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Financing Corporate Rescue – The Dutch Approach. A Cross-Border Comparison

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Introduction

On 22 November 2016, the European Commission (hereafter: 'Commission'), issued a proposal for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (hereafter: 'EC Proposal').[1] The Proposal is in line with the 'corporate rescue trend' that is currently ongoing throughout the world.[2]

In a nutshell, corporate rescue aims to rescue viable companies or their businesses from liquidation. It is held to benefit all stakeholders involved, as it can preserve employment, increase recovery rates for creditors, and allows shareholders to keep their investments. It presumes that stakeholders will receive a higher pay-out in corporate rescue scenario than in a liquidation scenario.[3]

In order to facilitate corporate rescue, it is imperative that the debtor's business is continued throughout the rescue attempt.[4] Access to finance will then be vital. This, however, also touches upon the heart of companies in distress: there is generally a lack of liquidity. *Ergo*, new finance[5] has to be found elsewhere. Nevertheless, as it is uncertain whether a company can meet its obligations, financiers are generally

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[1] Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (Proposal)' COM(2016) 723 final.

[2] Cf R Parry, 'Introduction' in K Gromek-Broc and R Parry (eds), *Corporate Rescue: An Overview of Recent Developments* (2nd edn, Kluwer Law International 2006) 1.

[3] ibid 2.

[4] ibid.

[5] Also known as 'fresh money', 'new money', 'post-commencement finance', 'post-petition finance' or 'rescue finance'.

reluctant to provide new finance. Hence, especially if they need it the most – in distress – companies have a hard time attracting finance.

The EC Proposal recognises this problem and seeks to incentivise the provision of new finance to companies in distress. Article 16(1) of the EC Proposal therefore states the following:

> "Member States shall ensure that new financing and interim financing are adequately encouraged and protected. In particular, new and interim financing shall not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith."

Internationally, as is also acknowledged in the EC Proposal,[6] it is accepted that, in order to encourage the provision of new finance, proper incentives to do so need to be in place. In accordance, many countries have accorded (super-)priority to new finance.[7]

This article sets out to critically assess new financing provisions in the Netherlands to determine whether Dutch law currently complies with the EC Proposal. Thereto, we will first briefly discuss Dutch corporate rescue culture. We will notice that, in the Netherlands, corporate rescue predominantly takes place outside of formal insolvency proceedings ('informal rescue'). Further, with regard to the status of new finance, a comparison will be drawn with the United States of America (hereafter: 'US') – arguably seen as the benchmark with regard to incentivising new finance in the corporate rescue context. It will be apparent that the provision of new finance outside of formal proceedings is quite risky. In formal proceedings, the incentives are – to a certain extent – quite similar to those available in the US.

After discussing the current situation, the article will briefly go over some upcoming changes to Dutch insolvency law and give some concluding remarks. Considering the potential effect of changes to formal insolvency law on informal rescue, it may be questionable whether becoming EC Proposal-compliant will have the desired effect. One may argue that the well-functioning Dutch informal rescue culture justifies an alternative approach. The article argues that, instead of providing a statutory basis for incentives in formal proceedings, the focus should lie more on protecting the provision of new finance in *bona fide* informal rescue attempts.

Corporate Rescue Culture

Corporate Rescue

Once a creditor becomes aware that a company faces financial difficulties, he will likely seek to protect its own position. A creditor may, for instance, demand (immediate) payment or (attempt to) seize the company's assets through judicial

[6] Article 16(2) EC Proposal.
[7] Doing Business, 'Resolving Insolvency: New Funding and Business Survival' (World Bank 2016) 102.

procedures. If multiple creditors take up this approach, an extra strain on liquidity is inevitable and may well push the company over the edge – resulting in a 'piecemeal liquidation sale'. If the assets of the business as a whole ('going-concern') represent a higher value than the piecemeal liquidation value, this individual approach destroys value.[8]

Corporate rescue essentially aims to avoid the abovementioned scenario. The objective is to reorganise – rather than liquidate – companies in distress.[9] As mentioned, an effective corporate rescue regime is held to benefit all stakeholders involved as it allows for the preservation of value.[10] If rescue is an option, it should take place sooner rather than later as a company's going-concern value may deteriorate quickly.[11]

Informal rescue can play an important role in that regard. Several characteristics make it preferable over formal proceedings. First, it takes place in relative quiet.[12] The negative effects of publicity and accompanying stigma related to insolvency are evaded.[13] It is based on consensus between creditors and thus for a more customised approach. The costs relating to formal proceedings can also be avoided.[14] Nonetheless, this perceived flexibility may also prove to be a downside. The lack of a 'cram down'-mechanism makes it impossible to bind dissenting creditors and may result in creditors (ab)using their 'nuisance value' in order to improve their pay-out.[15] Further, informal rescue does not prevent individual creditors from enforcing their claims.[16]

Alternative to informal rescue, parties can seek to obtain rescue through formal proceedings. Although less flexible, it generally does provide for court supervision and restricts creditors from enforcing their claims. As such, formal proceedings are believed to have a disciplining effect on the success rate of informal rescues and the two should interact accordingly.[17]

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[8] G McCormack, 'Corporate Rescue Law in Singapore and the Appropriateness of Chapter 11 of the US Bankruptcy Code as a Model' (2008) 20 Singapore Academy of Law Journal 396, 396.
[9] H Zhang, *Making an Efficient and Well-Functioning Corporate Rescue System in Chinese Bankruptcy Laws: from the Perspective of a Comparative Study between England and China* (PhD thesis, University of Leicester 2008) 3.
[10] See Parry (n 2) 3.
[11] See MB Jacoby and EJ Janger, 'Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy' (2014) 123(4) Yale Law Journal 862, 865.
[12] The World Bank, *Principles and Guidelines for Effective Insolvency and Credit Rights Systems* (World Bank 2001) (hereafter: 'World Bank Principles 2001') 46.
[13] World Bank Principles 2001, 54.
[14] INSOL International, *Statement of Principles of a Global Approach to Multi-Creditor Workouts* (INSOL International 2000) 12; World Bank Principles 2001, 54.
[15] SW Van den Berg, 'WCO II: de *cram down* beschouwd vanuit waarderingsperspectief' *TvI* 2014/7 237, 239.
[16] JM Garrido, *Out of Court Debt Restructuring* (World Bank Publications 2012) 13-16.
[17] UNCITRAL Legislative Guide 9-10.

Further, it must be noted that there is a distinction between company rescue and business rescue.[18] Under company rescue we understand the rescue of both the company ('the legal entity') and its business.[19] Business rescue allows the (viable part of the) business to be sold on a going-concern basis. The company dissolves while the business remains and the creditors receive the proceeds of the (partial) business sale.[20]

The United States

In 1978, under Title 11 of the US Code, a new bankruptcy law was introduced (the 'Code').[21] The Code recognises several formal insolvency proceedings, arranged into different chapters. For the corporate debtor, the most important ones are the liquidation proceedings of Chapter 7 and the reorganisation proceedings of Chapter 11. Considering the scope of this article, the focus will lie on the latter.

Chapter 11: Reorganisation

Chapter 11 intends to avoid liquidation and promote the reorganisation and rehabilitation of a distressed company.[22] Moreover, it aims to achieve equality of distribution among similarly situated creditors.[23] The proceedings generally commence upon the debtor's filing of a petition with the bankruptcy court.[24] Although there is no prerequisite for the company to be in a state of insolvency, there must be a genuine reorganisational goal.[25] Upon commencement, an automatic stay is triggered to withhold creditors from enforcing their claims against the company and its assets. [26]

Following the filing of a petition, the debtor becomes a debtor-in-possession (hereafter: 'DIP'). In accordance, the existing management remains in place but transforms into a 'quasi-trustee' and enjoys – to a certain extent – powers similar to a trustee.[27] In this capacity, the DIP has a fiduciary duty to act in the best interest of the estate, which includes the interests of creditors and other parties of interest.[28]

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[18] It goes beyond the scope of this article to discuss the distinction in full. RJ Mokal, 'Administrative Receivership and Administration—An Analysis' (2004) 57(1) Current Legal Problems 355, 361.
[19] S Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67(2) Modern Law Review 247, 248.
[20] ibid 249.
[21] Bankruptcy Reform Act 1978, Pub L. 95-598, 92 Stat. 2549 (codified as title 11 of the US code).
[22] SJ Davido, 'Making sense of US bankruptcy law' (1992) 3(12) International Company and Commercial Law Review 406, 406. However, the proceedings may be used to facilitate an orderly way of liquidation as well. See 11 USC §1123(b)(4).
[23] 11 USC §§1101-1174. See Senate Report no. 95-989, 95th Congress, 2nd Session (1978) 9-12.
[24] 11 USC §301. Proceedings may also be initiated involuntarily. See 11 USC §303.
[25] See *SGL Carbon Corporation (In re)* 200 F.3d 154 (3d Cir. 1999).
[26] 11 USC §362. Nevertheless, the stay is not absolute; where it has a detrimental effect on a party of interest, the stay may be lifted by the court. See House Report no. 95-595, 95th Congress, 1st Session (1977) 340.
[27] 11 USC §1107; G McCormack, *Corporate Rescue Law – An Anglo-American Perspective* (Edward Elgar 2008) 80. Although under certain circumstances, the court may decide to appoint a trustee instead. See e.g. 11 USC §1104(a) and (e) .
[28] *LaSalle National Bank v Perelman* 82 F. Supp.2d 279, 292-93 (D. Del. 2000).

Ideally, a Chapter 11 procedure concludes with the confirmation of a reorganisation plan. During the first 120 days, the DIP has the exclusive right to propose said plan to the company's creditors and shareholders.[29] The holders of claims or interests are placed into separate classes with other claims or interests that are substantially similar to them.[30] The plan must be accepted by all classes of claims or interests, although unimpaired classes are presumed to accept the plan.[31] Still, the plan may be forced upon uncooperative creditors regardless, thus allowing the reorganisation to take place despite a lack of unanimity and thereby discouraging creditors to hold out in order to receive better treatment.[32] Taking into account the far-reaching implications a cram down may have on a creditor's position, there are several safeguards in place to ensure that creditors will not be unduly harmed.[33]

Once the court confirms the reorganisation plan, it becomes binding upon the debtor and its creditors. The debtor subsequently receives a discharge and the procedure comes to an end.[34]

Pre-Packaged Chapter 11

The exclusive 120-day period will not always be sufficient for the DIP to come up with a reorganisation plan. There is therefore a trend noticeable where the debtor obtains approval for the reorganisation plan by the main impaired classes of creditors before filing.[35] Subsequently, the filing of a bankruptcy petition is accompanied by a reorganisation plan; a so-called 'pre-packaged Chapter 11'.[36]

The pre-pack minimises the time spend in the formal procedure, thus allowing deterioration of value to be kept to a minimum. In addition, the threat of a cram down may be utilised in order to tackle the biggest problem with informal rescue: the hold-out problem.[37] Lastly, going to the formal procedure may lead to the preservation of tax benefits.[38]

Despite the abovementioned advantages, a successful pre-pack still requires a great level of consensus. This may not be in line with the – often complex – reality of the situation.[39] Further, the process may lack transparency, which, in turn, may conflict with the principle of similar treatment of similarly situated creditors.[40]

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[29] 11 USC §1121.
[30] 11 USC §1122.
[31] 11 USC §1126(f).
[32] McCormack (n 28) 88.
[33] It goes beyond the scope of this article to discuss these safeguards, but among these can be considered, *inter alia*, the safeguards mentioned in 11 USC §§1129. See further ibid 86-89.
[34] 11 USC §1141(a) and §1141(d)(1).
[35] L Qi, 'The Rise of Pre-Packaged Corporate Rescue on both Sides of the Atlantic' (2007) 20(9) Insolvency Intelligence 129, 132.
[36] F Teloni, 'Chapter 11 Duration, Pre-planned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era' (2015) 23 American Bankruptcy Institute Law Review 571, 572.
[37] Qi (n 35) 132; JJ McConnell and H Servaes, 'The Economics of Pre-Packaged Bankruptcy' (1991) 4(2) Journal of Applied Corporate Finance 93, 94-95.
[38] Qi (n 35) 132.
[39] McConnell and H Servaes (n 37) 94.
[40] 11 USC §1123(a)(4); see Qi (n 35) 132.

Theoretically, the latter situation does not occur as court-confirmation is required. However, due to fierce competition between bankruptcy courts to attract filings, the strict requirements are not always upheld in practice; resulting in higher refiling rates and lower pay outs for creditors.[41]

Section 363-Sales

Chapter 11 also allows for another, slightly more controversial, alternative. Under section 363, the sale of (substantially) all of the debtor's assets – free and clear of both interests and claims – may take place.[42] The DIP may sell its business by motion, notion and hearing; no confirmation of the reorganisation plan has to take place.[43] This is cheaper and more time efficient than the abovementioned alternatives.[44] Selling the assets free and clear of both interests and claims allows for a higher price. The proceeds of such sale may subsequently be used to pay off (secured) creditors and creditors may enter into new (financing) agreements with the purchasing party. Moreover, a fast section 363 sale may preserve employment.[45]

Nevertheless, one may argue that 363 sales are merely aimed towards circumventing the Chapter 11 safeguards and should thus be deemed invalid.[46] Taking into account the clear benefits for secured creditors and lenders, the fear of the DIP being pressured into a 363 business sale is very real.[47] Even though courts are obliged to investigate whether the sale is for a 'good business reason', the influence of competition between bankruptcy courts must not be underestimated.[48]

The Netherlands

The Dutch Insolvency Code (*Faillissementswet*, hereafter: 'Fw') was introduced in 1896 and, apart from some minor changes, is still applicable today. It provides for two types of insolvency procedures: (i) suspension of payments (*surseance van*

[41] LM LoPucki and SD Kalin, 'The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a 'Race to the Bottom'' (2001) 54 Vanderbilt Law Review 231, 237 and 264.
[42] 11 USC §363(f); GW Kuney, 'Hijacking Chapter 11' (2004) 21 Bankruptcy Developments Journal 19, 105.
[43] 11 USC §363(b); see JJ Hurley, 'Chapter 11 Alternative: Section 363 Sale of All of the Debtor's Assets Outside a Plan of Reorganization' (1984) 58 American Bankruptcy Law Journal 233, 235.
[44] GW Kuney, 'Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from
Bankruptcy' (2004) 40(5) Houston Law Review 1265, 1273.
[45] Kuney (n 42) 108-09.
[46] *Braniff Airways, Inc., (In re)* 700 F.2d at 935, 940 (5th Cir. 1983); K Korres, 'Bankrupting Bankruptcy: Circumventing Chapter 11 Protections Through Manipulation of the Business Justification Standard in § 363
Asset Sales, and a Refined Standard to Safeguard Against Abuse' (2013) 63(4) Florida Law Review 959, 965.
[47] Korres (n 46) 961.
[48] *Lionel Corp., (In re)* 722 F.2d 1063, 1069 (2d Cir. 1983); Korres (n 46) 961; GW Kuney, 'Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process' (2002) 76 American Bankruptcy Law Journal 235, 236.

betaling); and (ii) bankruptcy (*faillissement*).[49] While Dutch bankruptcy proceedings are primarily aimed towards the liquidation of companies, it must be noted that there is also room for corporate rescue to take place. Hence, considering the scope of this article, bankruptcy will only be dealt with to the extent where it allows for corporate rescue.

Bankruptcy: Reorganisation Plan

As part of bankruptcy proceedings, the debtor may offer his creditors a reorganisation plan (*faillissementsakkoord*).[50] There is no distinction between classes. Once a majority – both in total value of claims and in number of ordinary creditors – votes in favour of it, the plan will be accepted.[51] Even where a reorganisation plan is rejected, it may still be crammed down upon creditors if this rejection is due to unreasonable voting behaviour.[52] Once accepted, a court needs to confirm the plan and, upon confirmation, the plan becomes binding on all ordinary creditors.[53]

Still, this option has several drawbacks is not always an option in practice.[54] For one, only debtor may offer a reorganisation plan; the court-appointed trustee (*curator*) nor creditors can initiate a reorganisation plan.[55] Further, the plan only binds unsecured creditors. And, lastly, the trustee will need to disclose a written opinion regarding the plan.[56]

Suspension of Payments

Suspension of payments is available for the debtor that *foresees* that he will not be able to continue the payment of his due and payable debts.[57] Upon request, the court shall immediately grant a provisional suspension of payments and an administrator (*bewindvoerder*) will be appointed.[58] The debtor is required to act in tandem with

[49] See SCJJ Kortmann and NED Faber (eds), *Geschiedenis van de Faillissementswet. Heruitgave Van der Feltz, I* (Tjeenk Willink 1994) 55ff.
[50] Article 138 Fw.
[51] Article 145 Fw.
[52] Article 146 Fw.
[53] Article 150-157 Fw. It must be noted here that creditors may oppose against the sanctioning of the plan. Under certain circumstances, the court will be bound to deny confirmation or will have the discretion to do so.
[54] In practice, less than 5% of all bankruptcies end this way. See B Wessels, 'Over aanbod en aanvaarding van een faillissementsakkoord als meerpartijenovereenkomst van eigen aard' in CG Breedveld-de Voogd and others (eds), *De meerpartijenovereenkomst* (Wolters Kluwer 2015) 235, 237.
[55] Article 138 Fw.
[56] Articles 157 and 140 Fw respectively. See further RJ Van Galen, 'The Netherlands: Dutch Expedited Reorganization Proceedings' in R Olivares-Caminal (ed), *Expedited Corporate Debt Restructuring in the EU* (OUP 2015) 533-34; JM Hummelen, 'A Response to the Financial Crisis: Recalibration of Bankruptcy Law' (2014) 11(5) International Corporate Rescue 297, 298-99.
[57] Article 214 Fw. Where a bankruptcy and suspension request are both pending, the suspension request will be dealt with first. See Article 218(6) Fw.
[58] Article 215 Fw.

the appointed administrator.[59] Non-preferential and ordinary unsecured creditors will be affected by a moratorium and any payments towards unsecured creditors will be on a *pari passu* basis.[60]

For the definitive suspension (up to maximum of eighteen months), a creditors' meeting must take place. Rejection of the suspension results into the declaration of the debtor's bankruptcy.[61]

Throughout the suspension, it is possible to propose a reorganisation plan. Alternatively, one can accompany the suspension request with a reorganisation plan. The latter option allows the court to immediately set a date for the voting upon the plan. The basic rules of the reorganisation plan are similar to that of a plan in bankruptcy proceedings.[62]

The suspension proceedings however, also suffer from certain drawbacks. First, it suffers from the stigma attached to formal proceedings.[63] Second, the moratorium does not affect secured and preferential creditors. Third, most suspension requests are not accompanied by a proper reorganisation plan.[64] Lastly, suspension proceedings are not exempted from the drag-along rules of the Business Transfer Directive and therefore make it difficult to dispose of unwanted employees.[65] Hence, the suspension proceedings may be considered a 'gateway to bankruptcy'.[66]

Restart

Another option is the 'restart'. This is a classic business rescue tool; similar to 363 sales, the trustee sells the (viable parts of the) business through an asset sale and distributes the proceeds amongst the creditors.[67]

The upside of this method are that much of the going-concern value can be retained, whilst creditors are likely to yield better returns. In addition, it allows for the preservation of jobs.[68] Nonetheless, it suffers from some classic business rescue-related drawbacks as well. For one, continuing performance contracts are not automatically transferred. Further, the (partial) business sale often demands that licenses be renewed and may lead to (considerable) delay. Lastly, with regard to the

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[59] Article 228(1) Fw respectively Article 215(2) Fw. Failure to act in tandem does not bind the estate (unless it is beneficial to the estate), see Article 228(2) Fw.
[60] Article 232 Fw. Secured creditors may nonetheless fall subject to a cooling-off period.
[61] Article 218(5) Fw. Nonetheless, the conversion does not alter the status of acts committed during the provisional suspension period. See Article 249 Fw.
[62] See Article 252 Fw and following.
[63] Van Galen (n 56) 536.
[64] ER Looyen, *Surseance van betaling. Praktijkboek Insolventierecht. Deel 8* (Kluwer 2010) 11-12.
[65]Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of
undertakings or businesses. See Hummelen (n 56) 299-300.
[66] RJ Van Galen, 'De surseance als echte reorganisatieprocedure' *TvI* 2015/23 150.
[67] NJ Polak, *Insolventierecht* (13th edn, Kluwer 2014) 238.
[68] ibid 238-39.

distribution of proceeds, it is not possible to deviate from the statutory bankruptcy waterfall.[69]

Semi-Formal Corporate Rescue: the Pre-Packed Restart

Similar to the US, the restart is often prepared beforehand (the 'pre-pack') in order to limit the time spent in formal proceedings.[70] Here, the court informally indicates who will be appointed as trustee in a bankruptcy procedure. This 'envisaged trustee' will investigate possibilities and prepare a restart in relative quiet.[71] This allows the actual business sale to take place within hours after the declaration of bankruptcy, thereby preserving as much going-concern value as possible.

However, the pre-pack is subject to scrutiny. First, it lacks a statutory basis and has therefore long been unclear what the status of the pre-pack is. Second, there is a lack of transparency, which may result in distortion of competition and has the potential to result in a subpar price. Lastly, it is often argued that the pre-pack could be abused in order to dispose of employees, contracts, and debt.[72]

Following the ruling of the EU Court of Justice (hereafter: ECJ) of 22 June 2017, the Business Transfer Directive is applicable to restarts. The ECJ came to the conclusion that the pre-pack does not meet the requirements of the exception mentioned in article 5 of the Business Transfer Directive.[73] Accordingly, the pre-pack will become a less attractive option.

Informal Corporate Rescue: the Silent Suspension of Payments

Following the above, corporate rescue is not often obtained through formal proceedings. This, however, disregards informal rescue possibilities. Rescue in the Netherlands predominantly takes place outside of formal proceedings through a so-called 'silent suspension of payments' (*stille surseance*) and yields great results.[74]

In the Netherlands, the relationship between the company and bank (the 'housebank') is not simply limited to providing secured loans; the housebank often also provides other financial services. Financial covenants incorporated in credit documentation allow the bank to closely monitor the (financial) status of a company.[75] Hence, the bank notices distress at an early time and can guide the

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[69] Van Galen (n 66) 150.
[70] See NWA Tollenaar, 'Faillissementsrechters van Nederland: geef ons de pre-pack!' *TvI* 2011/23.
[71] Polak (n 67) 39-40.
[72] For an overview of the discussion, with reference to relevant sources, see JR Hurenkamp, 'Failliet of fast forward? Een analyse van de pre-pack in de praktijk' *TvI* 2015/20.
[73] Case C-126/16 *Federatie Nederlandse Vakvereniging v Smallsteps BV* 22 June 2017.
[74] See TJH Akkermans, *De informele reorganisatie van insolvente ondernemingen. Faillissementswet - Voorontwerp Insolventiewet 1-0* (Celsus 2009) 40. The silent suspension is held to lead rescue 60-70% of the companies that enter into it. See Den Brinker and W Keuning, 'Bijzonder beheer bij banken bijna terug op niveau van voor crisis' Het Financieele Dagblad 3 October 2016. Nevertheless, it must be noted that, due to its informal nature, it is difficult to fact-check these numbers.
[75] See N Van Beers and others, 'De Nederlandse financieringsstructuur in perspectief. Bijlage bij CPB Policy Brief 2015/14 'Een wereld zonder banken? Marktfinanciering en bankfinanciering in perspectief'' CPB Backgrounddocument 27 August 2015 11-31, available at

company accordingly, thus drastically improving the chances of a successful rescue.[76]

The process is generally as follows. First, the dossier will be transferred to the bank's 'special care unit' (*Bijzonder Beheer*), which investigates the state of the company and the possibilities for a turnaround. Although the primary focus here lies on safeguarding the bank's position, the bank is also willing to initiate and monitor an informal reorganisation – provided that the company is viable.[77] If the bank has faith in the company's plans, it will usually continue financing (albeit under (more) stringent conditions). Furthermore, stakeholders generally sign a *standstill agreement* which often entails a rescue plan.[78] In addition, the bank's ability to pressure a company into taking sufficient reorganizational measures, such as appointing a *chief restructuring officer* (hereafter: CRO) is considered a great asset.[79]

The informal nature of the procedure allows for a flexible approach.[80] Still, the silent suspension is met with scepticism. Some believe that banks act primarily in their own interest and may actually push companies into insolvency. [81] Recent research does not underwrite these claims.[82] This seems logical, as banks simply need to obey the law. Moreover, banks are under constant scrutiny by virtue of the media and various supervision authorities (i.e. the European Central Bank, the Dutch National Bank etc.). Apart from that, their conduct needs to be in line with the Dutch Banking Code. Lastly, acting in a non-honourable way could lead to serious reputational damage.

A Brief Comparison

If we look at the commencement of formal proceedings, it becomes apparent that Chapter 11 proceedings may commence at an earlier time: there is no formal threshold. Paradoxically, entering into formal proceedings early, makes corporate

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<https://www.cpb.nl/sites/default/files/publicaties/download/cpb-achtergronddocument-27aug2015-denederlandse-financieringsstructuur-perspectief.pdf>; AMJG Van Amsterdam, *Insolventie in Economisch Perspectief* (diss. Vrije Universiteit van Amsterdam) (Boom Juridische Uitgevers 2004) 196 and 211.

[76] PJM Declercq, 'Rechten van schuldeisers in andere stelsels: hoe kijkt men in het buitenland naar Nederland' *TvI* 2010/4.

[77] See R Van den Bosch, 'Financiering, insolventie, boedelkrediet. Een realistische en praktische benadering' in MALM Willems and others (eds), *Praktijkboek Insolventierecht. Deel 4. Financiering en zekerheden* (Kluwer 2008) 40-45.

[78] RJ Abendroth, 'Herfinanciering van noodlijdende ondernemingen' in G Van Solinge and others (eds), *De financiering van de onderneming* (Kluwer 2006) 51, 53.

[79] It must be noted here that there is a fine line between pressuring and being a *de facto* policymaker. The latter situation may potentially result in liability in bankruptcy and should thus be avoided. See Articles 2:138 and 2:248(7) Dutch Civil Code. Further, see JAA Adriaanse and JG Kuijl, 'De paradoxale rol van banken in financiële moeilijkheden' *Accounting* 2004/10, 28-32.

[80] Akkermans (n 74) 33-34.

[81] As is illustrated by the dossier on the website Follow the Money. Available at <https://www.ftm.nl/dossier/bijzonder-beheer>.

[82] Authority Financial Markets, 'Rapportage Bijzonder Beheer. Een verkennend onderzoek naar de werkwijze van de afdeling bijzonder beheer van banken voor mkb-kredieten' (26 March 2015) 3-5. Available at <https://www.afm.nl/~/profmedia/files/rapporten/2015/bijzonder-beheer.ashx>.

rescue more likely.[83] Further, the debtor seems to have a (much) stronger position, as he remains in possession – as opposed to being replaced or having to act in tandem with an administrator. In addition, a moratorium with a broad scope provides the DIP with some breathing space. The voting process with regard to a reorganisation plan also varies drastically, instead of voting as one class, the creditors and shareholders in the US are divided into several classes.

Still, despite the difference in proceedings, we see similar developments. In both jurisdictions, parties try to limit the time actually spent in formal proceedings by preparing a plan before entering into formal proceedings. On another note, we see that the initial debtor-friendliness attributed to US insolvency law, is much more creditor-driven in practice. This is especially noticeable from the (often creditor-initiated) 363 sales.

If we then take into account the strong informal corporate rescue culture in the Netherlands, it is not a far stretch to argue that the Dutch are more rescue-minded than Dutch insolvency laws seem to indicate. Also, there are quite a few similarities to US law. First, informal rescue is generally initiated once the first signs of distress become apparent. The time of commencement here, can be held to occur roughly at the same time as a Chapter 11 procedure. Further, although less stringent, a standstill agreement might function similarly to the US' stay. Lastly, the silent suspension can be deemed a semi-DIP procedure; the debtor remains in possession.

Financing Corporate Rescue

Lenders generally feel reluctant to finance a company that is substantially indebted – a problem known as 'debt overhang'.[84] It will be unclear whether the provision of finance will lead to a successful rescue. In theory, existing creditors can offer contractual reassurance to financiers. This is however unlikely. First, it is difficult to get all creditors on board due to conflicting interests (the 'coordination problem'). Further, as rescue is not an exact science, creditors may feel as if they lack information to assess whether the rescue will be successful (the 'information asymmetry problem'). Consequently, creditors will feel reluctant to put their place on the distribution ladder on the line.[85]

Nonetheless, so long as the company has collateral available, the abovementioned is may not an issue, but this practice often not the case. Even *if* available, this will have adverse effects on unsecured creditors as it limits the assets available for distribution.[86]

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[83] RD Vriesendorp and R Van den Sigtenhorst, 'Herstructureringen in de moderne financieringspraktijk: Nederland vs. de V.S.' *NTHR* 2013/2 94, 96.
[84] See SC Myers, 'Determinants of Corporate Borrowing' (1977) 5(2) Journal of Financial Economics 147.
[85] DA Skeel, 'New Money and Privileges in Insolvency Proceedings' in H Peter, N Jeandin and J Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Schulthess Verlag 2006) 67-68.
[86] UNCITRAL Legislative Guide 115-16.

Hence, there is call for incentivising the provision of new finance. Proposed incentives range from granting (super-)priority to providers of new finance or granting the provider of new finance with a senior or equal security interest on existing collateral – so-called 'priming'.[87]

The United States

Taking into consideration that the mentioned incentives are largely inspired by the situation in the US, we will first discuss the situation there. It must be noted that the US legislator explicitly rejects an obligation to continue the provision of finance. Additionally, *ipso facto*-clauses in credit agreements are not prohibited.[88] The DIP must therefore rely on section 364 of the Code in order to obtain liquidity ('DIP finance').

Possible Providers of DIP Finance

Financing companies in the US is much more diversified than in the Netherlands. The company is therefore less dependent on one financier and has more entrepreneurial freedom. On the flipside, credit terms tend to be stricter and financiers seem less loyal.[89]

The previous also leads to the conclusion that the DIP has more options to obtain new finance. Besides the usual suspects – existing secured, under-secured, and unsecured parties – the DIP can also obtain finance from third party lenders (often specialised in DIP financing).[90]

DIP Financing: Section 364

Under section 364(a), unsecured credit provided in the ordinary course of business is considered an administrative expense. To achieve this status, the credit must be an actual, necessary cost or expense to preserve the estate. The conditions are strictly interpreted and, in accordance, the status is generally reserved for trade credit.[91]

The DIP may also attract unsecured credit outside of the ordinary course of business. After notice and hearing of the parties of interest, this type of credit may also be provided an administrative expense-status by the court. This route can also be chosen in order to prevent uncertainty with regard to the qualification of a claim resulting from these transactions.[92]

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[87] ibid 116-17.
[88] 11 USC §365(c)(2) respectively §365(e)(2)(B).
[89] Van Amsterdam (n 75) 198.
[90] L Qi, 'Availability of Continuing Financing in Corporate Re-organization: the UK and US Perspective' (2008) 29(6) Company Lawyer 162, 164.
[91] DG Epstein, 'Post-petition Lending under Section 364: Current Issues - Incentives to Lenders to Provide Financing to Borrowers Who Are the Subject of Bankruptcy Cases' (1994) 41(3) Federal Bar News &Journal 190; GG Triantis, 'A Theory of the Regulation of Debtor-in-Possession Financing' (1993) 46 Vanderbilt Law Review 901, 905.
[92] 11 USC §364(b). See *Cascade Oil Company, Inc., (In re)* 51 BR 877, 883 (Bankr. D. Kan. 1985).

Still, under subsection b, the lender will not receive preferential treatment within the rank of the administrative expenses.[93]

Considering that court authorisation is required either way, the lender will likely wish to improve its position under subsection c. Subsection c provides that, where the DIP needs is "unable to obtain unsecured credit" on a mere administrative expense-basis,[94] the court may grant the DIP lender with priority over all administrative expenses ('super-priority'). In addition, the DIP lender may be granted a security interest in unencumbered assets or a junior security interest in encumbered assets.[95]

For the latter option, it is essential that the value of the debtor's secured assets is higher than the secured debt (the 'equity cushion').[96] In this regard, a negative pledge is not considered much of an obstacle as the Code essentially eliminates its effectiveness.[97]

The last incentive section 364 mentions, is the priming security interest. The procedure is similar to that of the previous two subsections – authorisation will only take place after notice and hearing. Priming allows the lender to obtain a senior or equal security interest on encumbered assets.[98]

Subsection d is considered 'a last resort'. It requires that other options to obtain credit are unavailable.[99] Further, section 364(d) requires 'adequate protection' for existing secured creditors.[100] In short, options for said protection are: (i) cash payments; (ii) an additional or replacement security interest; and (iii) any other form of protection which resembles an indubitable equivalent of the secured creditor's interests in the collateral.[101]

The prerequisite of adequate protection leads to a paradox. Indeed, if no lender is willing to provide credit without receiving a priming security interest, how can the DIP then assure that the interests of existing secured creditors are adequately protected? Accordingly, priming is not often authorised.[102]

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[93] 11 USC §503(b)(1).
[94] This is not an absolute requirement. The DIP needs to demonstrate a 'good faith effort'. See *Snow shoe Co. Re,* 789 F.2d 1085, 1088 (4th Cir. 1986). Further, see BA Henoch, 'Postpetition Financing: is There Life After Debt?' (1991) 8 Bankruptcy Developments Journal 575, 584-85.
[95] 11 USC §364(c). See e.g. *Sobiech*, *(In re)* 125 BR 110, 115 (Bankr. S.D.N.Y. 1991).
[96] Obviously, without a sufficient equity cushion, a junior security interest can effectively be rendered worthless. See Henoch (n 94) 588.
[97] The threat of a suit would be ineffective due to the automatic stay. Even so, bankruptcy courts seem to have little interest in a possible breach of negative pledge clauses. K Ayotte and DA Skeel, 'Bankruptcy Law as Liquidity Provider' University of Chicago Law Review (2013) 80(4) 1557, 1591.
[98] 11 USC §364(d). Thereto, creditors must be adequately notified. See Henoch (n 94) 591.
[99] See e.g. *Snow shoe Co. Re,* 789 F.2d 1085, 1088 (4th Cir. 1986); *Qualitech Steel Corp., (In re)* 276 F.3d 245, 248 (7th Cir. 2001); *495 Central Park Avenue Corp., (In re)* 136 BR 626, 630 (Bankr. S.D.N.Y. 1992).
[100] Senate Report no. 95-989, 95th Congress, 2nd Session (1978) 53.
[101] 11 USC §361.
[102] G McCormack, 'Super-Priority New Financing and Corporate Rescue' [2007] Journal of Business Law 701, 715-16; Kuney (n 42) 48-49; DG Baird and TH Jackson, 'Corporate Reorganisations and the

The restrictive approach is deemed justified because, if the protection turns out to be inadequate, the primed secured creditor will receive a mere, essentially worthless, priority estate claim.[103] In consequence, a more lenient approach towards priming would increase risk for lenders, which, in turn, will increase the price of credit altogether.[104]

The Netherlands: Financing Informal Rescue

Lender Liability

The influence of banks is held to have a positive effect on informal rescue attempts. Nevertheless, financing in the 'twilight zone' is not without risk. Both continuing or discontinuing the credit relationship exposes the bank to risk.

First, although financiers are – in principal – free to terminate credit agreements, they cannot do so lightly. The termination of a credit agreement has to be acceptable by measures of reasonableness and fairness. If not, financiers may be forced to continue the credit agreement and/or will be held liable for damages.[105]

On the flipside, financing needs to be compliant with banking standards. Continuing to provide finance may imply to other creditors that a company is still viable. As such, it may expose the bank to the risk of liability due to 'keeping up the appearance of creditworthiness'.[106]

Avoidance Risk

Where new finance is provided against security, the transaction may fall subject to avoidance actions (*actio pauliana*) where certain prerequisites have been met. Dutch law differentiates between avoidance actions against obligatory acts and against voluntary acts.[107]

Dutch credit documentation usually provides for a 'positive pledge'; upon request of the lender, the debtor will provide additional collateral.[108] Acting conform the credit documentation is deemed an obligatory act. As such, it can only be avoided if

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Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 University of Chicago Law Review 97, 126-27.

[103] 11 USC §507(b). See e.g. *Carpet Center Leasing Co. Inc., (In re)* 991 F.2d 682 (11th Cir. 1993); *Blehm Land & Cattle Company, (In re)* 859 F.2d 137, 141 (10th Cir. 1988).

[104] Following also FEJ Beekhoven van den Boezem, 'De faillissementsprocedure wordt maatschappelijk relevant: hoera?', *TvI* 2008/2 71, 74.

[105] See HR 10 October 2014, *NJ* 2015, 70 (*ING/De Keijzer Beheer c.s.*). Further, see LJ Van Eeghen, *Het schemergebied vóór faillissement. Een onderzoek naar de wenselijke verdeling van verhaalsrisico's van de onderneming vóór faillissement* (Boom Juridische uitgevers 2006) 316-18; AJ Verdaas, 'De maatstaf voor de beëindiging van een kredietovereenkomst en de toepassing daarvan' *TvI* 2015/38.

[106] See P Vos, *Kredietopvraging en insolventierisico, overlevingskansen van bedrijven in financiële moeilijkheden en de Faillissementswet* (diss. Leiden University) (Kluwer 2003) 227-29. See, for example, HR 28 June 1957, *NJ* 1957, 514 (*Manifattura Tessile Erba/Amsterdamse Bank*). See also D Roffel, 'Opzegging van de financiering, voortzetting van de onderneming en schijn van kredietwaardigheid. Butterman q.q./Rabobank revisited' *FIP* 2012/7.

[107] Articles 42 and 47 Fw.

[108] See article 26 Dutch General Banking Conditions.

the counterparty is aware that bankruptcy is petitioned for[109] and that there is the aim – in the form of *collusion* between parties – to benefit the counterparty.[110] Due to a strict interpretation of article 47 Fw, said acts are hard to avoid.[111]

Voluntary acts are easier to avoid. Said acts must not be based on a legal or contractual obligation.[112] Further, the act has to be prejudicial towards creditors[113] and the debtor has to be aware of this prejudice. If the act is for consideration, knowledge from the counterparty of the debtor is required. Knowledge is presumed to exist if "at the time the act is performed the opening of the insolvency procedure and a deficit in the insolvency procedure were foreseeable with a reasonable amount of probability for both the debtor and its counterparty."[114] Considering that predicting the outcome of a rescue attempt is not an exact science, this requirement could expose the bank to being judged with 'brilliance of hindsight'.[115]

Fortunately for financiers, the Dutch Supreme Court has ruled that rebuttable presumptions do not apply in the situation where a financier provides new finance against new security.[116]

Nevertheless, the previous does not take into account the cross-border risks of an informal rescue attempt. Even if the provision of new finance may be completely justified under Dutch law, this may not be recognised as such in other jurisdictions. If formal insolvency proceedings commence outside of the Netherlands, there is a risk that the provision of new finance (against security) will be subject to local avoidance actions. In such an event, it may be very difficult to prove that the provision of new finance (against security) was, indeed, *bona fide*.[117]

Set-Off Risk

In a nutshell, set-off under Dutch law requires that two parties are – at the same time – each other's debtor and creditor. Their obligations must be similar and each of the claims must be due and payable.[118] In bankruptcy, the rules for set-off are less strict

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[109] See HR 16 June 2000, *NJ* 2000, 578 (*Van Dooren q.q./ABN Amro I*) and HR 29 June 2001, *NJ* 2001, 662
(*Meijs q.q./Bank of Tokyo*).
[110] See HR 24 March 1995, *NJ* 1995, 628 (*Gispen q.q./IFN*) and HR 20 December 1998, *NJ* 1999, 611 (*Verkerk/Tiethoff q.q.*).
[111] See also G Van Dijck, *De faillissementspauliana: revisie van een relict* (diss. University of Tilburg) (Wolf Legal Publishers 2006) 54-56.
[112] HR 8 January 1937, *NJ* 1937, 431 (*Van der Feltz q.q./N.V. Hoornsche Crediet- en Effectenbank*).
[113] HR 19 October 2001, *NJ* 2001, 654 (*Diepstraten/Gilhuis q.q.*). Further, the mere chance of prejudice is insufficient. See HR 17 November 2000, *NJ* 2001, 272 (*Bakker q.q./Katko*).
[114] HR 22 December 2009, *NJ* 2010, 273 (*ABN Amro/Van Dooren q.q. III*).
[115] This holds especially true if you consider that the trustee has a rebuttable presumption (article 43(1)(2) Fw) at its disposal. See e.g. Van Dijck (n 111) 124; JT Jol and RHWA Verhoeven, 'Noodkrediet in nood' in NED Faber and others (eds), *Bancaire zekerheid: liber amicorum Mr. J.H.S.G.K. Timmermans* (Kluwer 2010) 225-38.
[116] HR 29 November 2013, *NJ* 2014, 9 (*Roeffen q.q./Jaya*).
[117] Cf article 13 Council Regulation (EC) No. 1346/2000 on insolvency proceedings. See Case C-310/14 *Nike European Operations Netherlands BV vs Sportland Oy* [2015] Bus L.R. 1547.
[118] Article 6:217(2) DCC.

than outside of it.[119] To prevent abuse, article 54(1) Fw states that one may not acquire claims or debt if he is not acting in good faith. This is determined by whether the party, based on what he knew or ought to have known at the time of acquiring the claim or debt, had sufficient reason to understand that a bankruptcy proceeding would commence.[120]

During a rescue attempt, it is imperative that the debtor has access to its bank account. Payments coming in are directly set-off by the bank. The bank effectively benefits from its central role with regard to cashless payments. The Dutch Supreme Court considers this to go against the equality of creditors. In accordance, the bank is under an obligation to reserve incoming payments for the trustee.[121] An exception to this rule is where incoming payments concern claims subject to a silent pledge.[122]

Where a rescue entails the selling of encumbered assets, cooperation of the secured creditors is required. Here, it is suggested that the bank may circumvent the strict set-off rules by (a) establishing a (silent) pledge on the payments; or (b) requiring direct payment.[123] Further, the bank could allow an alternative way of execution,[124] whereby the debtor sells assets to the benefit of the bank. Incoming payments on the debtor's accounts may then be 'set-off' as part of the execution.[125]

The Netherlands: Financing Formal Rescue

The situation in formal proceedings is vastly different. Under Dutch insolvency law, the trustee or administrator[126] is allowed to continue the business.[127] As part thereof, the trustee may attract new finance; so-called 'estate credit' (*boedelkrediet*).[128]

Generally, estate credit is obtained by a credit agreement between the debtor's estate (represented by the trustee) and a financier.[129] As it is based on explicit action of the

[119] Article 53(1) Fw; Polak (n 67) 192. This criterion should not be interpreted too broadly. See HR 10 January 1975, *NJ* 1976, 249 (*Giro/Standaardfilms*); HR 27 January 1989, *NJ* 1989, 422 (*Otex/Steenbergen*).
[120] RM Wibier and FA Van Tilburg, 'Verrekening en faillissement; artikel 54 Fw en de centrale positie van banken in het betalingsverkeer' *NTHR* 2015/5 249-57; HR 7 October 1988, *NJ* 1989, 449 (*AMRO/Curatoren THB*).
[121] HR 8 July 1987, *NJ* 1988, 104 (*Loeffen q.q./Bank Mees en Hope I*). See CM Van der Heijden and IPL Van Munster, 'Verrekening' in AW De Man, NWA Tollenaar and RHWA Verhoeven (eds), Praktijkboek *Insolventierecht. Deel 3. Ongeoorloofde gedragingen. Actio pauliana, Verrekening, De curator en de bestrijding van faillissementsfraude* (Kluwer 2013) 79.
[122] HR 17 February 1995, *NJ* 1996, 471 (*Mulder q.q./CLBN*).
[123] HR 19 November 2004, *NJ* 2005, 199 (*ING/Gunning q.q.*)
[124] Article 3:251(2) DCC. See HR 25 February 2011, *NJ* 2012, 74 (*ING/Hielkema q.q.*)
[125] HR 14 February 2014, *NJ* 2014, 264 (*Feenstra q.q./ING*).
[126] For ease of reference, we will refer to trustee only.
[127] Article 98 Fw.
[128] LW Mooij, RHWA Verhoeven and JT Jol, 'Van boedelkrediet tot noodkrediet' in NED Faber, JJ Van Hees and NSGJ Vermunt (eds), *Overeenkomsten en Insolventie* (Wolters Kluwer 2012) 292. No distinction is made between estate credit attracted in suspension- or in bankruptcy proceedings, as the actions in suspension proceedings are respected in bankruptcy. See article 249(1) Fw.
[129] Van den Bosch (n 77) 36-37; ibid 292.

trustee, the obligations resulting from the arrangement will be given an estate claim-status. It therefore ranks ahead of pre-existing unsecured claims.[130]

Repayment is for instance largely dependent on the proceeds generated by the continued business and the status of competing estate claims. The number, size, and rank of competing estate claims may therefore considerably influence the availability of estate credit.[131]

Providers of Estate Credit

Taking into account its role in the process, the housebank can be held a likely provider of estate credit: he can determine fastest and easiest whether the provision of estate credit is feasible.[132] However, the opening of formal proceedings implies a failed informal rescue attempt. As such, financing will be dependent on whether the housebanks is convinced that this leads to a higher pay-out than in a liquidation scenario. The most likely reasons are that: (a) ongoing projects can be finished; (b) a restart is at hand; or (c) a (partial) business sale can take place.[133] Some argue that financiers base their decision on whether or not they have exposure; without exposure, there is little incentive to provide estate credit as their claim will be covered. [134]

Others claim that the relationship between financier and company (or its management) plays an important role; the decision will thus not always be based on rational, economic grounds.

In case the housebank is not an option, estate credit depends on the availability of an alternative financier; e.g. another (consortium of) bank(s), another company, or investor.[135] Considering the information disadvantage of said financiers compared to the housebank, it remains to be seen whether this is a realistic scenario.[136]

Ranking

Unless the law indicates otherwise, all estate claims are ranked the same.[137] Nevertheless, it is accepted that the trustee has some discretion. Estate claims arising from certain obligations that are beneficial to the estate as a whole, could therefore be granted a priority status.[138]

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[130] Article 68 respectively 228 Fw.
[131] Mooij, Verhoeven and Jol (n 128) 293.
[132] ibid 293.
[133] JHSGK Timmermans, 'De Curator en het Boedelkrediet' in JG Princen and A van der Schee (eds), *De ondernemende curator. Insolad Jaarboek 2011* (Kluwer 2011) 65-66.
[134] WJM Van Andel, 'Afkoelen en warmhouden' WPNR 2008/139 506, 511; ibid 66.
[135] Van den Bosch (n 77) 36.
[136] Cf HB Oosterhout, *De doorstart van de insolvente onderneming* (Kluwer 1998) 101-03.
[137] HR 28 September 1990, *NJ* 1991, 305 (*De Ranitz q.q./Ontvanger*). An exception to this rule are claims that occur as a result of an 'unmistakeable error', see HR 5 September 1997, *NJ* 1998, 437 (*Ontvanger/Hamm q.q.*). This exception is narrowly interpreted. See HR 8 June 2007, *NJ* 2007, 419 (*Van der Werff q.q./BLG*).
[138] HR 12 May 1989, *NJ* 1989, 1613 (*Reco/Staat*); HR 24 June 1994, *NJ* 1995, 368 (*INB/Klützow*); HR 20 March

As estate credit could enable rescue (and expedite liquidation), one could argue that priority would be justified. The financier could thus be seen as a specialist providing services to the estate.[139]

Estate credit often has a limited recourse character. This for instance the case with the financing of ongoing projects. Here, the proceeds flowing from the finished projects will be split following a specific distribution key and part of the proceeds will therefore be reserved for repayment. In other words; the bank receives factual priority.[140]

Incentives: Granting a (Priming) Security Interest?

Following the above, receiving an estate claim-status is no guarantee for repayment. Hence, the financier often makes the provision of credit dependent on whether other parties will provide subordinated debt or equity.[141]

Preferably, the financier will be granted security. Still, as mentioned, unencumbered assets will usually be unavailable. As it is common practice that credit documentation provides for a 'negative pledge', granting a security interest in encumbered assets is generally not an option either. The debtor, and – in line with *Berzona*[142] – the trustee, will therefore not be allowed to grant a (junior) security interest on encumbered assets without the existing secured creditor's consent.

Likewise, the trustee cannot create an equal or senior security interest on encumbered assets, nor can he seek to obtain a court-order for it.[143] Still, where the existing financier provides the new finance, it could be an option to combine existing credit with the estate credit and grant new security for the combined credit agreement ('cross-collateralisation').[144] Where there is exposure, however, this could lead to unjustified preferential treatment of the financier and a distortion of the *paritas creditorum*.[145] From a commercial standpoint, allowing cross-collateralisation could nevertheless be justified were the advantages outweigh the disadvantages.[146]

As such, priming seems difficult to fit in with the existing system. Nonetheless, as was confirmed in the *Payroll*-case[147], under certain circumstances, the refusal to

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1981, *NJ* 1981, 640 (*Veluwse Nutsbedrijven*); Timmermans (n 133) 70. By its nature, the trustee's remuneration will nevertheless retain the highest rank. See HR 28 September 1990, *NJ* 1991, 305 (*De Ranitz q.q./Ontvanger*).

[139] Timmermans (n 133) 70.

[140] Mooij, Verhoeven and Jol (n 128) 295.

[141] Timmermans (n 133) 70.

[142] HR 11 June 2014, *NJ* 2014, 407 (*ABN AMRO/Berzona*) 2 May 1989, *NJ* 1989, 1613 (*Reco/Staat*); HR 24 June 1994, *NJ* 1995, 368 (*INB/Klützow*)

[143] TT Van Zanten, *De overeenkomst in het insolventierecht* (diss. University of Groningen) (Kluwer 2012) 374; PJM Declercq, 'Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding... The Netherlands Chapter 11?' (2003) 77 American Bankruptcy Law Journal 392-93.

[144] EWJH De Liagre Böhl, *Sanering en Faillissement: naar huidig en nieuw recht* (Kluwer 1991) 239.

[145] AL Leuftink, *Surséance van betaling* (Kluwer 1995) 154.

[146] De Liagre Böhl (n 144) 239; ibid.

[147] HR 12 August 2005, *NJ* 2006, 230 (*Payroll*).

cooperate with a rescue attempt can be considered an abuse of power.[148] Whereas the context in *Payroll* was the refusal to consent to an arrangement outside of formal proceedings, a later case indicates that the ruling could be interpreted more broadly.[149]

In accordance, the abuse of power-doctrine could theoretically function as a justification for priming under Dutch law. This should not be taken lightly. Certain requirements will have to be met. First, in line with *Payroll*, it must become apparent – from facts and circumstances – that the dissenting creditor abuses its power, and that, in consequence, he cannot – in all reasonableness – refuse consent. Further, the trustee will need to substantiate that rescue is the preferred option (as it benefits the creditors as a whole), that he is unable to attract new finance otherwise, and that the position of the existing creditor is sufficiently protected.[150]

If we critically assess these requirements, we will see that priming – although possible – will likely remain a theoretical option. Abuse of power is already difficult to prove as it is. Substantiating that rescue is the preferred option also means a challenge as quantifying whether rescue will be successful is by no means an exact science.[151] Moreover, inability to attract new finance elsewhere is hard to fit in with rescue as the preferred option. As recently discussed in the US part, the provision of sufficient protection is generally not straightforward either.

Restrictions to Obtaining Estate Credit

The fact that reorganisations predominantly take place outside of formal proceedings may pose a problem for the successful obtainment of estate credit. Clearly, an unsuccessful informal rescue attempt indicates that the company is not viable as such. Hence, there is no economic justification for the provision of new finance.[152] In accordance, as discussed earlier, it is unlikely for an alternative financier to step up.

Where the housebank is caught off guard by the bankruptcy, it will usually terminate the credit agreement straight away and enforce its security. Maximisation of the collateral's value will then be its prime focus. Any provision of additional credit will likely be aimed towards this goal. Consequently, the terms of the credit agreement will explicitly prescribe how the credit may be used.[153]

Another restriction may be the reluctance of the trustee to seek new finance. The trustee can only obtain estate credit for the continuation of the business if this is in the best interest of the estate. The credit agreement, and meeting the strict conditions thereof, may however place a burden on the estate. Further, especially where financing takes place against collateral, the debtor's pool of assets often declines,

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[148] Article 3:13(2) DCC.
[149] HR 24 March 2017, *JOR* 2017, 209.
[150] Cf B Wessels, *Insolventierecht. Deel VI. Het akkoord* (4th edn, Kluwer 2013) §6222-6240.
[151] NB Pannevis, 'Een rationele benadering van kansen en uitkomsten bij reddingspogingen' *TvI* 2017/37.
[152] Mooij, Verhoeven and Jol (n 128) 294.
[153] ibid; Van den Bosch (n 77) 43-44.

therefore essentially shifting the risk of rescue towards existing creditors. The trustee will thus need to have a good reason to continue the business, otherwise he might face liability (either *qualitate qua* or *pro se*).[154]

A Comparison

The Purpose of New Finance in Rescue Proceedings

In the Netherlands, we see that the purpose of new finance differs depending on whether the provision thereof takes place within the context of informal or formal rescue attempts. In times of distress, virtue to the housebank's early warning mechanisms, the bank can be considered an important factor in the outcome of an informal rescue attempt. Generally, the bank will (continue to) provide (new) finance, thereby allowing the debtor to reorganise without the immediate threat of having its credit lines cut off.[155] Furthermore, the bank's involvement may stimulate other creditors to cooperate as well. On the other side, where the housebank is not cooperative, the predominance of the housebank and its information advantage could restrict the debtor from obtaining new finance elsewhere.

The same essentially holds true for formal proceedings. As the commencement of formal proceedings is often preceded by an unsuccessful informal rescue attempt, the housebank will likely deem the company non-viable and will not be interested to provide new finance in order to facilitate reorganisation.[156] Estate credit is then more likely to function as interim financing, specifically if (i) there are ongoing projects waiting to be finished; (ii) a restart is in the papers; or (iii) a going-concern sale of (parts of) the business may be achieved. Considering the bank's information advantage with regard to the company's status, alternative financiers will typically not be keen on providing new finance either.

In the US, DIP financing is usually geared towards facilitating reorganisation. DIP financing explicitly allows the company to continue its business activities while an automatic stay is in place. In this regard, it can be considered an asset that US companies are less reliant on bank debt. In accordance, debtors will have more options to attract new finance in times of distress.

In conclusion, we see that the difference in financing culture influence possibilities to attract new finance. Against a (perceived) lack of possibilities to attract new finance from alternative financiers in the Netherlands, we see better monitoring and a more loyal financier. On the other side, in the US, financiers seem less loyal, but there are more alternatives to attract new finance. Hence, less certainty here, seems to result in more opportunity.

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[154] See HR 19 April 1996, *NJ* 1996, 727 (*Maclou en Prouvost*); HR 16 december 2011, *NJ* 2012, 515 (*Prakke/Gips*) and HR 19 December 2003, *NJ* 2004, 293 (*Mobell*). See further Mooij, Verhoeven and Jol (n 128) 294; MAJG Janssen, 'Taken en Aansprakelijkheid curator' *FIP* 2010/5 140ff.

[155] Provided that the debtor meets the (more) stringent conditions under which credit is provided.

[156] Mooij, Verhoeven and Jol (n 128) 294

Attraction and Authorisation of New Finance in Formal Proceedings

As mentioned, the Dutch trustee may attract new finance where he deems this justified. In this regard, the trustee is believed to have a certain discretion. Safeguards mentioned in the Bankruptcy Code, such as *ex ante* court-confirmation after notice and a hearing, are unavailable under Dutch law. The trustee also has no obligation to show that the credit is "an actual, necessary cost or expense to preserve the estate," nor that he is "unable to obtain unsecured credit" otherwise.

One could argue that said safeguards are not required. For one, the trustee acts in the interest of the body of creditors. He must act in a way that can reasonably be expected of a trustee with sufficient insight and experience that acts in a conscientious and dedicated manner.[157] If not, he could face personal liability. Hence, a smart trustee will only attract new finance if he has reason to believe that this is, indeed, in the best interest of the body of creditors.[158]

The DIP, on the other hand, has less discretion. Attracting new finance – except where attracted in the ordinary course of business – requires *ex ante* court approval. Although the DIP has a fiduciary duty to act in the best interest of the estate, he also has an interest as the debtor. He is thus not completely independent, thereby warranting stricter monitoring.

Incentives

Earlier, we have seen that the Dutch trustee has (partially) similar means to attract new finance. Whereas Dutch insolvency law lacks explicit provisions for the granting of a (super-)priority status, it is accepted that the trustee may grant certain estate claims with higher ranking (equivalent to super-priority) if he deems this necessary.

Apart from the situation wherein credit is provided in the ordinary course of business, the DIP will have to acquire court-authorisation in order to grant priority. This ensures that super-priority does not unjustifiably prejudice creditors, but – as the process can be considered costly and time-consuming – may also prove a hurdle for the obtainment of new finance.

Alternatively, or in addition to the provision of super-priority, the provider of new finance may be granted a security interest. If available, the DIP may grant this on unencumbered assets. If not, and in spite of negative pledge clauses in credit documentation – it is possible to grant a junior security interest in already encumbered assets. The same cannot be said for the situation in the Netherlands. Here, negative pledge clauses prove an important obstacle because existing contrasts have to be respected in bankruptcy.[159] Granting a junior security interest will thus require the existing secured creditor's consent.

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[157] HR 19 April 1996, *NJ* 1996, 727 (*Maclou en Prouvost*).
[158] It is not uncommon for a trustee to seek the advice of the supervisory judge.
[159] HR 11 June 2014, *NJ* 2014, 407 (*ABN AMRO/Berzona*).

If the existing financier provides new finance, he may cross-collateralise security for his existing credit with estate credit, thereby 'upgrading' the status of his pre-insolvency claim. Even though this might improve the existing creditor's position in an unjustified manner, it is a great incentive to attract new finance and it could thus be commercially justified to do so regardless.

The most controversial incentive of DIP financing is the ability to granting a priming security interest. As discussed, priming initially seems unavailable in the Netherlands. Nonetheless, it could theoretically be possible if certain – very – stringent conditions are met. In this case, priming will not be based on facilitating reorganisation (as in the US), but rather it would be based on the fact that a creditor abuses its power. However, the author deems it unlikely for a trustee to go through all this trouble, thereby potentially burdening the estate and risking personal liability. Accordingly, without an explicit legal basis, priming will likely remain a theoretical option only.

Financing Corporate Rescue: the Future

Legislative Program: 'Reassessment of Dutch Insolvency Law'

As the Fw is over 120 years old, it is not surprising that the law has become obsolete at some points.[160] The past few years, however, the Dutch Ministry of Justice and Safety, has shown intent to improve the existing law by way of a new legislative program – the 'Reassessment of Dutch Insolvency Law'. After providing a brief overview, we will discuss what the role – if any – of new finance provisions will be in that regard.

The legislative program consists of three pillars: (i) prevention of fraud, (ii) improving the reorganisational possibilities, and (iii) modernisation of formal proceedings.[161]

For the purpose of this article, the second pillar is of relevance. The aim, here, is to prevent unnecessary bankruptcies and encourage distressed companies to seek early action.

The second pillar is divided into three proposals. The first proposal – the Continuity of Enterprises Act I (*Wet Continuïteit Ondernemingen I*, hereafter: 'CEA I') – provides a statutory basis for the earlier discussed pre-packaged restart.[162] The second proposal allows for the court-sanctioning of restructuring plans outside of formal proceedings (*Wet Homologatie Onderhands Akkoord ter Voorkoming van Faillissement*, hereafter: 'WHOA'). Accordingly, it aims to avoid formal bankruptcy proceedings.[163] This seems ambiguous: the WHOA explicitly facilitates a restructuring outside of bankruptcy proceedings, but, at the same time, the proposed

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[160] See e.g. CJH Jansen, RJQ Klomp and JHA Lokin, 'W.L.P.A. Molengraaff (1858-1931) en de Faillissementswet' *TvI* 1996/5, 116.
[161] Parliamentary Documents II 2012/13, 29 911, no. 74.
[162] Explanatory Memorandum CEA I, 1-2.
[163] Explanatory Memorandum WHOA, 1.

provisions fall under the Fw. The last proposal is the Continuity of Enterprises Act III (*Wet Continuïteit Ondernemingen III*, hereafter: 'CEA III'). Although the exact content remains unclear, it is held to contain several measures that expedite liquidation and, accordingly, limit the adverse effects for affected parties.[164] These measures are, *inter alia*, believed to (i) provide the trustee with the ability to use, sell, or lease goods during the cooling-off period, (ii) set aside non-compete clauses, (iii) assume or reject existing contracts, and (iv) give a limited carve-out to secured creditors.[165]

Although the legislative program sets out to improve rescue possibilities under Dutch insolvency law, we see that the legislator has really taken into consideration the existing rescue culture of the Netherlands. As such, it does not necessarily 'improve' the reorganisational character of formal proceedings. The proposals – at least two out of three –seem more focused on avoiding or limiting the time spent in formal proceedings.

Financing under the Proposals

Interestingly, and contrary to international consensus, the reassessment seems to have largely ignored the issue of new finance. The CEA III-proposal, of course, could introduce explicit provisions, but since this proposal is yet to be published, it is unclear whether this will indeed be the case. So far, new finance provisions have not been mentioned in the Minister's biannual letters.[166] The next part will therefore remain limiting to the discussion of the CEA I- and the WHOA-proposal.

Financing under the CEA I-Proposal

The lack of new finance provisions in the context of the pre-pack seems logical: the actual need for new finance is simply limited. Some of the risks discussed with regard to the financing of informal rescue remain relevant however.

Even though a financier – due to the silent character of the procedure – does not need to be included in the preparation of a pre-pack, it will, in practice, be difficult do so without his cooperation. As such, the financier will likely be informed. From that point on, the financier will not be able to set-off any payments received on the debtor's bank account as he will not be in good faith.[167] Even simply continuing the credit agreement, might lead to liability for keeping up the appearance of creditworthiness. The strain on liquidity thus increases and it will be difficult to continue the business.

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[164] Explanatory Memorandum WHOA, 2.
[165] Following Hummelen (n 56) 303. Who refers to Parliamentary Documents II 2012/13, 29 911, no. 74, 2-3 and Parliamentary Documents II 2012/13, 33 695, no. 1, 5-6.
[166] See JM Hummelen, 'Het verkoopproces in een pre-packaged activatransactie' *TvI* 2015/2 fn 113; Parliamentary Documents II 2014/15, 33 695, no. 7, 3-4.
[167] Article 54 Fw.

Attracting new finance in a pre-pack scenario is not likely either. Under the assumption that collateral is even available, it will be risky to do so as such acts may be subject to transaction avoidance actions under article(s) 42 and/or 47 Fw.

Hence, while the actual need for new finance may be limited due to the limited timeframe during which finance is required, the lack of new finance provisions seems surprising. Especially if we take into account an earlier version of the proposal under which the silent trustee did have the ability to approve certain actions.[168] Although the relevant provision admittedly had some flaws and, therefore rightfully suffered heavy criticism,[169] it did offer protection to providers of new finance.

Financing under the WHOA-proposal

In the WHOA-proposal the legislator acknowledges that financiers require security and that this security may be subject to avoidance actions if granted in the pre-bankruptcy stage.[170]

A voluntary act by which new finance is provided against security (pledge or mortgage) in order to allow the debtor to make payments reasonably necessary to continue his business as part of a restructuring plan, will be presumed to not be prejudicial to creditors nor will it be presumed that there is knowledge of such prejudice.[171]

Once the plan has been proposed, the court has the discretion to suspend its decision regarding a subsequent filing for bankruptcy.[172] As the counterparty will then be aware of the filing for bankruptcy, this leaves obligatory acts committed within this timeframe vulnerable to avoidance actions. Article 47 Fw is thereto accordingly amended in order to exempt said acts from avoidance actions.

In our view, the proposed new finance provisions are unsatisfactory. First of all, it is not clear what 'new finance' beholds. Does the continuation or an expansion of a credit relationship fall under its scope or will the protection be for new credit relationships only? We would argue that – in line with our next point – the scope should be broad. Supposedly, only sanctions payments that are necessary for the continuation of the business are protected. This negates the fact that this is not always an easy distinction to make – when are costs 'operational costs'? – nor does it acknowledge that non-operational costs may very well have an important role to play in a rescue attempt.

Further, the proposed amendments do not take into account that the provision of new finance is often one part of an assembly of transactions aimed towards the restructuring of a company. Merely protecting the granting of a pledge of mortgage

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[168] Article 365(2)(a) Fw (proposed in first draft).
[169] See e.g. N Le Grand and S Renssen, 'Financieren tijdens de pre-pack periode: do or don't?' in JJA Hamers and others (eds), *Young Corporate Lawyers 2016* (Uitgeverij Paris 2016) 11, 16-17.
[170] Explanatory Memorandum WHOA, 16-17.
[171] Article 42a Fw (proposed).
[172] Article 3d Fw (proposed).

in said transactions is then simply not a great incentive if other (related) transactions – e.g. surety agreements[173] – still face the risk of being avoided. Consequently, new finance might not be available or the price of credit will be higher. It could be argued that the lack of clarity will also result in less rescue attempts as directors simply do not want to be held liable for a failed attempt – regardless of whether the attempt is *bona fide*.

Furthermore, the WHOA-proposal seems to ignore the set-off risks that follow from a rescue attempt.[174] Indeed, if the debtor is allowed access to its bank account during a rescue attempt, the bank could face liability for not having been in *good faith* at the time of set-off. Therefore, and to ensure that the bank will not prematurely terminate the credit relationship, it would be better to implement a provision that also protects set-off taking place in the context of a rescue attempt.

Alternatively, the legislator could opt for a system where certain transaction receive *ex ante* approval and are thus protected from the aforementioned risks in subsequent insolvency proceedings. The benefit of this alternative approach could be that transactions do not automatically receive protection and, as such, this could prevent abuse of the provisions. Nevertheless, this approach has its own drawbacks. *Ex ante* monitoring will lead to higher costs and lengthens the time of the procedure – two things of which there is, by definition, a lack of in times of distress.

Concluding Remarks

This article set out to assess new financing provisions in the Netherlands. To provide the reader with some context, we have first given a description of Dutch rescue culture. One of the noteworthy characteristics of Dutch rescue is the fact that corporate rescue in the Netherlands predominantly takes place outside of formal proceedings. Through the so-called silent suspension, banks seem to have a critical role to play with regard to the success of rescue attempts. On the flipside however, it may be concluded that Dutch companies which do enter formal proceedings – in spite of an informal rescue attempt – are non-viable, and will thus have to be liquidated. The predominance of informal rescue may therefore also explain the focus on liquidation in formal proceedings.

Outside of formal proceedings, financing distressed companies may prove to be risky. Next to the fact that financiers may be held liable for the continuation or discontinuation of credit relationships, we see that financing in twilight zone may give rise to avoidance actions – both in a national and in an international context. Further, we have seen that financiers face restrictions with regard to the setting-off of incoming payments on the debtor's bank account.

Financing in formal proceedings can therefore be considered more attractive. Even though Dutch insolvency law does not provide for explicit new finance provisions,

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[173] Article 7:850 Dutch Civil Code.

[174] This is all the more striking considering that the WHOA's predecessor – the Continuity of Enterprises Act II (*Wet Continuïteit Ondernemingen II*) *did* provide for an exception with regard to set-off during this timeframe.

the trustee nevertheless has several incentives at its disposal. In this regard, the incentives seem quite similar to those in the US. However, due to the predominance of informal rescue, we see that the provision of new finance in formal proceedings, in practice, is not aimed towards the facilitation of corporate rescue.

The Reassessment of Dutch Insolvency Law is aimed at taking away some of the restrictions in formal proceedings – thereby stimulating the development of Dutch (formal) rescue culture. Taking into account the objectives of the reassessment, it is striking to notice that the Dutch legislator largely ignores the issue of new finance. Where available, however, the legislator – and rightfully did so – considered the predominance of informal rescue. In accordance, the proposal seems to have focused on protecting the provision of new finance in informal rescue attempts. Despite this, the suggested protection seems to limited. It dismisses that the positive effect of new finance goes beyond simply facilitating the continuation of the business. Moreover, it dismisses the fact that provision of new finance is often one part in an assembly of transactions aimed towards the rehabilitation of a company. The same essentially holds true for set-off possibilities during a rescue attempt. For the continuation of the business throughout a rescue attempt it is essential that the debtor retains access to its bank account.

Hence, for the situation to actually improve, we must ensure that certain actions are not considered suspicious from the set go. To this end, the scope of the proposed provisions should be broadened. In line with the Proposal, the provision of new finance (and related transactions) should be protected and set-off should be allowed throughout the rescue attempt. Alternatively, prospective actions could receive *a priori* sanctioning. Limits to the given protection should subsequently be found in whether or not said acts have been carried out *fraudulently or in bad faith*. As such, the proposed provisions can be made "EC Proposal-proof".