CLIFFORD
CHANCE

Briefing note April 2012

"Recourse claims are future claims" Dutch Supreme Court judgment relevant for enforcement and structuring of new transactions

The Supreme Court judgment will require more attention to recourse claims and the way they are dealt with in security documents, not only when preparing for enforcement but also when structuring new transactions.

Judgment

On 6 April 2012 the Dutch Supreme Court rendered a judgment in a case involving the statutory limitation period (*verjaringstermijn*) of recourse claims (*regresvorderingen*) of one joint and several debtor (*hoofdelijk schuldenaar*) against another joint and several debtor. The judgment includes an important consideration about the moment on which recourse claims are deemed to come into existence.

The Supreme Court ruled that recourse claims come into existence "at the moment the debtor satisfies a claim for an amount in excess of the amount such debtor was obliged to contribute (*draagplicht*)". This means that until such moment such recourse claims should be characterized as "future claims" (*toekomstige vorderingen*). This is contrary to what the Supreme Court ruled in the past, being that a recourse claim should be characterized as an "existing claim" (*bestaande vordering*).

Consequences for enforcement

Dutch security documents normally provide that recourse claims that could arise as a result of enforcement are pledged in advance (and often also that such claims are subordinated and/or waived in advance). This to avoid that a sale of the pledged asset by way of enforcement is being complicated or (practically) prevented due to the recourse claim that occurs as a result of such enforcement.

For example if lenders are selling one or more companies by enforcing a share pledge (eg a Dutch pre-pack), a key element is that these companies can be completely separated from the structure that is left behind, to the effect that former affiliates are not able to take recourse against any of the companies that are being sold. If such ringfencing cannot be achieved, a potential buyer may withdraw its offer to purchase or it will cause a purchase price decrease.

Contents

As a result of the Supreme Court judgment, however, the right of pledge in respect of recourse claims shall only become effective at the moment the recourse claim comes into existence, ie at the moment that the security is actually enforced (assuming the value of the asset sold by enforcement exceeds the amount the debtor was obliged to contribute). An important consequence thereof is that the right of pledge will not become effective if at the time of enforcement, the entity that created the security is subject to insolvency proceedings, as such entity is then no longer capable to dispose of its assets (*beschikkingsonbevoegd*).

The right of pledge will therefore no longer provide lenders with control over recourse claims, if the

enforcement takes place during insolvency of the security provider. This means that inclusion of the waiver of recourse claims in advance in security documents has become more important than before. Such waiver should in our view be characterized as a contractual arrangement, to the effect that the recourse claims will simply not come in to existence. Whether or not the debtor has become insolvent in the meantime should not change this analysis.

Conclusion

It can be concluded that following the Supreme Court judgment more attention will be required to deal with potential recourse claims in security documents.

When structuring new transactions it is important that, in addition to the right of pledge, recourse claims are waived in advance. In the event such waiver is not included in an already existing transaction, lenders could consider repairing this when dealing with waiver requests.

Contacts

Ilse van Gasteren
T +31 20 7119 272
E ilse.vangasteren@cliffordchance.com

Jelle Hofland
T +31 20 7119 256
E jelle.hofland@cliffordchance.com

Bas Boris Visser
T +31 20 7119 624
E basboris.visser@cliffordchance.com

Rick Verhagen
T +31 20 7119 290
E rick.verhagen@cliffordchance.com

Clifford Chance, Droogbak 1A, 1013 GE Amsterdam, PO Box 251, 1000 AG Amsterdam