Intra-group financing and enterprise group insolvency: problems, principles and solutions

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8 Facing Uncertainty: Intra-group Financing and Transaction Avoidance■

8.1 Introduction

In many jurisdictions, transactions between or involving group entities may face increased scrutiny, as do other related-party transactions[1] – especially if such transactions are concluded in the vicinity of insolvency. This is a common approach across many national legal systems.[2] It can be attributed to the information asymmetry that often exists between internal (related) and external (non-related) creditors (see section 7.3.). The former usually have a better awareness of the debtor's financial situation. In the group context, this awareness concerns the financial soundness of group entities and the entire group. Additionally, due to their control advantage and risk-shifting incentives in the vicinity of insolvency, shareholders can be incentivised and have the power to engage in value-destroying behaviour, be it in the form of overinvestment or value extraction.[3] The value extraction might be arranged through various means, from a transfer at an undervalue, assumption of liability, to a preferential payment of intercompany debt, e.g. via

■ This chapter builds upon the following previously published work by the author:
- I. Kokorin, S. Madaus and I. Mevorach, Global Competition in Cross-Border Restructuring and Recognition of Centralized Group Solutions, Texas International Law Journal, Vol. 56(2), 2021, pp. 109-154.
- I. Kokorin, The Future of Harmonisation of Directors' Duties in the EU: Restructuring Directive and Group Insolvencies, International Insolvency Review, Vol. 30, 2021, pp. 361-382.
- I. Kokorin, Intra-Group Financial Support in a Crisis: Between Rescue and Abuse, Norton Journal of Bankruptcy Law and Practice, Vol. 29, 2020, pp. 378-420.

1 UNCITRAL Legislative Guide, Part two, Ch. II, para. 182.

2 Control over related-party transactions is not limited to the area of insolvency law. For example, it surfaces in the rules imposing prohibitions and introducing procedural safeguards, mandatory disclosures, requirements for external independent advice, and ex post standard-based judicial review. L. Enriques, Related Party Transactions, in J.N. Gordon, W-G. Ringe (eds), The Oxford Handbook of Corporate Law and Governance, OUP, 2018, pp. 506-531.

3 R.J. Mokal, Corporate Insolvency Law: Theory and Application, OUP, 2005, p. 307, explaining that "in the twilight period while the company is distressed but not yet subject to formal insolvency proceedings, its assets are under the control of decision-makers who do not have the correct incentives to use them so as to benefit the company's new residual owners [creditors]."

setting-off an intercompany claim. There are other examples of transactions that could be detrimental to external creditors of separate group entities.[4]

The danger of group opportunism is only a part of the picture. Related-party transactions are not *per se* problematic in the sense that they do not always or often harm the collective interest of creditors. Intra-group loans may facilitate efficient allocation of liquidity within the group and mitigate the problem of underinvestment (lack of incentives to finance value-creating projects). Cross-guarantees are used to secure beneficial conditions (e.g. lower interest rates and larger amounts) from outside lenders and help address the debt overhang problem (a situation where the firm's high debt levels act as a disincentive to new investment). Both intra-group loans and cross-guarantees promote financing – whether from inside or outside the group. The previous chapter noted that subordination disincentivises intra-group lending. This chapter focuses on transaction avoidance.

Transaction avoidance can have an economic effect similar to that of subordination as both of them increase credit risk for a counterparty.[5] This follows from the fact that subordination and transaction avoidance rules limit "the ability of debtors to engage in the transactions in the first instance."[6] The word "ability" is not used here in the factual sense (parties may still proceed with a transaction at their own risk), but rather in the economic sense. Transaction avoidance creates a chilling or deterrent effect. A financier is likely to be reluctant to finance restructuring efforts if he has to face transaction avoidance, should the restructuring attempt fail. Think of an intra-group guarantee. Will an external creditor, like a bank, be willing to grant a loan to a distressed group entity, knowing that the guarantee offered by another group entity is likely to be avoided if the guarantor itself ends up in insolvency? On this, Mevorach argues that routine attacks on intra-group guarantees in insolvency "may deter lenders from providing funding in circumstances where the only security can be given by an affiliate know-

4 One such example is conduit pipe financing. See R. de Weijs, M. Baltjes, Opening the Door for the Opportunistic Use of Interim Financing: A Critical Assessment of the EU Draft Directive on Preventive Restructuring Frameworks, International Insolvency Review, Vol. 27, 2018, p. 227, describing a situation where the granting of finance is not intended for the benefit of the recipient company but is instead used to pay off the debts for which the shareholder gave a guarantee. Also H. Bennett, Late Floating Charges, in J. Armour, H. Bennett (eds), Vulnerable Transactions in Corporate Insolvency, Hart Publishing, 2003, p. 201.

5 A. Muscat, The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries, Dartmouth Publishing Company, 1996, p. 238, viewing equitable subordination as a functional substitute to fraudulent conveyance law.

6 D.G. Baird and T.H. Jackson, Fraudulent Conveyance Law and Its Proper Domain, Vanderbilt Law Review, Vol. 38, 1985, p. 834, pointing out that "in considering a legal rule such as fraudulent conveyance law, overbroad rules may be more pernicious than underbroad rules."

ing that the guarantee is likely to be attacked in the case of the guarantor liquidation."[7]

Yet cross-guarantees present substantial problems for transaction avoidance law, precisely because they are often driven by group interest and might not entail clear and direct benefits to group guarantors. This chapter examines the application of transaction avoidance rules and logic to intercompany guarantees as an example of a widely used group financing transaction. Section 8.2. examines national transaction avoidance law and concludes that legal uncertainty is inherent in the review of intercompany guarantees. This uncertainty relates to the acceptance of group economic reality or "group considerations" in transaction avoidance. Section 8.3. explores the difficulties of ex post review of intra-group transactions. Section 8.4. concludes.

8.2 "Group Considerations" in Insolvency Transaction Avoidance

8.2.1 Transaction avoidance and group specificity

The issue of validity and enforceability of cross-guarantees is of crucial importance. It makes a huge difference in terms of the size of creditor recovery and the overall dynamics of group insolvency. Historically, the review of transactions has fallen under the domain of transaction avoidance law. Roman law knew a remedial action for the rescission of conveyance in fraud of creditors, commonly known as *actio Pauliana*.[8] This action was available both in and outside insolvency.[9]

Transaction avoidance rules contribute to the achievement of various principles of insolvency law. Most notably, they seek to protect creditors from the diminution of assets available to them in insolvency, thereby promoting the preservation and maximisation of the insolvency estate value and ensuring equal treatment of creditors.[10] UNCITRAL identifies three types of transac-

7 I. Mevorach, Insolvency within Multinational Enterprise Groups, OUP, 2009, p. 293. Also I. Mevorach, Transaction Avoidance in Bankruptcy of Corporate Groups, ECFR, Vol. 8, 2011, p. 249, observing that "in a group scenario it may well be that intra-group guarantees […] are the only way to secure any credit for the distressed affiliate and gain breathing-space for the group as a whole."

8 R. Obenchain, The Roman Law of Bankruptcy, The Notre Dame Lawyer, Vol. 3, 1928, p. 200.

9 I. Pretelli, Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws, Yearbook of Private International Law, Vol. 13, 2011, p. 595, noting that the remedy was available to both *curator bonorum* and the creditors individually.

10 K. van Zwieten, Goode on Principles of Corporate Insolvency Law, 5th student edn, Sweet & Maxwell, 2019, para. 13-03, explaining that "avoidance provisions may thus be seen as necessary both to preserve the company's net assets and to ensure equality of distribution, at least among classes of creditors."

tions that are subject to avoidance, found in most legal systems: (i) transactions intended to defeat, hinder or delay creditors from collecting their claims; (ii) transactions at an undervalue; (iii) preferential transactions.[11] The existence of different grounds for invalidating transactions (transaction avoidance risk) can influence parties' willingness to engage in a transaction in the first place. For example, a financier may decide not to grant a loan if there is a high risk that a group guarantee that should secure the loan might be successfully challenged in the future. This becomes problematic if the "averted" loan transaction was, in fact, a value-creating one.

In this chapter, we do not aim to offer a detailed account of transaction avoidance law in specific jurisdictions.[12] Given the constraints of space and the main focus of this book, our attention is on group specificity. The central question revolves around the recognition and treatment of the group reality within the context of transaction avoidance law. Why does it matter? UNCITRAL observes that:

> Some transactions that might appear to be preferential or undervalued as between the immediate parties might be considered differently when viewed in the broader context of an enterprise group, where the benefits and detriments of transactions might be more widely assigned.[13]

In other words, the benefits and detriments of an intra-group transaction can be affected by the sheer economic position of the debtor within the group. Let's consider an example of a subsidiary that extends a guarantee benefitting a parent company. The guarantee may be a precondition for an external lender to provide financing to the parent company, or it may allow the parent company to negotiate better credit terms. While the subsidiary may not directly benefit from this transaction, it could still benefit indirectly by preserving the borrower's solvency, preventing the triggering of cross-defaults, ensuring a steady supply of goods and services from the borrower, or for other group-related reasons.[14]

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11 UNCITRAL Legislative Guide, Part two, Ch. II, para. 170.

12 For an overview of national approaches to transaction avoidance in insolvency law, see R. Bork and M. Veder, Harmonisation of Transactions Avoidance Laws, 1st edn, Intersentia, 2022.

13 UNCITRAL Legislative Guide, Part three, Ch. II, para. 75.

14 See an example of this reasoning in the Decision of the Russian Supreme Court No. 310-ЭС20-18954 from 25 March 2021 (*Spar Lipetsk*), holding with respect to liability of a director of a subsidiary, which provided a guarantee: "By itself, the issuance of such guarantees in favour of a credit institution insisting on additional security does not reveal the signs of unreasonableness or dishonesty in the behaviour of the guarantor's management […], even in a situation where the guarantor, acting in group interest and not with the purpose to injure creditors, assumes joint and several obligations to the bank in an amount exceeding its financial capabilities, believing that in the future the result of the group's activities will allow it to pay off the obligations of its members to creditors." (translation of the author).

Group-mindful application of transaction avoidance rules becomes particularly important in the context of insolvency and pre-insolvency rescue financing. In this respect, the World Bank opines that insolvency systems should "permit an enterprise group member subject to insolvency proceedings to provide or facilitate post-commencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency proceedings."[15] Similarly, UNCITRAL argues that insolvency law should permit an enterprise group member subject to insolvency proceedings to advance post-commencement finance to other group entities subject to insolvency proceedings, or grant security interest or guarantee in their favour.[16]

The reasoning is that in specific circumstances, however limited they may be, intra-group support provided by one insolvent group member to another insolvent group member may serve the interests of both of them, e.g. by ensuring continued operation or survival of the providing entity's business or preserving and enhancing its estate value.[17] UNCITRAL asserts, more generally, that the assessment of short and long-term implications for group members should permit, even if only in the short term, some detriment to the interests of an individual group entity and its creditors (short-term harm v. long-term gain).[18] Nevertheless, this does not mean that group interest can serve as a cover-up or justification for intra-group transactions that injure the creditors of an individual group entity, where a short-term detriment is *not* offset by long-term gain.

The next sections will examine the position of English, US and Dutch law on transaction avoidance in group insolvencies. It is impossible to analyse all types of transactions. This is why we will focus on a cross-guarantee, as a transaction common in group financing (Chapter 6). This type of transaction is challenging to evaluate from the perspective of an individual group company that incurs a contingent obligation to pay to a guaranteed creditor. In fact, it may appear as a pure gift with no consideration being paid to the guarantor.

15 The World Bank, Principles for Effective Insolvency and Creditor/debtor Regimes, 2021, C16.2.
16 UNCITRAL Legislative Guide, Part three, Recommendations 211-213.
17 Ibid., Ch. II, para. 66. See also para. 71, adding that the particular interest of the providing entity may relate to the outcome for the entire group, especially if there is a high degree of integration and reliance between businesses of the group entities.
18 UNCITRAL Legislative Guide, Part four, Section two, para. 4.

8.2.2 The UK: measuring the value for the creditor and guarantor

Section 238 of the Insolvency Act 1986 provides that if a company has entered into a transaction at an undervalue at a relevant time (i.e. within two years ending with the onset of insolvency),[19] an IP may apply to the court for relief, restoring the position to what it would have been if the company had not entered into that transaction. Importantly, the law adds that the debtor must be unable to pay its debts at the relevant time or should become unable to do so in consequence of the transaction – only then the time becomes "relevant".[20] The inability to pay debts is presumed, unless the contrary is demonstrated, if the transaction is entered into by a person who is connected to the debtor company.[21]

The Insolvency Act 1986 specifies that a transaction at an undervalue could be a gift (i.e. transfer of an asset for no consideration) or a contract for no consideration (e.g. a voluntary release of a debt), or a disposition for consideration worth significantly less than the value of the return consideration.[22] It is recognised that a guarantee transaction is not a gift or a no-consideration contract, even if the recipient of funds from the creditor – the borrower-principal debtor – is a different entity and the objective value of the advance to the guarantor is nil.[23] In fact, the consideration is the advance made to the borrower because this is "the act exacted by the surety as the price of his guarantee."[24] The fact that the advance is made to the principal debtor and not to the guarantor does not in itself render the guarantee a transaction at an undervalue.[25]

Besides, not every undervalued transaction can be avoided. Section 238(5) of the Insolvency Act 1986 provides a defence on the basis that there may be a legitimate reason for a party, such as a guarantor, to enter into a transaction at an undervalue. This defence applies if the transaction is entered into:

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19 Insolvency Act 1986, section 240(1).

20 Insolvency Act 1986, section 240(2).

21 Ibid. For a definition of a "connected party", see section 249 of the Insolvency Act 1986, mentioning among such parties "an associate of the company". In most cases, group members will be associates of each other and therefore constitute connected parties. See section 435 of the Insolvency Act 1986. An outside lender will typically not be a connected party.

22 Insolvency Act 1986, section 238(4).

23 K. van Zwieten, Goode on Principles of Corporate Insolvency Law, 5th edn, Sweet & Maxwell, 2018, paras. 13-23 and 13-32; D. Spahos, Lenders, Borrowing Groups of Companies and Corporate Guarantees: An Insolvency Perspective, Journal of Corporate Law Studies, Vol. 1, 2001, p. 336.

24 K. van Zwieten, Goode on Principles of Corporate Insolvency Law, 5th student edn, Sweet & Maxwell, 2019, para. 13-32. See also J.G. Doyle, Insolvency Litigation, Sweet & Maxwell, 1999, p. 205.

25 Ibid. (Van Zwieten), para. 13-32.

(i) in good faith and for the purpose of carrying out the party's own business; and in the circumstances, where (ii) at the time there were reasonable grounds to believe that the transaction in question would benefit the party. The assessment of whether there were such reasonable grounds is done objectively. Yet, for the defence to be available, it is not necessary for the transaction to have been beneficial in practice. Both elements (good faith and propriety of purpose and reasonableness) must be established at the same time.[26] If any of the elements is not present, the transaction remains vulnerable.

The first question to answer is whether a cross-guarantee qualifies as a transaction at an undervalue. The "value" refers to the amount that a reasonably well-informed purchaser is willing, in arms' length negotiations, to pay for an asset.[27] Where there is a market for an asset, its value can be determined by comparing the price of a substitute asset in the market.[28] However, when the asset is unique, such a comparison may not be possible. Because there is generally no market for corporate guarantees, determining the guarantee's market value and equality of exchange is difficult.

According to Goode, the crucial question is "whether the benefit conferred on the creditor by the issue of the guarantee is significantly greater than the value to the surety of the advance to the principal debtor."[29] Therefore, the balancing exercise involves measuring the value of the guarantee to the creditor, on the one hand, and the value of the guaranteed financing for the guarantor, on the other hand.[30] Should there be a *significant* difference

26 *Wallach v. Secretary of State for Trade and Industry* [2006] EWHC 989 (Ch). The burden of proof in establishing the defence rests on the party seeking to defend the transaction against its avoidance under section 238.

27 *Phillips (Liquidator of AJ Bekhor & Co) v. Brewin Dolphin Bell Lawrie Ltd* [2001] 1 W.L.R. 143, at 30.

28 *Re Brabon, Treharne v. Brabon* [2001] B.C.L.C. 11, at 38; *Spencer v. The Commonwealth* (1907) 5 CLR 418, at 431.

29 R. Goode, Principles of Corporate Insolvency Law, 4th edn, Sweet & Maxwell, 2011, para. 13-34. Also R. Goode, L. Gullifer, Goode and Gullifer on Legal Problems of Credit and Security, 6th edn, Sweet & Maxwell, 2017, para. 8-37, pointing out that "in deciding whether a guarantee gives rise to a transaction at an undervalue the act which constitutes the transaction is the giving of the guarantee, not the creditor's subsequent call under the guarantee."

30 This line of thinking was adopted in *Tailby v. HSBC Bank Plc* [2015] B.P.I.R. 143 (case on s. 339), pointing out that the value of the guarantee was originally minimal, while at the same time there was a real commercial benefit to the guarantor on several levels. See *Levy McCallum Ltd v. Allen* [2007] N.I Ch. 3, where the principal borrower and the guarantor belonged to the same group of companies and the guarantor extended the guarantee trying to improve its chances of receiving payment from the principal debtor.

between these two values, the transaction avoidance rules are triggered.[31] This approach is unusual because the "value" of a transaction is commonly assessed from the viewpoint of the debtor company (in our case, a group guarantor), and not from that of the third party (in our case, an outside lender). For instance, in *MC Bacon*, Millett J. observed that the assessment of the transaction requires "a comparison to be made between the value obtained by the company for the transaction and the value of consideration provided by the company. Both values must be […] considered from the company's point of view."[32]

However, the case of a guarantee transaction is somewhat special. Given that a guarantee creates contingent liability that may never crystallise, its value to the creditor and guarantor are often linked or (negatively) correlated. The more value it brings to the creditor (i.e. the more protection it grants to the creditor), arguably the less value and the higher risk or exposure it entails for the guarantor. In this respect, Goode suggests the following factors relevant for the assessment of the guarantee's value:

- Principal debtor's financial strength. If the principal debtor's financial position is strong and is likely to remain strong, and the guarantee is unlikely to be called upon, it may be argued that such a guarantee is of relatively small value to the creditor.[33] This is because the creditor can receive the full satisfaction from the principal debtor. The principal debtor's financial strength also correlates with the level of the guarantor's risk. The stronger the principal debtor, the smaller the guarantor's risk.

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31 D. Spahos, Lenders, Borrowing Groups of Companies and Corporate Guarantees: An Insolvency Perspective, Journal of Corporate Law Studies, Vol. 1, 2001, p. 338, highlighting that "only where the value of the impeached guarantee significantly exceeds the value of the economic benefit flowing to the surety will section 238 come into play." See, however, R. Bork, Transactions at an Undervalue – A Comparison of English and German Law, Journal of Corporate Law Studies, Vol. 14, 2014, p. 473, arguing that "[e]ven if indirect advantages, like the support of a parent company's interest in the financing of its subsidiary, are taken into account, these advantages will normally be of significantly less value than the security […]."

32 *Re MC Bacon Ltd (No. 1)* [1990] BCC 78, at 92.

33 K. van Zwieten, Goode on Principles of Corporate Insolvency Law, 5th student edn, Sweet & Maxwell, 2019, para. 13-33. Where the principal debtor is "on the rocks" and the guarantee merely staves off disaster, the guarantee will most certainly constitute a transaction at an undervalue (see para. 13-34). However, it is noted that in practice "it is unlikely that a guarantee will be impeached as a transaction at an undervalue except where it is clearly of no benefit to the surety company." For a similar position, see G.D. Vinter, Project Finance: A Legal Guide, 3rd edn, Sweet & Maxwell, 2006, p. 375. Also, R. Goode and L. Gullifer, Goode and Gullifer on Legal Problems of Credit and Security, 6th edn, Sweet & Maxwell, 2017, para. 8-37, concluding that "in the ordinary way a guarantee is unlikely to be held a transaction at an undervalue unless there is both a serious risk of default and no benefit to the surety […]."

- Existence of security (e.g. mortgage, charge) furnished by the principal debtor. When the principal debtor provides *in rem* security to the creditor, it not only improves the creditor's position but also positively affects the guarantor. If the guarantor ends up paying, it will have the right to be subrogated to the security held by the creditor, reducing the guarantor's risk.
- Presence of other guarantors guaranteeing the same obligation. If the guarantor pays in discharge of common liability, he generally acquires the right to seek contribution from the co-guarantors, who are likely to be members of the same group of companies. Again, this may reduce the risks for the paying guarantor.[34]

The second question is whether, even if there is an undervalue, the defence of section 238(5) of the Insolvency Act 1986 is available. Parry and Shivji consider this question in the context of intra-group support and conclude that there is nothing to prevent the defence from being applicable where one group entity makes a payment for the benefit of another group entity. Yet ultimately, what counts is the benefit received by the former and not the benefit enjoyed by the group as a whole.[35] Nevertheless, such benefit may arise from the fact that the receiving entity "needs funds in order to complete a particular contract so as to avoid liquidation and to avoid taking the entire group with it."[36] The common economic goal and survival of the entire group could be taken into account when evaluating the benefits of the transaction from the providing entity's perspective. However, if this entity itself is on the verge of insolvency or already insolvent, determining the benefit becomes challenging. It is difficult to assert that the payment was made to carry out *its own business* in such circumstances.[37] Similarly, if the group entity receiving intra-group support is irredeemably insolvent, particularly due to its business core being non-viable, the defence is more likely to fail.

34 K. van Zwieten, Goode on Principles of Corporate Insolvency Law, 5th edn, Sweet & Maxwell, 2018, paras. 13-33 and 13-34.

35 E. Ferran and L.C. Ho, Principles of Corporate Finance Law, 2nd edn, OUP, 2014, p. 35, noting that "since the interests of a failing company are identified with those of its own creditors rather than those of its shareholders or of the collective interests of the group's creditors, actions taken in the interests of the group will be particularly vulnerable under these sections [s. 238 and s. 239 Insolvency Act 1986]." *Re Genosyis Technology* [2006] EWHC 989 (Ch), at 25, drawing the line between the interests of the English group entity and those of other group entities with application to directors' duties.

36 R. Parry, S. Shivji, Transactions at an Undervalue (Insolvency Act 1986, Sections 238 and 339), in R. Parry et al. (eds), Transaction Avoidance in Insolvencies, 3rd edn, OUP, 2018, para. 4.166; A. Muscat, The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries, Dartmouth Publishing Company, 1996, p. 232, noting that "many such guarantees should be saved from the clutches of section 238 on the basis of the defence [of section 238(5)]."

37 Ibid. (Parry and Shivji), para. 4.167.

The defence of section 238(5) can also apply to intercompany guarantees. For this to work, it must be demonstrated that the guarantor acted in good faith and had reasonable grounds to believe that the guarantee was for the guarantor's own benefit. The benefit received by the guarantor is, therefore, one of the key elements. In the group context, it may be the case that the guarantor receives an indirect benefit if its interests are aligned with or dependent on those of the principal debtor, and the guarantee was issues as part of a group restructuring – group-related benefit.[38]

The analysis of the benefits can be carried out for different types of guarantees: downstream, cross-stream, and upstream guarantees. For a downstream guarantee, it is easier to see the benefit, as it could arise from the enhancement of the subsidiary's position, in which shares are held by the parent company-guarantor. For a cross-stream guarantee, the situation is less straightforward. The benefit may emerge if the advance made to a sister company is made available to the guarantor or if it is used to refinance the entire group. Finally, assessing the guarantor's benefit for an upstream guarantee is a matter of considerable difficulty. Again, the benefit may be observed if the advance received by the parent is shared with the guarantor or if it is used to ensure group restructuring, upon which the guarantor's own survival is based. Another factor to consider is whether the guarantor receives a fee for providing the guarantee, which might salvage the guarantee from avoidance.[39] But then, there remains a question of whether the fee is adequate and whether the relevant values are *significantly* different, given the risks assumed by the guarantor.

In considering potential benefits to the guarantor, regard must be had to what the provision of a guarantee sought to achieve (i.e. the motives of the guarantor). Hence, if the guarantee was extended to support the principal debtor's gamble for resurrection[40] or its last-ditch attempt to avoid insolvency, regardless of how unlikely its success was, there may be little potential benefit for the guarantor. Instead, there is a real risk of the guarantee

38 Ibid., para. 4.171. See also J. Armour, Transactions at an Undervalue, in J. Armour, H. Bennett (eds), Vulnerable Transactions in Corporate Insolvency, Hart Publishing, 2003, p. 70, discussing indirect consideration in the context of an upstream guarantee and giving an example, where the subsidiary (guarantor) relies upon the parent company for much of its business and the guarantee is necessary for the parent's continued trading. For a sceptical view on group-related indirect benefits, see J. O'Donovan, Lender Liability, English edn, Sweet & Maxwell, 2005, para. 10.80, arguing that the "court may not value very highly the intangible benefits of operating in a group […]."

39 Ibid. (Parry and Shivji), para. 4.179. Note, however, that in most cases, the consideration for a guarantee consists entirely of some advantage given to the principal debtor by the creditor. This may include forbearance from suing the principal debtor or granting a loan to the principal debtor. G. Andrews, R. Millett, Law of Guarantees, 4th edn, Sweet & Maxwell, 2005, para. 2-008.

40 Posner refers to "gambling for resurrection" as the "incentive of a firm at risk of insolvency to roll the dice […]." R.A. Posner, The Crisis of Capitalist Democracy, HUP, 2010, p. 91.

being called in. The benefits and risk also depend on the presence of adequate security that the guarantor can "inherit" and on the existence of other guarantors. Of course, the real effect of these safeguards will depend on the value of the security and the financial position of co-guarantors. Interestingly, while the mental element (subjective intent) of the guarantor plays a role when determining the availability of the defence, the law does not establish a similar element on the counterparty's (i.e. outsider lender's) side.[41]

To sum up, group guarantees raise particular difficulties for transaction avoidance rules. This is because the law requires the assessment of the present value of a contingent right conferred on the creditor by the guarantee and its relation to the benefit received by the guarantor from the advance made to the principal debtor. In practice, various factors can impact this fact-intensive investigation and influence the value of the guarantee to the creditor and guarantor. These factors may include group considerations, such as the recovery of the group and the risks that may arise from group destabilisation.

English law provides for the defence of good faith, propriety of purpose and reasonableness, which might alter the outcome and "save" an otherwise undervalued transaction. That being said, it is generally true that the higher the risk of default by the principal obligor is (e.g. due to financial distress or insolvency), the more likely it is that the guarantee will fall under close scrutiny. This concerns both the assessment of the guarantee's value and the use of the defence.

8.2.3 The USA: in search for future and indirect benefits

When it comes to US law, the relevant provisions concern the remedy for fraudulent transfers. As explained in Collier on Bankruptcy, fraudulent transfer law allows "to avoid transactions which unfairly or improperly deplete a debtor's assets or that unfairly or improperly dilute the claims against those assets."[42]

The US Bankruptcy Code permits a trustee[43] to challenge (avoid) any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within two years before the date of the bankruptcy filing. A transfer made or an obligation incurred prior to

41 G. McCormack, National Report for the UK, in R. Bork, M. Veder, Harmonisation of Transaction Avoidance Laws, Intersentia, 2022, p. 1294.

42 Collier on Bankruptcy, 16th edn, 2022, Vol. 5, ¶ 548.01.

43 Note that § 548 vests the power to avoid fraudulent transfers in the bankruptcy trustee, but in Chapter 11, § 1107 expands the definition of a "trustee" to include a debtor in possession.

the beginning of the statutory look-back period is invulnerable to an attack as fraudulent. A look-back period may, however, be longer if the action is brought using state fraudulent transfer law.[44] Notably, a transfer or obligation incurred after the bankruptcy filing cannot be considered a fraudulent transfer. But if it is "unauthorised", it may still be subject to avoidance.[45] We will not deal with the category of unauthorised transfers, as many intragroup transactions, including cross-guarantees, are entered into pre-petition and thus fall under the rules on fraudulent transfers.

A transaction may be challenged if the debtor (i) made a transfer or incurred liability with the actual intent to hinder, delay, or defraud creditors ("actual" fraudulent transfers),[46] or (ii) received less than a reasonable equivalent value in exchange for such a transfer or obligation ("constructive" fraudulent transfers).[47]

The first fraudulent conveyance statutes permitted the reversal of transactions only if the ill intent of the debtor was proven. Yet finding such intent could be difficult if the debtor does not cooperate and the transaction has a legitimate business purpose unrelated to injuring creditors.[48] Usually, intercompany guarantees are legitimate business transactions that are not made to defraud creditors. In contrast, the application of "constructive" fraudulent transfer rules is not premised on showing the debtor's intent to harm creditors' interests. Instead, it requires some extra pre-requisites or "plus" factors that make a transaction suspicious and typically signal an increased likelihood of harm. They include, inter alia, the debtor's insolvency at the time of the transaction, the debtor becoming insolvent as a result of the transfer or assumption of an obligation, or the debtor incurring debts beyond its ability to pay as they mature.[49] If the guarantor is insolvent

44 The law allows the trustee to avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that would otherwise be available to debtor's creditors under state law. 11 U.S. Code § 544(b). Many US states enacted a version of the Uniform Fraudulent Transfers Act, or its slightly modified successor, the Uniform Voidable Transactions Act.

45 11 U.S. Code § 549(a). Filing a bankruptcy petition transforms all debtor's property into property of the estate (11 U.S. Code § 541(a)(1)). From that moment, transfers of the debtor's property are prohibited, unless they fall within a statutory exception, such as transfers authorised under the Bankruptcy Code (e.g. transfers in the ordinary course of business) or by the court.

46 11 U.S. Code § 548(a)(1)(A).

47 11 U.S. Code § 548(a)(1)(B)(i).

48 A prima facie case of fraudulent intent can be established by offering proof of various badges of fraud. These badges include, among others, "(1) a close relationship among the parties to the transaction; (2) secret and hasty transfer not in the usual course of business; (3) inadequacy of consideration; (4) transferor's knowledge of the creditor's claim and the transferor's inability to pay it; (5) use of dummies or fictitious parties; and (6) retention of control of property by the transferor after the conveyance." *Rosener v. Majestic Mgmt. (In re OODC, LLC)*, 321 B.R. 128, 140 (Bankr. D. Del. 2005).

49 11 U.S. Code § 548(a)(1)(B)(ii).

when providing a guarantee, or becomes insolvent as a result of it, or is left with unreasonably small capital, therefore making insolvency highly likely, the guarantee is vulnerable to a fraudulent transfer attack.

The rules on constructively fraudulent transfers are often used to challenge intra-group support transactions. The purpose of voiding transfers unsupported by "reasonably equivalent value" is to protect creditors against the depletion of the debtor's estate.[50] As Clark pointed out, "be just before you are generous."[51] When deciding on what constitutes "reasonably equivalent value", a definition of "value" given in the US Bankruptcy Code is relevant. According to this definition, "value" means "property, or satisfaction or securing of a present or antecedent debt of the debtor […]."[52] The application of this definition to cross-guarantees is problematic, as in most cases, a guarantor does not receive any payment as consideration. As a general rule, obligations incurred by the debtor (guarantor) solely for the benefit of a third party (borrower) are treated as not supported by reasonably equivalent value.[53] However, in recognition of the group reality and contemporary financial practices, in several cases courts departed from an earlier, stricter approach to the value determination, and acknowledged that future or indirect benefits might be accepted.[54] Collier on Bankruptcy identifies three circumstances when an indirect benefit was recognised (not specifically or solely in the guarantee context):

> (i) the debtor and the third party are closely related or share an identity of interests, so that what benefits one will benefit the other on something close to a dollar-for-dollar basis; or (ii) the debtor had the actual use and benefit of the goods or services for which the third party was obligated, again on something close to a dollar-for-dollar basis; or (iii) when the transfer also satisfied an obligation for which the debtor was liable.[55]

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50 *In re Rodriguez*, 895 F.2d 725, 727 (11th Cir. 1990).

51 R.C. Clark, The Duties of the Corporate Debtor to its Creditors, Harvard Law Review, Vol. 90, 1977, p. 510.

52 11 U.S. Code § 548(d)(2)(A). Note that whereas "value" is defined, "reasonably equivalent value" is not. For example, the Third Circuit described it as follows: "The touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the commercial value of the assets transferred. Thus, when the debtor is a going concern and its realizable going concern after the transaction is equal to or exceeds its going concern value before the transaction, reasonably equivalent value has been received." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3rd Cir. 1991).

53 *Tourtellot v. Huntington Nat'l Bank (In re Renegade Holdings, Inc.)*, 457 B.R. 441, 444 (Bankr. M.D.N.C. 2011); *Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir. 1981).

54 *Rubin v. Manufacturers Hanover Trust Co*, 661 F2d 979, 991 (2d Cir. 1981), holding that "the transaction's benefit to the debtor need not be direct; it may come indirectly through benefit to a third person." *In re Image Worldwide, Ltd.*, 139 F.3d 574, 578 (7th Cir. 1998), noting that "[i]ntercorporate guarantees are routine business practice, and their potential voidability creates a risk for unwary lenders."

55 Collier on Bankruptcy, 16th edn, 2022, Vol. 5, ¶ 548.05[2][b].

The intercompany guarantee and, more generally, group financing relations could fall under these circumstances. For example, in *Mellon Bank*, the court found the reasonably equivalent value for the debtor's guarantee of an affiliate's debt when the loan strengthened the corporate group as a whole, so that the guarantor would benefit from the synergy within the group.[56] In *In re Young*, the court explained that the correct way to determine value was not to define it "only in terms of tangible property or marketable financial value," but instead to "examine […] all aspects of the transaction and carefully measure […] the value of all benefits and burdens to the debtor, direct or indirect, including 'indirect economic benefits.'"[57] In *Telefest Inc.*, it was first stressed that requiring a direct flow of capital to a guarantor to avoid a finding of a fraudulent transfer "is inhibitory of contemporary financing practices, which recognise that cross-guarantees are often needed because of the unequal abilities of interrelated corporate entities to collateralise loans."[58] The court then indicated that indirect benefits to a guarantor can exist when "the transaction of which the guaranty is a part may safeguard an important source of supply, or an important customer for the guarantor."[59] It suggested that "substantial indirect benefits may result from the general relationship between the parent company and its subsidiaries, rather than the particular transaction giving rise to the guaranty."[60] In *Fairchild*, the cross-stream financing was insulated from transaction avoidance, as the companies – the debtor-aircraft manufacturer and the debtor's affiliate, a commuter airline – shared the identity of interest and the debtor benefitted from the continued operation of the airline.[61]

It is important to keep in mind that while cross-guarantees may enhance the overall value of the enterprise group, including the guarantor, they can also merely shift the risk from one group entity to another or support the resurrection gamble, particularly if no viable enterprise exists. In the case concerning the insolvency of TOUSA Inc. and its subsidiaries, formerly one of the largest homebuilding enterprises in the USA, it was concluded that the argument of bankruptcy prevention (survival of the group) that may be cited to prove the benefit for the subsidiaries-lien providers arising from financing acquired by their borrower-parent was not persuasive.

56 *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3rd Cir. 1991). The court pointed out that indirect benefits included intangibles such as goodwill and an increased ability to borrow working capital.

57 *United States v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1415 (8th Cir.1996), vacated on other grounds.

58 *Telefest, Inc. v. VU-TV, Inc.*, 591 F.Supp. 1368, 1379 (D.C.N.J.,1984).

59 Ibid., at 1381.

60 Ibid. See also *In re Tryit Enterprises*, 121 B.R. 217 (Bankr. S.D. Tex. 1990), refusing to annul cross-guarantees on the basis that they were necessary for the optimal (group) financing arrangement.

61 *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 (C.A.5 (Tex.),1993).

The bankruptcy court observed that "not every transfer that decreases the odds of bankruptcy for a corporation can be justified."[62] It did not decide whether a chance to avoid bankruptcy can in principle constitute "reasonably equivalent value." Instead, it found that in the case at hand, financing secured by the subsidiaries' liens only delayed the inevitable collapse, as "[i]n contrast to the surprise attack at Pearl Harbor, the warnings about the collapse of TOUSA [debtor] made that event as foreseeable as the bombing of Nagasaki after President Truman's ultimatum."[63] Notably, the court in the first instance, whose judgment was affirmed on appeal, examined the group characteristics. It noted that the insolvency of the parent company would not necessarily have caused the subsidiaries to declare bankruptcy, and that the subsidiaries could have operated as independent entities without the services provided by the parent.[64]

TOUSA brings into focus the fraudulent transfer risk in financial arrangements within complex corporate families, especially where the borrower and the affiliated guarantors are financially distressed or when their insolvency is foreseeable at the time of the transaction. It also shows that the avoidance risk increases if the borrower is non-viable, and if the guarantor can function independently from its group affiliates.

As mentioned in the previous section, the analysis of benefits stemming from a corporate guarantee or its reasonable equivalent value may differ in situations where the guarantee is provided by the corporate parent (downstream guarantee). In the USA, courts tend to presume that the parent corporation receives a benefit in the form of increased stock value flowing from the increased strength and value of its subsidiary when the subsidiary obtains a loan guaranteed by the parent.[65] Therefore, downstream guaran-

62 *In re Tousa*, 680 F.3d 1298, 1311 (11th Cir. 2012).

63 Ibid., at 1313.

64 *In re Tousa, Inc.*, 422 B.R. 783, 847 (Bankr. S.D.Fla. 2009).

65 *In re Royal Crown Bottlers of N. Am., Inc.*, 23. B.R. 28, 30 (Bankr. N.D. Ala. 1982), stating that "the passing to a subsidiary of the consideration for a transfer by a debtor-parent may be presumed to be substantial […]."; *Branch v. Fed. Deposit Ins. Corp.*, 825 F.Supp. 384, 400 (D. Mass. 1993), noting that the "Court is aware of no case in which transfers to a solvent subsidiary have been determined to be for less than equivalent value." P. Blumberg, Intragroup (Upstream, Cross-Stream, and Downstream) Guarantees under the Uniform Fraudulent Transfer Act, Cardozo Law Review, Vol. 9, 1987, p. 701, explaining that in case of a downstream guarantee "additional liability incurred by the parent is offset by a comparable increase in the value of its equity interest." R.K. Rasmussen, Guarantees and Section 548(a)(2) of the Bankruptcy Code, The University of Chicago Law Review, Vol. 52, 1985, p. 215, arguing that when a debtor guarantees the obligations of its wholly owned subsidiary, "there should be a rebuttable presumption that the debtor received a reasonably equivalent value through indirect benefits."

tees are largely immune to attacks under fraudulent transfer rules.[66] Some courts have recognized this important point and noted that the otherwise applicable presumption of indirect benefits arising from a downstream guarantee does not apply if the subsidiary, whose obligation is guaranteed by the parent, is insolvent at the time of the transaction in which the guarantee is extended.[67]

In summary, the position of the US Bankruptcy Code on the avoidance of intra-group guarantees has some similarities to that of the Insolvency Act 1986. Both require a fact intensive analysis of the benefits (value) of the transaction at the time of its conclusion. Notably, in such an analysis, future and indirect benefits, including those arising from the relations and synergies with the principal debtor or those stemming from group operations, can be taken into account. This is likely to be the case in closely integrated and interdependent groups of companies.[68] As in the UK, it is also true that defending an intra-group transfer (e.g. in the form of a guarantee, collateral or provision of capital) is more difficult if, at the time of such a transfer, the guarantor and/or the principal debtor were insolvent or near insolvent. The type of the guarantee (downstream, upstream, or cross-stream) is equally important. Downstream guarantees are usually safe from fraudulent transfer challenges. Yet even they may become vulnerable to avoidance as constructively fraudulent transfers if the subsidiary-borrower was insolvent at the time when the parent company extended a guarantee. As for the differences, whereas the UK approach looks at whether there is a significant imbalance between the benefits (value) of the guarantee to the creditor and the value generated by the loan to the guarantor, the US approach mainly focuses on the benefits to the guarantor, whether direct or indirect. In prac-

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66 *Branch v. Fed. Deposit Ins. Corp.*, 825 F.Supp. 384, 389 (D. Mass. 1993) ("Generally, transfers to a solvent subsidiary are considered to be for reasonably equivalent value, because, since the parent is the sole shareholder of the subsidiary corporation, any benefit received by the subsidiary is also a benefit to the parent."). See, however, R. Squire, Distress-triggered liabilities and the agency costs of debt, in B.E. Adler (ed), Research Handbook on Corporate Bankruptcy Law, Edward Elgar Publishing, 2020, p. 137, stating that "a downstream guarantee – despite being the variety least vulnerable to fraudulent-transfer attack – typically produces a larger distortive transfer than an otherwise equivalent cross-stream guarantee, as the parent's equity stake in the subsidiary increases the correlation between the two entities' insolvency risks."

67 *In re Renegade Holdings*, Inc., 457 B.R. 441, 445 (Bankr. M.D.N.C., 2011), at 446 also noting that "the totality of the circumstances to be considered in assessing and weighing value versus obligation in this case includes the insolvency […] and whether the enterprise involving the Debtors and PTM [subsidiary-borrower] was *commercially viable*." (emphasis added). Also, *In re Duque Rodriguez*, 77 B.R. 937, 939 (Bankr. S.D.Fla. 1987).

68 Greer et al. argue (and we concur) that where "the parties involved are genuinely interdependent in some form or where the guaranty will enable the guarantor and affiliate for which it has provided a guaranty to realize genuinely synergistic gains […], the courts should protect the transfer, notwithstanding the fact that the estate may have been somewhat diminished by the transaction." B.E. Greer, J.S. Moss, N.B. Herther-Spiro, Guarantees in Bankruptcy: A Primer II, Norton Annual Survey of Bankruptcy Law, 2014 edn, p. 209.

tice, the effects of this difference may not be substantial, as both values tend to be correlated.

8.2.4 The Netherlands: *Faillissementspauliana*

The Dutch Bankruptcy Act provides for insolvency-related transaction avoidance rules (*actio pauliana*) in Articles 42-51. There are two principal sets of rules.[69] One of them, namely Article 42 Fw, regulates the avoidance (annulment) of legal acts, which the debtor had no prior obligation to perform. A legal act is considered obligatory if the debtor is legally obliged to perform it or, in other words, when a prior enforceable legal obligation existed for the debtor to perform the legal act in question.[70] If such a legal obligation exists, a legal act can only be challenged on the basis of Article 47 Fw, and not Article 42 Fw. The requirements for avoidance of obligatory legal acts are understandably more demanding compared to non-mandatory ones. In this section, we will first address avoidance under Article 47 Fw and then proceed with the rule of Article 42 Fw.

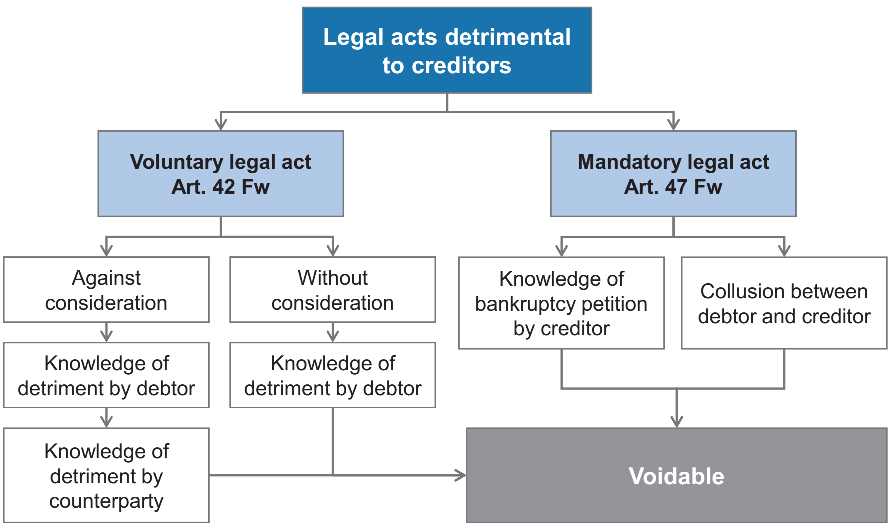

Figure 6. Transaction avoidance in Dutch insolvency law[71]

69 On both sets of rules, see B. Wessels, Gevolgen van faillietverklaring (Wessels Insolventierecht nr. III), 5e druk, Deventer: Wolters Kluwer, 2019, par. 3017-3273.

70 R.J. de Weijs, D.G.J. Heems, GS Faillissementswet, commentaar op art. 42 Fw; R.D. Vriesendorp, Insolventierecht, Deventer: Wolters Kluwer 2021.

71 This figure is based on N.B. Pannevis, The European harmonisation of avoidance rules, a Dutch perspective on reshaping an age-old instrument, TvI 2023/12, p. 78.

A guarantee may be considered an obligatory legal act if the guarantor undertook to extend a guarantee to a creditor prior to the actual granting of the guarantee, e.g. when the advance was made to the borrower on the condition that the guarantee would be granted in the future.[72] According to Article 47 Fw, the performance of a due and demandable (payable) obligation (*opeisbare schuld*) can be annulled only on the ground of fraudulent conveyance if it is shown that either the other party was aware of a pending bankruptcy petition, or the performance is the result of consultations (*overleg*) between the debtor and the creditor with the intention to favour that creditor. According to the Dutch Supreme Court, the second criterion requires collusion.[73] Notably, unlike Article 42 Fw (see further below), Article 47 Fw does not distinguish between gratuitous legal acts and legal acts for consideration.

As noted in the previous paragraph, for a successful challenge under Article 47 Fw, a creditor should be aware of the bankruptcy petition, or there has to be collusion between the creditor and the debtor. These elements must be restrictively interpreted. Regarding the creditor's awareness, it is not sufficient for the creditor to have knowledge of the likely or inevitable insolvency.[74] Instead, it needs to be shown that the creditor had knowledge of the filed bankruptcy petition. This rule is easy to apply in practice, which, according to the legislator's intent, should facilitate certainty of transactions. Unless the creditor and the guarantor have the same directors or a creditor was specifically notified about the bankruptcy filing, it will be difficult to demonstrate that the creditor was aware of the filed bankruptcy petition.

Proving collusion is even more challenging, as it requires more than just knowledge of disadvantage.[75] Dutch courts set a high bar to show the actual intention of the debtor and its creditor to favour the latter.[76] In *Cikam/Siemon qq*, the Dutch Supreme Court upheld the judgment of the Court of

72 R.J. de Weijs, D.G.J. Heems, GS Faillissementswet, commentaar op art. 42 Fw, observing that a broad interpretation should be given to what may constitute an obligatory legal act, and that it may encompass the creation of a security right. See HR 1 February 2013, *JOR* 2013/155, *NJ* 2013/156 (*Van Leuveren q.q./ING*), dealing with silent pledging of future claims by means of a collective deed construction (*verzamelpandakteconstructie*). Yet, if the prior legal obligation exists, the creation of such a prior legal obligation may itself be challenged under Article 42 Fw.

73 HR 24 March 1995, *NJ* 1995/628 (*Gispen q.q./IFN*).

74 HR 29 June 2001, *JOR* 2001/220, *NJ* 2001/662 (*Meijs qq/Bank of Tokyo*).

75 HR 20 November 1998, *NJ* 1999/611 (*Verkerk Varkenshandel/Tiethoff q.q.*).

76 HR 24 March 1995, *NJ* 1995/628, m.nt. P. van Schilfgaarde (*Gispen q.q./IFN*). R.D. Vriesendorp, Art. 47 FW: een geamputeerde tentakel of verdient de curator meer? in S.C.J.J. Kortmann e.a. (red.), De curator, een octopus, Zwolle: W.E.J. Tjeenk Willink 1996, p. 65-79; R.D. Vriesendorp, Enkele grenzen van artikel 47 Fw verkend: een machtig wapen voor de curator of een dode letter, Insolad Jaarboek 2014, Deventer: Kluwer 2015, p. 165-193.

Appeal, which assumed collusion, subject to proof to the contrary, on the basis of a very close connection between the creditor and the debtor with the same officers, and knowledge of both parties of the debtor's financial distress.[77] Conversely, if the guaranteed creditor is not related to the debtor, showcasing collusion is difficult.

In practice, it is likely that an IP will challenge the guarantee under Article 42 Fw, which applies to voluntary (non-obligatory) legal acts. After all, intercompany guarantees are usually provided without a prior obligation to grant them. The use of the parent company's power of instruction over the subsidiary-guarantor, whether legal or economic, does not make the guarantee an obligatory legal act.[78]

Article 42 Fw stipulates that if the debtor, prior to the commencement of the bankruptcy proceedings, performed a legal act which he was not obliged to perform, while he knew or should have known that the recovery rights of his creditors would be harmed as a result, this legal act (*rechtshandeling*) is voidable on the ground of fraudulent conveyance and may be nullified on the application of an insolvency practitioner. This provision aims to protect creditors from legal acts that prejudice them in insolvency. It targets (1) actions that reduce creditors' recovery capacity and damage both the debtor and creditors. Examples include a sale of the debtor's property below market value or the assumption of new debts without equivalent return (undervalued transaction). It also applies to (2) actions that are neutral to the debtor itself but interfere with the *pari passu* principle, such as paying a single creditor in the vicinity of insolvency to the disadvantage of other creditors (preferential transaction).[79]

There are several conditions that must be satisfied for an avoidance action to be successful: (i) optionality (voluntary character) of a legal act – the act is not mandated by law or contract, (ii) prejudice to creditors – broadly interpreted, and (iii) knowledge of the prejudice at the time the legal act was performed. Hence, the mere prejudice is insufficient. It is required that the debtor acted with knowledge of prejudice, that is to say that he knew or should have known that his creditors would be prejudiced in their recovery options as a result of the act.

77 HR 7 March 2003, *JOR* 2003/102, *NJ* 2003/429 (*Cikam/Siemon q.q.*).

78 Even if there is economic necessity, perceived or real, to perform a legal act, this does not mean that such legal act is mandatory. HR 10 December 1976, *NJ* 1977/617 (*Eneca/BACM*).

79 B. Wessels, Gevolgen van faillietverklaring (Wessels Insolventierecht nr. III), 5e druk, Deventer: Wolters Kluwer, 2019; R.J. van der Weijden, De faillissementspauliana (Onderneming en recht nr. 75) (diss. Nijmegen), Deventer: Kluwer 2012, p. 68-77.

Relevant to the element of knowledge, Dutch law distinguishes between gratuitous legal acts and legal acts concluded for consideration. In the case of the former, only the debtor's knowledge is relevant. It is presumed that such knowledge exists if the legal act was performed within one year before the declaration of bankruptcy.[80] In *Van Doorn Beheer/Thielen q.q.*, the court ruled that a guarantee granted by the subsidiary to finance the purchase of its shares from the parent company was an act for no consideration.[81] Also, if a security right (personal or *in rem*) is granted for a loan that has already been extended – without such security right being a precondition for the loan – the provision of the security might be regarded as a gratuitous legal act, unless there is some form of consideration (e.g. deferral on loan repayment, interest rate reduction, continued financing under a revolving credit facility).[82] If the guarantor derives some benefit from financing of another party, including obtaining direct or indirect access to credit, the guarantee does not constitute a gratuitous legal act.[83]

To annul a legal act made for consideration, knowledge of the prejudice by both the debtor and its counterparty is required. This should not be confused with the intention to cause harm or disadvantage, as showing such intention is not necessary. It is also not necessary for the parties to foresee the extent of the disadvantage or identify the injured parties.[84] To prove the required knowledge, an IP needs to show that at the time of the legal act, insolvency and a deficit could have been foreseen with a reasonable degree of probability by both the debtor and the party with or towards whom the debtor performed the legal act.[85] Thus, if the financier is or should be aware of the guarantor's financial distress and likely insolvency, the knowledge of the disadvantage may be attributed to it.

80 Dutch Bankruptcy Act, Article 45.

81 Gerechtshof Arnhem-Leeuwarden 12 February 2013, ECLI:NL:GHARL:2013:822, *JOR* 2014/78; Gerechtshof Arnhem-Leeuwarden, 12 September 2017, ECLI:NL:GHARL:2017:8021, finding that the payment made by the subsidiary to a lawyer of its parent company was an act for no consideration.

82 R.J. de Weijs, Faillissementspauliana, Insolvenzanfechtung en Transaction Avoidance in Insolvencies. Naar een geobjectiveerde regeling van schuldeisersbenadeling (Recht en Praktijk nr. InsR1) (diss. Amsterdam UvA), Deventer: Kluwer 2010, 4.2.1.2.3.

83 A. Jonkers, Selective Perforation by Means of Guarantees: Dutch Law, in The 800-Pound Gorilla. Limits to Group Structures and Asset Partitioning in Insolvency, NACIIL 2018 report, Eleven International Publishing, 2019, p. 79, noting that "even guarantees for which no direct premium is paid will usually be viewed as "for consideration".

84 R.J. de Weijs, D.G.J. Heems, GS Faillissementswet, commentaar op art. 42 Fw.

85 HR 22 December 2009, *NJ* 2010/273 (*ABN/Van Dooren q.q. III*). Read further R.J. van der Weijden, Wetenschap van benadeling in de zin van art. 42 Fw en de voorzienbaarheid van het faillissement van de schuldenaar, MvV, afl. 10, 2017, p. 285-289.

In practice, proving knowledge is difficult.[86] For this reason, Article 43 Fw establishes a number of presumptions. These presumptions apply to non-mandatory legal acts that took place within one year before the bankruptcy order was made. They cover instances which indicate the suspicious nature of a legal act, either because of the nature of the act itself (e.g. if the performance by the debtor was not yet due, *niet-opeisbare schuld*) or because of the persons involved.[87] For example, knowledge of the prejudice is presumed if the transaction involves another company within the same enterprise group.[88] In case of a guarantee, however, a creditor is often a non-related party (outside lender). This makes the presumption inapplicable Yet if the financier is a group member, the presumption will apply.

For the purposes of this section, another presumption is relevant. Under it, the knowledge of prejudice exists if the value of an obligation on the part of the debtor *significantly* exceeds that of the obligation on the other side.[89] An example of this can be an agreement where the debtor sells an asset for a fraction of its market value or pays substantially more when buying an asset.[90] A manifest discrepancy in the price indicates that the legal act is suspicious. Another example relates to a situation where the debtor accepts joint and several liability for the fault of another person without receiving any benefit.[91] As observed in the previous sections, the calculation of the value or benefits related to intra-group transactions, such as cross-guarantees, is very complex. Ultimately, a court has to assess the upside to the guarantor and determine whether this upside is proportionate to the liability incurred. If the guarantor has not benefited from the advance made to the borrower, the transaction is considered to be at an undervalue.

Dutch courts recognise the realities of enterprise groups and group interest as legally relevant factors, although in different contexts. For example, they have confirmed the existence of a "duty of group management" (*concernleidingsplicht*) of a parent company in an integrated enterprise group, which encompasses an obligation to actively oversee subsidiaries in order to prevent insolvency or minimise losses.[92] A parent company may therefore be liable in tort (6:162 BW) where the group structure has been set up with inherent risks for creditors of a subsidiary, and where the parent company discontinues financial support to a subsidiary, while its appearance of cred-

86 G. van Dijck, De Faillissementspauliana: Revisie van een Relict (proefschrift), 2016, p. 84, noting that 75% of the surveyed IPs indicated that it was (very) difficult to demonstrate knowledge of prejudice in situations where no presumption applied.
87 G.F. van der Feltz, Geschiedenis van de Wet op het Faillissement en de Surséance van Betaling, Haarlem: De Erven F. Bohn 1896, p. 442-443.
88 Dutch Bankruptcy Act, Article 43(1)(6).
89 Dutch Bankruptcy Act, Article 43(1)(1).
90 R.J. van der Weijden, De Faillissementspauliana, Deventer: Kluwer, 2012, p. 143.
91 F.M.J. Verstijlen, in: *T&C Insolventierecht*, commentaar op art. 42.
92 HR 21 December 2001, *NJ* 2005/96 (*Sobi/Hurks*).

itworthiness misguides creditors.[93] Directors of the subsidiary could take into account group interest, but this interest does not take precedence over the subsidiary's own interests.[94]

Thus, when reviewing intra-group financial transactions, various group-related circumstances may be taken into account. A court will consider which entity used the loan (e.g. whether the guarantor had access to the funds) and other relevant facts.[95] Focusing on a single transaction may not capture the whole picture. The availability of credit, improved through the issuance of a guarantee, might create wider benefits. These benefits may arise, for instance, if through outside financial injections it is possible to invest in other parts of the group to expand certain profit-making activities or keep other parts of the group, including the guarantor, viable.[96] Dutch law recognises that a legal act that in itself leads to the prejudice of creditors but which is part of a set of legal acts (*samenstel van rechtshandelingen*) that does not result in any prejudice cannot be annulled. This rule is deduced from the rationale of *faillissementspauliana* and is confirmed by the case law of the Dutch Supreme Court.[97] The "disadvantage" of the contested legal act can therefore, under certain (rather limited) circumstances, be mitigated or offset by the "advantage" (*gunstige gevolgen*) that lies outside the contested legal act.[98] This advantage should be conferred on creditors of the debtor (guarantor), and not solely on another group member (principal debtor-borrower) and its creditors.[99]

In sum, intra-group guarantees may be subject to avoidance actions (*actio pauliana*) pursuant to the Dutch Bankruptcy Act. For a non-Dutch lawyer, the law can look like a labyrinth. Different rules apply, depending on whether the guarantee constitutes the performance of a due and enforceable (payable) obligation or whether it was granted without prior commitment.

93 HR 11 September 2009, *NJ* 2009/565, *JOR* 2009/309 (*Comsys/Van den End q.q.*).

94 HR 26 October 2001, *NJ* 2002/94 (*Juno*). S. Bartman, Dutch Supreme Court at a Loss over Groups, European Company Law, Vol. 13, 2016, p. 125. See also HR 7 July 2017, *NJ* 2018/363 (*Oi Brasil Holdings Coöperatief/Citadel e.a.*) and *NJ* 2018/364, m.nt. F.M.J. Verstijlen *(Portugal Telecom International Finance/Citicorp Trustee Company e.a.*). The court noted with respect to Article 242 Fw (withdrawal of suspension of payments), that an IP may take into account the interests of the group in his decision. Yet the court pointed out that in bankruptcy proceedings, the starting point was the separate legal personality of group entities.

95 HR 13 July 2012, *JOR* 2012/306 (*Janssen q.q./JVS*).

96 HR 8 April 2003, *JOR* 2003/160 (*Rivier de Lek/Van de Wetering*), dealing with an internal obligation to contribute in group relationships.

97 HR 10 December 1976, *Nl* 1977/617 (*Curatoren Eneca/BACM*); HR 22 March 1991, *NJ* 1992/214, m.nt. Van Schilfgaarde (*Loeffen q.q./Mees & Hope II*); HR 9 June 2006, *NJ* 2007/21, m.nt. Van Schilfgaarde (*Smit/Van Hees q.q.*); HR 19 December 2008, *NJ* 2009/220 (*Curatoren AHC/Air Holland c.s.*).

98 R.J. van der Weijden, De faillissementspauliana, Deventer: Kluwer, 2012, 5.5.1.

99 Ibid.

For the category of non-obligatory legal acts – which most guarantees are likely to fall within – unless the transaction is gratuitous, the trustee must prove, among other things, the detriment and knowledge of both parties to such a transaction of its prejudicial character to the guarantor's creditors. This this hard to do. It must be shown that the guarantee was extended at the time when the financier could have anticipated the guarantor's insolvency with a reasonable degree of probability. Therefore, it is difficult to annul intercompany guarantees granted more than a year before the opening of the insolvency proceedings. As for transactions concluded within a one-year suspect period, the evidentiary presumption of knowledge applies if the transaction is undervalued. As it was illustrated in the English and US law sections, determining the value of a group guarantee and showing that it is not substantially lower than the assumed obligation is problematic. Dutch courts may have regard to the group reality and recognise indirect benefits for the guarantor. The extent of this recognition is not clear and will depends on the totality of facts. In examining these facts, courts could hypothesise what would have been the outcome if the guarantee had not been granted.[100] This contextual backward-looking analysis contributes to legal uncertainty and makes intercompany guarantees especially vulnerable to avoidance actions.

8.3 Difficulties of Ex Post Substantive Review

The insolvency law frameworks of the UK, the USA and the Netherlands contain rules that can be relied upon to challenge intra-group financial transactions, including cross-guarantees. Despite important differences and nuances (e.g. length of the suspect periods, requirements concerning knowledge of a counterparty, presumptions, defences), there are similarities. For example, in all three jurisdictions, a cross-guarantee may be subject to transaction avoidance as a transaction at an undervalue. Undervalued transactions are harmful to creditors because they reduce the insolvency estate value, otherwise available to creditors. The determination of whether an intercompany guarantee is such a transaction requires a fact-sensitive analysis. This analysis may include the assessment of:

- Direct and indirect benefits for a guarantor;
- Financial positions of the guarantor and principal debtor at the time of the transaction;

100 HR 19 October 2001, *NJ* 2001/654, *JOR* 2001/269, m.nt. NEDF *(Diepstraten q.q./ Gilhuis)*; Parket bij de HR, 16 October 2020, 19/05439, Conclusie B.F. Assink (*Volkerink q.q./Rabobank*), r.o. 3.17, arguing that what is required is "although not always simple – a realistic, measurable assessment of what concretely would have happened if that legal act had not taken place, making the judgment of probability intrinsically contextual."

- Degree of legal and economic integration within the group;
- Type of the guarantee: upstream, downstream or cross-stream.

With a certain, inevitable degree of generalisation, it can be observed that: (i) the vaguer and more distant the benefit of the guarantee is for the guarantor, (ii) the less stable the financial position of the guarantor and/or of the principal debtor is at the time of the transaction, (iii) the less integrated the group is – making continued existence of the guarantor less dependent on that of the principal debtor or other group entities, and (iv) if the guarantee is an upstream or cross-stream guarantee, the more vulnerable the guarantee becomes to an avoidance action.

Ex post (judicial) review of debtor's transactions is indispensable for the protection of creditors' rights.[101] Transaction avoidance rules contribute to the achievement of the principles of estate value maximisation and equal treatment of creditors. Additionally, an insolvency transaction avoidance procedure might also allow creditor participation or even initiation,[102] encouraging creditors to play an active role and ensuring *procedural fairness*. That said, there are important downsides and difficulties related to an ex post substantive review, especially when applicable to intra-group financing.

First, when applying rules on avoidance of undervalued transactions, determining reasonably equivalent value is often problematic.[103] This is especially true for intercompany guarantees – transactions for which no

101 A. Keay, The Harmonization of the Avoidance Rules in European Union Insolvencies, International & Comparative Law Quarterly, Vol. 66, 2016, p. 84, observing that the avoidance provisions promote collectivism and fairness among creditors, and protect them from unfair diminution of the insolvency estate.

102 An example of the law that allows creditors to initiate insolvency *pauliana* actions is Article 61.9(2) of the Russian Bankruptcy Act. In the jurisdictions studied in this book, creditors' right to challenge debtor's transactions is limited. See e.g. Article 49 Fw, according to which only an IP is authorised to challenge legal acts under Articles 42 and 47 Fw. However, creditors can compel an IP to challenge a legal act pursuant to Article 69 Fw. In the UK, with respect to transactions at an undervalue and preferences, only an IP (liquidator, administrator) has standing (sec. 238 and 239 Insolvency Act 1986). Yet transactions defrauding creditors can be challenged by any "victim" of a transaction, which includes creditors (sec. 424, providing that in insolvency proceedings, a victim can apply for an order only with the leave of the court). The US law gives a bankruptcy trustee or a DIP the sole authority to pursue fraudulent transfer actions (11 U.S. Code § 548). However, courts have allowed creditors' committees or individual creditors to commence litigation on behalf of the estate (derivative standing) under narrowly defined circumstances, e.g. where a DIP or a trustee unjustifiably refused either to pursue the claim or to consent to the movant's prosecution of the claim on behalf of the estate. *Official Comm. of Unsecured Creditors v. Meltzer*, 589 B.R. 6, 16 (D. Me. 2018); *In re Know Weigh, L.L.C.*, 576 B.R. 189, 210 (Bankr. C.D. Cal. 2017).

103 D.G. Baird, Legal Approaches to Restricting Distributions to Shareholders: The Role of Fraudulent Transfer Law, EBOR, Vol. 7, 2006, p. 211, noting that "[v]aluations by their nature are uncertain."

relevant market benchmark exists. Courts have to assess the true economic value of a transaction, which may entail an inquiry into complex business structures and group interdependencies. This is because, in most instances, a group entity acting as a guarantor does not receive a direct benefit for providing the guarantee but may derive indirect group-related benefits. Courts may be required to consider, with the benefit of hindsight, what would have happened in the alternative scenario, for example, in a hypothetical case where the guarantee had not been provided. Mevorach comments that the need to evaluate the true economic effect of a transaction or a combination of transactions "makes the law potent but also somewhat unpredictable."[104]

Second, transaction avoidance law is often connected to the issue of directors' liability and the decision-making process. After all, it is directors or an appointed chief executive officer (CEO) who decide whether to enter into a transaction. Debtor's management can be found personally liable for permitting the company to make a transaction that is declared void in insolvency.[105] However, especially in the shadow of insolvency, making the "right" choices is very difficult. As aptly spotted by Licht, the "vicinity-of-insolvency duties form a notoriously murky area, where legal space warps. The contours of this area are fuzzy."[106] On the one hand, directors are influenced by cognitive biases, such as self-serving bias, positive outcome or optimism bias, and illusion of control.[107] One the other hand, the irregularity of events of financial distress (compared to the business-as-usual), significant complexity imposed by diversity of interests, including the interests of other group companies, lack of adequate information, and uncertainty about the future, coupled with significant time pressure, make a choice of the "correct" strategy or transaction challenging. Both cognitive biases and irregularity of crisis situations indicate that ex post control may be a less suitable strategy for protecting creditors' rights or guiding directors' behaviour ex ante, at the time of the crisis.

104 I. Mevorach, Transaction Avoidance in Bankruptcy of Corporate Groups, ECFR, Vol. 8, 2011, p. 243.

105 UNCITRAL Legislative Guide, Part four, Section two, para. 7.

106 A.N. Licht, My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency, Washington University Law Review, Vol. 98, 2021, p. 1732.

107 On cognitive biases in the vicinity-of-insolvency decision-making, see M-W. Hung and W-H. Tsai, Managerial optimism, CEO retention, and corporate performance: evidence from bankruptcy-filing firms, Journal of Economics and Finance, Vol. 44, 2020, p. 506, studying the data on bankruptcy-filing firms in the USA, and concluding that managerial optimism is detrimental to operating performance at filing and survival probability. See also F. Drescher, Insolvency Timing and Managerial Decision-Making, Springer Gabler, 2014, p .84, arguing that the "context factors of the insolvency timing decisions are very likely to aggravate the manager's cognitive limitations."

Third, the effectiveness of the ex post review depends on how sophisticated and experienced the judges are. As demonstrated above, review of intra-group transactions encompasses complex issues related to indirect benefits, knowledge of prejudice, calculation of reasonably equivalent value, and the significance of an imbalance. Judges could have wide discretion when assessing these elements, and such assessment might be time-consuming and costly for the parties involved. The difficulty in evaluating cross-guarantees makes the ex post review less desirable in jurisdictions where the judiciary is less sophisticated and reliable.[108] This problem is exacerbated by the fact that the ex post review is clouded by hindsight and outcome biases, as a transaction is judged with full knowledge of an adverse outcome.[109] Notably, cognitive biases cannot be eliminated even in countries with experienced judges. Although knowledge or awareness about the existence of judgmental heuristics and resulting biases may help avoid certain simple errors, they are unlikely to mitigate the hindsight bias.[110] A combination of biases with the inherent uncertainty and complexity of the ex post evaluation contributes to over-deterrence of intra-group financing.[111]

The lack of predictability in applying transaction avoidance rules to intra-group transactions, such as intercompany guarantees, is problematic for a number of reasons. Legal uncertainty surrounding ex post review is harmful to the principle of protection of legitimate expectations. It can contribute to the increased cost of finance due to the risk of a guarantee being annulled

108 A. Gurrea-Martínez, Towards an optimal model of directors' duties in the zone of insolvency: an economic and comparative approach, Journal of Corporate Law Studies, Vol. 21, 2021, pp. 389-390, arguing that "in jurisdictions without sophisticated and reliable judicial systems […], the discretion of courts should be reduced."

109 N. Strohmaier et al., Hindsight bias and outcome bias in judging directors' liability and the role of free will beliefs, Journal of Applied Social Psychology, Vol. 51, 2020, pp. 141-158, finding that professional legal investigators such as judges and lawyers are affected by hindsight and outcome biases when assessing directors' conduct. A. Gurrea-Martínez, The Avoidance of Pre-Bankruptcy Transactions: An Economic and Comparative Approach, Chicago-Kent Law Review, Vol. 93, 2018, p. 714, observing that "hindsight bias will incentivize creditors, judges, and trustees to think that the transaction potentially challenged was harmful ex ante, even if it, at the moment of entering into the transaction, it looked reasonable."

110 G. Mandel, Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational, Ohio State Law Journal, Vol. 67, 2006, pp. 1391-1463; D. Hardman, Judgment and Decision-Making: Psychological Perspectives, BPS Blackwell, 2009, p. 37.

111 A.M. Pacces, Procedural and Substantive Review of Related Party Transactions: The Case for Noncontrolling Shareholder-Dependent Directors, in L. Enriques and T.H. Tröger (eds), The Law and Finance of Related Party Transactions, CUP, 2019, pp. 182-183, commenting with respect to the ex post substantive review of related-party transactions (not specifically in the insolvency context), that "fundamental incompetence of courts to evaluate the efficiency of RPTs stems from the same rationale behind judges' abstention from second-guessing business judgment" and arguing that "substantive ex-post review tends to over-deter RPTs as it leads courts to second-guess, with hindsight bias, the decision to enter into RPTs."

ex post, and result in foregone transactions. This is not bad if these transactions are value-destroying (overinvestment, debt dilution, etc.) and harm the guarantor's pre-existing creditors. However, it is undesirable if it leads to the underinvestment problem, as a result of which value-enhancing transactions and rescue attempts do not occur.

8.4 Conclusion

In the realm of enterprise group insolvency, there are many possibilities but few certainties. This observation also holds true for the rules regulating intra-group financing transactions. The application of these rules is often context specific and is marred by legal uncertainty. Some of it may be attributed to insolvency law itself, referred to by Goode and Gullifer as "one of the most technical and, in some respects, one of the most arbitrary branches of law."[112] To a certain degree, this can also be explained by the complexity of intra-group relations, diversity of operational and financial arrangements within enterprise groups, as well as varying levels of interdependence and integration characterising groups. This chapter explored one area of insolvency law, namely transaction avoidance, a form of an ex post review of debtor's transactions. This review entails the substantive assessment of a transaction under insolvency transaction avoidance rules.

When dealing with transactions involving group entities, UNCITRAL points out that intra-group transactions may need to be "considered differently when viewed in the broader context of an enterprise group, where the benefits and detriments of transactions might be more widely assigned."[113] It has been observed that national legal systems are in principle capable of taking the group context (e.g. group integration and interdependence) into account when reviewing transactions. For example, US courts have, when applying the remedy of fraudulent transfers, looked beyond a single entity and considered whether entities in a group were closely related and shared the "identity of interest". There may be some room for group considerations in English and Dutch transaction avoidance law, even though the full extent of their recognition and impact remains unclear. A common challenge lies in the calculation of indirect benefits stemming from the extension of a cross-guarantee. This calculation is problematic due to the difficulty of determining the (market) value of a guarantee ex post and the uncertainty that such determination creates. It increases the demand for specialised courts experienced in resolving insolvency and valuation disputes.

112 R. Goode, L. Gullifer, Goode and Gullifer on Legal Problems of Credit and Security, 6th edn, Sweet & Maxwell, 2017, para. 8-16.

113 UNCITRAL Legislative Guide, Part three, Ch. II, para. 75.

Based on the analysis of UK, US and Dutch law, the following conclusions are drawn:

- The application of insolvency transaction avoidance rules to intra-group transactions, such as group guarantees, lacks certainty. It involves a fact-intensive analysis in which various considerations may play a role, e.g. existence of co-guarantors (against whom a claim for contribution can be filed) or *in rem* security interest that the guarantor can "inherit" via the right of subrogation. These considerations affect guarantor's risk.
- Any ex post assessment of transactions can be affected by various cognitive biases, which may unjustifiably influence a court's decision. Such cognitive biases cannot be fully eliminated, even if they are acknowledged by decision-makers.
- The vaguer and more distant the value or conferred benefit for the guarantor is, the more vulnerable the guarantee becomes to a future avoidance action.
- A transaction becomes even more vulnerable to transaction avoidance if, at the time of the transaction, either the principal debtor or the guarantor is financially distressed or insolvent, making the risk of harm to their creditors more pronounced or expected.
- Upstream or cross-stream support transactions, including upstream and cross-stream guarantees, are more vulnerable to an avoidance challenge compared to downstream support transactions, such as downstream guarantees.

While the ex post review of intra-group financial transactions is necessary as a form of judicial protection, ensuring equal treatment of creditors and estate value preservation, the design of avoidance provisions – dating back to Roman law – makes it difficult to apply to transactions involving group members. As mentioned in Chapter 2, a group of companies is a relatively recent phenomenon. The quest is to achieve a balance between, on the one hand, maximising insolvency estate value, which depends on whether the transaction is properly compensated – not an easy calculation to be made ex ante and evaluated ex post, and, on the other hand, ensuring contractual predictability and legal certainty for the parties involved: principal debtor-borrower, group guarantor and outside lender. Transaction avoidance law is not shaped in a way that allows one to clearly foresee whether a group support transaction, such as a cross-guarantee, is voidable or not. As noted above, this is partially caused by the indeterminacy of (accepting) the "indirect" and "group" benefits. As a result, the outcome is problematic from a principle-based point of view. It is far from being optimal from the perspective of protecting legitimate expectations and the certainty of transactions. It is also disproportionate and harmful to the principle of estate value maximisation if the risk of transaction avoidance disincentivises efficient, value-enhancing transactions.