

**International Swaps and Derivatives Association, Inc.**  
COLLATERAL LAW REFORM GROUP

# **NETHERLANDS**

## **COUNTRY REPORT**

Supplement to  
*Collateral Arrangements in the European Financial Markets:  
The Need for National Law Reform*

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*European Office:*  
International Swaps and Derivatives Association, Inc.  
One New Change  
London EC4M 9QQ  
Telephone: +44 171 330 3550  
Fax: +44 171 330 3555

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## ***THE NETHERLANDS***

*Summary report on the legal framework for collateral arrangements for financial activity*

Summary of the legal analysis under the laws of the Netherlands applicable to collateral arrangements intended to secure financial trading activity in relation to privately negotiated derivative transactions, securities trading, securities repurchase transactions, stock lending and similar financial transactions in the wholesale financial markets. It is assumed that at least one of the parties involved is a financial institution (credit institution or investment firm) and that the collateral involved is cash, in euros or some other freely available currency, and/or fungible securities held listed on a stock exchange or recognised market and in immobilised or dematerialised form in a clearing system (“Fungible Securities”). References to “collateral” below indicate cash and Fungible Securities, unless otherwise specified.

*This summary was prepared for the purpose of identifying possible areas of uncertainty or commercial impracticality arising under the laws of the Netherlands in relation to collateral arrangements. It is not intended to be a definitive summary of the legal position relating to collateral in the Netherlands and should not be relied on as such.*

*The position is stated as of December 1999.*

***This summary, prepared by the Collateral Law Reform Group, does not necessarily represent the views of ISDA or any of its members. It is a subjective assessment of the position in the Netherlands and is simply intended to encourage debate and discussion of the relevant issues.***

- (1) The owner of a share in a pool of NECIGEF-securities would have absolute title to the assets as co-owner. NECIGEF-securities are securities held through the local clearing system under the Act on Giro Transfers of Securities.
- (2) The *lex loci* of a participant's interest in Fungible Securities held through a clearing system is probably the law of the place where the clearing system is established and operating, but this is not certain.
- (3) The *lex loci* would probably apply to a participant's interest in Fungible Securities held through a clearing system, and to any transfer thereof or the creation and perfection of a security interest therein.
- (4) A security interest in a participant's interest in Fungible Securities held through a clearing system should probably be created in accordance with the *lex loci*. A security interest in NECIGEF-securities is created by way of book-entry in the books of the relevant NECIGEF member, except that if the security interest is in favour of the NECIGEF member itself it is created by way of an agreement.

A security interest over cash held in a bank account may be created in accordance with the law chosen by the charger and the secured party.

- (5) If Dutch law applies, a security interest over cash held in a bank account must be in the form of a disclosed or undisclosed pledge. A disclosed pledge must be notified to the bank where the account is held. An undisclosed pledge must be registered with the tax authorities.
- (6) A pledgee may not use pledged assets as its own property.
- (7) Formal procedures apply to enforcement of a pledge.
- (8) Enforcement of a security interest may be stayed on insolvency for not more than two months.
- (9) Collateral arrangements based on title transfer are not invalid under Dutch law, provided that the title transfer is an outright transfer. If a transfer governed by Dutch law is not an outright transfer but under Dutch law qualifies as a “transfer for the purpose of creating security”, it is invalid. However, in the case of assets in the Netherlands, the transferee is likely to be allowed the rights and remedies of a comparable interest under Dutch law (probably a pledge). If a foreign law applies and the title transfer is valid under that law, the transfer should be upheld.
- (10) Close-out netting under an ISDA Master Agreement is enforceable.
- (11) In an insolvency, debts and claims in the same currency may be set-off. It is unclear whether additional contractual set-off will be allowed in bankruptcy.
- (12) Third party claims may disrupt set-off in certain circumstances.
- (13) Top-up collateral will not be avoided as a preference except under certain circumstances.

**1. Do the laws of the Netherlands deal clearly with the nature of a participant’s interest in a holding of Fungible Securities?**

The nature of a participant's interest in NECIGEF-securities is expressly set out in the Act on Giro Transfers of Securities (*Wet giraal effectenverkeer*, the "**Giro Act**"). "NECIGEF-securities" are securities which:

- (a) have been designated as such by Nederlands Centraal Instituut voor Giraal Effectenverkeer B.V. (NECIGEF) (the Dutch central securities depository); and
- (b) are held through NECIGEF or a member (*aangesloten instelling*) of NECIGEF.

There is no specific legislation which deals with the nature of a participant's interest in Fungible Securities other than NECIGEF-securities.

**2. How would such an interest be characterised under the laws of the Netherlands?**

The interest of a participant in NECIGEF-securities is characterised as a co-ownership right *in rem* to all the securities of the same class held in the collective account maintained by the NECIGEF member. The member's collective account includes *inter alia*:

- (a) its co-ownership right *in rem*, if any, in collective accounts for securities of the same class maintained by other NECIGEF members; and

- (b) its co-ownership right *in rem*, if any, in all securities of the same class held in the giro account maintained by NECIGEF itself.

**3. How would the location of Fungible Securities be determined under the laws of the Netherlands?**

Bearer securities (in global or definitive form) are deemed to be located in the place where the certificate evidencing the security is physically located.

The *locus* of registered shares is likely to be determined by the *lex societatis* of the company concerned. Other registered securities (that is, securities which, under Dutch law, would qualify as claims not to bearer or to order) will probably be deemed located in the jurisdiction of the governing law of the security. However, the relevant rules are not very clear and it is possible that different rules may apply for different purposes.

**4. Under the Dutch conflict of laws rules, what law would govern:**

**(a) the characterisation of a person's holding of Fungible Securities?**

Assuming that, as regards the clearing system in which the Fungible Securities are held:

- (i) under the law of the jurisdiction where the clearing system is established and operating, the clearing system is governed by the law of that jurisdiction; and
- (ii) insofar as the clearing system and the participants therein may choose the law governing any arrangements, they have chosen that such arrangements be governed by the same law;

it is likely (but not certain) that the characterisation of a participant's interest in Fungible Securities is governed by the governing law of the clearing system. A participant's interest in NECIGEF-securities is governed by Dutch law.

It is uncertain which law will prevail if several clearing systems are relevant and the characterisation of the participant's rights under the respective governing laws conflict.

**(b) the creation of a security interest in cash or Fungible Securities?**

If it is an international transaction, it is most likely that the creation of a security interest over cash in an account (current or otherwise) will be governed by the law chosen by the parties (assuming that such choice has been made). However, the law governing the account relationship will determine:

- (i) if such account is capable of being made the subject of a security interest; and
- (ii) the conditions under which the security interest can be invoked against the party with which the account is held; and
- (iii) whether such party's obligations have been discharged.

It is likely that the creation of a security interest in a participant's interest in Fungible Securities is governed by the governing law of the clearing system (see Question 4(a) above).

**(c) the formal validity or perfection of a security interest in cash or Fungible Securities?**

The law governing the creation of the security interest would apply (see Question 4(b)).

**(d) the effectiveness and formal validity of a transfer of title to Fungible Securities?**

The same law as the law which would govern the creation of a security interest would apply (see Question 4(b)).

**5. What types of security interest may be created under the laws of the Netherlands:**

**(a) With respect to cash?**

A security interest in cash held in an account (current or otherwise) must be in the form of a disclosed pledge or undisclosed pledge.

**(b) With respect to Fungible Securities?**

A security interest in a participant's interest in NECIGEF-securities must be in the form of a pledge under the Giro Act.

**6. In relation to each of these types of security interest, describe briefly any filing, registration, notification, notarisation or other formal requirement necessary to ensure validity of (or “perfect”) the security interest? In relation to each type of security interest, please indicate the consequence of failing to comply with the relevant requirement.**

**(a) Pledge of a current account**

A disclosed pledge of an account must be created by means of a deed (whether private or notarial) and must be notified to the person with which the account is held.

An undisclosed pledge of an account must be created by means of a notarial deed or by means of a private deed and registration thereof with the competent tax authorities (*Belastingdienst/Registratie en Successie*).

Non-compliance with these requirements means that the pledge is invalid.

**(b) Pledge of Fungible Securities**

A pledge of a participant's interest in NECIGEF-securities is created by way of book-entry in the books of the relevant NECIGEF member, except that a pledge in favour of the NECIGEF member through which the participant holds its securities is created by way of an agreement between the participant and the member. As between NECIGEF members, a pledge may also be created by way of book-entry in the books of NECIGEF.

Non-compliance with these requirements means that the pledge is invalid.

- 7. In relation to each type of security interest, indicate whether the collateral receiver is entitled to use the collateral as though it were the absolute owner of the collateral, including the right to sell, lend or re-pledge (rehypothecate) the collateral to a third party.**

The pledgee (collateral receiver) may not appropriate the pledged assets to its own use and any agreement to the contrary is invalid. As a result, the pledgee may not transfer or otherwise dispose of the pledged assets (except upon foreclosure in accordance with applicable foreclosure requirements).

The pledgee may only repledge (*herverpanden*) any collateral if there is an unambiguous agreement to that effect. It is likely that, unless otherwise agreed, the second pledgee may enforce its second pledge whether or not the original debtor has defaulted.

- 8. Briefly describe the enforcement procedures for each type of security interest commonly used for collateral in relation to financial activity. For example, is court approval required before the security interest may be enforced and/or is some form of auction procedure required. Indicate any practical difficulties typically encountered and also the relative efficiency and speed (or lack of same) of such procedures.**

**(a) Pledge of cash**

In the case of a disclosed pledge, the pledgee may collect any payments falling due from the account.

In the case of an undisclosed pledge, the pledgee may notify the debtor of the claim of the existence of the pledge if the pledgor fails, or gives the pledgee good reason to fear that it will fail, to honour the obligations secured by the pledge. The pledgor and the pledgee may agree that notice may also be given at any other time. After notice has been given, the pledgee may collect any payments falling due from the account.

As soon as the obligations secured by the pledge have fallen due, the pledgee may apply the monies received by it towards satisfaction of the secured obligations. Unless otherwise agreed, the pledgee must, insofar as possible, notify the pledgor of such action within one day.

Such procedures are generally efficient to execute.

**(b) Pledge of fungible securities**

The pledgee of a participant's interest in NECIGEF-securities may enforce the pledge if the pledgor is in default (*in verzuim*) under any of the obligations secured by the pledge, by selling the securities concerned on a stock exchange in accordance with the required procedures. If the securities are not traded on a stock exchange, they probably must be sold in accordance with the general provisions regarding enforcement of a pledge, which in principle require a public sale. However, see Question 9(b) below.

Sale on a stock exchange is generally efficient to execute.

**9.a. In relation to local law collateral arrangements based on transfer of title, please indicate whether there is a risk that the courts of the Netherlands would recharacterise the transfer of title as the creation of a form of security interest? If so, please give some indication of the degree of that risk (for example, very low, low, medium, high, very high). Please indicate the consequences of such a recharacterisation.**

A Dutch law transfer of title for the purpose of creating security is invalid pursuant to Section 3:84 subsection 3 Civil Code (*Burgerlijk Wetboek*, "CC"). However, for this purpose "for the purpose of creating security" must be interpreted in a legal sense, rather than in terms of its economic effect. If the transferee:

- (a) treat the assets transferred as its own (and, accordingly, use it and dispose of them);
- (b) is not obliged to return exactly the same assets (although it may be obliged to return equivalent assets); and
- (c) may retain the assets in case of a default (and, in particular, in that case is not obliged to sell the assets and apply the proceeds towards satisfaction of its claims and return the surplus, if any, to the transferor);

then the transfer should not qualify as a transfer for the purpose of creating security.

**9.b. If the agreement is governed by a foreign system of law that does not recharacterise, would the risk of recharacterisation under domestic law still be present?**

A foreign law transfer of title (valid under its own law) for the purpose of collateral in relation to assets outside the Netherlands should not be invalidated as a result of Section 3:84 subsection 3 CC. However, in the case of assets located in the Netherlands, a Dutch court is most likely to apply the test referred to in the response to Question 9.a. and, if it deems the transfer to be a transfer for the purpose of creating security, to compare it to available Dutch security rights. In such a case, it will allow the transferee the rights and remedies of the comparable security right (probably a pledge) under Dutch law. In that case, a sale of the assets can only take place in accordance with applicable Dutch requirements relating to enforcement of a security interest.

It should be noted that it is not always clear under Dutch law where securities (other than bearer securities) are located for purposes of applying the above analysis.

It is unclear what a Dutch court will do, if the relevant foreign law transfer would not be comparable to any Dutch security right.

Enforcement of a pledge over an account or a claim which is not to order or to bearer must take place as set out in answer to Question 8(a) above. Enforcement of a pledge over bearer claims and movable property must in principle take place through a public sale. Pledged property which is traded on a market or an exchange may be sold on such market or exchange through an authorised intermediary. The pledgee may act as a bidder in any sale. The competent court may allow the pledgee to sell the security in another way than through a public sale (for example, through a private sale) or may determine that the assets shall become the property of the pledgee for a price to be determined by the court. Also, the pledgor and the pledgee may agree on another form of sale, but only after the pledgee has become entitled to enforce its rights under the pledge.

- 10. Is close-out netting, for example, under a 1992 ISDA Master Agreement, enforceable under the laws of the Netherlands? If so, but subject to certain limitations (for example, as to the nature of the counterparty or types of transaction included within the netting), please indicate briefly what those limitations are.**

Generally, close out netting under the 1992 ISDA Master Agreement is enforceable. For a discussion, including relevant limitations and qualifications, see the netting opinion provided to ISDA by De Brauw Blackstone Westbroek N.V. of May 1999.

- 11. Is contractual set-off and/or insolvency set-off enforceable in the event of formal insolvency proceedings in the courts of the Netherlands in relation to a counterparty organised in the Netherlands? Please indicate the answer in relation to each type of formal insolvency proceeding (including rehabilitation or reorganisation proceedings such as administration or *redressement judiciaire*) possible in the Netherlands in relation to a corporate entity (including a financial institution).**

The relevant insolvency proceedings are bankruptcy (*faillissement*) and moratorium of payments (*surseance van betaling*). Credit institution and insurers can not be the subject of moratorium proceedings, but can become subject to emergency proceedings (*noodregeling*) under the relevant legislation.

In the event of an insolvency, irrespective of the type of proceedings a debtor of the insolvent party may set-off its debt against a claim against the insolvent party, if the debt and the claim are of the same type and both the debt and the claim have come into existence before the insolvency or result from act performed by the insolvent party prior to the onset of insolvency. Debts and claims in the same currency (including, for this purpose, different euro-currencies) are of the same type; debts and claims in different currencies are not. The parties may exclude by agreement any right of set-off on insolvency.

An agreement which limits the parties' rights to set off mutual debts and claims will generally still be enforceable on insolvency. It is unclear whether an agreement which extends set-off beyond the limits set out above, will be upheld in an insolvency.

It is unlikely that set-off will be disrupted by a freeze period (see Question 14(ii) below), but this is not entirely certain.

- 12. Would the exercise of netting or set off rights under a title transfer collateral arrangement be vulnerable to the rights of third parties in the event of the insolvency of the collateral giver? For example, would it be possible for the collateral giver to disrupt (deliberately or inadvertently) the netting or set-off by assigning to a third party creditor its right to redelivery of equivalent collateral under the collateral arrangement? Could that right to redelivery be attached by a third party creditor of the collateral giver free of the collateral taker's netting or set off rights under the collateral arrangement?**

Whether or not a claim is capable of being assigned is determined by the governing law of the claim. Under Dutch law, a claim is generally capable of being assigned, unless the debtor and the creditor have agreed otherwise. A claim which is not capable of being assigned can nevertheless be attached.

Under Dutch law, the assignment of a claim will not affect the debtor's ability to set off its debt against any claim against the original creditor of the claim, provided that:

- (a) the debtor's claim results from the same legal relationship as the transferred claim; or
- (b) the debtor acquired its claim, and the claim fell due, before the transfer.

This rule applies *mutatis mutandis* to any attachment of the claim.

**13. In relation to mark-to-market collateral arrangements, is there any risk under the preference (or similar) rules of the Netherlands that "top-up" deliveries of collateral would be vulnerable to avoidance if made during a relevant period prior to the insolvency of the collateral giver?**

Under Dutch *Paulian* rules, a receiver in a Dutch bankruptcy may avoid any legal act which the bankrupt performed before the effective date of the bankruptcy, if (a) the bankrupt was not obliged (*onverplicht*) to perform such act, (b) as a consequence of such act one or more creditors (present or future) of the bankrupt are prejudiced, and (c) at the moment of performance the bankrupt and (unless the act was performed for no consideration (*om niet*)), the other party with or *vis-à-vis* whom the bankrupt has performed such act, knew or should have known that one or more creditors (present or future) of the bankrupt would be prejudiced. The burden of proof with respect to the criterion mentioned in (c) is reversed with respect to certain transactions which are performed within one year prior to the bankruptcy, to the extent the bankrupt was not acting to satisfy a prior commitment. (Outside bankruptcy, creditors also have similar rights.)

In addition, a receiver may avoid the performance by the bankrupt of any due (*opeisbare*) obligation, effected before the effective date of the bankruptcy, if it is demonstrated that either (i) the recipient of the performance knew that a request for bankruptcy had been filed, or (ii) the performance of the obligation was the result of collusion between the bankrupt and the relevant creditor with a view to favour the latter above other creditors of the bankrupt.

There are additional provisions which limit the rights of a creditor of an insolvent party in *Paulian*-like circumstances. In addition, there is recent case law of the Dutch courts confirming and analysing the legal doctrines underlying Dutch bankruptcy legislation. This case law demonstrates that, in addition to the rights of the receiver set out above, in certain circumstances the preferential satisfaction of creditors may give rise to an action against the debtor or the satisfied creditors. There is also a tendency in case law towards an approach that the application of statutory provisions may be prevented in bankruptcy proceedings on the ground that, in the circumstances of the case, they would lead to an unacceptable result. A result may be considered unacceptable in the light of, for example, the legal doctrines underlying the Bankruptcy Act, principles of reasonableness and fairness *vis-à-vis* other creditors and the principle of *paritas creditorum*.

**14. Please add any additional comments on the general legal framework for collateral arrangements under the laws of the Netherlands, whether based on creation of a security interest or on title transfer, highlighting any difficulties that should be addressed in any project for collateral law reform in the Netherlands.**

Although in principle an insolvency does not affect the rights of a pledgee, the following exceptions apply:

- (a) A receiver in bankruptcy may set a reasonable period of time within which a pledgee who has a pledge over any asset which forms part of the bankrupt estate must exercise its rights as pledgee. If the pledgee fails to sell such asset within such period of time, the receiver may claim the asset and sell it himself in accordance with the Bankruptcy Act, without prejudice to the pledgee's right to receive the proceeds of the sale after deduction of bankruptcy expenses (which may be considerable).
- (b) In an insolvency, the competent court may decide that during a "freeze period" of not more than two months a pledgee who has a pledge over any asset which forms part of the bankrupt estate may not (i) claim such asset if it is under the control of (*in de macht van*) the bankrupt or the receiver in bankruptcy respectively, nor (ii) seek recourse against such asset, other than with the consent of the supervisory judge or court, as the case may be.

In addition, in an insolvency, the pledgee may no longer set off the excess proceeds following enforcement of its pledge against any other claims it may have against the pledgor.

It would be beneficial if Dutch private international law on the governing law of clearing systems, and the transfer of, and creation of security rights over a participant's interest therein were codified, so that the current uncertainty in this regard were removed.

In addition, it is argued that the scope of the prohibition on transfers of title for the purposes of collateral arrangements creates uncertainty and that clarification would be helpful.

*The Collateral Law Reform Group acknowledges the assistance of De Brauw Blackstone Westbroek N.V., Amsterdam in the preparation of this report. That firm, however, accepts no liability in relation to this report.*