Acquisition Finance

Contributing editors
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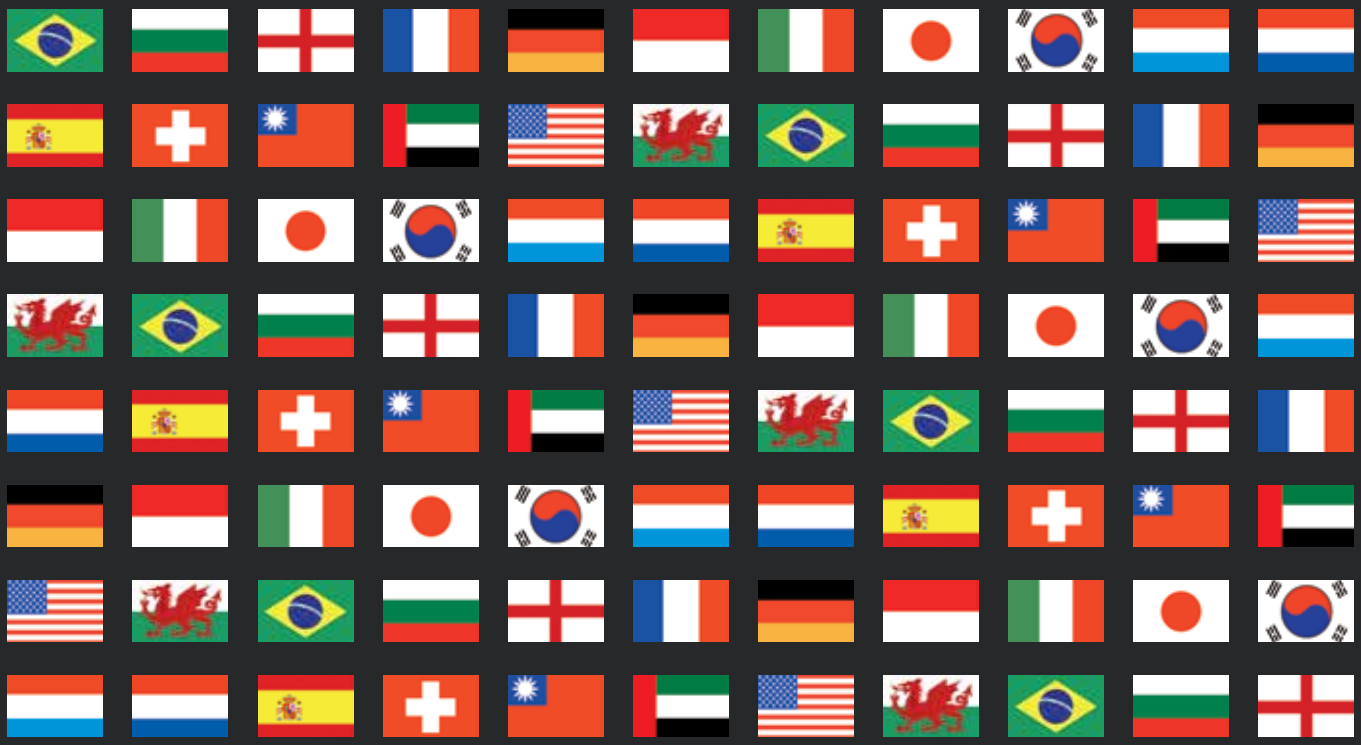

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GETTING THE DEAL THROUGH

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Acquisition Finance 2016

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Netherlands

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Van Doorne NV

General structuring of financing

1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Bilateral loan agreements are typically governed by the laws of the jurisdiction of the lender. In larger syndicated loan transactions, the loan and intercreditor agreements are often governed by English law. Documentation concerning financings by US lenders or high-yield bonds are often governed by New York law. Security documents are normally governed by the law of the jurisdiction where the assets are situated.

Subject to certain exceptions, and in accordance with the Rome I Regulation ((EC) 593/2008) on the law applicable to contractual obligations, a Dutch court will uphold the choice by the parties of the laws of a particular country to govern a contract. Judgments from courts of other EU member states are enforceable in the Netherlands in accordance with the Brussels Regulation (recast) ((EU) No. 1215/2012), and from the courts of Iceland, Switzerland and Norway in accordance with the Lugano Convention. Judgments from courts of other countries are not enforceable in the Netherlands, but the Dutch courts will generally uphold a final judgment obtained in such court and regard it as conclusive evidence when asked to render a judgment in accordance with that judgment, without substantive re-examination or re-litigation on the merits.

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

There are generally no restrictions on the acquisition of Dutch companies by foreign entities. However, acquisitions of interests that exceed certain thresholds in companies that are subject to financial supervision (eg, banks, insurers, investment firms and investment fund managers) require prior clearance by the Dutch Central Bank. In addition, merger control rules may apply under the EC Merger Regulation ((EC) 139/2004) and the Dutch Competition Act.

In accordance with the requirements of the Alternative Investment Fund Managers Directive as implemented in Dutch law, when a manager of an alternative investment fund acquires, disposes of or holds shares of a non-listed company above or below certain thresholds, it has to notify the competent authorities of its home member state of the proportion of voting rights held by it.

There are no specific restrictions on providing cross-border financing into the Netherlands for acquisitions of Dutch companies.

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

The purchase price in an acquisition is usually financed by a combination of debt and equity. The debt component may consist of senior (secured) loans or a combination of senior, mezzanine and junior loans and high-yield debt. Vendor financing in the form of a deferred purchase price is regularly used in acquisitions of private companies. A refinancing of the target's existing loans and working capital facilities is usually implemented as part of the acquisition financing.

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

A bidder in the acquisition of a public company must ensure that it will have the cash component to pay the consideration at settlement of the public bid. It must make a public announcement regarding 'certainty of funds' ultimately at the time of submitting the offer memorandum to the Netherlands Authority for the Financial Markets (AFM) for approval. The AFM will only verify whether sufficient transparency in relation to the 'certain funds' requirement is observed (see question 29). The AFM will not verify the accuracy or adequacy of the bidder's financing arrangements; this is left to the market to assess.

An acquisition of a private company is usually subject to financing and vice versa. The seller, the purchaser and the target company usually agree to cooperate in satisfying all required conditions precedent.

5 Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

Loan agreements and debt security documentation usually contain a purpose clause, specifying how the borrower may use the loan proceeds. If governed by Dutch law, a violation by the borrower of such purpose clause constitutes a breach of contract that may trigger an acceleration of the loans.

6 What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

Generally, no licence is required for lending into the Netherlands on a cross-border basis (ie, without having a physical presence in the Netherlands), except if to consumers. However, a banking licence is required if a lender carries on the business of a bank in the Netherlands by actively soliciting borrowers or by offering its banking services through a registered office or a branch office in the Netherlands. If a lender is a licensed bank in another EEA member state, it may offer its banking services in the Netherlands if it is properly 'passported' into the Netherlands under the passporting regime available under the Capital Requirements Directive (2013/36/EU). See also question 10.

7 Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

No Dutch withholding tax is levied on interest payments or other financing costs due by Dutch borrowers to unaffiliated lenders. This may be different if the loan is a sham loan, a loss-financing loan or a profit-participating loan, in which case the loan may be re-characterised as equity for Dutch tax purposes.

Loan agreements usually contain tax gross-up provisions which require the borrower to increase payments up to the amount of taxes withheld, and tax indemnity provisions which require the borrower to indemnify the lenders against any taxes they incur as a result of interest payments under the loan agreement.

8 Are there usury laws or other rules limiting the amount of interest that can be charged?

Save for loans to consumers, there are no rules on the interest rate that may apply to a loan to a Dutch borrower. However, an interest rate that is deemed excessive may be void under the rules of decency and public order. In addition, the Dutch courts may mitigate excessive interest rates under the overriding principle of reasonableness and fairness.

9 What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

Loan agreements usually contain numerous indemnity provisions covering various matters, including: tax, stamp duty, loss arising from participating in the transaction or providing funding, the costs of translation of a payment from one currency into the currency that was due under the finance documents, increased costs protection resulting from a change in law and costs and expenses arising from the transaction, amendments to the documentation, and enforcement and preservation of security.

10 Can interests in debt be freely assigned among lenders?

In principle, a Dutch company is prohibited from raising repayable funds (eg, by taking deposits, borrowing under a loan or issuing bonds) from 'the public' in the conduct of its business or profession. This prohibition does not apply if the Dutch borrower attracts the repayable funds from persons that are deemed not to form part of 'the public'. The Dutch Central Bank may impose fines and penalties on a Dutch borrower if it violates this prohibition. Therefore, loan agreements often contain representations by the borrower that it has not raised repayable funds from 'the public'. In syndicated loans where the identity of the lenders is not yet known, representations by the lenders on their status as 'non-public' lender are often included. In addition, the transfer of the loans to persons that form part of 'the public' is restricted so as to avoid the Dutch borrower violating this prohibition. A transfer of the loan in violation of such transfer restriction does not affect the validity of the claim of the assignee lender under the loan participation transferred to it.

In lieu of an interpretation of the term 'the public' under the Capital Requirements Regulation ((EU) 575/2013), a lender is deemed not to form part of 'the public' if it provides or acquires a loan to a Dutch borrower for a minimum initial amount of €100,000. Because they do not require the same level of protection as retail depositors of banks, it can be assumed that banks, insurers, investment firms, investment funds and large corporates do not qualify as forming part of 'the public' and thus that a Dutch company may borrow from such parties without violating the prohibition.

11 Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

No. However, a licence requirement may apply if the agent holds or sells financial instruments in the Netherlands as part of the collateral.

12 May a borrower or financial sponsor conduct a debt buy-back?

There are no legal restrictions on buy-backs of loans, although contractual restrictions on such repurchases are often included in the loan documentation. Public bids or exchange offers relating to bonds may be subject to public bid rules and prospectus requirements. Dutch law debt will be extinguished upon acquisition by the debtor.

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Subject to the overriding principles of good faith and reasonableness and fairness, there are no legal restrictions on a Dutch borrower offering an incentive to certain of its creditors to vote in favour of proposed amendments.

Guarantees and collateral

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

There are no restrictions in Dutch law on a Dutch company guaranteeing or granting security for obligations of its foreign or domestic parent or affiliates, or on a foreign affiliate guaranteeing or granting security for obligations of its Dutch parent or affiliate.

The effectiveness of guarantees and security may be limited by the financial assistance prohibition (see question 15) and the principle of corporate benefit. A guarantee or security by a Dutch company can be nullified by the company itself or its bankruptcy receiver if that transaction is not in furtherance of its corporate objects (ultra vires) 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 corporate objects of a legal entity are transgressed, not only is the description of the objects in that legal entity's articles of association decisive, but all relevant circumstances must be taken into account, in particular whether the interests of the legal entity were served by the transaction. Relevant circumstances in establishing whether the guaranteeing or granting of security by a Dutch company serves its interest, may include whether:

- the object clause in the articles of association of the company allows the granting of security for obligations of third parties;
- the company derives any commercial benefit from the financing (either directly or indirectly);
- the interests of the group of companies of which it forms part are served by granting security or guarantees for the debt;
- its own obligations are reciprocally guaranteed by the other group companies; and
- the transaction jeopardises its continuity.

No taxes are levied on the granting of guarantees by Dutch companies for obligations of an affiliate. A Dutch company may only deduct payments made by it under such guarantee from its taxable income to the extent that the transaction has been concluded on 'at arm's length' terms. Under certain circumstances, the Dutch company providing the guarantee may be expected by the Dutch tax authorities to charge a guarantee fee.

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

No financial assistance prohibition applies if the target is a private limited liability company (BV), but such prohibition does apply if the target is a public limited liability company (NV).

An NV may not guarantee or secure obligations entered into for the purpose of subscription or acquisition of shares in the NV's capital, and may only grant loans to a third party for the purpose of acquiring shares in its capital under strict conditions. This prohibition extends to all subsidiaries of an NV, including BVs and (as a matter of Dutch law) all foreign subsidiaries of an NV. No whitewash procedures are available. Security or guarantees granted in breach of this prohibition are deemed null and void. Security can be granted for the obligations that are not 'tainted' by this financial assistance prohibition by including a carveout of the acquisition loans from the scope of the secured liabilities.

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

The concept of a document that creates blanket security on all assets of a Dutch company is not available. The requirements for the creation and perfection of a security right differ for the various types of assets. As a consequence, security over each type of asset is often created in separate documents, although security over certain types of assets can be combined in a single security document.

There are two types of security rights that a debtor can create over its assets: a right of mortgage and a right of pledge. A mortgage can only be established on registered property (ie, real estate and registered vessels and aircraft). Security over all other types of assets is created as a pledge. The concept of transfer of title for security purposes (eg, security assignment) is not available.

There is no public register in the Netherlands in which titles to assets or security rights are registered, other than the registers maintained by the cadastre in respect of real property (the Land Register), telecom networks and registered vessels and aircraft. To follow is a non-exhaustive list of the most common types of security rights that may be granted over assets located in the Netherlands:

Real property
A mortgage over land or buildings is created by a deed executed before a Dutch civil law notary and registration at the Land Register. The mortgage only extends to property described in the mortgage deed and not to future properties also.

Moveable assets
A pledge over all present and future moveable assets situated in the Netherlands is usually created as a non-possessory pledge, with the pledgor retaining control of the assets, by way of a privately executed agreement which must be submitted to the Dutch tax authorities for date-stamping purposes. A possessory pledge, where the pledgee takes possession of the assets, is not often created in acquisition financings.

Receivables
A right of pledge over receivables is created either as a disclosed or an undisclosed pledge.

A disclosed pledge is created by way of a privately executed pledge agreement and notice to the debtors. Disclosed pledges are usually created in respect of claims under intercompany loans, share purchase agreements, important leases and insurances.

An undisclosed pledge is created either by a privately executed pledge agreement and registration with the tax authorities for date-stamping or by a deed executed before a Dutch civil notary.

Usually the pledgee authorises the pledgor to continue to collect its receivables until an event of default occurs. See question 18 for continuing perfection requirements.

Bank accounts
Claims relating to accounts with banks in the Netherlands are pledged by way of a pledge agreement and notice to the bank where the account is maintained. Usually the pledgee authorises the pledgor to have full control over the bank accounts until an event of default occurs.

Shares
A right of pledge over registered shares in a BV or NV is created by the execution of a deed before a Dutch civil law notary. A pledge of bearer shares is created by a pledge agreement and transferring possession of the bearer shares to the pledgee or a custodian appointed by it. A pledge over book-entry securities is created either by taking security over the relevant securities accounts or by book-entry of the pledge by the custodian bank. Depending on the conditions in the constitutional documents, a pledge over memberships in a cooperative or interests in a limited partnership must be created by either a notarial deed or a privately executed pledge agreement. The security documents usually provide that the security provider is permitted to exercise the voting rights and collect dividends until the occurrence of an event of default and notice by the pledgee of revocation of that permission.

Intellectual property
A pledge over intellectual property (IP) rights is created by a pledge agreement and registration with the tax authorities for date-stamping. Registration of the pledge in the relevant IP registers is not a requirement to create or perfect the pledge, but will give third-party effect to the pledge (see question 21). Know-how is not a separate asset that can be pledged.

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

See question 16.

18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

An undisclosed pledge of receivables can only be created over existing receivables and future receivables that directly arise under a legal relationship existing at the time of the execution of the pledge agreement. Therefore, the security document creating an undisclosed pledge usually contains an obligation that the pledgor periodically pledges its new receivables by way of short-form supplemental pledges and registration thereof.

19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

An enterprise that has 50 or more employees in the Netherlands should, in principle, institute a works council. If instituted, management must seek prior advice from the works council before deciding on certain important transactions that are listed in the Works Council Act. The request for advice must be in writing and be made at such a time that the works council's advice can materially influence the decisions to be taken by management. Transactions requiring prior advice by the works council include acquisitions by the company, a change of control over the company, borrowing under material loans, and the guaranteeing of or granting security for material debts of another person, which includes group companies.

20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

It is generally assumed that a Dutch law security right cannot be validly created in favour of a person who is not a creditor of the claim that the security right purports to secure. The concept of a trust is not available under Dutch law. The practical solution, which is invariably used to overcome this uncertainty, is to create a parallel-debt structure under which the borrowers undertake to pay to the agent amounts equal (and parallel) to all the loan obligations that are owed to the lenders. The agent is granted security for its claims under the parallel debt. This facilitates syndication and subsequent loan transfers, as it allows the lenders to transfer their loan claims without affecting either the parallel debt claims of the agent or the security granted to the agent for the parallel debt.

21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

Dutch law rights of mortgage and pledge are ancillary to the collateral asset and will continue to attach to the asset irrespective of a transfer of the asset by the debtor. An exception to this rule is where a third party acquires a pledged moveable asset or receivable from the debtor in good faith while being unaware of the right of pledge of the lender. The pledge of the lender over that asset may lapse. Third parties cannot successfully argue that they were unaware of the security at the time of acquiring title to an asset if the security right of the lender is publicly registered (eg, a mortgage over real property registered in the Land Register).

22 Describe the fraudulent transfer laws in your jurisdiction.

Outside of insolvency proceedings, transactions by a debtor can be challenged on account of fraudulent preference (actio pauliana) by a creditor. In bankruptcy only the court-appointed bankruptcy receiver (curator) may challenge transactions on account of fraudulent preference. Since requirements for a successful challenge outside and in insolvency are largely similar, only the requirements in bankruptcy are described below.

A bankruptcy receiver may nullify any transaction by the debtor if:

- the debtor did not have a legal obligation to enter into that transaction;
- the recourse position of the creditors was prejudiced by the transaction; and
- at the time of the transaction both the debtor and the other party knew or should have known that the transaction would prejudice the recourse position of present or future creditors.

Such knowledge is deemed to exist if the transaction was entered into for no consideration. The required knowledge of prejudice to the recourse position of the debtor's creditors is presumed to exist, subject to proof to the contrary, for transactions entered into during a one-year period prior to the insolvency order if the transaction:

- was at an undervalue;
- involved the payment of a debt that is not yet due; or
- was with an affiliated party (eg, a group company).

The bankruptcy receiver may nullify a transaction within three years of the time of discovering the fraudulent preferential nature of that transaction. The nullification has retroactive effect and the nullified transaction must be reversed.

Update and trends

A bill for amendment of the Dutch Bankruptcy Act has been submitted to parliament which will provide a legal basis for pre-packed restructurings. In practice, the Dutch courts already facilitate the implementation of pre-packed restructurings through insolvency proceedings.

It is expected that a second draft bill for amendment of the Bankruptcy Act will be submitted to parliament later during 2016. The second bill relates to the introduction of a quick and efficient restructuring for companies, or even a group of companies, through a single court-approved reorganisation plan. It will allow a single debtor or an entire corporate group to offer a binding composition to all its secured and unsecured creditors without having to apply for formal insolvency proceedings. The debtor will stay in control and, most significantly, non-consenting, out-of-the-money creditors and shareholders can be crammed down.

In 2015 two members of parliament published an initiative policy document which addresses certain harmful excesses of leveraged acquisitions. The recommendations in said document include the tightening of the requirements for deducting interest on acquisition debt for corporate income tax purposes, and making it more difficult for target companies to extend loans to the acquiring party for the purpose of financing the acquisition.

Debt commitment letters and acquisition agreements

23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

Banks may use their own form of documentation, but loan agreements based on the Loan Market Association form for leveraged finance transactions are often used. Commitment letters for the financing of acquisitions of private companies usually contain a long-form term sheet. In public-to-private acquisitions, a fully negotiated and signed loan agreement is required at the time the public bid is launched in order to satisfy the certain funds requirement (see question 29).

24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

The level of commitment largely depends on the transaction and the parties involved. Commitment letters for acquisition financings usually provide for underwritten debt.

25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

Commitment letters usually contain conditions regarding material adverse changes, satisfactory due diligence, breach of representations or warranties, execution of final documentation within a certain period of time, and regulatory requirements and approvals.

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Market flex provisions are seen in commitment letters for syndicated financings and often relate to increases in the margin and fees or moving the debt between the loan tranches. Market flex provisions are unusual in commitment letters by alternative finance providers.

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

Securities demands are not a key feature in the Netherlands, but can be relevant in bridge loans that are intended to be refinanced by a bond issuance.

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

Commitment letters usually provide that the conditions for the acquisition must be satisfied and that the acquisition agreement may not be amended without prior lender consent. The lenders usually require security over the purchaser's rights and claims under the acquisition agreement, and will demand that the acquisition agreement permits the creation of such security. The availability period for the financing should match the long-stop date for completing the acquisition.

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

There is no legal requirement to do so in respect of acquisitions of private companies. The 'certain funds' requirement in acquisitions of public companies requires public disclosure in the offer memorandum of the main characteristics of the financing of the offer, such as whether the bidder will fund the purchase price through a combination of debt and the equity, and the amounts. Commercial details (eg, covenants and margin, market flex provisions and fees) of the financing do not need to be disclosed.

Enforcement of claims and insolvency

30 What restrictions are there on the ability of lenders to enforce against collateral?

Dutch law security can only be enforced if there is a default in the payment of the secured claim. See question 32 for the cool-down period in insolvency proceedings.

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

The concept of DIP-financing is not available. However, in a court-ordered suspension of payments, a debtor can enter into certain financing arrangements with existing or new lenders and grant security if the debtor still has a going concern business. Such financing arrangements require the cooperation of the court-appointed administrator, and the new debt may be ranked as estate claims.

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

Secured creditors can enforce their security during a Dutch suspension of payments or bankruptcy as if there were no such insolvency proceeding. However, the court can order a cool-down period of two months with a possible extension of another two months, during which all creditors (including secured creditors) may not, without prior court consent, take any action.

33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

See question 22.

34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Secured creditors can enforce their security as if there were no insolvency proceedings. However, the Dutch tax collector has a preferential claim, to the extent the tax claims cannot be paid out of the bankrupt estate, on the enforcement proceeds realised by a secured creditor under a non-possessory right of pledge over moveable assets that are intended to furnish the premises (such as machinery and equipment) of the debtor. In bankruptcy, claims generally rank as follows:

- estate claims (ie, costs and expenses of the bankruptcy proceedings);
- claims of secured creditors for the distribution of the sale proceeds of their collateral if that collateral is sold by the bankruptcy receiver following the expiry of the term set by the receiver for foreclosure;
- claims of creditors having a specific privilege regarding a specific asset (eg, preservation costs);

- claims having a general privilege (eg, employee wages);
- unsecured creditors; and
- subordinated creditors.

Currently, out-of-court debt reorganisations are difficult to implement because they require all creditors to consent. In insolvency proceedings, the debtor can offer a composition to its unsecured creditors which the creditors can vote upon during a court set meeting. The composition is accepted if at least 50 per cent of the creditors present in court, representing at least 50 per cent of the (undisputed and admitted) debt, vote in favour. If accepted, the composition will bind all unsecured creditors. Secured creditors and other preferred creditors are not bound by a composition.

35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

The ranking of Dutch law security rights in respect of the same asset is determined on the basis of the time of perfection of the security. A mortgagee can agree to change the ranking of its mortgage over real estate, which requires the execution of a deed before a Dutch civil law notary and registration in the Land Register. Although there is no provision in Dutch law that expressly provides that holders of a right of pledge over the same asset can change their respective rank by mutual agreement, many practitioners and scholars believe that this is possible. In addition, a similar economic effect to changing the ranking of security can be reached by way of contractual arrangements between secured creditors regarding the distribution of enforcement proceeds.

36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

In principle, the claim will only be recognised for the principal amount. Accrued interest is frozen as per the date of the bankruptcy order.

37 Discuss potential liabilities for a secured creditor that enforces against collateral.

The government can claim reimbursement of costs from persons who have been unjustly enriched by the decontamination of polluted property. A mortgagee of real property may be unjustly enriched if, as a result of decontamination, the value of the collateral increases. This may impose an obligation on the lenders to conduct limit-related due diligence when taking security over a real property.

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