WARRANTIES AND GUARANTEES IN BELGIAN LAW

Dominique WALRAVENS
Racine & Vergels Advocaten – Avocats
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1.PERSONAL GUARANTEES

Personal guarantee ("Borgstelling"/"Caution")

This kind of guarantee is often required by banks, from company directors, their spouses, their parents, … in respect of loans to the company.

The guarantor assumes the same responsibility for payment of the debt as the debtor himself, and can be sued by the creditor as well as, or instead of, the debtor.

In civil matters: The guarantor shall sign the document and shall handwrite "good for" or "approved for" with the amount or the quantity of the subject in full (e.g. "good for the amount of fifty thousand frank as guarantee for the renter's obligations") (art. 1326 B.W.).

In commercial matters: no special requirements related to the form of the agreement.

2.MORTGAGES OF LAND

Mortgage of land ("hypotheek"/"hypothèque")

The most important form of security on immovable property is the mortgage, which provides the mortgagee the right to have a notary public appointed to sell the property sold upon default of the debtor, and to use the proceeds of the sale to repay the outstanding secured debt.

The creation of a mortgage requires notarized documents to be filed with the land registry and attracts stamp duty (registratierechten/droits d'enregistrement) of 1 per cent of the secured amount in addition to various fees.

3.CHARGING ORDERS

We do not know this kind of security.

A creditor who has a judgment – to which an appeal has been launched - can apply for precautionary seizure of the goods of its debtor ("bewarend beslag"/"saisie conservatoire"). This seizure will not create any priority: the proceeds of the goods that have been seized will be distributed among all creditors of this debtor.

4. MORTGAGES ON MOVABLE PROPERTY (chattels)

Pledge on movable property ("pand op roerende goederen"/"gage sur biens meubles"):

The principal type of security on movable assets is a pledge ("pand"/"gage"), which provides the pledgee the right to have the assets sold upon default of the debtor and is subject to the authorization of the Courts. The proceeds of the sale are used to repay the outstanding secured debt.

It is required:

- to have a pledge agreement (*)

- as well as the physical transfer of possession of the pledged asset to the secured creditor or to a third party.

(*) in commercial matters, this agreement can have any form; in civil matters, the agreement must be a deed, enacted by a notary public or a registered agreement.

5. HIRE PURCHASE AGREEMENTS:

Sale and leaseback operations are opposable in case of bankruptcy of the debtor-hirer.

The creditor remains the owner and the debtor is the hirer, typically until all the installments are paid.

Consumer HP transactions are heavily regulated by the Consumer Credit Act 1991

Remark related to the sale of vehicles:

It is very common that vehicles are sold with a clause containing retention of title ("clausule van eigendomsvoorbehoud"/"clause de réserve de propriété"). (Provision in a contract for the sale of goods that the title to the goods remains vested in the seller until payment of the purchase price by the buyer.)

In case a vehicle is sold this way, this is mentioned on the original invoice. Therefore, when buying a second-hand car or when a car is offered as a security, the creditor should ask to have the original invoice produced in order to check its content.

6.SHIPS AND AIRCRAFT:

These have their own specialized legislation:

Mortgage granted on sea ships: yes (Belgian Commercial Code, Book II)

Mortgage granted on aircrafts: no (No Belgian legislation allowing mortgage on aircraft and no ratification by Belgian authorities of the International Convention and Protocole of Kaapstad (2001))

7.CHARGE OVER CHOSES IN ACTION

Pledge on claim ("pand op schuldvordering"/"gage sur créance")

This can be a pledge on a claim of the debtor with regard to his bank, a claim of the debtor with regard to his insurance company, a claim of the debtor with regard to his employer, … .

In commercial matters:

The pledge exists when an agreement, whatever its form, has been closed.

The pledge is "opposable":

-against the debtor: only after notice has been given to the debtor who owes the book debt;

-against third parties: as soon as the pledge agreement was contracted;

-against specially protected third parties: only after notice has been given to the debtor who owes the book debt; (the bankruptcy receiver is not considered a specially protected third party; the creditor who has been granted a floating charge, the other party to whom a pledge on the same book debt was granted, … are examples of specially protected third parties)

In civil matters:

The pledge exists when the pledge agreement has been closed. This agreement must be:

-either enacted before notary public;

-either registered.

The pledge is "opposable":

-against the debtor: only after notice has been given to the debtor who owes the book debt –but only if the pledge agreement had the required form - ;

-against third parties: as soon as the pledge agreement was contracted –but only if the pledge-agreement had the required form -;

-against specially protected third parties: only after notice has been given to the debtor who owes the book debt –but only if the pledge agreement had the required form -; (the bankruptcy receiver is not considered a specially protected third party; the creditor who has been granted a floating charge, the other party to whom a pledge on the same book debt was granted, … are specially protected third parties)

8. ASSIGNMENT OF CHOSES IN ACTION

Factoring is a common situation in which businesses raise finance by assigning book debts to banks.

Notice must be given to the customer of the business, generally on each invoice raised by the business: this states that the debt created by the invoice has been assigned to the bank.

The customer must then make payment to the bank direct.

9. FLOATING CHARGES:

("pand op handelszaak"/"gage sur fonds de commerce").

This is a type of pledge that does not require any transfer of possession. A form of security interest that is similar to the English floating charge.

This floating charge covers all business assets of the charger with the exception of immovable property and 50 % of the value of the stocks.

The creation of a floating charge requires a written agreement which must be filed with the land registry and which attracts a stamp duty of 0.5 per cent of the value of the assets covered by the floating charge.

A floating charge may only be created to secure borrowings from an institution licensed as a credit institution within the E.C., or by certain other types of financial institution.

10. MORTGAGES BY COMPANIES:

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11. IMPACT OF INSOLVANCY LEGISLATION:

Security when approchoaching insolvency.

Creditor should not assume that the debtor can give a valid security over his assets if he is approaching insolvency.

Article 17 of the Bankruptcy Act provides that following acts cannot be invoked against the bankruptcy estate when executed by the debtor after the date of suspension of payments as determined by the Court (mostly the date of the bankruptcy judgment):

- all acts as to dispose gratuitously of movable or immovable property.
- all payments either in cash or by transfer, sale, setoff or otherwise, for debts that are not due yet, and all payments other than in cash or negotiable instruments, for expired debts,
- all stipulated mortgages and all rights concerning the use of premises or pledges, vested on the assets of the debtor due to previous debts.

The date of suspension of payments may in some cases - namely when objective and serious elements show that payments have stopped before the bankruptcy judgment - be advanced by the court with a period of maximum 6 months, this period is called the "suspicious period".

Art 18 of the Bankruptcy Act provides that all other payments made by the debtor for expired debts, or all actions committed for consideration after the date of suspension of payment and before the date of the bankruptcy judgment, may be declared non-enforceable, when those who have received something from the debtor or have done business together, knew that payments were suspended.

Discharging the guarantor :

The provisions regarding "the discharge of the gratuitous guarantor" have to be taken into account. Article 72 of the Bankruptcy Act provides that a person, who acts as a gratuitous – in the sense of being without interests - guarantor, may be discharged when the guarantor shows that the undertaken guarantee is disproportionate to his income and assets.

Conclusions & suggestions:

Effective forms of guarantee:

Mortgage on land

Floating charge (only for credit institutions)

Simple forms of guarantees:

Securities in lease matters:

In case of lease[i], parties tend to provide the following guarantees.

a.)Unconditional and irrevocable bank guarantee

b.)Sum on blocked bank account.

Other forms guarantee:

Cantonment and seizure (« Kantonnement » en « sequester »/ »cantonnement » et « séquestre »)

Judicial cantonment:

The debtor wants to avoid seizure on his goods or wants to withdraw the seizure.

Or, pending the appeal, the debtor wants to pay provisionally.

The funds are then "cantoned" at the Deposit and Consignment office (the interests stop)

Is one trying to avoid an executive seizure or an execution of an enforceable order, then the cantonment is a conditional payment. The funds have left the assets of the debtor. In case of a bankruptcy later on, the money shall go to the creditor, and not to the mass of creditors.

Is one trying to avoid precautionary seizure or is an enforceable order not available, then the cantonment is not a conditional payment. When the debtor is afterwards going in bankruptcy, the funds will not only go to the creditor: the funds will go back to the mass of creditors.

Amicable cantonment:

The parties shall designate a third party that will safeguard the funds. They have to clarify whether the conservatory act is a conditional payment or not.

The lawyer could serve as a third party. Sometimes funds are deposited on accounts in the name of two lawyers jointly.

[i] In case of residential lease: only three types of guarantees are accepted:

a.)a guarantee transferred to a 'blocked bank account': In this case the amount is equivalent to 2 months' rent. Both landlord and tenant must sign the documents to open the account.

b.)a bank guarantee : In this case the amount is equivalent to 3 months' rent. This formula is used when the tenant has insufficient means to produce the guarantee at once. When the tenancy agreement is concluded, the bank acts as guarantor for the tenant. The tenant pays the guarantee (3 months' rent) to the bank in monthly installments for the duration of the tenancy agreement, for a maximum period of three years.

c.)or the CPAS closes an agreement with the bank that provides the rent guarantee to the owner: in this case the rent guarantee amounts to three months' rent but no financial exchanges have been taking place, since the CPAS is the guarantor for the tenant. This stigmatizing effect is eliminated by the fact that the landlord does not know that the CPAS intervenes.