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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

Despite the effects of the COVID-19 pandemic (see **1.2 Impact of the COVID-19 Pandemic**), the financing landscape in the Netherlands remains stable and largely unchanged. The size of the loan market is relatively large in proportion to the size of the economy. The market is dominated by a couple of domestic banks that offer a wide range of products.

Typically, smaller size facilities are financed by a single bank, whereas larger deals are financed through a club deal or a syndicate of Dutch and international banks. The role of foreign players is still small. Some of the international banks that had a presence in the Netherlands have either withdrawn or downscaled their Dutch presence in the wake of the 2008 financial crisis.

Due to the stricter requirements for bank regulatory capital and resolvability and the supervision and compliance with such rules (Basel III/CRD IV (2013/36/EU) and BRRD (2014/59/EU)/SRM), the cost of supervision will increase and will likely be an entry barrier for new market participants.

Further, due to increased regulatory pressure on banks as well as a reduced risk appetite, borrowers are looking at other sources of funding, in particular the bond market, alternative lenders and the US private placement market. The effect of alternative lenders on the banking sector as a whole is still relatively small.

1.2 Impact of the COVID-19 Pandemic

In response to the COVID-19 pandemic, Dutch banks have demonstrated a considerable willingness to extend credit to businesses which are in some way or another affected by the outbreak, both by providing new facilities and by continuing or renewing existing credit lines. The market is benefitting from various support programmes, most notably the temporary lowering by the Dutch Central Bank of systemic risk buffers for major Dutch banks and the Business Finance Guarantee Scheme (*Garantie Ondernemingsfinanciering corona*) and the Trade Credit Insurance Guarantee Scheme (*Crisismaatregel Herverezekering Leverancierskredieten*) that were recently introduced by the Dutch government.

Under the Business Finance Guarantee Scheme the providers of new credit facilities made available to Dutch businesses which are affected by the pandemic may benefit from a guarantee from the Dutch State for up to 90% of the amount of the new facilities. Support under the Business Finance Guarantee Scheme is available to participating banks for eligible credit and/or bank guarantee facilities from EUR1.5 million up to EUR150 mil-

lion (in aggregate). The total budget for the scheme has been increased to EUR10 billion.

The Trade Credit Insurance Guarantee Scheme aims to ensure that trade credit insurance continues to be available to Dutch companies by providing a means of risk sharing between the credit insurers and the Dutch State. Up to a volume of EUR1 billion, the State will guarantee 90% of the claims of the credit insurers. The total budget for the scheme is EUR12 billion.

Given the anticipated duration of the economic consequences of the COVID-19 pandemic, and the negative effects on certain industries in particular, the number of restructurings and the volume of distressed debt transactions are expected to show a sharp increase in the next few years.

1.3 The High-Yield Market

In the Netherlands, the debt market has traditionally been dominated by banks. In recent years, due to regulatory changes and banks' stricter credit standards, as well as the low interest rates, there has been an increased demand for the bond market, in particular for high-yield bonds.

1.4 Alternative Credit Providers

Over the last few years, financing by alternative credit providers has grown in the Netherlands. However, the overall impact on the debt market is still relatively modest. On some transactions, alternative lenders team up with banks to provide credit – eg, to offer an attractive mix of short-term and long-term debt. Also, alternative credit providers step in to provide credit where banks no longer can or are unwilling to do so.

1.5 Banking and Finance Techniques

The offering by the Dutch banks is too limited for the demand. As a result, borrowers are diversifying and looking for other sources of funds. In particular, the market has seen an increase in direct lending by debt funds, insurance companies and pension funds, including on acquisition finance transactions. In addition, borrowers are looking at receivables financing and other asset-based lending transactions.

1.6 Legal, Tax, Regulatory or Other Developments

Change in the regulatory landscape continues to be one of the most important ongoing challenges for banks in the Netherlands. With the implementation of Basel III/CRD IV as well as BRRD/SRM proposals, the regulatory burden will only increase and will force banks to rethink their business models. The increased regulatory capital requirements and higher costs relating to supervision will affect the ability of banks to lend.

Dutch bankruptcy laws are due to be overhauled. One of several legislative proposals that are expected to be implemented in the

foreseeable future provides for a Dutch version of the scheme of arrangement/Chapter 11 procedure. See **7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency**.

The transition from existing interbank offered rates (EURIBOR/LIBOR) to a new system of risk-free rates is also an important development for the Dutch loan market.

See **4.1 Withholding Tax**, for a discussion on the introduction of a conditional withholding tax on certain interest (and royalty) payments as from 1 January 2021.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

Providing loans to corporates or institutions does not require a licence. A licensing requirement only applies when providing loans or other forms of financing to individuals not acting in the ordinary course of a profession or trade.

If the financing is obtained through the issuance of debt securities, the issuer may be subject to a prospectus requirement in accordance with the provisions of the Prospectus Regulation ((EU) 2017/1129). In addition, restrictions apply to the borrower when obtaining financing from the general public. However, none of these restrictions affect the lender.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

Similar to domestic lenders, foreign lenders are not restricted in granting loans to companies or institutions in the Netherlands. Granting loans to persons or entities other than retail clients is not a regulated activity.

3.2 Restrictions on Foreign Lenders Granting Security

The granting of security or guarantees to lenders is not a regulated activity.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls on the exchange or transfer of foreign currency in the Netherlands. At an EU level, the European Parliament and the Council can adopt special measures on the movement of capital to or from third countries involving direct investment (including investment in real estate), estab-

lishment, the provision of financial services or the admission of securities to capital markets. In addition, the Netherlands Act on Foreign Financial Relations 1994 (*Wet financiële betrekkingen buitenland 1994*) contains limited reporting requirements in relation to certain cross-border payments.

3.4 Restrictions on the Borrower's Use of Proceeds

No restrictions exist on the borrower's use of proceeds from loans or debt securities, other than customary restrictions such as violation of public order.

3.5 Agent and Trust Concepts

The concept of "trust" as known in common law jurisdictions is not known as such under Dutch law. Although a Dutch court may recognise the existence of a specific trust structure in accordance with and subject to the The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition, common law trust structures are generally considered unsuitable where Dutch law security is granted for the benefit of a group of lenders.

Instead, in syndication transactions, security is typically granted on the basis of a so-called parallel debt arrangement. The "parallel debt liabilities" are construed on the basis of an undertaking from each obligor to pay to the security agent amounts equal to the amounts owed by it to the finance parties under the finance documents (typically referred to as the "underlying liabilities"). Technically, the security secures the parallel debt liabilities rather than the underlying liabilities.

If enforcing security, the security agent is contractually obligated to apply the enforcement proceeds towards payment of the underlying liabilities (in the order agreed between the finance parties). The parties to a parallel debt arrangement agree that upon discharge of (part of) an underlying liability, (an equal part of) the corresponding parallel debt liability is deemed automatically discharged as well and vice versa.

3.6 Loan Transfer Mechanisms

The benefit of a loan can be transferred by means of assignment (*cessie*), contract takeover (*contractoverneming*) or subparticipation.

Assignment

Assignment is used as a method of transferring receivables or other transferable rights. A valid assignment requires a written instrument between the assignor and the assignee. If the assignment is undisclosed, the instrument must be executed before a Dutch civil law notary or registered with the Dutch tax authorities. If the assignment is disclosed, the debtor of the receivables purported to be assigned must be notified of the assignment.

An undisclosed assignment of receivables is not effective against the debtor of those receivables – ie, until the debtor is notified of the assignment, the receivables can be satisfied by payment to the assignor.

Contract Takeover

Contract takeover is used as a method to transfer a contractual relationship, – ie, both rights and obligations under a contract. A valid contract takeover requires a written instrument between the transferor and the transferee. In addition, the “co-operation” of the counterparty under the contract is required. Such co-operation may be evidenced by a written declaration but this is not strictly required.

Sub-participation

Sub-participation does not result in the actual transfer of rights or obligations. Instead, it is construed on the basis of a legal relationship between a lender who continues to be a party to the loan agreement and a third party, on the basis of which the economic benefits of the loan are transferred to that third party. The third party does not have any direct rights against the debtor of the loan.

Transfer of Security Package

Given the accessory nature of Dutch security rights that are created as security for certain claims, they transfer along by operation of law if those claims transfer from the original creditor to another party.

Where a right of mortgage (*recht van hypotheek*) or a right of pledge (*pandrecht*) has been created as security for parallel debt liabilities owed to a security agent in the context of a syndicated loan, the transfer of rights by a syndicate member to a third party does not impact the position of the security agent as holder of those security rights. Instead, the new lender would benefit from the contractual obligation of the security agent to apply any enforcement proceeds towards payment of the liabilities owed to the syndicate.

If Dutch security rights that have been created as security for parallel debt claims owed to a security agent are to transfer to a successor security agent, the existing security agent must transfer the parallel debt claims to the successor security agent, as a result of which the security rights will transfer along.

3.7 Debt Buy-Back

Dutch law does not categorically restrict a borrower or sponsor from entering into a debt buy-back transaction. Parties to a credit agreement are generally free to agree on any debt buy-back limitations they consider appropriate.

3.8 Public Acquisition Finance

Under Dutch public acquisition rules, a bidder is required to prove that, on the date on which the offering memorandum is submitted for approval to the competent authority, it has sufficient funds or has taken all required measures to have sufficient funds available to honour the offer. As soon as the funds are available or the required measures are in place, the bidder must confirm this in a public announcement. If (part of) the offer consideration is funded with debt, the bidder can only comply with the above requirement if such debt is available on a “certain funds” basis.

Although there is no requirement to have agreed form documentation in place, public acquisition financing is often based on long form documentation. There is no requirement that such documentation be publicly filed.

4. Tax

4.1 Withholding Tax

Arm’s-length payments of principal and interest under true loans may (currently) be made free from withholding tax. However, the Withholding Tax Act 2021 (*Wet bronbelasting 2021*) will introduce a conditional withholding tax on certain interest and royalty payments.

As of 1 January 2021, the (deemed) payment of interest (including guarantee payments) due by a paying entity (*inhoudingsplichtige*) that (i) is (deemed) resident (*gevestigd*) in the Netherlands or (ii) has a permanent establishment in the Netherlands to which the (deemed) payment of interest (or guarantee payment) is allocated, will be subject to withholding tax in the event that such paying entity is related (*gelieerd*) to the entity entitled to such (deemed) payment (*voordeelgerechtigde*) and such related recipient entity (i) is (deemed) resident in a low tax jurisdiction (*laagbelastende jurisdictie*) (as defined in the Withholding Tax Act 2021) or (ii) has a permanent establishment in such low tax jurisdiction to which the interest (or guarantee payment) is allocated (*worden toegerekend*).

In addition, if the related recipient entity is not (deemed) resident in a low tax jurisdiction, the aforementioned withholding tax nevertheless applies in case (i) such entity is entitled to the (deemed) payment of interest (or guarantee payment) with the main purpose or one of the main purposes of avoiding withholding tax in the hands of another person or entity and (ii) there is an artificial arrangement or transaction, or a series of artificial arrangements or transactions. An arrangement or transaction, or series of arrangements or transactions, shall be regarded as artificial to the extent that it is not put into place for valid commercial reasons which reflect economic reality.

The new withholding tax may further apply if a related entity is from a Dutch tax perspective regarded the recipient of the (deemed) payment of interest (or guarantee payment), whereas such related recipient entity is not regarded as the recipient (*gerechtigde*) thereof pursuant to the laws of the country in which such entity is (deemed) resident or pursuant to the laws of which such entity is established (*opgericht*) (hybrids and reverse hybrids).

4.2 Other Taxes, Duties, Charges or Tax Considerations

In general, no Dutch registration tax, stamp duty or any other similar tax or duty, other than court fees in case of enforcement, will be payable in the Netherlands by lenders making loans to (or taking security and guarantees from) entities incorporated in the Netherlands.

However, upon enforcement of a right of mortgage over real estate or a right of pledge over shares in a “real property company”, real estate transfer tax may become due at a rate of 6% (7% as per 1 January 2021) (or 2% for residential real estate) by the acquirer of the economic or legal ownership of the real estate or of an interest of at least one third (together with interests already held by the acquirer, or already held or acquired by parties related to the acquirer) in a real property company. A company is considered a “real property company” if its assets (on a fair market value basis) at the time of acquisition consist, or at any point in time in the year preceding the acquisition have consisted (i) of more than 50% of real estate as defined in the Real Estate Transfer Tax Act (*Wet op belastingen van rechtsverkeer*), and (ii) of at least 30% of real estate situated in the Netherlands, provided that at least 70% of the activities of such company consist of the acquisition, disposition or exploitation of such real estate.

Further, the Netherlands imposes an insurance premium tax (*assurantiebelasting*) at a rate of 21% with respect to insurances covering risks situated in the Netherlands.

Subject to certain exceptions, the Dutch tax authorities are a “preferred creditor” – ie, claims of the Dutch tax authorities have preference over claims of other (non-preferred) creditors. See 7.3 **The Order Creditors Are Paid on Insolvency**.

4.3 Usury Laws

Under Dutch law, there are no usury laws or other rules limiting the amount of interest that can be charged, save that in exceptional circumstances a contractual stipulation that provides for an excessive amount of interest may be set aside in accordance with rules of reasonableness and fairness.

5. Guarantees and Security

5.1 Assets and Forms of Security

Assets that are typically available as collateral to lenders include real property and other registered assets (*registergoederen*) – for example, sea vessels and aircrafts, movable assets (*roerende zaken*), receivables (*vorderingen*), shares and intellectual property rights.

In each case, the creation of Dutch security over assets requires a valid undertaking from the security provider to grant such security. In addition, the asset over which security is purported to be created must be capable of being transferred (*overdraagbaar*) and the security provider must be authorised to dispose (*beschikken*) of such asset at the time on which the security is purported to be granted.

Security over Registered Assets

Security over real property and other registered assets must be taken in the form of a right of mortgage, which is created pursuant to a deed of mortgage executed before a Dutch civil law notary and registered with the Dutch land register (*Kadaster*).

Security over Assets Other Than Registered Assets

Security over shares, moveable assets, receivables and intellectual property rights must be taken in the form of a right of pledge, as set out below.

Right of Pledge over Registered Shares

A right of pledge over registered shares (*aandelen op naam*) in (i) a Dutch limited liability company (*naamloze vennootschap*) whose shares are not listed on a regulated market or a multilateral trade facility (MTF), or (ii) a Dutch private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) is granted on the basis of a deed of pledge of shares that must be executed before a Dutch civil law notary. Unless the company whose shares are pledged is a party to the deed of pledge, the right of pledge must be notified to the company before the pledgee can exercise its rights against that company.

Registered shares in a limited liability company (*naamloze vennootschap*) whose shares are registered on a regulated market or MTF are pledged by means of a written instrument that can be executed without the involvement of a Dutch civil law notary.

Right of Pledge over Movable Assets

Security over movable assets can be taken in the form of a possessory right of pledge (*vuistpand*) or a non-possessory right of pledge (*bezitloos pandrecht*). A possessory right of pledge is created by giving the pledgee control over those assets. A non-possessory right of pledge is created by means of a written instrument registered with the Dutch tax authorities or, alternatively, executed before a Dutch civil law notary.

Right of Pledge over Receivables

Security over receivables is taken in the form of a disclosed right of pledge (*openbaar pandrecht*) or an undisclosed right of pledge (*stil pandrecht*). An undisclosed right of pledge can be validly granted (if applicable, in advance) over receivables that exist on the date on which such right of pledge is purported to be granted or will arise from a legal relationship that exists on the date on which the right of pledge is purported to be granted, whereas a disclosed right of pledge can also be granted in advance over receivables that will arise from a legal relationship that does not yet exist on the date on which such right of pledge is purported to be granted. In each case, the right of pledge is created at the time on which the receivable comes into existence.

A disclosed right of pledge is granted by means of a written instrument that can be executed without the involvement of a Dutch civil law notary. The debtor of a pledged receivable must be notified of the right of pledge before it can be invoked against such debtor.

An undisclosed right of pledge is granted by means of a written instrument that is registered with the Dutch tax authorities or, alternatively, executed before a Dutch civil law notary.

Right of Pledge over Intellectual Property

Dutch law provides for specific regulations with respect to various types of intellectual property rights, such as trade names (*handelsnamen*), trade marks (*merkrechten*), copyrights (*auteursrechten*) and patents (*octrooien*). These regulations do not provide for a uniform method of creating security over all types of intellectual property rights. In general, a right of pledge over intellectual property rights is created by means of a written instrument that does not require the involvement of a Dutch civil law notary. Typically, if an intellectual property right is registered in a public register, the right of pledge must be registered in such register before it can be enforced against third parties.

Security over Financial Collateral

The Collateral Directive (2002/47/EC) has been implemented in the Netherlands. Accordingly, Dutch law accommodates that security over securities (*effecten*), cash in bank accounts and credit claims is taken by means of a title transfer financial collateral arrangement or a security financial collateral arrangement. No formal requirements apply to the creation of security in the form of a financial collateral arrangement, save that the arrangement can be evidenced in writing or in a legally equivalent manner and that the collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the security taker.

Costs and Timing

For all types of security described above, an initial security document is simple to produce from existing standard forms and the main documentation costs are normally incurred in negotiating its terms. The involvement of a Dutch civil law notary typically results in additional costs. Dutch civil law notaries and their associates charge for their services at rates comparable to those charged by Dutch lawyers.

Negotiating the terms of a security document typically takes one to several weeks. Once the document is in agreed form, execution can be dealt with within a single day. If a document is executed before a Dutch civil law notary on the basis of one or more powers of attorney that are signed in a jurisdiction other than the Netherlands, the process typically takes longer depending on the completion of additional formalities (eg, legalisation and obtaining an apostille) in that jurisdiction.

5.2 Floating Charges or Other Universal or Similar Security Interests

Dutch law does not provide for a floating charge or other universal or similar security interest over all present and future assets of a company. In practice, rights of pledge over movable assets, receivables and intellectual property rights of one and the same pledgor or group of pledgors are typically created on the basis of a single combined instrument known as an “omnibus security agreement”.

5.3 Downstream, Upstream and Cross-Stream Guarantees

The validity and enforceability of the obligations of a Dutch legal entity under a transaction which it entered into (which may include the giving of downstream, upstream and/or cross-stream guarantees) may be contested by such entity or, if declared bankrupt, the receiver in bankruptcy (curator) if both (i) the entry into the transaction was outside the scope of the entity's objects (*doeloverschrijding*), and (ii) the counterparty of the entity knew or ought to have known (without any enquiry) that this was the case.

The Dutch Supreme Court has ruled that in determining whether a legal act (*rechtshandeling*) performed by a legal entity falls outside the objects of that entity, not only the description of such objects in its articles of association is relevant, but all relevant circumstances must be taken into account, in particular whether the interests of the legal entity are served by the transaction. Under Dutch law, the interest of a company may include the interests of the group of companies to which such company belongs.

5.4 Restrictions on Target

Under Dutch rules of financial assistance, a limited liability company or any of its subsidiaries cannot validly grant guarantees or security or otherwise provide financial assistance with a view to the acquisition by a third party of shares in its share capital. This rule does not apply to transactions with a view to the acquisition of shares in a private company with limited liability. In the context of an acquisition financing transaction with a target that is a limited liability company, applicable financial assistance restrictions are often circumvented by ensuring that the target is converted into a private company with limited liability prior to it or any of its subsidiaries granting guarantees or security. Alternative procedures include debt push-down structures and a merger between the target and the bid company with the target as disappearing entity.

Often, a combination of several procedures may be applied depending on the specific situation. Obviously, the ability of a target or any of its subsidiaries to grant guarantees or security may also be limited by its corporate objects and interest (as set out above).

5.5 Other Restrictions

Fraudulent Conveyance

Under Dutch rules of fraudulent conveyance (*pauliana*), a legal act – including the granting of guarantees or security, that was (i) performed by a debtor without an obligation to do so (*onverplicht*), and (ii) has resulted in one or more of its creditors being prejudiced – is subject to annulment by each of such creditors and, if the debtor has been declared bankrupt, by its receiver in bankruptcy if at the time of performance of such act the debtor and, unless the legal act was for no consideration (*om niet*), the counterparty knew or ought to have known that one or more creditors would be prejudiced as a result.

Corporate Approvals

Under the articles of association of a Dutch company, the granting of guarantees and security may be subject to approvals from one or more corporate bodies, such as a supervisory board, or the company's general meeting.

Works Council Advice

If guarantees or security are contemplated to be granted by a Dutch company as security for material financial liabilities owed by a third party and the company has a works council, the decision to grant such guarantees or security is normally subject to such works council's right to render advice. The contemplated decision must be submitted for advice at a time when the advice can truly have an impact on the outcome of the decision-making process and the works council must be given a reasonable time period to consider the proposed decision. A time period of three to six weeks is typical.

If the advice is positive or neutral, the company can proceed with the decision-making process and implement the decision. If the advice is negative, the company must explain to the works council why the decision was not in line with the advice. It must wait one month before the decision can be implemented. During that month, the works council can lodge an appeal against the decision with the Enterprise Chamber of the Amsterdam Court of Appeal.

The decision can be declared null if one or more formal requirements have not been complied with. In addition, the Enterprise Chamber can rule that the decision (and any measures taken towards its implementation) must be reversed if the company, given the interests of all parties involved, could not have reasonably taken the decision.

5.6 Release of Typical Forms of Security

Dutch law provides for a number of ways in which security rights are terminated. A right of mortgage or a right of pledge terminates by operation of law if all liabilities secured by that security right are paid (or otherwise discharged) in full.

Rights of mortgage and pledge can also be terminated by means of relinquishment (*afstand*). Relinquishment of a right of mortgage or a right of pledge is effected in accordance with the same formalities that apply to the creation of such right. Typically, relinquishment of a security right requires a written instrument between the security provider and the security taker and, if the security right is registered in a public register, de-registration from that register.

Additionally, if stipulated at the time of creation, rights of mortgage and rights of pledge can be terminated by means of cancellation (*opzegging*), which normally requires a notification from the security taker to the security provider.

5.7 Rules Governing the Priority of Competing Security Interests

Priority of Competing Security Rights

The priority of two or more rights of mortgage or rights of pledge over the same asset depends on the order in which those rights are created – ie, first in time has the highest priority. A change in the priority of rights of mortgage that are created over the same registered asset is expressly allowed under Dutch law. There is uncertainty as to whether it is possible for holders of rights of pledge over the same asset to change the priority of those rights contractually.

Subordination of Liabilities

As a general principle of Dutch law, all liabilities of a debtor rank *pari passu*, with the exception of liabilities that are mandatorily preferred by law or those that are subordinated by agreement

between the parties. Dutch law makes a distinction between subordination within the strict sense of the word (referred to as “actual subordination”) and subordination within the broader sense of the word (referred to as “quasi-subordination”).

Survival in Insolvency

Actual subordination is generally effective in an insolvency of the debtor. Assuming that an arrangement for actual subordination of junior liabilities owed by a debtor has been validly entered into before its bankruptcy, the receiver in bankruptcy can only apply the liquidation proceeds towards the junior liabilities in accordance with and subject to their subordinated nature.

Like all contractual obligations, the obligations of a debtor under contractual provisions of quasi-subordination may not be enforceable in a bankruptcy (*faillissement*) or suspension of payments (*surseance*) of that debtor. For example, an undertaking of the debtor to refrain from paying a junior liability before certain conditions are met may not be enforceable.

Actual Subordination

The result of actual subordination is that the subordinated claim no longer ranks *pari passu* with all or certain other claims of the debtor. Actual subordination requires that the debtor and the holder of junior liabilities enter into an agreement that stipulates that as to all or certain other liabilities of the debtor, the junior liabilities will have a lower priority than they would have on the basis of general rules of Dutch law.

Quasi-subordination

Quasi-subordination does not result in a departure from the *pari passu* principle, but is intended to have a similar economic effect. In Dutch legal practice, various methods of quasi-subordination are used. These include arrangements pursuant to which the junior liabilities do not become due and payable before all senior liabilities have been satisfied in full.

Another method used is an arrangement between a junior creditor and a senior creditor that provides for the turnover to the senior creditor of any proceeds realised by the junior creditor. A third method entails the creation of a right of pledge over the junior liabilities as security for payment of the senior liabilities.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders Enforcement of Dutch Security

A Dutch right of mortgage or right of pledge may only be enforced upon the occurrence of a default (*verzuim*) with respect to any payment obligation secured by that right.

Enforcement of a right of mortgage or right of pledge must take place in accordance with the applicable provisions of the Dutch Civil Code and the Dutch Code of Civil Procedure, as set out below.

Mortgage over Registered Assets

In principle, a right of mortgage over registered assets is enforced by way of a public sale. The sale must take place in accordance with certain procedures that may be time-consuming. As an alternative to a public sale, each of the mortgagee and the mortgagor may request the competent court to approve a private sale of the property.

Pledge over Registered Shares

In principle, a right of pledge over registered shares can be enforced by way of a public sale but this method is seldom used in practice. As an alternative to public sale, a pledgee may request the competent court to (i) approve a private sale of the shares, or (ii) allow the pledgee to appropriate the shares at a price determined by the court. As a final alternative, the pledgee and the pledgor may agree upon an alternative form of execution (including a private sale to a third party) without the involvement of the courts. However, this option is only available after the pledgee has become entitled to enforce the right of pledge.

In all cases, the shares must be transferred in accordance with applicable provisions of the articles of association of the company whose shares are pledged and, if applicable, any regulatory constraints. In practice, provisions from the articles of association that would restrict the enforcement of a right of pledge over shares (such as share transfer restrictions) are removed before the right of pledge is granted.

Pledge over Movable Assets

The methods of enforcement of a right of pledge over movable assets are identical to those available to the holder of a right of pledge over registered shares as set out above.

Pledge over Receivables

In practice, enforcement of a right of pledge over receivables takes place by collection of the receivables, following which the secured liabilities are satisfied from the collection proceeds. In case of a disclosed right of pledge, this requires that the debtors of the receivables are notified of an (event of) default and/or the enforcement of the pledge. In case of an undisclosed right of pledge, the right of pledge must be notified to the debtors of the receivables. In both cases, once the debtor of a pledged receivable is notified of the right of pledge, it can no longer discharge the receivable by paying to the pledgor.

The methods of enforcement set out above under pledge over registered shares are also available to the holder of a right of pledge over receivables.

Pledge over Intellectual Property Rights

For most types of intellectual property rights, a right of pledge can be enforced on the basis of the methods described above under pledge over registered shares. However, legislation with respect to certain types of intellectual property rights, such as the Patents Act 1995 (*Rijksoctrooiwet 1995*), provides for specific rules regarding the enforcement of security over such intellectual property rights.

Security over Financial Collateral

In general, security in the form of a security financial collateral arrangement over credit claims or securities may be enforced by a sale of the collateral by the collateral taker that subsequently recovers its claims out of the sale proceeds. Alternatively, the collateral taker may appropriate the collateral, following which its claims against the collateral provider are netted with the value of the collateral. Enforcement of a security financial collateral arrangement with respect to cash takes place by netting the cash with the claims secured by the arrangement. To a large extent, the parties are free to agree the enforcement process.

6.2 Foreign Law and Jurisdiction

Choice of a Foreign Law as the Governing Law of the Contract

In accordance with and subject to Rome I (Regulation (EC) No 593/2008), Dutch courts will generally recognise and uphold a valid choice of foreign law as the law governing a contract.

Submission to a Foreign Jurisdiction

Subject to certain restrictions, Dutch courts will generally uphold a valid contractual submission to the jurisdiction of a foreign court.

Waiver of Immunity

Under Dutch law, a Dutch legal entity is not entitled to claim for itself or for any of its assets, immunity from suit, execution, attachment or other legal process. However, assets that have a public utility function (*goederen bestemd voor de openbare dienst*) are not susceptible for attachment by law.

6.3 A Judgment Given by a Foreign Court

Courts of EU Member States

Dutch courts will recognise as a valid judgment any judgment given by a court of an EU Member State against a Dutch legal entity under a contract without retrial or examination of the merits of the case, in accordance with the provisions and subject to the limitations of Brussel I Recast ((EU)/1215/2012).

Courts of Other Countries

The Netherlands are a party to several treaties pursuant to which judgments of courts of certain countries are recognised as a valid judgment if certain requirements have been met. These countries include Switzerland, Norway, Iceland, Mexico, Singapore and Montenegro.

Judgments from courts of countries that have not entered into a treaty with the Netherlands with respect to the mutual recognition and enforcement of civil judgments are generally not enforceable in the Netherlands without re-litigation. However, under current practice, Dutch courts may be expected to render a judgment against a Dutch legal entity in accordance with the judgment of a foreign court, if certain procedural conditions are met. It is unclear if this practice extends to default judgments as well.

Arbitration

If the country of a chosen arbitration panel is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 (the Convention), an arbitral award duly obtained on the basis of the submission to arbitration contained in a contract in accordance with its terms will be recognised and enforced by the Dutch courts in accordance with and subject to the provisions of the Convention, and the applicable provisions of the Dutch Code of Civil Procedure.

6.4 A Foreign Lender's Ability to Enforce Its Rights

There are no specific restrictions applicable to a foreign lender to enforce its rights under a loan or security agreement.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

Last year, the Dutch government submitted a legislative proposal (Act on the Confirmation of a Private Restructuring Plan (*Wet homologatie onderhands akkoord*)) to introduce a preventive restructuring framework that allows debtors to restructure their debts outside formal insolvency proceedings (the "Dutch Scheme"). The legislative proposal has been adopted by the House of Representatives and is, subject to adoption by the Senate, expected to enter into force in the fourth quarter of 2020. The Dutch Scheme combines features of the UK scheme of arrangement, and Chapter 11 proceedings from the USA.

Although not specifically designed for this purpose, the Dutch Scheme is considered to meet the requirements of a restructuring framework within the meaning of the Directive on restruc-

turing and insolvency ((EU) 2019/1023) of 20 June 2019. The directive requires EU member states to ensure that preventive restructuring frameworks are available for debtors who are in financial difficulty and likely to fall into insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor. For the implementation of the directive, a separate legislative proposal will be prepared.

7.2 Impact of Insolvency Processes

If a debtor is declared bankrupt, all attachments made against the assets that belong to the bankrupt estate are lifted by operation of law. No valid attachments can be made thereafter. As a result, creditors can no longer effectively take enforcement measures against the bankrupt debtor, except in certain cases.

A creditor that holds a right of pledge or a right of mortgage over an asset that belongs to the bankrupt estate is entitled to enforce such right as if there were no insolvency proceedings. However, a Dutch bankruptcy court may order a mandatory stay-period of up to four months in aggregate during which all creditors, including mortgagees and pledgees, cannot enforce their rights. Rights against other parties, such as guarantors and third-party security providers that have not been declared bankrupt remain unaffected.

7.3 The Order Creditors Are Paid on Insolvency

Subject to exceptions on grounds of preference recognised by law, creditors have, among themselves, an equal right to be paid from the net proceeds of the assets of the debtor in proportion to their claims. Preference results from rights of pledge, rights of mortgage, privilege (*voorrecht*) and other grounds provided for by law. In principle, rights of pledge and rights of mortgage rank before privileges. With respect to privileges, a distinction is made between privileges upon the entire estate and those with respect to specific assets. Unless otherwise provided by law, the latter category ranks over the first.

7.4 Concept of Equitable Subordination

Equitable subordination is not a known concept under Dutch law. In bankruptcy, loans extended by shareholders are not subordinated by law. There are a few judgments in which Dutch courts held that pursuant to the specific facts and circumstances of the case, the claim of the shareholder should be subordinated.

7.5 Risk Areas for Lenders

In bankruptcy, there is the risk of annulment of a legal act based on the rules of fraudulent conveyance. See 5.5 **Other Restrictions**.

8. Project Finance

8.1 Introduction to Project Finance

From its inception in 2001, more than EUR13 billion has been provided through project financing (notably road infrastructure, buildings and locks) under the Dutch DBFM(O) programme. The vast majority of these projects have been delivered on time and within budget. The programme is attractive to foreign contractors, investors and financiers because the conditions for tendering and the agreement itself are clear and the Netherlands is a politically stable country. However, in some projects, contractors have suffered substantial losses, as a result of which the popularity of the contract form in that part of the market has declined sharply.

In addition to (public) infrastructure, project financing in the Netherlands is regularly applied for wind farms, including the mega-wind farms at sea which are being tendered by the Dutch State, and the project financing of data centres is developing rapidly. The Netherlands must expand its rail infrastructure, possibly by means of light-rail projects, and there seems to be a good chance that project financing will play a role in these projects as well.

The year 2018 was a particularly active one for infrastructure PPP transactions in the Netherlands, with three significant projects reaching financial close, with the largest being the Blankenburg Connection near Rotterdam. In 2019 there were two significant infrastructure projects, one that reached financial close (*PPP Project A9 Badhoevedorp-Holendrecht*) and another that was successfully tendered (*PPP Project A15 Extension*). It is expected that the Dutch State will not tender any PPP projects with an external financing component in the near future.

There are no specific industry-related regulations applicable to the project finance industry in the Netherlands. However, depending on the type of project, numerous specific laws and regulations may be applicable, including relating to the environment, mining and energy.

8.2 Overview of Public-Private Partnership Transactions

PPP transactions are commonly used in the Netherlands as a form of project financing including in the accommodation, infrastructure, and waste-water treatment sectors.

The majority of PPP transactions, including private financings, are tendered by the Dutch central government, such as the Ministry of Infrastructure and Water Management (*Ministerie van Infrastructuur en Waterstaat*) through the Directorate-General for Public Works and Water Management (*Rijkswaterstaat*). The procurement process is governed by the Public Procure-

ment Act 2012 (*Aanbestedingswet 2012*) which implements the European Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.

As previously mentioned, central government PPP transactions use standardised DBFM(O) contracts. Additionally, central government uses a standard procurement guideline, which has been developed especially for project finance transactions.

8.3 Government Approvals, Taxes, Fees or Other Charges

Governmental Approvals

In general, no governmental approvals are required for project finance transactions. However, certain governmental approvals and permits may be required for the implementation of certain types of projects.

Taxes, Fees and Other Charges

In general, no specific taxes will be payable in the Netherlands by lenders in connection with project finance transactions. See 4.2 Other Taxes, Duties, Charges or Tax Considerations for general tax comments.

Administrative levies (*leges*) will be charged by the relevant authorities (ie, municipalities, provinces) for processing permit and spatial planning applications.

Registrations and Filings

Other than in relation to security perfection requirements described in 5.1 Assets and Forms of Security, project finance transaction documents do not need to be registered or filed with any governmental body in the Netherlands.

The relevant authority will publish applications for, and granting of, permits and spatial planning to provide concerned parties the possibility to appeal.

Governing Law

The governing law of project finance transaction documents (other than hedging documents) is usually Dutch law. Hedging documents are usually governed by English law.

8.4 The Responsible Government Body

PPP transactions, including private financings, for national infrastructure projects are tendered by the Ministry of Infrastructure and Water Management through the Directorate-General for Public Works and Water Management (*Rijkswaterstaat*).

Energy policy and legislation in the Netherlands are primarily determined by the Minister for Economic Affairs and Climate Policy (*Minister van Economische Zaken en Klimaat*). The Authority for Consumers and Markets (*Autoriteit Consument en Markt*) is the national energy regulatory authority.

8.5 The Main Issues When Structuring Deals

Overview

The duration of the financing is normally linked to the project duration and, with respect to PPP transactions, most have payment mechanisms connected to project availability and completion. Therefore, the structure of the financing and contracting arrangements must anticipate and address possible future issues and changes in market conditions which, for example, may lead to construction delays (which may result in rescheduling of debt repayments), exceeding construction costs or early termination.

Other issues that need to be considered include risk allocation, transitional arrangements for construction and maintenance obligations, change in ownership of the special purpose vehicle (SPV) and the contractor and use of project accounts and escrow accounts.

The standardised DBFM(O) contracts mentioned above go a long way towards addressing many of these issues. For example, they include a comprehensive mechanism for the repayment of finance costs in case of early termination of the project due to default by the contracting authority or a force majeure.

Legal Form of Project Company and Relevant Laws

Projects are normally financed through an SPV in the form of a Dutch private company with limited liability. The SPV then enters into back-to-back subcontracts in relation to project works, normally with another Dutch private company with limited liability or general partnership (*vennootschap onder firma*) that can be owned by a single sponsor or, more commonly, a consortium of sponsors.

There are no laws specific to project companies other than general Dutch corporate law.

Restrictions on Foreign Investment and any Relevant Treaties

Dutch law does not impose any restrictions on foreign investments specific to project finance transactions. However, current and proposed legislation and treaties may impact projects that comprise investments in electricity generation facilities, LNG installations, telecommunications and other vital infrastructure and high-tech.

The Foreign Direct Investments Regulation (Regulation 2019/452/EU) will apply from 11 October 2020. The regulation submits all investments by non-EU investors to a screening if such investments are likely to affect the security or the public order of a Member State or of the EU.

In November 2019 the Dutch government has announced the preparation of a legislative proposal for the introduction of a national security risks investment test.

8.6 Typical Financing Sources and Structures for Project Financings

The typical financing sources for projects in the Netherlands include domestic and foreign commercial lenders (including institutional investors such as insurance companies), international institutions such as the European Investment Bank and, to a lesser extent, project bond investors and export credit agencies.

Equity is normally provided by a single sponsor or a consortium of sponsors.

The sponsor(s) normally determine(s) the financing structure for the project. The financing is provided on a limited recourse basis, although contingent equity, completion guarantees and performance bonds from the sponsor(s) and other parent entities are often used.

For larger PPP transactions, an increasing number of commercial lenders have been providing their financing through a mix of short-term debt during the construction phase (including by way of bridge financing for equity and milestone payments) and long-term debt for the duration of the project.

8.7 The Acquisition and Export of Natural Resources

The Netherlands is one of Europe's largest gas producers and exporters, with the Groningen natural gas field being one of the largest onshore gas fields in the world. On 29 March 2018, the Dutch Minister of Economic Affairs and Climate announced that natural gas extraction from this field will be terminated entirely in the coming years. This decision is due to the negative impact of natural gas extraction in the province of Groningen – i.e., earthquakes and consequential damage to buildings.

An exploration or production licence (as the case may be) is required for the exploration or production of minerals. Licence holders have certain financial obligations, including the duty to pay:

- surface right (*oppervlakterecht*);
- severance tax (*cijns*);
- profit share (*winstaandeel*); and
- a one-time payment to the relevant province (*afdracht aan de provincie*) based on the size of the area used.

8.8 Environmental, Health and Safety Laws

Real estate and infrastructure projects will almost always require project integrated permits pursuant to the Environmental Permitting (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*). These permits are required for activities impacting the physical environment such as construction, demolition, spatial planning, and noise, air and soil pollution. In general, the municipality in which the project largely takes place is the competent regulatory body. However, depending on the project, the competent authority could instead be a province or a minister.

A special regime applies to large infrastructure projects, in which case the relevant permissions follow from the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*). In that case the Minister of Infrastructure and Environment (*Minister van Infrastructuur en Waterstaat*) is the competent regulatory body. In addition, other permits and approvals could be required depending on the nature of the activities.

With respect to real estate and infrastructure projects a permit based on the Nature Conservation Act (*Wet natuurbescherming*) is likely required given that possible significant adverse effects on nitrogen sensitive habitats in nearby Natura 2000-sites cannot be ruled out as the construction of such projects often involves nitrogen deposition. The conditions for granting such a permit are quite strict.

Given the general unfavorable conservation statuses of nitrogen sensitive habitat types in most of the Natura 2000-sites, it is not a given that a permit based on the Nature Conservation Act can be granted. To deal with this issue, the Dutch Government had established the Programmatic Approach to Nitrogen Deposits (*Pogrammatiese Aanpak Stikstof, PAS*). The PAS made the granting of permits easier. However, as the Dutch Council of State on 29 May 2019 ruled that this programmatic approach was in breach of the European Habitat Directive, the program is not in effect anymore. As a result, the granting of these permits has become more complicated again. The Emergency Act approach Nitrogen (*Spoedwet aanpak Stikstof*), which entered into force on 1 January 2020, reserves some space for nitrogen deposition of seven large infrastructural projects in the Multiannual Programme for Infrastructure, Space and Transport (*Meerjarenprogramma Infrastructuur, Ruimte en Transport* or MIRT).

Another issue for construction works can be the presence of PFAS (poly- and perfluoroalkyl substances) in the soil. The presence of low concentration of certain types of PFAS in soil has culminated in a restriction of the management and reuse of soil and sediments and consequently in the pausing of dredging and building activities. Currently, a temporary PFAS action framework (*Tijdelijk handelingskader voor hergebruik van PFAS-*

houdende grond en baggerspecie (geactualiseerde versie van 2 juli 2020)) is applicable which contains provisional application standards for the reuse of soil and dredging sludge containing PFAS. For many projects this action framework means that PFAS-measurements have to be included in the research into the quality of soil or dredging sludge resulting in delay of those projects.

From 1 January 2022, almost all legislation relating to impacts on the physical environment will be consolidated in one comprehensive Environment and Planning Act (*Omgevingswet*). With regard to health and safety, the Working Conditions Act (*Arbeidsomstandighedenwet*) and affiliated legislation apply to the conditions on the project site.

NETHERLANDS LAW AND PRACTICE

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Stibbe handles complex legal challenges both locally and cross-border. By understanding the commercial objectives of clients, their position in the market and their sector or industry, Stibbe can render suitable and effective advice. From an international perspective, it works closely with other top-tier firms on cross-border matters in various jurisdictions. These relationships are non-exclusive, enabling Stibbe to assemble

tailor-made integrated teams of lawyers with the best expertise and contacts for each specific project. This guarantees efficient co-ordination on cross-border transactions throughout a multitude of legal areas, irrespective of their nature and complexity. The firm's main offices are in Amsterdam, Brussels and Luxembourg, with branch offices in London and New York.

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