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Arrest Haven: The Netherlands

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Introduction

As some may have experienced, the Netherlands is an attractive jurisdiction for ship arrests. Procedural law provides for an effective way to easily obtain leave for a pre-judgment attachment in order to secure a claim. Such pre-judgment attachment could have significant consequences for owners, charterers and (bunker) suppliers, though. This became even more so with the revised Brussels I Regulation which came into force in 2015.

Pre-judgment attachment

The pre-judgment attachment is frequently used by Dutch and foreign creditors to collect claims against various debtors, both Dutch and foreign. The order by the court to grant leave for such a pre-judgment attachment is commonly used to obtain security, so as to make sure that the debtor will fulfill its obligations should a judgment be rendered against it. A creditor can then simply liquidate the attached assets of its creditor to obtain payment under the judgment. Furthermore, it is widely used as an effective means of putting pressure on debtors in order to obtain quick payment while, at the same time, avoiding lengthy and sometimes costly substantive legal proceedings or arbitration.

In practical terms obtaining leave for a pre-judgment attachment can be achieved in just a matter of hours. Courts are always available to rule on an application for a pre-judgment attachment even during evenings and weekends if it concerns an urgent matter. This is obviously the case in the event that security is to be obtained from a vessel owner whose vessel is to call at a port and there is uncertainty as to when she will depart. The decision by the court on the application is a so-called *ex-parte* decision, which means that the debtor is not able to defend itself on the application itself. The creditor applying for the attachment generally has the benefit of the doubt when seeking leave for an attachment. If the applicant has an arguable case regarding the merits of its claim, leave is likely granted. Normally only the facts will be considered by the court who will apply a marginal test on the basis of limited facts and, in many of the cases, only very few documents to substantiate the claim. However, a debtor confronted with an attachment for a bogus claim is able to counter the arguments in summary proceedings to have the attachment lifted. Once leave is obtained from the court it is the bailiff who actually executes the attachment, which usually takes only one hour depending on the location of the assets.

Cross-border effect on a Dutch pre-judgment attachment order

Since the revised Brussels I Regulation came into force, under certain circumstances, it would even be possible to file an application with the Rotterdam Court in order to obtain leave for the attachment of assets elsewhere in the EU. The revised Brussels I Regulation provides uniform rules throughout the EU on international jurisdiction and recognition and enforcement of civil judgments, and replaces the previous Brussels I Regulation. So, on the basis of the revised Brussels I Regulation a creditor is able to enforce assets of its debtor throughout the EU by obtaining leave from the attachment friendly Dutch courts. The only condition for such cross-border pre-judgment attachment order is that the Rotterdam Court has jurisdiction on the merits of the claim. This is, for example, the case where parties have included in their contracts a 'choice of forum' clause conferring jurisdiction on the Rotterdam Court.

The revised Brussels I Regulation provides that the *ex-parte* order is served upon the debtor before assets are attached. If, for example, the debtor is a Greek ship owner and the vessel is to be arrested in Germany, good co-ordination between the authorities responsible for the service and the actual arrest is needed to uphold the surprise effect of the arrest.

An interesting example of the revised Brussels I Regulation in practice is the arrest of the pusher-barge *Navin 24*.[1] The court granted a direct attachment order to arrest the barge, which was located in Germany or Austria for a claim relating to unpaid charter hire. Jurisdiction was based on a choice of forum clause in the time-charter, which vested jurisdiction in the Rotterdam Court.

The *Navin 24* is an example of the attachment friendly jurisdiction of the Netherlands, also in applying the revised Brussels I Regulation in a cross-border case. It is anticipated that upcoming European legislation will further bolster this development. From 2017, the EAPO-Regulation (European Account Preservation Order) will enter into force and will provide for the opportunity to allow a court to grant an EAPO which can be directly enforced in another member state, leading to the attachment of a bank account of the debtor. It could also be used against third parties domiciled in other member states that owe money to the debtor. Where the EAPO Regulation specifically targets bank accounts, the revised Brussels I Regulation applies to tangible assets located in other member states.

Security

As pointed out above, a party confronted with an attachment of its assets for an obvious nonsense claim, could easily initiate summary proceedings and request the court to lift the attachment. Alternatively, and often seen, a debtor (often through its insurers) puts up security to have the attachment lifted. In particular when its vessel is arrested, providing security on standard terms is an efficient way to lift the attachment with limited costs.

In the Netherlands the Rotterdam Guarantee Form 2008 (RGF2008) is commonly used and, as was recently ruled again, is sufficient security to force a creditor to lift the attachment. The standard wording of RGF2008 is widely accepted as an attractive form of security, for instance because it does not prejudice jurisdiction of foreign courts or arbitration institutes in substantive proceedings. In other words, a creditor could benefit from obtaining security in the Netherlands while at the same time be able to pursue its claim in another preferred jurisdiction.

International Group Club letters of undertaking may, subject to the wording, also be accepted by the courts in the Netherlands, but in practice parties prefer to work on the basis of RGF2008 in order to avoid any potential discussion on the terms and conditions of the security to have it in place without delay.

Once security is provided it is only a matter of minutes for the bailiff to practically lift the attachment. In the event of a ship arrest, the Master of the vessel is informed as well as the port authorities.

Conclusion

The Netherlands is widely recognised as an attractive jurisdiction for attachments. Dutch courts easily allow for the attachment of assets of a debtor, which decision is usually based on limited factual information and with relatively limited substantiation. The revised Brussels I Regulation will most likely increase the options for creditors in the future to attach debtor's assets throughout the EU. As mentioned above, it is a condition for such cross-border attachment that the Rotterdam Court has jurisdiction over the merits of the claim.

A recent development with the Rotterdam Court will even more facilitate enforcement of debtor's assets by creditors. Since 1 January 2016 it is, in certain cases, possible to have the proceedings on the merits conducted in English. These cases include maritime and transport cases and parties could jointly apply to have the proceedings in English. A further step is anticipated where all maritime and transport related cases will be concentrated in Rotterdam and the Rotterdam Court will be the maritime court in the Netherlands.

We are grateful to Robert Hoepel, dispute resolution lawyer at AKD Rotterdam, for this article.

[1] *Court of Rotterdam, 12 March 2015, ECLI:NL:RBROT:2015:3395*