

Registration of pledge on movable property and security trustees in Belgium

Dr. Roel Fransis discusses a brief overview of the 2013 reform



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Introduction

The law of 11 July 2013 (the “**Law**”) will reform the common legal regime for security rights in movable property (in addition to the regime applicable to financial collateral governed by the Law of 15 December 2004 implementing Directive 2002/47/EC on Financial Collateral Arrangements). The legal regime applicable to mortgages on immovable property and statutory preference rights remains, with a few exceptions, unaffected by the Law. Although the Law’s entry into force is scheduled for 1 December 2014, it is expected that it will be probably postponed until 1 January 2017 the latest. This should allow sufficient time to set up the electronic national pledge register.

The Law (i) introduces new rules with respect to a pledge on movable property (whether tangible or intangible, with respect to certain, specific assets or with respect to a pool of assets), (ii) generally recognises the validity and enforceability of reservation of title clauses and (iii) grants a statutory pledge to creditors exercising a right of retention.

The 2013 reform aims at creating a flexible and efficient regime for the creation and enforceability of such security rights, combined with modern, economically oriented enforcement proceedings and a predictable outcome of ranking conflicts between secured creditors. Ultimately this should enhance the access to credit for companies and individuals at a lower cost. The Law is inspired



by international examples such as the 2006 legislative reform in France, the filing system for security interests introduced by the *United States Uniform Commercial Code* and international model laws and guidelines such as the *Uncitral Legislative Guide on Secured Transactions*.

Pledge on movable property

The creation of a pledge on movable property between the parties (being a creditor or security trustee, and a debtor or third party collateral provider) is now a matter of mere consensus: it exists between the parties as soon as parties have entered into a pledge agreement.

Although not being a validity requirement, it is recommended that parties enter into a written pledge agreement specifying the

maximum amount secured by the pledge, as only such a written agreement will (i) by virtue of the Law, provide sufficient evidence of the pledge and (ii) be eligible for the registration of the pledge into the national pledge register. With respect to consumers, a written agreement expressing the value of the collateral is required as a matter of validity of the pledge.

Within the maximum amount specified in the agreement, the pledge secures (i) the principal amount, (ii) interests, (iii) penalties and (iv) enforcement costs, it being understood that, with respect to consumers, the total secured amount of items (ii), (iii) and (iv) may not be higher than 50% of the principal amount.

In order to protect consumers against providing excessive collateral (known in

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German law as *Übersicherung*), the value of the collateral provided by them may not exceed the double of the amount of the secured claim (as defined above).

Security trustee

In addition to the existing specific regime for financial collateral agreements, the Law now recognises the validity and enforceability of pledge agreements involving a security trustee or agent, holding a pledge on movable property for and acting on behalf of one or more beneficiaries, provided that the identity of the beneficiary(ies) can be determined on the basis of the pledge agreement. The security trustee is jointly liable with the beneficiary(ies), unless provided otherwise in the agreement.

Registration, ranking and enforcement

Prior to the 2013 reform, the

existence and enforceability of a pledge on movable property required the collateral to be handed over physically to the creditor or third party pledge holder. Since the 2013 reform, parties may now opt for the registration of the pledge into a national pledge register. While the debtor remains in possession of the collateral (and is entitled, save as provided otherwise in the agreement, to dispose of the collateral in the ordinary course of the business and to process the collateral into new goods), the registration ensures the enforceability of the pledge against other creditors and third parties and determines the rank of the pledge.

The Law provides for flexible enforcement proceedings with respect to a pledge provided by non-consumers: an *ex ante* court intervention is no longer required; instead, any interested party can request the court to conduct an *a posteriori* control. It is for the parties to determine

how the collateral will be enforced: by way of a private or public sale, a rent or by way of appropriation of the collateral by the creditor. The Law requires the enforcement proceedings to be conducted in good faith and in a way that is economically justified. ■



THE 2013 REFORM AIMS AT CREATING A FLEXIBLE AND EFFICIENT REGIME FOR THE CREATION AND ENFORCEABILITY OF SECURITY RIGHTS



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