Regres bij concernfinanciering

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SUMMARY

Chapter 1: Introduction

The focus of the research conducted for this thesis is the right of recourse resulting from the contractual joint and several liability granted as collateral for group credit by the companies in the group. In this research, the nature and effect of this right of recourse are analysed in the context of the uncertainty that exists regarding this issue in both the literature and in practice. In **Chapter 1,** the research design shall be outlined with this uncertainty in mind. A brief description of the problem and the way in which this problem is examined in this research will follow below.

In the Dutch financing system, it is a common practice for group companies to declare themselves jointly and severally liable for the group credit. As a result of the joint and several liability granted by the group companies, the creditor can appeal to each and every one of these joint and several debtors to fulfil the entire debt. If the creditor appeals to one of the joint and several group companies, and this debtor fulfils more than his share compared to his co-debtors, this debtor is allowed to enforce his right of recourse against the co-debtors.

Uncertainty regarding the nature and effect of this right of recourse leads to problems that in the literature are known as 'recourse issues in relation to group finance'. These recourse issues consist of two themes, namely: (I) the obligation to contribute issue and (II) the uncertainty regarding the effectiveness of party agreements intended to influence recourse rights. Regarding the first topic, there is debate about the way in which the obligation to contribute of the joint and several debtors must be determined. These issues are particularly relevant when the parties have not agreed on anything in this respect, or when existing obligations to contribute arrangements no longer apply. The second topic should be considered against the background of agreements made by parties that are intended to restrict or exclude the rights of recourse and subrogation. In the literature, there is an ongoing debate about the extent to which these party agreements are effective.

What is remarkable in the recourse debate is the absence of external comparative legal research. Studies on recourse issues in foreign law have only been carried out to a very limited extent, and they consist of loose remarks rather than coherent and structured research. This gap can be considered striking, as our neighbouring legal systems are also very familiar with legal features like joint and several liability and the right of recourse. In addition, these legal orders have similar ways of granting collateral, organising group finance, and restructuring. Nonetheless preliminary research shows, that the relevant problems in the Netherlands do not play a significant role or are not even known in these legal systems, raising the question of why recourse issues are absent in foreign law but, on the contrary, exist in Dutch law.

The foregoing discussion leads to the following two key questions:

I. How can more legal certainty be provided regarding the recourse issues that arise from the joint and several liability granted by group companies favouring group credit?
II. Why don't recourse issues in group finance exist under German and Belgian law, but do exist in the Dutch legal order?

The key questions are divided into five sub-questions:

1. What is the nature and operation of the general right of recourse in the meaning of Art. 6:10-6:14 Dutch Civil Code (DCC)?
2. According to Dutch law, what is the nature and operation of the group as an economic, social and legal phenomenon?
3. What is the role of the perception about the group in the debate on the obligation to contribute in relation to group finance and regarding the different positions adopted in this debate?
4. According to Dutch law, what is the effectiveness of party agreements and measures that aim to influence the existing rights of recourse and subrogation between group companies?
5. What is the function and operation of the German right of recourse (§ 426 German Civil Code (GCC)) and the Belgian right of recourse (Art. 1214 Belgium Civil Code (BCC)) related to group finance?

The choices that have been made regarding external comparative legal research on the Dutch, the German and the Belgium legal systems are justified in brief here. In addition to having similar economic systems, the three countries are to some extent similar concerning their corporate and group (financing) structures, as well as the patrimonial doctrines that will be discussed in this research. Differences exist regarding the legal recognition of the group. In Germany, the group is legally recognised, while the Netherlands uses a limited group concept and in Belgium, the group is not legally recognised. In addition, German group law is largely codified, though in the Netherlands that is only partially the case and in Belgium group law is not codified at all. There is also a difference in the legal right of recourse arising from the joint and several liability between the Netherlands and Belgium on the one hand and Germany on the other hand. In the Netherlands and Belgium, the law applies an open standard in determining the obligation to contribute. In Germany, the *Ausgleichungspflicht* sets forth that, under § 426 GCC, jointly and severally liable debtors must contribute to the debt *zu gleichen Anteilen*. The German law has already resulted in a specific criterion.

These similarities and differences make a comparison useful. The similarity of the countries' legal systems also facilitates insights that may be applied to Dutch law. Furthermore, a comparison with Germany proves interesting because German law literature is rich with comments. Therefore, the number of sources that can be

consulted is comprehensive and offers opportunities for new insights. A comparison between Belgian private law and Dutch private law also proves interesting because of their shared historical roots.

Chapter 2: View on the right of recourse

In **Chapter 2**, research is conducted on the nature and operation of the general right of recourse in Art. 6:10-6:14 DCC. The development of the right of recourse is described from a historical and comparative law perspective. Within this framework, different aspects of the right of recourse are outlined. The following items are treated successively below: the right of recourse from a historical perspective, the basic rule system and the residual rule system, criteria and ranking in the obligation to contribute, threshold (free) recourse, a relative and absolute obligation to contribute, and cascade recourse.

The right of recourse from a historical perspective

Historical law research shows that the oldest form of the right of recourse is the recourse claim of the guarantor on the principal debtor. This recourse option stems from the pre-classic period (250 B.C.-0). Under Roman law, surety was a popular tool to provide security, therefore the right of recourse developed especially in relation to surety.

The investigation shows that the right of recourse with joint and several liability was developed at a later stage. In this respect, the observation was made that joint and several liability does not have its own designation in Roman law. Joint and several liability is known under different descriptions as *teneri in solidum, obligari in solidum* or *duo rei stipulandi*. The development of the right of recourse with joint and several liability consists of three stages, situated in the classical (0-250) and post-classical periods (250-565).

During the first stage, the relationship between the co-debtors was the only source from which the rights of recourse might arise. An independent right of recourse was not yet recognized by Roman law at the time. In this period, of the internal relationships *societas* (partnerships), *communio* (community), co-heirs, mandate, and *negotiorum gestio*, it was accepted that these relationships could serve as a basis for recourse.

In the second phase, cession recourse *(beneficium cedendarum actionum)* was developed as a recourse instrument. When using this tool, the claim of the creditor is transferred to the co-debtor who has paid the debt. This co-debtor can in turn use the claim to demand compensation from the other co-debtors. Originally, parties had to agree upon this 'ancestor' of the subrogation. In later times, the addressed debtor could demand that the creditor transfers his claim to him.

In the third phase, an independent right of recourse seemed to develop, albeit this cannot be said for certain because the sources are not clear about this and cannot be interpreted unambiguously. But it is obvious that in this phase, the number of recourse options was further extended. The method of calculating the share of debt held by each debtor is not shown in the Roman sources. What is clear is that the basis for recourse, as far as the Romans were concerned, must be found in the mutual relationship between the debtors.

The research shows that these developments in Roman law influenced the later formation of the right of recourse. Such reflections of the classical antiquity can, for example, be seen in French law. Akin to the after-classical Roman law, the French Civil Code (FCC) (1804) opts for a double basis under which the debtor that fulfils more than its share of the debt may receive redress from the co-debtors. In this respect, Art. 1214 FCC is an independent right of recourse and Art. 1251, paragraph 3 of the FCC constitutes a right of subrogation. The development of the right of recourse in the FCC was an important precursor for the development of the Dutch right of recourse, as codified in the Old Dutch Civil Code (ODCC) (1838). The ODCC was based on the French legislation. For instance, the aforementioned double basis is included in the ODCC through Art. 1329 and Art. 1436-1439.

Furthermore, the investigation shows that only in the middle of the 18th century and in the course of the 19th century can it be said with certainty that an independent right of recourse existed in the European legal systems. The Codex Maximilianeus Bavaricus Civilis of 1756 afforded such a right. In this period, there was also more emphasis on the codification of standards designed to determine the extend of the obligation to contribute of each debtor. One of the first examples of this emphasis can be found in the 18th-century Allgemeine Landrecht für die Preußischen Staaten.

The basic rule system and the residual rule system

In Chapter 2, the contemporary right of recourse is analysed from an external comparative law perspective. This research has shown that, on the basis of the criterion obligation to contribute equal shares, a typology can be created for the legal recourse provisions of European codifications. This typology is divided into two categories: the basic rule system and the residual rule system.

In both systems, the obligation to contribute equal shares operates as an anchor point. In the basic rule system, the criterion marks the starting point, except when an alternative criterion appears in an agreement. In the residual rule system, the obligation to contribute equal shares applies only when all other possible criteria do not provide relief. Both systems can be subdivided between an explicit form and an implicit form. In the first form, the obligation to contribute equal shares explicitly results from the appropriate recourse provision, as in § 426 (1) GCC. With the implicit form, the criterion does not arise from the legal text, but from the interpretation of the law, the case law, or the legal history. Dutch Art. 6:10 of the DCC can be qualified as an implicit residual rule system.

The application of the basic rule system or the residual rule system reflects a procedural difference. In the first case, the person entitled to recourse has to demonstrate the obligation to contribute and not the size of the obligation to contribute, to the extent that a division of equal shares is sufficient. In the case of the residual rule system, the person entitled to recourse must argue and provide evidence of both the obligation to contribute and the extent of the obligation to contribute of the liable debtor. In the Dutch legal system, it is not standard practice to use the obligation to contribute equal shares as the basic rule. In my opinion the use of the residual rule system in situations where the extent of the obligation to contribute of the debtor liable for the recourse can easily be demonstrated, don't raise any objections. In situations where it is less simple to demonstrate the extent of the obligation to contribute, the residual rule system is less appropriate, primarily when an unreasonable degree of information asymmetry exists between the parties. The option of a legal reversal of the burden of proof might serve as a helpful instrument in this case.

Criteria and the ranking of the obligation to contribute

In Chapter 2, the operation of the recourse and subrogation provisions in Art. 6:10-14 DCC are described in brief. In addition, the chapter highlights several aspects of how these provisions were designed and operate. Special attention is devoted to how the extent of the obligation to contribute can be determined. Criteria for the determination of the obligation to contribute may result from different sources, such as the law, an agreement, a legal relationship or legal principles. In a specific situation in which the obligation to contribute must be determined, multiple criteria might be applicable. In such a case, criteria are competing against each other. These criteria can be ranked and, in this research, this process is referred to as the ranking of the obligation to contribute. Such a ranking follows from the Toelichting Meijers of Art. 6.1.2.4. First, the ranking considers whether a criterion is found in the party agreements. If this is not the case, the mutual legal relationship of the jointly and severally liable debtors needs to be interpreted using other legal features, jurisprudential standards and legal principles in order to identify a criterion. If there is no other link between the debtors, then the fact that they are jointly and severally co-debtors and the debt is contracted with a consideration, then it is important to what extent the countervalue of their debt has benefited each of them. If this criterion (the profit principle) does not offer a reasonable outcome, then the obligation to contribute equal shares applies.

Threshold (free) recourse, relative and absolute obligation to contribute and cascade recourse

Under current Dutch law, a recourse threshold exists. This means that the performing debtor can only request redress from co-debtors when the debt is redeemed above the 'threshold' of their share of the debt. This may lead to an unfair situation, for example, when multiple debtors liable for the obligation to contribute exist, but

one of them is addressed by the creditor for less than his share of the debt, and the remaining debt is not recovered. In that event, the debtor held liable cannot receive redress from the co-debtors and, in this way, the external creditor may influence the internal relationship between the debtors. However, when the performing debtor is allowed to obtain a threshold-free recourse, the situation described above cannot occur. Then, a settlement will take place between the co-debtors after each payment to the creditor. In order to avoid the risk of a circle of claims, each co-debtor should internally only contribute to their share of the debt. Under certain circumstances, it might be desirable for the parties to agree on the option of threshold-free recourse in the party agreements.

In the case of two joint and several debtors, the obligation to contribute can be determined in relation to each other. In the case of multiple debtors, a relative obligation to contribute sometimes results in an imbalance in the obligation to contribute. In this case, a balanced division of the debt between the debtors can only be determined by using an absolute obligation to contribute provision. In this respect can be referred to the German legal theory concerning the *Einzelabwägung*, *Gesamtschau* and *Kombinationstheorie*. In the Dutch literature, doubts exist regarding which system is applicable, that is, if the obligation to contribute should be determined in a relative or an absolute manner. Brunner believes that the system of relative obligation to contribute applies. Van Boom concludes, inter alia, based on the Toelichting Meijers, that the system of absolute obligation to contribute is the prevailing law. In my view, Van Boom is right on this point, although it appears that the use of the relative obligation to contribute is not excluded as a legal option. This creates the possibility to use principles of reasonableness and fairness as a guideline to achieve a reasonable outcome in a specific situation by applying one of the systems.

The joint and several debtor that is held liable may have to start as many redress proceedings as there are joint liable co-debtors. This process could be very onerous. Given the fact that the performing debtor apparently was held liable by the creditor at random, it seems that he was unreasonably disadvantaged. As a remedy the German literature has suggested the application of cascade recourse, meaning that the debtor held liable, claims the total amount that was redeemed from his capital, with his share of the debt deducted. This form of recourse appears to be sympathetic, but it does not provide an equal distribution of the risk. The last internally held liable debtor is at less risk; he only has to pay his own share. The insolvency of one of the co-debtors may also lead to claim and evidence issues. In such a case, the internally held liable co-debtor should claim and prove that one of the co-debtors underwent bankruptcy to achieve an alternative distribution of the obligation to contribute. Full equality between the several debtors seems impossible. In my opinion, the system of cascade recourse is too complex, and the problem-solving capacity of the system is too insignificant to justify this complexity.

Chapter 3: View on the group, group finance and provision of security

In **Chapter 3**, the group, group finance and provision of security are discussed, insofar as they relate to this research. In the investigation, in particular, an analysis is rendered of the group law, the relationship between central management and administrative autonomy, the group finance, and the security provision in group (financing) structures.

The group: Definition and approach

Chapter 3 first addresses the legal description of the group. This description will take into account that a group can have many appearances and that it is the dominant company form in nearly all sectors of the economy. In this research, the group is defined as a unit that is focused on sustainable participation in economic activities and consists of legally independent companies, which are subject to central management. This definition is in line with the literature but does not correspond with the legal group concept of Art. 2:24b DCC. This article is focused on the economic entity and lacks the building blocks of central management and control that are essential for the group. These building blocks do exist in Art. 2:24a DCC and, in the literature, this article is referred to as an implicit legal group concept. However, the literature states that Art. 2:24a DCC lacks the element of policy coordination. The two articles are not in line with the concept of the group that stems from the legal doctrine and legal practice.

In the legal systems of France, Belgium and Germany, the group, obviously, also comprises an important economic reality. The French and Belgian legislatures do not provide for a group concept. In France, the concept was finalised by case law: Financial dependence must exist between the parent company and its subsidiaries, and there must be a group strategy. In Belgium, the jurisdiction did not provide a definition of the group concept. The Belgian legal system does not use the central management concept either. Therefore, Belgian law does not focus on the group itself, but on the relationships between companies, wherein the independence of the respective group companies is central to this approach. In the German legal order, the group is defined in § 18 of the German Stock Corporation Act (GSCA). In this definition of a group, the key element is central management. Compared to the conceptual framework used in France, Belgium, and the Netherlands, the German group concept corresponds most closely to the concept of the group that prevails in the legal doctrine and legal and economical practice.

About central management and administrative autonomy

The relationship between central management and administrative autonomy is a topic that recurs in several places in this research. The contrast between the group as an economic unit and, at the same time, as a legal multitude is a source of many group law disputes. In brief, the group interest can collide with the partial interests. The qualification of such collisions and the redressing thereof depends on the point of view on the group.

Two points of view can be distinguished: the conflict model and the harmony model. In the Dutch legal system, the group interest has a certain significance in the balancing of interests by the management of a subsidiary. The group interest is not unambiguously recognised in the Dutch legal system. It seems that in typical corporate law topics, the group interest plays a significant role. In patrimonial issues, the group interest is relatively less decisive.

In general, the group management can impose its policy on its subsidiaries. This occurs in a formal and an informal manner. As a shareholder in its subsidiary, the parent company has the ability to dismiss unwilling management and appoint more flexible management. Management agreements or administrative agreements can also be concluded with the management of the subsidiary. The performance of central management will often take place in an informal manner. The factual power of the parent company, combined with the ability to replace the management of a subsidiary, is typically sufficient to enforce the group policy.

Under French and Belgian law, the permitted influence of the parent company on the policy of its daughters is restricted using the Rozenblum doctrine. This doctrine aims for (I) a proportional relationship between the delivered performances of the group company and the group and (II) a guaranteed continuity of the group company in relation to the group interest.

To managers of both parent companies and subsidiaries, it might be unclear where exactly the permissible limits fall, and when they become liable as managers. In this context, the position of the manager of the subsidiary is not to be envied, as the manager can be trapped between the threat of dismissal and obeying instructions of the parent company that might be harmful to the subsidiary he represents. Therefore, more clarity is required regarding the scope of the (actual) administrative autonomy of the management of a (100%) subsidiary that is controlled as a division.

In this context, the Forum Europaeum has argued to distinguish between group companies, namely: on the one hand, Service companies and, on the other hand, Ordinary companies. Regarding Service companies, it is expected that they provide major weight to the group interest; any liability finds its way to the parent company, and their administrative autonomy is limited. A corresponding legal form is found in German law. The Service Company has characteristics similar to the legal form of the *Eingliederung.* In contrast to Service companies, Ordinary companies have a 'normal' level of administrative autonomy and their liability is by default limited to the Ordinary companies themselves.

In Dutch literature, proposals for a distinction between group companies have also been made. In this respect, the instrumental company should be distinguished from the autonomous company. The instrumental company is used for the benefit of the group and, in the first place, it serves the group interest. Of course, this goes hand in hand with the expansion of the liability of the parent company for the commitments of its

instrumental subsidiary. For the autonomous group company, the interest of its own company is central. The group interest is less decisive, compared to the significance of the group interest for an instrumental group company. Nor can the parent company treat the autonomous group company as a division. At the same time, the parent company cannot easily be held liable for the commitments of its autonomous subsidiary.

Group Finance

Group finance consists of (I) consolidated lending and (II) cash management. Consolidated lending is usually divided into (I) umbrella credit and (II) a single credit line (also called umbilical cord lending in this research). Cash management is divided into netting and cash pooling. Cash pooling has two main forms: (I) a notional (virtual) cash pool and (II) a physical cash pool, which is usually designated by the term 'balance concentration'.

Financing at the group level provides various benefits to the group. First of all, through economies of scale, the group obtains a better negotiating position vis-à-vis the bank. This better negotiating position usually leads to better conditions compared to when companies separately negotiate with the bank. The group can also make maximum use of all available financial resources. The risks associated with group finance are the creation of financial cross-connections. These financial cross-connections may cause an insolvent group company to drag other group companies into its bankruptcy.

Regulations for cash pooling are based on civil law, company and group law, banking and financial law, insolvency law and tax law. The research has shown that the legal implications of this potpourri of regulations are not always clear. In particular, in the field of cross-border cash pool systems, where different legal systems affect the same cash pool, legal uncertainty can occur. This uncertainty may hinder intra-group transactions. In my opinion, that is why it is important to facilitate cross-border cash pooling with regulations at the EU level.

Security provision

The security provision in group (financing) structures was addressed in this research because of the implications that it may have for the emergence of rights of recourse. Banks usually require the securities of the group companies to function as security for the group loan. Securities are important for a bank in two ways. On the one hand, they serve as a means for the bank to recover its money after the cancellation of the credit agreement. On the other hand, they ensure that the bank needs to hold as little capital as possible in relation to the credit provided. The interest to be paid on the group credit is related to these two aspects. As a result, for a group, it is important to adjust the structure of the securities accordingly. After all, adjustment leads to lower interest costs.

One of the collaterals that is regularly provided is surety. Various authors believe that the rights of recourse of the surety are not strong enough in the context of the Van Aart and ASR/Achmea judgment. These authors justify their argument by pointing to 'altruistic surety'. This surety provides security without self-interest and sometimes without compensation. This surety deserves better protection. In my opinion, the position mentioned above, cannot hold in a group structure because group companies that provide guarantees for group credit generally have an interest in the group obtaining credit.

In addition, within group finance, joint and several liability is used frequently. For a bank, a granted joint and several liability across the group serves as a useful tool to ensure a degree of control over the assets of the group companies. In this way, the bank is better able to guard itself against practices where assets are redirected to non-liable group companies. In addition, through the use of the granted group liability, the group can use all the credit potential from the group. In this respect, as a result of the use of joint and several liability, the costs of attracting borrowed capital are lower compared with when no joint and several liability is granted.

The upstream granting of joint and several liability by a group company for the benefit of the group credit may not be unlimited. Some authors have argued that granting joint and several liability can be regarded as unreasonable in the event that the group company does not benefit from the group credit in a manner that is proportional. Additionally, if a mismatch exists between the equity of the group company and the joint and several liability granted by it, where the latter by far exceeds the former, the joint and several liability provided may be unreasonable. When the continuity of a group company is threatened by the provision of the joint and several liability, it can also be considered unreasonable. In this context, attention can also be drawn to the Rozenblum criteria, as defined in the French and Belgian legal systems. However, it should be noted that discussion on the admissibility of the joint and several liability seems to play a larger role in the above-mentioned legal systems than in the Dutch legal system.

Chapter 4: The obligation to contribute in relation to group finance

In **Chapter 4**, one of the key topics of this research is discussed: problems regarding the obligation to contribute in relation to group finance. The central question of this topic is: Which part of the internal debt is related to a debtor compared to his co-debtors? This chapter deals with the development of the debate regarding this matter. It also proposes a method to determine the obligation to contribute within a group of companies.

The debate on the obligation to contribute and aspects of the obligation to contribute
The obligation to contribute debat evolved in the 1980s as a result of the collapse of the Ogem Group. In the beginning, the debate was focused on the apportionment of recourse in relation to the system of separate circuits. Since the 1990s, the obligation to contribute, and the way that the obligation to contribute of each of the several debtors must be determined, has been central in the debate. In this respect, the debate consists of a significant number of proposals for the use of one or the other criterion in order to achieve a reasonable calculation of the obligation to contribute that is also applicable in practice. In particular, two criteria were mentioned in the debate: the profit principle and the solidarity principle. Both principles compete for application. In this respect, none of the criteria has been approved by the vast majority of the authors.

One reason for this lack of consensus is that both criteria advocate a different legal approach to the group. In this research, two approaches can be distinguished: (I) the single approach and (II) the consolidated approach. The first approach considers the obligation to contribute from the perspective of a single company. The profit principle is often central to this approach. Most of the time, only a direct relationship between the group credit and the benefits from the group credit is considered sufficient to serve as a basis for the obligation to contribute. Specifically, this means that a group company belongs to the circle of parties with the obligation to contribute when it directly and demonstrably benefits from the group credit. Under this approach, the extent of the obligation to contribute of a joint and several liable group company is determined by the equivalent of its debt as a result of its use of the group credit.

The consolidated approach applies the group perspective to determine the obligation to contribute. The basic concept is that group relationships must be discounted in some way with the allocation of the obligation to contribute. This starting point is justified in different ways. In the 1980s and 1990s, authors emphasised the shared destiny of group companies. After the Rivier de Lek/Van de Wetering judgment, justification has often been sought regarding the direct or indirect availability of group credit to group companies. With reference to the subject above, the obligation to contribute equal shares is often adduced with an appeal to the solidarity or the shared destiny that would exist between group companies.

In the Janssen q.q./JVS judgment, the Supreme Court argued in ground 6.2 that, in the absence of agreements on the obligation to contribute, one must first look at who has used the loan or credit, or to whom the loan or credit has become available. Only when this profit principle does not lead to an acceptable division of the obligation to contribute may one rely upon the obligation to contribute equal shares. Here, the obligation to contribute equal shares functions as a residual rule in accordance with the implicit residual rule system of the Netherlands.

Some authors have praised ground 6.2 for its clarity. In my view, this praise is unjustified. In the first place, the Supreme Court provides no clarity about the definition that it uses for the concept of the profit principle. This definition is necessary because there is a lack of clarity about the nature and scope of the concept in the literature. For instance, direct profit can be distinguished from specific indirect profit and abstract indirect profit. In the absence of jurisprudential clarity, the issue of which type of profit the obligation to contribute pertains to in a group structure, has sparked a debate in the literature. Secondly, in practice, it is not clear how profit should be measured because it is not always feasible to untangle the knot of cash flows in a group of companies. Thirdly, the ground is unclear since the Supreme Court is not specific about his perspective of the group from which the ground must be read. Does it approach the issue of obligation to contribute in a single or consolidated manner? Fourthly, the ground only provides guidance to a limited extent because the Supreme Court added that with the obligation to contribute, all other relevant circumstances of the case are of interest. Finally, it is noteworthy that the Supreme Court deviates from the ranking with the obligation to contribute as it appears in the parliamentary history, the older case law, and literature.

In its ground 6.2, the Supreme Court refers to parliamentary history. However, this reference does not clarify the ground. The parliamentary history related to this case is not interpreted unambiguously in the literature. It is also important to realise that the relevant passages are not written with the characteristics and relevance of the contemporary group in mind. For instance, regarding the profit principle, the parliamentary history refers to the Verduin/Beck judgment. This judgment was delivered in 1946 and focuses on the marital community. Whether the principles used in this judgment do justice to the modern group and the current economic reality is debatable.

Who determines, pays

In Chapter 4, a method is proposed to determine the obligation to contribute in a group of companies. This formula for the obligation to contribute meets a number of design rules. This formula is flexible, can be applied in a general sense, and is accurate, manageable and in line with the practice. This method offers solutions regarding the allocation of the obligation to contribute and the apportionment. With the obligation to contribute, a sharp distinction should be made between the determination of the obligation to contribute and the determination of the extent of the obligation to contribute. This distinction is not always made clear in the literature. In order to lend flexibility to the formula for the obligation to contribute, a different criterion is used for the determination of the obligation to contribute than for the determination of the extent of the obligation to contribute. Legally or jurisprudentially, no objections exist to distinguishing various criteria in this manner.

In my opinion, in the absence of agreement on the obligation to contribute, the criteria should be derived from the mutual legal relationship of the debtors on the basis of which they have committed themselves jointly and severally liable. It is remarkable that the Supreme Court, in its Janssen q.q./JVS formula for the obligation to contribute (ground 6.2), appears not to emphasise the mutual legal relationship between jointly and severally liable debtors and any subsequently resulting recourse keys, despite the fact that in ground 5.2, the Supreme Court refers to the mutual legal relationship as a source for an alternative obligation to contribute apportionment. In any case, the Supreme Court does not make the present mutual legal relationship explicit. It is unclear whether and how the Supreme Court has used this legal relationship with regard to its obligation to contribute formula. This is rather remarkable, particularly because this mutual legal relationship was already used to develop the right of recourse in Roman law. In the later legal and legislative history, the case law and the literature often refers to the mutual legal relationship, such as in the Toelichting Meijers, which explicitly mentions the mutual legal relationship as a source to derive criteria for the determination of the obligation to contribute.

The mutual legal relationship between joint and several liable group companies is the group relationship. This relationship is to a large extent shaped by the relationship that the parent company maintains with its subsidiaries. The group (financing) structure is determined at the level of the parent company, usually in such a way that the same parent company can benefit the most from its subsidiaries. Especially in a close-knit group, it occurs more often than not that the directors of the parent company are also part of the management of one or more subsidiaries. It's clear that the central management that a parent company formally and informally exercises, can seep through into the capillaries of the group.

Often, subsidiaries are instrumental companies with a factually limited degree of autonomy. Therefore, it is logical to use the power of the parent company to shape the policy of the instrumental subsidiaries to determine the obligation to contribute. When the parent company is at a greater distance from its subsidiaries and these subsidiaries are autonomous, it must also have an impact on the determination of the obligation to contribute. The extent to which a company can formulate its policy (truly) independently is known as the power criterion. The principle of the power criterion is: who determines, pays.

The application of the power criterion works as follows. When the group management controls the subsidiaries as divisions, this can be a basis for the application of a central obligation to contribute. In this case, the jointly and severally liable parent company is the only one with an obligation to contribute. However, this argument can also be reversed. To the extent that the parent company and the subsidiaries are at a greater distance, and the subsidiaries actually make autonomous (financial) decisions, it is more reasonable to argue that the subsidiaries also belong to the circle

of parties that are obligated to contribute. In short, jointly and severally liable instrumental companies would have to be considered part of the circle of debtors with no obligation to contribute and jointly and severally liable autonomous companies would have to considered part of the circle of debtors with an obligation to contribute.

The apportionment of the extent of the obligation to contribute should, in principle, occur for equal shares within the circle of group companies belonging to the circle of parties with the obligation to contribute. This criterion is based on an interpretation of the mutual legal relationship between jointly and severally liable debtors and is not established by converting the residual rule into the basic rule. The implicit residual rule system in place in the Netherlands remains unchanged. It is emphasised that, under Dutch law, no legal systematic objections exist to this apportionment of the obligation to contribute. This apportionment is used in several sections of the law. In the German and Belgian legal systems, a division of equal shares to jointly and severally liable debtors is also accepted as a starting point for the allocation of the obligation to contribute.

The application of the obligation to contribute equal shares as the main rule reinforces the redress position of the recourse-seeking party. Its burden of proof is limited as a result of this rule; the extent of the obligation to contribute does not need to be demonstrated, as far as whether the amount is equal to or less than the equal share. This can serve as a great advantage, especially when the debtor entitled to recourse is in an unfavourable information position, which will frequently be the case when a group subsidiary seeks recourse against the parent company. After all, the subsidiary often has little or no insight into the financing of the group and the individual group members.

The criterion obligation to contribute equal shares offers significant legal certainty. The division is clear, without complex calculations, and in complex group relationships, it offers more clarity than the profit principle. The precise scope and application of this last criterion are not clear. This uncertainty gives co-debtors who are internally held liable the space to limit their benefit from the group credit with various factual defences. Such conceptual vagueness may potentially lead to a long and protracted legal battle. This point is also recognised as such by French and Belgian law, which, on that basis, have rejected the concept of respective importance as the normative concept in determining the obligation to contribute.

If parties cannot meet their obligation to contribute, apportionment will take place. The relevant rules in ex Art. 6:13 DCC should be fully applied. Situations concerning apportionment, or the obligation to contribute, whereby parties are unreasonably affected by the right recourse, must be addressed by fairness corrections.

Chapter 5: Measures that affect the right of recourse

Claims by virtue of recourse and subrogation may conflict with the execution policy of the bank. In addition, the cross-links resulting from recourse and subrogation can make the restructuring of a group more difficult. Parties may try to avoid or minimise this problem by making agreements. Third parties, such as the curator or a minority shareholder, sometimes have an interest in affecting the rights of recourse and subrogation. In **Chapter 5,** party agreements and measures are discussed that may reference the foregoing cases. The effectiveness of these agreements and measures are considered. Furthermore, the practice of creating a contractual remedy shadowing the legal right of recourse, with the aim of changing the legal right of recourse, is addressed.

Methods to influence recourse or subrogation claims

Parties intending to affect recourse or subrogation claims utilise several methods. These methods can be divided into methods which, on the one hand, directly and, on the other hand, indirectly affect the rights of recourse and subrogation. The first group has the purpose of affecting the credit/security agreement, in particular the joint and several liability statement. When the joint and several liability is affected, there are consequences for the subsequent recourse and subrogation claims. Direct methods, on the other hand, focus on the rights arising from recourse and subrogation.

The extent to which these kinds of party agreements result in the intended effect depends partially on the moment that parties reach agreement. Agreements made on the brink of bankruptcy may be voidable by an actio Pauliana. The risk of voidability by such an action can be reduced when the debtor and the creditor agree on a positive pledge clause. To offer more certainty regarding the resistance of such agreements, most recourse and subrogation influencing provisions will be agreed upon by the bank and the group companies involved in the credit agreement at the inception of the agreement. At this time, the group companies usually still have good prospects. After all, a bank will not easily grant credit to a group with major financial problems. Therefore, in this case, detriment of debtors is unlikely to exist.

To the management that restricts the redress options of the company it represents, the liability of the directors also might play a role. The management may proceed to limit the redress options to facilitate restructuring. If this results in a liability for the directors, it should be assessed on the basis of the circumstances of the case. For example, in the context of the probability of success of a restructuring to which the company has committed.

The moment of inception of the recourse claim and party arrangements

The effectiveness of party agreements is influenced by the moment of inception of the relevant recourse claim. Whether the claim is qualified as a future right or an existing right under suspensive conditions can have far-reaching consequences. As a result of

the *Nemo plus* principle, in future (recourse) claims, the lack of power of disposal is an obstacle for property law actions. Property law actions regarding future (recourse) claims can only be performed in advance. This may cause problems when the future recourse claim arises after the bankruptcy of the party that has the claim. The bankrupt party loses its power of disposal to the curator and it is up to the latter to determine whether the intended property law actions may be continued. Logically, the curator will not be very much in favour of proceeding with actions that limit the redress options of the estate.

After the ASR/Achmea judgment, in which the Supreme Court considered the legal recourse claim as a future claim, concerns were raised in the literature about the influence of the moment of inception of the recourse claim on different legal structures. In particular, regarding the impact of this judgment on the security surplus arrangements, questions were raised in (financial) practice. After the Supreme Court ruled in the Lage Landen c.s./L.B.A. van Logtestijn judgment, the uncertainty evident in the literature and (financial) practice decreased. In this judgment, the Supreme Court considered the security surplus arrangements' resistance to bankruptcy. The Supreme Court determined that it was not *contra legem* if parties generate a contractual recourse claim under suspensive conditions. In order to achieve that result, the future recourse claim must arise from a pre-existing legal relationship with the defaulting debtor at the moment of bankruptcy declaration. With respect to the security surplus arrangements, it is necessary for the debtor to be a party to the arrangement. In this way, the recourse is provided under a contractual basis.

It appears from the foregoing that parties may not render an opinion on the moment of inception of the legal recourse claim, but on the basis of the freedom of the contract and the parties' autonomy, they may determine the moment of inception of the contractual recourse claim. In principle, the contractual recourse claim prevails above the legal recourse claim. The ruling of the Supreme Court in the Lage Landen c.s./L.B.A. van Logtestijn judgment focused on the right of recourse with surety within the framework of security surplus arrangements. In my view, this is no obstacle to the application of the guidance of the Supreme Court for recourse outside of this context, such as regarding the right of recourse resulting from the joint and several liability granted as security for group credit.

Because changing the moment of inception of a resource claim made by parties affects the legal position of third parties, in my opinion, a recourse claim may not be changed endlessly. The property law consequences of another moment of inception can really be felt by the estate creditors in a bankruptcy. Therefore, it seems advisable to me to allow such party agreements until the limit is reached where third parties suffer an unreasonable degree of disadvantage in their rights. This limit may be reached when, at the prospect of bankruptcy, the parties make agreements about the nature and operation of the future recourse rights in force between them. Having said that, and with the lower limit of reasonableness and fairness in mind, (extensive) contractual recourse constructions are acceptable in my opinion.

The moment of inception of the recourse claim also affects the methods that aim to influence legal recourse and subrogation. This includes the subordination, the renunciation and the pledging of a recourse claim. These methods are widely used in the credit terms and conditions of the major Dutch banks. In the literature, some authors have expressed their concerns about the sustainability of these party agreements with respect to the legal recourse claim. In my opinion, only the pledging of a future recourse claim is not possible.

The subordination of a recourse claim is, in my opinion, a contractual matter between parties. The bankruptcy of one of the parties will not change anything in this agreement. Therefore, the curator must respect the subordination. The subordinated recourse claim will thus not obtain the same ranking as a competing claim in redress.

At the renunciation of a recourse claim, parties do not aim to transfer the claim. Thus, for the waiver of a recourse claim, no acts of disposal are necessary based on the meaning of Art. 3:84 DCC. Again, from my point of view, the renunciation of a recourse claim is a contractual feature. As a result of the party appointment to renounce, the recourse claim will never arise. The recourse claim will therefore not enter into the assets of one of the parties.

The establishment of a pledge *for* a future recourse claim is problem-free. Even when the recourse claim arises after the date of bankruptcy, the pledgee should be able to receive redress on the estate. In my opinion, the fixation principle should not be applied so strictly that a right of pledge to secure a future claim, arising from a legal relationship existing at the time of bankruptcy declaration, cannot be executed.

This differs with the establishment of a right to pledge *on* a future recourse claim. In this case, at the occurrence of the claim after bankruptcy, the debtor's lack of disposal power will hinder the establishment of the right of pledge. This operation is, as a result of the fixation principle, reserved for the curator. That is why the subordination of such a claim is advisable from the perspective of the bank.

Regarding the pledging of future subrogation claims, the parties could seek refuge in party agreements to secure the desired operation of the pledge. In the literature, it has been proposed that, where appropriate, parties make use of a reserved right of pledge. This construction means that a claim arising from subrogation is only obtained subject to a pledge of that claim to the benefit of the original creditor. Since the alienation of the subrogation claim is a transition from a right, it will not lead to any objections on the grounds of lack of power of disposal. The subrogated third party obtains a claim pledged with a limited right for the benefit of the bank.

Chapter 6: Recourse and the group of companies in German law

Chapter 6 is written bearing in mind the question of why recourse problems in group finance do not play a role in the German legal order. To answer this question, the historical development regarding the German legal perspective on the group is set forth. In this chapter, parts of the current German group and company law are also discussed. In addition, the granting of securities in the German financing practice is covered.

In the German territories, the concentration of companies has been increasing since the second half of the 19th century. In German law, this concentration of companies is embedded in such a way that it should lead to a reasonable balance between business' economic and organisational interests, and the protection of the interests of interested parties, such as minority shareholders and creditors. In order to enable the group interest and the partial interests to exist in a reasonable balance with one another, the German legislature made an effort to avoid the *Überschuldung* of companies. As will be shown below, the commitment to avoid *Überschuldung* constitutes one of the reasons why recourse is not yet an issue in group financing in the German legal system.

The development of German group law is described in Chapter 6 during the course of five periods: the preliminary phase, the *Belle Époque*, the *Goldene Zwanziger Jahre*, the 1930s and the post-war period. This classification is based on economic concentration movements. Initially, group law was, in particular, a matter of the GSCA and the GSCA group. Over time, the GmbH (private limited company), which is more flexible and cheaper than the AG (public limited company), took an increasingly prominent position in the group. Nowadays, the GmbH is the most common legal form in German group structures.

German group law is part of the *Recht der verbundenen Unternehmen*. The German legislature approaches the concentration of companies based on the idea that their intertwining, and the nature thereof, differs to a great extent. The group relationship is one of the possible intra-company relationships that German law distinguishes as a possible form of concentration. In this respect, the GSCA group legislation is laid down in the GSCA. The GmbH group law is not codified and is a composition of analogically applied GSCA group law, jurisprudential standards and company and civil law regulations.

In Chapter 6, four explanations are given to provide insight into the absence of recourse problems in group finance in German law: (I) the limited use of personal securities at the upstream granting of securities, (II) the existing standard in the German financing practice to limit execution options contractually, (III) the use of zero balancing in German group financing systems and (IV) the custom to attribute the losses of subsidiaries to the parent company, based on group law and company law instead of general civil law.

The use of personal securities with the upstream security provision is limited in the German financial practice. The provision of collateral securities is much more typical. The German financial practice turns to the use of joint and several liability less frequently as a security for group credit. As far as this is the case, the granting of joint and several security occurs in the downstream security provision. How can this relatively limited use of joint and several liability be explained? One possible explanation is that the execution of the collaterals granted is often limited in order not to breach the rules for capital maintenance (§ 30 GmbHG) and the rules for the prevention of insolvency (§ 64 GmbHG). Violating the system of standards of the abovementioned legal provisions may result in liability for the directors.

Limiting the extent of possible execution takes place by choosing certain collaterals and contractual guarantees. Parties usually opt for collaterals. When choosing personal security, a maximised surety, a *Höchstbetragsbürgschaft*, is often used. Also, in the case of the provision of joint and several liability, the execution is contractually limited to avoid *Überschuldung*. These contractual guarantees are carried out in the form of *Limitation Language*. In the collateral agreement, it is agreed that the realisation of the granted securities is limited up to the amount (I) where the *Stammkapital* is (further) affected or (II) that leads to the insolvency of the company.

In case of a violation of the rules for capital maintenance, the director of the GmbH may, deny his cooperation for the execution of the securities. For this purpose, he may appeal to a *Leistungsverweigerungsrecht* that can be based on § 64 (third sentence) GmbHG, *Limitation Language* or the *Existenzvernichtungshaftung*.

The relatively limited use of joint and several liability logically leads to a lower risk of recourse problems arising from joint and several liability. The restrictions on the enforcement also reduce the risk that a company pays more than its share of the debt and that recourse claims arise.

A third explanation for the absence of recourse claims in German financial practice is of a practical nature. German group structures typically make use of zero balancing as the group finance system. As a result, group companies only have liquidity to a limited extent. Furthermore, usually the assets of the group companies have also been pledged or mortgaged. Therefore, these group companies are unattractive to seek redress from.

A fourth explanation for the absence of recourse issues is the primacy of the group law legislation above the general civil law legislation. Group law and company law legislation will attempt to address discrepancies between the external and the internal liability. Often, this results in the allocation of the losses incurred by the subsidiary to the dominant company.

When group law and company law regulations do not lead to a satisfactory solution, general civil law can provide a solution in the form of § 426 GCC. It should be noted that in German case law no cases are known in which, with respect to joint and several liability for group credit, this recourse provision is used. If § 426 GCC is applied, the extent of the obligation to contribute is, in principle, divided into equal shares. From the case law regarding § 426 GCC, it usually appears that the obligation to contribute equal shares is adjusted for a division into unequal shares in accordance with the *Natur der Sache*.

Chapter 7: Evaluation and conclusions

In **Chapter 7**, the most important findings of this research are outlined and the two main questions are answered. First, I address key question (I), namely: How can more legal certainty be provided regarding the recourse issues that arise from the joint and several liability granted by group companies favouring group credit? Subsequently,

key question (II) is assessed: Why don't recourse issues in group finance exist under German and Belgian law, but do exist in the Dutch legal order? Key question (I) is divided into two topics: (I) the obligation to contribute issue and (II) the uncertainty regarding the effectiveness of recourse influencing party agreements.

With respect to key question (I), this research explains that legal uncertainty exists for recourse in group structures as a result of a legally ambiguous attitude toward the group as a phenomenon. Under Dutch law, the legal approach of the group is not unambiguous; the legal perspective on the group of companies is alternately single or consolidated. This is, inter alia, a result of the case law of the Supreme Court. The Supreme Court may address this uncertainty by setting a clear legal framework from which it approaches the group. In my opinion, it would be advisable to opt for a consolidated approach to recourse issues. This approach would be in line with the practice and economic reality of inextricably linked group companies and group transactions that cannot be considered in isolation. To this end, in Chapter 4, a proposal is made with regard to the obligation to contribute, in which the influence that the parent company exerts on the policy of its subsidiary is the central element as a criterion in the allocation of the obligation to contribute. The core of this proposal can be summarised as follows: who determines, pays.

Regarding key question (II), it appears that the ambiguous approach of the group also constitutes a reason why recourse issues occur in Dutch law. In foreign law, there is usually more clarity about the legal approach of the group. In Germany, the group is often approached from a consolidated perspective and in Belgium, this perspective is principally single. The second difference between the Netherlands on one hand and Germany and Belgium on the other hand, is that joint and several liability is frequently used as security for group credit in the Netherlands. In Germany, the use of joint and several liability as upstream security to secure group credit is not the standing practice. The reasons for this difference are set out in Chapter 6 and stem from corporate law regulations to prevent *Überschuldung*. In the event that recourse claims arise in Germany or Belgium, the obligation to contribute is determined on the basis of clear standards. Both in Germany and in Belgium, the starting point is *de jure* or *de facto* the obligation to contribute equal shares. Of course, when necessary, this starting point may be derogated from.

Recourse issues in relation to group finance manifest themselves in the Dutch legal system as the symptom of an underlying phenomenon. This phenomenon represents an ambiguous legal approach to the group that can be explained historically. The old legislature did not take the modern group into account in a consolidated manner. Therefore, the law and partially also the case law do not approach the group in a consolidated way, but focus on the separate legal entities from which the group is comprised. At the same time, it is clear that the group, in practice, is considered a collective. The legislation should embrace this view, meaning that the legal

personality of the legal entities participating in the group should be put into perspective. This is a difficult topic because it affects one of the pillars of Dutch company law. Nevertheless, in my opinion, it is desirable to approach group issues in general, and recourse issues in relation to group finance in particular, in a consolidated manner.