

# BULLETIN

## ON THE NEW BELGIAN ACT ON SECURITY INTERESTS

THE NEW BELGIAN ACT ON SECURITY INTERESTS<sup>i</sup>, WHICH ENTERED INTO FORCE ON 1 JANUARY 2018, OPTIMIZES FINANCING MECHANISMS BUT ALSO CALLS FOR PRECAUTIONS BEFORE ACCEPTING SECURITY OR PAYING A PURCHASE PRICE. ANTWERP, BELGIUM, OCTOBER 2018

### SCOPE

1. The new Title XVII on the Security Rights on Movable Assets in Book III of the Belgian Civil Code (hereinafter “New Act on Security Interests”) governs

- the pledging of existing and future movable assets (see hereunder par. 3 to 7),
- the pledging of existing and future receivables (par. 8),
- the unpaid seller’s reservation of title (par. 9),
- and the rights of retention (par. 10), and
- the pledging of intellectual rights but without prejudice to provisions already governing the pledge registration of intellectual property; (this will not be discussed in this bulletin).

2. Sea going ships and inland barges are excluded from the application of the New Act on Security Interests, so that the provisions governing the mortgage thereon remains unaffected.<sup>ii</sup>

### PLEDGE ON MOVABLE ASSETS

3. The registration of a pledge now enables to secure a receivable by pledging movable assets while the proprietor/debtor keeps the possession and the use of the asset pledged.

4. Until the entry into force of the New Act on Security Interests on 1 January 2018 a pledge on a movable asset would only be opposable to third parties if the pledgor transferred possession (material control) thereof to the pledgee or to a custodian thereto appointed. The practical consequence was that the pledgor could not use the pledged asset.

5. The new pledge provisions still enable the pledging accompanied by a transfer of material control over the assets by the pledgor to the pledgee or a custodian (art. 39), but it also provides for a valid and effective pledging without such transfer, but, by means of a registration in the National Pledge Register. This registration shall, under conditions, cause the pledge to be opposable to third parties. (art. 15)

6. While article 2279 Belgian Civil Code, according to which the possession (material control) constitutes a title over the assets (“*la possession vaut titre.*”), remains in force, a registered pledge may now supersede this provision granting title to possession. To put it otherwise, third parties, such as purchasers and pledgees should no longer rely on the possession by the seller or pledger, as a registration may encumber the property.

7. According to article 57 New Act on Security Interests the pledgee’s claim is preferred on the assets pledged, without prejudice however, to the preference of a few claims listed in the articles 21 to 26 and 58 of New Act on Security Interests and of the retention creditor.<sup>iii</sup>

### PLEDGE OF RECEIVABLES

8. The initial New Act on Security Interests provided for the registration in the National Pledge Register of the pledge of receivables, but it has later been expressly excluded. (art. 15) The reason given for this exclusion was that the notification to the debtor of the pledged receivable, made such a registration useless. However such a notification does not avoid the risk of pre-existing pledges.

## THE UNPAID SELLER'S RESERVATION OF TITLE

9. The New Act on Security Interests grants to the unpaid seller the right to reclaim the assets sold provided the reservation of title results from a writing made up prior to the delivery of the assets. The New Act on Security Interests provides for the ability to register such right, but does not state explicitly the effect of such registration or the lack thereof as it does for the registration of a pledge. All it states in that respect concerns the effect of a registration on the rights of the unpaid seller in the event of the asset becoming immovable. (art. 71) The fate of a subsequent purchaser having paid for assets cursed with a (registered or not) reservation of title is unclear.<sup>iv</sup>

### RIGHT OF RETENTION

10. The right of retention, customarily (but inaccurately) translated as "lien" is the right of a party (hereinafter "retention creditor") who materially controls an asset, to defer the return of such asset, until his claim in relation to that asset has been settled. Several statutory provisions provided for specific rights of retention<sup>v</sup>, but there was no explicit statutory provision granting such right of retention in general. But, the specific rights of retentions were, by case law, expanded to other creditors with material control. Now, the New Act on Security Interests expressly provides, in general terms, for a right of retention for claims in relation to an asset which is under material control of the creditor. This right of retention shall take priority over other rights on the assets, even older rights, provided the retention creditor could reasonably believe his debtor had the power to submit the asset to a right of retention. (art. 27) The creditor with material control shall only be able to oppose the right of retention to other creditors and third parties if he could reasonably believe that this creditor could reasonably believe that his debtor, at the time of transferring material control, had the power to curse the asset with a right of retention. (art. 75)

### THREATS AND PRECAUTIONS

11. **If you are a purchaser** you are at risk that you pay for assets which are subject to foreclosure to the benefit of a pledgee

- a. although the assets are in the possession of your seller: check in the National Pledge

Register whether your seller has not pledged the assets you purchase;

- b. if the assets are not in the possession of your seller, whereas a pledge is opposable to you even without registration thereof, therefore, do not pay nor irrevocably undertake a payment, without acquiring possession first.

12. Still as a purchaser you are at risk to pay for assets which are subject to a reservation of title of an unpaid preceding seller (seller of your seller). Decrease this risk by paying only

- a. after ascertaining the absence of a registration in the National Pledge Register, and
- b. after you acquired material control.

13. **If you are a pledgee**, you are, *mutatis mutandis* exposed to the above mentioned purchaser's risks. The assets to be pledged to you may,

- a. although under material control of your pledgor, already be pledged and so registered, therefore, check the National Pledge Register first;
- b. although free of pledge registration, already be pledged and under material control of this earlier pledgee (or a custodian thereto appointed), therefore, do not seek to obtain the pledge over assets if not under material control of your pledgor, even if the assets are free of pledge registration;
- c. be subject to a reservation of title of an unpaid preceding seller (seller of your pledgee), whether registered or not<sup>vi</sup>; therefore, check the National Pledge Register (but note the uncertainty set out at paragraph 8 here above).

14. **If you are an unpaid seller** reserving his property right until paid, the act is unclear on what the position will be. It is prudent to vest the agreement on the title reservation in writing prior to delivery and to register your reservation of title in the National Pledge Register, bearing in mind that the New Act on Security Interests does not expressly state it protects you against subsequent pledging of the asset, sale thereof or cursing with a right of retention. (see here above paragraph 9)

15. **If you are a lessor or proprietor without material control** you are at risk of your lessee pledging your property, cursing it with a right of retention or selling it. Provide your assets with a clear marking of your capacity of proprietor and the lack of power of any other person to curse the assets with any right. It is our view that with such a marking nor a pledgee neither a retaining creditor shall satisfy the condition of reasonably believing that the pledgee or the retention debtor had the power to curse the asset. (art. 6 and 75)

**DOES THE NEW ACT CALL FOR ANY UPDATE OF EXISTING SECURITY INTERESTS? YES.**

16. Security interests existing prior to 1 January 2018 may require an update. For instance, if you obtained a registered general pledge on a business (gage du fonds de commerce) you need to register the assets pledged in the new National Pledge Register, no later than 31 December 2018.<sup>vii</sup> Further, certain financings may rely on a lien which has now been suppressed<sup>viii</sup>, so that a pledge should instead be sought and registered. It is beyond the scope of this bulletin to list up all the possible scenario's. It is safe to review financings set up prior to 1 January 2018.

**CROSS-BORDER MOVEMENTS OF ASSETS**

17. A movable asset, by its definition, is subject to movement, and may therefore cross national frontiers. As a consequence, such asset may be submitted to other jurisdictions and other legislations. If the dispute is submitted to Belgian court, these courts will apply Belgian International Private Law, more in particular the articles 87 to 94 of the Code of International Private Law<sup>ix</sup>, subject to general provisions in the

Code which may point to another law. There are too many scenario's to elaborate within the scope of this bulletin to give useful guidance in respect of transnational movements, but we would be happy to help you in respect of a practical case.

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<sup>i</sup> Act of 11 July 2013 amending the Civil Code in respect of security interests, *Moniteur belge*, 2 August 2013, hereinafter "New Act on Security Interests". The entry into force was initially set on 1 December 2014, but deferred to 1 January 2017 and subsequently to 1 January 2018 to serve implementation needs of the National Pledge Register.

<sup>ii</sup> The New Act on Security Interests does not apply to sea going ships, nor inland barges. (Article 7 New Act on Security Interests) The mortgage on these sea going ships and inland barges are governed by the articles 8 and 272bis Book II, Code of commerce.

<sup>iii</sup> Such as but not limited to court costs, costs for the preservation of the asset; carrier's claim, the lien of the seller and the lien of the subcontractor, etc.

<sup>iv</sup> Art. 69 states that an unpaid seller who, in writing at latest upon delivery, deferred the property transfer to his buyer until payment, can recover the assets if the buyer fails to pay. The Memorandum of Reasons indicates there is no registration required to oppose this reservation of title to third parties. But, "third parties" in this context seem to refer only to other creditors. (Doc 53 2463/001, Chamber, 24 October 2012, 4<sup>th</sup> session of the 53<sup>rd</sup> legislature, page 96, [http://www.dekamer.be/FLWB/PDF/53/2463/53K\\_2463001.pdf](http://www.dekamer.be/FLWB/PDF/53/2463/53K_2463001.pdf)) If that is correct, article 69 would not protect the seller having reserved his property timely and in writing against a subsequent purchaser who has acquired possession (material control). Would a registration of the reservation of title be helpful to protect the unpaid seller? The logic would say yes, but, there is no express specific provision to that end, as there is for the protection of the pledgee. However, the Memorandum of Reasons to the Act of 25 December 2016, amending the New Act on Security Interests,

suggests, though incidentally, the registration of a reservation of title has the same effect as the registration of a pledge (Doc 54 2138/001, Chamber, 7 November 2016, 4<sup>th</sup> session of the 54<sup>th</sup> legislature, <http://www.dekamer.be/FLWB/PDF/54/2138/54K2138001.pdf>).

<sup>v</sup> Article 1948 Belgian Civil Code provides explicitly for the keeper of assets to retain the assets to secure his keeping fees. Article 124 Book II, Code of Commerce provides for the sea carriers right to entrust the cargo to a third party, until payment of freight.

<sup>vi</sup> The reservation of title is effective towards third parties, even if not registered, so that the risk of a reservation of title remains a risk, even if there is no reservation of title registered.

<sup>vii</sup> Art. 107 §1 Act 11 July 2013 amending the Civil Code in respect of security interests and suppressing provisions thereto related, *Moniteur belge*, 2 August 2013.

<sup>viii</sup> Art. 100 and following Act 11 July 2013 amending the Civil Code in respect of security interests and suppressing provisions thereto related, *Moniteur belge*, 2 August 2013.

<sup>ix</sup> Selective translation of the articles 87 to 94 Belgian Code of International Private Law:

Law applicable to real rights.

Art. 87. § 1. The rights in rem on an asset are governed by the law of the State on whose territory this property is located at the time when it is invoked.

The acquisition and the loss of such rights are governed by the law of the State in whose territory the property is located at the time when the doings (transactions) or facts invoked as a basis for the acquisition or loss of those rights occur.

§ 2. In the event that the assets referred to in § 1 consist of an asset formed by a set of assets with a special purpose, such as a business, it shall be deemed to be in the territory of the State with which the asset have the closest links.

§ 3. Establishment of a security (or other) right on receivables as well as the consequences of the transfer of a claim against such rights shall be governed by the law of the State in whose territory the party that has established these rights or has transferred the claim has his habitual residence at the time of the establishment or transfer.

The consequences of a stipulated subrogation on rights in rem are governed by the law of the State on whose territory the subrogating person had his habitual residence at the time of the transfer.

Law applicable to transit assets.

Art. 88. The rights and securities of an asset in transit are governed by the law of the State of destination.

Law applicable to means of transport.

Art. 89. The rights on an aircraft, ship, boat or any other means of transport registered in a public register shall be governed by the law of the State in whose territory the registration took place.

Law applicable to cultural assets.

Art. 90. ...

Law applicable to negotiable instruments.

Art. 91. § 1. The rights on a negotiable instrument for which the law imposes registration in a register are governed by the law of the State in whose territory the register is located in which the entry appears on the individual accounts of the holders of the rights.

The register shall be presumed, subject to proof to the contrary, to be located at the place of principal establishment of the person keeping the individual accounts.

§ 2. The rights to an effect that is not the subject of a registration as referred to in § 1 are governed by the law of the State in whose territory the effect is when invoked.

The acquisition and the loss of these rights are governed by the law of the State in whose territory the instrument is located at the time when the acts or facts invoked as a matter of acquisition or loss of those rights occur.

§ 3. The law of the State in whose territory the instrument is issued determines whether this instrument represents an asset or a movable value and determines whether it is negotiable and what rights are attached to it.

Law applicable to stolen assets.

Art. 92. ...

Law applicable to intellectual property.

Art. 93. The intellectual property rights are governed by the law of the State for the territory of which the protection of the property is requested.

The determination of who is the original holder of an industrial property right is, however, governed by the law of the State with which the intellectual activity has the closest connection. When the activity takes place in the context of contractual relations, it is presumed that the aforementioned State is the one whose right to apply that relationship is, subject to proof to the contrary.

[...]