11 Insolvency Stay on Creditor Action and its Extension to Group Entities■

11.1 Introduction

A stay of individual enforcement actions and the replacement of such actions with a collective enforcement process are among the cornerstones of modern insolvency law. They aim to preserve the value of the insolvency estate and facilitate its efficient administration.[1] Hence, a stay effectively addresses the common pool problem. Jackson explains that:

> To the extent that a non-piecemeal collective process (whether in the form of liquidation or reorganization) is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group. This is derived from the commonplace notion: that a collection of assets is sometimes more valuable than the same assets would be if spread to the winds. It is often referred to as the surplus of a going concern value over a liquidation value.[2]

A stay plays an equally important role in proceedings aimed at rescuing ailing companies, as it provides the debtor with a breathing space, safeguards its going concern value, and strengthens its position in negotiations with creditors.[3] Without a stay, creditors could seize assets essential for carrying out the business, thereby jeopardising any prospects for a successful restructuring. By blocking actions of individual creditors that can frustrate restructuring efforts, even if these efforts are supported by the majority

■ This chapter builds upon the following previously published work by the author:
– I. Kokorin, Promotion of group restructuring and cross-entity liability arrangements, Journal of Corporate Law Studies, Vol. 21, 2021, pp. 557-593.e Groups, European Company and Financial Law Review, Vol. 18, 2021, pp. 107-140.

1 UNCITRAL Legislative Guide on Insolvency Law, Part two, 2004, Ch. II, para. 26; O. Couwenberg, S.J. Lubben, Essential Corporate Bankruptcy Law, EBOR, Vol. 16, 2015, p. 49; T.H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard University Press, 1986, p. 14.

2 T.H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard University Press, 1986, p. 14.

3 See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), noting that a stay "gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy."

of creditors, a stay mitigates the anti-commons problem.[4] Whereas the commons problem deals with the collective action problem linked to the numerosity of creditors and the difficulty of coordinating actions between them, the anti-commons problem is premised on fragmented and conflicting interests of such creditors.[5] In addition to preserving the value of the insolvency estate, a stay also ensures equality of distribution among creditors (*paritas creditorum*) by preventing the grab race, which would result in some creditors always winning and others always losing.[6]

The importance of a stay is emphasized by various standard setting organisations, including the World Bank,[7] UNCITRAL,[8] FSB[9] and EBRD.[10] The Restructuring Directive acknowledges that a "debtor should be able to benefit from a temporary stay of individual enforcement actions, […] with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations."[11]

This chapter discusses the stays available to companies in financial distress. It is no coincidence that this chapter follows the chapter on third-party releases. A stay – when extended to group guarantors, co-debtors, or collateral providers – ensures the effectiveness of a third-party release. But even without such a release, it may be employed to address the problems created by the triangle of rights and liabilities (see Chapter 6), even if temporarily.

4 On the problem of holdouts and the tragedy of anti-commons in insolvency and restructuring, see R.J. de Weijs, Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and Anticommons, International Insolvency Review, Vol. 21, 2012, pp. 67-83. See, generally, M.A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, Harvard Law Review, Vol. 111, 1998, pp. 621-688.

5 D.G. Baird and R.K. Rasmussen, Antibankruptcy, The Yale Law Journal, Vol. 119, 2010, p. 648.

6 See, however, B. Wessels, S. Madaus (eds), Rescue of Business in Europe: A European Law Institute Instrument, OUP, 2020, p. 195, observing that "a stay does not primarily serve to guarantee equal treatment of creditors, but rather serves to protect the realisation of the intention of the debtor to restructure its business."

7 World Bank, Principles for Effective Insolvency and Creditor/Debtor Regimes, 2021, C5, stating that the "injunctive relief (stay) should be as wide and all-encompassing as possible, extending to an interest in assets used, occupied, or in the possession of the debtor."

8 UNCITRAL Legislative Guide (2004), Part two, Ch. II, para. 26ff.

9 FSB Key Attributes of Effective Resolution Regimes for Financial Institutions, 2014, KA 3.2. referring to the power of resolution authorities to impose a stay on creditor actions to attach assets or otherwise collect money or property from a bank, and the power to temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of a bank into resolution.

10 EBRD Core Principles of an Effective Insolvency System, September 2020, Principle 6.

11 Restructuring Directive, Recital 32, Articles 6 and 7.

This chapter proceeds as follows. First, we describe the main features of how a stay is regulated in the chosen national legal systems (section 11.2.). This study demonstrates that the availability, design and scope of a stay vary between jurisdiction, and sometimes also within the same jurisdiction, depending on the applicable procedure. For instance, in the UK, an automatic stay applies in administration but is not available in schemes of arrangement or CVAs. Besides, a stay binds secured creditors in administration, but not in liquidation. Secured creditors are generally unaffected by bankruptcy under Dutch law. In contrast, under US bankruptcy law, a wide-ranging stay is automatically imposed on both secured and unsecured creditors. Second, since this book primarily focuses on group financial arrangements, we explore whether an enforcement stay could be given an extension effect. In other words, we look into the personal scope of a stay and examine whether it can be extended to cover third parties, such as group entities acting as guarantors, co-debtors and collateral providers (section 11.3.), even if they are not themselves subject to an insolvency or restructuring proceeding. Section 11.4. contains suggestions on when a group-wide extension of a stay may be desirable.

11.2 Enforcement Stays in National Law

11.2.1 The UK: patchwork of different rules and procedures

The rules on enforcement stays are found in the laws of many jurisdictions. However, the scope of these rules, and the mode of their operation (e.g. automatic vs. non-automatic, general stay vs. selective stay, length of a stay) vary depending on the type of procedure or the creditor concerned.[12]

English law is not homogeneous. It contains a menu of procedures that can be used in a situation of financial distress. Among them are winding up by the court, administration, administrative receivership, CVAs, and more recently, a standalone moratorium. While these procedures are part of the Insolvency Act 1986, schemes of arrangement, often relied on to restructure debts of financially distressed firms, are governed by the Companies Act 2006. The existence, purpose and scope of a stay depend on the applicable procedure. For example, differences can be observed between a liquidation stay applicable upon making a winding-up order[13] and an administration stay applicable during administration.[14] The former "is designed to avoid the unnecessary expenditure of assets otherwise available for distribu-

12 G. McCormack, A. Keay, S. Brown, J. Dahlgreen, Study on a new approach to business failure and insolvency, 2016, pp. 230-231.
13 Insolvency Act 1986, sec. 130(2).
14 Insolvency Act 1986, Schedule B1, para. 43.

tion amongst creditors and to support the replacement of a creditor's right to establish a claim by judgment in an action with a right to lodge a proof of debt."[15] A liquidation stay does not affect the right of a secured creditor to enforce security, as well as other real rights. This is based on the understanding that the purpose of liquidation is not rehabilitation but the disposal of the debtor's assets and the distribution of proceeds among creditors.[16] By contrast, administration imposes a statutory moratorium on the enforcement of most types of claims, including secured ones.[17] Therefore, no steps may be taken to enforce security over the debtor's property except with the consent of an administrator or court permission.[18] This promotes the preservation of the debtor's business as a going concern. Nevertheless, historically, administration in the UK has been associated with the end of the reorganisation prospects.[19]

The CIGA introduced a new, stand-alone moratorium procedure aimed at providing the debtor with a breathing space to explore its restructuring options free from creditor action.[20] Its scope is broadly similar to an administration stay, with some differences. When a company invokes a moratorium, it is entitled to a "payment holiday" for its pre-moratorium debt, which includes both (i) debts that were due before the moratorium, and (ii) debts that fall due during the moratorium but arose from obligations incurred before the moratorium.[21] Certain debts are excluded from the moratorium, such as the monitor's remuneration or expenses, amounts payable for goods or services supplied during the moratorium, rent for a period during the moratorium, and wages or salary arising from a contract of employment.[22] While the "payment holiday" in principle extends to both unsecured and secured creditors,[23] it does not apply to "debts […] arising under a contract or other instrument involving financial services."[24]

15 *Gardner v. Lemma Europe Insurance Company Ltd* [2016] EWCA Civ 484, at 2.

16 *Heis & Ors (Administrators of MF Global UK Ltd.) v. MF Global Inc.* [2012] EWHC 3068 (Ch), at 33.

17 Administration does not affect enforceability of a security interest under a financial collateral arrangement. See Regulation 8(1)(a), Financial Collateral Arrangements (No. 2) Regulations 2003.

18 Insolvency Act 1986, Schedule B1, para. 43.

19 S. Paterson, Corporate Reorganization Law and Forces of Change, OUP, 2020, p. 239.

20 Insolvency Act 1986, Part A1. Between 26 June 2020 and 30 June 2023, in England and Wales, 45 moratoriums were obtained. See Official Statistics. Monthly Insolvency Statistics, June 2023, released on 18 July 2023.

21 Insolvency Act 1986, Part A1, Ch. 4, s. A18(3).

22 Ibid.

23 In addition, a moratorium imposes a restriction on the enforcement of security over the debtor's property, subject to specified exceptions (e.g. financial collateral). See Insolvency Act 1986, Part A1, Ch. 4, s. A21(1)(s).

24 Insolvency Act 1986, Part A1, Ch. 4, s. A18(3).

This exclusion covers loan agreements.[25] Consequently, unless the lender consents to a payment holiday, the debtor must continue making payments under a loan agreement, regardless of whether the payment obligation arises before or after the start of the moratorium. This may reduce the attractiveness of the moratorium procedure in practice.[26]

As opposed to the above procedures, which in one way or another encompass a stay, such a stay is not prescribed by the Companies Act 2006. Neither schemes of arrangement (Part 26) nor restructuring plans (Part 26A) give the debtor a break. The absence of a stay leaves the company exposed to creditor actions during the period when the proposed restructuring is negotiated and implemented. This exposure is not insignificant, considering that it may take at least eight weeks between the proposal of a scheme and its sanctioning by the court.[27] In some cases, courts have recognised their jurisdiction to order a stay of proceedings initiated by a creditor against the debtor to recover debt, pending the implementation of a scheme of arrangement. This jurisdiction was based on the UK Civil Procedure Rules (CPR) and the court's case management powers.[28] Additionally, a scheme of arrangement or a restructuring plan could be accompanied by a freestanding moratorium (Part A1), which can support the negotiation of a scheme or a restructuring plan. Yet, as noted above, this moratorium does not apply to contracts involving financial services. Alternatively, a standstill agreement may be entered into with a selected group of creditors (e.g. financial creditors). A standstill agreement is a useful contractual solution, especially for situations where creditors are not numerous and have homogenous interests.

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25 Insolvency Act 1986, Schedule ZA2. See *Minor Hotel Group MEA DMCC v. Dymant & Anor* [2022] EWHC 340 (Ch), at 14, observing that the "exclusion of finance debts from the "payment holiday" effects of a moratorium is somewhat surprising: but is the clear meaning of the amended Act."

26 J. Payne, An Assessment of the UK Restructuring Moratorium, Lloyd's Maritime and Commercial Law Quarterly, 2021, p. 465, explaining that "for the moratorium to be fully effective the company will need to have the support of its lenders, and possibly enter into some form of waiver or standstill agreement with them."

27 J. Payne, Schemes of Arrangement: Theory, Structure and Operation, CUP, 2021, p. 239.

28 *BlueCrest Mercantile BV v. Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm). The court stated that the scheme of arrangement had a reasonable prospect of success, and relied on CPR, Rule 3.1(2)(f). Under this rule, the court has the power to "stay the whole or part of any proceedings or judgment either generally or until a specified date or event." *Sea Assets Ltd v. PT Garuda Indonesia*, 27 June 2001, unreported. Another case where the CPR were relied on to order a stay is *Riverside CREM 3 Ltd v Virgin Active Health Clubs Ltd* [2021] EWHC 746 (Ch), at 34, establishing that the "process under Part 26A should be permitted to proceed without being impeded by a judgment being entered or enforced."

The last procedure worth mentioning is a company voluntary arrangement (CVA),[29] due to its value as a debt restructuring mechanism.[30] If a CVA runs in parallel with a winding-up or administration, it benefits from the statutory moratorium. Besides, prior to the CIGA, the law allowed directors of "eligible companies" to take steps to obtain a moratorium if they intended to make a proposal for a CVA – a so called small company moratorium.[31] It was available to companies that satisfied certain criteria related to turnover, balance sheet, or the number of employees.[32] The small company moratorium regime was not widely used,[33] and was replaced by the CIGA with a standalone moratorium procedure, discussed above. Outside these special cases, entry into a CVA does not attract a moratorium. In the absence of a moratorium, a CVA can alter obligations and impose new payment terms, so that creditors would only be able to institute any action if these terms have not been complied with by the debtor.[34] However, any creditors not bound by the CVA do not have such restrictions and would, therefore, be able to institute any type of action based on their claims.

Describing corporate reorganisation toolbox in the UK and the USA, Paterson emphasises the striking difference between "relative weakness of available moratorium (or stay) protection in English corporate reorganization law when compared with the US."[35] The following section examines the scope and operation of an automatic stay under US bankruptcy law.

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29 Insolvency Act 1986, Part I.

30 See e.g. *Discovery (Northampton) Ltd v. Debenhams Retail Ltd* [2019] EWHC 2441 (Ch). Note, however, that a CVA does not bind preferential and secured creditors without their consent. Insolvency Act 1986, section 4.

31 Insolvency Act 1986, Schedule A1 (abolished by the CIGA).

32 Ibid. Section 382(3), Companies Act 2006. I. Fletcher, The Law of Insolvency, 5th edn, Sweet & Maxwell, 2017, paras. 15-054 to 15-059.

33 P. Walton, C. Umfreville and L. Jacobs, A snapshot of company voluntary arrangements: Success, failure and proposals for reform, International Insolvency Review, Vol. 29, 2020, p. 269.

34 On this point, it has been noted that a moratorium is "an almost universal feature of a concluded CVA, although its effect is confined to those bound by the CVA." K. van Zwieten, Goode on Principles of Corporate Insolvency Law, 5th edn, Sweet & Maxwell, 2018, para. 11-54. See also J. Payne, Schemes of Arrangement: Theory, Structure and Operation, OUP, 2014, p. 216, observing that "a CVA will only have this effect [a stay] if its terms so provide. Without such a term any creditor, even one bound by a CVA, is free to pursue his claims by action, whereas with such a term, creditors bound by the CVA are not free to pursue their claims, save for those creditors outside the CVA (e.g. the secured creditors)."

35 S. Paterson, Corporate Reorganization Law and Forces of Change, OUP, 2020, p. 239.

11.2.2 The USA: broad automatic and worldwide stay

The filing of a bankruptcy petition in the USA automatically opens the bankruptcy case and triggers a worldwide stay binding on the debtor's creditors, whether secured or unsecured. The stay is akin to a statutory injunction, as a result of which "[i]nstead of an uncontrolled self-help scramble for the debtor's assets, creditor claims must be dealt with in an orderly manner under the supervision and control of the bankruptcy court."[36] Actions carried out in violation of a stay – whether or not a party had knowledge of the bankruptcy filing – are deemed void *ab initio*,[37] and, when intentional, may be punishable as contempt of court.

The stay covers the commencement or continuation of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before a Chapter 11 case, or the recovery of a claim against the debtor that arose before the commencement of the case.[38] Importantly, a claim arises at the time when the obligation is incurred, and not when it is due.[39] Lawsuits based on post-petition claims are not stayed unless the debtor receives injunctive relief from the bankruptcy court. The stay precludes creditors from enforcing pre-petition judgments, perfecting or enforcing pre-petition liens, foreclosing on collateral, terminating executory contracts on account of pre-petition default (i.e. executory contracts are considered a form of property of the estate), setting-off pre-petition debts arising from different transactions, etc.[40] In sum, the automatic stay is extensive and normally remains in place for the whole duration of the bankruptcy procedure.[41]

There are myriad exceptions to the automatic stay. They include, inter alia, enforcement by a governmental unit of a "police and regulatory power", including protection of public health, safety and welfare,[42] commencement or continuation of a criminal action or proceeding against the debtor,[43] and the exercise of contractual rights under various financial contracts (e.g. repos, commodity contracts, forward contracts, securities contracts, swap

36 C.J. Tabb, Law of Bankruptcy, 4th edn, West Academic Publishing, 2016, p. 235.

37 A minority of courts holds view that acts taken in violation of the stay are voidable. See e.g. *In re Coho Res., Inc.*, 345 F.3d 338, 344 (5th Cir. 2003).

38 11 U.S. Code § 362(a)(1). For the broad definition of a "claim" see § 101(5).

39 Collier on Bankruptcy, 16th edn, 2022, Vol. 3, ¶ 362.03[3][a].

40 11 U.S. Code § 362(a)(2)-(8).

41 11 U.S. Code § 362(c)(2).

42 11 U.S. Code § 362(b)(4). Note that the police power exception in principle does not affect the stay applicable to the enforcement of a money judgment even if it is connected to the government's police and regulatory powers.

43 11 U.S. Code § 362(b)(1).

agreements).[44] As noted previously, parties to these contracts enjoy the privilege to the extent that they are not limited in exercising their right "to cause the liquidation, termination, or acceleration" of the contract by the prohibition of ipso facto clauses.

Unlike a liquidation stay in the UK or as further discussed below, a stay in Dutch bankruptcy and suspension of payments procedures, a stay under the US Bankruptcy Code binds secured creditors. In specific circumstances, a secured creditor can request relief from the stay. In fact, motions related to stay relief are one of the most common forms of litigation in bankruptcy procedures.[45] The law stipulates that:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
> (2) with respect to a stay of an act against property under subsection (a) of this section, if -
> (A) the debtor does not have an equity in such property; and
> (B) such property is not necessary to an effective reorganization;[46]

This provision aims to establish a balance between the interests of a debtor and unsecured creditors in a reorganisation process, on the one hand, and the interests of secured creditors and other property rights holders, on the other hand. If the value of the collateral is diminishing during a stay, the interests of a secured creditor are affected and require adequate protection. Conversely, the absence of any decline in the value of collateral might be regarded as a lack of impairment of the creditor's rights, indicating that these rights being adequately protected.

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44 11 U.S. Code § 362(b)(6), (7), (17), (27). A.J. Levitin, Business Bankruptcy: Financial Restructuring and Modern Commercial Markets, Wolters Kluwer, 2016, p. 266, noting that the "anti-forfeiture principle and the general policy of favoring reorganization are not limitations on financial contract creditors" and that their exemption from a stay "is essentially the ultra super-priority." Also, S.J. Lubben, Subsidizing Liquidity or Subsidizing Markets: Safe Harbors, Derivatives, and Finance, American Bankruptcy Law Journal, Vol. 91, 2017, p. 472, observing that "the bankruptcy court has no ability to stay the exercise of safe harbor rights or the commencement of closeout netting."

45 C.J. Tabb, Law of Bankruptcy, 4th edn, West Academic Publishing, 2016, p. 285.

46 11 U.S. Code § 362(d).

"Adequate protection" is a flexible concept that should be assessed against the facts and circumstances of each case.[47] The aim of guaranteeing adequate protection as a prerequisite for the continuation of an automatic stay is to ensure that a creditor receives the value for which he has bargained pre-bankruptcy.[48] This is derived from the property interest protections found in the Fifth Amendment to the US Constitution.[49] In practice, adequate protection comes in a variety of forms. It may take the form of cash payments (lump sum or, more commonly, periodic) offsetting depreciation of the property's value, as well as additional or replacement collateral. A secured creditor is entitled to the protection of the collateral value and not of the rights in a specific asset given as collateral.[50] Arguably, in many cases, a distressed debtor lacks the necessary liquidity and unencumbered assets to offer as collateral. This is why the third means of adequate protection becomes particularly important. Namely, adequate protection could consist of "granting such other relief […] as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property."[51]

The US Bankruptcy Code does not define "indubitable equivalent".[52] The phrase originated in the context of a plan cram-down, where it is used to refer to the "unquestionable value of a lender's secured interest in the collateral."[53] This "catch-all" phrase gives the courts significant flexibility and discretion to determine what protection is appropriate in a given situation. Some courts have found that adequate protection can be accomplished through: (i) the existence of an equity cushion shielding the interests of a

47 H. Rep. No. 595, 95th Cong., 1st Sess. 343-4 (1977), U.S.Code Cong. & Admin.News 1978, p. 5787. See also *In re Alyucan Interstate Corp.*, 12 B.R. 803 (Bankr. D.Utah 1981); *In re Bushee*, 319 B.R. 542, 551 (Bankr. E.D. Tenn. 2004), noting that the "determination of whether a creditor's interest is adequately protected is not an exact science nor does it involve a precise arithmetic computation. Rather, it is pragmatic and synthetic, requiring a court to balance all relevant factors in a particular case, including the value of the collateral, whether the collateral is likely to depreciate over time, the debtor's prospects for a successful reorganization and the debtor's performance under the plan. Other considerations may include the balancing of hardships between the parties and whether the creditor's property interest is being unduly jeopardized."

48 *In re DB Capital Holdings, LLC*, 454 B.R. 804, 816-17 (Bankr. D.Col. 2011); *In re O'Connor*, 808 F.2d 1393, 1396 (10th Cir.1987).

49 *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940). See, however, C.J. Tabb, The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors in Bankruptcy, University of Illinois Law Review, Vol. 2015, 2015, pp. 765-809, arguing that the Fifth Amendment is not relevant in considering the constitutional rights of secured creditors in bankruptcy.

50 *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940).

51 11 U.S. Code § 361.

52 The phrase "indubitable equivalent" has its genesis in the opinion of Judge Learned Hand, writing for the court in *In re Murel Holding Corporation*, 75 F.2d 941 (2nd Cir.1935). For the background of this phrase, see *In re Colrud*, 45 B.R. 169 (Bankr. D. Alaska 1984).

53 *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 310 (3d Cir. 2010).

secured creditor from loss due to a decrease in the property's value,[54] (ii) a third-party guarantee,[55] and (iii) the maintenance of insurance on a creditor's collateral or leased property, protecting the collateral against loss or depreciation.[56] Notably, granting administrative priority to a claim does not constitute adequate protection, as "such protection is too uncertain to be meaningful."[57]

The preceding paragraphs discussed relief from the automatic stay "for cause", such as due to the lack of adequate protection of an interest in property. If the equity cushion is found to be adequate or the debtor is able to provide an alternative means of adequate protection, relief from the stay can nevertheless be granted to a creditor, provided that the requirements of the second test of § 362(d) of the US Bankruptcy Code are met. Under this test, a stay shall be lifted if: (i) the debtor has no equity in the property of the bankruptcy estate, *and* (ii) this property is not necessary for an effective reorganisation.[58] Both requirements must be met. To satisfy the first requirement, the value of the property should not exceed the debts secured by all liens and other encumbrances on such property.[59] Valuation is determined case-by-case, taking into account the nature of the debtor's business, market conditions, the debtor's prospects for rehabilitation, and the type of collateral. If the debtor maintains equity in the property, a stay cannot be lifted under this provision. But even if the debtor lacks such equity, a stay relief will be denied if the debtor needs the property in question for a successful reorganisation. To satisfy this requirement, the debtor must show that the property is essential for an *effective* reorganisation that is in prospect.[60] This means that there must be "a reasonable possibility of a suc-

54 *In re Norton*, 347 B.R. 291, 298 (Bankr. E.D. Tenn. 2006); *In re Mellor*, 734 F.2d 1396, 1400 n. 2 (9th Cir. 1984); *In re Roane*, 14 B.R. 542 (E.D. Pa. 1981). The equity cushion of 20% or more is usually deemed to be sufficient by courts. An equity cushion of 0% to 11% has generally been held insufficient, and case law is divided on whether a cushion of 12% to 20% constitutes adequate protection. For a summary of case law, see *In re Big Dog II, LLC*, 602 B.R. 64 (Bankr. N.D.Fla. 2019).

55 *In re Harrow Leasing Corp.*, 35 B.R. 916 (Bankr. E.D.Pa. 1983); *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir. 1994), noting that the sufficiency of a guaranty would depend on the financial strength of the guarantor. However, *In re C.F. Simonin's Sons, Inc.*, 28 B.R. 707, 712 (Bankr. E.D.N.C. 1983), holding that "[e]ven if there was undisputable evidence of the creditworthiness of the guarantors, the chance to pursue a guarantor with its uncertainties and costs is not adequate protection."

56 *In re Powell*, 223 B.R. 225, 234 (Bankr. N.D. Ala. 1998), stating that "adequate protection may include providing proof of an enforceable insurance policy on the collateral and/or proof of proper maintenance of the property."

57 S. Rep. No. 95-595, 95th Cong., 2d Sess., at 54 (1978).

58 11 U.S. Code § 362(d)(2).

59 *In re Garsal Realty, Inc.*, 98 B.R. 140 (Bankr. N.D.N.Y. 1989); *Sutton v. Bank One, Texas, Nat'l Ass'n*, 904 F.2d 327 (5th Cir.1990).

60 *In re HSD Partners, LLC*, 451 B.R. 636, 638 (Bankr. S.D. Ga. 2011), noting that for property to be necessary to an effective reorganization, it must be "logically required for a reorganization which has a reasonable possibility of succeeding within a reasonable time."

cessful reorganization within a reasonable time"[61] (feasibility) and that the property in question is necessary for this reorganisation (necessity). If the relief from a stay is requested at the early stages of bankruptcy, the burden upon the debtor tends to be less stringent. As the case progresses, this burden becomes heavier.[62]

In sum, a stay on creditor actions under the US Bankruptcy Code is distinguishable from that available in the UK. Unlike the complex puzzle of procedures and tools found in the Insolvency Act 1986 and the Companies Act 2006, some of which do not provide for a stay, US Chapter 11 acts as a single gateway to corporate restructurings. It offers an automatic and extensive stay that precludes the commencement and continuation of proceedings aimed at recovery on a pre-petition claim, as well as collection and foreclosure actions of debtor's creditors, including secured ones. Nevertheless, it seeks to maintain a balance by granting secured creditors the right to request relief from an automatic stay. This contributes to the growing influence of secured creditors over firms in bankruptcy. The following section will show that Dutch law is even more protective of the interests of secured creditors.

11.2.3 The Netherlands: moratoriums and cooling-off periods

In the Netherlands, as in the UK and the USA, there is no statutory stay in an out-of-court workout. In this section, we discuss three relevant statutory procedures found in the Dutch Bankruptcy Act, namely: (i) suspension of payments (*surseance van betaling*); (ii) bankruptcy (*faillissement*); and (iii) WHOA scheme or plan (*onderhands akkoord*), introduced in section 3.3.3.

The suspension of payments provides for a stay or moratorium (*schorsing van executie*) that is effective from the day on which a suspension of payments is (provisionally) granted. As a result, the debtor cannot be forced to pay debts in respect of which the suspension is effective, and all executions initiated to recover such debts are suspended.[63] This applies not only to the payment of a sum of money but also includes, in line with Article 6:30 BW, every form of satisfaction in the broadest sense.[64] The stay applies to both pre-filing claims and claims arising from a legal relationship that already

61 *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988).

62 *Matter of Holly's, Inc.*, 140 B.R. 643 (Bankr. W.D. Mich. 1992); *In re Ashgrove Apartments of DeKalb County, Ltd.*, 121 B.R. 752 (Bankr. S.D. Ohio 1990); *In re Brian Wise Trucking, Inc.*, 386 B.R. 215 (Bankr. N.D. Ind. 2008).

63 Dutch Bankruptcy Act, Article 230(1).

64 HR 23 October 1981, *NJ* 1982/173, m.nt. B. Wachter (*Gemeente Heiloo/Orthopedagogisch Centrum Noord-Holland c.s.*); Rb. S'-Hertogenbosch 20 October 2010, *JOR* 2011/28, m.nt. W.J.M. van Andel, concerning an obligation to provide a bank guarantee.

existed at the time of the filing.[65] It is important to note that the stay is only effective against unsecured creditors and only lasts as long as the suspension remains in effect.[66] Thus, it does not bind creditors with priority.[67] Priority arises from a pledge, mortgage, privilege, or other grounds laid down in the law.[68] Insofar as a claim cannot be recovered from the goods on which the priority rests, such a claim is subject to a stay. Some authors have cited the fact that priority claims, especially secured claims, remain unaffected by the stay as one of the primary reasons why the suspension of payments is considered an inefficient reorganisation procedure, often acting as a gateway to bankruptcy.[69]

Dutch law grants the possibility to acquire protection against secured creditors. It states that upon the request of an interested party or *ex officio*, the court may declare a cooling-off period or *afkoelingsperiode*, during which any power to recover from the insolvency estate or to claim assets that are in the debtor's control, cannot be exercised except with the authorisation of the court or (if appointed) a supervisory judge (*rechter-commissaris*).[70] A cooling-off period can be granted for a period of up to two months, with a possible extension once again for a maximum of two months. This aligns with the objectives of the suspension of payments, as this procedure primarily aims at ensuring the continuity of the debtor's business. Yet the limited duration of a cooling-off period is based on the understanding that it constitutes a significant limitation of (secured) creditors' rights.[71] The court has the authority to restrict the application of a cooling-off period to certain creditors and attach specific conditions thereto.[72]

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65 Ibid. HR 19 April 2013, *NJ* 2013/291, m.nt. F.M.J. Verstijlen (*Koot Beheer/Tideman qq*); HR 23 March 2018, *NJ* 2018/290, m.nt. F.M.J. Verstijlen (*Credit Suisse Brazil (Bahamas)/Jongepier qq*). This interpretation also follows from Article 233 Fw.

66 In principle, the provisional suspension of payments (and its stay) is first granted for a period of two months, with one extension of up to two more months. Within this period, creditors must be consulted by the court to reassess the validity of the suspension of payments. See Article 215 Fw and the National procedural regulations in bankruptcy cases (*Landelijk procesreglement verzoekschriftprocedures insolventiezaken rechtbanken*), 1 July 2023, at 2.3.1. When a court grants a final suspension of payments, this is for a maximum of 1,5 years. Before the expiration of this period, the debtor can request an extension for a maximum of 1,5 years once or several times. The court will reassess every time whether the debtor still qualifies for the suspension of payments. Article 223(2) Fw.

67 Dutch Bankruptcy Act, Article 232.

68 Dutch Civil Code, Article 3:278(1).

69 R.J. van Galen, De surseance als echte reorganisatieprocedure, TvI 2015/23, p. 151-152; R.D. Vriesendorp, Insolventierecht, 2e druk, Deventer: Wolters Kluwer, 2021.

70 Dutch Bankruptcy Act, Article 241(a)(1). Note that the exception is made for *boedelschuldeisers* – creditors with post-commencement or estate claims. HR 19 April 2013, ECLI:NL:HR:2013:BY6108, *NJ* 2013/291, m.nt. F.M.J. Verstijlen (*Koot Beheer/Tideman*). Also, B. Wessels, Vereffening van de boedel (Wessels Insolventierecht nr. VII), 5e druk, Deventer: Wolters Kluwer 2021/7075.

71 Rb. Amsterdam 4 December 2013, ECLI:NL:RBAMS:2013:8883, *RI* 2014/46, *JOR* 2014/340.

72 Dutch Bankruptcy Act, Article 241(a)(2).

The regulation of a stay in the bankruptcy procedure is similar to that applicable in the suspension of payments. Dutch law provides for a stay of enforcement actions brought by individual creditors upon the commencement of a bankruptcy case.[73] Consequently, individual enforcement actions come to an end as soon as a bankruptcy order is pronounced. The basic rule is that creditors can only assert their claims by submitting them for verification, and that these claims cannot be enforced outside bankruptcy.[74] This follows from the "fixation principle" (*fixatiebeginsel*), pursuant to which a legal position of all parties involved becomes "fixed" or "immutable" as a result of bankruptcy. The fixation principle offers creditors protection against the reduction in the assets of the estate available for distribution in bankruptcy and against an increase in liabilities of the debtor, which could result in reduced bankruptcy payouts.[75] However, as in the case of the suspension of payments, a bankruptcy stay does not apply to secured creditors, who can enforce security rights and sell the pledged or mortgaged asset as if there were no bankruptcy.[76] This "separatist" position of secured creditors dates back to the onset of the Dutch Bankruptcy Act of 1893 (in force since 1896) and is intended to promote lending.[77]

As in the suspension of payment, in a bankruptcy, a cooling-off period might be imposed by a supervisory judge, either at the request of an interested party or *ex officio*.[78] The aim of this cooling-off period is to enable an IP to investigate which assets belong to the estate and which assets should be preserved for the estate, for example, with a view to the continuation of the debtor and/or a going concern sale of its business.[79] The maximum duration of a cooling-off period is four months, consisting of an initial two

73 Dutch Bankruptcy Act, Article 33.

74 Dutch Bankruptcy Act, Articles 26 and 110.

75 HR 28 January 2022, ECLI:NL:HR:2022:80, r.o. 3.2.1, *NJ* 2022/50; HR 18 December 1987, *NJ* 1988/340, m.nt. G (*OAR/ABN*).

76 Dutch Bankruptcy Act, Article 57. F.M.J. Verstijlen, F.M. van Nieuwstadt, Stelling: De separatistenpositie voor zekerheidsgerechtigden moet worden afgeschaft, TvI 2005/14; G.D. Hoekstra, De positie van de pandhouder in het faillissementsrecht (diss. Groningen), Den Haag: Boom Juridische Uitgevers 2007, p. 132-135.

77 E.F. Verheul, GS Faillissementswet, commentaar op art. 57 Fw. For criticism of creditor separatism, see S.C.J.J. Kortmann, Het faillissement, een paradijs voor banken (afscheidsrede Nijmegen), Nijmegen: Radboud Universiteit 2017.

78 Dutch Bankruptcy Act, Article 63(a). If the applicant, whether a debtor or a creditor, requests a cooling-off period at the moment of the bankruptcy filing, the cooling-off period is ordered by the court. See M.J. van der Aa, De afkoelingsperiode in faillissement (diss. RUG), Kluwer 2007; B. Wessels, Gevolgen van faillietverklaring (1) Wessels Insolventierecht nr. II, 5e druk, Deventer: Wolters Kluwer, 2019/2596ff.

79 Parl. Gesch. Wijziging Rv. e.a.w., Inv. 3, 5 en 6, p. 414; S.C.J.J. Kortmann, N.E.D. Faber (red.), Geschiedenis van de Faillissementswet. Wetswijzigingen, Zwolle: W.E.J. Tjeenk Willink 1995, p. 203-204.

months plus a possible extension of up to two months, which includes the cooling-off granted in the suspension of payments.[80]

Lastly, a cooling-off period can also accompany negotiations of a WHOA scheme. The Dutch Bankruptcy Act stipulates that a debtor or the restructuring expert, if appointed, may request the court to order a cooling-off period if the debtor has submitted a declaration regarding the preparation of a WHOA plan and has proposed a plan or undertakes to propose such a plan within two months.[81] Hence, in a WHOA procedure, there is no automatic stay. Yet if a cooling-off period is granted by the court, during such a period (maximum four months with a possibility of extension up to eight months in total): (i) third parties cannot enforce their rights against the debtor's assets without leave from the court; (ii) the court can lift attachments at the request of the debtor; and (iii) the review of requests to open bankruptcy or suspension of payments proceedings is suspended.[82] When the court has announced a general cooling-off period, the suspension of individual enforcement rights in principle applies to all creditors. However, if the cooling-off order is addressed to a specific group of creditors (which is possible under the Dutch Bankruptcy Act), only those creditors cannot take recourse against the debtor's assets.

The cooling-off period can be ordered if there is *prima facie* evidence that it is necessary for the debtor to continue its business during the preparation and negotiation of a WHOA plan. Moreover, at the time when the cooling-off period is announced, it should be reasonable to assume that the interests of the debtor's joint creditors are served by this measure and that it would not materially prejudice the interests of third parties.[83] The cooling-off period is in the interest of creditors if the preserved going concern value and potential payouts exceed the liquidation value. As for material prejudice, insofar as collateral is established on the debtor's property, no such prejudice exists if the collateral value remains stable during the cooling-off period.[84] When considering the imposition of a cooling-off period, courts conduct a balancing exercise, taking into account potential payouts that could be expected without the cooling-off period (i.e. in bankruptcy), the viability

80 Rb. Amsterdam 4 December 2013, *JOR* 2014/340, ruling that a cooling-off period in the suspension of payments is deducted from the term of a cooling-off period in the subsequent bankruptcy.
81 Dutch Bankruptcy Act, Article 376(1). Rb. Overijssel 16 July 2021, ECLI:NL:RBOVE:2021:2907, r.o. 3.6, *RI* 2021/82.
82 Dutch Bankruptcy Act, Article 376(2).
83 Dutch Bankruptcy Act, Article 376(4). Rb. Den Haag 15 January 2021, ECLI:NL:RBDHA:2021:198, r.o. 4.6ff, *RI* 2021/25, *JOR* 2021/77.
84 Rb. Oost-Brabant, 25 February 2022, ECLI:NL:RBOBR:2022:916, r.o. 4.9-4.11.

of the debtor, and the likelihood of successfully adopting a WHOA plan.[85] Available evidence shows that courts are likely to grant cooling-off requests (>80% approval rate), whether to support the continuity of the debtor's business during restructuring or to facilitate an orderly liquidation of a non-viable company.[86] If the statutory requirements for a cooling-off period are no longer satisfied, the court must lift the stay, either at the request of the debtor, a third party, or on its own initiative.[87]

11.2.4 Summary of national law approaches

This section highlights the diversity of rules regarding a stay across different jurisdictions. This relates to:

- *Availability of a stay*, protecting the debtor against creditors' claims. For example, a stay is a feature of English administration and liquidation proceedings, Dutch bankruptcy and suspension of payments, and US bankruptcy proceedings. At the same time, certain procedures available to financially distressed debtors (e.g. English schemes of arrangement, CVAs and restructuring plans) do not come with a statutory stay.
- *Operation of a stay*. A stay may be automatic and connected to the opening of a proceeding. This is the case in US Chapter 11, English administration and Dutch bankruptcy and suspension of payments proceedings. By contrast, the Dutch cooling-off period available in a WHOA scheme can only be granted upon the filing by the debtor or a restructuring expert, if appointed. In the UK, procedures which do not trigger a stay (as mentioned above) could be supplemented by a stand-alone moratorium.
- *Duration of a stay*. Another aspect characterising the operation of a stay relates to its length. While in some cases, the duration of a stay coincides with the duration of the procedure (e.g. English administration, US Chapter 11, Dutch bankruptcy), in other instances, the maximum length of a stay is prescribed by law (e.g. English moratorium, cooling-off periods in a WHOA scheme, bankruptcy and suspension of payments procedures of the Dutch Bankruptcy Act).
- *Scope of a stay*. The scope addresses the types of creditors and/or contracts that fall under a stay. A category of creditors who often enjoy priority and

85 Rb. Rotterdam 8 March 2021, *JOR* 2021/247, m.nt. Mennens; Rb. Oost-Brabant, 17 September 2021, r.o. 3.7., *RI* 2022/6, noting that the necessity of a cooling-off period is substantiated by the fact that the WHOA plan, if successfully implemented, would lead to a better result for creditors than the alternative of bankruptcy.

86 R.D. Vriesendorp et al., One year and 100 court decisions later: Dutch restructuring scheme in practice, 23 March 2022. The bill implementing the Restructuring Directive in the Netherlands explicitly authorizes granting a stay to support an orderly winding-up of the debtor company.

87 Dutch Bankruptcy Act, Article 376(10).

may be carved out from a stay are secured creditors. For example, an English liquidation stay and a stay triggered by Dutch bankruptcy and suspension of payments filings do not affect secured creditors. These creditors can proceed with enforcing their security rights. Conversely, a US bankruptcy stay, English administration stay, and Dutch cooling-off period cover or may cover enforcement rights of secured creditors. In addition to creditors protected by *in rem* security rights, exemptions from a stay could apply to parties in financial contracts. For example, the new UK moratorium procedure does not affect contracts "involving financial services", including a loan agreement, while the automatic Chapter 11 stay does not affect contractual rights of counterparties to financial contracts (e.g. swap and repurchase agreements).

This diversity of regulatory frameworks concerning a stay can be explained by the differences in the applicable procedures and their intended purposes (e.g. liquidation-oriented v. rescue oriented, pre-insolvency v. insolvency, court-supervised v. out-of-court procedures). However, these important factors alone cannot fully explain the variations in the design and qualities of a stay across jurisdictions. In this regard, Wessels and Madaus convincingly argue that "a 'stay' serves as a tool to balance, on the one hand, the interests involved with restructuring a viable business, and, on the other hand, the interests of certainty, predictability and stability of contractual positions."[88] This balancing exercise naturally results in different solutions, influenced by the normative commitment to freedom of contract (traditionally strong in the UK) and the organisational and institutional environment in which legal rules are developed and applied. Paterson notes that in the UK, until the early 2000s, large corporate reorganisations operated outside the court system, and since the 2000s, most reorganisations have been confined to financial liabilities.[89] In contrast, the US Bankruptcy Code was adopted with a range of tools to effectuate full operational and financial restructurings, as they were prevailing at that time. Whether these tools, including an automatic stay – the US bankruptcy law's core institution, preserve their importance in view of the changing corporate structures and a move towards the service economy is questioned by some scholars.[90]

88 B. Wessels and S. Madaus, Rescue of Business in Europe: A European Law Institute Instrument, OUP, 2020, p. 195.

89 S. Paterson, Corporate Reorganization Law and Forces of Change, OUP, 2020, p. 2.

90 M.J. Roe, Three Ages of Bankruptcy, Harvard Law Review, Vol. 7, 2017, pp. 187-219; J. Armour, A. Hsu, A. Walters, The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK, Review of Law & Economics, Vol. 8, 2012, pp. 101-135, noting that the UK market practice of all-encompassing security interest with a single bank gave it effective control over the debtor's assets, and that English law effectively allowed a private liquidation via administrative receivership, making a stay unnecessary. This contrasted significantly with the US bankruptcy law, which is underpinned by the idea of a bargain between the debtor's creditors, supported by a wide-ranging stay.

In terms of operation, an automatic stay maximises legal certainty, yet it may be less justified from the perspective of proportionality when compared to a tailored and court-ordered stay.[91] After all, a stay on creditor actions hinders creditors' enforcement rights.[92] This is why the duration of a stay could be limited, and its extension might be based on the showing that it continues to serve its purpose.[93] Regarding the scope, a far-reaching stay binding secured creditors facilitates equal treatment of creditors. It may also contribute to the preservation of the debtor's estate value and the development of a restructuring plan. However, the need to ensure adequate protection of the property rights of secured creditors and the value of security justifies lifting a stay in certain circumstances.[94] Given the main focus of this book, the following paragraphs address the group insolvency context.

11.3 Extension of an Enforcement Stay to Group Entities

11.3.1 A stay and group insolvency

One of the key features of recent restructuring reforms is that they provide for the possibility to stay individual enforcement actions, giving the debtor a breathing space, protecting its going concern value, and improving its position in negotiations with creditors. However, the success of restructuring or insolvency proceedings often depends on the preservation of financial and operational links within the group of companies (section 4.4.1.). The threat of enforcement against the debtor's affiliates (co-debtors, guarantors, collateral providers) may significantly weaken the debtor's bargaining power. One way to secure a stay for group companies is to initiate separate proceedings with respect to each of them. Arguably, this could drive up transaction costs and substantially complicate coordinated group

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91 R. Bork, Rescuing Companies in England and Germany, OUP, 2012, paras. 10.04-10.07.

92 L. Stanghellini et al. (eds), Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law, Wolters Kluwer, 2018, p. 117, observing that "a stay directly impinges on creditors' legal and contractual rights, limiting them" and arguing that "the longer the stay, the higher the confidence should be in the fact that the stay is maximising value for the creditors."

93 See e.g. Article 376(5) Fw. See Rb. Den Haag 3 September 2021, r.o. 4.4., *RI* 2021/91 (*ADO Den Haag*), extending the cooling-off period for a Dutch association football club and referring to the progress made in reaching a plan (extensive consultation with stakeholders, completed class formation, establishment of a data room with important documents, etc.).

94 Restructuring Directive, Article 6(9)(c); Article 376(10) Fw; 11 U.S. Code § 362(d). On lifting of the administration stay, see *Bristol Airport Plc v. Powdrill* [1990] Ch 744; *Re Atlantic Computer Systems plc (No 1)* [1992] Ch 505; *Mackay v. Kaupthing Singer* [2013] EWHC 2533 (Ch). In the UK, the underlying principle is that an administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise, save to the extent that this may be unavoidable and even then, this will usually be acceptable only to a very limited extent.

restructuring. The question is whether, in order to preserve the overall value of the group enterprise, a stay can (and should) be extended to the debtor's group members and, if the answer is positive, under what conditions.

In essence, the rationale behind an intra-group stay extension overlaps with that of a third-party release discussed in the previous chapter. Both tools aim to preserve enterprise value, ensure a coordinated response to financial distress, and give the debtor additional leverage in negotiations with creditors. However, there is a distinction between them. While a third-party release entails group debt deleveraging or debt adjustment, the extension of a stay does not affect the existence and extent of the liability of third parties. It only gives these third parties a temporary break or interim protection to allow the adoption of a group solution, whatever this may be (e.g. group business sale as a going concern, restructuring of group members' obligations). In this sense, the extension of a stay is less intrusive compared to a third-party release. The extended stay can be used on its own or combined with a third-party release. Without a stay, the release may be less efficient since, until the confirmation of a plan with a third-party release, a guaranteed creditor can enforce its claim against the guarantor.

UNCITRAL considers the extension of a stay to the debtor's affiliates to be beneficial, especially in cases where there is "interrelatedness of the business of the group".[95] This is likely to be the case in a situation when financing is arranged on a group basis. The Restructuring Directive does not clearly authorise such an extension.[96] Yet it acknowledges that if provided for under national law, it should be possible for a stay to apply for the benefit of third parties, including guarantors and collateral givers.[97] Ultimately, the Directive does not offer much guidance on the nature of third parties (e.g. whether they should be group entities or not) or the conditions under which a stay can be extended to shield third parties.

Under English law, there is no express statutory authority to extend the benefits of a stay to third parties. As a result, a group guarantor seeking to benefit from a stay will need to initiate its own procedure, such as administration or moratorium.[98] The statutory language does not support the extension of a stay to non-debtors. For example, the Insolvency Act 1986 specifies

95 UNCITRAL Legislative Guide, Part three, 2010, Ch. II, para. 40.

96 Restructuring Directive, Articles 6 and 7.

97 Restructuring Directive, Recital 32.

98 The UK is not the only jurisdiction that adheres to this approach. In *State Bank of India vs. V. Ramakrishnan and Ors.* (14.08.2018 - SC), the Supreme Court of India, interpreting section 14 of the Insolvency and Bankruptcy Code 2016, clarified that the insolvency moratorium could not be extended to the debtor's personal guarantor.

that the administration stay applies to a company in administration,[99] and the liquidation stay applies to a company against which a winding-up order has been made.[100] Similarly, in the case of a stand-alone moratorium, the law stipulates that it is available to an eligible company upon filing or lodging documents at the court.[101] Hence, the availability of a stay is linked to the opening or filing for the opening of an insolvency procedure by a specific entity. Since the UK does not seem to offer the possibility to extent a stay to third parties, the next paragraphs will examine jurisdictions that either allow extended stays through case law (the USA) or directly approve them in the statute (the Netherlands).

11.3.2 The USA: limited possibility of a stay extension

As a general rule, the automatic stay does not extend to third parties.[102] This position is based on the language of the US Bankruptcy Code, which states that the bankruptcy petition "operates as a stay, applicable to all entities, of […] any act to collect, assess, or recover a claim *against the debtor* that arose before the commencement of the case under this title"[103] (emphasis added). Thus, by its terms, the US Bankruptcy Code's stay applies only to debtors, property of the debtor, or property of the estate, and does not cover proceedings against non-debtor parties, such as group guarantors or co-debtors.

Nevertheless, the power of a court to enjoin actions against third parties has been recognised in exceptional circumstances where these actions interfere improperly with the purposes of bankruptcy law or where "there is such an identity between the debtor and the third-party defendant that […] a judgment against the third-party defendant will in effect be a judgment or finding against the debtor."[104] The extension of a stay has also been allowed when a claim against a third party is considered to have "an immediate adverse economic consequence for the debtor's estate"[105] and when protection by a stay is believed to be "essential to the debtor's

99 Insolvency Act 1986, Schedule B1, para. 43.
100 Insolvency Act 1986, sec. 130(2).
101 Insolvency Act 1986, Part A1.
102 *Credit Alliance Corp. v. Williams*, 851 F.2d 119, 121 (4th Circ. 1988); *In re S.I Acquisition, Inc.*, 817 F.2d 1142, 1147 (5th Cir.1987); *In re Supermercado Gamboa*, 68 B.R. 230, 232 (Bankr.D.P.R.1986); *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir.2003).
103 11 U.S. Code § 362(a)(6).
104 *Reliant Energy Services, Inc. v. Enron Can. Corp.*, 349 F.3d 816, 825 (5th Cir. 2003).
105 *Ritchie Capital Management, L.L.C. v. Jeffries*, 653 F.3d 755, 763 (8th Cir. 2011), citing *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287-88 (2d Cir.2003).

efforts of reorganization."[106] For example, in *Caesars*, the court issued an injunction to prevent indenture trustees and holders of notes issued by the debtor from pursuing suits against the debtor's corporate parent, acting as a guarantor.[107] It accepted that the debtor's reorganisation depended heavily on the parent's financial contribution, which would have been undermined by guarantee litigation. According to the court, the extension of a stay furthered public interest in a successful reorganisation since "reorganizations preserve value for creditors and ultimately the public."[108]

Two observations can be made regarding the approach of US courts to the extension of a bankruptcy stay to group affiliates.

First, the legal basis for extending a stay to non-debtor parties is not clear. Some courts base their decisions on §105(a) of the US Bankruptcy Code and the equitable power to grant an injunction to enjoin third-party litigation.[109] According to §105(a), the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[110] However, it is pointed out that §105(a) does not constitute an independent source of subject matter jurisdiction or a repository of substantive rights. Instead, it allows the court to issue an order when "necessary or appropriate" to carry out the provisions of the Bankruptcy Code, for example, §362(a).[111] Other courts rely exclusively on §362(a) when extending the stay, even though this section does not explicitly provide for such an extension.[112] Thus, there is no certainty whether the extension is based on §105(a) alone, or in conjunction with §362(a), or solely on §362(a).

106 *In re Union Trust Philadelphia, LLC*, 460 B.R. 644, 658 (E.D. Pa. 2011); *In re Hart*, 530 B.R. 293, 308 (Bankr. E.D. Pa. 2015); *In re Saxby's Coffee Worldwide, LLC*, 440 B.R. 369, 386 (Bankr. E.D. Pa. 2009).

107 *In re Caesars Entertainment Operating Co., Inc*., 561 B.R. 441 (Bankr. N.D. Ill. 2016).

108 Ibid., at 453. *In re Integrated Health Services, Inc*., 281 B.R. 231, 239 (Bankr. D.Del. 2002), confirming that "[p]romoting a successful reorganization is one of the most important public interests."

109 *In re Calpine Corp*., 365 B.R. 401, 409 (S.D.N.Y. 2007). In this case, the court first noted that the request by the debtor for an injunction under the US Bankruptcy Code, authorising the court to issue any order, is treated as a request for a preliminary injunction. It stated that the following factors should be evaluated: (1) whether there is a likelihood of successful reorganisation; (2) whether there is imminent irreparable harm to the estate in the absence of an injunction (whether there is imminent, substantial and irreparable threat to the reorganisation process); (3) whether the balance of harms tips in favour of the moving party; and (4) whether the public interest weighs in favour of an injunction.

110 11 U.S. Code § 105(a).

111 *In re Bora Bora, Inc*., 424 B.R. 17, 23 (Bankr. D.P.R. 2010); *In re Continental Airlines*, 203 F.3d 203, 211 (3d Cir. 2000), observing that section 105(a) does not "create substantive rights that would otherwise be unavailable under the Bankruptcy Code."

112 See e.g. *In re QA3 Fin. Corp*., 2011 WL 2678591 (Bankr. D.Neb. 2011).

Second, it has been observed that the case law on the extension of a bankruptcy stay is rather "confusing" when it comes to the appropriate standard or test.[113] What is clear is that the possibility to enjoin litigation against third parties is limited and depends on the facts of each case. Normally, the party seeking the extension should meet the test applicable in injunction actions, including, among other things, a reasonable likelihood of successful reorganisation and the possibility that the debtor would suffer some cognizable prejudice or irreparable injury as a result of the creditor's lawsuit against the third party. The latter can be demonstrated if the third party has a right of indemnity against the debtor.[114] While the general approach remains restrictive, US courts have been willing to extend a stay or grant an injunction to enjoin actions against the debtor's affiliates where it was necessary for the successful restructuring. This is particularly the case when there is a strong showing that the debtor's reorganisation would be severely hampered if the lawsuit against a non-debtor group entity were to proceed. Courts retain broad discretion in determining whether a bankruptcy stay can be extended. The need for a group-wide extension is somewhat reduced due to the prevailing practice of simultaneous bankruptcy filings by all or the majority of entities comprising the group.[115] As a consequence, each group entity secures a separate automatic stay.

While the extension of an enforcement stay in the USA is not group-specific – it can benefit debtors' directors, insurers, and even third parties who allegedly participated in a Ponzi scheme[116] – the Netherlands has implemented reforms that aim to create efficient tools to address financial distress within

113 S. Maza, Enjoying Third Party Litigation under §362, Norton Journal of Bankruptcy Law & Practice, Vol. 26, 2017 (online version).

114 *First Nat'l Bank v. Kanawha Trace Dev. Partners*, 87 B.R. 892 (Bankr. E.D.Va. 1988); *In re Lomas Fin. Corp.*, 117 B.R. 64 (S.D.N.Y. 1990); *Rivera-Olivera v. Antares Oil Services*, 482 B.R. 44 (D.P.R. 2012), extending a stay to third parties and noting that the process established by the bankruptcy court allows third parties to submit proofs of claim for indemnification or contribution against the debtors, and because certain third parties in this case have submitted or will submit such claims against the debtors, a judgment against non-debtor third parties may constitute a judgment against the debtors, which, in turn, could negatively impact the liquidation process.

115 This practice is facilitated by the "affiliate-filing rule" of 28 U.S. Code § 1408. This rule allows a company to file a bankruptcy petition in a district where its affiliate is the debtor in a pending title 11 case. Under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, if a joint petition or two or more petitions are pending in the same court by or against a debtor and an affiliate, the court may order a joint administration of the estates. These rules promote the reorganisation of an entire business enterprise in a centralised manner. Another reason for group-wide filings may be the general unavailability of such a remedy as a third-party release in the USA (see section 10.2.3.).

116 *In re Madoff*, 848 F.Supp.2d 469 (S.D.N.Y. 2012), granting a §105(a) injunction and barring the bankrupt investment firm's customers from bringing class action lawsuits against third parties with whom the trustee was on the brink of settling pending fraudulent transfer action lawsuits.

enterprise groups. Among other legal tools inspired by US Chapter 11 and English schemes of arrangement, Dutch bankruptcy law permits the extension of a cooling-off period to group affiliates as part of a WHOA scheme.[117]

11.3.3 The Netherlands: extension of a stay to group entities

The previous chapter showed that Dutch law responds to the group environment and permits a WHOA plan to modify creditors' rights against legal entities that form one enterprise group with the debtor – a third-party release.[118] The rights of creditors towards debtor's affiliates must intend to satisfy or to secure the performance of the debtor's obligations (e.g. cross-guarantees, provision of collateral) or the obligations for which such legal entities are liable with the debtor (e.g. co-debtorship). Among other requirements, the law states that a group entity subject to a release must be in a situation where it may reasonably be assumed that it will be unable to continue paying its debts. Hence, there has to be a threat of insolvency that justifies a court's intervention. Other requirements include the consent of the to-be-released group entity, the court's jurisdiction over it, and compliance with substantive requirements, including the best-interest-of-creditors test.[119]

If a WHOA plan seeks to amend creditor's rights against a non-debtor group entity, the debtor can request the court to extend a cooling-off period to that group entity.[120] This extension is premised on the proposed amendment of creditors' rights against that group entity through the plan. This is why, to be eligible for an extended stay, the relevant group entity must meet the conditions set for a third-party release, such as being in a state of financial distress.

Without extending a cooling-off period to group guarantors, in some cases, it may be too late to implement a third-party release. By the time of plan confirmation, the assets of such group guarantors might have been dismembered, and their business could be destroyed. In a recent case involving a group engaged in international e-commerce business, the court approved the extension of a cooling-off period to the debtors' corporate shareholders.

117 Legal systems that include rules for the extension of an enforcement stay in a group scenario are Germany and Singapore. In Germany, StaRUG, §49(3) permits the extension of a stay of actions arising from intra-group liability arrangements to protect group guarantors and collateral providers. Similarly, in Singapore, according to IRDA section 65(1), the court may, on the application of a company that is a subsidiary, a holding company or an ultimate holding company (related company) of the subject company (debtor), restrain the commencement or continuation of any proceedings or enforcement actions, including enforcement of security rights, against a related company.

118 Dutch Bankruptcy Act, Article 372(1).

119 Dutch Bankruptcy Act, Article 384(3).

120 Dutch Bankruptcy Act, Article 372(3), together with Article 376(1).

The court observed that: (i) the debtors – sister companies, and their shareholders were organisationally and financially interconnected and formed an economic unit within the meaning of Article 2:24b BW (see section 2.3.); (ii) the shareholders were jointly and severally liable for the debts owed to financiers by the debtors; (iii) the successful restructuring required an amendment of creditors' rights against the guarantors-shareholders, pursuant to the proposed third-party releases.[121] The court linked the necessity to extend the cooling-off period with the operational and financial interdependence of group entities and the proposed restructuring through third-party releases.

The extension of a cooling-off period to the debtor's affiliates shall not materially prejudice the interests of a guaranteed creditor. This requirement can be inferred from the general provisions applicable to a cooling-off period.[122] If during the extended cooling-off period the financial position of a group guarantor significantly deteriorates, or if such entity is involved in value-destroying activities, it should be possible to lift the extended stay. The same rule applies if the value of third-party collateral diminishes during the cooling-off period. This rule is necessary for maintaining a balance between the interests of all parties involved and bears resemblance to the adequate protection requirement of the US Bankruptcy Code.

11.4 Conclusions and Suggestions

11.4.1 Overview of main findings

A stay on individual enforcement actions is a defining feature in most insolvency law regimes. It serves to preserve the value of the insolvency estate, facilitates its efficient administration, and promotes the restructuring of viable enterprises. In this chapter, we have demonstrated that laws differ when it comes to the availability, operation (automatic vs. non-automatic), duration (limited in time vs. applying throughout the entire procedure), and scope (general vs. targeted) of a stay.

Among the laws studied in this book, the automatic stay provided by the US Bankruptcy Code stands out as the most powerful, with an extremely broad scope. In contrast, Dutch bankruptcy and suspension of payments

121 Rb. Oost-Brabant 25 February 2022, ECLI:NL:RBOBR:2022:916, r.o. 4.13; Rb. Amsterdam 15 February 2021, ECLI:NL:RBAMS:2021:6516, granting the request to order a cooling-off period and extend it to the debtor's affiliates and observing that: (i) a temporary stay is necessary for the continuation of the debtor's business; (ii) the plan offers higher payouts to the creditors compared to bankruptcy; and (iii) the bankruptcy is unavoidable without a cooling-off period and the plan.

122 Dutch Bankruptcy Act, Article 376(4)(b).

procedures do not affect secured creditors unless the court orders a temporary cooling-off period. Without it, secured creditors can enforce their security rights as if there were no bankruptcy. UK law offers a patchwork of different rules and procedures that can be used either on a stand-alone basis or in combination with other procedures. Another area where national laws diverge is whether a stay can be extended to third parties, including debtor's group members, who are not themselves subject to the relevant insolvency or restructuring procedure but are linked to the debtor through various cross-liability arrangements (e.g. intra-group guarantees). The review of national legal systems reveals a variety of attitudes and criteria for extending a stay to benefit debtor's affiliates, which are summarised below.

Figure 13. Extension of a stay to third parties

	USA	**Netherlands**
Is the extension of a stay to third parties available?	Only available in exceptional circumstances	Explicitly available in WHOA schemes
Who can request the extension of a stay?	Debtor or a third party	Debtor or restructuring expert, if appointed
Who can benefit from the extension of a stay?	Broad category of persons (e.g. group entities, officers, insurance companies)	Group entities that have secured the obligation of the debtor (guarantor, collateral provider) or are liable with the debtor (co-debtors)
What are the requirements for the extension of a stay?	Different considerations, inter alia, (i) identity between the debtor and a third party; (ii) a claim against a third party has an immediate adverse effect on the debtor's estate; (iii) a stay is essential to debtor's reorganisation efforts	(i) A WHOA plan entails the amendment of creditors' rights against the related (group) company, (ii) this group company is in financial distress, (iii) it gives its consent, and (iv) the court has jurisdiction over it. The extension of a cooling-off period must not materially prejudice the creditor's interests

We argue that given the group economic reality, extending a protective shield of an insolvency stay to debtor's affiliates may contribute to achieving efficient restructuring of a group enterprise. It can help preserve group synergies, maintain operational continuity of group members, and strengthen the debtor's bargaining power. While English law does not seem to permit such an extension, US and Dutch laws are more flexible and, to one extent or another, allow courts to enjoin actions against third parties.

In the US, bankruptcy courts tend to enjoin actions against non-debtor parties in rare and exceptional circumstances. The exact configuration of these circumstances remains somewhat ambiguous, dependent on specific facts, and may vary from one court district to another. Moreover, the legal basis for the extension of a stay is disputable. However, courts often grant injunctions that benefit group companies if it is deemed essential for the debtor's reorganisation or if failing to do so could result in immediate adverse economic consequences for the debtor's estate.

Finally, Dutch law clearly permits the extension of a stay (a cooling-off period to be more precise) to debtor's affiliates within the WHOA framework. It places a cooling-off period in the context of a WHOA restructuring plan, which aims to amend creditors' rights against related group members (i.e. third-party release) and targets debtor's guarantors, collateral providers or co-debtors. Hence, Dutch law makes the extension of a stay conditional on a particular type of contractual relationship, the amendment of creditors' rights against a third party in a WHOA scheme, and the financial position of such a third party. Essentially, the extension of a stay plays an ancillary role, supporting the effectiveness of a (future) restructuring plan containing a third-party release.

11.4.2 Suggestions on the extension of a stay to group entities

Based on an overview of national law approaches and in pursuit of a balanced solution, the following suggestions can be made regarding the extension of a stay in the group context.

First, the extension of a stay on individual enforcement actions to non-debtor group entities may be useful as a tool promoting the preservation and maximisation of the estate value, and specifically of the group enterprise value (see section 4.4.1.). However, the extension of a stay should not be automatic. Non-debtor group entities are not themselves subject to insolvency proceedings and, therefore, should not automatically benefit from insolvency law protections, including the insolvency stay. Granting an automatic extension of a stay would go too far in limiting creditors' rights and unduly restrict the protective function of intercompany guarantees and other forms of cross-liability arrangements. Instead, any extension of a stay should be carried out following notice and a court hearing, ensuring that affected creditors have an opportunity to be heard and participate in the decision-making process. This approach aligns with the notion of (procedural) fairness (section 5.2.).

Second, the case for the extension of an enforcement stay to non-debtor group companies is stronger in the following scenarios:

- The first scenario is when an enterprise group is integrated, and the non-debtor group company is or may become financially distressed or insolvent as a result of creditor's enforcement action. In this case, the extension of a stay to protect another group company can be justified if that company plays an integral and necessary role in the anchor debtor's restructuring or future operations.

- The second scenario is when the debtor's restructuring plan envisages a third-party release. If a creditor of the to-be-released group company (e.g. group guarantor, co-debtor or collateral provider) is allowed to pursue its claim against this company and collect on its claim before a release is confirmed and takes effect, the third-party release could become futile. Paraphrasing the well-known legal maxim "Justice delayed is justice denied", we can say, "An extension of a stay delayed is a third-party release denied."

By contrast, the extension of an enforcement stay appears to be less justified where:

- The creditor's action against a non-debtor group company is unlikely to jeopardise or frustrate a restructuring attempt of the anchor debtor, and such action does not disrupt the debtor's business during negotiations with creditors. This may be the case where the group is not integrated (i.e. decentralised groups), and the businesses of the debtor and its group affiliates are not aligned, dependent, or synergetic (section 2.4). In such instances, the extension of a stay is simply not necessary. The necessity requirement is an integral part of the proportionality analysis (see section 5.4.3.). If the extension of a stay is not necessary for successful restructuring of the debtor, it is hardly proportional. However, if the debtor's affiliate needs insolvency law protection, it can secure it by filing its own insolvency petition.
- A debtor's group affiliate is solvent and liquid, and the creditor's action does not undermine its solvency or liquidity. In a case like this, there is unlikely to be a reason for financial relief and insolvency protection. In general, limiting contractual rights exercised against solvent entities is more likely to be disproportionate. However, in rare circumstances, a stay covering a solvent group guarantor, co-debtor or collateral provider could be proportionate, particularly when it aims to protect an asset or assets (e.g. production equipment) central to the business of the entire group or the anchor debtor.[123] Nevertheless, any extension of an insolvency stay to solvent companies should be subject to strict scrutiny by the court.

Third, the extension of a stay should in principle be available to achieve the goal of business preservation, regardless of whether the business remains

123 UNCITRAL Legislative Guide, Part three, 2010, Ch. II, para. 41. However, UNICTRAL recognises that ordering insolvency-related relief with respect to a solvent group member may conflict with the protection of property rights and raise constitutional law questions. See ibid., para. 42.

within current legal entities or is sold and transferred to new entities. This means that the extension of an enforcement stay should be used to preserve and ensure the continuation of economically viable businesses whose going concern value exceeds their liquidation value. If the debtor's assets are to be liquidated on a piecemeal basis, the extension of a stay may be unnecessary or ill-suited to facilitate the preservation of value.

However, there are instances where the non-viability of an anchor debtor, a third party (e.g. group guarantor), or the entire group enterprise should not preclude the extension of a stay. Such an extension may be needed to facilitate an orderly liquidation of a non-viable business, as exemplified in the Nortel Networks case (section 1.1.2.). In that case, a unified approach to the sale of the group's assets resulted in USD 7.3 billion – an amount that could not have been attained if the assets were sold on an entity-by-entity basis.[124] In cases like this, the extension of a stay makes it possible to preserve the pool of assets spread across different group entities. Consequently, these assets can be bundled and sold together to secure the highest purchase price possible. One might simply need a group-wide stay, even if on a temporary basis, to preserve the global pool of assets which are more valuable if sold together.

Thus, there are situations in which the extended stay is value-maintaining or value-increasing, even if the underlying business is not viable and the debtors are to be liquidated with their assets sold to the highest bidder on the market. Notably, this approach differs from the one adopted in the chapter on third-party releases (section 10.3.2.), where we pointed out that such releases should be reserved for cases seeking going concern value preservation and not asset liquidation.

Fourth, and finally, a restraint on enforcement actions against third parties should not unfairly prejudice the rights of an affected creditor (e.g. guaranteed creditor, creditor benefiting from a third party collateral) or cause substantial detriment to it. This detriment may occur if the value of collateral, held by the debtor's affiliate, significantly depreciates during a stay or if the guaranteed creditor's claim is made worse-off, potentially leading to uncompensated loss. This can happen in a situation where the debtor or a group guarantor engage in opportunistic value-destroying behaviour or misconduct, such as the strategic stripping of assets from the guarantor or co-debtor out of the creditor's reach and to the detriment of a guaranteed creditor. In cases like this, it should be possible to terminate the extension of a stay. This suggestion is inspired by the approach adopted in the

124 J.L. Westbrook, Corporate Formalism in a Global Economy, in J.P. Sarra and B. Romaine (eds), Annual Review of Insolvency Law, Toronto: Carswell, 2015, observing that the sale of Nortel's assets "realized far more than the parties had expected, no doubt because of the global nature of the sale."

Netherlands for lifting a cooling-off period if the interests of a creditor are materially prejudiced (section 11.3.3.), and the US bankruptcy rule for lifting an automatic stay "for cause, including the lack of adequate protection" (section 11.2.2.). The option to lift an extended stay for valid reasons ensures proportionality in the application of the discussed legal tool. It helps strike a balance between the principles of estate value preservation and the protection of trust and legitimate expectations.