ARREST OF SHIPS IN THE NETHERLANDS TO OBTAIN SECURITY*

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1. SHIP ARREST IN THE NETHERLANDS IN PRACTICE

In practice it is quite easy to arrest a ship to obtain security for a claim in the Netherlands, although it does vary from court to court how quickly and how easily authority to arrest can be obtained. The Dutch judge is competent to authorise the arrest if a vessel is expected to arrive in the jurisdiction of that judge, whereby it is not relevant when the vessel is expected to arrive. This means that it is possible to obtain authority to arrest a vessel months before the vessel is actually in port, as long as the vessel is eventually expected to arrive in that port.[1] The applicant will have to describe the facts and legal basis of its claim in its application, which application will have to be supported by documentary evidence. If the application, on the face of it, is acceptable to the judge, a prima facie case will have been proven. The authority to arrest is issued ex parte.

The Netherlands is party to the 1952 arrest convention.[2]

Most ships are arrested in the port of Rotterdam and that court is very experienced with dealing with ship arrests. After office hours the court has judges on standby to deal with applications to arrest vessels and it is possible (and not uncommon) to go to a judge's house when the court is closed to obtain the required authority to arrest a vessel.

Until mid-2011, the application in which the authority to arrest a vessel was requested could be very short and no documentary evidence for the alleged claim needed to be filed with the application in which permission to arrest a vessel was asked. However, in June 2011 the Dutch courts tightened up the requirements for an arrest application and since then an application has to contain a complete description of the claim and must be supported by documentary evidence.

When freezing assets (including vessels) in the Netherlands, it is important to realise that by art. 700 DCCP proceedings on the merits must be commenced within the time period to be decided by the injunction judge, which time period will be at least 8 days[3].

In the Netherlands, the courts allow assets to be arrested to obtain security for the principal amount of the claim, plush the following percentages as security towards interest and costs:

i) In the event of a claim for a principal amount up to € 300.000: the principal amount plus 30%,
ii) In the event of a claim for a principal amount between € 300.000 and € 1.000.000: 30% of the first € 300.000 plus 20% of the rest of the principal amount up to € 1.000.000,
iii) In the event of a claim for a principal amount of € 1.000.000 until € 5.000.000: 30% of the first € 300.000 plus 20% of the rest of the principal claim until € 1.000.000 plus 15% of the rest of the principal amount until € 5.000.000,

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iv) In the event of a principal amount of more than € 5.000.000: 30% of the first € 300.000 plus 20% of the rest of the principal amount until € 1.000.000 plus 15% of the rest of the principal amount until € 5.000.000 plus 10% over the rest of the principal amount until € 5.000.000.

A request for the extra security for interests and costs is only denied in exceptional cases.[4]

After the arresting lawyer has received the phone call from his client to arrest the vessel, the first thing he does is phone his bailiff and put him on standby to go to the port to arrest the vessel. He will then phone the court to inform it that he must arrest a vessel as fast as possible and he will request the court to find a judge to be ready to sign the application within about an hour. If it is after office hours, the lawyer will phone the standby judge on his mobile phone (the emergency mobile telephone number has been published by the Court of Rotterdam) or at his home. Alternatively, a different judge who lives in the neighbourhood can be phoned on the off chance that the judge is in and is prepared to deal with the application.
After the bailiff and the judge have been put on standby, the lawyer will write his application. When the application is completed, he will email a copy of the application in advance to the bailiff. With the information contained in the application the bailiff will be able to draw up the report of the arrest that he will have to give to the Master of the vessel when he goes on board to arrest it. The lawyer will then jump in his car or on his bike and go to the court. Once at the court, he will ask for the judge to be phoned (or he will phone the relevant office himself on his mobile phone) and an assistant of the judge will come downstairs to pick up the application and bring it up to the judge. Alternatively the application can be faxed to the court. As the maximum number of pages allowed to be faxed is 20 it means the entire application including supporting documents cannot be more than 10 pages because it has to be submitted in duplicate. If the total number of pages is larger than 10 then the application will have to be brought to court.
After the urgent application has been brought or faxed to the court it will take about half an hours until the judge's clerk brings back the signed application. Sometimes a judge will have some questions, and will ask the lawyer to come up to explain something to him. In the meantime, the bailiff will have finished typing up his papers and will come to the court to collect the original signed application.

In matters which are less urgent, for instance because the ship is only expected in port in a couple of days, the signed application will be sent by ordinary mail to the lawyer on the same day if the application was received by the court before 09:00 hours. Alternatively the lawyer can request the court to have the signed application sent to the court's reception desk where the bailiff can pick it up. Applications submitted before 09:00 hours can be picked up at around 13:00 hours the same day.

In urgent matters where a signed application is handed back to the lawyer within about 30 minutes the lawyer will hand the signed application to the bailiff, who will get in his car and drive to the vessel, where he will go on board and serve the papers on board, at which time the vessel is arrested. Only after the papers are served, will the bailiff phone the port authority to inform it that the vessel is under arrest. As of that moment, the vessel will not be allowed to sail until the port authorities have been informed by the bailiff that the arrest has been lifted.

If the client sends the lawyer clear instructions and the required documentary proof for the claim, the time between the first phone call and the arrest can be very short. If the claim is not a complicated one, it can take as little as two hours for the lawyer to draft the application and have the court and the bailiff on standby. Then about an hour to travel to the court and wait for the judge to sign the application.

Delay can be caused at the court waiting for the judge. Then maybe 30–45 minutes travelling time for the bailiff from the court to the vessel. Obviously, a lot is dependent on how long it takes to find a judge, traffic congestion, the location of the vessel in the Rotterdam port area and other factors that can cause delay. However, if all goes well, a vessel can be arrested in under 2 hours from the moment of the first phone call.

2. INJUNCTION PROCEEDINGS TO HAVE THE ARREST LIFTED OR THE WORDING OFTHE GUARANTEE DECIDED

In instances in which the lawyers cannot agree upon the security to be put up or if the carrier is not prepared to put security up (for whatever reasons, e.g. the carrier may be of the opinion that the vessel cannot be arrested for particular claim in question) a party can apply to the Injunction Judge for a hearing. In such a hearing the Injunction Judge will give a decision on the question in dispute. In very urgent matters, a hearing can be obtained within hours, sometimes even at a judge's home after office hours. In some other instances, there will be no capacity available at the court, and no judges available to conduct an extraordinary hearing and a vessel will actually be delayed until a hearing can be conducted to decide the security issue. In even more unfortunate cases a vessel can remain under arrest for days or more than a week. It is all down to capacity available at the court.

3. SUMMARILY SHOW THAT THE CLAIM FOR WHICH THE ATTACHMENT WAS MADE IS INVALID

After the arrest, the discussions on lifting the arrest will commence. As stated above, all that is required to obtain authority to arrest a vessel is to shortly state the facts (with no evidence required) in an application. A prima facie case is then deemed to have been established and the authority to arrest is given ex parte. The first the debtor will know about the arrest application is when his vessel has been arrested.[5]

Art. 705(2) Dutch Civil Procedure Code (DCPC) provides that an arrest must be lifted *"(.. .) if it is summarily shown that the debtor has no valid claim or that the arrest was unnecessary, or, if the arrest has been made for a money claim, if sufficient security is put up."* The expression *"summarily show"* makes it clear that the standard of evidence required to set aside the prima facie case based on which the authority to arrest was given is limited to what is possible in injunction proceedings and is therefore considerably less than what is required in proceedings on the merits of the claim. E.g. in injunction proceedings there will be no time to hear witnesses. The Dutch Supreme Court has held that the mere fact that the court of first instance has dismissed the claim for which an attachment was made is not enough reason to order assets to be released from attachment if an appeal has been filed. The burden will still be on the person seeking the release of his assets to summarily prove that the claim is invalid and that, after balancing the interests of both parties, the arrest should be lifted. Within the restrictions of injunction proceedings, it cannot be required from the injunction judge that he tries to

anticipate the outcome of the appeal proceedings.[6]

4. SUFFICIENT SECURITY

Art. 705(2) (cited above) also provides that the arrest must be lifted against *"sufficient security"*. The question is what *"sufficient security"* is. Article 6:51(2) Dutch Civil Code (DCC) says that security must be sufficient to cover the claim and the interest and costs and it should allow the creditor to obtain payment "*without any trouble*" (*zonder moeite*). There is a considerable amount of case law concerning the question what precisely sufficient security is. In paragraphs 5 through to 11 herein below I will discuss various aspects of the "sufficient security" question that arise on a regular basis in practice.

5. SUFFICIENT SECURITY AND THE ROTTERDAM GUARANTEE FORM

It is usually accepted that the wording of the Rotterdam guarantee form is an accept- able wording.[7] The form has been in use in the Netherlands since the 1970's.

The latest version is the 2008 form (Appendix 1 to this paper). The form was created to prevent protracted discussions on wording each time a vessel is arrested.

Because the Rotterdam guarantee form is usually considered to be an accept- able form, discussion on wording can be kept down to a minimum, although some lawyers will sometimes not be able to reach agreement on the manner of completion of the form.

E.g. the description of the claim for which security is put up can cause problems (see appendix 1 at 'E'). The most practical way to avoid discussion on this point is to describe the claim for which the vessel has been arrested as 'the claim as further described in the arrest application'.

Sometimes, discussion will arise because after the arrest the arresting lawyer found out that a different party was the lawful holder of the bill of lading and should also therefore be covered by the guarantee. The carrier's lawyer may be inclined to say that he is only prepared to include the petitioners in the arrest application as beneficiaries of the guarantee. This is however not a very practical thing to do for a carrier's lawyer, as all the cargo interests' lawyer would have to do to obtain security for the new lawful holder is to file an application in the name of the new lawful holder and arrest the vessel again. Obviously, this would be a waste of costs and everybody's time.

Sometimes, dispute arises concerning the part of the Rotterdam form that states the purpose for putting up the security. The Rotterdam form describes that purpose as follows 'for the purpose of the release from and/or the prevention of a conservatory attachment of (G) on account of the above mentioned claim(s)'. Note that the expression 'conservatory attachment' is a different way of translating the expression *"conservatoir beslag"*. In this book we have translated 'conservatoir beslag' as protective attachment or provisional attachment. If a ship has been arrested it is common to fill the name of the arrested vessel in at 'G'. Some lawyers will however want to fill in not only the name of the vessel but additional expressions such as ' ... and any other assets'. This type of discussion should not really cause insurmountable problems, but in rare cases lawyers cannot come to agreement and end up at the injunction judge asking for a decision on this point.

A more relevant point concerning wording that can cause a dispute in a principled matter is that the Rotterdam Guarantee form only requires the guarantor to pay under the form if a judgment that 'is no longer subject to appeal' is obtained. It is however the case in the Netherlands that usually judgments obtained from the court of first instance are declared provisionally enforceable. This means that the judgment can be enforced regardless of an appeal, i.e. that the appeal does not suspend the operation of the judgment. Almost all judgments in the Netherlands are rendered in the provisionally enforceable form.

Some lawyers would argue that they are not prepared to lift the arrest for less than what they already have. The argument is that they have a major asset (i.e. the arrested vessel) in the Netherlands under arrest. If they do not lift the arrest and if they obtain a provisionally enforceable judgment, they can sell the vessel in an enforced sale and obtain payment of their claim. If they have to wait until appeal proceedings have finished, this can cause a delay of two to five years or more. For these reasons, some lawyers refuse to lift an arrest against a Rotterdam form, and demand that the words 'no longer subject to appeal' are deleted from the form.

In my view, there is a lot to be said for the argument that the Rotterdam form should not demand that a judgment that 'is no longer subject for appeal' should be obtained before the guarantor is obliged to pay under the guarantee. I believe that the words should be replaced by the words that payment should be made against a judgment 'that is provisionally enforceable'. There is some legal precedent to support this argument.[8] However, most judges will consider that the Rotterdam form with the existing wording is sufficient security. The argument of these judges is that Art. 705 DCCP requires that arrests are lifted against 'sufficient security' and that sufficient security is something different than 'absolute security'. There is also a lot to be said for this second viewpoint.

Fortunately, most maritime lawyers in the Netherlands are very practical and agreeing the wording of the security usually does not cause too many problems.

6. THE NVB 1999 FORM

Note that once legal proceedings have been commenced, the Rotterdam Guarantee form will remain valid for an unlimited period of time. Some banks do not like this, as they prefer to put a limit on the amount of time that they want to put a guarantee form up. For this reason, some banks are reluctant to put up security on the Rotterdam guarantee form and prefer to use the form made by the Dutch branch association for banks. This form is known as the NVB 1999 form (Appendix 2 to this paper). If legal proceedings are commenced within the time limit agreed between the parties and filled in on the NVB 1999 form, the guarantee remains valid for ten years. If legal proceedings are still on-going after ten years and the bank is notified of this fact by a lawyer practicing in the Netherlands, the guarantee is extended for an additional ten years. A time limit of twenty years should be enough time to finalise legal proceedings, even in the most complex cases.[9]

The NVB 1999 form contains a lengthy clause dealing with the bankruptcy contingency. In that clause the guarantor can either choose to pay the debtor (i.e. the beneficiary under the guarantee) or commence legal proceedings against the informed the guarantor of the creditor's bankruptcy to obtain a judgment stating that the guarantor does not

have to pay the debtor. Also, the bank does not have to pay the debtor if the receiver in the creditor's bankruptcy commences legal proceedings against the debtor within four months.

Also under the NVB 1999 form the guarantor only has to pay the creditor after a judgment that is no longer subject to appeal has been obtained.

The NVB 1999 form is more than twice as long as the Rotterdam guarantee form. In particular its clause concerning bankruptcy is lengthy and under that clause various notices have to be issued by the beneficiary under the guarantee and by the receiver and a waiting period of four months has to be adhered to before the beneficiary knows whether the bank will pay him or commence litigation.[10]

This four months is an additional delay on top of the delay that a bankruptcy causes under the Rotterdam form.

7. CONCLUSION WITH REGARD TO THE ROTTERDAM FORM AND THE NVB FORM

My opinion is that, especially for overseas beneficiaries, the Rotterdam form is to be preferred above the NVB form. The Rotterdam form is simple. In the event of bankruptcy it does not require notices to be sent from various parties and does not contain the extra delay of four months. Moreover, it does not contain an expiry clause once litigation is on-going. For these reasons, I would advise creditors, especially those residing outside of the Netherlands, to only accept the Rotterdam form as sufficient security.

In practice, banks will put the Rotterdam form up instead of the NVB form in international cases, but will insist on using the NVB form in national cases.

8. SUFFICIENT SECURITY, FOREIGN GUARANTORS AND CLUB GUARANTEES

A different question is the identity and place of domicile of the guarantor. In ship arrest cases in the Netherlands, a creditor who has arrested a vessel will sometimes argue that it has an asset in the Netherlands (i.e. the arrested ship) as security and that if it obtains a judgment in the Netherlands it can enforce that judgment against that asset without any trouble. The creditor sometimes argues that if it lifted the arrest against security put up by a foreign guarantor, it could be confronted by problems if it would have to enforce its Dutch judgment against a foreign guarantor, as it would then have to obtain an enforcement order on its Dutch judgment to be able to enforce it abroad. For that reason, creditors can argue that an arrest only has to be lifted against security in the Netherlands and that security offered up by a foreign guarantor can be rejected. In practice of course, arresting lawyers will usually lift arrests against P&I Club guarantees. Sometimes, Club guarantees are however rejected as being insufficient security.

A case at the Injunction Judge of Rotterdam of 12 November 1980[11] concerned the question whether a Club letter offered as security by the Noord Nederlandse Protectie Club (i.e. a Dutch P&I Club) was sufficient security. The judge said 'The offered security is sufficient (.. .) the Club (mutual insurance) can fall back on its members, which have 400 vessels in ownership; all claims above an amount of NLG 100,000.- have been reinsured at The West of England, that forms a pool with almost all the other large English Clubs to cover the bigger claims. The owner has an interest to put up a Club

guarantee as the owner does not incur costs for a Club guarantee, whereas he would if he had to put up a bank guarantee'.

In a more recent judgment[12] the Court of Appeal of The Hague confirmed that security offered by a foreign insurance company is sufficient, as is a P&I Club guarantee. It said 'the objections against the (.. .) guarantee put up by the Polish insurer PUZ are rejected: (a) the submitted documents show that PUZ is good for its money and has a higher than average ranking (b) the form, language and amount of the security is usual and because of the applicability in Poland of the European recognition and enforcement directive,[13] it gives sufficient security that payment can be obtained quickly, in the same manner as e.g. a P&I Club guarantee does'.

Because of the applicability of the European recognition and enforcement convention (the predecessor of the aforementioned directive) the Court of Appeal of the Hague[14] held that a bank guarantee from a Swiss bank was sufficient security as enforcement problems were not to be expected.

In a decision from 1997 the Injunction Judge at Rotterdam[15] said: 'sufficient security is not only security from a bank or insurance company established in the Netherlands. In principle a bank guarantee on the Rotterdam Guarantee from ''MSC Samia'''s Brussels' hull insurer can be considered sufficient, whereby an extract from the companies register should be obtained to check the correct name of the insurer. The creditor can also respond to the annual report of the insurer that will still be sent to it'.

The case law discussed above makes clear that the Dutch courts are practical and have no difficulty finding that security offered by foreign P&I Clubs, insurers and banks is sufficient security. It remains however a requirement that the creditor can enforce a judgment against the foreign guarantor 'without trouble'. Because of the European recognition and enforcement directive, the Dutch courts consider that enforcement against guarantors in countries that are a party to the directive can be done 'without trouble'.

It however surprises me that in the case law that I have found nothing is said about the fact that a lot of P&I Clubs have structures whereby agents sign guarantees in London for principals with the assets in Bermuda. Considering this, on the face of it, the security offered by a lot of P&I Clubs is not as solid as one might wish. I have never tried to enforce a judgment against assets in Bermuda under a guarantee signed by an agent in London, but I imagine that it could prove problematic if the guarantor in Bermuda would be unwilling to pay under the guarantee. I am not aware of the existence of any recognition and enforcement treaty between the Netherlands and Bermuda. Fortunately however the big P&I Clubs have a first class reputation in Rotterdam and there are very few (if any) instances known of P&I Clubs failing to meet their obligations under a P&I guarantee. For this reason, the Club guarantees are accepted by arresting lawyers as sufficient security even though a case can be made in law that Club guarantees in fact are not sufficient security.

9. SUFFICIENT SECURITY, THE VALUE OF THE ATTACHED ASSET, THE INFLUENCE OF MORTGAGES AND MAINTAINING AN ATTACHMENT TO PUT PRESSURE ON THE DEBTOR

It sometimes happens that a vessel is arrested and that the value of the vessel is lower than the mortgage on it. The shipowner then argues that the purpose of an arrest is to obtain security for a claim and that an arrest is not allowed to be used merely to put pressure on the shipowner to force him to pay the claim. The argument is that as the mortgage is higher than the value of the vessel, the arrest has no value, as, if the vessel were sold, everything would go to the mortgagee and nothing would be left for the creditor. It is however also possible that the mortgagee and the shipowner have colluded together by intentionally over-mortgaging the vessel to avoid it being arrested and being forced to put up security. Because of the possibility of collusion there is legal precedent that says that a mortgage that is higher than the value of the vessel is no prohibition against arresting the vessel.[16]

In a judgment from 1987 the Injunction Judge at Middelburg even went so far as to hold that even though it had not been proven that the reason for a mortgage on a vessel that was higher than the value of the vessel was collusion between the mortgagee and the shipowner, the creditor could have an interest in not lifting the arrest to put pressure on the creditor, and that that was more so in the case as the impression existed that the shipowner was looking for a solution for his financial problems.[17]

More recent judgments however contain different decisions. The Court of Appeal of Amsterdam held in a decision of 10 February 2000[18] that the fact that an arrest had to be lifted against sufficient security did not mean that the security had to be for the full amount of the claim. In that case a fishing boat had been arrested for a claim of USD 800,000 but it was established that the vessel was only worth USD 110,000. The court therefore ordered that the arrest should be lifted against the USD 110,000 security that the owners had offered. The court said that on balancing the interests of both parties, it found that the interest of the owner to have the arrest lifted to be able to use the vessel to fish was greater than the interest that the debtor had in maintaining the arrest to put pressure on the owner to pay. The Court of Appeal said that in certain circumstances it would be acceptable to allow the creditor to maintain the arrest to put pressure on the debtor, but the mere fact that it was known that the owners had considerably more assets was not such a circumstance.

Clearly, the Court of Appeal of Amsterdam was of the opinion that it is possible to maintain an arrest merely to put pressure on a party. The Injunction Judge at Rotterdam however held that the purpose of an arrest is to obtain security for a claim and that the amount of the security to be put up is limited by the amount recoverable if the arrested vessel is sold.[19]

A similar judgment was given by the Injunction Judge at Haarlem.[20] In that case, fuel of a Turkish airline had been attached to obtain security for a claim of EURO 6 million. The value of the fuel was less that EURO 5,000.- and that amount was paid by the Turkish airline to the creditor. The injunction judge ordered the attachment to be lifted as maintaining the attachment was causing the Turkish airline (that could not let its plane leave because of the attached fuel) to suffer damage, whereas the amount of EURO 5,000.- that had been paid was more than the value of the fuel. The only reason for

maintaining the attachment was therefore to put pressure on the airline, and that was unlawful.

In a judgment from 1998 the Injunction Judge at Middelburg dismissed the argument that a creditor could have an interest in maintaining an attachment

merely to put pressure on a debtor. It said that the arguments cited by the creditor in support of its contention of the entitlement to maintain an attachment was based on case law regarding the arrest of foreign flag ships that had colluded with their mortgagees to frustrate arrests. It said that in the case at hand there was no collusion and the debtor had no other assets or other means of having security put up. Therefore 'it was not sufficiently probable that maintaining the arrest to put pressure on would be successful'.

The case law of the lower courts therefore does not make clear if, in certain circumstances, a creditor is allowed to use an attachment merely to put pressure on a debtor or not. However, the Dutch Supreme Court recently held that the time period of art. 700(3) DCPC[21] was intended to prevent the creditor from merely using an attachment as a method to put pressure on the debtor whilst doing nothing after the attachment has been made. The Dutch Supreme Court goes on to say

'There can be no question of this unauthorised pressure on the debtor if the injunction judge has lifted the attachment in a provisionally enforceable judgment'. I believe that this judgment makes clear that an arrest may not be used to merely put pressure on a debtor, but must be used as a means to obtain security for a claim. If follows that a creditor must lift an arrest for the value that it would obtain if it sold the attached asset in a forced sale.

10. SUFFICIENT SECURITY, AND A MORTGAGE OFFERED AS SECURITY

In its decision of 22 July 1999[22] the Injunction Judge at Amsterdam said that a right of second mortgage cannot be deemed to be sufficient security as meant in art. 6:51(2) DCC.

In a decision of 5 October 1992[23] the Injunction Judge at Middelburg said that in general the offer to vest a mortgage is not enough to have an arrest lifted, also not if the debtor says that the vessels that he owns will be in the Netherlands on a regular basis. However, the Injunction Judge said that the facts of this specific case made it necessary to make an exception to the rule that a mortgage is not sufficient security. Those facts were the following:

Latvian Shipping and Sovcomflot (Russian Federation) had an agreement whereby services had to be paid in 'hard-currency roubles'. A dispute arose and Sovcomflot arrested one of Latvian's vessel to obtain security for an alleged claim of USD 7 million. Latvian offered Sovcomflot a mortgage on its vessel as security. The Injunction Judge considered that because of the collapse of the USSR the system of 'currency' roubles that could be exchanged for hard currency did not exist anymore. The collapse of the Soviet Union had also led to a dramatic decrease in the value of the rouble exchange rate, and it was therefore doubtful whether Sovcomflot's claim was as high as it said it was. For the same reason, the judge also felt that it was doubtful that Latvian's offer to pay Sovcomflot's claim in roubles was sufficient. The judge said that both parties had

completely unexpectedly come into a situation in which they both were in dire need of hard currency. Latvian could earn hard currency by trading the arrested ship, and it could then use the income from the vessel to pay Sovocomflot. Sovcomflot was blocking a solution to the problem by maintaining the arrest, whereby Latvian was becoming the

sole victim of circumstances that both parties had not foreseen. In these circumstances security in the form of a mortgage with the possibility to again arrest a Latvian vessel if the mortgaged vessel would be lost was sufficient security against which the arrest had to be lifted.

11. SUFFICIENT SECURITY AND BAIL BONDS

In its decision of 29 October 1996[24] the Court of Appeal of The Hague (which is the court that hears the appeals from the court of first instance at Rotterdam) held that a bail bond was not sufficient security. The court held: '[t]he bail bond offered to Black King by MSC's agent Medite Shipping Company (Felixstowe) does not constitute sufficient security: it has not been established that the bail bond, that Black King did not find sufficient, under English law or custom is sufficient security. A legal opinion says that a bail bond is security given to a court and cannot be given for a decision in arbitration. The court also does not believe that the mere assertion of Medites' lawyer, which assertion was not followed by a similar assertion by Medite, that the bail bond would also be sufficient to cover an award in arbitration, is enough to form sufficient security for a claim against Medite.'

12. LIABILITY FOR WRONGFUL ARREST AND COUNTER SECURITY

The Dutch Supreme Court[25] has formulated the following rule about liability for wrongful arrest: a creditor is strictly liable for the consequences of an arrest if the claim for which the arrest was made is found to be completely unfounded (i.e. there is no basis for the claim at all). If the claim for which the arrest was made is only partially awarded, this does not mean that the arrest was wrongful. The question whether the creditor is liable for the consequences of the arrest because it was made for a too high amount, light-heartedly or unnecessarily maintained, must be answered in accordance with the criteria of abuse of right (*misbruik van recht*). In the circumstances of the specific case it can then be investigated if the arrest was vexatious and therefore wrongful (see DSC 11 April 2003, NJ 2003, 440). In cases in which an arrest was made for a higher amount than the amount awarded in a judgment and that the debtor has offered to pay, the mere fact that the creditor is only willing to lift the arrest if (also) the amount of his claim that has not been awarded in the judgment is paid, does not mean that there is misbruik van recht. Also, the mere fact that other conditions are demanded for lifting the arrest than are contained in the creditor's enforceable title, in itself, does not constitute a 'misbruik van recht'.

The above shows that in the Netherlands an arrest is not deemed to be wrongful very quickly. Art. 701 DCPC says that the Injunction Judge can award the requested authority to attach assets under the condition that a counter security is put up for the damage that can be caused by the arrest. In practice, this counter security is rarely, if ever, required from the Injunction Judge when the authority to attach assets is requested. However, it does happen that after an attachment has been made, counter security is requested in injunction proceedings.

In its decision of 27 September 2001[26] the Court of Appeal of Amsterdam dismissed a request for counter security because the party requesting the counter security had failed to convince the Court that there was enough reason to believe that the attachment had been wrongfully made. In its judgment of 21 September 2004 the Court of Appeal of The Hague[27] ordered a creditor who had attached assets to obtain security of EURO 305,000 to put up counter security of EURO 61,200 because that creditor did not have any known assets – either in the Netherlands or in its place of establishment – against which damage resulting from wrongful arrest and the costs of unnecessarily putting up security could be recovered.

In a case before the District Court of Rotterdam[28] a P&I Club had put up security in the amount of USD 400,000.- for alleged cargo damage. In the proceedings on the merits the burden of proof had been placed on cargo interests, who appealed to the Court of Appeal. Those proceedings had however become dormant, because cargo interests were awaiting a decision in a similar case at the District Court of Rotterdam. The P&I Club demanded a counter security of USD 80,000.- to cover the costs of keeping the P&I Club letter in place, and its demand for counter security was awarded.

In a similar case at the Court of Appeal of The Hague[29] Beltrade had had security in the amount of USD 500,000.- put up in favour of Jumbo. Jumbo had however taken no action to pursue its claim, it was not clear when it would start taking such action and the Court did not believe that Jumbo had any assets against which Beltrade could recover possible damage. For these reasons Jumbo was ordered to put up counter security in the amount of 10% of the security that had been put up for Beltrade, i.e. USD 50,000.-

When a ship is arrested or other assets are frozen, the damage caused by the attachment can be limited if the debtor promptly puts up security. In that case, the damage caused by a possible wrongful arrest is limited to the costs of keeping the security in place. The cases cited above make clear that it can be worth the debtor's while to ask for counter security if the creditor does not vigorously pursue its claim, thereby causing the debtor to incur unnecessary costs for keeping the security in place.

13. INJUNCTION PROCEEDINGS TO DEMAND THE GUARANTEE BACK

13.1. URGENT INTEREST

Obviously, a vessel will want to avoid being detained and will put up security even though it does not agree with the arrest or the security demanded or considers the claim to be inflated. In these instances, security is put up under protest, or the arresting lawyer reserves the right to demand the security back. After the security has been put up and the vessel has sailed, the carrier's lawyer will then have a writ served on the cargo interests and demand that they appear in injunction proceedings. In those proceedings the carrier will demand a court order in which the cargo interests are ordered to give the guarantee back. Such proceedings have led to some interesting decisions, which will be discussed in this paragraph.

It is a requirement for a plaintiff who wishes to be heard in injunction proceedings to state and prove (whereby usually the level of proof required is not high) that he has an urgent interest in his claim. It could be argued that the party that puts up a bank guarantee to have his vessel released does not have an urgent interest anymore when he

demands his guarantee back in injunction proceedings, as the vessel has sailed so that the pressure is off the case. According to a decision of the injunction judge at Rotterdam that argument should however be rejected. An urgent interest is not required to demand a bank guarantee back, in the same way as an urgent interest is not required in a demand in injunction proceedings to have an arrest lifted. It would be unreasonable if it were later found that an arrest that was wrongful and therefore should have been lifted immediately could be replaced by a guarantee that has to remain in place until the proceedings on the merits have ended.[30]

13.2. LEGAL BASIS FOR THE DEMAND

An interesting question is what the legal basis is for a demand to have a bank guarantee given back. One argument is that a reasonable construction of art. 705

DCPC (cited at 3 hereinabove) means that the possibilities that that article offers to have an arrest lifted can also be used to lower or bring to an end the security that has been put up to have the arrest lifted.[31]

A different argument is[32] that art. 705 DCPC cannot form the basis for the demand after parties have reached agreement to lift the arrest against security. In

this view, the question to be asked is if, in the circumstances of the case, and in the light of art. 6:248 DCC the guarantee still applies to the full extent.

Before continuing the discussion of the Rotterdam injunction judge's decisions I should explain the role of art. 6:248 DCC in Dutch Contract law. Art. 6:248

DCC is an article of Dutch statutory law which allows the terms and conditions of a contract to be changed. It can be translated as follows:

1) A contract does not only have the legal consequences agreed between the parties, but also those that follow from the nature of the contract, the law, custom or the requirements of what is fair and reasonable.

2) A rule that has been agreed between parties in a contract does not apply if, in the given circumstances, standards of reasonableness and fairness would make it unacceptable for that rule to apply.

The influence of this article in Dutch Contract law cannot be overemphasized.

In her aforementioned judgment, the Injunction Judge at Rotterdam went on to say that a demand to give the guarantee back or to lower the amount can only be awarded if there are new circumstances that would justify such a demand. The judge did not consider that alleged delay in the proceedings on the merits or the fact that the burden of proof had been placed on the creditor as such new circumstances. The judge was therefore of the opinion that there were no real reasons on which to base the debtor's request to lower the amount of the guarantee. The judge said that on balancing both parties interests, she also found in favour of the creditor as it could not be excluded that the only asset against which the creditor could recover its claim was the bank guarantee, whereby the debtor had already been given counter security for possible damage that could be caused by a possible wrongful arrest.

In a third decision of the Injunction Judge at Rotterdam[33] it was held that both

art. 705 DCPC and art. 6:248 DCC could form the basis of the demand to have a guarantee returned, but that the test to be applied was the same: in both cases the first question is if the claim for which the arrest was made and the guarantee was put up, on the face of it, has enough merit to justify these actions, or if the claim has summarily been shown to have no merit. When considering the question of the merit or otherwise of the claim, circumstances such as the amount of the claim, the length of the proceedings on the merits that have possibly been on-going between parties and possible counter claims all have to be brought into the balance.

13.3. RESERVATION OF RIGHTS

Sometimes a debtor who puts up a guarantee reserves the right to demand it back in injunction proceedings. The Court of Appeal of The Hague[34] said the following about this: lowering the guarantee is possible in certain circumstances now that it was put up under the condition that it could be demanded back or lowered in injunction proceedings. The debtor's demand that the present guarantee will be replaced by the – usual – Rotterdam guarantee form cannot be awarded: at the time the guarantee was, albeit under pressure, put up under the aforementioned condition, and was accepted in that form by the creditor; this condition applies if there are new facts, such as a lowering of the amount of the alleged claim, but does not allow the conditions of the security to be changed.

In the decision that has already been discussed above[35] the Injunction Judge applied article 705 DCPC to a demand to have a guarantee given back. The judge said: In this case the guarantee has been put up on the Rotterdam Guarantee form. That form states that it will apply until a decision has been rendered between the parties that is no longer subject to appeal. That provision sets art. 705 DCPC aside, unless there are special circumstances that justify an exception being made, such as new facts or changed circumstances. The debtor's argument that it had no choice but to put up a guarantee to have the arrest lifted is not correct as the debtor could have demanded in injunction proceedings that the arrest would be lifted. The debtor also did not reserve the right to demand the guarantee back when it put the guarantee up.

These decisions make clear that it is important when a guarantee is put up to have an arrest lifted, to reserve the right to be allowed to demand the guarantee back. It is probably not a requirement for success when demanding a guarantee back that the reservation of rights has been made, but the question whether or not the reservation was made will be one of the circumstances that a court will take into consideration when deciding whether a demand to have a guarantee given back should be awarded or not.

The next question then becomes whether a creditor should accept a guarantee that is put up under the condition that it can be demanded back. My view is that such a reservation of rights should not be accepted, as, on the basis of the case law cited above, accepting the condition means that the creditor makes it easier for the debtor to get the guarantee back. A guarantee that has been put up conditionally is therefore less security than a guarantee that has been put up unconditionally, and I would deny that a conditional guarantee is sufficient security.

13.4. PURPOSE OF THE DEMAND TO GIVE THE GUARANTEE BACK

When a debtor demands that a creditor gives the guarantee back, the purpose of the debtor is of course to ensure that the creditor can make no demands under the guarantee. This is therefore the relinquishment of an entitlement (afstand van recht). In its decision of 29 July 2003[36] the Court of Appeal of The Hague had to deal with a creditor who had been ordered to give a guarantee back, but refused to do so, even though a penalty had been imposed on the creditor if it would fail to comply with the order to give the guarantee back. After the refusal to give the guarantee back, the debtor requested the Court of Appeal to render a judgment with the same power as a statement by the creditor in which all claims under the bank guarantee were relinquished. The Court of Appeal said: 'now that the creditor has refused to give the guarantee back, whereas the debtor has an urgent interest[37] in the guarantee being given back, the debtor's demand can be awarded and the creditor cannot make any claims under the bank guarantee, whereby the court holds that this decision will have the same power as an agreement whereby the creditor relinquishes its rights under the bank guarantee to the bank. The court went on to say that the right of the court to render a judgment that took the place of the legal act being refused was meant for just such cases, in which penalty sums were not effective'.[38]

The power of a court to render a judgment that takes the place of a legal act that a party refuses to carry out is based on art. 6:300 DCC. That article can be translated as follows:

1. If a party is obliged to carry out a legal act in its relationship with another party, then the court can, unless the nature of the legal acts makes this impossible, at the request of the entitled party, decide that its decision shall have the same power as a deed drawn up in accordance with the law of the person who should have carried out the legal act (.. .).

2. If the defendant is obliged to make a contract with the plaintiff, then the judge can decide that its decision will come in the place of that contract, or part of that contract.

13.5. A DISCUSSION OF SOME CASE LAW IN WHICH DEMANDS TO HAVE A GUARANTEE GIVEN BACK WERE GRANTED AND DISMISSED

In its decision of 25 January 2000[39] the Court of Appeal of The Hague ordered a guarantee to be given back because the competent court of first instance at Rotterdam had held that the claim was time barred. The Court of Appeal saw no reason why the decision of a judge or arbitrator in Chile should still be awaited.

In a different decision, the District Court of Middelburg[40] ordered a creditor to give a guarantee back after a limitation fund had been formed against which its claim should be filed, so it no longer had an interest in keeping the guarantee.

In its decision of 12 May 1998[41] the Court of Appeal of The Hague dis- missed a demand to have a guarantee given back. The reasons it gave were the following: the debtor who

demands that a guarantee is given back to it must, within the restricted possibilities of injunction proceedings, make a plausible case that the creditor's claim has no merit, whereby also the interests of both parties must be balanced (DSC 14 June 1996, NJ 1997, 481).[42] It is in the creditor's interest to retain the guarantee as security for its claim against the debtor as it is questionable whether the creditor will otherwise be able to recover its claim from the debtor. The creditor says it is a financially solid company who can reasonably be expected to be able to bear the costs of the guarantee. The various expert opinions do not make it possible at this stage to say anything about the amount of the claim, so the demand to lower the amount of the guarantee is also dismissed.

The Court of Appeal at Amsterdam[43] dismissed a demand to have a guarantee given back after the creditor's claim had been dismissed in the court of first instance. It said: the fact that the creditor's claim has been dismissed at the court of first instance does not mean that it will not obtain a judgment that is no longer subject to appeal against the debtor in future. The debtor has also not stated any new facts that could lead to a different decision.

Clearly, the decisions are very much dependant on the facts of each individual case, whereby all the circumstances of the case are taken into account and the different parties' interests are balanced. The burden of proof is on the debtor, and the prima facie case that the creditor has to make does not require much. The conclusion is that the law on attachment, including the question if and when a guarantee has to be returned to the debtor, is very much in favour of the creditor.

14. BANKRUPTCY OF THE DEBTOR, LEGAL PROCEEDINGS AND THE ROTTERDAM GUARANTEE FORM

In legal proceedings in the Netherlands, if the defendant goes bankrupt, the legal proceedings are suspended. The receiver in the defendant's bankruptcy can then either decide to pay the plaintiff, or take over the bankrupt defendant's legal proceedings.

Bankruptcies can cause legal proceedings to be suspended for years. The Rotterdam Guarantee Form states that in the event of bankruptcy of the principal debtor, the principal creditor can commence legal proceedings against the guarantor 'in order to have the indebtedness of the Principal Debtor ascertained by the Court'.

The bankruptcy mechanism in the Rotterdam form can lead to long delays. In the Netherlands, civil litigation can take a relatively long time. It is possible for legal proceedings between a debtor (e.g. a carrier) and a creditor (e.g. a cargo interest) concerning for example a cargo claim to last for anything from two to five years or more before a final judgment in first instance is obtained. In complicated or large cargo claims, more often than not, appeals are filed against judgments in first instance, and the proceedings are continued at the Court of Appeal. At that court it can also take two to five years or more before a final judgment is obtained.

If, after years of litigation, the debtor goes bankrupt during proceedings at the Court of Appeal, the principal creditor under the Rotterdam Guarantee Form will have to start proceedings all over again against the guarantor at the court of first instance. This is

really not a nice position for the principal creditor to be in. It is however preferable to having to wait for the receiver's decision whether or not to pay the claim.

It would of course be nice for the creditor (the beneficiary under the guarantee) to not suffer from the bankruptcy at all. This could be achieved by redrafting the Rotterdam guarantee in such a way that if an insolvency event (as listed in the Rotterdam form) occurs, the guarantor has to automatically pay the beneficiary's claim. Such a mechanism would however put the beneficiary in a much better position than he was in when he had the arrested vessel as security. The reason for this is that under Dutch law, if the debtor would go bankrupt whilst his vessel is under arrest, the arrest would expire and the vessel would fall into the bankrupt estate. In that event, the creditor will have lost his security (i.e. the ship he had under arrest). It is therefore clear that under Dutch law a mechanism whereby the guarantor pays the creditor if an insolvency event occurs would be giving the creditor a lot more than have had if the arrest had not been lifted.

I do however feel that the creditor must have some protection against the debtor going bankrupt. In my view, the fairest solution is to make sure that the period in which the creditor is exposed to the risk of the debtor going bankrupt is as short as possible. This can be done by changing the Rotterdam form in such a way that the guarantor has to pay the creditor (beneficiary) as soon as a provisionally enforceable judgment is obtained (instead of a judgment that is no longer subject to appeal) and by speeding up the proceedings at the court. Fortunately, the court of first instance at Rotterdam and the Court of Appeal of The Hague have been working very hard the last five years or so to clear up their backlog of cases and hopefully this will result in final judgments being reached quicker than has been the case in the last ten years or so.

Footnotes

* The original version of this paper was completed in January 2008. Chapter 1 of this paper was rewritten in January 2013 to bring it up to date, but the rest of the paper and the case law has not yet been updated. That will be done as soon as we have an opportunity to do it.

1. Art. 728 DCPC and DSC 11 September 1998, SES 1999, 13.

2. International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952.

3. In practice, a ship arrest is lifted against security within hours, or, if injunction proceedings have been commenced, usually within days, so usually that proceedings on the merits do not have to be commenced so quickly.

4. Art. 6:51(2) DCC requires that 'The offered security must be sufficient to properly cover the claim and the costs and interest'.

5. There is no obligation under Dutch law to announce that an arrest will be made. See e.g. the court of first instance (Rechtbank) at Middelburg, 30 November 1994, SES 1995, 17. This is self- evident, as announcing an arrest could lead to the debtor causing the asset to disappear. Rule 19 of the Dutch lawyer's code of conduct (gedragsregels) says that the lawyer who is contemplating commencing legal action, in particular enforcement action, must inform his opponent so as to give him a reasonable time to consider the matter. In my view, this rule cannot apply to protective attachments, as that would make such attachments considerably less effective and would not be in the client's interest.

6. Dutch Supreme Court (Hoge Raad or 'HR') 30 June 2006, NJ 2007, 483. The general rule that the injunction judge that has been asked to lift an attachment must balance the interests of both parties was stated in e.g. HR 14 June 1996, NJ 1997, 481 and HR 22 April 1983, NJ 1984, 180.

7. There is not much case law in which it is said in so many words that the language of the Rotterdam

Guarantee form is sufficient security as in most cases it is not a point of discussion. See Injunction Judge Rotterdam, 3 November 1989, SES 1990, 65 for an example of a decision in which the judge said that the Rotterdam form was one of the forms that was used locally and was sufficient.

8. Injunction Judge Amsterdam, 28 June 2005, SES 2006, 69. This case was a fatal injury case in which the judge was of the opinion that the surviving relatives of the person who had died (who had been the breadwinner) should not have to wait for a judgment which was no longer subject to appeal. In a different case, the Injunction Judge Alkmaar, 20 August 1998, KG 1998, 244 said that the Rotterdam form was not sufficient security and that the creditor must be able to have the choice to be allowed to enforce a provisionally enforceable judgment. Injunction judge Dordrecht, 18 September 1992, 1993, 118 also held that the debtor did not have to accept less (the Rotterdam form) than he had (the possibility of execution with a provisionally enforce- able judgment.

9. Injunction Judge Arnhem, 17 April 1996, SES 1997, 7 held that an NVB guarantee that had been extended to 15 years was a guarantee for a sufficient duration.

10. Injunction Judge Arnhem, 17 April 1996, SES 1997, 7 held that the bankruptcy clause in the NVB form had to be replaced by the clause in the Rotterdam form.

11. Injunction Judge Rotterdam, 12 November 1980, SES 1981, 14.

12. Court of Appeal, The Hague, 30 November 2006, SES 2007, 64.

13. Council Regulation (EC) no. 44/2001, 22 December 2000 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

14. Court of Appeal, The Hague, 24 November 1998, SES 1999, 54.

15. Injunction Judge, District Court of Rotterdam, 6 November 1997, SES 2002, 37.

16. Injunction Judge, Middelburg, 19 September 1978, SES 1979, 122; Court of Appeal, Den Haag, 22 October 1991, SES 1987, 104.

17. Injunction Judge, Middelburg, 27 March 1987, SES 1987, 104.

18. Court of Appeal, Amsterdam, 10 February 2000, SES 2000, 111.

19. Injunction Judge, Rotterdam, 14 April 1989, SES 1991, 3.

20. Injunction Judge, Haarlem, 25 April 2003, SES 2004, 19.

21. See the example arrest application and authority to arrest hereinabove and the footnote in the text of the authority to arrest.

22. Injunction Judge, Amsterdam, 22 July 1999, KG 1999, 278.

23. Injunction Judge, Middleburg, 5 October 1992, SES1993, 81.

24. Court of Appeal, The Hague, 29 October 1996, SES 1997, 101.

25. Dutch Supreme Court, 5 December 2003, NJ 2004, 150.

26. Court of Appeal, Amsterdam, 27 September 2001, SES 2003, 133.

27. Court of Appeal, The Hague, 21 September 2004, SES 2004, 131.

28. Injunction Judge, Rotterdam, 25 November 2003, SES 2005, 15.

29. Court of Appeal, The Hague, 28 December 2004, SES 2007, 109.

30. Injunction Judge, Rotterdam, 18 October 2005, SES 2006, 94.

31. Injunction Judge, Rotterdam (Mr. Van den Emster), 30 March 2005, SES 2005, 114.

32. Injunction Judge, Rotterdam (Ms. Rijpersman), 25 November 2003, SES 2005, 15.

33. Injunction Judge, Rotterdam (Mr. Heyman), 18 October 2005, SES 2006, 94.

34. Court of Appeal, The Hague, 22 June 1999, SES 2000, 40.

35. Injunction Judge, Rotterdam, 30 March 2005, SES 2005, 114.

36. Court of Appeal, The Hague, 29 July 2003, SES 2004, 4.

37. Note that in its decision of 18 October 2005, SES 2006, 94, discussed at 15.13.1., the Injunction Judge at Rotterdam had held that an urgent interest was not required in a demand for a guarantee to be given back.

38. See for similar decisions Court of Appeal, The Hague, 27 June 2002, SES 2003, 54 and Injunction Judge, Rotterdam, 18 October 2005, SES 2006, 94.

39. Court of Appeal, The Hague, 25 January 2000, SES 2000, 76.

40. Injunction Judge, Middelburg, 29 January 1998, SES 1998, 108.

41. Court of Appeal, The Hague, 12 May 1998, SES 1998, 88.

42. See chapter 3. hereinabove.

43. Court of Appeal, Amsterdam, 27 September 2001, SES 2003, 133.

Appendix 1

ROTTERDAM GUARANTEE FORM 2008

The undersigned (A), waiving and renouncing all rights and defences, conferred on guarantors, and in particular the provisions of the articles 7:852 and 7:855 Dutch Civil Code, hereby irrevocably declares to bind itself as surety to and in favour of (B) (the Creditor) by way of security for the true and proper payment by (C) (the Principal Debtor) of the amount the Principal Debtor may be found to be indebted to the Creditor by virtue of a judgment (which is not or no longer subject to appeal) rendered against the Principal Debtor by a competent court of law having jurisdiction in the matter hereinafter mentioned, or by virtue of a valid arbitration award which is not or no longer subject to appeal or by virtue of an amicable settlement between the parties, in respect of the principal amount, interest and costs of suit relating to a claim at present estimated by the Creditor at (D) for (E).

The expression "a judgment (which is not or no longer subject to appeal)" is deemed to include a judgment by default rendered against the Principal Debtor, provided that such judgment has been served upon the undersigned and provided that no appeal has been entered against such judgment within six weeks after that service.

If the Principal Debtor is declared bankrupt or granted a suspension of payment, or if a statutory debt rescheduling scheme has been implemented regarding the Principal Debtor, or the Principal Debtor is in liquidation or liquidated, the Creditor is entitled to bring legal proceedings against the undersigned in order to have the indebtedness of the Principal Debtor ascertained by the Court. In that event, the undersigned undertakes to pay the Creditor the indebtedness of the Principal Debtor as established by a judgment (which is not or no longer subject to appeal) rendered in those proceedings, subject to the maximum amount set forth hereinafter.

This guarantee is hereby given without any prejudice (including any question as to statutory limitation of liability and the right to demand a release of this guarantee and/or a reduction of the amount thereof), and for a maximum amount of (F) for the purpose of the release from and/or the prevention of a prejudgment attachment of (G) on account of the above-mentioned claim(s).

This guarantee is governed by the law of the Netherlands. The undersigned and the Creditor submit to the non-exclusive jurisdiction of the competent court of law in Rotterdam for disputes and claims in respect of this guarantee.

This guarantee will expire unless before or within (H) months from the date of signing hereof legal proceedings have been instituted with relation to the aforesaid issue against the Principal Debtor in a competent court of law having jurisdiction in the matter, or against the undersigned, as provided in the third paragraph above, or a deed of compromise has been signed or an appointment of one or more arbitrators has been notified or requested or proposed under an arbitration clause, or an amicable settlement has been concluded between the parties.

This guarantee will also expire if the proceedings before the court or the arbitration proceedings, instituted by the Creditor within the time limit mentioned in the previous paragraph, all have led to a decision, which is not or no longer subject to appeal, that the

court or arbitrator(s) lack(s) jurisdiction or that the Creditor has no right to claim or that the claim of the Creditor is dismissed or that the proceedings are struck out for want of prosecution, or if the proceedings have been finally withdrawn by the Creditor without an amicable settlement having been concluded.

Appendix 2

ATTACHMENT GUARANTEE (NVB 1999) (home market)

The undersigned,

..... , established in ..... , also having an office in ....., hereinafter called the 'Bank'

WHEREAS:

A. ..... , established in ..... , hereinafter called: The 'Beneficiary', alleges to have a claim against ....., hereinafter called the 'Debtor', on account of , currently calculated at NLG , here-

in after called: the 'Claim';

B. the Beneficiary has caused or intends to cause (a) conservatory attachment(s) to be made against the Debtor in respect of the Claim;

C. the Debtor has requested the Bank to issue a bank guarantee for the benefit of the Beneficiary for the purpose of the withdrawal or prevention of such attachment(s) and to prevent any further conservatory attachment in respect of the Claim;

STATES THE FOLLOWING:

1. The Bank hereby confirms that it will irrevocably be a guarantor vis-a-vis the Beneficiary for the payment of all that will be due to the Beneficiary by the Debtor in respect of the Claim as shown by the pieces of documentary evidence specified in 2, paragraphs a to c inclusive, or in the preamble of 3 or in paragraphs a and b, subject to the provisions set out below.

2. At the Beneficiary's first written demand and on the simultaneous production of:

a. a copy of a decision of a Dutch court given in proceedings between the Beneficiary and the Debtor, accompanied by a statement of a solicitor, registered to practice in the Netherlands, to the effect that no notice of

appeal, cassation or opposition was received within the legal term laid

down for this and that, to his knowledge, no notice of appeal or cassation was given against the decision within this term, or that objection to a default judgment was made within six weeks after service of the judgment to the Bank, or

b. an original copy of an arbitration award rendered in proceedings between the Beneficiary and the Debtor in connection with the Claim, or

c. a copy, certified by the parties, of a deed containing an amicable settlement between the Beneficiary and the Debtor in respect of the Claim,

the Bank undertakes to pay to the Beneficiary the sum which the Beneficiary declares in writing to be due and payable by the Debtor in respect of the Claim, it being understood that the Bank shall not be bound to pay more than the sum which the Beneficiary can

claim from the Debtor, as shown by one or more of the above-mentioned pieces of documentary evidence.

3. If the Debtor is declared bankrupt or if the Debtor falls under the scope of a statutory debt rescheduling regulation, the Bank, after the expiry of a period of four (4) months after the day on which the Beneficiary informed the Bank by registered mail that the Debtor has been declared bankrupt or falls under the scope of a statutory debt rescheduling regulation, accompanied by written confirmation of the receiver or the administrator that the Debtor has been declared bankrupt or that he falls under the scope of a statutory debt rescheduling regulation, shall pay the Beneficiary the sum which the Beneficiary declares in writing to be due and payable by the Debtor in respect of the Claim unless.

a. the Bank served a writ of summons on the Beneficiary within the afore- mentioned four (4) months period with a view to causing the validity and the amount of the claim to be determined in legal proceedings and to cause the Beneficiary to be barred from invoking this guarantee, in which case the Bank will effect payment to the Beneficiary against surrender of a copy of a decision of a Dutch court, which is not or no longer subject to appeal, rendered in proceedings between the Beneficiary and the Bank; or

b. the receiver in the bankruptcy or the administrator served a writ on the Beneficiary within the aforementioned four (4) months period to appear in court with a view to causing the validity and amount of the Claim to be determined or to bar the Beneficiary from invoking this guarantee and the receiver or the administrator notified the Bank of this by registered mail within the aforementioned period, in which case the Bank will effect payment to the Beneficiary against surrender of a copy of a decision of a Dutch court, which is not or no longer subject to appeal, rendered in proceedings between the Beneficiary and the receiver or the administrator, and furthermore against surrender of a statement in accordance with article 2, paragraph a, or a deed as referred to in article

2, paragraph c, it being understood that the Bank shall not be bound to pay more than the sum which the Beneficiary can claim from the Debtor as shown by any of the aforementioned pieces of documentary evidence.

The provisions laid down in this article do not prejudice the Beneficiary's rights to demand payment pursuant to article 2.

4. This guarantee covers a maximum sum of NLG ..... (in words: ..... (amount written out in full).

If the Beneficiary, in the event of a written demand for payment in respect of this guarantee, states that such demand concerns a partial payment, the guarantee will continue to remain in force for the balance.

5. Unless legal proceedings have been instituted before the competent court in respect of the Claim between the Beneficiary and the Debtor, or notice is given of the appointment of one or more arbitrators pursuant to an arbitration clause, or such appointment is requested or proposed, or an amicable

settlement is effected before or within.... months after the date of signing this guarantee, and the Bank has received written notification of this from or on behalf of the Beneficiary,

this guarantee shall expire within a month following the period specified in this article and in any event within ten (10) years after the date on which this guarantee was signed, unless the Bank has received a written statement from a solicitor, registered to practice in the Netherlands and acting on behalf of the Beneficiary, to the effect that proceedings between the Beneficiary and the receiver concerning the Claim are still pending or that, pursuant to article 3, proceedings between the Beneficiary and the trustee or the Bank are pending, in which case the guarantee will be valid for an additional ten (10) years period.

6. After expiry of this guarantee the Beneficiary will no longer be entitled to lodge any claim in respect of this guarantee (optional) and, at the Bank's request, the Beneficiary will be obliged to return this guarantee to the Bank/ release the Bank from its obligations.

7. This guarantee shall be governed exclusively by Dutch law. Any disputes between the Bank and the Beneficiary concerning this guarantee, as well as the proceedings as meant in article 3, paragraph a, shall, in first instance be submitted exclusively to the competent Court in ..... .

Thus made and signed in ..... on .....

The Bank:

Appendix 3 (Some relevant articles from the Dutch Code of Civil Proceedings

Third book. Various forms of the administration of justice
Fourth title. Protective attachments
First section. General Provisions

Article 700
1. A protective attachment can only be made with authority of the Injunction Judge of the court within whose district one or more of the properties concerned are located, or, if the attachment does not pertain to property, the debtor or the person or the persons under whom the attachment will be made, is domiciled.

2. The authority is requested in an application which states the type of the attachment to be made and the right that the applicant is invoking, and, if this right is a money claim, also the amount or, if this amount has not yet been established, the maximum amount thereof, without prejudice to the special requirements dictated by the law for the attachment in question. The Injunction Judge will decide after a summary investigation. In the case of a money claim he establishes the amount for which authority for attachment will be given, including the costs that the debtor will be ordered to pay. When giving the authority to attach, the Injunction Judge can also give authority to make the attachment on all days and at all hours, without prejudice to Art. 64 par. 3 DCPC. No appeal is possible against a authority given based on this paragraph.

3. Unless at the time that the authority to attach is granted the proceedings on the merits have already been commenced, the authority will only be granted under the condition that proceedings on the merits are commenced within a time period to be decided by the Injunction Judge of at least eight days after the attachment is made. The Injunction Judge can extend this time period if the applicant requests an extension before the time period has lapsed. Appeal against the decision is not possible. In the event of attachments as meant in article 714 or article 718 the extension, to have effect, within eight days after the time on which the time period would have lapsed without the extension, must be notified in writing to the company meant in article 715, respectively the third party meant in article 718. If the time period to commence proceedings on the merits is exceeded the attachment will lapse.

4. Authority to attach assets for the account of an institution as meant in article 212a, under a of the Bankruptcy Code can only be granted after that institution has been given the opportunity to be heard, unless the attachment only pertains to real property or moveable property.

Article 701
1. The Injunction Judge can give the authority to attach subject to the condition that security is put up for an amount to be decided by him for damage that the attachment could cause.

2. The security must be offered to the debtor before or at the time that the attachment order is served on the debtor. For the rest, article 616 applies.

Article 702
1. Unless the law provides otherwise, protective attachments are made apply- ing mutatis mutandis the requirements that apply to enforceable attachments to recover a money claim made on the same type of asset as is being attached. Instead of the enforceable title the attachment order will mention the Injunction Judge's authority to arrest as meant in article 700.

2. This authority to attach and the application on which it is given and the attachment order will be served together on the debtor.

Art. 703
Assets intended for the public services may not be attached.

Art. 704
1. As soon as the creditor has obtained an enforceable title in the proceedings on the merits and this title has become enforceable, the protective attachment changes into an executable attachment, subject to the title obtained being served

on the creditor and, if the attachment was made under a third party, it has also

having been served on that third party.

2. If the claim on the merits has been rejected and appeal is no longer possible, then the attachment will lapse by operation of the law. The same applies if, to enforce the decision in the case on the merits a court order or declaration of enforceability is required, and the decision in which this has been refused by the court is no longer subject to appeal.

Article 705
1. Notwithstanding the competence of the normal judge, the Injunction Judge who gave authority to make the attachment can, in Interim Injunction Proceedings, release the assets from attachment at the request of any interested party.

2. The assets will be released from attachment if forms that must be adhered to

on pain of nullity of the attachment have not been adhered to, or if the defectiveness of the debtor's claim has summarily been shown, or if the attachment is found to be unnecessary, or if the attachment has been made for a money claim, if sufficient security is put up for that claim.

3. Article 63, paragraph 1 and Article 438, paragraph 2, fourth sentence, third, fourth and fifth paragraph apply mutatis mutandis.

Article 706
The costs of the attachment can, either in the proceedings on the merits or not, be claimed from the debtor, unless the attachment is null and void, unnecessary or illegal.

Article 707
The provisions concerning the protective attachment of property apply mutatis mutandis to the protective attachment of a restricted right or of a share in such

property.

Article 708
1. The provisions concerning protective attachment of assets of the debtor apply mutatis mutandis to protective attachments of assets that the creditor can recover against but that belong to a different party than the debtor. In this case the creditor is obliged to serve the attachment order on the debtor within eight days.

2. If the attachment is made for the account of the debtor than the creditor is

obliged to serve it on the other party within eight days or, if he does not know of that other person's right, immediately after he learns of that right. If that other party, before eight days after the service have lapsed, gives the bailiff written notice that he intends to oppose the recovery against his assets, the attachment will only become enforceable against him after an enforceable title has been obtained against him obliging him to tolerate the enforcement.

Article 709
1. At the request of the applicant for authority to attach moveable property that is not registered property, or at the request of the person that has already attached such property, the Injunction Judge that gave authority to attach or within whose district one or more of the concerned properties are located, can order that that property shall be sequestered by a sequestrator to be appointed by the Injunction Judge.

2. A similar request can be made by a holder of a pledge as meant in Article 237 of Book 3 of the DCC when an executable attachment has been made on property that has also been pledged.

3. The Injunction Judge will not grant the request before having given the debtor or possible other interested parties the opportunity to be heard, unless

special circumstances demand that the order is given straightaway. No appeal is

possible against the decision.

4. Article 701 applies mutatis mutandis.

Article 710
1. If a dispute exists between two or more parties concerning the question who owns one or more properties, those properties can be put under administration by the Injunction Judge at the request of each of the parties in Interim Injunction

Proceedings at the court within whose district one or more of the properties are

located or at the court at which the proceedings on the merits have been commenced or at the court that by the normal rules would be competent to hear the proceedings on the merits.

2. Unless the proceedings on the merits have already commenced, property will only be put under administration under the condition that the proceedings on the merits will be

commenced within a time period to be decided by the Injunction Judge. The Injunction Judge can extend the time period if an extension is requested

by one of the parties or by the administrator before the time period has lapsed. An

appeal against the decision is not possible. If the time period is exceeded, the administration will come to an end.

3. Attachments made by parties on one or more of the properties will not restrict the administrator in the exercising of the powers that have been invested in him.

4. The administrator will ensure that the properties under his administration are handed over to the person who, by a judgment that is provisionally enforceable or is no longer subject to appeal, is entitled to them, unless the Injunction Judge decides otherwise.

5. The Injunction Judge can impose such rules on the administration that he finds appropriate. In so far as the rules made by the Injunction Judge do not state otherwise, the Articles 433 paragraph 1, 435, 436 paragraph 1–3, 437, 438 paragraph 1, 439, 441 paragraph 1 first sentence and 442–448 of Book 1 of the DCC will apply. The administration can be brought to an end by agreement between the parties or by the Injunction judge at the request of one of them.

Article 710a
The bailiff can also file petitions based on articles 700, third paragraph third sentence, 709, second and third paragraph, 715, second paragraph, third sentence and 721, second sentence. If the bailiff files the application, his office is deemed to be the petitioner's chosen place of domicile.

Section 6 A. Protective Arrest of vessels

Article 728
1. The Injunction Judge of the court within whose district a vessel is expected is also competent to give authority to arrest that vessel. Article 711, paragraph 1, does not apply. Article 712 also does not apply, unless a vessel as meant in article 576 is arrested.

2. In the arrest order domicile can also be chosen at the bailiff's office instead of at the office of the public notary. Domicile can also be chosen in the Netherlands at the office of an attorney.

Article 728a
1. Article 708, second paragraph, does not apply. Articles 566, 567 and 513a apply mutatis mutandis.

2. The time period of article 508, in connection with article 568, commences to run as of the day that the creditor obtains an enforceable title which can be enforced and which has been served on the debtor against which the title has been rendered.

Article 728b
If a vessel is arrested that is registered in the register as meant in article 193 of

Book 8 or Article 783 of Book 8 DCC and the proceedings on the merits have not been commenced within the time period of Article 700, third paragraph, the arrestor is obliged to immediately have the registration of the arrest struck off from the public registers on pain of being liable for damages.

Section 8 Protective attachment of assets belonging to debtors with no known place of domicile within the Netherlands.

Article 765
If the debtor has no known place of domicile within the Netherlands, property can be attached in the Netherlands in accordance with the previous sections of this title, without fear for dissipation of assets having to be shown.

Article 766
By operation of the law the creditor is the baillee of the attached goods, if they are in his possession; if not than a sequestrator or can be appointed in accordance with the rules of an enforceable attachment.

Article 767
In the absence of a different way to obtain an enforceable title in the Netherlands the proceedings on the merits, including the claim for costs made for attachment, can be commenced at the court of which the Injunction Judge gave the authority for the attachment that was made or was prevented from being made by security, or was lifted. In the event of authority to attach goods that are under a third party this only applies if the property to be attached is clearly described in the application.

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