Publicity in secured transactions law: Towards a European public notice filing system for non-possessory security rights in movable assets?

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was thus not that possession in the hands of the secured lenders had at one time given correct information to third parties, and now no longer does. Not were secured lenders seriously suspected of such deceit. Insofar as the possessory pledge had hitherto been applauded for these reasons, it was therefore in my view on incorrect grounds.

Now, one might ask what is so bad about juggling with the abstract notion of possession. It undoubtedly gives academics a great opportunity for philosophizing, but it clouds our vision. It prevents us from getting down to the real nitty gritty, the true substance of the question: why is public information on security interests so important and to whom? This analysis will be conducted in Chapters 3 through 4.

An example of non-public filing: Dutch secured transactions law

Chapter 3

buyers in the ordinary course

secured lenders

An example of non-public filing: Dutch secured transactions law

attached unsecured creditors

policies by unsecured creditors

Chapter 3

An example of non-public filing: Dutch secured transactions law
1. Introduction

No matter how interesting thought exercises on the subject matter may be, for the purpose of this research it might be less interesting than looking into a system in which a public filing system is not available to parties that are generally involved in secured transactions law and in which therefore problems presumed to result from such absence must have materialized. After all, a purely theoretical discussion on the puzzling concepts of publicity and of possession, as conducted in the previous chapter, is only one way to approach the publicity issue. It would seem useful to approach the existence of problems such as ‘false appearance of wealth’ also from a practical angle, by considering the expectations and needs of the alleged beneficiaries of publicity (hereafter for convenience’s sake, ‘third parties’), given the legal context in which they operate. After all, much more relevant than an asset’s – or a debtor’s – ability to deceive certain parties, is the precise respect in which such parties can be deceived given their true interests in public information on existing security rights, with a view to e.g. the nature of their business, their market behavior, their common use of legal instruments etc. Taking these observations into consideration, this chapter will provide a description of one of the few remaining legal systems of secured transactions law that does not make use of a public filing system: the Dutch legal system. It will provide both a description of the Dutch legal rules and concepts on secured transactions law and a description of the way Dutch lenders and trade creditors deal with these rules in practice. The consequences of the lack of public filing for third parties and of the debtor will be analyzed in Chapter 4. That same chapter will present conclusions on the use of public information on security interests for these parties.

2. Dutch legal rules on secured transactions law

2.1. General introduction

2.1.1. Core elements of the Dutch secured transactions law system

Dutch legal rules on secured transactions law, e.g. the rules on the creation of security rights in movable property, their effect against third parties and priority rules, are found in Book 3 (’The Law of Property, Proprietary Rights and Interests’) and Book 5 (’Rights in rem’) of the Dutch Civil Code (in Dutch: *Burgerlijk Wetboek* (’BW’)).


1 Although most Books were enacted separately, roughly between 1970 and 2003, the core (including Book 3 and Book 5) entered into force on 1 January 1992. There are two exceptions to this: parts of Book 7 entered into force between 1992 and 2007 and Book 10 entered into force on 1 January 2012.
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Both between the Books and within each Book of the BW, a hierarchical or ‘layered’
structure can be found. Book 3 contains general provisions and key definitions used in
patrimonial law – such as ‘property’, ‘property rights’ and ‘things’. In addition, it deals
with the acquisition and loss of property in general, the rights of pledge and mortgage,
and the rights of recourse that creditors have against the debtor’s property. Book 5 deals
only with things, and therefore only with the right of ownership of movable and immovable
things and limited rights that apply only to things, such as: easement, leasehold, the right of superficies and apartment rights. Limited rights that can apply to all
property, i.e. to both things and property rights, are dealt with in Book 3.

Like most European legal systems, Dutch law adheres to the *numerus clausus* principle,
which forbids parties to create proprietary rights ‘outside the box’: these rights are
restricted to the types of proprietary rights that are provided by law. Hence, unlike U.S.
law, Dutch law has adopted a so-called ‘dogmatic’ (i.e. not functional) approach to
property rights (including security interests). As a consequence, Dutch law recognizes

Dutch BW has been cited regularly as the most modern Civil Code in Europe. See Von Bar & Drobnig
2004, no. 470: “The most modern European Civil Code is the Dutch code, whose books on patrimonial law (books 3, 5
of private law in Western Europe, meanwhile, is Dutch law: not only did it adopt an entirely new civil code in 1992, it
amended its assignation provisions in 2004.” In the course of writing this thesis, this was overtaken by the fact
that France has renewed its secured transactions law in 2006 and 2007 (see Civil Code Article 2355 et seq.)
and by Belgian law; see supra Chapter 1, footnote 38 and 45. The Dutch Civil Code may nevertheless still
be considered as relatively modern. It is in any event the most modern Code in a system that has not
adopted public filing.

2 All translations of Dutch legal rules in this thesis are taken from Warendorf, Thomas & Curry-Sumner
2009.
3 This means that the rules are structured hierarchically, i.e. from ‘general’ to ‘specific’. Snijders & Rank-
4 Art. 3:1 BW: “Property is comprised of all things and of all proprietary rights and interests.”
5 Art. 3:6 BW: “Property rights are any rights of a proprietary nature which, either separately or together with another right,
are transferable; rights which are intended to procure a tangible benefit to the holder; or rights which have been acquired in
exchange for actual or expected tangible benefit.”
6 Art. 3:2 BW: “Things are corporeal objects which can be subject to human control.”
7 Cf. Salomons 2011a, p. 9-10 and Von Bar & Drobnig 2004, no. 470. For more details on the structure of
Dutch patrimonial law, see e.g. Snijders & Rank-Berenschot 2012, nos. 10-13.
8 Cf. Von Bar & Drobnig 2004, no. 472: “According to the doctrine of numerus clausus, only the proprietary rights
admitted by law are available for use by the parties, and these are unable to recur to, or to create, any other real rights.”
Cf. Struycken 2007. For an in-depth analysis of the numerus clausus principle in European property law, see
Akkermans 2008.
9 This follows from Art. 3:81(1) BW, first sentence: “A person who is entitled to an independent and transferable
right, may, within the limits of that right, establish the limited rights recognized by law.” See also Asser/Mijnssen, De
Haan & Van Dam 3-I 2006/39. Some scholars are of the view that, when it comes to adherence of the
Dutch legal system to the numerus clausus rule, the Dutch system is ‘half-open’ rather than ‘closed’. See
only eight types of property rights: long leasehold, easement, usufruct, apartment rights and the right of superficies, pledge and mortgage. Each property right gives the entitled party a right to the object, and has erga omnes effect and droit de suite. In the case of successive rights, the rule of prior tempore applies (‘first come, first served’). The most important property right is the right of ownership.

The Dutch approach to the concept of ownership has its roots in the civil law tradition: rather than adopting the ‘bundle of rights’ doctrine – as known from the common law tradition – ownership cannot be divided: one person alone can be the owner, and with that, exercise the owner’s powers. These powers include, most importantly, the right to use, to reindicate and to dispose of the asset. However, Dutch law does recognize the concept of ‘relative ownership’, which refers to the phenomenon of a transfer having effect vis-à-vis certain third parties only: the acquirer is considered to be a (mere) ‘relative’ owner.

Only movable assets (in the Dutch BW: ‘things’) can be subject to the right of ownership, but a similar concept applies to intangible assets such as claims – in which case the ‘owner’ is called ‘the entitled party’.

In order to transfer ownership or to create a limited proprietary right with respect to an asset, there must be a valid title, the debtor must be entitled to dispose and the asset must ‘delivered’ to the acquirer.

A sharp distinction is made in Dutch law between ‘ownership’ on the one hand and ‘security’ on the other. Of the eight property rights listed above, the pledge and the mortgage are the only security rights. A pledge is vested in movable assets; whereas the mortgage is vested in immovable property. The law does not allow the transfer ownership for purposes of security; the fiduciary transfer is explicitly prohibited in Dutch
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law. It is, however, possible for a seller to retain ownership; this qualifies as ‘retention of title’. In addition, Dutch law contains a rule that gives unpaid sellers of movable assets the right to terminate the contract and reclaim unpaid goods as the rightful ‘owner’, under the right of reclamation.20

Dutch law recognizes two different types of pledge with respect to movable assets: the possessory pledge and the non-possessory pledge. A right of pledge can secure both existing and future claims (art 3:231 BW),21 and is automatically terminated when the debt has been paid off. The right of pledge ‘depends on’ the claim that it secures. This means that the right of pledge terminates or passes to the acquirer of the claim respectively, when the debt is paid off (with the result that the claim ceases to exist) or the claim is transferred to a third party.22

Before explaining how a right of pledge is created, I will provide a brief description of the transition from possessory security to non-possessor security in Dutch law in the next subsection 2.1.2.

2.1.2. The transition from possessory to non-possessor security in Dutch law
When the Dutch legislature adopted the Civil Code in 1838 (hereafter ‘BW (former)’), 25 years after the Dutch regained their independence from France, the possessory pledge was adopted as the only possible form of security. The BW (former) explicitly stated that a movable asset, in order to be pledged, had to be handed over to the pledgor or a third party who was appointed by the contracting parties (Art. 1198(1) BW (former)).23 In doing so, the BW (former) followed the example of most European jurisdictions.24

The Dutch legislature deviated from the French Civil Code (*Code Civil*, ‘CC’) in two important ways. First, it required ‘delivery’ of the asset – a factual handing over of the asset – in order to transfer ownership of the asset, instead of allowing parties to transfer

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19 Art. 3:84(3) BW: “A juridical act intended to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer, after transfer, does not constitute valid title for transfer of that property.”
20 A retention of title is created by adopting a retention of title clause, in Dutch called an ‘eigendomsvoorbehoud’, in the contract of sale, see Art. 3:92 BW. The right of reclamation (in Dutch referred to as ‘recht van reclame’) is provided in Art. 7:39 BW. Since both the retention of title clause and the right of reclamation are constructions that facilitate creditors in ensuring that their debts are repaid, they are both discussed in this chapter.
21 See also on this subject Veder 2007, p. 195. However, the claims for which security is created must be sufficiently identifiable. It is not required that the claims are described in the deed of pledge, but that is often done: the deed customarily contains either a concrete description of the secured liabilities, or a broader reference to such liabilities and the legal relationship from which they will or may arise. A broad description of this kind will be sufficient to meet this requirement. See *infra* subsection 2.2.2.
22 See Art. 3:7 BW in conjunction with Art. 3:82 BW and Art. 6:142(1) BW. Cf. Asser/Van Mierlo & Van Velten 3-VI* 2010/52 and 135.
23 Art. 1198(2) BW (former) made this even clearer by stating that a right of pledge in a tangible asset became invalid as soon as the movable asset was transferred back to the debtor. Asser/Van Mierlo & Van Velten 3-VI* 2010/21. Now, this requirement is adopted in Art. 3:258(1) BW.
24 See *infra* Chapter 1, subsection A.1 and A.4.
property only by consent (i.e. it adopted the so-called ‘tradition system’).\textsuperscript{25} Second, with regard to immovable goods, a public register was established in which the transfer of ownership had to be filed.\textsuperscript{26} As mentioned in the previous chapter, both measures are based on the belief that property rights — e.g. the right of ownership in movable and immovable things — should be made public to third parties.\textsuperscript{27}

Since the need for a form of non-possessory security was strongly felt in commercial practice in not only the Netherlands but throughout Europe, all possible means were used to evade the requirement of dispossession. One such means was the attempt to interpret the act of handing over of the asset to the secured lender broadly, for example by (merely) handing over the key of the company premises to the secured lender.\textsuperscript{28} Initially, the judges were uncompromising as to stretching the rules: if there was no public handing over of the asset, the transaction was simply declared invalid.\textsuperscript{29} Nonetheless, commercial practice came up with the construction of the fiduciary transfer, whereby the lender acquired a right of ownership rather than a right of pledge.\textsuperscript{30} The fiduciary transfer did not require the debtor to be dispossessed, since the parties involved could make use of ‘constructive delivery’ (the delivery \textit{constitutum possessorium}, ‘delivery c.p.’), recognized by the Dutch Supreme Court (in Dutch: \textit{Hoge Raad}, hereafter ‘HR’ or ‘Supreme Court’) in 1885.\textsuperscript{31}

In a nutshell, the fiduciary transfer entailed the debtor and its lender agreeing that the latter would be entitled to the assets in case of default of the debtor, under the condition that the lender would return the assets to the debtor (by means of delivery \textit{brevi manu}) as soon as the debt had been paid off.

Since use of the fiduciary transfer was no more than a means to create a non-possessory security right, the question arose as to whether this construction should be regarded as a breach of Art. 1198 BW (former). In 1929 the Dutch Supreme Court ruled that the

\textsuperscript{25} See Dutch author Scheltema on this in 1938: “Our legislator abandoned the system of the Code, under which ownership can be obtained inter alia “par l’effet des obligations” (art. 711), and in art. 639 returned to the ancient legal rule: traditionis et usucaptionis dominia vennu transferuntur, non nudis pactis. The notion underlying such a system is evidently this, that the existence of a personal obligation — generally arising from agreement — to cause the thing to be transferred into the property of another is not deemed sufficient to accept the transfer of the right of ownership, but for this it is required that, to perform the said personal obligation, de facto power over the thing is granted by the transferee.” (translated) Scheltema 1990, p. 395. \textit{Cf.} Salomons 1994, pp. 1264-1266.

\textsuperscript{26} Meijers 1932, p. 65.

\textsuperscript{27} \textit{See supra} Chapter 1, subsection A.4.

\textsuperscript{28} For an overview of the attempts made to evade the requirement of Art. 1198 BW (former), see Blom 1929, p. 43 \textit{et seq}, and p. 107 \textit{et seq}, and Jarolímek 1956, pp. 6-10.

\textsuperscript{29} Jarolímek 1956, p. 10. A few examples of case law in which this was the issue: Rh. Maastricht 5 October 1922, NJ 1923, 64 and Hof Den Bosch 3 February 1925, W. 11570, NJ 1925, 927.

\textsuperscript{30} According to Jansen, this construction — and also the construction of the retention of title — was copied from the German legal system. \textit{See} Jansen 1999.

\textsuperscript{31} HR 21 February 1885, W 5146 (Peters/Van Herzelee). \textit{Cf.} Salomons 1994, p. 1264. Some argue that the recognition of the delivery c.p. in the Dutch legal system took place earlier, in 1841 (in HR 26 November 1841, W 249); \textit{see for example} Rechuis 1987, p. 36.
construction of the fiduciary transfer by means of a delivery c.p. was not a breach of Art. 1198 BW (former) and was therefore valid.32,33

Despite its practicality from the perspective of commercial trade, there was objection to the recognition of the fiduciary transfer due to its ‘silent’ character. The leading critic in this respect was Professor Meijers, the legal scholar entrusted with the monumental task of drafting the New Civil Code between 1947 and 1954. Meijers argued for abolishing the fiduciary transfer and replacing it with a non-possessory right of pledge that had to be filed publicly.34 He believed that fiduciary transfers allowed the debtor to antedate existing deeds or to feign non-existing deeds of transfer, simply because they were not public, resulting in harm for unsecured creditors.35 Meijers’ proposal to replace the fiduciary transfer with a non-possessory pledge was successful, but the requirement to file it in a public register failed in the adoption process and did not become law due to many objections from members of the Dutch Parliament. First of all, many members of the Dutch Parliament were not persuaded by Meijers’ ‘false appearance of wealth’ argument:

“(…) the Committee first considered that the legislator can never prevent a debtor from being able to pose as wealthier than he really is. It will always be possible, using hired or borrowed goods or objects on hire-purchase, to live in grand style. A prospective creditor must therefore not rely on appearance, but must exercise great caution.”36

Moreover, members stated explicitly that they were fearful of publicity with regard to granting credit: it could actually obstruct the granting of credit, as such publicity could be harmful to businesses. Other objections related to the alleged costs and bureaucracy that the filing requirement would bring about.37 The Dutch Parliament was therefore more

32 HR 25 January 1929, NJ 1929 (Brouwerij), p. 616 and 21 June 1929, NJ 1929 (Hakkers/Van Tilburg), p. 1096. It is important to note that the issue was not the validity of the fiduciary transfer itself, but the fact that such transfer was effectuated by means of a delivery c.p. Cf. Pitlo/Brahn, Groot & Breemhaar 1980, p. 475.
33 Even so, in several instances of case law the fiduciary transfer was, as far as its legal consequences were concerned, in many ways equated with the right of pledge. See HR 3 January 1941, NJ 1941, 470 (Hazerswoude-Los), HR 30 January 1953, NJ 1953, 578. HR 7 March 1975, NJ 1976, 91 (Van Gend & Loos), HR 18 December 1945, NJ 1946, 750 and HR 28 June 1957, NJ 1957, 514. For more detailed information on this topic, see e.g. Jansen 1999, p. 19 and 29, note 42.
34 Meijers referred to a survey of bailiffs in both urban and rural areas, that found that they were unsuccessful in their attempt to seize the goods of defaulting debtors in over 50% of cases because the assets had been transferred 'secretly' – i.e. by means of a c.p. delivery – to the debtor’s lenders. According to Meijers, the alleged loan deeds were all fake deeds. As a result, according to Meijers, the entire legal system was undermined, in particular the position of unsecured creditors. Meijers 1936, p. 184. The debates in the Dutch Parliament also showed that the value of this survey (already 20 years old by then) was questioned. See Parliamentary History, Book 3, p. 2692. Cf. Jarolimek 1956, p. 32.
35 Meijers 1936, p. 184.
37 Parliamentary History, Book 3, p. 691.
receptive to the argument concerning the risk of antedating and fraud by falsified deeds whose inherent risks it was prepared to address by introducing statutory provisions to ensure date certainty:

“The requirement of a fixed date stamp would in no way obstruct the granting of credit. Filing in public registers, on the other hand, would indeed have this effect; after all, it is known from practice that people are fearful of publicity about the granting of credit secured by movable goods.”

With regard to the argument of fraud by falsified deeds, Meijers’ objection against the proposed solution was – rightly – that date certainty is not a sufficient remedy. The only way for this risk to be resolved, in Meijers’ view, was by introducing a publicly filed non-possessory pledge. Yet Meijers’ resistance was fruitless: his proposal for a public non-possessory pledge never made it through Parliament. As a result, the New Civil Code introduced the non-possessory pledge, but its ‘silent’ character remained in force: in order to create the non-possessory pledge a written deed of pledge was required. This was effectuated by the drawing up a notarial (i.e. authentic) deed or registering a private (i.e. non-authentic) deed of pledge with the competent tax authority, whose ‘register’ was not public to third parties. The fiduciary transfer was explicitly banned in the BW.

2.2. The most important security rights and the requirements for creation

2.2.1. General introduction to the right of pledge (possessory and non-possessory)

The basic requirements for creating a right of (possessory or non-possessory) pledge are the same as those for transferring ownership: there must be a valid title, the debtor must

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39 See on this subject extensively Salomons 2013, p. 321-325.
40 Art. 3:84(3) BW: “A juridical act intended to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer, after transfer, does not constitute valid title for transfer of that property.” The most important case on the subject of the fiduciary transfer, the Sogelease case (HR 19 May 1995 (Keereweer q.q./Sogelease), NJ 1996, 119), shows that the scope of Art. 3:84(3) BW is rather limited. In the Sogelease case the Supreme Court held that a financing construction in which a lessee is financed by the lessor, while the former transferred full ownership to the latter for security purposes, is valid as long as a ‘true transfer’ has taken place. Evidence of this ‘true transfer’ character must mainly be that the lessee is not just given preferential treatment in relation to other creditors by merely being given a right of priority. Hence, if the lessee has received more than just a right to take recourse on the assets, the transaction passes the Art. 3:84(3) BW test. For more details of the Sogelease case see Pitlo/Reehuis-Heisterkamp 2012, nos. 119a and 760 and Snijders & Rank-Berenschot 2012, nos. 194, 198 and 485.
41 Despite the prohibition, there are a number of legal concepts in Dutch law that have a fiduciary character: retention of title, hire-purchase and also financial leasing, which was developed in commercial practice. See Asser/Mijnssen, De Haan & Van Dam 3-1 2006/472-473. See also Parliamentary History Book 3, p. 1197, Pitlo/Reehuis-Heisterkamp 2012, no. 760 and Snijders & Rank-Berenschot 2012, no. 194. For more information about the history of the fiduciary transfer, see e.g. Reehuis 1987 and Van Mierlo 1988.
42 I note that the debtor is not necessarily always the pledgor, given that a third party may also create a pledge over its assets to secure an obligation of the debtor (third party pledge or in Dutch ‘derdenpand’).
be entitled to dispose of the asset and several formal requirements must be fulfilled,\(^43\) which will be discussed in subsections 2.2.3-2.2.4.

The first requirement, that establishment of a proprietary interest does not take effect if there is no valid title (\textit{causa traditionis}, in Dutch: ‘titel’), is commonly defined as the legal ground that underlies the proprietary transaction and serves as a justification for that transaction.\(^44\) If the title is invalidated after creation of the pledge, the pledge automatically ceases to exist.\(^45\) When establishing a right of pledge, the title is commonly represented by a clause in the credit agreement to the effect that a right of pledge is to be created.\(^46\)

The second requirement for creating a pledge – that the debtor must be entitled to dispose – follows from the \textit{nemo plus principle}: one cannot give what one does not have. This means that such a right can only be established if, and to the extent that, the debtor either owns the assets or is empowered to dispose of them by either the owner or by statute. In the absence of proper authorization, the debtor has no power to dispose if for example it had leased or stolen the assets, if its supplier has retained title to the assets or, alternatively, if the debtor has taken custody of the assets. If the debtor is declared bankrupt, it is also not entitled to dispose. To satisfy commercial necessity, however, a debtor can fulfill the \textit{formalities} necessary for the creation of a right of pledge despite the fact that it is not (yet) the owner.\(^47\) In that case, the pledge will come into existence as

\(^{43}\) See supra footnote 17; this follows from Art. 3:98 BW: “\textit{Unless otherwise provided by law, this Section on the transfer of property applies, mutatis mutandis, to the establishment, transfer and abandonment of a limited right to such property.}” See also Parliamentary History, Book 3, p. 404 and Asser/Van Mierlo & Van Velten 3-VI* 2010/26.

\(^{44}\) Snijders & Rank-Berenschot 2012, no. 314. Alternatively, it is described as legal cause, or the legal relationship that commits parties to transfer or encumber the asset. Pitlo/Reehuis-Heisterkamp 2012, nos. 113-116.

\(^{45}\) This consequence is part of a policy choice made by the Dutch legislator to adopt the \textit{causal} system with regard to the transfer and encumbrance of goods. The choice in favor of this causal system was first made in 1950 by the Supreme Court in the Damhof/Staat case (HR 5 May 1950, NJ 1951, 1. This causal system was also adopted in Belgium, France and England and Wales and is the ‘opposite’ of the \textit{abstract} system. The abstract system, adopted in e.g. Germany, abstracts from the validity of the title; this means that avoidance of the contract by e.g. committed fraud or abuse has no influence on the validity of the transfer.

\(^{46}\) It can also be provided by statute. See for example, Art 3:206 BW. The title is invalid, for example when avoided by one of the parties on the basis of coercion of duress. It is obvious that such situations are rare.

\(^{47}\) This is done in the same way as prescribed for pledging an \textit{existing} asset. Asser/Van Mierlo & Van Velten 3-VI* 2010/179-180. It follows from Art. 3:97(1) BW in conjunction with Art. 3:98 BW. Whereas
soon as the debtor acquires the ownership of the assets. Nonetheless, Dutch law does not recognize a ‘floating lien’ concept de jure.48

The third general requirement is that the pledge must be executed in the form statutorily prescribed for that precise type of pledge. The applicable formalities differ according to the nature of the asset in respect of which a pledge is created: there is no ‘one size fits all’ form by which all assets, regardless of their nature, may be pledged.

2.2.2. The possessory pledge
In order to fulfill the ‘specific formalities’ for creating a non-possessory pledge, the assets must be placed effectively in the possession of the pledgee or a third party agreed upon by both parties, and that they must remain out of the control of the debtor for as long as the pledge exists.49 In line with this reasoning, Art. 3:258(1) BW provides that the possessory pledge will automatically end if the pledgor regains control over the collateral.

2.2.3. Non-possessory pledge (I): filing a private deed with the tax authorities
In order to fulfill the ‘specific formalities’ to create a possessory pledge, parties can draw up a private agreement and ‘file’ this agreement with the tax authorities or draw up a notarial deed (the notarial deed is, eventually, also filed with the tax authorities). The databases for these files at the tax authorities, however, are not open to public inspection; the only purpose of both ways of creation is to fix the date on which the right of pledge

Art. 3:97(1) BW provides: “With the exception of registered property and property which is prohibited to be the subject matter of a contract, future property may be delivered in advance”, Art. 3:98 BW makes this also applicable to pledging: “Unless otherwise provided by law, this Section on the transfer of property applies, mutatis mutandis, to the establishment, transfer and abandonment of a limited right to such property.”

48 This does not apply to all European jurisdictions. A ‘floating lien’ is available in the United Kingdom and is, to a certain extent, recognized in Belgian law (the Belgian “gage”).

49 Art. 3:236(1) BW: “The right of pledge on a movable thing, on a right payable to bearer or order, or on the usufruct of such a thing or right, is established by bringing the thing or the paper to bearer or order under the control of the pledgee or of a third person agreed upon by the parties. Furthermore, endorsement is required for the establishment of a right of pledge on a right payable to order or on the usufruct thereof.” If the assets are placed in the possession of a third party, the latter cannot be an agent or other representative of the pledger. In addition, the third party will not be permitted to hand over the assets to the pledgor without the permission of the pledgee. If the collateral is already in the possession of the pledgor or a third party, the possessory pledge can be created by issuing a bilateral declaration to the pledgor or the third party that a right of possessory pledge is created.

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was created. In the current subsection (from subsection 2.2.3.1 et seq.) the option of drawing up a private agreement that has to be filed with the tax authorities will be elaborated on; in subsection 2.2.4 the option of drawing up the notarial deed will be discussed.

2.2.3.1. Drawing up the private deed

The first option for the creation of a non-possessory pledge is the option of drawing up a private agreement (sometimes referred to as a ‘non-authentic deed’) and filing the deed with the tax authorities. Before explaining how a private deed is ‘filed’ with a tax officer and how the ‘register’ is organized, I will briefly elaborate on what the private deed must contain to be valid.

For a private deed to be valid, it is sufficient that there is an agreement signed by the debtor, in which the debtor declares that it creates a right of pledge in favor of its lender. This deed needs to be signed by the debtor, and may also be signed by the secured lender. In the deed, the debtor is required by law to declare that it is entitled to grant a right of pledge in the collateral at stake to the pledgee, and furthermore that it has not previously established a non-possessory pledge on the goods concerned in an earlier time. If the debtor nonetheless has done so, it is required to declare to what extent and to whom such limited rights have been granted.

There is no requirement that the maximum amount of the secured claim – insofar as agreed upon – is stated in the deed.

50 For private deeds, see HR 14 October 1994, NJ 1995, 447. The Parliamentary History of the BW makes clear that this has the purpose of preventing antedating. The Parliamentary History of the Registratiewet (Zitting 1969-1970, doc. no. 10559, no. 3) gives the same argument for registration: “Thus the registration means there is proof that the registered deed exists or existed at the time of registration. (...) The registration therefore provides a guarantee against embezzlement and antedating or other irregular alteration or addition to the deeds.” (translated). With regard to authentic deeds, the prevention of antedating is achieved by the fact that the declaration of the tax inspector provides peremptory proof of the date to everyone (see Art. 157 Rv.). In addition, the Registratiewet mentions other purposes that filing seeks to achieve, e.g. supervising the compliance with the statutory rules that are applicable in drawing up notarial deeds, such as the Notaries Act (in Dutch: ‘Wet op het Notarisambt’). See Parliamentary History, Siting 1969-1970, doc. no. 10559, no. 3. For more information on this subject, see Struycken 2009, p. 131.

51 Art. 3:237(1) BW. See also Snijders & Rank-Berenschot 2012, no. 469 and Asser/Van Mierlo & Van Velten 3-VI* 2010/166.

52 Art. 3:237(2): “The pledgor must declare in the instrument that he is entitled to pledge the property and furthermore that the property is not encumbered with limited rights or, if it is, by which rights it is encumbered.” This is not required when a possessory pledge is created. The debtor can give this declaration even if it has not yet received the assets it intends to encumber, but knows that it will receive them in the (near) future. The debtor will then have to declare that it has not previously established a non-possessory pledge on the goods concerned in advance of their receipt. When it is not possible to make a declaration about entitlement – for example because a non-possessory pledge is established in advance on future goods, which will be supplied under retention of title – an obligation to give this declaration does not exist. See Asser/Van Mierlo & Van Velten 3-VI* 2010/170 and Parliamentary History, Book 3, p. 749, Snijders & Rank-Berenschot 2012, no. 533.

53 If the deed lacks this declaration this does not influence the validity of the creation of the right of pledge. However, if the debtor makes false statements in the deed, it can be liable to prosecution for
Although it is not required that the maximum amount of the secured claim is stated in the deed, the debtor can ask its lender for a written declaration concerning the nature and, if possible, the amount of the secured claim. The lender is obliged to account for this information (Art. 3:241 BW). 54

The assets that are the subject of the proprietary transaction need to be described in the deed in such a way that they can be properly identified. This means that the deed of pledge has to contain a description of the assets by reference to which one is able to ascertain which precise assets are made the subject of the pledge. 55 It is common practice to provide a broad description of the collateral; as long as the assets are described ‘in a sufficiently precise manner’, it will not be necessary to attach a list identifying the assets concerned in greater detail. The current view of the Dutch Supreme Court concerning the degree of description for goods, described in a ‘sufficiently precise manner’ is that the amount of information in the deed must be sufficient to determine, which specific assets have been actually pledged even in hindsight. 56

Given that secured lenders want as much assets as possible to be included in this description – think in this respect mainly of after-acquired property – one might consider that the boundaries of this doctrine are pushed. However, with regard to movable assets, a description like ‘all movable assets the debtor owns or will acquire in the future’ is considered to be sufficient. I reiterate that a lender may be interested in keeping a list with an enumeration of the collateral to gain an impression of what assets are owned by the debtor, but this is not necessary for the creation as such.

The previous requirement should not be confused with the requirement of ‘identifiability’ that applies to the claims for which security is created (hereafter ‘secured liabilities’). The secured liabilities must be ‘sufficiently identifiable’ on the basis of Art. 3:231(2) BW. The deed of pledge customarily contains either a concrete description of the secured liabilities, or a broader reference to such liabilities and the legal relationship from which they will or may arise. Given that a broad description of this kind will be sufficient, the requirement of identifiability in this context is easily met.

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56 This is established in a series of cases, see e.g. HR 14 October 1994, NJ 1995, 447 (Rivierenland/Gispen).
2.2.3.2. Filing the private deed; authority to file and costs of filing

Parties are required to register their private deed with the tax officer in Rotterdam.\(^{57}\) Given that Dutch judges are quite generous when it comes to the ‘sufficient’ description of the collateral, the deed consists mostly of no more than a few pages. The deed can be offered to a tax officer in person or by mail; electronic filing has not yet been introduced.\(^{58}\)

If the deed is offered in person, this can be done only on working days between 9 a.m. and 3 p.m. If the deed is offered after 5 PM, it is considered to have been offered on the next working day. If the deed is offered by mail, the day of delivery is regarded as the day of registration.\(^{59}\) In 2001, the Supreme Court decided that a faxed copy of the original deed is also sufficient to establish the non-possessory pledge, but this is fairly uncommon.\(^{60}\) In practice, lenders – or lawyers acting on their behalf – normally send a clerk to the tax authority, who offers the documents to a tax officer.

Registration entails that the tax officer enters a certain amount of information in its computer (the details on the type of information will be discussed in the next subsection). In addition, it entails that the tax officer provides the filer with a declaration containing most of these information elements (often called ‘relaas van registratie’).\(^{61}\) For the purposes of this subsection it is sufficient to note that this declaration mentions the type of the deed, the name of the party that had submitted the document for registration and the date at which the deed is offered for registration. An example of such a declaration:

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\(^{57}\) This follows from Art. 1(2)(b) of the Registratiewet 1970 (‘Registratiewet’) in conjunction with Art. 4 of the Uitvoeringsbeschikking Registratiewet 1970 (‘Uitvoeringsbeschikking’) and the change in statute that became effective January 1, 2013. Before January 1, 2013 parties were allowed to register private deeds at a tax office of their own choice, but for budgetary reasons this function has now been concentrated at the tax office in Rotterdam only. See \(<www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/prive/contact/anderwerpen/registratie_van_onderhandse_akte/belastingkantoor_dat_akte_registreert>\) (last visited February 5, 2014).

\(^{58}\) See \(<www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/prive/contact/anderwerpen/registratie_van_onderhandse_akte/hoe_biedt_u_een_akte_aan_voorRegistratie>\) (last visited February 5, 2014).

\(^{59}\) Ibidem.

\(^{60}\) HR 29 June 2001, NJ 2001, 662 (Meijjs q.q./Bank of Tokyo-Mitsubishi). From this case it also follows that the pledge can be declared invalid if, at a later stage, the copy is found not to be identical to the original private deed of pledge. Cf. Asset/Van Mierlo & Van Velten 3-VI* 2010/166 and Struycken 2009, p. 137 and Kaptein 2012, p. 141, footnote 22.

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59 Ibidem.

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In addition to the declaration, registration involves affixing a label with a unique number, the date of registration and the signature (or its initials) of the tax officer to the last page of the deed. An example:

![Image of a label with registration details]

The signature (or its initials) of the tax officer, as exemplified above, is placed not only on the label itself, but at the bottom of every page. If the deed is offered in person, it is not possible to wait for the label at the time of issue; a receipt will be issued and the official proof will be sent a few weeks thereafter. It is common practice that the parties, for want of a better system, rely on this receipt until the official proof arrives.

Which of the two parties may file the private deed is not clear from either the Registratiewet or the Uitvoeringsbeschikking, nor can it be derived from the BW itself. In the legal literature and in practice, each of the parties is considered to be entitled to do so. Since January 1, 2008 registration of the private deed is free of charge. Register searches are free as well (although it should incidentally be noted that the search options are, as will be explained in the next subsection, very limited anyway).

2.2.3.3. Organization of the tax office database; possibilities to search

As mentioned in the previous subsection, it is not the deed itself that is filed. After (a copy or a fax of) the deed has been received, the tax officer will only enter key data concerning the deed into the computer files of the tax authority. These key data (the so-

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63 Cf. Struycken 2009, p. 127. The receipt normally takes the form of a stamp on the accompanying letter that the pledgee offered together with the deed.
64 See e.g. Struycken 2009, p. 127.
66 On top of that, of course, the costs of preparing the deed should be accounted for. This comes down to a few billable hours of a lawyer. Sophisticated parties, such as banks, however, prepare such deeds themselves.
67 In the Uitvoeringsbeschikking these files are referred to by ‘Registration numbers’: the private deeds that are registered directly at the tax authority have to be filed under Registration no. 4; the authentic deeds,
An example of non-public filing: Dutch secured transactions law

called ‘libellé van registratie’ are: a serial number that is consecutive in each part (of the register), the type of the deed, the name, initials and place of residence of at least one of the two contract parties, the total number of copies of the deed that are offered, the total number of pages comprising the deed, and the total number of alterations made in the deed. Finally, special mention must be made if the deed has not been signed by the persons referred to in the deed. After the tax officer has completed the data processing – which in practice takes about two weeks – the (copy or fax of the) document receives the label and is returned to the party that had submitted the document (in practice most often, the secured lender).

In accordance with the aim of providing date certainty – i.e. not substantive publicity – tax officers are subject to a strict duty of confidentiality as regards the (content of the) documents they receive. The information may be disclosed only to a very limited group of persons; in a nutshell, the parties to a deed, their heirs or their successors in title.

An alteration is an addition, change or deletion of the text, to which reference is made in the margin or at the end of the text.

An alteration is an addition, change or deletion of the text, to which reference is made in the margin or at the end of the text. See Arts. 11 and 12 of the Uitvoeringsbesluit. See also Struycken 2009, p. 130 and <www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/prive/contact/andere_onderwerpen/registratie_van_onderhandse_akten/welke_gegevens_registreert_de_belastingdienst/> (last visited February 5, 2014).

This follows from Article 14 of the Uitvoeringsbesluit.

I reiterate that this is information on the question i) who holds an interest, ii) in what asset and iii) in what capacity. See supra Chapter 2, subsection 4.1.

See <www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/prive/contact/andere_onderwerpen/registratie_van_onderhandse_akten/wie_mogen_geregistreerde_gegevens_inzien> (last visited February 5, 2014). From inquiries made to the tax office it follows that a subsequent pledgee does not qualify as a ‘successors in title’.

In addition to the parties to a deed, their heirs or their successors in title, the public official who drew up the deed or offered it for registration, his deputy or his successor will upon request, in the matter of the deed, be granted leave to inspect the registers of registration, or be provided with an extract from those registers. See Art. 10(1),(2) and (4) of the Registratiewet. Cf. Struycken 2009, p. 130.
In practice, requests of this kind are very rare. It was found, on inquiry, that if anyone telephones at all, it is at most to ask ‘if anything is known on that date’ or ‘under that name’. The person who wants to know this must, however, inform the unit where the registration took place, often in writing, who he is (after all, it must be possible to ascertain whether that person is actually entitled to know). In practice, it turns out to be at most a bankruptcy trustee, who occasionally wants to verify whether a pledge was indeed created on a certain date. Although the Ministry has no official policy line on this, the bankruptcy trustee is usually assumed to be acting on behalf of the bankrupt debtor (as its legal representative), so providing an answer to such a request is not a problem (Art. 10(1) Registratiewet). Provision of this information therefore does not require authorization pursuant to Art. 10(3) Registratiewet.

It follows from the above that prospective pledgees and unsecured creditors have no possibility to inspect the registers. Even if they were accorded this access, it would be of no benefit to them anyway. After all, if this category would search for a deed of pledge, only the name, initials and place of residence of at least one of the two parties involved in drawing up the deed, the date of registration and the number of pages of the deed would have been entered in the files of the tax authority. Furthermore, a copy of the deed is not included in the files either. Hence, no intrinsic information is available; what has been pledged and in favor of whom can barely be deduced from this information.

2.2.3.4. Time of creation; periodic filing update
Since neither the provisions of the Registratiewet nor those of the BW clarify as to which moment is decisive to determine the moment of creation of the right of pledge, the Supreme Court had to decide on this matter. In 1994, the Supreme Court decided that the moment that the deed is offered to the public servant of the tax authority is decisive (even if the deeds are stamped with the fixed date and entered in the register at a later time). Yet this method of filing only fixes the date, not the hour or minute on which the right of pledge is created. Therefore, when two pledges have been created on one day in the same

77 HR 14 October 1994, NJ 1995, 447 (Rivierenland/Gispen). This outcome is not very surprising: the person who offers the deed should be responsible and thus in control with regard to the moment of creation. It would cause a great deal of legal uncertainty if this moment depended on the speed with which the public servant did his job. This was also the line of reasoning of the Dutch Supreme Court. Furthermore, the Dutch Supreme Court referred to the rules applicable with regard to immovable goods (in Dutch called ‘registragoederen’), whose transfer or encumbrance has to be filed in the public register (see Art. 3:19(2) BW): in this case, the date that the deed is offered to the register is also considered to be the moment of creation. Cf. Struycken 2009, p. 128 and p. 136 and Asser/Van Mierlo & Van Velten 3-VI* 2010/168.
78 In case law, the question arose whether registration in the context of creating a non-possessory pledge by private deed can be replaced by drawing up a notarial deed of deposit of a private deed. The Dutch Supreme Court answered this question in the negative in its judgment of 19 November 2004, NJ 2006, 215 (Bannenberg/Rosenberg Polak q.q.).
collateral by means of a registered private deed, the two rights are considered to have the same ranking.\(^{79}\)

The registration of just one deed (with a generic description of the collateral) is sufficient to establish a non-possessory pledge with regard to existing and after-acquired property in tangible assets. There are no provisions in the Registratiewet or the Uitvoeringsbeschikking that make it compulsory to update the filing periodically. This is simply because the purpose of filing is to provide the deed with date certainty, not to create the possibility for third parties to review that deed.

### 2.2.4. Non-possessory pledge (II): drawing up a notarial deed

#### 2.2.4.1. Drawing up the deed

If parties choose to have a notary draw up the deed, the deed is not a private deed, but a so-called ‘notarial deed’.\(^{80}\)

One advantage of choosing to have a notarial deed drawn up is that, on the basis of this type of deed, the bailiff can directly claim the collateral from the pledgor in case of default, without the need to go to court.\(^{81}\) In practice, however, most pledges are accomplished by drawing up private deeds, because the costs of the notarial deed are much higher than those of the private deed. From inquiries made, the costs of drawing up a notarial deed vary from €400 to €1500.

A notarial deed is drawn up by a private party who exercises a public function: the notary.\(^{82}\) The notary is required to state the names, the place of residence and the type of entity of the legal persons that are party to the deed,\(^{83}\) and also the place and the time (including the year, the month and the day) on which the deed was executed.\(^{84}\) In addition, the notary must sign the deed and state the time of its signature.\(^{85}\) This is the same information required for private deeds as discussed in the previous subsection, but the information entered must also include the serial number under which the deed is recorded in the notary’s register (repertorium),\(^{86}\) the name and practice location of the notary and the number of documents (annexes) attached by means of the notary’s official

\(^{79}\) Asser/Van Mierlo & Van Velten 3-VI* 2010/128. This is different if parties make use of a notarial deed, see subsection 2.2.3.

\(^{80}\) Unlike private deeds, notarial deeds provide all parties with conclusive evidence of what the notary, within his competence, has declared regarding his observations and actions. See Art. 157 Rv.


\(^{82}\) See Art. 156(2) Rv.

\(^{83}\) See Art. 40(1) of the Wet op het Notarissenb (Notaries Act).

\(^{84}\) See Art. 40(2), preamble and under c of the Wet op het Notarissenb. If the deed lacks these details, it is invalid; see Art. 40(4) Wet op het Notarissenb.


\(^{86}\) In this register (repertorium), the notary records the (time and place of all) deeds that he draws up (Art. 7(1) Registratiewet). Pursuant to Art. 7(2) Registratiewet, this register must be submitted to the inspector for verification within 10 days of the end of each year, by the notary or his deputy or successor. Cf. Struycken 2009, p. 130.
seal, if any. In addition, in congruence with the requirements for a private deed, the notarial deed must contain a declaration from the debtor stating that it is entitled to grant a security interest in the collateral at stake to the secured lender, and furthermore that it has not granted other limited rights in the collateral at an earlier time. If the debtor nonetheless has done so, it is required to declare to what extent and to whom such limited rights have been granted. As mentioned above, if the deed lacks this declaration this has no influence on the validity of the creation of the security right, but the debtor can be liable to prosecution for forgery (see Art. 227 Sr.) or fraud (Art. 326 Sr.) if it makes false statements in the deed.

2.2.4.2. Filing the notarial deed; authority to file

Notarial deeds are filed not by the parties themselves, but by the notary. Since January 1, 2013 the Registratiewet prescribes that the notary must file notarial deeds with the Royal Netherlands Notarial Organization (in Dutch: Koninklijke Notariële Beroepsorganisatie, ‘KNB’). Filing of notarial deeds has to take place within 10 days of drawing up the deed, in an electronic register held by the KNB (repertorium). The KNB has the duty to send an electronic copy of every notarial deed to the tax authority.

Before this amendment of statute, the notary registered the notarial deeds directly with the tax authorities. As a result, each year approximately 1.5 million private and notarial deeds were registered with the Dutch tax authority. These deeds were copied and filed manually, a task that occupied 120 government officials per day. Although only a small proportion of these deeds actually related to tax matters, the handling costs for the tax authority – and hence for the Dutch government – amounted to approximately $8 million per year. In an attempt to reduce costs, the Dutch government decided that as of January 1, 2014 notarial deeds of pledge could no longer be registered with the tax authority, but instead by the KNB. As a result, registration takes place closer to the source, and it has eliminated the present postal transfer of documents between the notaries and the tax offices.

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88 See supra footnote 52.
89 Asser/Van Mierlo & Van Velten 3-VI* 2010/170.
90 See Art. 3(2) Registratiewet and section 3 of the Explanatory Memorandum (33 406, nr. 3, 2012-2013) to the Amendment of the ‘Registratiewet’. This amendment will not take effect until January 1, 2014, but the tax authorities have already started to implement it in practice.
91 See Art. 3(1)-(2) and Art. 7(1) of the Registratiewet. Pursuant to Art. 4 under a) of the Uitvoeringsbeschikking, the deed is registered with the inspector in whose area the practice location of the notary lies. See also Struycken 2009, p. 129.
92 Art. 7a(1) of the Registratiewet.
93 Before the amendment of statute of January 1, 2013 other types of writings could also be filed with the tax authority to provide for date certainty, such as lease contracts, security agreements or simple letters etc. Only some of these categories relate to tax matters. Letter from the State Secretary of Finance to the Lower House of the Dutch Parliament, 2011-2012, 31 066, No. 117, p. 2. Hence, this amount of 1.5 million deeds did not consist of deeds of pledge only.
94 See subsection 2.3 and section 3 of the Explanatory Memorandum (33 406, nr. 3, 2012-2013) to the Amendment of the ‘Registratiewet’. There have been calls before for electronic registration; see for example Kaptein 2012, p. 145.
Filing the deed, however, is not a constitutive requirement for establishing the right of pledge: the date and time when the deed is executed is deemed to determine when the right of pledge comes into existence (see subsection 2.2.3.1).

2.2.4.3. Organization of the tax office’ database; abilities to search
For the purposes of implementation of the above-mentioned changes in law, the KNB has set up a central deeds administration system which serves to keep an electronic register (repertorium) of any and all notarial deeds that are executed. The KNB as keeper of the register does not have access to substantive information contained in the deeds that are registered. The tax authorities will gain such access only to the extent required to perform their supervisory function. The searching possibilities for third parties are similar to those mentioned under the filing of private deeds: i.e. practically nonexistent (see supra subsection 2.2.3.3).

2.2.4.4. Time of creation; periodic update of filing
The time when the deed is executed is deemed the time when the right of pledge comes into existence. The ranking between competing rights of pledge is to be established by comparing the dates and times stated in the notarial deeds. When the deeds are drawn up on the same day, the time of drawing up the deed is considered to be decisive.

2.2.5. Retention of title
An important instrument for selling trade creditors to secure payment of the purchase price of the assets they sell to their debtors is the retention of title clause. One of the primary consequences of stipulating a retention of title clause is that the debtor, will not become the owner of the assets. Most typically, selling trade creditors adopt such a clause in (the general conditions of) their contracts of sale; it makes the transfer of title to the buyer conditional upon the payment of the purchase price. In legal terms, the retention of title clause is a species of transfer under condition precedent. It has its basis in Art. 3:92(1) BW:

"Where a contract is intended to reserve to one party the ownership of a thing over which the other party is given control, until an obligation owed by the latter has been performed, the former is..."

95 See subsection 5 of the Explanatory Memorandum (33 406, nr. 3, 2012-2013) to the Amendment of the ‘Registratiewet’.
96 See subsection 2.2 of the Explanatory Memorandum (33 406, nr. 3, 2012-2013) to the Amendment of the ‘Registratiewet’.
97 Asser/Van Mierlo & Van Velten 3-VI* 2010/166.
98 For a study of international retention of title clauses, with a focus on Dutch, French and German private international law, see Rutgers 1999.
Although the existence of a retention of title clause can usually be derived from the wording in the agreement, there are no specific requirements as to the wording of an effective retention of title clause: if the agreement has the purpose of retaining ownership of the assets that are physically transferred to the debtor (i.e. the buyer), there is a statutory presumption that retention of title has been created.\textsuperscript{100} In order to successfully retain ownership of the assets, it is sufficient to make a contractual provision to that effect\textsuperscript{101} and to give the debtor physical power over the asset (in Dutch this is called ‘machtsverschaffing’). Furthermore, there are no other formalities that have to be fulfilled, such as a label with a fixed date or some other form of registration. Since a retention of title clause is a species of transfer under condition precedent, the seller remains the owner until the condition precedent – payment of the purchase price – is fulfilled; and, conversely, the debtor will not become the owner until the condition is fulfilled.\textsuperscript{102} A retention of title clause, however, is valid only as far as it secures so-called ‘supplier’s credit’. This means that it may only secure the purchase price; other claims may be secured if, and to the extent that, they are related to the purchase price.\textsuperscript{103} If the retention of title clause is formulated so as to cover other claims as well, the clause is only void with regard to the part that attempts to include more claims than is permitted. Since many types of assets are used to manufacture products and semi-finished products, this can, and mostly will, result in a loss of identity of the assets. The assets will, in other words, transform into other assets. When this occurs, the selling trade creditor will not manage to retain ownership in the assets, as the debtor becomes the owner of the new assets by means of accession, conversion or commingling.\textsuperscript{104} In Dutch law, it is not

\begin{footnotesize}
\begin{enumerate}
\item See also, Pitlo/Reehuis-Heisterkamp 2012, no. 963.
\item Retention of title clauses are commonly part of the seller’s general conditions of sale.
\item This ensues from Art. 3:84(4) BW, which provides: “Where delivery is made in the performance of a conditional obligation, the right so acquired is subject to the same condition as the obligation.”
\item This follows from Art. 3:92(2) BW: “Reservation of title may be validly stipulated only with respect to claims for the counter-obligation for things delivered or to be delivered by the debtor to the acquirer pursuant to a contract, or for work performed or to be performed pursuant to such a contract, for the benefit of the acquirer, as well as with respect to claims for failure to perform such contracts. To the extent that a condition is null and void on this basis, it is held to be unwritten.”
\item The underlying idea of this rule is that a supplier of assets should not be given preference in relation to other creditors solely on the ground that the supplier could retain title in the assets sold. See Parliamentary History, Book 3, p. 388 and p. 1240. Cf. Pitlo/Reehuis-Heisterkamp 2012, no. 967.
\item Cf. Asser/Van Mierlo & Van Velten 3-VI* 2010/539, Pitlo/Reehuis-Heisterkamp 2012, no. 967 and Bartels 2012, pp. 27-33. In the context of this study, it would be going too far to elaborate on the technical details of accession, commingling and conversion. Only necessary elements relating to these doctrines will be discussed where relevant. Detailed information on this topic can be found in e.g. Pitlo/Reehuis-Heisterkamp 2012, no. 509 et seq. and 967, Asser/Van Mierlo & Van Velten 3-VI* 2010/539 and Salomons 2011a.
\end{enumerate}
\end{footnotesize}
possible to stipulate a clause with the purpose of extending the retention of title to the newly created assets.\textsuperscript{105}

2.2.6. The right of reclamation

In addition to the possibility of stipulating a retention of title clause, suppliers of assets have a statutory ‘right of reclamation’ (in Dutch: ‘reclamerecht’). Hence, unlike the retention of title, the right of reclamation has its basis directly in statute (Art. 7:39 BW).\textsuperscript{106} The right of reclamation gives the supplier who remains unpaid, after invoking this right, the right to reclaim the assets sold as its property (in Dutch, this right is said to have ‘proprietary effect’).\textsuperscript{107} In a nutshell, the right of reclamation applies only when the following five requirements are met. First, the movable assets must have been delivered to the debtor. Second, the purchase price must have remained unpaid, as a result of which the seller is entitled to terminate the contract.\textsuperscript{108} Third, the right of reclamation must be invoked by means of a written declaration by the seller directed to the debtor. Fourth, the right of reclamation can only be exercised to the extent that the assets delivered are in the same state as they were when delivered.\textsuperscript{109} Finally, the right of reclamation will lapse upon the expiry of six weeks after payment of the purchase price has become due and sixty days from the day on which the goods were deposited with the debtor or a person designated to act on its behalf.\textsuperscript{110}

2.3. Remedies of secured lenders and trade creditors in case of default

2.3.1. Remedies of secured lenders

Upon the occurrence of a payment default, the secured lender becomes entitled to enforce the pledge by a sale of the secured asset\textsuperscript{111} and to recover from the proceeds the secured liabilities, which include principal, interest and costs.\textsuperscript{112} The lender is entitled to

\textsuperscript{105} Furthermore, the rules on accession, commingling and conversion as set out in Art. 3:4 BW and Art. 5:14-16 BW are rules of imperative law, which means that they cannot be set aside by a contract.

\textsuperscript{106} Art. 7:39 BW: “The seller of a movable thing, other than registered property, which has been delivered to the buyer can reclaim the thing by a written declaration addressed to the buyer, if the price was not paid and if, in connection therewith, the requirements to set aside the contract and terminate the contract, as referred to in Article 265 of Book 6 have been met. This declaration sets aside and terminates the right of the buyer or his successor; Articles 271, 273, 275 and 276 of Book 6 apply, mutatis mutandis.”

\textsuperscript{107} In a nutshell, the right of reclamation applies only when the party must have failed in the performance of one of its obligations (unless the failure, given its special nature or minor significance, does not justify the setting aside of the contract and the consequences following therefrom).

\textsuperscript{108} See Art. 7:41 BW: “The right of reclamation may be exercised to the extent that the thing delivered is still in the same condition as it was when delivered.”

\textsuperscript{109} See Art. 7:44 BW: “The seller’s right described in Article 39 shall lapse on the expiry of six weeks since payment of the purchase price became due and sixty days from the day on which the thing was deposited with the buyer or with someone on his behalf.” See also Pitlo/Reehuis-Heisterkamp 2012, no. 961.

\textsuperscript{110} See Arts. 3:248-3:251 BW.

\textsuperscript{111} See Art. 3:248 BW: “Where the obligor is in default of performing that for which the pledge serves as security, the pledgee is entitled to sell the pledged property and to have recourse against the proceeds for what is owed to him.”
sell the collateral without authorization by the court (in Dutch it is therefore referred to as ‘het recht van parate executie’, meaning ‘the right to summary execution’). The sale has to take place by public auction ‘according to local custom and upon the usual conditions’. Depending on the nature of the secured asset, an enforced sale may also take the form of a private sale with consent of either the pledgor or the court. Secured lenders (i.e. pledgees) have the same right in the event of the debtor’s insolvency; in that case, this right is referred to as ‘separatistpositie’, meaning ‘the right to enforce without the need to first obtain a money judgment from a court’.115

When a secured lender enforces the pledge by a sale of the secured asset, it does not become the owner of the assets. The debtor’s right of ownership is transferred to the buyer, and the secured lender, in its capacity of pledgee, may recover from the sale proceeds. Any surplus has to be returned to the debtor. Secured lenders may not appropriate the collateral, unless with court permission.116

A right of pledge can only be exercised with regard to the collateral as a whole. It is impossible for the pledgor to claim a partial release of the collateral if just a portion of the claim remains unpaid. In fact the reverse applies: if just part of the claim remains unpaid, the entire collateral can be foreclosed on.117, 118

a number of pledgees, every pledgee has the right to sell the collateral. However, if a lower ranking pledgee (‘junior pledgee’) decides to sell the collateral, it can only do so subject to pledges with a higher ranking (‘senior pledgees’); see Art. 3:248(3) BW. Therefore, in practice, it is usually the senior pledgee who sells the collateral. Inversely, if a senior pledgee decides to sell the collateral, the junior rights of pledge terminate, but the senior pledgee must account for the proceeds in accordance with the priority rules that will be explained in subsection 2.4 (see Art. 3:253(1) BW). Cf. Pitlo/Reehuis-Heisterkamp 2012, no. 790a.

113 Art. 3:250(1) BW. In practice, the sale always takes place under the supervision of either a civil law notary or a bailiff.

114 For more information on the requirements for this execution sale, see e.g. Asser/Van Mierlo & Van Velten 3-VI* 2010/156, 104 and 135-138, Snijders & Rank-Berenschot 2012, nos. 514-517 and Pitlo/Reehuis-Heisterkamp 2012, nos. 790-794.

115 Art. 57 of the Bankruptcy Act (in Dutch: Faillissementswet, abbreviated and hereafter ‘Fw’); “Pledges and mortgages may exercise their rights as if there was no bankruptcy,” (translated). The pledgee must exercise its power within a reasonable time limit, to be set by the bankruptcy trustee; this restriction can be found in Art. 58(1) Fw. Another restriction follows from Art. 63a Fw, which provides that the bankruptcy judge can suspend the pledgee’s exercise of its power for two months, with the possibility of extension for another two months. See also Asser/Van Mierlo & Van Velten 3-VI* 2010/ 93, 97 and 104.

116 This is prohibited by Art. 3:235 BW; “Any stipulation whereby the pledgee or the mortgagee is given the power to appropriate the secured property is null and void.” See also Asser/Van Mierlo & Van Velten 3-VI* 2010/63.

117 See Art. 3:230 BW; “A right of pledge or mortgage is indivisible even if the obligation it secures has two or more obligees or obligors and the obligation is divided amongst them.” If a lender decides to do this, it obviously has to return the surplus to the debtor. See also Asser/Van Mierlo & Van Velten 3-VI* 2010/56.
Defaults other than with respect to payment, such as financial covenant breaches, may give the lender the right to invoke contractual remedies under the so-called finance agreement, but do not warrant enforcement action under the security document in the sense of execution of the security. Defaults that are not remedied in due time, or are not capable of remedy, may justify the lender in terminating and accelerating the loan, on the basis of either the provisions in the finance agreement or statutory remedies in contract law. The effect of acceleration is that the agreed payment date is brought forward and whatever payment might be outstanding needs to be paid immediately. Failure to do so results in a payment default and entitles the secured lender to enforce the security by a sale of the secured asset (after all).

In addition to the grounds of default as formulated in the loan documents, secured lenders have a few statutory remedies available to them in their capacity of pledgee, i.e. based on statute. For example, if the lender that is secured by a non-possessory pledge has reason to believe that the debtor will no longer be able to meet its obligations under the finance agreement, the secured lender may demand the surrender of possession of the asset that is subject to the non-possessory pledge, in order to promote it to a possessory pledge.

Possessory secured lenders have the right to retain possession of the assets until the amount due (including interest and costs) has been paid off. In the meantime, they (or the

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119 If, in certain specific circumstances, the collateral reduces in value, e.g. as a result of fire, the pledgees obtains by statute a right of pledge on all claims that the pledgor is entitled to as compensation for the reduced value of the good at stake. This occurs automatically and has its basis directly in the law, see Art. 3:229 BW. See also Asser/Van Mierlo & Van Velten 3-VI* 2010/58-61.

119 ‘Default’ will mostly refer to the debtor’s duty to pay the secured claim, but can also express shortcomings that consist of other duties, such as the debtor’s duty to take good care of the collateral or the duty to not transfer the assets to third parties. These duties may be contractual in nature or may follow from statute. See also Pitlo/Reehuis-Heisterkamp 2012, no. 786.

120 A ‘financial covenant breach’ refers to a debtor’s breach of promises made to its lender concerning the debtor’s financial stability standing as reflected in e.g. its balance sheet or in terms of certain ratios, such as debt to equity or interest rate cover.

121 See Art. 3:237(3) BW: “Where the pledgor or the obligor fails to perform his obligations as regards the pledge, or gives him good cause for concern that there will be such a failure, the pledgee is entitled to demand that the thing or the paper to bearer be brought under his control or that of a third person. (…)” When a non-possessory pledge is created by a private deed – rather than a notarial deed – the secured lender needs permission of the court in order to take possession of the assets in order to sell the collateral. See Art. 496 Rv.
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appointed third party) have to take good care of the collateral.\textsuperscript{122} When the loan has been paid off, the pledgee has the duty to return the collateral to the debtor.\textsuperscript{123}

In practice, asking the debtor to surrender possession engenders the debtor’s bankruptcy.

2.3.2. Remedies of (secured) selling trade creditors

2.3.2.1. Retention of title

A selling trade creditor that is secured by retention of title can reclaim control over the assets as its property if the debtor defaults on payment of the purchase price.\textsuperscript{124} Should the debtor refuse to return the assets voluntarily, the seller may enforce its claim for surrender of the assets by a pre-judgment attachment on such assets, and upon receipt of a final judgment seek the return of the assets through a bailiff.

In the event of the debtor’s bankruptcy, the bankruptcy trustee may opt to perform the contract by paying the purchase price to the selling trade creditor. As a result, the assets automatically become part of the debtor’s estate. The trustee may also decide not to perform the contract, or may fail to decide within a reasonable time; in that case, the selling trade creditor has the right to terminate the contract and claim back control over the goods sold.\textsuperscript{125} Hence, the contract is not terminated automatically as a result of the commencement of the insolvency proceedings.\textsuperscript{126}

2.3.2.2. Right of reclamation

If the selling trade creditor invokes the right of reclamation, two main consequences come to the fore. First, the contract is terminated by force of law.\textsuperscript{127} Second, the right of ownership of the debtor (or its successor, if the assets have been sold on) ends. Hence, the right of reclamation has ‘proprietary effect’: the selling trade creditor can reclaim control over the assets as its property, in the hands of the debtor, but also in the hands of the debtor’s buyer or pledgee.

\textsuperscript{122} Art. 3:243(1) BW: “A person who holds a thing pursuant to a right of pledge must take care of it as a good pledge.” For more information on what this duty entails, see e.g. Pitlo/Reehuis-Heisterkamp 2012, no. 783 and Asser/Van Mierlo & Van Velten 3-VI* 2010/151-154.

\textsuperscript{123} Art. 3:256 BW: “After the extinction of the right of pledge, the pledgee must do all that is necessary for the pledgor to recover the actual control of the property to which the latter is entitled and, if so demanded, the pledgee must give written proof to the pledgor that the right of pledge has been terminated. (…).” See also Art. 3:258(1) BW.

\textsuperscript{124} After all, as a result of the retention of title, the seller has remained simply the owner. Art. 5:2 BW: “The owner of a thing is entitled to recover it from any person who holds it without right.”

\textsuperscript{125} Art. 37(1) Fw: “If, at the time of the declaration of bankruptcy, all or part of a reciprocal contract has not been performed by either the debtor or his counterparty, and the bankruptcy trustee does not state, within a reasonable period set for this purpose in writing by the counterparty, that he is willing to perform the contract, then the bankruptcy trustee will lose his right to claim performance of the contract.” (translated).

\textsuperscript{126} Cf. Kieninger 2004a, p. 269.

\textsuperscript{127} To reiterate, Art. 7:39(1) BW: “The seller of a movable thing, other than registered property, which has been delivered to the buyer can reclaim the thing by a written declaration addressed to the buyer, if the price was not paid and if, in connection therewith, the requirements to set aside the contract as referred to in Article 265 of Book 6 have been met. This declaration sets the sale aside and terminates the right of the buyer or his successor (…).” This termination does not have retroactive effect. See Art. 6:265 BW.
Unlike the right of pledge, the right of reclamation can be applied to only part of the assets that have been delivered but not paid for; i.e. it is possible to only claim back the goods that have not been paid for. In addition, the right of reclamation is not, as with the right of pledge and the mortgage, "dependent" on the claim that it secures. Hence, if the claim is transferred to a third party, that third party does not acquire the right of reclamation that the seller had.

The right to reclaim the assets on the basis of 7:39 BW remains effective in the event of the debtor's (i.e. buyer's) insolvency. In that case, the selling trade creditor must give reasonable notice by means of a written declaration to the bankruptcy trustee. The bankruptcy trustee who wishes to retain the assets within the estate can achieve this end by paying the purchase price, or alternatively by providing security for payment.

2.4. Priority rules

2.4.1. Introduction

Since Dutch law makes no distinction between the creation of a proprietary interest and its effect against third parties, a proprietary interest (including a security interest) has effect against third parties as soon as it is created. In other words, Dutch law does not have perfection requirements. While subsection 2.2 explained how security interests are created, and subsection 2.3 explained the legal consequences of this creation in relation to the debtor, this subsection will discuss the legal consequences in relation to several parties that are involved in secured transactions law, in particular the priority rules. I reiterate from Chapter 1 that the parties that may have interests in respect of the same collateral include the following categories:

i. Lenders: these are typically, but not necessarily, banks that are secured by a security interest over the debtor's assets.

ii. (Selling) trade creditors: these are e.g. sellers of movable assets that have sold and supplied their assets to the debtor on credit terms.

iii. Buyers: these are parties that have purchased movable assets from the debtor.

128 See Art. 7:39(2) BW. Obviously, this is possible only if the type of goods allows this 'division'. If the goods cannot be divided, Art. 7:39(3) allows the seller to reclaim all the goods in exchange for reimbursement of what has already been paid. Cf. Pitlo/Reehuis-Heisterkamp 2012, no. 956.


130 See Art. 7:40(1) BW. See also Kieninger 2004a, p. 203 and 269 and Pitlo/Reehuis-Heisterkamp 2012, no. 960.

131 The same applies if a right of ownership is either transferred or retained (by means of a retention of title clause). Dutch law does recognize the concept of 'relative ownership', see Damsteegt 2009.

132 Since in Dutch law a secured party either has a proprietary interest or it does not, it might perhaps be better to say that Dutch law does know 'perfection' or 'attachment'. The mere fact that for certain types of pledges registration is required does not change this, since registration is an integral part of creation of the security interest. One cannot speak of a proprietary interest that has effect between parties only. Cf. Patrick 2012, p. 275.

133 For an in-depth discussion of these categories of parties, see supra Chapter 1, subsection D.1.
iv. Attaching unsecured creditors or execution creditors: creditors that have commenced enforcement action against (part of) the debtor’s assets to recover their trade debts.

v. General unsecured creditors: creditors that do not have the benefit of a security interest or any other preference.

Main rules; outline
Creditors can have recourse for their claims against any and all of the debtor’s assets.134 This right is effectuated by attachment of the relevant assets followed by public auction, on the basis of a judgment obtained against the debtor. All creditors have an equal right to be paid their pro rata share from the proceeds of sale, unless a creditor has the benefit of a preference — in more common parlance — priority.135, 136 This also applies if these creditors have made attempts to enforce their rights by attaching the property; between enforcing general unsecured creditors, attachment does not produce any form of preference.137 Preference results from pledge, mortgage, privilege and any other grounds provided for by law.138 Rights of pledge and mortgage take priority over privileges, unless determined otherwise by statute.139 There is, for example, an express exception to this rule for certain categories of tax claims and in respect of certain qualifying assets (’bodemgoederen’). In respect of such tax claims, by seizing the assets concerned the Dutch tax receiver takes priority over non-possessory security existing in respect of such assets; this will be further discussed in subsection 2.4.3. Rights of pledge and mortgage give the secured lender priority over other creditors with respect to the proceeds realized from an enforced sale of the secured assets.

2.4.2. Secured lenders vs. (enforcing) general unsecured creditors
Secured lenders with a right of pledge have priority over general unsecured creditors on the basis of the statute. Since Dutch law makes no distinction between the creation of a

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134 Unless otherwise provided by law or contract; see Art. 3:276 BW. See also Asser/Van Mierlo & Van Velten 3-VI* 2010/4-5.
135 See Art. 3:277 BW: “Except for the grounds for preference recognized by law, after payment of the costs of foreclosure, creditors have, amongst themselves, an equal right to be paid from the net proceeds of the property of their debtor in proportion to their claims.” This main rule of equality of creditors is known as paritas creditorum. See also Snijders & Rank-Berenschot 2012, no. 707 and Asser/Mijnssen, De Haan & Van Dam 3-1 2006/29, Asser/Van Mierlo & Van Velten 3-VI* 2010/6 and Pitlo/Reehuis-Heisterkamp 2012, no. 737 on this doctrine.
136 An agreement by which a creditor accepts a lower rank than afforded by statute for the benefit of one or more other creditors – ’contractual subordination’ – is also permitted, on the basis of Art. 3:277(2) BW: “A contract between a creditor and a debtor may stipulate that the claim of the creditor shall take, in respect of all or certain other creditors, a ranking lower than that conferred by law.” See on this subject also Snijders & Rank-Berenschot 2012, nos. 707 and 484, and Pitlo/Reehuis-Heisterkamp 2012, no. 744.
138 Art. 3:278(1) BW.
139 Art. 3:279 BW. As to the right of pledge, this applies regardless of whether it is possessory or non-possessory in nature.
right of pledge and its effect against third parties, a pledge has effect – I reiterate – against general unsecured creditors as soon as it is created, regardless of whether the lender benefits from a possessory or a non-possessory pledge.

As already briefly mentioned in the previous subsection, the only way for general unsecured creditors to collect their debts is by attaching the property. This can be done by authorization of – i.e., a judgment from – the court, but a pre-judgment attachment of the debtor’s assets at the outset of a lawsuit is also permitted. In the latter case, the property seized pursuant to attachment is held by the bailiff pending the outcome of a judgment.

If a general unsecured creditor attaches assets of the debtor that have already been pledged to a lender, it is bound to be left empty-handed if an attempt is made to pursue the attachment and recover what was owed from the proceeds of enforced sale, simply because the lender, as a pledgee, will be satisfied first, on the basis of its priority. The lender may invoke its right of pledge against an enforcing general unsecured creditor even if the former’s claim arises only after attachment by the enforcing creditor: the moment of creation of the pledge is decisive. Obviously, the pledgee or mortgagee must hold an existing claim to have the right of execution.

Although they have only limited capacity to enable unsecured creditors to recover their claims, attachments by general unsecured creditors are nonetheless frequently made in practice, since they also serve as a means of putting pressure on the debtor to pay its due debts.

If the secured lender proceeds to execution, any surplus will go to a general unsecured creditor that has attached the secured assets. In most cases, however, execution of the collateral by the secured lender results in the debtor’s bankruptcy.

If a general unsecured creditor attaches the debtor’s property before the debtor grants a right of pledge to its lender, the lender cannot invoke its right against the enforcing general unsecured creditor. This means that the general unsecured creditor can proceed to execution without cooperation of the secured lender. The attaching creditor may pay itself with priority from the proceeds of sale; the lender is only entitled to the surplus.

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134 Unless otherwise provided by law or contract; see Art. 3:276 BW. See also Asser/Van Mierlo & Van Velten 3-VI* 2010/6 and Pitlo/Reehuis-Heisterkamp 2012, no. 737 on this doctrine.
135 See Art. 3:277 BW: “An agreement by which a creditor accepts a lower rank than afforded by statute for the benefit of one or more other creditors – ’contractual subordination’ – is also permitted, on the basis of Art. 3:277(2) BW:”
136 An agreement by which a creditor accepts a lower rank than afforded by statute for the benefit of one or more other creditors – ’contractual subordination’ – is also permitted, on the basis of Art. 3:277(2) BW:
138 Rights of pledge and mortgage take priority over privileges, unless determined otherwise by statute. There is, for example, an express exception to this rule for certain categories of tax claims and in respect of certain qualifying assets (‘bodemgoederen’). In 2012, nos. 707 and 484, and Pitlo/Reehuis-Heisterkamp 2012, no. 744. See on this subject also Snijders & Rank-Berenschot 2012, no. 707.
139 Art. 3:279 BW. As to the right of pledge, this applies regardless of whether it is possessory or non-possessory in nature.
140 This follows from Art. 3:231(1) BW, according to which the existence of a claim is not a condition for the creation of a right of pledge. Cf. Pitlo/Reehuis-Heisterkamp 2012, no. 753.
142 The description in this subsection is based on the assumption that no creditors other than the enforcing general unsecured creditor are involved.
143 The conflict between secured lenders and enforcing general unsecured creditors in the event of bankruptcy of the debtor will be discussed in the next subsection.
144 This follows from Art. 453a(1) Rv (in conjunction with Art. 712 Rv). See Art. 453a(1) Rv: “There shall be no entitlement to claim any right as against the attachor arising from an alienation, establishment of an encumbrance, creation of a regime of fiduciary administration or lease of the thing, entered into after it has been attached.” (translated.)
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Hence, it can be said that secured lenders and general unsecured creditors that have attached the property are ranked according to the prior tempore rule: the one that created the security interest or attached the property first has priority. An exception to this can be found in subsection 2 of Art. 453(a) Rv. This article provides that if the lender has received a possessory pledge and acted in good faith with regard to the attachment by the enforcing general unsecured creditor, it may take over the execution from the latter and pay itself from the proceeds of sale with priority. 145, 146

Bankruptcy

In the event of the debtor’s bankruptcy, 147 all attachments of general unsecured creditors cease to exist. 148 This means that if a general unsecured creditor has seized the assets of the debtor, but finds that the debtor is declared bankrupt before enforcement is completed, the creditor has to release the assets. From that moment, all general unsecured creditors must file their claims against the bankruptcy estate. The debtor loses its ability to dispose of assets. 149 From this time forward, the bankruptcy trustee has the duty to manage the assets of the debtor, to execute them and to distribute the resulting proceeds among creditors in accordance with the priority rules. When the bankruptcy trustee distributes the proceeds, general unsecured creditors are satisfied only to the extent that the value of the collateral exceeds the secured and preferred debt(s). In this (rare) case, general unsecured creditors are paid pro rata, in proportion to their claims.

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145 Art 453(a)(2): “Rights acquired by a third party, otherwise than by gratuitous title, shall be respected, provided that the thing has come into his hands and at the time be was in good faith.” (translated).
146 See Art. 480(1) and (2) Rv. Art. 480(1) Rv: “If there is no other creditor who has attached the goods or the proceeds of execution, and there is no known holder of a limited right, whose right is extinguished by the execution, the bailiff shall pay the net proceeds to the enforcing creditor up to the amount of his claim. The balance, if any, shall be paid to the debtor.” (translated). Art. 480(2) Rv: “Where there are creditors or holders of a limited right, as referred to in the first paragraph, the bailiff shall immediately deposit the net proceeds with a custodian (…). When the aforementioned creditors and holders of a limited right and the debtor and the enforcing creditor reach agreement on the division of the net proceeds, the bailiff or, on his order, the custodian shall pay to each what is owed to him.” (translated). See also Pitlo/Reehuis-Heisterkamp 2012, nos. 762, 773 and 797.
147 In Dutch law, there is not duty for the debtor to file for bankruptcy. If the debtor does not file for bankruptcy itself, it may be forced into bankruptcy by a petition for that purpose by of one or more of its creditors. To succeed in this petition, the applying creditor must prove that the debtor ‘has ceased to pay its debts’. Evidence of this is deemed to be sufficient if it can be established that two or more creditors have unpaid debts. In practice this is known as the requirement of ‘plurality of creditors’; the applicant must prove that at least one supporting claim exists.
148 This follows from Art. 33(1) and (2) Fw. Art. 33 (1) Fw: “A bankruptcy order shall have the effect that all judicial executions of any part of the debtor’s estate, started before the bankruptcy, shall immediately end, and that, also from that time, no judgment may be enforced by committal of the debtor.” (translated). Art. 33 (2) Fw: “Attachments made prior to the bankruptcy shall lapse; the registration of a declaration to that effect from the bankruptcy judge shall authorize the registrar of the public registers to cancel the entries regarding the attachments. (…)” (translated).
149 See Art. 23 and Art. 35 Fw. The same is true in a ‘suitance van betaling’, meaning ‘suspension of payments’. This is a moratorium prior to bankruptcy that can only be filed for by the debtor, in order to give the debtor the opportunity to put its debts in order, by keeping creditors at a distance; see Art. 214 Fw.
2.4.3. Secured lenders vs. secured lenders

A debtor is entitled to create more than one pledge in the same collateral.150 The ranking of these pledges is in principle determined by the prior tempore rule: ‘first151 come, first served’. The same applies to security rights that are created in relation to future assets: the lender that fulfilled the requirements for creating the pledge in advance first is ranked ahead of a creditor that fulfilled these requirements later in time.152

Regardless of whether the existence of a previously established pledge is communicated the prior tempore rule dictates that the prospective lender will obtain a right of pledge, but with a second ranking. The second-in-time pledgee may nevertheless be protected on the basis of Art. 3:238(2) BW against the pledge that was established first.153 The second-in-time pledgee must obtain a possessory pledge154 and act in good faith with regard to a first-in-time pledge when the assets are brought into its possession.155 Turning to the requirement of good faith, Art. 3:238(2) BW provides in more specific terms that the secured lender may not have knowledge nor ought to have knowledge of the earlier established right of pledge. This entails that the second-in-time lender has a certain duty to investigate the debtor’s entitlement to dispose. It seems to be generally accepted that this duty has not been fulfilled if the deed of pledge lacks the declaration of the debtor referred to in Art. 3:237(2) BW,156 and that this duty has been fulfilled if this declaration is included. The inclusion of such a declaration in the security agreement is therefore standard practice.157 Provided that the conditions of Art. 3:238(2) BW are met, both pledges will be valid and

150 Some scholars use terms such as the debtor is only ‘partly’ entitled to dispose, because it cannot grant the second-in-time pledgee a pledge that is first in time. Cf. e.g. Snijders & Rank-Berenschot 2012, no. 361 Pitlo/Reehuis-Heisterkamp 2012, no. 141. Whatever terms are used: the pledgor can pledge its collateral several times. Since physical possession of the good cannot be transferred twice, the accumulation of pledges in the same collateral has only been possible since the non-possessory pledge was introduced in 1992.
151 I reiterate from subsection 2.2.2 that if parties create a pledge by drawing up a private deed that is registered with the tax authorities, the day on which the parties offer the deed to the tax authorities counts as the moment when the pledge is created. If they choose to go to the notary, the moment when the notary signs the deed is decisive in determining the moment of creation.
152 See supra subsection 2.2.1 (especially footnote 47) for the requirements to create a pledge in advance.
153 This follows from Art 3:238(1) and (2) BW. Art 3:238(1) BW: “A right of pledge on a movable thing (…), established by a pledgor who lacks the right to dispose of such a thing (…), is valid if the pledge is in good faith at the time the thing (…) was brought under his control or that of a third person.” Art. 3:238(2) BW: “Where property referred to in paragraph 1 is encumbered with a limited right, knowledge of which the pledgee does not have nor ought to have at the time referred to in that paragraph, the right of pledge ranks ahead of such limited right.”
154 This protection rule will also apply if, and at the moment that, a non-possessory secured lender ‘promotes’ its pledge to a possessory pledge, by taking possession of the assets. See infra following footnote.
155 Or into the possession of a third party. Art. 3:238(2) BW makes clear that the moment of establishing good faith is crucial for deserving protection: if the second-in-time pledgee acts in good faith at the moment of creation, but is no longer in good faith at the moment the assets are brought into its possession, it will not deserve to be protected by Art. 3:238(2) BW. Cf. Pitlo/Reehuis-Heisterkamp 2012, nos. 770-771.
156 Art. 3:237(2) BW provides: “The pledgor must declare in the instrument that he is entitled to pledge the property and furthermore that the property is not encumbered with limited rights or, if it is, by which rights it is encumbered.”
enforceable, but their ranking will be reversed. This creates an important exception to the prior tempos rule.

It follows from the foregoing that non-possessory secured lenders – in practice the majority of them – do not have the benefit of the protection provided by Art. 3:238(2) BW; the fact that they may have been acting completely in good faith at the time of creation of non-possessory security rights is simply irrelevant; it is solely the question of whether the assets are brought into their possession (and the existence of good faith at that particular moment in time) that matters.\(^\text{159}\)

In practice, one would perhaps expect the effect of this rule to be of little importance, given that possessory pledges are rarely used in the context of financing operational businesses. Although this is true, it is nuanced by the fact that in order to protect their rights and enforce the non-possessory pledge, lenders regularly make use of a so-called ‘bodemverhuurconstructie’ (freely translated: ‘premises lease construction’). The basis for this construction is that although as a general rule rights of pledge take priority over claims preferred by statute, there is an express exception to this rule for certain categories of tax claims and in respect of certain qualifying assets (‘bodemgoederen’) only.\(^\text{160}\) In respect of such tax claims, by seizing the assets concerned the Dutch tax receiver takes priority over non-possessory security existing in respect of such assets.\(^\text{161}\) This exception applies only, however, with respect to assets physically located in the premises in use by the debtor and only to the extent that such assets serve to upholster the premises (such as inventory (furniture) and equipment, but not stock).\(^\text{162}\) In the wake of an insolvency where the secured lender may have reason to believe the tax authorities may exercise their priority right by seizing the assets concerned, the secured lenders can fence off this risk by physically promoting their non-possessory security to possessory security. This requires taking possession of the assets concerned, which is normally effectuated by the secured lender removing the assets concerned from the debtor’s premises and taking them into its own custody. However, this is sometimes impracticable in view of the number or size of the assets concerned, or the timing for completion of the operation before the tax receiver effectuates its seizure. The alternative developed in Dutch legal practice is for the debtor and the secured lender to instead enter into a lease arrangement regarding the premises where the assets are located. As a result of the lease, the right of use of the premises passes from the debtor to the secured lender and the former will no longer have access to those premises or to the assets concerned. If successfully implemented, this structure results in the premises no longer being in the debtor’s use and the assets concerned no longer qualifying as those over which the tax receiver can lay a priority claim. Instead, the assets will have come into the possession of the secured lender and the pledge will have been promoted to possessory security that the tax receiver will be bound to respect. By its nature, this structure is almost invariably only put into effect when bankruptcy of the debtor has become inevitable and the secured lender has cancelled or is about to cancel the credit

\(^{158}\) I reiterate that protection will be granted after all, if the non-possessory secured lender ‘promotes’ its pledge to a possessory pledge, given that at that moment all the conditions for protection as provided in Art. 3:238(2) BW are met.


\(^{160}\) See Art. 3:278 BW and Art. 21(2) Invorderingswet (‘Inv. wet’).

\(^{161}\) The tax priority takes effect automatically once bankruptcy or suspension of payments proceedings have commenced in respect of the debtor.

\(^{162}\) To be more precise, ‘bodem’ literally translates as ‘floor’, but for current purposes reference to ‘premises’ is sufficiently accurate.
lines. This conflict is often referred to as ‘the race between the tax authority and the bank’ and the Dutch legislature has recently introduced new legislation designed to enhance the position of the tax receiver, by requiring the secured lender to give at least 4 weeks' notice to the tax receiver before implementing a premises lease construction.\textsuperscript{163} Although the permissibility of the ‘premises lease construction’ is not undisputed, what this boils down to – and the point of this description was to make this clear – is that the use of this ‘bodemverhuurconstruktie’ means that although possessory pledges are still rare, they do in fact exist, be it mostly in respect of assets of non-operating businesses only. If lenders make use of this construction, they have the possibility to benefit from protection on the basis of Art. 3:238(1) BW as against pledges that were earlier in time, provided that the good faith requirement is also met, simply because the pledge is now possessory in nature.

\textbf{Bankruptcy}

In the event of bankruptcy, secured lenders may enforce a sale of their secured assets without the cooperation of the bankruptcy trustee. They must exercise these powers within a reasonable time limit set by the bankruptcy trustee.\textsuperscript{164} The prior tempore rule and the exception of Art. 3:238(2) BW apply fully with regard to the conflict between secured lenders, in bankruptcy. This means that if the debtor is financed by more than one secured lender and both know of one another’s existence, the ‘first come, first served’ principle applies. Secured lenders have to prove the ranking of their right to the bankruptcy trustee by showing the deed of pledge, which contains a fixed date.\textsuperscript{165} If this can be established without any problems – which is mostly the case – the secured lender and the bankruptcy trustee often agree that the latter will organize the execution of the collateral, in consideration for a contribution for the efforts made.\textsuperscript{166} If the situation occurs in which a second-in-time lender is surprised by the existence of a first-in-time lender, I reiterate that it can only be protected if it has both taken possession of the assets and acted in good faith with regard to the first pledge at the moment it received...

\textsuperscript{163} See ‘Belastingplan 2013’, mainly Art. 22bis to be found on: <www.rijksbegroting.nl/2013/voorbereiding/begroting,kst173902.html> (last visited February 5, 2014).

\textsuperscript{164} This restriction can be found in Art. 58(1) Fw: “The bankruptcy trustee may require the pledges and mortgagees to proceed to exercise their rights in accordance with the preceding article within a reasonable period. If the pledgee or mortgagee has not sold the collateral within this period, the bankruptcy trustee may claim the property and sell it (...), notwithstanding the right of the pledge or mortgage to the proceeds. The bankruptcy judge may extend the period one or more times at the request of the pledge or mortgage.” (translated). Another restriction follows from Art. 63a Fw, which provides that the bankruptcy judge can suspend the pledgee’s exercise of its power for two months, with the possibility of extension by another two months. Cf. Asser/Van Mierlo & Van Velten 3-VI* 2010/ 93, 97 and 104.

\textsuperscript{165} See supra subsection 2.2.3 and 2.2.4. Compare Strucyken, p. 131 on this subject.

\textsuperscript{166} The so-called ‘Separatistenregeling’ (freely translated: ‘secured creditors arrangement (in respect of remuneration)’) is a guideline that provides indicative standards for the amount of the bankruptcy trustee’s remuneration for the services that he performs regarding the execution sale. It was approved by the RECOFA (national consultative committee of bankruptcy judges, in Dutch: ‘landelijk overleg van rechters-commissarissen insolventes’), after consultation with INSOLAD (the Dutch Insolvency Lawyers Association, in Dutch ‘de Vereniging Insolventierecht Advocaten’), the NOvA (Dutch Bar Association, in Dutch ‘De Nederlandse Orde van Advocaten’; the regulatory authority for the legal profession) and the NVB (Dutch Banking Association, in Dutch ‘De Nederlandse Verenging van Banken’).

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possession of the assets. In that case, both pledges will be valid and enforceable, but their ranking will be reversed (Art. 3:238(2) BW).

2.4.4. Secured lenders vs. (secured) sellers
2.4.4.1. Secured lenders vs. sellers secured by retention of title
Traditionally, a lender provides the debtor with a regular (working capital) loan in exchange for a right of pledge in all or part of the debtor’s assets, while a seller conducts business with the debtor by supplying assets on credit. If a seller has stipulated retention of title, the debtor will not become entitled to dispose until after it has paid for the assets, since it becomes the owner of the assets only at that moment. If the debtor nevertheless pledges the assets, one might be tempted to think that the seller would ‘trump’ the secured lender, but in fact: with regard to these assets the prospective lender will in principle not become a pledgee at all.

In practice, suppliers of movable assets authorize their buyer (i.e. in this thesis: the debtor) to sell goods that have the purpose of being sold in the ordinary course of business. This is referred to as ‘restrictive retention of title’ (in Dutch: ‘geclausuleerd eigendomsvoorbehoud’). It is obviously not in the ordinary course of business if goods are pledged to the debtor’s lender.

There is an exception to this rule if the prospective secured lender obtains a possessory pledge and acts in good faith with regard to the fact that the debtor was not the owner at the time it granted the lender the right of pledge. In that case, the latter can be protected on the basis of Art. 3:238(1) BW. This rule is comparable to the protection of Art. 3:238(2) BW, except that there is no reverse ranking: as a result of the protection provided by Art. 3:238(1) BW, the seller’s retention of title terminates and the secured lenders acquires a right of pledge.

For the same reasons as mentioned in relation to secured lenders among themselves, this rule does not apply very often in practice: lenders rarely take possession of the movable assets that are subject to retention of title, given the nature of these assets; and for the same reasons as mentioned in that subsection, the rule may after all apply when the ‘bodemverhuurconstructie’ is used and the pledge becomes possessory in nature.

The seller can also invoke its retained ownership against prospective pledgees that established a right of pledge with regard to future assets. Since the retention of title prevents the debtor from becoming the owner of the assets, the pledge does not take effect until

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167 It should be noted that the power to (re)sell the assets in the ordinary course of business is to be understood as a power to dispose.
168 See supra footnote 153 for Art. 3:238(1) BW. Additional information concerning this rule can be found in e.g. Asser/Van Mierlo & Van Velten 3-VI* 2010/565.
169 For more information, see supra subsection 2.4.3.
the debtor has paid the purchase price to its seller (as a result of which the retention of title ceases to be effective and the debtor becomes entitled to dispose of the assets). 170

Sellers do, however, run the risk of losing their entitlement when the assets become the debtor’s property, for example as a result of accession or commingling. As of that moment the debtor will be entitled to dispose of them and, accordingly, any rights of pledge created in advance will automatically become effective. Dutch law does not recognize extended retention of title, i.e. a clause with the purpose of extending the retention of title to the newly created assets. Therefore the only way for a supplier of movable assets to mitigate this risk is to create a right of pledge ‘in advance’ over the newly created assets. Only if the supplier had done so earlier in time than a competing secured lender, it would have priority over the latter. 171 Here, the same protection rules as discussed in respect of secured lenders apply; see supra subsection 2.4.3. However, a supplier will hardly ever find itself in such a luxury position, since lenders tend to stipulate and acquire rights of pledge on all of the debtor’s existing and future assets. As a result, the supplier will often at best only be second in line or in the worst case will have lost its security altogether. 172

2.4.4.2. Secured lenders vs. sellers secured by right of reclamation

If a selling trade creditor discovers that the debtor is not able or not willing to pay the purchase price, the seller has the right to reclaim the assets sold as its property. The right of reclamation has so-called ‘proprietary effect’. 173 Exercise of the right of reclamation does not have retroactive effect. This means that the debtor is and has been the owner as long as the seller has not invoked the right of reclamation. As a result, a right of pledge is valid if the debtor granted this right to the lender before the seller invoked the right of reclamation. In spite of this consideration, however, it follows from Art. 7:39 BW that upon invocation the right of reclamation allows the seller to reclaim the assets as its property, not only when the goods are in the hands of the debtor, but also when they are in the hands of the debtor’s buyer or pledgee. 174 This can lead to an exception if the prospective buyer or pledgee acted in good faith with regard to the question of whether it was likely that the right of reclamation would be invoked, whether the prospective buyer

170 Pitlo/Reehuis-Heisterkamp 2012, no. 969.
172 Compare HR 3 February 2012, LJN BT6947 (Dix q.q./ING Bank) and Verstijlen 2012 on this subject.
173 I reiterate from subsection 2.2.7 that the right of reclamation applies only when the following five requirements are met. First of all, the movable assets must have been delivered to the buyer. Second, the purchase price must have remained unpaid, as a result of which the seller is entitled to terminate the contract. Third, the right of reclamation must be invoked by means of a written declaration of the seller directed to the buyer. Fourth, the right of reclamation can only be exercised to the extent that the assets delivered are in the same state as they were when delivered. Finally, the right of reclamation will lapse on the expiry of six weeks after payment of the purchase price has become due and sixty days from the day on which the goods were deposited with the buyer or someone on his behalf; see supra subsection 2.2.7.
174 See Art. 7:39 BW: “(…). This declaration sets aside and terminates the right of the buyer or his successor; (…)”
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has paid for the assets and has taken delivery of them. Requiring the assets to be physically delivered to the buyer means that it is not possible to reclaim the assets if they were delivered through constitutum possessorium. In the case of a pledge, this means that only possessory pledges are afforded protection. Hence, this rule bears similarity to Art. 3:238 BW, and as we will see in subsection 2.4.5, also to Art. 3:86 BW.

2.4.4.3. Bankruptcy

The bankruptcy trustee can choose to perform the debtor’s contract of sale by paying the purchase price to a seller that is secured by retention of title. As a result, the assets become part of the bankruptcy estate from that moment. A comparable effect takes place when the bankruptcy trustee fences off a seller’s right of reclamation by paying the seller the purchase price, or, alternatively, by providing security for payment within a reasonable period. In the latter case, the assets are retained for the bankruptcy estate.

In the first situation discussed above, ownership to the assets is transferred to the (insolvent) debtor after bankruptcy has been declared. Consequently, the assets become part of the debtor’s property after declared bankrupt. Due to the status of bankruptcy at that moment, however, the debtor will not become entitled to dispose of these assets. Accordingly, the right of pledge created in advance over future assets will not come into existence. Hence, in bankruptcy, selling trade creditors with retention of title are paid in full or can claim back the assets, while a competing secured lender has no rights whatsoever with regard to these assets.

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175 This follows form Art. 7:42(1) and (2) BW. Art. 7:42(1) BW: “Unless the thing has remained in the hands of the buyer, the right to reclaim lapses when (...) the thing has been transferred, otherwise than by gratuitous title, to a third person who could not reasonably have expected that the right would be exercised.” Art. 7:42(2) BW: “Where, after the delivery, a usufruct or pledge has been created over the thing, otherwise than by gratuitous title, paragraph 1 applies, mutatis mutandis.”

176 See supra subsection 2.2.1.

177 Asser/Van Mierlo & Van Velten 3-VI* 2010/184. Art. 3:238 BW and Art. 3:86 BW are not applicable because these articles only apply to debtors that are not, or only partially entitled to dispose. The peculiarity of the right of reclamation is that, before it was invoked, the debtor was fully entitled to dispose, since it does not have retroactive effect.

178 The trustee may also decide not to perform the contract, or may fail to decide within a reasonable time. In that case, the seller has the right to terminate the contract and claim back the assets sold. See Art. 37(1) Fw: “If, at the time of the declaration of bankruptcy, all or part of a reciprocal contract has not been performed by either the debtor or his counterparty, and the bankruptcy trustee does not state, within a reasonable period set for this purpose in writing by the counterparty, that he is willing to perform the contract, then the bankruptcy trustee will lose his right to claim performance of the contract.” (translated). Cf. Pitlo/Reehuis-Heisterkamp 2012, no. 972.

179 It follows from Art. 7:40 BW that the right of reclamation has the same effect in the case of insolvency of the debtor. Cf. Pitlo/Reehuis-Heisterkamp 2012, no. 960 and Kieninger 2004a, p. 203.

180 This follows from Art. 35(2) Fw in conjunction with Art. 3:98 BW. Art. 35(2) Fw reads: “If, before the day of the declaration of bankruptcy, the debtor delivered future property in advance, then if he first acquired it after the beginning of that day, this property forms part of the bankruptcy estate.” (translated). Art. 3:98 BW declared this paragraph equally applicable in case a right of pledge is created: “Unless otherwise provided by law, this Section on the transfer of property applies, mutatis mutandis, to the establishment, transfer and abandonment of a limited right to such property.”
If the assets have become part of the debtor's property before the debtor has been declared bankrupt, either because the seller was paid off just before that time, or because the assets were commingled with other assets before that time, any rights of pledge created in advance will become effective before bankruptcy and will have full effect in bankruptcy. In that case, it is the lender that ‘wins’ against the competing selling trade creditor.

If the selling trade creditor invokes the right of reclamation – for example because the creditor does not have the benefit of retention of title – the situation changes, because the debtor does have ownership to the assets as long as the right of reclamation has not been invoked. As a result, the debtor was entitled to dispose and to create rights of pledge in favor of a lender before that moment. Because the right of reclamation has ‘proprietary effect’, however, the seller can claim the assets as its property from the debtor, and from the bankruptcy trustee acting on the debtor’s behalf. In addition, the seller can claim the assets that are covered by the right of pledge established by debtor’s secured lender, despite the fact that this right of pledge was valid. The secured lender may benefit from protection if it was acting in good faith with regard to the question of whether there was a reasonable expectation that the right of reclamation would be invoked and received delivery of the assets. Thus, only possessory pledgees may benefit from the protection offered by Art. 7:42 BW.

2.4.5. Secured lenders vs. buyers

As a general rule between secured lenders and buyers, a right of pledge continues in the collateral notwithstanding its disposition by the debtor to a buyer, unless the secured lender has authorized the disposition free of the right of pledge. This strong right of the secured lender does not have its basis in statute, but in a general principle of property law, which dictates that a person cannot transfer more rights than he has himself (‘nemo plus’). This in turn relates to the absolute effect of property rights and hence to another important principle of property law, usually known as the principle of ‘zaaksgevolg’ (‘droit de suite’): if the secured lender did not authorize the disposition of particular collateral, the pledge continues to ‘stick’ to that collateral and the buyer will acquire the asset subject to a right of pledge. Lenders that benefit from a non-possessory pledge will normally allow the debtor to sell secured assets in the ordinary course of business, simply because these sales will generate the cash from which the lenders could expect the debtor to

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178 See Art. 3:98 BW.
179 In the latter case, the assets are no longer part of the bankruptcy estate from that moment.
180 This follows from Art. 35(2) Fw in conjunction with Art. 3:98 BW. Art. 35(2) Fw reads: “(translated).”
182 See supra previous footnote. I reiterate, this rule is very similar to Art. 3:86 BW and Art. 3:238 BW. Art. 3:86 BW and Art. 3:238 BW are not applicable because they only apply to debtors that are not entitled to dispose. The peculiarity of the right of reclamation is that the debtor was entitled to dispose before it was invoked, since it does not have retroactive effect.
183 Salomons 2011, p. 15: “(…) property rights have absolute effect (from the Latin absolutus: dissolved, detached) and can be invoked against whomever is in possession of the object.”
service the debt. In these cases, the right of pledge will terminate as soon as the asset is transferred to the debtor. Such termination of the security can be an implied term of the security agreement or can be expressly agreed. If a secured lender did not authorize the sale, in principle the debtor is not permitted to transfer title to the assets free of the right of pledge. Buyers may nevertheless take assets free of existing security interests if the requirements for third party protection are met. These requirements will be explained in the next subsection.

2.4.5.1. Secured lenders vs. buyers
If a debtor has not been authorized to sell the collateral by the secured lender in the ordinary course of business, or if the debtor sells other assets (that do not have this purpose), the buyer will acquire the asset subject to a right of pledge, unless it deserves protection on the basis of Art. 3:86(2) BW. In summary, the article requires the buyer to have acted in good faith, to have paid for the assets and to have received the assets. With regard to the rights of pledge that have been created in the collateral, this means that the buyer must have had no knowledge of the pledge whatsoever, or – if it did possess this knowledge – had no reason to believe that the sale violated the rights of the pledgee. Since security agreements normally authorize the debtor to sell the collateral free of security in the case of sales in the ordinary course of the debtor’s business, most buyers will have no reason to ask questions and will therefore be protected.

2.4.5.2. Bankruptcy
If a buyer has obtained good and valid title prior to bankruptcy, the buyer is not affected by the event of bankruptcy: the secured lender already ‘lost’ the security to the buyer, and bankruptcy in itself will not create a conflict between the two. However, buyers that choose to perform the contract without taking possession of the assets run the risk that, in the event of bankruptcy of the debtor, the secured lenders will promote their right of pledge to a possessory pledge. In that (rare) case, the buyer will enjoy no protection on the basis of Art. 3:86(2) BW, because it has not taken possession of the assets and, as from that moment, no longer will have the possibility of taking possession.

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185 Whether such a clause has been agreed to is to be determined on the basis of the security agreement. Asser/Van Mierlo & Van Velten 3-VI* 2010/126.
186 Art. 3:86(2) BW: “Where property mentioned in paragraph 1 and having been transferred, otherwise than by gratuitous title (…), is encumbered with a limited right of which the acquirer does not know or ought to have known at that time, such right is extinguished (…)”. This Article has to be read in conjunction with Art. 3:86(1) BW: “Although an debtor lacks the right to dispose of the property, a transfer (…) of a movable thing (…) is valid, if the transfer is not by gratuitous title and the acquirer acts in good faith.”
187 The requirement that the assets have to be physically transferred to the buyer (or a third person) in order for this protection to be provided follows from Art. 3:90(2) BW, which reads: “Delivery of a thing which remains in the actual possession of the debtor has no effect as regards a third person who has a prior right to the thing, until the thing comes into the actual possession of the acquirer, unless the person with the prior right consented to the alienation.”
2.4.6. Secured sellers vs. (enforcing) general unsecured creditors

2.4.6.1. Sellers secured by retention of title vs. (enforcing) general unsecured creditors

A seller that has retained title in the assets can claim them back from anyone who holds them without right, including general unsecured creditors that have levied the assets. If the seller deems this necessary, it can even lodge an official protest against the attachment by following the procedures set out in Art. 456 Rv. General unsecured creditors that attach the goods acting in good faith with regard to the retention of title, do not have the benefit from a protection rule.

2.4.6.2. Sellers secured by right of reclamation vs. (enforcing) general unsecured creditors

A selling trade creditor’s right of reclamation can be invoked against the debtor, despite the fact that general unsecured creditors of the debtor may have seized the latter’s property. Furthermore, it is generally assumed that this right causes the attachments of general unsecured creditors to lapse.

2.4.6.3. Bankruptcy

A selling trade creditor that has retained title in the assets can also exercise this right when the buyer has filed for bankruptcy. The same applies for the right of reclamation: when invoked, it has full effect, also in bankruptcy.

2.4.7. (Secured) sellers vs. buyers

2.4.7.1. Sellers secured by retention of title vs. buyers

If a selling trade creditor is secured by a retention of title, the debtor is not entitled to transfer ownership to the assets, simply because the debtor is not the owner (yet). However, selling trade creditors generally allow their debtors to sell goods in the ordinary course of business, for the same reasons as secured lenders: they want to be repaid from the sale proceeds.

Whether the selling trade creditor has indeed authorized the debtor to resell the assets depends on the purchase agreement between the seller and the debtor. According to the Love-Love case, this conclusion can be based on the use of explicit wording to this end, but this is not necessary. However, this conclusion cannot be based on the mere

189 Art. 453a(1) Rv does not apply.
190 According to Pitlo, this assumption is based on the fact that the right of reclamation remains effective in the event of the debtor’s insolvency. See Pitlo/Reehuis-Heisterkamp 2012, no. 960.
191 See supra subsection 2.4.4.3 for more information on this.
192 Once again, this is known as ‘restrictive retention of title’. See also Asser/Van Mierlo & Van Velten 3-VI* 2010/545 and also Kieninger 2004a, p. 293.
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fact that the assets have the purpose of being resold in the ordinary course of business.\textsuperscript{194}

If a secured seller did \textit{not} authorize the sale, the debtor is in principle not permitted to transfer ownership. Buyers may nevertheless take goods free of existing security interests if the requirements for third party protection rules are met.

In this context of third party protection, the interpretations are similar to those described in relation to buyers that take assets subject to a right of pledge created in favor of a secured lender.\textsuperscript{195} In order to qualify as a buyer acting in \textit{good faith}, the buyer has to reasonably believe that the seller is entitled to dispose; this conclusion can still be drawn if the buyer knows that the seller and the debtor (first and second hand) agreed to a retention of title clause. Hence, if the assets are sold under normal conditions, and the buyer had no reason to believe that the retention of title would be exercised by the seller, good faith is deemed to exist.\textsuperscript{196} The buyer must also have taken possession of the assets and paid for the assets.

2.4.7.2. Sellers secured by right of reclamation \textit{vs.} buyers

Another type of conflict between the debtor’s selling trade creditors and the debtor’s buyers occurs when the seller invokes the right of reclamation. I reiterate from subsection 2.4.4.2 that this right has absolute effect against \textit{all} the parties that derive a right from the debtor, except if the requirements of Art. 7:42(1) BW are met. In summary, this article provides that protection on this basis is given when the assets have been physically handed over to the buyer, and the buyer has paid for the assets and acted in good faith.\textsuperscript{197} In establishing good faith, the main question is not whether the buyer could reasonably have expected that the seller was not entitled to dispose, but whether the debtor or the debtor’s seller exercise of the right of reclamation falls within the realm of reasonable expectation. This means that the buyer must have had no reason to believe that the transaction would not have been settled normally.\textsuperscript{198} The line of reasoning behind this rule is parallel to the reasoning in Art. 3:86 BW and Art. 3:238(1) or (2) BW.

2.4.7.3. Bankruptcy

A selling trade creditor that has retained title in its assets can also exercise its right when the debtor, has filed for bankruptcy. The same applies for the right of reclamation: when invoked, it has full effect, even in bankruptcy.\textsuperscript{199}

\textsuperscript{194} HR 14 February 1992, NJ 1993, 623 (Love-Love).
\textsuperscript{195} See supra subsection 2.4.5.
\textsuperscript{196} Cf. Asser/Van Mierlo & Van Velten 3-VI* 2010/563-564.
\textsuperscript{197} See Asser/Van Mierlo & Van Velten 3-VI* 2010/184 and Pitlo/Reechuis-Heisterkamp 2012, no. 959.
\textsuperscript{198} Pitlo/Reechuis-Heisterkamp 2012, nos. 959 and 968.
\textsuperscript{199} For further information, see subsection 2.4.4.3.
2.4.8. Buyers vs. (enforcing) general unsecured creditors

In theory, a buyer can purchase collateral from the debtor that, at the time of transfer, was subject to an attachment by a general unsecured creditor. Conversely, a general unsecured creditor can levy upon an asset that has already been sold, but not physically transferred. The second situation is very rare, since buyers normally take the assets they buy with them at the moment of sale. Art. 453a Rv applies to the first situation. To summarize, this means that the buyer takes the asset subject to the levy. This can only lead to an exception if the prospective buyer was acting in good faith with regard to the levy, has paid for the assets and has taken receipt of them.

3. Dutch legal practice of lenders and trade creditors

The previous subsection gave an overview of the legal rules and concepts of Dutch secured transactions law. It explained, for instance, that Dutch law provides for the possessory pledge (Art. 3:236(1) BW) and the non-possessory pledge (Art. 3:237(1) BW). In addition, it explained that two other ways to secure payment are embodied in the retention of title (Art. 3:92 BW) and the right of reclamation (Art. 7:39 BW). None of these proprietary rights are (made) public via a public filing system: the retention of title and the right of reclamation require no registration whatsoever, while the deed for non-possessory pledge requires that the deed is ‘stamped’, to serve the purpose of date certainty. Hence, the “register” in which the deeds are entered is – apart from one minor exception – not open for public inspection.

In order to gain some idea whether any problems exist in relation to parties involved in secured transactions in a system where public filing is not available – which analysis will be conducted in the next chapter – this section will provide a general description of how these parties deal with these legal rules in their common legal practice. Since this research focuses on lenders and trade creditors, I will provide a general description of the practical process of lending by banks and supplying on credit terms by trade creditors, in which I will concentrate on the following four main issues follows:

i. the process of entering into a (credit) relationship, with the focus on the most important considerations and deliberations that are made in this process (subsection 3.1.1 and 3.2.1);

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200 Art. 453a(1) Rv: “A transfer, charge, trust or lease of the asset created or effectuated subsequent to its attachment, cannot be held against the attaching creditor.” (translated)
201 Art. 453a(2) Rv: “Rights acquired by a third party other than for no-consideration are respected, provided that the asset has passed into its hands and at that time such party was acting in good faith.” (translated)
202 Reasons of cost and efficiency usually compel Dutch lenders to use the option of drawing up a private agreement and filing that deed with the tax authorities, instead of applying for a notarial deed. See supra subsection 2.2.3, Beekhoven van den Boezem & Goosmann 2010b, p. 45. Cf. Van den Bosch et al. 2008, p. 18.
203 The information in the register may be disclosed only to a very limited group of persons; in a nutshell, the parties to a deed, their heirs or their successors in title; supra subsection 2.2.3.3 and 2.2.4.3.
The decision to stipulate collateral security, the extent to which this is done, and relevant factors in making this decision (subsection 3.1.2 and 3.2.2);

iii. the legal and non-legal tools to control the debtor in case of default (subsection 3.1.3 and 3.2.3);

iv. the methods for covering shortfalls in the event of their debtor’s default (subsection 3.1.4 and 3.2.4).

3.1. The lending practices of Dutch lenders vis-à-vis customers

3.1.1. The process of entering into a credit relationship

The process of granting credit – in Dutch often referred to as ‘het kredietbedrijf’ – is a core activity for all banks. The structure of a bank’s credit business is highly complex and therefore cannot be explained in mere few pages. For the purposes of this thesis, however, it is sufficient to merely present an outline.

The first point of contact for prospective borrowers (hereafter ‘debtor’204) are account managers: they are responsible for the loan applications. Debtors must provide the account manager with necessary (or required) information.205 Customarily, this information includes at least:

- The annual accounts of the last 3 financial years
- The interim financial results of the last 3 financial years
- An operating budget for the current financial year and, if possible, the expectations for the next 12 months
- A liquidity plan for the next 12 months.206

Account managers investigate various aspects of the debtor’s business before they can approve any loan. First, they conduct a ‘financial analysis’ of the debtor’s business, focused on solvency, liquidity and profitability. Then ‘business-related aspects’ are analyzed, such as the type of business, its legal structure, its market position, the structure of the management, the quality of the management, etc. Further, the reliability of the financial accounts will be critically analyzed, which reliability is considered to be greater if an accountancy audit has taken place. After the account manager has gathered the appropriate information, he/she will determine what types of credit can be extended and

204 Only the fate of commercial debtors is discussed in this thesis; see Introduction subsection D.1.
205 Drontmann & Kampfraath give an example of what they call the ‘perfect loan application’, see Drontmann & Kampfraath 1993, p. 57-61.
206 Vos 2009, p. 22. This is consistent with what I have learned from interviews with various bankers. As to the financial results, however, several bankers indicated that, in days of recession, good results achieved in the past are less and less a guarantee for achieving positive results in the future. Consequently, bankers pay more attention to the financial figures of the past six months and, moreover, to the soundness of the business plan in contrast to prior practice. Interview, Practitioner 2 (banker), March 5, 2012; Interview, Practitioner 10 (banker), April 16, 2012. Sometimes, a ‘management letter’ is also submitted, i.e. a document that is set up by the accountant and addressed to the management. It includes the relevant information about vulnerabilities of the company. See Beekhoven van den Boezem & Goosmann 2010b, p. 47, n. 12.
subsequently negotiate and decide on the nature, the terms, and the conditions of the loan.\footnote{207}

Whether or not the loan application is granted depends on a multiplicity of objective and subjective \textit{(i.e.} to be assessed by the account managers) factors. Financial analysis is the most important factor in this assessment, with the expected continuity of the business a matter of the utmost importance.\footnote{208} Most loan applications go through several stages before the final decisions are actually made. At each stage, several departments assess the loan application according to their specialized angle of approach and experience. The frequency of these double checks depends mostly on the size and complexity of the loan: small loans can often be granted by the account manager himself.

When the account manager has prepared a loan application on the basis of the required information, this is submitted for assessment – in accordance with the ‘Two Man rule’ or ‘four-eye principle’ – to a department within the bank that must approve the loan application. This department is often called the ‘(Credit) Risk Management Department’ \textit{(hereafter, for simplicity: the ‘Risk Department’) or something of that nature. While the account manager is responsible for structuring the loan, the Risk Department checks whether the account manager’s deliberations are sound, in view of their own knowledge and experiences of the market. Depending on the size and complexity of the loan\footnote{209} the loan application (and the advice of the Risk Department) can then be re-assessed by one or more internal so-called ‘credit committee(s)’. These committees examine the application with a certain seniority, and also assess how the loan fits into the credit portfolio of the bank.\footnote{210} Very occasionally, \textit{i.e.} in the case of very large and complex loans, permission at board level is also required.

\subsection*{3.1.2. The decision to stipulate collateral security}

If collateral security is stipulated in the form of a pledge, Dutch banks nearly always make use of non-possessory pledges.\footnote{211} However, whether collateral security is stipulated or not depends primarily on the \textit{type} of financing that is granted. In some business segments security is never stipulated for loans, the so-called \textit{ratio or blank} loans.\footnote{212} Conversely, there

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\footnote{207}{207} Interview, Practitioner 2 (banker), March 5, 2012. Vos refers to these last two steps of the lending process as the ‘credit analysis’ and the ‘grantability analysis’ (translated); see Vos 2009, pp. 23-26.

\footnote{208}{208} See e.g. Beekhoven van den Boezem & Goosmann 2010b, p. 55 and Vos 2009, p. 24.

\footnote{209}{209} Banks classify companies into different categories within their credit business, according to size (measured in terms of turnover and number of employees) or according to the type of financing that they grant to those companies. The categories vary from one bank to another, but measured in terms of size they are (very) roughly: i) loans up to 500,000 euros (Small Businesses), ii) loans up to ten or sometimes 25 million euros (Small and Medium-sized Enterprises (\textit{SME’s})), iii) loans up to 250 million euros (Large Businesses), and finally iv) loans above 250 million euros (\textit{Corporate Clients}).

\footnote{210}{210} Interview, Practitioner 4 (banker), March 5, 2012 and Interview, Practitioner 7 (banker), March 15, 2012. \textit{Cf.} Vos 2009, p. 27.

\footnote{211}{211} See \textit{supra} Chapter 1, subsection A.1. \textit{Cf.} Beekhoven van den Boezem & Goosmann 2010b, p. 45. Needless to say, considerable use is also made of personal security, such as guarantees, suretyships \textit{etc.}

\footnote{212}{212} In the case of ratio loans, it is often agreed upon that they will become immediately repayable as soon as the business no longer satisfies certain financial ratios, or that as soon as this occurs the debtor will have to give security rights. Interview, Practitioner 7 (banker), March 15, 2012. \textit{Cf.} Beekhoven van den Boezem & Goosmann 2010b, p. 47-48.
are loans that are only granted on the basis of assets, asset-based loans. Hence, the type of loan that is granted (i.e. secured or unsecured) is dictated by the nature of the business: certain types of loans are therefore granted more often in one sector than in another.

Supermarket chains, for example, are pre-eminently suitable for blank loans, because the assets in the business are either of little value (e.g. cabinets, shelves etc.) or are not very suitable to be used as collateral (stock has a very short turnover time), while the future cash flows are steady (i.e. the risk that people will stop buying food is very low). Examples of asset-based loans are leasing and factoring, where the loan is linked one-on-one to the (value of the) collateral.\footnote{Beekhoven van den Boezem & Goosmann 2010b, p. 47.}

The bargaining power of the companies concerned also plays an important role: security will rarely be required for plain vanilla working capital loans to the very large companies\footnote{Cf. Beekhoven van den Boezem & Goosmann 2010b, p. 47. This is not unique to the Dutch legal practice; see ‘Secured Transactions Systems and Collateral Registries’ (Washington DC: IFC, 2010), p. 8.} – the Unilever and Shell corporations of this world – simply because these multinationals have banks lining up to finance them. In other words, the level of competition offered by other banks is very high.\footnote{In the case of these loans, it is often agreed with the company that the lender will provide blank financing as long as the company is performing well, and that security will be requested as soon as the company falls below a certain ratio. Cf. supra footnote 212.} When loans are granted to SME’s, however, the stipulation of security is actually standard practice. Undertakings that have a growing need for credit, are often financed by means of syndicates, in case of which security rights are distributed to the multiple lenders involved.\footnote{See e.g. Beekhoven van den Boezem & Goosmann 2010b, p. 47.}

\subsection{3.1.2.1. The capital requirements pursuant to Basel II (and III)\footnote{At the time of closing the manuscript for this thesis, a new set of rules is in the process of coming into force. These are based on proposals by the members of the Basel Committee on Banking Supervision in 2010/2011 (<www.bis.org/publ/bcbs189.pdf>, last visited February 5, 2014) to strengthen bank regulatory capital requirements and which build on the three pillars of the Basel II framework (Third Basel Accord or Basel III). Basel III has been transposed into Directive 2013/36/EU dated 26 June 2013 and into Regulation (EU) No 575/2013 dated 26 June 2013. These provide for a phased introduction of new rules over a period of time between 1 January 2014 and 31 December 2017. My analysis is based on Basel II, but this will not be affected by the substance of the Basel III rules, other than that these signify even greater importance of collateral security for purposes of bank regulatory capital requirements.} (Pillar 1)}

The question of whether a Dutch bank stipulates security for a loan has an impact on several important issues concerning its own position. First of all, it has an impact on the amount of capital that it must hold on its balance sheet on the basis of the Basel II rules,\footnote{Basel II (2004) was the second of the Basel Accords adopted by the Bank for International Settlements (‘BIS’), under the auspices of the Basel Committee on Banking Supervision. It sets international capital adequacy standards for lenders and investment firms and was implemented in the EU in two Directives: Directive 2006/48/EC, OJ L 177, better known as ‘the Banking Directive’, and Directive 2006/49/EC, OJ L 177, 2006/48/EC, OJ L 177, chapter 3, section 3, subsection 1 and 2 and Regulation (EU) No 575/2013 dated 26 June 2013. These provide for a phased introduction of new rules over a period of time between 1 January 2014 and 31 December 2017. My analysis is based on Basel II, but this will not be affected by the substance of the Basel III rules, other than that these signify even greater importance of collateral security for purposes of bank regulatory capital requirements.} which found their way in European Directives and accordingly have been
implemented in the Netherlands. According to Pillar I of the Basel II rules, lenders must hold a minimum amount of regulatory capital on their balance sheet; in Basel terminology: ‘own funds’. In short, lenders may not lend or invest this capital, because it must serve as cover for outstanding loans. Under Basel I (in force until 2007), a lender was required to hold approximately 8% of the total amount of outstanding loans. Basel II made this cover dependent on the risk profile of the total credit portfolio and this will remain largely unaffected under Basel III.\(^{219}\) Under the Basel rules, the minimum amount of ‘own funds’ or regulatory capital is defined by three parameters: credit risk, market risk and operational risk.\(^{220}\) For the purposes of this thesis, it is especially the credit risk parameter that is relevant.\(^{221}\) Credit risk is understood to be ‘the risk of a financial loss that occurs if a client or counterparty fails to meet the terms of a contract or otherwise fails to perform as agrees’.\(^{222}\) This parameter is expressed in the ‘Expected Loss’ (‘EL’),\(^{223}\) that the lender expects to incur on the borrower concerned for every loan on the one hand and the maturity of the loan (‘M’) on the other.\(^{224}\) The amount of the EL for each (type of) loan can either be directly derived from the Basel rules or calculated by lenders on the basis of requirements set out in Basel; this depends on the choice that they make between the Standardized Approach (‘SA’) and the Internal Ratings Based Approach (‘IRB approach’).\(^{225}\) Under the SA, lenders assess the amount of regulatory capital they must hold on the basis of the clusters defined by Basel used to categorize their individual loans (i.e. this is not rated internally).

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\(^{219}\) See supra footnote 217.


\(^{221}\) For more information on Market Risk and Operational Risk, see e.g. ABN AMRO Annual Report 2012, p. 135 et seq. and Rabobank Group Annual Summary 2013, p. 16 and 49-50.

\(^{222}\) ABN AMRO Annual Report 2012, p. 140.


\(^{224}\) For an illustration, see ABN AMRO Annual Account 2012, p. 144.

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The SA is similar to the method used under Basel I, but is more refined because the Expected Loss must be calculated for every individual loan granted. For exposures secured by mortgage on residential property, for example, is assigned a risk weight of 35%; for exposures to multilateral development banks (such as the EBRD) 0%, and for exposure to corporates the risk weight may vary from 20% to 150%. Under the IRB approach, lenders calculate the EL by reference to the following formula in simplified form: PD x LGD x EAD = EL, where:

- The Probability of Default (‘PD’) is the likelihood that the debtor will be unable to meet its interest and repayment obligations to the lender within one year. The PD is measured at the level of the debtor and depends on, among other things, the debtor’s solvency, profitability, liquidity, quality of the management, etc.
- The Exposure At Default (‘EAD’) gives an estimate of the total amount that the debtor will owe to the bank at the time of default. This largely depends on the type of facility available to the debtor.
- The Loss Given Default (‘LGD’) is the loss that the bank will incur on the debtor, after liquidation of the security and setoff of the credit balances held at the bank, in the event of definitive default of the debtor. The LGD is therefore measured at facility level and depends on, among other things, the quality of the security, the loss of interest in the period between the moment of default and the time of liquidation, agreed guarantees and covenants, and the costs incurred by the bank in order to collect its claim.
- The Expected Loss (‘EL’) is the loss that the bank expects to incur on the loan to the debtor.

Under the IRB approach lenders are allowed to calculate either their debtor’s PD or their debtor’s PD and LGD, depending on which IRB variant they choose. These calculations are performed using the ‘internal rating models’ developed internally by the

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227 For a definition of ‘Probability of Default’, see Directive 2006/48/EC, OJ L 177, Article 4; no. 25 and Regulation (EU) No 575/2013, Article 4, no. 54. Cf. Staal 2011, p. 3. The PD of strong start-up companies is generally less than 1%, while that of weaker start-ups is around 4 to 5%. In the review of existing borrowers, it can happen that a PD has gone up to 20%. Interview, Practitioner 4 (banker), March 5, 2012.
228 Cf. Staal 2011, p. 3.
229 For a definition of ‘Loss Given Default’ see Directive 2006/48/EC, OJ L 177, Article 4; no. 27 and Regulation (EU) No 575/2013, Article 4, no. 55. Cf. Ibrahim & Koch 2009, p. 21, Veldman 2007, p. 36 and Staal 2011, p. 3. Even if the lender still manages to collect (some of) its claim, the bank always incurs costs that cannot be recovered from the debtor. This explains why the LGD can never be calculated as 0%.
231 Under the Foundation variant (‘F-IRB’), lenders calculate their debtor’s PD only; under the Advanced variant (‘A-IRB’) lenders calculate both the PD and LGD. For an example, see ABN AMRO, Annual Report 2012, p. 136.
lenders,\textsuperscript{232} which in turn are based on extensive empirical data from their entire organization, reflecting their lending experience with customers. Lenders can consequently opt for the IRB approach only if they have sufficient empirical data ("mass") to develop these models.\textsuperscript{233} Use is therefore subject to approval from national regulators. Accordingly, smaller banks will be more inclined to use the SA approach, while larger banks, who have greater resource, are more likely to apply the IRB approach.\textsuperscript{234}

From Directive 2013/36/EU, it follows: “Member States shall require that institutions provide the competent authorities of their home Member States with all the information necessary for the assessment of their compliance with the rules adopted in accordance with this Directive and Regulation (EU) No 575/2013. Member States shall also ensure that internal control mechanisms and administrative and accounting procedures of the institutions permit the checking of their compliance with such rules at all times.”\textsuperscript{235}

In the Netherlands De Nederlandsche Bank (‘DNB’) supervises compliance with these rules, which it does on the basis of these banks’ periodic reports, among other things. The rating models are evaluated on e.g. quality and transparency.\textsuperscript{236}

Calculating the PD and LGD in practice

In practice, the PD and LGD calculations based on these rating models are performed by account managers who, when granting each individual loan to a prospective borrower, enter both quantitative and qualitative variables regarding the debtor,\textsuperscript{237} its company\textsuperscript{238} and the proposed loan\textsuperscript{239} in a computer system that calculates the applicable PD and LGD percentages.\textsuperscript{240} Both the PD and the LGD are characteristic of – and therefore different for – each e.g. type of business, size of business (SME, Large Corporates etc.), market segment (commodities, energy, real estate, etc.) and type of loan (project financing, working capital financing, acquisition finance, etc.).\textsuperscript{241} Large banks use a total of no less than 40 to 50 categories and their concomitant rating models, including private individuals. In principle, the models provide a conclusive answer, but account managers can propose an override on the model outcome if there are specific circumstances not

\textsuperscript{232} These are referred to as ‘PD models’ and ‘LGD models’. In addition, lenders are allowed to use ratings issued by external rating agencies, such as Moody’s etc. Directive 2006/48/EC, OJ L 177, Preamble, nos. 38-39 and Regulation (EU) No 575/2013, nos. 42. Cf. ABN AMRO, Annual Report 2012, p. 135.
\textsuperscript{233} Cf. Heiting 2010, p. 15-16.
\textsuperscript{234} See for example Rabobank Group Annual Summary 2013, p. 41 and ING Group Annual Report 2012, p. 346.
\textsuperscript{235} See Directive 2013/36/EU, Section II, Article 4(5).
\textsuperscript{237} Such as the debtor’s main activity, its financial accounts, profit and loss account of the past year, etc.. Cf. Staal 2011, p. 2.
\textsuperscript{238} Such as how long the company has been in existence, whether there have been any recent management changes, etc. Cf. Staal 2011, p. 2.
\textsuperscript{239} Such as the duration of the loan, what goods are offered as collateral, etc..
\textsuperscript{240} Interview, Practitioner 2 (banker), March 5, 2012.
\textsuperscript{241} Cf. Ibrahim & Koch 2009, p. 21.
considered within the ramifications of the model.\textsuperscript{242} The same applies to those involved in the decision making process.

### 3.1.2.2. How the ‘EL’ affects the level of the credit risk surcharge and solvency surcharge

The loss that lenders expect to incur with regard to debtors – hence, the Expected Loss (EL) – impacts their relationship with debtors in two ways. First, it reflects the credit risk they run on their debtors.\textsuperscript{243} After all, the losses that lenders expect to incur with regard to their debtors will materialize somewhere in their credit portfolio; this is, after all, what these lenders have calculated on the basis of their internal rating models. Second, the EL reflects the extent to which lenders are not allowed to lend capital to new debtors, or invest it in projects.\textsuperscript{244} To reiterate from the previous subsection, that this is explained by the fact that the EL reflects the amount of regulatory capital (‘own funds’) that Dutch banks must hold on the basis of the Basel rules.

Both issues cause repercussions on the price of credit, \textit{i.e.} the interest.\textsuperscript{245} First, this is because the credit risk run by lenders is captured by the inclusion of a ‘credit risk surcharge’ in the price of credit.\textsuperscript{246} Second, the fact that lenders cannot lend the capital reflected in the EL means that this capital does not, so to speak, ‘make any money’. Banks pass on this ‘lost profit’ in their price of credit, in the form of a ‘solvency surcharge’.\textsuperscript{247} These surcharges are added to the costs made to attract funding in the market, known as the funding costs of credit, based on the Euribor\textsuperscript{248} and developments within the capital market. In addition, a profit surcharge and an operational costs surcharge are often also charged; the latter covers the administrative costs that lenders incur to arrange the loan (such as the costs of (computer) systems, the creation of security rights, etc.).

\textsuperscript{242} Interview, Practitioner 2 (banker), March 5, 2012. \textit{Cf.} Staal 2011, p. 1. This is also illustrated in the ABN AMRO Annual account 2012, p. 141. An example would be the situation where a company received a large order, half of which has already been paid, the day before the loan application, while the rating model in principle uses only the most recent profit and loss account. In that case, an account manager can make a positive adjustment to the PD obtained from the ‘black box’. Interview, Practitioner 9 (banker), April 3, 2012.

\textsuperscript{243} Credit risk is the risk that a debtor will be unable to meet interest and repayment obligations to its lender. \textit{Cf.} Leenaars 2003, p. 341.

\textsuperscript{244} Interview, Practitioner 9 (banker), April 3, 2012. See also \textit{supra} subsection 3.1.2.1.

\textsuperscript{245} \textit{Cf.} Leenaars 2003, p. 342-343.

\textsuperscript{246} With regard to the interest margin on loans that are granted against cover of collateral, compared with loans that are granted without such cover, Vos says that the difference is about 1%: “\textit{As a rule of thumb, well covered loans are granted with an (interest) surcharge on an annual basis of 1% to 1.5%; for loans that are not so well covered, the surcharge will be 2% to 2.5%.”} (translated). Vos 2009, p. 29.

\textsuperscript{247} In Dutch legal practice, this solvency surcharge is also known as a ‘balance sheet surcharge’ or ‘capital surcharge’ (translated).

\textsuperscript{248} Euribor stands for \textit{Euro Interbank Offered Rate}; briefly put, this is the interest rate at which European banks lend to each other (or say they do).
3.1.2.3. The impact of collateral security on surcharges, and with that: the interest rate

Relevant to this research is the question of how the stipulation of collateral security affects the two above-mentioned surcharges, and hence the price of credit. The answer to this is, in short, that the amount and quality of the assets that are offered to the bank as collateral have an impact on the lender’s Loss Given Default, i.e. the loss that the lender will suffer after liquidation of the security in case of the debtor’s default. The more a lender will be able to recover from (collateral) security, the lower the loss – and therefore the Expected Loss – will be. Because both the credit risk surcharge and the solvency surcharge are related to the amount of the Expected Loss, security has a positive impact on the price that debtors pay for their credit. The exact price of the credit is different in each case given that other important factors, such as the bargaining power of the debtor concerned and the competition offered by other banks play a role.

Contrary to common assumptions, it is not always standard practice to take all of the debtor’s assets as security by the lender. In certain sectors, blank loans are given as a result of the nature of the businesses (e.g. supermarket chains). In the segment in which the stipulation of collateral security is customary, such as the SME segment, debtors have the possibility to negotiate, which they frequently use.

Interviews with various account managers indicated that some debtors blindly go for the lowest price by simply offering all their assets as security; others are more assertive and critical, refusing to give certain assets as security, for instance if these assets are not related to the type of financing granted to them (e.g. they refuse to give claims as security if only the working capital is financed), or if this is not required by another bank with a comparable financing proposal.

3.1.2.4. Concluding remarks

In view of the foregoing, it can be said that if it is customary for a particular segment to request security from the debtor (e.g. SME), account managers feel encouraged to ask for it as much as possible. This is because, the more security that can be stipulated, the lower the interest those lenders can offer to the debtor, enabling them to win the competitive battle with other banks. In this way, they not only gain the loyalty of these borrowers, they also unlock more capital, which can be used to grant credit to others and hence increase capital returns.

3.1.3. The tools to prevent the debtor from going into default

As a consequence, it is in the interest of both the debtor and the lender that the Expected Loss is as low as possible in as many cases as possible. Thus, it is important first to mitigate

251 Interview, Practitioner 2 (banker), March 5, 2012; Interview, Practitioner 9 (banker), April 3, 2012 and Interview, Practitioner 10 (banker), April 16, 2012.
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the debtor’s Probability of Default. Apart from careful screening of the debtors at the gate (see supra subsection 3.1.1), existing borrowers are carefully monitored. Individual loans are, for instance, monitored and if necessary revised on the basis of e.g. (interim) financial results, periodic interviews with the management and liquidity forecasts. Monitoring also takes place at the portfolio level, by looking periodically for negative signs, such as companies that show sharply reduced turnover or reach their credit limit, or by a revision of the market segments that have become more risky and require extra attention. This is sometimes referred to as ‘loan quality control’.

As soon as a lender notices that a business starts to become unstable, more intensive supervision is initiated; the department that deals with these issues is often called ‘Restructuring’. At this stage, the debtor’s management is often called in, and if necessary persuaded to restructure activities or take other measures. In this process, lenders have a grip on the debtor on the basis of many types of contractual agreements. The most important of these is perhaps the personal surety, which acts as a spur to the management to keep the business running, since it entails the risk of being personally liable for any shortfalls.

If a business is really going downhill, it is transferred to the department known as ‘Insolvency & Special Risks’ or ‘Financial Restructuring & Recovery’ for the most intensive form of supervision. At this stage, outgoing payments by the debtor from extended credit lines are very closely monitored. An important part of this intensive supervision is to ensure the integrity of the security that has already been established. If necessary, additional security will be stipulated on the basis of Art. 26 of the General Banking Conditions (in Dutch, the ‘Algemene Bank Voorwaarden’, ‘ABV’).

253 The computer systems are designed in such a way that the people who perform the monitoring automatically receive a red flag if a company reaches its limit. Interview, Practitioner 3 (banker), March 5, 2012.
254 ABN AMRO Annual account 2012, p. 140.
255 Sometimes, for instance, payments may only be made if they have been approved by the lender. Interview, Practitioner 6 (banker), March 5, 2012.
256 Article 26 (Collateral) ABV: “As a result of the General Banking Conditions becoming applicable, the Customer has undertaken vis-à-vis the Bank to provide (additional) collateral for all existing and future amounts that the Customer owes to the Bank, on any account whatsoever, at the first request of the Bank and to the Bank’s satisfaction. This collateral must be such, and if necessary must be replaced and/or supplement by the Customer to the Bank’s satisfaction, that the Bank, taking into account the Customer’s risk profile, the cover value of the security and any other factors relevant to the Bank, continually has sufficient collateral. At the Customer’s request, the Bank shall inform the Customer of the reason of the
3.1.4. Methods for covering shortfalls in the event of their debtor's default

This subsection will discuss the methods for covering shortfalls if the debtor fails to pay the outstanding debt and if the collateral security – if stipulated – turns out to be insufficient. In lenders' terminology, these are methods to mitigate the Loss Given Default.

3.1.4.1. Mitigating the LGD

The second important method to keep the EL as low as possible is to mitigate the loss that the bank will incur from the debtor, after liquidation of the security and setoff of the credit balances held at the bank, in the event of definitive default of the debtor (i.e. the LGD). The LGD is lower when, e.g. the quality of the security is better, the period between the start of the liquidation situation and the time of liquidation is shorter (because the loss of interest is as limited as possible and collateral values realized tend to decrease with the passing of time), guarantees or covenants have been agreed, etc.²⁵⁷ Furthermore, the agreed ranking of security is another aspect of this.

We saw above that it varies from one segment to another whether security is stipulated at all, and also, if this is the case, how many lenders are involved in a loan. From large businesses, the ‘Corporate Clients’, security will almost never be asked for. In the SME segment, however, it is usual for there to be just one lender, known as the ‘principal bank’. In case of syndicates, the security rights, and their corresponding ranking, are distributed by the banks among themselves.²⁵⁸

When security is stipulated for in a loan, Dutch lenders are guided strongly by the explanatory notes to the debtor’s financial statements that specify if they have the ranking that they agreed with the debtor (when multiple lenders are involved) or whether they are indeed the only secured lender (in case of SME’s). According to Art. 2:375(3) BW, these explanatory notes to the financial statements must specify the number of lenders providing credit to the debtor and what security has been stipulated.²⁵⁹ Although this

²⁵⁷ Cf. ABN AMRO Annual account 2012, p. 162-163.
²⁵⁸ See on this subject extensively Thiele 2003 and Thiele 2009.
article does not require that the explanatory notes state to whom the security rights have been given, lenders claim that this information can be deduced from the ‘informal’ interim financial statements that they ask the business to submit.\textsuperscript{260} If these statements show that there is in fact a first-in-time lender, it is customary for the second lender to require the earlier lender to release its security rights in the SME segment. The latter will normally be prepared to agree to do so if the outstanding debt is paid in full; to this end, the first lender will normally issue a ‘Release Declaration’, stating the amount owing to the first lender and confirming release of the security upon receipt of the outstanding amount. As soon as the debt owing to the first lender has been paid in full, the security ceases to have effect.\textsuperscript{261}

This seems to be a chicken-and-egg problem. After all, the first-in-time lender will only release the security when the debt has been paid in full, whereas the second-in-time lender will not be prepared to put the debtor in funds to pay the debt of the first-in-time lender until after the security has been released. It is therefore standard practice for the loan documents of the second lender to contain a condition precedent to the effect that the debtor must have given written payment instructions to the second lender for the amount of the loan owing to the first lender.\textsuperscript{262} This way the second lender can be assured that the first loan is repaid and accordingly, the Release Declaration becoming effective. In practice, all this communication takes place via the debtor; in principle, lenders have no contact with each other.\textsuperscript{263}

3.1.4.2. \textit{Mitigating the risk of a conflicting or intervening security interest}

Sometimes lenders agree to refrain from taking security, on the understanding that the debtor will not provide security to other lenders either. Alternatively, a secured lender may want to ensure, for a variety of reasons, that no subsequent security is created for the benefit of other creditors over the same assets over which it holds its first ranking security. To achieve such result, lenders often use negative pledge and \textit{pari passu} clauses, both when granting blank loans as secured loans.

Negative pledge clauses have the purpose of prohibiting the debtor from creating a right of pledge in favor of another lender, as this would frustrate the first lender’s right to take first ranking security itself or to recover its unpaid debt on a \textit{pari passu} basis with other creditors. A \textit{pari passu} clause requires the debtor to grant the first lender a security right of the same kind and ranking as was granted to the competing lender.\textsuperscript{264} The negative pledge clause also helps to better protect the secured lenders interests in the secured assets and avoids conflicts and complications if a prospective lender took second ranking security which it enforced against upon the occurrence of a payment default prior to the first lender’s loan having matured or defaulted.

\textsuperscript{260} Beekhoven van den Boezem & Goosmann 2010\textit{a}, p. 47.
\textsuperscript{261} Cf. Beekhoven van den Boezem & Goosmann 2010\textit{b}, p. 47 and Beekhoven van den Boezem & Goosmann 2010\textit{a}, p. 751.
\textsuperscript{262} Interview, Practitioner 8 (lawyer), March 15, 2012.
\textsuperscript{263} Interview, Practitioner 2 (banker), March 5, 2012.
\textsuperscript{264} See e.g. Beekhoven van den Boezem & Goosmann 2010\textit{b}, p. 47.
To mitigate the risk of a conflicting pledge that has been stipulated at an earlier time, banks use several methods. When security is stipulated for in a loan, the debtor is obliged by law to declare in the deed of pledge that it is entitled to grant a security interest in the collateral concerned to the pledgee, and furthermore that it either has not granted other limited rights (which would include rights of pledge) in the collateral at an earlier time (Art. 3:237(2) BW) or if it did, what limited rights are already in existence and given to whom.265 As discussed previously, in subsection 2.2.3.1, if the deed lacks this declaration this bears no influence on the validity of the creation of the security right, however, the debtor can be liable for forgery (see Art. 227 Sr.) or fraud (Art. 326 Sr.) if false statements were made in the deed.266 In addition, if a company has the obligation to have its annual accounts audited by an accountant,267 this audit (and the corresponding accountant’s judgment) is seen as a strong comfort that the debtor has not created any security rights earlier in time. This is largely because the accountant examines the accounts in considerable depth, looking into e.g. credit lines and important payments: the existence of an older right of pledge would then certainly be found.268 Banks derive a certain degree of comfort from the ‘compilation report’ that is issued below the level at which an audit is obligatory, in situations when an outsourced bookkeeper completes the day-to-day accounts. Here, the bookkeeper explains the basis upon which the accounts were made without a disclosure concerning the accuracy of these findings.

If the debtor is indeed deceptive and deliberately faill to disclose an earlier created pledge, this information will be entered by name in the ‘EVA register’,269 an interbank system from the Dutch Banking Association (in Dutch: Nederlands Vereniging van Banken, ‘NVB’) and the Association of Funding Providers in the Netherlands (in Dutch: Vereniging van Financieringsondernemingen in Nederland; ‘VFN’) that aims to prevent (or restrict) all kinds of fraud by businesses.270 If a company is entered in the register as a result of fraud, then – partly due to the damage to their reputation – the company is ‘finished’ as far as doing

265 See supra footnote 52.
266 This applies to both the private deed and the notarial deed creating a right of pledge. Cf. Asser/Van Mierlo & Van Velten 3-VI* 2010/170 and supra subsections 2.2.3 and 2.2.4.
267 According to Art. 2:393(2) BW, a business has an audit obligation if it has satisfied two of the following three criteria for at least two successive financial years: i) turnover of more than 8.8 million euros, ii) balance sheet total of more than 4.4 million euros, iii) more than 50 employees.
268 Interview, Practitioner 2 (banker), March 5, 2012. Compare Beekhoven van den Boezem & Goosmann 2010b, p. 47.
269 EVA stands for Externe Verwijzings Applicatie, which means: External Reference Application (freely translated). The EVA register only contains so-called ‘reference information’ (such as the name and date of birth of the director or trade register number). This information is open for inspection under strict conditions by affiliated banks and other financial institutions.
business is concerned. Such registration expires after 8 years, unless a new event materialized prior to such date that justifies a new entry of the company in the register.  

3.1.4.3. The materialization of the risk of a hidden pledge in the Dutch finance practice

In Dutch financing practice, lenders are confronted only rarely with an existing pledge that was unknown to them. In the case of syndicated loans, this happens only very occasionally and is usually related to insufficient communication between the lenders and the parties due to commercial pressure, which results in the documentation (such as the explicit release of security) being incomplete and therefore incorrectly arranged.

In the segment of SME’s banks seem to be equally unaffected by this problem. Interviews with ‘Insolvency & Special Risks’ or ‘Insolvency & Special Risks’ departments brought to light that, in most cases debtors are honest about earlier created pledges, mentioning them or reporting them in the (interim) financial statements.  

As discussed above, on the rare occasion that an earlier secured lender can indeed be discovered, use is made of the ‘Release Declaration’. Still, even if the first lender were not to release the security, strictly speaking that would not meet any objections, because the first lender no longer has anything to claim from the debtor.

One interviewee mentioned that a debtor in the SME segment, even if it has honestly stated that an earlier lender exists, sometimes still commits deceit by impulse, by not actually repaying the debt to the first lender when the second lender has already provided the loan. If a second lender provided the loan without making sure that the debtor uses the funds to repay the first lender, the debtor de facto ends up with two loans at its disposal, whilst the first lender continues to have priority. The banker indicated that it regarded this as ‘its own fault’ as it, being second lender, simply should have taken appropriate measures to avoid this.

The risk of deceit either on purpose or by accident is greatest in the segment of small business facilities, because the provision of such loans is becoming more and more automated. Thus, face-to-face contact with the debtor is decreasing, since loan applications are more and more completed online. Even so, experienced bankers say that such deceit does not occur more than a few times a year, mostly in small credit

271 See Protocol Incidentenwaarschuwingssysteem Financiële Instellingen, Art. 4.3.2. A registration may also be deleted prior to the 8 years expiry period, if the conditions set by art. 5.2.1 of the Protocol are no longer met. From the interviews it emerged that sometimes the fraud specialists at different banks will contact each other informally about possible (extreme) cases of fraud. Interview, Practitioner 6 (banker), March 5, 2012.

272 Interview, Practitioner 5 (banker), March 5, 2012; Interview, Practitioner 6 (banker), March 5, 2012; Interview, Practitioner 12 (banker), April 25, 2012, Interview; Practitioner 13 (banker), April 25, 2012 and Interview, Practitioner 14 (banker), April 25, 2012.

273 Interview, Practitioner 4 (banker), March 5, 2012.

274 Verstijlen refers to loans of this kind as ‘the bargain basement of the credit market’ (translated). Verstijlen 2011, p. 272.
facilities. What is more important, however, is the observation that in this segment, loans are granted not so much on the basis of whether or not there is collateral available for recovery, but more on the basis of the risk profile of the future debtor, such as the track and payment record due to the nature of the assets that these businesses have to offer (a couple of desks and chairs). In other words, the standard stipulation of a pledge on all assets in this segment does not occur because lenders depend on such security; it is more just a matter of: ‘nice to have’.

When asked about the ‘double pledge problem’, the bankers I interviewed that were most experienced made comments such as: “in my 25 years of experience, those cases can be counted on one hand.” This corresponds to a quick and light search for published case law in the past 20 years: only 4 conflicts of this nature came to the light. The risk of unauthorized sale of the assets just before bankruptcy was perceived to be slightly greater.

3.1.4.4. Hidden retention of title or unauthorized sale in Dutch financing practice

The existence of retention of title clauses is not perceived in Dutch practice as a ‘hidden’ proprietary interest: lenders know that the suppliers to their debtors often rely on retention of title clauses in their supply contracts and lenders take this into account. For the reasons mention in subsection 4.2.2.1, with regard to these assets the prospective (non-possessory) secured lender will not acquire a valid right of pledge, since the debtor does not have ownership title to and cannot dispose of the assets until after he has paid for them.

Something that is perceived as a risk, however, at least in the preliminary stage of bankruptcy, is the likelihood of unauthorized sale of assets by the debtor to prospective buyers. In practice, this risk only exists in relation to non-consumer buyers, since lenders usually give the debtor permission to sell the assets to consumers, i.e. end users, simply because lenders will be paid from the proceeds of sale. Interviews with bankers revealed that the risk of unauthorized sales occurs particularly in the SME segment at the preliminary stage of bankruptcy: for example when the lender wants to proceed to execution and discovers that the factory is completely empty. Even when the prospective buyer can be traced and cannot place reliance on a bona fide third party protection rule, lenders may not always easily recover the value of the sold assets. Clearly,

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275 Interview, Practitioner 12 (banker), April 25, 2012; Interview, Practitioner 13 (banker), April 25, 2012.
277 Interview, Practitioner 5 (banker), March 5, 2012 and Interview, Practitioner 13 (banker), April 25, 2012.
278 Interview, Practitioner 11 (banker), April 19, 2012.
279 In the loan agreement with its lender, the debtor is therefore usually allowed to sell the goods to end users free from security. Yet, even without such permission, consumers are protected if they acted in good faith and meet the additional requirements set by Art. 3:86 BW; see supra subsection 2.4.5.1.
280 Interview, Practitioner 11 (banker), April 19, 2012.
unauthorized sales are an issue only if the proceeds were not used to reduce the secured indebtedness.

3.2. Trade creditors’ selling practice

3.2.1. The process of entering into a trade relationship

Suppliers of product or services often allow their customers to make payment only after delivery of the product or service concerned. The term allowed for payment often ranges between 30 to 90 days and the extension of such term for payment represents ‘short-term trade credit’ for the benefit of the purchaser of the product or service. Such short-term credit is an important source of financing for businesses, as it alleviates working capital needs. It is quite common in trade worldwide and the Netherlands makes no exception to this.\(^{281}\)

Only limited information is available to answer the question on what grounds trade creditors base their decision to enter into a business relationship on credit terms or, if they have a choice, how they select one customer over another.\(^{282}\) As to the first aspect – I will call this the ‘operational motives’ to supply on credit terms – it is simply standard practice in many segments of business to grant the purchaser a term for payment. It is not difficult to imagine that such practice differs from segment to segment.\(^{283}\) Common sense dictates that adherence to business customs in any given segment helps to cement solid and durable business relationships. By allowing a term for payment, for example, purchasers are given the opportunity to satisfy themselves that the product supplied is of satisfactory quality, is delivered on time and that the delivery is complete.\(^{284}\) As to the second aspect, – how trade suppliers select one

\(^{281}\) The largest credit insurer in the Netherlands Atradius conducts large-scale annual surveys of the payment practices by companies in various different countries, including the Netherlands. The purpose of these surveys is to provide insight into the payment practices of companies that engage in national and international trade. The results are published twice a year in the ‘Atradius Betalingsbarometer’ (Payment Practices Barometer). In the most recent survey, conducted in spring 2013, 2,943 companies from 14 countries were surveyed (Belgium, Denmark, France, Germany, Greece, Great Britain, Ireland, Italy, the Netherlands, Spain, Austria, Turkey, Sweden and Switzerland). Surveys conducted in previous years included more companies from more countries. With the express caveat that these surveys might be one-sided or potentially biased (cf. caveat made in Chapter 1, subsection E.2), they claim that Dutch companies sell to a large degree on credit terms: sales on credit terms were said to account for about 48.6% of total domestic sales in 2013. Compared to other Western European jurisdictions this is claimed to be slightly above average. See ‘Atradius Betalingsbarometer’ (Payment Practices Barometer), core result for the Netherlands (Spring 2013), p. 4 to be found on <www.atradius.nl> (last visited February 5, 2014).

\(^{282}\) Dekker & Ligterink do mention one thing that seemed relevant for the purpose of this topic: “(…) the conditions under which a supplier supplies trade credit, does not strongly depend on its buyers’ credit worthiness, (…)”. Dekker & Ligterink 2004, p. 118 (translated).

\(^{283}\) The Atradius Barometers also suggest that the extent to which trade suppliers sell their assets on credit terms, varies according to the sector concerned, such as manufacturer sector, the wholesale sector, the retail sector, the distribution sector or the services sector and also depends on the size of the business. See ‘Atradius Betalingsbarometer’ (Payment Practices Barometer), International survey of B2B payment behaviour, Core results Western Europe (Spring 2012), p. 8.

\(^{284}\) Dekker & Ligterink 2004, p. 117-126. Cf. ‘Atradius Betalingsbarometer’ (Payment Practices Barometer) of 2010-2013, which provide similar reasons to grant trade credit to business-to-business customers
customer over another – limited information are available. A large-scale Atradius survey conducted in 2010\textsuperscript{285} reported four main elements that play a role in Western-European companies’ decision making to that effect: credit check, familiarity, track record and ‘reputation’. ‘Track record’ and ‘credit check’ give a perspective on the debtor’s payment history, whereas ‘familiarity’ refers to knowledge of the customer from experience or as a result of economic, cultural or geographical proximity.\textsuperscript{286} These elements are mirrored by most jurisdictions included in the survey, be it not always in the same order of priority. For Dutch trade suppliers these considerations were, in reported order of importance: ‘track record’ of the debtor, ‘familiarity’ and ‘credit check’.\textsuperscript{287}

3.2.2. The decision to stipulate collateral security (e.g. retention of title)

With regard to the decision to stipulate security rights, examination of the sales conditions of 25 randomly selected businesses in the SME segment involved in the sale of movable property showed that in 23 out of 25 cases, trade creditors stipulate retention of title on the goods that they will supply. Non stipulate the creation of a right of pledge, which is hardly surprising given the much more relaxed formalities for stipulating retention of title as opposed to taking a non-possessory pledge. The examination of the sales conditions of 13 randomly selected sector organizations in the SME segment has yielded a similar result: 12 out of 13 showed a retention of title clause.

This finding corresponds with the estimation by various employees from the ‘Insolvency & Special Risks’ departments of different banks. They indicated that 80-90% of trade creditors make use of retention of title clauses; they are not used by the other 10-20% because of old-fashioned business methods, a certain mentality in a certain sector,\textsuperscript{288}

(\textit{referring to as ‘trade credit supply determinants’), namely: ‘the establishment of long term trade relationships’, ‘the promotion of growth in sales’, a ‘source of short-term financing’ and ‘to allow customers time to confirm the quality of the product before payment’. See e.g. ‘Atradius Betalingsbarometer’ (Payment Practices Barometer), core results overall survey (Fall 2011), p. 7-8.\textsuperscript{285} The research results from this Atradius report are subject to the caveat made in footnote 125 of Chapter 1, subsection E.2 and footnote 21 of this Chapter.\textsuperscript{286} ‘Atradius Betalingsbarometer’ (Payment Practices Barometer), survey of payment behaviour of international companies, Summer 2010, p. 10.\textsuperscript{287} Atradius Betalingsbarometer (Payment Practices Barometer), Core results – The Netherlands, Summer 2010, pp. 10-12.\textsuperscript{288} Among car dealers, for example, the idea of ‘an honest man’s word is (as good as) his bond’ – “If you don’t pay, I’ll come and get it” – is quite important. Interview, Practitioner 6 (banker), March 5, 2012.}
or because it is not customary in the sector. A small minority (about 1/5th) of the 80-90% that use retention of title clauses were said to make use of the option of the ‘extended retention of title’ that is offered by Dutch law in Art. 3:92(2) BW. This corresponds with the examination of the sales conditions of 25 SME businesses, where 2 out of 25 indeed deployed such ‘extended retention of title’.

3.2.3. Tools to control the debtor in case of default

The relationship between businesses is very different from the relationship between a business and a lender. Unlike lenders, trade creditors do not monitor their debtors’ business at close range and therefore do not have, as lenders do, methods to mitigate their debtor’s probability of default.

3.2.4. Method’s for covering shortfalls in the event of their debtor’s default

In spite of the fact that trade creditors do not have methods at their disposal to mitigate the debtor’s probability of default, they can cover themselves against possible losses in the event of the debtor’s default. As subsection 3.2.2 shows, they do this by e.g. stipulating retention of title, for appropriate sectors. Trade creditors also tend to protect themselves against possible losses by closely watching payment arrears or by taking out credit insurance.

The Atradius reports suggest that smaller business have a greater preference for cash payment, whereas larger business – having greater credit management resource – tend to also use tools, such as active monitoring and pursuing debtors for payment, checking their creditworthiness and track record etc.

Larger businesses can also monitor the market in terms of sectors that – or are expected to – experience difficulties, but smaller businesses normally not have the possibility to do so.

If a business is going downhill and trade creditors become aware of this situation, the Dutch business culture is such that, according to ‘common knowledge’, trade creditors will either reduce the term allowed for payment, ultimately resulting in demanding cash against delivery or will stop supplying. For this reason, rescue operations performed by Dutch lenders for businesses in financial difficulties are often kept secret (also known as ‘silent restructurings’), because if the business has lost trade credit, it will find itself in an acute liquidity crisis, with bankruptcy as the usual – but undesirable – result.
kept secret (also known as ‘silent restructurings’), because if the business has lost trade credit, it will find itself in an acute liquidity crisis, with bankruptcy as the usual – but undesirable – result.