

Wider arrest possibilities in the Netherlands under the revised Brussels I Regulation



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The Netherlands is widely recognised as an arrest haven, and this has been widened under the revised Brussels I Regulation.

Introduction

As discussed in an earlier article published in *The Standard Bulletin*, the Netherlands is widely recognised as an arrest haven. Its procedural law provides for effective means by which to obtain security in advance of main proceedings against a debtor. Such security can be obtained by seizing the assets of the debtor on the basis of a pre-judgment attachment order. These pre-judgment attachment orders can be obtained in a matter of hours in Rotterdam in case of need.

The pre-judgment attachment order is widely used by Dutch and foreign creditors to collect claims against Dutch debtors or foreign debtors. The order can be used solely for the purpose of providing security, so that the debtor will fulfil its obligation after a judgment has been rendered against it. If the debtor fails to honour such an obligation, the creditor can simply satisfy its claim by liquidating the assets that have been secured by means of the pre-judgment attachment order. The attachment order can also be used as a means to exert pressure on the debtor to make payment and thus avoid the need to start substantive proceedings. Only by satisfying the claim of the creditor is the debtor able to regain control over its assets.

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

Can Dutch courts arrest assets of debtors that are located in other EU member states?

This question has recently gained importance due to the revised Brussels I Regulation (Recast Brussels I), which came into force on 15 January 2015. This regulation provides uniform rules throughout the EU on international jurisdiction and recognition and enforcement of civil judgments, and replaces the previous Brussels I Regulation.

The Recast Brussels I Regulation introduces an important change. Under the new regulation, it is now possible to enforce, throughout the EU, provisional measures granted on the basis of an ex-parte application in any individual member state. The only condition is that the court issuing the attachment order must have jurisdiction as to the subject matter of the proceedings (on the basis of the jurisdictional rules of the regulation). The Recast Brussels I Regulation effectively makes it possible to attach assets anywhere in the EU if the Dutch court has jurisdiction as to the subject matter of the proceedings. This is, for example, the case if the parties have included in their contracts a 'choice of forum' clause conferring jurisdiction on the Rotterdam Court.

Pre-judgment attachment order

The order is usually granted ex-parte and can also be served on third parties, such as banks. The attachment order blocks any payments by the third party to the debtor. If the money is held in a bank account, the entire sum in the account at the time that the attachment is served will be seized awaiting a decision in the core proceedings.

Timing of attachment order

The Recast Brussels I Regulation requires the *ex-parte* order to be served upon the debtor before the assets are attached. The attachment order could obviously lose its effect if the debtor has knowledge beforehand that its assets will be attached. So, to uphold the 'surprise effect', good co-ordination is required between the authorities responsible for the service of the attachment order and the authority responsible for the actual seizure of the assets.

If matters are co-ordinated properly, the time gap between the notice and the enforcement can be kept to a minimum. The debtor will be informed very shortly before or simultaneously with the arrests that are actually placed on its assets. Conversely, the effect of service of the attachment order may provoke the debtor to instigate settlement discussions to avoid its assets being arrested.

Free circulation of arrest or attachment orders

The modification included in the Recast Brussels I Regulation enables a free circulation of arrest or attachment orders throughout the EU. This new development coincides with another development in European legislation. From 2017, the EAPO-Regulation (European Account Preservation Order) will enter into force. This regulation allows one court (having subject-matter jurisdiction) to grant an EAPO which can be directly enforced in another member state, resulting in the attachment of a bank account of the debtor. Where the EAPO specifically targets bank accounts, the Recast Brussels I can be used for the attachment of tangible assets which are located in another member state. Furthermore, it can be used against third parties domiciled in other member states that owe money amounts to the debtor. Due to these developments in European legislation, cross-border attachment orders are expected to be used widely. The ease

with which such an attachment order will be issued and circulated throughout the EU will greatly benefit creditors.

Conclusion

The Recast Brussels I Regulation allows *ex-parte* attachment orders to circulate throughout the EU. Consequently, the whole EU is a potential arrest and attachment haven for the Dutch courts. The only requirement is that the Dutch court has jurisdiction on the merits of the substantive claim (on the basis of Recast Brussels I).

This is a positive development for claimants interested in achieving swift collection of claims, either in one jurisdiction or in cross-border cases.

Recent Dutch case law already shows that the Dutch courts are willing to issue cross-border attachment orders so as to seize assets located in other EU member states. An example is the arrest of the pusher-*barge Navin 24*.¹ In this case, the court granted a direct attachment order to arrest this barge, which was located in Germany or Austria. The dispute involved non-payment of hire under a time-charter. Jurisdiction was based on a choice of forum clause in the time-charter, which vested jurisdiction in the Rotterdam Court.

It is expected that such willingness to grant cross-border arrest orders will increase even more in future, with the implementation of the Recast Brussels I Regulation. Including a choice of forum clause in contracts which confers jurisdiction to the Dutch courts (for example, the Rotterdam Court) greatly assists in securing the enforcement of contractual rights against unwilling debtors. The Rotterdam Court can – and has shown that it will – issue orders for an attachment not only in the Netherlands but also in other EU member states.

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