The Netherlands

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FUND STRUCTURES IN THE NETHERLANDS

A Dutch alternative investment fund (AIF) may be structured in various ways, both as corporate and contractual entity. Corporate entities have legal personality (*rechtspersoonlijkheid*), enabling them to hold legal title to assets, and are governed by mandatory corporate law, whereas contractual entities lack such legal personality and are unable to hold legal title, but enjoy the benefit of more contractual freedom. Frequently used corporate investment vehicles are the private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and the co-operative with excluded liability (*coöperatie met uitgesloten aansprakelijkheid*). Contractual investment vehicles are commonly established in the form of a limited partnership (*commanditaire vennootschap*) or a mutual fund (*fonds voor gemene rekening*). Which type of entity is selected strongly depends on the outcome of relevant tax and legal structuring analyses.

The two most common Dutch legal entities in fund structures are the co-operative with excluded liability and the limited partnership.

IMPACT OF STRUCTURES ON DUE DILIGENCE AND GENERAL ISSUES IN THE NETHERLANDS

Impact of the structure on due diligence – limited partnership

When reviewing a limited partnership agreement, the following points should be checked:

Seat
The limited partnership agreement should stipulate that the limited partnership has its seat in The Netherlands. Under Dutch private international law, a (limited) partnership will be governed by Dutch law if it has its seat (*zetel*) in The Netherlands according to its instrument of establishment.

Objects/powers
A Dutch (limited) partnership is not bound to legal acts that are not related (*betrekkelijk op*) to the (limited) partnership. In determining whether a legal act is related to the (limited) partnership, all relevant circumstances must be taken into account, including the wording of the objects clause in the (limited) partnership agreement and whether such legal act could add to achieving the purposes of the (limited) partnership. It should be assessed whether the proposed transaction is permitted by the (limited) partnership agreement.

Contributions
It is a requirement for the valid establishment of a (limited) partnership that two or more persons undertake to make contributions to be held in common property with the intention to share the benefits derived therefrom. A contribution may consist of money, (enjoyment of) assets and labour.

Profit share
There is no statutory provision as to the division of the profits, other than that no partner may be excluded altogether from sharing in the profits. The wording of the (limited) partnership agreement is not decisive, and its effect in practice must also be taken into account.

Legal title
A limited partnership is not, as stated above, an entity with legal personality and cannot acquire and hold legal title to assets in its own name. Usually, the limited partnership agreement appoints either the general partner (GP) or a separate entity with legal entity as holder of legal title. When a separate title holder is appointed, this normally takes the legal form of a foundation (*stichting*) incorporated solely for the purpose of holding the assets of the relevant fund. A foundation is an orphan entity that does not have shareholders or members. It is important that the entity that holds legal title to the assets becomes a party to the agreement pursuant to which security needs to be granted as well as the documents pursuant to which security is granted.

Structured as a co-operative with excluded liability
When the fund entity is a co-operative with excluded liability, particular attention should be given to its constitutional documents. A co-operative with excluded liability is incorporated by a notarial deed of incorporation, including its articles of association. The objects clause in the articles of association should permit the co-operative to enter into financings, to provide guarantees for indebtedness of other fund entities and to grant security over its assets.

General issues on due diligence in The Netherlands

Security over investor commitments – are the receivables capable of being pledged?
In certain financings, such as subscription line and hybrid financings, a pledge over investor commitments is an important part of the collateral package of the lenders. The investor commitments can be pledged in a disclosed and an undisclosed manner; in both cases, a key part of the due diligence will be determining whether the pledge over the investor commitments is protected in the event of insolvency. (Please refer to page 180 of this chapter for a more detailed description of the disclosed and undisclosed right of pledges – for all practical purposes, the qualification matter as described in this paragraph is relevant for each form of pledge over investor commitment.)

Investor commitments (being receivables owed by the investors to the AIF) under Dutch law can be classified in two ways (and that classification then has a decisive impact on whether any right of pledge (security) over future investor receivables will survive insolvency of the relevant pledgor). Either the investor commitment is regarded as an existing claim that is conditionally payable, or alternatively the investor commitment is regarded as a future claim whose existence is conditional on a drawdown notice being served. Any claim that comes into existence after the insolvency of the pledgor will not be subject to a valid right of pledge; therefore the classification is relevant for the collateral position of a lender.

If the claim is considered a future claim, any right of pledge that is created in advance (so at the entering into of the finance documents) will only take effect if such claim comes into existence (i.e. by the issue of a drawdown notice) prior to the pledgor becoming insolvent. Any claim that would come into existence after insolvency of the pledgor (i.e. if the drawdown notice is served following insolvency of the pledgor) will not be subject to a valid right of pledge and will subsequently be part of the bankruptcy estate of the pledgor. However, if the claim is considered an existing claim, meaning that the entire capital commitment is considered to be an existing claim on the date of the relevant fund documents conditionally payable in the future, a valid right of pledge can be created over those claims even if the conditional payment (the capital call) is met after the pledgor's bankruptcy.

The prevailing view as backed up in Dutch literature and case law is that – by default and in the absence of an agreement to the contrary – the investor commitment owed by the investor to the AIF qualifies as a future claim whose existence is conditional on the alternative investment fund manager (AIFM) sending the relevant capital call notice to the relevant investor, which, as stated above, means a less favourable treatment in insolvency. However, based on case law, it is accepted that the investor and AIF may agree otherwise (i.e. an agreement between parties may affect the qualification of the claim as either an existing or future claim). Therefore, the parties to the fund agreement may agree on the qualification of a receivable as (i) an existing claim payable under condition of a capital call being made, or (ii) a future claim coming into existence under the condition of a capital call being made. Given the preference for the former ((i) above) as previously flagged, fund documentation will typically contain a clause that explicitly states that any receivable owed by the investor to the AIF is considered an existing but conditional claim, conditional upon the capital call being made. A right of pledge created over an existing but conditional receivable is also valid if the condition (the capital call) is met after the pledgor's bankruptcy.

Non-assignability clauses

Under Dutch law, receivables and contractual rights may, through a clause in the contract from which such receivables or contractual rights arise, be made non-assignable/transferable and as a result be "non-pledgeable". Depending on the wording of the relevant provision of the contract, such non-assignability clause could cause the relevant receivables to become fully incapable of being pledged, in which case creating a right of pledge over such receivable or right will simply not be possible. The fund documentation should be carefully checked on this.

Power of attorney/ability to issue capital call notices

Obviously, lenders in subscription line financings require that they are granted the ability to issue capital call notices. There is some debate in the literature on whether a pledgee may

issue capital call notices solely based on its right of pledge. To mitigate the risks of the right of pledge being insufficient for that cause, the pledgee may request to be granted a direct, independent right to issue capital call notices in default situations. Often, a direct agreement to be entered into between the pledgee and the investors is not (commercially) feasible. Nowadays, we do see fund documentation containing a third-party stipulation for (future) pledgees (as an independent right) to make capital calls by submitting capital call notices (to avoid the need to arrange this at a later stage via direct agreements). Alternatively, or in addition, the AIFM may grant a power of attorney or mandate to the pledgee to issue, in certain default situations, a capital call notice in the AIFM's name to the investors (again, this right is often acknowledged in the fund documentation). However, a power of attorney or mandate to which Dutch law is applicable is terminated by operation of law, in the event of bankruptcy of the entity that has granted the power of attorney.

Equity pledges and constitutional documents

In certain financings such as net asset value (NAV) financings or certain GP financings, the lenders may ask for a pledge of certain equity interest held by the AIF. In practice this often results in either the AIF pledging the shares it holds in the underlying portfolio companies or the AIF pledging the shares it holds in an aggregator vehicle. If structured as Dutch entities, the portfolio holding companies and aggregators are typically in the form of Dutch limited liability companies (BV). The articles of association of each such BV are to be thoroughly checked to assess whether: (i) there is no restriction on the pledging of those shares; (ii) the shares are freely transferable (no blocking clause); (iii) the voting rights can be transferred to a pledgee; and (iv) a pledgee with voting rights can convene a general meeting of shareholders.

If the AIF is required to pledge the equity interests it holds in the portfolio companies, parties should also consider performing due diligence on underlying shareholders' agreements if structured at the level of that entity.

A pledge of shares in a Dutch BV is granted by way of executing a notarial deed of pledge of shares either during a physical notary meeting or (as is customary) on the basis of powers of attorney granted by the pledgee, pledgor and relevant BV to the notary.

No security filings

There is no public register in The Netherlands for Dutch law security rights, and as such, no filings are required in relation to them. The pledge of shares in a BV is, however, registered in the company's (privately held) register of shareholders.

LEGAL DOCUMENTATION: FACILITY AGREEMENTS

Impact of structures on facility agreements

If the fund entity is a limited partnership, the holder of legal title to the assets should become a party (in its own capacity) to each finance document that creates security over an asset held by it (including each document where it is agreed to create such security). That holder, in the case of a limited partnership will usually be the general partner. However, based on the Dutch regulatory regime, certain funds may be required to appoint a separate depositary entity set-up for this purpose. In practice this will typically be a Dutch foundation; as such an entity can be structured as an insolvency-remote and orphan entity.

If the fund entity is a co-operative or limited liability company under Dutch law, no such separate holder of legal title will be required, and the fund entity will directly hold the assets, as such, no additional obligors to the finance documents are required.

General issues in The Netherlands on facility agreements

Parallel debt

Dutch law security rights can only be created in favour of, and enforced by the person who is the creditor of, the secured liabilities. Therefore, if the security is to be held by an agent, a parallel debt undertaking in favour of the security agent must be included in the finance documents and the claims arising under this parallel debt undertaking should be the secured liabilities under the Dutch law security documents.

Governing law and Dutch terms

There is no restriction under Dutch law as to the governing law of any facility agreement entered into by an AIF, nor does Dutch law provide for any limitation that would affect what borrowers and lenders are looking to achieve on a commercial level. Fund finance documentation entered into by Dutch fund entities are in practice typically governed by either Dutch, New York or UK law, depending on the parties involved in the transaction. The majority are currently based on Dutch law. In some, but not all, transactions, borrowers or lenders prefer to include specific Dutch terms in the facility agreement (there is no requirement to include such Dutch terms, but it is fairly common).

AIFMD leverage considerations

The Alternative Investment Fund Managers Directive (AIFMD) imposes certain rules as to the use of leverage by AIFs (defined as any method by which the AIFM increases the exposure of an AIF it manages, whether through borrowing of cash or securities, leverage embedded in derivative positions, or by any other means). The same rules apply throughout Europe, although, in practice, AIFs will need to take into account the interpretation by the relevant local regulator in their home jurisdiction. For a more detailed description of leverage considerations in relation to the different type of fund finance facilities, please refer to the relevant section in the Luxembourg chapter on page 168.

SECURITY: STRUCTURE AND ISSUES FOR DUTCH SECURITY; PERFECTION BY NOTICE/REGISTRATION

Pledge of receivables

Pursuant to Dutch law, security over receivables can be established by way of a disclosed right of pledge, or by way of an undisclosed right of pledge.

A disclosed right of pledge is created by way of a security agreement (or notarial deed) and notification of the right of pledge to the relevant debtors of the receivables that are being pledged. Acknowledgement of the notification is not required.

An undisclosed right of pledge is created either by way of a notarial deed or by way of a security agreement that is registered with the Dutch tax authorities for date-stamping purposes.

A disclosed right of pledge can be created over present and future receivables. Upon a new investor acceding to the fund, a right of pledge over its commitment can be perfected by notification to the debtor, without supplemental security being required.

An undisclosed right of pledge can only be created over present receivables and future receivables directly arising from legal relationships existing at the time of creation of such undisclosed right of pledge. For an undisclosed right of pledge, it is common practice to file supplemental security agreements with the Dutch tax authorities periodically, and at any time a new investor accedes to the fund, to also secure present and future receivables resulting from legal relationships that have been entered into after the date of the initial security agreement (or notarial deed).

Both the disclosed and undisclosed right of pledge over receivables of the AIF on its investors are used in practice and are often combined. Choosing one form of pledge over the other depends, to some extent, on whether it is commercially desirable to disclose the right of pledge to the relevant investors, and whether an undisclosed right of pledge is acceptable to the lender. There are no Dutch legal requirements on the form of notification; consequently, such notification can be made by uploading the notice to an investor portal or referencing the right of pledge in any investor reporting document, making the process of serving notice a fairly effortless procedure. Regardless of how the notice is sent (by means of registered mail, uploading to an investor portal, etc.), in order for the notice to have effect it should be received by the relevant investor (which can be confirmed by, for example, a proof of receipt in case of registered mail, or a log evidencing that the investor has accessed the portal in case of an upload to the investor portal).

Bank account security (for subscription line, NAV and GP facilities)

Positive balance in a bank account qualifies as a receivable against the bank which can be pledged in a manner as stipulated above. Under Dutch general banking conditions, Dutch banks have a first ranking of pledge over the balance standing to the credit of the account and may set off this balance against their claims. Consequently, the co-operation of such account bank is required to create a right of pledge over a Dutch bank account, and a waiver is required in relation to the account bank's first ranking right of pledge and right of set-off. Dutch account banks generally do not co-operate and consent to the creation of a right of pledge over bank accounts for the benefit of third-party lenders if they are not involved in

the financing in any other capacity or have another commercial relationship with the fund in any other capacity. If the account bank cooperates, it will often retain its right of pledge and set-off for costs related to the account.

Cascading security structures
It is possible under Dutch law to create a cascading security structure. The pledgee of a disclosed right of pledge over a claim, which itself is secured by a security right, is entitled to exercise the enforcement rights under such security right. Therefore, a lender which has a right of pledge over the feeder commitments into a master fund entity, which in turn is secured by a security right granted by the feeder entity in favour of the master fund entity over its capital commitments, can exercise the enforcement rights under both the security rights granted in favour of it as the security rights granted in favour of the master fund.

New laws/regulations on bankruptcy

Dutch WHOA
On 1 January 2021, a new instrument was added to the Dutch insolvency toolbox: a pre-insolvency debtor-in-possession scheme (based on the *Wet homologatie onderhands akkoord*, also known as WHOA). The WHOA provides for a structured and flexible process to negotiate debt agreements and restructure financial obligations and, as such, is similar to insolvency mechanisms like the US Chapter 11 and the UK scheme of arrangement and restructuring plan. Since introduction in 2021, the WHOA has proven itself as an effective restructuring tool used in both local and cross-border restructurings.

Dutch act to ban transfer and pledge restrictions
In June 2024, the Dutch parliament approved a legislative proposal that aims to prohibit the inclusion of non-pledgeability clauses in certain agreements. It is anticipated that the new law will come into force over the course of 2024. Even though fund documentation typically does not include any non-pledgeability clause, this new law might render such a clause (if included nonetheless) null and void. Pledge restrictions applicable to Dutch bank accounts are not within the scope of the new law.

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