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### Insider guarantees in corporate finance

*An economic analysis of Dutch, US and German law*

Jonkers, A.L.

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# CHAPTER 4

## Dutch law on opportunism with the guarantee relationship

### 1 Introduction

Chapter 3 discussed the guarantee relationship from the perspective of opportunism. This chapter analyses how Dutch law deals with the problems identified in chapter 3. The question addressed in this chapter is:

*How does Dutch law deal with opportunism with the guarantee relationship in the context of corporate finance?*

Most legal systems contain specific rules on opportunism in the internal relationship. Many of those rules are designed to protect the guarantor, who is often considered a weak party. After a short introduction of types of guarantees relevant to corporate finance in paragraph 2, Dutch law on the protection of weak parties, most notably the guarantor, will be discussed in paragraph 3. The focus lies on the context of corporate finance, in which shareholders or directors often guarantee debts of their company. The discussion of weak party protection in paragraph 3 will thus focus on the extent to which shareholders or directors are protected as weak parties.

After discussion of the rules protecting weak parties, the regulation under Dutch law of opportunism towards outsiders of the guarantee relationship (as identified in chapter 3 paragraph 3) will be analyzed extensively in paragraph 4. Here, the analysis really breaks new ground, as a comprehensive analysis of the regulation under Dutch law of such externalities of guarantees does not exist yet.

### 2 Introduction to types of guarantees in Dutch law

A guarantee relationship, in its simplest form consisting of a principal debtor, a creditor and a guarantor, can take different legal shapes. The guarantee relationship can for example be a suretyship in the sense of art. 7:850 BW, or an independent bank guarantee. Dependent on the

type of guarantee, a different regime can apply. Independent guarantees are not specifically regulated by the Dutch Civil Code itself, whereas there are many specific statutory rules in the Civil Code on suretyship. This paragraph discusses the basic types of guarantees under Dutch law. The archetype of a guarantee is suretyship (*'borgtocht'*), which will be discussed extensively in paragraph 2.1, after which a short overview of other common types follows. This paragraph serves to provide a basic understanding of Dutch law on personal security rights in order to be able to discuss opportunism in and with the relationship in paragraphs 3 and 4. The introduction to the types of guarantees should be read as an introduction and in no way aims to be comprehensive. Especially the independent guarantee and the group guarantee for accounting purposes will only be introduced shortly.

## 2.1 Suretyship ('borgtocht')

In Dutch law on personal security rights, the concept of joint and several liability (*'hoofdelijke verbondenheid'*) takes a central position. The Dutch Civil Code describes joint and several liability as occurring when several debtors are liable for the same debt, and each to the full amount of that debt (art. 6:6 paragraph 2 BW).<sup>526</sup> Suretyship (*'borgtocht'*) is a specific contractual form<sup>527</sup> of joint and several liability.<sup>528</sup> Suretyship is probably the most well-known type of a guarantee under Dutch law. A typical example of suretyship is the case in which a relative, for example a mother of the principal debtor guarantees the debt of her daughter towards a bank. Suretyship is also often used when a shareholder of a corporation guarantees the debts of the corporation towards a bank.

Art. 7:850 BW describes suretyship as a contract in which one party, the surety, guarantees the currently existing or future debt of a principal debtor towards the creditor of that debtor. The parliamentary history specified that a guarantee relationship amounts to a suretyship if the guarantor has presented himself towards the creditor as someone who is *not* liable for the debt in the internal relationship between the debtors.<sup>529</sup> In other words, the rules on suretyship apply in case the guarantor has presented himself as a guarantor. It can be relevant whether the words *borg* (surety) or *borgtocht* (suretyship) have been used, but this is not decisive for the qualification.<sup>530</sup>

The relevance of the qualification of suretyship is that the legislator has protected the surety through a detailed regime in art. 7:850 – 7:870 BW. The idea behind this protection is that suretyship is potentially dangerous for the surety. The regime provides default rules, many of which are mandatory law for consumer suretyship.

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<sup>526</sup> Doctrinally, each debtor has a separate obligation towards the creditor(s) to perform, instead of one obligation that binds all debtors (C.J.M. Klaassen, 2002, pp. 660; 663; Van Boom, 1999, pp. 10–13). Intrinsic and characteristic to the concept of joint and several liability is however that performance by one party discharges the other parties as well (art. 6:7 paragraph 2 BW) (Van Boom, 1999, pp. 29; 46; 48). In that sense, there is a connection between the separate obligations that are together characterized by joint and several liability.

<sup>527</sup> B. Wessels, 1994, p. 13

<sup>528</sup> C.J.M. Klaassen, 2002, p. 660; Asser/Van Schaick 7-VIII\* 2018/62; Bergervoet, 2014; B. Wessels, 1994, p. 10.

<sup>529</sup> See also Bergervoet, 2014.

<sup>530</sup> Parl. Gesch. Boek 7 (Inv. 3, 5 en 6) p. 418. See also C.J.M. Klaassen, 2002, p. 661; see extensively Bertrams, 2017.

Suretyship is by default a dependent and subsidiary liability. However, the contract of suretyship can deviate from the subsidiary nature and partly from the dependent nature, though only limitedly so in case of a consumer suretyship (art. 7:862 and 7:855 BW). The principal debtor's knowledge of or consent to the suretyship contract is not required (art. 7:850 paragraph 2 BW). The surety that pays the creditor, receives a statutory right of recourse to the principal debtor (art. 7:866 BW; art. 6:10 BW) and a statutory right of subrogation (art. 6:12 BW).

### 2.1.1 The relationship creditor-guarantor

Suretyship is a species of joint and several liability (see further paragraph 2.2 below). The surety is someone that has presented himself towards the creditor as someone who is not liable for the debt in the internal relationship between the debtors. In that sense, parties are not free to decide whether a guarantee relationship amounts to general joint and several liability or to suretyship. This applies equally to professional and consumer guarantors.<sup>531</sup> Thus, also professional guarantors profit from the regulation of suretyship in art. 7:850 ff. BW. Professional sureties however enjoy considerably less protection than consumer sureties. Firstly, the protection of articles 7:857-864 BW does not apply to professional sureties. Articles 7:852-856 BW (on defences, subsidiarity<sup>532</sup>, interest and costs, prescription, suretyship for payment in kind) do apply, but professional parties can in principle deviate from these by contract.<sup>533</sup> In that sense, suretyship of professional guarantors can closely resemble general joint and several liability as far as the relationship creditor-guarantor is concerned.<sup>534</sup>

#### *Dependency*

Suretyship is by default a dependent liability (art. 7:851 paragraph 1 BW; art. 7:852 BW). This dependent nature means the obligation of the surety towards the creditor cannot exist without the obligation of the principal debtor towards the creditor (art. 3:7 BW).<sup>535</sup> The consequence of art. 3:7 BW, which stipulates that a dependent right cannot exist without the right on which it depends, is that the surety is discharged when the obligation of the principal debtor is null and void from the start or when it is annulled.<sup>536</sup> Moreover, when the principal debtor performs in full, the suretyship extinguishes.

Another characteristic of dependent rights under Dutch law is that a dependent right follows the right on which it depends (art. 3:82 BW). The creditor cannot transfer the dependent right separately, and a transfer of the primary right (on which the dependent right depends) per definition means a transfer of the dependent right. The primary right and the dependent right are thus always in the same hands.

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<sup>531</sup> See otherwise Bertrams, 2017, claiming that the principle of freedom of contract would allow professional guarantors to contract for general joint and several liability when the situation is actually a suretyship situation.

<sup>532</sup> Somewhat unclear is however whether parties can divert, and more specifically to what effect, from the subsidiary nature of suretyship where it concerns non-consumer suretyships. Bergervoet, 2014; Asser/Van Schaick 7-VIII\* 2012/76.

<sup>533</sup> See Blomkwist, 2012, p. 13. Commercial parties can deviate from the principle of subsidiarity but probably not fully, see Asser/Van Schaick 7-VIII 2018/76; Bertrams, 2017.

<sup>534</sup> See also Bertrams, 2017.

<sup>535</sup> See also Haentjens, 2010, p. 430.

<sup>536</sup> Unless the primary obligation is only relatively null and void, Asser/Hartkamp & Sieburgh 6-III 2018, nr. 612.

An elaboration of this dependency can for suretyship be found in art. 7:852 and 7:853 BW, the first of which provides that the surety can invoke all defenses towards the creditor that the principal debtor has towards the creditor, in as far as these concern the existence, content or time of performance of the obligation of the principal debtor.<sup>537</sup> Paragraph 2 of that article stipulates that the surety can suspend performance if the principal debtor can annul his obligation, provided the surety or creditor has set a deadline for invoking the ground for annulling.

Also art. 7:853 BW can be directly related to the dependent nature of suretyship. The creditor should be wary of possible prescription of the primary debt, as such prescription extinguishes the suretyship by force of law (art. 7:853 BW). The article is deemed necessary for the protection of the surety, as art. 7:868 BW allows the principal debtor to invoke any defense, including prescription, he has against the creditor, also towards the surety that asks for reimbursement.<sup>538</sup>

### *Subsidiarity*

A guarantee obligation can either be a subsidiary or a non-subsidiary obligation. In the second case, the creditor can call upon the guarantor even if the principal debtor has not (yet) defaulted. For suretyship, the Dutch Civil Code stipulates that subsidiarity is the starting point: the surety does not have to perform until the principal debtor has defaulted (art. 7:855 paragraph 1 BW, see on default art. 6:74 ff. BW). It should be noted that this form of subsidiarity is not very strong and does not provide much protection. A simple default by the principal debtor is enough to trigger the possibility of calling on the surety.<sup>539</sup> Dutch law does not grant the surety the full so-called *benefit of discussion*, which would entail that the surety can first point to the possibility of the creditor to pursue the principal debtor, in case the principal debtor still has some assets.<sup>540</sup>

Subsidiarity, in combination with the open norm of reasonableness and fairness,<sup>541</sup> is sometimes interpreted to include an obligation of the creditor to use his best efforts to make sure that calling on the surety will not be necessary.<sup>542</sup> This could be seen as a weak echo of the *benefit of discussion* doctrine, through the open norm of reasonableness and fairness. The question whether the creditor has such an obligation in general is however controversial.<sup>543</sup> A specific context in which reasonableness and fairness is often invoked, is in case of concurrence of security rights available to the creditor. Should the creditor first try and satisfy his material interest by invoking real security rights or other available ways to receive payment? For the case of suretyship, art. 6:139 paragraph 1 BW stipulates that the surety can suspend payment in case the creditor can invoke set-off against the principal debtor. The creditor however generally has the choice which security rights he invokes first.<sup>544</sup> Again, the circumstances of the case may lead to another conclusion, based on the general principle of reasonableness and fairness.

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<sup>537</sup> The surety can however not invoke a mere possibility of the debtor to annul the primary obligation against the creditor. Only an annulment that has actually been successfully invoked by the debtor can help the surety against the creditor (Dutch Supreme Court 6 June 2008, *NJ* 2010, 12 (*Satisfactorie*)).

<sup>538</sup> See also Haentjens, 2010, p. 430.

<sup>539</sup> See extensively Koops, 2010, pp. 348–351.

<sup>540</sup> See further on the benefit of discussion Koops, 2010.

<sup>541</sup> Which could in this case be specified by the prohibition to make abuse of one's rights (art. 3:13 BW), more specifically abusing one's right to enforce.

<sup>542</sup> See Asser/Van Schaick 7-VIII\*, nr. 84.

<sup>543</sup> Blomkwist, 2012, p. 69; see extensively Koops, 2010, pp. 358–366.

<sup>544</sup> Blomkwist, 2012, p. 25; see also Koops, 2010, pp. 358–366.

The subsidiary nature of suretyship is also reflected in an information duty of the creditor towards the surety. Art. 7:855 paragraph 2 BW stipulates that the creditor that gives notice of default to the principal debtor, must simultaneously inform the surety. Art. 7:855 BW is mandatory law where it concerns consumer suretyship (art. 7:862 BW).

Related to the principle of subsidiarity is also the rule that the surety only has to pay interest over the period that *he* is in default towards the creditor, not over the period that the principal debtor is in default (art. 7:856 paragraph 1 BW).<sup>545</sup> The idea behind this article is that it cannot be expected of the surety to keep track of a possible default of the principal debtor towards the creditor, combined with the fact that the costs can be steep.<sup>546</sup>

#### *Suretyship for non-pecuniary obligations*

Art. 7:854 BW stipulates that a suretyship for a payment in kind amounts to a suretyship for the payment of damages in case the principal debtor does not perform, unless expressly agreed otherwise. Thus, the surety is protected against having to perform some kind of payment in kind, unless he clearly agreed to do so. This rule relates to the fact that, under Dutch law, a creditor can normally choose between demanding specific performance (art. 3:296 BW) and demanding damages instead of specific performance. The legislator has clearly deemed it undesirable to apply the possibility to demand specific performance one on one on a surety to whom it wasn't entirely clear that he would have to pay in kind.

### **2.1.2 The relationship guarantor-principal debtor**

By default, the guarantor is granted the statutory right of reimbursement (art. 7:866 BW and art. 6:10 BW) and the right of subrogation (art. 6:12 BW) against the principal debtor, even if there was no contractual relationship between guarantor and principal debtor. The right of subrogation can likely be waived, also *ex ante* and even by a consumer guarantor. The statutory right of recourse can probably not be waived in a contract between creditor and guarantor, though the guarantor could possibly waive it towards the principal debtor.

In the case of a joint and several liability, art. 6:10 BW stipulates that the guarantor has a reimbursement claim against the other co-debtors in as far as he has paid more than he would be liable for in the internal relationship with the other co-debtors (art. 6:10 paragraph 1 BW). In the case of suretyship, art. 7:866 BW gives the surety a right of recourse, with reference to art. 6:10 BW, which in turn stipulates that the guarantor has a reimbursement claim against the other co-debtors in as far as he has paid more than he would be liable for in the internal relationship with the other co-debtors (art. 6:10 paragraph 1 BW). When a surety in the sense of art. 7:850 BW stands surety for more than one principal debtor, which principal debtors are jointly and severally liable, the surety can claim the full amount of either of them (art. 7:866

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<sup>545</sup> There are two exceptions: the first applies when the primary debt is a debt that originated in an unlawful act, the second when the primary debt is a liability for damages because of a default of the primary debtor (art. 7:856 par 1 BW in conjunction with 6:83 sub b BW).

<sup>546</sup> Haentjens 2010, Article 856 Boek 7 BW, note 2; Paragraph 2 of art. 7:856 BW stipulates that the surety can also be held to reimburse the costs of the creditor for legal action against the debtor, but only if the creditor has timely notified the surety of his intention to commence legal action against the debtor.

paragraph 2 BW). Art. 7:866 BW thus puts the surety in a considerably better position than a codebtor would be under art. 6:10 BW.<sup>547</sup>

Reimbursement is not the only possible legal ground for a compensation claim of the guarantor. The surety can also invoke art. 6:12 BW, which grants the guarantor a right of subrogation. After the guarantor has paid more than his internal share, he is subrogated in the position of the creditor towards the principal debtor for the amount that exceeds his share. As a result of subrogation, the guarantor not only receives the claim the creditor had on the principal debtor, but also other rights that the creditor could have invoked towards the principal debtor, such as real security rights securing the claim. This is the most important difference with reimbursement (art. 6:10 BW). The advantage of reimbursement (art. 6:10 BW) is on the other hand that reimbursement can also be claimed for reasonably made costs,<sup>548</sup> whereas subrogation (art. 6:12) does not allow this. The guarantor can choose whether he invokes subrogation or reimbursement. A creditor can be disadvantaged by the fact that the guarantor subrogates in his security rights towards the creditor.<sup>549</sup> To prevent this, Dutch law used (until a few decades ago) to contain a rule of subordination of the position of the guarantor in relation to the creditor, but this rule has been abolished.<sup>550</sup> Thus, the collection efforts of the creditor can be hampered by a subrogation claim of a guarantor.

In case there is some contractual arrangement that allows for recourse by the guarantor on the principal debtor, the question can arise how this contractual arrangement relates to a possibly also available statutory right of reimbursement or subrogation. This is not entirely clear under Dutch law. The Dutch Supreme Court has held that in such a case of concurrence, the contract *in principle* governs the relationship.<sup>551</sup> Whether prescription of the contractual right also makes recourse under a statutory right of recourse impossible, is for example not clear.<sup>552</sup> On the other hand, clear is that the parties can, even in case of concurrence, agree contractually that the right of recourse already exists before the guarantor pays,<sup>553</sup> in deviation of the rule for the statutory right of recourse.<sup>554</sup>

The general provision on unjustified enrichment (art. 6:212 BW) can furthermore serve as a general legal basis for recourse claims, for any type of guarantee relationship. If a guarantor pays the creditor, the debt of the principal debtor towards the creditor will cease to exist, even in an independent guarantee relationship. The principal debtor is thus ‘enriched’: he gets released from his debt without paying. The guarantor is impoverished by the transaction: he paid, but did not get rid of any debt.<sup>555</sup>

The guarantor can waive his right of statutory recourse or subrogation, even *ex ante* and even for consumer guarantees, (art. 6:11 paragraph 4, 6:160 and 7:866 BW) towards the person

<sup>547</sup> See also Bertrams, 2017.

<sup>548</sup> See also Asser/Hartkamp & Sieburgh 6-I 2016, nr. 125; Asser/Van Schaick 7-VIII 2018, nr. 115.

<sup>549</sup> See also Koops, 2010, pp. 361–362.

<sup>550</sup> Bergervoet, 2014; Koops, 2010, pp. 361–362.

<sup>551</sup> Dutch Supreme Court, 20 November 1981, *NJ* 1982, 174 with case comment WHH (*Rollman/Van Opzeeland*).

<sup>552</sup> Van Boom, 1999, p. 102.

<sup>553</sup> Dutch Supreme Court 16 October 2015, ECLI:NL:HR:2015:3023 (*DLL/Van Logtenstijn q.q.*).

<sup>554</sup> Dutch Supreme Court 6 April 2012, ECLI:NL:HR:2012:BU3784, (*ASR/Achmea*).

<sup>555</sup> Van Boom, 1999, p. 105; see also Dutch Supreme Court 22 November 2013, ECLI:NL:HR:2013:1381 (*TEP / Silvius & Van Steen q.q.*); District Court of Noord-Holland, 25 November 2015, ECLI:NL:RBNHO:2015:11663 (*X q.q. / TUG Vastgoed*); Amsterdam Court of Appeal, 2 June 2015, ECLI:NL:GHAMS:2014:2101, (*Verwiel q.q. / Hansteen Netherlands*).

against whom he has this right. Waiving subrogation should probably also be considered possible in the contract between guarantor and creditor, but waiving recourse in this contract is probably not possible.<sup>556</sup> Apart from waiving, parties can also set further conditions for recourse, for example subordinating the right of recourse of the guarantor in relation to the claim of the creditor, or excluding possibilities for set-off of the recourse claim, or pledging the recourse claim to secure the primary claim.<sup>557</sup>

Article 6:2 paragraph 1 BW stipulates that parties to a contract should behave in accordance with the demands of reasonableness and fairness towards each other. Paragraph 2 of that article stipulates that any rule, be it statutory or contractual, that would apply to their relationship will not apply if the rule would under the applicable circumstances not be in accordance with the demands of reasonableness and fairness. As discussed above, a guarantee relationship can exist without a contractual relationship between principal debtor and guarantor. In the case of multiple guarantors, there may also not be a contractual relationship among guarantors. Therefore, art. 7:865 BW extends the application of art. 6:2 BW to the relationship principal debtor-guarantor and the relation between multiple guarantors. Article 6:8 BW does the same for joint and several liability.

### 2.1.3 Co-suretyship, contribution

There can be more than one guarantor, in which case the other guarantors may need to contribute to the guarantor that paid. Co-sureties can under circumstances be called upon to contribute if one of the other co-sureties has paid more than its internal share.

Dutch law does not contain any clear default rules on how to determine the extent of the internal liability of co-debtors. Parties can make arrangements on this point, but this doesn't happen often in practice.<sup>558</sup> In absence of such contractual arrangements, the obligation to contribute has to be based on the extent to which each co-debtor has used the credit or has had access to the credit, as well as the other circumstances of the case.<sup>559</sup> This 'access-to-credit' principle is rather vague, the application of which can be difficult in practice. Only when this does not lead to useful results, the parties will be internally liable for equal shares.<sup>560</sup>

If there are more co-debtors, a contribution claim on each individual co-debtor is limited to the amount that they owe in the internal relationship (art. 6:10 paragraph 2 BW). The co-debtors are not jointly and severally liable for the reimbursement claim. If one of the co-debtors does not provide opportunity for recourse, for example because he has no assets or is untraceable, the

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<sup>556</sup> Asser/Van Schaick 2018, nr. 116.

<sup>557</sup> See extensively (for suretyship) Bergervoet, 2014; Bergervoet discusses that a problem with pledging may be that the recourse claim only comes into existence after the guarantor pays the creditor (see Dutch Supreme Court 6 April 2012, ECLI:NL:HR:2012:BU3784, (*ASR/Achmea*)), however, the Dutch Supreme Court has since ruled that parties can contractually decide on the moment that a *contractual* recourse claim comes into existence, and this can also be before the guarantor pays (Dutch Supreme Court 16 October 2015, ECLI:NL:HR:2015:3023 (*DLL/Van Logtenstijn q.q.*)). The moment that the statutory recourse claim comes into existence can however probably not be decided on by contract, see F.E.J. Beekhoven van den Boezem, 2017, para. 7.3.

<sup>558</sup> Bergervoet, 2014; see further on the obligation to contribute extensively Van Boom, 1999, p. 107 ff.

<sup>559</sup> (Dutch Supreme Court 13 July 2012, JOR 2012/306, (Janssen q.q. / JVS); *Parlementaire geschiedenis Boek 6 NBW*, p. 108.); Dutch Supreme Court 18 April 2003, JOR 2003/160, m.nt. Bartman (Rivier de Lek/Van de Wetering).

<sup>560</sup> Bergervoet, 2014; Van Boom, 1999, pp. 107–108; *Parlementaire geschiedenis boek 6*, p. 108.



debtor that has paid more than his internal share is somewhat compensated through art. 6:13 BW: the share that was irrecoverable will be allocated on the other co-debtors pro rata to each's internal share. The co-debtors that are not liable in their internal relationship with the other co-debtors do not have to share in the burden. This changes if recovery from co-debtors that are liable in the internal relationship is not possible, for example if they cannot be found, but only if the debtor that seeks recourse from his co-debtors is himself not at all liable in the internal relationship to his co-debtors (art. 6:13 paragraph 2 BW). This system of recourse is often explained as a system of strict separation between co-debtors with an internal obligation to contribute and co-debtors without such an obligation.

Particularly in the case of group finance, in which context all group companies often guarantee a bank loan, the system of a strict separation under Dutch law between co-debtors with an internal obligation to contribute and co-debtors without such an obligation can lead to seemingly arbitrary results. To understand why, recall the Dutch doctrine on the obligation to contribute as discussed above. It can be hard to ascertain who has used the line of credit in the case of group finance. In a corporate group, the separate legal entities are often economically closely intertwined with one another. Even if a certain entity did not directly receive part of the loan on its bank account, it may very well have profited indirectly in many different ways. Lacking clear guidance on how to value indirect profit, scholars generally seem to agree that cash flow from creditors to debtors should give content to the establishment of who has an obligation to contribute.<sup>561</sup> This cash flow-based test can lead to arbitrary results in individual cases, especially if a single benchmark date is taken for this test.<sup>562</sup> Some have therefore argued that, in the case of group finance, the starting point (when there are no contractual arrangements) should be that the group companies are internally liable for equal shares.<sup>563</sup> The Dutch Supreme Court however does not seem to accept this as a point of departure. In each case, it will have to be ascertained who has (directly or indirectly) used the line of credit, in context with all the other circumstances of the case.<sup>564</sup>

## 2.2 Co-debtorship for security purposes ('contractuele hoofdelijkheid')

Above it was explained that a guarantee relationship amounts to a suretyship if the guarantor has presented himself towards the creditor as someone who is *not* liable for the debt in the internal relationship between the debtors. Under such circumstances parties are not free to opt out of suretyship law altogether. If the creditor does however not know that one of his debtors is in fact only a guarantor, in the sense that the debt does not concern that debtor in the internal relationship between two or more of his debtors, the guarantee relationship does not amount to suretyship. Under Dutch law, such a guarantee relationship will probably (of course dependent on the specific circumstances) be qualified as a joint and several liability ('*hoofdelijkheid*'). The consequence thereof is that the guarantor is less protected than a surety would be.

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<sup>561</sup> C.J.M. Klaassen, 2002, pp. 691–692.

<sup>562</sup> C.J.M. Klaassen, 2002, pp. 688–694.

<sup>563</sup> Most notably Ophof, 1987.

<sup>564</sup> Dutch Supreme Court 13 July 2012, JOR 2012/306, (*Janssen q.q. / JVS*).

Consider the example in which a mother and daughter together take out a line of credit from the bank, both signing the contract as co-debtors, whilst it is clear between mother and daughter that only the daughter is going to use the credit. In as far as the bank is justified in thinking both mother and daughter are going to use the line of credit, this is not a suretyship, but an ordinary joint and several liability (art. 6:6 BW). A more common fact pattern in which joint and several liability applies is however that in which a bank that finances a group of companies extends the full amount of the loan to the parent, whilst obtaining a guarantee of the full amount from each group company. In as far as the bank is justifiably under the impression that the credit line will (directly or indirectly) be used by each subsidiary, this amounts to ordinary joint and several liability (*'gewone hoofdelijkheid'*), not suretyship.

It should be stressed that joint and several liability can occur under many circumstances. For example, a group of people may be joint and severally liable towards a tort victim. This book pre-occupies itself with contractual guarantees, in which the guarantor guaranteed the debt of another person. Other types of joint and several liability are not discussed, although some points raised may of course be relevant to joint and several liabilities with a non-contractual basis as well. The contractual type of joint and several liability can be referred to as co-debtorship for security purposes.

Art. 6:7 paragraph 2 BW stipulates that performance by one of the co-debtors discharges the others as well.<sup>565</sup> The rule can be understood from the essence of a joint and several liability: although there is more than one co-debtor, their respective liabilities each aim to satisfy the same interest of the creditor. When that interest has been satisfied by one, the other co-debtors are discharged towards the creditor. When one of the joint and severally liable co-debtors pays the creditor more than that co-debtor is owed in the internal relationship with the other co-debtor(s), he receives a statutory right of recourse as well as a statutory right of subrogation on those co-debtors (art. 6:10 BW and 6:12 BW), even if there is no pre-existing contractual relationship between the co-debtors.

Unlike suretyship, a joint and several liability (*'hoofdelijkheid'*) in principle creates a non-subsidiary obligation, but can contain some form of subsidiarity. What subsidiarity means in such a case, depends on (interpretation of) the contract.<sup>566</sup>

Art. 6:10 BW stipulates that the co-debtor has a reimbursement claim against the other co-debtors in as far as he has paid more than he would be liable for in the internal relationship with the other co-debtors (art. 6:10 paragraph 1 BW). As discussed under suretyship, reimbursement is not the only possible legal ground for a 'compensation claim'. The joint debtor can also invoke art. 6:12 BW, which grants the guarantor a right of subrogation. Art. 6:13 BW on contribution (see further par. 2.1.3 above) between joint debtors also applies.

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<sup>565</sup> See also Bergervoet, 2014; Van Boom, 1999, pp. 48–49; This also applies in case of performance by way of set-off or tendering in payment.

<sup>566</sup> If a guarantee is of subsidiary nature, this does not (necessarily) lead to the conclusion that the obligation of the guarantor is subject to a condition precedent in the sense of art. 6:22 BW, but instead, that the obligation of the guarantor is not due before default of the debtor (Asser/Van Schaick 7-VIII\* 2018/77).

## 2.3 Independent guarantee ('onafhankelijke garantie')

In finance practice the independent guarantee has developed and gained importance in the last few decades. Such independent guarantees are often referred to as bank guarantees, because the guarantor is often a bank. The denotation 'bank' in this context is however misleading as the guarantor does not have to be a bank and banks can also issue other types of guarantees. The independent guarantee is not specifically regulated in the Dutch Civil Code. The independent guarantee is however generally seen as a contract *sui generis*.<sup>567</sup>

The independent guarantee *cannot* be seen as a species of a joint and several liability. The legislative history shows that the Minister was of the opinion that the rules on joint and several liability (art. 6:6 ff BW) do not apply to independent guarantees, because the guarantor has an obligation to pay independently of the obligation of the principal debtor, with the consequence that the guarantor cannot invoke defences from the underlying relationship.<sup>568</sup> It could be said that Dutch law thus assumes a narrow definition of joint and several liability, which seems to be confirmed in the literature and case law.<sup>569</sup> The definition is narrow, in the sense that only joint and several liabilities in which payment by one debtor necessarily discharges the others, are regarded joint and several liabilities in the sense of art. 6:6 BW. Moreover, even if payment by one debtor discharges the others, independent guarantees can still not amount to a joint and several liability under Dutch law.<sup>570</sup> An often-found argument substantiating why an independent guarantee does not amount to co-debtorship is that the guarantor in such a construction obliges himself to pay his own debt, not the debt of the debtor.<sup>571</sup> As a result, the

<sup>567</sup> Emden and Emden, 2009, p. 2; case note G.J.L. Bergervoet to Dutch Supreme Court, 13 March 2015, ECLI:NL:HR:2015:600, *JOR* 2015, 184; see extensively on the developments in the case law on this point: Russcher, 2018.

<sup>568</sup> Parl. Gesch. Boek 6, p. 1204; Van Boom, 1999, pp. 35–38.

<sup>569</sup> Dutch Supreme Court 8 July 2011, ECLI:NL:HR:2011:BQ0593, *JOR* 2012/67 m.nt. Bergervoet, NJ 2011/308; Bergervoet, 2014; Bergervoet is of the opinion that the essence of co-debtorship can be distilled from this ruling: at least two persons are liable for the same debt, as a consequence of which performance by one party also discharges the other(s). I don't think the ruling can be interpreted this broadly. The case concerned two parties that had each committed to not cut down (the same) trees. The court of appeal had ruled that this was a joint and several liability. The Dutch Supreme Court concludes that it cannot be, because it is not the case that performance by one party discharges the others. This reasoning is understandable, but confusing. The source of confusion is probably the difficulty of working with an obligation to refrain from something. The court should have ruled that this is not a case of joint and several liability because the debtors are not liable for the same debt. The creditor wants two things: he wants debtor A to refrain from cutting down the trees, and he wants debtor B to refrain from cutting down the trees. The possible idea that this concerns the same 'debt' because it concerns the same trees is somewhat confused. Of course, that this is not the same debt can most clearly be seen if we consider the consequence of joint and several liability that performance by one discharges the others: performance by A (meaning not cutting down the trees) doesn't allow B to cut down the trees. In that sense the ruling can be understood, by pointing to a consequence that in this case shows the mistake in the ruling of the court of appeal. But inferring that generally, if there is no immediate discharge of all other debtors, joint and several liability cannot exist, takes it too far.

<sup>570</sup> Van Boom argued co-debtorship can exist, also in an independent guarantee relationship, in as far as performance by one of the debtors discharges the others, but this view does not seem to be widely shared Van Boom, 1999, p. 38.

<sup>571</sup> Blomkwist, 2012; such a statement could be confusing, as the purpose of a personal security instrument is obviously to secure performance by the principal debtor. Thus, the guarantor cannot be said to just pay his own debt. The idea that the guarantor in an independent guarantee relationship pays his own debt is also somewhat confusing if contradicted to the nature of the debt of the guarantor in a joint and several liability regime. As discussed, under co-debtorship, doctrinally, each debtor has a separate obligation towards the creditor(s) to perform, instead of one obligation that binds all debtors (C.J.M. Klaassen, 2002, pp. 660; 663; Van Boom, 1999, pp. 10–13). If each has a separate obligation, the idea under joint and several liability is already that each performs his own

provisions on joint and several liability do not apply one on one. Neither is there specific legislation on independent guarantees. The guarantor thus, for example, does not have a statutory right of recourse to the principal debtor after paying under the guarantee.

The legal recognition of the independent character of an independent guarantee has been confirmed in Dutch case law for a few decades.<sup>572</sup> Recently, the Dutch Supreme Court strongly anchored the recognition of the independent character. The Dutch Supreme Court considered that an independent guarantee entails an obligation to pay that is independent in relation to the underlying relationship. This means, according to the Supreme Court, that defences from the underlying relationship can in principle not preclude a claim to payment under the independent guarantee if the conditions for payment as stipulated in the bank guarantee have been met.<sup>573</sup>

Technically, for an independent guarantee relationship to exist, there does not need to be a (pre-existing) relationship between principal debtor and guarantor. Typically, there will be a contractual relationship between guarantor and principal debtor, as Dutch law does not grant the guarantor in an independent guarantee relationship a statutory right of recourse,<sup>574</sup> and reliance on the general provision of unjustified enrichment is likely to be less secure and more difficult to prove.<sup>575</sup>

Payment by the guarantor to the creditor may alter the relationship between the creditor and principal debtor. If the creditor calls upon the guarantor, while he is not entitled to this in his relation to the principal debtor, the principal debtor could have a claim on the creditor. Such a claim could be based on breach of contract (art. 6:74 BW), unjustified enrichment (art. 6:212 BW)<sup>576</sup> or (possibly) undue payment.<sup>577</sup>

Under Dutch law, it is not entirely clear whether an independent guarantee can (always) be seen as a contractual relationship between guarantor and creditor or as a unilateral act of the guarantor, but this difference is not of much relevance in practice.<sup>578</sup> For an independent guarantee, a (statutory) prescribed form does not exist. The independent guarantee is however hard to imagine in non-written form.<sup>579</sup>

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obligation. Each in that sense, always ‘pays his own debt’. So in short, while on the one hand the guarantor in an independent guarantee relationship does clearly not pay his own debt, he does on the other hand have his own and separate obligation towards the creditor, but that does not necessarily distinguish the relationship from joint and several liability.

<sup>572</sup> Emden and Emden, 2009, p. 4; see also Bergervoet, 2014 and case note G.J.L. Bergervoet to Dutch Supreme Court, 13 March 2015, ECLI:NL:HR:2015:600, *JOR* 2015, 184 (*Amstelpark*).

<sup>573</sup> Dutch Supreme Court, 13 March 2015, ECLI:NL:HR:2015:600, *JOR* 2015, 184, par. 4.2.2 (*Amstelpark*).

<sup>574</sup> As, under Dutch law, an independent guarantee cannot be a suretyship, nor a joint and several liability (see above); compare Emden and Emden, 2009, pp. 34–36; Amsterdam Court of Appeal, 3 May 2007 (Grote Noord/Korse), *JOR* 2007/280, m.nt. R.I.V.F. Bertrams.

<sup>575</sup> Compare Van Boom, 1999, pp. 103–105.

<sup>576</sup> Dutch Supreme Court 28 October 2011, *NJ* 2012/495 (Van Hees q.q./X).

<sup>577</sup> Emden and Emden, 2009, p. 56.

<sup>578</sup> Emden and Emden, 2009, p. 2; case note G.J.L. Bergervoet to Dutch Supreme Court, 13 March 2015, ECLI:NL:HR:2015:600, *JOR* 2015, 184 (*Amstelpark*); theoretically relevant is that a unilateral act is irrevocable (art. 3:37 paragraph 5 BW), whereas an offer for a contractual relationship can in principle still be revoked before it has been accepted (art. 6:219 BW) (see also Emden and Emden, 2009, p. 8).

<sup>579</sup> As Bertrams notes, the principle of independence simply decouples the guarantee from the underlying contract, but does not tell us when the guarantor is obligated to pay (Bertrams, 2013, p. 45). That function is performed by the conditions for payment, (Bertrams, 2013, p. 45) which, in combination with the principle of strict conformity, (Emden and Emden, 2009, p. 7; Dutch Supreme Court 9 juni 1995, *NJ* 1995, 639, m.nt. PvS (Gesnoteg/Mees Pierson); Dutch Supreme Court, 13 March

## 2.4 Group guarantees for accounting purposes ('403-verklaring')

Parent companies often finance their subsidiaries in one way or another. One way of financing a subsidiary is guaranteeing certain or all debts of a subsidiary. Under rules that implemented the European Fourth Directive<sup>580</sup> a subsidiary can be exempted from the obligation to file and publish full annual accounts if the parent company issues a statement of joint and several liability for the debts of the subsidiaries with which the accounts are consolidated. This allows for simplified annual accounts, but does require a type of guarantee for the debts of the subsidiary.

Article 2:403 BW (which was adopted as an implementation of the Fourth Directive, article 57 paragraph 1) demands a statement of joint and several liability for certain debts of the subsidiaries with which the accounts are consolidated. Hence, such a guarantee for the debts of a subsidiary is often referred to as a 403-statement.

The Dutch Supreme Court has held that the 403-statement is not a contractual relationship, but a unilateral statement of joint and several liability,<sup>581</sup> which does not lead to a dependent right in the sense of 3:7 BW.<sup>582</sup> The 403-statement has a specific regime for withdrawal of the statement. Article 2:404 BW stipulates that the statement can be withdrawn by a statement that should be deposited at the Chamber of Commerce. However, the guarantor remains liable for debts that derive from legal acts from before the withdrawal (art. 2:404 paragraph 2 BW). This remaining liability can however also be ended, on the condition that the subsidiary legal person leaves the group. Creditors in this case get a two month period to oppose ending the remaining liability, which opposition will be successful if the opposing creditors are not offered sufficient security for their claims (art. 2:404 par 3-6 BW).

## 3 Dutch law on opportunism towards parties inside the guarantee relationship

Chapter 3 paragraph 2 discussed opportunism in the internal relationship. This paragraph will discuss in which way and to which extent Dutch law protects parties in the guarantee relationship. As expected, especially the guarantor is protected by various mechanisms. According to the Dutch legislator the laws on protection of weak guarantors have been inspired by two conflicting thoughts. The first is that suretyship can be a dangerous contract for the surety and that history has shown that sureties are often rash in making the decision to stand surety, trusting the principal debtor to perform, whilst often not asking a premium for standing surety. On the other hand, suretyship is an important instrument in banking, especially for those

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2015, ECLI:NL:HR:2015:600, JOR 2015, 184 with case note Bergervoet) is hard to imagine to be laid down in a form other than in writing.

<sup>580</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies.

<sup>581</sup> The 403-statement, being a unilateral declaration, is directly formed by the unilateral act containing the declaration of the guarantor (see also Spierings, 2012, para. 2.1); C. Spierings, 2016, p. 215 ff.

<sup>582</sup> Dutch Supreme Court 28 June 2002, *NJ* 2002/447 (Akzo/ING); Spierings, 2012, para. 2; C. Spierings, 2016, p. 215 ff; Bergervoet, 2014.

(would be) principal debtors that are unable to provide real security rights.<sup>583</sup> As will become clear, Dutch law offers some protection to *consumer* sureties, but natural persons that stand surety for business debts are often excluded from this protection.

### 3.1 Definition of consumer suretyship

The consumer surety enjoys some protection under Dutch law. The relevance of the qualification of suretyship is that the legislator has protected the surety through a detailed regime in art. 7:850 – 7:870 BW. The idea behind this protection is that suretyship is potentially dangerous for the surety.<sup>584</sup> Many provisions on suretyship are mandatory in the case of a consumer surety.<sup>585</sup>

Suretyship (*borgtocht*) is a statutory *species*, laid down in article 7:850 – 7:870 BW, of the *genus* of joint and several liability (art. 6:6 BW).<sup>586</sup> The parliamentary proceedings show that the intention of the parties is not decisive regarding the demarcation between joint and several liability and suretyship.<sup>587</sup> Primarily relevant is the way in which the guarantor has presented himself towards the creditor. If the guarantor has presented himself as a pure guarantor, thus someone that is not liable for the debt in his internal relation to the principal debtor, it is a suretyship.<sup>588</sup> If for example two friends enter a bank and apply for a loan which they both sign and it is clear to the bank employee that only one of the friends is going to use the line of credit, that person is a surety. If instead the bank is justified in thinking they are both going to use the loan, neither of the friends is a surety, but both are joint and severally liable towards the bank. Suretyship does not have to be agreed upon explicitly.<sup>589</sup> As many of the specific rules on suretyship have the status of mandatory law, the qualification of suretyship cannot simply be evaded by using different wording (although the wording can of course be relevant in determining how parties have presented themselves). The key question is how the guarantor has presented himself towards the creditor.

A *consumer* suretyship is described in art. 7:857 BW as a suretyship in which the surety is a natural person that neither acts in the course of a profession or in the operation of a business, nor on behalf of the normal operation of the business of a public limited company (*NV*) or a private limited company (*BV*) of which he is a director and in which he alone (or together with the other directors) holds the majority of shares.<sup>590</sup> Because of the mandatory nature of many of the provisions, the demarcation between consumer suretyship and professional suretyship is an

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<sup>583</sup> T-M, *Parl. Gesch. Inv.*, p. 417; see also Haentjens 2010; Asser/Van Schaick 5-IV 2004/178; this statement could be more sophisticated. As discussed in chapter 2, the economic goal of asking for personal security rights is often the prevention of moral hazard, not simply recourse when the debtor fails.

<sup>584</sup> See Koops, 2010, p. 349 and the sources referred to there.

<sup>585</sup> Art. 7:857 in conjunction with art. 7:862 BW stipulates that art. 7:852-856 BW and art. 7:858-861 BW are mandatory law for consumer suretyship.

<sup>586</sup> See art. 7:850 paragraph 3 BW; see also C.J.M. Klaassen, 2002, p. 660; Bergervoet, 2014; B. Wessels, 1994, p. 10; Asser/Van Schaick 7-VIII\* 2018/62.

<sup>587</sup> MVA II *Parl. Gesch. Boek 7*, p. 426.

<sup>588</sup> This probably also applies if the creditor should have known (Bergervoet, 2014; Asser/Van Schaick 2018, nr. 62).

<sup>589</sup> See on *hoofdelijkheid*: Asser/Hartkamp & Sieburgh 6-I\* 2012, par 109.

<sup>590</sup> Indirect directorship or shareholding is seen as sufficient, see Dutch Supreme Court 11 juni 2003, NJ 2004/173 (Kelders/Fortis) and Dutch Supreme Court 8 October 2010, *JOR* 2010/367 (Abbink/SNS).

important issue that has been widely discussed in Dutch legal literature and has led to a large amount of case law.<sup>591</sup>

Some have argued that Dutch law should, within the group of consumers, offer more specific protection to sureties in a family context, but this position has not been adopted by the legislator, nor by the courts.<sup>592</sup> It is however clear that natural persons that guarantee loans of family members generally qualify as consumer sureties. Clear is also that legal persons cannot qualify as consumer sureties. Less clear can be whether an entrepreneur that guarantees a loan of a corporation he or she is involved in qualifies as a consumer surety. Often this will not be the case and the entrepreneur is thus often denied consumer protection.

A suretyship by a natural person can first of all disqualify as consumer suretyship when the person granting the suretyship acts in the normal course of his profession in doing so.<sup>593</sup> A natural person that guarantees debts of others on a daily basis is however very rare in practice. Much more relevant is the other exception that disqualifies a suretyship of a natural person as a consumer suretyship: the natural person that acts to the benefit of the normal operation of his business. Requirements for this exception are that the surety is a director of the BV or NV of which he guaranteed a debt, and that he alone (or together with the other directors) holds the majority of shares. This is usually not hard to establish. Also indirect shareholdings or -directorships qualify as such.<sup>594</sup> Much more difficult to establish is the issue what qualifies as ‘normal operation of the business’ in the sense of art. 7:857 BW.<sup>595</sup> The Dutch Supreme Court has clarified that if the loan taken by the company (for which the guarantee was issued) can be qualified as a loan in the normal operation of the business, this also applies to the guarantee.<sup>596</sup>

There is a lot of case law concerning the question what amounts to a loan (and guarantee for that loan) in the normal operation of a business.<sup>597</sup> The answer to that question depends on the circumstances of the case. In the current interpretation, ‘normal operation of the business’ does not seem limited to day to day business. Somewhat counterintuitively (and, as will be discussed in chapter 7, also undesirably) also one-off acts, such as taking a large loan, can under circumstances be seen as in the normal operation of the business, as long as the proceeds from the loan are spent on the normal operation of the business.<sup>598</sup> Whereas taking a normal loan, such as a bank loan, will thus generally be considered to be qualified as an act in the normal operation of business if normal business activities are funded with such a loan, this can change

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<sup>591</sup> See inter alia Blomkwist, 2012, p. 11 ff; Bergervoet, 2014; C.J.M. Klaassen, 2002, pp. 665–668; Tjittes, 1996; Tjittes, 2001; Asser/Van Schaick 7-VIII\* 2018/101 ff; Haentjens, 2010, pp. 418–419.

<sup>592</sup> Tjittes has argued that Dutch law should, and this has led to some debate, but has not been adopted. See Tjittes, 1996; Haentjens, 2010, pp. 418–419.

<sup>593</sup> See art. 7:857 BW and Dutch Supreme Court 14 April 2000, NJ 2000/689 (Soetelieve/Stienstra).

<sup>594</sup> Dutch Supreme Court 11 July 2003, JOR 2003/223, m.nt. Verdaas (*Kelders/Fortis*); Dutch Supreme Court 26 January 2007, «JOR» 2007/80, m.nt. NEDF (*Steins/ING*); Dutch Supreme Court 8 October 2010, JOR 2010/367 (*Abbink/SNS Bank*).

<sup>595</sup> Which is the same definition as found in art. 1:88 paragraph 5 BW on protection of the spouse, see paragraph 3.7 below.

<sup>596</sup> Dutch Supreme Court 14 April 2000, NJ 2000/689 (Soetelieve/Stienstra); Dutch Supreme Court 8 July 2005, JOR 2005/233 m.nt. Verdaas (*Rabobank/Van Hees*). See recently also Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3606, (Nooij /ING).

<sup>597</sup> See also Smelt, 2017; Blommaert, 2018.

<sup>598</sup> Compare Dutch Supreme Court 13-07-2018, ECLI:NL:HR:2018:1220, 17/03820, JOR 2018/263.

under specific circumstances.<sup>599</sup> Emergency funding in an attempt to save the business, with its inherent risks, will often not be regarded as normal.<sup>600</sup>

Below, the different ways in which Dutch law protects *consumer* guarantors will be discussed in paragraph 3.2 (consumer protection: duty to warn the surety), 3.3 (protection of consumer suretyship through mandatory suretyship law) and 3.4 (protection of consumer guarantors other than sureties), followed by a discussion of the very limited protection of non-consumer sureties in paragraphs 3.5 and 3.6.

### 3.2 Consumer protection: duty to warn the surety

The contract of suretyship may be subject to annulment through the concept of vitiated consent (*'wilsgebreken'*). In case of vitiated consent, the formation of the necessary consent is in some way corrupted. For the case of suretyship, the most important source of vitiated consent is mistake (*'dwaling'*). Also important is the closely related concept of *'oneigenlijke dwaling'*, which occurs when someone's intention and declaration do not correspond.<sup>601</sup> In a few cases, the Dutch Supreme Court has formulated a duty of the creditor to warn the consumer surety of the dangers involved in a specific suretyship.<sup>602</sup> If the creditor fails this duty, the consumer surety will have an easy case arguing that a mutual mistake should be for the account of the creditor. Mistake itself should however still be proven by the consumer surety.

Art. 6:228 BW stipulates that an agreement entered into under the influence of mistake, which would not have been concluded in case of a correct view of the situation, is voidable in three situations. The first of these situations is that in which the mistake is caused by information from the counterparty, unless that party could have assumed that the contract would also have been concluded without providing this information (art. 6:228 paragraph 1 sub a BW). The second is the case in which the counterparty should have provided the mistaking party with the information he had or should have had regarding the mistake (art. 6:228 paragraph 1 sub b BW). The third is the situation in which the counterparty has relied on the same inaccurate information as the mistaking party, unless the counterparty could also in case of a correct view of the situation have believed that this would not refrain the mistaking party from entering into the agreement (art. 6:228 paragraph 1 sub c BW). In the case of suretyship, a mutual mistake can arise as to the creditworthiness of the primary debtor. Both the creditor (by extending credit)

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<sup>599</sup> Bergervoet, 2014.

<sup>600</sup> Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3606, (Nooij/ING); Dutch Supreme Court 8 July 2005, *JOR* 2005/233 m.nt. Verdaas (*Rabobank/Van Hees*); Dutch Supreme Court 14 April 2000, *NJ* 2000/689 (Soetelieve/Stienstra); Amsterdam Court of Appeal, 31 May 2016, ECLI:NL:GHAMS:2016:2057 (*Rabobank/X*); The Hague Court of Appeal, 29 March 2016, ECLI:NL:GHDHA:2016:708 (*Rabobank/X*); see also Smelt, 2017

<sup>601</sup> Another ground, abuse of circumstances (ar. 3:44 paragraph 1 BW) can also be of importance. See for example ECLI:NL:GHSHE:2016:4681; in which a lawyer made the shareholder/director sign a suretyship for the debts of his company towards the lawyer, while the company was in financial distress. Especially abusive was that the lawyer made him sign the suretyship at the court, on the day of a court hearing in a case of the company. The court of appeal ruled the lawyer made abuse of circumstances, also because the rules of conduct for lawyers don't allow the lawyer to take security for his claims, unless the dean of the bar association gives permission.

<sup>602</sup> Dutch Supreme Court, 1 June 1990, *NJ* 1991/759 (*Van Lanschot / Bink*); Dutch Supreme Court 1 April 2016, ECLI:NL:HR:2016:543, (*Harderveld/Aruba Bank*); Dutch Supreme Court 12 April 2013, *NJ* 2013/390 m.nt. Tjong Tjin Tai (*Pessers/Rabo*).



and the guarantor (by guaranteeing the credit) take some risk. If the debtor has for example withheld negative credit information, this could cause mistake on the side of both the creditor and the surety.

Paragraph 2 of art. 6:228 BW contains an important limitation on invoking mistake, stipulating that an action for annulment cannot be based on a mistake on (exclusively) future circumstances, nor on a mistake that should come at the expense of the mistaken party based on common opinion or the circumstances of the case. When both creditor and surety are mistaken on the creditworthiness of the debtor, this should usually come at the expense of the creditor, but this can change under circumstances, especially if the surety is a weak party (see further below).

The Dutch Supreme Court has ruled various times on the concept of mistake in relation to contracts of suretyship. In 1924 the Dutch Supreme Court ruled that there was a case of mistake because the creditor had caused a mother in law to believe that she would save her son in law from bankruptcy by standing surety towards that creditor.<sup>603</sup> In the later and widely cited and discussed 1990 case *Van Lanschot/Bink*<sup>604</sup>, there was a mutual mistake regarding the creditworthiness of the debtor. The Dutch Supreme Court held that, under the relevant circumstances, the creditor had a duty to warn the (future) surety of the dangers involved. If the creditor does not fulfill his duty to warn, the sanction is that a mutual mistake in the sense of article 6:228 paragraph 1 sub c BW is for the account of the creditor. In other words, the surety, having proven that he or she was mistaking in the sense of art. 6:228 paragraph 1 sub c BW, is able to annul the suretyship in case the creditor has not fulfilled his duty to warn.<sup>605</sup>

The 1990 case *Van Lanschot/Bink* involved a consumer surety and a professional creditor (a bank). In a later case, the Dutch Supreme Court held that this duty to warn does not apply to a commercial surety. According to the Dutch Supreme Court, a mutual mistake should, following the nature of suretyship, be for the account of the commercial surety, unless the mistake is due to an act or omission of the creditor in the sense of art. 6:228 paragraph a or b BW.<sup>606</sup> However, ‘consumer surety’ should not be defined too narrowly in this context. In the 2016 case of *Hardeveld/Aruba Bank*, the Dutch Supreme Court ruled that also outside a family relationship between surety and debtor, in this case a businessman that stands surety for a friend, the special duty to warn can apply.<sup>607</sup>

<sup>603</sup> Dutch Supreme Court 30 May 1924, NJ 1924, 835 (*Schoonmoeder*)

<sup>604</sup> Dutch Supreme Court, 1 June 1990, NJ 1991/759 (*Van Lanschot / Bink*).

<sup>605</sup> In 1995, in a case based on the same facts as *Van Lanschot/Bink*, the Dutch Supreme Court held that the special duty to warn does not apply to the consumer debtor himself, but just to the consumer borg: Dutch Supreme Court 19 May 1995, NJ 1997/648 m.nt. Brunner. However, one should distinguish such a special duty to warn from the general duty of care that banks have towards customers in the context of risky financial products under Dutch law, see: Dutch Supreme Court 12 April 2013, NJ 2013/390 m.nt. Tjong Tjin Tai (*Pessers/Rabo*) – this duty of care has a much further reach than just a duty to warn.

<sup>606</sup> Dutch Supreme Court, 3 June 1994, NJ 1997/287 (*Direktbank/Breda*); In a few subsequent rulings, some ancillary questions or uncertainties have been addressed. In 1999, the Dutch Supreme Court ruled on a procedural issue, holding that the surety should first prove that he was mistaking, before being able to accuse the creditor of failing his duty to warn (Dutch Supreme Court 8 October 1999, NJ 1999/781 (*Bouman/Rabobank*)). In 2014, the Dutch Supreme Court ruled that the special duty to warn does not rest on non-professional creditors (Dutch Supreme Court, 21 March 2014, NJ 2014/266 m.nt. Tjong Tjin Tai, (*Dulack q.q./X*)).

<sup>607</sup> In a 2016 judgement, the Dutch Supreme Court reaffirmed the duty to warn the consumer surety with reference to the aforementioned case of *Van Lanschot/Bink*. Other than the case in *Van Lanschot/Bink*, this case does not concern a family relationship between surety and debtor, but a

Both these cases can be seen as an interpretation by the Dutch Supreme Court of the aforementioned article 6:228 paragraph 2 BW on mistake.<sup>608</sup> In case of a consumer surety, a mutual mistake should come at the expense of the creditor, unless the creditor has sufficiently warned the consumer surety. In case of a commercial surety, a mutual mistake should come at the expense of the surety. Furthermore, in both consumer and commercial suretyships, a mistake that is due to an act or omission of the creditor in the sense of art. 6:228 paragraph a or b BW is however for the account of the creditor. It still remains somewhat unclear what the content of the special duty to warn is. Some are of the opinion that the warning can be limited to the dangers that are generally involved in engaging in a suretyship,<sup>609</sup> others are of the opinion that the creditor (also) has to warn of the specific risks involved in each individual case.<sup>610</sup> Because a mutual mistake usually relates to the creditworthiness of the primary debtor, it seems appropriate to obligate the creditor to inform of the risks involved in the individual case, because only such a duty incentivizes the creditor to research that creditworthiness further and thus prevent mutual mistake.

The protection of the surety through a duty to warn could be qualified as a primarily formal protection.<sup>611</sup> Risky suretyships are in principle enforceable, even if the guaranteed amount surpasses the guarantor's wealth, as long as the creditor has sufficiently warned the surety.<sup>612</sup> This contrasts with the special duty of care that a bank has under Dutch law towards non-professional investors that trade in risky products through their bank. The bank, after warning the investor, may even have to step in and stop the investor by refusing certain transactions.<sup>613</sup> The Dutch Supreme Court has thus far not formulated such a far reaching duty of banks towards sureties, whilst some commentators have argued for such a duty.<sup>614</sup> Blomkwist has however argued that a prudent creditor would not conclude such suretyship because the main purpose of the suretyship contract, in his opinion recourse to the surety if the principal debtor fails, would not be served by such a suretyship.<sup>615</sup> This line of reasoning neglects the central aim of many suretyships, which are often concluded rather for control than for actual recourse, see extensively chapter 2. Such control can paradoxically increase if the suretyship can actually push the surety into bankruptcy.

It is, on the other hand, probably true that the formal requirements under Dutch law, such as the duty to inform the surety and the substantive safety valve protection through the general doctrine of reasonableness and fairness (article 6:248 BW) may prevent lenders from too often concluding suretyship contracts with natural persons that cannot meet the obligations.<sup>616</sup> A good example of such use of the duty to inform in combination with the general doctrine of

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businessman that stands surety for a friend. The Dutch Supreme Court ruled that also in in such a relationship, the special duty to warn applies. Moreover, the Dutch Supreme Court finds, based on the other circumstances of the case, that the judgement of the Court of Appeal that the mistake of the surety should be for his own account, is unintelligible (Dutch Supreme Court 1 April 2016, ECLI:NL:HR:2016:543, (*Harderveld/Aruba Bank*)).

<sup>608</sup> Hartkamp and Sieburgh, 2014, para. 245.

<sup>609</sup> For example: Blomkwist, 2012, p. 63; Bergervoet, 2014.

<sup>610</sup> For example: Bob Wessels, 1994, p. 163; C.J.M. Klaassen, 2002, p. 671; Haentjens, 2010, pp. 426–427.

<sup>611</sup> Cherednychenko, 2014, p. 677.

<sup>612</sup> Haentjens, 2010, p. 421.

<sup>613</sup> Cherednychenko, 2014, p. 678.

<sup>614</sup> See in particular Tjittes, 1996.

<sup>615</sup> Blomkwist, 2012.

<sup>616</sup> Haentjens, 2010, pp. 419–422.

reasonableness and fairness is a recent decision by the Amsterdam Court of Appeal.<sup>617</sup> Shortly put, the bank had requested a suretyship from a consumer surety of around € 2 million. According to the court, it was already clear to both the bank and the surety that he would not be able to pay in case the liability was triggered. The surety however had little choice, because the bank made clear that the suretyship was a condition for providing credit to a certain company, which company was economically owned by the children of the surety. Moreover, the surety had a claim of around € 900.000 on that company, which would probably not be repaid if the bank wouldn't grant financing. The Court of Appeal held that, under these circumstances, the bank would breach its duty of care by demanding suretyship for such a large sum without further research into the financial position of the surety and without giving insight to the surety in this position in relation to the suretyship. The Court of Appeal thus took the approach that the bank should have warned the surety of the specific dangers in this case, not just of the general dangers of standing surety. After the debtor had been declared bankrupt, the bank had not only requested the surety to pay but also requested the court to declare the surety bankrupt. The Court of Appeal holds that using this suretyship claim to ask for the surety to be declared bankrupt is, given the background of the claim, contrary to the principles of reasonableness and fairness.

### **3.3 Protection of consumer suretyship through mandatory suretyship law**

Articles 7:852-856 BW and articles 7:858-861 BW are mandatory law for consumer suretyship (art. 7:862 BW). Art. 7:851 paragraph 1 BW stipulates the dependent nature of suretyship, which is thus mandatory for consumer suretyship (see on the dependent nature extensively paragraph 2.1.1 above). Art. 7:855 paragraph 1 stipulates the subsidiary nature, which is thus also mandatory for consumer suretyship. In other words, consumer suretyships cannot deviate from the dependent and subsidiary nature and its implications. Some other provisions that are mandatory law for consumer suretyship are art. 7:856 (on interest) art. 7:853 (prescription) and art. 7:853 BW (on suretyship for non-pecuniary obligations).

Next to the mandatory subsidiary and dependent nature and related rules, there are various specific statutory protections of consumer sureties laid down in articles 7:858-861 BW. Article 7:858 BW stipulates that, in case the amount of the obligation of the principal debtor is not yet fixed at the time of concluding the suretyship, the suretyship will be invalid if it does not contain a maximum amount. In other words, at the time of concluding the suretyship, it has to be clear what the maximum liability of the guarantor under the suretyship is. A second limit is that the conditions for enforcement against the surety cannot be more onerous than the conditions that apply to the principal debtor.<sup>618</sup> Moreover, a surety cannot be held liable under the contract of suretyship for debts of the principal debtor that did not yet exist at the moment of concluding the suretyship and originate in a voluntary act of the creditor, performed at a moment on which the creditor (already) knows the principal debtor will probably not be able to pay (art. 7:861 paragraph 4 BW). The creditor can also not claim damages owed by the principal debtor from a

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<sup>617</sup> Amsterdam Court of Appeal 18 December 2018, ECLI:NL:GHAMS:2018:4783.

<sup>618</sup> Unless these more onerous conditions relate to the way in which the existence and extent of the obligation of the primary debtor can be proven towards the surety (art. 7:860 BW).

consumer surety if the creditor could have prevented the damage with better monitoring of the principal debtor (art. 7:861 paragraph 3 BW).<sup>619</sup>

A suretyship can be entered into for future debts. The duration of such a suretyship is however limited, in the sense that the surety can terminate the suretyship at any moment if the suretyship is entered into for an indefinite period, and can terminate after five years if the suretyship was entered into for a set period longer than five years (art. 7:861 paragraph 1 BW). After termination, the suretyship for the debts of the principal debtor existing on the moment of termination will remain in force.

A contract of suretyship does not have any prescribed form.<sup>620</sup> However, through specific rules on the standard of proof, a prescribed form has almost de facto been adopted for consumer suretyship. In deviation from the general rules on evidence, the suretyship can only be proven towards the surety by presenting a document, signed by the surety (art. 7:859 para 1 BW).<sup>621</sup>

Applicable to all types of guarantees in which the guarantor acts as consumer are also general contract law rules on consumer protection.<sup>622</sup>

### 3.4 Protection of consumer guarantors other than sureties

The application of the measures that protect consumer sureties is not limited to contracts of suretyship, as art. 7:863 BW extends the scope of application to other personal security instruments in which a consumer binds himself towards the creditor to perform in case a third person does not perform an obligation<sup>623</sup> *with a different substance*. The difference between this type and suretyship is thus that the obligation of the guarantor is not the same as that of the principal debtor towards the creditor.<sup>624</sup> The extension of the mandatory law provisions to this type is meant to prevent evasion of those provisions.<sup>625</sup>

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<sup>619</sup> See extensively Bergervoet, 2014.

<sup>620</sup> For a suretyship, such a prescribed form (in writing) has been considered by the legislator, but explicitly not adopted (Bergervoet, 2014 with reference to Parl Gesch Boek 7, p. 417; p. 448.). The legislator did not want to impede the important function of the suretyship in the lending business too much (Bergervoet, 2014 with reference to Parl Gesch Boek 7, p. 417; p. 448.).

<sup>621</sup> This also applies to the agreement that obligates to enter into a *borgtocht* (art. 7:859 paragraph 3 BW); the requirement on the necessary evidence does not apply when the surety himself has already paid under the suretyship (art. 7:859 par 2 BW). The requirement of paragraph 7:859 para 1 BW is of mandatory law for the consumer surety (art. 7:862 BW).

<sup>622</sup> Relevant could for example be the rules on general terms and conditions (art. 6:231 ff BW). Conditions in general terms and conditions are void if (i) the user has not provided a reasonable opportunity to be informed of those terms or (ii) if the term is unreasonably onerous (art. 6:233 BW). For consumers, Dutch law uses two lists of conditions that are respectively always unreasonably onerous (the so called black list, art. 6:236 BW) and deemed to be unreasonably onerous (the grey list, art. 6:237 BW). For example relevant could be art. 6:237 paragraph g BW (grey list), that deems a clause that limits the right of a counterparty (in our case: the guarantor) to set off to be unreasonably onerous.

<sup>623</sup> The extension of the scope is not applicable to cases in which the guarantor guarantees that another person that does not have an *obligation* towards the debtor will act in a certain way, see also Blomkwist, 2012, p. 15.

<sup>624</sup> Blomkwist, 2012, pp. 9–11.

<sup>625</sup> MvT Inv., *Parl. gesch. Inv.*, p. 458; Haentjens, 2010, pp. 417–418; Castermans & Krans, T&C Burgerlijk Wetboek, commentaar op artikel 863 Boek 7 BW.

Art. 7:864 BW further extends protection of consumer sureties to the case in which an intermediary is used as surety, by mandate and for the account of another person, who is not the principal debtor. It makes sense that using such an intermediary cannot evade mandatory law on the protection of the ultimate surety, here the person giving the mandate. The rule laid down in art. 7:864 BW is that the suretyship between intermediary and creditor is valid in such a case, but the intermediary does not have recourse to the person that gave the mandate if the creditor would not have been able to claim on that person under a suretyship.

Notably, the scope is however not extended to personal security instruments by consumers that, for another reason than having a different substance than the primary debt, do not amount to a suretyship, for example because the guarantor does not present himself as someone that is not internally (towards the principal debtor) liable.<sup>626</sup> Also, protection does not seem to be extended to independent guarantees given by consumers, although the text and legislative history are somewhat unclear on this point. It seems that art. 7:864 paragraph 2 BW was specifically drafted with bank guarantees in mind,<sup>627</sup> and such bank guarantees are usually independent guarantees. This, combined with the argument that evasion would be too easy if protection was not extended to independent guarantees by consumers, should lead to the conclusion that the mandatory provisions on consumer suretyship can be applied to independent guarantees by consumers.

### 3.5 Protection of weak parties other than consumers

The idea of the legislator was that the professional surety should be deemed to be capable of assessing the possible consequences of suretyship, and thus does not need protection of mandatory laws.<sup>628</sup> This idea seems to make sense for professional sureties that act in the course of a profession or the operation of a business. Not many natural persons are however in the business of providing guarantees. For another, more abundant category of professional sureties, the reasoning is more problematic. The ‘professional’ surety that guarantees a loan of the company in which he holds shares does have an interest in the principal debtor, but does not act in the course of a profession or the operation of a business in guaranteeing. The guarantee for certain corporate debts is often a one-off and particularly risky act of the guarantor.

It seems that the definition of professional suretyship under Dutch law is designed to pierce the corporate veil: the guarantor that does not act in the operation of his own business, but that

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<sup>626</sup> See on this difference Blomkwist, 2012, p. 5 ff.

<sup>627</sup> Blomkwist, 2012, p. 20.

<sup>628</sup> Parl. Gesch. Boek 7, p.420-421. See also Blomkwist, 2012, p. 34. A consumer surety is a natural person that neither acts in the course of a profession or in the operation of a business, nor on behalf of the normal operation of the business of a public limited company (NV) or a private limited company (BV) of which he is a director and in which he alone (or together with the other directors) holds the majority of shares. There is a lot of case law concerning the question what amounts to a loan (and guarantee for that loan) in the normal operation of a business. The answer to that question always depends on the circumstances. Whereas taking a normal loan, such as a bank loan, will generally be considered to be qualified as an act in the normal operation of business, this can change under specific circumstances. See Dutch Supreme Court 14 April 2000, JOR 2000/113 (Soetelieve/Stienstra); Dutch Supreme Court 8 July 2005, JOR 2005/233 m.nt. Verdaas (*Rabobank/Van Hees*); Dutch Supreme Court 18 December 2015, NJ 2016/29, (X/ING); see also Bergervoet, 2014). Emergency funding, with its inherent risks, will for example often not be regarded as normal (Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3606, (Nooij/ING); Dutch Supreme Court 8 July 2005, JOR 2005/233 m.nt. Verdaas (*Rabobank/Van Hees*); see also Amsterdam District Court 16 April 2003, JOR 2003, 191 with case note A.J. Verdaas.

conducts business through the vehicle of a public or private limited company, is equated with a professional guarantor.<sup>629</sup> This seems a pragmatic move of the legislator, but the consequences can be grave.<sup>630</sup> The legislator sees the entity as transparent for the application of the definition of a professional surety, but otherwise does not regard the entity transparent. As discussed in chapter 3 paragraph 3.1, this setup can be an ideal situation for the guaranteed creditor. On the one hand, business assets are shielded from claims of private creditors of the guarantor, whilst on the other hand the guaranteed creditor is not prevented from claiming on the guarantor himself. It is this setup, probably combined with real security rights on business assets, that may persuade the creditor to provide the loan, where he might not have done so if the guarantor would not have conducted business through a legal entity but instead in his own name. As such, the guarantor takes on large liabilities, which he might not have been able to take in his own name. The risks are typically also hard to oversee for the guarantor, who is likely to be heavily influenced in his risk-assessment by his own involvement in the corporation (see further chapter 3 paragraph 2).

Dutch law offers little protection to ‘professional’ sureties. In some extreme cases, professional sureties have however been successful in relying on art. 6:162 BW (tort law) against the creditor in cases where the creditor, inter alia through the guarantee relationship, exerted pressure on the guarantor in order to act in the interest of the creditor. The seminal case is *Kip en Sloetjes/Rabobank Winterswijk*.<sup>631</sup> Rabobank had for many years been the main bank of the Elka group. Kip and Sloetjes were shareholders of the top holding. They had guaranteed a substantial part of the group loans. When Elka ran into some financial trouble, Rabobank acted, in the view of Kip and Sloetjes, carelessly towards Elka, Kip and Sloetjes, by forcing unfavorable conditions on Kip, Sloetjes and Elka and ultimately by forcing Kip and Sloetjes to sell their shares at a low price. The Court of Appeal had held that the claim of Kip and Sloetjes on Rabobank was a claim for derivative damages, which would mean that, in line with the case law of the Dutch Supreme Court, only the primarily injured party (Elka) could have claimed damages. The Dutch Supreme Court however disagreed, considering that the interests of the shareholders were strongly interwoven with those of the group, also given the personal guarantees granted by them and given their dependence on Elka for their income. Given those personal interests of the shareholders, the bank may have violated specific duties of care towards the shareholders directly. The shareholders can claim direct damages in case of such a violation, which claim can be distinguished from a derivative claim for damages as shareholders of the company.

In the 2018 case *Leliveld/Rabobank*, the Court of Appeal applied the reasoning in *Kip en Sloetjes/Rabobank*, and indeed found that the bank had acted unlawfully directly towards the shareholders of a group by making abuse of circumstances by forcing very unfavorable conditions on the group and the shareholders in financially difficult times. The unfavourable conditions for a credit expansion of € 20 million included a sale of 60% of the shares to the bank (and other lenders) for € 1 and a fee to be paid to the lenders of € 20 million (the same amount

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<sup>629</sup> See MvT Inv., Parl. Gesch. Inv., p. 445; Compare also Nethe, 2003.

<sup>630</sup> The parliamentary history of the definition of a (non-)professional surety indeed shows that the legislator was, in formulating the rule on shareholder/managers that guarantee debts of their business, especially pre-occupied with the ability of the company to acquire sufficient financing, and not so much with the possible inability of the shareholder/director to assess the possibly substantial risk involved (MvA II Inv., Parl. Gesch. Inv., p. 443 e.v. particularity p. 445; Parl. Gesch. Aanpassing BW (Inv. 3, 5 en 6), p. 20. See also p. 24 (MvA II)).

<sup>631</sup> Dutch Supreme Court 2 mei 1997, ECLI:NL:HR:1997:ZC2365, NJ 1997, 662 (*Kip en Sloetjes/Rabobank Winterswijk*).

as the credit expansion).<sup>632</sup> The fact that the shareholders had guaranteed part of the debts of the group towards the bank was in the reasoning of the Court of Appeal both one of the circumstances of which the bank made abuse, and, like in *Kip en Sloetjes/Rabobank*, helped in reaching the conclusion that the bank had acted unlawfully directly towards the shareholders.

As already discussed, the duty of the creditor to warn the surety does not apply to relationships involving a professional surety (and also not to relationships involving a non-professional creditor). Dutch law does, under special circumstances, allow some indirect effect of the consumer suretyship rules on professional suretyships, for example where it concerns a one-man company that resembles a consumer.<sup>633</sup>

### 3.6 Protection of legal persons standing surety

Legal persons cannot be consumers in the sense of art. 7:857 BW, therefore consumer protection does not apply to them. Articles 7:852-856 BW (on defences, subsidiarity<sup>634</sup>, interest and costs, prescription, suretyship for payment in kind) do apply as default rules, but professional parties can in principle deviate from these by contract.<sup>635</sup> Legal persons may however enjoy some protection through the *ultra vires* doctrine.

Legal persons often guarantee debts of other legal persons. In the case of two at first unrelated legal persons, the guarantor would ask a premium to the creditor or principal debtor, reflecting the risk he assumes and the costs he incurs. Within corporate groups, cross-ties in the form of guarantees to a lender can often be found.<sup>636</sup> The problem with such groups is that they often operate as one economic entity. Rarely an arm's length premium paid by the creditor or principal debtor to the guarantor is found in this context. Such a case may raise the question whether a guarantee is actually in the interest of the guarantor in question, or whether the guarantee is in line with the (statutory) goal of the legal entity.<sup>637</sup>

In this context, we can distinguish between *upstream*-, *downstream*-, and *cross-stream* guarantees. *Downstream* guarantees (guarantee by a parent for the debts of a subsidiary) are generally not considered problematic in this context, as looking after the subsidiaries is often assumed to be (part of) the goal of the parent company. This will typically also directly benefit

<sup>632</sup> Gerechtshof Arnhem-Leeuwarden 27 March 2018, ECLI:NL:GHARL:2018:2893, *Leliveld / Rabobank*.

<sup>633</sup> Tjittes, 2001, p. 349; C.J.M. Klaassen, 2002; Haentjens, 2010, p. 419.

<sup>634</sup> Somewhat unclear is however whether parties can divert, and more specifically to what effect, from the subsidiary nature of suretyship where it concerns non-consumer suretyships. Bergervoet, 2014; Asser/Van Schaick 7-VIII\* 2018/76.

<sup>635</sup> See also Blomkwist, 2012, p. 13.

<sup>636</sup> See also Bartman and Dorresteyn, 2013, pp. 265–266.

<sup>637</sup> The idea of a 'goal' of a legal entity, and sanctions on exceeding that goal, may need some more explanation. Whereas natural persons are deemed to be able to take part in legal transactions without having any overarching goal in doing so, legal persons are under Dutch law not allowed to do so purposelessly (Art. 2:26 paragraph 1 BW; 2:53 paragraph 1 BW; 2:66 paragraph 1 BW; 2:177 paragraph 1 BW; 2:285 paragraph 1 BW). This difference can be related to the fact that legal persons cannot act autonomously, but are instead a vehicle for natural persons. To do justice to separate legal personality, the legal person needs some goal (compare Groenewald, 2001, p. 1). From this flows the *ultra vires* doctrine: if the legal person needs a goal to do justice to legal personality, it should not be allowed to act outside this goal (see further Groenewald, 2001, pp. 3–4). The doctrine thus protects the legal person against itself, or more specifically, against instrumental use by the natural persons behind the legal person in as far as such instrumental use is not in line with the goal of the company.

the parent (and its creditors), as the shares in the subsidiary are assets of the parent. With *upstream* guarantees (guarantees by a subsidiary for debts of a parent) and *cross-stream* guarantees (guarantees by a group company to another group company that is neither a parent, nor a subsidiary), the interest of the company in guaranteeing can be more questionable.

Article 2:7 BW stipulates that a legal act of a legal person is voidable in case the act is outside the goal of the legal person and the counterparty knew or should have known (without its own examination). Only the legal person itself can avoid the act on this ground. The parliamentary history shows that the ‘goal’ should be understood as the statutory goal, although also the interest of the company should be taken into account.<sup>638</sup> Guarantees by group companies for the debts of other group companies, or for the debt of the whole group, are however difficult to avoid on grounds of art. 2:7 BW under current Dutch law for a number of reasons.<sup>639</sup> Firstly, a credit facility can possibly be deemed to be used by each entity in the group that has access to it, even if the entity in question has not actually used it.<sup>640</sup> Secondly, the goal of the legal person can be formulated broadly and will often include, after describing the goal substantively, something like “*as well as everything that could be serving this goal or has a connection to the goal, including guaranteeing obligations of group entities.*”<sup>641</sup> Thirdly, even if the statutory goal lacks such a formulation, ‘secondary acts’, that are not covered by the statutory goal in a strict textual interpretation but do have some relation to the goal, are generally deemed to be covered by the statutory goal.<sup>642</sup> Fourthly, even if a guarantee for a debt of a group company can be considered outside the statutory goal, the entity can only invoke 2:7 BW if it can prove that the counterparty knew or should have known it was outside the scope.<sup>643</sup>

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<sup>638</sup> Asser/Maeijer, Van Solinge & NieuweWeme 2-II\* 2009/830; Blomkwist, 2012, p. 45.

<sup>639</sup> Asser/Maeijer, Van Solinge & NieuweWeme 2-II\* 2009/830; Bergervoet, 2014.

<sup>640</sup> Although the Dutch Supreme Court is not entirely clear on this point, it seems to accept that access, and or/indirect profit, can be sufficient to establish that a group entity has ‘used’ the credit line. See Dutch Supreme Court 13 July 2012, NJ 2012, 447 (Janssen q.q./JVS Beheer); Dutch Supreme Court 18 April 2003, JOR 2003/160, m.nt. Bartman (Rivier de Lek/Van de Wetering); see also Bartman and Dorresteiijn, 2013, p. 275 ff). Thus, if the entity had access to a facility and it cannot be proven that the entity really did not directly or indirectly profit from the facility, relying on art. 2:7 BW will be difficult because co-signing the credit facility must then at least partly be deemed to have been in the interest of the company.

<sup>641</sup> Although there is some discussion whether, if the statutory goal specifically allows guaranteeing debts of group entities, there could not still be room for avoidance if the guarantee is clearly not in the interest of the entity in question, see Bergervoet, 2014; <sup>641</sup> Asser/Maeijer, Van Solinge & NieuweWeme 2-II\* 2009/830; Dutch Supreme Court 20 September 1996, NJ 1997, 149; JOR 1996/119 (Playland). There is some discussion on the question whether such a formulation always excludes relying on art. 2:7 BW to avoid a guarantee as *ultra vires*. Van Schilfgaarde has argued that there should still be some room for 2:7 BW, even if the statutory goal explicitly allows guaranteeing obligations of group companies, for example in cases of (gross) disproportionality between the assets of the company and the incurred liability (Schilfgaarde and Winter, 2003, p. 153); see for reference to other authors arguing this point: Bartman and Dorresteiijn, 2013, p. 273. Some others however see less room for 2:7 BW in such a case (See, also for more references: Bartman and Dorresteiijn, 2013, pp. 273–274).

<sup>642</sup> Acts in relation to the financial structure of the group are generally thought to be such secondary acts, especially if the company has ‘used’ the line of credit (Asser/Maeijer, Van Solinge & NieuweWeme 2-II\* 2009/830). Again, as noted above, the Dutch Supreme Court has a rather wide interpretation of ‘use’ in this context: access to the credit or indirect profit may be sufficient. See Dutch Supreme Court 13 July 2012, NJ 2012, 447 (Janssen q.q./JVS Beheer); Dutch Supreme Court 18 April 2003, JOR 2003/160, m.nt. Bartman (Rivier de Lek/Van de Wetering); see also Bartman and Dorresteiijn, 2013, p. 275 ff.

<sup>643</sup> As the subjective element of knowledge will be hard to prove in practice, the party will often have to rely on the objectified version: the counterparty should have known. Of course, this becomes harder to prove in case the text of the statutory goal explicitly sanctions such a guarantee



Guarantees given by a company for group debts could not only be suspect in the context of the *ultra vires* doctrine, but also in the context of conflicts of interests in the sense of art. 2:129 paragraph 6 and 2:239 paragraph 6 BW. The director of the group company that issues the guarantee could be a natural person that is also the director of the parent company, or of other group companies, and may thus be pursuing the interest of another group company when issuing the guarantee, instead of the interest of the guarantor itself. Or the director could be the parent company itself, pursuing its own interest rather than that of the subsidiary.

Until 2013 Dutch law had a provisions on conflicts of interest which applied to the limited company (art. 2:256 BW) and to the public company (art. 2:146 BW). This provision stipulated that, simply put, in case of a conflict of interest of one of the *directors* of the company, the directors would not be authorized to represent the company. If the board would have represented the company anyway, the legal act resulting from it would be invalid and this invalidity had external effect, meaning that the company (or its bankruptcy administrator) could rely on the invalidity towards an external party, in as far as that external party knew or could reasonably have known about the conflict of interests.<sup>644</sup> However, art. 2:256 BW and art. 2:146 BW have been revoked on 1 January 2013.

The new provisions on conflicts of interest, art. 2:129 paragraph 6 and 2:239 paragraph 6 BW for directors, do not have external effect. Conflicted directors are still not allowed to take part in taking the decision at hand, but even if they do, this does not affect the legal act that flows from the decision, merely the internal management decision can be avoided (art. 2:15 BW). In other words, the company (or its bankruptcy administrator) cannot against an external party rely on the fact that one or more directors were conflicted in taking the decision, even if the external party was aware of the director(s) being conflicted.<sup>645</sup>

The provisions on conflict of interest could however still have some relevance in the context of guarantees. Even lacking external effect, it can under specific circumstances be unacceptable according to the standards of reasonableness and fairness for the counterparty that knew that a director was conflicted to invoke the contract against the company (the so-called *Bibolini-defence*).<sup>646</sup> The question whether a conflict of interest exists thus remains relevant.

There has been a recent shift of the Dutch Supreme Court from an abstract reading of conflicts of interests, to a more case-by-case approach that makes proving a conflict of interest more difficult.<sup>647</sup> Moreover, the Dutch Supreme Court recently noted that guaranteeing a group debt is in principle not suspect under the rules of conflicts of interests.<sup>648</sup> The new law as of January 2013 also seems to exclude such cases more broadly, by emphasizing the *personal* interest of the director. An interest of the director in the quality of being a director of another group company does not seem to be viewed as a personal interest by the legislator.<sup>649</sup> However, it seems likely that a director who makes the corporation guarantee a debt of himself towards his creditor,

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(Bergervoet, 2014). The category of cases in which knowledge on the side of the counterparty can be proven, therefore probably exclusively covers cases in which a guarantee was manifestly detrimental to the debtor to such an extent that it endangered the own activities of the entity (Asser/Maeijer/Van Solinge & NieuweWeme 2-II\* 2009/830).

<sup>644</sup> Dutch Supreme Court 11 September 1998. RvdW 1998, 150C (Mediasafe II).

<sup>645</sup> See also Bartman and Dorresteijn, 2013, p. 284.

<sup>646</sup> Dutch Supreme Court 17 December 1982, NJ 1983, 480 (Bibolini).

<sup>647</sup> Dutch Supreme Court 27 June 2007, NJ 2007, 420 (Bruil), see also Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II\* 2009/400.

<sup>648</sup> Dutch Supreme Court 27 June 2007, NJ 2007, 420 (Bruil).

<sup>649</sup> Kamerstukken Tweede Kamer 2008/2009, 31 763, nr. 6, p. 18; see also Dongen, 2013, p. 47.

would be serving a personal interest. A more difficult question poses itself when a mix of these cases occurs: the director that represents the company in guaranteeing his own debt, could at the same time be the parent company (under Dutch law, legal persons can be directors), which makes the debt a group debt. Such a guarantee is not considered to be suspect under the current conflict of interest rules.

### 3.7 The spouse

Spouses of consumer guarantors are somewhat protected against adverse effects of guarantees by art. 1:88 and 1:89 BW.<sup>650</sup> Guarantees can make the guarantor liable for large sums, which the guarantor – as opposed to the case of a normal loan, has never received. As such, it can put the guarantor, and his or her spouse, in great financial danger. Therefore, some guarantees need approval of the spouse, otherwise the spouse (but not the guarantor himself) can avoid the guarantee under art. 1:89 BW.<sup>651</sup> This regime applies regardless of the marital conditions between spouses and also applies to registered partnerships.

Art. 1:88 paragraph 1 BW stipulates which legal acts need approval of spouses; sub c of that article quite generally covers guarantee relationships.<sup>652</sup> Excluded however are guarantee relationships in which the guarantor himself also takes on some internal liability.<sup>653</sup> Moreover, art. 1:88 paragraph 1 sub c BW excludes guarantees if the guarantor's occupation or business consists of issuing guarantees, or if this is at least normal in their occupation or business. This exception is rather narrow, as there are probably not many natural persons that routinely issue guarantees in the course of their business.<sup>654</sup>

Art. 1:88 paragraph 5 BW contains a more important exception, stipulating that approval is not necessary concerning guarantees issued by a spouse on behalf of the normal operation of the business of a public limited company (*NV*) or a private limited company (*BV*) of which he is a director and in which he alone (or together with the other directors) holds the majority of shares.<sup>655</sup> This definition is analogous to the definition of consumer suretyship in art. 7:857 BW. The Dutch Supreme Court has interpreted this paragraph as meaning that if the loan taken by the company (for which the guarantee was issued) can be qualified as a loan in the normal operation of the business, this also applies to the guarantee.<sup>656</sup> Protection is also withheld in case of a one-off loan, as long as the proceeds are used for the normal operation of the business.

There is a lot of case law concerning the question what amounts to a loan (and guarantee for that loan) in the normal operation of a business. The answer to that question always depends on the circumstances. Some guidelines and rules of thumb can however be formulated based on the

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<sup>650</sup> Conceptually, the consumer guarantor is not protected, but the spouse is.

<sup>651</sup> See also Asser/Van Schaick 7-VIII\* 2018/109.

<sup>652</sup> The other acts that need approval include acts concerning houses in use with the spouses

<sup>653</sup> Asser/De Boer 1\* 2010/248.

<sup>654</sup> See also Bergervoet, 2014; Asser/De Boer 1\* 2010/249; Blommaert, 2018.

<sup>655</sup> Indirect directorship and shareholding is (rather obviously) seen as sufficient, see Dutch Supreme Court 11 juni 2003, NJ 2004/173 (Kelders/Fortis) and Dutch Supreme Court 8 October 2010, *JOR* 2010/367 (Abbink/SNS), as long as the surety has control over the organization and has a financial interest in it. See also: District Court Midden-Nederland, 1 July 2015, *JOR* 2015/313 (Barclays/X).

<sup>656</sup> Dutch Supreme Court 14 April 2000, NJ 2000/689 (Soetelieve/Stienstra). See recently also Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3606, (Nooij/ING).

available case law. Firstly, the aim of protection of the spouse of art. 1:88 BW should be taken seriously and the exception of paragraph 5 of that article should not be interpreted broadly.<sup>657</sup> Secondly, whereas concluding a normal loan such as a bank loan will generally be considered to be qualified as an act in the normal operation of business, this can change under specific circumstances.<sup>658</sup> Emergency funding, with its inherent risks, will for example often *not* be regarded as normal.<sup>659</sup>

If approval of the spouse was needed, but is absent, the spouse can avoid the guarantee (art. 1:89 BW). The creditor in good faith can however defend himself against such avoidance (art. 1:89 paragraph 2 BW). If he was made to believe that the guarantor was not married, for example because the guarantor told him so, he could rely on this article.

In 2013, the Dutch Supreme Court ruled that the special duty to warn the surety (see paragraph 3.2 above) does not equally apply to the spouse that co-signs the suretyship pursuant to art. 1:88 BW.<sup>660</sup> All that is needed is the signature of the spouse, the creditor does not need to inform the spouse separately on the dangers involved in the suretyship. This does reduce the protective force of art 1:88 BW substantively.<sup>661</sup> The requirement does, because of this decision of the Dutch Supreme Court, not do much more than making sure that the spouse at least has knowledge of the existence of the suretyship (and of course helping the occasional lucky spouse that did not co-sign with an avoidance action). It would be a strange marriage (though probably not too uncommon) in which the spouse did not have any knowledge of such a risky transaction. In that sense, apart from helping lucky spouses with an avoidance action, the requirement seems to have little substance. If the bank on the other hand would have the duty to warn the spouse of the risk involved, this may substantially help prevent irrationally assumed suretyships.

If for example a spouse is the shareholder of a small corporation and the bank requests a personal guarantee for the corporate debts, the shareholder may, because of his or her involvement in the business and thus colored view of the risk involved, not be able to rationally consider the proposal, especially when he or she is under high pressure, for example in the case of a distressed business. His or her spouse may be better able to oversee the situation in a more detached and rational manner. A duty of the bank to inform the spouse directly of the risks involved would help making the right decision.

### 3.8 Protection through bankruptcy law

Arguably, a surety that is liable for a large amount is somewhat protected by the protection that bankruptcy law offers against life-long over-indebtedness by discharging debts under certain

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<sup>657</sup> Dutch Supreme Court 14 April 2000, *NJ* 2000/689 (Soetelieve/Stienstra).

<sup>658</sup> Bergervoet, 2014.

<sup>659</sup> Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3606, (Nooij/ING); Dutch Supreme Court 8 July 2005, *JOR* 2005/233 m.nt. Verdaas (*Rabobank/Van Hees*); see extensively also Blommaert, 2018; Smelt, 2017.

<sup>660</sup> Dutch Supreme Court 12 April 2013, *NJ* 2013/390 m.nt. Tjong Tjin Tai (*Pessers/Rabo*); if the spouse is, apart from co-signing the suretyship, also a client of the bank, for example because the spouse has an account at that bank, the bank may have a duty to warn the spouse of the dangers involved in co-signing because of that contractual relationship between bank and account holder. See Dutch Supreme Court 12 April 2013, *NJ* 2013/390 m.nt. Tjong Tjin Tai (*Pessers/Rabo*).

<sup>661</sup> Case comment Tjong Tjin Tai to Dutch Supreme Court 12 April 2013, *NJ* 2013/390 (*Pessers/Rabo*).

conditions. The granting of a fresh start is however not self-evident under Dutch law and it will in any case take a long time before such a fresh start is granted, if it is. Art. 285 paragraph 1(f) Fw stipulates that a debtor should first try to settle his debts with his creditors. If this does not work out, the debtor needs to obtain a declaration from the mayor and the city council members of the municipality where the debtor lives, declaring that he indeed tried to settle his debts and that this has proven not to be possible. With this declaration in hand, the debtor who is a natural person can request the court to be submitted to the '*schuldsaneringsprocedure natuurlijke personen*' (debt clearing procedure for natural persons).

The court will only allow the debtor to enter the procedure if the debtor has, over the past five years, not been in bad faith in relation to incurring debts or leaving debts unpaid (art. 288 paragraph 1(b) Fw). The court has considerable freedom in establishing whether the debtor has been in good faith. Debts related to criminal offences or debts related to tax claims are generally not considered to be acquired in good faith. Debts on guarantees for corporate debts are generally seen as acquired in good faith, but this may change depending on the circumstances.

Further requirement for entry in the procedure is that it must be sufficiently clear to the court that the debtor will be able to perform the duties of the procedure and will make an effort to earn as much as possible during the course of the procedure in order to pay his creditors (art. 288 paragraph 1(c) Fw). The requirements of the procedure are strict. Requests to be admitted to the procedure are dismissed for the reason that the court is not convinced that the debtor will be able to perform his duties. This could be because the debtor does not seem sufficiently proactive, or because the debtor is involved in ongoing personal trouble.

If the debtor is allowed entry to the procedure, the court appoints an administrator. The administrator liquidates all the assets of the debtor (excluding some basic necessities) (art. 347 Fw) and divides the proceeds between the creditors (art. 349 Fw). That is just the beginning. The procedure takes at least three years (art. 349a Fw). During those three years, the debtor is supposed to work and earn money to pay his creditors as much as possible. If the debtor is unemployed, he or she has to continuously apply for jobs and submit proof of such applications. The administrator has to be given all relevant information. The debtor is not allowed to incur new debts or to act against the interest of creditors. The administrator supervises whether the debtor performs these duties. If the debtor fails to perform his duties, the court can remove him or her from the procedure (art. 350 paragraph 3 Fw). A fresh start is not granted in that case and the debtor is denied access to the procedure in the next ten years (art. 288 paragraph 2 (d) Fw). Only when the whole procedure has been successfully finished after three years (or five if the court decides to prolong it), the slate is wiped clean (art. 358 paragraph 1 Fw).

In short, Dutch bankruptcy law is not forgiving towards debtors. A fresh start can be obtained, but only after a lengthy procedure that is not open to everyone and that involves liquidating all assets of the debtor *and* involves the debtor having the obligation to work to as much as possible pay the creditors for at least three years.

### 3.9 Summary

This paragraph discussed Dutch law on the internal relationship between principal debtor, creditor and guarantor. Consumer sureties enjoy some protection, both based on case law and

on statutory mandatory law. This protection however usually does not extend to sureties in the context of corporate finance, which is the subject of this book. The Dutch law rules on consumer suretyship can in principle extend to shareholders or directors that stand surety for corporate debts, but do so only in a limited number of cases. Under Dutch law, such sureties fall outside the realm of consumer protection if they are both director and (alone or together with the other directors) hold the majority of shares of the debtor and the suretyship is on behalf of the normal operation of the business. This excludes many suretyships by shareholder/directors in the context of corporate finance from consumer protection, even suretyships for large, one-off loans.

Even if a surety qualifies as consumer, there are also some gaps in consumer surety protection, most notably the lack of substantive protection, the limited protection of consumer guarantors that are co-debtors and not sureties, the lack of clarity around consumers that are guarantors in independent guarantee relationships and the lack of specific protection of family sureties. One of the important default rules in favor of the guarantor is the statutory right to reimbursement, subrogation and contribution that the guarantor is granted. These rights can however, at least to an important extent, be waived, also by consumers.

Dutch law is rather well developed in protecting the spouse of the guarantor against the financial danger that guarantees can entail, by stipulating that the spouse can annul certain guarantees (though the exceptions to this rule have been interpreted liberally by courts, seriously undermining the protection) if they were entered into by the guarantor without the consent of the spouse. However, the special duty to warn the surety does not extend to the spouse, which substantially reduces the protection of the spouse.<sup>662</sup>

## 4 Dutch law on opportunism towards parties outside the guarantee relationship

Until this point, only the relations between the parties in the guarantee relationship, being the creditor, the principal debtor and the guarantor, have been discussed. Often the focus is primarily on these relations. Guarantees can however, as has been extensively described in chapter 3 paragraph 3, also influence the positions of outsiders. This chapter examines the current regulation under Dutch law of such effects on outsiders and the protection of the interests of these outsiders against possible opportunistic use by insiders. This analysis breaks new ground, as Dutch law and scholarly writing has had very little attention to the externalities of the guarantee relationship.

Chapter 3 paragraph 3 identified various types of opportunistic behavior with guarantees towards outsiders in two categories: opaque priority structures (*ex ante* opportunism) and covert insider dealing (*ex post* opportunism). Taking these types of opportunistic behavior as a starting point, or in comparative law terms as *tertium comparationis*,<sup>663</sup> Dutch law will be discussed.

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<sup>662</sup> Dutch Supreme Court 12 April 2013, *NJ* 2013/390 m.nt. Tjong Tjin Tai (Pessers/Rabo).

<sup>663</sup> See extensively chapter 1.

The discussion will mostly focus on the context of the financing of closely held corporations, because guarantees by shareholders or group companies are by far most common in this setting. Some reference will be made to the setting of public companies, especially where indirectly relevant to the closely held corporation.

As the analysis will show, Dutch law is underdeveloped in dealing with opportunism towards parties outside the guarantee relationship, also in relation to US law (chapter 5) and German law (chapter 6).

#### **4.1 Regulatory approach to opaque priority structures (ex ante opportunism)**

Guarantees can serve as a device instrumental in creating a structure in which one creditor or insider guarantor has priority over another creditor, especially in the context of corporate finance. In essence, guarantees can be used as a functional equivalent to real security rights by creating a perforated limited liability shield. This is not directly apparent, because it seems that the guaranteed creditor has recourse to an alternative source of payment with the guarantee and thus is not prioritized above other creditors of the debtor, but when one zooms out from the entity level, the priority granted by guarantees, and the externalities that come with it in the context of corporate finance, become apparent.

Chapter 3 paragraph 3.1.2 discussed whether such priority structures could as such generally be justified as efficient. Although guarantees can certainly perform efficient functions by preventing asset stripping, the analysis also showed that such piercing guarantees lead to various inefficient dynamics. It was concluded from the analysis of the literature on the efficiency of limited liability that the efficiency case for limited liability in small companies and within corporate groups is generally very weak and even weaker when guarantees are used to selectively pierce the limited liability shield. Legal systems should thus be wary of such contractually perforated shields. From a different perspective, the analysis of the literature on the efficiency of secured credit has also shown that the efficiency case for guarantees piercing a limited liability shield is very weak. Justification of secured credit based on efficiency grounds is already very problematic and the efficiency case for the priority that guarantees grant is even more problematic, as such priority is often more covert, misleading and deceptive. This paragraph will discuss to what extent Dutch law upholds such perforated limited liability structures.

As emerges from chapter 3 paragraph 3.1, there are roughly four regulatory approaches by which a legal system could address the inefficiencies created by pierced limited liability structures as such: (1) not upholding limited liability ('tearing down the walls'), (2) avoiding the piecing guarantees ('reinstating the walls') (3) subordinating loans guaranteed by shareholders (somewhat reinforcing the walls, though only to protect the patrimony of the debtor) and (4) disallowing double proof (again, somewhat reinforcing the walls). To which extent Dutch law adopts these approaches is discussed below in the aforementioned order. As the analyses will show, Dutch law offers little protection against opaque priority structures with guarantees.

### 4.1.1 Annulling limited liability

To recall, chapter 3 paragraph 3.1.2 discussed incorporation combined with a guarantee that pierces the limited liability shield (or entity shield) that incorporation creates. The argument developed there was that it is hard to justify such structures from the policy arguments that support limited liability. In essence, a combination of incorporation and a piercing guarantee allows the guaranteed creditor and guarantor together to use limited liability of the debtor as a shield against non-guaranteed creditors. This paragraph analyzes to what extent Dutch law has any sensitivity to these dynamics or addresses the problems identified, by tearing down the limited liability walls under certain circumstances.

#### *a) Direct veil-piercing*

In the public and the private company, shareholders of the company are not personally liable for the (unpaid) debts of the corporation (art. 2:64 paragraph 1 BW and 2:175 paragraph 1 BW respectively). However, in case of abuse of legal personality, a court could equate the legal person with its shareholder(s), thus burdening the shareholder with all the debts of the legal person, effectively cancelling legal personality and thus limited liability. Dutch courts rarely do so.<sup>664</sup> Necessary conditions for such equation probably include a clear case of abuse of legal personality with the purpose of avoiding opportunities for recovery by creditors.<sup>665</sup> Of course, the fact that a shareholder guaranteed some debts of the company could be a relevant circumstance in establishing abuse of legal personality, as such a guarantee diminishes the separateness of the asset pool of the company, but will in itself certainly not be sufficient to pierce the corporate veil.

Next to direct veil-piercing, the veil could *de facto* be (partly) lifted by a tort claim against shareholders of the company, in Dutch law often referred to as indirect veil-piercing, which will be discussed below.

#### *b) Shareholder liability in tort law*

'Direct' veil-piercing was discussed above. When the corporate veil is directly pierced, the boundaries between legal persons are completely disregarded by a court: they are seen as one legal person with one patrimony. As also discussed, such direct piercing is very rare. That does not mean shareholders are safe from claims of creditors of the company. Creditors could pursue shareholders on the basis of tort (art. 6:162 BW), often referred to as indirect veil-piercing. If such a claim succeeds, the boundaries between the shareholder and the company it holds shares in are not completely disregarded, but the shareholder is *de facto* held liable for some specific debt(s) of the company. The veil is partly lifted. Dogmatically however, the veil is not lifted and the shareholder is not held liable for the company's debts, but the shareholder is held liable for its own unlawful behavior and the damage that results from such behavior towards a creditor.<sup>666</sup> Question is whether shareholders can generally, outside cases of distributions on guaranteed

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<sup>664</sup> Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II\* 2009/836.

<sup>665</sup> See Barneveld, 2014, pp. 470–471; The Dutch Supreme Court case Krijger/Citco (9 June 1995, *NJ* 1996, 213) is also often mentioned in this context, although the case is strictly not about veil-piercing, see also Groenewoud, 2003, pp. 4–5.

<sup>666</sup> Compare: Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II\* 2009/837.

loans (which will be discussed below in paragraph 4.2), be more easily held liable because they have already voluntarily pierced the veil by giving one creditor a guarantee.

Relevant in this context is that, next to liability for distributions, the Dutch Supreme Court has also set out the conditions for holding shareholders responsible for (certain) debts of the subsidiary on the basis of art. 6:162 BW in situations of unjustifiably continuing the company.<sup>667</sup> In short, a parent company (or shareholder) can be held liable if there are close ties between shareholder and company with the accompanying power of intervention of the shareholder,<sup>668</sup> which leads to the conclusion that the parent has some duty of care towards creditors of the subsidiary, while this duty has been breached at a certain point by not acting on a moment that the subsidiary is in a deplorable financial state and the shareholder knows, or should have known, that new creditors would be prejudiced.<sup>669</sup> This category of shareholder liability is often referred to as liability for creating a false appearance of creditworthiness. The parent company can be held liable for the claims of creditors on their subsidiary if these claims came into existence after the moment that the parent should have acted. Whereas the earlier case law of the Dutch Supreme Court led many to believe that liability could only occur if this appearance of creditworthiness was created actively,<sup>670</sup> for example by the shareholder communicating to creditors that he would continue to financially support their debtor,<sup>671</sup> later case law also seems to allow for the possibility of claiming on the parent even if the parent did not actively create the appearance.<sup>672</sup>

Important to note is that the mere fact that the parent has financed the subsidiary, directly with loans or indirectly with guarantees, and stops this financing at some point, can in itself probably not lead to the conclusion that the parent can be held liable for creating a false appearance of creditworthiness.<sup>673</sup> A shareholder that still invests in the company prior to insolvency, and thus takes risk himself, is often actually less likely to be held liable for creating a false appearance of creditworthiness.<sup>674</sup> In that sense, the fact that a shareholder guarantees or has guaranteed certain debts of the company could, counterintuitively, make it more likely that the shareholder escapes liability towards other creditors.

There are also some cases in which liability of shareholders was not based on not acting by the shareholders at a moment at which bankruptcy of the debtor was foreseeable, but as such on the corporate structure of which the bankrupt debtor was part. Such cases are however rare. The leading case before the Dutch Supreme Court is *Comsys*.<sup>675</sup>

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<sup>667</sup> Most notable are: Dutch Supreme Court 25 September 1981, *NJ 1982, 443* (Osby); Dutch Supreme Court 12 September 2008, *JOR 2008/297* (Van Dusseldorp/Coutts Holding); Dutch Supreme Court 19 February 1988, *NJ 1988, 487* (Albada Jelgersma); Dutch Supreme Court 18 November 1994, *NJ 1995, 170* (NBM/Securicor); Dutch Supreme Court 21 December 2001, *JOR 2002/38* (Sobi/Hurks).

<sup>668</sup> See particularly Dutch Supreme Court 21 December 2001, *JOR 2002/38* (Sobi/Hurks) and the case note by Bartman; see also Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II\* 2009/842.

<sup>669</sup> Dutch Supreme Court 21 December 2001, *JOR 2002/38* (Sobi/Hurks).

<sup>670</sup> See case note Bartman to Dutch Supreme Court 21 December 2001, *JOR 2002/38* (Sobi/Hurks).

<sup>671</sup> See for such a case Dutch Supreme Court 19 February 1988, *NJ 1988, 487* (Albada Jelgersma).

<sup>672</sup> Dutch Supreme Court 21 December 2001, *JOR 2002/38* (Sobi/Hurks); see also Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II\* 2009/842.

<sup>673</sup> See the Court of Appeal case that led to Dutch Supreme Court 12 September 2008, *JOR 2008/297* (Van Dusseldorp q.q./Coutts Holding).

<sup>674</sup> See paragraph 4.20 of the Advocate General's opinion to Dutch Supreme Court 12 September 2008, *JOR 2008/297* (Van Dusseldorp q.q./Coutts Holding).

<sup>675</sup> Dutch Supreme Court 11 September 2009, *NJ 2009/565* (Comsys/Van den End q.q.) with annotation by H.J. Snijders and P. van Schilfgaarde.



Comsys Systems B.V. (hereafter: Holding) was sole shareholder and director of Comsys Services B.V. and Comsys B.V.. Together the entities ran an integrated economic operation. Comsys B.V. dealt with contracts and debt collection, whereas Comsys Services B.V. bought and installed products, for which it was not fully remunerated by Comsys B.V.. Comsys Services B.V. ran at a loss from the start, whereas Comsys B.V. was profitable. The losses were compensated in a current account within the group for some time, but this line of support was discontinued at some point by the parent. The bank had security rights on the assets of Comsys Services B.V.. Comsys Services B.V. inevitably went bankrupt and the creditors other than the bank had no recourse. The bankruptcy administrator brought a tort claim against Holding, on behalf of the joint creditors. The Dutch Supreme Court upheld the judgment by the Court of Appeal, deciding that Holding was liable under tort law (art. 6:162 BW) for setting up a group structure in which Comsys Services B.V. was inevitably loss-making, with inherent risks for the creditors, which risks were increased further by the fact that the bank had security rights on the assets of Comsys Services B.V.. In such a group structure, Holding had a duty of care towards the creditors of Comsys Services B.V.. This duty was breached by discontinuing the support for Comsys Services B.V. without warning the creditors.

In the literature, some reservations have been made as to deriving general rules from this case.<sup>676</sup> The circumstances were rather specific, with Comsys Services being loss-making from the start and by design, as the profits from Comsys Services' economic activities were granted to another group entity. Outside setting up a structure in which one or more group companies are loss making by design and others take the profits, the ruling probably has little influence.<sup>677</sup>

The relevance of this to selectively pierced group structures is that operating a group such as the one in the *Comsys* case is often essentially made possible by piercing guarantees. Strangely enough, this is not as such discussed in the *Comsys* case itself, although piercing guarantees were very likely in place. The Court of Appeal does mention that there was one credit contract between the whole Comsys group and Rabobank and that Comsys Services had pledged all its assets to Rabobank. These circumstances are almost unthinkable without each group member guaranteeing the whole debt. Because of these guarantees, Rabobank did not have to care much about the internal group structure. The parent profits from the structure, the major lender that makes the structure possible by financing it does not care about the structure because all group companies have issued guarantees to the bank. The creditors that probably had no knowledge of the structure are however prejudiced. The guarantees are thus a crucial part of making the structure practically possible.

In short, Dutch law does not clearly recognize the guarantee by a shareholder a relevant factor in shareholder liability cases. In that sense, Dutch law has little sensitivity to the opaque priority structure that the guarantee and incorporation together can create.

#### 4.1.2 Avoidance of the guarantee itself

An alternative legal response to tearing down the limited liability walls in order to address the inefficiencies of certain perforated limited liability structures is to reinstate the walls by giving

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<sup>676</sup> See Verstijlen and Karapetian, 2019, also for references.

<sup>677</sup> Most or even all claims made by bankruptcy administrators based on *Comsys* have been dismissed in the lower case, see Verstijlen and Karapetian, 2019, also for references.

certain actors such as other creditors or the bankruptcy administrator the power to annul the guarantee. Under Dutch law, an avoidance action (*actio pauliana*) seems most suitable to this end. As the discussion below shows, the *actio pauliana* is not easy to apply to the situation discussed and does not track the efficiency analysis of guarantees given in chapters 2 and 3. Other instruments to avoid (the effects of) a piercing guarantee that may come to mind are an action based on the doctrine of *ultra vires* (*doeloverschrijding*) and an action based on conflict of interest of the directors involved. Both these actions are however excessively hard to apply to the situation discussed, as already shown in paragraph 3.6 above. Current Dutch law on these actions thus needs little further discussion.

Guarantees issued by the debtor could become suspect as transactions at an undervalue if the guarantor does not receive a (sufficient) direct premium for issuing the guarantee. If a debtor that issued such a guarantee enters into bankruptcy, the bankruptcy administrator may try to avoid the guarantee, thus avoiding liability for debts of others.

Under Dutch law, the bankruptcy administrator can avoid certain acts that the debtor performed before bankruptcy, the so-called *actio pauliana*. Within transaction avoidance law, the Dutch doctrine distinguishes between legal acts that the debtor was obliged to perform (art. 42 Fw), and acts that were not required by a pre-existing legal duty (art. 47 Fw). Acts that were required by a pre-existing legal duty are generally (much) more difficult to avoid for a bankruptcy administrator. If a group entity guarantees group debt towards a lender, this may be on request of the parent or holding company. Such an instruction by the parent, does however not make issuing the guarantee 'obliged' in the sense of art. 47 Fw. Only legal obligations towards the counterparty of the contested act qualify as obligations in the sense of art. 47 Fw.<sup>678</sup> Unless the debtor committed himself towards the creditor to issue the guarantee prior to guaranteeing, the bankruptcy administrator can rely on art. 42 Fw in trying to avoid the act.

For the application of art. 42 Fw, the bankruptcy administrator should, next to showing that there was no legal duty to perform the act, show that the act brought prejudice to the creditors and that both the debtor and the counter-party had knowledge of such prejudice (art. 42 Fw). Knowledge of prejudice on the side of the counterparty does not have to be shown by the bankruptcy administrator in case the act was for no consideration, and if such act for no consideration was performed within less than one year prior to insolvency, knowledge of prejudice is presumed to exist on the side of the debtor (art. 45 Fw). These exceptions may apply to issuing guarantees in the context of group finance if it can be shown that the debtor in no way profited from issuing the guarantee. In the case *X q.q./Van Doorn Beheer*, the Court of Appeal found that a guarantee of an ex-subsidiary that guaranteed the debt of the buyer of the shares of that subsidiary towards the ex-parent company was an act without consideration.<sup>679</sup> More generally however, the courts are likely to assume that indirect benefits from the guarantee will qualify as consideration.<sup>680</sup> Most guarantees for group debt, or guarantees by natural persons for debts of a limited liability corporation in which they hold shares, will thus probably qualify as acts for consideration.

Secondly, prejudice to creditors needs to be shown. The Dutch Supreme Court has a rather broad understanding of prejudice, which makes proving prejudice generally no issue for the

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<sup>678</sup> Schilfgaardde, 1987, p. 86; compare also District Court of The Hague (president) 23 June 1992, KG 1992/343; see on that case also van Sint Truiden, 1992.

<sup>679</sup> Arnhem-Leeuwarden Court of Appeal, 12 February 2013, ECLI:NL:GHARL:2013:822, *JOR* 2013/78

<sup>680</sup> Dutch Supreme Court 13 July 2012, *JOR* 2012/306, (Janssen q.q. / JVS).

bankruptcy administrator.<sup>681</sup> Showing (somewhat objectified) *knowledge* of prejudice is generally however hard, especially on the side of the counterparty. The yardstick that the Dutch Supreme Court has formulated is that such knowledge exists on the side of the counterparty if it can be shown that bankruptcy and a deficit in such bankruptcy, which implies prejudice to creditors, could have been foreseen with reasonable probability.<sup>682</sup> This is generally hard to show.

The bankruptcy administrator is however helped with the evidentiary presumptions of knowledge of prejudice (on both the side of the creditor and the debtor) of art 43 Fw, which presumptions may apply to the case of guarantees in the context of group finance and guarantees by business owners. The first requirement for the presumption to apply is that the guarantee was issued within one year prior to insolvency. For older guarantees, the bankruptcy administrator will always have to show that bankruptcy and a deficit in such bankruptcy could have been foreseen with reasonable probability by both parties to the transaction.

If the guarantee was issued in the year prior to bankruptcy, the evidentiary presumption applies only if one of the following alternative conditions is also met: (1) the transaction was at an undervalue; (2) the transaction was a payment on or security for old debt that was not yet due; (3) the counterparty was a related party, as defined in art. 43 paragraph 1 (3)(4)(5) and paragraphs 2-6. The background of these requirements is that art. 43 Fw describes particularly suspect categories of transactions that should more easily be up for avoidance.

The first alternative condition, transactions at undervalue, is complicated to apply to guarantees. As discussed above, even guarantees for which no direct premium is paid will usually be viewed as ‘for consideration’. That does not mean that the up- and downside to the guarantor were sufficiently balanced. If, in the group context, the debtor that issued the guarantee hardly used the credit facility, this may lead to the conclusion that, whilst there may have been consideration, the transaction was performed at an undervalue.<sup>683</sup> If the transaction was at an undervalue because the profit the debtor had from the transaction was disproportional to the liability incurred, the creditor could possibly argue that he did not have to have insight in the internal relations of his debtors.<sup>684</sup> Whether this suffices is unsure and probably dependent on the circumstances. As Van Schilfgaarde argues, this defense becomes difficult to maintain if the liability of the debtor under the guarantee exceeds the size of the patrimony of the debtor.<sup>685</sup> The focus in applying this requirement is on what the upside was for the guarantor and what liability was incurred, and whether these are in balance. As discussed in chapter 3 paragraph 3.1.4 and shown by Squire (cited there), this focus does not follow the efficiency analysis of such guarantees. The focus should be on the question to which extent the fate of guarantor and debtor were correlated. A higher correlation makes it more likely that the guarantee disadvantaged other creditors.

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<sup>681</sup> Dutch Supreme Court 19 October 2001, ECLI:NL:HR:2001:ZC3654, NJ 2001, 654 (Diepstraten/Gilhuis q.q.); Dutch Supreme Court 8 July 2005, NJ 2005, 457, JOR 2005/230 (Van Dooren q.q./ABN AMRO II).

<sup>682</sup> Dutch Supreme Court 22 December 2009, ECLI:NL:HR:2009:BI8493, NJ 2010, 273 (Van Dooren q.q. / ABN AMRO III).

<sup>683</sup> See also Schilfgaarde, 1987, pp. 86–87.

<sup>684</sup> Schilfgaarde, 1987, p. 87.

<sup>685</sup> Schilfgaarde, 1987, p. 87.

The evidentiary presumption also applies if the guarantee was assumed for an older debt that was not yet due (art. 43 paragraph 1 sub 2 Fw).<sup>686</sup> Guarantees are probably often granted for such old debts that are not yet due, but by definition not for debts of the debtor himself, but for debts of others. The requirements thus do not apply directly. One could convincingly argue for analog application, but there is no leading case law on exactly this point.<sup>687</sup>

The same applies to the alternative condition for application of the evidentiary presumption of related party transactions in art. 43 paragraph 1 (3)(4)(5) and paragraphs 2-6 Fw. These apply in the case that the counterparty is a related party of the debtor as defined in those articles. When the debtor guarantees group debt or debts of a legal person he holds shares in, the counterparty is often not a related party, whereas the principal debtor obviously is. Again, the presumption of art. 43 Fw does thus not apply directly to acts in the year before bankruptcy. Analog application is somewhat harder to argue here, as the act is avoided by a successful action which comes directly to the detriment of the unrelated creditor.

In short, reinstating the walls by avoiding guarantees is difficult under Dutch law. Guarantees that have been granted longer than a year before bankruptcy are very hard to avoid, as knowledge of prejudice to creditors (interpreted as reasonably having been able to foresee bankruptcy) on both sides to the transaction (debtor and creditor) will have to be shown. In the year before bankruptcy an evidentiary presumption as to this requirement may apply, but this is not obvious and is likely to be controversial. All this is only the case if the guarantee was voluntarily granted. If there was a legal obligation for the debtor to issue the guarantee, for example based on earlier contracts, the guarantee is even harder to avoid.

#### 4.1.3 Subordinating loans guaranteed by shareholders

Shareholders often finance the companies they hold shares in with loans. Such shareholder loans are an alternative to providing share capital. By financing with loans instead of share capital, a shareholder may be able to substantially or even fully reduce his share capital investment in the company, whilst still providing the company with the necessary funds. Using such loans instead of share capital may have various reasons, such as tax benefits. The reason could also simply be to limit downside risks for the shareholder. The downside risk could be further reduced by granting security rights, which are not possible for an equity position, for the shareholder loan.

An indirect way for the shareholder to provide a shareholder loan could be to get a third person to provide the loan and to guarantee the loan towards the third person, possibly even backed by real security rights provided by the shareholder to the third person. This can be referred to as an indirect shareholder loan. Again, this can be an alternative to providing share capital. And again, the claim by the external creditor could also be secured by security rights granted by the company. In this way, an indirect secured shareholder loan can be created.

If the legal system qualifies such constructions with shareholder guarantees as (equivalent to) shareholder loans and subordinates the loan of the outsider creditor to other claims in the

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<sup>686</sup> If the guarantee was given for a new debt, this presumption does not apply, see Dutch Supreme Court 29 November 2013, *NJ* 2014/9 (Roeffen q.q./Jaya).

<sup>687</sup> One could possibly argue that the case Dutch Supreme Court 16 oktober 2015, *NJ* 2016/49, (*Ingwersen q.q./ING Commercial Finance*) points in the direction that analog application would not be possible here, but the setting in that case is very different.

bankruptcy proceedings of the debtor, the opaque priority structure created by a combination of incorporation and the guarantee is weakened somewhat, though not completely. The creditor still has an alternative source of collection (the guarantor's patrimony), but is somewhat limited from claiming directly on the debtor in the bankruptcy of the debtor, by which the other creditors of the debtor are somewhat protected. In other words: the pierced limited liability walls would be somewhat reinforced by subordinating claims guaranteed by shareholders.<sup>688</sup> A somewhat weaker version would be to allow the claim of the external creditor to rank normally, but to allow subsequent reimbursement from the shareholder under certain circumstances. Does Dutch law take one of these approaches?

Under Dutch law, a shareholder loan can generally be submitted as a claim on the bankrupt debtor in insolvency, whilst share capital cannot. Dutch law does not contain specific regulation of shareholder loans. Even security rights for shareholder loans seem to generally be allowed and can be enforced in insolvency of the debtor without much restraint (art. 57 Fw). In the Dutch legal literature, concerns about misuse of shareholder loans have been voiced.<sup>689</sup> Some have also tried to play down the problems surrounding shareholder loans.<sup>690</sup>

Dutch courts have so far not established a principled way of dealing with shareholder loans in insolvency. The judgments of district courts show a mixed picture, with courts sometimes subordinating shareholder loans, though arguably only under extreme circumstances, sometimes not, and if they do, they base this on differing arguments or legal principles.<sup>691</sup> The Advocate General was dismissive of general subordination of shareholder claims in a conclusion to a case in 2012, but the Dutch Supreme Court itself did not go into the matter.<sup>692</sup> The Arnhem Court of Appeal dismissed the idea of general subordination, but considered subordination of shareholder loans to be possible under specific circumstances through the open norm of reasonableness and fairness.<sup>693</sup> In a recent conclusion, the Advocate General to the Supreme Court seemed, though implicitly, however less dismissive of the idea of subordination of certain shareholder loans.<sup>694</sup>

Because direct shareholder loans are generally permitted as claims in insolvency, there may not always be incentive to structure such loans as indirect loans through guarantees. However, payments on shareholder loans will be subject to greater scrutiny, whereas payments on indirect shareholder loans often escape such scrutiny under Dutch law (see paragraph 4.2.1 below). Indirect shareholder loans are thus still more attractive.

In short, no general rule of subordination exists and the literature and case law are inconclusive both on the specific circumstances under which subordination of direct shareholder loans may be warranted and inconclusive on the legal basis on which such subordination can be grounded,

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<sup>688</sup> See for such an approach German law, chapter 4.1.3.

<sup>689</sup> See inter alia De Weijs, 2010a; De Weijs, Abendroth and Fransis, 2013; De Weijs, 2008; Schimmelpenninck, 2003.

<sup>690</sup> Hoff, 2009; Barneveld and Corpeleijn, 2014.

<sup>691</sup> See Amsterdam District Court, 17 December 2008 (One.tel); Breda District Court 7 July 2010 (Oude Grote Bevelsborg q.q./Louwerier q.q.); Court of Appeal Arnhem-Leeuwarden, 10 March 2015, ECLI:NL:GHARL:2015:1695, (P&O / Van Anandel q.q.); Dutch Supreme Court 8 November 1991, NJ 1992, 174 (Nimox/Van den End q.q.).

<sup>692</sup> Dutch Supreme Court, 20 January 2012, JOR 2012/97.

<sup>693</sup> Court of Appeal Arnhem-Leeuwarden, 10 March 2015, ECLI:NL:GHARL:2015:1695, (P&O / Van Anandel q.q.)

<sup>694</sup> Conclusion of Advocate General Timmerman to Dutch Supreme Court 7 april 2017, ECLI:NL:PHR:2017:635, NJ 2017/177, JOR 2017/213, (Jongepier/Drieakker c.s.)

if it all. It should, from this perspective, not be surprising that Dutch law is underdeveloped on the issue of possible subordination of covert shareholder loans, such as the often occurring case of loans by third parties guaranteed by shareholders.

#### 4.1.4 Disallowing double proof

Chapter 3 paragraphs 3.1.1 and 3.1.4 discussed the opaque priority structure created by the mechanism of double proof with guarantees. Double proof occurs when a creditor is able to make more than one claim in relation to a single debt. Double proof can, especially in the context of corporate groups, have the effect of ‘squeezing down’ ordinary creditors.<sup>695</sup> Because of guarantees for group debts, the ordinary creditors of a single group entity are often confronted with a creditor with an artificially high claim that can be of a completely different magnitude than the amount that this entity actually used, simply because other group entities together owe a certain amount and because this entity has guaranteed the full group debt. By enforcing this artificially high claim time and time again against each entity, thus double proofing the claim, the creditor can also in insolvency of the whole group reach much higher pay-out percentages. Chapter 3, paragraph 3.1.1 gave a simple example in which the all creditors receive a 26% pay-out in the insolvency of a company insolvency. The company was then structured differently, consisting of a holding and 9 subsidiaries that each had their own assets and creditors but all guaranteed the claim of the major lender. In this example the ordinary creditors of each group company only received a pay-out of 8,3%, whereas the guaranteed creditor received a total pay-out of 83% in the case of strong form double proof and 72% in the case of deficiency double proof. Both are strong increases from the 26% for all creditors in case all assets and liabilities are collapsed in one entity. This paragraph discusses to which extent Dutch law allows double proof. Of course, the problem of double proof would not occur if either limited liability would not be upheld, or if the guarantee would be annulled (see on the possibilities, paragraphs 4.1.1 to 4.1.3 above).

Dutch law allows *strong-form double proof*.<sup>696</sup> Art. 136 Fw regulates some specific questions that could arise in the context of an insolvent principal debtor who is the beneficiary of a guarantee relationship. This provision, that generally applies to debtors that are joint and severally liable, states in paragraph 1 that the creditor can submit the full amount of his claim, measured on the day of the declaration of bankruptcy, in the insolvency proceedings of his debtor, and if there are more bankrupt joint and severally liable debtors, in each insolvency proceeding. In essence, this article stipulates that *strong-form double proof* is allowed without restrictions. There is some, though limited, case law on more straightforward *ipso facto* clauses,<sup>697</sup> which seem generally allowed as long as the clause can be viewed as consideration for some disadvantage that the lender may suffer in case of insolvency or bankruptcy of the principal.<sup>698</sup>

If five joint and severally liable debtors are declared bankrupt on the same day and the creditor has a claim of 100 on them, the creditor can submit 100 in each insolvency proceeding. If he gets

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<sup>695</sup> Widen 2007, p.301 ff.; compare also Kronfeld, 2012; see extensively chapter 3 paragraphs 3.1.1 and 3.1.4.

<sup>696</sup> See on strong-form double proof chapter 3 paragraphs 3.1.1 and 3.1.4.

<sup>697</sup> Chapter 3, paragraph 3.1.4 on double proof explained that issuing a guarantee can, under a rule of double proof and under a conditions of a high correlation between the fate of the debtor and the guarantor, be compared to an *ipso facto* clause, or in other words to selling a claim on your own insolvent estate.

<sup>698</sup> Dutch Supreme Court 12 April 2013, *NJ* 2013/224 (Megapool/Laser).

paid 20 in one bankruptcy proceeding on, say, day 10, he can, also after day 10, still pursue a claim of 100 in the proceedings of the other four. Art. 136 paragraph 1 Fw is a strange exception to the rule of art. 6:7 paragraph 2 BW, which latter rule stipulates that performance by one joint and severally liable debtor discharges the other debtors as well. The reason provided for this exception is simplicity. Without strong form double proof, payments on the guaranteed debt made after the date of bankruptcy have to be taken into account. If the other debtors/guarantors are also bankrupt, the claims in each case depends on the outcome in the other cases, and the other way around.<sup>699</sup> Theoretically this is indeed a coordination problem. A simple and practical solution can however be thought of, for example allowing the bankruptcy judge to reasonably allocate the burden, if possible taking the internal liability of the co-debtors (the amount which can, in the internal relationship between co-debtors, be attributed to each co-debtor) into account.

Strong-form double proof has been widely criticized in Dutch legal literature in the late 19<sup>th</sup> century<sup>700</sup> and is (not surprisingly) still criticized.<sup>701</sup> However, changes have never been considered by the legislator or courts, which is striking given the fact that double proof is not allowed with real security rights. If the creditor has real security rights, he can only submit the unsecured part of the claim in the insolvency of the debtor (art. 59 Fw), not the full claim. No attention whatsoever has been given to the problem of *deficiency double proof*.<sup>702</sup> Even the critics of *strong-form double proof* did not discuss that the same problem essentially remains in a slightly weaker form when only deficiency claims on guaranteed debt can be submitted.

One remark should be made to put the problem of double proof somewhat in perspective. In the Dutch system, so called ‘403-statements’ by parent companies are common in the group context. As discussed above in paragraph 2.4, with such a statement, which makes the parent liable for the contractual debts of the subsidiaries for which the statement is issued, the subsidiaries can be exempted from the obligation to file and publish full annual accounts. Those accounts can be consolidated with the parent’s accounts. If such a statement was issued, this would water down the effects of double proof somewhat, as those contractual creditors now also have at least two sources of recourse in the group: the given subsidiary and the parent that issued the statement. It however worsens matters for non-contractual creditors of the parents, which are now confronted with even more double proofed claims. Moreover, the creditors of subsidiaries only get a claim on the parent, whereas the guaranteed creditor can have a claim on all group entities that guaranteed the debt. As a result, double proof still occurs and still squeezes down the claims of other creditors, though the dynamics are slightly different.

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<sup>699</sup> Parliamentary proceedings of the House of Representatives (*Tweede Kamer*) 1980/81, 16593, 3, p. 156 (MvT). Without strong form double proof, payments on the guaranteed debt made after the date of bankruptcy have to be taken into account. If the other debtors/guarantors are also bankrupt, the claims in each case depends on the outcome in the other cases, and the other way around. Theoretically this is indeed a coordination problem. A simple and practical solution can however be thought of, for example allowing the bankruptcy judge to reasonably allocate the burden.

<sup>700</sup> See for an overview Van Boom, 1999, pp. 84–88.

<sup>701</sup> Van Boom, 1999, pp. 87; 237–238; C.J.M. Klaassen, 2002, p. 696; see however Bergervoet, 2014, who approves of extra bonus for the creditor, arguing this accommodates expedient settlement of the insolvency proceedings. What he essentially seems to say, is that it’s just simpler to do it this way. In discussing art. 136 paragraph 1 Bankruptcy Code, most authors seem to focus on the highly theoretical problem that the creditor would receive more than the full claim, and discuss whether this would be possible or not, see Van Boom, 1999, p. 84 ff; Bergervoet, 2014.

<sup>702</sup> As explained in chapter 3 paragraph 3.1.4, deficiency double proofing is a weaker form of double proofing, in which only the deficiency claim can be double proofed.

Dutch law does have rules to prevent ‘double claims’ from a different perspective: the guarantor’s (contingent) claim on the principal debtor and the creditor’s claim on the principal debtor cannot both be submitted in the principal debtor’s bankruptcy proceedings. Art. 136 paragraph 2 Fw regulates when the guarantor is allowed to submit his (future) recourse claim in the insolvency proceedings of the principal debtor. The article balances the interests of the creditor, the interests of the other creditors of the principal debtor, and of course the interest of the guarantor who wishes to take recourse against the insolvent principal debtor.<sup>703</sup> The basic rule is that the guarantor cannot submit his recourse claim, unless one of three exceptions applies. The first exception is the situation in which the creditor, for whatever reason, cannot submit his claim, for example if he has already been partly paid before insolvency (art 136 paragraph 2 sub a Fw).<sup>704</sup> If the creditor is fully paid during insolvency, the guarantor can also submit his recourse claim (art 136 paragraph 2 sub b Fw). Lastly, if, for another reason, the creditors of the principal debtor would not be prejudiced by admittance of the recourse claim of the guarantor, he can also submit his claim (art 136 paragraph 2 sub c Fw). Again, this shows that Dutch law is focused on protecting the interests of guarantors but neglects the interests of outsiders to the guarantee relationship.

## **4.2 Regulatory approaches to covert insider dealing (ex post opportunism)**

Paragraph 4.1.1. above discussed to which extent Dutch law upholds opaque priority structures in which guarantees are used to create externalities for outsiders (‘ex ante opportunism’). Not unrelated, but clearly distinguishable from such opportunistic behavior is the opportunistic behavior that the guarantee incentivizes *after* (‘ex post’) concluding the guarantee. Whereas paragraph 4.1 thus discussed regulatory approaches to the selectively pierced structures as such, this paragraph discusses to which extent adverse dynamics that are created by such structures, if upheld (which they generally are under Dutch law), are regulated.

Chapter 3 paragraph 3.2 discussed that insider guarantees are likely to create externalities for other creditors by giving incentive for insider dealing whilst at the same time covering up such insider dealing.<sup>705</sup> This paragraph will discuss how Dutch law deals with this problem. Various mechanisms under Dutch law that may be relevant in this context are discussed below: first and foremost preference law, but also shareholder liability, director liability and lender liability. As the analysis will show, Dutch law hardly regulates the adverse dynamics created by guarantees as discussed in chapter 3 paragraph 3.2 and urgently needs change in this context.

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<sup>703</sup> See also Bergervoet, 2014.

<sup>704</sup> Bergervoet, 2014 with reference to the parliamentary history.

<sup>705</sup> See also Ayotte and Morrison, 2009; Baird, 1994a, p. 2262 ff.



### 4.2.1 Avoidance of payments on guaranteed loans

Transaction avoidance law may deter the control that a lender can obtain through a guarantee, thus deter the incentive for insider dealing.<sup>706</sup> If a principal debtor is in financial trouble, he or persons involved in the principal debtor (if the principal debtor is a company) may have incentive to give preference to a guaranteed lender above other creditors, as extensively explained in chapter 3 paragraph 3.2. This could happen in the context of group finance, in which a parent company may prefer its subsidiary to pay creditors guaranteed by the parent before other creditors when the subsidiary is approaching bankruptcy, or in the case of small-business finance, in which a shareholder or manager that guaranteed corporate debt may have the same inclination. The motivation to pay guaranteed debt first is driven by the fact that the guarantor indirectly profits from such payments, because his exposure under the guarantee is reduced with the same amount.

Under Dutch law, there is no specific regulation dealing with the problem of the indirect profit that the guarantor receives by limiting his exposure through influence on the principal debtor.<sup>707</sup> Dutch transaction avoidance law has great difficulty dealing with such indirect preferences.

Unlike US law and UK law, Dutch transaction avoidance law does not clearly distinguish between preferences given to a creditor and acts detrimental to the debtor himself. Instead, a distinction is made between legal acts (*rechtshandelingen*)<sup>708</sup> that were voluntary in the sense that there was no legal obligation to perform the act (art. 42 Fw), and legal acts that were obligatory (art. 47 Fw). Legal acts that were obligatory, such as due payments, are generally near impossible to avoid, whereas legal acts that were voluntary can more easily be avoided. The test for the latter is whether the creditors have been prejudiced and whether both debtor and counterparty had knowledge of such prejudice to creditors (art 42 Fw). The Dutch Supreme Court has a very broad understanding of prejudice to creditors, so this will often be easy to show.<sup>709</sup> *Knowledge* of prejudice to creditors is explained as having been able to foresee bankruptcy of the debtor and a shortfall in such a bankruptcy with reasonable probability.

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<sup>706</sup> Two central principles of Dutch patrimonial law in the relation debtor-creditor are the principle that the creditor can exercise his right of recourse to the whole patrimony of his debtor (art. 3:276 BW) and the principle of *paritas creditorum*, expressed in art. 3:277 paragraph 1 BW, which stipulates that creditors, between themselves, have an equal right to be satisfied proportional to each claim, after deduction of the costs of execution, notwithstanding rights of priority as recognized by statute. Dutch law on transaction avoidance can be understood as protecting these two principles. The first typical form of undesirable pre-insolvency behavior of a debtor is engaging in transactions at an undervalue. This can threaten recourse by creditors on the whole patrimony of the debtor (art. 3:276 BW) because the simple fact that the transaction took place at an undervalue, will diminish the patrimony, thus (partly) evading recourse by creditors. The second type of undesirable pre-insolvency behavior of the debtor is that of giving preference to certain creditors above others, in breach with the principle of *paritas creditorum*. Dutch law does not make a clear distinction between these two types of behavior (transactions at an undervalue and preferences) in the doctrine, see extensively De Weijs, 2010a, p. 206 ff, but for analytical purposes this distinction, it helps to understand the interaction between transaction avoidance law and guarantees.

<sup>707</sup> See also De Weijs, 2010b, p. 162.

<sup>708</sup> Only legal acts can be avoided with transaction avoidance law. Other actions of the debtor that have been detrimental to the creditor cannot be attacked by transaction avoidance law. In order to undo the consequences of such non-legal acts, the bankruptcy administrator would often have to rely on unjustified enrichment (art. 6:212 BW) or tort (art. 6:162 BW).

<sup>709</sup> Dutch Supreme Court 19 October 2001, ECLI:NL:HR:2001:ZC3654, NJ 2001, 654 (Diepstraten/Gilhuis q.q.); Dutch Supreme Court 8 July 2005, NJ 2005, 457, JOR 2005/230 (Van Dooren q.q./ABN AMRO II).

If a payment on a guaranteed debt was not due, avoidance of the payment is in principle rather simple, though not because of existence of the guarantee, but simply because art. 43 paragraph 1 sub 2 Fw presumes that payments within one year prior to insolvency on debts that are not due, were accompanied by knowledge of prejudice to creditors on both the side of the principal debtor and of the counterparty (the guaranteed creditor). Rebuttal of the presumption will be difficult outside exceptional circumstances, as payment of undue debts at a moment that there are also (many) due debts to pay, will always be suspect. However, avoidance on the basis of art. 42 (in conjunction with art. 43) Fw only allows retrieving payment from the direct counterparty of that payment, not from the person that indirectly profited from such payment (here the guarantor). The fact that the insider guarantor indirectly profits, and thus has engaged in insider dealing, is usually not considered directly relevant in this context.

The question whether there was prejudice to creditors in the context of a guarantee relationship has come before the Dutch Supreme Court in a somewhat complicated case, *Bosselaar q.q./Interniber*. The parent company had guaranteed the debt of a subsidiary towards the bank. The parent company had also bought caravans from the subsidiary, and paid the subsidiary for the caravans on the bank account of the subsidiary. Because there was an overdraft on the bank account, the payment essentially satisfied part of the claim of the bank, and thus limited the exposure of the parent company towards the bank under the guarantee. The Court of Appeal had held that the sale of and payment for the caravans could not have prejudiced the other creditors, because a fair price was paid for the caravans. The Dutch Supreme Court however held in paragraph 3.2 of the case that even though the price was fair, there was prejudice to the other creditors because the proceeds of the transaction directly went to the bank, while the other creditors were left empty-handed (regarding these proceeds).<sup>710</sup> It is questionable how important the indirect benefit to the parent was for the Dutch Supreme Court to come to this conclusion. Also absent the guarantee, the Dutch Supreme Court could possibly have found that there was prejudice to other creditors because the proceeds of the sale only benefitted one creditor (the bank).<sup>711</sup> In that sense, the reasoning of the Dutch Supreme Court in this case does not shed much direct light on the treatment of guarantees in this context.

Payments made in accordance with a legal obligation to make such a payment are generally much harder to avoid by a bankruptcy administrator.<sup>712</sup> Article 47 Fw is written for avoidance of legal acts that were required by a pre-existing legal duty, such as payment of a due debt. Such a payment can only be avoided in two categories of cases: (i) cases in which the party that received payment knew that a request for bankruptcy of the principal debtor had already been filed at the court, or (ii) cases of collusion between principal debtor and creditor to prejudice other creditors (art. 47 Fw).

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<sup>710</sup> See Dutch Supreme Court 22 May 1992, NJ 1992, 526 (*Bosselaar q.q./Interniber* – also known as *Montana I*); this is in line with later case law of the Dutch Supreme Court on prejudice to creditors, giving a broad interpretation of prejudice: Dutch Supreme Court 19 October 2001, ECLI:NL:HR:2001:ZC3654, NJ 2001, 654 (*Diepstraten/Gilhuis q.q.*); Dutch Supreme Court 8 July 2005, NJ 2005, 457, JOR 2005/230 (*Van Dooren q.q./ABN AMRO II*). See also Abendroth, 2006, pp. 58–594.

<sup>711</sup> Dutch Supreme Court 8 July 2005, NJ 2005, 457, JOR 2005/230 (*Van Dooren q.q./ABN AMRO II*).

<sup>712</sup> Professional creditors use this system by ex ante making sure, through their general terms and conditions, that giving in to any request they may want to make in difficult times of their debtor, can be qualified as a 'due payment'. The creditor can thus, also when in bad faith, request the debtor to post additional security, which is 'due' on the basis of the general terms and conditions. If the bankruptcy administrator wants to avoid the posting of additional collateral, he will have to invoke art. 47 Fw, not art. 42 Fw.

Important to note is that especially professional financial creditors are able to (and do) manipulate the distinction that Dutch law makes between obligatory and voluntary legal acts. If there was a pre-existing duty to perform the act, the act is considered obligatory. The courts have interpreted obligatory legal acts very broadly. If for example a contract (or: the general terms and conditions of a contract) allows a counterparty under circumstances to ask for additional security or for repayment of the full loan, a subsequent granting of security or repayment respectively is considered to have been obligatory, and thus largely immune from attacks based on transaction avoidance law. The standard terms that all major banks in the Netherlands use, therefore contain a provision that the debtor has to post additional collateral when the bank reasonably requests this. Thus, such additional collateral, even if posted on the eve of bankruptcy and even if both debtor and creditor knew very well that bankruptcy of the debtor was soon to be expected, is probably immune from transaction avoidance attacks.

As stated above, an obligatory legal act can only be avoided in two categories of cases: (i) cases in which the party that received payment knew that a request for bankruptcy of the principal debtor had already been filed at the court, or (ii) cases of collusion between principal debtor and creditor to prejudice other creditors (art. 47 Fw). The first category only applies to a very small number of cases and will, even if applicable, often be hard to prove for a bankruptcy administrator, unless the creditor himself filed for insolvency of the principal debtor before receiving the obligatory payment.

The Dutch Supreme Court has furthermore developed a rather narrow interpretation of 'collusion' as referred to in art. 47 Fw. The landmark cases on this point are *Gispen q.q./IFN*<sup>713</sup> and *Cikam/Simon q.q.*<sup>714</sup> In *Gispen q.q./IFN*, the Dutch Supreme Court considered that collusion as referred to in art. 47 Fw should be understood as meaning that both parties have intentionally and willingly prejudiced the other creditors of the principal debtor by paying this particular creditor. In the case itself, the Dutch Supreme Court considered such intention not to be present on the side of the principal debtor, because he gave in to pressure from the creditor to make the payment. Under the conditions set out in *Gispen q.q./IFN*, collusion is generally very hard to show. However, in *Cikam/Simon q.q.* the Dutch Supreme Court did find a case of collusion. The Dutch Supreme Court confirmed the judgment of the Court of Appeal, and also specifically the consideration of that court that collusion as referred to in art. 47 Fw could be presumed to be present under the circumstances of the case. Those circumstances were, simply put, that *Cikam GmbH* made a due payment to sister company *Cikam B.V.*, while the financial situation of *Cikam GmbH* was very troublesome, and while *Cikam B.V.* knew this as well, given the fact that the management of that company was in the same hands.

In the case of a due payment on a guaranteed debt, the collusion that has to be shown by the bankruptcy administrator in order to rely on art. 47 Fw is a collusion between creditor and principal debtor, not between guarantor and principal debtor. Even if such collusion between creditor and principal debtor can be shown, avoidance on the basis of art. 47 Fw, like avoidance on the basis of art. 42 Fw, only allows for retrieving the sum from the creditor, not from the guarantor that profited indirectly. The question then is whether the fact that the guarantor, through direct or indirect influence on the principal debtor, indirectly favored himself by the payment of the principal debtor to the creditor, is a relevant circumstance in order to come to a

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<sup>713</sup> Dutch Supreme Court 24 March 1995, *NJ* 1995, 628 (*Gispen q.q./IFN*); See also Dutch Supreme Court 20 November 1998, «*JOR*» 1999/19, m.nt. NEDF (*Verkerk/Tiethoff q.q.*).

<sup>714</sup> Dutch Supreme Court 7 March 2003, *NJ* 2003, 429 (*Cikam/Simon q.q.*).

presumption that there was a collusion between *creditor* and principal debtor. The *Cikam* case<sup>715</sup> cannot be applied directly, not even in case the guarantor and principal debtor are group companies in the same hands, because there is no direct payment to a group company, just indirect profit. The answer to this important question thus largely remains open.

In a district court judgement, the court has found that a guarantee relationship was a relevant circumstance to decide that creditor and principal debtor had conspired. The case was however very specific. Creditor and guarantor (who was the director and indirect shareholder of the principal debtor) had discussed the difficult situation of the principal debtor, which led to granting the creditor additional security (which was due) in exchange for cancelling the guarantee for the same amount.<sup>716</sup> Here, we see a clear case of collusion, with the principal debtor (as represented by the guarantor) and the creditor at the table, contriving how to enrich the guarantor and creditor at the expense of other creditors of the principal debtor.<sup>717</sup> However, Faber claims, without further substantiation, in a case note that the reasoning of the district court, in which the district court derives the intention of the principal debtor to prejudice the guaranteed creditor above other creditors from the fact that the director bargained for a benefit for himself (partly cancellation of the guarantee relationship), is slightly blunt.<sup>718</sup> That is not convincing. The fact that the director of the principal debtor bargained for a benefit for himself as guarantor, clearly gives the director, and thus the company, incentive to prejudice the guaranteed creditor above other creditors. If the principal debtor then, and only after the benefit for the director was bargained for, posts additional security to the guaranteed creditor, there should be enough evidence to conclude that collusion between principal debtor and guaranteed creditor has taken place.

The question is however how far this reasoning can be stretched. In the case discussed, the guarantor could only profit if the creditor cancelled part of the guarantee, because the unsecured part of the claim of the guaranteed creditor was higher than the maximum of the guarantee. Thus, posting some additional security by the principal debtor would not as such have benefitted the guarantor. Some bargaining, and thus a clear collusion, was necessary to this end. A situation could however also occur, and does often occur, in which posting additional security by the principal debtor will benefit the guarantor because his exposure is reduced, without having to bargain for such a benefit. In that situation, there is clear incentive for the guarantor to influence the principal debtor to post additional security, to secure the benefit for the guarantor. If this guarantor is an insider, such as a director, a shareholder, or a group company, this incentive can arguably be attributed to the principal debtor. Whether this as such suffices to establish

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<sup>715</sup> Dutch Supreme Court 7 March 2003, *NJ* 2003, 429 (*Cikam/Siemon* q.q.).

<sup>716</sup> Of course, if the guarantor guaranteed the full debt of the creditor, such cancelling would practically not have any effect, because giving the creditor additional security would already have benefitted the guarantor. However, in this case, as often happens, the guarantor had only partly guaranteed the debt of the creditor. As a result, the additional security given to the creditor may not have benefitted him if the remainder of the claim after foreclosing on security rights would still have exceeded the maximum amount of the guarantee. To make sure the guarantor did benefit from the transaction, the arrangement was made that part of the guarantee relationship was cancelled.

<sup>717</sup> See also on the case: *De Weijs*, 2010b; see otherwise N.E.D. Faber in his comment to the case: Utrecht District Court 6 June 2007, *JOR* 2008, 19, m.nt. Faber (Aerts q.q./Rabobank and FGH).

<sup>718</sup> N.E.D. Faber in his comment to the case: Utrecht District Court 6 June 2007, *JOR* 2008, 19, m.nt. Faber (Aerts q.q./Rabobank and FGH): “*Het lijkt erop dat de rechtbank uiteindelijk uit het feit dat de bestuurder van Fort in het zicht van het faillissement van Fort bij de genoemde verpanding voor zichzelf een voordeel heeft bedongen (te weten een één-op-één vermindering van zijn verplichtingen uit hoofde van de met FGH gesloten borgtochtvereenkomst), afleidt dat Fort het oogmerk heeft gehad FGH boven andere schuldeisers te begunstigen [...]. Dat is net iets te kort door de bocht.*”.

collusion between principal debtor and guaranteed creditor however remains unclear. Dutch law is underdeveloped on such cases.<sup>719</sup>

It could be inferred from the *Bosselaar q.q./Interniber* case of the Dutch Supreme Court<sup>720</sup> that there is some attention to the indirect benefit the guarantor can have through a guarantee relationship. However, this case first of all concerned a different question (whether the sale of caravans to the shareholder for a fair price indirectly prejudiced other creditors or not), and secondly the guarantee relationship was, as already discussed above, probably not essential in the reasoning of the Dutch Supreme Court that there was prejudice. In that sense, not much weight can be attached to this case in answering the question whether a guarantee relationship can lead to a presumption of collusion in the sense of art. 47 Fw.

The problem with acknowledging that an insider guarantor can enrich himself (and the guaranteed creditor) at the expense of non-guaranteed creditors and that the principal debtor therefore has incentive to disadvantage non-guaranteed creditors, is that this may lead to counter-intuitive results for guaranteed creditors. The guarantee can then be used as a circumstance in a case on transaction avoidance of a payment of a due debt to that creditor. Thus, the guarantee could arguably lead to less security, instead of more.<sup>721</sup> However, such reasoning paints a somewhat distorted picture and should be rejected. It should not be forgotten that the guarantee was, probably, the reason that the payment was made, especially if no other creditors were also paid at the same time. In that sense, the existence of the guarantee relationship created the incentive for the selective payment in the first place. If this wasn't the case and other, non-guaranteed creditors also received due payments around the same time, the payment could be regarded as a normal and not suspect payment, which would make the case for collusion weak. Lastly, it should be kept in mind that transaction avoidance only annuls the payment to the creditor, not the guarantee itself. After having reimbursed the insolvency trustee, the creditor can possibly call upon the guarantor under the guarantee relationship. In that sense, the creditor is not worse off. Of course, the creditor is still worse-off if the guarantor is insolvent as well, but in such a case the guarantee did not really represent any value other than control over the guarantor.<sup>722</sup> Whether annulment of the payment indeed brings the guarantee back to life is however somewhat unsure, because the Dutch doctrine in principle only recognizes *relative effect* of the annulment. This relative effect means the annulment in principle only has effect between the bankruptcy administrator and the counterparty of the payment.

The almost complete lack of attention under Dutch law to the problem that the guarantor is incentivized by the guarantee to prefer the guaranteed creditor, thus indirectly himself as guarantor by limiting his exposure under the guarantee, is particularly remarkable given the fact that, as discussed in paragraph 3.5 above, the courts do seem sensitive to the potency of the guarantee relationship in another context. In the cases discussed in paragraph 3.5 above, the guarantor himself had argued that pressure exerted by the bank through (inter alia) the guarantee made him act in ways that were ultimately detrimental to his own interests, which argument has been followed by the court in for example *Leliveld/Rabobank*.<sup>723</sup> It is however much more likely that the guarantee makes the guarantor act in his own interest, rather than the

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<sup>719</sup> Compare De Weijs, 2010b.

<sup>720</sup> Dutch Supreme Court 22 May 1992, NJ 1992, 526 (*Bosselaar q.q./Interniber* – also known as *Montana I*).

<sup>721</sup> See also De Weijs, 2010b.

<sup>722</sup> Westbrook, 1991.

<sup>723</sup> Court of Appeal Arnhem-Leeuwarden 27 March 2018, ECLI:NL:GHARL:2018:2893, *Leliveld/Rabobank*.

exceptional cases in which such pressure makes the guarantor act detrimental to his own interests. In that sense, it is all the more remarkable that the courts have little attention to this mechanism in the context of preference law.

Lastly, it should be noted that art. 43 and 47 Fw only apply to legal acts. Wealth transfers can remain covert, especially in cases where the wealth transfer is not a payment but another fact pattern that prefers the guaranteed creditor, such as lien feeding or a delayed bankruptcy filing (see extensively chapter 3 paragraph 3.2.2). Because art. 43 and 47 Fw only apply to a legal act (*'rechtshandeling'*), such covert wealth transfers escape the (very limited) scrutiny of Dutch preference law in any case.<sup>724</sup>

Consider for example the common situation in which a shareholder has guaranteed debt of a corporation towards the bank where the corporation also has a bank account. The bank account has an overdraft. The principal debtor may, on the eve of bankruptcy, sell goods at a fair price to unrelated buyers, who pay on the bank account of the principal debtor. The bank sets these incoming payments off against the overdraft, thus reducing the exposure of the shareholder under the guarantee. This benefit is however hard to attack with transaction avoidance law, because the bankruptcy administrator cannot directly target this benefit, but would have to target the sale of goods to unrelated buyers, for which proof that these unrelated buyers should have reasonably foreseen bankruptcy is needed, which will be hard to obtain. Transaction avoidance law thus cannot deal with this problem. Set-off by the bank could also be targeted (art. 54 Fw), but this again requires proof that the bank should have foreseen bankruptcy at the moment of the incoming payment.

In short, Dutch transaction avoidance law is insensitive to indirect preferences. Dutch law distinguishes between avoidance of obligatory and voluntary acts. This distinction is somewhat flawed in the sense that it allows creditors to contract around it by *ex ante* making sure, using contractual provisions, that preferences given on the eve of bankruptcy will be qualified as obligatory payments. Avoidance of obligatory payments is generally difficult under Dutch law, and the circumstance that an insider such as a manager or shareholder has guaranteed the debt that was paid, may arguably make avoidance of the payment easier, but very unclear is whether this is indeed the case and if it is the case, how much easier it will make avoidance of the payment. Furthermore, both in case of obligatory and voluntary payments, Dutch law strongly relies on subjective factors that are often hard to prove. Relevant objective factors, such as the fact that an insider has indirectly profited from a certain transaction, hardly play a role, neither in the statutory law nor in the case law.

#### **4.2.2 Possibilities for redress outside preference law**

A payment to a guaranteed creditor could constitute unlawful behavior of one of the actors directly or indirectly involved, even if the payment itself cannot be avoided by relying on transaction avoidance law.<sup>725</sup> The Dutch Supreme Court has however held that selective payments that cannot be avoided by relying on transaction avoidance law do in principle and in absence of special circumstances also not constitute unlawful behaviour of the debtor and the

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<sup>724</sup> See also Weijs, 2018.

<sup>725</sup> Sigtenhorst and Winters, 2017, para. 15.4.4; Weijs, 2018; Dutch Supreme Court 28 June 1957, *NJ* 1957, 514, (Erba/Amsterdamse Bank).

direct counterparty.<sup>726</sup> In that sense, transaction avoidance law does in principle regulate which payments are and aren't allowed in the twilight zone before insolvency. Transaction avoidance law thus has indirect effect on tort law.

It should be stressed that the above just applies to the lawfulness of the behavior of the parties *directly* involved in the payment: the debtor and the creditor. When a debtor company pays a guaranteed creditor, the directly involved actors are the debtor company and the guaranteed creditor. If that payment cannot be avoided by transaction avoidance rules, the debtor company and guaranteed creditor will, outside special circumstances, also not have acted unlawfully. Transaction avoidance law however does not give direct guidance on the lawfulness of the behavior of other actors involved. Thus, a guarantor (in the corporate context often the shareholder of the debtor) that profits indirectly from a payment that cannot be avoided, cannot rely on the absence of applicability of transaction avoidance rules to plead himself free. The same applies to directors of the debtor company. Transaction avoidance rules are not of direct relevance to the relationship between shareholder-guarantors or directors and unpaid creditors of the debtor, as the Dutch transaction avoidance rules don't allow clawback from such third persons involved. Moreover, the application of transaction avoidance rules is often dependent on certain knowledge or intent of the creditor that received a benefit. Directors or shareholder-guarantors possess different knowledge and intent and can and should thus be treated differently.

Paragraphs 4.2.3 and 4.2.4 below will discuss possible unlawful behaviour of the director and the shareholder-guarantor towards the unpaid creditors of the debtor. After that, the room for application of the norms on unlawful behaviour in relation to the creditor as a direct counterparty of a payment will be discussed (paragraph 4.2.5). In that relationship, transaction avoidance rules are relevant.

### 4.2.3 Shareholder liability for unlawful withdrawals outside preference law

A shareholder that has received an indirect benefit through a guarantee could act unlawfully in his role in creating such benefits, even when the payment or other act of the debtor that has created the benefit cannot be avoided by relying on transaction avoidance law. In the discussion of opaque priority structures (paragraph 4.1.1 above), 'direct' veil-piercing was discussed. When the corporate veil is directly pierced, the boundaries between the companies are completely disregarded by a court: they are seen as one company. As also discussed, such direct piercing is very rare.<sup>727</sup> That does not mean shareholders are safe from claims of creditors of the company. Creditors could pursue shareholders on the basis of art. 6:162 BW, often referred to as indirect veil-piercing. If such a claim succeeds, the boundaries between the shareholder and the company it holds shares in are not completely disregarded, but the shareholder is *de facto* held liable for some specific debt(s) of the company.

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<sup>726</sup> Dutch Supreme Court 16 June 2000, *NJ* 2000, 578 (Van Dooren q.q./ABN Amro I).

<sup>727</sup> See also Barneveld, 2014, pp. 469–471.

We can roughly distinguish between two types of unlawful shareholder behavior towards creditors.<sup>728</sup> The first category concerns liability because of unlawful distributions or wealth transfers to shareholders, the second concerns unjustifiably continuing the company in difficult times. The first category is particularly relevant in the context of indirect preferences given through guarantees. When payments on company debts guaranteed by shareholders are made, the shareholder limits his exposure and thus indirectly receives a distribution. Payments on shareholder-guaranteed debts can thus be seen as covert distributions.

The Dutch Supreme Court has, in some exceptional cases, held that distributions or wealth transfers to shareholders can indeed be unlawful towards creditors, but has never (clearly) ruled on the unlawfulness of indirect transfers through guarantees. In the *Keulen/Bouwfonds* case, Bouwfonds was in control of another entity (a non-profit entity, a 'stichting' (foundation)) but withdrew and foreclosed on a loan when it heard that the local government would not finance the entity, and quickly made sure its claim on the entity was fully satisfied.<sup>729</sup> The foundation had to liquidate, and all the creditors were only paid 65%. Keulen, one of the creditors, pursued Bouwfonds for its allegedly unlawful behavior. The Dutch Supreme Court held that the behavior of Bouwfonds could indeed be unlawful if it, when receiving the payment, should have seriously taken the possibility of a shortfall after liquidation into account. However, the Court of Appeal had already held that it was not sufficiently proven that Bouwfonds had an indication of such a shortfall.<sup>730</sup> The case shows that although establishing liability of a shareholder (or otherwise controlling entity) that seemingly favored himself as a creditor above other creditors is not easy on the basis of an unlawful act. A stricter norm applies to the liability of such a shareholder/creditor than to other normal creditors. Whereas a normal creditor will typically not act unlawfully when he receives payment in the vicinity of insolvency, not even if he knew of the financially deplorable state of his debtor, the shareholder/creditor could act unlawfully if it can be proven that he knew of serious financial difficulties.<sup>731</sup>

Another case that deserves attention in this context is *Nimox*.<sup>732</sup> Nimox sold its large claim, which was essentially a dividend-payment turned into a loan, on its full subsidiary Auditrade to a third party that paid Nimox for the claim. That third party had an abundance of security rights, and could thus rank above other creditors in the bankruptcy of Auditrade that soon followed, also for the claim bought from Nimox. This behavior was held unlawful.<sup>733</sup>

Both in *Nimox* and in *Keulen/Bouwfonds*, the benefits received by the shareholder either directly or *de facto* amounted to withdrawals of share capital.<sup>734</sup> Payments that simply benefit a shareholder as an insider can arguably be distinguished from such *de facto* withdrawals of share

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<sup>728</sup> See for this distinction: Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II\* 2009/842-843; A third category can arguably also be distinguished. This third category consists of cases in which liability of shareholders was not based on not acting by the shareholders at a moment at which bankruptcy of the debtor was foreseeable, but as such on the corporate structure of which the bankrupt debtor was part. Such cases are however rare. The leading case before the Dutch Supreme Court is *Comsys*. See further paragraph 4.1.1 above.

<sup>729</sup> The relationship between Bouwfonds and the Stichting (foundation) can be seen as analogous to a parent-subsidary relationship, see case note Van der Grinten to Dutch Supreme Court 9 May 1986, *NJ* 1986, 792 (*Keulen/Bouwfonds*).

<sup>730</sup> Dutch Supreme Court 9 May 1986, *NJ* 1986, 792 (*Keulen/Bouwfonds*). See on the case also Schilfgaard, 1987, p. 84.

<sup>731</sup> Case note Van der Grinten to Dutch Supreme Court 9 May 1986, *NJ* 1986, 792 (*Keulen/Bouwfonds*).

<sup>732</sup> Dutch Supreme Court 8 November 1991, *NJ* 1992, 174, (*Nimox/Van den End q.q.*).

<sup>733</sup> Par. 3.3.1 of Dutch Supreme Court 8 November 1991, *NJ* 1992, 174, (*Nimox/Van den End q.q.*).

<sup>734</sup> Compare Barneveld, 2014, pp. 481; 493.



capital, though of course dependent on what qualifies as *de facto* share capital.<sup>735</sup> Under current Dutch law, payments on third-party loans that are guaranteed by shareholders, in general probably do not qualify as withdrawals of share capital.

In the *Coral/Stalt* case, the Dutch Supreme Court held that a parent company is not free to favor itself as a creditor above other creditors after deciding to stop the activities of a subsidiary, except under special circumstances.<sup>736</sup> The facts in the *Coral/Stalt* case present a rather extreme example, in which the decision to discontinue the business was already made before the payments to the parent were made. In other words, the payments were clearly part of a *de facto* liquidation of the business. Question remains whether a shareholder can already be held liable for the damage done by such payments in the period before the decision to discontinue.<sup>737</sup> Moreover, in *Coral/Stalt*, the debtor company directly favored the shareholder. The question remains whether the rule can be applied to the situation in which the debtor company pays an unrelated third-party creditor, for which the shareholder acts as guarantor. The shareholder does not directly receive a payment in this case, but indirectly limits his exposure. Barneveld argues such indirect payments should largely escape scrutiny,<sup>738</sup> whereas the analysis in chapter 3 paragraph 3.2 showed that such indirect preferences should be deterred.

The facts in the *Sobi/Hurks* case show that guarantees can lead to preferential payments, but the Dutch Supreme Court does not seem to acknowledge this, or at least not explicitly.<sup>739</sup> The Court of Appeal had established that the shareholder should, from a certain date onwards, have understood that new creditors would be prejudiced, and held the shareholder liable for the debts of those new creditors (and not held the shareholders liable on the theory of unlawful distributions to shareholders). What happened after that date (but possibly also partly before) is that the principal debtor paid off debts with the bank, which the shareholder had guaranteed. The guarantee relationship can explain the behavior of the shareholder.<sup>740</sup> It could be that the shareholder fully understood that the subsidiary was not a viable company anymore and that new creditors would from a certain moment on be prejudiced, but still kept this quiet and opportunistically waited with filing for insolvency in order to use the future incoming payments to limit its own exposure under the guarantee. Neither the Dutch Supreme Court, nor the Court of Appeal seem to have fully acknowledged the guarantee as a relevant circumstance.<sup>741</sup> Moreover, if they would have acknowledged this fact, it should not only have led to liability of the shareholder towards the new creditors, but also towards old creditors because they are also prejudiced by such indirect distributions to shareholders.<sup>742</sup>

As becomes apparent from the cases discussed, The Dutch Supreme Court has in some rather exceptional circumstances found unlawful behavior of a shareholder by favoring himself as a creditor present, whilst it also becomes apparent from the exceptional nature of these cases that such unlawful behavior is far from easy to show for another creditor or bankruptcy

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<sup>735</sup> See Barneveld, 2014, p. 495; of course, whether such a distinction can be made simply depends on the qualification of what is (de facto) seen as share capital. If an insider guarantee is qualified as share capital, limiting exposure under the guarantee is a withdrawal of share capital.

<sup>736</sup> Dutch Supreme Court 12 June 1998, *NJ* 1998, 727 (*Coral/Stalt*); Barneveld, 2014, pp. 495–496.

<sup>737</sup> See also Barneveld, 2014, pp. 495–496, who assumes this to be the case in as far as the involved actors understood or should have understood that bankruptcy was imminent.

<sup>738</sup> Barneveld, 2014, pp. 495–496.

<sup>739</sup> De Weijs, 2010b, p. 163.

<sup>740</sup> See also De Weijs, 2010b, p. 163.

<sup>741</sup> De Weijs, 2010b, p. 163.

<sup>742</sup> See also De Weijs, 2010b, p. 163.

administrator. Concerning a shareholder that indirectly profits from payments made on a loan guaranteed by him, the creditor prejudiced by this will at least have to show that the shareholder should have seriously taken bankruptcy of the company, and the possibility of a shortfall in that bankruptcy, into account at the moment of receiving the indirect benefit. However, as case law on such indirect benefits in this context is currently absent, even that may not prove sufficient. The objective fact that a guarantee by a shareholder plays an important role in the dynamics, is not recognized as such.

#### 4.2.4 Director liability for insider preferences

An important deterrent force on insider dealing with guarantees in the context of corporate finance may come from director liability rules for such behavior. Roughly two situations should be distinguished in this context: (a) payment of the guaranteed debt has only prejudiced other creditors and (b) payment of the guaranteed debt has both prejudiced creditors and damaged the company. The latter situation really is the exception and is mostly of theoretical interest. Payments to creditors normally don't damage the debtor itself. It is however conceivable that the payment of a debt is, also from the perspective of the debtor, detrimental. This could for example be the case because more pressing debts could not be paid because of that payment, which in turn has damaged the business. The damage thus done is however not directly related to the amount paid, but will often be lower (though higher is theoretically also possible). The distinction is relevant in light of director liability. Under Dutch law, the rules on director liability towards the shareholders or the company differ from the rules on director liability towards outsiders such as creditors. It should be reiterated that, when assessing director liability for unlawful payments, liability towards the unpaid creditors for preferring one creditor is by far the most important category and will consequently be discussed first.

##### a) Liability for preferential payments that have prejudiced creditors

Creditors of the company and bankruptcy administrators can pursue directors of the company for unlawful behavior in case serious blame can be attributed to a director because he or she has effectuated, or allowed, that the company does not live up to its statutory or contractual obligations, whilst the director should have understood that the behavior of the company that he or she has allowed or effectuated would result in a failure to meet its obligations and that the company would also not provide sufficient opportunity for recovery.<sup>743</sup> In case of unlawful behaviour that falls in this category, generally both the individual creditors and the bankruptcy administrator (on behalf of the joint insolvency creditors) could bring a claim against director for such unlawful behavior.<sup>744</sup>

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<sup>743</sup> Dutch Supreme Court 8 December 2006, *NJ* 2006, 659, ECLI:NL:HR:2006:AZ0758 (Ontvanger/Roelofsen); the Dutch Supreme Court has also recognized another category of unlawful behavior of directors towards creditors, but this other type is generally not relevant to cases of selective payment. This type concerns directors to which serious blame can be attributed because of representing the company in contracting with third parties, while they knew or should have known that the company would not be able to perform and would also not provide sufficient opportunity for recovery (Dutch Supreme Court 6 October 1989, *NJ* 1990, 286 (Beklamel)).

<sup>744</sup> Dutch Supreme Court 14 January 1983, *NJ* 1983, 597 (Peeters q.q./Gatzen); Dutch Supreme Court 21 December 2001, *NJ* 2005, 95 (Lunderstadt/De Kok c.s.).

This category of debtor liability can be relevant in the context of payments on debts guaranteed by shareholders or directors of the debtor, although the relevance of such guarantees to the application is rather unclear. Generally, directors are free to choose who to pay first, but this can change near insolvency. If the directors are aware of the serious financial difficulties of a company, and are aware that a certain payment will prejudice the other creditors, they may act unlawfully if they make the payment anyway.<sup>745</sup> Clear is that directors who (can) foresee that insolvency is unavoidable are not allowed to make selective payments to creditors anymore, and will be liable for the damage done to creditors if they represent the company in making such payments anyway. Somewhat unclear in the doctrine is whether selective payments made to insiders, such as shareholders, group companies, or to the directors themselves, can be unlawful at a time when selective payments to outsiders would still be lawful. This indeed follows from both the *Beijer/Willems q.q.* case of the Arnhem Court of Appeal, and the *Stoets/Bohncke* case of the Den Bosch Court of Appeal.<sup>746</sup> In the latter case, the Court of Appeal explained that even though selective payments to creditors are generally allowed even in difficult times, the circumstances of the case, such as the fact that only insiders were paid, can lead to the conclusion that the directors have acted unlawfully.<sup>747</sup>

However, that still leaves the question on indirect payments to insiders somewhat open. A payment on a loan guaranteed by an insider is not a direct payment to an insider, but an insider indirectly profits. This circumstance arguably makes qualification of a selective payment in difficult times as unlawful more likely, but Dutch law is unclear and underdeveloped on this point. Moreover, even if such selective payments are unlawful because of the moment at which they were made in combination with the fact that an insider profited, there is, in the current doctrine, possibly still room for justification.<sup>748</sup> Such a justification could arguably be more likely to be accepted by a court in cases of payments that only indirectly benefitted insiders, than in cases of direct selective payments to insider creditors.<sup>749</sup>

A judgment of the Amsterdam Court of Appeal (*Pieper/Mentzel c.s.*) illustrates that point well.<sup>750</sup> The accusation had been made towards the director that the available funds (more than 1 million Euro) had been almost exclusively used to pay debts for which the director was personally liable towards those creditors. The payments had thus limited the exposure of the director under that contractual liability. The Court of Appeal firstly reiterates that a director should, also in case of distress and also when it is clear that not all creditors will receive full satisfaction from the available funds, have freedom in paying those creditors on which the company is most dependent regarding the continuance of the business. The Court of Appeal acknowledges that, if the director has indeed adjusted payments of the company to suit his

<sup>745</sup> Dutch Supreme Court 8 December 2006, *NJ* 2006, 659, ECLI:NL:HR:2006:AZ0758 (Ontvanger/Roelofsen); Den Bosch Court of Appeal, 19 January 2010, *JOR* 2010/113 (Stoets Holding/Bohncke); Arnhem Court of Appeal, 15 September 2009, *JOR* 2010/112 (Beijer/Willems q.q.).

<sup>746</sup> Arnhem Court of Appeal, 15 September 2009, *JOR* 2010/112 (Beijer/Willems q.q.). Den Bosch Court of Appeal, 19 January 2010, *JOR* 2010/113 (Stoets Holding/Bohncke). In her case comment to the cases, Rijckenberg argues against such a distinction between payments to insiders and payments to outsiders, but instead argues that this distinction could have some influence in the question whether the payment, if made after a point that directors should have understood that insolvency was very near, could be justified or not. To me, the approach of the courts makes much more sense.

<sup>747</sup> Den Bosch Court of Appeal, 19 January 2010, *JOR* 2010/113 (Stoets Holding/Bohncke), par. 8.6.1.

<sup>748</sup> Dutch Supreme Court 12 June 1998, *NJ* 1998, 727 (Coral/Stalt).

<sup>749</sup> Compare case note Rijckenberg, par 13, Arnhem Court of Appeal, 15 September 2009, *JOR* 2010/112 (Beijer/Willems q.q.).

<sup>750</sup> Amsterdam Court of Appeal 14 February 2012, ECLI:NL:GHAMS:2012:BW1995 (*Pieper/Mentzel c.s.*), r.o. 3.32.

personal interests of being released from a personal guarantee, the conclusion that the director has improperly managed the company should usually be reached. However, the court also directly weakens this statement, by stating that the simple fact that a personal interest of a director is served by a certain payment, does not mean that the director cannot justifiably make the assessment that the continuance of the company is coincidentally also best served by that payment. In the case itself, the director had argued that the payments were indeed in the interest of the company, and the Court of Appeal accepted this fact as not contested (though the directors were held liable towards the claiming creditors on other grounds<sup>751</sup>).

Although the Court of Appeal is not entirely clear on this, one could infer that the fact that certain payments have served the personal interests of a director because of a guarantee relationship with the creditor, can help the claimant somewhat in proving that the director has behaved improperly, but not sure is how much. The claimant should show that (1) the payment was made at a time in which the director should have understood that not all creditors would receive full satisfaction from the available funds and that (2) the director had a personal interest in such payments. It is then for the director to show that, although such personal interest existed, the payments were essential from a going concern point of view. If such a personal interest of the director would have been absent, the claimant would possibly also have to show that the payment was not strictly necessary, as the starting point of the Court of Appeal was that the director should be given the freedom to decide which payments are necessary. In other words, the existence of a personal interest of the director, here based on a guarantee, puts the burden of proof that the payment was indeed necessary from a going concern point of view on the director, whereas absent a guarantee the burden to show that the payment was not necessary from a going concern point of view lies with the claimant.

The question of liability of directors for preferring one creditor above another is particularly also relevant in the context where no payment was made, but in which factual behaviour of the debtor has preferred a certain guaranteed creditor (and indirectly thus the insider guarantor) above other creditors. Chapter 3 paragraph 3.2.2 gave the example of continuing the business, or even speeding up the business, such as the processing of raw materials into a finished product, by which a certain creditor (automatically) gets a security right. Articles 42 and 47 Fw only apply to legal acts and are thus unable to police such behavior. The fact that Articles 42 and 47 Fw do not regulate such behavior, does not compromise the possibility of a claim based on an unlawful act (art. 6:162 BW) of a director.<sup>752</sup>

b) Liability for preferential payments that have prejudiced both shareholders and creditors

As shortly introduced above, preferential payments normally don't hurt the debtor himself. Under specific circumstances, this could change. The doctrine of conflicts of interest can be relevant in the case in which a director of a company guaranteed the debt of the company towards a major lender. This can lead to conflicts of interest because the guarantee essentially ties (some of) the personal assets of the directors to the fortunes of the company, or more specifically, to the repayment of the debt of the major lender. The personal interest of the

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<sup>751</sup> See for the continuation of the case Amsterdam Court of Appeal 3 december 2013, ECLI:NL:GHAMS:2013:4258.

<sup>752</sup> See also Sigtenhorst and Winters, 2017, para. 15.4.4; Weijs, 2018.

director, repayment of or sufficient security for the debt to the major lender, may not always coincide with the interest of the company. The decisions in which the director may be conflicted, are thus the decisions of the company on repayment of or security for the guaranteed debt, or more indirect decisions that somehow facilitate that the debt that the director guaranteed is serviced. The issuing of the guarantee itself is not problematic in this context, as this is not an act of the company but of the director personally.

Although the new law on conflicts of interest (art. 2:129 paragraph 6 and 2:239 paragraph 6 BW) does not have external effect, the (bankruptcy administrator of the) company, in this case the principal debtor in a guarantee relationship, could still rely on the so-called Bibolini-defense (see paragraph 3.6 above), arguing that it is, under the specific circumstances applicable, unacceptable according to the standards of reasonableness and fairness for the counterparty that knew that a director was conflicted to rely on the legal act by the company in which the director was conflicted.<sup>753</sup> This case is clearly not exempted under the group financing exemption that the Dutch Supreme Court gives in the *Bruil* case, and the guarantee clearly creates a *personal* interest of the director. Whether there is a conflict of interests, will have to be established on a case-by-case basis.<sup>754</sup>

Furthermore, if directors were conflicted in representing the company, they can possibly be held liable towards the company (art. 2:9 BW) for not acting in accordance with the rules on conflicts of interest.<sup>755</sup> Damage done to the company by conflicted directors can thus, even though the legal acts performed by the company are valid, possibly be claimed from directors. The question is of course what the damage on the side of the company is. The fact that certain stakeholders of the company, for example other creditors, have been affected by such acts of the company, does not necessarily mean that the company itself has suffered damage.

Typically (though certainly not exclusively) in small enterprises, where the director and shareholder are the same person, guarantees are often issued by the shareholder/director. What is the relevance of the rule on conflicts of interest in such a case? The rule, which is part of Dutch company law, is focused on the relationship between directors and shareholders. If directors are conflicted, shareholders have to take the decision (if there is no supervisory board) (art. 2:129 paragraph 6 and 2:239 paragraph 6 BW).<sup>756</sup> If director(s) and shareholder(s) are the same person(s), this is pointless,<sup>757</sup> especially if the rule is just interpreted as an allocation of responsibilities between shareholders and directors. On the other hand, if more is expected of the rule, for example protection of creditors of the company,<sup>758</sup> which to some extent was at least the effect when the rule still had external effect, it is not pointless in its effects. The effectiveness of the rule to this extent remains questionable, because the conflicted director could simply decide to take the decision ‘as shareholder’.

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<sup>753</sup> Dutch Supreme Court 17 December 1982, *NJ* 1983, 480 (Bibolini).

<sup>754</sup> Dutch Supreme Court 27 June 2007, *NJ* 2007, 420 (Bruil).

<sup>755</sup> Nowak & Leijten, 2012; Dongen, 2013.

<sup>756</sup> In associations, the general assembly of members decides in such a case (art. 2:47 BW).

<sup>757</sup> See also Leijten, 2013.

<sup>758</sup> Abendroth, 2006, pp. 61–62 with reference to Dutch Supreme Court 9 July 2004, *NJ* 2004, 519 with comment Maeijer. See also (and dismissive) Fernández, 2008.

#### 4.2.5 Lender tort liability for insider preferences

Preference law allows to claw back payments made to the lender by the debtor before insolvency but, as discussed in paragraph 4.2.1 above, Dutch preference law has little sensitivity to the dynamics created by guarantees. Moreover, Dutch law allows circumvention of the preference law rules in place by allowing parties to agree *ex ante* that certain payments or other performances are obligatory. Pressure of a lender on a debtor that leads to the debtor preferring that creditor above others in the twilight zone before insolvency can however still lead to the conclusion that the creditor has behaved unlawfully under general tort law (art. 6:162 BW). Both the individual creditors and the bankruptcy administrator (on behalf of the joint insolvency creditors) could bring a claim against the creditor for such unlawful behaviour.<sup>759</sup> In the case certain adverse legal acts of the debtor are within the scope of articles 42 and 47 Fw, there is however little room for a claim based on article 6:162 BW on a lender that received preferential payments if the transaction is not subject to avoidance on the basis of 42 or 47 Fw. Even though a claim related to a fraudulent transfer or preferential payment can alternatively be based on art. 6:162 BW,<sup>760</sup> if articles 42 and 47 Fw do not allow avoiding the legal act, receiving the payment is in principle also not considered unlawful for the lender.<sup>761</sup>

In considering the extent of this indirect effect of transaction avoidance law, attention must be given to the reason why a certain act cannot be avoided under transaction avoidance law. If the only reason why application of transaction avoidance law is not possible is for example that the adverse behaviour did not constitute a legal act, this does not necessarily stand in the way of applying the general norm of unlawful behaviour. As discussed in paragraph 4.2.1 above, Dutch transaction avoidance law is currently unable to police benefits through insider guarantees. The question is therefore whether the fact that an insider guaranteed the loan, can be a special circumstance that allows a claim based on art. 6:162 BW. The literature does generally qualify related party transactions as an example of a special circumstance under which the indirect effect of transaction avoidance law on tort law is less strong,<sup>762</sup> but whether an indirect related party transaction, such as the payment of a loan guaranteed by an insider, qualifies as such a special circumstance is an open question.

This is particularly also relevant in the context where no preferential payment was made, but instead factual behaviour of the debtor has preferred a certain guaranteed creditor (and indirectly thus the insider guarantor) above other creditors. Chapter 2 Paragraph 3.2.2 gave the example of continuing the business, or even speeding up the business, such as the processing of raw materials into a finished product, on which a certain creditor (automatically) gets a security right. Articles 42 and 47 Fw only apply to legal acts and are thus unable to police such behavior. In such cases, that are outside the scope of art. 42 and 47 Fw, a claim based on unlawful act (art. 6:162 BW) on a lender is generally considered possible.<sup>763</sup> Of course, the harmed creditor or the bankruptcy administrator that brings the claim will have to prove unlawful behaviour, which is

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<sup>759</sup> Dutch Supreme Court 14 January 1983, *NJ* 1983, 597 (Peeters q.q./Gatzen); Dutch Supreme Court 21 December 2001, *NJ* 2005, 95 (Lunderstadt/De Kok c.s.).

<sup>760</sup> Dutch Supreme Court 28 June 1957, *NJ* 1957, 514, (Erba/Amsterdamse Bank).

<sup>761</sup> Dutch Supreme Court 16 June 2000, *NJ* 2000, 578 (Van Dooren q.q./ABN Amro I).

<sup>762</sup> Case note of Van Schilfgaarde, par 5 to Dutch Supreme Court 16 June 2000, *NJ* 2000, 578 (Van Dooren q.q./ABN Amro I); Sigtenhorst and Winters, 2017, para. 15.4.4; Dutch Supreme Court 28 October 2011, *NJ* 2012, 495 (Ponzi-scheme).

<sup>763</sup> Compare Sigtenhorst and Winters, 2017, para. 15.4.4.

generally not a small hurdle. In any case, the sole fact that the lender, using the guarantee relationship, put some pressure on the debtor will certainly not suffice.

#### 4.2.6 Specific dynamics in reorganization

Guarantees can play an important role in restructurings in bankruptcy. As discussed in chapter 3 paragraph 3.2.5, the principal debtor may be under pressure because of the guarantee, even in bankruptcy. Various complicated questions as to voting on and the scope of a reorganization plan can also arise in this context. Dutch law is not well developed in this context. Article 160 Fw simply stipulates that the reorganization plan has no influence on rights of the creditor against third parties such as sureties.<sup>764</sup> The Dutch Supreme Court,<sup>765</sup> as well as the common opinion in the literature, confirm this.<sup>766</sup>

Strangely enough, in at least two court-approved reorganization plans, in the Lehman Brother's bankruptcy<sup>767</sup> and in the bankruptcy of the Stichting Wereldruiterspelen,<sup>768</sup> that were not fully consensual, rights against third parties have been waived, against the will of some creditors. In the case of the Stichting Wereldruiterspelen all possible claims against directors and their insurers were waived. In the Lehman Brothers reorganization plan many possible claims against third parties were waived, including possible claims against directors of Lehman Brothers, accountants and the bankruptcy administrators themselves. Although these third parties were not guarantors, these cases beg the question whether waiving rights against guarantors, combined with a cram-down, would also be possible. Given the fact that the court approved these plans, it could be held that there may be a possibility for such plans to waive third-party rights. However, the Dutch Supreme Court, the text of art. 160 Fw, and the literature in general are clearly dismissive of the possibility. It is therefore seems unlikely that such waivers will hold in (higher) courts.

There is however considerable legislative action in the field of out-of-bankruptcy reorganization plans. The first preliminary draft bill seemed to generally sanction waivers of third party rights.<sup>769</sup> The updated version of the draft bill that has been sent to the parliament in July 2019 has a much more limited approach.<sup>770</sup> Waivers of rights towards third parties such as guarantors can generally not be altered by a reorganization plan (draft bill, art. 370 paragraph 2), but an exception is made for the corporate group context (draft bill, art. 372). This exception allows claims arising from guarantees or co-debtorship within the group to be included in the restructuring of a single debtor in that group, even though those third parties are not generally included in the restructuring. There are some conditions, including that the guaranteed creditor does not receive less than he would have received in the bankruptcy of also those third parties,

<sup>764</sup> Of course, if all parties involved in the reorganization plan agree to waive a right against a third party, they are free to do so (freedom of contract), and the third party can invoke such a waiver on the basis of art. 6:253 BW Soedira, 2011, p. 96.

<sup>765</sup> Dutch Supreme Court 18 May 1990, *NJ* 1991, 412 (CLBN/De Maas Janssens).

<sup>766</sup> Soedira, 2011, pp. 224–226, Hermans, 2015, p. 17.

<sup>767</sup> The plan can be accessed on: <http://www.lehmanbrotherstreasury.com/pdf/english/CompositionPlan.pdf>.

<sup>768</sup> See Soedira, 2011, p. 93; Hermans, 2015, p. 17.

<sup>769</sup> Preliminary draft bill for the 'de Wet continuïteit ondernemingen II', <https://www.internetconsultatie.nl/wco2>

<sup>770</sup> Draft legislative bill of 8 July 2019, Kamerstukken II 2018/19, 35249, nr. 1, titled "Wet homologatie onderhands akkoord". See also Hermans, 2015; Hermans and Vriesendorp, 2014.

and that those third parties should, like the debtor, be in a state in which it is likely that outstanding and due debts cannot be paid in the near future. Although this will probably only apply to a narrow set of cases, it does show that the legislator seems to start to pay some attention to opaque priority structures with guarantees especially within groups, more specifically the possibly detrimental effects on reorganization of such structures.

### **4.3 Summary of Dutch law on external relations**

Guarantees can influence the positions of outsiders. This section examined the current regulation under Dutch law of such influence on outsiders and the protection of the interests of these outsiders against possible opportunistic use by insiders.

Ex ante opportunism, using the guarantee to set up an opaque priority structure, was discussed first. Dutch law is poorly developed in dealing with the, often disguised, way in which guarantees can give priority to some creditors above others. Shareholder liability in tort or by veil-piercing is rare and clear guidance on how to value guarantees in this context is lacking. Dutch insolvency law is also unclear and underdeveloped on how to deal with shareholder loans in insolvency, so it should come as no surprise that Dutch law has little attention to the more complex form of an indirect shareholder loan, such as a loan guaranteed by a shareholder. Dutch law furthermore generally allows for double-proofing with guarantees, allowing the guaranteed lender to issue the full claim on all the joint and severally liable debtors, even if they are all insolvent, and even if part of this claim has already been paid in one of the insolvency procedures. Through this mechanism, the guaranteed creditor can squeeze down ordinary creditors, especially in insolvencies of larger groups of companies.

Dutch law is insensitive to insider dealing in the context of guarantees. The non-guaranteed (or: outsider) creditors of the principal debtor in the guarantee relationship could in theory be protected through transaction avoidance law against the principal debtor giving preferences to the guaranteed lender, but the analysis has shown that Dutch law is poorly developed on this point and generally inapt in dealing with the complex and indirect ways in which guarantees can be used to give preferences to guaranteed creditors above non-guaranteed creditors. Creditors of the principal debtor that suffer damage because of such adverse behavior of their debtor as influenced by a guarantee relationship could theoretically pursue shareholders or directors for damages in extreme cases, but again Dutch law does not offer clear guidance on how to deal with directors or shareholders that indirectly benefitted through a guarantee relationship or that are to blame for giving preferences to certain lenders.

## **5 Conclusion**

The question addressed in this chapter is:

*How does Dutch law deal with opportunism with the guarantee relationship in the context of corporate finance?*



In answering the question this chapter has, after a short introduction of types of guarantees under Dutch law, discussed opportunism with the guarantee relationship both towards insiders of the relationship and towards external parties.

Regarding protection of insiders to the relationship, especially the protection of consumer sureties is rather extensive. This protection is often dictated by mandatory law and is extended to contracts in which a consumer guarantees to do something else than the principal debtor has promised, for the purpose of security (art. 7:863 BW). However, there are also some gaps in the consumer protection, most notably the lack of substantive protection, the limited protection of consumer guarantors that are co-debtors and not sureties, the lack of clarity around consumers that are guarantors in independent guarantee relationships, and the lack of specific protection of family sureties. Outside the area of consumer suretyship, guarantors also enjoy some protection, but not much. Shareholder-directors that stand surety for their own business often enjoy too little protection.

Regarding opportunism towards outsiders of the guarantee relationship, Dutch law is underdeveloped. Dutch law has little to no attention to the opaque priority structure that a guarantee combined with incorporation can create and little to no attention to the more specific problems of indirect shareholder loans and double proofing of guaranteed loans. Dutch transaction avoidance law is mostly unable to deal with the insider dealing that a guarantee by an insider can lead to. Director- and shareholder liability rules are also mostly unable to effectively deal with such insider dealing, or at least it is not clear to which extent such rules can be applied effectively.

In short, many problems of opportunistic use of guarantees towards outsiders of the relationship are not addressed by Dutch law. Dutch law does partly deal with opportunism towards insiders, but only in the context of consumer guarantees.