New law on security over movable assets
Significant impact on financing transactions

The reform of security over movable assets: key features

Introduction

The Belgian parliament approved on 30 May 2013 a law amending the Belgian Civil Code with respect to security over movable assets (the “Law”).

The Law applies to all security interests over movable assets. It codifies certain principles and brings fundamental changes to the legal framework. The Law will significantly impact the practice and will substantially enhance the ability to grant security over movable assets.

Summary of main amendments

> Security over any movable asset

The Law abolishes the part of the law of 25 October 1919 that concerns pledges over business assets (pand handelszaak/gage sur fonds de commerce) and allows the granting of a pledge over any movable asset (actual or future, individually or as one unit) to the extent that such assets can be transferred. As such, the Law will govern pledges over business assets (permits, names, inventories, receivables, know-how, raw materials, machinery, etc.), receivables (trade, rental income, vendor, insurance, intra-group, etc.), as well as intellectual property rights and other movable assets.

The Law does not amend the mortgage law of 16 December 1851 or the financial collateral law of 15 December 2004 (the “Financial Collateral Law”).

> Perfection through registration or dispossession

Under the current legal regime, “dispossession” of the pledged asset over which security is created is required in order for the pledge to be enforceable (other than business assets under the law of 1919, which is a registered

1 The Law is expected to be published in the Belgian State Gazette soon. You can find the version tabled for approval by parliament here. A second law will bring limited amendments to the Judicial Code: the attachment judge (beslagrechter/juge des saisies) will be competent to handle disputes with respect to security over movable assets and the pledge register.

2 The Law also abolishes the distinction between civil and commercial pledges. Instead, it provides for certain exceptions and derogations for pledges granted by consumers. It also abolishes and amends some liens (voorrechten/privilèges). These are not discussed in this alert.
pledge, or in the case of receivables, where the dispossession is fictitious). In the future, parties will be able to perfect a pledge over movable assets either (i) by registering the pledge in the new on-line National Pledge Registry or (ii) by means of a dispossession. This may in part be driven by the costs of the new registration system. An implementing Royal Decree will provide further details on the registration procedure and the costs of registration (which will probably be calculated on the basis of the maximum secured amount to be mentioned in the pledge agreement).

As it will still be possible to choose between registration and dispossession, the National Pledge Registry will not necessarily reflect all the security granted by a given party over its movable assets. Ranking and priority will be determined on the basis of the date of filing or the date of dispossession. The latter could give rise to discussion.

If parties choose registration, the pledgee will have the right to proceed with the registration in the National Pledge Registry pursuant to the pledge agreement. In its registration, the pledgee will have to identify the pledged assets, the secured claims (which can include future claims) and the maximum amount of the claims secured by the pledge. The pledgee will be responsible for any damages that would result from any incorrect information contained in the National Pledge Registry.

The registration in the National Pledge Registry will be valid for 10 years (renewable for new terms of 10 years). The pledge agreement and the registration will also have to mention the maximum secured amount, which will cover principal and costs (accessories). This may raise practical issues with respect to the granting of security over future assets and in case of increases in facilities. It will require appropriate valuations for all types of asset. Assuming that the registration costs will be a function of the secured amount, parties will have to find the right balance between (i) the lenders' interest in having a sufficiently high secured amount and (ii) the pledgors'/borrowers' interest in limiting registration costs (as is currently the case for mortgages and pledges over business assets).

> Simplified enforcement procedures

The Law provides for a simplified enforcement procedure that is similar to the procedure foreseen in the Financial Collateral Law. The parties are free to determine the enforcement procedure in the pledge agreement (sale, appropriation by the pledgee, lease to third party, etc.), as long as they ensure that any enforcement is conducted in an economically justified manner. The pledgee will be responsible for the manner of enforcement.

Enforcement will no longer require prior judicial approval. Rather, it will be sufficient for the pledgee to give 10 days' notice. The pledgor will nevertheless have the right to challenge the proposed enforcement in court (before the attachment judge). Any such challenge will suspend the enforcement process. In addition, judicial review following any enforcement will remain possible up to one year after notice of completion of enforcement. One of the practical issues that pledgees will face in case of enforcement...
when they have registered the pledge (without any dispossession) is that they will have to have access to the movable assets in order to proceed with the enforcement.

> **Use of a representative (security agent)**

As is the case in the Financial Collateral Law, it is possible to enter into a pledge agreement with a representative who is acting for the account of one or more beneficiaries of the pledge. Aside from the practical benefits of the use of a representative (e.g. no intervention of all parties needed for registration or enforcement), an important further advantage is that the beneficiaries of the pledge will not be affected by a bankruptcy of the representative.

> **Codification of certain existing principles**

The Law codifies certain principles, in large part in line with existing jurisprudence. For example, the Law explicitly provides that, if a pledgor were to sell the pledged assets, the pledge will extend to the proceeds of any such sale. More generally, the Law provides that the security will extend to any claim which replaces the pledged assets (including any insurance claim or claim for losses).

The Law further grants a right of use to the pledgor and, unless otherwise agreed in the pledge agreements, provides that the pledgor may dispose of the pledged asset “in the normal course of business”. The pledgee will have a right of inspection, but is not entitled to re-pledge the assets (a scenario which would only be relevant in the case of a dispossession).

**Impact on existing security**

Beneficiaries of an existing pledge on business assets registered before the entry into force of the new regime will preserve their rank if they register under the new regime within one year after the entry into force of the Law. It is not clear whether any costs will be associated with this type of registration.

Business pledge mandates, i.e., the power of attorney granted to a proxy holder to register a pledge on business assets in the future, will retain their validity. Accordingly, any existing business pledge mandate can still be used under the new legal regime to register a pledge over business assets.

As regards the impact of the Law on other existing security interests over movable assets which are not currently subject to registration requirements, the preparatory works of the Law provide that the pledgee will retain its rights.

**Impact on new security**

For pledges on business assets, we expect that parties will continue to use a registered pledge rather than dispossession since the latter is undesirable from an economic point of view. Depending on the level of the registration costs for a new pledge, the practice of entering into unregistered business pledge mandates may continue. An advantage of the new regime is that the
security will extend to 100 per cent of the inventory rather than the current 50 per cent. Also, there will no longer be a requirement for pledges on business assets to be granted only to EU credit institutions and certain financial institutions.

With respect to pledges on receivables, the situation is different: since the dispossession requirement for receivables is fictitious (i.e., actual dispossession is not required but is deemed to happen by the mere entry into the pledge agreement), parties may prefer not to register but to continue to make use of this “fictitious dispossession”. This may particularly be the case if the costs for registration are high. Nevertheless, a novelty for such unregistered pledges is that the Law will require that the pledgee must have the power to notify the pledge to the underlying debtor of the pledged receivable.

The Law also refers to pledges on intellectual property rights, providing that any (im)material asset can be subject to a pledge. The preparatory works of the Law refer to “intellectual property rights (e.g. patents, trade marks)”. These specific examples should not limit the general scope of the statement providing for the ability to pledge intellectual property rights in general. The general scope of the Law is a welcome relaxation, since today a clear legal framework exists only in relation to the perfection of pledges over patents, trade marks and designs/models. As there is currently no specific legislation for other intellectual property rights (such as copyrights, software, databases, domain names or know-how), there is some uncertainty as to the validity and enforceability of pledges over such rights. The Law creates, however, some uncertainty as to the existing specific registers for patents, trade marks and designs/models. It is unclear whether registration with the National Pledge Registry will have to be cumulated with registration in the specific intellectual property register. On the basis of the amendment of the text of the draft law in the Senate, it can be argued that it is sufficient to register in the existing specific registers.

It can further be expected that, in addition to the general pledge agreements discussed above, separate pledges on specific movable assets (e.g., cars and works of art) will be taken.

Still to come and timeline

Further details concerning the National Pledge Registry and related costs will be set out in a Royal Decree which is still to be drafted.

The Law provides that it will enter into force on the date determined by the King, which may not be later than 1 December 2014. This timeline should allow for the creation of the National Pledge Registry and for all interested parties to prepare for the new regime.

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