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Contents

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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

The financing landscape in the Netherlands remains very stable and largely unchanged. The size of the loan market is relatively large in proportion to the size of the economy. The market is dominated by a couple of domestic banks that offer a wide range of products. Typically, smaller size facilities are financed by a single bank, whereas larger deals are financed through a club deal or a syndicate of Dutch and international banks. The role of foreign players is still small. Some of the international banks that had a presence in the Netherlands have either withdrawn or downscaled their Dutch presence in the wake of the 2008 financial crisis.

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

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

1.2 The High-yield Market

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

1.3 Alternative Credit Providers

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

1.4 Banking and Finance Techniques

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

1.5 Legal, Tax, Regulatory or Other Developments

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

Dutch bankruptcy laws are due to be overhauled. There are several legislative proposals that are expected to be implemented in the foreseeable future, including in relation to a court approved "pre-pack" procedure and a Dutch version of the scheme of arrangement/Chapter 11 procedure. Please see **7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency**, below.

The transition from existing interbank offered rates (EURIBOR/LIBOR) to a new system of risk-free rates will be an important development for the loan market. At the moment, it is still unclear what the exact impact will be, including in terms of costs for market participants and how legacy transactions will need to be "repapered".

Please see **4.1 Withholding Tax**, below, for a discussion on the proposed introduction of conditional withholding tax on certain interest (and royalty) payments which will likely become due as from 2021.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

Providing loans to corporates or institutions does not require a licence. A licensing requirement only applies when providing loans or other forms of financing to individuals not acting in the ordinary course of a profession or trade. If the financing is obtained through the issuance of debt securities, the issuer may be subject to a prospectus requirement in accordance with the provisions of the Prospectus Regulation ((EU) 2017/1129). In addition, restrictions apply to the borrower when obtaining financing from the general public. However, none of these restrictions affect the lender.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

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

3.2 Restrictions on Granting Security to Foreign Lenders

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

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls on the exchange or transfer of foreign currency in the Netherlands. At an EU level, the European Parliament and the Council can adopt special measures on the movement of capital to or from third countries involving direct investment (including investment in real estate), establishment, the provision of financial services or the admission of securities to capital markets. In addition, the Netherlands Act on Foreign Financial Relations 1994 (*Wet financiële betrekkingen buitenland* 1994) contains limited reporting requirements in relation to certain cross-border payments.

3.4 Restrictions on the Borrower's Use of Proceeds

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

3.5 Agent and Trust Concepts

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

Instead, in syndication transactions, security is typically granted on the basis of a so-called parallel debt arrangement. The "parallel debt liabilities" are construed on the basis of an undertaking from each obligor to pay to the security agent amounts equal to the amounts owed by it to the finance parties under the finance documents (the "underlying liabilities"). Technically, the security secures the parallel debt liabilities rather than the underlying liabilities. If enforcing security, the security agent is contractually obligated to apply the enforcement proceeds towards payment of the underlying liabilities (in the order agreed between the finance parties). The parties to a parallel debt arrangement agree that upon discharge of (part of) an underlying liability, (an equal part of) the corresponding parallel debt liability is deemed automatically discharged as well and vice versa.

3.6 Loan Transfer Mechanisms

The benefit of a loan can be transferred by means of assignment (*cessie*), contract takeover (*contractsoverneming*) or sub-participation.

Assignment

Assignment is used as a method to transfer receivables. A valid assignment requires a written instrument between the assignor and the assignee. If the assignment is undisclosed, the instrument must be executed before a Dutch civil law notary or registered with the Dutch tax authorities. If the assignment is disclosed, the debtor of the receivables purported to be assigned must be notified of the assignment. An undisclosed assignment of receivables is not effective against the debtor of those receivables – ie, until the debtor is notified of the assignment, the receivables can be satisfied by payment to the assignor.

Contract Takeover

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

Sub-participation

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

Transfer of Security Package

Given the accessory nature of Dutch security rights that are created as security for certain claims, they transfer along by operation of law if those claims transfer from the original creditor to another party. Where a right of mortgage (*recht van hypotheek*) or a right of pledge (*pandrecht*) has been created as security for parallel debt liabilities owed to a security agent in the context of a syndicated loan, the transfer of rights by a syndicate member to a third party does not impact the position of the security agent as holder of those security rights.

Instead, the new lender would benefit from the contractual obligation of the security agent to apply any enforcement proceeds towards payment of the liabilities owed to the syndicate. If Dutch security rights that have been created as security for parallel debt claims owed to a security agent are to transfer to a successor security agent, the existing security agent must transfer the parallel debt claims to the successor security agent, as a result of which the security rights will transfer along.

3.7 Debt Buy-back

Dutch law does not categorically restrict a borrower or sponsor from entering into a debt buy-back transaction. Parties

to a credit agreement are generally free to agree on any debt buy-back limitations they consider appropriate.

3.8 Public Acquisition Finance

Under Dutch public acquisition rules, a bidder is required to prove that, on the date on which the offering memorandum is submitted for approval to the competent authority, it has sufficient funds or has taken all required measures to have sufficient funds available to honour the offer. As soon as the funds are available or the required measures are in place, the bidder must confirm this in a public announcement. If (part of) the offer consideration is funded with debt, the bidder can only comply with the above requirement if such debt is available on a "certain funds" basis. Although there is no requirement to have agreed form documentation in place, public acquisition financing is often based on long form documentation. There is no requirement that such documentation be publicly filed.

Certain fund provisions are frequently used in private M&A transactions as well, in particular in case of a competitive auction as having certainty of funds increases the attractiveness of the offer. The type of documentation used depends on the specific circumstances.

4. Tax

4.1 Withholding Tax

Arm's-length payments of principal and interest under true loans may (currently) be made free from withholding tax. A legislative proposal has been submitted to the Dutch parliament to introduce a conditional withholding tax on interest (and royalty) payments. This will likely become due as from 2021 in case of intra-group payments to "low tax jurisdictions" or to jurisdictions included in the EU list of non-cooperative jurisdictions (and in certain abusive situations). Interest payments made to a third party (non-intra-group) will not fall within the scope of this legislative proposal. Thus, interest payments to a third-party lender should not become subject to the conditional withholding tax.

4.2 Other Taxes, Duties, Charges or Tax Considerations

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

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

Further, the Netherlands imposes an insurance premium tax (*assurantiebelasting*) with respect to insurances covering risks situated in the Netherlands. Risks are deemed to be situated in the Netherlands if the insured person is located in the Netherlands. The tax base for purposes of the insurance premium tax is the net premium for the insurance plus the consideration charged for services in connection with the insurance, excluding the insurance premium tax itself. The insurance premium tax rate is 21%.

The Dutch tax authorities are in principle a "preferred creditor" – ie, claims of the Dutch tax authorities have preference over claims of other (non-preferred) creditors. However, claims secured by a right of pledge or a right of mortgage in principle rank ahead of claims of the Dutch tax authorities – except, for example, in respect of a right of pledge over certain movable goods (*bodemgoederen*). Please see **7.3 The Order Creditors Are paid On Insolvency**, below.

4.3 Usury Laws

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

5. Guarantees and Security

5.1 Assets and Forms of Security

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

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

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

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

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

Registered shares in a limited liability company whose shares are registered on a regulated market or MTF are pledged by means of a written instrument that can be executed without the involvement of a Dutch civil law notary. Unless the company whose shares are being pledged is a party to the instrument, the right of pledge must be acknowledged by it in writing in order to be valid. Alternatively, the right of pledge can be created on an undisclosed basis, which requires that the deed of pledge is executed before a Dutch civil law notary or registered with the Dutch tax authorities.

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

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

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

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

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

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

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

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

5.2 Floating Charges or Other Universal or Similar Security Interests

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

5.3 Downstream, Upstream and Cross-stream Guarantees

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

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

5.4 Restrictions on Target

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

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

5.5 Other Restrictions

Fraudulent Conveyance

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

Corporate Approvals

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

Works Council Advice

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

If the advice is positive or neutral, the company can proceed with the decision-making process and implement the decision. If the advice is negative, the company must explain to the works council why the decision was not in line with the advice. It must wait one month before the decision can be implemented. During that month, the works council can lodge an appeal against the decision with the Enterprise Chamber of the Amsterdam Court of Appeal. The decision can be declared null if one or more formal requirements have not been complied with. In addition, the Enterprise Chamber can rule that the decision (and any measures taken towards its implementation) must be reversed if the company, given the interests of all parties involved, could not have reasonably taken the decision.

5.6 Release of Typical Forms of Security

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

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

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

5.7 Rules Governing the Priority of Competing Security Interests

Priority of Competing Security Rights

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

Subordination of Liabilities

As a general principle of Dutch law, all liabilities of a debtor rank pari passu, with the exception of liabilities that are mandatorily preferred by law or those that are subordinated by agreement between the parties. Dutch law makes a distinction between subordination within the strict sense of the word (referred to as "actual subordination") and subordination within the broader sense of the word (referred to as "quasi-subordination").

Survival in Insolvency

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

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

Actual Subordination

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

Quasi-subordination

Quasi-subordination does not result in a departure from the pari passu principle, but is intended to have a similar economic effect. In Dutch legal practice, various methods of quasi-subordination are used. These include arrangements pursuant to which the junior liabilities do not become due and payable before all senior liabilities have been satisfied in full. Another method used is an arrangement between a junior creditor and a senior creditor that provides for the turnover to the senior creditor of any proceeds realised by the junior creditor. A third method entails the creation of a right of pledge over the junior liabilities as security for payment of the senior liabilities.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Enforcement of Dutch Security

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

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

Mortgage over Registered Assets

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

Pledge over Registered Shares

In principle, a right of pledge over registered shares can be enforced by way of a public sale but this method is seldom used in practice. As an alternative to public sale, a pledgee may request the competent court to (i) approve a private sale of the shares, or (ii) allow the pledgee to appropriate the

shares at a price determined by the court. As a final alternative, the pledgee and the pledgor may agree upon an alternative form of execution (including a private sale to a third party) without the involvement of the courts. However, this option is only available after the pledgee has become entitled to enforce the right of pledge.

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

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

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

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

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

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

6.2 Foreign Law and Jurisdiction

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

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

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

6.3 A Judgment Given by a Foreign Court

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

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

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

Arbitration
If the country of a chosen arbitration panel is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 (the Convention), an arbitral award duly obtained on the basis of the submission to arbitration contained in a contract in accordance with its terms will be recognised and

enforced by the Dutch courts in accordance with and subject to the provisions of the Convention, and the applicable provisions of the Dutch Code of Civil Procedure.

In the absence of a treaty or if an applicable treaty allows to invoke the laws of the country where recognition and enforcement is requested, a party can request recognition and enforcement of a foreign arbitral award in the Netherlands on submission of the original or a certified copy of the arbitration contract and the arbitral award.

6.4 A Foreign Lender's Ability to Enforce Its Rights

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

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

Currently, there are no rescue or reorganisation procedures outside of insolvency proceedings available under Dutch law. However, there are two legislative initiatives that will change this in the near future.

The first initiative comes from the EU – the Directive on restructuring and insolvency ((EU) 2019/1023) entered into force on 16 July 2019. The Netherlands has to implement (the substantive parts of) the directive in its legislation by 17 July 2021 at the latest, although a one-year extension can be granted.

The key feature of the directive is the introduction of a preventive restructuring framework. The directive requires EU Member States to ensure that preventive restructuring frameworks are available for debtors who are in financial difficulty and likely to fall into insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor.

This year, the Dutch government submitted a legislative proposal (Act on the Confirmation of a Private Restructuring Plan (Wet homologatie onderhands akkoord)) to introduce a new preventative restructuring tool. The tool appears to meet the requirements of a restructuring framework within the meaning of the directive. However, for the implementation of the directive a separate legislative proposal will be prepared. It is expected that the legislative proposal will propose to implement the restructuring framework requirements of the directive by amending the existing suspension of payments procedure.

7.2 Impact of Insolvency Processes

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

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

7.3 The Order Creditors Are Paid on Insolvency

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

7.4 Concept of Equitable Subordination

The concept of equitable subordination is not a known concept under Dutch law. In bankruptcy, loans extended by shareholders are not subordinated by law. There are a few judgments in which Dutch courts held that pursuant to the specific facts and circumstances of the case, an exception to the paritas creditorum was justified and that the claim of the shareholder should be subordinated. However, so far, the Dutch Supreme Court has not rendered a judgment on the basis of which a shareholder's loan is deemed subordinated without a specific contractual provision.

7.5 Risk Areas for Lenders

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

8. Project Finance

8.1 Introduction to Project Finance

In the 1990s, project financing was still in its early stages in the Netherlands. Initially it was only applied in the energy sector (cogeneration plants) and a limited number of industrial installations. This changed when public private partnership (PPP)/private finance initiative (PFI) came over from the UK.

After the financing of the High Speed Rail Link in 2001 (which was mainly run by UK advisors) the financing of the Harnaschpolder Wastewater Treatment Plant and the second Coentunnel followed. For the latter project, a standard DBFM Agreement was developed which, although regularly reviewed, is still in use. Under the Dutch DBFM(O) programme, more than EUR13 billion has been provided through project financing (notably road infrastructure, buildings and locks). The vast majority of these projects have been delivered on time and within budget. The programme is attractive to foreign contractors, investors and financiers because the conditions for tendering and the agreement itself are clear and the Netherlands is a politically stable country. However, in some projects, contractors have suffered substantial losses, as a result of which the popularity of the contract form in that part of the market has declined sharply.

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

Several projects are also due for refinancing – the first project that was refinanced under the Dutch DBFM(O) programme was the National Military Museum (2017).

Last year, 2018, was a particularly active one for infrastructure PPP transactions in the Netherlands, with three significant projects reaching financial close, with the largest being the Blankenburg Connection near Rotterdam. In 2019 there are two significant infrastructure projects in the pipeline, with one scheduled to reach financial close and another in the process of tendering.

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

8.2 Overview of Public-Private Partnership Transactions

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

The majority of PPP transactions, including private financings, are tendered by the Dutch central government, such as the Ministry of Infrastructure and Water Management (*Ministerie van Infrastructuur en Waterstaat*) through the Directorate-General for Public Works and Water Management (*Rijkswaterstaat*). The procurement process is governed by the Public Procurement Act 2012 (*Aanbestedingswet* 2012) which implements the European Directives 2014/23/EU, 2014/24/EU and 2014/25/EU. Whether this Act applies depends on the characteristics of the particular project, for example if the value exceeds a certain financial threshold.

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

8.3 Government Approvals, Taxes, Fees or Other Charges

Governmental Approvals

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

Taxes, Fees and Other Charges

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

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

Registrations and Filings

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

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

Governing Law

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

8.4 The Responsible Government Body

Energy policy and legislation in the Netherlands are primarily determined by the Minister for Economic Affairs and Climate Policy (*Minister van Economische Zaken en Klimaat*). The Authority for Consumers and Markets (*Autoriteit Consument en Markt*) is the national energy regulatory authority. The Electricity Act 1998 (*Elektriciteitswet* 1998) primarily regulates the production, transport and supply of electricity. The Mining Act (*Mijnbouwwet*) primarily regulates the

production and offshore transport of minerals. The Gas Act (*Gaswet*) regulates the transport and supply of gas. The Nuclear Energy Act (*Kernenergiewet*) applies to nuclear energy. The Offshore Wind Energy Act (*Wet Windenergie op zee*) applies in respect of offshore wind energy projects.

8.5 The Main Issues When Structuring Deals

Overview

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

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

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

Legal Form of Project Company and Relevant Laws

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

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

Restrictions on Foreign Investment and any Relevant Treaties

Dutch law does not impose any restrictions on foreign investments specific to project finance transactions. However, current and proposed legislation and treaties may impact certain types of projects.

In March 2019, the Dutch government submitted a legislative proposal amending the Telecommunications Act (*Telecommunicatiewet*) with respect to undesirable control in telecommunication parties. The proposal aims to create a legal basis for preventing an undesired party to acquire such control in the communication infrastructure or service provision so that it can misuse this control.

In April 2019 the Foreign Direct Investments Regulation (Regulation 2019/452/EU) came into force and shall apply from 11 October 2020. The regulation submits all investments by non-EU investors to a screening if such investments are likely to affect the security or the public order of a Member State or of the EU. The Netherlands is party to the Energy Charter Treaty, which, among other things, focuses on the protection of foreign investments, non-discrimination and investment dispute resolution.

8.6 Typical Financing Sources and Structures for Project Financings

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

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

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

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

8.7 The Acquisition and Export of Natural Resources

The Netherlands is one of Europe's largest gas producers and exporters, with the Groningen natural gas field being one of the largest onshore gas fields in the world. On 29 March 2018, the Dutch Minister of Economic Affairs and Climate announced that natural gas extraction from this field will be terminated entirely in the coming years. This decision is due to the negative impact of natural gas extraction in the province of Groningen – ie, earthquakes and consequential damage to buildings. The coalition agreement presented by the current Dutch government states that no exploration permits will be issued for new onshore gas fields during this government's term of office.

The ownership of minerals located 100m or more below the surface is regulated in and pursuant to the Mining Act. Title to such minerals vests in the Dutch State and transfers to the holder of the production licence upon extraction of the oil or gas from the subsoil.

An exploration or production licence (as the case may be) is required for the exploration or production of minerals. Licence holders have certain financial obligations, including the duty to pay (i) surface right (*oppervlakterecht*), (ii) severance tax (*cijns*), (iii) profit share (*winstaandeel*), and (iv) a one-time payment to the relevant province (*afdracht aan de provincie*) based on the size of the area used.

8.8 Environmental, Health and Safety Laws

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

A special regime applies to large infrastructure projects, in which case the relevant permissions follow from the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*). In that case the Minister of Infrastructure and Environment (*Minister van Infrastructuur en Waterstaat*) is the competent regulatory body.

In addition, other permits and approvals could be required depending on the nature of the activities.

From 1 January 2021, almost all legislation relating to impacts on the physical environment will be consolidated in one comprehensive Environment and Planning Act (*Omgevingswet*).

In regard to health and safety, the Working Conditions Act (*Arbeidsomstandighedenwet*) and affiliated legislation apply to the conditions on the project site.

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9. Islamic Finance

9.1 The Development of Islamic Finance

There is no well-developed market for Islamic finance in the Netherlands, although recent studies suggest a growing demand for Islamic finance products, particularly residential home mortgage loans. Dutch banks do not currently offer Islamic finance solutions. This may change in the future due to growing demand but it remains to be seen at what pace the market will develop. We are aware of a small number of Dutch Shari'a-compliant real estate transactions that were funded by (the Islamic desks of) financial institutions outside the Netherlands. Although the existing Dutch legal framework generally supports Islamic finance structures, there are no policy initiatives that are specifically aimed at stimulating this particular market.

9.2 Regulatory and Tax Framework

There is no Dutch regulatory and tax framework with a specific focus on Islamic finance, nor do Islamic finance products enjoy any particular beneficial treatment in the Netherlands. The existing regulatory framework would apply to Islamic finance activities to the extent that such activities fall within the scope of that framework. The same goes for the existing tax framework.

A considerable obstacle for the introduction of Islamic residential home mortgage loan products in the Netherlands seems to be that the Dutch tax authorities do not consider the profit paid in those transactions to qualify as interest for purposes of mortgage interest income tax relief. This would make Islamic residential home mortgage loans more expensive than Dutch conventional residential home mortgage loans.

9.3 Main Shari'a-compliant Products

For reasons discussed above, Shari'a-compliant products remain fairly rare in the Netherlands.

9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

Dutch law seems generally adequate to facilitate the issuance of sukuk. Sukuk transactions outside the Netherlands for the financing of one or more assets are often structured on the basis of common law trust concepts to meet the Shari'a requirement that the sukuk holders hold some form of ownership in those assets. As indicated above, the common law trust is not a concept of Dutch law as such and may not be recognised by a Dutch court.

Dutch law provides for alternatives to meet the ownership requirement mentioned above. One of these alternatives entails the transfer of the economic ownership of the underlying assets to the sukuk holders whereas the legal ownership of the assets remains with the issuer. The transfer of economic interest does not normally give the acquirer any pre-

ferred rights in a bankruptcy of the legal owner. This means that the assets would fall within the bankruptcy estate and that the rights of the economic owner are limited to a set of contractual rights against the legal owner.

9.5 Recent Notable Cases

We are not aware of any significant Dutch case law which concern Shari'a-compliant finance products or structures.