VANDOORNE

Dutch commercial real estate (CRE) loans and COVID-19

8 questions from our international CRE lender and borrower client base answered

Over the past weeks, the COVID-19 pandemic has had a huge impact on peoples' lives. Various aspects of the economy have also been affected, some in a severe way. This short article aims to provide some clarity and guidance further to a number of questions we repeatedly received from our international CRE lender and borrower client base over the past weeks around their legal position and remedies available to them under Dutch law to protect themselves from any resulting negative impact that they may suffer as a result of the COVID-19 pandemic. We will also briefly discuss measures that have so far been taken by the Dutch government and representatives of market parties that are relevant to parties with an interest in the Dutch CRE finance market.

This article was last updated on 29 April 2020.

1. Has the Dutch legislator imposed specific rules on how Dutch CRE lenders and borrowers should deal with loan defaults as a consequence of the COVID-19 pandemic?

The Dutch government has not imposed any specific rules on how to deal with (potentially) defaulting CRE loans (or other kinds of commercial loans) as a consequence of the COVID-19 pandemic. Parties will therefore have to assess their positions on the basis of existing rules of Dutch law. The Minister of Economic Affairs has urged market parties to discuss solutions that are supported by main - and could therefore serve as guidance to all - market participants. The main Dutch banks have in the meantime expressed their willingness to see where they can come to arrangements with borrowers, including CRE borrowers, that have been affected by the COVID-19 pandemic (see further 3 below). Furthermore, retail investors and large retail tenants have come to an arrangement intended to provide guidance to landlords and tenants of retail property (see 7 below).

2. Under what circumstances could the COVID-19 pandemic give CRE borrowers the right to request for relief under their Dutch law loan terms?

It can be expected that at least a number of CRE borrowers will no longer be able to comply with their obligations under their loan agreements, including payment obligations, financial covenants, but possibly also property covenants, such as ensuring that let space is in use and not left vacant, where tenants are no longer able to pay rent or suspending the payment of rent and negotiating payment delays or reductions. The Netherlands are no exception on this point.

The following rules of general Dutch law are relevant here:

- The firm main rule remains that borrowers should comply with the loan terms they agreed to.

- The Dutch law concept of force majeure (*overmacht*) will not normally provide relief to a borrower. Loan agreements do not usually include any provisions on this subject, which may assist the borrower towards making such an argument. From a Dutch law perspective, the fact that a borrower is experiencing financial difficulties, even if these can be said to result from a worldwide crisis such as the COVID-19 pandemic, are in principle considered to fall within the risk sphere of the borrower, not the financier.

- Where it can prove that its financial difficulties are (predominantly) the direct result of (government measures taken with respect to) the COVID-19 pandemic, which was unforeseen at the time the loan agreement was entered into and not of other factors that may already have affected its business financially, a borrower may be able to argue that a lender can in reasonableness and fairness not expect it to pay and perform other obligations under its loan agreement that are breached as a result of the COVID-19 crisis on the basis of the Dutch law concept of unforeseen circumstances.

- Two points should be kept in mind here though.

  On the one hand, Dutch courts will generally adopt a reserved approach towards honoring the argument of a contracting party on the basis of unforeseen circumstances and if an argument on this basis is accepted the Dutch courts are likely to look for a remedy that would interfere as little as possible with the contractual terms agreed between parties. Again, it should be kept in mind here that financial difficulties are, as a firm main rule, considered to be circumstances that belong in the borrowers risk sphere.

  On the other hand, there is a steady line of Dutch caselaw that, in the absence of fraud, bankruptcy or another serious default that is not capable of remedy, lenders and borrowers are expected to consult with each other for a reasonable period of a few months (on the basis of existing caselaw typically 3) and see if alternative solutions are possible before a lender would be expected to accelerate its loan and enforce its security.

- Bearing these points in mind, the most likely approach taken by a Dutch court would be to conclude that a lender should accept a payment delay during a limited number of months for borrowers that can truly be said to have been left without means to meet their financial obligations towards a lender due to the Corona crisis, but that borrower's would also be expected to look for alternative solutions themselves once this period has past and that, if that does not prove to be possible, the usual approaches as adopted in the past by financiers and other creditors towards borrowers experiencing financial difficulties from restructuring to collection and enforcement and insolvency scenarios can be expected to be followed.

In any case it can be concluded that borrowers and lenders are well advised not to let matters lie and enter into discussions as soon as possible where loan defaults are expected. Under Dutch law, borrowers are from their end also expected to provide accurate and up-to-date information to their financiers and be pro-active towards finding a solution that will as much as possible still enable them to comply with the terms of their loans going forward.

3. Have CRE financiers adopted a form of joint approach towards borrowers that are experiencing financial difficulties due to the COVID-19 pandemic?

The main Dutch banks have moved to adopt a joint approach specifically aimed at SME-s, entailing that for loans up until EUR 2,500,000 for a period of six months they will accept payment delays with respect to amortizations/repayment of principal (in principle not interest), but generally not waive amounts due. This only applies to companies that had a healthy business prior to the COVID-19 crisis. Each bank has its own view on this though, meaning that some banks (such as ABN Amro) also allow delay of interest

payments, whereas other banks continue to require their borrowers to pay interest and only accept delays in repaying principal.

Larger loans are dealt with on a case-by-case basis. In general terms, our experience so far has been that where CRE borrowers are experiencing financial difficulties, which can in fairness be considered to result from the COVID-19 pandemic or government measures adopted in relation thereto (see 5 below), lenders may at this stage consider payment delays of principal and possibly also of interest for periods ranging from 3-9 months depending on the case, but not reductions in payments. Discussions around whether and to what extent matters could (also) be resolved by the sponsor applying an equity cure are also to be expected.

ING Real Estate Finance has announced a specific arrangement for CRE loans, which is not expressed to be limited to loans below a specific loan amount, to the effect that borrowers that are experiencing liquidity issues as a direct result of (government measures taken in connection with) the COVID-19 pandemic could qualify for a payment delay with respect to amortizations/repayment of principal until coming August. This is, in particular, relevant for CRE loans provided in relation to the financing of retail assets, but could also be relevant where offices or other commercial properties are leased out to tenants with Corona related payment difficulties. ABN Amro and Rabobank have not announced any specific policies concerning CRE loans. ABN has specifically excluded CRE loans from the above-mentioned arrangement for SME borrowers in an announcement on its website. However, both banks have also indicated that they appreciate that COVID-19 also affects CRE borrowers and that, bearing this in mind, would review potential CRE loan defaults on a case-by-case basis. For a full and up-to-date overview on current lenders policies this article is useful.

4. Has the Dutch legislator imposed specific rules with respect to insolvency cases as a consequence of the COVID-19 pandemic?

Unlike for example in Germany, the Dutch legislator has not opted to (temporarily) amend Dutch statutory law with respect to requests for bankruptcies or moratoria of payments. As opposed to German law, Dutch insolvency law does not require a company to file for bankruptcy in the event of illiquidity or over-indebtedness. The main Dutch law point to bear in mind here is director's duties. If the managing directors of a company enter into new obligations on behalf of the company at a time where they knew or should have realised that the company would not be able to meet its financial liabilities resulting from such obligations, they run the risk of being held personally liable for those obligations.

In a temporary deviating regulation on how to handle cases during the COVID-19 crisis issued on 9 April 2020, the Dutch courts have marked bankruptcy and moratorium requests and related proceedings as having a high priority, whereby "the judge will take into account all relevant circumstances, including the current pandemic and its economic impact". It is too early to predict how this policy will be applied by the Dutch courts in practice, but the general aim appears to be prevent abuse of the current situation, not just by creditors of bankruptcy procedures wishing to put debtors under pressure, e.g. in cases where a company's financial difficulties can be expected to be of a temporary nature and directly caused by COVID-19, but also possibly by companies themselves, e.g. to get rid of employees. The regulation itself just briefly notes that "protection of rights and prevention of abuse of the current situation is considered of great importance".

Furthermore, on 27 March 2020, the Dutch government qualified the bill for the introduction of the Dutch Act on the Confirmation of Private Plans (*Wet Homologatie Onderhands Akoord*, the WHOA) as an emergency bill, meaning that the WHOA bill is now expected to be handled with priority and come into force on 1 July 2020. The WHOA is a brand-new pre-insolvency procedure for a compulsorily composition and provides an instrument to domestic and foreign debtors with a sufficient link to the Netherlands to restructure their debts in a time and cost efficient manner through a compulsory composition outside of formal insolvency proceedings. WHOA arrangements can also be made to cover the claims of secured creditors and shareholders and WHOA proceedings and involve a cross-class cramdown. In this article, the WHOA is explained in further detail.

5. What relief is the Dutch legislator offering to businesses affected by the COVID-19 pandemic?

Immediately after the COVID-19 pandemic hit the Netherlands, the Dutch government imposed several measures to mitigate the impact of the pandemic on the Dutch economy. So far, these measures focus on job and income security by way of the Temporary Emergency Measure Bridging Work for the Preservation of Work (NOW-regeling) for employers and the Temporary Bridging Scheme for Self-Employed Persons (TOZO) for self-employed persons. Also, several tax measures have been imposed in order to eliminate temporary liquidity issues to support businesses (see this article).

Furthermore, the introduction of a guarantee arrangement focusing on SME has been accelerated (the SME Credit Guarantee Scheme, *Borgstelling midden- en klein bedrijf, BMKB*) and the government has introduced a guarantee scheme for agricultural companies (Credit Guarantee Scheme for Agriculture, *Borgstelling MKB-Landbouwkredieten*). In addition thereto, the existing Corporate Finance Guarantee Scheme (*Garantie Ondernemingsfinanciering*, in short GO-Scheme) will be increased which allows banks to request for a guarantee from the Dutch government for bank loans provided to medium-sized and large companies. However, the GO-scheme specifically excludes loans provided for the financing of real estate (other than loans provided in relation to brokerage of real estate).

Although none of the above-mentioned measures focus directly on CRE loans, it is the intention that it will nevertheless contribute towards keeping the Dutch economy going and could be relevant for certain tenants (in particular SME and self-employed people). The Dutch government has indicated that it will continue to review whether further measures are required. Several branches have urged for additional measures and relief, such as the cultural and entertainment sector and the bars and restaurants, which must remain closed until at least 20 May 2020.

6. Under what circumstances could the COVID-19 pandemic give a CRE tenant the right to request for a payment delay or change of the terms of its Dutch law lease?

The Dutch government has not imposed total lock down. Restaurants, cafes, theatres and sport centers must remain closed, but shops are allowed to stay open. However, apart from supermarkets and other shops selling food to consumers to take away, shops do suffer from a general lack of buyers due to people staying at home or are closed because retailers cannot guarantee compliance with the 1.5 m distance rule between people imposed by the Dutch government in their shops.

In the Netherlands, the large majority of lease agreements is based on ROZ standard documentation for either office space or retail, as applicable. On the basis of the standard ROZ lease agreement and the standard general conditions applicable thereto, a tenant is not allowed to suspend, reduce, deduct or set off its payment obligations.

Dutch lease law as laid down in the Dutch Civil Code will not so easily interfere with these provisions and allow for a rent reduction. In cases where it can clearly be argued that a tenant is experiencing unforeseen financial difficulties as a result of COVID-19 (measures) payment delays or temporary rent reduction may be argued on the basis of the legal concept of the Dutch law concepts of unforeseen circumstances/reasonableness and fairness (for a more detailed analysis see this article. As per the above though (see 2), financial difficulties experienced by a party (in this case a tenant) are, as a general rule, considered to be for that party's own risk and not regarded as a valid reason for a tenant to no longer comply with its obligations under a lease agreement. Also, same as for borrowers and lenders, the question whether there is an investor/parent company behind the relevant tenant that would have the financial means to enable the tenant to continue to meet its (payment) obligations towards its CRE landlord is, of course, also a usual topic of discussion, even if no such recourse is available to the landlord on contractual legal grounds, such as a guarantee. It can also not be excluded that especially in these times, a Dutch court might have less sympathy for an argument in favour of rent reduction where there is an investor/parent company behind the tenant that should also be able to contribute financially towards a solution, not directly if no or only limited recourse beyond the tenant itself is possible under the terms agreed with

respect to the relevant lease agreement, but possibly still in the context of its decision whether or not to award a certain remedy to a tenant towards a rent reduction on the basis of reasonableness and fairness.

7. Has the Dutch legislator imposed specific rules on how landlords and commercial real estate tenants should handle tenant liquidity issues in the context of their leases?

The Dutch government has so far not interfered with commercial lease agreements, leaving it to parties to consider amongst each other if a temporary delay or reduction of rent would be appropriate and acceptable to the parties. This is different in some other European jurisdictions, such as Germany, where the government has – as part of the emergency COVID-19 legislation referred to above – prohibited landlords to terminate a lease agreement until 30 June 2020 on the grounds of non-payment, in case such non-payment is caused by the pandemic.

Shortly after the start of the COVID-19 pandemic, a number of larger retail tenants and their shareholders started putting pressure on landlords by announcing that they would not pay rent due, at least for the next few months. Just before the Easter weekend, representatives of landlords, tenants in the retail sector, the Ministry of Economic Affairs and the Dutch Banking Association made the so-called Easter agreement, which includes a package of (support) measures to divide the economic pain as equally as possible between parties involved.

The Easter agreement includes a set of guidance rules on the basis of which retailers that can be expect to suffer a loss equal to at least 25% of their total turnover during the period from April to and including June this year as a consequence of (measures adopted with respect to) COVID-19, should be offered a payment delay of three months by their landlords for at least 50% upto 100% in severe cases of the rent that would normally have been payable by them as from the beginning of April. After that period, parties should assess the actual loss of turnover suffered by the relevant retailer/tenant and consider if a rent reduction would be appropriate and reasonably acceptable. The Easter agreement further provides that tenants should make all reasonable efforts to keep their shops open and in business, do the maximum reasonably possible to continue to meet their obligations towards their landlords and that tailormade arrangements should be made where large international chains of stores, shops with an 'international' shareholder and Dutch companies with shops abroad are concerned. A large number of landlords had already offered some sort of relief to their tenants prior to the Easter agreement, mostly in terms of allowing them to pay rent at a later stage for the next few months or sometimes - in particular in the case of restaurants, cafes, hairdressers, businesses of other professions requiring close contact and sports/fitness centres that are to remain closed until at least 20 May 2020 as a direct result of government measures – in the form of a temporary (partial) reduction of rent.

However, there is as of yet no mandatory law requirement that specifically requires landlords to agree to a payment delay or rent reduction at this point in time. See further this article, which describes the Easter agreement in further detail.

8. How are Dutch CRE developments currently impacted by the COVID-19 pandemic and what are the typically resulting legal issues?

In ongoing projects, acute problems mostly arise due to less availability of employees as many foreign workers have returned to their native (mainly Eastern Europe) countries or employees being ill and less availability of materials if these are produced in a highly affected country such as China or Italy. These issues will lead to higher costs (in case of replacement of foreign workers for more expensive Dutch employees, if available) and delays in delivery of projects.

These complications could lead to non-compliance by the constructor of its obligations towards the developer under the building contract. In principle, delay and higher costs are for the economic risk of the constructor, as usually agreed upon in the building contract and applicable general conditions. This article discusses relevant typical (legal) provisions included in building contracts, the (usually) applicable UAV general conditions and the Dutch Civil Code and where these could provide some form of relief in terms

of not being liable for damages, extending periods for performance/delivery periods and room for an argument on the basis of unforeseen circumstances or force majeure are discussed in further detail.

Non-performance under underlying lease or development documents could of course also have a materially adverse impact on a borrower being able to meet with its obligations under a loan agreement entered into with respect to the financing of the relevant property or development. This makes for a multi-layered problem, requiring timely consultation and, where opportune, (temporary) alternative arrangement being put in place with all parties involved. A timely analysis of one's own legal position can assist with this and help towards minimizing costs and loss incurred.

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