

SCHEDULE 2

BELGIUM

COUNTRY ANALYSIS

Draft – September 2000

1. General

1.1 Pledge – General Characteristics

- The Belgian law requires for the establishment of a commercial pledge:
 - an agreement between the parties: the agreement may be oral but, for reasons of evidence, it will preferably be in written form. The agreement may cover one or more transactions, provided that they are sufficiently defined or determinable;
 - a transfer of possession of the pledged assets is required for both the establishment and the perfection of the pledge.
- Fungible securities can be either bearer or registered securities held under a particular custodian arrangement with the C.I.K.; the relevant pledge asset with this fungibility regime will be the pledgee's undivided, notional interest in the pool of securities held by the CSD involved. All securities deposited with CIK are fungible securities, as well as the securities deposited with any affiliated member of CIK. In practice virtually all Belgian based banks and securities firms are CIK affiliates.
- With dematerialised securities, dispossession is done by crediting the amount of the securities to be pledged to a special account in the books of the relevant account keeping institution or with the appointed operator of the applicable clearing system (the National Bank of Belgium). With respect to dematerialised bonds and shares issued by private companies, the competent account keeping institution has not yet been designated.
- The most frequent method of taking securities over shares will be the pledge, although they can also be covered by floating charge, but pledge is in almost all cases the preferable method. Voting rights do not pass automatically to the pledgee, but are usually retained by the pledgor. Dividends shall be paid direct to the pledgee, although in practice it is common to agree that the dividends are paid to the pledgor until an event of default occurs. Future shares can be pledged but the pledge is not perfected until shares come into the ownership of the pledgor and perfection requirements are met. Enforcement is by Court supervised sale (public or private auction). A pledge of registered shares is perfected by registration in the shareholders' register or by giving notice of pledge to the company. There is no time limit but if registration is delayed more than 15 days after signing security documents and is then made within the pre-bankruptcy risk period, the security will be voidable. For bearer shares there are no registration requirements, as the pledge is perfected by delivery of the share certificates to pledgee or agreed third party holder. Belgian dematerialised shares are not yet in existence and special rules will apply requiring shares to be credited to special collateral account. For shares or other securities held in Euroclear, special rules apply but the shares will be credited to a special collateral account held in Euroclear.
- Other investment securities may be the subject of a pledge. These would include (under the regime of the law of 2nd of January 1991 – see on perfection below) OLO bonds and Treasury Bills issued in dematerialised form by the Belgian government; MTNs, CPs or CDs issued in dematerialised form by the following public sector entities: the Belgian Government, Belgian government agencies and government-owned organisation; foreign governments and agencies; European and other international institutions; central banks and any other entities that may be identified for these purposes by royal decree. Under the regime of the Royal Decree No 62 and company law, investment securities that may be pledged include securities issued in dematerialised form by Belgian companies under

articles 52 octies/1sq. Company Law; MTNs, CPs or CDs issued in dematerialised form under the law of 22nd of July 1991 by private companies or any issuers other than the public sector entities listed above; all other securities deposited on fungible basis in a securities account held with a qualifying institution – see on perfection below with reference to Euroclear's position.

1.2 Transfer of Title – General Characteristics

The concept itself is the subject of controversy in Belgian law. However there is a statutory exception that makes transfer of title possible for certain financial transactions (repo, reverse repos, securities loans, ...) between financial intermediaries (broadly defined) (hereinafter referred to as Financial Transactions). See Art. 223 to 26 to L. 2 January, as modified by L15, July 1998.

Article 25 bis of the Law of January 2, 1991 explicitly recognises this technique as a form of collateral provided that the conditions set out in the law have been followed.

1.3 Considerations relevant to collateral arrangements

Pledge

The Supreme Court has recognised the validity of a pledge granted by a customer to its bank as a security for any and all amounts which are or would become due in the future by that customer to its bank. As a matter of contract a security interest in respect to future collateral can validly be created provided that the collateral is determined. A pledge will be validly perfected upon the pledgor's dispossession of the pledged asset.

As regards over collateralisation, there is no restriction with respect to the amount of collateral to be pledged in relation to the value of the debt to be secured. In any event, possible abuse by the pledgee is prevented by the invalidity of clauses entered into prior to the debt becoming due providing for a right to appropriate the asset to the pledgee's benefit. The preferential right of the pledgee is in any event limited to the amount of the secured claim and any excess of the proceeds is to be returned to the debtor.

There is no requirement as to filing, registration, notification, stamping or notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval required under the laws of Belgium to establish, perfect, continue or enforce the security interest.

Apart from the returning of the collateral upon satisfaction of the debt, the pledgee as the holder of the collateral has to preserve the collateral with reasonable care.

The secured party must take care that the substitution of collateral does not disturb the continuity of the pledge (avoiding invalidation under the bankruptcy rules relating to new security constituted during the pre-bankruptcy suspect period (Art. 17 of the Bankruptcy Law)). The continuity will be subject to the Cour de Cassation principles that the new collateral does not have a value in excess of the previous collateral; and that the substitution is simultaneous. Even if the substitution was effected in the suspect period, the pledge will be upheld and preserve its priority if both conditions are met. There is difficulty in applying the conditions in factual circumstances and general legal uncertainty with this aspect.

In bankruptcy and reorganisation procedures, there are heavy restrictions upon the pledgee's rights. Further, there is risk of conflict with claim over the securities by a pledgee of the business assets.

There is no re-use of the collateral and the pledgee is not allowed to dispose of the securities it holds.

Transfer of Title

Transfer of title arrangements may be agreed between professional market players; the transferred assets must be cash, securities or other financial instruments booked to an account. The arrangement must contain a contractual obligation on the transferee to transfer cash or securities, or similar securities or valuables, back to the transferor upon complete fulfilment by the transferor of its obligations. The other formality with which the parties must comply is the transfer of securities from the account of the provider to the taker.

If these conditions are met, recharacterisation risk will not arise for the initial transfer of securities or for subsequent transfers of securities margin or substitutions of new securities.

A transfer in Euroclear is evidenced by transfer of securities from the collateral giver to the collateral taker's account in Euroclear, according to Euroclear operating procedures. No special account needs to be opened; the securities can be transferred into an existing account resulting in full legal and beneficial ownership passing to the collateral taker. Euroclear has not proposed any specific documentation for this collateral but the collateral giver and taker will need to enter into some form of security agreement.

There is no specific enforcement procedure, as the securities are already owned by the collateral taker. It may set off their value against its claim against the collateral giver and a clause permitting this may be agreed at the time the transaction is entered into and included in the documentation.

After the transfer of title, the collateral taker may use the securities transferred and dispose of them, provided that it retransfers equivalent securities. As to voting rights, these are transferred to the collateral taker along with ownership.

The law provides that the transfer of title to securities to effect substitution will be valid and enforceable in a bankruptcy or any other situation of competing creditors' claims and is not subject to Art. 17 of the Bankruptcy Law; so no specific conditions need to be met. This provides flexibility and legal certainty.

Under bankruptcy and reorganisation rules, the transfer of title enjoys substantial advantages over the pledge. The collateral taker can rely on Art.2279 of the Civil Code to oppose any claim over the securities by a pledgee of the business assets.

In the light of the advantages which title transfer appears to enjoy over a pledge, it seems that it should nearly always be the collateral arrangement of choice of collateral taker. However there are situations in which the collateral taker may not wish to take title because of unfavourable tax, accounting or regulatory consequences in the collateral taker's jurisdiction. Also the collateral giver is taking a bankruptcy risk on the collateral taker, so if the latter defaults on its obligations to return to the collateral giver same or equivalent securities, the collateral giver would be merely an unsecured creditor of the taker.

2. Private International Law and Domestic Law Aspects of Collateral

Validity of the Contract/Attachment

Belgian private international law:

- The law chosen by the parties to govern their contract between them will be the “lex contractus” which will govern the constitution and scope, the validity and effectiveness of contractual relationship embodied by the agreement; whether there is a valid agreement will be governed by the “lex contractus”.
- Belgian law recognises the parties’ right to choose the governing law of the agreement creating the security interest, provided that the agreement has an international nature (e.g., when parties come from different jurisdictions, or the collateral is held outside Belgium; ...) and provided it is not the intention of the parties to avoid the application of mandatory provisions of Belgian Law.
- The relationship between the contracting parties is governed by the law of the contract “lex contractus”.
- The question as to whether the dispossession of the pledgor with respect to the collateral is realised, will be governed by the “lex rei sitae”, irrespective of the law chosen by the parties.

Belgian domestic law:

- For the creation of a valid pledge, a simple written or even oral agreement suffices if the pledge can be qualified as commercial, that is if the pledge secures a commercial debt (the law of 5th of May 1872 on Commercial Pledges, which contains specific rules applicable to these commercial pledges.)
- A pledge over securities in Euroclear is effected by booking the securities into a special pledged account in the books of Euroclear; upon the transfer to this account the pledge is perfected against third parties (including the pledgor's other creditors and bankruptcy trustee). The pledgor, pledgee and MGT CoNY, Brussels branch enter into one of the versions of the Euroclear Pledged Account Terms and conditions governing aspects of their relationship.

Perfection:

Belgian private international law:

- Perfection will depend on the law of the place where the relevant assets are situated (“lex rei sitae”), however different criteria may be used when it comes to determining the location of the assets.
- Registered securities will be regarded as located at the place where the registry is held; bearer securities will be regarded as located in Belgium if the bearer certificate is physically held in Belgium.
- As to securities kept in Euroclear or any other clearing system: the law of 15th of July 1998 now expressly confirms that they should be treated as being located at the place where the clearing system is established. The purpose of the fungibility regime organised by the Royal Decree n. 62 of 10 November 1967, applicable to Euroclear, breaks the direct link between the owner of the securities and the certificates representing the specific securities. Euroclear as depositary may discharge its redelivery obligation by delivering any certificates of the same issue, therefore the physical location of certificates becomes irrelevant, because the participants have no specific right to any particular certificate. As long as the

securities are fungible, the rights of their owners are represented by book entries in the clearing system rather than by any physical certificate. In short, the location of securities kept in a clearing system should be the place where the clearing system is operated and this has been reinforced with the law of 15th of July 1998. This law will amend art. 2bis of the Royal Decree n.62, providing that Euroclear may redeposit the securities it holds on account with any sub-custodian in Belgium or abroad, and that the rules set out by the Royal Decree with regard perfection of pledges remain applicable in that case. So Belgian law will govern the perfection of a pledge over securities kept in Euroclear, irrespective of a possible redeposit of securities by Euroclear with a foreign sub-custodian.

- Dematerialised securities have no physical existence and no obvious location; the closest thing to a physical existence of these securities is their representation as an account entry in a clearing system, so the location of the clearing system, will be the relevant location of the securities, and this analysis is consistent with the conflicts of laws rule now set out by the law of 15 July 1998 in relation to securities kept in Euroclear.

Belgian domestic law

- A commercial pledge is perfected by way of a simple written or even oral agreement as soon as the pledgor is dispossessed of the collateral. An interruption in the dispossession will affect the existence of the pledge.
- In the case of pledge based collateral, the perfection requirements depend on the type of securities concerned and the nature of the issuer. There are two different regimes to take into account:

1. Regime of the Royal Decree n. 62 and Company Law:

- the pledgor must have agreed that the securities will be subject to the fungibility regime of this decree (save in the case of securities issued in dematerialised form by Belgian companies under Art. 52 octies/1sq. of the Company Law). The Terms and Conditions Governing Use of Euroclear provide that Belgian law is applicable, and that the system operates under the fungibility regime set forth by the Belgian Royal Decree, n.62 of 10th of Nov 1967. An additional provision should be included in the relevant security agreement when the collateral is held in Euroclear.
- the securities must be booked on a special account opened at a member institution of the applicable clearing system; and this clearing system is that of either the National Bank of Belgium in respect of public sector securities or the CIK in respect of private sector issuers. With regard to dematerialised securities issued under Arts. 52octies/1sq. of the Company Law, the applicable clearing system is still to be determined by a Royal Decree. The requirement is not that the securities should be redeposited in the clearing system, but simply that they should stand to the credit of an account held at a member of the clearing system.
- Euroclear is a member of the CIK and of the clearing system of the National Bank of Belgium, so the transfer of the securities to a special account opened in Euroclear therefore satisfies this requirement. With this service the pledgee must enter into a standard form agreement with Euroclear and pay certain fees.
- When the beneficiary is a Euroclear participant, it may request Euroclear to open an additional account in its name and arrange for the collateral securities to be

credited to it. Here the security agreement needs to include provisions as to the special account's nature. Similar arrangements when the beneficiary of the collateral is not a participant; a third party custodian member must then be involved.

2. Regime of the law of the 2nd of January 1991:

- the requirements are set out in Art. 7 of this law, which sets out some conditions:
- the securities must be credited to a special account which must be opened at an institution authorised by this law (member of the central bank's clearing system for dematerialised securities; for instance Euroclear, Belgian institutions and investment firms; foreign banks and investments firms, unless they have a branch in Belgium will not be authorised). The special account can be opened directly at the central bank in the securities clearing system.
- the account holder ("teneur de comptes") must act as beneficiary or third party holder;
- inclusion of an additional provision reflecting the perfection requirements should be included in the security agreement.

Priorities:

Belgian private international law:

- Priority aspects will be governed by the *lex rei sitae*.

Belgian domestic law:

- A pledge confers upon the pledgee a "preference" over the asset pledged, in the sense that the pledgee may in case of the debtor's bankruptcy or insolvency be paid out of the proceeds of realisation of the asset in priority to all other unsecured or junior ranking creditors of the debtor; this preference also implies the right to retain the asset until the secured claim is fully repaid.
- A pledge may suffer from the risk of conflict with a pledge granted to another creditor over the general business assets of the debtor (similar to a floating charge) which could cover the pledged securities. Here the first pledge constituted would have priority.
- The general rule is that all creditors are to be treated equally; this rule has a public policy character, but is subject to validly created security interests. Only security interest provided for by law can constitute a valid and enforceable priority right.
- In the absence of any senior pledges, a pledge confers upon the beneficiary a first priority right to be paid out of the proceeds of the realisation of the asset against all other creditors of the debtor, provided that the pledge was not created during the "suspect period" to secure a pre-existing claim or the pledge has not otherwise been nullified under the applicable bankruptcy rules.

- Priority between different pledges as to the same collateral: the priority will be determined in accordance with the date of creation and the earliest pledge will have priority over all subsequent pledges.

Enforcement:

Belgian private international law:

- Upon default of the counterparty, the enforcement is governed by the law of the location of the assets. Belgian law will be relevant in the various situations described above, and in particular when the collateral is deposited in Euroclear.
- The most common conflict of laws rule for determining the law governing the enforceability against third parties will be also the law of the location of the collateral (“lex rei sitae” or “lex situs”); so the key issue is to resolve where the collateral is situated.

Belgian domestic law:

- When the collateral is created by way of a pledge, the Belgian law sets out very simple requirements and again these depend on the type of regime involved:

1. For securities falling under the law of the 2nd of January 1991:

- no prior court authorisation is necessary;
- upon default of the counterparty the recipient may sell the collateral on its own initiative;
- the enforcing party must give prior notice to counterparty, then sell it within the shortest period of time and refund to the counterparty any excess proceeds.

2. For securities falling under the Royal Decree or Company Law:

- the requirements above will apply if the securities are admitted to listing on stock exchange or dealt in another regulated market, recognised and open to the public or transferables and liquid debt instruments, which can have a value accurately determined at any time or at least twice a month;
- if the criteria is not satisfied then for securities which are unlisted, the enforcement will be subject to the procedures set out in the law of the 5th of May 1872: service of demand (by bailiff) on the debtor, application to the president of the commercial court, service (by bailiff) of a copy of the application on the debtor, two day waiting period, decision by the president of the commercial court, service (by bailiff) of a copy of the decision on the debtor, and sale on the exchange (if the securities are listed) or at the stock exchange's weekly auctions (if they are not listed).
- enforcement must comply with the mandatory requirements of the commercial pledge law ((Law 5th of May 1872) requiring prior notice to the debtor, application to the competent commercial court, which will authorise the public auction or private sale of the securities by a person appointed by the court, unless the securities are traded on a regulated exchange, regularly functioning, recognised and open to the public (Art.5,2 of the Royal Decree n.62). The pledgee may then sell the securities after notification to the pledgor, provided that the sale is made promptly, considering the volume of the transactions. The pledgor and pledgee may agree to depart from these rules (i.e. agree that securities will be appropriated by the pledgee and their value set-off against its claim against the pledgor), provided that this is not decided in the suspect period after the execution of the pledge agreement. If this is not agreed when the pledge is entered into, it is subject to the consent of the pledgor. During the course of the pledge, it is subject to the traditional rules of commercial pledges, including the prohibitions of using or disposing the pledged assets by the pledgee. Also according to most Company laws, the voting power linked to the securities remains with the pledgor, unless in proxy (a specific one, granted for a limited time and meetings) is given by the pledgor to the pledgee.

Insolvency:

Belgian private international law:

- The lex contractus and the lex rei sitae may be set aside by the relevant bankruptcy laws "lex concursus creditorum"; this will be normally be Belgian law if the bankrupt company is incorporated in Belgium, but foreign law if the company is incorporated outside Belgium.
- Where Belgian law is applicable as the lex concursus creditorum, the validity and effectiveness of the security interest are determined by the lex rei sitae; however the question as to whether a certain transaction is enforceable upon the debtor's bankruptcy, e.g. because the transaction was entered into during the "suspect period", may be determined in accordance with the lex concursus creditorum.

Belgian domestic law:

- Even after the closing of the claims verification procedure, the court upon application of the trustee can suspend the right of the pledgee to enforce the pledge for a maximum of one year from the declaration of bankruptcy, if certain conditions are met.
- Under a judicial composition a pledgee may not enforce the pledge during the period from the filing of a petition for judicial composition until the decision of the court (within 15 days of the filing); during the “temporary stay” that the court may grant (Art. 15 of the Judicial Composition Law), the pledgee may not enforce the pledge, if the interest and charges on the debt are paid to it; and during the “definitive stay” the pledgee may enforce its rights, except if it has agreed to the contrary or the court has made such stay compulsory. The Court may only do this if the reorganisation plan approved by the court provides for the payment of interest.

3. Miscellaneous

3.1 Cross-border transactions in multi-tiered holding systems

Belgium was one of the first jurisdictions to create a new legal category by statute to prevail over the rule that depositories lose their property rights in the individual securities deposited with the intermediaries and commingled in fungible goods.

The Belgian Royal Decree transformed the personal or contractual claims against Belgian financial intermediaries into co-property rights in notional pools of securities evidenced solely by accounting entries on the records of the financial intermediary, regardless of where the individual securities or actual pools of fungible securities were located.

When taking collateral over securities held in Euroclear, the following points should be considered: a foreign law may be chosen to govern the security agreement, but Belgian law is relevant with regard to the perfection of formalities and the enforcement methods; Belgian law is not necessarily the only law that may apply to perfection; perfection requires that the pledged securities be transferred to a special collateral account in Euroclear which may be set up through Euroclear’s own “pledged account” service, but this is not always necessary; when the pledged securities held in Euroclear consist of Belgian OLO bonds or similar securities, it is necessary to use Euroclear’s “pledged account” service or a custodian which is both a participant in Euroclear and a member of the National Bank of Belgium’s clearing system; the security agreement always needs to contain certain provisions to ensure perfection in accordance with the Belgian law requirements and in most circumstances, enforcement upon default is not subject to any court approval.

In short this law has contributed to increased certainty in international marketplace by permitting a modern approach to conflicts of laws and by allowing investors and secured creditors to determine in advance, with certainty and without undue cost, the substantive law that will govern their rights and obligations.

3.2 Implementation of the Settlement Finality Directive

Belgium has opted for the broad interpretation of the Art.9 (2) of the Directive which has been passed by a Law of April 28 1999. Art. 8 (2) of the Law is more or less a literal adoption of the language of the Art. 9 (2) but contains reference to any requirement that the security should be provided in “connection with a system”. It is also not restricted to securities held in a European system. Thus the Belgian solution adopts the broadest

interpretation of the Directive and is a strict application of PRIMA. The new Law entered into force on June 11 1999.