

Credit claim as a new form of financial collateral in Poland

The act implementing Directive 2009/44/EC (the "**Directive**") which amends, among others, the Certain Financial Collateral Law (the "**Amendment Act**") was enacted on 27 January 2012. The Amendment Act introduces a new category of assets that can constitute financial collateral – credit claims.

The Amendment Act came into force on 2 March 2012.

Under the law in force before 2 March 2012, only cash and financial instruments could constitute financial collateral. The fundamental amendment provided for in the Amendment Act is to expand the list of assets that may constitute financial collateral by adding credit claims to that list. The financial collateral arrangements in respect of credit claims may involve both a transfer and a financial pledge over a credit claim.

Key issues

- Credit claim
- Debtor of the credit claim – several issues
- List of claims
- Satisfaction of financial collateral in the form of a credit claim
- Summary

Credit claim

The Amendment Act defines the term "credit claim" as a **pecuniary claim arising under an agreement in which a specific institution authorised to grant credit facilities has granted a credit facility or a loan**. The institutions authorised to grant credit facilities are mentioned in the Certain Financial Collateral Law¹, and the list includes all entities with such authority under the law of any Member State of the European Union or European Economic Area, i.e. banks (both Polish and foreign), credit institutions, branches of foreign banks and cooperative savings and credit societies (*spółdzielcze kasy oszczędnościowo-kredytowe*).

Contrary to the literal wording, not only a pecuniary claim originating from/under/in respect of a credit facility², but also from a loan³ will be considered a credit claim within the meaning of the Amendment Act.

However, as a rule, it will not be possible to establish financial collateral over a credit claim where the debtor is a consumer under a consumer credit agreement. The Directive permits the Member States to provide for such an exception.

¹ By reference to the authorisation for such institution resulting from: (a) the Banking Law; (b) the Act on Cooperative Savings and Credit Societies (*spółdzielcze kasy oszczędnościowo-kredytowe*); (c) provisions of law of the European Union Member States; and (d) the provisions of law of the European Economic Area states.

² In the meaning of the Banking Law.

³ In the meaning of the Civil Code.

Debtor of the credit claim – several issues

A basic Polish regulation in relation to the transfer of claims is the right of the debtor of the transferred claim to set off the transferred claim and the debtor's claim against the transferor, provided that the debtor's claim did not become due and payable later than the transferred claim. For this reason, under the Amendment Act, it is possible for the debtor to exercise its right to set off the transferred credit claim vis-à-vis: (a) a claim that is vested in the debtor against the collateral provider and/or (b) a claim that is vested in or could be vested in the debtor against the collateral taker. However, such a situation could adversely affect the interests of the collateral taker if the debtor exercised its right of set-off. Therefore, pursuant to the Directive, the Amendment Act provides that the debtor may waive this right. The question remains whether in practice a debtor will be willing to grant such a waiver.

As collateral may be established on credit claims, the matter of banking secrecy arises. Clearly, the collateral taker will be very interested in the identity of the debtor of the credit claim because it indirectly affects the value of the collateral. The requirement to observe banking secrecy, which under the Banking Law applies to all information on banking activities that is obtained during negotiations and the conclusion and performance of the agreement on the basis of which the bank carries out that activity, could be a serious obstacle when using this form of collateral. Consequently, the Banking Law requires that the debtor of a credit claim should give its prior consent to the disclosure of information that constitutes banking

secrecy to the collateral taker for the purpose of the credit claims being used as financial collateral. Such consent should be given in writing. However, the Amendment Act does not state whether such consent may be given as blanket consent, or whether it must refer to the specific entity being the collateral taker, which could become problematic in practice when establishing financial collateral.

The terms of the agreement for the establishment of financial collateral in the form of a credit claim, in particular those terms concerning the method by which the debtor of the credit claim is to settle the performances due, will be effective vis-a-vis the debtor if the information was provided to the debtor in writing.

List of claims

In order for a credit claim to be valid and effective financial collateral, a **list of claims** will be required, i.e. a written document indicating the claims forming the collateral and containing the necessary information for identifying the credit claims that constitute collateral, including:

- the parties to the credit facility/loan agreement;
- the form of the agreement;
- the date and place of conclusion of the agreement; and
- the value of the credit claim at the time the collateral is established.

Satisfaction of financial collateral in the form of a credit claim

Satisfaction of financial collateral in the form of a credit claim takes place on the same terms as satisfaction of other collateral, but with certain

exceptions. Primarily, in the case of a financial pledge over a credit claim, the pledgee has no "right of use", i.e. it is not entitled to exercise rights to the collateral. This is because credit claims are not convertible, so it would be difficult to replace such claims with different, equivalent collateral. However, the pledgee does have the right to collect the performances arising under the credit facility or loan agreement, including the right to collect benefits.

Summary

The following documents are required in order to establish financial collateral in the form of a credit claim:

- an agreement to establish financial collateral;
- a list of credit claims;
- the consent of the debtor of the credit claim to the disclosure of information which consists of banking secrecy to the collateral taker;
- information as to whether the debtor of the credit claim has waived its right to set off its claim from the collateral provider against the credit claim; and
- information as to whether the debtor of the credit claim has undertaken not to exercise its right to set off against the credit claim any claims it has or will have in future from the collateral taker.

It is worth noting that both the collateral taker and the collateral provider of the credit claim will be professional entities (e.g. banks); therefore in our opinion this form of collateral could assist such entities to secure their mutual claims.

Furthermore, financial collateral in the form of a credit claim may be used as an instrument to secure commercial banks' liabilities to the National Bank of Poland in respect of financing made available to such banks by the NBP.

The introduction of a credit claim as a new form of financial collateral could have a positive effect on the market of interbank operations by increasing the number of such operations, while at the same time increasing the liquidity of the financial market.

In our opinion, the entities which may potentially grant financial collateral over credit claims should consider amending the following in accordance with the additional clauses mentioned above (i.e. statements on the set-off, consent to disclose banking secrecy etc.): (i) procedures in relation to the granting of credit facilities and loans and (ii) documentation for a client-borrower. In the future, this would enable or at least significantly facilitate the utilisation of this financial collateral when securing financial claims. In practice, this task may turn out to be difficult because of the uncertainties in relation to the interpretation, as indicated above, concerning the content and scope of the debtor's declarations.

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