

# Loan and security documentation in the Netherlands

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*Dutch law does not stipulate any specific requirements for loan documentation. It is important, however, to clearly set out the arrangements in the contract, in order to avoid or limit subsequent discussion. This includes arrangements about security, as lending money often goes hand in hand with negotiating collateral. Below is a brief overview of the various and most common forms of security available in the Netherlands.*

## **Collateral**

A lender may demand a mortgage right and/or a right of

pledge on the borrower's assets, depending on the type of asset. Establishing these security rights is subject to a number of specific requirements:

### *Immovable property and registered ships and aircraft*

A right of mortgage on land, buildings, registered ships and registered aircraft is vested by a deed executed before a civil-law notary, followed by registration in the public registers of the Dutch land registry. A right of mortgage cannot be established on future assets (i.e. assets that the mortgagor does not yet own).

### *Movable property*

Security on moveable assets, such as inventory and stock, is generally established as a non-possessory right of pledge, where the pledgor is still entitled to use, consume and sell the goods in the ordinary course of business and – if future movable assets are included in the deed of pledge – a new right of pledge is established on each new good so acquired. A non-possessory right of pledge is vested either by way of a privately executed deed, followed by registration with the Dutch tax authorities, or a deed executed before a civil-law notary. Unlike registration with the land registry, registration with the tax authorities is non-public and exists for stamp



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purposes only. An alternative is to establish a possessory right of pledge, in which case the pledgee takes possession of the goods.

### *Receivables*

A distinction can be made between disclosed and undisclosed rights of pledge. Whereas a disclosed right of pledge is established by way of a privately executed deed followed by a notice to the debtor of the pledged receivable, an undisclosed right of pledge is established by way of either a privately executed deed followed by registration with the tax authorities, or a notarial deed. Undisclosed rights of pledge can only be established on future receivables that derive directly from a pre-existing legal relationship when the deed of pledge was executed. Professional lenders therefore frequently register, on the basis of the powers of attorney issued by their borrowers, additional pledge instruments that describe both the receivables to be pledged and the pledgors in general terms.

Pursuant to the Dutch General Banking Conditions (which are applied by all banks in the Netherlands), a right of pledge (first rank) is established on a bank account with a Dutch bank (i.e. on the credit balance on that account), in favour of that bank. At the same time, Dutch banks are not keen on granting any rights

of pledge (even with a lower rank) on such balances to third parties. Many banks' general terms and conditions state that the balance on a bank account may not be pledged, except to that bank, with any effect under property law within the meaning of Article 83(2) of Book 3 of the Dutch Civil Code, and banks are usually reluctant to deviate from that rule.

#### *Registered shares in a Dutch limited liability company*

A right of pledge on registered shares in a Dutch private or public limited liability company includes dividend distributions, and is established by executing a notarial deed. Usually the company itself is also a party to that deed, for the purpose of acknowledgement. It is common practice to agree that, unless and until a default occurs, the shareholder/pledgor retains the entitlement to dividend distributions and the authority to exercise the voting rights on the shares. However, the company's articles of association might need to be amended (also by notarial deed) in advance if they include any provisions prohibiting or restricting pledges of shares in the company.

#### *Intellectual property rights*

IP rights are pledged either using a privately executed deed, followed by registration with the tax authorities, or else

by notarial deed. Although this is not required, it is highly recommended (i.e. in order to obtain third-party effect) to register the right of pledge with the offices where the IP right is registered (such as the register of the Dutch Industrial Property Office or the Benelux Trademark Register).

The pledgor's power of disposition ends in the event of bankruptcy: no new rights of pledge can be created on assets that the pledgor acquires after the date of its bankruptcy.

### **Ranking**

If an asset is pledged or mortgaged in favour of two or more pledgees or mortgagees, how those rights are ranked is determined by the dates and times when they were registered in the public land registry (mortgage) or when the perfection formalities were fulfilled (pledge). It is possible for security holders with respect to the same asset (whether mortgagees and/or pledgees) to change their respective rankings.

### **Guarantees**

Besides the rights of mortgage and pledge described above, lenders often require a guarantee from the borrower's group companies and/or shareholders/directors. A guarantee is created by contract, and there are no specific formalities.

## **Enforcement**

If a borrower defaults in the fulfilment of a secured payment obligation, the lender is entitled to sell the collateral and use the proceeds towards fulfilling that obligation. This does not require a court order. Although in principle enforcement takes place by way of a public sale – and, for mortgages, before a civil-law notary – a private sale is permitted (and often results in higher proceeds) either with prior court approval (mortgage or pledge) or based on an agreement with the pledgor after the lender becomes entitled to enforce the security (pledge). The pledgee is not permitted to appropriate the collateral. However, the pledgee may request the court to rule that the asset will remain with the pledgee, as its purchaser, for an amount determined by the court.

Although also pledged receivables can be sold by the pledgee, the pledgee will usually enforce its rights by collecting the receivables. With an undisclosed right of pledge, the debtor of the pledged receivable should be notified first of the existence of that pledge before the pledgee may collect the receivable.

Enforcing a right of pledge on shares in a limited liability company is usually more complicated: i) shares are not well

sued for public sale, especially if the pledge does not extend to 100% of the shares; and ii) if the articles of association contain any transfer restrictions, these must also be taken into account.

## **Bankruptcy, suspension of payments and the Dutch Scheme**

Although mortgagees and pledgees remain entitled to enforce their rights if their debtor is declared bankrupt or is granted a suspension of payments, the court may order (if the trustee requests) a “cooling-off period” of up to two months, which may be extended for additional period of up to two months. During this cooling-off period, secured creditors are restricted in the enforcement actions that they may take. The court may also impose a cooling-off period (whether general or specific) under the Dutch Scheme (“WHOA”), if it is apparent that: a) it is necessary for the debtor to continue its business while preparing and negotiating a scheme; and b) it is reasonable to assume that this is in the best interests of the debtor’s joint creditors and that the interests of third parties (such as security holders) will not be substantially prejudiced. However, the pledgee or mortgagee may request the court to authorize them to recover their claims from the encumbered assets or to lift

that cooling-off period, by arguing that no grounds exist for imposing a cooling-off period or that a cooling-off period will materially harm their interests.

### **In conclusion**

**The above provides only a limited overview of the various Dutch security rights and the issues that need to be considered when enforcing those rights. If you are planning to grant a loan to a Dutch party, if you already have collateral on Dutch assets that you wish to enforce, or if you simply wish to find out more about this subject, please contact [Eveline Kruisifikx](mailto:kruisifikx@dvdw.nl).**

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