

FAMED CASE: WHAT IS THE IMPORTANCE OF THE DUTCH HOGE RAAD JUDGMENT?

For several decades the question whether or not – and to what extent – future claims can be used as collateral in financing transactions has been a topic of discussion in the Netherlands. Although this discussion shall continue to be held in the coming years, the Famed case is to be welcomed because it further reduces the uncertain status of claims arising from medical services contracts as future receivables. In this client briefing we explain the importance of this judgment for the Dutch finance, factoring, securitisation and restructuring practices.

For the insolvency treatment of assignments and pledges of future claims, article 35 of the Bankruptcy Act (*Faillissementswet* or *Fw*) raises two fundamental questions:

1. Was the assignment or pledge completed before the date on which the assignor or pledgor was declared insolvent (the "insolvency date")?
2. Did claims which were assigned or pledged as future claims become existing ones before the insolvency date?

Question 1 (art. 35(1) Fw)

As a matter of Dutch property law, future claims can be assigned and pledged on a disclosed basis, provided that their debtors are already known (so that they can be notified).ⁱ Alternatively, they can be made subject to an undisclosed assignment or pledge, to the extent that such future claims result directly from a legal relationship (usually a contract) which is in existence at the time of the assignment or pledge. In addition, an undisclosed assignment or pledge requires that the deed of assignment or pledge is registered with the tax authorities or is executed in notarial form.ⁱⁱ Where notification or registration/notarisation has not yet taken place before the insolvency date, the assignment or pledge will be ineffective.

Question 2 (art. 35(2) Fw)

Even where the deed of assignment or pledge has been validly executed and (in the case of undisclosed assignments and pledges) the claims will arise from pre-insolvency contracts, claims coming into existence *on* or *after* the

Good-to-know

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- Although the Famed case has further reduced the unmapped territory, some blank spaces remain. For several types of claim it has not yet been decided by the Hoge Raad whether or not they are future claims.

insolvency date will not be transferred or encumbered with a right of pledge. It is therefore of crucial importance to determine whether claims will be deemed to exist at the insolvency date or whether at that time they will still be "future" claims. The Famed-case is concerned with this issue.

A BRIEF HISTORY OF LAW

Under the regime of the former Civil Code, originally only existing claims could be assigned or pledged. The Hoge Raad (Dutch supreme court) mitigated the adverse practical effects of this by ruling that claims which had their 'immediate foundation' (*onmiddellijke grondslag*) in pre-existing relationships must be deemed to exist.ⁱⁱⁱ Many decades later (1980) the Hoge Raad decided that, in addition, future claims could be assigned.^{iv} Accordingly, it was no longer necessary to employ the 'immediate foundation fiction'. This may have caused the Hoge Raad to rule in 1982 (SOS/ABN) that the mere fact that claims are based on pre-existing legal relationships does *not* entail that they must be deemed to exist.^v This marked the beginning of a new era of great uncertainty, in which it could often not be determined with certainty whether claims were existing or future ones. In the past 35 years the Hoge Raad has gradually reduced this uncertainty.

DECIDED CASES 1980 – 2015

During this period the Hoge Raad has given several rulings on the present or future nature of various claims:

- Claims arising under rental agreements (*huurovereenkomsten*), including *lease instalments* under operational leases, are future claims, in the sense that they only come into existence after the landlord/lessor has actually provided the tenant/lessee with the quiet enjoyment of the object during the period to which each relevant instalment relates.^{vi} This means that, generally, claims corresponding with rentals which will be due and payable after the assignor/pledgor has been declared insolvent will not be subject to the assignment or pledge.
- Claims arising in tort (*onrechtmatige daad*) only arise when damage has been suffered, even when the unlawful act has taken place earlier.^{vii}
- Claims under a penalty clause only arise upon breach of contract.^{viii}
- Claims for restitution of performances made under contract which have been terminated only arise upon termination.^{ix}

With regard to the moment of origin of *recourse claims* arising between joint-and-several debtors, the Hoge Raad has followed a rather complex course. In 2004, the Hoge Raad appeared to decide that recourse claims between joint-and-several debtors under a security surplus arrangement (*overwaarde-arrangement*) were existing conditional claims.^x This situation changed, however, in 2012 due to a Hoge Raad ruling (ASR/Achmea), whereby it was decided that statutory recourse claims – contrary to prevailing views in Dutch legal literature at that time – are future claims and only come into existence after the debtor or surety has paid its obligations vis-à-vis the creditor.^{xi} In 2015, the Hoge Raad mitigated the practical consequences of its ASR/Achmea decision. The Hoge Raad ruled in *De Lage Landen/van Logtestijn q.q.* that parties can validly stipulate that a *contractual* recourse claim will come into existence from the moment of the entering into by all

parties of the security surplus arrangement.^{xii} It was also confirmed in this ruling that *statutory* recourse claims only come into existence after the debtor or surety has paid its obligations vis-à-vis the creditor.

CASE LAW: RULES OF THUMB

As yet, no generally accepted rule can be distilled from case law that can be used to determine with certainty whether a claim is an existing claim or a future claim. If the claim arises on the occurrence of future events which are certain to occur, then in most circumstances it is likely to be an existing claim (payable when that event occurs). If the claim arises on the occurrence of future events which are uncertain to occur, then the Dutch courts would look at the nature of the agreement (and the relevant statutory rules that apply to such agreement) and the intention of the parties. The more that the parties (i.e. creditor and/or debtor) can influence the occurrence (or non-occurrence) of the future event on which the claim depends, the more likely it is that such claim is a future claim.

In addition, the following rules of thumb may be extracted from the decided cases:

- A claim which is due and payable is an existing claim.
- Claims which are not yet due and payable can either be existing claims subject to a condition precedent or time specification (e.g. periodic payments) or future claims.
- The mere fact that the extent of a claim is not yet certain, does not prevent it from being an existing claim.
- If the claim is not (yet) due and payable, but merely depends on the lapse of time, then it is likely to be an existing claim (which will in time become payable).

FAMED CASE

Facts

In short, the facts were as follows. Better Life B.V. ('Better Life') was a health care institution for children and young adults with Asperger's and certain other syndromes. Famed B.V. ('Famed') is a factoring company which specialises in invoicing on behalf of health care institutions, pre-financing these invoices and offering general credit management services. Better Life made use of Famed's services since October 2011. In the contract between them, Better Life had granted a right of pledge (*pandrecht*) over all of its (present and future) claims (*vorderingen*) on its debtors, in order to secure Better Life's indebtedness (to repay loans or otherwise) to Famed. On 12 March 2013, Better Life was declared bankrupt. At the time of the bankruptcy judgment Better Life owed Famed EUR 2,383,691. Two weeks earlier Famed had sent letters to certain health care insurers informing them that Better Life had pledged its insurance claims to Famed. The amount of these claims corresponded with an amount of EUR 885.989 for medical services rendered by Better Life. This amount had been transferred to an escrow account (designated by Better Life's bankruptcy liquidator and Famed), after it had been invoiced and received by Famed in accordance with the so-called 'DBC-Arrangement' (see below). The question of law which the Hoge Raad had to answer was whether Famed had acquired

a right of pledge on Better Life's claims for 'work in progress' (EUR 885.989). This work in progress consisted of (the value of) the medical treatments which Better Life had commenced (but not completed) prior to its bankruptcy, and which had not yet been invoiced with the health care insurers at the time it was declared bankrupt.

'DBC-arrangement'

The claims which Better Life had pledged to Famed had arisen within the framework of a so-called Diagnosis Treatment Combination (*Diagnose Behandeling Combinatie* or *DBC*). Since the enactment of the Health Care Act (*Zorgverzekeringswet*) in 2006, medical treatment in the Netherlands takes place pursuant to a group of connected contracts. In case of a so-called 'restitution insurance' (which was in dispute) these contracts are:

- a medical treatment contract between patient and health care provider;
- a restitution insurance between patient and health care insurer; and
- a 'payment agreement' (*betaalovereenkomst*) between health care insurer and health care provider.

Pursuant to the payment agreements, health care insurers will directly reimburse health care providers for the costs of medical treatment of the patient concerned. The WMG-Act (*Wet marktordening gezondheidszorg*) grants statutory powers to the D(utch) C(are) A(uthority) (*Zorgautoriteit*) to issue regulations concerning the conditions under which the costs (the so-called 'tariffs') of medical treatment can be charged and to establish the rates of these tariffs. Pursuant to regulations issued by the DCA the costs of medical care can only be declared after the 'DBC-trajectory' has fully run and is closed. On this basis the appellate court decided that Better Life's claims on a health care insurer would only come into existence after the medical treatment had been fully completed and the 'DBC' had been finalised. In respect of claims for work in progress, this entailed that they had not yet come into existence at the time Better Life was declared bankrupt and that they were therefore *not* charged with a right of pledge in favour of Famed.

Claims subject to Famed's right of pledge

As will appear below, the central part of the Hoge Raad's judgment is concerned with the moment of origin of claims arising under a contract for medical treatment between a health care provider and a patient. However, the claims over which Famed alleged to have a right of pledge were not Better Life's claims against its patients, but its claims against the health care insurers pursuant to the payment agreements. In the payment agreements, health care insurers agree to pay the medical fees directly to the health care providers. The Hoge Raad considered that usually this constitutes a payment by a third party (in the sense of article 6:30 BW). The Hoge Raad's considerations on the moment of origin of claims arising under contracts for medical treatment are therefore also decisive for the moment of origin of the (pledged) claims under the payment agreements.

Claims arising under contracts for services generally

The Hoge Raad came to a completely different conclusion than the appellate court. The Hoge Raad observed that the contract for medical treatment as

defined in article 7:466 BW is a *species* of the general contract of instruction (*opdracht*) defined in article 7:400 BW. For the latter type of contract the Civil Code does not provide a general rule determining at which moment fees are owed (and the corresponding claims come into existence). It follows from the nature of this contract, however, that – unless the parties have agreed otherwise – claims for the payment of fees come into existence after the agreed activities have been carried out. Where such contracts include activities that are to be performed for a longer period of time, or relate to activities consisting of several components, this may entail that claims for fees come into existence intermediately, that is before the instruction is completely carried out.

This is not to say that there cannot be cases where fees are only owed when the activities of the service provider have fully realised the contract's purposes. For instance, generally fees will only have to be paid to a real estate broker or a securities broker when the envisaged contracts of sale are concluded. But this is not a general rule.

Claims arising under contracts for medical treatment

The Hoge Raad considered that for the contract for medical treatment (*geneeskundige behandelingsovereenkomst*) the Civil Code does not provide a general rule determining at which moment fees are owed. On the basis of the legislative history it must be concluded that the legislator did not want to either provide such a general rule or rule out that, in case of protracted medical treatment, fees are owed intermediately. Given the legislative history and the nature of the contract for medical treatment, a reasonable interpretation of article 7:466 BW entails (according to the Hoge Raad) that during the term of the contract separate claims may come into existence, each time upon a partial performance being completed. This will be the case where within the framework of the contract several partial performances can be identified, which can be expressed in monetary terms. The fact that the medical treatment takes place subject to DBC regulations does *not* prevent that – during the medical treatment – claims for fees will arise intermediately. The DBC regulations determine, in particular, the rate and the method of invoicing the tariffs of medical performances, but do not influence the moment of origin of the corresponding claims. Statutory tariff schemes have a different role to play. Where they distinguish separate tariffs for certain kinds of activities, this may lead to the conclusion that one is dealing with partial performances expressed in monetary terms.

'NON-PARTIAL' PERFORMANCES: UNJUSTIFIED ENRICHMENT

In another recent judgment (HR 2 December 2016) the Hoge Raad dealt with a case where an insolvent debtor (a building contractor), before he was declared bankrupt, rendered a performance (building activities) which could *not* be characterised as a partial performance corresponding with a separate contractual claim on his counterparty.^{xiii} The Hoge Raad ruled that such debtor may nevertheless have a claim based on unjustified enrichment (article 6:212 BW) against his contractual counterparty. Such claim could – depending on the moment of its origin – be covered by a pledge of claims granted to the debtor's financier.^{xiv}

UNCHARTED TERRITORY

Although the Famed case has further reduced the unmapped territory, some blank spaces remain. For several types of claim it has not yet been decided by the Hoge Raad whether or not they are future claims.

The Hoge Raad has not yet decided whether *insurance* claims are existing conditional claims or whether they are future claims which only come into existence once the insured event occurs. *Term insurances* (*sommenverzekeringen*) are likely to generate existing claims, in so far as they relate to capital already built up. In respect of *indemnity insurances* (*schadeverzekeringen*), it is very likely that the claim against the insurer only comes into existence if and when the damage materialises. Accordingly, there is a risk that when insured events occur after the relevant assignor or pledgor has been declared insolvent, the corresponding insurance claims will not be subject to a right of pledge. For secured creditors the negative effects of this risk are considerably reduced by article 3:229 BW, pursuant to which a pledge or a mortgage over tangible assets includes a pledge on all claims for compensatory damages and insurance that have to be regarded as a substitution for the encumbered property itself, including claims resulting from a depreciation of the value of that property. This right of pledge arises by operation of law and irrespective of whether the relevant pledgor is bankrupt when the insured event occurs.

Scheduled (re)payment instalments (but not necessarily interest payments) under a fully drawn loan and under a hire purchase contract, may be considered to be existing claims. Claims in respect of future *interest* periods are likely to qualify as future claims. However, in certain cases (e.g. fixed term deposits) parties may be able to agree that the claims will come into existence *ab initio*, but will only be payable periodically.

CAN CONTRACTING PARTIES DETERMINE THE MOMENT OF ORIGIN?

In the Famed case, the Hoge Raad considers that the parties can agree that, rather than upon completion of a partial performance, the claims shall only arise upon full completion. But can the parties also effectively agree that claims which objectively speaking would arise in the future (e.g. upon partial or full performance) arise immediately upon conclusion of the contract? In *De Lage Landen/van Logtestijn q.q.*, the Hoge Raad ruled that parties can effectively stipulate that a contractual recourse claim will come into existence from the moment of the entering into by all parties of the security surplus arrangement.^{xv} This would support a positive answer to our question. On the other hand, in her conclusion for the Famed case, the Advocate-General observed that the 'restrictive course' followed by the Hoge Raad in respect of the moment of origin of claims is said to be connected with a deliberate policy in favour of the bankrupt estate, and thus serves to protect the other creditors of the assignor or pledgor. Although this 'policy' has never been expressly endorsed by the Hoge Raad, at present it would be safe to assume that there are certain limitations on the parties' freedom to determine the moment of origin themselves.

CONCLUSION

The Famed case brings clarity as to whether claims arising under medical treatment contracts are future or existing claims. The same could apply to other long-term contracts, such as construction contracts or asset management contracts. Depending on the nature of the contract, separate monetary claims may come into existence each time a partial performance under the contract is completed. Such existing claims can – during the term of the contract, and not only upon its completion – effectively be used as collateral or as the object of factoring and securitisation transactions. Even though the Famed case is to be considered positive for the finance practice, it should be noted that parties may agree that claims will only come into existence upon completion of the long-term contract. In that case the claims cannot be effectively assigned or pledged prior to the completion of the contract.

CONTACTS



Jelle Hofland
Partner

T + +31 20 711 9256
E jelle.hofland
@cliffordchance.com



Ilse van Gasteren
Counsel

T +31 20 711 9272
E ilse.vangasteren
@cliffordchance.com



Rick Verhagen
Senior advisor

T +31 20 711 9290
E rick.verhagen
@cliffordchance.com



Dennis Faber
Senior advisor

T +31 20 711 9373
E dennis.faber
@cliffordchance.com



Guido Bergervoet
Associate

T +31 20 711 9534
E guido.bergervoet
@cliffordchance.com



Katelijne Ribbink
Transaction manager

T +31 20 711 9560
E katelijne.ribbink
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Droogbak 1A, 1013 GE
Amsterdam, PO Box 251, 1000 AG
Amsterdam

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- i Art. 3:94(1) BW; art. 3:237 BW.
- ii Art. 3:94(3) BW; art. 3:239(1) BW.
- iii HR 25 February 1932, NJ 1932/301 (Ontvanger/Schermer); HR 29 December 1933, NJ 1934/343 (Fijn van Draat q.q./Credietmaatschappij de Nederlanden)
- iv HR 24 October 1980, NJ 1981/265 (Solleveld II)
- v HR 26 March 1982, NJ 1982/615 (SOS/ABN).
- vi HR 30 January 1987, NJ 1987/530 (WUH/Emmerig)
- vii HR 24 May 1991, NJ 1992/246 (Ontvanger/ABN AMRO)
- viii HR 5 January 1990, NJ 1990/325 (Dubbeld/Laman)
- ix HR 3 December 2010, NJ 2010/653 (ING/Nederend q.q.)
- x HR 9 July 2004, NJ 2004, 618 (Bannenberq q.q./NMB Heller)
- xi HR 6 April 2012, JOR 2014/172 (ASR/Achmea).
- xii HR 16 October 2015, JOR 2016/20 (De Lage Landen/Logtestijn q.q.)
- xiii HR 2 December 2016, JOR 2017/239
- xiv In HR 2 December 2016 the claim for unjustified enrichment originated – according to the Hoge Raad – during the pledgor's insolvency, and was therefore not subject to the bank's right of pledge.
- xv HR 6 April 2012, JOR 2014/172 (ASR/Achmea).