



Protective measures in the Netherlands

Research project on legislation, ruling and practices.

Over the past two years, Utrecht University has carried out a research project on protective measures in the Netherlands on behalf of the Dutch 'Raad voor de rechtspraak' (an organisation similar to the Judges Council of England and Wales in the United Kingdom, and the Conseil superieure de la Magistrature in France). In this respect over 500 court files from six district courts were reviewed, and interviews took place with sixty lawyers involved in cases in which protective measures had been taken.

Although, compared to other European countries, the scheme in the Netherlands is in some ways divergent, the results of this project will prove to be valuable with respect to various aspects to be discussed today.

Leave for an attachment easy to obtain

In particular, this divergence is demonstrated in the situation where in the Netherlands the provisional relief court decides upon an application to obtain leave for an attachment after a summary inquiry based solely on limited information given by the creditor. Furthermore, in the case of a protective bank attachment the creditor is not required to invoke any fear of embezzlement (*'periculum in mora'*). This means that it is simple for the creditor to obtain leave to levy any kind of attachment, including a third-party attachment of bank balances. Even if the creditor cannot supply proof of the alleged claim involved in the attachment when an application is being made, relief can still be obtained. The assessment of the application by the relief court may be compared to a default procedure.

Supposedly compensating sub-schemes

The Dutch scheme on attachments consists of three sub-schemes in which guarantees for the debtor can be found. These are:

1. the review of an application to obtain leave for an attachment and the creditor's obligation to initiate a principal action;
2. the possibility for a debtor to request the attachment to be lifted by bringing summary proceedings;
3. the creditor's damage liability in case of an unfounded or wrongful attachment.

Public Hearing on Improving the Enforcement of Judgments and facilitating cross-border debt recovery, 1 June 2010, Brussels

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Speaker: Mirjam Meijsen LLM, University of Utrecht



The consistency between these three sub-schemes consists of a supposed compensation: the summary inquiry concerning the application can be compensated by lifting unfounded attachments in summary proceedings and the liability of the creditor (Figure 1). As a result these sub-schemes should ensure that the creditor has legal certainty that his claim will be met once it is legally ascertained and the debtor has a real opportunity to have an attachment lifted and be financially compensated if that attachment is considered wrongful.

Reasons to initiate the research project

History shows that over the years a wide range of assets became liable to attachment where only goods could be attached in days gone by. A fear of embezzlement should only be invoked in a few circumstances today, while this was previously generally required for attachments, and the review of this requirement by the provisional relief courts today is either minimal or non-existent. Also, a general development can be distinguished, which is, so to speak, an almost 'unnoticed' change in attitude: the primary notion that an attachment is considered to be quite a substantial measure against an alleged debtor, which makes the protection of the debtors interests necessary, is to be found in all legal textbooks of an earlier date. Today, the creditor's interests seem to have become leading considerations where protective measures are concerned. This change in attitude is also reflected in the case law of the Dutch Supreme Court, the Hoge Raad, and subsequently also in the case law of the lower courts.

A previous research project on the review of applications to obtain leave for an attachment shows that in relatively few cases (less than 4% of all leave for attachment) is a request to lift the attachment filed. The fact that this safety net against wrongful attachments is invoked so rarely has led to the decision to investigate whether the balance in the Dutch scheme as a whole provides sufficient counterweight against developments that affected today's debtor's position in a negative way.

A lack of balance

The main finding of the research project is that the Dutch scheme is not as balanced as we thought. The summary inquiry of requests for leave for an attachment turns out to provide room for other uses than the legislator intended when creating the scheme. About 75% of attachment petitions turn out not just to be filed solely to secure later payment. Putting pressure on the party to be attached may be the real reason, or one of the reasons, to obtain leave for an attachment. Other reasons are to open negotiations or to obtain information on assets. Since judges decide on limited information, supplied by the attaching party, the chances that an attachment petition will not be granted are quite limited. In the Netherlands these are circumstances that were chosen for presuming that a wrongful attachment can be lifted in interim proceedings. Our research shows that the limited use of this possibility to request the lifting of an

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attachment is caused by the opinion of lawyers that the chances of being successful in such a procedure are quite limited. This conviction is based on experience and follows from the case law on these kinds of procedures, in which the garnishee must show that the attachment is unfounded. The few cases in which it is worth filing such a request are those in which it is crystal clear that the creditor's claim is not valid, and the case is not too complex. Considering this reticent possibility to have an attachment lifted, the number of cases in which the provisional relief courts did lift the attachment (30% of all requests, table 6), is not very substantial.

The third sub-scheme includes the attaching party's liability for damages if the attachment is unfounded. The garnishee may address the claim for damages in the principal action or in a separate action. To prove damage and causality is therefore problematic and procedures are so drawn out that claims are rarely filed, so we were informed by lawyers we questioned about their experiences. The case files confirm this: in 107 case files in which a verdict in the principal action was available, six garnishees did instigate a claim, in just one case was the claim recognised by the court.

All in all we must conclude that in the Netherlands the position of the attaching party has become stronger, at the expense of the garnishee's safeguards. The supposed compensation between sub-schemes cannot work since such developments have taken place in all three separate sub schemes. As a result, compensation amongst sub-schemes has become impossible. The scheme has become out of balance.

Remedial measures

The lack of balance in the Dutch scheme turns out to be of influence in a specific, detectable, type of legal cases. The features of these cases are: the garnishee opposes the creditor's claim and the claim itself is relatively extensive and legally complicated. As part of the research project remedial measures regarding attachments for this specific kind of claims have been advised. The main recommendation which was made is the requirement to substantiate applications to obtain leave for an attachment. This step is necessary in order to facilitate a more profound inquiry into the applications by the Dutch provisional relief court judges. The interests of creditors and debtors may thus be weighed and additional information in this early stage of the scheme will result in a better impression concerning the creditor's claim itself and the reasons for requesting leave for an attachment. Furthermore, if the garnishee feels there is sufficient reason to oppose the attachment, the information given in the creditor's application, such as the reason for the attachment, may be refuted in defence.

Also the suggestion is made that creditors themselves might take an interest in the prevention of debt collecting problems. The entrepreneur doing business may make enquires beforehand about a client's solvency and should not continue deliveries

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when bills are not being paid. In this way legal problems may not occur and protective measures will not therefore be needed.

European Community Cross-border Attachments

On behalf of this hearing the court files involved in the research project have been reviewed once more in order to learn more about the share of European Community Cross-border attachments. It showed that only in a few cases is a party from another European member state involved in an attachment procedure. In 6.2% of over 500 cases one or both parties involved were not from the Netherlands. In 12 cases (2.2%, table 7), a 3rd party bank balance was attached; the parties involved were in the majority of cases business partners (8 out of 12, table 8). The attaching parties were from Germany (4), the Netherlands (3), the UK (2), Belgium, France and Ireland. As in Dutch attachment cases the value of the creditor's claim is more extensive when the garnishee defends himself in summary proceedings against the attachment (millions of euros versus an average of 300,000 euros). The creditors' claims turn out to be multivarious.

A European Community scheme for Bank Attachments?

The summary of the replies to the Green Paper shows that most of the respondents think of the position of the debtor as a key issue. The Dutch research project has focused on fundamental questions regarding our system for attachments: the debtor's position was one of them. The system as such, laid down in rules and case law, seems, prima facie, to be well balanced. However, the project discovered that real life is different, because the position of the debtor in the Netherlands has, up until now, gradually deteriorated over the last decades. Debtors' are confronted with a loss of control over their assets whilst finding themselves one step behind in court proceedings: it demonstrates that it is quite difficult to dispose of wrongful attachments.

The structure of the current proposed system in the Green Paper fundamentally looks similar to the Dutch system, with all its inherent risks of imbalances. The need for a very substantial review of the applications is obvious: only a thorough investigation of the creditor's claim and the legal defence thereto can prevent such undesired effects and potential abuse.

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Suggestions

Before embarking on a new detailed cross-border system of attachments we would suggest:

- that the trade community prepares cross-border trade with a professional awareness with respect to trade credit. It is a question of being ‘better safe than sorry’ rather than having to be compelled to embark upon debt collection in court proceedings. Legal procedures, like attachments, do not run parallel with prospering business relationships.
- that the trade financing institutions create a product facilitating secure payments and prepayments for cross-border trade, like a simple, cheap and uniform European security deposit or bank guarantee
- that the rules and policy makers ensure a substantial review of applications before approving attachments.

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Research Project in Full Text (Dutch) via URL:

<http://igitur-archive.library.uu.nl/law/2010-0511-200231/UUindex.html>

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FACT SHEET

**Figure 1: Attachments: Scheme/sub-schemes (compensation)
The Netherlands**

Review of application (summary inquiry) Creditor's obligation to initiate principal action	Lifting the attachment in an interim removal procedure	Creditors damage liability when attachment is unfounded
Compensation		

**Table 1: Ratios
The Netherlands**

Residents*	16,592,206	March 2010
Civil servants**	1,000,000	January 2010
Lawyers***	15,542	December 2009
Judges (FTE)****	2,203	December 2009

Sources: *:CBS **:www. overheid.nl ***: NOvA ****: Jaarverslag De Rechtspraak 2009.

**Table 2: Attachments versus principal actions nationwide.
Average 2004-2008**

Principal Civil Actions	36,000	100%
Attachments	15,000	42%

Source: Raad voor de rechtspraak Database

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Table 3: Attachments
Six District Courts, 2006, 267 cases

3 rd party bank balance	96	28%
3rd party general	59	17%
Property	94	27%
Movables	28	8%
Shares and securities	9	3%

Source: Research Project Utrecht University

Table 4: Parties involved
Six District Courts, 2006, 267 cases

Business partners	114	43%
Business vs. Individual	88	33%
Individuals	36	13%
Individual vs. Business	29	11%

Source: Research Project Utrecht University

Table 5: Claims involved in the attachment (main categories)
Six District Courts, 2006, 267 cases

Unpaid bills	62	23%
Loan/credit relationship	38	14%
Buying/selling property	22	8%
Rental	19	7%
Employment relationship	13	5%
Building development	14	5%
Bankruptcy	10	4%
Reliability claims/tort	8	3%

Source: Research Project Utrecht University

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**Table 6: Results of requests for the interim lifting of the attachment
Six District Courts, 2006, 267 cases**

Repeal	75	28%
Expulsion	35	12%
Verdict	153	57%

Six District Courts, 2006 (153 verdicts)

Attachment lifted	79	30%
Alteration of attachment	15	6%
Attachment maintained	57	21%

Source: Research Project Utrecht University

**Table 7: European Cross-border (ECB): Attachments
Six District Courts, 2006, 534 cases**

All attachments ECB	33	6.2%
ECB 3 rd party bank balance	12	2.2%

Source: Additional research on Project Utrecht University

**Table 8: ECB 3rd Party Bank Balance Attachments: Parties involved
Six District Courts, 2006, 12 out of 534 cases**

Business partners	8
Individuals	1
Individual vs. Business	3

Source: Additional Research on Project Utrecht University

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