Legal Alert

DE BRAUW BLACKSTONE WESTBROEK

6 FEBRUARY 2012

# Dutch Supreme Court accepts floating charge

Dutch Supreme Court's ruling leads to accepting a *"floating charge"*. This ruling affects banks, other lenders, borrowers and their other creditors.

In recent years Dutch banks have established a practice of creating undisclosed rights of pledge (*stil pandrecht*) on all current and future receivables of their borrowers in an easy way and without the borrower's involvement. In the Supreme Court's ruling of 3 February 2012 (HR 3 February 2012, LJN BT6947), this practice was unsuccessfully put to the test by a bankruptcy trustee, who contested the alleged right of pledge of ING Bank on receivables of its bankrupt client.

The Dutch Supreme Court approved the current practice and confirmed that a bank obtains an undisclosed right of pledge on all receivables of its (corporate) borrower by registering, before the bankruptcy of the borrower, an unspecified collective deed of pledge (*verzamelpandakte*) on a regular basis (e.g. weekly or even daily). That is provided (i) a master deed of pledge (*stampandakte*) between the bank and borrower and (ii) an irrevocable power of attorney from the borrower to the bank had been registered previously. With such power of attorney the borrower authorises the bank to establish on his behalf an undisclosed right of pledge in favour of that bank on all his current and future receivables. The power of attorney may be part of the bank's general terms and conditions.

## Implications for banks and other lenders

For banks the Supreme Court's ruling means that there is no longer uncertainty about this method of establishing undisclosed rights of pledge on receivables. Under Dutch law, a pledge

cannot cover receivables arising out of legal relationships that do not yet exist when creating the pledge. By putting in place the right documentation and repeatedly fulfilling a simple formality (registration of a collective deed of pledge on behalf of all its borrowers), banks can make sure that their security packages continue to cover all the borrowers' receivables, including those arising from new legal relationships. Added to the fact that under Dutch law in principle all other current and future assets of a borrower can be pledged (other than real estate and other registered property, which can be mortgaged), the Supreme Court's ruling leads to the acceptance of what amounts to a floating charge in the Netherlands. There is, however, one major exception that should be taken into account.

Under Dutch law, parties can agree that receivables arising from their contracts shall be non-transferable. By operation of law, such receivables cannot be validly pledged. Non-transferability clauses are increasingly seen in practice. Consequently, banks and other lenders taking security on receivables should be aware that such non-transferable receivables will still not be included in their security package, notwithstanding the Supreme Court's ruling. They can only take recourse against such receivables by making an attachment by garnishment under the debtor of such receivable (*derdenbeslag*). This does not, however, provide protection in an insolvency of the borrower nor does it create exclusivity in the distribution of the proceeds of the attachment.

## Implications for other (unsecured) creditors

Unsecured/ordinary creditors often find themselves without any possibilities of recourse against assets of their debtors due to financiers taking full security in the Netherlands; bankruptcy trustees are confronted with bankruptcy estates without recourse possibilities. This Supreme Court ruling confirms that, if the arrangement described above is correctly used, all receivables will be pledged and therefore also be unavailable to the bankrupt estate/for recourse by other creditors. Those creditors will have to rely on arrangements such as retention of ownership, bank guarantees, escrow arrangements, suretyships and advanced payment conditions in order to manage their credit risk.

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