



# VAN STEENDEREN MAINPORTLAWYERS

# International Law Seminar 2012

## **Enforcement of foreign judgments and awards in the Netherlands**

The recognition and enforcement of judicial orders and proceedings in the Netherlands, including mortgages, judgments, insolvency proceedings and judicial sales.

27 September 2012

contribution by Charlotte J. van Steenderen

VAN STEENDEREN  
MARITIME LAWYERS

# Introduction

- I. Recognition and enforcement of foreign judgments;
- II. Enforcement of foreign arbitral awards;
- III. Judicial sale of vessels;
- IV. Insolvency proceedings.

# I. Recognition and Enforcement of foreign judgments

Recognition of foreign judgments:

if the following three conditions are met:

- 1) the judgment is a result of proceedings compatible with Dutch concepts of due process;
- 2) the judgment does not contravene with public policy;

# I. Recognition and Enforcement of foreign judgments

- 3) the foreign court must have found itself competent on grounds which are internationally accepted,

foreign judgments will be recognised in the Netherlands.

# I. Recognition and Enforcement of foreign judgments

Enforcement of foreign judgments:

foreign judgments can only be directly enforced in the Netherlands on the basis of an enforcement treaty or EU instrument.

# I. Recognition and Enforcement of foreign judgments – Treaty applicable

## Relevant Enforcement and Recognition Treaties

- EC Regulation (EC Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, No. 44/2001)
- the New Lugano Convention (Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 30 October 2007)

# I. Recognition and Enforcement of foreign judgments – Treaty applicable

Judgments delivered in the Member States of the European Union (EC Regulation) and in Norway, Switzerland and Iceland (New Lugano Convention) are enforceable in the Netherlands once leave to do so has been obtained from the preliminary relief judge of the District Court.



# I. Recognition and Enforcement of foreign judgments – Treaty applicable

Dutch Supreme Court 29 September 2006, S&S 2007, 1:

- collision between “Seawheel Rhine” and “Assi Eurolink” on the North sea (outside of the territorial waters) on 25 January 2003. The “Assi Eurolink” sinks. The Dutch State summons the respective Owners of the vessels to pay for the costs of the wreck removal;
- the Owner of the “Seawheel Rhine” (Northsea) commences arbitration proceedings against B&N,

# I. Recognition and Enforcement of foreign judgments – Treaty applicable

the bareboat charter of the “Seawheel Rhine”, in Sweden;

- B&N commences limitation proceedings before the court of Stockholm, Sweden. The Swedish court limits B&N’s liability to SDR 1,800,093.00;
- After the formation of the limitation fund, Westereems (the Owner of the “Assi Eurolink”) arrests the “Seawheel Rhine” when she is in the Netherlands;
- Northsea and B&N commence summary proceedings to lift the arrest;

# I. Recognition and Enforcement of foreign judgments – Treaty applicable

- in the summary proceedings, Northsea and B&N refer to the “limitation” decision of the Swedish court, arguing ex Article 13 Convention on Limitation of Liability for Maritime Claims 1976 that the arrest must be lifted since it was made after the formation of the limitation fund;
- Supreme Court: the “limitation” decision of the Swedish court can be qualified as a decision as mentioned in Article 32;

# I. Recognition and Enforcement of foreign judgments – Treaty applicable

- pursuant to Article 33 par. 1 EC Regulation, the decision of the Swedish court shall be recognised in the Netherlands, without any special procedure being needed. Pursuant to Article 35 par. 3 EC Regulation, the jurisdiction of the Swedish court cannot be reviewed. Furthermore, under no circumstances the decision may be reviewed as to its substance (Article 36 EC Regulation);
- based on the decision of the Swedish court, the arrest on the “Seawheel Rhine” lacks legal effect and must be lifted.

# I. Recognition and Enforcement of foreign judgments – Treaty absent

If neither the EC Regulation nor the New Lugano Convention is applicable, foreign judgments cannot be enforced directly in the Netherlands, but need to be enforced by commencing a new course of action before the Dutch courts.

However, based on case law of the Dutch Supreme Court (Supreme Court 17 December 1993, *NJ* 1994, 348 (Esmil/Enka)) an exemption to this general principle is possible:

# I. Recognition and Enforcement of foreign judgments – Treaty absent

if a foreign judgment meets the three criteria for recognition in the Netherlands (see slides 4 and 5) and will therefore be recognised, the Dutch court will generally hand down judgment identical to the judgment rendered by the foreign court without a new action on the merits of the case being necessary.

## II. Enforcement of foreign arbitral awards

General principle based on Dutch national legislation:

recognition and enforcement of an arbitral award must be sought by way of an application to the president of the competent District Court. A leave in the form of an Enforcement Order will be granted after the period for challenging the award (3 months after receipt of the award) has elapsed.

## II. Enforcement of foreign arbitral awards – Treaty applicable

The Netherlands is a party to the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, ratified by the Netherlands on 24 April 1964).

Arbitral awards made in countries that are party to the New York Convention are enforceable in the Netherlands in accordance with the provisions of the New York Convention.



## II. Enforcement of foreign arbitral awards – Treaty applicable

### New York Convention vs. national legislation

Article VII New York Convention: a party seeking enforcement of a foreign arbitral award may also base its request on relevant national legislation.

## II. Enforcement of foreign arbitral awards – Treaty applicable

Dutch national enforcement law (art. 1076 DCCP) is slightly more favourable than the New York Convention as it appears to set less stringent formal requirements for the arbitration agreements than the “agreement in writing” required by the New York Convention (Articles II par. 1 and II par. 2 New York Convention).

The party requesting enforcement may therefore consider basing its claim primarily on the DCCP and alternatively on the New York Convention.

## II. Enforcement of foreign arbitral awards - Treaty absent

If the New York Convention does not apply, foreign arbitral awards can also be enforced in the Netherlands, upon submission of the original or certified copy of the arbitration agreement and arbitral awards.

# III. Judicial sale of vessels

## Relevance

- in the third quarter of 2008 the global financial and economic crisis hit the shipping industry;
- since then there is a severe lack of funding for (trade/ (re)financing) transactions;
- ship values have plummeted;
- there is pressure on banks to start foreclosure projects given the plunge in second-hand vessel values and the ramifications of Basel III;

# III. Judicial sale of vessels

- clear to everyone concerned that the build-up in problem loans cannot be put off indefinitely;
- choosing the proper venue for an execution sale is of the utmost importance, since the law of the country where the execution sale takes place is decisive for the rules governing the sale, the time needed to go through the enforcement proceedings and the subsequent priority of claims.

# III. Judicial sale of vessels

The law regulating the execution sale of vessels is contained in the DCCP and the DCC.

The Netherlands is a signatory to the 1926 Brussels Convention on Maritime Liens and Mortgages.

# III. Judicial sale of vessels – preconditions I

- I. The creditor must have a legal title (Enforcement Order) allowing a sale. Such legal titles are the following:
  - a money judgment from a Dutch court;
  - a notarial deed from a Dutch notary public;
  - a money judgment by a foreign court enforceable in the Netherlands;
  - a notarial deed by a foreign notary public, if enforceable in the Netherlands;

# III. Judicial sale of vessels – preconditions II

- an arbitral award from a Dutch arbitral tribunal;
- a foreign arbitral award, enforceable in the Netherlands;
- an European Enforcement Order (pursuant to EU Regulation No. 805/2004 of 21 April 2004).



## III. Judicial sale of vessels – preconditions III

- II. The original legal title must be served on the debtor *in personam* and on the Owner of the vessel (if they are not the same person).
- III. The vessel must be under arrest, whether conservatory or in enforcement and therefore the vessel must be within the Dutch territorial waters (including the River Scheldt).

Timeframe: 6 – 8 weeks from arrest to have sale.

# IV. Insolvency proceedings

## Introduction

- as of 31 May 2002, the EU Insolvency Regulation provides the rules regarding intra-EU cross-border insolvency proceedings.

# IV. Insolvency proceedings

## Insolvency proceedings in the Netherlands

- insolvency proceedings that do not fall within the scope of the EU Insolvency Regulation are subject to the general rules of Dutch (private international) law;
- the Dutch Bankruptcy Act does not constitute a well-developed body of law, but contains a few provisions specifically addressing international insolvencies;

# IV. Insolvency proceedings

- insolvency proceedings opened in the Netherlands encompass the entire estate of the debtor, including assets located outside of the Netherlands (Dutch Supreme Court 15 April 1955, *NJ* 1955, 542 (Kallir/Comfin) and Articles 20 and 203 through 205 of the Dutch Bankruptcy Act);

# IV. Insolvency proceedings

- a creditor who has seized assets located outside of the Netherlands belonging to a party that has been declared bankrupt in the Netherlands, has to pay the proceeds thereof to the bankrupt estate, unless the relevant assets are subject to a priority right in favour of this creditor (Article 203 Bankruptcy Act);
- no distinction between domestic and foreign creditors, foreign creditors are entitled to file their claims with the administrator in order to be paid out of the proceeds of the bankrupt estate.

# IV. Insolvency proceedings

## The effect of foreign insolvency proceedings

In principle, foreign insolvency proceedings are recognised in the Netherlands. However, the effects of such recognition are limited.

Foreign insolvency proceedings do not comprise assets of the debtor that are located in the Netherlands (Dutch Supreme Court 2 June 1967, *NJ* 1968, 16 (Hiret/Chiotakis) and Dutch Supreme Court 31 May 1996, *NJ* 1998, 108 (De Vleeschmeesters)).

## IV. Insolvency proceedings

In short, a foreign insolvency does not prevent unpaid creditors from having recourse to the assets of the debtor that are located in the Netherlands during or after the foreign insolvency proceeding and attachment of these assets is possible (Dutch Supreme Court 22 February 1917, *NJ* 1917, 347).



Thank you for your attention

