



Forcing contract compliance and easy asset tracing through attachment on Dutch assets



Summary

As in all periods of financial uncertainty, especially now many companies are confronted with debtors who do not pay their debts.

- Did you know that, in the Netherlands, it is relatively easy to realize a (pre-judgment) attachment of assets?
- Did you know that, under Dutch law, it is irrelevant whether the proceedings are being conducted abroad, as long as there are (also) assets located in the Netherlands?

The pre-judgment attachment can be beneficial in many ways, either by securing your claim or by forcing your counterparty into fulfilment of their obligations.

This publication explains how this can be achieved.

Contacts

For further information, please contact the Netherlands litigation team:



Lotte van der Leij
Senior Associate

T: +31205600670
lottevanderleij@eversheds-
sutherland.nl



Lennart Baijer
Associate

T: +31102488016
LennartBaijer@eversheds-
sutherland.nl



As in all periods of financial uncertainty, many will be confronted with debtors who do not pay their debts or with contractual parties who are not complying with the terms of a contract or are trying to defer or cancel their obligations e.g. the purchasing or acceptance of goods, pricing conditions, delivery times, or payment conditions.

Although such debts and obligations may be governed by laws other than Dutch law, when you have goods delivered in the Netherlands or when the other party has assets, such as goods, shares in subsidiaries, bank accounts, real estate property, or business partners in the Netherlands, Dutch procedural law may provide for a very effective instrument to compel your counterparties to settle their debts and/or obligations with you: (pre-judgment) attachment of assets in the Netherlands.

This instrument may also provide you with the option to secure or take recourse in the event you consider court proceedings or intend to enforce a judgement or arbitral award, even if taking place respectively obtained outside of the Netherlands.



Attachment in the Netherlands

Leave from a Dutch court is required to levy a pre-judgment attachment on assets in the Netherlands (conservatoir beslag). This is relatively easy to obtain and at low costs.

Pre-judgment attachments can be levied prior to proceedings or during pending proceedings whether the proceedings are in the Netherlands or abroad.

In principle, all assets of your debtor(s) that are located in the Netherlands may be attached, e.g.:

- inventory and cargo
- bank accounts
- shares (in Dutch subsidiaries)
- intellectual property such as trademarks and patents
- vehicles (such as cars, trucks, but also airplanes and ships)
- real estate and land
- claims of your debtor on third parties (such as Dutch creditors, its customers or Dutch holding companies)
- goods under a third party to retrieve those goods, if you have a retention of title on those goods (a so-called revendicatory attachment)

Additionally, evidence may be attached if located in the Netherlands and can then be disclosed after separate summary proceedings.



Obtaining leave

When deciding on a request for leave for attachment, the Dutch court will marginally assess the claim without hearing the defendant (the proceedings are ex parte) and will normally grant the leave within one to two days. No appeal against this decision is permitted.

A request for leave must contain the following elements:

- the nature of the attachments to be made
- the basis of the underlying claim
- a specification of the assets concerned
- whether proceedings on the merits have commenced
- for the attachment of movable or immovable property, intellectual property and shares in Dutch companies, evidence must be provided that there is fear of embezzlement of the assets

The burden of proof for the creditor is generally low; an explanation of the claim accompanied with relevant documents, such as the contract, invoices and any relevant correspondence, is usually sufficient to obtain a leave.





When should a claim be instigated? What are the defendant's possibilities to lift the attachment and what happens next?

Once an attachment is levied, a claim on the merits must be instigated within a certain period of time (meaning the serving of a legal instrument to start the actual proceedings before a (Dutch or foreign) court or arbitral tribunal - usually within 14 days. A longer period may also be granted, for example in the event of a foreign counterparty, in arbitration or in other extraordinary circumstances like the current COVID-19 pandemic.

A claim can be initiated in summary proceedings or emergency arbitration, main proceedings on the merits or in arbitration, as well as by serving a (conditional) counterclaim in pending proceedings before a state court or in arbitration. It is thereby irrelevant whether these (arbitral) proceedings take place in the Netherlands or are conducted outside of the Netherlands.

As a result of the attachment the debtor, in principle, is not permitted to freely dispose of their assets, for example a bailiff may freeze their assets as specified in the leave for attachment issued by the court. In order to cease the situation, the debtor is pressured into producing a settlement proposal or simply paying their invoices. Practice shows that pre-judgment attachment often leverages pending discussions and leads to an out-of-court settlement, saving both money and time.

In the event that no proceedings are initiated within the period of time specified by the court or if the debtor provides sufficient security, normally by ways of issuing a bank guarantee, then the attachment will lapse.

In the case that no mutual agreement is reached, the debtor is only able to lift the attachment after a judgement is rendered in their favour in the proceedings.

Under limited circumstances, the debtor can initiate preliminary relief proceedings for the lifting of the attachment. If your claim is granted, the pre-judgment attachment will automatically be converted into an executory attachment. This means the attached assets may then be executed and used for recovery of the claim.



Cost efficiency

Pre-judgment attachment normally saves money for the subsequent proceedings being initiated, as a writ of summons or (conditional) counterclaim can normally be based on the request for leave. A writ of summons can be drafted cost efficiently, particularly if we are provided with (i) a comprehensive summary of the case which can then form the basis for the request for leave and (ii) if we are provided with all relevant exhibits pertaining to the case.



Summary

The pre-judgment attachment can be beneficial in many ways, either by securing your claim or by forcing your counterparty into fulfilment of their obligations. Under Dutch law, it is irrelevant whether the proceedings (court litigation or arbitration) are being conducted abroad, as long as the assets are located in the Netherlands. Attachments can be levied prior to instigating litigation, during pending litigation or arbitration or after a judgment or arbitral award is rendered.

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