

Judgment by Hoge Raad (Dutch Supreme Court) 14 January 2011 - Aukema qq vs Uni-Invest BV

On 14 January 2011 the Dutch Supreme Court rendered a judgment in a case involving the early termination by the trustee (*curator*) of the tenant of a rental agreement in respect of an office building on the basis of section 39 of the Dutch Bankruptcy Act (DBA). The landlord claimed damages including the rental payments for the remainder of the rental period on the basis of what was agreed in the rental agreement. It was held that such a claim for damages was not allowed in case of a termination on the basis of section 39 DBA. The Supreme court distinguished this matter from a claim for damages in case of a rescission (*ontbinding*) of a rental agreement by the landlord. Reference was made to another judgment by the Dutch Supreme Court (HR 13 May 2005, JOR 2005/222, m.nt. Van AnDEL)."

The facts of this case are as follows.

- Uni-Invest B.V. ("**Uni-Invest**") rented an office building to Info Opleiders B.V. ("**Info**"), with effect from 1 May 1998, pursuant to a written agreement (the "**Rental Agreement**").
- The Rental Agreement would expire on 31 December 2006.
- The obligations of Info pursuant to the Rental Agreement were secured by a bank guarantee dated 14 August 2002 (the "**Bank guarantee**") issued on Info's instructions by ING Bank N.V. for the benefit of Uni-Invest.
- On 9 April 2003, Info was declared bankrupt and the trustee (*curator*) in Info's bankruptcy terminated the Rental Agreement against the first possible date with due observance of a statutory notice period of 3 months on the basis of section 39 Dutch Bankruptcy Act ("**DBA**").
- Pursuant to what was agreed between Info and Uni-Invest in the Rental Agreement (more specifically pursuant to article 7.3 of the "*Algemene bepalingen huurovereenkomst kantooruimte volgens het ROZ-Model 1996*"), Uni-Invest claimed damages from Info resulting from the early termination of the Rental Agreement. The bulk of the amount claimed related to rental payments from the date of termination until the agreed expiry date of the Rental Agreement. At the same time Uni-Invest filed a claim with ING Bank under the Bank guarantee, which ING Bank paid on or around 16 December 2003.
- On 3 December 2004, the trustee (*curator*) initiated proceedings before the district court of The Hague (*sector canton*) to claim repayment from Uni-Invest of the amount paid to it under the Bank guarantee. The claim of the trustee (*curator*) was based on a number of arguments, the most important of which, for the purpose of this client briefing, was as follows. Article 39 DBA stands in the way of a claim for damages based on foregone rent payments relating to the period from termination of the Rental Agreement until the agreed expiry date. As Uni-Invest was not entitled to claim such damages relating to foregone rental payments from Info, it was also not entitled (in the view of the trustee (*curator*)) to make a corresponding claim under the Bank guarantee.

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- In first instance the district court (*sector canton*) held in favour of the trustee (*curator*). The court of appeal of The Hague held in favour of Uni-Invest and overturned the judgment of the district court (*sector canton*). The trustee (*curator*) appealed in highest instance to the Dutch Supreme Court (*Hoge Raad*) which held in favour of the trustee (*curator*), following his reading of section 39 DBA with an unconvincing appeal on the legislative history in respect of the DBA; unconvincing since the DBA was first enacted in 1895 and any circumstances which might have been existing then are certainly not bound to exist in the same way more than a century later.
- The Dutch Supreme Court also held that its present judgment (and other, earlier ones) does not deviate from its judgment of 13 May 2005 (NJ 2005/406; JOR 2005/222, m.nt. Van Andel). In the last mentioned judgment the Dutch Supreme Court held that section 39 DBA (and the similar provision (section 238 DBA) applicable to moratorium (*surseance van betaling*)) does not prohibit a clause in a rental agreement, in addition to the arrangements set out in the law, whereby (a) the landlord (*verhuurder*) is afforded the contractual possibility to rescind (*ontbinden*) the rental agreement for the future in case of the tenant's moratorium/bankruptcy, and (b) the landlord is entitled to claim damages in relation to such rescission by the landlord (as opposed to a termination by the trustee (*curator*) pursuant to section 39/238 DBA), also for the foregone rental payments until the end of the agreed rental period.
- The judgment of the Dutch Supreme Court has attracted some attention in the Dutch press given the consequences for the validity of pre-agreed damages in case of early termination of a rental agreement and the impact thereof on the landlord's possibility to claim the amount of such damages under a bank guarantee issued by the tenant's bank.
- Indeed it follows from the judgment of the Dutch Supreme Court that in case of a termination of a rental agreement pursuant to section 39/238 DBA, the landlord will be entitled to at most three months of rental payments. The claim of the landlord in this respect is, however, an estate claim (*boedelvordering*) and as such enjoys high priority.
- Other types of transactions that could (potentially) be affected by the judgment referred to in this client briefing, are rental agreements in respect of other goods (than real estate), operational lease agreements (which for Dutch legal purposes could be considered to be the same as rental agreements), certain types of securitisations and certain defeasance transactions.
- Where it is important for a landlord (or, potentially, an operational lessor) and/or its financier that in case of an early termination/rescission of the rental agreement/operational lease agreement, it can successfully claim damages in respect of all remaining rental payments/lease instalments, we feel that a solution of the potential problems created by the judgment of the Dutch Supreme Court should be sought in the distinction which is made by the Dutch Supreme Court between a termination by the trustee (*curator*) of the tenant or by the landlord on the basis of section 39/238 DBA and a rescission of the relevant rental agreement/operational lease agreement by the landlord/lessor on the basis of a contractual stipulation affording him such right to rescind. ■

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