

SCHEDULE 2
NETHERLANDS
COUNTRY ANALYSIS

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Netherlands Country Analysis
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1. General

1.1 Pledge – General Characteristics

- It is possible to establish a pledge on future collateral and, therefore, on a fluctuating pool of assets, assuming that the assets are sufficiently identifiable; if the pledge is effected by a deed, the assets will be sufficiently identifiable if the deed contains sufficient information to determine, in retrospect if required, which assets are subject to the pledge. Also the pledge will only be created once the pledgee has power of disposal over the assets (generally when the pledgee becomes owner). After the bankruptcy of the pledgee, he no longer has power of disposal over his assets. Therefore no pledge will be created after the bankruptcy of the pledgee.
- In the case of substitution the pledgor will not by law have a right of pledge on the new securities, however it is possible to establish a right of pledge on future assets.
- Under Dutch law there is no incidence of stamp duty or any equivalent documentary tax on pledges.
- Under Dutch law a person can only receive collateral if he has a claim against debtor who gives collateral to secure that claim. In syndicated loans a collateral agent is not always also a creditor. Furthermore, if a new syndicate member appears after the collateral has been given, it is unclear whether under Dutch law the claim of this new creditor can be deemed to be secured by the original collateral as well. In other words, the question is whether collateral given to a collateral agent can also be deemed to secure future claims of future creditors, i.e. future syndicate members.
- **Types of security interest available: - bearer shares or registered shares (“Pandrecht”):**
- A pledge over registered shares must be by notarial deed. Notification is required by the pledgee to the pledgor to enforce security (but it may be waived). This is required so that rights attaching to the shares may be exercised by the secured party. If a BV is a party to pledge agreement then rights attaching to shares can be exercised once the BV has acknowledged the pledge, or the deed served on the BV, or BV has acknowledged the pledge by registration in the shareholders register.

Shareholder consent is often required for the transfer of voting rights in limited circumstances and similar rules apply to the transfer of shares. Dividends are automatically pledged unless otherwise specified. A power of attorney to vote may be given by the pledgee to the pledgor to allow pledgor to vote; however it may be revoked and may terminate automatically upon an enforcement event. Usually includes non-possessory right of pledge over related assets (claims, bonus-stock, instruments, etc).

BV's usually also have mandatory statutory restrictions in articles of association on transfers of shares.

Registration is made in the shareholders' register and notarial deed.

Bearer shares (often used for listed companies) are usually deposited with participating banks in the Dutch central depository and governed by the Act on book entry securities trade. Securities with the Necigef system can be pledged by means of book entries.

Bearer securities in general (bearer bonds and bearer shares) may be the subject of a non-possessory pledge. Bearer securities often used for listed companies are usually deposited with participants banks in the Dutch central securities depository (Necigef) and governed by the Act on book entry securities trade. Securities with the Necigef system can be pledged by means of book entries.

1.2 Transfer of Title – General Characteristics

Under Dutch law a transfer of property is only possible if there is a valid title for the transfer of that property. A juridical act which is intended to transfer property for purposes of security or which does not have the purpose of bringing the property into the estate of the acquirer after transfer does not constitute a valid title for transfer of that property, see section 3:84 DCC.

In short under Dutch law it is not possible to effect a fiduciary transfer of legal title although case law has limited the effects of the restriction resulting from this rule (Hoge Raad 19 mei 1995, Keereweer q.q./Sogelease, NJ 1996/119).

2. Private International Law and Domestic Law Aspects of Collateral

Validity of the Contract

Dutch private international law:

- Parties are, in general, free to make a choice of law. However special rules about the applicable law may exist. In case of a legal person the law of incorporation in general determines the constitutional power and capacity issues.

Dutch domestic law:

- According to Dutch law a pledge is created by (i) establishment, (ii) pursuant to a valid title (iii) by a person who has power of disposal over the assets.
- A pledge on securities being rights to bearer is established by bringing the right to bearer under the control of the pledgee or of a third person agreed upon by the parties or a registered or authentic notarial deed (Sections 3:236, 237 of the Dutch Civil Code (“DCC”). If securities are not rights to bearer or order and qualify as rights which can be exercised against one or more specifically determined persons, a pledge on those securities is established by a deed intended for that purpose and notice thereof given by the pledgee or pledgor to those persons (Sections 3:94 and 98 DCC), or alternatively an authentic or registered deed without notification thereof to those persons, provided that the right in question already exists at the time of the establishment of the right of pledgor or will be directly acquired pursuant to a

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juridicial relationship already existing at that time (Section 3:239 DCC).

- A pledge on securities which are part of the central clearing system in favour of a member institution of Necigef is established by book-entry effected by Necigef, or as the case may be by the member institution that holds the securities, of the pledged securities to the name of the pledgee (See Section 42 of the Netherlands Giro Securities Administration and Transfer Act).

Perfection:

Dutch private international law:

- Lex rei sitae.

Dutch domestic law:

- After the creation of a valid pledge there are no special requirements for the perfection of a security interest.

Priority:

Dutch private international law:

- In general the applicable law will be the same as for the realisation of the pledge although it is argued that also the "lex concursus" might be relevant.

Dutch domestic law:

- In case of the pledgee enforcing, the earliest pledge has the highest priority. Unless otherwise provided for by law, a right of pledge ranks before any privilege (Section 3:279 DCC)
- In the case of a pledge on securities only a claim for recovery of costs incurred in preserving the securities could create a privilege which ranks before pledge.

Enforcement:

Dutch private international law:

- The applicable legal system for the realisation of the pledge will depend on the type of collateral: in case of:
 - for bearer securities it is the lex rei sitae.
 - for a pledge on securities held in and settled through a clearance system the establishment and realisation of a pledge will probably be governed by the law of the jurisdiction where such clearance system is situated, although there is no case law dealing with the matter.

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- for non-bearer securities it is uncertain which law governs the realisation of the pledge although it seems likely that this is the law that governs the establishment of the pledge and it is argued that in case an investor in securities only has a contractual claim against an intermediary the law governing the establishment of the pledge by the investor can be chosen by the pledgor and the pledgee.
- The “lex concursus” might be relevant if foreign bankruptcy law follows a universal approach.

Dutch domestic law:

- Where the debtor is in default of payment for which a pledge serves as security, the pledgee is entitled to sell the pledged property and to take recourse against the proceeds for what is owed to him without any approval being necessary by a judge. However the pledgor and the pledgee may stipulate that no sale will take place until after the judge, upon demand of the pledgee, has determined that the debtor is in default (Section 3:248 DCC).
- Unless otherwise stipulated, in order to proceed to a sale, a pledgee must, to the extent that this is reasonably possible, give at least three days notice of the intended sale with mention of place and time to the debtor and the grantor of the pledge (Section 3:249 DCC).
- The sale takes place in public according to local customs and upon the usual conditions (Section 3:250 DCC). Securities will generally, if possible, be sold on a stock market. Unless otherwise stipulated, the President of the district court may determine that the pledged securities will be sold in a manner which deviates from the preceding rule or he may also determine that the pledged property will remain with the pledgee as buyer for an amount to be determined by him. The pledgee who has become entitled to proceed to a sale may agree with the pledgor to a manner of sale that deviates from the preceding article. Where the pledged property is encumbered with a third party right or is under seizure, the co-operation of the holder of the right or of the seizer is also required (Section 3:251 DCC).

Insolvency:

Dutch private international law:

- Dutch law follows a “universal” approach for bankruptcies declared in The Netherlands. Foreign bankruptcies do not have consequences for assets located in the Netherlands, (a “territorial” approach) although in recent case law the Supreme Court of the Netherlands decided that a trustee of a foreign bankruptcy was allowed to exercise a competence resulting from foreign bankruptcy law in the Netherlands (Hoge Raad 24 oktober 1997, Gustafsen q.q./Mosk, NJ 1999/316)
- Dutch courts are able to declare bankrupt anyone who lives or lived in the Netherlands or conducts or conducted business in the Netherlands and has or had an office in the Netherlands.

Dutch domestic law:

- Section 42 of the Dutch Bankruptcy Act provides that where a debtor has, before his bankruptcy, entered into a transaction without being legally obliged to do so and knew or should have known that the interests of its creditors would be negatively affected thereby, the trustee in bankruptcy has the right to nullify such transaction if certain conditions are met.
- Art. 47 of the Bankruptcy Act states that the trustee in bankruptcy may also nullify a transaction which the debtor was obliged to do if at the moment of the transaction the counterparty of the debtor knew that the petition for bankruptcy of the debtor was filed or the transaction was a result of a concerted plan of the debtor and his counterparty to advantage this counterparty above other creditors by doing this transaction (Actio Paulana).
- If a debtor is declared bankrupt, the zero hour rule applies. This states that the bankruptcy begins at 0.00 hour on the day on which the debtor is declared bankrupt. From this time the debtor is no longer able to dispose over his assets including granting any right of pledge on his assets.
- In the event of bankruptcy or suspension of payments involving a debtor, the holder of a right of pledge can exercise its statutory rights as if there were no such bankruptcy or suspension of payments (Section 57 of the Dutch Bankruptcy Act). However a bankruptcy influences the position of the pledgee in at least the following two ways:
 - Section 63 a of the Dutch Bankruptcy Act provides that at the request of the insolvent party and at the request of the trustee in the bankruptcy, the court can determine that any powers of third parties to take recourse against assets belonging to the bankrupt's estate cannot be exercised during a period of up to two months (to be determined by the court), except with the authorisation of the court. It is not entirely certain whether this provision applies to securities.
 - Section 58 of the Bankruptcy Code states that a trustee in bankruptcy has the right to force a pledgee to enforce its security right within a reasonable period.
- There are no custodian or depository laws or regulations that can entail risks with the insolvency of a custodian.

3. Miscellaneous

3.1 Cross-border transactions in multi-tiered holding systems

Clients who have deposited securities that are part of the clearing system of Necigef do not have individual ownership of the securities deposited but are joint owners of the relevant collective deposit, pro rata to the quantity of securities deposited. Since a collective deposit does not form part of the assets of the member institution of Necigef,

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the securities are not available to the institution's trustee in bankruptcy if the institution becomes insolvent, and are therefore protected.

Securities that are not part of the clearing system of Necigef are often held by the special purpose entities of banks. Since these entities co-mingle the securities they hold in deposit, clients lose their property rights on the assets. The client has a direct claim against the special purpose entity with respect to the deposited securities. Since the special purpose entity's only activity is to act as custodian and the assets of the special purpose entity are separated from the bank's assets, clients who have deposited their securities are protected against insolvency of the bank and the bank's creditors taking recourse on the deposited securities.

3.2. Implementation of the Settlement Finality Directive

| The bill implementing the Directive was submitted to Parliament on October 1998, and came into force on January 1999. The language implementing Art. 9 (2) is found in Article 212 (f) of the Netherlands Bankruptcy Act which provides that where securities or rights in securities are provided as collateral security to participants or central banks of the member states of the European Union and these securities or rights in securities are legally recorded on a register, account or centralised deposit system located in a member state of the European Union, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that member state. This Article follows the language of Art. 9 (2), giving a narrow interpretation. However the Ministry of Justice has set up a special commission on private international law that has proposed a draft bill on the conflicts of laws rules relating to property issues, which it is envisaged will come into effect during the autumn of 2001. This draft bill adopts PRIMA for indirectly held securities.

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