judgment

COURT OF APPEAL IN AMSTERDAM

Civil law / Tax law division, team I

Case no. : 200.169.606/01
Case/cause list no Amsterdam District Court : C/13/449889 / HA ZA 10-380

Judgment of the three-judge division for civil matters, 14 November 2017

Antonie VAN HEES and **Catharina Maria HARMSEN,**
in their capacity as trustees in the bankruptcy of N.V. The Indonesische Overzeese Bank (The Indonesia Overseas Bank),
both having their office in Amsterdam,
appellants in the main action,
respondents in the cross appeal,
counsel: G.A.J. Boekraad in Amsterdam,

versus

BANK INDONESIA, a legal entity organised and existing under the laws of the Republic of Indonesia,
in Jakarta, Indonesia,
respondent in the main action,
counsel: M.H.J. van Maanen in The Hague.

1. The proceedings on appeal

The parties are hereinafter referred to as: "the trustees" and "BI," respectively. N.V. The Indonesische Overzeese Bank (The Indonesia Overseas Bank) is hereinafter referred to as: "Indover".

By summons of 26 November 2014, the trustees appealed the judgments of the Amsterdam District Court of 12 May 2010, 24 August 2011, and 27 August 2014, rendered under the above-mentioned case/cause list numbers between BI as claimant in the main verification action, defendant in the counterclaim, and the trustees as defendants in the main verification action and claimants in the counterclaim.

The parties subsequently produced the following documents:
- statement of appeal, with exhibits;
- defence on appeal, also statement of appeal in the cross appeal, with exhibits;
- defence on appeal in the cross appeal;
- submission commenting on exhibits, and producing one additional exhibit;
- legal opinion Prof. F. de Ly;
- Prof. Th.M. de Boer's response to the legal opinion.

At the hearing of 24 January 2016, the parties had their cases argued; the trustees by the aforementioned counsel Boekraad, and by B.M. Katan, lawyer in Amsterdam; and BI by the aforementioned Van Maanen, all on the basis of pleading notes that were presented to the Court. The trustees produced an additional exhibit.
Thereafter, the Court was asked to render judgment.

On appeal in the main action, the trustees moved that the Court of Appeal, by immediately enforceable judgment as far as the law allows, (i) overturns the judgment of 27 August 2014; (ii) dismisses BI's claims; (iii) allows the trustees' claims; (iv) orders BI to repay the trustees what the latter paid to BI in compliance with the aforementioned judgment; and (v) orders BI to pay the costs of the proceedings in both instances.
On appeal in the main action, BI moved that the Court of Appeal, by immediately enforceable judgment as far as the law allows, upholds the judgment of 27 August 2014, as the Court of Appeal understands it to the extent that its claims were allowed and the claims of the trustees were dismissed, and orders the trustees to pay the costs of the proceedings.

In the cross appeal, BI moved that the Court of Appeal, by immediately enforceable judgment as far as the law allows, overturns the judgment of 27 August 2014 to the extent that its claims were dismissed. BI moved that the Court of Appeal rules (i) that BI's claim in the bankruptcy of Indover has immunity, being the property of a central bank, or state property intended for public use, and as such may not be attached or used for setting off, or for any other form of execution; (ii) that the prejudgment attachment is null and void; and (iii) that any new attachment of BI's claim in the bankruptcy of Indover or of other property of BI is null and void by operation of law. BI additionally claims in cross appeal that the trustees be prohibited from attaching property of BI again, subject to a penalty, and that it be declared that the trustees have no cause of action with their alternative claim brought on behalf of the joint creditors based on unlawful act/tort, and that the trustees be ordered to pay the costs of the proceedings.
In the cross appeal, the trustees moved that the grounds for appeal be dismissed and that BI be ordered to pay the costs of the proceedings.

Both parties offered to produce proof of their assertions on appeal.

2. Facts

In paras. 2.1 - 2.16 of the contested judgment of 27 August 2014, the District Court gives the facts it established. Insofar as grounds for appeal 1, 2 and 3 in the main action are directed against the accuracy of the facts established by the District Court, the Court of Appeal will address these in the following representation of facts. The uncontested facts are also binding on the Court of Appeal. The following are considered established facts, supplemented with other facts that are asserted on the one hand and not or not sufficiently contested on the other.

2.1. *BI*

2.1.1. Article 4(1) of the Indonesian Act of 1999/23 *("Act of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia")* reads in an English translation produced by BI: *"Bank Indonesia is a Central Bank of the Republic of Indonesia"*. Article 4(3) of that Act reads in that English translation: *"Bank Indonesia is a legal entity based on this Act"*.

2.2. *Indover*

2.2.1. Indover is a Dutch public company, organised and existing under the laws of the Netherlands; it was incorporated on 1 July 1965 as successor of BI's branch office in the Netherlands.

2.2.2. Indover conducted the business of credit institution under a licence of the Nederlandsche Bank N.V. ("DNB"), the Dutch regulator.

2.2.3. Indover exclusively served the business market. Its clients were for a large part East Asian, specifically Indonesian, companies.

2.2.4. Indover had a branch office in Hamburg (Germany) and a representative office in Jakarta (Indonesia).

2.2.5. Indover had subsidiaries in Hong Kong and Singapore.

2.2.6. Indover's external auditor was KPMG Accountants N.V. ("KPMG").

2.2.7. Until 1 April 2000, Indover's financial year ran from 1 April to 31 March. As of 1 January 2001, Indover's financial year coincided with the calendar year.

2.3. *BI and Indover*

2.3.1. BI was the sole shareholder of Indover since its incorporation.

2.3.2. In the final years, the management and supervisory board of Indover were for a large part composed of officers and former officers of BI.

2.3.3. Under pressure from the International Monetary Fund, BI decided at some point to divest its shares in Indover *("divestment")*. For this purpose, BI initially entered negotiations with PT Bank Negara Indonesia ("BNI").

2.4. *1997*

2.4.1. In the course of 1997 East Asia was hit by a financial crisis.

2.5. *1998*

2.5.1. By letter dated 13 January 1998, DNB wrote to BI, insofar as is relevant:

> On 8 January, 1998, we discussed the recent economic developments in Indonesia with Mr C.J.P. van Westreenen, member of the Supervisory Board of NV De Indonesische Overzeese Bank (Indover), and Mr Sidharta S.P. Soerjadi, General Manager of Indover.
> We were informed that as a consequence of these developments the liquidity position of Indover is under pressure and the quality of the credit portfolio deteriorating. In view of this deterioration, Indover had to decide to add material amounts (at least totalling FL 75 million) to the provision for doubtful debts. Mr Van Westreenen and Mr Sidharta informed us that on 15 January, this situation will be discussed during a meeting of the Supervisory Board in Jakarta.
> We have expressed our deepest concern about the consequences which these developments could have for the continuity of Indover. In this respect we inform you that the Nederlandsche Bank will adhere to its current policy, which is based on the assumption that Bank Indonesia will continue to honour its commitments as 100% shareholder of Indover. I would highly appreciate to receive your comments.

2.5.2. The minutes of the meeting of the Supervisory Board of 15 January 1998 read in an English translation produced by BI, insofar as is relevant:

Indover Liquidity Problem
(…)
There are reports from the market that Indover confirmation for now (with definite time) is still 100% owned by Bank Indonesia will potentially fix the market trust and decrease liquidity pressure. The Meeting has decided to follow up that idea by sending letters to stakeholder that Bank Indonesia still at least in a certain time own 100% Indover Bank. Regarding this matter, the European BOSD and BOM For this thing Europe Board of Commissioner is asked to follow up.

The meeting was also attended by representatives of BNI.

2.5.3. A memo dated 3 February 1998 from H.Y. Susmanto ("Susmanto"), head of BI's representative office in London (United Kingdom) and member of the Supervisory Board of Indover, to BI's head office in Jakarta (Indonesia) reads in an English translation produced by BI, insofar as is relevant:

On (…) 2 February 1998, BI Representative Office in Europe and Indover's management has met again in Amsterdam, to decide a suggestion of draft of Press Release from Bank BNI as well as from Bank Indonesia (…). This press release has been awaited by stakeholders in Europe which we predict will recover the market's and employees trust of Indover. According to the survey held by the senior manager, it is predicted that the longer the postponement of the divestment, the better it would be. In this matter, the management suggested the postponement for 5 (five) years, but in the draft press release which we prepared, we have stated 3 (three) years. If you agree such draft, please decide the period of postponement as agreed between Bank Indonesia and Bank BNI.

2.5.4. By letter sent by fax dated 5 February 1998, Mr Kellerman, Indover's lawyer at the time, wrote to Indover:

(…) it is clear that Indover is in a dire position. We understand that (…) Indover will as of today not have sufficient liquidity. Indover has requested liquidity support from Bank Indonesia. At this point in time it is not certain whether this support will be granted. It is in this context that you have asked our advice as to what action would be required from the board of managing directors and the board of supervisory directors in view of their duties under Netherlands law. We feel that as a matter of urgency all members of the board of supervisory directors, as well as the shareholder, should be made aware of the acute situation in express terms. In addition, it should be pointed out to either party that unless Bank Indonesia confirms in writing that it will ensure that Indover will meet its obligations, followed up by immediate liquidity support, Indover will not be able to meet its obligations and, is therefore technically bankrupt. Such a confirmation and support can take various forms, such as a pledged deposit or guarantee, but should be forthcoming in a matter of days, if not hours.

2.5.5. A letter dated 5 February 1998 from Susmanto to BI's head office, reads in an English translation produced by BI, insofar as is relevant:

We herewith inform you that today (…) Mr. Van Westreenen has consulted with Dutch legal counsel handling Indover case. The conclusion of such meeting which need Bank Indonesia's attention will be as follows:

1. In prevailing laws in Netherland, it is stated that if management of a finance company knows that their company is in trouble, such management (…) are obliged to report to the authorized authority to take a proper action.

2. Particularly regarding Indover bank, according to the related legal counsel there is a strong indication that the company is having trouble fulfilling its short obligations. Therefore, legally according to such legal counsel, the management should report to DNB. In this regard, the normal action usually will be directed to action as regulated in Article 11 of DNB provision, DNB will non activate all management and replace them with DNB's personnel in order to formulate the final settlement. Previous experience of the implementation of Article 11 always ends in a liquidation.

3. On Wednesday dated 4 February 1998, Mr. Tom de Swaan, Managing Director of DNB called us (…) offering a good service which DNB is willing to help Indover's financial problems as long as Bank Indonesia agrees on a term (to guarantee its settlement). We have not provided any action and we await Bank Indonesia's instruction.

4. From our assessment, together with management of Indover and Mr. Van Westreenen, we presume that if the draft press release which we have submitted 2 days ago can be agreed, the trust of Indover's customers to Indover will recover gradually and therefore the process of the above Article 11 will not be pursued.

5. Basically, the negligence to report as stated in point 2 above will affect to the management's personal liability to the management if in the future it is found that there are obligations of Indover which are unsettled.

6. In this context, we also inform that branches of Indonesian commercial bank in Europe have the same problems (…). In this regard, if such press release has been issued, we suspect that Indover can recover and also help such branches.

Therefore, please issue the Press Release from Bank Indonesia and Bank Negara Indonesia as soon as possible.

2.5.6. A press release issued by BI on 16 February 1998 by BI reads:

In light to recent economic developments in Indonesia, it has been decided to postpone the sale of shares of Indover Bank to PT. Bank Negara Indonesia for a period of at least 3 years.
Therefore, in a period of at least 3 (three) years, Indover Bank will remain 100% owned by Bank Indonesia, the Central Bank of Indonesia. In this respect, Bank Indonesia will ensure that Indover Bank will meet its obligations.

2.5.7. By letter dated 20 February 1998 DNB ("the Bank") wrote to Indover, insofar as is relevant:

We refer to our various telephone conversations with you in the past few days and inform you as follows.

The Bank has found that your institution is barely able to raise funds from third parties in the open market any longer. Furthermore, on 17 February 1998 it was found that your institution's Supervisory Board consisted in fact of only one person. In light of this information, and in view of the recent developments in Indonesia, the Bank finds that these developments put the liquidity of your institution at risk and that immediate action is necessary.

We have given you the opportunity to comment on the immediate execution of the measures to be taken. Also in view of our consultations with you, we decide, taking into account Article 28(4) of the Dutch Credit System (Supervision) Act, 1992, that pursuant to Article 28(3)(a) of this Act, the Supervisory Board of your institution may only execute its tasks with the approval of a person to be appointed by the Bank.

The Bank has appointed the following person to this position: Mr C.J.P. van Westreenen.

We point out to you that this notification is effective immediately and that pursuant to Article 28(5)(a) of the Act the corporate bodies of your institution, including the management, are obliged by law to cooperate with the appointed person.

2.5.8. By letter dated 9 March 1998 BI wrote to DNB, insofar as is relevant:

In reference to your letter dated January 13, 1998, I highly appreciate your concern regarding the problems faced by the Indover Bank. As you are aware, the Indover Bank is facing liquidity mismatch, not only due to the substantial decline in its funding from the market, but also because of the deterioration of its credit portfolio. In my opinion, the recent events have been largely beyond our control.

However, we will continue to honour our commitments that within a period of at least three years, the Indover Bank will remain 100% owned by Bank Indonesia. In this respect, Bank Indonesia will ensure that the Indover Bank will meet its obligations as well as comply with all requirements stipulated by De Netherlandsche Bank.

Bank Indonesia would highly appreciate if you could provide your continued support in the capacity as a central bank.

2.5.9. A letter from DNB to the Supervisory Board of Indover, containing a report prepared by DNB ("the Bank") dated 8 June 1998, of a meeting it had with Indover ("IndOv") on 23 April 1998 reads, insofar as is relevant:

1 GENERAL

You have explained IndOv's current situation. In this regard, you discussed the policy of Bank Indonesia (BI) to divest participating interests in banks, the sale of IndOv to Bank Negara Indonesia (BNI), and to postpone this sale for a period of three years in view of the economic crisis. You referred to BI's letter of 9 March 1998, in which the Bank is informed about the obligation BI accepted to remain shareholder of IndOv for another three years at least. You confirmed once more that BI will ensure that IndOv will continue to meet its obligations and will comply with the requirements imposed by the Bank.
We have stated that the Bank attaches great importance to this letter and highly appreciates that BI sent the Bank this letter.

2 SUPERVISORY BOARD

The Supervisory Board is currently composed of three people. IndOv continues its search for a Dutch supervisory director, but has not yet found any suitable candidates that are prepared, in the present circumstances, to become a supervisory director of IndOv. The candidates specifically consider the risk of liability if IndOv goes bankrupt as too high.
We promised you that we will support you, if necessary, in your search for a suitable candidate, but realise that this will not be easy.

3 MANAGEMENT

At the end of April 1998, Mr M. Muchtar Panjaitan will assume the position of managing director. We have already approved Mr Muchtar's appointment in our letter of 29 January 1998.
You have stated that BNI undertakes to offer IndOv support in the upcoming 3-year period of transition. Assigning an experienced director is part of this support.

4 INDOV'S ACTIVITIES

You have indicated that in the next few years IndOv will prepare itself for the final takeover by BNI.

We asked you whether BI has also considered other options, e.g. liquidation, since the outlook of IndOv is limited in the present situation. The quality of the assets seems to be deteriorating and IndOv is currently unable to acquire funding in the open market. It is expected that IndOv has a long and uncertain way ahead of it before it will be restored to being a healthy bank again.

You informed us that BI considered the possibility of liquidation, but rejected it. You gave the following reasons for this decision:

- The negative effect this will have on the value of (a large part of) the outstanding loans of IndOv, since it is expected that it will take longer to collect the outstanding loans in Indonesia. The immediate liquidation of assets is expected to bring in much lower proceeds
- You consider the European market an important growth market for Indonesia's trade and consequently consider the presence of Indonesian banks in Europe desirable

- BI has accepted obligations towards BNI.

5 QUALITY OF THE ASSETS

You stated that the claims against Indonesian credit institutions are guaranteed by the Indonesian State. IndOv consequently expects that it will be possible to collect these debts. You also stated that an agreement is expected to be concluded shortly in Indonesia with respect to the financial restructuring o the business sector. This agreement will be applicable to IndOv's outstanding loans to Indonesian companies.

We explained that in the Netherlands a distinction is made between provisions for country risks and provisions for debtors. According to the Dutch banking sector, Indonesia is currently considered a country that is at risk of not meeting its payment obligations. Consequently, it stands to reason that a provision for country risk has to be made for Indonesian debts.
We also explained to you that setting up proper provision for debtors is, in principle, the first responsibility of the credit institution. The Supervisory Directorate determines to what extent a credit institution has adequately fulfilled this responsibility.
We discussed the possibility that after the necessary provisions have been taken, IndOv may no longer be able to comply with its minimum solvency requirements.
You informed us that IndOv is currently negotiating with its external auditor, which has in the meantime suggested anumber of alternative solutions. You assured us that BI will ensure that IndOv will continue to meet the solvency requirements. If necessary this will be done by issuing additional equity.
We agreed that IndOv will inform the Bank on the issues discussed above shortly.

6 AGREEMENTS

Summing up, the following is agreed:

- IndOv will endeavour to find a Dutch supervisory director
- Mr Muchtar will take up his position at the end of April 1998
- IndOv will inform the Bank shortly on the provisions to be made and the supporting measures to be taken by BI in this respect, including, where necessary, issuing additional equity to ensure that the solvency requirements will be met.

2.5.10. The minutes of the meeting of the Supervisory Board of Indover, held on 24 and 25 April 1998, read in an English translation produced by BI, insofar as is relevant:

A. Current Situation
Current situation of NV Indover is the same as the situation faced by Indonesian national banks in mid economic crisis, which are under distress since the loan portfolio quality is decreasing and confidence breakdown from the depositors and creditors. This can be understood since from the total amount of assets of USD 3,0 billion, more than 2/3 are loans provided to Indonesian banks and corporates while others mostly are for companies in Asian countries. From funding side, 1/3 are from Bank Indonesia (including shareholders' funds) while the rest are from the market (sale of securities, customer's deposits, etc).
a. worsening of loan's portfolios, caused by Indonesian monetary crisis, has suppressed NV Indover:
b. Prohibition for Indover bank to receive funding from third parties. This prohibition is issued by DNB due to high risk of placement into Indover, the vacant position in the Board of Supervisory Directors and no certainty of composition of the Board of Management.
c. tendency of withdrawal of funds by depositors and creditors.
The above pressures have and If not handled immediately, then Indover will need financial support from Bank Indonesia.

B. Future Business Strategy
As explained above, there are discussions on strategy and policies on Indover in the future by analyzing the pros en cons from some options which relate to the interest of BI and the Indonesian state as a whole. Among other, the chance to liquidate Indover has been discussed (including with DNB officials) with the conclusion that such option for this time is not an optimal option with the following reasons:
a. Liquidation without honoring the rights of all depositors and creditors will breakdown all images of national financial institution overseas, at least for the next several years. On the other hand, the amount that will have to be spent by BI to return back the customers funds is quite high (in the amount of USD 2 billion). Also, the take over the sale of assets (receivables) to companies in Indonesia by BI still (…) face the challenges since there is no assets management company yet. The expected profit from sales will be far from enough to cover amounts paid (which will be a huge realized loss for BI).

b. Temporary research (…) expected that if European monetary union is formed, in the future NV Indover will have an important role as a bridge between domestic financial market and European financial market, whoever the owner of Indover will be.
Such conclusion means that for this time the divestment program as well as the release of BI participation in NV Indover cannot be undertaken without a bigger risk. Therefore, what we can do is a consolidation to reduce BI's burden and to make NV Indover to be ready for divestment.
Consolidation will be directed into 3 aspects:
a. take efforts so Indover can reenter the market, which is very important to fix its liquidity condition (to reduce its dependency with BI), rentability (with cheaper funding) as well as to maintain and strengthen its market presence (which to justify its existence).
b. take efforts to fix its credit portfolio qualities, in particular credits which are provided to its Indonesian debtors, to reduce its loan loss provision expense liabilities. In this regard, BI is expected to support, especially in the arrears settlement of nasional banks in NV Indover (in the context of government guarantee scheme), as well as bill settlement to non-bank parties in respect of INDRA scheme.
c. to improve the efficiency of bank operational, especially through the reduction of operational expenses (including management and staff's salary and facility reviews).

C. Steps to be undertaken
(…) For the purpose that NV Indover can enter the market, we have completed the composition of the Board of Supervisory Directors and in process to complete the Board of Management (…). Besides that, to reduce the Indover depositors and creditors' risks, BI is asked to formally issue a letter of guarantee. This guarantee is required to complete the composition member of the Board of Management with banker from Netherland. Forms and requirements from this formal guarantee are still being discussed between Susmanto and Mr. Westreenen.

2.5.11. By letter dated 24 June 1998, KPMG wrote to Indover, insofar as is relevant:

In a number of meetings with the Managing Board of N.V. De Indonesische Overzeese Bank (Indover), we have discussed the situation that the bank has been presented with following the recent economic and political crisis in Southeast Asia, in particular Indonesia. As a result of this crisis, the bank will need to create significant provisions for its Indonesian loan portfolio. We have discussed and advised you on a number of alternatives available to the bank in order to deal with this situation during the finalisation of the bank's 1997/1998 financial statements.

You have asked us to summarise these alternatives in a letter that you can present at the meeting of the bank's Supervisory Board, to be held in Jakarta in the beginning of July. With this letter, we are pleased to honour your request.
(…)

3 Alternatives

The following alternatives have been considered in detail.

3.1 Set off the provions by means of a direct capital contribution from Bank Indonesia

In this alternative, Indover will charge the required additions to the provisions to its 1997/1998 profit and loss account. This will result in a significant loss for the bank, wiping out all of its capital base. In order to restore this capital, Bank Indonesia will have to pay up new capital, either by directly contributing additional funds or by converting debt to equity.
(…)

We (…) agree with you that this alternative should not be pursued.

3.2 Obtain a guarantee from Bank Indonesia for the Indonesian loan portfolio

In this alternative, Bank Indonesia will guarantee the interest and principal of all loans currently outstanding to its Indonesian debtors. If such a guarantee could be obtained, the exposure to individual banks and corporations would be replaced by an exposure to Bank Indonesia. Under the present circumstances, it would not be necessary to raise specific provisions for this exposure. However, since Bank Indonesia is itself an Indonesian debtor, the country risk provision requirements would still apply. These country risk provisions are by far the largest part of the total provisions required.

Given the standing and reputation of Bank Indonesia, the Dutch central bank might allow you to set the country risk provision for Bank Indonesia exposure at the lower end of the scale. However, this will still involve significant amounts. Also, since full interest payments on the deposits of Bank Indonesia would still be required, this alternative does not meet the objectives in respect of the future cash flow position and financial statements of the bank.

We therefore agree with you that this alternative does not provide an adequate solution to the situation.

3.3 Conclude pledge agreements with Bank Indonesia

A significant part of the funding of Indoverbank is already provided by Bank Indonesia in the form of time deposits. In this alternative, these deposits will be pledged to Indoverbank to cover the risks in the Indonesian loan portfolio of the bank. The following elements should be take into account in these pledge agreements:

- Bank Indonesia pledges deposits to Indover for an amount at least equal to the required level of specific and country risk provisions;
- the deposits will only be repaid if and to the extent that Indover receives a repayment of principal from its Indonesian debtors or if the required level of provisions can be reduced for other reasons;
- in order to ensure that the cash flow situation of the bank is managed and the bank does not have to show a loss in next year's financial statements, the interest payments on these deposits should be limited. Various alternatives are available to this end. In the current proposal, Indover will only pay interest to the extent that the net income of the bank does not fall below zero. The remainder of the interest charges on these deposits will have to be waived by Bank Indonesia.

We have suggested that it might be beneficial to Bank Indonesia if a distinction is made between two types of agreements: (1) an actual pledge agreement whereby specific deposits are fully pledged to Indover to cover the risk in a number of specific loans and (2) an agreement whereby the deposits are not yet pledged, but where Bank Indonesia undertakes to leave the deposits with Indover and to pledge them to Indover at the earliest request of the management of Indoverbank. This second 'promise to pledge' has to be structured in such a way that it materially achieves the same level of certainty as the actual pledge agreement. However, in legal terms there is a difference between deposits that actually have been pledged and deposits that will have to be pledged at the request of Indover.

We have indicated that for the financial statements we may accept a structure whereby an actual pledge is obtained to cover all specific provisions required and a 'promise to pledge' is obtained to cover the required level of the country risk provision.

If such pledge agreements can be obtained for sufficient amounts, this implies that the risk on these loans is transferred to Bank Indonesia. Indover will then not be required to create provisions in its own accounts for these risks. Of course, it will be necessary that the notes to the financial statement explain in some detail the nature of the transactions concluded with Bank Indonesia.

This alternative achieves the objectives noted above. We therefore agree with you that this alternative should be further pursued with Bank Indonesia.
(...)

4 1997/1998 financial statements

The purpose of the pledged and "promised pledge" deposit agreements is to transfer the credit risks on the Indonesian loan portfolio to Bank Indonesia. If adequate agreements are concluded before finalising

the 1997/1998 financial statements, this will reduce the need to create a provision in the financial statements of Indover.

2.5.12. A letter dated 22 July 1998 from DNB ("the Bank") to Indover ("IndOv") reads, in an English translation produced by BI, insofar as is relevant:

> On 15 July 1998 a meeting was held (...) between the Bank and (...) NV De Indonesische Overzeese Bank (...). We have drawn up the following report of the meeting.
> (...)
>
> 3 PROVISIONS
>
> You informed the Bank that BI has decided to link its deposits to doubtful loans and thus to take over the credit risk from IndOv. You will decide on the amount needed for this purpose in consultation with your external auditor.
>
> In addition, BI will submit a so-termed 'promise to pledge' to cover the provision for country risk. In this context you informed us that moneys placed outside Indonesia are no longer considered part of Indonesia's Net International Reserve (NIR). In your opinion, any linking or non-linking of deposits will, therefore, have no impact on the level of the NIR. You informed us that the situation is fully transparent and acceptable to the IMF.
>
> On the assumption that this is so, the Bank stated that it, in principle, agreed to the solution you have chosen (...).
>
> The Bank is of the opinion that IndOv's policy should be aimed at meeting the provisioning percentages prevailing at the end of 1998. With respect to the interim period, the Bank will assess the reasonability of a well-founded proposal from IndOv on the level of this provision. In this context it will be important that the deposits currently placed by BI at IndOv be not repaid in the short term.
>
> You informed the Bank that as regards the connected deposits IndOv will only have to pay interest to BI insofar as the IndOv annual result is positive. It has, as yet, not been agreed, however, whether this will be effected by means of remission or postponement of payment.

2.5.13. On 25 September 1998, BI and Indover concluded a written *Deposit and Pledge Agreement (relating to certain Credit Facilities Agreements),* which reads, insofar as is relevant:

> WITNESSETH
>
> A. Indover Bank has granted certain credit facilities (each, a "Credit Facility") to certain of its customers (each a "Borrower") pursuant to credit facility agreements (each a "Credit Facility Agreement") between Indover Bank and the Borrowers concerned (...).
>
> B. The parties hereto agree that the deposits (each, a "Deposit") which have already been placed with Indover Bank by Bank Indonesia will serve to cover the obligations of the Borrowers to Indover Bank pursuant to the Credit Facility Agreements. (...) The Deposits are in an aggregate principal amount equal to the current aggregate amounts outstanding under the Credit Facilities Agreements.
> (...)
>
> NOW THEREFORE IT IS AGREED AS FOLLOWS:
> Section 1.
> Deposit.

1.1. Bank Indonesia hereby agrees to maintain the Deposits with Indover Bank, in order to secure any and all of the obligations of the Borrowers concerned under the Credit Facility Agreements.
(…)

Section 2.
Pledge.

2.1. Bank Indonesia hereby grants to Indover Bank a first right of pledge ("eerste recht van pand"), and Indover Bank hereby accepts such right, on all receivables which Bank Indonesia presently has or at any time hereafter may acquire vis-à-vis Indover Bank pursuant to or otherwise in connection with all or some of the Deposits (…). Such pledge serves as security for the payment of all amounts that are now due or which may become due at any time in the future by any of the Borrowers to Indover Bank pursuant to or otherwise in connection with any Credit Facility Agreement.
(…)

Section 7.
Effective Date.

This Agreement takes effect among the parties hereto as from 31 March 1998.

2.5.14. In addition, BI did not claim the remaining (callable) deposits *("free deposits")* from Indover.

2.6. *1999*

2.6.1. On 17 May 1999, the Act of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia, mentioned above at 2.1.1, entered into force. Article 7 of the Act reads, in the English translation produced by BI: *"The objective of Bank Indonesia is to achieve and maintain the stability of the rupiah value"*. Article 64(1) of the Act reads in the same translation: *"(1) Bank Indonesia may only conduct an equity participation in any legal entities or any other entities deemed necessary in the implementation of the tasks of Bank Indonesia upon the approval of the House of Representatives. (2) The funds required for such investment as referred to in paragraph (1) may only be obtained from the Special Purpose Reserves"*. Article 77 of the Act reads in translation: *"Bank Indonesia shall, within a maximum of 2 (two) years term after the effective date of this Act, divest all of its investment in legal or other entities which is not in accordance with the provision as referred to in Article 64 paragraph (l)"*.

2.7. *2000*

2.7.1. By letter dated 28 September 2000, DNB informed Indover, insofar as is relevant:

N.V. De Indonesische Overzeese Bank (Indover) currently has a large portfolio with bad loans on its books. To cover the credit risk on these loans, Bank Indonesia (BI) has placed deposits with Indover and pledged them as security for the loans.

De Nederlandsche Bank NV (the Bank) has taken due note of a draft Asset Downsizing Plan dated 20 September 2000. This plan provides for a phased setoff, with the poorest quality loans being set off first.
(…)

It has been stipulated in the Deposit and Pledge Agreement of 25 September 1998 between Indover and BI that Indover would consult the Bank and/or the external auditor before proceeding to setoff.

As for a large proportion of the loans there is little prospect of collecting the amounts owing, the Bank agrees with Indover's Managing Board that Indover should start setting off the loans against the pledged deposits. After all, if this portfolio were to remain on Indover's balance sheet, the interest to be paid on the deposits would be charged to Indover's results whilst no interest would be received. This means a (too) heavy burden on Indover's profit and loss account. Besides, such a large portfolio of bad loans on the balance sheet seems an impediment to regaining the confidence of the market.

2.7.2. By letter dated 12 October 2000, KPMG informed Indover, insofar as is relevant:

As a consequence of the economic crisis in Asia and in Indonesia in particular, Indover bank currently has a significant portfolio of non-performing loans. The credit risk on this portfolio has largely been transferred to Bank Indonesia by means of a number of agreements, known as the pledged deposit agreements. These agreements allow the Board of Management of Indover bank, after consultation with the Dutch central bank and/or its external auditor, to set-off non-performing loans, which are considered total write-offs, against the deposits placed by Bank Indonesia.

We have been informed of the draft Asset Downsizing Plan as prepared by Indover bank. This plan provides for a phased set-off, with the poorest quality loans being set off first.

We have taken note of the letter of the Dutch central bank, dated 28 September 2000. In this letter, the central bank recommends to start setting off non-performing loans against the pledged deposits. As a significant part of the non-performing loans can be considered as total write-offs with little prospect of recovering them, we agree with the central bank and with management that these loans should be set off against the pledged deposits. The write-off will improve the results of the bank, since it will eliminate the need to pay interest on these deposits. Furthermore, the quality of the bank's balance sheet will improve, something which is important for restoring the confidence of clients and counterparties in the bank.

2.7.3. By letter dated 23 October 2000, Indover wrote to BI, insofar as is relevant:

In relation with Bank Indonesia plans to divest Indover bank by the end of this year/early next year, herewith we would like to submit an assets downsizing plan for your consideration and agreement. The three year Business Plan implementation and the divestment of Indover has reached a stage whereby a decision with regard to a compensation of Non Performing Loans (NPL) will have to be made.

As you may aware of, the problem faced by Indover bank caused by the Asian economic crisis, is the relatively high amount of NPL, which account for about 30% of its total portfolio. This NPL has created a *solvency problem* and the shareholder has placed a pledge deposit to support Indover bank as a temporary measure. Having this solvency problem not being solved permanently, where the NPI is still recorded in the balance sheet, Indover bank having difficulty to raise funds from the international market. Hence this leads to *liquidity problem*.
To make Indover bank profitable on its operation in the future, we have to solve the solvency problem permanently, which further will help to solve the liquidity problem and finally will open the opportunity to address *profitability*. By doing this, the assets quality and the performance of Indover bank will be improved which in turn will make Indover bank more attractive for potential investors.

Aside from the above, the new regulation from the Dutch Central Bank (DNB) with regard to country risk provision will require Indover bank either to increase its capital or to make specific provision for debtors originating from country that is qualified as high risk. This new regulation justified the necessity to start with the compensation of the NPL.

In relation with the effort to solve the above mentioned solvency problem, Indover bank has been requested by Hong Kong Monetary Authority (HKMA) and DNB to formulate an action plan together with a time table to scale down the NPL. Based on this request an Assets Downsizing Plan (ADP) has been prepared to schedule the write-off of the NPL (set-off the NPL against pledge deposit). With their letter (…) DNB has confirmed their support to the ADP. The same support to the ADP has been given by our external Auditor, KPMG, as well.

The ADP was prepared based on urgency category as follows:
(…)

Based on the urgency level mentioned above, the proposed schedule for the write-off of the NPL as per 30 September 2000 are as follows:

			USD million
• Urgency 1:	September 2000	amounting to	71.7
• Urgency 2:	December 2000	amounting to	55.6
• Urgency 3:	March 2001	amounting to	76.5
• Urgency 4:	May 2001	amounting to	75.0

In view of the fact that the independent advises from both DNB and KPMG recommending the compensation have been obtained we seek your support and agreement to the implementation of the Asset Downsizing Plan.

2.7.4. BI responded positively to this letter. The first *Asset Downsizing Plan* was implemented: invoking its rights of pledge, Indover recovered an amount of up to USD 278.8 million of its claims under the non-performing loans from (BI's claim against it under) the deposits.

2.8. *2001*

2.8.1. By letter dated 3 January 2001, DNB wrote to BI, insofar as is relevant:

Finally, we were informed that the external auditor of Indover Bank, KPMG, values a statement by Bank Indonesia on the status of the commitment that was confirmed in a letter, dated 9 March 1998, to mr Tom de Swaan, our former director in charge of banking supervision. In this letter Bank Indonesia stated that it would continue to honour its commitments that within a period of at least three years the Indover Bank would remain 100% owned by Bank Indonesia, and that in this respect Bank Indonesia would ensure that the Indover Bank would meet its obligations as well as comply with all requirements stipulated by the Nederlandsche Bank. Strictly speaking, this assurance expires in March 2001. We would welcome your view on the status between March 2001 and the completion of the divestment process.

2.8.2. The *Minutes of the meeting held between NV The Indonesische Overzeese Bank (Indover), De Nederlandsche Bank N.V. (DNB) and KPMG Accountants NV. (KPMG) on 31 January 2001, at the offices of KPA;*" prepared by KPMG read, insofar as is relevant:

3 Silent custody

Mr. Holthuizen describes the reasons that prompted DNB to appoint Mr. Toebosch. This silent custody was recently terminated by DNB for the following reasons: no special situations occurred and there were no disagreements between the management of Indover and Mr. Toebosch. Therefore, there was no reason for DNB to continue with the silent custody. Mr. Toebosch confirmed to DNB that there was no job for

him to do at Indover. Indover is now under normal supervision again, although it is likely that DNB will visit the bank more frequently.
(…)

6 Divestment

It is likely that the divestment will be postponed, at least to the end of 2001. In a recent meeting with mrs. Miranda Gultom, Mr. De Wilde of DNB has asked BI for an extension of the guarantee issued by BI. Mrs. Gultom told DNB that she will pass this on to the BI board, but she thought it unlikely that the guarantee will be extended beyond March 2001. She has promised that if it is necessary, BI can issue a letter stating that Indover will still be owned by BI until the divestment takes place.

Asked by DNB, KPMG explains the issues that are relevant in finalising the accounts of Indover. These issues have also been discussed in a meeting of 5 December 2000 between KPMG, Indover and Mr. Toebosch. DNB has received minutes of this meeting.

KPMG explains that, based on the pledge agreements in place, the equity position of Indover is of no concern. A potential concern is the liquidity position, given the still limited access to the markets and the dependency on BI. This also relates to the free deposits of BI, which theoretically can be withdrawn by BI if they so choose. It is decided that Indover will prepare detailed forecasts of its profitability and liquidity, including scenario analyses. KPMG will then assess whether or not a guarantee is still required to ensure the viability of the bank for at least one year after signing the accounts.

2.8.3. By letter dated 20 March 2001 BI wrote to DNB, insofar as is relevant:

As you may be aware, Bank Indonesia Act stipulates that Bank Indonesia shall, within a maximum of 2 (two) years after Bank Indonesia Act become effective (by May 2001), divest all of its investment in legal or other entities which is not in accordance with BI's equity participation deemed necessary in implementation of BI's tasks as referred to in article 64 paragraph (1). Meanwhile, in accordance with the draft of amendment of Bank Indonesia Act, which is now in the process of ratification by the Parliament, the deadline for Bank Indonesia divestment obligation will be extended until the end of 2001.

With regard to the provision of the amendment, we herewith inform you that Bank Indonesia will maintain its ownership in Indover Bank and will be fully responsible for its obligation until the completion of its divestment process under the said Act.

2.8.4. By letter dated 30 March 2001, DNB wrote to BI, insofar as is relevant:

Thank you for your letter dated 20 March 2001. We highly appreciate your willingness to declare that Bank Indonesia will maintain its ownership in Indover Bank and will be fully responsible for its obligation until the completion of the divestment process.

2.8.5. The Minutes of Meeting with Mrs Goeltom re Indover prepared by KPMG in respect of a meeting between representatives of BI, Indover and KPMG on 14 May 2001 read, insofar as is relevant:

1 Purpose of the meeting

Mr Muchtar welcomes all participants to the meeting. He explains that KPMG has raised a number of issues in discussions with the management in relation to the completion of the audit of the 2000 financial statements. These issues include the implementation of the ADP and the letter of comfort issued by BI.
(…)

6 Repayments to Bank Indonesia

KPMG points out that the amount that is repaid to BI is important in assessing the viability of the bank. KPMG is therefore pleased with the recent letter, in which BI confirms that no more than USD 5 million per month needs to be repaid by Indover.

Mrs Goeltom confirms the content of this letter. She explains that KPMG should regard the letter from BI as binding (…).

She further explains that BI regards the original comfort letter to DNB as sufficient in this respect. The reference to 'its obligation' in that letter should in her opinion be read as 'the obligations of Indover bank'. However, given the request of KPMG, BI has decided to issue the additional letter confirming specifically that no more than USD 5 million needs to be repaid.
(…)

KPMG should, according to Mrs Goeltom, also take into account the fact that the ADP can now be implemented, that the EOP tranches that have been received by Indover can be 'repaid' to BI gradually, that a new 'comfort letter' has been issued to DNB etc. According to Mrs Goeltom, all this clearly demonstrates BI's commitment to continue to support Indover bank.

M.S. Goeltom ("Goeltom") was deputy governor of BI at the time.

2.8.6. On 26 May 2001 KPMG wrote in a *'Report concerning the financial statements/or the nine months period ended 31 December 2000*' to Indover, among other things:

2.4 Continuity of the bank

As mentioned above, the substantial support by BI, mainly in the form of the pledged deposits and the additional funding, is at this point in time essential to the bank's continuity.
(…)
Furthermore, we mention the letter issued by BI to DNB on 9 March 1998, whereby BI commits itself to ensure that Indover bank will meet its obligations as well as comply with all requirements stipulated by DNB for a period of at least three years. This commitment formally expired in March 2001. BI has sent a letter dated 20 March 2001 to DNB, confirming that the divestment is postponed until the end of 2001. In this letter, BI confirms that "Bank Indonesia will maintain its ownership in Indover bank and will be fully responsible for its obligation until the completion of its divestment process under said Act". Although the wording of the letter dated 20 March 2001 is less specific than the letter of 9 March 1998, we have been verbally informed by BI that this letter should be read as an extension of the commitment referred to in the letter of 9 March 1998. In the absence of a guarantee by BI, we have assessed the financial situation and projections of Indover on a stand-alone basis. Based on that assessment, it can be concluded that the solvency of the bank is adequate, with a BIS capital ratio of 173%. The bank's forecasts, which includes the implementation of the ADP as planned, show expected profits for the foreseeable future.

2.8.1. The second *Asset Downsizing Plan* was implemented: invoking its rights of pledge, Indover recovered an amount of up to USD 91.5 million of its claims under the non-performing loans from (BI's claim against it under) the deposits.

2.9. *2003*

2.9.1. By letter dated 28 November 2003, KPMG wrote to Indover, insofar as is relevant:

To facilitate the 2003 financial statements sign off by KPMG we would like to ask you to request for a similar kind of letter as Bank Indonesia sent in the past, duly signed, stating that Bank Indonesia as the shareholder of Indover will continue supporting the activities of Indover Bank, until the moment the shares of the bank will be sold to a third party.

2.9.2. A letter from Indover to BI dated 8 December 2003 reads in an English translation produced by the

trustees, insofar as is relevant:

> In conformity to your direction during our visit to Bank Indonesia on October 2003, we would receive your approval concerning the following issues:
>
> (…) The letter of BI to DNB concerning the support of BI as shareholder to Indoverbank (Letter of comfort).
>
> Concerning this letter, it should have the purpose to continue the previous letter of Bank Indonesia (…) of March 20 2001, upon which immediate support is given to Indover bank until the divestment and to the letter (…) dated 6 June 2002, that gives information that the planned implementation of the divestment cannot be reached in accordance to the target date of June 2003 (see letter of KPMG dd. 28 Nov. 23 enclosed).

2.9.3. By letter dated 29 December 2003, BI wrote to DNB, insofar as is relevant:

> We (…) inform you on the progress of Indover bank's divestment process. Bank Indonesia last letter for you dated 25th March 2003 only explained on the process of transferring Indover bank's NPL to other entity so that Indover bank can be sold as a clean bank. Bank Indonesia had appointed PricewaterhouseCoopers (PwCS) as financial advisor of Indover bank's divestment project. PwCS is expected to dispose of Indover as a clean bank after the NPLs of Indover bank is transferred out of Indover. It is my pleasure to inform you that the transfer of the NPL had taken place on 24th November 2003.
> At the moment, PwCs is in the process of marketing Indover bank to investors, and we hope the project could be completed in the first half of 2004.

2.9.4. In a report dated 30 December 2003 rating agency Fitch gave Indover a rating of B+ (long term). The report stated, among other things:

> Since Indover (…) is Dutch and subject to the regulatory and supervisory framework of the Netherlands, its ratings are not constrained by the sovereign rating of the Republic of Indonesia. However, since it is dependent for funding on its parent, the Central Bank of Indonesia, and has a high level of Indonesian risk on its balance sheet, there is, nevertheless, a close relationship between its ratings and those of the Indonesian state.

2.10. *2004*

2.10.1. By letter dated 28 January 2004, KPMG wrote to Indover, insofar as is relevant:

> With our letter dated 28 November 2003 we asked you to request for a letter from Bank Indonesia, stating that Bank Indonesia will continue supporting the activities of Indover Bank.
>
> In this respect we received a copy of a letter dated 29 December 2003 of Bank Indonesia, to the President of De Nederlandsche Bank. Although this letter gives some comfort about the continuity of Indover Bank until the expected divestment in 2004, the wording of the letter is in our opinion not strong enough. For audit purposes we would like to see a confirmation with the wording that Bank Indonesia will continue supporting the activities of Indover Bank until the shares of the bank will be sold to a third party.

2.10.2. A letter dated 3 February 2004 from Indover to its Supervisory Board, reads in an English translation produced by BI, insofar as is relevant:

We refer to KPMG letter dated November 28, 2003 concerning the request of letter of support from Bank Indonesia as shareholder to Indover bank, Bank Indonesia has informed the continuity of Indover bank until the completion of divestment in 2004, in its letter to President of DNB dated December 29, 2003.

Bank Indonesia's information from DNB is deemed not strong enough for KPMG in respect of audit purposes to finish financial statement of Indover bank of 2003. Therefore, KPMG asked Bank Indonesia to provide letter of support for Indover bank confirming that: "Bank Indonesia will continue supporting the activities of Indover bank until the share of the bank will be sold to a third party", as confirmed in the attached KPMG letter dated January 28, 2004.

2.10.3. A letter dated 13 February 2004 from BI to the Supervisory Board of Indover reads in an English translation produced by BI, insofar as is relevant:

With reference to Indover Bank's letter (...) dated February 3, 2004 (...) herewith we request your response/comments on the request from Indover Bank/KPMG. Henceforth, we expect to receive your clarification on the legal basis for the fulfillment of the request from KPMG auditor. Aside from that, we also expect to receive your explanation whether DNB ever question BI's commitment in providing support to Indover Bank, considering BI's support directly to Indover Bank has been expressed in the *Pledge Deposit Agreement*.

2.10.4. A letter dated 13 February 2004 from the Supervisory Board of Indover to BI reads in an English translation produced by BI, insofar as is relevant:

With reference to your letter (...) dated today and Indover Bank's letter to us (...) dated February 3, 2004 (...) we wish to advise as follows:

As far as we know, since the beginning of 1998 Bank Indonesia's support letter for the continuity of Indover Bank's operations was required by De Nederlandsche Bank (DNB) and KPMG in connection with the bank's condition at that time which was feared to be unable to fulfill its obligations to its creditors. The apprehension resulted in DNB placing Indover Bank in trusteeship until Bank Indonesia is willing to arrange "quasi-recapitalization" through the execution of the Pledge Agreement with Indover Bank.

This signing of the Pledge Agreement was deemed by DNB as an unconditional requisite for the continuity of Indover Bank's operations and therefore KPMG is able to audit and evaluate the Bank's assets as "a going concern".

However, even though the Pledge Agreement was in place, the possibility for Bank Indonesia as the owner to liquidate (to bankrupt) Indover Bank was not closed, including by ways of reducing funding support outside of the Pledge Agreement so Indover Bank is unable to fulfill its obligations to the third party. DNB's and KPMG's apprehension is primarily based on the 1999 Bank Indonesia law regarding the deadline the divestment for Indover Bank as well as the statements from Bank Indonesia's officials to the media.

In order to close this possibility, DNB and KPMG annually request Bank Indonesia to declare its support for the continuity of Indover Bank, until such a guarantee is available that Indover Bank can fulfill its obligations to the third party. For KPMG as Indover Bank's auditor, this assurance is needed to enable them to evaluate "going concern value" (not "liquidation value") for Bank Indover's assets as well as for the evaluation of "unqualified opinion".

The legal basis for KPMG to request such a statement, is based on their appointment as auditor of Indover Bank, besides existing accounting standards, is required by DNB to apply all existing banking regulations, including proper protection for all bank creditors. Based on this and as an auditor, therefore they have the right to refuse to provide "unqualified opinion" in the context that there is apprehension or doubtness in the evaluation that is being conducted.

We provide this clarification as a background to the request of Board of Management of Indover Bank to Bank Indonesia in their letter (…) dated December 8 2003 for your consideration. In this regard, we wish to affirm that the Board of Supervisory Directors of Indover Bank in principle agree and support the request of the Board of Management of Indover Bank in the above mentioned letter.

2.10.5. By letter dated 20 February 2004, DNB wrote to Indover, insofar as is relevant:

1 INTRODUCTION

In November 2003 Messrs R.E. Derksen RC and E.W.R. Weerdenburg RA of the Supervisory Directorate (*Directoraat Toezicht*, ('Tz') conducted an investigation within the context of the business economic supervision of The Indonesische Overzeese Bank N.V. ('Indover'). Object of the investigation was to obtain insight into the various activities in respect of Trade Finance and Corporate Finance, and to assess the manner in which your institution recognises and manages the credit risk and other risks associated with these activities.
(...)

2 FINDINGS AND CONCLUSIONS

Based on our investigation and findings Tz arrives at the following conclusion.

2.1 Conclusion

The credit portfolio is relatively limited. As a direct consequence, the extent of the total credit risk is limited as well. It should be noted, however, that the portfolio contains many low-rated loans (a high credit risk); (...). Also, in view of the limited activities, the current organisation offers insufficient possibilities to properly manage the credit risk (...).

2.4 Funding

You gave as principal reason for the limited size of the credit portfolio the absence of commercial funding opportunities. A major part of the funding is currently provided by the parent company, Bank Indonesia ('BI'). As agreed with BI, Indover is obliged to repay part of this funding every month. However, Indover is hardly able to independently attract (long-term) funding at a commercial rate, so that the mandatory repayments to BI translate directly into a further diminishing in value of the credit portfolio. It is expected that a Letter of Comfort from BI, as issued in the past as well, might help Indover attract external funding. We understand that you are still negotiating such Letter of Comfort with BI.

We agree with Indover that having larger funding facilities available is an essential condition for being able to profitably continue the activities in the future. BI is currently trying to divest Indover. When screening the potential buyer, DNB will also consider the manner in which Indover's future funding needs will be ensured.

2.10.6. By letter dated 25 February 2004, BI wrote to KPMG, insofar as is relevant:

Referring to your request for Bank Indonesia confirmation to support audit opinion on Indover bank Financial Statement 2003 as mentioned in your letter to Indover bank dated 28 January 2004, we confirm that Bank Indonesia as shareholder of Indover bank will continue supporting the activities of Indover bank, until the moment the shares of the bank is sold to a third party.

2.10.7. The *Minutes of the Meeting held between NV, The Indonesische Overzeese Bank (Indover bank), De Nederlandsche Bank N V. (DNB), and KPMG Accountants NV. (KPMG) on 1 September 2004* prepared by KPMG read, insofar as is relevant:

> DNB asked why it was necessary to mention that KPMG requested a confirmation letter by Bank Indonesia on supporting Indover Bank until the completion of the divestment process. KPMG indicate that this letter was requested given the financial results of the bank in combination to the funding position. KPMG expresses that they were happy with this comfort letter when they had to sign the financial statements. DNB agreed on this.

2.11. *2005*

2.11.1. A report prepared by Fitch dated 19 December 2005 states, among other things:

> BI has confirmed in writing its responsibility for its obligations as the shareholder of Indover until completion of the divestment. However, this commitment does not constitute a guarantee.

2.12. *2006*

2.12.1. On 26 June 2006, Indover, as Borrower, entered, a *Facility Agreement* for a maximum amount of USD 75 million with a term to maturity of (roughly) one year with a banking consortium which did not include BI.

2.12.2. A report prepared by Fitch dated 22 December 2006 states, among other things :

> BI has confirmed in writing that "as shareholder of Indover bank, BI will continue supporting the activities of Indover Bank, until the moment the shares of the bank is sold to a third party". However, this commitment does not constitute a guarantee.

2.13. *2007*

2.13.1. By letter dated 23 February 2007, Indover wrote to BI, insofar as is relevant:

> As you are aware, repayments of Bank Indonesia (BI) funding must be resumed by Indover from the end of 2006. On 23 November 2006 (…), we sent our request for a postponement for the scheduled instalments. Since our request was declined (…) on 18 December 2006, we have continued to meet our obligation with instalments of USD 7.5 million in January and February 2007 consecutively.
> On this occasion, please allow us to clarify at a greater extent why BI funding support is so critical for Indover's business viability, in light of existing weaknesses in the bank's financial position and banking operation. Considering the seriousness of the concerns explained below, we would like to submit our request for a rescheduling yet again.
>
> (…)
>
> We (…) believe that a continuation of BI funding placement is very crucial to facilitate our efforts in acquiring external financing. We would utterly appreciate if you can reconsider your decision by maintaining BI funding support with indover.

2.13.2. A letter dated 18 April 2007 from BI to Indover reads in the English translation produced by BI, insofar as is relevant:

Referring to your letter (…), we would like to inform you that Bank Indonesia has made some decisions as follows:

(…) To approve the postponed repayments of non pledge deposit installment amounted for USD 5 million/month from April 2007 until the divestment process has finalized. Bank Indonesia will evaluate Indover bank achievement for some requirements at the end of each year before renewing the postponed repayments of non pledge deposit installment.

2.13.3. On 20 April 2007, Indover, as Borrower, entered a *Facility Agreement* for a maximum amount of USD 100 million with a term to maturity of (roughly) one year with a banking consortium which did not include BI.

2.13.4. On 7 May 2007, BI and Indover concluded a written *Termination of Pledge Deposit Agreement and Conversion of Deposit* which reads, insofar as is relevant:

WITNESSETH

A. On September 25, 1998, Bank Indonesia and Indover Bank have entered into Deposit Agreement, Deposit and Pledge Agreement (Relating to Certain Credit Facilities Agreements), and Deposit and Pledge Agreement (Relating to Deposits Maintained with IAL), hereinafter to referred to as Pledge Deposit Agreement.

B. Indover Bank is now able to cover any loss arising from its activity and therefore does not need the support of Bank Indonesia, in full or in part, as provided through the Pledge Deposit Agreement.

C. Section 6 of the Pledge Deposit Agreement stipulates that the Pledge Deposit Agreement may be terminated if and when it is agreed between Bank Indonesia and Indover Bank and taking into account consultations by Indover Bank with the Dutch central bank and/or taking into account advice received by Indover Bank from the external auditors of Indover Bank that Indover Bank no longer needs (in full or in part) the support from Bank Indonesia as provided for in the Pledge Deposit Agreement.

D. On March 29, 2007, DNB and the external auditors of Indover Bank KPMG, in a separate consultative meeting with Bank Indonesia, and Indover Bank, have agreed to terminate the Pledge Deposit Agreement.

2.13.5. By letter dated 15 June 2007, BI notified DNB of the agreement mentioned above in para. 2.13.4 and also that it will nominate P.C.M. van der Voort van Zyp as (Dutch) member of the Supervisory Board of Indover.

2.13.6. On 16 July 2007, Indover, as Borrower, entered, , a *Facility Agreement* for a maximum amount of USD 150 million with a term to maturity of (roughly) one year with a banking consortium which did not include BI.

2.13.7. The minutes of the extraordinary meeting of shareholders of Indover held on 19 December 2007 read, insofar as is relevant:

b. Matters that require considerations in Shareholder Meeting
Mr. Budi Mulya (…) announced the followings:
- Bank Indonesia will continue to maintain its existing funding placement until Indover bank is divested;
- The Letter of Comfort issued by BI in 2004 will be renewed to reflect BI's support as the Shareholder for the activities of Indover bank;
- The divestment plan is still on and has to be effected in 2008;

A report of that meeting, together with annexes, reads in an English translation produced by BI, insofar as is relevant:

BI informed that the divestment process will keep running taking into account the divestment deadline on January 2009, by re-opening the opportunity to State Owned banks (…) to conduct acquisition of Indover bank.

BI will provide comfort letter addressed to DNB/KPMG regarding BI's support on the financial condition of Indover bank. Such comfort letter shall not be addressed to the creditor as requested by Indover bank. (…)

Indover bank requested Bank Indonesia to make a comfort letter addressed to the creditors to increase the third party funds. BI stated that the comfort letter will be issued for DNB interest in respect of BI's commitment as shareholder but the comfort letter is not addressed to the creditor.

2.13.8. A report prepared by Fitch dated 27 December 2007 states, among other things*inter alia*:

BI has confirmed in writing that as shareholder of Indover bank, BI will continue supporting the activities of Indover, until the moment the shares of the bank are divested. However, this commitment does not constitute a guarantee.

2.14. *2008*

2.14.1. By letter dated 25 January 2008 Indover wrote to BI, insofar as is relevant:

Referring to the Extraordinary General Meeting of Shareholders held on 19 December 2007 (…), the letter of "confirmation on supporting Indover Bank" dd. 25 February 2004 (…) is considered for a renewal to support the business plan of Indover bank 2008, especially for the funding program.

Herewith, the Management of Indover bank is pleased to enclose a draft concept for your consideration.

In conclusively, we also wish to express our thank for your continue support, as the renewed letter will also contribute to the smoothening of the Annual Account process of 2007.

2.14.2. By letter dated 5 February 2008 BI wrote to KPMG, insofar as is relevant:

Referring to Bank Indonesia's letter (…) dated February 25, 2004 Re: Confirmation on Supporting Indover bank, herewith we would like to confirm that as shareholder of Indover bank, we will continue to support the activities of Indover bank as long as Bank Indonesia owns the shares of Indover bank. In view of the forthcoming divestment of Indover bank, it is our present intention to undertake a transfer of ownership to one of Indonesia State Owned Banks.
We hope the above information could assist you in supporting your audit opinion of Indover bank.

2.14.3. On 9 May 2008 Indover, as Borrower, entered a *Facility Agreement* for a maximum amount of USD 117 million with a term to maturity of (roughly) one year with a banking consortium which did not include BI.

2.14.4. On 16 July 2008 Indover, as Borrower, entered a *Facility Agreement* for a maximum amount of USD 80 million with a term to maturity of (roughly) one year with a banking consortium which did not include BI.

2.14.5. On 8 and 9 August 2008, an *Indover Bank Creditors' Forum* was held in Bali (Indonesia), attended by representatives of Indover, BI and a number of banks.

2.14.6. In September 2008, Indover faced a liquidity crisis due to the fall of Lehman Brothers.

2.14.7. By letter dated 25 September 2008, Bank Mandiri informed BI that it had decided against acquiring the shares in Indover.

2.14.8. By order of 6 October 2008, at the request of DNB, the District Court in Amsterdam declared the emergency ruling applicable to Indover, appointing Messrs A. van Hees and H.P. de Haan RA as administrators.

2.14.9. By letter dated 12 October 2008, the administrators of Indover asked BI to advance additional funding of EUR 250 million to Indover by 13 October 2008 at the latest.

2.14.10. By letter dated 31 October 2008, BI wrote to the administrators of Indover, insofar as is relevant:

> Following the phone conversation (…) on 30th October 2008, we herewith confirm that we are not able to inject fresh funds to the Indover Bank, as we were not able to obtain the needed approval by the Parliament as required by our Central Bank Act (…).

2.14.11. By judgment of the Amsterdam District Court of 1 December 2008, Indover was declared bankrupt, with the appointment of the administrators as trustees. On 1 April 2011, Mr Harmsen took the place of Mr H.P. de Haan RA.

2.15. *2009*

2.15.1. By letter dated 18 September 2009, the trustees wrote to BI, insofar as is relevant:

> In your letter dated 25 February 2009 you submitted a claim (the "**Claim**") on behalf of Bank Indonesia ("**BI**") with the trustees of Indover Bank. (…) In this letter we inform you on the status of the Claim.
>
> The Claim consists of the following items:
>
> (i) an amount of EUR 4,987,667.93 for a current account with account number 1001-000149-075;
>
> (ii) a total amount of EUR 38,308,974.42 for several money market placements and time deposits;
>
> (iii) a total amount of EUR 213,317,14 for interest accrued up to 1 December 2008; and
>
> (iv) an amount of EUR 32,551.46 for a current account with account number 1001-000149-011.
>
> Therefore, the total of the Claim amounts to EUR 43,542,510.95. According to the administration of the Indover Bank, the claimed amount is correct. However, the trustees are of the opinion that they have a substantial claim (the "**Trustees' Claim**") on BI pursuant to, *inter alia*, (i) a guarantee issued by BI and/or (ii) a claim for damages arising from an unlawful act for which BI is liable. It is to be expected that the amount of the Trustees' Claim will considerably exceed the amount claimed by BI in the Claim. Pursuant to article 6:127 of the Dutch Civil Code (the "**DCC**"), the trustees hereby (partially) set-off the Trustees Claim with the amount claimed by BI in its Claim, which Claim by virtue of article 6:127 DCC in conjunction with article 6:129 DCC ceases to exist retroactively. Therefore, you do not have any claim on Indover Bank at all, and consequently the Claim is not acknowledged.

2.16. *2011*

2.16.1. On 30 March 2011 and 27 April 2011, the trustees, with leave from the president of the District Court in Amsterdam, had the claim submitted to them for verification by BI attached, as (prejudgment) attachment of a counterclaim (*eigenbeslag*) and as attachment of assets of a debtor not domiciled in the Netherlands (*vreemdelingenbeslag*).

2.16.2. At the trustees' request, DNB wrote to the trustees on 29 July 2011, in so far as is relevant:

> First of all, it should be noted that this case is peculiar, and that Indover is different from other supervised companies, in the sense that Indover is a subsidiary of a (fellow) central bank, which guaranteed DNB on several occasions, on which guarantee DNB was justified to rely, that it would continue to support Indover until the divestment was completed and a new shareholder was found. This guarantee had a strong influence on the supervisory activities exercised by DNB over Indover. The supervision of Indover exercised by DNB should be understood in this light.

3. Assessment

3.1. BI claims in these proceedings, among other things, that it be admitted as ordinary creditor in the bankruptcy of Indover on the basis of its claim of € 43,542,510.95 and that its claim be admitted and verified for that amount. BI additionally seeks, put briefly, a declaratory judgment that this claim is immune from execution, that the attachment of BI's assets is declared null and void, or that the attachments are lifted, and that the trustees are prohibited from attaching the assets again.
The trustees principally seek an order against BI to pay a sum of € 31,421,202, or an amount equal to the estate debts, plus an amount equal to the contested claims against the bankrupt, to the extent that these will be admitted as yet. Moreover, they principally seek an order against BI to pay a sum of € 35,648,352.22, plus an amount equal to the statutory interest and contractual interest Indover will still owe in respect of the claims against the bankrupt, to be determined in separate proceedings, and a sum of € 3,992,842.30 plus interest, and a sum of € 147,164, plus interest. The trustees alternatively seek an order against BI to pay a sum of € 31,421,202.83, an amount equal to the estate debts, plus an amount equal to the contested claims against the bankrupt, to the extent that these are admitted as yet. They additionally seek as an alternative an order against BI to pay a sum of € 36,699,084.87, plus an amount equal to the aggregate of the statutory interest to which the joint creditors are additionally entitled, to be determined in separate proceedings, and a sum of € 3,992,842 plus interest, and a sum of € 147,164.11, plus interest.

3.2. The trustees admit that Indover owes the sum of € 43,542,510.95 to BI. However, they invoke set-off with a claim they allege to have against BI. This claim is based on the fact that BI guaranteed Indover that for as long as BI is Indover's sole shareholder, BI will ensure that Indover will be able to fulfil its financial obligations and that BI failed to fulfil this obligation. In their principal claim, the trustees seek compensation for the loss resulting from this failure. With their alternative claim the trustees bring a so-called Peeters/Gatzen claim on behalf of the joint creditors (the "PG Claim"). They argue that in view of BI's statements, Indover's joint creditors and regulators were justified in relying on BI's guarantee that, for as long as it was the sole shareholder of Indover, it would ensure that Indover would be able to continue to fulfil its financial obligations and that BI wrongly failed to honour that guarantee; that the creditors advanced loans to BI on the basis of that reliance; and that the regulators were intentionally induced not to intervene. In doing so, the trustees hold that BI acted unlawfully towards Indover's joint creditors.

3.3. In the contested final judgment (there are no grounds for appeal submitted, neither on appeal in the main action nor on appeal in the procedural issue, against the interim judgments), the District Court dismissed the trustees' principal claim on the grounds that BI was not under an obligation towards Indover to ensure that Indover would fulfil its financial obligations (paras. 4.5.1-4.5.12). Concerning the alternative claim, the District Court found that, even if the trustees have a cause of action with their PG Claim, the claim should be dismissed. The creditors were not at liberty to rely on the press release of 16 February 1998 that BI would be unconditionally prepared to solve any problems that might arise in the future. The same holds for all other information issued by BI. Nor were the creditors at liberty to rely on the fact that DNB and KPMG had not intervened (further) in Indover (paras. 4.6.1-4.6.8).

The District Court stipulated that BI will be admitted as ordinary creditor in the bankruptcy of Indover with its claim of €43,542,510.95 and lifted the attachment of that claim by the trustees. The trustees were ordered to pay the costs of the proceedings, both in the main action and in the counterclaim.

3.4. By submitting the present grounds for appeal in the main action, the trustees appeal against this

decision and the reasoning on which it is based.
BI submits grounds for appeal in the cross appeal, contesting that the trustees have a cause of action with the PG Claim and against the finding of the District Court that BI has no interest (or no longer has an interest), in having its claim allowed for a declaratory judgment that BI's claim in the bankruptcy of Indover is immune from execution, that the attachment of BI's assets is null and void, and its claim that the trustees be prohibited to attach again.

3.5. The trustees' principal claim

3.5.1. The trustees' grounds for appeal 4 to 23 are directed against the dismissal by the District Court of their principal claim. Put briefly, the trustees argue that by issuing the press release on 16 February 1998 and its letter to DNB of 9 March 1998, BI was under an obligation towards Indover, by way of an agreement (which was formed as a result of trust raised by Indover), to ensure that Indover would be able to continue fulfilling its obligations and to guarantee that Indover would continue to fulfil the solvency and liquidity requirements imposed by DNB. According to the trustees, these obligations apply for as long as BI is the sole shareholder of Indover. BI disputes the existence of such agreement. These grounds for appeal may be assessed jointly.

3.5.2. The Court of Appeal first has to establish the applicable law that will be used to decide whether BI and Indover had concluded an agreement as alleged by the trustees. This law is the law that applies to the agreement, assuming for the sake of argument that it was in fact concluded. The applicable law must be determined on the basis of the Convention on the Law Applicable to Contractual Obligations, Treaty Series 1980, 156 ("the Convention"). Since no choice of law is asserted, the applicable law is the law of the country with which the agreement is most closely connected (Art. 4.1 Convention). Pursuant to Art. 4.2 of the Convention, it is presumed that the agreement is most closely connected to the country where the party that is to effect the performance, which is characteristic of the agreement, has its principal place of business at the time the agreement is concluded. In the absence of any specific connecting factors offered by the parties this presumption is decisive. According to the alleged agreement, the characteristic performance is to be effected by BI (i.e. to ensure that Indover may continue fulfilling its obligations). Given that BI had its principal place of business in Jakarta at the time the alleged agreement was concluded, the principal claim must be assessed in accordance with Indonesian law.

3.5.3. Pursuant to Article 1320, preamble, and at (1), Indonesian Civil Code, an agreement may only exist if those who bind themselves to it consent. Material in this instance – also because the trustees based their principal claim on it – is whether, by issuing the press release of 16 February 1998 and sending its letter to DNB dated 9 March 1998, BI must be deemed to have consented to the alleged obligations. The circumstances of the case must also be considered in this assessment.

3.5.4. In January 1998, Indover was facing serious financial difficulties caused by the financial crisis which had hit Asia. First of all, its liquidity position had come under pressure and the quality of its credit portfolio – which largely consisted of loans to Indonesian debtors – had deteriorated. Indover found itself forced to make considerable provisions to cover the ensuing debtors' risk. As a result, it might be unable to meet the minimum liquidity and solvency requirements imposed by DNB. Secondly, Indover depended for its funding to a significant extent on its sole shareholder BI, whereas because of the proposed divestment it was uncertain whether BI would be prepared to continue providing this funding in the long term. Thirdly, due to the difficulties it was in, Indover had trouble finding suitable candidates to strengthen its management.

3.5.5. Against this background, DNB wrote to Indover on 13 January 1998 that it had serious concerns about the continuity of Indover and notified Indover that it still assumed that *"Bank Indonesia will continue to honour its commitments as 100% shareholder of Indover"*.

3.5.6. On 15 January 1998, the Supervisory Board of Indover accordingly decided that the management would have to send its stakeholders a letter informing them that BI would remain sole shareholder of

Indover at least for the time being.

3.5.7. Thereupon – according to Mr Susmanto's memo referred to in 2.5.3. above – representatives of BI and the management of Indover discussed, at a meeting held on 2 February 1998, a draft for a press release to be published by BNI and BI, which would announce that BI would postpone its divestment for three (or better still five) years, expecting that this would restore faith in the market and the employees of Indover.

3.5.8. On 5 February 1998, Susmanto wrote to BI's head office that he had consulted with the management of Indover and with Van Westreenen and that they feared, in view of the advice from a Dutch lawyer, that DNB would declare the emergency ruling applicable to Indover. Susmanto, Indover's management, and supervisory director Van Westreenen expected that if BI agreed with the press release submitted to it two days earlier, faith in Indover might be gradually restored and that the emergency ruling would not be imposed. Susmanto concluded with the following request: *"therefore, please issue the Press release from Bank Indonesia and Bank Negara Indonesia as soon as possible.*"

3.5.9. It may be inferred from the above that Indover only asked BI to issue a press release to announce that the proposed divestment would be postponed by at least three years in order to restore faith in the market. Apparently, Indover considered such press release to be the most appropriate means to do so. In any event, it cannot be concluded from the established facts that Indover asked BI (much less in sufficiently clear terms) to guarantee that Indover would continue to be able to meet its obligations towards third parties. This signifies that it is not obvious, and consequently the Court of Appeal does not assume, that BI intended to accept such serious commitment heedlessly in a press release without having been asked to do so (instead of on the basis of a written agreement properly concluded between the parties, as was the case at a later stage in respect of the agreement concerning the pledged deposits) and that Indover was subsequently reasonably not entitled to conclude from the press release that BI had undertaken, unsolicited and without having been given an urgent reason, such a drastic obligation like the one evoked by the trustees.

3.5.10. This is not altered by what the trustees put forward in support of their argument.

3.5.11. The trustees invoked the opinion given by Indover's lawyer, Mr Kellerman, of 5 February 1998, which reads: *"unless Bank Indonesia confirms in writing that it will ensure that Indover will meet its obligations, followed up by immediate liquidity support, Indover will not be able to meet its obligations and, is therefore technically bankrupt. Such a confirmation and support can take various forms, such as a pledged deposit or guarantee, but should be forthcoming in a matter of days, if not hours."* Although this means that Mr Kellerman advised Indover that Indover could still only be saved if BI (i) confirmed in writing that it would guarantee that Indover would continue to be able to meet its obligations, and (ii) provided financial support, but that this first requirement was subsequently not asked by Indover (much less in sufficiently clear terms) of BI by way of a binding pledge on the part of BI towards Indover. Even if it is to be accepted that BI understood as a matter of course that Indover required additional financial support – as Mr Kellerman also advised – this nevertheless required reaching a separate agreement.

3.5.12. The trustees also invoked the passage in DNB's letter of 13 January 1998 to Indover: *"Bank Indonesia will continue to honour its commitments as 100% shareholder of Indover,"* specifically the term *"commitments"*. Whatever DNB intended to express with this passage, even if it intended BI to honour its obligations as central bank and financially prop up its subsidiary Indover – for instance based on the commonly accepted view at the time that a central bank was not expected to let a subsidiary go bankrupt – this still does not alter the fact that Indover did not ask BI to accept such an obligation and could not expect BI to undertake such obligation unsolicited.

3.5.13. The phrase in the press release pointed out by the trustees: *"In this respect, Bank Indonesia will ensure that Indover Bank will meet its obligations"* does not alter the foregoing either. It is not likely that BI intended to express more in a press release than what Indover had requested on 5 February 2005, as has

already been held earlier. Moreover, the press release was not solicited, nor was it intended, as undertaking an obligation towards Indover, but an announcement to the (potential) clients of Indover and other market parties in order to restore their faith in Indover.

3.5.14. The same holds for BI's letter of 9 March 1998 to DNB in which BI stated that it would ensure that Indover would continue to meet its obligations and fulfil the requirements imposed by DNB. It cannot be said of this letter either that Indover was entitled to consider it as a consent given to it – intended to conclude an agreement with it – concerning an obligation to continually prop up Indover financially.

3.5.15. The subsequent events do not offer support for the trustees' argument either.

3.5.16. Some days after the press release on 20 February 1998, DNB saw reason to take an emergency measure by appointing Van Westreenen (2.5.7), which does not suggest that DNB was convinced that Indover's financial difficulties had been solved.

3.5.17. According to the minutes of the meetings of the Supervisory Board of Indover (2.5.10), the situation and the manner in which Indover might survive with the support of BI was discussed on 24 and 25 April 1998. Liquidating Indover was discussed, but this option was eventually rejected. It was decided, however, that BI would be asked *"to formally issue a letter of guarantee"* whereby *"Forms and requirements from this formal guarantee are still being discussed between Susmanto and van Mr. Westreenen*". What may be inferred from this is that the management of Indover apparently did not assume either, on 24 and 25 April 1998, that BI was at that time already under an obligation towards Indover to guarantee that Indover would at all times be able to meet its obligations towards third parties, but that this still required a formal written guarantee issued by BI, the content of which was still being discussed by the parties. What is certain is that BI never issued the requested *"formal letter of guarantee."*

3.5.18. According to KPMG's letter of 24 June 1998, Indover asked KPMG to sum up, for the benefit of the Supervisory Board, the alternatives available to Indover to head off the situation that had arisen, and to consider in particular the fact that Indover would have to make significant provisions for the debtors' risk of its Indonesian credit portfolio (see para. 2.5.11, above). KPMG examined in this context whether a guarantee to be provided by BI to Indover as security for Indover's outstanding loans to the Indonesian debtors was one option to provide Indover with funds, if necessary, should the debtors risk materialise. However, such guarantee would have been unnecessary if BI had already committed itself towards Indover by means of the press release to provide Indover with funds in that event.

In the end, KPMG advised BI that it might offer Indover the required support by means of pledge agreements. Following the approval of DNB, this resulted in the *Pledge Deposit Agreement,* concluded with BI on 25 September 1998. This was in line with the advice given by Mr Kellerman on 5 February 1998, since BI had announced in the press release of 16 February 1998 that it would continue as shareholder of Indover for another three years at least, and that *"In this respect, Bank Indonesia will ensure that Indover Bank will meet its obligations.*" Partially on the advice of KPMG, this *ensurance* was put in the form of the *Pledge Deposit Agreement.* Thereupon, BI implemented its *ensurance* to enable Indover to continue to meet its obligations towards third parties by not calling the remaining callable deposits *("free deposits")* and by charging Indover favourable interest rates, and also by means of the *Asset Downsizing Plan I and II* in 2000 and 2002.

3.5.19. BI's announcement of 20 March 2001 to DNB that BI *"will maintain its ownership in Indover Bank and will be fu1lly responsible for its obligation until the completion of its divestment process"* (see para. 2.8.3, above) does not lead to the conclusion that BI had accepted the obligation evoked by the trustees either. The trustees argue that BI referred with the term *"its obligation"* to the obligations of Indover, for which BI accepted "*full responsibility.*" The Court of Appeal does not consider this a likely interpretation of that announcement. Given the financial support provided by BI by means of the deposits and *Pledge Deposit Agreement,* it is rather more probable that BI referred to its own *"obligation"* to maintain the deposits in compliance with the *Pledge Deposit Agreement.* Moreover, if this were otherwise,

it must again be held that this announcement was not addressed to Indover, so that no consent between the parties may be inferred from it for this reason either.

3.5.20. According to the management report of 26 May 2001, external auditor KPMG did not confer the meaning advocated by the trustees to BI's comments either, since KPMG wrote in that report that *"in the absence of a guarantee*" it had valued Indover on a "*stand-alone"* basis (see para. 2.8.6, above).

3.5.21. Subsequent documents offer insufficient support for the trustees' viewpoint as well. By letter dated 13 February 2004, BI asked the Supervisory Board of Indover to explain *"whether DNB ever question BI's commitment in providing support to Indover Bank, considering BI's support directly to Indover Bank has been expressed in the Pledge Deposit Agreement"* (see para. 2.10.3, above). On that same day, the Supervisory Board of Indover wrote to BI that *"the possibility for Bank Indonesia as the owner to liquidate (to bankrupt) Indover Bank was not closed, including by ways of reducing funding support outside of the Pledge Agreement so Indover Bank is unable to fulfil its obligations to the third party*" (see para. 2.10.4, above). Apparently, Indover also assumed that BI did not have any obligations towards it other than those that ensued from the supporting measures agreed in 1998.

3.5.22. In its letter of 25 February 2004, BI wrote to KPMG rather unsignificantly that *"Bank Indonesia as shareholder of Indover bank will continue supporting the activities of Indover bank, until the moment the shares of the bank is sold to a third party*" (see para. 2.10.6, above), from which it is hard to infer more than what follows from the supporting measures agreed in 1998. Comparable non-significant phrases are found in BI's letter of 5 February 2008 to KPMG, i.e.: *"as shareholder of Indover bank, we will continue to support the activities of Indover bank as long as Bank Indonesia owns the shares of Indover bank"* (see para. 2.14.2, above).

3.5.23. The Fitch reports of 19 December 2005, 22 December 2006, and 27 December 2007 (see paras. 2.11.1, 2.12.2 and 2.13.8, above) rather support the view that no obligation was agreed between Indover and BI in the sense evoked by the trustees. The Fitch reports expressly warn that *"BI has confirmed in writing that as shareholder of Indover bank, BI will continue supporting the activities of Indover, until the moment the shares of the bank are divested. However, this commitment does not constitute a guarantee."* and Indover never opposed this warning included in the Fitch reports, which prejudiced Indover in its possibilities to attract funding in the market. The different statements Indover made to the lenders with which it concluded credit agreements after 2006 are not binding on BI. BI was not a party to these agreements and never made such statement.

3.5.24. Lastly, Indover never invoked the existence of a promise made by BI against BI as the trustees argue.

3.5.25. Thus, it must be concluded that in any event BI did not oblige itself, in support of Indover, to more than the *Pledge Deposit Agreement,* the agreement that BI would not call the remaining callable deposit *("free deposits")*, that BI would charge Indover favourable interest rates and finally, in 2000 and 2002, agree to the *Asset Downsizing Plan I and II.*

3.5.26. What follows from the above is that Indover never asked BI to guarantee that Indover would at all times be able to meet its obligations to third parties and that BI cannot be held to have undertaken such obligation. Insofar as the consent referred to in Article 1320, preamble, and at (1), Indonesian Civil Code may be deemed to have been given by creating a justified trust on the part of the opposite party, the foregoing bears out that Indover was never justified in presuming that BI would have consented to undertaking such obligation.

3.5.27. The conclusion must be that grounds for appeal 4 - 23 in the appeal in the main action fail.

3.6. The trustees' alternative claim

3.6.1. Grounds for appeal 24 - 29 in the main action concern the dismissal of the alternative PG Claim brought by the trustees. Ground for appeal 1 in the cross appeal concerns the cause of action the trustees have with their PG Claim.

3.6.2. In its judgment, at para. 4.6.2, the District Court found that the procedural authority of the trustees to bring the PG Claim is governed by Dutch law. This finding is – rightly – not disputed on appeal, given the provisions of Article 212t Dutch Bankruptcy Act.

3.6.3. Under Dutch law, a trustee in bankruptcy may, if the interests of creditors are prejudiced by the bankrupt, defend the creditors' joint interests, whereby the Dutch Supreme Court ruled, for the first time in *Peeters v Gatzen* (14 January 1983, ECLI:NL:HR:1983:AG4521, NJ 1983/597), that in certain circumstances claims for damages may also be validated against a third party involved in prejudicing those interests, even if – naturally – the bankrupt itself may not bring such claim. The joint creditors in the bankruptcy may bring such claim because it is based on their possibilities of recovery having been prejudiced due to the acts of the bankrupt (and the third party). For this reason, such claim does not form part of the bankrupt's estate.
Since the claim is brought in order to restore the creditors in bankruptcy's possibilities of recovery, that is to say their possibilities of recovery within the context of the bankruptcy, the proceeds from the claim are in fact part of the bankrupt's estate and consequently fall to the joint creditors by way of an increase of the bankrupt's assets to be divided in accordance with the distribution list. The trustee obtains his authority to validate such claims from the instruction given to him pursuant to Art. 68(1) Dutch Bankruptcy Act to administrate and liquidate the bankrupt's estate. A claim in connection with an unlawful act/tort executed against a specific group of the bankrupt's creditors falls outside the scope of the remit given to the trustee by Art. 68(1) Dutch Bankruptcy Act, while the Act does not include any basis for it in any case. See also Dutch Supreme Court *in De Bont v Bannenberg q.q.* (16 September 2005, ECLI:NL:RVS:2005:AT7997, NJ 2006/311, and in *Dekker v. Lutèce* (24 April 2009, ECLI:NL:HR:2009:BF3917, NJ 2009/416.

3.6.4. Put briefly, the trustees base their alternative claim on the fact that:
(i) BI wrongly did not fulfil its guarantee to Indover that it would ensure that, for as long as BI held the shares in Indover, Indover would be able to meet its obligations towards third parties at all times, when this was necessary in September and October 2008, as a result of which the possibilities of recourse of the joint creditors of Indover have been prejudiced;
(ii) BI led the joint creditors in the bankruptcy of Indover to believe that BI would ensure that Indover would continue to be able to meet its obligations and wrongly did not live up to this belief when this was necessary in September and October 2008, as a result of which the possibilities of recourse of the joint creditors of Indover have been prejudiced;
(iii) BI by signalling its continued support and by its actions intentionally prevented regulators such as DNB and KPMG from taking action to protect all creditors of Indover sooner.

3.6.5. As regards the ground mentioned at (i), since it has not been established that BI gave Indover any guarantee in the sense referred to by the trustees, it cannot be held against BI that it has not fulfilled this guarantee. The claim must be dismissed if only for this reason.

3.6.6. The grounds mentioned at (ii) are based on the presumption that all creditors in Indover's bankruptcy have legitimately believed, in view of BI's announcements and acts, that BI would at all times guarantee that Indover would be able to continue to meet its obligations, so that BI was bound to do so towards each and every one of them and its failure to honour this commitment in September/October 2008 consequently constitutes an unlawful act towards the joint creditors in the bankruptcy of Indover. However, the trustees have not asserted and nor has it become apparent who those creditors are, when they became creditors of Indover, or which concrete announcements and actions of BI they relied on and/or believed. This means that it cannot be ruled out that the claims of some of those creditors already existed before 16 February 1998 (the date of the press release), whereas it cannot be assumed, without further explanation – which is not given – against BI's contestation, that it is an established fact, also in view of the express

warning given in the Fitch reports that BI had not given any guarantee, that all creditors in the bankruptcy of Indover in view of the announcements and actions of BI have actually legitimately relied upon BI at all times ensuring that Indover would be able to continue to meet its obligations. Given these circumstances, it cannot be assumed that by bringing the claim referred to in (ii) the trustees defend the interests of all creditors in the bankruptcy of Indover and not of only some of those creditors that were justified in relying on BI at all times ensuring that Indover would be able to continue to meet its obligations. Insofar as the trustees argue, in the grounds mentioned in (iii), that all existing creditors of Indover were prejudiced in their possibilities of recourse due to the regulators' failure to act, because if they had intervened sooner Indover would have offered more recourse to its creditors, they only raise the occurrence of unlawful act/tort vis-à-vis a specific group of creditors of the bankrupt, i.e. those who were already creditors of Indover at the time when this intervention should have taken place. This moves the alternative claim, insofar as it pertains to the unlawful acts of BI referred to in (ii) and (iii), beyond the scope of the authority conferred to the trustee in bankruptcy pursuant to Art. 68(1) Dutch Bankruptcy Act to bring a claim for damages on behalf of the joint creditors in bankruptcy against a third party implicated in prejudicing the creditors' possibilities of recourse. To this extent, the trustees have no cause of action with their alternative claim.

3.6.7. The foregoing leads to the conclusion that the trustees' alternative claim, where it is based on the ground mentioned at (i), must be dismissed and that the trustees have no cause of action with the claims based on the grounds mentioned at (ii) and (iii). Grounds for appeal 24 - 29 in the main action fail. Grounds for appeal 1 in the cross appeal partially succeeds. The Court of Appeal will overturn the judgment appealed against to this extent and will rule that the trustees have no cause of action. BI has no interest in a further discussion of what it put forward in support of its first grounds of appeal in the cross appeal, since this will not lead to a different outcome.

3.7. The attachment

3.7.1. In para. 4.7.1 of the final judgment, the District Court holds that dismissal of the trustees' principal and alternative claims means that the attachment by the trustees of BI's claim will be lifted. This signifies, in the District Court's view, that BI – the central bank of the Republic of Indonesia – had insufficient interest in a declaratory judgment that its claim against Indover should be considered state property and is consequently immune from attachment (para. 4.7.1). The (further) alternative claim for an unconditional ban on a renewed attachment may not be allowed (para. 4.7.3). With grounds for appeal 2 in the cross appeal BI argues that all of its assets are immune from attachment.

3.7.2. No post-judgment measures may be taken against property of a foreign State, unless and except to the extent that exemptions of Article 19(a), (b), or (c) of the *Convention on Jurisdictional Immunities of States and their Property* ("the UN Convention) apply (*cf.* Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190). The exemption mentioned at (c) is the instance in which the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum. Pursuant to Article 21(1), preamble and at (c) UN Convention, property of the central bank or other monetary authority of the State in particular, is not considered property specifically in use or intended for use by the State for other than government non-commercial purposes. Although the UN Convention has not yet entered into force, Article 21(1), preamble, and at (c) UN Convention is a codification of international customary law (*cf.* Dutch Supreme Court 28 June 2013, ECLI:NL:HR:2013:45, NJ 2014/453 and Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190). The trustees hold that this does not mean that property of a central bank of a foreign State may not be attached in the Netherlands. The trustees argue that BI, where its claim against Indover is concerned, may not be considered as the central bank, because to that extent it acts as a commercial market party. This argument is rejected. Firstly, it cannot be inferred from the categorical exemption of Article 21(1), preamble and at (c), UN Convention that such distinction may be made. Furthermore, the distinction made by the trustees would make Article 21(1), preamble, and at (c), meaningless, as this would ensure, by a roundabout route, that property other than non-commercial property of a central bank may be attached after all.

3.7.3. Grounds for appeal 2 in the cross appeal are consequently well-founded. The Court of Appeal will rule that BI's claim in the bankruptcy of Indover has immunity, being property of a central bank, and may not therefore be attached. The Court of Appeal will furthermore rule that the attachment of BI's claim against Indover's bankruptcy is null and void. For the rest, BI no longer has an interest in what was otherwise claimed.

3.8. This means that grounds for appeal 6 in the cross appeal also succeed; that grounds for appeal 3 and 4 in the cross appeal need not be discussed; and that BI has no interest in grounds for appeal 5 in the cross appeal. This furthermore means that grounds for appeal 30 and 31 in the main action fail and that grounds for appeal 32, 33 and 34 in the main action, which are based on the preceding grounds for appeal, fail as well. The grounds for appeal in the main action that are not numbered also fail.

3.9. The trustees' offer to produce proof is insufficiently specific and/or is not pertinent, so that the Court of Appeal rejects it. Regarding the offer to produce proof concerning the relationship between BI and Indover and the existence of the guarantee, Court of Appeal remarks that the trustees have not offered concrete facts or circumstances to be proved that, if proved, may result in a different outcome, in view of what is held in paras. 3.5.1 - 3.5.27.

3.10. The grounds for appeal in the main action fail. Grounds for appeal 1 in the cross appeal are partially well-founded, as are grounds for appeal 2 in the main action. The contested final judgment will be partially overturned and for the remainder upheld, as will be the interim judgments of 12 May 2010 and 24 August 2011, against which no grounds for appeal have been submitted. As party largely found against, the trustees will be ordered to pay the costs of the proceedings in both the main action and the cross appeal.

4. The decision

The Court of Appeal:

Pronouncing judgment in the main action and in the cross appeal:

upholds the judgments of 12 May 2010 and 24 August 2011;

overturns the judgment of 27 August 2015, insofar as the District Court dismissed in the main action BI's claim for a declaratory judgment regarding the attachment by the trustees of the claim of €43,542,510.95 and in the counterclaim the trustees' alternative claim based on the grounds mentioned in para 3.6.4 at (ii) and (iii); and in a new judgment:

to that extent, newly, judging,

declares that BI's claim in the bankruptcy of Indover, as property of a central bank, has immunity and may consequently not be attached;

declares that the trustees' attachment of BI's claim against the bankruptcy of Indover is null and void;

declares that the trustees have no cause of action with their alternative claim, insofar as it is based on the grounds mentioned in para. 3.6.4, at (ii) and (iii);

upholds the remainder of the judgment of 27 August 2015;

orders the trustees to pay the costs of the proceedings on appeal in both the main action and in the cross appeal, set until this date on the part of BI at €5,114 in disbursements and €20,610 in lawyer's fees;

declares the order for costs to be immediately enforceable;

dismisses what was otherwise claimed.

This judgment was rendered by Justices A.W.H. Vink, D.J. Oranje and J.M. De Jongh and pronounced in open court on 14 November 2017.

[signature] [signature]
Mr. J.W. Hoekzema