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Securing assets during a claim in EU countries

 Netherlands

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European Judicial Network
(in civil and commercial
matters)

1 What are the different types of measures?

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There are two types of measures: interim measures and precautionary measures.

Interim measures are measures preceding court rulings in proceedings on the merits. The judgment delivered by the court in the proceedings on the merits may confirm the interim measure or set it aside.

Precautionary measures are measures designed to ensure that the debtor fulfils his obligations. These measures enable creditors to cover themselves against the risk of not receiving what is due to them.

The court may impose interim and precautionary measures against the debtor's property. The creditor is entitled by law to request certain measures before the judgment, and even before the proceedings, which serve to preserve rights which can be exercised only after the judgment. The intention is to avoid the other party from rendering the creditor's right of recovery illusory, for example by selling goods, concealing them, giving them away or encumbering them with a lien or mortgage.

1.1 Interim measures

Interim measures may be imposed in proceedings specifically seeking them or in proceedings on the merits pending before the court.

Special rules apply for interim injunctions in divorce proceedings.

1.2 Precautionary measures

A. Attachment (*conservatoir beslag*)

The court may give the creditor permission to attach the debtor's property, with a view to preserving the property until the right claimed by the person levying attachment has been established.

There are four types of attachment:

1. Attachments for the collection of receivables (*conservatoire verhaalsbeslagen*). Property is attached after the court has ruled that a monetary claim must be met.
2. Attachment for the purpose of surrender of movable property or delivery of goods (*conservatoir beslag tot afgifte van roerende zaken of levering van goederen*). In this case, attachment is imposed on the debtor to ensure the preservation of rights as owner or beneficiary entitled to delivery.
3. The prejudgment marital attachment (*conservatoir marital beslag*). The spouse seeking divorce, legal separation or the liquidation of the marital community of property can levy this attachment in order to

prevent goods from being removed from the community before the distribution takes place.

4. The attachment to preserve evidence (*conservatoir bewijsbeslag*). The purpose of this attachment is to safeguard evidence.

B. Consignment

This measure relates mainly to cases where there is a risk that attached items will be removed. At the request of the person levying the attachment, the court orders that the items attached or to be attached are handed over to a custodian to be designated by the court.

Consignment can also be ordered separately from attachment.

C. Placing under administration

Property that is the subject of a dispute over ownership can be placed under administration by the court. For example: there is a dispute on the right to delivery of a company. Attachment or consignment of the company's goods could impede the continuation of its business operation. The administrator can run the company pending the proceedings.

D. Placing of seals and inventory

With the permission of the sub-district court (*kantonrechter*), goods belonging to a succession or certain jointly owned property can be placed under seal by the notary. A lawyer is not required. This measure is rarely used. It can be requested for example by heirs, the surviving spouse or registered partner, executors and persons with (limited) entitlement to a share of the jointly owned property.

Request for removal of the seal is also made to the sub-district court.

At the request of the aforementioned persons, among others, the sub-district court may order an inventory by a notary. A lawyer is not required. The measure serves to determine the size (and value) of the estate. The application may be made together with a request to seal or remove a seal. The measure comprises a brief description of all assets and liabilities of the estate and, at the request of a party, an assessment of the value of the movable property. If the parties are unable to agree on the designation of the certified valuer(s), the valuer(s) are appointed by the notary.

1.3 Provisional enforcement

If required, the court may declare its judgment provisionally enforceable in all cases that arise, unless otherwise determined by law or the nature of the case. If it does not follow from the law, the provisional enforcement order must be requested by the claimant. The court cannot pronounce this of its own motion.

A judgment declared provisionally enforceable may be enforced immediately even if opposition, appeal or appeal in cassation is lodged against the decision. The enforcement order may cover all or part of the judgment. The judgment could also be executed without being declared provisionally enforceable, although its execution would be suspended by the lodging of an appeal. If a judgment is declared provisionally enforceable, its execution may be continued or even commenced after an appeal has been lodged against the judgment.

2 What are the conditions under which such measures may be issued?

2.1 The procedure

A. Attachment

Attachment is levied with the permission of the district court judge hearing applications for interim relief. Application for permission is made by a lawyer. The judge may in principle rely on the applicant's claims. In principle, the debtor is not heard. The court order is usually issued the same day. In the case of a monetary claim, the judge sets the amount for which the permission is granted. The judge may order the provision of security for possible damage caused by the attachment.

The attachment is levied by writ served by a bailiff. A person levying attachment who is later found to have

wrongfully levied attachment may be ordered to pay damages.

The procedure requesting attachment gives rise to costs, such as: court registration fee (<http://www.rechtspraak.nl/>), costs incurred in instructing a lawyer (<http://www.advocatenorde.nl/>) and bailiff's fees (<http://www.kbvg.nl/>).

B. Consignment

Consignment is ordered at the request of the party levying attachment by the district court judge hearing applications for interim relief. The attached party and any other interested parties are heard unless urgent circumstances preclude this. No appeal is permitted against the order. The judge may order the provision of security.

The district court judge hearing applications for interim relief may order consignment separately from attachment.

The procedure requesting consignment gives rise to costs, such as: court registration fee (<http://www.rechtspraak.nl/>), costs incurred in instructing a lawyer (<http://www.advocatenorde.nl/>) and bailiff's fees.

C. Placing under administration

At the request of the interested party, the district court judge hearing applications for interim relief places the disputed property under administration. The measure is not related to any attachment levied. Any attachments levied on the property do not restrict the powers of the administrator. The measure may cover any kind of goods, movable and immovable property and property rights. The administration is mainly of interest to ensure continued management by an independent third party of the goods of companies, for example, during the proceedings.

The procedure requesting placing under administration gives rise to costs, such as: court registration fee (<http://www.rechtspraak.nl/>), costs incurred in instructing a lawyer (<http://www.advocatenorde.nl/>) and administrator's salary.

D. Interim measures

Interim proceedings can be conducted entirely separately from, and do not have to be followed by, proceedings on the merits.

The district court judge hearing applications for interim relief has jurisdiction to grant interim relief, where appropriate, in all matters. The sub-district court judge also has jurisdiction in cases for which he is to give judgment in proceedings on the merits. In addition to normal territorial jurisdiction, the court in whose area of jurisdiction the measure is to be taken has extra jurisdiction. Each order or prohibition that could be requested in proceedings on the merits may be requested in interim proceedings. Monetary claims may be allowed under certain conditions (see 2.2).

In proceedings before the judge hearing applications for interim relief, the claimant must be assisted by a lawyer. The defendant may be assisted by a lawyer. In proceedings before the sub-district court judge, the parties may proceed without a lawyer. The hearing is oral and informal. The judgment is usually given after a few weeks. The court may declare of its own motion that the interim measure is provisionally enforceable. 'Interim' means that the judgment is legally reversible. A different judgment may be delivered in any proceedings on the merits.

This procedure gives rise to the following costs: court registration fee (<http://www.rechtspraak.nl/>), bailiff's fees (<http://www.kbvg.nl/>) and, for the claimant, costs incurred in instructing a lawyer (<http://www.advocatenorde.nl/>).

Interim relief measures may also be granted in pending court proceedings on the merits, which apply for the duration of the litigation. The interim relief to be requested must be related to the claim in the main proceedings. This procedure is little used.

In divorce cases, interim injunctions are requested for the duration of the procedure and for some time

afterwards. Examples are: the marital home, the goods intended for daily use, the children and the maintenance allowance for one spouse to be paid by the other.

These measures are requested by separate petition, prior to, during and even after divorce proceedings, until the time when they cease to have effect. The oral proceedings must have commenced no later than in the third week after filing and the judge will rule as soon as possible.

This procedure gives rise to the following costs: court registration fee (<http://www.rechtspraak.nl/>) and costs incurred in instructing a lawyer (<http://www.advocatenorde.nl/>).

E. Provisional enforcement

In ordinary summons proceedings, the court may, on application of the claimant, declare all or part its judgment to be provisionally enforceable, unless otherwise determined by law or the nature of the case. It may make provisional enforceability subject to the condition of the provision of security. Declaration of provisional enforceability is also possible of its own motion in interim proceedings. The same applies in petition proceedings.

2.2 The main conditions

A. Attachment

The petition must contain certain information: the nature of the attachment to be levied and the right invoked by the petitioner and, in the case of a monetary claim, also the (maximum) amount thereof. In addition to this, depending on the attachment to be levied, it has to be demonstrated whether or not the fear of misappropriation is founded. An urgent interest is not required.

B. Consignment

In the case of a request by a person levying attachment, urgency is not required. In interim proceedings, however, the claimant must have an urgent interest. Fear of misappropriation does not need to be demonstrated.

C. Placing under administration

This involves interim proceedings, so the claimant must have an urgent interest. Fear of misappropriation does not need to be demonstrated.

D. Interim measures

In interim proceedings, the claimant must have an urgent interest, the court weighs up the interests of the parties and the decision provides interim relief. The urgent interest of the claimant does not have to lie in circumstances related to the defendant. The claim may be contested or contestable. More stringent requirements apply with respect to the admissibility of monetary claims in interim proceedings. The claimant's urgent interest receives extra scrutiny, while the risk of impossibility of repayment – which may lead to refusal of relief – will also have to be taken into account in the weighing up of interests. At all district courts, interim debt collection proceedings are possible for uncontested claims or claims which cannot reasonably be contested arising from an agreement in respect of goods delivered and/or services provided.

For interim measures in divorce proceedings and other proceedings on the merits, no requirements apply concerning contestability or urgency of the case. Fear of misappropriation is also irrelevant.

E. Provisional enforcement

Not applicable.

3 Object and nature of such measures?

The purpose of precautionary measures is to maintain a *de facto* or *de jure* situation for the preservation of rights (of redress). The purpose of interim measures is to create a *de facto* or *de jure* situation prior to a ruling in proceedings on the merits.

3.1 What types of assets can be subject to such measures?

A. Attachment

In principle, attachment is possible on all types of goods, with the exception of assets intended for public services and the items stated in Articles 447, 448 and 712 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). A portion of wages and other claims to periodic payments is not eligible for attachment. Attachment can also be levied on a limited right or on a share in an asset. The rules for attachment on such assets are in that case applicable *mutatis mutandis* (Article 707 Code of Civil Procedure).

B. Consignment

Movable property that is not registered property.

C. Placing under administration

All goods to which entitlement is in dispute.

D. Interim measures

All types of goods may be the subject of a claim in interim proceedings or of a provisional claim in proceedings on the merits.

E. Provisional enforcement

Not applicable.

3.2 What are the effects of such measures?

A. Attachment

The consequence of attachment is that the attached assets are frozen. The attached party may no longer sell, give away, encumber or lease the property, etc. This incapacity to dispose of property is relative: it has effect only in relation to the person levying attachment. In the case of attachment by garnishment, the garnishee must also refrain from making any further payment or handing over property. However, the *bona fide* third party acquirer is protected under certain conditions. In the case of attachment by garnishment, the garnishee is obliged to state what he is holding on behalf of the attached party. Withdrawal of attached goods is punishable.

B. Consignment

Withdrawal of consigned goods is punishable.

C. Placing under administration

The administration of the goods is transferred to the administrator.

D. Interim measures

Compliance is often enforced by means of a periodic penalty payment.

3.3 What is the validity of such measures?

A. Attachment

When granting permission for the attachment, the court must always specify the time limit within which the statement of claim in the principal action must be lodged. If no principal action is yet pending, the court specifies a time limit in the permission for attachment, of at least eight days following the attachment, within which the principal action must be brought. Only proceedings to obtain an enforceable order for payment of the claim, for which the attachment was levied as insurance, can be considered as principal action. The attachment can in the meantime be lifted by the court at the request of the person on whose goods the attachment has been levied or at the request of another interested party. If the time limit set by the court is exceeded, the attachment lapses.

Attachment becomes executory as soon as the person levying the attachment has obtained an enforceable enforcement order and this order has been served on the attached party (and in the case of garnishment, also on the third party).

If the statement of claim in the principal action is irrevocably dismissed, the attachment lapses. Attachment can be lifted at the request of the attached party.

B. Consignment

Consignment can be lifted by the judge hearing applications for interim relief at the request of each interested party in interim proceedings. This judge determines, if required, to which party the custodian must hand over the property. Lifting the attachment on which the consignment is based results in lifting the consignment. The custodian then delivers the property to the attached party. Once the party entitled to the property has been determined by judgment declared final or provisionally enforceable, the custodian hands over the property to this person.

C. Placing under administration

If the claim in the principal action has not yet been brought before the court, it must be lodged within a time limit to be determined by the court. If this time limit is exceeded, the administration ends.

Once the party entitled to the property has been determined by judgment declared final or provisionally enforceable, the administrator hands over the property to this person. The administration is lifted by a joint decision between the parties or, at the request of one of them, by the judge hearing applications for interim relief.

D. Interim measures

Interim relief measures apply until the court has passed judgment in the proceedings on the merits.

The judge in interim proceedings may also limit the period of validity of the measures or make them subject to the condition that proceedings on the merits are brought within a certain time limit. Interim injunctions issued in proceedings on the merits also end if the principal action is prematurely ended.

Interim injunctions in divorce proceedings may remain in effect for some time after the divorce. They may be amended or withdrawn. Interim injunctions issued prior to the divorce proceedings lapse if the divorce petition is not lodged within four weeks of the decision granting the interim injunctions.

E. Provisional enforcement

The court of appeal can suspend the enforcement. Suspension can also be obtained by way of execution proceedings.

4 Is there a possibility of appeal against the measure?

General rules

Opposition, appeal and appeal in cassation may be lodged against a judgment.

Opposition may be lodged with the court that entered the judgment in default, by the party convicted in absentia, within four weeks (commencement variable).

Appeal (for amounts in excess of EUR 1 750) may be lodged with the court of appeal, by the unsuccessful party, within three months of the date of delivery of the judgment.

Appeal in cassation may be lodged with the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) by the unsuccessful party, within three months of the date of delivery of the judgment either in the first and highest instance, or in appeal.

Appeal to the court of appeal and appeal in cassation to the Supreme Court of the Netherlands against an order

are possible.

Appeal is lodged by the applicant and interested parties who appeared in the proceedings, within three months of the date of delivery of the judgment, and by other interested parties, within three months of the court order being notified to them.

Appeal in cassation can be lodged by parties who appeared in one of the previous courts, within three months of the date of delivery of the judgment.

These legal remedies have the effect of suspending enforcement, unless the judgment was declared provisionally enforceable.

A. Attachment

No higher appeal is permitted against permission to levy attachment (Article 700(2) of the Code of Civil Procedure). The person levying attachment may lodge an appeal and then an appeal in cassation against a decision to dismiss the claim.

B. Consignment

If consignment has been ordered at the request of the person levying attachment, no higher appeal is permitted against the order.

The applicant may lodge an appeal and then an appeal in cassation against dismissal of the claim.

Opposition, appeal and appeal in cassation may be lodged against an interim court order.

C. Placing under administration

Opposition, appeal and appeal in cassation may be lodged against an order placing property under administration.

D. Interim measures

Opposition, appeal and appeal in cassation may be lodged against interim injunctions granted in interim proceedings or in proceedings on the merits. Appeal or appeal in cassation against interim injunctions granted in divorce proceedings is not permitted.

E. Provisional enforcement

If a judgment has not been declared provisionally enforceable, such a declaration may still be obtained in appeal or in appeal in cassation or via execution proceedings. If a judgment is declared provisionally enforceable, the appeal judge may suspend enforcement. This is not possible under an appeal in cassation. Suspension can also be obtained via execution proceedings.

■ Last update: 10/05/2024

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