KEY POINTS

- Clause 2 of the General Dutch Banking Conditions includes a duty of care that banks are required to take into account in their relations with customers.
- A Dutch court is unlikely to conclude that a sale and assignment or transfer of loans amounts to a breach of the duty of care.
- The Dutch courts are more likely to intervene if it is felt that a lender's course of action is disproportionate, for instance if the lender seeks enforcement on minor defaults without consulting the borrower on an alternative solution, particularly where the borrower may be able to repay or refinance through a voluntary sell down of its secured assets.

Author Victor Gielen

Dutch non- and sub-performing loan portfolio sales: the margins of a lender's duty of care

This article briefly discusses relevant Dutch law legal developments with respect to the scope of a lender's duty of care in the context of Dutch non- and sub-performing loan portfolio sales in the wake of the Cerberus/Van Lanschot Dutch and a number of other recent Dutch distressed loan portfolio sales.

On 6 August 2015, the Dutch Van Lanschot bank announced by means of a press release that it was selling part of its commercial property loan portfolio to Promontoria, a Dutch subsidiary of the American investment company Cerberus Capital Management LP. The loan portfolio consisted of non- and sub-performing loans with a nominal value of around €400m. Van Lanschot indicated that it wanted to reduce its regulatory capital charges by selling loans such as these, which it no longer considered to be part of its core business. The transfer was effected by means of a transfer of contract of the relevant loan agreements backed up by an assignment of the loan receivables concerned. Following the sale to Promontoria, several of the 120 borrower customers contested the sale and transfer and claimed to have suffered damage as a result of the sale and subsequent treatment they received from Promontoria. According to these borrowers, the damage and losses suffered by them were mainly caused by the loan-to-own strategy pursued by Promontoria in contrast to the long-term financing strategy and relationship bank approach which they had been used to from Van Lanschot. This led to a series of court cases in which ex-Van Lanschot borrowers contested the sale and transfer of their loans to Promontoria and the right of Promontoria to accelerate their loans and enforce security provided for the loans.

Now that the dust has settled somewhat, after a number of – sometimes conflicting – lower court judgments, it appears that the transfer of contract by Van Lanschot to Promontoria of the relevant loan agreements was not valid, but that the assignment of receivables to Promontoria was. The problem here was not duty of care related, but a Dutch law legal technical issue. In short, the co-operation of all parties to a contract is required in order for a Dutch law transfer of contract to be valid and the general conditions clause whereby borrowers of Van Lanschot gave their consent to loan transfers by Van Lanschot by way of transfer of contract in advance was limited to transfers taking place "in the context of a transfer by Van Lanschot of (part of its) (lending) business". The courts decided that the transfer to Promontoria did not fall within the scope of such consent. Interestingly, this has led to a situation where Van Lanschot is still considered the counterparty lender under the relevant loan agreements and therefore arguably remains responsible for the treatment received by the relevant borrowers from Promontoria, whereas the loan receivables concerned now belong to Promontoria. This leaves the question whether Van Lanschot and, more generally, a lender could be held to violate a duty of care by selling its defaulted loans, especially when the buyer is not a bank or other supervised financial institution, but a so-called "vulture fund". It further gives rise to questions around the margins of a lenders' duty of care towards its borrowers when accelerating its loans and enforcing the security provided.

TRANSFER METHODS FOR NON-PERFORMING LOAN PORTFOLIOS

Because a transfer of contract leads to a complete transfer of the whole contractual relationship of a lender with a borrower under a loan agreement (as does a novation under English law whereby the new bank is substituted for the rights *and obligations* of the existing bank), this method of transfer is generally preferred to a mere assignment of loan receivables. As under English law, the practical disadvantage of a Dutch law transfer of contract is that the cooperation of every borrower under a loan that the bank wants to transfer is required, unless the loan agreement or general conditions applicable thereto include a provision whereby the borrower has consented to a transfer of contract in advance. It should be noted that the loan agreements and general conditions used by most Dutch banks and financial institutions include quite a widely phrased borrower consent clause on this point. Unfortunately, this was not the case with Van Lanschot. For a Dutch law assignment of claims debtor consent is not required unless expressly agreed otherwise with the debtor. Where this works, in particular from a tax and employment law perspective, a Dutch loan portfolio sale might also be effected through a legal de-merger. The pros and cons of this method of sale are case specific and fall outside the scope of this article.

WHICH RIGHTS WILL PASS ON A MERE ASSIGNMENT OF LOAN RECEIVABLES?

Pursuant to s 6:142 of the Dutch Civil Code (*Burgerlijk wetboek*), on assignment, a successor creditor assignee obtains all ancillary rights, including any rights of mortgage, pledge and suretyships that were provided as security for the assigned receivables. Ancillary rights tagging along on the assignment of receivables further include the right to receive interest, penalties or other compensations that may be claimed in relation to the assigned receivables, subject to the right of the assignor and assignee to make alternative arrangements. An important right that is not mentioned in s 6:142 Dutch Civil Code, is the right of a lender to revise the interest rate (including the margin) payable on its loan at the end of an agreed fixed interest period. The generally prevailing view amongst legal practitioners in the field is that this right is so closely linked to the right to receive interest that it cannot be separated from it. However, caselaw on this topic is scarce and there is one court decision (Den Bosch Court of Appeal (ECLI:NL:GHSHE:2016:5316)) where the court considered that a mere assignment of a loan receivable does not include a transfer of the right to revise the interest rate to the assignee and that this right should be deemed to stay behind as part of the contractual relationship embodied in the loan agreement that remains with the assigning lender, which lender, in the case of a mere assignment of loan receivables, continues to be the counterparty of the borrower under the loan agreement.

COULD A LENDER BE HELD TO ACT IN BREACH OF A DUTY OF CARE BY SELLING ITS DEFAULTED LOANS (EVEN IF THE TERMS OF THE LOAN AGREEMENT PERMIT THE RELEVANT ASSIGNMENTS OR TRANSFER)?

Over the past few years, Dutch courts have been asked to consider this question a number of times and this point was considered in quite some level of detail in *B&S v Propertize* (ECLI:NL:RBMNE:2016:6718). The loan was sold as part of a non- and sub-performing loan portfolio sale to a purchase vehicle belonging to Goldman Sachs. The Mid-Netherlands District Court ruled that such a sale (and subsequent assignment/ transfer) was not unacceptable on grounds of reasonability and fairness, was not unlawful and did not amount to an abuse of rights on the part of the transferor. The fact that the transferee/assignee may have a different policy towards its borrowers does not change this. It was held that by not meeting its payment obligations under the loan, the borrower (B&S) became exposed to the collection and enforcement measures implemented by its (original) lender and that a lender's strategy in this regard could also include a sale of the relevant loans to a typical purchaser of these kinds of loans.

THE MARGINS OF A LENDERS' DUTY OF CARE WHEN ACCELERATING ITS LOANS AND ENFORCING THE SECURITY

If the buyer of the loans is not a Dutch supervised bank or financial institution and the loans concerned are granted to borrowers that have entered into the relevant loan agreement in the context of their business or profession, the loans fall outside the scope of the Dutch financial supervision act (*Wft*).

If the seller is a Dutch bank, it will, however, usually have applied the General Dutch Banking Conditions (*Algemene Bankvoorwaarden*) to all its loans. Pursuant to Art 2 of these general conditions, banks have a general obligation towards all their customers to exercise due care in providing their services and to take the justified interests of the customer into account as much as possible. If loans are transferred by means of a transfer of contract and these general conditions apply to the relevant loans, the buyer of the loans will become bound by this contractual provision. Arguably, this might not be the case in all respects if the sale has been effected by means of a mere assignment of loan receivables. However, in practice, Dutch selling banks will usually insist on including an undertaking to the effect that the buyer will adhere to Art 2 of the General Dutch Banking Conditions in the loan purchase agreement in any case, regardless of whether the sale was effected by way of a mere assignment. Furthermore, any buyer of Dutch law governed loans will be bound by a duty of care under Dutch civil law, as developed in Dutch caselaw, on the basis of the Dutch legal concepts of contractual reasonableness and fairness (*redelijkheid en billijkheid*, ss 6:2 and 6:248 of the Dutch Civil Code) and unlawful act/ negligence (*onrechtmatige daad*, s 6:162 of the Civil Code). The scope of a lender's civil law duty of care as developed in Dutch caselaw depends on the circumstances of the case, including the degree of expertise and relevant experience of the borrower concerned, the complexity of the loan (possibly coupled with a hedging instrument) and the associated risks, but also on whether or not the borrower is meeting its own obligations under the loan agreement, as well as the seriousness of the defaults, the availability of alternative solutions and the lender's willingness to discuss such solutions with the borrower during a fair period of time (usually around three months) in cases where there is no immediate threat to the lender's right or recourse.

In the most recent judgment in the series of court cases revolving around the Van Lanschot – Promontoria loan sale (ECLI:NL:RBNHO:2018:9754), the North-Holland District Court (judge in summary proceedings) ruled that Promontoria could not proceed with the enforcement sale over properties mortgaged to it as security for one of the loans and first had to use a reasonable period of time to (further) consult with borrowers to see if an alternative solution could be found. The court considered:

- Promontoria's business model, which focuses on making money as quickly as possible through the liquidation of the loans purchased by it and realisation of the security assets provided in relation to the loans;
- that Promontoria is not a supervised financial institution; this led the court to seek a careful assessment of Promontoria's actions;
- that the only default under the loan consisted of two attachments (court orders) over the undivided co-ownership interest of one of the borrowers in the

Biog box

Victor Gielen graduated with honours from the University of Maastricht, the Netherlands. He is an associate at Dutch law firm Van Doorne and works in Van Doorne's real estate finance team, with a particular focus on property loan portfolio sales.

Email: gielen@vandoorne.com

properties mortgaged to Promontoria and these attachments posed no immediate threat to Promontoria's interests;

- that none of the other borrowers and co-owners in the properties mortgaged to Promontoria were in default in spite of the considerable increase in interest (from 1.25% to 6% p.a.) that Promontoria had imposed; there had been no payment defaults in servicing the loan;
- the borrowers being willing to co-operate towards a voluntary sale of the security assets in order to obtain the highest proceeds;
- that Promontoria's attitude showed its preference for speed over revenue; it was understood that since the proceeds of an enforcement sale would be sufficient to pay off the loans, Promontoria had no interest in pursuing any surplus value; nevertheless it still could not sufficiently explain to the court its interest in not providing some extra time for a voluntary sale of the assets as proposed by the borrowers;
- that Promontoria operated too much from a position of power and had not made a real effort to consult with the borrowers on alternative solutions to an enforcement scenario and that this constituted a violation of Art 2 of the General Dutch Banking Conditions (which were applicable to the relevant loan documentation).

Finally, the court pointedly observed that a delay of one year before it could proceed with the enforcement sale would not harm Promontoria's interests as, considering all the ongoing issues and disputes following its purchase of the Van Lanschot loan portfolio, it looked as if it would be quite busy with the management of the portfolio for some time yet and that during the time that Promontoria would now still have to consult with the borrowers, it would continue to receive a considerable interest of 6% on the loans. On this point, the court also observed that the lack of clarity that still existed with respect to the exact legal position of Promontoria as buyer of the loans was in itself not enough to suspend an enforcement sale, but that it was an additional consideration that let it to decide not to allow Promontoria to proceed with enforcement against the borrowers' security assets at that point in time.

In terms of a possible claim in damages for damage and loss suffered by the borrowers/security providers as a result of an enforcement sale of their security assets in a case where a Dutch court would find that the lender had acted in breach of a duty of care in effecting an enforcement sale, the damage suffered by the borrowers/security providers would have to be measured against the most realistic proper alternative scenario that would otherwise have developed. This is not an easy task and very case specific.

It should also be noted that from a Dutch law perspective the situation where a lender accelerates its defaulted loan should be clearly distinguished from cases where the loan has matured and the lender demands repayment of the loan by the agreed maturity date. In that latter case the loan must be repaid and it is up to the lender and the borrower if they wish, to agree to an extension to the loan and, if so, on what terms (Court of Appeal *Arnhem-Leeuwarden*, 05-02-2019 ECLI:NL:GHARL:2019:1062).

CONCLUSION

Under Dutch law the legal regime applicable to the question whether a transfer or assignment of a loan is valid should be clearly distinguished from the relevant rules of law to be applied to determine whether a lender has the right to accelerate its loan and enforce its security.

The first turns on what is essentially a legal technical analysis. The assignment or transfer either meets the Dutch law criteria for a valid assignment of rights or transfer of contract or not. Although the "ethics (or lack thereof)" of selling loans to purchasers such as Promontoria have been considered by Dutch courts in a few cases, this has so far not led a court to conclude that a sale and assignment or transfer of loans itself could lead to a breach of a duty of care on the part of a selling lender. If such loan sales themselves could be held to be in breach of the duty of care, it would become very difficult for banks and financial institutions to cleanse their balance sheets of non- and sub-performing loans, which would be detrimental to the health of the banks and financial institutions, which could ultimately affect the stability of the financial system.

This does not mean that buyers of non- and sub-performing loans can do what they like. Although the Dutch legal system is relatively lender friendly and the importance of lenders being able to accelerate their loans and have access to quick enforcement proceedings is recognised, the Dutch courts will intervene if it is felt that a lender's course of action is disproportionate, especially where the defaults that occurred are minor and where, provided these do not impose an immediate threat to the lender's own rights or recourse, the lender did not first take a reasonable period of a few months to consult with the borrower towards achieving an alternative solution in order to allow the borrower to refinance or repay the loan through a voluntary sell down of its secured assets. ■

Further reading:

- Bankers' oaths or being nicer chaps: Banking reform in the Netherlands and the UK compared (2014) 6 JIBFL 383.
- The new breed of transfer restrictions in leveraged lending transactions: a new paradigm or just a sign of the times? (2018) 4 JIBFL 222.
- LexisPSL: Banking & Finance: Key issues in loan transfers.