International Briefings

The Netherlands

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SUBMISSION AND WITHDRAWAL OF A 403-STATEMENT

It is quite common for a Netherlands parent company – the parent in most cases being a public limited liability company (*naamloze vennootschap*, N.V.) – to assume joint and several liability for obligations arising from legal acts of a subsidiary – the subsidiary in most cases being a private limited liability (*besloten vennootschap*, B.V.) – by submitting a so-called 403-statement with respect to the subsidiary with the trade register of the Chamber of Commerce. The 403-statement is intended to provide comfort to a counterparty of the group company that is considering entering into an agreement or transaction with the group company. The agreement may be a plain vanilla loan agreement but also a master agreement for financial transactions such as an ISDA Master Agreement or a GMRA or GMSLA.

Problems may arise when the parent company withdraws its 403-statement and/or wishes to terminate its residual liability thereunder. The withdrawal on 2 June 2017 by Shell Nederland B.V. (Shell) of its 403-statement with respect to its subsidiary Nederlandse Aardolie Maatschappij B.V. (NAM), a company engaged in fracking gas in the province of Groningen and allegedly responsible for the earthquakes that occurred in that province, raised concern among the public, when the withdrawal was revealed in the media in January 2018, that Shell was trying to avoid liability for damage caused by these earthquakes. In light of the public commotion, Shell felt obliged to issue a press release stating that it is, and has always been, its intention to compensate for all damage caused by the earthquakes. On 31 March 2017, the Netherlands Supreme Court (*Hoge Raad*) handed down a landmark judgment in a case in which SNS Bank and SNS Reaal wished to terminate their residual 403-liability with respect to two former subsidiaries but were confronted with creditors of the former subsidiaries opposing this move. The judgment was published in the national case reports (*NJ*) on 3 February 2018 (HR 31 March 2017, NJ 2018, 26). These examples provide sufficient reasons therefore to devote this International Briefing to the 403-statement.

BACKGROUND OF A 403-STATEMENT

Under Netherlands law, in principle, each company has a duty to publish financial statements annually. Section 2:403 of the Netherlands Civil Code (NCC) contains an exemption from this publication requirement for a legal person which forms part of a group provided certain conditions are met. One of these conditions is that the parent company that consolidates the financial figures of the relevant group company in its own annual accounts, has to issue a statement whereby it "has declared in writing that it assumes joint and several liability for any obligations arising from the legal acts of the legal person", as stated in s 2:403, para 1, sub f NCC.

From the legislative history of the provision it appears that the reasoning behind this condition is that creditors doing business with the group company are thus protected against a lack of insight into its financial position. The exemption does not release the group company from drawing up a simplified balance sheet showing the sum of the company's fixed assets, the sum of its current assets and the amount of its own funds, its provisions and obligations and a simplified profit-and-loss account showing the company's figures resulting from its ordinary course of business and the balance of its benefits and expenses after tax (s 2:403, para 1, sub a NCC).

The advantage of a 403-statement over a traditional guarantee is that a traditional guarantee would have to be provided to each creditor separately, whereas a 403-statement is submitted with the trade register of the Chamber of Commerce and is thus publicly available and granted to all creditors of the group company together.

SCOPE AND INTERPRETATION

It follows from the text of s 2:403, para 1, sub f NCC that the liability of a consolidating parent company on the basis of a 403-statement is limited to obligations arising from legal acts only (which is held to include claims for damages arising from breach of contract). The liability mentioned does not extend to claims on other grounds such as claims arising from tort. Claims based on tort or claims for damages that fall outside the scope of breach of contract cannot be awarded on the basis of a 403-statement. Going back to the 403-statement originally submitted by Shell with respect to NAM and later withdrawn: this 403-statement would not have covered any direct liability for damage caused by the Groningen earthquakes; however, it might have covered liability resulting from possible out-of-court settlements on compensation concluded between NAM and victims of the earthquakes. The Netherlands Supreme Court has ruled that a creditor does not derive any rights directly from the provision in s 2:403, para 1, sub f NCC, but only from the actual statement published (HR 28 June 2002, JOR 2002/136). That implies that in order to determine whether a claim is covered by a 403-statement it comes down to the interpretation of the 403-statement.

PRIMARY OR SECONDARY OBLIGATION?

In principle, s 2:403, para 1, sub f NCC provides for joint and several liability, thus allowing a creditor to not only claim from its contractual counterparty but to also claim directly from the parent company. The Netherlands Supreme Court has ruled (HR 28 June 2002, JOR

International Briefings

2002/136) that a 403-statement does not constitute a secondary liability only – an undertaking to pay a debt in case another does not – but provides for an arrangement under which both the parent company and the group company for whose debts the parent company is assuming legal responsibility, are primarily liable. From case law it appears, however, that a creditor is not always free to choose whether to claim from its contractual counterparty or from the parent company. The creditor may be obliged, on grounds of reasonableness and fairness, to claim from its contractual counterparty first.

WITHDRAWAL

Pursuant to s 2:404 para 1 NCC, a 403-statement may be withdrawn by the parent company by submitting a statement to that effect with the trade register of the Chamber of Commerce. The consequence is that the parent company will not be liable for debts resulting from legal acts entered into after the day on which the statement of withdrawal was submitted with the Chamber of Commerce or after a later date if a later date was mentioned in the statement of withdrawal. However, pursuant to s 2:404 para 2 NCC, the parent company remains liable in respect of obligations resulting from legal acts entered into before the effective date of the withdrawal.

With respect to a master agreement for financial transactions, such as an ISDA Master Agreement or a GMRA or GMSLA, the scope of the liability resulting from a 403-statement will depend on how transactions concluded under the master agreement, are to be characterised. If these transactions are to be viewed as independent agreements that come into effect at the time the transactions are concluded, the parent company will not be liable for obligations under transactions concluded by the subsidiary after the withdrawal of the 403-statement. If, however, these transactions are to be characterised as forming a single agreement together with the master agreement and all other transactions, and to the extent that, because of this contractual structure, obligations resulting from one transaction cannot be legally separated from those resulting from other transactions, there are two different approaches possible. Under the first approach, newly concluded transactions are viewed as arising from the master agreement and, in effect, as dating back to the date of its conclusion, in which case the parent company would not only be liable for obligations under transactions entered into by the subsidiary prior to the withdrawal of the 403-statement, but also for those under transactions entered into by the subsidiary after such withdrawal. Under the second approach, the conclusion of a new transaction is viewed as supplementing the existing master agreement and, in effect, causing it to be "reborn". Under that approach, the parent company would only be liable for transactions pursuant to the master agreement, entered into by the subsidiary before the withdrawal of the 403-statement.

From a Netherlands private international law perspective, it is primarily the law governing the master agreement, ie English law or New York law in the case of an ISDA Master Agreement and English law in the case of a GMRA or GMSLA, that will determine:

- whether a transaction under a master agreement should, for the purpose of the question at hand, be characterised as a separate agreement or as an integrated part of the master agreement and, in the latter case;
- whether the conclusion of a transaction should be deemed to "date back" to the date of entry into the master agreement or whether the conclusion of a transaction should be deemed to bring forward the date of the master agreement to the date of the transaction.

Under Netherlands law, there is no case law or literature on this specific issue.

TERMINATION OF RESIDUAL LIABILITY

Pursuant to s 2:404 para 3 NCC the residual liability referred to above will cease if the following conditions are satisfied:

- the legal person no longer forms part of the group;
- a notice of the intention to terminate the residual liability has been available for inspection for at least two months at the trade register at which the legal person is registered;
- at least two months have elapsed since publication in a daily newspaper with a national circulation of a notice that such information is available for inspection and where it may be inspected; and
- a creditor has not in good time opposed the intention or his opposition is withdrawn or declared unfounded by an irrevocable court decision.

As may appear from these conditions, it is not possible for the parent company to terminate the residual liability as long as the company for whose debts the parent company is assuming legal responsibility, forms part of the group.

Creditors are protected against their position being adversely affected by a termination of residual liability. If a creditor so demands, the parent company is obliged to provide adequate security to the creditor or provide it with other safeguards for the fulfilment of the parent company's existing obligations towards the creditor, failing which the opposition referred to below will be upheld in court. This obligation will not apply if it is clear that after termination of the residual liability the creditor will have sufficient security that the claims will be satisfied, having regard to the financial condition of the group company or for other reasons (s 2:404 para 4 NCC). Within two months after publication of a public notice as referred to above a creditor may oppose the intention to terminate the residual liability by filing a petition with the district court in the district where the subsidiary has its principal place of business. (s 2:404 paras 5 and 6 NCC).

On 31 March 2017, the Netherlands Supreme Court handed down judgment in a case in which SNS Bank and SNS Reaal wished to terminate their residual 403-liability with respect to two former subsidiaries but were confronted with creditors of these former subsidiaries opposing this intention (HR 31 March 2017, NJ 2018, 26). The claims of these creditors were disputed by SNS Bank and SNS Reaal. The Supreme Court ruled that in a situation where the claim of a creditor is being disputed or uncertain, a court must uphold the creditors' opposition, unless the court considers the claim to be unmistakably unfounded (*onmiskenbaar ongegrond*). The rationale behind this decision is that a counterparty, when entering into an agreement or a transaction with a subsidiary, may have relied on the 403-statement of the parent company and should not be worse off as result of a termination of residual liability. ■