
CHAMBERS GLOBAL PRACTICE GUIDES

Debt Finance 2024

Definitive global law guides offering
comparative analysis from top-ranked lawyers

**Netherlands: Law & Practice and
Trends & Developments**

Gianluca Kreuze, Ruben den Hollander
and Anne van Geen
Loyens & Loeff



NETHERLANDS



Law and Practice

Contributed by:

Gianluca Kreuze, Ruben den Hollander and Anne van Geen
Loyens & Loeff

Contents

1. Market p.4

- 1.1 Debt Finance Market Performance p.4
- 1.2 Market Players p.4
- 1.3 Geopolitical Considerations p.5

2. Types of Transactions p.6

- 2.1 Debt Finance Transactions p.6

3. Structure p.6

- 3.1 Debt Finance Transaction Structure p.6

4. Documentation p.7

- 4.1 Transaction Documentation p.7
- 4.2 Impact of Types of Investors p.7
- 4.3 Jurisdiction-Specific Terms p.8

5. Guarantees and Security p.8

- 5.1 Guarantee and Security Packages p.8
- 5.2 Key Considerations for Security and Guarantees p.10

6. Intercreditor Issues p.11

- 6.1 Role of Intercreditor Arrangements p.11
- 6.2 Contractual v Legal Subordination p.11

7. Enforcement p.12

- 7.1 Process for Enforcement of Security p.12
- 7.2 Enforcement of Foreign Judgments p.12

8. Lenders' Rights in Insolvency p.13

- 8.1 Rescue and Reorganisation Procedures p.13
- 8.2 Main Insolvency Law Considerations p.14

9. Tax & Regulatory Considerations p.14

- 9.1 Tax Considerations p.14
- 9.2 Regulatory Considerations p.15

10. Jurisdiction-Specific or Cross-Border Issues p.15

- 10.1 Additional Issues to Highlight p.15

Loyens & Loeff is a leading continental European law and tax firm with over 1,000 advisers, and is the logical choice for companies doing business in or from its home markets of the Netherlands, Belgium, Luxembourg and Switzerland. Loyens & Loeff keeps track of developments in the constantly evolving banking environment and helps its clients to navigate the

increasingly complex debt and financial markets. It also goes a step further, guiding clients in identifying opportunities and innovative ways to access the funding most suitable for them, whilst also managing risk. The firm's ability to stay ahead of these changes enables clients to stay focused on their core business.

Authors



Gianluca Kreuze is a partner within the finance practice group and co-head of the private equity team at Loyens & Loeff. He focuses on (cross-border) finance transactions, with particular

expertise in leveraged finance and fund finance. Gianluca is often consulted on the structuring and documenting of debt finance transactions, with an emphasis on leveraged finance and follow-on recapitalisations and other corporate finance transactions. He represents private equity sponsors, their portfolio companies, financial institutions and alternative finance providers across all tiers of the debt capital structure.



Ruben den Hollander is a member of the finance practice group and the private equity team at Loyens & Loeff. He focuses on cross-border finance transactions, with particular

expertise in leveraged finance and fund finance, advising financial institutions and private investors. Prior to joining the banking and finance practice group, Ruben worked in the firm's investment management practice group, where he assisted managers with the formation of their funds and advised institutional investors on their investments in funds.



Anne van Geen is an associate in the finance practice group and a member of the private equity team at Loyens & Loeff. Anne focuses on (cross-border) finance transactions, with

particular expertise in leveraged finance and portfolio company level financing obtained for or by private equity sponsors. She advises a wide range of borrowers and lenders, including traditional lenders and private debt funds. She also has experience in employment law, particularly the employment law aspects of M&A deals and restructurings, co-determination procedures and the dismissal of managing directors.

Loyens & Loeff N.V.

Parnassusweg 300
1081 LC Amsterdam
The Netherlands

Tel: +31 20 578 57 85
Fax: +31 20 578 58 00
Email: info@loyensloeff.com
Web: www.loyensloeff.com



1. Market

1.1 Debt Finance Market Performance

Overall, debt finance markets had a challenging year in 2023 as global macro-economic factors, including the rising interest rate environment, and geopolitical factors dampened investment appetite. Larger transactions and the high-yield bond issuance market in particular came to a halt. This mirrors the general private equity transaction market activity, although market participants in the medium and smaller-sized space are still considered active.

Moreover, the current economic environment has resulted in borrowers being unable to fulfil obligations under the financing documentation, particularly with regard to payment and financial ratios. In return for waiving certain defaults, lenders often impose additional conditions on borrowers that can lead to amending the financing documentation, such as agreeing to new financial ratios, increasing interest rates, limiting flexibility for borrowers on general covenants, or imposing more extensive information undertakings and charging amendment fees.

As a result of higher interest rates and inflation, many borrowers have encountered liquidity issues, resulting in requests for additional financings (through either increasing existing facilities

or attracting new incremental lines). To obtain additional financing, lenders will likely impose additional conditions (as described above), and shareholders are typically expected to put in equity as well.

1.2 Market Players

The Dutch debt finance market is traditionally divided into three market segments based on debt quantum:

- small (up to circa EUR30 million) – often lent by traditional (Dutch) commercial banks and on a bilateral basis (and increasingly by a direct lender);
- medium (from circa EUR30 million up to circa EUR250 million) – often lent by a direct lender or a club of (Dutch) commercial banks; and
- large (in excess of EUR250 million) – often lent by larger syndicates consisting of commercial banks (or direct lenders).

Over the last few years, the Dutch debt finance market has become crowded in terms of the number of debt providers active in the small, medium and large financing space. Even though traditional commercial banks are still active, direct lenders (often private credit funds) have grown their market share in the Netherlands, especially in the leveraged finance market. Direct lenders typically operate outside the scope of EU bank-

ing supervision, affording them exemption from regulatory pressures.

As this trend of direct lenders increasing their market share develops, direct lenders are exploring new market areas, such as the financing of working capital, the financing of (stretched) senior solutions (rather than unitranche), financing based on recurring revenue as opposed to EBITDA and the financing of smaller sized private equity transactions (ie, companies with an EBITDA around EUR10 million or less). As such, traditional bank-led leveraged loan financing is no longer the predominant source for funding private equity transactions in the Netherlands, and direct lenders are starting to move into the corporate space as well.

1.3 Geopolitical Considerations Dutch Loan Market Faces Challenges

Economic changes and geopolitical tensions and conflicts have introduced uncertainty into the financial markets, affecting investor confidence, risk appetite and deal volumes. The changing market has forced certain lenders to reassess their capital requirements and financing strategies. Most lenders have become more risk-averse and are closely monitoring portfolio company performance to determine the impact of inflation, increasing interest rates, labour costs and supply chain issues. Longer timelines for deal closures have resulted from increased due diligence and a need for lenders to assess and mitigate potential risks associated with geopolitical events and economic changes. In addition, commercial banks need to cope with the capital requirements that often affect the debt quantum and the pricing.

Higher pricing of debt products and inflation have also caused borrowers to kick planned debt financing down the road and explore alter-

native forms of financing, such as vendor loans and subordinated financings, including holdco financing or, in the private equity space, financings at fund level. Certain borrowers financed acquisitions without third-party debt, hoping to obtain a debt financing in the future whenever markets, pricing and terms improve. In addition, existing financings are being increased to obtain extra liquidity.

Direct Lending

As a result of unpredictability around pricing, more borrowers have turned to direct lending options. The private credit market has grown explosively over the years and, especially in leveraged finance transaction, direct lenders are considered to dominate the market in the Netherlands. While direct loans are typically more expensive than traditional loans, direct lenders have been able to secure more deals as they underwrite and hold debt themselves, which removes syndication risk and uncertainty for borrowers.

(Borrower-Friendly) Terms

Although the current market can still be classified as borrower-friendly, lenders are tightening conditions on certain types of transactions. In addition, lenders have become more selective and focus on a higher quality threshold for credits and borrowers. As long as interest rates remain high, the expectation is that lenders will remain focused on free cash flow instead of growth (EBITDA).

Market Outlook

It is challenging to predict whether the market will return to 2022 levels as stability returns. While economic indicators were showing positive signs in January of this year, the uncertainties arising from the latter half of 2023 make it difficult to assess whether the gains observed in

January truly reflect an improving economy. With speculations about interest rate cuts in June, there is optimism that 2024 will bring compelling opportunities for the finance markets.

2. Types of Transactions

2.1 Debt Finance Transactions

In the Netherlands, various types of debt finance transactions are prevalent. The specific types of transactions may vary based on the needs of businesses and economic environment. The main types of debt finance transactions commonly observed in the Netherlands include leveraged acquisition finance, asset-based finance (including receivable-based financings such as factoring and supplier financings), securitisations, project finance, real estate finance, ship finance, fund finance and general corporate finance.

In addition, there has been a growing interest in sustainable finance, with businesses and financial institutions in the Netherlands exploring green or sustainable-linked loans and other environmentally friendly financing options. Companies committed to sustainability may use green loans to fund projects with positive environmental and social impacts. Furthermore, the interest rates or terms of a sustainable-linked loan can be tied to the borrower's achievement of sustainability-related KPIs or targets, such as carbon emissions, incentivising the borrower's achievement of ESG targets.

3. Structure

3.1 Debt Finance Transaction Structure Loan Facilities

Debt finance transactions in the Netherlands can take various forms; the structure highly depends on the specific needs of the borrower, the type of debt provider, the prevailing market conditions and the nature of the financing. That said, the following forms of loan facilities are often seen in the Netherlands:

- term loans to (re)finance the underlying asset;
- revolving credit facilities that allow borrowers to draw and repay funds to finance working capital as needed; and/or
- overdraft facilities.

In leveraged financings, sponsors often negotiate that the term loans are non-amortising (term loan B) and the inclusion of accordion features, which allows them to increase the size of the facility or attract additional financing under certain conditions. This feature provides flexibility to adapt the financing arrangements to changing needs or increased funding requirements without the need to renegotiate the entire agreement.

As a result of the increase of direct lenders, medium and large sized private equity transactions are increasingly structured as unitranche products (ie, a blended senior and mezzanine risk structured as a non-amortising secured term loan). In larger internationally arranged financings, senior financing is more often combined with mezzanine or second lien financing or high-yield bond issuances. All types of transactions are witnessing an increase in the use of vendor loans and/or earn-out arrangements.

Syndicated Loans Versus Debt Securities

The choice between syndicated loans/unitranche facilities and debt securities often depends on factors such as the issuer's preferences, market conditions and the desired level of flexibility or liquidity. Borrowers tend to choose loans or unitranche facilities over debt securities, up to a certain size (in terms of debt quantum), as those facilities generally provide for more bespoke terms, quicker execution and no disclosure of information to the public. On the other hand, bonds provide access to a broader pool of investors through the capital markets and can be traded on secondary markets, providing more liquidity for investors compared to syndicated loans.

Types of Investors

For both loan facilities and debt securities, the investor base can be diverse, reflecting the varied risk appetites and investment preferences of financial institutions. Loan facilities are traditionally provided by commercial banks and/or private credit funds but institutional investors, such as pension funds and insurance companies, increasingly offer and participate in bank loan financings. Debt securities financings are provided by a wide range of institutional investors, including asset managers, pension funds and insurance companies. In some cases, retail investors may participate through individual bond purchases. Hedge funds are also active participants in the debt securities markets, especially in more complex or distressed situations.

4. Documentation

4.1 Transaction Documentation

In Dutch debt finance transactions, in most cases the basis for the finance documentation is the

documentation published by the Loan Market Association (LMA).

In some medium and small financings, alternative lenders have been willing to work off short(er) form documentation, which is often a stripped down version of the LMA format. Dutch commercial banks also offer short form documentation for smaller transactions where, at the offset, syndication of the product is not considered part of the bank's strategy nor commercially likely.

The level of negotiations strongly depends on the size of the deal, the type of lenders, the type and size of the borrower and the borrower's strategy and financial performance.

4.2 Impact of Types of Investors

Different types of investors have different preferences, risk appetites and business models that impact the negotiation and structuring of loan agreements. Compared to direct lenders, commercial banks often impose more traditional and conservative covenants and financial ratios to mitigate their risk. On the other hand, direct lenders – often seeking higher yields – are comfortable with a higher debt quantum and are willing to offer more flexible documentary terms, such as fewer interim repayment obligations and more headroom on the financial covenants. Direct lenders are often flexible on equity cure mechanics, normalisation provisions with respect to financial covenants, access to incremental lines and the use of grower baskets that are linked to the financial performance or size of the borrower. As a result of this flexibility, borrowers are less likely to default under these financing arrangements, which in turn minimises interference from debt providers.

Although the level of negotiation strongly varies per transaction and debt provider, key areas

of negotiation typically revolve around the general undertakings (even more so for buy-and-build companies), the financial covenants and financial reporting. As to financial covenants, an important area of negotiation between the borrowers and the lenders is the use of equity cures and calculations of the structuring EBITDA (including normalisations).

4.3 Jurisdiction-Specific Terms

There are generally no Dutch-specific terms that need to be included in cross-border loan documentation that affect the commercial agreement between a lender and a borrower. However, it is common to cater for certain Dutch law concepts in loan documentation, especially around the permitteds – eg, to allow for Dutch fiscal unities between members of the borrowers' group. It is also common to include a section on Dutch terms to clarify which Dutch terms correspond to certain terms included in the credit agreement.

5. Guarantees and Security

5.1 Guarantee and Security Packages

Secured Liabilities

Dutch law security can only secure monetary payment liabilities. Security rights are accessory rights that follow the claims they secure by operation of law, meaning that they cannot be transferred or assigned independent from the secured liabilities. See also **5.2 Key Considerations for Security and Guarantees** for information on parallel debt.

Types of Assets and Security

The typical security package in connection with debt financing in the Netherlands consists of shares, real estate, movable assets, receivables (eg, insurance and intercompany receivables), bank accounts (and cash deposited therein) and

IP rights. In principle, both present and future assets can serve as collateral. A security right over future assets can be granted but will not catch any assets that are acquired or come into existence after the security provider has been granted a suspension of payments or been declared bankrupt. In deals involving a strong borrower (sponsor), collateral is often limited to shares, material intercompany receivables and material bank accounts of the material companies only.

Creation of Security

For a valid security right, collateral needs to be capable of being pledged (ie, no transfer/assignment restrictions apply) and sufficiently identifiable (a generic description often suffices). The following conditions also need to be met:

- the security provider must have the authority to dispose of and encumber the collateral;
- there needs to be an agreement to create a security right; and
- the formalities for creating security as prescribed by law must be complied with.

Formalities and Perfection Requirements

Unlike other jurisdictions, the Netherlands does not provide for the concept of a “floating charge”. The formalities and perfection requirements for creating security vary per type of asset, as follows.

- Shares are created pursuant to a notarial deed of pledge, executed in front of a civil law notary. The security provider typically remains entitled to collect dividends and exercise voting rights until a certain trigger event occurs. Security over shares needs to be registered in the shareholder's register to have third-party effect.

- Real estate are created by way of a notarial deed of mortgage, executed in front of a civil law notary. The deed of mortgage must be registered with the Land Register upon execution. In addition, the mortgage usually provides for a maximum secured amount, which typically amounts to the principal loan amount increased by 40% to cover interest and costs.
- Movable assets are created by way of a right of pledge and can take two forms.
 - (a) A possessory right of pledge is created by bringing the movable assets under the effective and exclusive control of the secured party (or a third party acting on its behalf). As this might raise practical difficulties in the ordinary course of business of a security provider, it is more common to create a non-possessory right of pledge.
 - (b) A non-possessory right of pledge does not require the secured party to take control over the assets. Instead, it is created by entering into a private deed, which is registered with the Dutch tax authorities (no public register; date stamp only). Upon the occurrence of a certain trigger event, the non-possessory pledge will be converted to a possessory pledge.
- Receivables are created by way of a right of pledge and can take two forms.
 - (a) A disclosed right of pledge is created by entering into a private deed and notification to the debtor of the right of pledge. A disclosed right of pledge can cover all existing and future receivables a security provider has against a debtor, and allows the secured party to collect the receivables. In practice, the secured party authorises the security provider to keep on collecting receivables until the occurrence of a certain trigger event.
 - (b) An undisclosed right of pledge does not require debtors to be notified but merely requires a private deed, which is registered with the Dutch tax authorities. An undisclosed right of pledge covers all receivables existing on the day of the registration and future receivables that result directly from existing legal relationships. As a result, the scope of the security should be regularly updated by means of supplemental deeds to capture future receivables that are not covered by the initial pledge.
- Cash deposited in bank accounts – for the purpose of taking cash as collateral, a Dutch bank account is considered to be a receivable against the account bank and security is therefore created in the same way as a pledge over receivables. The Dutch general banking conditions render bank account receivables incapable of being pledged and provide for a first ranking right of pledge and a right of set-off for the account banks. To secure a (first ranking) right of pledge for the secured party, certain consents/waivers need to be obtained from the account bank. Due to the increasing burden to monitor clients to mitigate risks regarding money laundering, Dutch account banks are often reluctant to provide consent to pledge bank account receivables. If the account bank does not want to co-operate, no valid right of pledge can be created.
- IP rights are created by way of a right of pledge by entering into a private deed. IP rights are only capable of being pledged if specifically provided for by law. Registration of the private deed with the Dutch tax authorities is only a condition for the creation of a valid right of pledge over licences and domain names. While not a constitutive requirement for the creation of a right of pledge, a right

of pledge over IP rights needs to be registered in the relevant IP register in order to be enforceable against third parties.

Signing Formalities

As Dutch law allows for a generic description of assets, the security over different types of assets can, to a large extent, be combined in one agreement/private deed (a so-called “omnibus pledge”). As mentioned, a notarial deed of mortgage and pledge over shares must be executed before a civil law notary. In practice, each party grants a power of attorney to the notary, to avoid having to physically appear in front of the notary. The signatures on such powers of attorney must be legalised (including a statement of authority) and furnished with an apostille.

A deed of mortgage (in relation to real estate assets and certain registered assets, such as vessels or aircrafts) must be executed in the Dutch language or, if in another language, must be accompanied by a certified translation. No language requirements apply for share pledges or private deeds. Private deeds may be executed in counterparts, and no other execution formalities apply.

5.2 Key Considerations for Security and Guarantees

Parallel Debt

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 standard market practice to use a parallel debt structure (as often included in the credit or intercreditor agreement). This structure creates a separate claim owed by the obligors to the security agent, which equals the total amount owed to the secured lenders. A parallel

debt becomes due and payable at the same time as the amounts owed to the secured lenders, and is discharged when the debt of the secured lenders is repaid. The secured liabilities under the Dutch security documents refer to the parallel debt.

Trust

A trust created under the laws of another jurisdiction will be recognised under Dutch law if the governing law provides for trusts and the trust has been created voluntarily and is evidenced in writing. However, the courts in the Netherlands will not be bound to recognise a trust if the significant elements of said trust are more closely connected with states that do not provide for the institution of the trust.

Guarantee Limitations

Under Dutch law, there are no general legal restrictions on providing guarantees for obligations of third parties, except for the financial assistance prohibition applicable to a public limited liability company (*naamloze vennootschap*). A public limited liability company is restricted from granting security or providing guarantees for debt used to acquire shares in its capital; its direct or indirect subsidiaries are prohibited from doing the same.

Notwithstanding the foregoing, a company (or the bankruptcy trustee on its behalf) can challenge the validity of a transaction if the company has acted beyond the scope of its corporate objects (ie, its business purpose) and the counterparty was aware or should have been aware thereof (generally this concept is referred to as “corporate benefit” or “ultra vires”). In determining whether there is corporate benefit, all circumstances must be considered. While the wording of the objects clause in the articles of association of the company is relevant, it is not deci-

sive. In particular, 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 jeopardised by the transaction. This is a factual test to be made by the management. The fact that the legal entity is part of a group can be taken into account (indirect benefit), particularly if the members of the group are economically and operationally intertwined. This test does not generally pose a problem on group financings for upstream guarantees, and is also not something that renders certain guarantee limitation wording applicable.

6. Intercreditor Issues

6.1 Role of Intercreditor Arrangements

Creditors of Dutch debtors have an equal right to be paid from the net proceeds of all assets of their debtor in proportion to their claims (*paritas creditorum* – equality of creditors) and, as such, their claims rank equally or *pari passu*. Dutch law, however, allows for intercreditor structures to be based on both lien subordination and claim subordination. Under Dutch law, multiple liens (eg, security interests) can be created on the same asset, whereby the ranking of each lien/security right is determined by the moment of perfection. Other preferred creditors are creditors with a right of retention, the Dutch tax authority and the bankruptcy trustee (for certain claims only). Similarly, a contractual arrangement between a creditor and a debtor may stipulate that a claim of a creditor shall take a ranking lower than the ranking conferred by law in respect of all or certain other creditors. Such contractual arrangements can be included in an intercreditor agreement or subordination agreement, for example.

The primary purpose of the intercreditor agreement is to rank the creditor's debt and their

entitlements to the enforcement proceeds, and to contractually restrict their behaviour – eg, by arranging when and by whom security might be enforced and when payments can be made by a borrower to a given class of creditors. Intercreditor arrangements in Dutch law debt financings are considered largely similar to those in key jurisdictions, such as the United Kingdom. A wide variety of types of documentation are available and applied, ranging from short form priority deeds to long form intercreditor agreements based on the relevant LMA format.

6.2 Contractual v Legal Subordination

In the Netherlands, there are essentially three ways of implementing subordination.

- Contractual (claim) subordination: creditors can agree on a different ranking by way of contractual arrangements. In this case, the creditors typically finance the same borrower and share in the same security package of the same ranking, which is often granted in favour of a common security agent. The ability to enforce the security of the junior creditor will be restricted by contractual arrangements.
- Lien subordination (*in rem*): both the junior lender and the senior lender finance the same borrower and have security over the same collateral, but different in ranking. The ranking is determined by the moment of perfection of the security and has property law effect. Dutch law also allows for the parties to implement a change of ranking of existing security rights. Any amendments to the priority of security rights are subject to the same formalities as are required for creating a new security interest.
- Structural subordination – claims are subordinated based on the corporate structure of the relevant debtors, rather than by way

of contractual arrangements. An example: a junior lender provides a loan to a parent company, the shareholder of the corporate group to which the senior lender makes its loan. Security, if any, for the junior loan will be granted at parent level, and security for the senior debt will be granted at corporate group level. Funds will only be upstreamed from the corporate group to the parent company (to be applied towards repayment of the junior loan) if there is still value left after the senior loan has been repaid. In practice, the upstreaming of cash from the corporate group to the parent level is subject to restrictions in the senior loan documentation, protecting the senior lenders from cash “leakage” to the parent company, which would effectively allow for the junior creditor to take priority over the senior creditor.

7. Enforcement

7.1 Process for Enforcement of Security

A Dutch law security right can be enforced only following a default by the debtor in relation to the (monetary) secured liabilities; in other words, there must be a payment default (usually triggered by way of acceleration after an event of default). Whether a payment default has occurred should be determined based on the laws that govern the underlying documentation that contains the relevant monetary payment obligations.

The enforcement of Dutch security rights is a relatively easy and quick process and can take place through:

- a public sale (without court involvement) or private sale (with court approval);

- in case of a pledge only, a private sale agreed between the secured party and the security provider (without court involvement); or
- in case of a pledge of receivables only, collecting receivables and applying the proceeds towards the secured obligations.

Appropriation is not allowed but a secured party may bid in a public sale, or it may buy the asset with the approval of the court.

As follows from the above, judicial enforcement may be required if out-of-court enforcement is not possible or unsuccessful. This involves filing a request to obtain a court order for the enforcement of security. Generally, a court hearing will be scheduled within two to four weeks after the request has been filed, in which the secured party will be heard. Although there is no formal requirement to also hear the security provider or any other interested party, practice has shown that the court will either give notice itself or order the secured party to give notice of the intended sale to the security provider and any interested party. The court ruling (in the event of either approval or rejection) is not open to appeal on the merits of the case.

7.2 Enforcement of Foreign Judgments

The recognition of foreign judgments is subject to the existence of treaties. Judgments by any EU member state court can generally be enforced in the Netherlands without any need for a re-examination of the merits of a case. However, in the absence of a treaty (for example, in case of the United States), a judgment by a non-Dutch court cannot be enforced in the Netherlands without re-litigation of the merits.

A Dutch court will typically grant the same judgment without substantive re-examination of the merits if:

- the judgment results from proceedings that are compatible with the Dutch concepts of due process;
- the judgment does not contravene the public policy of the Netherlands;
- the jurisdiction of the non-Dutch court is based on internally acceptable grounds; and
- the judgment by the non-Dutch court is not incompatible with an earlier judgment rendered between the same parties concerning the same subject and cause by a Dutch court, or by a non-Dutch court provided that such judgment qualifies for recognition in the Netherlands.

8. Lenders' Rights in Insolvency

8.1 Rescue and Reorganisation Procedures

WHOA

The Dutch scheme of arrangement (*Wet homologatie onderhands akkoord ter voorkoming van faillissement*, or WHOA) is based on the UK Scheme of Arrangement and the US Chapter 11. Companies have the possibility to offer a composition to their (secured) creditors without having to file for bankruptcy and retaining control of their assets (eg, debtor in possession). Creditors, shareholders and a works council (if established) can initiate the launch of a composition by requesting the court to appoint a restructuring expert. Such expert can offer a composition to the creditors and shareholders on behalf of the company.

The purpose of a composition can be to restructure the company's debts or to liquidate the company and distribute proceeds amongst the creditors. A composition under the WHOA can only be offered if the debtor is in a situation where it can reasonably be expected that it will

be unable to continue to pay its debts. This will be the case if there is no realistic prospect of the debtor avoiding insolvency without restructuring its debts. During the negotiating process, the debtor stays in possession and is offered protection against enforcement actions.

Only creditors whose rights are affected by the composition are entitled to vote, and must be placed in a class. The court can be asked for ratification if at least one class of creditors voted in favour of the composition. If ratified by the court, a composition can be imposed on dissenting (classes of) creditors and shareholders. Future obligations can be amended or terminated, and guarantees issued by group entities can also be included in the composition. The court's decision cannot be appealed.

There are several mandatory grounds for refusal, which require the court to reject the relevant motion (to ratify the plan as offered), such as procedural requirements not being met or the composition being a result of fraud. In addition, the court can refuse ratification upon request of a dissenting creditor or shareholder if:

- such creditor or shareholder would be worse off than in a bankruptcy scenario ("no creditor worse-off rule");
- the statutory or contractually agreed ranking is deviated from to the detriment of this class, unless there is a reasonable ground for doing so and the interests of the creditors or shareholders involved are not prejudiced ("absolute priority rule"); the court will only rule on any motion invoking the absolute priority rule to the extent that the relevant creditor is part of a dissenting class; or
- the relevant creditors are not offered a cash amount under the composition.

8.2 Main Insolvency Law Considerations Enforcement in Insolvency

In general, secured creditors have a strong position under Dutch insolvency law. Under Dutch law, a secured party may enforce its security rights as if there were no suspension of payments or bankruptcy, and without any co-operation of a bankruptcy trustee being required. In addition, Dutch security rights create a preferred right on the distribution of the proceeds and rank above any other right (subject to limited exceptions – eg, certain claims of the Dutch tax authorities).

A court may order a general stay of all creditors' actions for a maximum period of four months in a suspension of payments or bankruptcy. This will give the bankruptcy trustee time to investigate the debts and assets of the bankrupt company, during which time the rights of creditors are suspended. The bankruptcy trustee may also require the secured party to enforce its security within a reasonable period. Failure to comply may lead to the bankruptcy trustee selling the assets. In that case, the secured party will keep a statutory priority right on the proceeds but it will only receive payment after the bankruptcy estate has been distributed, and it will have to share in the bankruptcy costs.

Fraudulent Conveyance

There are no general hardening periods in the Netherlands. However, in an indirect way, there is a hardening period of one year in relation to fraudulent conveyance claims. Creditors and the bankruptcy trustee have the right to challenge the validity of certain transactions that have been prejudicial to creditors if they were entered into by a company prior to bankruptcy (fraudulent conveyance or *actio pauliana*). The challenge generally requires that both the company and (if the transaction was entered into for consideration) the counterparty knew or should have

known that the other creditors would be prejudiced. For certain transactions, required knowledge is presumed if the transaction occurred less than one year prior to the bankruptcy or suspension of payments. This presumption does not apply if there was an existing obligation to create the security (predating the bankruptcy by more than one year), which is why the loan agreement will often contain an undertaking to create (additional) security (positive pledge).

No Equitable Subordination

The Netherlands does not acknowledge the concept of equitable subordination. More specifically, there is no statutory provision under Dutch law pursuant to which shareholder loans are subordinated to the claims of other creditors. This means that, in principle, claims of shareholders shall not be subordinated and shall rank *pari passu* with other unsecured debt, unless there is a contractual subordination of such claims.

9. Tax & Regulatory Considerations

9.1 Tax Considerations

Withholding, Stamp and Other Taxes

Interest payments by a Dutch borrower under a loan provided by a third-party lender can in principle be made free from withholding or deduction of or for Dutch taxation, except that:

- 25.8% Dutch conditional withholding tax may be applicable in respect of interest payments (deemed to be) made by a Dutch taxpayer to a “related party” in case of financing structures involving so-called “low tax” or “non-cooperative” jurisdictions or hybrid entities, or in certain abusive situations. The risk allocation in this regard is typically addressed in the financing documentation.

- 15% Dutch dividend withholding tax may be applicable if the debt is granted under such terms and conditions that it is capable of being classified as or actually functions as an equity interest in the Dutch borrower (eg, a loan which has no term or a term in excess of 50 years, which has a profit-contingent interest and which is subordinated to claims of other creditors). Also, in these cases, Dutch conditional withholding tax on these deemed dividends may be due, which may effectively result in 25.8% withholding tax being due.

No Dutch registration tax, stamp duty or other similar documentary tax or duty is due in respect of or in connection with debt financing involving Dutch borrowers, except for Dutch real property transfer tax, which may be due upon a (deemed) acquisition of ((an interest in) an asset that qualifies as or a right over) real property situated in the Netherlands.

Interest or other payments by a Dutch borrower for the granting of credit under the debt financing should not attract Dutch VAT.

In addition to the various interest deduction limitations that may apply to a Dutch borrower in respect of intragroup debt financing, there is a general interest deduction limitation that applies to a Dutch taxpayer's intragroup and/or third-party net borrowing costs for each financial year to the highest of (i) 20% of the EBITDA (for tax purposes) and (ii) EUR1,000,000.

9.2 Regulatory Considerations

Licence Requirements

Lending to businesses is not regulated in the Netherlands and it is not necessary for lenders to a company to be licensed, qualified or otherwise entitled to carry on business in the Netherlands by reason only of entering into a loan agreement

or acting as agent or security agent and enforcing their rights thereunder.

Attracting Funds From the Public

A Dutch borrower is not permitted to attract funds from a person who belongs to the “public”, as referred to in Article 4.1(1) of the Capital Requirements Regulation (EU/575/2013). The reason for this is that the public cannot, among others, assess the risks attached to the provision of financial services. Violating this rule may result in criminal liability for the borrower.

Dutch law qualifies “the public” as parties other than professional market parties, and parties that do not belong to a restricted circle with the entity that receives the repayable funds.

Qualified investors and persons in relation to which a party attracts repayable funds are considered “professional market parties” if – in short – the minimum drawing per lender exceeds EUR100,000.

10. Jurisdiction-Specific or Cross-Border Issues

10.1 Additional Issues to Highlight Leakage Outside of the Obligor Group

In the Netherlands, the following two situations could result into intra-group liabilities outside the banking group:

- Fiscal unity – A Dutch obligor may be part of a fiscal unity for Dutch corporate income tax and/or VAT purposes (either as a parent or a subsidiary) if certain conditions are met, which may provide for certain benefits for several reasons. Generally, each fiscal unity member is and remains jointly and severally liable for taxes payable by the entire fiscal

unity with respect to the period it was part of the fiscal unity. The potential (secondary) tax liability of a Dutch obligor may therefore extend to the (potential) standalone tax liabilities of non-banking group entities that are a member of the same fiscal unity.

- 403 statement – under Dutch law, parent companies may choose to file consolidated financial statements for its subsidiaries. If a parent company chooses to do so, (i) the subsidiaries are exempted from their obligations to file financial statements and (ii) the parent company declares itself jointly and severally liable for all obligations of its subsidiaries that result from legal acts by issuing the so-called 403 statement.

As both the fiscal unity and the 403 statement qualify as a guarantee and may result in incurring additional debt (other than debt arising from it being an obligor under the credit agreement), these concepts should be considered in the context of the loan documentation. If such liabilities are incurred, a lender would typically want to limit these to liabilities between members of the banking group to prevent any leakage. On the other hand, the borrower wants to ensure that the actual intra-group liabilities are correctly reflected in the relevant section to avoid any misrepresentations and defaults under the loan documentation.

If a Dutch obligor is part of a fiscal unity for Dutch corporate income tax purposes, deconsolidation of such fiscal unity (including as a result of security enforcement) may result in taxable income (and actual tax cash outs) for the Dutch obligor and in principle results in any available tax loss and interest carry forwards to remain with the fiscal unity parent. As this may have adverse consequences to a lender's recourse, this is usually assessed in the relevant financing documentation.

Works Councils

The Works Councils Act (WCA) obliges a company with 50 employees or more to set up a works council. A company that is not obliged to set up a works council under the WCA can be obliged to do so under a collective bargaining agreement or can do it voluntarily.

A works council with jurisdiction over a Dutch company has or may have the right to render its advice on certain important economic or organisational decisions, such as attracting financing out of its ordinary course of business, granting guarantees or security for third parties and pledging shares in the company. If the company has failed to (timely) request and obtain advice from the works council (when it should have done so), or if the company did not follow the advice of the works council when making its final decision, the works council can lodge an appeal with the Enterprise Chamber of the Amsterdam Court in Amsterdam against the decision of the company, which will in any case lead to a delay of the contemplated transaction.

Trends and Developments

Contributed by:

Gianluca Kreuze, Ruben den Hollander and Anne van Geen

Loyens & Loeff N.V.

Loyens & Loeff N.V. is a leading continental European law and tax firm with over 1,000 advisers, and is the logical choice for companies doing business in or from the Netherlands, Belgium, Luxembourg and Switzerland, its home markets. The banking environment is constantly evolving. Financing solutions and legal implications related to financial products are becoming more complex. Due to the ever-changing economic, political, environmental and regulatory worlds, financial markets will

continue to be a challenge in the years ahead. Loyens & Loeff keeps track of the developments and helps its clients to navigate the increasingly complex debt and financial markets. It also goes a step further – guiding its clients in identifying opportunities and innovative ways to access the funding most suitable for them, whilst also managing risk. It is the firm's job to stay ahead of these changes for its clients, allowing them to stay focused on their core business.

Authors



Gianluca Kreuze is a partner within the finance practice group and co-head of the private equity team at Loyens & Loeff. He focuses on (cross-border) finance transactions, with

particular expertise in leveraged finance and fund finance. Gianluca is often consulted on the structuring and documenting of debt finance transactions, with an emphasis on leveraged finance and follow-on recapitalisations and other corporate finance transactions. He represents private equity sponsors, their portfolio companies, financial institutions and alternative finance providers across all tiers of the debt capital structure.



Ruben den Hollander is a member of the finance practice group and the private equity team at Loyens & Loeff. He focuses on cross-border finance transactions, with particular

expertise in leveraged finance and fund finance, advising financial institutions and private investors. Prior to joining the banking and finance practice group, Ruben worked in the firm's investment management practice group, where he assisted managers with the formation of their funds and advised institutional investors on their investments in funds.

Contributed by: Gianluca Kreuze, Ruben den Hollander and Anne van Geen, **Loyens & Loeff N.V.**



Anne van Geen is an associate in the finance practice group and a member of the private equity team at Loyens & Loeff. Anne focuses on (cross-border) finance transactions, with

particular expertise in leveraged finance and portfolio company level financing obtained for or by private equity sponsors. She advises a wide range of borrowers and lenders, including traditional lenders and private debt funds. She also has experience in employment law, particularly the employment law aspects of M&A deals and restructurings, co-determination procedures and the dismissal of managing directors.

Loyens & Loeff N.V.

Loyens & Loeff N.V.
Parnassusweg 300
1081 LC Amsterdam
The Netherlands

Tel: +31 20 578 57 85
Fax: +31 20 578 58 00
Email: info@loyensloeff.com
Web: www.loyensloeff.com

LOYENS  LOEFF
Law & Tax

Introduction

In 2023, the Dutch debt finance market faced challenges amidst a backdrop of global macroeconomic uncertainties, including high inflation, a rising interest rate environment and geopolitical tensions. This uncertainty led investors to lose investment appetite, become more risk-averse and selective and focus on a higher quality threshold for credits and borrowers. Particularly affected were the larger transactions and high-yield bond issuance markets, both of which experienced a standstill. This trend was reflected across the general private equity transaction market, although some activity persisted in the medium and smaller-sized segments. With speculations about potential interest rate cuts in June, market participants are cautiously optimistic that 2024 could be a year of newly emerging opportunities, but economists are not as sure about that.

Macroeconomic context

As an economy heavily reliant on trade, the Netherlands has been exposed to fluctuations in the international markets, which affected investor confidence, business investments and overall economic growth. One of the most discussed topics in the Dutch economy (and in Europe generally) in 2023 was undoubtedly the strong inflation and the feared recession that would result from it. The strong inflation can be contributed to two high-impact events:

- (post-)pandemic effects – as a result of COVID-19-related challenges in supply chains, prices for raw materials, products and transport have increased globally; and
- war in Ukraine – with Europe being very “energy-dependent”, higher global oil and gas prices have led to sharp increases in the prices of gas and oil throughout Europe.

The ECB aggressively fought this inflation by increasing interest rates, starting at an interest rate of approximately 0.75% in July 2022 and gradually hiking up to an interest rate of approximately 4.75% in September 2023. To put this in perspective, the FED responded faster and more aggressively than the ECB, as the ECB’s policy is blocked by southern EU countries that cannot afford high rates (current US rates are at approximately 5.5%). The interest rates set by the ECB had a significant impact on borrowing costs and the availability of credit and thus the attractiveness of debt financing.

The rising interest rate was thought to be an important trigger for an upcoming recession, but the economy sent mixed signals and, in the end, showed to be resilient enough to overcome a recession. On the one hand, there has been slowing business investment (including M&A) and sales, and depressed consumer confidence. Higher interest rates led investors to shift their focus from growth (with expected profits) to more immediate profit (costs cutting). On the other hand, unemployment remains historically low; more jobs are created every day, wages are rising (but not keeping up with the recent inflation numbers) and household spending (which is one of the key drivers of the economy) is still high. The housing market seems to be quite strong still, even though mortgage rates have increased sharply. In addition, there are a lot of PE funds sitting on significant amounts of cash, ready to be deployed.

The recent tightening in financial conditions is comparable to periods like 1998, 2000, 2007 and 2011 – all periods that preceded an increase in default rates and two of which led to recessions. The loan default rate increased in 2023 in Europe and is expected to increase further in 2024 due to high interest cost burdens and mac-

roeconomic pressure. Fitch Ratings forecasts default rates for European high-yield bonds and leveraged loans to rise to 4% in 2024 and 2025 from 2.5% and 3% respectively in 2023. In light of this, more restructurings and bankruptcy scenarios are likely.

Recently, the ECB has officially opened the door for a cut-back in interest rates, now that data shows that inflation is decreasing. However, the ECB stressed that it has no plans to completely undo the rate hikes implemented since July 2022. Instead, it will likely make minor adjustments, slightly easing the tight monetary policy. The ECB's bank lending survey for the Eurozone further shows that demand for loans will remain slow, which means that no immediate lending pickup is expected in the months ahead, and tight monetary policy will still have a restrictive effect.

Market Overview

Economic uncertainty and higher interest rates have resulted in lenders and borrowers pulling back from issuing and attracting loans. The changing market has forced lenders to reassess their capital requirements and financing strategies. Most lenders have been concerned about the economy, have become increasingly risk-averse and are closely monitoring performance of (portfolio) companies to determine the impact of inflation, interest rate increases, labour costs and supply chain issues. In addition, arrangers have had difficulty offloading the committed loans to the market. Buyout deals underwritten prior to Q3 2022 required big discounts to clear syndication in 2023, resulting in losses for arrangers. Higher pricing has also forced borrowers to postpone planned debt financing, instead opting for vendor loans or foregoing third-party debt, with the hope of securing better debt financing terms in the future.

The deal activity for 2023 mainly focused on amend-and-extend transactions and refinancings driven by maturity or increasing liquidity. Meanwhile, default rates, restructuring and bankruptcy filings have picked up, but at the same time are historically not at a high level. The economic conditions led to borrowers being faced with higher borrowing costs and tighter credit conditions and struggling to meet their obligations under financing agreements, especially concerning payment schedules and financial covenants. Lenders, in exchange for waiving certain defaults, often imposed additional terms on borrowers, necessitating amendments to financing agreements. These amendments often involve agreeing to new financial ratios, higher interest rates, more restrictions in terms of undertakings and extensive reporting requirements.

In addition, the combination of higher interest rates and inflation resulted in liquidity challenges for borrowers, prompting requests for additional financing, either through expanding existing credit facilities or securing new lines of credit. However, obtaining such financing typically entails lenders imposing additional conditions, and shareholders are often expected to inject additional equity as well.

Market Participants

The Dutch debt finance market is traditionally divided into three segments based on debt size.

- Small – up to EUR30 million, often lent by traditional Dutch commercial banks on a bilateral basis, though increasingly also by direct lenders.
- Medium – ranging from approximately EUR30 million to EUR250 million, commonly lent by direct lenders or consortia of Dutch commercial banks.

- Large – exceeding EUR250 million, usually lent by larger syndicates comprising both Dutch and non-Dutch commercial banks or direct lenders.

As a result of unpredictability around pricing, more borrowers and issuers have turned to direct lending options. The private credit market has grown explosively over the years (21% over the past decade) and in particular gained market share in the (sponsored) middle-market. According to Preqin's data, as of June 2023, European private lending to corporates totals roughly USD460 billion in assets under management, or approximately 27% of the USD1.7 trillion globally.

As direct lenders are growing market share, we see that they are also exploring new market areas. Direct lenders are increasingly investing in financing working capital, providing (stretched) senior solutions, favouring financing models based on recurring revenue over EBITDA and supporting smaller private equity transactions. Consequently, traditional bank-led financing is no longer the primary source for funding private equity endeavours in the Netherlands. Instead, direct lenders are also expanding their reach into the corporate financing arena. At the same time, commercial banks are trying to regain some market share by mirroring the offering of direct lenders at lower rates.

Trends and Developments

NAV facilities

In the face of the current challenges in the (leveraged) loan market, borrowers and lenders are seeking new opportunities. As investment funds are experiencing more difficulties on securing financing on favourable terms for their portfolio companies, more complex structures are explored, for example on fund level. A type

of facility that is frequently used by investment funds is the so-called net asset value (NAV) facility. NAV financing provides investment funds with flexible and efficient access to additional capital, based on the value of their portfolio investments. NAV financing is particularly used when the undrawn investors' commitments are low or when the investment phase of the fund has ended, and there is a need for liquidity to distribute to investors, make additional investments or bolster the financial stability of distressed portfolio companies. NAV facilities have shown to be a strategic tool for investment funds, filling the gap when portfolio company level financings do not provide the desired outcome.

Considerations for directors and supervisory board members in LBOs

Another interesting development has been the increased awareness of the responsibilities of directors and supervisory board members in the context of leveraged buyout transactions. This awareness has come up against the backdrop of the recent judgment of the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal relating to childcare organisation Estro Group (formerly named Catalpa), which was acquired by the private equity investor Providence in 2010 through a leveraged buyout (LBO). As is customary in LBO transactions, the target group assumes, guarantees and/or secures the acquisition financing provided by third-party creditors. In this case, to avoid financial assistance rules, a legal merger between the bid company (as acquiring entity) and Estro (as the disappearing entity) was set up, resulting de facto in both the bank financing and the shareholder loan becoming liabilities at target company (Estro) level. Estro went bankrupt in 2014 because of revenue losses due, at least in part, to government cutbacks of subsidies. The bankruptcy trustee filed a petition for an inquiry into

the policies and affairs of Estro in relation to the acquisition. Following the investigation results, the Enterprise Chamber has now determined that there was mismanagement at Estro.

An important aspect in the Enterprise Chamber judgment was the disclosure of information to the works council. The directors are responsible for keeping the works council correctly and fully informed during the advisory process. If it turns out that the information used by the works council is not correct, this should be corrected and, if appropriate, the works council should be given the opportunity to issue further advice. If certain deal aspects only become clear at a later stage in the transaction process, the works council should be updated.

The judgment further shows that directors must carefully consider the (financial) pros and cons of an LBO, given that an LBO is often accompanied by a significant financial burden on the target company. The corporate interest analysis should not only consider the continuity of the target company following the LBO, but also whether the LBO contributes to the sustainable success and execution of the strategy of the target company after the LBO has taken place. During the entire process, the board must consider whether the LBO and its conditions can still be aligned with the interest of the target company, or whether these conditions require adjustments. The target company management board must adopt a proactive approach and, when necessary, challenge the parties involved in the process (including the private equity investor). In doing so, directors should provide for an accessible paper trail to ensure transparency on decision-making processes.

In making the corporate benefit analysis, directors should seek assistance of independ-

ent experts to determine any issues and risks associated with the LBO. If certain red flags are identified, the board should quantify these and, if necessary, take measures to address any possible consequences. If recommendations for further investigation are made, the board should consider whether any such further investigation is necessary to gain sufficient knowledge of the potential impact of the LBO on the target company.

Directors should keep in mind that an increased duty of care may apply due to personal financial interests, such as entitlements to exit bonuses or management participation incentives. In their decision-making, the board should consider the potential effects of such personal interests and demonstrate that these do not conflict with the interests of the target company. In addition, as the largest childcare company in the Netherlands, Estro was heavily reliant on childcare subsidies from the government. The company's interest was therefore also influenced by the public interest in the continuity and accessibility of high-quality and affordable childcare, and this interest therefore had to be considered in the board's decision-making.

Supervisory board members need to ensure that directors who are subject to an enhanced duty of care, observe that duty of care in the preparation, decision-making and execution of the acquisition. When recommendations are made by experts, the supervisory board should urge the management board to act upon these. Private equity delegates appointed as board observers in the supervisory board, should be aware that an enhanced duty of care may also apply to them due to conflicting interests from involvement in the preparations or execution of the LBO.

ESG

A final notable trend in the Dutch debt finance market is the growing emphasis on sustainability and green finance. Investors are increasingly prioritising environmental, social, and governance (ESG) considerations when making investment decisions, leading to a surge in demand for green bonds and sustainability-linked loans. Dutch lenders, mainly European banks, have responded by increasing their issuance of green bonds and incorporating ESG criteria into their financing strategies. By doing so, banks are less likely to have to deal with regulatory supervision and potential sanctions given the increased attention by the ECB of incorporating such criteria in lending policies.

In this context, several market initiatives have been undertaken to standardise terms and provisions for loan products with a focus on a green or sustainability aspect. For example, the Loan Market Association has developed principles and guidance for two commonly used types of loans: (i) the green loan (made available to exclusively finance green projects), and (ii) the sustainability-linked loan (which incentivise the borrower's achievement of sustainability performance targets, by for example reducing the margin).

Outlook

The market outlook remains uncertain – especially in light of the recent escalation of the conflicts in Ukraine and the Middle-East – but recent developments offer some grounds for cautious optimism. With a decrease in inflation rates in sight, activity has slightly picked up and syndicated loan markets are slowly opening up again, evidenced by successful syndications of refinancings and prospects of M&A activity. Anticipated maturities and companies looking to refinance their debt are expected to continue to drive market activity. With increasing competition for refinancings, we expect (stronger) borrowers to secure good prices. Less strong borrowers will likely wait for better times and explore alternative/more complex financing or debt structuring, for example on fund level (eg, NAV financing). Direct lenders will continue to be crucial sources of liquidity and offer flexible financing options, as long as the regulatory environment allows them to do so. Commercial banks might, however, regain some market share, given the high costs of direct lenders and the willingness to copy some direct-lender features. Finally, the momentum towards sustainability and green finance is expected to continue, driven by increasing investor demand, regulatory initiatives and corporate commitments to ESG principles.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com