. Pursuant to Section 2:7 of the Dutch Civil Code, a legal act performed by a Dutch company which is not in the company's corporate interest, may be nullified by the company (or its trustee in bankruptcy) on the basis of ultra vires. Section 2:7 of the Dutch Civil code applies to all types of legal transactions.

Ultra vires can be determined by means of a strict or broad interpretation. In our view, the broad interpretation should be used to determine ultra vires. According to the strict interpretation, the actual wording of the objects clause in the articles of association is decisive. According to the broad interpretation it should also be determined whether or not the company benefits from the transaction. All circumstances should be taken into consideration to assess whether or not the company benefits from the transaction, including any benefit that the group of which the company is a member derives from the transaction. Also, it must be considered whether the interests of the company are served by the transaction and, on the downside, whether the existence of the company is jeopardized by the transaction. The board of directors must assess whether it does not unlawfully prejudice its other creditors. Outside a distress scenario, lenders usually rely on this assessment which is confirmed in the board resolutions and their own financial analysis of the company when determining whether or not to lend and on which terms. To the extent the annual accounts are audited, the auditor's statement gives comfort as well as it implies that the auditor is of the opinion that the company will be able to continue to pay its debts when they become due for at least a year.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

The financial assistance prohibition (Section 2:98c Dutch Civil Code) applies to a Dutch public limited liability company and its direct and indirect subsidiaries. The financial assistance prohibition in Dutch law prohibits a Dutch public limited liability company from granting security or providing guarantees for debt that has been

used to acquire shares in its capital, and its direct or indirect subsidiaries are also prohibited from doing the same. There is no whitewash procedure available under Dutch law, and acquisition debt which is being refinanced is considered to be subject to the financial assistance rules (tainted debt). Any guarantees or security provided in respect of tainted debt are void. Even though the financial assistance prohibition for private limited liability companies has been lifted since 1 October 2012 the private limited liability company may be a subsidiary of a public limited liability company and the financial assistance prohibition may still apply. If the financial assistance prohibition applies a Dutch NV as target can grant security for debt used to finance a dividend distribution – also if used by the purchaser (being the new shareholder) of the Dutch NV to pay part of the purchase price. In this manner the acquisition debt will be pushed down to the level of the Dutch NV up to the amount of its distributable reserves. Alternatively, the Dutch NV can provide an upstream loan up to the amount of its distributable reserves. The target group can grant security for that part of the acquisition debt without violating the Dutch prohibition on financial assistance.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

It is generally assumed that a Dutch law security right cannot be validly created in favour of a person who is not the creditor of secured liabilities. For this reason, if Dutch law security is held by an agent or trustee for the benefit of other parties, it is market practice to use a parallel debt. There is no statutory law or case law available on the parallel debt. In our opinion, which is supported by the general view of leading authors in Dutch legal literature, a parallel debt creates a claim of the security holder which can be validly secured by a security right. The security agent can apply enforcement proceeds to claims of all lenders (through contractual arrangements included in either the intercreditor agreement or credit agreement).

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

Not applicable.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

Yes, if parties included a specific choice of law in the agreement.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

(i) A judgement by a court of another jurisdiction with whom the Netherlands entered into an enforcement treaty will be recognised and enforced in the Netherlands subject to the provisions of the applicable enforcement treaty. In the absence of an applicable treaty, a judgment rendered by a foreign court (a **Non-Treaty Court**) will not be enforced by the courts in the Netherlands. In order to obtain a judgment which is enforceable in the Netherlands the claim must be relitigated before a competent Dutch court. A Dutch court will, under current practice, generally grant the same judgment without relitigation on the merits if (a) that judgment results from proceedings compatible with the Dutch concept of due process, (b) that judgment does not contravene public policy (*openbare orde*) of the Netherlands, (c) the jurisdiction of a Non-Treaty Court has been based on an internationally acceptable ground and (d) the judgment by a Non-Treaty Court is not incompatible with a judgment rendered between the same parties by a Dutch court, or with an earlier judgment rendered between the same parties by a non-Dutch court in a dispute that concerns the same subject and is based on the same cause, provided that the earlier judgment qualifies for recognition in the Netherlands.

(ii) The Netherlands is a party to The Convention on the Recognition and Enforcement of Foreign Arbitral Award.

16. What (briefly) is the insolvency process in your jurisdiction?

There are three types of insolvency proceedings under Dutch law: (i) the *Wet Homologatie Onderhands Akkoord* (**WHOA**) is a so-called debtor in possession proceeding (inspired by and to an extent comparable to the US Chapter 11), (ii) suspension of payments proceedings (management has joint control of the business with a court appointed administrator) and (iii) bankruptcy proceedings (court appointed bankruptcy trustee controls all assets) being a court-ordered liquidation.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

Under the WHOA, the company could request the court to issue a cooling off period for a maximum of 8 months in total, during which creditors cannot take recourse on the assets for pre-petition claims. Claims can be impaired through a composition process on the basis of a cross class cram down mechanism (one in the money class votes in favour, threshold for adoption is 66% in value of claims/shares), with dissenting creditor protection mechanisms such as the no creditor worse off rule (not worse off than in liquidation).

For the duration of suspension of payments proceedings (which can only be requested on a voluntary basis and can initially take up to 18 months depending on sufficient creditor support) creditors will not be able to take recourse on the company's assets for their claims. Unsecured claims can be impaired through a composition process with a single class vote (thresholds: 50%+1 in number, representing at least 50% of claim value), with dissenting protection mechanisms such as the no creditor worse off rule (not worse off than in liquidation). Secured parties cannot enforce their security during a cooling off period (maximum of 4 months) but cannot be crammed down through a composition process.

Unsecured and preferred creditors can no longer take recourse against the company's assets and creditors can only submit their claim with the court appointed liquidator. Unsecured claims can be impaired through a composition process with a single class vote (thresholds: 50%+1 in number, representing at least 50% of claim value), with dissenting protection mechanisms such as the no creditor worse off rule (not worse off than in liquidation). Preferred and secured parties cannot enforce their security during a cooling off period (maximum of 4 months) but cannot be crammed down through a composition process.

18. Please comment on transactions voidable upon insolvency.

If security or a guarantee is granted without a legal obligation to do so, creditors (outside a bankruptcy scenario) and the bankruptcy trustee (in a bankruptcy scenario) may be able to successfully challenge the validity of transactions entered into by a company which are prejudicial to creditors of a company if both the company and the counterparty (i.e. the lenders benefitting from the guarantee and security) knew or should have known that the position of other creditors would be prejudiced. In case of a successful challenge, the guarantee and security can be invalidated. Whether or not the rights of other creditors are prejudiced must be assessed at the time of the challenge. Whether or not the company and lenders had knowledge thereof is to be assessed at the time that the guarantee or security was given. If it is not or could not be reasonably foreseen that bankruptcy of the company was imminent and that the rights of certain creditors would be adversely affected, this knowledge test will not be met. Particularly outside a distress scenario, this knowledge test will be very difficult to meet. One caveat, knowledge is presumed (subject to counterproof) for certain transactions, such as the creation of a guarantee or security for an undue claim, if the transaction took place less than one year prior to the bankruptcy and there was no pre-existing legal obligation to do so.

19. Is set off recognised on insolvency?

Pursuant to Section 53 of the Dutch Bankruptcy Act (**DBA**) for bankruptcy (and Section 234 DBA for suspension of payments) a right of setoff exists if a debt and a claim arise before the declaration of bankruptcy or if they result from actions carried out with the debtor before the declaration of bankruptcy. Pursuant to Section 54 DBA, if debts or claims are transferred before the declaration of bankruptcy, setoff is possible only if this was done in good faith. Debts and claims transferred after the declaration of bankruptcy cannot be set off. The Dutch Supreme Court ruled that a transfer into a bank account is deemed a transfer of a debt, meaning that a bank cannot setoff incoming payments against a debit balance if the bank is not in good faith. However, there is an exception: lenders that benefit from an undisclosed security rights over claims of the account holder may set off payments of these claims even if the bank is not in good faith within the meaning of Article 54 DBA (Article 235 DBA for suspension of payments) or if the payments were received during bankruptcy.

Specifically in respect of WHOA processes and only after a so-called starting declaration has been filed with the court, setoff will be deemed to have been made in good faith if it takes place within the context of financing the continuation of the business and is not used to curtail unused credit. The aim of this is to enable the debtor to retain control over its current account facilities during the composition process.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Normally mitigates for risks related to any statutory or third party interests are included in the credit agreement and structuring of the transaction (for example by ringfencing). A list of potential statutory or third party interests we come across when working on transactions (mainly asset based lending) can be found below.

i. Receivables paid into the account of the company post bankruptcy. Payments that are made into a bank account after bankruptcy of the account holder fall within the bankruptcy estate such account holder. The pledgee has a preferred claim, but will have to share in the bankruptcy costs. This risk can be mitigated either by redirecting payments pre insolvency or by making an arrangement with the trustee (for a negotiated fee).
ii. Preferential creditors – most commonly employees' claims for arrears of wages, claims of tax and social security authorities and unfunded pension contributions.
iii. Estate claims – All expenses properly incurred in the winding-up or administration (including remuneration of trustees and payment of disbursements and expenses properly incurred by them in performing their functions).
iv. Realisation costs – these costs are usually made by pledgee and are thus controlled by the pledgee (and if so, can be satisfied against the security by including them in the secured obligations). In our experience it is not customary to take a reserve from the outset, but only on a certain trigger (if at all).
v. Claims that are closely connected to the relevant asset (e.g., costs made with respect to the preservation of the asset, such as costs for repair of the asset) – as above under (i).
vi. Retention of title claims – the security right over movables that is subject to retention of title is only perfected once the purchase price is paid. Until the purchase price is paid in full, a pledgee has a right of pledge over the legal title to the movables under condition precedent that the purchase price is paid, but not over the goods itself. This right can be waived by the supplier.
vii. For inventory and equipment:
    i. accession / commingling / specification invalidation.
    ii. Possessory liens – a creditor that controls assets (e.g. the landlord or a warehouse operator) may keep possession of the goods until its fees are paid. A possessory lien can be waived by the relevant party (e.g. landlord or toller). In our experience, if no waiver can be obtained lenders often take a reserve for a few months rent / fees (to be determined on a case by case basis following diligence).
    iii. Rights of reclamation – In our experience it is not customary to maintain a reserve from the outset.
viii. For real estate:
    i. claims for taxes (of minor importance – e.g., water board charges).
    ii. costs made for maintenance of a road chargeable to the collateral.
ix. For bank account receivables – account bank right of pledge / set-off. Account banks are often not willing to waive their rights of pledge and set-off. Alternatively, the lender could require that all (collection) accounts are maintained with the lender.
x. For IP rights: unregistered IP security may not enforceable against a 3rd party who acquires a right over the IP. This risk is controlled by the pledgee – registration can be made a requirement (either from the outset or at a certain trigger).
xi. For registered shares:
    i. potential "blocking clause" issue if less than 100% of shares is secured by the banks pledge.
    ii. unregistered share security in the shareholders register may not enforceable against a 3rd party who acquires such shares in good faith. This risk is rather theoretical. Security over shares is taken by way of a notarial deed of pledge. The notary will normally ensure that the right of pledge is registered in the shareholders

register and that a copy is provided to the pledgee.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

Directive (EU) 2021/2176 introduces a single European framework for the secondary market of non-performing credit agreements. On 12 June 2023 the Dutch government published the consultation proposal for the Directive's implementation law. One of the main takeaways from the consultation proposal is that a licensing requirement is introduced for parties servicing non-performing credit agreements (credit servicers). These parties are currently already subject to licensing requirements as credit intermediaries for their role as credit manager.

A legislative proposal on the prohibition on bans on assignment between companies is subject to consultation. The effective date of this measure is not known yet. Pursuant to this proposal prohibitions on assignment will be banned. Companies are no longer allowed to agree on non-assignment clauses. Suppliers may transfer or pledge any monetary claims they have outstanding with their customers, to banks and other lenders as security for a loan. We note that bank account receivables and receivables arising from syndicated credit are exempted.

Lastly, we note that unless an entity holds a license as a bank from the European Central Bank, the Dutch Central Bank or from an authority from another Member State, it is in principle prohibited pursuant to article 3:7 Financial Supervision Act (**AFS**) for an entity to conduct business in the Netherlands on the financial markets while using the word "bank" in its name. The prohibition aims to avoid confusion about the nature of the activities of an entity using the word "bank", a translation or form thereof. Such confusion will arise if an entity which is not a bank, or a bank which is not authorized to be active in the Netherlands, is active on the financial markets. On the basis of the text of Section 3:7 AFS, the explanatory notes thereto in parliamentary history and the limited guidance of Dutch Central Bank (De Nederlandsche Bank N.V., DNB), we understand that such confusion may arise where a bank (which is not authorised to be active in the Netherlands) operates as a true bank, for instance where it performs activities such as deposit-taking.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

The portion depends on various factors, such as industry, economic conditions and regulatory environment. Historically, traditional lenders (bank) have been the primary source of lending. In the recent years alternative credit providers (including fintech firms, private equity and credit funds) have been steadily increasing their market share. There is no generic number that universally applies to all industries in the Netherlands. Over the past few years, we see a trend in sustainable finance. Companies and lenders make sustainability considerations part of their financial decision-making. This means more climate neutral, energy- and resource-efficient and circular finance projects. Sustainable finance is needed to implement the Commission's strategy towards achieving the UN Sustainable Development Goals.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

Sustainability linked and green provisions for finance documents have been introduced in the market (by ICMA, the LMA and individual lenders). Parties are still debating how to deal with the sustainability/green riders (i.e. how are lenders going to treat sustainability as financial risks).

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