# Chapter 22C. The Netherlands

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Chapter 22C

# The Netherlands

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## I. INTRODUCTION

### § 22C:1 Secured transactions regime

This chapter sets out the main rules of Netherlands law with re-

spect to the creation and enforcement of security interests, both outside and in insolvency proceedings (the "Netherlands secured transactions regime" or "Netherlands security law"). These rules will be compared with those of the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions (the "Guide").

Generally, it can be said that the secured transactions regime has proven itself quite flexible in accommodating the needs of practice with respect to the creation and enforcement of security interests. The Supreme Court (*Hoge Raad*) plays an important role in this respect with hallmark cases regarding, amongst others, the prohibition of transfers for security purposes only as provided in section 3:84(3) of the Civil Code (*Burgerlijk Wetboek*) and (the interpretation of) non-assignability clauses.

### § 22C:2 Terminology

The words used in this chapter have the same meaning as such those listed in the glossary provided for in the Guide, except for the terms "security right" and "pledge." The term "security right" is restricted in this chapter to encumbrances *in rem*, such as a right of pledge and a right of mortgage.

It does not include transfers for security purposes. The term "security interest" comprises both security rights and transfers for security purposes. Secondly, in this chapter, the term "right of pledge" is not confined to a security right over movable property, but also extends to a security right over intangible assets (such as receivables). Finally, the term "movable property" is used instead of "tangible assets" to denote every form of corporeal movable asset.

## II. KEY OBJECTIVES OF SECURED TRANSACTIONS REGIME

### § 22C:3 In general

The Guide provides for 11 key objectives of secured transactions.[1] Below the key objectives of the Guide are compared with the key objectives of the secured transactions regime.

Although there is no official statement, preamble, or the like setting out the purposes of secured transactions regime, its main objectives may be derived from the Civil Code itself, its legislative history as well as from case law of the Netherlands Supreme Court.

### § 22C:4 Key objectives of secured transactions regime

Generally, it can be said that the secured transactions regime

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**[Section 22C:3]**

[1]Recommendation 1.

pursues the same objectives as the Guide. However, in one respect, the objectives of secured transactions regime deviate from the Guide. Key objective (vi) of the Guide—Recommendation 1(f)—provides that a secured transactions regime should provide for registration of a notice in a general security rights register to enhance certainty and transparency.

Netherlands law only partially provides for filing systems (for example where it concerns real estate). There is no registry available for inspection by interested third parties for security over tangible assets and receivables. Although the introduction of such register was heavily debated in the course of realization of the new Civil Code in 1992, in the end, the legislator decided not to introduce such publicity requirement for security interests in movable property and receivables.

However, the absence of a public register for security interests does not mean that it is not possible to create non-possessory or undisclosed rights of pledge. In accordance with key objective (v), under the secured transactions regime, a non-possessory right of pledge may be created over movable property, such as equipment and inventory, and an undisclosed right of pledge may be created over receivables. The formalities that must be complied with to create non-possessory or undisclosed rights of pledge are discussed in further detail below.

It is open to discussion whether key objective (ix) of the Guide—Recommendation 1(i), which may be summarized as the recognition of party autonomy in security law, can be regarded as one of the underlying principles of the secured transactions regime. On the one hand, the secured transactions regime is characterized by the *numerus clausus* principle. This means that, under Netherlands security law, it is not possible to create proprietary interests except as provided for by law. The property rights recognized under Netherlands security law thus form a closed system. As a result, there is, in principle, no room for party autonomy in creating security interests.

On the other hand, the security law and the Supreme Court seem quite flexible in tailoring security interests in order to accommodate practices needs (see, text, below). Moreover, where it concerns financial collateral arrangements, i.e., security rights in or a transfer of title of cash, securities or credit claims, parties are allowed more flexibility to tailor the arrangements to meet their precise needs.

Parties to a financial collateral arrangement may, for example, agree that the pledgee has the right to rehypothecate (i.e., transfer for security purposes or repledge) the collateral.[1] Although it can be argued that, as a general starting point, there is no room for party autonomy under the secured transactions regime, it has proven itself quite flexible and several exceptions to this rule may be found in the Civil Code itself and in case law of the Supreme Court.

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**[Section 22C:4]**

[1]Civil Code, section 7:53.

## III. BASIC APPROACHES TO SECURITY RIGHTS

### § 22C:5 Source and nature of secured transactions regime

*Source of Security Law*

As all continental European legal systems, Netherlands law finds part of its roots in Roman law and may therefore, be labelled as a Civil Law system (as opposed to the Common Law systems). Consequently, statutes are the main source of Netherlands (secured transactions) law.

Netherlands civil law was codified for the first time in the *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* of 1809, which was in force until 1811 when it was replaced by the French Civil Code. From 1811 to 1838, the French Civil Code was the primary source of civil law in The Netherlands. In 1838, the Civil Code, heavily influenced by its French predecessor, came into force. The 1838 Civil Code survived many attempts at law reform. In 1992, it was replaced by the current Civil Code.

The secured transactions regime is primarily provided in the Civil Code, which entered into force on January 1, 1992. Other statutes, such as the Bankruptcy Act (*Faillissementswet*) and the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), are relevant for the enforcement of security interests as well. Another important source of law generally and of the secured transactions regime in particular is case law. Groundbreaking decisions of the Supreme Court relate to the creation of a right of pledge over receivables, in particular the "principle of identifiablity" (see text, below) and transfer of title for security purposes (the *Sogelease* decision).

*Nature of Security Law*

As stated above, property law, which includes security law, is of a mandatory nature (*dwingend recht*). Exceptions to this rule must be explicitly provided for in the relevant statute, such as in section 3:251(1) of the Civil Code (relating to the enforcement of a pledge) and sections 7:53 and 7:54 of the Civil Code (relating to financial collateral arrangements). In creating and enforcing security interests, parties are bound by the rules as provided in the Civil Code, the Bankruptcy Act and the Code of Civil Procedure.

### § 22C:6 Instruments traditionally designed for security rights

The type of security rights *in rem* that may be created under Netherlands law depends on the type of asset that is provided as security. Netherlands law distinguishes between tangible assets (*zaken*) and intangible assets (*vermogensrechten*). In practice, receivables (*vorderingsrechten*) are the most important example of intangible assets. Tangible assets may be divided in movable assets (*roerende zaken*) and immovable assets (*onroerende zaken*).

The Civil Code recognizes two types of security rights *in rem*, these being the right of pledge (*pandrecht*) and the right of mortgage (*hypotheekrecht*). There are two types of pledge on movable property. The first is the possessory right of pledge (*vuistpandrecht*). An essential feature of this type of pledge is that the property must be brought under the control (*macht*) of the pledgee or a third party acting on its behalf. As a corollary thereof, the pledgee has a lien (*retentierecht*), which means that it can retain the property until its claim is satisfied. The second type of pledge on movable property is the non-possessory right of pledge (*vuistloos pandrecht*), whereby the property remains under the pledgor's control.

There are two types of pledge of receivables. The first is a disclosed right of pledge (*openbaar pandrecht*), whereby the (third party) debtor of the receivable is notified of the pledge. The second is an undisclosed right of pledge (*stil pandrecht*), whereby no such notification is made. In addition, subject to certain limitations discussed below, security transfer or security assignment is used in practice to provide security, both on movable property and on intangibles.

A right of mortgage may be created over assets subject to registration (*registergoederen*). Assets that are subject to registration are immovable property and certain ships and aircraft. Although certain intellectual property rights may be recorded in a register, these assets do not qualify under Netherlands law as "assets subject to registration."

Shares in a Netherlands private limited-liability company (*besloten vennootschap*) take a special position. Such shares are always registered shares (*aandelen op naam*) and are subject to special provisions concerning transfer and pledge. A Netherlands public limited company (*naamloze vennootschap*) may issue either registered shares or bearer shares (*aandelen aan toonder*).

The transfer and pledge of registered shares in a Netherlands public limited company also are subject to special provisions. Bearer shares are transferred and pledged in the same way as movable property is transferred and pledges as will be set out below.

## § 22C:7 Characteristics of secured transactions regime and security rights; right in rem, limited right, accessory right

**Right In Rem and Right In Personam.** Under the Civil Code, a right in an asset may either be *in rem* (*goederenrechtelijk recht*) or *in personam* (*persoonlijk recht*). Rights *in personam* are mainly contractual in nature and have what is called a "relative effect": they can only be invoked against one or more specific parties, such as the contractual counterparty. Rights *in rem*, such as the right of pledge and the right of mortgage, can be invoked against all other parties, *i.e.* have third party effect, and are therefore, referred to as "absolute

rights" (*absolute rechten*). Both the right of pledge and the right of mortgage are absolute rights.

**Limited Rights.** The right of pledge and the right of mortgage are limited rights. Limited rights are rights that are derived from a more comprehensive right *in rem*, such as the right of ownership, and "encumber" such right *in rem*.[1]

**Accessory Rights.** A right of pledge and a right of mortgage pass by operation of law to the transferee if and when the secured claim is transferred[2] and cease to exist if and when the secured claim is discharged.[3] This is referred to as the "accessory nature" of a right of pledge and a right of mortgage.

If the mortgage right is vested to secure both present and future claims, it depends on the interpretation of the mortgage deed whether a transfer of the secured claim entails a passing of the mortgage right to the transferee.[4]

*Principle of Identifiability (Bepaalbaarheidsvereiste)*

It is a general principle of Netherlands property law that the assets to be transferred or encumbered, e.g., by way of a pledge or mortgage, must be sufficiently identifiable at the moment that such asset is transferred or encumbered.[5]

With regard to a right of pledge over receivables, the Supreme Court held in a landmark judgment that this requirement is met if, on the basis of objective data, it is possible to determine at the time the right of pledge is created, or in any event at the time it is enforced, which receivables have been pledged.[6]

According to a decision of the Supreme Court, the identifiability of the object of a transfer or a pledge should be distinguished from the question of whether the parties actually intended to transfer or pledge a particular asset. The latter is a matter of interpretation and is not exclusively dependent on the wording of the deed, but also on the meaning that the parties could reasonably give to the relevant provisions under the circumstances and what they could reasonably expect from each other with respect thereto.[7]

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**[Section 22C:7]**

[1]Civil Code, section 3:8.

[2]Civil Code, section 3:82.

[3]Civil Code, section 3:7.

[4]HR 16 September 1988, ECLI:NL:HR:1988:AD0420, *NJ* 1989/10 (*Onderdrecht/FGH & PHP*).

[5]Civil Code, section 3:84(2) in conjunction with 3:228.

[6]HR 20 September 2002, ECLI:NL:HR:2002:AE7842, *NJ* 2004/182 (*Mulder q.q/Rabobank*).

[7]HR 3 April 2020, ECLI:NL:HR:2020:590, *NJ* 2020/152.

 

*Numerus Clausus or Principle of Closed System of In Rem Rights*

Another general principle of secured transactions regime is the *numerus clausus*-principle or the principle of the closed system of *in rem* rights (*gesloten stelsel van goederenrechtelijke rechten*).

It means that the number of *in rem* rights is limited and parties are not allowed to modify the rights *in rem* provided under the law or to create rights *in rem* of their own. The rights *in rem* are primarily provided for in the Civil Code.

*Summary Foreclosure; Separatist*

If the security provider defaults, the secured creditor may sell the assets provided as security and may recover its claim from the proceeds. This is referred to as the right to summary foreclosure (*recht van parate executie*). The secured creditor does not require a court order or any other form of authorization, even in the event of the security provider's insolvency and even if its claim enjoys a lower priority than other claims.

If the security provider is declared bankrupt, the secured creditor is a so-called "separatist" in insolvency proceedings. It may, upon default, sell the pledged assets as if there were no insolvency proceedings and satisfy its claims from the proceeds, with priority over other creditors, subject to the obligation to surrender any excess proceeds of the sale of the assets provided as security to the trustee in bankruptcy (*curator*).[8]

*Priority*

The order of priority (*voorrang*) among various pledges or various mortgages on the same asset is, in principle, determined by the moment they were created, the general rule being that the earlier pledge or mortgage prevails.

This rule also is referred to as the "first in time, first in right" rule (*prior tempore potior iure*). There are a number of exceptions to the rule. These exceptions are discussed below.

## § 22C:8 Use of transfer of title for security purposes

*Transfer of Title to Creditor*

As opposed to the current Civil Code, the 1838 Code did not provide for non-possessory or undisclosed security rights in movable property or receivables. In practice, this was problematic as it was not possible to provide security without the movable property having to be brought under the control of the security taker or without notice having to be given to the debtor of the receivable.

In 1929, following the example set by the German Supreme Court

[8]Bankruptcy Act, section 57(1).

(*Bundesgerichtshof*), the Supreme Court recognized the transfer of title, referred to as "fiduciary transfer" or "fiduciary assignment," as a valid way to provide security. With the introduction of the Civil Code in 1992, non-possessory and undisclosed security rights were introduced and fiduciary transfers were prohibited. The prohibition to transfer an asset for security purposes only is provided in section 3:84(3) of the Civil Code. It provides that a legal act whose purpose is to transfer an asset for security purposes only (*overdracht tot zekerheid*), is invalid.

However, as a result of the judgement of the Supreme Court in the *Sogelease* case,[1] certain qualifications of the prohibition stated in section 3:84(3) of the Civil Code seem to have become necessary. The Supreme Court interprets the concept of "a transfer for security purposes" as "granting the transferee a mere right of enforcement in the event of the transferor's default" (*overdracht ten titel van verhaal*). An agreement falling within the scope of the prohibition is one which, in the event of a breach, limits the transferee's rights to selling the assets transferred and applying the proceeds to cover its damage resulting from the breach and which, at the same time, obliges the transferee to return the excess sale proceeds to the transferor.

In entering such agreement, the parties are, in fact, attempting to accomplish the same result as they would achieve with a non-possessory or undisclosed right of pledge, but without the required formalities. Such arrangements are prohibited by section 3:84(3) of the Civil Code. However, section 3:84(3) of the Civil Code does not stand in the way of an agreement which purports to be an "actual transfer" (*werkelijke overdracht*), i.e., one by which title passes to the transferee without restriction, even if the purpose of the agreement was in fact to provide security. Consequently, it must be determined on a case by case basis whether a transfer of title arrangement is allowed under section 3:84(3) of the Civil Code.[2]

By virtue of section 7:55 of the Civil Code, transfers under a title transfer financial collateral arrangement are excluded from the scope of section 3:84(3) of the Civil Code. Therefore, although such a transfer might qualify as "a transfer for security purposes only" (as described above) it will not be affected by section 3:84(3) of the Civil Code and will take effect in accordance with its terms.

In conclusion: although the Civil Code prohibits a transfer of title for security purposes only, it follows from the Supreme Court's case law that this prohibition should be interpreted narrowly on a case-by-case basis. Moreover, the prohibition provided in section 3:84(3) of the

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**[Section 22C:8]**

[1]HR 19 May 1995, ECLI:NL:HR:1995:ZC1735, *NJ* 1996/119.

[2]HR 18 November 2005, ECLI:NL:HR:2005:AT8241, *NJ* 2006/151 (*BTL/Van Summeren*).

Civil Code is not applicable to financial collateral arrangements. Finally, the Civil Code does not contain any provision regarding the enforcement of such security interests, and there is no guidance from the Supreme Court in this respect. It is up to the parties to agree whether the collateral taker may take title to the collateral in satisfaction of its claim or whether it, although it is the owner of the assets, must recover its claim from the proceeds of an enforcement sale and return any excess.

*Retention of Title by Creditor*

Under Netherlands law, retention of title (*eigendomsvoorbehoud*) by a creditor is provided for in section 3:92 of the Civil Code. Pursuant to that provision, the seller (i.e., the creditor) remains the legal owner of the assets that it delivers to the buyer (i.e., the debtor) until the buyer pays the purchase price in full. If the buyer fails to pay the purchase price or if the buyer is declared bankrupt, the seller has, as legal owner of the assets, the right to reclaim the assets from the buyer (or from the bankruptcy trustee, if the buyer is declared bankrupt). In a recent decision, the Supreme Court held that, upon delivery of the asset to the buyer, the buyer obtains a conditional right of ownership, which conditional right of ownership is capable of being transferred and pledged.[3]

If the buyer and the seller have agreed to a title retention clause and the assets subject thereto are incorporated into new products, the legal ownership of the seller ceases to exist. Moreover, if the assets of the seller are commingled with assets of the same kind of another owner, so that it cannot be determined which assets belong to the seller (e.g., if the buyer stores coal belonging to the seller in a warehouse on the same stockpile as its own coal), the seller may not reclaim the assets from the buyer as it cannot prove which assets (i.e., what coal) belongs to it.[4]

This is referred to under Netherlands law as commingling (*oneigenlijke vermenging*). The latter approach does not seem to be in line with Recommendation 22 of the Guide, which provides that security interests created in movable property before they are commingled in a mass or product should continue in the mass or product.

## § 22C:9 Uniform comprehensive security right

It is not possible under Netherlands law to create a security inter-

[3]HR 3 June 2016, ECLI:NL:HR:2016:1049, NJ 2006/290 (Rabo/Reuser).

[4]HR 12 January 1968, ECLI:NL:HR:1968:AC2286, *NJ* 1968/274 (*Teixeira de Mattos*). In this landmark decision, the Supreme Court held that, by depositing bearer securities which are not registered specifically by number in the depositor's name, the depositor loses his ownership interest in the securities and, in the event that the depository institution becomes bankrupt, ranks as an unsecured creditor with a claim against the depository institution's bankruptcy estate.

est over a company's entire business (an "all-asset security right"). Consequently, if a party wishes to take full security over a company's business, various types of security interests are combined to accomplish this effect, for example, a pledge over the inventory, stock, and receivables and a mortgage over the company's real estate.

## IV. CREATION OF SECURITY RIGHTS

### § 22C:10 In general

Both the transfer (for security purposes) of, and the creation of a right of pledge or right of mortgage over, assets require the performance of certain formalities, pursuant to a valid legal cause (*geldige titel*), by a person who has the power to dispose of the asset (*beschikkingsbevoegdheid*). The legal cause will generally be embodied in the security agreement, i.e., the agreement obliging the collateral giver to provide security. In general, the owner of an asset has the power to dispose over that asset. If the owner of an asset is declared bankrupt, it loses its right to dispose over its assets (section 23 of the Bankruptcy Act). In such event, the bankruptcy trustee acquires the right to dispose over the assets of the insolvent company.

If the three requirements described above (application of the appropriate formalities, valid legal cause, and power to dispose) are met, a transfer, right of pledge or right of mortgage is validly created and enforceable against the security provider and a third party. In other words, Netherlands law does not distinguish between the creation of a security right and third-party effectiveness. If the security interest is validly created, it is enforceable against third parties. The Guide, however, prefers an approach where the security right is effective only against the security provider, and an additional act, such as registration or providing possession of the asset to the secured creditor, is required to make the security right effective as against third parties.[1] As explained above, this is not the position taken under Netherlands law.

### § 22C:11 Formalities for creating security interests

*In General*

The formal requirements that must be fulfilled depend on the type asset that is provided as security (a right of pledge is the appropriate instrument to vest security on movable property, whereas a right of mortgage is the appropriate instrument to vest security on real estate) and, where it concerns a right of pledge, the type of pledge that is envisaged by the parties (a traditional possessory or disclosed right of pledge versus a non-possessory or undisclosed right of pledge).

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**[Section 22C:10]**

[1]See, Part II "Creation of security right (effectiveness as between the parties)," A. General remarks, 1. Introduction, at pp. 75 and 76 of the Guide.

*Pledges over Tangibles*

The only formal requirement for creating a possessory right of pledge over movable property is the delivery of control (*macht*) to the pledgee or a third party on its behalf.[1] "Control" in relation to tangibles requires that the pledgor physically delivers the assets to the pledgee (or a third party on its behalf). In particular, it is not required to register the right of pledge in a register as recommended by the Guide.[2]

A non-possessory pledge over movable property, on the other hand, is created by the execution of a "deed," without "control" over the asset having to be provided to the pledgee.[3] In this connection, we mean by "deed" an instrument which can either be a "notarial deed," i.e., a deed executed before a civil law notary (*authentieke akte*), or a private deed (*onderhandse akte*).

Where the deed is in the form of a private instrument, the pledge arises upon the registration of this private instrument with the Inland Revenue Registration Department (*Belastingdienst*). Such registration is a constitutive requirement for the creation of the pledge. The register kept by the Inland Revenue Registration Department is not a public record of security interests as it cannot be searched by interested parties.[4] The only aim of "registration" is to obtain a fixed date of the private deed.[5]

*Pledge over Receivables*

Receivables cannot be physically delivered to the security taker since there is no physical presence of these assets. In relation to receivables, a disclosed right of pledge (*openbaar pandrecht*) requires a deed (as described above) and notice to the security provider's debtor. Both the security provider and the security taker can notify the third party debtor of the right of pledge.[6]

An undisclosed right of pledge over receivables is created by the execution of a notarial deed or a private deed without notice being given to the debtor. Where the deed is in the form of a private instrument, it must be registered with the Inland Revenue Registration

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**[Section 22C:11]**

[1]Civil Code, section 3:236(1).

[2]Recommendation 32.

[3]Civil Code, section 3:237(1).

[4]Registration Act 1970 (*Registratiewet 1970*), section 10. Certain exceptions apply. For example, a bankruptcy trustee may search the register kept by the Inland Revenue Registration Department.

[5]Van Zeben, Du Pon, and Olthof, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 3. Vermogensrecht in het algemeen*, 1981, at pp. 727 and 728; Reehuis and Slob, *Invoering Boeken 3, 5 en 6. Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 3. Vermogensrecht in het algemeen*, 1990, at p. 1329.

[6]Civil Code, section 3:236(2), read in connection with section 3:94(3).

Department. Such registration is a constitutive requirement for the creation of the pledge. As set out above, registration with the Inland Revenue Registration Department is not a public filing intended to give third parties notice of the right of pledge. The only aim of "registration" is to obtain a fixed date of the private deed.

A disclosed right of pledge entails that the debtor of the pledge receivable is notified of the creation of such security right. Following such notification, the debtor can discharge its obligation only by making payments to the pledgee.[7] Credit balances on bank accounts are usually pledged to the bank by means of a disclosed right of pledge.

Under the general banking conditions (*algemene bankvoorwaarden*), used by virtually all banks in The Netherlands, a disclosed right of pledge in favor of the bank is created over the bank accounts held with that bank and a right of pledge over those bank accounts in favor of a third party is prohibited without the bank's prior consent.

When an undisclosed right of pledge is created over receivables, the third party debtor is not notified of such security right. As it is not aware of the existence of the right of pledge, payments to the pledgor discharge the third party debtor of its obligation towards the pledgor. From the point of view of the pledgee, the consequence of notification is that it obtains the right to demand payment and to collect the relevant receivable, while the pledgor loses these rights.

As notification prevents the debtor from making payment to the pledgor, the pledgee obtains "control" over a receivable by notifying the third party debtor of a right of pledge. We note that, when a disclosed right of pledge is created, the pledgee may give permission to the pledgor to demand payment and collect the pledged receivables.[8] In that event, the pledgor and the pledgee generally agree that this permission is revoked when the pledgor defaults.

*Financial Collateral Arrangements*

A special regime applies to the creation of a right of pledge over or the transfer of title of cash (i.e., rights to payment of funds credited to a bank account), securities and credit claims,[9] i.e., financial collateral arrangements.

This regime only applies to arrangements entered into between professional financial market parties or between a professional financial market party and a non-consumer. Financial collateral arrangements entered into by a consumer (e.g., a right of pledge over a bank account provided by a consumer to the account bank) fall outside the scope of this regime.

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[7] Civil Code, section 3:246(1).

[8] Civil Code, section 3:246(4).

[9] Credit claims are claims arising out of an agreement under which a credit institution grants credit in the form of a loan. Civil Code, section 7:51(f).

The rules in respect of financial collateral arrangements are provided in section 7:51–7:55 of the Civil Code and form the implementation of the Collateral Directive (Directive 2002/47/EC). The Collateral Directive prohibits on the one hand that the creation of a financial collateral arrangement is made dependent on the performance of any formal act. On the other hand, the Collateral Directive requires financial collateral to be "delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf."[10]

The legislator has taken the view that the rules for creating a disclosed right of pledge over and transferring cash and credit claims as provided in the Civil Code suffice to meet the "possession or control" requirement for creating a right of pledge over and transfer of cash and the rules as provided in the Securities Giro Administration and Transfer Act (*Wet giraal effectenverkeer*) meet the "possession or control" requirement in respect of book-entry securities.

However, views in legal literature differ as to the question whether the "possession or control"-requirement is met when a disclosed right of pledge is created and the pledgor is allowed to demand payment and collect the pledged receivables until the pledgor defaults. Until recently, neither the European Court of Justice (ECJ), nor a Netherlands Court had provided guidance on the way in which this requirement should be interpreted.

However, on 10 November 2016, the Court of Justice of the European Union rendered a judgment on the interpretation of the requirement of possession or control.[11] It follows from this judgment that a right of pledge for the benefit of a bank (the collateral taker) on cash deposited by a depositor (the collateral provider) in an account with that bank can be enforced notwithstanding the commencement of insolvency proceedings in respect of the depositor, only if:

1. The cash was deposited in the account in question before the commencement of those proceedings or those monies were deposited on the day of commencement;
2. In respect of those monies deposited on the day of commencement, the bank has proved that it was not aware, nor should have been aware, that those proceedings had commenced; and
3. The depositor, as account holder, was prevented from disposing of any cash deposited in the account after it had been deposited in that account.

A Netherlands court should, in principle interpret the local law provisions on financial collateral arrangements in accordance with this

[10]Collateral Directive, articles 1(5) and 3(2).

[11]European Court of Justice, 10 November 2016, C-156/1, ECLI:EU:C:2016:851 (*Private Equity Insurance Group/Swedbank*).

judgment. The foregoing is likely to extend equally to collateral in the form of securities and analogously to collateral in the form of credit claims, each within the meaning of the Collateral Directive, as implemented in Netherlands law, as well as to any such securities-collateral that is administered in an account of the collateral provider with a party other than the collateral taker. For the avoidance of doubt, the conditions referred to under items 1 and 2, above, already follow from Netherlands insolvency law in respect of financial collateral arrangements within the meaning of the Collateral Directive.

The condition under item 3, above, however, follows from an interpretation given by the Court to the formality of "possession" or "control", for which no uniform interpretation was yet available. This formality will have to be fulfilled in order for a pledge over the relevant collateral to qualify as a security financial collateral arrangement. In light of the opinion of European Court of Justice Advocate General Szpunar of 21 July 2016,[12] it might be argued that it follows from the judgment that the requirement of possession or control merely requires that the collateral taker should have the contractual right to prevent the collateral provider from disposing over the collateral.

However, it cannot be excluded, and the wording of the judgment seems to support this view, that the requirement of possession or control should be interpreted so as to entail that the collateral provider is deprived of the right to dispose over the collateral entirely, both legally and as a matter of fact.

*Right of Mortgage*

A right of mortgage is created by the execution of a deed before a civil law notary, followed by the filing of a certified copy of such deed in the public register maintained by the Land Registry Office (*Kadaster*). Before the deed is executed, the notary is obliged to investigate whether the party creating the right of mortgage has the power of disposal over the assets subject to registration and whether any mortgages (or other limited rights) are vested therein. This is done by reviewing the relevant party's "chain of title" and by checking the Land Register.

The Land Register may be searched by third parties. It provides a high degree of certainty as to the ownership and quality of title to the relevant immovable property. However, registration in the public registers of a person as owner does not provide a guarantee under Netherlands law that the respective person is actually the owner. In addition, lease agreements and other facts that relate exclusively to rights *in personam* with respect to immovable property cannot be entered into the public registers, neither does the Land Registry register beneficial ownership and therefore leases and beneficial ownership do not appear on the excerpts from the Land Registry.

[12]ECLI:EU:C:2016:586.

*Transfer of Title for Security Purposes*

Netherlands law allows for the transfer of title for security purposes if the transfer can be qualified as an "actual" transfer (see text, above). The formalities to transfer title of movable property consist of the delivery of possession to the transferee.[13]

The formalities to transfer receivables for security purposes are identical to the formalities that are required to be performed to create a valid right of pledge over receivables, i.e., execution of a deed and notification of the transfer of such receivable to the debtor thereof or execution of a notarial deed or execution of a private deed followed by registration of the private instrument with the Inland Revenue Registration Department.[14]

## § 22C:12 Creating right of pledge over after-acquired property

Future movable property also can be pledged, provided that it is sufficiently identified. This entails that the formalities to pledge the property may be fulfilled in advance.[1] The pledge actually arises when the pledgor acquires the property. If the pledgor is bankrupt at that time, the pledge does not come into effect.

An undisclosed right of pledge over future receivables can only be created if the receivables arise directly from a legal relationship already existing at the time the notarial deed or the private pledge instrument is executed.[2] This restriction does not apply to disclosed rights of pledge.[3]

Future receivables which do not arise from such a relationship but with respect to which the debtor is, at the time the deed is executed, already known can be made the subject of a disclosed right of pledge (in advance). However, a disclosed right of pledge over receivables will often not be feasible for practical and commercial reasons.[4] In both cases, the pledge arises at the time the receivable becomes a present receivable. If the pledgor is bankrupt at that time, the pledge does not come into effect.

In order to ensure that a right of pledge picks up future receivables

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[13]Civil Code, section 3:90.

[14]Civil Code, section 3:94(1) and (3).

**[Section 22C:12]**

[1]Civil Code, section 3:89, in conjunction with section 3:97(1).

[2]Civil Code, section 3:239(1).

[3]It has been argued in legal literature that this requirement applies to disclosed pledges on future receivables as well. However, to date there is no case law to support this view. We believe that the risk of a Netherlands court following this suggestion is limited.

[4]Notification of the right of pledge to each debtor is administratively onerous and may cause customers to lose confidence in the pledgor's business.

which arise from new legal relationships, a procedure has been developed that is workable for financiers. This procedure requires the pledgor to regularly (usually daily, weekly or monthly) submit standard pledge forms (*pandlijsten*) to the pledgee, which pledge forms are registered with the Inland Revenue Registration Department. These standard pledge forms refer to computer lists enumerating the pledged claims.[5] It is not possible to create a right of mortgage in advance.

Registration of rights of mortgage on future real estate would pollute the public register. The Supreme Court has also upheld a construction for a bulk pledge by way of a collective pledge deed. Under this construction, the financier executes and registers collective pledge deeds providing for the vesting of a right of pledge on any and all claims of all of the financier's borrowers *vis-à-vis* third parties existing at the time these collective pledge deeds are executed and registered or that arise directly from a legal relationship existing at that time. These pledge deeds are executed and registered by the financier acting on behalf of its borrowers on the basis of an irrevocable power of attorney granted to it by these borrowers.[6]

In a recent decision, the Supreme Court held that a pledge deed may serve to bring into existence a disclosed right of pledge as well as an undisclosed right of pledge.[7] Whether parties intended to create a disclosed right of pledge, an undisclosed right of pledge, or both must be determined by interpretation of the deed.

The Supreme Court suggests, as a starting point for interpretation, that the deed intends to create both types of pledges unless there are circumstances pointing in a different direction. These considerations of the Supreme Court are relevant in view of the impossibility to create an undisclosed right of pledge over future receivables that do not arise directly from a legal relationship existing at the time that the deed is executed but is considered to have limited practical impact given the practice of bulk pledges.[8]

## § 22C:13 Receivables and non-assignability clauses (*onoverdraagbaarheidsclausules*)

According to section 3:83(1) of the Civil Code, a receivable is transferable unless transfer would be incompatible with the nature of the receivable (*aard van het recht*). The Supreme Court has rendered

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[5]This procedure was approved by the Supreme Court in a decision of 14 October 1994, ECLI:NL:HR:1994:ZC1488, *NJ* 1995/ 447 (*Spaarbank Rivierenland / Gispen q.q.*).

[6]HR 3 February 2012, ECLI:NL:HR:2012:BT6974, *NJ* 2012/261 (*Dix q.q. / ING*); HR 1 February 2013, ECLI:NL:HR2013:BY4134, *NJ* 2013/156 (*Van Leuveren q.q. / ING*).

[7]HR, 22 February 2019, ECLI:NL:HR:2019:268, *NJ* 2019/202.

[8]Commentaries of F.J. Verstijlen, *NJ* 2019/202, paragraph 8, and F.J.L. Kaptein, in *Netherlands Journal of Insolvency Law*, 2019/28, paragraph 5.

two judgments holding that the nature of a receivable originated by a bank *vis-à-vis* a borrower does not prevent a transfer of the receivable to a non-bank.[1] The decisions are of vital importance for the validity of transactions whereby receivables of a bank against a client are transferred to a non-bank, such as securitizations and covered bond transactions.

Section 3:83(2) of the Civil Code provides that a creditor and a debtor may agree that a receivable is non-transferable. If a receivable is not capable of being transferred, it can neither be pledged.[2] If the relevant agreement contains a so-called "non-assignability clause" (*onoverdraagbaarheidsclausule*), it is not possible to transfer or pledge the receivables that arise out of that agreement. Therefore, it is essential to check whether the agreement contains a non-assignment clause.

The Supreme Court has provided guidance as to the way in which non-assignability clauses should be interpreted.[3] The Supreme Court held that, if a contract contains a non-assignability clause and the creditor transfers or pledges the receivable notwithstanding this clause, this will generally result in a breach of contract, but will not affect the possibility to transfer or pledge the receivables. Should parties wish to achieve the latter effect, i.e., the non-assignment of the receivable, the non-assignability clause must explicitly provide that the receivables "are non-transferable" or "cannot be transferred" (instead of "may not be transferred" or "may not be transferred").

The Guide recommends that an assignment is effective despite a contractual restriction on assignment agreed upon between the creditor and the debtor (with the exclusion of certain receivables, such as receivables arising from a financial contract).[4] The approach in respect of non-assignability clauses under Netherlands law differs from this approach as, under Netherlands law, the creditor and debtor can create a receivable that cannot be assigned, as a consequence of which the assignment of such receivable to a third party is not effective. However, we note that, as explained above, specific wording is required to achieve this result.

Finally, with respect to non-assignability clauses, on 2 June 2020, a legislative proposal was submitted to the Dutch Lower House to limit

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**[Section 22C:13]**

[1]HR 10 June 2020, ECLI:NL:HR:2020:1274 and HR 10 June 2020, ECLI:NL:HR:2020:1276.

[2]Civil Code, section 3:228.

[3]HR 21 March 2014, ECLI:NL:HR:2014:682, *NJ* 2015/167 (*Coface Finance GmbH / Intergamma B.V.*).

[4]Recommendation 24 (Creation of security right (effectiveness as between the parties)).

the scope of section 3:83(2) of the Civil Code.[5] The proposal introduces a new section 3:83(3) to the Civil Code and provides that it is not possible to exclude the assignability of a monetary receivable resulting from trade, business, or profession or to exclude that a receivable cannot be pledged. Certain monetary receivables are excluded from the scope of the legislative proposal (which means that such receivables can be subject to non-assignability clauses), such as monetary receivables resulting from payment and saving accounts and monetary receivables resulting from a loan provided by multiple lenders.

### § 22C:14 Obligations to be secured

As a general rule, a right of pledge or a right of mortgage can only exist in conjunction with the claim it secures and cannot be transferred without the secured claim. In order for a right of pledge or right of mortgage to be valid, the secured claim must be sufficiently defined.[1] This requirement is met if the secured claim can be identified on the basis of its description in the security agreement.

A right of pledge or right of mortgage can be given to secure any existing and future claims for the payment of a sum of money.[2] In a recent decision, The Supreme Court held that, if the secured claim comes into existence after a pledgor is declared bankrupt and the claim results directly from acts performed prior to such date, the pledgee may take recourse against the pledged assets for such claim.[3]

## V. PUBLICITY AND FILING SYSTEMS

### § 22C:15 Publicity requirements

The starting point of the Guide is that a security right in a tangible asset is effective against third parties if a notice with respect to the security right is registered in the general security rights registry as described in Recommendation 54-75 of the Guide (Recommendation 32). However, the Guide provides for alternatives and exceptions to registration for achieving third-party effectiveness (Recommendation 34).

As discussed above, registration in a general security rights registry is not the starting point for the creation of security interests under Netherlands law. Under Netherlands law, the requirement to register a security right in a public register is only required in respect of a se-

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[5]Parliamentary Documents II 2019-2020, 35 842, nr. 2.

**[Section 22C:14]**

[1]Civil Code, section 3:231(2).

[2]Civil Code, section 3:231(1).

[3]HR 16 October 2015, ECLI:NL:HR:2015:3023, NJ 2016/48 (De Lage Landen/Van Logtestijn q.q.). HR 16 October 2015, ECLI:NL:HR:2015:3094, *NJ* 2016/49 (*Ingwersen q.q./ING Commercial Finance*).

curity right over certain property, i.e., real estate and certain ships and aircraft. There is no requirement to register a security right over movables or receivables in a public register.

In respect of tangible assets, Recommendation 34 of the Guide provides that a security right also may be made effective against third parties by the secured creditor's possession. The Guide recommends taking the following approach to possession: "creditor possession requires real relinquishment by the grantor of physical custody over the encumbered assets." In other words, where it concerns the creation of security rights over tangible assets, the Guide prefers actual possession over constructive possession. This also is the position taken by Netherlands law. The assets must be physically delivered to the pledgee.[1]

However, when security is provided by way of transfer of title, the security provider will generally use the encumbered asset in the course of its business. Therefore, the security provider and the security taker will generally agree that possession will be delivered to the security taker by way of a possession surrogate (*bezitsverschaffing constituto possessorio*). In that event, the security taker holds indirect possession (*indirect bezit*), while the security provider obtains direct holdership (*direct houderschap*). As physical custody over the encumbered asset remains with the security provider (and is not provided to the security taker), this approach does not seem to be in line with the principles of the Guide as described above.

For creating non-possessory rights of pledge (over movable assets) and undisclosed rights of pledge (over receivables), neither registration nor the delivery of possession or, in case of a right of pledge over receivables, notification of the debtor is required. Also in this respect, Netherlands law deviates from the Guide (i.e., Recommendation 32).

## § 22C:16 Filing systems

The Netherlands is divided into parcels of land that are all individually registered in the Land Register. The information registered includes the names of the owner(s) and other holders of rights *in rem* in the property. All land in the Netherlands is registered.

As a general rule, neither rights *in personam* in real estate nor beneficial ownership rights can be registered. There are a few statutory exceptions to this rule. For example, it is possible to register a contract of sale, a so-called *Vormerkung*.[1] A transfer of ownership of real estate and the creation, transfer, or waiver of other rights *in rem* all require

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**[Section 22C:15]**

[1]Civil Code, section 3:237(1).

**[Section 22C:16]**

[1]Civil Code, section 7:3.

an entry in the land register in order to come into effect. However, as stated above, the fact that someone is registered as an owner (or holder of an *in rem* right) does not guarantee that this is the case: the documents registered are not independently verified by the Land Registry Office, unlike in other countries.

The Netherlands does not have a system under which registration is decisive. Hence, the Land Register does not provide absolute certainty on the legal status of real estate. Nevertheless, the mandatory involvement of a civil law notary in all real estate transactions, in view of the scope of the review he is required to carry out and the strict rules he must follow in providing his services (e.g., to be impartial and act in the interest of all parties to a transaction), has compensated for most of the shortcomings of this system.

In effect, each civil law notary relies on his own investigation and those of the civil law notaries who have been involved in prior transactions relating to the relevant real estate. Consequently, conclusions regarding the ownership of real estate and the quality of a title can be reached with a high degree of certainty. The land register has most of the characteristics as described in Recommendation 54 of the Guide. It is, for example, centralized, available to the public and may be searched without the need for the searcher to justify the reasons for the search.

## VI. PRIORITY

### § 22C:17 Priority rules

A security provider may create several security rights in the same asset in order to use the full value of its assets to obtain credit. If several security interests are created in the same asset, the question arises whether, and if so, which security right has priority over other security rights.

Under Netherlands law, the order of priority (*voorrang*) among various pledges or various mortgages on the same asset is, in principle, determined by the moment they were created, the general rule being that the earlier pledge or mortgage prevails. This rule also is referred to as the "first in time, first in right" rule (*prior tempore potior iure*).

There are a number of exceptions, both in type and amount, to the above-mentioned rule. These exceptions are clearly and specifically described in the Civil Code and other statutes. For example, where a person acting in good faith is granted a possessory pledge on an asset which is already subject to another (non-possessory) pledge or other limited right, the possessory pledgee ranks senior to the earlier

 

pledge.[1] Such a change in rank does not occur in the event that the later right is a non-possessory right of pledge. A non-possessory pledgee must, even if it acted in good faith, continue to respect rights were created earlier.

In principle, a right of pledge and a right of mortgage take priority over a statutory privilege (*voorrecht*) in respect of the same property. This rule is subject to a number of exceptions. For example, the privilege which applies to costs incurred to preserve the collateral ranks senior to a non-possessory pledge. The same applies to the privilege given to small building contractors.

An important exception to the principle that a pledge ranks senior to a privilege can be found in section 21(1) of the Tax Collection Act (*Invorderingswet*). Pursuant to section 21(2), the privilege of the tax authorities which attaches to certain movable assets found on the tax debtor's premises (assets that are intended for use on a long-term basis, principally equipment and office furnishing, not stock-in-trade) has priority over a non-possessory pledge on such asset. This privilege entitles the tax authorities to recover the debtor's tax liability out of the sale proceeds of such asset without regard to the rights of third parties therein, where such rights were created for security purposes only.

A creditor with a possessory lien on a movable asset (*retentierecht*) that is subsequently pledged (to a different creditor) can invoke its lien against the pledgee. This means that the creditor can recover its claim from the proceeds of the asset prior to the pledgee. Conversely, where a (second) creditor obtains a possessory lien on property already subject to a pledge, the pledge is only inferior to the claim of the creditor, if the pledgor had the power to enter into the agreement from which the possessory lien arose or the creditor was entitled to rely on the existence of this power.

Recommendation 83 of the Guide provides that the law should limit, both in type and amount, preferential claims arising by operation of law that have priority as against security rights and, to the extent preferential claims exist, they should be described in the law in a clear and specific way. Although there are several exceptions to the "first in time, first in right" rule, it is our view that Netherlands law is in line with this Recommendation as the exceptions are within limits and, if and to the extent applicable, are clearly described in the relevant laws.

## § 22C:18 Voluntary alteration of priority: subordination agreements

Netherlands law allows for subordination agreements. The legal

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**[Section 22C:17]**

[1]Civil Code, section 3:237(3).

basis for one type of subordination can be found in section 3:277(2) of the Civil Code. The section provides that a creditor can agree with the debtor that the creditor's claim against the debtor will be given a lower ranking in relation to all or specific creditors than the law provides.

In addition to this type of subordination, which is based on a contract between the junior creditor and its debtor, it is possible for a junior and senior creditor to agree on subordination of the first without the debtor being involved. The rules in respect of subordination agreements are in line with Recommendation 94 of the Guide.

## VII. ENFORCEMENT OF SECURITY RIGHTS

### § 22C:19 Enforcement of security rights in respect of movable assets

The pledgee has a right to summary foreclosure (*parate executie*) if and when the pledgor is in default, which entails that the pledgee may enforce its security right without obtaining a court order, also in the event of bankruptcy of the debtor and even if its claim enjoys a lower priority than other claims. Unless otherwise agreed by the pledgor and the pledgee, it is required that a written default notice is served on the debtor before the pledgee is allowed to exercise his rights (section 6:74 of the Civil Code).

In the event of the pledgor's bankruptcy, the pledgee is treated as a "separatist." It may, upon default, sell the pledged assets as if there were no insolvency proceedings and satisfy its claims from the proceeds, subject to the obligation to surrender any excess proceeds of sale to the trustee in bankruptcy.

However, section 58 of the Bankruptcy Act provides that if the pledgee does not enforce its right within a reasonable period of time fixed by the bankruptcy trustee, the latter can claim and sell the property and the proceeds will become part of the bankruptcy estate (which means that part of the bankruptcy costs will be deducted from the proceeds that the pledgee will receive from the bankruptcy trustee as a result of the sale of the property).

Under no circumstances does the right of pledge entitle the pledgee to appropriate the asset (section 3:235 of the Civil Code). However, a court may permit the pledgee, at his request, to keep the asset by way of payment of an amount to be determined by the court. Another exception to the prohibition of appropriation can be found in section 7:54 of the Civil Code. It provides that parties to a pledge financial collateral arrangement can agree that the collateral taker is allowed to appropriate the financial collateral (cash, securities, credit claims), provided that certain conditions are met.

The non-possessory pledgee who wishes to enforce its right of pledge must first obtain control over the encumbered assets. It is entitled to

 

demand control if and when the debtor gives the pledgee good reason to fear that it will default on its obligations.[1] The pledgor can be forced to surrender the encumbered assets via a bailiff (*deurwaarder*).

The enforcement is in principle effected by selling the asset by public auction.[2] No court order or other form of authorization is required. Before the pledgee's claim is due and payable, it may not agree with the pledgor on a private sale. Thereafter, they may do so.[3]

The Supreme Court held that, if the pledgor and pledgee may agree on a private sale by the pledgor (as private sales may yield higher proceeds) such sale qualifies as a sale under execution (*executoriale verkoop*) because the pledgor sells the assets for the benefit of the pledgee. As a result, the pledgee may apply the proceeds in discharge of it claim against the pledgor.[4]

Both the pledgee and the pledgor are at all times entitled to request the court to authorize the sale of the asset other than by public auction.[5] Such permission will generally only be granted if a private sale will yield more than a public sale. The pledgee must account towards the pledgor (or the trustee in the pledgor's bankruptcy) for the proceeds and pay out any excess over his claim.[6] The pledgee will rank *pari passu* with unsecured creditors for any amount by which the proceeds fall short of its claim.

The rules regarding the enforcement of a right of pledge over movables assets as described above are in line with the post-default rights of the secured creditor as described in Recommendation 141 of the Guide, except for Recommendation 141(c), which provides that the secured creditor can propose to acquire an encumbered asset in total or in partial satisfaction of the secured obligation. Under Netherlands law, this is only possible with the permission of a court or where it concerns financial collateral arrangements.

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**[Section 22C:19]**

[1]Civil Code, section 3:237(3).

[2]Civil Code, section 3:250.

[3]Civil Code, section 3:251(2).

[4]HR 25 februari 2011, ECLI:NL:HR:2011:BO7109, *NJ* 2012/74 (*ING/Hielkema q.q.*) and HR 14 februari 2014, ECLI:NL:HR:2014:319, *NJ* 2014/264 (*Feenstra q.q./ING*).

[5]Civil Code, section 3:251(1).

[6]Civil Code, section 3:253.

## § 22C:20 Enforcement of security rights in respect of receivables

The pledgee has the right of summary foreclosure (see text above). According to the letter of the law, it must sell the pledged receivables.[1] In practice, however, enforcement takes place by the pledgee giving notice to the debtor and collecting the pledged receivables. In that event, provided that it keeps the sums collected separated from its own funds, the pledgee obtains a right of pledge on the sums collected by operation of law,[2] and it may proceed to satisfy its claim from these sums when the claim is due and payable.

As stated above, in the event of the pledgor's bankruptcy, the pledgee is a "separatist." In the case of a pledge over receivables that has been notified to the third-party debtor (a disclosed right of pledge), whether before or during the bankruptcy proceedings, the pledgee is, from the time of the notification, entitled to collect the receivables. In addition, it is entitled to apply any sums paid to it after the notification in discharge of its own claim. Any excess must be surrendered to the bankruptcy trustee.

The pledgee will rank *pari passu* with unsecured creditors for any amount by which the proceeds fall short of its claim. In the case of an undisclosed right of pledge, i.e., a pledge which has not been notified to the third party debtor, payment to the insolvent pledgor or his bankruptcy trustee will result in the extinguishment of the pledge. In a landmark decision in 1995, the Supreme Court held that, in these circumstances, the pledgee is no longer a separatist. However, it takes priority with respect to the sums collected. Its claim must nevertheless be submitted to the bankruptcy trustee for verification, which means that it will must pay part of the bankruptcy costs.[3]

In addition, in the case of an undisclosed right of pledge, the Supreme Court ruled that a bankruptcy trustee must take into account a reasonable period of time to allow the pledgee to notify the third party debtors of the right of pledge. Where the pledgor is a professional party such as a bank, a 14-day period is seen as a reasonable period of time.[4]

Moreover, the bankruptcy trustee is obliged to provide the pledgee with the information that its requires to notify the third party debtors

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**[Section 22C:20]**

[1]Civil Code, section 3:248(1).

[2]Civil Code, section 3:246(5).

[3]HR 17 February 1995, ECLI:NL:HR:1995:ZC1641, *NJ* 1996/471 (*Mulder q.q./CLBN*).

[4]HR 22 juni 2007, ECLI:NL:HR:2007:BA2511, *NJ* 2007/520 (*ING/Verdonk* q.q.).

and, in doing so, effect its right of pledge.[5] The rules regarding the enforcement of a right of pledge over receivables as described above are in line with the post-default rights of the secured creditor as described in Recommendation 141 of the Guide, in particular Recommendation 141(e).

## § 22C:21 Enforcement of security rights in respect of real estate

A mortgagee has the right of summary foreclosure (section 3:268 of the Civil Code) and, in the event of the mortgagor's bankruptcy, the mortgagee is treated as a "separatist." Therefore, what is stated above in respect of the right of summary foreclosure and the "separatist" position in relation to a right of pledge over movable assets applies *mutatis mutandis* to a right of mortgage.

An arrangement under which the mortgagee has the right to appropriate the mortgaged asset is null and void (section 3:235 of the Civil Code and see text, above). The enforcement is in principle effected by selling the asset by public auction in the presence of a civil law notary.[1] Both the mortgagee and the mortgagor may request the court to authorize a private sale or to approve of an agreement for a private sale.[2] An arrangement that entitles the mortgagee to enforce its security right in another way than through a public or private sale is null and void,[3] which means that a mortgage may only be enforced through a private sale with the approval of the court.

If the encumbered asset has been sold by either a public sale or a private sale, the buyer must pay the purchase price to the civil law notary.[4] The civil law notary arranges for the distribution of the proceeds. Any excess over the mortgagee's claim will be paid out to the mortgagor. The mortgagee will rank *pari passu* with unsecured creditors for any amount by which the proceeds fall short of his claim.

## § 22C:22 Enforcement of movable assets and receivables transferred for security purposes

As stated above, there are no rules in the Civil Code nor is there any guidance from the Supreme Court regarding the enforcement of such security interests. Therefore, it will primarily depend on the terms of the security agreement when and how enforcement of mov-

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[5]HR 30 October 2009, ECLI:NL:HR:2010:BJ0861, *NJ* 2010/96 (*Hamm q.q. / ABN Amro*).

**[Section 22C:21]**

[1]Civil Code, section 3:268(1).

[2]Civil Code, section 3:268(2).

[3]Civil Code, section 3:268(5).

[4]Civil Code, section 3:270(1).

able assets and receivables transferred for security purposes will take place.

It could be that as the secured creditor may take title to the assets provided as security in satisfaction of its claim. It could also be that, subject to the terms of the security agreement, it must sell the assets provided as security and must recover its claim from the proceeds and return any excess.

## VIII. INSOLVENCY

### § 22C:23 Sources of insolvency law

The primary sources of Netherlands insolvency law are the Bankruptcy Act, case law of the Netherlands Supreme Court and, in respect of cross-border insolvencies, the EU Recast Insolvency Regulation.[1]

### § 22C:24 Insolvency proceedings

The main types of insolvency proceedings in the Netherlands are suspension of payments (*surseance van betaling*) and bankruptcy proceedings (*faillissement*). Suspension of payments, which is aimed at the restructuring of a company's debts and the reorganization and continuation of its business, is less common than bankruptcy proceedings.

Bankruptcy proceedings are aimed at a company's liquidation. As suspension of payments is often followed by bankruptcy proceedings, suspension of payments will not be further discussed here.

### § 22C:25 Commencement of bankruptcy proceedings

A request to commence bankruptcy proceedings may be submitted by either the debtor itself or its creditors.[1] If the court determines that the debtor is no longer paying its debts, it will declare the debtor bankrupt.[2]

### § 22C:26 Consequences of commencement of bankruptcy proceedings

Section 23 of the Bankruptcy Act provides that, as a result of the declaration of bankruptcy, the bankrupt party cannot dispose of as-

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**[Section 22C:23]**

[1]Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, [2015] OJ EC L 141/19.

**[Section 22C:25]**

[1]Bankruptcy Act, section 1(1).

[2]Bankruptcy Act, section 1(1) and (3).

sets that are part of the bankruptcy estate from, and including, the day on which the declaration of bankruptcy is rendered by the court. As from that moment (the "bankruptcy date"), only the bankruptcy trustee has the power to represent and bind the debtor and to administer, transfer, encumber or otherwise dispose of its assets. The assets in the bankruptcy estate comprise all assets belonging to the company as at the bankruptcy date and any assets acquired during the bankruptcy, even if they are in the possession of third parties.

By virtue of the court's decision to open bankruptcy proceedings, all attachments on the debtor's property lapse and are replaced by a general attachment in favor of all creditors equally.[1] These rules match with Recommendation 35 ("Assets constituting the insolvency estate") and Recommendation 46 ("Measures applicable on commencement") of the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide").

Section 23 of the Bankruptcy Act implies that a judgment of bankruptcy is effective retroactively from 0:00 hours on the Bankruptcy Date (the "zero-hour rule"). Section 24 of the Bankruptcy Act provides that the bankrupt's estate is not liable for obligations incurred by the bankrupt party on and after the bankruptcy date, except to the extent that such obligations arise from transactions which benefit the estate. section 35(1) of the Bankruptcy Act provides that if, on the Bankruptcy Date, not all acts required to effect the formalities required for creating a security interest by the bankrupt party have been fulfilled, these formalities can no longer be validly effected.

A special regime applies in respect of financial collateral arrangements as referred to in section 7:51 of the Civil Code. Section 63e(1) of the Bankruptcy Act provides that, in derogation from sections 23 and 35 of the Bankruptcy Act, a declaration of bankruptcy in respect of a debtor under a financial collateral arrangement does not become effective retroactively from zero hours on the bankruptcy date with respect to financial collateral arrangements entered into, financial collateral provided or instructions to set-off given by such debtor before the exact time at which the court handed down the order commencing bankruptcy proceedings (the "bankruptcy time").

Furthermore, section 63e(2) of the Bankruptcy Act provides that sections 23, 24, and 35 of the Bankruptcy Act cannot be invoked against third parties in respect of financial collateral arrangements entered into after the bankruptcy time, in respect of a transfer effected or pledge created pursuant to a financial collateral arrangement or in respect of any legal act pursuant to a financial collateral arrangement in respect of obligations of the debtor arising after the bankruptcy time, provided that the relevant legal act took place on

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**[Section 22C:26]**

[1]Bankruptcy Act, section 33.

the same day and the counterparty can prove that it did not know and should not have known of the bankruptcy at the time of the legal act.

### § 22C:27 Security rights in bankruptcy proceedings

Mortgagees and pledgees—as secured creditors—have a strong position in bankruptcy proceedings. They are separatists and are entitled to exercise their rights as if there were no bankruptcy proceedings (section 57 of the Bankruptcy Act). The bankruptcy trustee may, however, set a reasonable period within which mortgagees and pledgees must exercise their rights, failing which he may sell or otherwise realize the encumbered assets himself (section 58 of the Bankruptcy Act).

In that event, the mortgagee or pledgee retains a preferential right to the resulting proceeds, but must file a claim for verification and share in the general costs of the bankruptcy. At the mortgagee's or pledgee's request, the period set by the trustee for enforcement may be extended one or more times by the supervisory judge.

Recommendation 46(c) of the Insolvency Guide provides that the foreclosure or the enforcement against the assets of the bankruptcy estate is stayed on the commencement of bankruptcy proceedings. As may follow from the above, Netherlands law takes another point of departure: mortgagees and pledgees can exercise their rights as if bankruptcy proceedings had never been commenced.

### § 22C:28 Limitations on enforcement of security rights

The supervisory judge may, at the request of an interested party (such as the bankruptcy trustee) or *ex officio*, order a "stay on enforcement" for a period not exceeding two months, which may be extended once by a maximum of two months.[1]

While the stay is in effect, third parties (including, for the avoidance of doubt, secured creditors) are prohibited from exercising any right to take recourse against assets belonging to the bankruptcy estate or to claim assets under the bankrupt party's or trustee's control except with the specific authorization of the supervisory judge.

However, a creditor with an undisclosed pledge over receivables may, in spite of the stay, disclose the pledge and collect payment of the receivables, but without proceeding to satisfy its claim from the collection proceeds. In addition, a secured party under a financial collateral arrangement may enforce its security interest notwithstanding a stay ordered by the supervisory judge (*rechter-commissaris*).[2]

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**[Section 22C:28]**

[1]Bankruptcy Act, section 63a.

[2]Bankruptcy Act, section 63e.

### § 22C:29 Validity of security rights and avoidance actions (*actio pauliana*)

Section 42 of the Bankruptcy Act provides that a bankruptcy trustee can nullify any transaction the insolvent debtor has entered into without having an obligation thereto, if as a result of such transaction, the interests of other creditors have been prejudiced, provided that it is proven that the debtor and the secured creditor knew or should have known, at the time of the transaction, that the transaction would result in the position of creditors being negatively affected.

Under section 43 of the Bankruptcy Act, it is presumed that both parties had such knowledge, if the transaction took place within one year before the declaration of bankruptcy, and the value of the transaction provided by the debtor considerably exceeds such value provided by the secured creditor.

Pursuant to section 47 of the Bankruptcy Act, a payment, in the face of bankruptcy, of a claim that is due and payable by the debtor, also can be voided by the bankruptcy trustee, provided that the trustee proves that the creditor of such claim knew that the petition for bankruptcy of the debtor was already pending at the moment of payment or that the insolvent party and the creditor intentionally agreed to grant the creditor a benefit over all other creditors. The term "payment," as used in section 47 of the Bankruptcy Act, also will cover the creation of security (a right of pledge or right of mortgage).

With respect to this second possibility, a conspiracy (*samenspanning*) is required. Both the debtor and the creditor should have had the intention to favor the creditor above all other creditors. Mere knowledge of favoritism is not sufficient. If the debtor is heavily forced by the secured creditor to pay him, no intentional agreement within the meaning of section 47 of the Bankruptcy Act is reached between the parties. Section 47 of the Bankruptcy Act is only applicable if the creditors are prejudiced. It is not sufficient that the creditors are deprived of an advantage: the payment must disadvantage the creditors in order for section 47 of the Bankruptcy Act to be applicable. Case law is not clear with regard to this distinction.

## IX. CONFLICT OF LAWS AND TERRITORIAL APPLICATION

### § 22C:30 Sources of conflict-of-laws rules

The main source of Netherlands conflict of laws rules is, as far as it concerns secured transactions, Book 10 of the Civil Code, as well as case law of the Supreme Court.

In addition, Regulation 593/2008 of the European Parliament and of the Council of 17 June, 2008, on the law applicable to contractual obligations (the "Rome I Regulation") and the revised Regulation 1215/2012 of the European Parliament and of the Council of December 12, 2012, on jurisdiction and the recognition and enforcement of judg-

ments in civil and commercial matters (the "Brussels Regulation") may be relevant.

### § 22C:31 Netherlands conflict-of-laws rules

Under Netherlands private international law, a distinction is made between the contractual obligation to transfer, or to grant a security interest in, an asset on the one hand and the aspects *in rem*, i.e., the proprietary aspects (*goederenrechtelijke aspecten*) of a transfer of, or the granting of a security interest in, an asset on the other. The proprietary aspects include, inter alia, the transferability of such assets, the requirements for transferring it or creating a security interest therein and the rights of third parties in relation to any such transfer or any such security interest.

A Netherlands court would determine the law that governs the contractual aspects of a transfer of, or the granting of a security interest in, movable property or receivables on the basis of the Rome I Regulation. Subject to the limitations imposed by the Rome I Regulation, a Netherlands court will recognize and give effect to a choice of law made by the parties to govern the contractual aspects.

### § 22C:32 Conflict-of-laws rules for creation and enforcement of security rights over movables

The basic rule of Netherlands private international law is that rights *in rem* are determined by the *lex rei sitae*, which provides that the law of the country where assets are situated at the time of the creation or enforcement of a transfer of, or the granting of a security interest in, the assets will, in principle, govern that creation or enforcement. The *lex rei sitae* rule is codified in section 10:127 of the Civil Code.

It follows from this provision that, if the assets are situated in the Netherlands and a dispute about a security interest in the assets is brought before a Netherlands court, Netherlands law will apply. As regards this rule, Netherlands law is in line with the Guide, which provides that the law should provide that the law applicable to the creation, effectiveness against third parties and priority of a security right in movable property is the law of the State in which the asset is located (Recommendation 203).

Generally, it is not possible to create forms of security interest that do not exist or are not permitted under the laws of the Netherlands if the assets are situated in The Netherlands. The reason is that Netherlands law provides for a closed system of rights *in rem*: the only rights *in rem* which can be created on movable property situated in the Netherlands are those specifically identified in the Civil Code. The secured creditor and its debtor cannot deviate from the foregoing by choosing foreign law.

However, it is possible to enforce in the Netherlands a form of secu-

 

rity interest that does not exist under Netherlands law, provided that it can be assimilated to a form which is known under Netherlands law. In a leading case, the Supreme Court held that it is not decisive whether or not a foreign security interest is similar in all respects to a security interest available under Netherlands law, but whether or not, with a view to the application of a specific Netherlands law provision, the foreign security interest can, in terms of its content and purpose, be considered equivalent to a related Netherlands security interest. Subsequently, the Supreme Court held that a floating charge under Tanzanian law could be considered equivalent to a Netherlands non-possessory right of pledge and that it should therefore be recognized.[1]

On the basis of the Brussels Regulation, a decision to enforce a security interest given by a court in a European Union (EU) member state must be recognized and enforced in the other member states. This means that, indirectly, forms of security interests that are not known in one of those member states may be enforced there.

If a security interest is not permitted in a member state, it could perhaps be argued that the courts of that member state may refuse the recognition and enforcement of the foreign judgement on the ground that it is contrary to public policy (article 45 of the Brussels Regulation).

## § 22C:33 Conflict-of-laws rules for creation and enforcement of security rights over receivables

Section 10:135 of the Civil Code contains a conflict-of-laws rule for the transfer of and the creation of security interests in receivables. Pursuant to section 10:135(1) of the Civil Code, the transferability of receivables will be determined on the basis of the laws that govern the receivables.

The law that governs the receivables is the law that is applicable to the relationship, such as an agreement or tort, from which the receivable arises. The other proprietary aspects, including the requirements that must be met for transferring or creating a security interest in the receivables, will be determined by the law applicable to the agreement, between the transferor/party granting the security interest and the transferee/secured party, to effect the security interest (section 10:135(2) of the Civil Code).

This will generally be the chosen law or, if no law has been chosen, the law as to be determined on the basis of articles 4 et seq. of the Rome I Regulation. As regards this conflict-of-laws rule, Netherlands law deviates from the Guide, which provides that the law should

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**[Section 22C:32]**

[1]HR 14 December 2001, ECLI:NL:HR:2001:AD4933, *NJ* 2002/241 (*Sisal II*).

provide that the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset (such as a receivable) is the law of the State in which the security provider is located (Recommendation 208).

If a security interest in the receivables is created by way of assignment, a Netherlands court will apply the above-mentioned conflict-of-laws rule relating to a transfer of receivables in the proprietary sense. Pursuant to this regime, the law governing the transfer of receivables against a third party is, as far as the relationship between the transferor and transferee is concerned, the law that, under the Rome I Regulation, applies to the underlying agreement between those parties creating the obligation to effect the transfer.

It is uncertain, however, whether the law applicable to this agreement also governs the question whether and under which conditions such transfer can be invoked against the third party, or whether this question is governed by the law governing the relevant receivable. This follows from a judgment of the Supreme Court of May 16, 1997.[1] According to this judgment, the law governing the transfer of a contractual right against a third party is, as far as the relationship between the transferor and the transferee is concerned, the law which under the predecessor of the Rome I Regulation, the Rome Convention, applies to the underlying agreement between the transferor and the transferee.

However, since the reasoning of the Supreme Court is based entirely on a predecessor of the Rome I Regulation (the Rome Convention) and since, pursuant to section 12(2) of the Convention, the question of whether and under which conditions a transfer of contractual rights against a third party can be invoked against that third party is governed by the law governing such contractual rights, the Supreme Court's decision leaves room for doubt as to the applicability of the law governing the agreement between the transferor and the transferee to the procedures and requirements to be taken into account for the transfer to be effective against the third party.

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**[Section 22C:33]**

[1]HR 16 May 1997, ECLI:NL:HR:1997:ZC2373, *NJ* 1998/585 (*Hansa*).