A comparison between Belgian, Dutch and South African law dealing with pledge and execution measures*

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INTRODUCTION

In recent years certain execution measures in case of pledge has become rather controversial in South African law.[1] In this article I compare the Belgian, Dutch and South African legal position pertaining to pledge and its concomitant execution measures. I evaluate the Belgian and Dutch systems because both belong to the civil-law legal family and can therefore serve as excellent examples for future development of the South African law of pledge. The Belgian code is based on the French *Code Civil* of 1804. For various reasons it interests the South African researcher: It is older than the Dutch code, but could be closer to the South African legal position because it is more closely related to Roman law. In Belgium this necessitated the introduction of specific legislation to address the shortcomings of the code in providing for the needs of the modern commercial world in this regard. The Dutch *Burgerlijk Wetboek* (*BW*), on the other hand, is the most recent codification of the European civil-law legal systems. It is more in line with the German *Bürgerliches Gesetzbuch* (*BGB*) of 1900, which is generally regarded as a model of scientific legal thinking based on the Roman

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1 Susan Scott 'Summary execution clauses in pledge and perfecting clauses in notarial bonds (*Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 1 SA 251 (ECD))' 2002 *THRHR* 656–664; JC Sonnekus 'Onverwagte raakpunte tussen menseregte en saaklike sekerheidsregte' (2002) 1 *Tijdschrift Voor Privaatrecht*; WG Schulze '*Parate executie, pacta commissoria,* banks and mortgage bonds' 2004 *De Jure* 256; Samantha Cook & Grant Quixley 'Parate executie clauses: is the debate dead?' 2004 *SALJ* 719–730; WG Schulze '*Parate executie* and public policy. The Supreme Court of Appeal provides further guidelines' 2005 *Obiter* 710; Susan Scott 'A private-law dinosaur's evaluation of summary execution clauses in light of the Constitution' 2007 *THRHR* 289–299.

tradition. The *BGB* therefore largely influenced modern legal development on the continent and elsewhere.

I shall start with a broad outline of the position in Belgian law, followed by a brief exposition of the concomitant position in the Netherlands. In the conclusion I indicate the differences between these two legal systems, as well as those between these two and the South African law in this regard. I do not discuss the South African legal position, but merely refers to it in so far as it differs from the other systems. I further suggest possible adaptations of the existing South African legal position to bring pledge as a form of real security in line with modern requirements.

BELGIAN LAW

Introduction

In terms of article 2071 of the Belgian *Burgerlijk Wetboek* (*BW*) pledge[2] is a contract in terms of which a debtor agrees to deliver a thing to his creditor as security for repayment of a debt. Pledge is therefore a conventional security right to another person's property. The pledgor remains owner of the pledged object. On transfer of control to him the pledgee merely acquires a limited real right to the pledged object.

The BW distinguishes between different forms of pledge depending on the nature of the object of the pledge agreement: articles 2085–2091 BW regulate a pledge of immovables (*genotspand*).[3] In this form of pledge a debtor undertakes to transfer control of an immovable thing to his creditor. It allows the creditor to enjoy the fruit in reduction of the principal debt. For economic reasons this form of pledge has fallen into disuse in Belgium.[4] The legal institution of *hypothec* enjoys preference today because it confers the same security without the disadvantage for the debtor of having to part with control of the security object.

In the case of movables the security is described as a pledge.[5] This term is employed for the agreement and the resultant real security right, as well as the object of the real security right. The creditor to whom the pledge is

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2 French term: *nantissement*.

3 French term: *antichrèse*.

4 FT 'Kint *Sûretés et principes généraux du droit de poursuite des créanciers* (2004) par 232; Eric Dirix 'Vuistpand' in *Voorrechten en hypotheken – artikelsgewijze commentaar met oversicht van rechtspraak en rechtsleer* (2001) 3; R Dekkers *Handboek burgerlijk recht* Deel 2 (2005) 366.

5 French term: *gage*.

delivered is the pledgee.[6] The debtor who delivers the object is the pledgor.[7] It should be noted that the debtor is not necessarily the owner of the pledged article; a third person may be the pledgor.

In pledge agreements a further distinction is drawn between a pledge constituted over corporeal movables and one over incorporeal[8] movables. A pledge over corporeal movables is termed a possessory pledge (*vuistpand*).[9] The term clearly indicates that the pledged object is placed in the actual physical control of the pledgee. The commercial world, however, requires a form of pledge where control of the security object remains with the debtor. Specifically small businesses and the agricultural sector showed a need for a form of non-possessory pledge. The legislature provided in this need with the introduction of the *Wet van 25 Oktober 1919* which makes provision for a pledge of a business (*handelszaak*) and the *Wet van 15 April 1884*, which created a similar security right for credit providers of farmers. In the absence of transfer of control in these situations, provision had to be made for an alternative form of publicity. Therefore these kinds of pledges must be noted in specific registers which are accessible to everyone. For this reason such a pledge is termed a registered pledge (*registerpand*).

A second and very important division of pledge in Belgian legislation depends on whether the security agreement relates to a civil debt (*burgerlijk schuld*) or to a commercial debt (*handelschuld*). Articles 2072–2091 of the *BW* regulate the civil pledge (*burgerlijk pand*)[10] whereas the commercial pledge (*handelspand*)[11] is regulated in terms of a specific statute, *Wet van 5 mei 1872*.[12] Apart from these forms of real security, specific legislation also

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6 French term: *créancier gagiste*.

7 French term: *bailleur de gage*.

8 Although it is a very important form of real security, pledge of claims (incorporeals), is not discussed in this article: for the Belgian law on this issue, see Alain Verbeke in *Overdracht of inpandgeving van schuldvorderingen* (1995); also Dirix 'Verpanding van schuldvorderingen' n 4; E Dirix & R de Corte *Zekerheidsrechten* in *Beginselen van Belgisch Privaatrecht* XII (2006) par 486 *et seq*; E Dirix 'Beslag, verpanding en cessie tot zekerheid van schuldvorderingen in Belgie' in *Discussies omtrent beslag, verhaal en beschikkingsbevoegdheid* (1997) BWM Nieskens-Isphording, EM Hemmen & THD Stuycken (eds) 121–142; For the Dutch position, see HJ Snijders & EB Rank-Berenschot *Goederenrecht* (1994) 490 ev; HLE Verhagen & MHE Rongen *Cessie* (2000) 71–84; WHM Reehuis, AHT Heisterkamp, GE van Maanen & GT de Jong *Pitlo het Nederlands burgerlijk recht* 3 *Goederenrecht* (2001) 569 *et seq*; Regine R Feltkamp *De overdracht van schuldvorderingen* (2005) pars 82–85.

9 Dirix n 4 above at 4.

10 French term: *gage civil*.

11 French term: *gage commercial*.

12 Recorded in Book I of the *Wetboek van Koophandel* (*WKh*).

exists in regard to a pledge of a trade object;[13] of claims evidenced in invoices (book debts);[14] of claims against the state for work done and supplies delivered;[15] of a claim in terms of an insurance policy;[16] of fungible and dematerialised shares;[17] of patents;[18] etcetera.

Civil pledge[19]

General

The Belgian civil code deals with pledge in articles 2071–2084. The appropriate judge is the judge of the district court (court of first instance). The rules of evidence are those laid down in the *Burgerlijk Wetboek*. According to the wording of article 2084 *BW* these rules are not applicable to a commercial pledge. The latter has its own rules laid down in a specific act which I discuss below.[20]

Pledge is dealt with quite briefly by the draughtsmen of the *Burgerlijk Wetboek*, because they attached very little value to movable things.[21] After all, at the beginning of the nineteenth century a person's wealth was determined with reference to his immovable property. The authors therefore foresaw only a marginal position for a pledge of movables. Today a pledge of movables is to a certain extent still relatively unimportant, but then for different reasons than 200 years ago.[22] The nature of a pledge inherently has certain vital disadvantages. The biggest of these is the fact that the debtor has to relinquish control of his movables to constitute the real security right. Both in a private and in a commercial situation the control requirement is a serious obstacle. The relative scarcity of possessory pledge in modern law does not mean, however, that there is no role for pledge to play in the modern commercial world. Of special interest still is a pledge of claims and of commercial paper to bearer.

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13 *Wet van 25 oktober 1919*.
14 Articles 13–16 *Wet van 25 oktober 1919*.
15 Article 23 *Wet Overheidsopdrachten*.
16 Article 120 *Verzekeringswet*.
17 Article 5 *Koninklijk Besluit* (*KB*) *nr 62 van 10 November 1967*, art 470 *Vennootschapswet*.
18 Article 46 *Octrooiwet*.
19 Dirix n 4 above at pars 7 *et seq*; Dirix and De Corte n 8 at pars 462 *et seq*.
20 Below under 2.3.2.1.
21 'Kint n 4 at par 238.
22 Movable things have indeed become valuable objects in a person's estate.

A modern form of pledge of commercial movables can be found in the sale and lease back agreement.[23] The movable is sold and delivered to a buyer (new owner) who immediately rents it to the seller. On termination of the rent agreement the seller has an option to buy the leased movable for the outstanding amount or if the full amount has been paid, the seller becomes owner. The seller in this way remains in control of the sold article which serves as a pledge to secure payment of the purchase price.

Execution[24]

Principle

In principle a pledgee may exercise his right of execution when the debtor is in default – when he is unable to fulfil the secured duty, mostly failure to pay the principal debt. The pledgee may sell the pledged article to satisfy the outstanding debt. Before this right of execution may be exercised, the principal debt must be enforceable and the debtor must be in default.[25] Note that a preceding attachment is not required for execution purposes. The creditor is after all in control of the pledged thing. Although an executorial title (*uitvoerbare titel*) is not required, the pledgee must place the debtor *in mora*. In Belgian law the pledgee cannot exercise his right of execution freely. It is subject to prior judicial control. Although the Belgian legal texts in this regard refer to *summary* execution it does not mean that court intervention is not required.

Article 2078 *BW* determines the legal position of the creditor in case of default by the debtor. The pledgee may not personally sell the pledged article. He must approach the court and ask the judge to order a public sale or to allocate the property to him as payment of the debt. This limitation flows from Roman law where a *pactum commissorium* was prohibited.[26] In terms of such an agreement the pledgor and pledgee agree that the pledgee may keep the pledged article for himself in the case of default by the pledgor. Obviously this agreement opens the door for abuse and even today such agreements are prohibited in most civil-law legal systems.[27] Nevertheless, whichever form of execution is used, Belgian law requires judicial intervention.

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23 'Kint n 4 at par 239.

24 Dirix n 4 at pars 32 *et seq*; Dirix and De Corte n 8 at pars 478 *et seq*.

25 Dirix n 4 at 26.

26 Dirix n 4 at 26; Dekkers n 4 at 381. See further discussion below under par 2.2.2.4.

27 See discussion below under 2.2.2.4. Dirix n 4 at 6 sees this as an application of the general principle against enrichment underlying the exercise of real security rights.

Apart from the above orders, a judge can order that the debtor must be given a moratorium.[28] Articles 1244 item 2 *BW* and 1333 *Gerechtelijk Wetboek* (*GerW*) give the judge the power to make such an order subject to specific conditions and certain statutory exceptions. A judge can even act *mero motu* in such circumstances. Article 1244 only applies to contractual obligations and the judge must here act in terms of his general duty to adjudicate fairly. The moratorium can take the form of a deferment of payment of the whole debt until a later date to be determined by the judge, or a remission of partial and periodical payments.

Article 1337 *GerW* summarises a few situations in which a debtor is not entitled to a moratorium of payment. These statutory exceptions include, inter alia, that the debtor is factually in a state of insolvency or obviously unable to pay; that other creditors require a sale of the debtor's property and the possibility that the debtor may abscond.

Sale

The possibility to have the pledged property sold is one of two options open to the pledgee who has not been paid. I indicated above that the pledgee does not have to have the movable attached as he is already in control of it. He does, however, require the permission of a judge to sell the property. In this way the debtor is provided with the opportunity to raise certain defences like the one in article 1244 *BW* I discussed above.

Although the pledgee is entitled to sell the movable, he nevertheless is not obliged to do so. He can postpone the sale and retain the movable as pledge, he can have other property of the debtor attached or he can claim against the insolvent estate of the debtor.[29] Like all other creditors, the pledgee retains the right to decide against which property of the debtor he wishes to enforce his claim.[30] No matter which execution measure he opts for, he will not lose his right of preference attached to the pledge.

The sale takes place by public auction subject to the applicable customs and conditions under the direction of the person appointed in the court order to

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28 H Reghif, 'De tenuitvoerlegging van zakelijke zekerheidsrechten' in *Voorrechten en hypotheken – Artikelsgewijze commentaar met oversicht van rechtspraak en rechtsleer* (2006) 11; Dekkers n 4 at 382; ME Storme *Zekerheden- en insolventierecht* I–V (2005) 539.

29 Reghif n 28 at 27.

30 Dirix n 4 at par 33; Dirix and De Corte n 8 at pars 19, 21, 478.

do so.[31] This judicial liquidator must guarantee professional and independent conduct to both parties, subject to certain statutory exceptions.[32] This proviso obviously protects both the debtor and his other creditors, otherwise the creditor may be prepared to accept a low price as long as his claim is satisfied thereby.

In the execution sale the pledgee, like any other creditor attaching the property of his debtor and selling it in execution, acts as an *ex lege* representative (*dwangvertegenwoordiger*) of the pledgor.[33] The pledgor therefore is regarded as seller and not the pledgee. The sale is therefore subject to article 1649 *BW*.

The risk for the successful wrapping up of the sale thus also rests with the pledgor. This means that when the proceeds of the sale are insufficient to cover the principal debt, the pledgor still has to pay the outstanding amount. The pledgee, however, loses this advantage if the pledgor can show that the pledgee acted carelessly in the execution of his representative authority.

Awarding of pledged object in ownership to pledgee in payment of debt

Another option open to the pledgee is to ask the judge to award the movable to him in payment of the debt. Judicial intervention here prevents abuse in a situation where the value of the thing exceeds the value of the principal debt. In such a situation it is solely in the discretion of the judge to determine the value of the thing. The judge may consult (but does not have to) an expert who acts merely in an advisory capacity. The judge is not bound by the expert's estimate.[34]

The granting of such an order effects transfer of ownership to the pledgee. If the value of the pledged article, as determined by the judge, exceeds the amount of the pledgee's claim, the latter must pay the balance to the pledgor. For such payment the pledgor enjoys the same preference as an unpaid seller in terms of article 20, 5˚ of the *Hypotheek Wet*. Where the value of the pledged article is insufficient to satisfy the principal debt, the pledgor remains obliged to pay the balance to the creditor. In this situation the creditor, however, becomes a concurrent creditor for the balance.

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31 *Eg* a sheriff (*gerechtsdeurwaarder*) or stockbroker (*wisselagent*).
32 Dirix n 4 above at 28.
33 *Ibid.*
34 *Id* at 29.

Pactum commissorium

Initially a *pactum commissorium* in Roman law was valid. This is an agreement between the pledgor and the pledgee that the pledgee may keep the pledged article on default by the debtor. Such agreements obviously open the door for abuse by the pledgee who may speculate on the possibility of default by the pledgor that could result in his obtaining a valuable thing for a trivial debt. Therefore Constantine abolished it.[35] Article 2078 item 2 of the Belgian *BW* regards such agreements as invalid.[36] All agreements providing for a private sale, a transfer of the pledged article to the creditor in payment of the debt or an exemption from judicial intervention are null and void. Such agreements are nevertheless valid, provided that they have been concluded after the debt fell due and became payable.

Dirix[37] states that we are here dealing with absolute invalidity because the ruling of article 2078 item 2 *BW* is peremptory. A judge therefore has to apply it *mero motu*.'Kint and Storme argue that article 2078 item 2 *BW* serves to protect the interests of the pledgor. This together with the fact that the article no longer applies after default indicate to them that we are here dealing with relative invalidity. Consequently only the pledgor can invoke the protection of this section.[38] All three authors agree however that the invalidity of the particular clause does not affect the whole security agreement. Evasion of this article by the pledgee makes him liable towards the debtor and other aggrieved creditors.

Commercial pledges [39]

General

I indicate above that the Belgian *Burgerlijk Wetboek* treats of a civil pledge of movables in articles 2071–2084. According to the wording of article 2084 these principles are not applicable to a commercial pledge. This form of pledge is dealt with explicitly in a specific statute: *Wet van 5 mei 1872*.[40] The determining criterion for the type of pledge is the nature of the principal

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35 JC van Oven *Leerboek van Romeinsch privaatrecht* (1948) 172; P van Warmelo *''n inleiding tot die studie van die Romeinse reg* (1957) 177; Rolf Dannenbring *Roman private law* (1968) 132; JHA Lokin *Prota* (2003) 201; Andrew JM Steven *Pledge and lien* (2008) at pars 3–09 to 3–11. See also the excellent historical discussions of this agreement in both the majority decision of De Villiers AJA and the minority decision of Maasdorp JA in *Mapenduka v Ashington* 1919 AD 343.

36 'Kint n 4 at above at pars 293–294.

37 Dirix n 4 above at 29.

38 'Kint n 4 above at pars 293–294; Storme n 28 at 540.

39 Dirix n 4 above at pars 45 *et seq*; Dirix & De Corte n 8 at pars 481 *et seq*.

40 *WKh* n 12.

obligation. Neither the capacities of the parties, nor the nature of the pledged object plays a role in determining the type of pledge. This approach is a necessary implication of the accessory nature of a pledge agreement.[41]

A commercial debt is in the first instance a debt which the code describes as such.[42] Second, all debts of a merchant (*handelaar)* are regarded as commercial debts, unless it can be proven that they were not incurred in the exercise of his business.[43] A merchant is someone who performs commercial acts in the normal carrying out of his business.[44]

Although the rulings of the *Burgerlijk Wetboek* pertaining to pledge do not apply to a commercial pledge, the provisions of *Wet van 5 mei 1872* are too fragmentary to form a comprehensive system. Consequently, despite the clear wording to the contrary in article 2084 *BW*, several issues necessitate consultation of the *Burgerlijk Wetboek*. The general principles pertaining to civil pledge therefore find application in so far as they have not been overruled by the act on commercial pledge.[45] The nature of the object (for example a movable corporeal thing or a claim or a share) of this form of pledge determines the method in which the pledge is constituted. Therefore, in a commercial pledge of corporeal movables transfer of control is retained, but article 2 of the act creates a presumption in favour of transfer of control for the pledgee, if: the movables are available in his warehouse or ship; under control of customs; in a public warehouse; or if movables that are in transit are in his control before landing in terms of a bill of lading. (Note that this summary is not exhaustive.)[46]

An important distinction between a civil and a commercial pledge lies firstly in the competence of the courts.[47] In proceedings concerning a commercial pledge a judge of the commercial court is competent.[48] Second, important differences[49] exist in the respective court orders pertaining to enforcement, which I discuss below.[50] Lastly, in proceedings pertaining to a commercial

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41 'Kint n 4 at par 233; Dirix n 4 34; Dekkers n 4 at 388–89.
42 Arts 2 and 3 *WKh* n 12.
43 Art 2, *in fine, WKh* n 12.
44 Art 1 *WKh* n 12.
45 Dirix n 4 at 35.
46 E Dirix and De Corte n 8 at par 484.
47 Dekkers n 4 at 389.
48 Art 573–574 *GerW*.
49 The *Wet van 5 Mei 1872* nevertheless leaves certain basic principles of the civil pledge intact: transfer of possession (*buitenbezitstelling*), right of retention, indivisibility, duty to preserve, *etc*.
50 See ***Specific forms of commercial pledge*** below.

pledge evidentiary issues are determined by the rules regulating evidence in commercial cases, not by civil-law evidence principles.[51]

From this brief overview it is clear that the commercial pledge is more practical than the civil possessory pledge. The special forms of non-possessory pledge existing for merchants definitely enhance its value in practice. In the discussion that follows I briefly refer to the nature and enforcement methods of the different forms of commercial pledge. Apart from the ordinary commercial pledge, I also refer to the pledge over a business (*pand op de handelszaak*), the warrant (*de warrant*) and the pledge of an invoice (*pand op de factuur*).

Specific forms of commercial pledge

Wet van 5 Mei 1872*: ordinary commercial pledge*

The act regulating commercial pledges provides only for one form of realisation, that is, the sale of the pledged object. Articles 4 to 9 determine the procedure. The legislature made sure that the execution process for a commercial pledge is faster than for a civil pledge. Article 10 echoes the prohibition of article 2078 *BW*. Agreements allowing the creditor to take over the pledged article without following statutory prescribed measures are therefore invalid. As is the case in a civil pledge, the prohibition in article 10 does not apply after the debtor is in default.[52]

The pledgee who wishes to realise the pledge, is obliged to serve two formal notices on the debtor.[53] First, he has to place the debtor in default.[54] Second, he has to inform him that he intends to apply to the president of the court for authorisation to sell the pledged object. The pledgee can then apply for authorisation from the president of the commercial court (*voorzitter van de rechtbank van koophandel*) to realise the pledge.[55] In an application for such authorisation the competency of the president is limited. He can only decide on the *prima facie* legality and lawfulness of the application. In fact he will therefore only determine the legality of the process, the validity of the pledge and whether the debt is due and payable. He cannot decide on the debt

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51 Article 25 *W Kh* n 12.

52 Dirix n 4 above at 36; 'Kint n 4 at pars 293–294.

53 Article 4 *Wet van 5 Mei 1872*.

54 This notice must be served (*betekend*). This means it must be served by a sheriff; a registered postal notice is insufficient, see the *Hof van Beroep te Antwerpen 29 Januari 1990 Rechtskundig Weekblad* 1989–90 990.

55 A Verbeke & I Peeters *Voorrechten, hypotheken en andere zekerheden* (1996–97*)* par 485; Dirix & De Corte n 8 at par 483.

itself.[56] The latter determination falls under the competency of a judge after application to the court. The president can reject an application only if there is serious uncertainty on any of the above aspects. The pledgee has no remedy against such rejection and such a decision is also not regarded as a court order. The creditor can thus approach the president of the commercial court anew whenever he thinks that he can bring new aspects for consideration before the president of the commercial court.

The decision to allow the application for realisation can be implemented after the debtor (or the third-person pledgor, if applicable) has been informed. Articles 5 and 6 allow for objections against the decision to allow realisation. This objection is heard before the court and an appeal against this court's finding is possible.[57] The creditor carries the risk of realisation. Should a judge in later proceedings hold that the execution of the pledge was unlawful, the creditor (former pledgee) is obliged to indemnify the loss.

Pledge of business[58]

The *Wet Inpandgeving Handelszaak van 25 oktober 1919* introduced the pledge of a business.[59] For many merchants their business is their sole valuable property. The business as a whole is regarded as a movable thing and therefore cannot be subject to a hypothec (mortgaged). For this reason the act provides for a form of non-possessory pledge similar to a hypothec. Obviously the different movable things of the business can be pledged separately, but the business as a whole is more valuable as a security object.[60] Neither Dutch, nor German law recognises a similar legal institution: Dutch law provides for a non possessory registered pledge and a confidential (undisclosed) pledge (*stil pandrecht*) of claims. German law acknowledges and widely uses transfer of ownership for security purposes. In both these systems difficulties may arise with adherence to the specificity principle when the object of the security is of a changing nature, for example, when stock in trade is the object of security.[61] The publicity requirement in a pledge of a business is fulfilled by means of an entry in the register at the deeds office.

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56 Dirix n 4 above at 36.
57 Dirix & De Corte n 8 at par 483
58 *Id* at pars 520 *et seq*.
59 French term *Gage sur fonds de commerce*.
60 Dekkers n 4 above at 391.
61 Storme n 28 at 577.

The object of this form of pledge is a business which, according to Belgian law, qualifies as such. In terms of article 2 of the act 'business' in principle includes the: equipment, furniture, tools, intellectual property rights, leases, patents, signboard, clients and up to 50% of the available stock. By agreement the parties can vary this content of a business to include or exclude certain objects.

If the same business operates in different localities, the client basis determines whether the pledge extends over the different locations. If there is unity in the client basis, the pledge extends over the business as it is found in all the different localities. If the pledge is constituted over more businesses, the pledge over each of them is determined separately and they should be so indicated in the pledge agreements.[62]

Article 4, 3˚ of the *Wet Inpandgeving Handelszaak* limits this pledge to existing businesses only. In reality it is often new merchants who require credit to get their businesses from the ground. The high court of appeal clearly indicated that constitution of a business pledge is possible once a solid client base exists. It is consequently possible to establish a business pledge over a developing business.[63]

Article 7 of the *Wet Inpandgeving Handelszaak* limits the group of possible creditors to those banks and credit institutions authorised for this purpose.[64] In this way the act strives to protect merchants against credit institutions that are not bona fide. The requirements of this article must be adhered to at the moment of constitution of the pledge. The sanction for non-compliance is, however, only relative nullity.[65]

Realisation of the business pledge takes more or less the same form as realisation in the case of a commercial pledge with the exception that attachment is required – this is understandable because the object of the pledge is in the control of the debtor.[66] Although this view is controversial, attachment of the pledged articles takes place of the business as a whole and not of the individual objects in the business.[67]

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62 'Kint n 4 above at par 334.
63 Dirix & De Corte n 8 above at par 526.
64 *Id* at par 527.
65 Verbeke a& Peeters n 55 above at par 495.
66 Article 11 *Wet Inpandgeving Handelszaak*.
67 Dekkers n 4 above at 392; Storme n 28 above at 587–588; Verbeke & Peeters n 55 at par 502–508; Dirix & De Corte n 8 at above par 533.

Warrant[68]

The warrant is commercial paper issued in duplicate, the one document being the receipt indicating that goods have been received (*warrant*), and the other is a property-law commercial paper representing the ownership of the property so received (*ceel*). It is the document evidencing the property stored in a warehouse. Handing over of this document serves to pledge the property described in the warrant.[69]

The (third) person who receives the property and holds it in safekeeping issues the warrant. There are actually two documents: the *warrant* and the *ceel*. The two documents together entitle the holder of the warrant to deal with the property in the warehouse. The *warrant* alone represents possession of the pledged objects for pledge purposes, whereas the holder of the *ceel* alone has the entitlement to deal with the pledged articles subject to the pledge. The legal position of the warrant is determined by the *Wet van 18 November 1862*. This act therefore represents a deviation from articles 2074–75 *BW* in regard to the constitution of a pledge. For the realisation of this type of pledge, the same principles apply as for an ordinary commercial pledge. The pledgee must therefore have the property attached and apply to the president of the commercial court for permission to sell the property.[70]

Endorsement of invoices

Legislation provides for the possibility to 'pledge' book debts evidenced in invoices by means of endorsement of such invoices.[71] Endorsement requires the name of the endorsee, signature of the endorser, as well as the date and the fact that the endorsement of the invoices takes place to constitute a pledge. The endorsement becomes effective against third person-debtors (for example, the buyers) upon receipt of written notice of the endorsement. Against other debtors the endorsement is effective merely because of its existence.[72] Due to the relaxation of the strict requirements for cession in terms of the *Wet van 6 Julie 1994*, a pledge of claims has become more informal and suitable as security and subsequently endorsement of invoices has lost its role in the modern credit world.[73]

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68 Dirix and De Corte n 8 at pars 540 *et seq*.
69 Dekkers n 4 above at 393.
70 *Wet van 5 mei 1872*, see nrs 17–18.
71 *Wet van 25 oktober 1919*, ss 13–17. See further Verbeke n 8 at 100–101.
72 Dekkers n 4 above at 394.
73 Dirix & De Corte n 8 above at 343.

Introduction

The Dutch *Burgerlijk Wetboek* (*BW*)[74] provides for a possessory pledge over movable things and rights such as rights to order or bearer, ususfruct, *etcetera*. All transferable, tangible things and property rights (*vermogensrechten*) of the creditor or a third person can form the object of such a pledge in so far as they are not regarded as registered property or rights (*registergoederen*). Dutch law distinguishes, inter alia,[75] between a possessory pledge, a (registered) non-possessory pledge[76] and a confidential (undisclosed) pledge of claims.[77]

In Dutch law the pledgee has a right to summary execution which allows him to realise the pledged object without a court order (*executoriale titel*).[78] This form of execution also differs from an 'ordinary' execution in the sense that no prior attachment is required. This, of course, results from the fact that the object of execution is determined and already in control of the pledgee.[79]

The right to summary execution can be excluded by agreement between the parties.[80] In such an instance the pledgee will have to obtain a court order before the pledged object can be sold. The judge determines if the debtor is in default before granting such an order.

Execution sale

Default

Before the creditor can take execution steps, the debtor must be in default. The legislature opted for the term 'verzuim' to indicate default. To determine the meaning of this kind of default articles 6:81 *et seq* of the *BW* are relevant. In other words, recourse must be had to the law of obligations to determine the content of this term. Article 6:82 *BW* provides that a debtor is in default, when he was placed in default by means of a written notice giving him a reasonable time to perform and he fails to perform within the prescribed period. If performance is impossible, the debtor is not obliged to pay damages because he has not defaulted.[81]

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74 Article 3:236.

75 For other forms see Reehuis and Heisterkamp n 8 par 759 *et seq*; Snijders and Rank-Berenschot n 8 473 *et seq*.

76 Article 3:237.

77 Article 3:239. See further Reehuis and Heisterkamp n 75 at ch 14.4.

78 Article 3:248 *BW*. See further Reehuis and Heisterkamp n 75 at pars 746, 785, 793.

79 PA Stein *Zekerheidsrechten – hypotheek* (2004) 3.

80 Article 3:248 item 2 *BW*.

81 Article 6:82 *BW*. See further Reehuis and Heisterkamp n 75 at par 793.

Molenaar[82] refers to Reehuis who raises the question whether the latter qualification applies where a pledgee wishes to take execution measures. According to Reehuis it does not apply. Molenaar agrees that the proviso does not apply in a pledge situation. A pledge is after all almost always constituted to secure payment of a sum of money. Even where it was given to secure a duty to perform something other than payment of a sum of money, the recourse for failure to fulfil such duty will be expressed in money and payment of such debt cannot become impossible in the sense envisaged by article 6:82.

Article 3:249 *BW* provides the possibility for the creditor to pay the debt before the execution sale takes place. If a pledgee elects to sell the pledged object, he must serve a notice on the debtor (or third party pledgor, where applicable) and other persons who may have limited rights to the property or may wish to have the property attached. This notice must be sent out, as far as reasonably possible, three days in advance of the execution sale.[83] This gives the debtor (pledgor) the possibility to free the object from the pledge by paying the debt. Other creditors are also given the opportunity to protect their interests.

Article 3:249 *BW* explicitly provides that the parties may deviate from the notice requirement by agreement. Such agreement, however, is not binding on persons who were not parties to the contract. This ruling therefore seems to be directory in nature.[84] Non-adherence to this article consequently will not result in nullity of the sale. The pledgee will nevertheless be liable for damages caused by such non-adherence. The reason for introducing the possibility to deviate from the notification requirement stems from the necessity to sell certain goods straight away.

Execution process

In principle execution takes place by means of a sale of the pledged object. In terms of his right to summary execution, the pledgee does not require judicial intervention. The sale takes place by public auction subject to the local customs and conditions.[85] If the pledged goods are of such a nature that they can be sold on a stock exchange or market, the goods may be sold on such exchange or market with the assistance of a broker of such goods or an

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82 F Molenaar 'Pandrecht' in *Monografieën nieuw BW* (1991) 24.
83 Article 3:249 *BW*.
84 WG Huijgen in *Burgerlijk wetboek, tekst en commentaar* (1994) 200–201.
85 Art 3:250 item 1 *BW*.

appropriate agent. The sale must take place according to the rules and customs regulating ordinary sales on these markets.[86] The pledgee may also bid at such sale.

The sale at a public auction by the pledgee has a dual nature: on the one hand it is an execution process and on the other it is a sale. The pledgee sells in his own right as execution creditor, therefore not as a representative of the pledgor/owner. He is, nevertheless, held accountable for all his acts performed in execution of the sale.[87]

Other realisation possibilities also exist provided the president of the appropriate court permits these. Both the pledgor and pledgee may approach the president for a sale other than by public auction. The president can then decide on a private sale or any other form of sale he may deem suitable.[88]

The pledgee may further ask the president of the court to award the pledged object to him in ownership as payment of the debt.[89] The president, in his sole discretion, determines the value of the pledged object.[90]

Because all creditors are entitled to take execution on all the property of the debtor,[91] a pledgee as ordinary creditor is therefore also entitled to make use of other property belonging to the debtor, even property that was not part of the debtor's estate at the time of concluding the principal debt. For recourse the pledgee is thus not limited to the pledged property.[92]

Duties of pledgee in execution process

Despite the dual nature of the execution sale in which the pledgee acts as seller, the execution seller is not treated wholly as an ordinary seller so that he does not have all the duties of such a seller. Thus article 7:19 item 1 *BW* provides that a buyer at an ordinary execution sale cannot claim that the object of the sale is subject to a limitation which should not have been on it, or that the thing does not fulfil the description in the agreement, unless the

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86 Art 3:250 item 2 *BW*.

87 F Molenaar 'Algemene bepalingen zekerheidsrechten op goederen' in *Monografieën Nieuw BW* (1992) par 23.

88 Art 3:251 item 1 *BW*.

89 *Ibid*.

90 See art 3:251 item 1 *BW*. Both these realisation possibilities may be excluded by means of agreement between the pledgor and pledgee, see Snijders and Rank-Berenschot n 8 464.

91 Art 3:276 *BW*. See also Reehuis and Heisterkamp n 75 at pars 736 and 745.

92 Stein n 78 at 12.

seller had knowledge of such defects. Item 2 of this article is also noteworthy because it equates summary execution sales with ordinary execution sales in terms of a court order, provided the buyer knew that he was buying at a summary execution sale.

The pledgee, however, carries the important duty of a seller to deliver the object to the buyer. This delivery includes both actual and constructive delivery. The pledgee after all is in control of the pledged goods which enables him to deliver them to the buyer.[93]

One day after the execution sale the former pledgee must notify the debtor (former pledgor) and other interested third parties of the sale.[94] If the proceeds of the sale exceed the debt, the former pledgee must pay the balance to the former pledgor or other third parties who are entitled to such payment, for example, lower ranking real right security holders.[95]

Pactum commissorium

The *Burgerlijk Wetboek* prohibits an agreement between the pledgor and pledgee that the pledgee may keep the pledged object if the debtor is unable to fulfil his obligations in terms of the principal debt.[96] The courts interpreted this article to include a prohibition against an agreement allowing for a private sale by the pledgee before the debtor is in default.[97]

According to the *Hoge Raad* (*HR*) an agreement concluded after default allowing for the appropriation of shares by the pledgee at market value is valid.[98] This rule has been confirmed in the civil code.[99] After default it further allows the pledgor and pledgee to agree to a sale other than at a public auction, provided the permission of the president of the court is obtained. It is, however, not possible to agree that the pledgee may keep the pledged object at an agreed price.

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93 The *Hoge Raad* confirmed that delivery *longa manu* is on par with transfer of actual control, see *HR 18 September 1987*, *Nederlandsche Jurisprudentie* (1988) 983.?

94 Article 3:252 *BW*.

95 Article 3:253 *BW*. In Belgian law the position is the same, see Dirix n 4 at 20.

96 Article 3:235 *BW*; HG van Everdingen, HPJ Ophof, JC van Straaten & J E Fesevur 'Zekerheden en uitwinning' in *Serie Bank- en Effectenrecht* (1990) 8–9; Reehuis & Heisterkamp n 75 at par 758.

97 *HR 1 April 1927 Nederlandse Jurisprudentie* (1927) 601.

98 *HR 17 Januari 1929 Nederlandse jurisprudentie* (1929) 622. Although I think his statement is contentious, it is interesting to note that Cloete JA in *Graf v Buechel* 2003 4 SA 378 (SCA) 388H–389A stated that such an agreement can be concluded even before default.

99 Article 3:251 item 2 *BW*.

Other creditors of the pledgor that may be prejudiced by such arrangements may resort to their remedies in terms of the *actio Pauliana* or, in the event that they foresee such prejudice they may have the property attached or have the debtor declared insolvent.[100]

COMPARATIVE SUMMARY

General

This brief overview of the Belgian and Dutch legal positions highlights certain differences between these two systems. It also accentuates divergences with the legal position pertaining to pledge in South African law.[101] I indicated elsewhere[102] that the execution process in South African law is in need of reform. This is also true of the general principles regarding pledge of movables (corporeal and incorporeal),[103] despite the implementation of the Security by Means of Movables Act 57 of 1993.[104]

In this summary I evaluate the divergences in the different systems under the following headings: object of pledge; forms of security by means of movables; effect of pledge on creditor's general right to recourse over the entire estate of his debtor; the forms of execution; right to summary execution; execution process (competent judicial officer; capacity of pledgee and duties of pledgee); *pactum commissorium* (validity, value determination and prejudice to other creditors of debtor).

Object of pledge

In Belgian law specific statutes deal with a pledge over a variety of objects, for example, corporeal movables; incorporeal movables;[105] businesses; book

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100 Van Everdingen et al n 95 at 9.

101 See, *eg*, TJ Scott & Susan Scott *Wille's law of mortgage and pledge in South Africa* (1987) 120 *et seq*; CG Van der Merwe *Sakereg* (1991) 650 *et seq*; JC Sonnekus and JL Neels *Sakereg vonnisbundel* (1994) 749 et seq; PJ Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman's the law of property* (2006) 390 *et seq*. See further *Mapenduka v Ashington* 1919 AD 358; *Graf v Buechel* 2003 4 SA 378 (SCA) 386–387.

102 Susan Scott and Eric Dirix 'Calling-up a mortgage bond of immovable property' 2009 (4) *THRHR* 575–598. This need does not manifest itself only in South African law, continental systems in general seem to be working towards a uniform and more effective system of security by means of movables.

103 Susan Scott 'A step towards a more sympathetic credit security dispensation in South Africa' 2008 (3) *THRHR* 473–482. For incorporeals, see, *eg*, Susan Scott 'Evaluation of security by means of claims: problems and possible solutions' 1997 (2) *THRHR* 179–201.

104 For a brief discussion of this Act, see Susan Scott 'Notarial bonds and insolvency' 1995 (4) *THRHR* 672–684.

105 See Verbeke n 8 above at 126.

debts; goods stored in warehouses or in transit. In Dutch law the *Burgerlijk Wetboek* provides for a pledge over assets (*goederen*) which includes corporeal things and proprietary rights, such as claims. South African law provides for a pledge over things (including corporeal and incorporeal things, such as claims).

Forms of security by means of movables

As I indicate above,[106] Belgian law has different statutes dealing with pledges of different classes of objects. It is also the only system of the three that distinguishes between a civil pledge and a commercial pledge. This deviation from the civil code occurred quite early in Belgian legal development (1872) to satisfy the needs of the commercial world. It makes provision for a simple and speedy form of pledge available to merchants. Although Dutch law provides for different forms of pledge, it does not distinguish between civil and commercial pledges. Apart from the possessory pledge, which negatively affects the position of the pledgor, the Dutch *BW* also provides for a non-possessory (registered) pledge and a confidential (undisclosed) pledge of claims.[107] In South Africa the typical form of pledge is the possessory pledge over both corporeal and incorporeal things. The possession requirement in a pledge of incorporeals is controversial,[108] as is the whole concept for some authors.[109] In 1993 the Security by Means of Movables Act[110] was introduced to alleviate the detrimental consequences of a possessory pledge. The act provides for registration of a notarial bond (a non-possessory pledge) over a very limited class of movables, that is, corporeal movables described in such a way that they are readily identifiable.[111] This definition excludes from its operation incorporeal things such as claims.[112] It further does not make provision for a pledge of stock-in-trade or a whole business. [113]

Effect of pledge on creditor's general right of recourse to debtor's entire estate

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106 Under **Object of pledge**.

107 See above under **DUTCH LAW Introduction**.

108 Susan Scott *The law of cession* (1991) 239–240; Susan Scott n 103 at 182.

109 Susan Scott n 103 above at 185.

110 57 of 1993.

111 S 1 of the Act; *Ikea Trading und Design AG v BOE Bank Ltd* 2005 (2) SA 7 (SCA). See further Susan Scott n 104 at 679.

112 Scott n 104 above at 680.

113 Due to the requirements of s 1 of the Act and the varying nature of the object of the bond in these circumstances. See also JC Sonnekus 'Voertuigvloot as sekerheidsobjek' 2000 (4) *THRHR* 637.

In both the Belgian[114] and Dutch law[115] a creditor retains his right of recourse to the entire estate of his debtor, save for certain general exclusions relating to those assets that are not susceptible to attachment, for example, that part of a debtor's salary that cannot be attached or his tools used in the execution of his trade. The normal court procedure has to be followed to obtain an executorial title. The pledgor nevertheless retains his secured right of pledge until the debt has been extinguished. In South African law creditors also have recourse to the entire estate of the debtor.[116]

Summary execution

Although the Belgian texts refer to a right of summary execution, the term does not have the same meaning that it has in Dutch and South African law. In both these systems the term 'summary execution' means execution without recourse to a court of law. In Belgian law the pledgee does not have to obtain an executorial title from a court of law, but there is a form of court supervision over the execution process. After placing the debtor in default, the pledgee must approach the court and ask for permission to sell the pledged object at a public sale or to award it to him. Belgian law, however, provides for a speedy process in the case of a commercial pledge where permission is granted by the president of the commercial court.[117] In Dutch law summary execution is the regular form of execution unless it was excluded by agreement. The protection measures introduced for the debtor is the written notice of the sale and the fact that it must take place at a public auction where the debtor may also bid.

The South African position[118] is that summary execution is not possible unless agreed to by the parties. Although it is not clearly stated, I think that the pledgor must be placed in default, especially in transactions where the National Credit Act 34 of 2005 applies.[119] Furthermore, the pledged object should be sold at a public auction[120] or at least a market where such goods are

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114 See discussion under *Sale* above.

115 Article 3:235 *BW* and discussion above in text at nn 90–91.

116 Sonnekus & Neels n 101 at 746.

117 See discussion above under *Wet van 5 Mei 1872: ordinary commercial pledge* above.

118 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531; *Aitken v Miller* 1951 1 SA 153 (SR); *Sakala v Wamambo* 1991 4 SA (ZHC); *De Beer v Keyser* 2002 1 SA 827 (SCA); *Bock v Dubororo (Pty) Ltd* 2004 2 SA 242 (SCA); *Juglal NO v Shoprite Checkers (Pty) Ltd* [2004] 2 All SA 268 (SCA); *South African Bank of Athens Ltd v Van* Zyl 2005 5 SA 93 (SCA); see further sources quoted in n 1 above.

119 See s 129.

120 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531 544 refers to Van der Keessel who stated that the sale had to take place 'either publicly or privately, through a broker'. In *Sakala v Wamambo* 1991 4 SA (ZHC)148–149 it seems that the judge also preferred a

normally sold.[121] The debtor may also approach the court where he was prejudiced by the sale.[122]

Execution process

Competent judicial officer

According to Belgian law a judge in a civil pledge will order the execution sale or will award the pledged object to the pledgee in ownership as payment for the debt. In an ordinary commercial pledge the president of the commercial court is competent to order the sale in execution after acceptance of certain prima facie evidence.[123] His decision is not an order of court and new evidence can be produced if he declines the application for a sale. In Dutch law summary execution is possible without court intervention. For other forms of realisation the pledgee and/pledgor can approach the president of the court for permission to do so. For an award of the pledged object in ownership to the pledgee a court order is required. In the absence of a summary execution clause in a pledge agreement, according to South African law, only a court can order an execution sale, which takes place by way of public auction.

Capacity of pledgee during sale

It is noteworthy that in Belgian law the seller in an execution sale acts as the *ex lege* representative of the pledgor,[124] whereas in Dutch law the pledgee at the public auction acts as seller, subject to certain deviations from the ordinary position of a seller.[125] In South African law the pledgee in an execution sale is not regarded as the seller and can therefore buy the thing at the sale.[126] However, where the pledgee sells in terms of a summary execution clause, he sells as representative of the pledgor and therefore he cannot buy the property.[127]

Duties of pledgee

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public sale. However, Harms JA in *Bock v Dubororo (Pty) Ltd* 2004 2 SA 242 (SCA) 107*c* clearly stated albeit in an *obiter dictum* that a summary execution clause allows for a private sale.

121 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531 534 538.

122 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531 547; *Sakala v Wamambo* 1991 4 SA (ZHC) 147I–J; *Bock v Dubororo (Pty) Ltd* 2004 2 SA 242 (SCA) 107*c*.

123 See discussion above under Wet van 5 Mei 1872: *ordinary commercial pledge* above.

124 See discussion above under *Sale* above.

125 See discussion above under ***Execution process*** above

126 Scott & Scott n 101 above at 245.

127 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531548 *et seq*.

In Belgian law the pledgor must be placed in default before a court will grant an execution order. In Dutch law the pledgee cannot exercise his right of summary execution unless he has placed the debtor in default by means of a written notice giving him a reasonable time to perform and he fails to perform within the prescribed period.[128] Notifying the pledgor of the fact that he is in default and that execution measures are to be introduced serves as a wake-up call and gives him the opportunity to pay his debt before execution measures are taken. The position in South African law is not clear: in *Osry v Hirsch, Loubser & Co Ltd*[129] provision was made for notice to the debtor and such notice was duly given. In *South African Bank of Athens Ltd v Van Zyl*[130] AR Erasmus AJA mentioned a very important point where he states that a summary execution clause may be incompatible with public policy where, for example, it entitles the creditor to determine the default of the debtor.

According to Belgian law the pledgee acts as representative of the pledgor as seller and therefore the latter carries the ordinary duties of a seller. Although the execution seller in Dutch law is regarded as the seller, he is not treated wholly as an ordinary seller so that he does not have all the duties of such a seller. Thus article 7:19 *BW* determines the legal position of sellers at both an ordinary execution sale and a summary execution sale.[131]

In South African law the pledgee in an execution sale is not regarded as the seller, but the pledgor is the seller and therefore has the normal duties of a seller. The same applies where the pledgee sells in terms of a summary execution clause, since he sells as representative of the pledgor.

Forms of realisation

In Belgian law the type of pledge determines the possible form of realisation. In a civil pledge, for example, two forms of realisation are possible: the court can order a sale in execution or it can award the pledged object in ownership to the pledgee.[132] The latter form of execution is not possible in other forms of pledge in Belgian law. In Dutch law only a sale in execution is possible in terms of the right to summary execution, but the pledgor and/or the

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128 See discussion above under ***Default*** above

129 1922 CPD 531 533 536 and 540.

130 2005 5 SA 93 (SCA) 98H–I.

131 See discussion above ***Duties of pledge in execution process*** above.

132 See discussion under *Awarding of pledged object in ownership of pledgee in payment of debt* above.

pledgee may approach the court for a sale other than by public auction, for example, a private sale or any other realisation measure that the president of the court may order.[133] The pledgee may also approach the court for an order awarding the pledged object to him in ownership as payment of the debt. A sale at a stock exchange or other market where the object of the pledge is normally sold is also possible in Dutch law.[134]

Once again, the position is uncertain in South African law. Apart from a public sale[135] or sale at an appropriate market for a particular kind of goods, for example, the Municipal Feather Market,[136] it seems that a private sale is also possible in terms of a summary execution clause.[137] I discuss the position where there is a *pactum commissorium* in the pledge agreement separately below.

Court orders

In Belgian law the court, under certain circumstances, can give the pledgor a moratorium.[138] Two realisation possibilities further exist: the court can order a sale in execution or award the pledged article to the pledgee as payment. In Dutch law the court can also order other forms of realisation, for example, it can also award the pledged article to the pledgee or order a private sale.[139] In South African law the court could possibly also intervene in transactions where the National Credit Act 34 of 2005 applies.[140]

Pactum commissorium

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133 See discussion under *Execution process* above.
134 *Ibid*.
135 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531 544.
136 *Osry v Hirsch, Loubser & Co* Ltd 1922 CPD 531 534 538.
137 *Bock v Dubororo (Pty) Ltd* 2004 2 SA 242 (SCA) 107*c–d* – this statement is, however, an *obiter dictum*.
138 See discussion above under *Principle* above.
139 See discussion above under ***Execution process*** above.
140 See, eg, ss 79 80 and 83.

In principle such an agreement is prohibited in all three legal systems.[141] However, Dutch law allows for realisation forms similar to those often agreed upon in a typical *pactum commissorium*. The pledgor and pledgee may ask the president of the court to make an order allowing the pledgee to keep the pledged article at a price determined by the president. After default the parties may agree to a sale other than a public sale, provided the president of the court gives his permission. The pledgee may also appropriate shares at market value. The pledgor and pledgee cannot, however, agree that the pledgee may keep the thing at an agreed price.[142] The reason why such forms of realisations are allowed after default is obvious: the debtor knows that the pledgee may sell the property and no further protection of his vulnerability is therefore required.

Where the court awards the pledged object to the pledgee in both the Belgian[143] and Dutch[144] law determination of the value of the pledged object in such an instance lies completely within the discretion of the judge.

Broadly stated the legal position of *pacta commissoria* in South African law[145] is as follows: *pacta commissoria* in pledge (and mortgage) agreements are void. However, after default the pledgee can 'retain the pledge as his own … provided a fair price is given.'[146]

Prejudice to debtor's other creditors

If other creditors of the debtor are prejudiced by the court's awarding of the pledged object to the pledgee, their remedies are to be found in the ordinary

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141 For the position in Belgian law see the discussion under 2.2.2.4 above; for the position in the Netherlands, see the discussion above under 3.3; and for the South African position, see *Mapenduka v Ashington* 1919 AD 343; *Graf v Buechel* 2003 4 SA 378 (SCA); *Bock v Duburoro* 2003 4 All SA 103 (SCA); *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 6 SA 110 (SCA). See also Schulze n 1 256, n 1 710. This type of agreement is prohibited in most legal systems, see Eric Dirix 'Remedies of secured creditors outside insolvency' in *The future of secured credit in Europe* vol 2 (2008) eds Horst Eidenmüller and Eva-Maria Kieninger 230 *et seq*.

142 See discussion above under ***Execution process*** and **Pactum commissorium** above

143 See discussion above under *Awarding of pledged object in ownership to pledgee in payment of debt* above.

144 See discussion above under ***Execution process*** above.

145 *Mapenduka v Ashington* 1919 AD 343; *Graf v Buechel* 2003 4 SA 378 (SCA); *Bock v Duburoro* 2003 4 All SA 103 (SCA); *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 6 SA 110 (SCA). See also Schulze n 1 256, n 1 710.

146 *Mapenduka v Ashington* 1919 AD 343 353.

remedies protecting creditors against possible undue preference. For example in Belgian law they can rely on the pledgee's general duty of care in terms of article 1382 of the *BW* or the fact that the pledgee may not be enriched by the security.[147] In Dutch law such other creditors may resort to their remedies in terms of the *actio Pauliana* or, in the event that they foresee such prejudice they may have the property attached or have the debtor declared insolvent.[148]

CONCLUSION

This brief comparison between Belgian, Dutch and South African law brought up a number of interesting issues. There are clearly more similarities than dissimilarities. This can be ascribed to the shared tradition of the Roman law. The divergences are not substantial, but rather small. In both the Belgian and Dutch systems there is a clear tendency to simplify the procedures whilst affording maximum protection to the debtor and the other creditors of the debtor. Judicial oversight in some or other form interestingly remains pivotal. South African law deviates substantially from this in the sense that we allow summary execution without court intervention (apart from recourse to the court where the pledgor has been prejudiced). We possibly also allows for summary execution that results in a private sale. Furthermore, in South African law the pledgee and pledgor can agree, after default, that the pledgee may retain the pledged object at an agreed price, provided it is a fair price.

This brief comparison of the three systems, as well as my thorough re-reading of the relevant South African judgments convinced me that a comprehensive re-think of the South African legal position on these issues is inevitable.

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147 Dirix & De Corte n 8 at pars 27 and 28.

148 See discussion above under **Pactum commissorium** above.