[in the name of the King]

# JUDGMENT

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**AMSTERDAM COURT OF APPEAL**
Civil law and tax law division, team I

Case number: 200.169.606/01
Case/Cause-list number of the
Amsterdam District Court: C/13/449889/HA ZA
10-380

Judgment of the three-judge panel of the civil law chamber of 14 November 2017

***mr*. Antonie VAN HEES** and ***mr*. Catharina Maria HARMSEN,**
both acting in their capacity as Trustees in the bankruptcy of N.V. De Indonesische Overzeese Bank ("The Indonesia Overseas Bank"), a public limited company,
both with their office address in Amsterdam,
Appellants,
also Respondents in the cross-appeal proceedings,
Lawyer: *mr*. G.A.J. Boekraad, practising in Amsterdam,

*v.*

**Bank Indonesia**, a company incorporated under the laws of the Republic of Indonesia,
with its registered office in Jakarta, Republic of Indonesia

Respondent,

Lawyer: *mr*. M.H.J. van Maanen, practising in The Hague.

## 1. The proceedings on appeal

The parties are hereinafter referred to as the Trustees and BI. N.V. De Indonesische Overzeese Bank (The Indonesia Overseas Bank) is hereinafter referred to as Indover.

In their Summons dated 26 November 2014, the Trustees filed an appeal against the judgments of the Amsterdam District Court dated 12 May 2010, 24 August 2011 and 27 August 2014, delivered under the aforementioned case/cause-list number between BI as the claimant in the original claim validation proceedings, also the defendant in the counterclaim proceedings and the Trustees as the defendants in the original claim validation proceedings and counterclaimants.

The parties then entered the following documents into the proceedings:
- Statement of Appeal, accompanied by exhibits;
- Defence on Appeal, also containing a cross-appeal, accompanied by exhibits;
- Defence to the Cross-Appeal;
- Brief commenting on exhibits and filing an exhibit;
- Prof. F. de Ly's legal opinion;

- Prof. Th.M. de Boer's response to this legal opinion.

The parties had their case argued at the hearing dated 24 January 2016, the Trustees by the aforementioned *mr*. Boekraad and by *mr*. B.M. Katan, lawyer practising in Amsterdam, and BI by the aforementioned *mr*. Van Maanen, all based on pleading notes filed with the court. The Trustees also entered an exhibit into the proceedings.
A judgment by this Court was then requested.

On appeal, the Trustees moved that this Court, where possible immediately enforceable, (i) set aside the judgment dated 27 August 2014, (ii) now deny BI's claims, (iii) now award the Trustees' claims, (iv) order BI to reimburse the Trustees the payments it received under the aforementioned judgment, ordering (v) BI to pay the costs of the proceedings in both instances.

On appeal, BI moved that this Court, where possible immediately enforceable, uphold the judgment dated 27 August 2014, as this Court understands it to the extent that its claims were awarded and the Trustees' claims were denied, ordering the Trustees to pay the costs of the proceedings.

In the cross-appeal proceedings, BI moved, where possible immediately enforceable, that this Court set aside the judgment dated 27 August 2014 to the extent that its claims were denied in it. BI moves that this Court issue a declaratory decision finding that (i) BI's claim in the bankruptcy of Indover as property of a central bank, or at least as state property intended for public use, enjoys immunity and as such cannot be attached, set off or sold off in any other way, (ii) the pre-judgment attachment is null and void, and (iii) any new attachments to be levied on BI's claim in the bankruptcy of Indover or other BI assets are also null and void by law. BI also moves in the cross-appeal proceedings that the Trustees be restrained from levying attachment on BI assets on pain of a penalty and that the alternative claim on account of an unlawful act filed by the Trustees on behalf of the joint creditors be declared inadmissible, ordering the Trustees to pay the costs of the proceedings.

In the cross-appeal proceedings, the Trustees move that the grounds for appeal be dismissed and that BI be ordered to pay the costs of the proceedings.

Both parties offered to furnish evidence of their submissions on appeal.

## 2. The facts

In the contested judgment dated 27 August 2014, the District Court listed the facts in paras. 2.1 to 2.16 that it assumed as established. To the extent that grounds for appeal 1, 2 and 3 in the appeal proceedings take issue with the accuracy of the facts established by the District Court, this Court will consider these objections in the representation of the facts set out below. The non-contested facts bind this Court too. In combination with other facts which were established after being asserted and not or insufficiently contested, this Court will proceed from the following facts.

2.1 *BI*

2.1.1. Section 4(1) of Indonesian Act 1999/23, of which BI has filed an English translation ("Act of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia"), reads as follows: "Bank Indonesia is a Central Bank of the Republic of Indonesia". Section 4(3) of that Act reads as follows in the English translation: "Bank Indonesia is a legal entity based on this Act".

2.2. *Indover*

2.2.1. Indover, a public limited company incorporated under Dutch law with its registered office in the Netherlands, was established on 1 July 1965 as the successor to BI's branch office in the Netherlands.

2.2.2. Indover conducted the business of a credit institution with a licence from De Nederlandsche Bank N.V. (hereinafter: "DNB"), the Dutch banking regulator.

2.2.3. Indover only served the business market. For the most part its clients came from East Asia, in particular from Indonesia.

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 accountant was KPMG Accountants N.V. (hereinafter: "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 Indover's sole shareholder from the time of its incorporation.

2.3.2. In its last years, the management board and the supervisory board of Indover were largely made up of officers and former officers of BI.

2.3.3. Under pressure from the International Monetary Fund, BI planned to divest its shares in Indover. To that end, BI, in the first place, entered into negotiations with PT Bank Negara Indonesia (hereinafter: "BNI").

2.4. *1997*

2.4. In the course of 1997 a financial crisis hit East Asia.

2.5. *1998*

2.5.1. In a letter of 13 January 1998, DNB, to the extent that is relevant here, wrote to BI:

*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 An English translation of the minutes of the meeting of Indover's supervisory board, held on 15 January 1998, which has been entered into the proceedings by BI, reads, to the extent that is relevant here, as follows:

*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.*

Representatives of BNI were also present at this meeting.

2.5.3. An English translation of a memo dated 3 February 1998 from H.Y. Susmanto (hereinafter: "Susmanto"), the head of BI's representative office in London (United Kingdom) and member of Indover's supervisory board, addressed to the BI headquarters in Jakarta (Indonesia), which has been entered into the proceedings by BI, reads, to the extent that is relevant here, as follows:

*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. In a fax of 5 February 1998 *mr*. Kellerman, at the time Indover's lawyer, wrote, among other things, the following:

*(...) 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. An English translation of a letter dated 5 February 1998 from Susmanto to the BI Headquarters, which has been entered into the proceedings by BI, reads, to the extent that is relevant here, as follows:

*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 not activate all management and replace them with DNB's personnel in order of formulate the final settlement. Previous experience of the implementation of Article 11 always ends in 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 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 dated 16 February 1998 issued by BI reads as follows:

*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. In a letter of 20 February 1998 DNB (“the Bank”) wrote to Indover, to the extent that is relevant here:

*We refer to the numerous telephone conversations with you over the past few days and inform you as follows:*

*The Bank has found that your institution is hardly able to attract monies from third parties on the public market any more. In additions, it was discovered on 17 February 1998 that at present the Supervisory Board of your institution de facto consists of only one person. On the basis of this information, combined with the recent developments in Indonesia, the Bank is of the opinion that this situation jeopardises the liquidity of your institution and calls for immediate action.*

*We have given you an opportunity to state your views on the immediate implementation of the measures to be taken. Taking our consultations with you into consideration, we hereby determine, having regard to section 28(4) of the Dutch Credit System (Supervision) Act 1992 (Wet toezicht kredietwezen, "Wtk"), that pursuant to section 28(3)(a) of that Act the supervisory board of your institution may only exercise its powers with the approval of a person designated by the Bank.*

*The Bank has designated the following person for that purpose: Mr C.J.P. van Westreenen.*

*This notice has immediate effect and pursuant to section 28(5)(a) Wtk the bodies of your institution, including the managing board, are legally required to give their full cooperation to the designated person.*

2.5.8. In a letter of 9 March 1998 BI wrote to DNB, to the extent that is relevant here:

*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 Nederlandsche 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 Indover's supervisory board, containing a report drawn up by DNB ("the Bank"), dated 8 June 1998, of a meeting held with Indover ("IndOv") on 23 April 1998 reads, to the extent that is relevant here:

*1 GENERAL COMMENTS*

*You have explained the current situation regarding IndOv. We discussed the policy of Bank Indonesia (BI) to divest itself of banking participations, the sale of IndOv to Bank Negara Indonesia (BNI) and the fact that this sale was postponed for three years due to the financial crisis.*
*You referred to BI's letter of 9 March 1998, informing the Bank of the obligation assumed by BI to maintain its shareholding in IndOv for at least three more years. You have confirmed once again that BI will ensure that IndOv will fulfil all its obligations and that it will comply with the requirements imposed by the Bank. We indicated that the Bank attaches a lot of value to this letter and that it is much appreciated that BI has sent this letter to the Bank.*

*2 SUPERVISORY BOARD*

*The SB currently consists of three members. IndOv is continuing its search for a Dutch supervisory director but so far, it has not found any suitable candidates who are willing to become a supervisory director of IndOv in the current situation. Candidates find that the liability risk in the event of a possible bankruptcy of IndOv is too high.*
*We promised to help you find a suitable candidate, if so desired. However, we do not deny that this is a difficult matter.*

*3 MANAGEMENT BOARD*

*Mr M. Muchtar Panjaitan will start his activities as a director at the end of April 1998. We already approved the appointment of Mr Muchtar by letter of 29 January 1998.*

*You explained that BNI has committed itself to supporting IndOv in the upcoming transitional period of three years. Part of this support is to provide an experienced director.*

*4 INDOV'S ACTIVITIES*

*You explained that in the next few years IndOv will prepare itself for the final take-over by BNI.*

*We asked you if BI has also considered other scenarios, such as liquidation. After all, in the current circumstances IndOv's future prospects seem limited. The quality of the assets seems to keep deteriorating and it has proven impossible for IndOv, at this time, to attract funding from the market. It is expected that IndOv will have a long and uncertain road to travel before becoming a healthy bank again.*

*You informed us that BI has considered the liquidation option, but has decided against it. You mentioned the following reasons for this decision:*
*- the negative effect on the value of (a large part of) IndOv's outstanding loans. It is expected to be a long time before outstanding Indonesian loans can be recovered. A direct liquidation of its assets will probably generate far less;*
*- you regard the European market as a vital growth market for Indonesian trading activities and therefore consider it desirable to have Indonesian banks in Europe;*
*- BI has assumed obligations in respect of BNI.*

*5 QUALITY OF THE ASSETS*

*You indicated that the receivables from Indonesian credit institutions have been guaranteed by the Indonesian government. Therefore, IndOv is confident that these debts can be collected.*
*You also stated that you expect an agreement to be concluded in Indonesia soon which involves the financial restructuring of business activities. Loans granted by IndOv to Indonesian companies will be covered by this agreement.*

*We further explained that in the Netherlands a distinction is made between provisions for country risk and provisions for debtors. According to the Dutch banking industry, Indonesia is currently categorised as a country that presents a risk of being unable to fulfil its payment obligations. It would therefore seem reasonable to create a country risk provision for Indonesian receivables.*

*We also explained to you that, in principle, it is one of the main responsibilities of the credit institution to create an appropriate provision for debtors. The Supervision Directorate (Directoraat Toezicht) assesses to what extent a credit institution has adequately put that responsibility into practice. We discussed the possibility of IndOv becoming unable to comply with minimum solvency requirements after creating such necessary provisions.*
*You informed us that IndOv is discussing this issue with its external accountant, who in the meantime has presented a few alternative solutions. You assured us that BI will ensure that IndOv will continue to comply with the solvency requirements. If necessary, this will be done by providing additional capital.*
*We agreed that IndOv would shortly provide the Bank with further information on the above issues.*

*6 AGREEMENTS*

*In conclusion, we agreed on the following:*
*- IndOv will continue its search for a Dutch supervisory director;*
*- Mr Muchtar will assume his activities as a director at the end of April 1998;*
*- IndOv will shortly inform the Bank on the provisions to be made and the support to be provided by BI in that respect, which will include, to the extent that is necessary, providing additional capital in order to continue to comply with the solvency requirements.*

2.5.10. An English translation of the minutes of the meeting of Indover's supervisory board, held on 24 and 25 April 1998, submitted by BI, reads as follows, to the extent that is relevant here:

***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 honouring 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 re-enter 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 national 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. In a letter of 24 June 1998 KPMG wrote to Indover, to the extent that is relevant here:

*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 provisions 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 taken 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. An English translation of a letter dated 22 July 1998 from DNB ("the Bank") to Indover ("IndOv"), submitted by BI, reads as follows, to the extent that is relevant here:*

*On 15 July 1998 a meeting was held at De Nederlandsche Bank NV (hereinafter the Bank) between the Bank and (...) NV De Indonesische Overzeese Bank (hereinafter IndOv). (...) 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 entered into a written Deposit and Pledge Agreement (relating to certain Credit Facilities Agreements), which reads, to the extent that is relevant here:

*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 never claimed the remaining (due and payable) deposits (“free deposits”) from Indover.

2.6. *1999*

2.6.1. The Indonesian Act 1999/23 (“Act of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia”) referred to above at 2.1 became effective on 17 May 1999.
Section 7 of that Act reads, in an English translation submitted by BI:
“*The objective of Bank Indonesia is to achieve and maintain the stability of the rupiah value”.*
*Section 64(1) of that Act, in the same translation, reads: “(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”.*
*The translation of Section 77 of that Act reads: “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 Section 64 paragraph (1)”.*

2.7. *2000*

2.7.1. In a letter of 28 September 2000 DNB wrote to Indover, to the extent that is relevant here:

*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 set-off.*

*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. In a letter of 12 October 2000 KPMG wrote to Indover, to the extent that is relevant here:

*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. In a letter of 23 October 2000 Indover wrote to BI, to the extent that is relevant here:

*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's reaction to this letter was positive. The first Asset Downsizing Plan was executed: Indover set off its receivables up to a sum of USD 278.8 million from non-performing loans against the (claim by BI against Indover pursuant to the) deposits, while relying on its pledges.

2.8. *2001*

2.8.1. In a letter of 3 January 2001 DNB wrote to BI, to the extent that is relevant here:

*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 N.V. De Indonesische Overzeese Bank (Indover), De Nederlandsche Bank N.V. (DNB) and KPMG Accountants N.V. (KPMG) on 31 January 2001, at the offices of KPMG, which were drawn up by KPMG, read as follows, to the extent that is relevant here:

*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 Ms. Miranda Goeltom, Mr. De Wilde of DNB has asked BI for an extension of the guarantee issued by BI. Mrs. Goeltom 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. In a letter of 20 March 2001 BI wrote to DNB, to the extent that is relevant here:

*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. In a letter of 30 March 2001 DNB wrote to BI, to the extent that is relevant here:

*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 the Meeting with Mrs Goeltom re Indover”, containing a report of a meeting between representatives of BI, Indover and KPMG of 14 May 2001, which were drawn up by KPMG, read as follows, to the extent that is relevant here:

***I 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 lndover can be 'repaid' to B1 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 (hereinafter: Goeltom) was deputy governor at BI at the time.

2.8.6 On 26 May 2001 KPMG wrote the following to Indover in the ‘Report concerning the financial statements for the nine months period ended 31 December 2000’

**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 he read as an extension of the commitment referred to in the letter of 9 March 1998. In the absence of a guarantee by 131, we have assessed the financial situation and projections of Indover on a stand-alone basis. Based on that assessment, it can he concluded that the solvency of the bank is adequate, with a HIS capital ratio of 173%. The bank's forecasts, which includes the implementation of the ADP as planned, show expected profits for the foreseeable future.*

2.8.7. The second Asset Downsizing Plan was executed: Indover set off its receivables up to a sum of USD 91.5 million from non-performing loans against the (claim by BI against Indover pursuant to the) deposits, while relying on its pledges.

2.9. *2003*

2.9.1. In a letter of 28 November 2003 KPMG wrote to Indover, to the extent that is relevant here:

*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. An English translation of a letter dated 8 December 2003 from Indover to BI, which has been submitted by the Trustees, reads, to the extent that is relevant here:

*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. In a letter of 29 December 2003 BI wrote to DNB, to the extent that is relevant here:

*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 of 30 December 2003, rating agency Fitch gave a rating of B+ (long term) to Indover. The report noted, among other things, the following:

*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 or the Indonesian state.*

2.10. *2004*

2.10.1 In a letter of 28 January 2004 KPMG wrote to Indover, to the extent that is relevant here:

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. An English translation of a letter dated 3 February 2004 from Indover to BI, which has been submitted by BI, reads, to the extent that is relevant here:

*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. An English translation of a letter dated 13 February 2004 from BI to Indover’s supervisory board, which has been submitted by BI, reads, to the extent that is relevant here:

*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 fulfilment 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. An English translation of a letter dated 13 February 2004 from Indover’s supervisory board to BI, which has been submitted by BI, reads, to the extent that is relevant here:

*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 fulfil 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 fulfil 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 fulfil 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 doubt 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. In a letter of 20 February 2004 DNB wrote to Indover, to the extent that is relevant here:

*1 INTRODUCTION*

*In November 2003 drs. R.E. Derksen RC and drs. E.W.R. Weerdenburg RA of the Supervision Directorate (Directoraat Toezicht, 'Tz') performed an audit at De Indonesische Overzeese Bank N.V. ('Indover') in the context of the prudential supervision of the business. The audit's objective was to gather information on the various activities in Trade Finance and Corporate Finance and to assess the manner in which your institution recognises and manages the credit risks and other risks presented by these activities.*

*(…)*

*2 FINDINGS AND CONCLUSIONS*

*On the basis of our activities and findings the Tz has concluded as follows:*

*2.1 Conclusion*

*The credit portfolio is relatively limited. The direct result of this is that the total credit risk is limited. However, the portfolio does contain a lot of loans with a low credit rating (high credit risk); (…). Partly in view of the limited activities, the current organisation offers sufficient possibilities to achieve adequate management of the credit risk. (…).*

*2.4 Funding*

*You refer to the lack of commercial funding options as the main reason for the limited size of the credit portfolio. At this time the main part of the funding comes from the parent company Bank Indonesia ('BI'). Pursuant to agreements made with BI, Indover is required to pay back part of this funding on a monthly basis. However, Indover is hardly capable of raising (long-term) funding at a commercial rate on its own; consequently, the mandatory repayments to BI directly result in a further reduction of the credit portfolio. Expectations are that a Letter of Comfort from BI, as was issued before, could help Indover to raise external funding. We understand that consultations with BI on such a Letter of Comfort are in progress.*

*We agree with Indover that the availability of more generous financing facilities are an essential precondition for a profitable future. BI is currently looking into the possibilities of divesting Indover. DNB will assess the prospective purchaser, taking into consideration how Indover's funding needs will best be safeguarded in the future.*

2.10.6. In a letter of 25 February 2004 BI wrote to KPMG, to the extent that is relevant here:

*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 N.V. De Indonesische Overzeese Bank (Indover bank), De Nederlandsche Bank N.V. (DNB) and KPMG Accountants N.V. (KPMG) on 1 September 2004*, which were drawn up by KPMG, read as follows, to the extent that is relevant here:

*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 Fitch report dated 19 December 2005 states, among other things, the following:

*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 entered into a Facility Agreement with a consortium of banks - which did not include BI - as the Borrower of a sum of USD 75 million for a term of (approximately) one year.

2.12.2. A Fitch report dated 22 December 2006 states, among other things, the following:

*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.*

*2007*

2.13.1. In a letter of 23 February 2007 Indover wrote to BI, to the extent that is relevant here:

*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. In an English translation of a letter of 18 April 2007 submitted by BI, BI wrote to Indover, to the extent that is relevant here:

*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 instalment 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 instalment.*

2.13.3. On 20 April 2007 Indover entered into a Facility Agreement with a consortium of banks - which did not include BI - as the Borrower of a sum of USD 100 million for a term of (approximately) one year.

2.13.4 On 7 May 2007 BI and Indover entered into a written *Termination of Pledge Deposit Agreement and Conversion of Deposit*, which reads, to the extent that is relevant here:

*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. In a letter of 15 June 2007 BI informed DNB of the agreement referred to above in 2.13.4 and also informed DNB that it will nominate P.C.M. van der Voort van Zyp as a (Dutch) member of Indover's supervisory board.

2.13.6. On 16 July 2007 Indover entered into a Facility Agreement with a consortium of banks- which did not include BI - as the Borrower of a sum of USD 150 million for a term of (approximately) one year.

2.13.7. The minutes of the extraordinary meeting of shareholders of Indover, held on 19 December 2007 read as follows, to the extent that is relevant here:

***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.*

An English translation of a report from that meeting, entered into the proceedings by BI, reads as follows, to the extent that is relevant here:

*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 other than (...) 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 Fitch report of 27 December 2007 states, among other things, the following:

*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. In a letter of 25 January 2008 Indover wrote to BI, to the extent that is relevant here:

*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. In a letter of 5 February 2008 BI wrote to KPMG, to the extent that is relevant here:

*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 entered into a Facility Agreement with a consortium of banks - which did not include BI - as the Borrower of a sum of USD 117.5 million for a term of (approximately) one year.

2.14.4. On 16 July 2008 Indover entered into a Facility Agreement with a consortium of banks - which did not include BI - as the Borrower of a sum of USD 80 million for a term of (approximately) one year.

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

2.14.6. In September 2008 Indover experienced liquidity problems due to the collapse of the Lehman Brothers.

2.14.7. In a letter of 25 September 2008 Bank Mandiri informed BI that it had decided not to purchase shares in Indover.

2.14.8. In the judgment of 6 October 2008 the District Court of Amsterdam, at the request of DNB, declared the emergency regulations applicable to Indover and appointed *mr.* A. van Hees and H.P. de Haan *RA* as its administrators.

2.14.9. In a letter of 12 October 2008 the administrators of Indover requested BI to provide additional funding to Indover in the amount of EUR 250 million by 13 October 2008 at the latest.

2.14.10 In a letter of 31 October 2008 BI wrote to Indover's administrators, to the extent that is relevant here:

*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. Indover was declared bankrupt on 1 December 2008 by judgment of the District Court of Amsterdam and the Court appointed the administrators as its trustees. H.P. de Haan *RA* was replaced by *mr.* Harmsen as of 1 April 2011.

2.15. *2009*

2.15.1 In a letter of 18 September 2009 the Trustees wrote to BI, to the extent that is relevant here:

*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 preliminary relief judge of the District Court of Amsterdam, levied prejudgment attachment on the Bank of Indonesia claim submitted to them for validation, which attachment constituted an attachment of assets of a debtor not domiciled in the Netherlands.

2.16.2. On 29 July 2011, at the Trustees’ request, DNB wrote, where relevant here, the following to the Trustees:

We would like to note in advance that the present case is special and Indover differs from other supervised companies in that Indover is a subsidiary of a (fellow) central bank, which guaranteed to DNB on several occasions, which DNB relied on, that it would continue to support Indover until the divestment had taken place and there was a new shareholder. This guarantee had a substantial impact on the supervisory activities performed by DNB in relation to Indover. The supervision that DNB exercised on Indover should be understood against this background.

**3. The assessment**

3.1. In these proceedings BI is claiming, among other things, that it be recognised as an ordinary creditor in Indover’s bankruptcy based on its claim of EUR 43,542,510.95, and that its claim for this amount be acknowledged and validated. In addition BI is also claiming, put briefly, a declaratory judgment that this claim enjoys immunity from execution, that the attachment of BI’s assets is void, or that the attachments that have been levied be lifted, and that the Trustees be prohibited from levying attachment again.

Among other things the Trustees are claiming, principally, that BI be ordered to pay the sum of EUR 31,421,202, an amount that is equal to the debts of the estate, as well as a sum equal to the disputed bankruptcy claims to the extent that these are acknowledged after all. Among other things they are also claiming, principally, that BI be ordered to pay the sum of EUR 35,648,352.22 as well as an amount that is equal to the total interest at the statutory rate and any contractual interest that Indover will owe on the bankruptcy claims, to be determined in quantum of damage assessment proceedings, as well as the sum of EUR 3,992,842.30, with interest, plus the sum of EUR 147,164 with interest. Alternatively, the Trustees are claiming, *inter alia*, that BI be ordered to pay the sum of EUR 31,421,202.83, an amount that is equal to the debts of the estate, as well as an amount equal to the disputed bankruptcy claims to the extent that these are acknowledged after all. They are also claiming, alternatively, that BI be ordered to pay the sum of EUR 36,699,084.87 as well as an amount equal to the total interest at the statutory rate to which the joint creditors are additionally entitled, to be determined in quantum of damage assessment proceedings, as well as the sum of EUR 3,992,842 with interest, plus the sum of EUR 147,164.11 with interest.

3.2. The Trustees acknowledge that Indover owes BI the sum of EUR 43,542,510.95. They have also placed reliance, however, on this sum being set off against a claim which they assert they have against BI. They base this claim on the argument that BI guaranteed Indover that, as long as it was Indover's sole shareholder, it would ensure that Indover would be able to continue to perform its financial obligations, and that BI failed to perform this obligation. In their principal claim the Trustees are claiming compensation of the damage which was the result of this failure. In their alternative claim the Trustees have filed a *Peeters v Gatzen* claim ("PGC") on behalf of the joint creditors. They argue that, based on the statements issued by BI, Indover's joint creditors and its supervisors were entitled to rely on BI ensuring that, as long as it was Indover's sole shareholder, Indover would be able to continue to meet its financial obligations, that BI wrongly failed to perform this guarantee, that the creditors granted loans to Indover based on this reliance, and that the supervisors were deliberately persuaded not to intervene. According to the Trustees, BI acted unlawfully against Indover's joint creditors.

3.3. In the contested final judgment (no grounds for appeal or cross appeal were filed against the interlocutory judgments) the District Court dismissed the Trustees' principal claim on the grounds that BI had no obligation to Indover to ensure that Indover performed its financial obligations (paras. 4.5.1 – 4.5.12). As regards the alternative claim, the District Court held that, to the extent that the Trustees' PGC was admissible, it could not be allowed. The press release of 16 February 1998 did not provide the creditors with any reason to have confidence in BI's unqualified willingness to resolve all problems that might arise in the future. That also applied to the other information that originated from BI. Nor were the creditors entitled to rely on this confidence based on the fact that DNB and KPMG had not intervened (or made any further intervention) at Indover (paras. 4.6.1 – 4.6.8).

The District Court ruled that, as an ordinary creditor in Indover's bankruptcy, BI's claim of EUR 43,542,510.95 was allowed and it lifted the attachment levied by the Trustees on this claim. The Trustees were ordered to pay the costs of the proceedings in both the original and the counterclaim proceedings.

3.4. In the appeal proceedings the Trustees have filed grounds for appeal against these decisions and the reasoning on which they are based.

In its grounds for cross appeal BI contests the admissibility of the Trustees' PGC and the District Court's finding that BI does not have (or no longer has) any interest in its claim for a declaratory judgment that BI's claim in Indover's bankruptcy enjoys immunity from execution and that the attachment on BI's assets is invalid and its claim that the Trustees be prohibited from levying attachment again.

3.5. *The Trustees' principal claim*

3.5.1. In their grounds for appeal 4 to 23 the Trustees take issue with the District Court's dismissal of their principal claim. Put briefly, the Trustees argue that, by *inter alia* issuing the press release of 16 February 1998 and sending its letter of 9 March 1998 to DNB, BI undertook to Indover by way of an agreement (concluded on the basis of the confidence generated at Indover) that it would ensure that Indover would be able to continue to perform its obligations and that Indover would comply with the solvency and liquidity requirements imposed by DNB. According to the Trustees, these obligations would continue to apply for as long as BI was Indover's sole shareholder. BI disputes the existence of such an agreement. These grounds for appeal can be assessed together.

3.5.2. This Court must first establish what law should serve as the basis for assessing whether the agreement which the Trustees allege was in place between BI and Indover was concluded. A decisive factor in this regard is the law that applies to that agreement, assuming that it was actually

concluded. The law that applies to it is established on the basis of the Convention on the law applicable to contractual obligations (the Rome Convention) (Treaty Series 1980, 156). Given that no choice of law was made, the law of the country with which the alleged agreement is most closely connected applies (Article 4(1) of the Rome Convention). Pursuant to Article 4(2) of the Rome Convention, it is presumed that the agreement is most closely connected with the country where the party who is to effect the performance which is characteristic of the agreement had its central administration at the time of concluding the agreement. In the absence of any other specific pointers from the parties, this presumption is decisive in this regard. On the basis of the alleged agreement, BI is the party that was obliged to provide the performance which is characteristic of the agreement (i.e. ensuring that Indover was able to continue performing its obligations). Since BI's central administration was based in Jakarta at the time that the alleged agreement was concluded, the principal claim must be assessed according to Indonesian law.

3.5.3. Pursuant to Article 1320, opening words and (1) of the Indonesian Civil Code, there must be consent between the individuals who are to be bound by an agreement in order for that agreement to be valid. In essence this means, in this case – partly because the Trustees have based their principal claim on this – that it must be ascertained whether BI should be considered to have consented to these alleged obligations by issuing the press release of 16 February 1998 and sending its letter of 9 March 1998 to DNB. This assessment must include consideration of the circumstances of the case.

3.5.4. In January 1998, Indover was facing severe problems as a result of the Asia crisis. Firstly, Indover's liquidity position was under pressure and the quality of its credit portfolio (which mainly consisted of loans issued to Indonesian debtors) had deteriorated. Indover was forced to make considerable provisions for the resulting default risk and, consequently, it was at risk of no longer being able to meet the minimum liquidity and solvency requirements set by DNB. Secondly, Indover depended to a large extent on its 100% shareholder BI for its funding, but there was uncertainty about BI's willingness to keep providing that in the long term given the intended divestment. Thirdly, given the problems it was facing, Indover was having difficulty finding suitable candidates to reinforce its management.

3.5.5. Against this background DNB wrote to Indover on 13 January 1998 that it was seriously concerned about Indover's continuity and it informed Indover that it would continue to assume that "*Bank Indonesia will continue to honour its commitments as 100% shareholder of Indover*".

3.5.6. On 15 January 1998, Indover's supervisory board accordingly decided that the management board should send letters to stakeholders informing them that BI would, for the time being in any case, continue to be Indover's 100% shareholder.

3.5.7. Then, on 2 February 1998 (according to the Susmanto's memorandum referred to in para. 2.5.3. above) representatives of BI and Indover's management board met to discuss a draft of a press release, to be issued by BNI and BI, stating that BI would postpone its intended divestment by three years (or preferably five years) in the expectation that that would restore the confidence of the market as well as that of Indover's employees.

3.5.8. Then, on 5 February 1998, Susmanto wrote to BI's head office saying that he had consulted with Indover's management board and Van Westreenen and that they were afraid, after having obtained the Dutch lawyer's advice, that DNB would declare the emergency regulations applicable to Indover. Susmanto, Indover's management board and Van Westreenen, a member of Indover's supervisory board, expected that if BI were able to consent to the press release that had been proposed two days previously, confidence in Indover could gradually be regained and that the

emergency regulations would not be applied. Susmanto concluded by requesting: "*therefore, please issue the Press release from Bank Indonesia and Bank Negara Indonesia as soon as possible*."

3.5.9. This course of events makes it clear that Indover merely asked BI to issue a press release announcing that the intended divestment would be postponed by at least three years so that market confidence could be restored. Indover clearly considered that such a press release was the best way to achieve this for the time being. At least, the established facts do not in any case demonstrate that Indover asked BI to ensure that Indover would always be able to continue to perform its obligations to third parties (let alone to issue a statement to that effect in sufficiently clear wording). This means that it is not obvious, and therefore this Court does not assume, that BI intended, without being asked, to issue a press release nonchalantly assuming such onerous obligations (instead of in a proper written agreement drawn up between the parties, as occurred later with regard to the pledged deposits) and that Indover was not reasonably entitled to conclude from the press release that BI thereby undertook, without being asked and without any compelling reason having been given to do so, to take on such a far-reaching obligation as the Trustees now argue.

3.5.10. This is not altered by the Trustees' submissions in substantiation of their position.

3.5.11. The Trustees relied on the advice given by *mr.* Kellerman, Indover's lawyer, on 5 February 1998 which stated: "*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 shows that *mr.* Kellerman advised Indover that it could only be salvaged if BI both (i) provided written confirmation that it would ensure that Indover would always continue to perform its obligations and (ii) provided financial support, Indover did not then request BI (far less in sufficiently clear wording) to issue an undertaking to Indover binding itself to the first of these two requirements. It may well have been self-evident to BI that Indover required additional financial support (as *mr*. Kellerman advised), but separate agreement would then have been needed in that regard.

3.5.12. The Trustees have also placed reliance on the passage in DNB's letter to Indover of 13 January 1998 that states: "*Bank Indonesia will continue to honour its commitments as 100% shareholder of Indover*" and, in particular, the word "*commitments*". Whatever DNB may have meant by this passage, even if it had been contemplating the obligations of BI as Indonesia's central bank to keep Indover afloat (e.g. from the then conventional point of view that a central bank would be expected not to allow a subsidiary to go bankrupt) this still does not alter the fact that Indover did not ask BI to assume any such obligation and that it was not entitled to expect BI to bind itself in such a way without being asked.

3.5.13. The words in the press release to which the Trustees refer – "*In this respect, Bank Indonesia will ensure that Indover Bank will meet its obligations*" – do not alter the foregoing either. After all, as found above it is not likely that, in issuing its press release, BI intended to provide more than what Indover had requested on 5 February 1998. Furthermore, the press release was not requested – nor was it intended – as an acceptance of an obligation addressed to Indover, but rather as a message to Indover's clients (and potential clients) and other market parties aimed at restoring their confidence in Indover.

3.5.14. The same applies to BI's letter of 9 March 1998 to DNB stating that BI would ensure that Indover would continue to perform its obligations in addition to the requirements stipulated by DNB. Once again, Indover was not entitled to regard this letter as consent addressed to it (with the

intention of concluding an agreement with it) regarding an obligation to continue to keep Indover afloat.

3.5.15. The events that unfolded after that do not provide any support for the Trustees' submissions either.

3.5.16. On 20 February 1998, a few days after the press release, DNB saw reason to carry out an emergency measure by appointing Van Westreenen (para. 2.5.7. above); this does not mean that DNB had been reassured that this had removed Indover's financial problems.

3.5.17. According to the minutes of the meetings of Indover's supervisory board (para. 2.5.10.), the prevailing situation and the way Indover could survive it with BI's support were discussed on 24 and 25 April 1998. This had included discussion of Indover's liquidation, but that was decided against in the end. The decision was also taken ask BI "*to formally issue a letter of guarantee*"; in this regard, "*Forms and requirements from this formal guarantee are still being discussed between Susmanto and Mr. Westreenen*". It can be concluded from this that Indover's management board, too, clearly did not assume on 24 and 25 April 1998 that BI was obliged to Indover at that point to ensure that Indover would always be able to continue performing its obligations to third parties, but that this still required BI to issue a formal written guarantee, the substance of which was still being negotiated at that point. It is an established fact that BI never issued the requested "*formal letter of guarantee*".

3.5.18. According to KPMG's letter of 24 June 1998, Indover requested KPMG to provide a summary to the supervisory board of the alternatives that were available to Indover to cope with the situation, including consideration, in particular, of the fact that Indover would have to make substantial provisions for the default risk of its Indonesian credit portfolio (see para. 2.5.11. above). In this regard, KPMG investigated whether a guarantee to be issued by BI to Indover securing the outstanding loans to Indover's Indonesian debtors was one of the possibilities, thus providing Indover with funds if its default risk was to materialise. Such a guarantee would, however, have been unnecessary if the press release issued by BI had included such an undertaking to provide Indover with the requisite funds in that eventuality.

In the end, KPMG's advice was that BI could provide the requisite support to Indover by means of pledge agreements. After DNB granted its approval, this resulted in the Pledge Deposit Agreement concluded with BI on 25 September 1998. Indover and BI thus acted in line with the advice issued by *mr.* Kellerman on 5 February 1998. The fact is that, on 16 February 1998, BI announced in its press release that it would continue to be a shareholder of Indover for at least another three years and that "*In this respect, Bank Indonesia will ensure that Indover Bank will meet its obligations*". Partly on KPMG's advice, this assurance was ultimately formalised in the Pledge Deposit Agreement. BI then also implemented its assurance that it would enable Indover to continue to perform its obligations to third parties by refraining from calling in the remaining due and payable deposits ("*free deposits*") and by charging Indover favourable interest rates, as well as by agreeing the Asset Downsizing Plans I and II in 2000 and 2002.

3.5.19. BI's letter of 20 March 2001 to DNB stating that BI "*will maintain its ownership in Indover Bank and will be fully responsible for its obligation until the completion of its divestment process*" (see para. 2.8.3. above) also does not force one to conclude that BI gave the undertaking in the sense argued by the Trustees. The Trustees have argued that BI's use of the words "*its obligation*" was a reference to Indover's obligations for which BI declared that it was thus "*fully responsible*". This Court does not consider this interpretation of the letter to be likely. Given the financial support that BI provided in the form of the deposits that it made and the Pledge Deposit Agreement which it concluded, it is more likely that BI was referring to its own *"obligation*" to maintain its deposits in order to perform the Pledge Deposit Agreement. Furthermore, even if the situation were different, it

is once again the case that this letter was not addressed to Indover, meaning that for this reason, too, the conclusion cannot be that there was consensus between the parties.

3.5.20. Nor, according to the management report of 26 May 2001, did KPMG, the external accountant, attach to BI's statements the conclusion that the Trustees advocate. The fact is that in that report KPMG wrote 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. Later documents also provide insufficient support for the Trustees' position. In a letter of 13 February 2004, BI asked Indover's supervisory board 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). That same day Indover's supervisory board wrote to BI saying 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 fulfill its obligations to the third party"* (see para. 2.10.4. above). Clearly, therefore, Indover itself also assumed that BI had no obligations to it other than those pursuant to the support measures agreed in 1998.

3.5.22. In its letter of 25 February 2004, BI only blandly stated to KPMG 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). It is difficult to conclude anything more from this than the support measures agreed in 1998. Similar insignificant wording is to be found in the letter that BI sent, upon request, to KPMG on 5 February 2008, specifically: "*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) instead provide support for the view that no obligation was agreed between Indover and BI in the sense argued by the Trustees. The Fitch reports contain the explicit warning 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*." In addition, Indover never opposed this warning in the Fitch reports which negatively impacted Indover's opportunities for attracting funding from the market. The statements to the contrary that Indover made to the lenders with whom it concluded credit agreements from 2006 are not binding upon BI. BI was not a party to those agreements, nor did it make those statements.

3.5.24. Finally, Indover never stated to BI that it was relying on the existence of an undertaking from BI as argued by the Trustees.

3.5.25. The conclusion must therefore be that BI in any case never issued any undertaking to support Indover other than by concluding the Pledge Deposit Agreement, agreeing to refrain from calling in the remaining due and payable free deposits, charging Indover favourable interest rates and, finally, in 2000 and 2002, agreeing to the Asset Downsizing Plans I and II.

3.5.26. It follows from the foregoing that Indover did not ask BI to ensure that Indover would always be able to continue performing its obligations to third parties, and that BI cannot be deemed to have accepted such an obligation. To the extent that the consent under Article 1320, opening words and (1) of the Indonesian Civil Code may be deemed to have been given on the basis of the legitimate confidence generated with the other party, it also follows from the foregoing that Indover could not have legitimately assumed that BI had consented to accepting such an obligation.

3.5.27. The conclusion is that grounds for appeal 4 to 23 fail.

*3.6. The Trustees' alternative claim*

3.6.1. Grounds for appeal 24 to 29 concern the dismissal of the Trustees' alternative claim, the PGC. The ground for cross appeal 1 concerns the admissibility of the Trustees' PGC.

3.6.2. In para. 4.6.2 the District Court found that the Trustees' procedural authority to file the PGC is governed by Dutch law. This finding was not questioned on appeal – correctly, given the provisions of section 212t of the Dutch Bankruptcy Act (*Faillissementswet*).

3.6.3. Under Dutch law, if the creditors have been prejudiced by a bankrupt party then the Trustees are allowed to represent the interests of the joint creditors; in such a case the Dutch Supreme Court held for the first time in its judgment of 14 January 1983, ECLI:NL:1983:AG4521, NJ 1983/597 (*Peeters v Gatzen*) that, in certain circumstances, a claim for damages against a third party who was involved in such prejudice may also be enforced even if the bankrupt party did not, of course, have that claim itself. The joint creditors have such a claim because it is based on the prejudicing of their means of recovery as a result of the bankrupt party's actions (and the third party's). That is why this claim does not form part of the estate.

Since the claim is for the recovery of the bankruptcy creditors' means of recovery, i.e. their means of recovery within the context of the bankruptcy, the proceeds from their claims do form part of the estate and are therefore due to the joint creditors in the form of an increase to the estate assets to be apportioned in accordance with the distribution list. A trustee bases his authority to enforce such claims on the instruction issued to him under section 68(1) of the Dutch Bankruptcy Act to manage and liquidate the bankrupt estate. A claim pursuant to an unlawful act that was committed against a certain group of creditors of the bankrupt party does not, however, come under the scope of the instruction issued to the trustee under section 68(1) of the Dutch Bankruptcy Act, nor does this act provide any other basis for such a claim. In this regard, see the Dutch Supreme Court 16 September 2005, ECLI:NL:RVS:2005:AT7997, NJ 2006/311 (*De Bont v Bannenberg q.q.*) and Dutch Supreme Court 24 April 2009, ECLI:NL:HR:2009:BF3917, NJ 2009/416 (*Dekker v Lutèce*).

3.6.4. Put briefly, the Trustees based their alternative claim on the following:
(i) BI wrongly failed, when this was necessary in September and October 2008, to fulfil the guarantee it had issued to Indover that, for as long as BI held the shares in Indover, Indover would always be able to continue to perform its obligations to third parties, as a result of which Indover's joint creditors' means of recovery were prejudiced;
(ii) BI generated the confidence among the joint creditors in Indover's bankruptcy that BI would ensure that Indover would continue to be able to perform its obligations and that it wrongly failed to fulfil that legitimate confidence when that was necessary in September and October 2008, as a result of which Indover's joint creditors' means of recovery were prejudiced;
(iii) by issuing its statements about its continuing support and as a result of its conduct, BI deliberated restrained regulatory bodies such as DNB and KPMG from taking action earlier to protect all of Indover's creditors.

3.6.5. With regard to the grounds described in (i) above, given that it has not been established that BI issued a guarantee to Indover in the sense argued by the Trustees, BI cannot be blamed for not having fulfilled it. Therefore, this claim cannot be allowed for this reason alone.

3.6.6. The grounds described in (ii) above are based on the assumption that, given BI's statements and conduct, all creditors in Indover's bankruptcy had the legitimate confidence that BI would always continue to ensure that Indover could continue to meet its obligations, meaning that BI was obliged

to perform those obligations to each of them, and its failure to perform this obligation in September/October 2008 was therefore unlawful in relation to the joint creditors in Indover's bankruptcy. The Trustees have not, however, stated or explained who these creditors are, when they became creditors of Indover, or which specific statements and conduct by BI they acted and/or relied on. This means that it cannot be ruled out that the claims of some of these creditors came about *before* 16 February 1998 (the date of the press release), and that, partly having regard to the explicit warnings given in the Fitch reports that BI had not issued a guarantee, it cannot be assumed as an established fact without further explanation, which has not been given, and in the face of BI's denial, that all the creditors in Indover's bankruptcy did indeed have the legitimate confidence, based on the statements and conduct of BI alleged by the Trustees, that BI would always ensure that Indover could continue to perform its obligations. In these circumstances it cannot be assumed that, with their claim under (ii), the Trustees are representing the interests of the joint creditors in Indover's bankruptcy and not just the group of creditors that did in fact have the legitimate confidence that BI would ensure that Indover would continue to perform its obligations. To the extent that the Trustees argue in (iii) above that the means of recovery of all of Indover's existing creditors were prejudiced as a result of the regulatory bodies failing to intervene earlier because, if intervention had occurred earlier, Indover would have been able to provide its creditors with greater means of recovery, they are to this extent also acting in response to an unlawful act that was committed against a certain group of creditors of the bankrupt party, specifically against those who were already creditors of Indover at the point that that earlier intervention should have occurred. This means that the alternative claim, to the extent that it is based on BI's allegedly unlawful actions described in (ii) and (iii) above, exceeds the authority granted to the bankruptcy trustee under section 68(1) of the Dutch Bankruptcy Act to file a claim on behalf of the joint creditors against a third party who was involved in prejudicing their means of recovery. To this extent the Trustees' alternative claim is inadmissible.

3.6.7. The conclusion from the foregoing is that the Trustees' alternative claim should be dismissed to the extent that it is based on the grounds described in (i) above, and that it is inadmissible to the extent that it is based on the grounds described in (ii) and (iii) above. Grounds for appeal 24 to 29 fail. Ground for cross appeal 1 succeeds in part. This Court will to this extent set aside the judgment appealed against and declare the Trustees' claim inadmissible after all. BI does not have an interest in any further discussion of its submissions made in substantiation of its ground for cross appeal 1, as that 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 found that the dismissal of the Trustees' principal and alternative claims meant that the Trustees' attachment of BI's claim would be lifted. The District Court held that this meant that BI – the central bank of the Republic of Indonesia – had insufficient interest in a declaratory judgment that its claim against Indover should be deemed to be state property and, therefore, was not susceptible to attachment (para. 4.7.1.). An unrestricted injunction against attachment being levied again, claimed as an alternative and second alternative, could not be granted (para. 4.7.3). In its ground for cross appeal 2 BI argues that all its property enjoys immunity from attachment.

3.7.2. Pre-judgment measures against property of a foreign state are not allowed unless and to the extent that one of the exceptions referred to in Article 19(a), (b) or (c) of the Convention on Jurisdictional Immunities of States and their Property (the "UN Convention") applies (cf. Dutch Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236, NJ 2017/190). The exception referred to at (c) concerns property that 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. In accordance with Article 21(1), opening lines and (c) of the UN Convention, property of the central bank is not considered as 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), opening lines and (c) are a codification of customary international 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). According to the Trustees this does not mean, however, that property of a central bank of a foreign state is not susceptible to attachment in the Netherlands. The Trustees argue that BI should not be regarded as a central bank as regards its claim against Indover because to that extent it is acting in the capacity of a commercial market party. This argument is rejected. Firstly, it cannot be concluded from the categorical exception provided in Article 21(1), opening lines and (c) of the UN Convention that such a distinction can be made. Secondly, the distinction argued by the Trustees would make Article 21(1), opening lines and (c) meaningless because the indirect consequence of this would be that property other than non-commercial property of a central bank could be attached.

3.7.3. Ground for cross appeal 2 is therefore well-founded. This Court will issue a declaratory judgment that, as property of a central bank, BI's claim in Indover's bankruptcy enjoys immunity and, as such, is not susceptible to pre-judgment attachment. This Court will also issue a declaratory judgment that the pre-judgment attachment levied by the Trustees on BI's claim in Indover's bankruptcy is void. BI currently has insufficient interest in any other or further declaratory judgments.

3.8. This means that ground for cross appeal 6 is also successful, that grounds for cross appeal 3 and 4 do not require discussion, and that BI does not have an interest in ground for cross appeal 5. This also means that grounds for appeal 30 and 31 fail. Thus, grounds for appeal 32, 33 and 34, which elaborate on the grounds that precede them, cannot succeed either. The grounds for appeal that are not separately numbered therefore fail as well.

3.9. The Trustees' offer of evidence is not sufficiently specific and/or relevant and this Court therefore rejects it. As for the offers of evidence regarding the legal relationship between BI and Indover and the existence of the guarantee, this Court also notes that the Trustees have not offered to prove any specific facts or circumstances that, if proven, could lead to a different finding in light of the findings made in paras. 3.5.1 to 3.5.27.

3.10. The grounds for appeal fail. Ground for cross appeal 1 is partially valid, as is ground for cross appeal 2. The contested final judgment will be partly set aside and, for the rest, upheld, as will the interlocutory judgments of 12 May 2010 and 24 August 2011, against which no grounds for appeal were directed. As the predominantly unsuccessful party, the Trustees will be ordered to pay the costs of the proceedings in both the appeal and the cross appeal proceedings.

## 4. The decision

This Court:

issuing judgment in the appeal and the cross appeal proceedings:

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

sets aside the judgment of 27 August 2015 to the extent that the District Court dismissed the declaratory judgments claimed by BI in the original proceedings regarding the Trustees' attachment of the claim of EUR 43,542,510.95 and, in the counterclaim proceedings, dismissed the Trustees' alternative claim which was based on the grounds set out in para. 3.6.4. (ii) and (iii).

and to this extent issuing a new judgment:

issues a declaratory judgment that, as property of a central bank, BI's claim in Indover's bankruptcy enjoys immunity and, as such , is not susceptible to pre-judgment attachment;

issues a declaratory judgment that the Trustees' pre-judgment attachment of BI's claim in Indover's bankruptcy is void;

declares that the Trustees' alternative claim is inadmissible to the extent that it is based on the grounds set out in para. 3.6.4. (ii) and (iii);

upholds the judgment of 27 August 2015 for the rest;

orders the Trustees to pay the costs of the proceedings in the appeal and the cross appeal proceedings, estimated up to today's date on BI's part at EUR 5,114 in disbursements and EUR 20,610 in lawyer's fees;

declares this order for costs immediately enforceable;

dismisses any other or additional claims.

This judgment was issued by judges A.W.H. Vink, D.J. Oranje and H.M. de Jongh and pronounced by the cause-list judge in open court on 14 November 2017.

[signed and sealed]

J.W. Hoekzema