7. How certain elements of the Dutch scheme may (or may not) affect ISDA Master Agreements

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Given our frequent involvement in restructuring cases as well as financial derivatives transactions and ISDA documentation, we are interested in how the unilateral termination mechanism, the ban on ipso facto provisions and the statutory freeze mechanism of the Dutch Scheme might affect the enforceability of certain key provisions of the ISDA Master Agreement. The result is this article.

1. Introduction

1.1 The Dutch Scheme

On 1 January 2021, the legislative framework for court-approved restructurings of debts outside formal insolvency proceedings[1] (hereafter referred to as the 'Dutch scheme', or simply, the 'scheme') entered into force.[2] Under the Dutch scheme a debt restructuring plan can be submitted to the creditors for voting, whereby a majority can bind a minority within each class of creditors and the competent court has the power to make the plan binding on dissenting classes of creditors. The Dutch scheme provides for a number of mechanisms to support a debtor in preparing the debt restructuring plan.[3] Among these supporting mechanisms are:

(i) a mechanism for the unilateral termination of existing contracts (hereafter referred to as the 'unilateral termination mechanism');
(ii) a ban on so-called 'ipso facto provisions'; and
(iii) a mechanism for a court-order freeze period *(afkoelingsperiode)* (hereafter referred to as the 'statutory freeze mechanism').

It was thus far unclear how the Dutch scheme would safeguard the netting and financial collateral arrangements entered into under and in connection with these types of agreements

In the final stages of the legislative process that resulted in the introduction of the Dutch scheme, members of the Dutch Senate submitted a number of questions about the impact of the legislative proposal on the enforceability of financial framework agreements such as the ISDA Master Agreement. It was thus far unclear how the Dutch scheme would safeguard the netting and financial collateral arrangements entered into under and in connection with these types of agreements. The Memorandum of Reply published on 22 September 2020 (hereafter referred to as the 'MoR')[4] provides an integrated response to these questions. Despite some imperfections (which we will discuss in this article), the MoR provides useful guidance on how the unilateral termination mechanism, the ban on ipso facto provisions and the statutory freeze mechanism may work in the context of an ISDA Master Agreement.

1.2 This article

Given our frequent involvement in restructuring cases as well as financial derivatives transactions and ISDA documentation, we are interested in how the unilateral termination mechanism, the ban on ipso facto provisions and the statutory freeze mechanism might affect the enforceability of certain key provisions of the ISDA Master Agreement. What follows in part 2 of this article is a brief description of each of these mechanisms. For those who are not familiar with financial derivatives or ISDA documentation, part 3 of this article provides a high-level introduction on these matters. Parts 4-6 describe how the enforceability of certain key provisions of the ISDA Master Agreement may be affected by the unilateral termination mechanism, the ban on ipso facto provisions and the statutory freeze mechanism, respectively. In addition, part 6 of this article touches upon the effects of the statutory freeze mechanism on an existing right to enforce security over financial

1 The Court Approval of a Private Composition (Prevention of Insolvency) Act *(Wet homologatie onderhands akkoord)* was adopted on 7 October 2020.

2 Decree of 26 October 2020 concerning the entry into force of the Court Approval of a Private Composition (Prevention of Insolvency) Act, Bulletin of Acts and Decrees 2020-415.

3 Parliamentary Documents, House of Representatives 2018/19, 35249, no. 3 Explanatory Memorandum *(memorie van toelichting)*, page 20.

4 Parliamentary Documents, Senate 2020/21, no. 35249, Memorandum of Reply *(memorie van antwoord)*.

collateral provided under ISDA collateral documentation. Part 7 of this article offers a summary consisting of key observations and a conclusion. Unless indicated otherwise, this article is about Dutch law only. Accordingly, it does not deal with the legal implications of the Dutch scheme in jurisdictions other than the Netherlands.

2. Supporting Mechanisms

2.1 Unilateral termination mechanism

This paragraph explains the unilateral termination mechanism of section 373(1) of the Dutch Bankruptcy Act *(Faillissementswet)* (hereafter referred to as the 'Bankruptcy Act'). Pursuant to the unilateral termination mechanism, a debtor may request a competent court to grant approval for the unilateral termination of an existing contract if the counterparty to the contract has failed to accept a proposal for amendment or early termination of such contract. Proceedings under the unilateral termination mechanism are structured as follows. Before the debtor can submit its request to the competent court, it must submit an offer to its counterparty under the contract for early termination or amendment of the contract. Only if the counterparty fails to accept the offer, the debtor can proceed to submit the request for unilateral termination to the court. The request must be submitted together with the request for approval of a debt restructuring plan. As part of the request, the debtor (or the restructuring expert) must propose a notice period following which the termination will become effective. The request will be granted if both of the following conditions are met:

(i) the debtor is subject to a condition in which it is reasonably foreseeable that it will not be able to continue to perform its obligations; and

(ii) the debt restructuring plan is approved by the court.

The court can order a longer notice period if it considers the proposed notice period to be unreasonably short. Section 373(1) of the Bankruptcy Act stipulates that a notice period of three months from the date on which the restructuring plan is approved will in any case be sufficient.[5] If the request for unilateral termination is approved, the termination will become effective by operation of law at the end of the notice period. The effect of such termination is that the contract must be settled *(afgewikkeld)*.[6] As part of the settlement, the debtor's counterparty under the contract may be entitled to compensation of damages that result from the termination. Pursuant to section 373(2) of the Bankruptcy Act, part 6.1.10 of the Dutch Civil Code *(Burgerlijk Wetboek)* (hereafter referred to as the 'Civil Code') will apply. Part 6.1.10 of the Civil Code provides for rules on compensation for damages. The debtor subsequently has the choice to include the claim for damages in the debt restructuring plan.

2.2 Ban on ipso facto provisions

Another supporting mechanism of the Dutch scheme is the ban on so-called 'ipso facto provisions' of section 373(3) of the Bankruptcy Act. Pursuant to this section, a creditor is barred from exercising any right (including under a contractual provision (called an 'ipso facto provision')) it would have had to:

- alter or suspend an obligation or liability owed to the debtor; or
- terminate an existing contract with the debtor

(hereafter referred to as 'alteration, suspension and termination rights') on the ground that a debt restructuring plan is being prepared or submitted for voting or certain steps in relation to a restructuring of debts have been taken (hereafter referred to as 'restructuring steps'). Due to this mechanism, ipso facto provisions are not enforceable. Creditors cannot successfully invoke an ipso facto provision against a debtor that is taking restructuring steps under the Dutch scheme.

2.3 Statutory freeze mechanism

Pursuant to section 376 of the Bankruptcy Act,[7] a debtor may request a competent court to order a statutory freeze period of up to four months (which can be extended with a second period of up to four months). During such statutory freeze period, creditors[8] are barred from, among other things, seeking recovery from assets *(verhaal nemen op goederen)* that are under control of *(die zich in de macht bevinden van)* the debtor without prior leave from the court. The request can only be made if the restructuring process has formally commenced[9] and is granted if each of the following is summarily demonstrated:

(i) a freeze period is required for the continuation of the debtor's enterprise during the preparation and the negotiation of the restructuring plan; and

(ii) on the moment the freeze period is ordered, it may be assumed that the interests of the joint creditors will benefit from such freeze period and that the interests of any individual creditor who is entitled to take or in the

5 See also: Parliamentary Documents, House of Representatives 2018/19, 35249, no. 3 Explanatory Memorandum *(memorie van toelichting)*, page 54.

6 Parliamentary Documents, Senate 2020/21, no. 35249, Memorandum of Reply, page 9.

7 It is important to note that, subject to a single exception (which is not relevant for purposes of the matters discussed in this article), the regime of the statutory freeze mechanism under the Dutch Scheme is meant to be consistent with the terms of the statutory freeze mechanism of section 241d of the Bankruptcy Act. This follows from Parliamentary Documents, House of Representatives 2018/19, 35249, no. 3 Explanatory Memorandum *(memorie van toelichting)*, page 54.

8 It is up to the discretion of the debtor or restructuring expert to request a freeze period that is applicable to all creditors on only part of the creditors.

9 A restructuring expert must have been appointed or, if the debtor will be in charge of proposing the restructuring plan, a formal declaration must have been submitted to the court and the debtor has to propose a plan ultimately two months after submission of the declaration.

process of taking certain enforcement actions[10] will not be disproportionally affected as a result thereof.

If the statutory freeze period is ordered, creditors can no longer take enforcement measures against assets that are under control of the debtor, including assets over which they hold security. An exception applies to financial collateral that has been pledged *(verpand)* under a financial collateral arrangement *(financiëlezekerheidsovereenkomst)* within the meaning of section 7:51 of the Civil Code (hereafter referred to as a 'financial collateral arrangement').[11] In principle, the holder of a right of pledge over such financial collateral does not require leave from the court to enforce such right of pledge. More on this subject follows in paragraphs 6.1-6.3 below.

Pursuant to section 373(4) of the Bankruptcy Act, a statutory freeze period will also have the effect that creditors are barred from exercising any alteration, suspension and termination rights on the ground that the debtor has failed to perform any of its obligations prior to the statutory freeze period (hereafter referred to as a 'pre-existing performance failure'). This rule does not apply if the debtor has failed to provide sufficient security for new obligations that may arise during the statutory freeze period.[12]

3. the ISDA Master Agreement

3.1 Framework agreement for financial derivative transactions

The ISDA Master Agreement is a framework agreement developed by the International Swaps and Derivatives Association (ISDA) that allows the parties to enter into all kinds of financial derivative transactions (often simply referred to as 'derivatives').[13] A derivative is a financial instrument that derives its market value from an underlying market value. For instance, the market value of an interest rate swap will depend on the development of the interest rates being 'swapped'. In addition to interest rate swaps, there are many categories of derivatives, such as forwards, foreign exchange rate swaps, options and credit default swaps. Derivatives can be used to mitigate financial risks, such as an adverse trend in interest or foreign exchange rates or commodity prices. Derivatives can also be used for speculative purposes. A portion of all outstanding derivatives relates to standardized instruments that are exchange-traded. The remainder of the derivatives market[14] consists of instruments that are tailor-made to meet a specific need of the end user. These instruments are entered into by means of bilateral transactions between two parties, which is why they are called 'over-the-counter' (OTC) derivatives. Most OTC derivatives are entered into under some form of ISDA Master Agreement.

3.2 Master Agreement, Schedule and Confirmations; governing law

The provisions of the ISDA Master Agreement are standardized. The ISDA Master Agreement has a 'Schedule' attached to it that includes a number of optional provisions and room to introduce additional terms and conditions or change the meaning of existing terms and conditions by adding further provisions. By using the Schedule to supplement and amend the terms of the ISDA Master Agreement, the parties can tailor their legal relationship under the document. The ISDA Master Agreement contains elements that are typically also found in credit agreements, such as definitions, payment obligations, representations and warranties, acceleration mechanics, information undertakings, transfer restrictions and choice of law and jurisdiction clauses. The key difference with a credit agreement is that each of both parties to the ISDA Master Agreement may at any time be a creditor and/or a debtor, considering that financial derivative transactions entered into under the ISDA Master Agreement may result in payment obligations in either direction between the parties. The economic and financial terms and conditions of individual financial derivative transactions, such as maturity, payment dates, notional value and underlying rates are documented by means of so-called 'Confirmations'. According to the ISDA Master Agreement, all transactions are entered into on the basis that the ISDA Master Agreement and all Confirmations together constitute one and the same agreement. An ISDA Master Agreement is typically expressed to be governed by English law or the laws of the State of New York.[15] One of the major aims of the ISDA Master Agreement is to mitigate the credit risk that the parties are mutually exposed to. The early termination provisions[16] and close-out netting

10 These actions are: the seeking of recovery from assets of the debtor by means of enforcement of security rights or by attachment of assets or filing an application for the debtor's bankruptcy *(faillissement)* (section 376(4)(b) of the Bankruptcy Act).

11 Section 376(8) of the Bankruptcy Act in conjunction with section 241d of the Bankruptcy Act.

12 Section 373(4) of the Bankruptcy Act.

13 In fact, there are multiple versions of ISDA Master Agreements, including two documents published in 1992 titled 'ISDA Master Agreement (Multicurrency – Cross Border)' and 'ISDA Master Agreement (Local Currency – Single Jurisdiction)' respectively and a document published in 2002: the '2002 ISDA Master Agreement'. Unless indicated otherwise, all references to 'ISDA Master Agreement' are references to the 2002 ISDA Master Agreement.

14 OTC derivatives notional outstanding totalled $558.5 trillion at the end of December 2019. Source: ISDA, Key Trends in the Size and Composition of OTC Derivatives Markets in the Second Half of 2019, June 2020.

15 ISDA has developed a limited number of ISDA Master Agreements that are governed by the laws of jurisdictions other than England and the State of New York. Those types of ISDA Master Agreements will be ignored for purposes of the remainder of this article.

16 Section 6(a) *(Right to Terminate Following Event of Default)*, section 6(b) *(Right to Terminate Following Termination Event)* and paragraph (i) of section 6(c) *(Effect of Designation)* of each of the ISDA Master Agreement (Multicurrency – Cross Border), the ISDA Master Agreement (Local Currency – Single Jurisdiction) and the 2002 ISDA Master Agreement.

provisions[17] are instrumental in achieving that aim. These provisions are generally regarded as the core provisions of the ISDA Master Agreement.

3.3 Events of Default and Termination Events

The early termination and close-out netting provisions of an ISDA Master Agreement become relevant following the occurrence of an 'Event of Default' or a 'Termination Event'. Events of Default include events such as a failure to meet a payment obligation, a breach of any other obligation under the contract, repudiation of the contract, bankruptcy and the initiation of bankruptcy proceedings. Termination Events are typically more neutral events such as illegality and force majeure. Following the occurrence of an Event of Default or a Termination Event with respect to one of the parties to an ISDA Master Agreement, the other party or, in some instances, each of the parties is entitled to designate an 'Early Termination Date' in respect of all or certain transactions that are outstanding under the ISDA Master Agreement.

3.4 Designation of an Early Termination Date; Early Termination Amount

If following the occurrence of an Event of Default or a Termination Event one of the parties to an ISDA Master Agreement has designated an Early Termination Date with respect to one or more outstanding transactions, both parties will no longer be obligated to effect payments or deliveries in respect of those transactions after the Early Termination Date. Instead, the existing obligations are terminated and replaced with a single obligation of one of the parties to pay to the other party an 'Early Termination Amount' in respect of the transactions that are terminated.[18] In brief, the Early Termination Amount is an amount equal to the sum of the 'Close-out Amounts' determined for the terminated transactions. The Close-out Amount for a terminated transaction is based on quotations from third party and other market data that give an indication of the cost of replacing the terminated transaction with an 'economic equivalent' replacement transaction. In accordance with the terms of the ISDA Master Agreement, the parties agree and acknowledge that the Early Termination Amount is a reasonable pre-estimate of loss (not a penalty) and that the Early Termination Amount is payable for the loss of bargain and the loss of protection against future risk. If an Early Termination Amount becomes payable in connection with the early termination of one or more transactions under an ISDA Master Agreement, the party that is entitled to such Early Termination Amount may recover the amount due in any possible manner, including, if applicable, by means of enforcement of collateral provided under a so-called 'Credit Support Document'.

3.5 ISDA Credit Support Documents

In addition to various Master Agreements, ISDA has published several standardized Credit Support Documents.[19] ISDA Credit Support Documents are used by market participants to post and accept collateral as security for payment and delivery obligations under transactions that are entered into under an ISDA Master Agreement. Under each type of ISDA Credit Support Document one or each of the parties provides collateral to the other party as security for its obligations under the ISDA Master Agreement. Collateral can be provided by transferring title to the collateral to the other party[20] or by creating security over the collateral in favor of the other party. To the extent that (i) an ISDA Credit Support Document is entered into by a financial or other qualifying institution within the meaning of section 7:52(1) of the Civil Code with (a) another qualifying institution or (b) any other person (not being a natural person) and (ii) the collateral to be posted thereunder consists of financial collateral (i.e. money *(geld)*, securities *(effecten)* or credit claims *(kredietvorderingen)*), it qualifies as a financial collateral arrangement *(financiëlezekerheidsovereenkomst)* within the meaning of section 7:51 of the Civil Code.[21] We will discuss in part 6 of this article why this is relevant in the context of the Dutch scheme. ISDA Credit Support Documents are expressed to supplement and form part of the ISDA Agreement in connection with which they are entered into.

17 Paragraph (ii) of sections 6(c) *(Effect of Designation)*, section 6(d) *(Calculations)* and section 6(e) *(Payments on Early Termination)* of each of the ISDA Master Agreement (Multicurrency – Cross Border) and the ISDA Master Agreement (Local Currency – Single Jurisdiction) and Paragraph (ii) of sections 6(c) *(Effect of Designation)*, section 6(d) *(Calculations; Payment Date)* and section 6(e) *(Payments on Early Termination)* of the 2002 ISDA Master Agreement.

18 See paragraph (ii) of section 6(c) *(Effect of Designation)* of the ISDA Master Agreement.

19 These include: (i) the 2016 Phase One Credit Support Annex for Initial Margin (IM) (expressed to be governed by the laws of the State of New York), (ii) the 2016 Credit Support Annex for Variation Margin (VM) (expressed to be governed by the laws of the State of New York), (iii) the 2016 Credit Support Annex for Variation Margin (VM) (expressed to be governed by English law) (iv) the 2018 Credit Support Annex for Initial Margin (expressed to be governed by the laws of the State of New York), (v) the 2016 Phase One IM Credit Support Deed (expressed to be governed by English law); (vi) the 2018 Credit Support Deed for Initial Margin (expressed to be governed by English law), (vii) the ISDA 2019 Collateral Transfer Agreement for Initial Margin (IM) (Multi-Regime Scope), (viii) the ISDA 2019 Security Agreement for Initial Margin (IM) (expressed to be governed by English law), (ix) the ISDA 2019 Security Agreement for Initial Margin (IM) (expressed to be governed by the laws of the State of New York), (x) the ISDA 2019 Security Agreement (expressed to be governed by Belgian law), (xi) the ISDA 2019 Security Agreement (expressed to be governed by French law), (xii) the ISDA 2019 Security Agreement (expressed to be governed by Irish law) and (xiii) the ISDA 2019 Security Agreement (expressed to be governed by Luxembourg law).

20 Typically referred to as a title transfer arrangement.

21 Sections 7:51-56 of the Civil Code have incorporated the provisions of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

4. Effect of the unilateral termination mechanism

4.1 Introduction

An ISDA Master Agreement may become subject to unilateral termination under the unilateral termination mechanism of the Dutch scheme. A contract that has been terminated under the unilateral termination mechanism will terminate on the termination date. The counterparty will not be left empty-handed, but will have a claim for compensation for any damages resulting from the unilateral termination. The debtor has the choice to include such claim for damages in the debt restructuring plan or not. This is further discussed in paragraph 4.3. We first discuss whether the unilateral termination mechanism affects any early termination rights that the counterparty may have.

4.2 Effect on early termination provisions

If a request for unilateral termination of an ISDA Master Agreement has been approved by the competent court but the debtor's counterparty has also become entitled to designate an Early Termination Date with respect to one or more transactions, could that counterparty still validly designate such Early Termination Date? In such scenario, the ability to exercise an existing right to designate an Early Termination Date may be important for a counterparty that wants to terminate its exposure to the debtor prior to the termination date approved by the court. This may be especially relevant in situations where there is a (perceived) risk that the amount of such exposure will grow or where the value of collateral may diminish. Obviously, a right to designate an Early Termination Date does not exist or cannot be exercised if the right would be based on an ipso facto provision[22] or, if a statutory freeze period applies, if it has resulted from a default predating such freeze-period.[23] However, the unilateral termination mechanism itself does not suggest that prior to the court-approved termination date a debtor's counterparty would be barred from exercising its rights under a contract before the contract will be terminated. In the case of an ISDA Master Agreement, those rights would include an existing right to designate an Early Termination Date with respect to one or more outstanding transactions. Of course, the designated Early Termination Date would have to fall prior to the court-approved termination date. If not, the designation would not be enforceable (before a Dutch court) as this would effectively conflict with the decision of the court to approve the termination of the contract at the end of the notice period.

4.3 Effect on close-out netting provisions

The MoR suggests that the close-out netting provisions of an ISDA Master Agreement continue to be relevant for the manner in which the claim for damage will be determined and how this claim will be treated by the debtor. The reasoning is as follows. The debtor's counterparty is entitled to compensation of damages that may result from a termination under the unilateral termination mechanism. In principle, the amount of damages must be determined in accordance with part 6.1.10 of the Civil Code. According to the MoR, there are two scenarios for the treatment of a counterparty's claim for compensation of such damages.[24]

- In the *first scenario*, the claim is included in the restructuring plan, under which the debtor may propose a deferment of payment or a partial waiver or cancellation of the claim.
- In the *second scenario*, the claim is not included in the restructuring plan, which effectively means that the claim must be paid in full.[25]

It is our expectation that a certain practice will develop in which debtors and their counterparties will be inclined to agree to terminate the outstanding transactions under an ISDA Master Agreement on the basis of a fiction that a 'Bankruptcy' Event of Default has occurred with respect to the debtor

In the first scenario, the debtor's counterparty will have the rights given to other creditors with voting rights *(stemgerechtigde crediteuren)* under the Dutch scheme. Under section 384(3) of the Bankruptcy Act, a creditor with voting rights can petition the competent court to deny the request for approval of the proposed restructuring plan if such creditor summarily demonstrates that it would be worse off than it would be if the debtor's estate were liquidated in formal bankruptcy proceedings. This rule is referred to as the 'no creditor worse off-principle'. In practice, the debtor's counterparty under an ISDA Master Agreement must summarily demonstrate that the proposed compensation amount is lower than the Early Termination Amount that would have resulted from the designation of an Early Termination Date with respect to the transactions outstanding under the ISDA Master Agreement following a 'Bankruptcy'

22 See paragraph 2.2.
23 See paragraph 2.3.
24 See MoR, page 11.
25 See Parliamentary Documents, House of Representatives 2018/19, 35249, no. 3 Explanatory Memorandum *(memorie van toelichting)*, page 46 and MoR, page 10.

Event of Default relating to the debtor.[26] If the counterparty succeeds in demonstrating this, the court will deny the request for approval of the proposed restructuring plan. Because of the no creditor worse off-principle, attempts to propose a claim for compensation of damages on the basis of anything other than the close-out netting provisions of the ISDA Master Agreement that would apply in case of a 'Bankruptcy' Event of Default would be prone to failure. The MoR supports this view. Although it does not confirm in so many words that close-out netting provisions of financial framework agreements continue to be enforceable, it does follow from the MoR that in practice such provisions will govern how the amount of compensation for damages must be determined.[27] According to the MoR, this means that the first scenario would result in the same outcome as the second scenario.[28] Apparently, it is the intention of the legislator that in both scenarios the amount of compensation for damages must be determined in accordance with the close-out netting provisions of the financial framework agreement.[29] Obviously, this conclusion is reassuring for counterparties of Dutch debtors under ISDA Master Agreements (and other financial framework agreements).

4.4 Offer to terminate

Given the above, it is our expectation that a regular practice might develop in which a debtor that wants to terminate the transactions under an ISDA Master Agreement as part of a debt restructuring under the scheme, will submit an offer to terminate to its counterparty. We expect that the debtor will propose an Early Termination Date with respect to the outstanding transactions and propose an Early Termination Amount for those transactions in accordance with the early termination and close-out netting provisions that would apply if a 'Bankruptcy' Event of Default would have occurred with respect to that debtor. It seems likely that the counterparty will accept such proposal unless it believes that a court would refuse a request for unilateral termination.[30]

5. Effect of the Ban on ipso facto provisions

5.1 Effect on early termination and close-out netting provisions

The rights of a debtor's counterparty under an ISDA Master Agreement or other financial framework agreement are not affected by the unilateral termination mechanism until the agreement has been terminated. Those rights of the debtor's counterparty would include the right to designate an Early Termination Date in respect of one or more outstanding transactions following the occurrence of an Event of Default or a Termination Event (provided that the Early Termination Date so designated would not occur after the termination date approved (or extended) by the court see paragraph 4.2) and the right to determine an Early Termination Amount with respect to those transactions. However, as a result of the ban on ipso facto provisions under section 373(3) of the Bankruptcy Act, these rights cannot be exercised if the Event of Default has resulted from restructuring steps. For the avoidance of doubt, such restructuring steps would include the filing of a request for approval for the unilateral termination of an ISDA Master Agreement under the unilateral termination mechanism. It follows from the above that, unless the right to designate an Early Termination Date in respect of one or more transactions and to determine an Early Termination Amount with respect to those transactions exists in connection with an Event of Default or Termination Event that has not resulted from restructuring steps, it will not be enforceable.

5.2 No exception for close-out of financial framework agreements

Many jurisdictions, including those of the United States and the United Kingdom, also have bans on ipso facto provisions in debt restructuring proceedings. Often though, those bans are subject to an exception for financial framework agreements. Under the United States Bankruptcy Code, the exercise of contractual termination and

26 It is important to note that the designation of an Early Termination Date on the basis of an Event of Default may result in a different Early Termination Amount than the Early Termination Amount that would result from the designation of an Early Termination Date on the basis of an 'Illegality' or 'Force Majeure' Termination Event. The reason for this is that in case of the designation of an Early Termination Date on the basis of an 'Illegality' or 'Force Majeure' Termination Event, the determining party for the purpose of determining the Close-out Amount for each of the terminated transactions must, if obtaining quotes from third parties, ask that such third parties will ignore the creditworthiness of the determining party and provide mid-market quotations rather than sell-side quotations. Normally, a third party would take such creditworthiness into account when providing a quotation and the quotation itself would typically be a sell-side quotation. As a result, an Early Termination Amount determined in connection with an Event of Default may generally be expected to be somewhat more favourable for the determining party (typically: the non-defaulting party) than an Early Termination Amount determined in connection with one of the Termination Events referred to above.

27 See MoR, page 10.

28 See MoR, page 10. The legislator seems to assume that in all cases, the counterparty will receive a full compensation of its claim. However, this might be different if it is clear that insufficient or no security is available for the recovery of such claim. In that case, the claim may be included in the restructuring plan and the counterparty may be forced to accept a partial write-off.

29 See MoR, page 10.

30 For example when the creditor expects that the restructuring plan will not be confirmed by the court.

netting rights under 'swap agreements'[31] (including any master agreement for such agreements) is excluded from both the automatic stay mechanism under Section 632(a) thereof and the prohibition from exercising rights under ipso facto provisions under Section 365(e) thereof.[32] Both exceptions apply in case of a liquidation under Chapter 7 and in case of a reorganisation under Chapter 11 of the United States Bankruptcy Code.[33] In similar fashion, debts and other liabilities arising under contracts or other instruments involving financial services are excluded from the scope of a general moratorium[34] and a ban on ipso facto provisions[35] which have recently been introduced in UK insolvency law by virtue of the United Kingdom Corporate Insolvency and Governance Act 2020.[36] Unfortunately, no similar exception has been created with respect to the ban on ipso facto provisions under the Dutch scheme. This is remarkable since the statutory freeze mechanism under the Dutch scheme is subject to an exception for enforcement of security over financial collateral under financial collateral arrangements. The reasons for this choice are not entirely clear. Presumably, the legislator believes that the interests of counterparties under financial framework agreements are

31 In Section 101(53B) of the United States Bankruptcy Code, the definition of 'swap agreement' includes:
(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is (a) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap, (b) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement, (c) a currency swap, option, future, or forward agreement, (d) an equity index or equity swap, option, future, or forward agreement, (e) a debt index or debt swap, option, future, or forward agreement, (f) a total return, credit spread or credit swap, option, future, or forward agreement, (g) a commodity index or a commodity swap, option, future, or forward agreement, (h) a weather swap, option, future, or forward agreement, (i) an emissions swap, option, future, or forward agreement, or (j) an inflation swap, option, future, or forward agreement;
(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that (i) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein) and (ii) is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;
(iii) a master agreement that provides for an agreement or transaction referred to in, inter alia, paragraph (i) or (ii) above, together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to paragraph (i) or (ii) above; and
(iv) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in, inter alia, paragraph (i), (ii) or (iii) above, including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in such paragraph.

32 Sections 362(b)(17) and 560 of the United States Bankruptcy Code.

33 Section 103(a) of the United States Bankruptcy Code.

34 Pursuant to Section A18(3) of the United Kingdom Insolvency Act 1986 (as amended by the Corporate Insolvency and Governance Act 2020), certain pre-moratorium debts are excluded from the pre-moratorium debts for which a company has a payment holiday during a moratorium. Such excluded pre-moratorium debts include the pre-moratorium debts of such company that have fallen due before the moratorium, or that fall due during the moratorium in so far as they consist of amounts payable in respect of, inter alia, debts or other liabilities arising under a contract or other instrument involving financial services, which includes 'financial contracts' within the meaning of Schedule ZA2 to the United Kingdom Insolvency Act 1986 (as amended by the Corporate Insolvency and Governance Act 2020). The definition of 'financial contracts' includes:
(i) a futures or forwards contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;
(ii) a swap agreement, including
(a) a swap or option relating to interest rates, spot or other foreign exchange agreements, currency, an equity index or equity, a debt index or debt, commodity indexes or commodities, weather, emissions or inflation;
(b) a total return, credit spread or credit swap;
(c) any agreement or transaction similar to an agreement that is referred to in paragraph (a) or (b) above and is the subject of recurrent dealing in the swaps or derivatives markets; and
(iii) a master agreement for any of the contracts or agreements referred to in, inter alia, paragraphs (i) and (ii) above; and
(iv) derivatives within the meaning of Regulation (EU) No 648/2012 (EMIR) or a master agreement for derivatives.

35 Section 233B of the United Kingdom Insolvency Act 1986 (as amended by the Corporate Insolvency and Governance Act 2020) provides for a ban on 'a provision of a contract for the supply of goods or services to the company […] if and to the extent that, under the provision (a) the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or (b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure.'
Pursuant to Section 233B(10) and Part 3 of Schedule 4ZZA to the United Kingdom Insolvency Act 1986 (as amended by the Corporate Insolvency and Governance Act 2020), the other provisions of Section 233B do not apply to 'financial contracts'. To the extent relevant for this article, the definition of 'financial contract' includes of Schedule 4ZZA is identical to that of Schedule ZA2.
Part 3 of Schedule 4ZZA to the United Kingdom Insolvency Act 1986 (as amended by the Corporate Insolvency and Governance Act 2020) also stipulates that nothing in Section 233 affects the operation of (i) set-off or netting arrangements (within the meanings given by section 48(1)(c) and (d) of the Banking Act 2009) or (ii) the Financial Collateral Arrangements (No.2) Regulations 2003. In addition, Part 3(15) of Schedule 4ZZA stipulates that Section 233 does not apply to derivatives within the meaning of Regulation (EU) No 648/2012 (EMIR) or a master agreement for derivatives.

36 Corporate Insolvency and Governance Act 2020 of 25 June 2020.

sufficiently safeguarded without an exception to the ban on ipso facto provisions in view of the effect of the close-out netting provisions as discussed in the previous paragraph. Although we agree that the counterparty's rights are indeed safeguarded, including an exception would have resulted in a more straightforward way for termination of financial framework agreements. The consequences of the chosen approach are that a debtor's counterparty under an ISDA Master Agreement cannot designate an Early Termination Date on the basis of an Event of Default or Termination Event that has resulted from restructuring steps. Effectively, the counterparty is forced to continue to perform its obligations with respect to the outstanding transactions until it receives an offer to amend or terminate the agreement or the agreement is terminated under the universal termination mechanism. This is different only in case of an Event of Default or Termination Event that has resulted from anything other than restructuring steps and is not affected by a freeze period (see part 6 of this article).

Effectively, the counterparty is forced to continue to perform its obligations with respect to the outstanding transactions until it receives an offer to amend or terminate the agreement or the agreement is terminated under the universal termination mechanism

6. Effects of the Statutory freeze mechanism

6.1 Enforcement of financial collateral arrangements

As discussed in paragraph 2.3, one of the effects of the statutory freeze mechanism is that during a statutory freeze period creditors must obtain leave from the court before they can take enforcement measures against assets that are under control of the debtor, including assets over which they hold a security interest. An exception applies for security that has been created under a financial collateral arrangement over financial collateral (i.e. money, securities or credit claims).[37] The holder of such security can enforce such security as if there was no statutory freeze period.[38] As indicated above, to the extent they are entered into by a qualifying institution with another qualifying institution or any person (not being a natural person) with respect to money, securities or credit claims, ISDA Credit Support Documents generally qualify as financial collateral arrangements. This means that a debtor's counterparty with security over financial collateral under an ISDA Credit Support Document can enforce such security without leave from the court during a statutory freeze period.[39]

6.2 Practical issues

There is a potential problem though. Typically, the holder of a security right cannot effectively enforce that security right before it has a claim against the debtor which can be satisfied from or set off against the proceeds of enforcement. As to transactions under an ISDA Master Agreement, the effective enforcement of security in connection with a default under any of those transactions (including security over financial collateral) requires that an Early Termination Amount has been designated with respect to those transactions. As discussed in paragraph 2.3, the designation of such Early Termination Amount in relation to a pre-existing performance failure will not be possible during a statutory freeze period if collateral has been provided for obligations of the debtor that may arise during that period. Section 373(4) of the Bankruptcy Act does not provide for a mechanism similar to that of section 376(2)(a) of the Bankruptcy Code which would allow the counterparty to request the court for leave to exercise any existing early termination and close-out netting rights. To us, this seems inconsistent. Where is the logic in giving a creditor the right to request the court to grant leave for seeking recovery from assets of the debtor during a statutory freeze period if the court cannot grant that same creditor leave to exercise any existing alteration, suspension or termination right that such creditor may have?

6.3 Close-out subject to court leave

Fortunately, the Dutch legislator seems to have recognized the problem. Notably, the MoR states that a statutory freeze period could hinder a debtor's creditor under a financial framework agreement in its attempts to seek recovery from the debtor's assets (including financial collateral pledged to

37 Sections 376(8) and 241d of the Bankruptcy Act. Section 241d of the Bankruptcy Act has been introduced as part of the implementation of the Financial Collateral Directive.

38 No exception is required for the enforcement of a financial collateral arrangement with respect to collateral that consist of assets *that are no longer under the control of the debtor*. This is the typical situation under a transfer financial collateral arrangement *(financiëlezekerheidsovereenkomst tot overdracht)*.

39 Despite the text of sections 376(8) and 241d of the Bankruptcy Act, the MoR states that during a statutory freeze period, creditors are hindered in their attempts to seek recovery from assets of the debtor *including financial collateral over which they hold security* (see MoR, page 11). The reference to security over financial collateral creates the impression that the exception with respect to financial collateral under sections 376(8) and 241d of the Bankruptcy Act is ignored. This is confusing as it seems to suggest that the holder of security over financial collateral under a financial collateral arrangement would require leave from the court to enforce such security during a statutory freeze period under the Dutch scheme. On the basis of legislative documentation concerning the introduction of section 241d of the Bankruptcy Act, we know that this suggestion cannot be correct. See also: Parliamentary Documents, House of Representatives 2004/05, 30138, no. 3 Explanatory Memorandum *(memorie van toelichting)*, page 22, which states that (i) the statutory freeze mechanism of section 63a (in case of bankruptcy *(faillissement)*) or section 241a (in case of suspension of payment *(surséance van betaling)* is incompatible with Article 4(4)(d) in conjunction with Article 4(5) of the Financial Collateral Directive, (ii) the enforcement of security over financial collateral under a financial collateral arrangement may not be hindered by any applicable waiting period, not even in case of a bankruptcy or suspension of payment and (iii) the immediate enforcement of such security must at all times be possible.

it).[40] The MoR continues by stating that if, as a result of that situation, the protection offered to a debtor's creditor by the close-out netting mechanism *and* security over financial collateral would fall away in part or in whole, the court cannot refuse to grant leave for the exercise by such creditor of its close-out netting *and* those security rights.[41] According to the MoR, this approach adheres to the principle reflected in Consideration (94) of the Directive on Restructuring and Insolvency,[42] which reads as follows:

'Member States should be allowed to exempt netting arrangements, including close-out netting *(saldering bij vervroegde beëindiging)*, from the effects of the stay of individual enforcement actions even in circumstances where they are not covered by Directives 98/26/EC, 2002/47/EC [i.e. the Financial Collateral Directive] and Regulation (EU) No 648/2012, if such arrangements are enforceable under the laws of the relevant Member State even if insolvency proceedings are opened.'

As long as the wording of section 373(4) of the Bankruptcy Act does not reflect an exception to this clause for *close-out netting* in case the counterparty has financial collateral, the counterparty should follow the route as set out in the MoR and obtain leave for the enforcement in connection with the exercise of close-out netting. It follows from the MoR that the court *must* grant such leave if the restrictions under a statutory freeze period would result in the falling away of the protection offered to a debtor's creditor by a close-out netting mechanism under a financial framework agreement *and* any financial collateral posted as security in connection with such agreement. Although the criterion leaves some room for interpretation, in our view it means that if the recovery position of a debtor's counterparty with respect to one or more transactions under an ISDA Master Agreement would be affected as a result of a statutory freeze period, (upon request) that counterparty will generally be granted leave from the court to:

- exercise any right it may have to designate an Early Termination Date with respect to such transactions;
- exercise its right to determine an Early Termination Amount; and
- if such Early Termination Amount is an amount owed to it, enforce any security it may have over financial collateral provided under a financial collateral arrangement as security for that Early Termination Amount.

40 See MoR, page 11.

41 See MoR, page 11.

42 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

The fact that a solution is created by the legislator is positive news for the counterparty under an ISDA Master Agreement of a debtor that is taking restructuring steps under the Dutch scheme

Although obtaining leave appears to be a step which cannot easily be explained in view of the Financial Collateral Directive,[43] the fact that a solution is created by the legislator is positive news for the counterparty under an ISDA Master Agreement of a debtor that is taking restructuring steps, provided that such counterparty holds security over financial collateral under a financial collateral arrangement.
In itself, the assurance offered by the MoR is a good thing. However, the suggestion that leave would be required to effectively exercise an existing right to enforce security over financial collateral under a financial collateral arrangement during a statutory freeze period is anything but reassuring. Any proceedings required to obtain such leave would be likely to result in the loss of valuable time before termination, close-out netting and security rights can be exercised. A movement of the markets during such time could result in a reduction of recovery proceeds. It is effects like these that the European legislator has tried to avoid with Articles 4(4)(d) and 4(5) of the Financial Collateral Directive.[44] As discussed above, we believe that a requirement to obtain leave from a court for the exercise of an existing right to enforce security over financial collateral provided under a financial collateral arrangement is incompatible with these articles of the Financial Collateral Directive and with section 241d of the Bankruptcy Act. Our recommendation to the Dutch legislator is that an exception to the rule of section 373(4) of the Bankruptcy Act be created for the exercise of existing early termination and close-out netting rights during a statutory freeze period where the exercise of those rights is necessary to effectively enforce security over financial collateral under a financial collateral arrangement.

6.4 Other scenarios

The MoR does not offer much clarity where it concerns the effects of the statutory freeze mechanism in scenarios where:

43 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

44 Article 4(4) of the Financial Collateral Directive 4 stipulates that, among other things, the manners of realising financial collateral shall, subject to the terms agreed in the security financial collateral arrangement, be without any requirement to the effect that the terms of the realisation be approved by any court, public officer or other person or any additional time period must have elapsed. Pursuant to Article 4(5) of the Financial Collateral Directive, EU Member States must ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker.

- a debtor's counterparty under a financial framework agreement does not hold security over any of that debtor's assets; or
- a debtor's counterparty under a financial framework agreement holds alternative security (i.e. security that does not fall within the scope of the exception created under section 241d of the Bankruptcy Act).[45]

In the first scenario, a debtor's counterparty under an ISDA Master Agreement would neither be restricted in exercising any existing right to designate an Early Termination Date with respect to one or more transactions under that ISDA Master Agreement nor would it be restricted in exercising its right to determine an Early Termination Amount with respect to those transactions. The reason for this is that section 376 of the Bankruptcy Act does not prohibit the exercise of these rights and that section 373(4) of the Bankruptcy Act would only prohibit the exercise of such rights if sufficient security would have been provided for liabilities that may arise during the statutory freeze period (which is not the case in the first scenario). Obviously, in the first scenario the counterparty must still obtain leave from the court for any subsequent action to recover an Early Termination Amount payable to it from the assets of the debtor.[46] The MoR does not indicate how a court should rule in response to a request for such leave. Presumably, such request would be considered on the basis of the same rules as a request for leave for the recovery from the debtor's assets of a claim under any other type of contract. Thus, it would seem that wholly unsecured financial framework agreements have no special status for purposes of the Dutch scheme but at least the early termination and close-out netting rights remain unaffected in the first scenario.

As to the second scenario, we assume that in accordance with the main rule of section 373(4) of the Bankruptcy Act, a debtor's counterparty under an ISDA Master Agreement would be barred from exercising any existing right to designate an Early Termination Date with respect to one or more transactions and to determine an Early Termination Amount during the statutory freeze period. As discussed in paragraph 6.3, it follows from the MoR that in certain scenarios[47] a competent court has the authority to grant leave from the restrictions under section 373(4) of the Bankruptcy Act. It is unclear if such authority would extend to a scenario in which the counterparty holds alternative security rather than security over financial collateral under a financial collateral arrangement. If not, it would mean that in the second scenario existing early termination and close-out netting rights cannot be exercised even if this would result in the falling away of the protection offered by those rights in combination with such alternative security. We find it somewhat regrettable that the MoR does not clarify this issue.

7. Key Observations and conclusion

7.1 Unilateral termination mechanism

Until the unilateral termination by a debtor of an ISDA Master Agreement in accordance with the terms of the unilateral termination mechanism becomes effective, the rights of the debtor's counterparty under the agreement are not affected (although they may be affected by the statutory freeze mechanism and the ban on ipso facto provisions). Those rights include the right to exercise any existing right to designate an Early Termination Date with respect to one or more outstanding transactions, provided that the Early Termination Date designated would not occur after the end of the notice period approved by the court. Following unilateral termination of an ISDA Master Agreement under the unilateral termination mechanism, the counterparty has a claim for compensation of any damages resulting from such termination. It follows from the MoR that in practice the close-out netting provisions of an ISDA Master Agreement will govern how the amount of compensation must be determined. In accordance with the no creditor worse off-principle, it would make sense that the close-out netting provisions are applied as if a 'Bankruptcy' Event of Default would have occurred with respect to the debtor. It is our expectation that some practice will develop in which debtors and their counterparties will be inclined to agree to terminate the outstanding transactions under an ISDA Master Agreement on the basis of a fiction that a 'Bankruptcy' Event of Default has occurred with respect to the debtor.

7.2 Ban on ipso facto provisions

If the right to designate an Early Termination Date with respect to one or more transactions outstanding under an ISDA Master Agreement follows from an Event of Default or Termination Event that has resulted from restructuring steps, it will not be enforceable. This is different in many other jurisdiction, including the United States and the United Kingdom, in which a similar ban on ipso facto provisions applies but where many types of financial framework agreements (including (most types of transactions entered into under) ISDA Master Agreements) are excluded from the scope of such ban.

7.3 Statutory freeze mechanism

In principle, an existing right to designate an Early Termination Date with respect to one or more transactions outstanding under an ISDA Master Agreement cannot be exercised without prior leave from the court in scenarios where sufficient collateral has been provided as security for obligations that may arise during the statutory freeze

45 We often see this in transactions where one or more interest rate swaps are entered into to hedge the interest risk under one or more floating rate loans and where the obligations under both the loans and the swaps are secured by 'ordinary' security over assets, such as a right of mortgage over real property and rights of pledge over movable assets or (trade) receivables.

46 This follows from section 376(2)(a) of the Dutch Bankruptcy Act.

47 These are scenarios in which a debtor's counterparty under a financial framework agreement holds security over financial collateral under a financial collateral arrangement and the protection offered by the close-out netting provisions of that financial framework agreement and such security would practically fall away as a result of a statutory freeze period.

period. The exercise of any right to determine an Early Termination Amount in accordance with the close-out netting provisions of an ISDA Master Agreement is similarly restricted.

During a statutory freeze period, a debtor's counterparty cannot exercise any existing right to enforce security over that debtor's assets without prior leave from the court. Although the MoR seems to suggest otherwise, this restriction does not apply with respect to existing rights to enforce security over financial collateral provided under financial collateral arrangements.

Section 373(4) of the Bankruptcy Act does not provide for a mechanism that would allow a counterparty to request the court for leave to exercise any existing right to designate an Early Termination Date with respect to one or more transactions outstanding under an ISDA Master Agreement during a statutory freeze period. This seems inconsistent. The Dutch legislator seems to have recognised this inconsistency. The MoR states that if as a result of a statutory freeze period the protection offered to a debtor's creditor by the close-out netting *and* any security over financial collateral (under a financial collateral arrangement) would effectively fall away, the court cannot refuse to grant such creditor leave to exercise those rights. This does suggest that an existing right to enforce security over financial collateral under a financial collateral arrangement during a statutory freeze period would be subject to prior leave from the court. As indicated above, such restriction would conflict with Articles 4(4)(d) and 4(5) of the Financial Collateral Directive and with section 241d of the Bankruptcy Act.

Our recommendation to the Dutch legislator is that an exception to the rule of section 373(4) of the Bankruptcy Act be created for the exercise of existing early termination and close-out netting rights during a statutory freeze period where the exercise of those rights is necessary to effectively enforce security over financial collateral under a financial collateral arrangement.

As discussed in paragraph 6.4, the MoR does not offer much clarity on the effects of the statutory freeze mechanism on scenarios in which a debtor's counterparty does not hold security over such debtor's assets or if such security consists of alternative collateral. This is somewhat regrettable.

7.4 Conclusion

The provisions of the supporting mechanisms under the Dutch scheme discussed in this article give rise to questions about the enforceability of financial framework agreements including ISDA Master Agreements. Some of these questions have been addressed as part of the legislative process that has resulted in the introduction of the Dutch scheme. Despite some imperfections, the MoR adds legal certainty with regard to the effects of the unilateral termination mechanism, the ban on ipso facto provisions and the statutory freeze mechanism on the enforceability of early termination and close-out netting provisions of financial framework agreements and related financial collateral arrangements. This is especially so for scenarios in which a debtor's counterparty holds security over financial collateral under a financial collateral arrangement, although it is a bit confusing that the MoR suggests that the exercise of an existing right to enforce such security during a statutory freeze period would be subject to prior leave from the court. In our view, this suggestion is incorrect. Others could argue that the MoR merely suggests that the right to designate an Early Termination Date during a statutory freeze period will be subject to prior leave from the court and that accordingly, any existing right to enforce security over financial collateral provided under a financial collateral arrangement can only be effectively exercised once such leave has been granted. The MoR is not entirely clear on this point. In addition, it fails to provide specific guidance on the interpretation of the provisions of the statutory freeze mechanism with respect to scenarios in which the transactions entered into under a financial framework are not secured at all or in which the security consists of alternative collateral. The primary cause for these imperfections may have been a lack of time. As discussed, the questions from the Senate members about the enforceability of financial framework agreements were submitted at the end of the legislative process. To a large extent due to the economic effects of COVID-19, there has been immense pressure on the Dutch legislator to finalise the legislative process and procure that the Dutch scheme entered into force as soon as possible. Against this background and despite the imperfections, the MoR will undoubtedly play an instrumental role in maintaining legal certainty as to the enforceability of ISDA Master Agreements and other financial framework agreements in the context of the Dutch scheme. Within this context and subject to our recommendation for an amendment of section 373(4) of the Bankruptcy Act (discussed in paragraph 6.3), we believe that the Dutch legislator has done a decent job in making sure that the interests of participants in the OTC derivatives markets who deal with Dutch or other counterparties that may make use of the Dutch scheme someday, are sufficiently safeguarded. The MoR will prove instrumental in this respect.

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