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DEBT COLLECTION IN THE NETHERLANDS

Introduction

I. The following are some notes on matters relating to the collection of debts in The Netherlands.

In principle, the following options are open to a creditor with regard to a money claim:

- a) filing a petition for bankruptcy, or
- b) effect a conservatory arrest, and (or)
- c) obtain a title to enforcement, either through *summary proceedings*, or through *ordinary proceedings*.

Under Dutch law a creditor having a payable money claim may enforce it against the debtors property, either

- a) by filing his claim with the trustee in bankruptcy after a petition in bankruptcy has been granted, or
- b) by way of attachment.

Bankruptcy

II. A petition in bankruptcy is often used in The Netherlands as a means to get uncooperative debtors to pay their due.

Dutch law does not distinguish between bankruptcy proceedings taken against merchants or non-merchants.

Insolvency can only be declared by juridical decision.

A petition in bankruptcy by which such a decision is asked may be filed by any creditor, regardless of whether he has obtained a title to enforcement or not.

The only prerequisite is that the debtor has reached the position of insolvency, whereas the creditor filing the petition must show similarly the validity of his claim.

In addition, judicial practice requires that it be shown there is more than one creditor still claiming payment before the Court will consider the petition.

Title to enforcement

III. Attachment in execution implies that one or more of the debtors assets must be converted into cash on behalf of one or more of his creditors.

It is the general rule of The Netherlands, that in order to levy execution a creditor needs a title to enforcement (an instrument containing a permission to levy execution).

The Dutch code also provides for a means of conservatory arrest (provisional attachment), by which the creditor can attach property of the debtor in anticipation of a judgement; no title to enforcement is needed to initiate this attachment.

This is, however, no exception to the general rule since in conservatory arrest proceedings a title to enforcement must be procured by the creditor before he is able to liquidate the property attached.

Judgement rendered by a Dutch Court provides a title to enforcement.

Foreign judgements do not provide a title to enforcement. An exequatur or judicial leave, must be obtained from a Dutch Court in accordance with the provisions of international agreements and those contained in possible statutes pursuant to a treaty, before any executory measure can be taken on a foreign judgement.

An exequatur *must* be refused by the Court (or judicial authorities) trusted with granting it, if they hold the proceedings, as they were conducted abroad, to be contrary to Dutch notions of *fair trial*.

Summary proceedings

IV.a. Summary proceedings might be considered if and when the debtor has no reasonable grounds whatsoever not to pay the debt.

The summary judgement has become more important than the meaning of these words seem to imply.

In this case the creditor may bring an action for "*provisional relief*" (which in fact it is not) before the President of the District Court.

The proceedings take place at a date and time determined by the President after hearing the plaintiff.

The defendant is summoned by way of a Writ.

Apart from this rule, the way summary proceedings are conducted is scarcely determined by law.

The practice is that on the day the proceedings take place the plaintiff explains his case, his opponent pleads the defence and witnesses called by either party are heard as far as the President considers their testimony to be relevant.

The President hears all parties, takes notice of the evidence presented and pronounces judgement (within a few weeks).

From this judgement an appeal may be taken to the Appeal Court; and from the decision of the Appeal Court review may be sought in the Dutch Supreme Court.

Furthermore, the party who lost the summary proceedings may take the issue that was litigated to the ordinary Court of first instance.

The summary judgement becomes in-operative not only when rescinded and appealed, but also when -the same issue having been brought before an ordinary Court- this Court passes a final judgement contrary to the summary judgement.

The party loosing his case in summary proceedings has a duty to observe the summary judgement.

However, if the case is subsequently taken to the ordinary Court and the decision of this Court would differ from the summary judgement, the opponent must pay damages in case he has levied execution in the meantime.

Ordinary proceedings

IV.b. The time "ordinary" proceedings take is mainly determined by the stays given between each production of one of the written statements containing the arguments of parties on the dispute.

Normally, these proceedings take longer than one year to conclude.

Property subject to enforcement and arrest

V. Both movables and immovables may be seized for the enforcement of a judgement or attachment; the same applies to claims the debtor has against third parties.

Conservatory arrest

VI.a. A creditor, who is not entitled to execution as he lacks a title to enforcement, may nevertheless attach the assets of his debtor.

The rules for proceedings relating to conservatory arrest in general are to be found in the *Code of Civil Proceedings*.

There are a few general principles that apply to all types of conservatory arrest.

General principles of conservatory arrest

VI.b. Leave of the President of the District Court is needed to authorise one to effect a conservatory arrest. This leave is obtained through a simple petition to be filed by a solicitor, member of the bar.

The creditor must show that his claim is prima facie a valid one. Usually it is sufficient when he states that he has a claim against his debtor which has accrued due.

He does not have to prove anything about the claim being due at that stage; prove as to the existence of the claim does not become relevant before lifting of the arrest is demanded in summary proceedings.

A creditor does not normally have to provide security beforehand in respect of costs, damages and interest that might be caused by the arrest.

However, if the creditor is a foreign entity, the President may (at his discretion) decide otherwise.

Lifting the arrest in summary proceedings

VI.c. It is important to note, that there is a possibility of obtaining a Court order lifting the arrest in summary proceedings.

Leave to arrest is obtained relatively easily because a debtor can, if desired, demand the lifting of the arrest quickly and simply in summary proceedings before the President of the District Court.

The President will always order lifting of the arrest where the debtor provides suitable security, i.e. a guarantee by a first class bank.

The President shall also lift the arrest when, having heard the parties, he finds the claim to be invalid or the arrest unnecessary.

In those cases the President will go deeper into the question whether there is a claim and whether the party whose assets are arrested is indeed the debtor.

It should be realised however that these are summary proceedings in which the President merely gives his provisional judgement.

For the sake of good order it should be mentioned that appeal is possible against the judgement of the President sitting in summary proceedings.

However, as a judgement ordering the lifting of arrest results in immediate lifting, it is in most cases hardly useful to appeal as it will certainly take several months before the Appeal Court decides.

Wrongful arrest

VI.d. It should also be kept in mind that under Dutch law a creditor who wrongfully arrests is liable for damages and costs.

The party whose assets were wrongfully arrested, however, has to make a reasonable effort to limit losses, for instance by

demanding lifting of arrest in summary proceedings. Similarly he may have to accept security.

Proceedings after arrest

VI.c. Please note, that it is essential, that the arrest lapses *ex lege* unless, within a term set by the President of the Court (which normally is 14 days), a Writ is issued and served with regard to the claim secured by the arrest.

This means that if no such Writ has been served within this term, the debtor may dispose over the goods arrested. So, a conservatory arrest must be followed by proceedings.

As these proceedings are ordinary proceedings, it may take longer than a year before a judgement on the merits (after full proceedings).

In the meantime the property which is subject to attachment may not be sold, neither by the creditor, nor the debtor.

Arrest under a third party

VI.e. Dutch law does not entitle the creditor to act on his own on behalf of his debtor through collecting what is due to the latter by third parties.

Only by conforming to the rules governing garnishment may a creditor reach claims of his debtor against third parties.

From the moment garnishment is levied the garnishee must referring from paying any money to the debtor. Such payment would not discharge him from his duty in regard of the garnishor, not even if the sum he owes the debtor exceeds the amount for which garnishment was levied. Garnishment may also be used to reach chattels which the third party holds for the debtor.

Future claims of the debtor are not subject to garnishment, except in case they are directly originating from obligations that already exist at the time of garnishment. This implies that garnishment of a bank account only includes the funds available at the time of the garnishment and/of what is transferred to the account at a later date.

Garnishment as a means of enforcement has to be based on a Dutch title to enforcement if the garnishee is domiciled or has his residence in The Netherlands.

In this way, even foreign corporations can be mixed up in these proceedings taking place in The Netherlands when they have a subsidiary here and the payment to be effected by garnishment is connected to the affairs of the subsidiary.

On the other hand, if the third party, against whom the creditor wants to levy garnishment, is domiciled in The Netherlands, but has a subsidiary in another country, garnishment may be levied in The Netherlands, even though the debt attached must be paid abroad.

However, this garnishment is thought to be justifiable only when there is no doubt that the local Court of the place where the debt attached is due will recognise the garnishment levied in The Netherlands with the effect that the garnishee is released from his obligation to the debtor if he pays the garnishor.

If you require any further information on matter related to the collection of debts in The Netherlands, please feel free to contact Blenheim (info@blenheim.nl).