ENTRY INTO FORCE OF THE LAW OF 2013 ON SECURITY OVER MOVEABLE ASSETS.

Pursuant to the law of 11 July 2013 amending the Civil Code (as amended by the law of 25 December 2016), Belgium has adopted a modernised framework for security over moveable assets. The date of entry into force of the law has been postponed a number of times, but the law is now expected to enter into force on 1 January 2018.

This note examines the practical consequences for lenders and borrowers of the entry into force of the law of 11 July 2013 (the "**2013 Law**").

Key points

- Both pledgees and pledgors may wish to prepare for the entry into force of the 2013 Law
- Pledgees will need to register all existing floating charges in the National Pledge Register within 12 months; such registration will give rise to costs capped at EUR 500
- Pledgees may wish to convert existing floating charge mandates into proper pledges
- Pledgors and pledgees should consider (voluntarily) registering pledges over moveable assets (inventory, machinery, …) into the National Pledge Register
- The 2013 Law will not impact financial collateral arrangements, nor will it change the framework for taking mortgages over real estate

The 2013 Law made fundamental changes to the legal framework for security interests

In summary, the 2013 Law made the following (fundamental) changes to the legal framework for security interests over moveable assets:

- The 2013 Law allows for security over moveable assets (such as inventory or machinery, for instance) to be perfected by way of two alternative perfection methods, namely (i) registration of the pledge in a new online National Pledge Register, or (ii) the pledgor being dispossessed of the pledged assets; pursuant to the current legal framework, only dispossession is available.
- The 2013 Law abolishes the law of 1919 on floating charges (*pand op handelszaak / gage sur fonds de commerce*); a pledge over the "business" of the pledgor is still available – and will still cover all elements that constitute the "business" of the pledgor – but the limitations and restrictions set out in the law of 1919 will disappear[1].
- The 2013 Law provides for simplified enforcement procedures, and grants more flexibility to the parties to determine contractually the enforcement methods; in addition, enforcement will no longer require prior court approval, and the pledgee will be entitled to appropriate the pledged assets if the terms for such appropriation were set out in the pledge agreement.

[1] The law of 1919 provides that the pledgee to whom a floating charge is granted must be an EU credit institution; these requirements linked to the identity of the pledgee will no longer apply after the entry into force of the new law. Similarly, the existing limitation of the scope of a floating charge or "business" pledge to 50% of the stock disappears, and a floating charge or "business" pledge will therefore cover up to 100% of the inventory or stock if this is agreed between the parties in the pledge agreement.

- The 2013 Law allows for security to be created in favour of a security agent, acting for the account of the beneficiaries of the security; the beneficiaries of the pledge, and the benefit of the security, will not be affected by the bankruptcy of the representative.

Existing floating charges or "business" pledges must be registered in the new National Pledge Register within 12 months

The 2013 Law provides that an existing floating charge (*pand op handelszaak / gage sur fonds de commerce*) must be registered in the National Pledge Register within a period of 12 months following the entry into force of the 2013 Law in order for such security interest to maintain its rank.

Pursuant to the law of 1919 on floating charges, all floating charges had to be registered with local mortgage registration offices. The 2013 Law provides that these registrations will not suffice, and all floating charges must be registered in the new National Pledge Register, notwithstanding the previous registrations with local mortgage registration offices.

All beneficiaries of existing floating charges should prepare for this registration, and have the necessary information at hand in order to be able to register their security within the prescribed period of 12 months. The cooperation of the pledgor is not required for the registration of existing floating charges in the new National Pledge Register, but pledgors must be notified when the registration was carried out.

The registration of existing floating charges in the National Pledge Register will give rise to the payment of costs which are proportionate to the secured liabilities, but capped at EUR 500. Most existing floating charge agreements provide that costs associated with the pledge or its perfection are to be borne by the pledgor.

Converting floating charge mandates into proper pledges

Under the current legal framework, any floating charge or business pledge taken over the "business" of a pledgor gives rise to registration and other duties amounting to approximately 0.6% of the amount secured by the floating charge. In order to limit the amount of duties due by the pledgor, a practice had developed pursuant to which the pledgor would create an irrevocable mandate to a third party allowing such third party to create a floating charge or business pledge over the "business" of the pledgor, in the future.

Given that the costs associated with the registration of a security interest in the National Pledge Register are now capped at EUR 500, pledgees may wish to convert existing floating charge mandates (that do not create a proper security interest) into proper pledges that are indeed registered and enforceable against third parties.

The conversion of a floating charge mandate into a proper pledge does not necessarily require the intervention of the pledgor, but pledgors must – at least – be informed of the proposed conversion and a copy of any registration in the National Pledge Register must be delivered to the pledgor.

Existing pledges over inventory, machinery, aircraft, trains, etc.

Pledges over inventory, machinery or aircraft will invariably contain stringent restrictions on the use of the pledged assets. These limitations were required under the current legal framework in order to achieve valid dispossession.

The 2013 Law provides for an alternative perfection method for these types of security interests, namely registration in the National Pledge Register. This means that the parties to a pledge agreement will have a choice between:

- registering their security in the National Pledge Register and paying the (limited) costs associated with such registration (the costs are capped at EUR 500); if this option is selected, the stringent limitations linked to "dispossession" will no longer be required; or
- not registering the security in the National Pledge Register, but instead having the pledgor being "dispossessed" of the pledged assets (with the pledgee or a third-party pledge holder acting for the pledgee taking possession of the pledged assets); in this scenario, the limitations linked to "dispossession" of, and control over, the pledged assets will continue to apply.

In practice, we expect that most pledgors and most pledgees will seek to "convert" existing pledges over inventory, machinery, aircraft, trains and other moveable assets into registered security interests. The advantage for the pledgee is that such "registered" security interest will remove the risks that are inherently associated with all structures based on dispossession (because the courts will review the factual circumstances in order to assess whether valid dispossession has been achieved). The advantage for the pledgor is that the stringent limitations and restrictions that were required in order to comply with the "dispossession" requirement will no longer be required with respect to a "registered" security interest, so that the pledgor will gain more flexibility in the operation of its business.

When "converting" an existing pledge into a registered security interest, the parties would usually be expected to enter into a written agreement amending the existing pledge agreement. The amendment agreement would:

- seek to remove most limitations and restrictions that were linked to the "dispossession" requirement;
- define the "maximum amount" for which the security should be registered by the pledgee;
- grant the pledgee authorisation to register the security in the National Pledge Register; and
- provide for an undertaking (usually) by the pledgor to pay the costs associated with registration in the National Pledge Register.

If the amendment agreement is limited to the items mentioned above, and the parties neither seek to renegotiate the terms of the security agreement nor expand or restrict the scope of the security, then we believe that the entry into the amendment agreement should not give rise to the creation of a new security interest which is subject to hardening period rules.

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