

# **CROSS BORDER ENFORCEMENT OF MONETARY CLAIMS - INTERPLAY OF BRUSSELS I A REGULATION AND NATIONAL RULES**

**NATIONAL REPORT: THE NETHERLANDS**

**Author**  
**Fokke Fernhout**



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# **Cross border Enforcement of Monetary Claims - Interplay of Brussels I A Regulation and National Rules**

National report: The Netherlands

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# Cross border Enforcement of Monetary Claims - Interplay of Brussels I A Regulation and National Rules

## National report: The Netherlands

FOKKE FERNHOUT

**Abstract** The "National Report: The Netherlands" systematically and comprehensively addresses the main features of the enforcement of monetary claims in the German legal system, focusing in particular on the analysis of legal remedies in the enforcement procedure. Said issues are approached from both national and cross-border perspectives. The issues discussed are profoundly typical in light of the recent coming into effect of the Brussels IA Regulation (Recast) and its more or less successful implementation in the national systems of the Member States, which has raised a number of issues. The report critically reflects some of the controversial solutions covered by the Recast Regulation regarding the effectiveness and appropriateness of the Regulation's application in the legal system in question and related problems. It also deals with national specificities in the enforcement procedure, which still constitute an obstacle to cross-border procedures. The report was created as part of a study conducted under the auspices of the EU project BIARE ("Remedies on the Enforcement of Foreign Judgments according to Brussels I Recast") under the coordination of the Faculty of Law University of Maribor.

**Keywords:** • Brussels IA Regulation • cross-border enforcement procedure • enforcement of monetary receivables • legal remedies • The Netherlands •

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## Table of Contents

1	<b>Main Features of the National Enforcement Procedures for Recovery of Monetary Claims (General Overview).....</b>	<b>1</b>
2	<b>National Procedure for Recognition and Enforcement of Foreign Judgments .....</b>	<b>19</b>
3	<b>Recognition and Enforcement in Brussels I Recast .....</b>	<b>23</b>
4	<b>Remedies .....</b>	<b>31</b>
5	<b>Final Brief Evaluation of Brussels I Recast .....</b>	<b>59</b>



# **1 Main Features of the National Enforcement Procedures for Recovery of Monetary Claims (General Overview)**

## **1.1**

Dutch Rules regarding enforcement of titles can be found in the Code of Civil Procedure (CCP), starting with Article 430 and ending with Article 584r.<sup>1</sup> Many legal regulations, for instance those regarding tax law and administrative law, refer for enforcement to these provisions in the CCP. Indirect enforcement by means of *astreinte* and civil arrest is covered by the Articles 585-611i CCP. A special procedure exists for the recovery and enforcement of damages that have not been estimated in the court judgment in which the defendant is ordered to pay these damages (Article 612-615b CCP).

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<sup>1</sup> In the following, the focus will be on enforcement of titles regarding monetary claims. Other claims (like a claim regarding the handing over of a certain object) will not be discussed systematically.

## 1.2

Currently, civil procedure in the Netherlands is in the middle of a reform process due to the introduction of mandatory digital litigation. The project is known as KEI (*Kwaliteit en Innovatie*, Quality and Innovation). The statutes, decrees and regulations introducing these KEI-reforms have been enacted and published,<sup>2</sup> but implementation will be realized in phases. The first phase for first instance courts will probably start in 2019,<sup>3</sup> whereas the last phase (procedures to obtain interim measures) cannot be expected before 2022.<sup>4</sup> These changes will not affect the procedures regarding enforcement. Next to KEI a smaller project has also been enacted, but has not been implemented either. This project sees at changing the rules regarding attachment of periodic payments like wages and allowances.<sup>5</sup> It aims at simplifying the calculation of exempted income in the case of garnishment of periodic payments. For the implementation, no date has been set yet, but this will be not later than January 1, 2019.<sup>6</sup>

## 1.3

Enforcement regulations all start from the principle that no court interference is needed to enforce a title that has been issued by the designated authorities. The creditor<sup>7</sup> is given the power to take all steps necessary to recover the debt of the debtor without the need to apply for any kind of permission. All measures can be taken simultaneously (Article 435(1) CCP), making it for instance possible to attach wages, bank accounts, movables and immovables at the same time. However, all those steps can only be taken by a public civil servant, the process server

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<sup>2</sup> Dutch Bulletin of Acts, Orders and Decrees (*Staatsblad*) 2016, 288-294, and Government Gazette (*Staatscourant*) 2016, 39486. In the following, the Bulletin will also be abbreviated to *DBAOD*.

<sup>3</sup> Parliamentary Proceedings (Kamerstukken) II 2017/18, 29279, 405, Appendix (1 February 2018).

<sup>4</sup> However, as of March 1, 2017, commercial claims brought before the Supreme Court should follow the new rules (Dutch Bulletin of Acts, Orders and Decrees 2017, 16). Monetary claims of EUR 25,000 and more to be brought before the courts of the pilot districts of Midden-Nederland (Utrecht) and Gelderland follow the new rules as of September 1, 2017 (Dutch Bulletin of Acts, Orders and Decrees 2017, 174).

<sup>5</sup> Act on the Simplification of Exempted Income, Dutch Bulletin of Acts, Orders and Decrees 2017, 110.

<sup>6</sup> Parliamentary Proceedings II 34775 XV, 2 (19 September 2017).

<sup>7</sup> In Dutch law there is a sharp distinction between the creditor as such (*crediteur*, *schuldeiser*) and the creditor who started enforcement (*executant*). In this text the term 'creditor' usually has the latter meaning. It will appear from the context when the more general meaning is intended.

(*gerechtsdeurwaarder*, bailiff), in his capacity of enforcement officer. The process server has an obligation to provide the services requested by the creditor, unless these would be unlawful. Handing over the enforceable title to the process server empowers him to take any steps necessary for enforcement (Article 434 CCP). The debtor or a third party who wants to challenge the enforcement should take the initiative to get a court ruling, either in summary proceedings or by bringing an ordinary suit (Article 438 CCP). Section 4.2 will give a description of all actions available to the debtor and third parties.

#### 1.4

In short, enforcement regulations do not specify a procedure to be followed to get permission for enforcement. On the other hand, the CCP describes in detail which steps have to be taken by the process server to recover a monetary claim. These steps depend largely on the type of asset of the debtor that has been chosen by the creditor to sell off. There are for instance separate rules for enforcement of titles on real property, moving property, ships, airplanes, shares, insurance rights and claims on third parties. Any property rights not explicitly mentioned in the CCP (like Air Miles and stock market options) are covered by Article 474bb CCP (the catch-all clause). Once the creditor (which could also be the State or any administrative organ) obtains an enforceable title, he is entitled to give the process server appropriate instructions, depending on the asset of the debtor that is deemed to be most suitable for the recovery of the money owed.

#### 1.5

Enforceable titles are specified in the law. There are some general provisions (like Article 430 CCP, designating judgments and notarial deeds as enforceable titles, provided that they have been issued as such, bearing the title ‘In name of the King’)<sup>8</sup> and many specific provisions. No extra recognition by the court is required, unless the title is not Dutch (and does not fall within the scope of EU-regulations or other instruments that provide for this recognition). When the enforcement is disputed

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<sup>8</sup> In Dutch ‘*In naam van de Koning*’. Older enforceable titles will bear the title ‘In naam der Koningin’ (*In name of the Queen*), which obviously depends on the monarch on the throne and is covered by the Act of 22 June 1891, Dutch Bulletin of Acts, Orders and Decrees 1891, 125.

and when recognition (followed by an *exequatur*) is required, the first instance court has jurisdiction. The application has to be brought before the court of the place of residence of the defendant or the court where the enforcement took place or will take place (Article 438 and 985 CCP, *see* section 2.3).

## 1.6

This being said, it should be emphasized that only the process server is competent in matters of enforcement, being the sole enforcement officer allowed to initiate enforcement. However, the detailed procedures that have to be followed sometimes designate other authorities with specific tasks. For instance, in the case of attachment of shares, the first instance court will have to decide on the way the public sale takes place (Article 474g CCP). The public sale of attached immovables, ships and airplanes are held by a notary, the first instance court and a judge of instruction respectively (Articles 514 and following CCP). In the case of garnishment of claims of the debtor on third parties, the creditor will have to file an application to ask the first instance court to determine the amount garnished when he chooses to dispute the declaration of the third party.

### 1.7.1

This results in a system that can only be qualified as fully private. All steps taken by the process server and consequently all steps taken by other authorities in enforcing the title solely depend on decisions of the creditor. In the same way, in performing their supervisory tasks the courts depend exclusively on the initiative of the debtor, the process server or (sometimes) third parties. The courts do not have any *ex officio* authority and do not have the power to issue any decision on their own motion.

### 1.7.2

The system is also private in the sense that no government money is involved. The process server and anything he does has to be paid upfront by the creditor.<sup>9</sup> Process servers do not receive additional payments from any administrative body. The tariffs

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<sup>9</sup> Legal aid cases are excepted. When the creditor is entitled to legal aid, all process server's costs are covered by the legal aid system (Art. 40 *Wet op de rechtsbijstand*, Act on Legal Aid).

the process server may charge are fixed in a decree (Article 434a CCP).<sup>10</sup> The costs made by the creditor may be fully recovered from the proceeds of the enforcement (Article 474 CCP for non-registered movables, Article 524 for immovables). Only when the process server or the notary embezzles the money recovered in the process of enforcement, the State is jointly liable (Article 480 CCP for the process server, Article 551(4) CCP for the notary).

### 1.8.1

Seen from a general point of view, there are three methods of enforcement of monetary claims.

### 1.8.2

The first is attachment of any asset of the debtor, followed by a public sale. The creditor recovers his costs and his claim from the proceeds of the public sale. There are intricate and quite complicated rules for the procedures to be followed depending on the nature of the attached property right, of which section 4.2 will give a more detailed account.

### 1.8.3

The second method of enforcement is attachment of ready money. The process server who attaches ready money has an obligation to open a special bank account and deposit the money on this account (Article 445 CCP). The creditor and debtor are jointly entitled to the balance of the account.<sup>11</sup> The bank becomes sequestrator. The process server decides what and when has to be paid to whom (Article 861 CCP).

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<sup>10</sup> *Besluit tarieven ambtsbandelingen gerechtsdeurwaarders* (Decree on bailiff fees for official acts) of 4 July 2001 (DBAOD 2001, 325, as changed subsequently).

<sup>11</sup> As can be derived from HR (*Supreme Court*) 12 January 2011, ECLI:NL:HR:2001:AA9441, NJ (*Nederlandse Jurisprudentie*, the most authoritative Dutch court reporter) 2001, 371, which judgment concerned an account especially opened by a notary on behalf of his clients, in which case Art. 25 Notary Act applies. This rule has been confirmed in HR 23 June 2017, ECLI:NL:HR:2017:1139 for all accounts held by notaries, lawyers (solicitors), accountants and bailiffs on behalf of their clients. Since creditor and debtor are jointly entitled, the statute of limitations does not apply to any claims regarding this joint entitlement.

#### 1.8.4

The third method of enforcement is garnishment of claims of the debtor on a third party (the garnishee). The garnishee is asked to fill out a declaration form regarding what he still owes to the debtor (Article 476a CCP). This (usually money, but it could be goods) should be paid or handed over to the process server (Article 477(1) CCP).<sup>12</sup> The goods follow the rules of section 1.8.2. The process server is entitled to pay money recovered directly to the creditor. When the creditor disputes the amount declared by the garnishee or when the garnishee refuses to submit a declaration, a special procedure of the creditor against the garnishee is provided (Article 477a(1) and (2) CCP). If necessary, the garnishee is convicted to pay the correct amount (or to deliver the goods), thus giving the creditor a title that can be enforced directly against the garnishee (*see* also section 4.2.1).

#### 1.8.5

There are two indirect means of enforcement, the *astreinte* (Article 611a–611i CCP) and civil imprisonment (Article 585–600). These indirect means of enforcement do not apply to monetary claims with the exception of judgments ordering the payment of maintenance based on Book 1 of the Civil Code (Article 585 sub b CCP). In the case of non-compliance with such an order, civil imprisonment may be requested and, if granted, enforced.<sup>13</sup>

#### 1.9.1

The following principles can be distinguished as underlying all regulations regarding enforcement of enforceable titles.

#### 1.9.2

All enforcement measures can only be taken by Dutch process servers and all decisions are taken by Dutch courts. Attachment and enforcement are exclusively

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<sup>12</sup> For special cases there are special rules. A life insurance policy for instance will be converted first to a surrender value (Art. 479m CCP).

<sup>13</sup> Civil imprisonment for a monetary claim regarding maintenance will not be discussed in this report. Only a few cases have been reported over the years.



governed by Dutch law. Attachment and garnishment thus have to follow the Dutch rules, all with the exceptions following from international law with a direct effect.<sup>14</sup> In short, the principle of territoriality applies.

### 1.9.3

As a consequence, the objects (in a general sense) on which the enforcement is executed have to be located in the Netherlands. In the case of attachment of a claim (garnishment) it is difficult to determine what the location of the claim is. Several possibilities occur that may entail extraterritorial consequences. In this respect, the *Lindeteves* judgment of the Dutch Supreme Court still gives the applicable rules.<sup>15</sup> There are two conditions that have to be satisfied for a claim to be located in the Netherlands. In the first place, the garnishee has to be domiciled or seated in the Netherlands as defined by the Articles 1:10–1:14 of the Civil Code. This implies, that the place where the claim has to be paid is not decisive. In the second place, if the claim has to be paid in another country, Dutch enforcement has to be recognized in the other country. This recognition should ensure that the garnishee cannot be forced to pay twice.

### 1.9.4

The next principle to be identified is the principle of efficiency. In the process of enforcement, no court interference is foreseen unless one of the persons concerned (including the process server) submits an application. Point of departure is that all decisions are made by the creditor alone or – on his behalf – by the process server. For the implementation of these decisions, the creditor has to make use of the services of a process server. The process server is bound to provide these services, unless this would amount to unlawful acts. In other words, the legislator is of the opinion that debtors have to pay their debts and that the law should give the creditor efficient means to effectuate involuntary collection of his claims. The law should be such that no debtor could have the feeling of being out of reach of his creditors.<sup>16</sup>

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<sup>14</sup> Art. 13a General Provisions Act.

<sup>15</sup> HR 26 November 1954, NJ 1955, 698 (*Lindeteves/Meilink*).

<sup>16</sup> Parliamentary Proceedings II 2016/17, 34628, 3, p. 12.

### 1.9.5

Protection of the debtor is guaranteed in the first place by the step by step procedure that the process server has to follow in case of enforcement. These steps aim to ensure that the debtor is fully informed about the measures being taken and has all the opportunities to comply voluntarily. Therefore, any enforcement should start with serving the title on the debtor (Article 430(3) CCP) and a summons to pay within a period of at least two days (Article 439(1) CCP). All steps following have to be served on the debtor by the process server (e.g. the attachment itself and the day of the public sale). Moreover, the debtor has full access to the first instance court in summary or ordinary proceedings to dispute the enforcement (Article 438 CCP, *see* section 4.3). To ensure that the debtor will always be able to provide for his own costs of living several goods are exempted from attachment (Article 447–448 CCP) and periodical payments are exempted up until 90 % of the applicable social security allowance (Article 475d CCP).<sup>17</sup>

### 1.10

As has been shown, enforcement does not depend on a judgment of the court permitting recovery of the claim expressed in the title. However, such a permission is required for foreign titles unless an international or national instrument provides otherwise (Article 431 and 985 CCP). A separate procedure applies for foreign arbitral awards (Article 1075–1076 CCP).

#### 1.11.1

Court intervention with regards to enforcement has been assigned to the civil courts. The Netherlands has a three-tiered court system. Almost all cases start at the court of first instance (*Rechtbank*, District Court), located in eleven separate districts. At the second tier, the appellate courts (*Gerechtshof* or in short *Hof*) are distributed over four regions. The procedure in appeal amounts to a full reconsideration of the first instance decisions, including examination of the facts if necessary. At the top of the

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<sup>17</sup> The Act on the Simplification of Exempted Income (see above section 1.2) will increase this to 95 %, while at the same time 5 % of the incomes under the social security minimum may always be attached.

pyramid resides the Supreme Court (*Hoge Raad*), which is a cassation court. Leave to appeal or to commence cassation proceedings against final judgments is not required.

### 1.11.2

Within the first instance courts, several sections have to be distinguished. Summary proceedings are always assigned to the summary proceedings judge (*voorzieningenrechter*, hereinafter also SPJ). The procedure is mostly informal, quick and not too expensive. When no summary proceedings are foreseen, the case is dealt with by the cantonal judge (*kantonrechter*) or the non-cantonal judge (single judge) or chamber (three judges). The cantonal judge has jurisdiction over claims up to EUR 25,000 (Article 93 CCP). Legal representation before the cantonal judge is not mandatory.

### 1.11.3

For enforcement procedures, in almost all cases the first instance court has jurisdiction.<sup>18</sup> To dispute enforcement, the debtor and third parties have the choice between summary proceedings before the summary proceedings judge and ordinary proceedings (Art. 438 CCP). Apart from this, the legislator seems to make a distinction between weighty decisions (over which the court itself has jurisdiction, like the permission to enforce a foreign judgment, Article 985 CCP) and decisions that are needed to ensure a fast but fair enforcement. In the latter case, the summary proceedings judge has been assigned to decide on the actions concerned.<sup>19</sup>

## 1.12

Territorial jurisdiction is always assigned to the court in the territory of which the enforcement is taking place or will take place. When such a court cannot be determined, the normal rules should be followed. In case of a procedure starting with a writ of summons (*dagvaarding*), the application should be addressed to the

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<sup>18</sup> An exception can for instance be found in Art. 1076(6) CCP, according to which an application for permission to enforce certain foreign arbitral awards has to be submitted to the appellate court acting as court of first instance.

<sup>19</sup> A quick count yielded 40 of such provisions. Most of these will be discussed in section 4.2.

court of the defendant (Art. 99 CCP, with some alternative possibilities). In case of a procedure starting with a petition, the application should be submitted to the court of the claimant (Art. 262 CCP, with some alternative possibilities). The choice between the two procedures is determined by the applicable provisions regarding the remedy sought (Art. 78 and 261 CCP).

### 1.13

The object of the enforcement is fully determined by the title itself<sup>20</sup> and the process server will refuse to enforce any obligations not clearly mentioned in the title. Conditional obligations mentioned in the title can be enforced once the condition has been fulfilled. If there is any proof of this in the form of documents, these documents should best be served on the debtor together with the title itself, although no obligation in this respect exists. When the enforcement of a conditional obligation is disputed by the debtor in court, claiming that the conditions have not been fulfilled, the burden of proof is with the creditor.<sup>21</sup>

### 1.14

Enforceable titles follow the creditor after transfer of the claim (Article 6:142 Civil Code). The same title can be used without any modification – thus still mentioning the original creditor –, but the transfer of the claim has to be served on the debtor by writ (Article 431a CCP). The title can also be used against the successors of the debtor, since the creditor is allowed to recover his claim from the estate of the deceased (Article 4:184(1) Civil Code).

#### 1.15.1

The Code of Civil Procedure distinguishes three categories of enforceable titles: court judgments, authentic instruments and other titles designated by law as enforceable.

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<sup>20</sup> However, there are some exceptions. In case of a costs order in a judgment, the creditor is also allowed to recover specific costs made after the judgment (like costs incurred by informing the other party by letter of its obligation to pay), even though these costs are not mentioned in the title (HR 19 March 2010, ECLI:NL:HR:2010:BL1116, NJ 2011, 237).

<sup>21</sup> HR 12 July 2013, ECLI:NL:HR:2013:BZ3640, NJ 2013, 435, section 3.9 sub b.

### 1.15.2

Court judgments are enforceable when they carry at the top of the judgment the words ‘In name of the King’ (*In naam van de Koning*).<sup>22</sup> These words are added by the court clerk and if needed the creditor is provided with several copies bearing the same heading (Article 231 CCP). No distinction is made between judgments of civil, administrative or criminal courts, nor between the type of judgments. The enforceable version (*grosse*) of the judgments is only issued to the creditor (which could be, by the way, either party). No costs are charged for the issuing of these copies of the judgment.

### 1.15.3

Authentic instruments are instruments in the required form made by a civil servant or someone else with the power to do so according to an obligation provided by law to report in that way about their observations or actions (Article 156(2) CCP). Notarial deeds are authentic instruments, but also writs issued by a process server, acts of the registrar of the Registry of Births, Deaths and Marriages and court minutes drawn up by the judge and court clerk. These titles become enforceable when they carry the words ‘In name of the King’. A special provision allowing the author of the instrument to add these words is needed. For notaries, this provision can be found in Article 50 Notary Act.

### 1.15.3

The other enforceable titles come in a wide variety. They do not always carry the words ‘In name of the King’. In the context of debt recovery, the most important of these is in the first place the settlement reached in court, written down in the court minutes and signed by the parties. These minutes are then issued in an enforceable form (Article 87(3) CCP, which means that the words ‘In name of the King’ are added on top) and consequently can be directly enforced. In this category also fall Dutch arbitral awards for which the summary proceedings judge has issued

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<sup>22</sup> Art. 1 of the Act of 22 June 1891, *DBAOD* 1891, 125, provides that the word ‘King’ is changed into ‘Queen’ whenever a Queen is the head of state.

a permission of enforcement (*exequatur*, Article 1062 CCP), and all foreign titles that are or have been recognized.

### 1.16.1

Permission for enforcement has to be asked in case of Dutch arbitral awards, foreign arbitral awards and foreign titles (judgments or authentic instruments) for which no national or international rule states otherwise.

### 1.16.2

For an arbitral award, an application in the form of a petition has to be submitted to the summary proceedings judge (Article 1062 CCP). The permission will be issued on the original of the award or in a separate judgment. The decision is taken *ex parte*.

### 1.16.3

For a foreign arbitral award, an application in the form of a petition has to be submitted to the appellate court (Art. 1075 and 1076 CCP). Apart from that, the same procedure is followed as discussed below for foreign titles.

### 1.16.4

To obtain permission to enforce a foreign title, an application in the form of a petition has to be submitted to the court where the debtor is domiciled or seated or where the enforcement will take place.<sup>23</sup> Legal representation by counsel is mandatory for both parties. An authentic copy of the title has to be submitted and proof should be provided that the title is enforceable in the country of origin. The request should be based on a provision in a treaty or of Dutch law. The court may require the translation of the title and other documents. The court invites the debtor to appear at a court hearing, but a summons for that hearing has to be served on the debtor by writ on behalf of the creditor. The decision is issued as soon as possible.

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<sup>23</sup> All is to be found in the Articles 985–993 CCP.

### **1.17.1**

Every step taken during the enforcement of a title has to be notified to the debtor and possibly also to others, like the garnishee. Notification has to be done by writ, served by a process server. For attachment itself, a writ is always needed as well.

### **1.17.2**

When a notification has to be served by writ the general rules for writs apply, which can be found in the Articles 45–66 CCP. As regards the contents of the writ, the parties should be specified, and the writ should specify what it is about. Particular attention is being paid to the way the writ is served. This has to be specified in detail (including date and place) in order to make it possible to verify whether the writ was served according to the applicable rules. The most secure way of serving is to the addressee in person, but this is not always possible. In those cases, the writ may be handed over to a housemate or member of the family or it may be left in an envelope with specific directions on the cover. Separate provisions are being given for the service on different types of legal persons; heirs; legal or moral persons without permanent or temporary residence in the Netherlands; members of the Royal Family; and spouses in the case of divorce procedures. The process server is not allowed to serve a writ on Sundays, celebration days, after 8 pm and before 7 am. Article 65 CCP specifies that non-compliance with these rules entails nullity when this is specified in the applicable provision, but Article 66 CCP limits this to cases in which the addressee has been unreasonably prejudiced by the failure to comply with the rules for serving writs.

### **1.17.3**

A separate enumeration of all writs to be issued is not very informative, since a quick count revealed that there are at least 60 different writs. Section 4.2 will give more details. Some of these writs hardly ever occur, because they are associated with a very specific stage of a very specific form of attachment. However, some writs are important to be mentioned explicitly in this general overview. The first two are the writs with which every attachment commences, that have already been mentioned in section 1.9.5. The third is the writ with which the attachment itself is being effectuated. The rules for these writs depend on the object that is being attached.

Sometimes a writ alone is enough to create the attachment (for instance in the case of registrable property), in other cases the process server has to see and designate the attached property or has to be on board (in the case of ships). For garnishment the writ has to be served on the garnishee, but the process server does not have to verify whether the attached claim or goods actually exist. The fourth writ to be mentioned here is the writ with which the debtor is notified of the attachment (Art. 443 CCP). The notification should also be served on third parties, if they are involved (the garnishee and the sequestrator).

#### **1.17.4**

There are some special rules for the contents of the writs with which the attachment is effectuated and with which the debtor and others are notified of the attachment. Non-compliance entails sometimes nullity. Examples can be found in the Articles 439 (chosen domicile at the process server's office), 440 (contents of the writ with which attachment is effectuated) and 475 CCP (contents of the writ with which garnishment is effectuated). These nullities are absolute. Failure to comply with these rules will make the process server liable towards the creditor.

#### **1.18.1**

In general, any type of enforcement may be preceded by protective measures aimed at freezing the assets of the debtor before an enforceable title has been obtained. Attachment as protective measure follows the rules of attachment in case of enforcement. For that reason, attachment is divided into a protective and an enforcement stage. In the protective stage, the assets of the debtor are frozen to secure the rights of the creditor. Once these rights have been established in the form of an enforceable title, the attachment enters the second phase and recovery of the claim will be realized by the process server, provided that the assets are sufficient.

#### **1.18.2**

Since in the case of a protective measure the rights of the creditor have not been established yet, preliminary permission of the court is required. The application for this permission has to be submitted in the form of a petition to the summary



proceedings judge of the first instance court of the debtor<sup>24</sup> or the place where the goods to be attached actually are located (Article 700(1) CCP). Legal representation by counsel is mandatory. The decision is given *ex parte*, although the court has the power to order a hearing (which power is seldom used). The courts issued a set of recommendations (the *Beslagsyllabus*, Attachment Outline) that are followed by all courts when deciding on these petitions.

### 1.18.3

The petition should specify and summarily give evidence of the claim of the creditor and describe the goods to be attached. For some types of attachment the creditor has to state and summarily show that the debtor is likely to make the goods to be attached disappear and thus to frustrate attempts to collect the debt.<sup>25</sup> Usually, the permission is issued on the petition itself, specifying the amount for which the attachment is allowed and the period within which proceedings have to be started to obtain an enforceable title.<sup>26</sup> This period is mostly set by the summary proceedings judge at 14 days for proceedings in the Netherlands and 30 days for proceedings abroad, to count from the moment of attachment. When this period is not respected, the attachment expires. Once the enforceable title has been obtained, enforcement may continue without the need of attaching the goods again (Article 704 CCP).

### 1.18.4

Since the permission for protective measures is granted *ex parte*, it is relatively easy to obtain it. Moreover, since issuing of the permission is done on the petition itself, the procedure is very swift. In most courts there are judges available to grant these permissions instantly (in some courts even 7/7 and 24/24). Such arrangements can be needed when for instance the ship to be attached is on the point of leaving the

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<sup>24</sup> Throughout in this report, 'the court of the debtor' is used as shorthand for 'the court within the district of which the debtor has his residence or where the debtor, in case of a legal person, has its seat, all as meant in the Articles 1:10-1:14 of the Dutch Civil Code'.

<sup>25</sup> This is not a requirement for the protective attachment of claims (Art. 719 CCP) and ships (Art. 728 CCP).

<sup>26</sup> Specific proceedings are not prescribed. Any procedure that will lead to an enforceable title will do. Thus a counterclaim in current litigation and a claim of a victim within a criminal procedure have been accepted.

harbour. The debtor can always commence summary proceedings to have the attachment lifted or get an injunction against the creditor (Article 705 CCP).

### 1.19.1

A remark should be made about time limits in the Dutch Code of Civil Procedure. These time limits are usually expressed in days, weeks and months. Days and weeks correspond to a number of one and seven days respectively. Months are a bit more complicated (see below). In general, a deadline ending on a Saturday, Sunday or recognized holiday will be extended to the first day that is not a Saturday, Sunday or recognized holiday.<sup>27</sup> A time limit of three days or more has to be extended in such a way that at least two working days fall within it.<sup>28</sup>

1.19.2 Determining the last day a remedy against a decision may be submitted usually has to start on the day after the pronouncement of the decision.<sup>29</sup> If the time limit is expressed in months, the last day of the time limit will be the corresponding day in the month that follows from the time limit. If such a day does not exist, it will be the last day of the month.<sup>30</sup> Thus a time limit of three months for an appeal against a judgment pronounced on November 30 will expire on February 28 in a normal year and on February 29 in a leap year.

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<sup>27</sup> Art. 1(1) Statute Containing General Provisions Regarding Time Limits (*Algemene termijnenwet*).

<sup>28</sup> Art. 2 Statute Containing General Provisions Regarding Time Limits (*Algemene termijnenwet*).

<sup>29</sup> This is correct for all non-default judgments and for the parties who appeared in a procedure that was started by a petition. Other cases are more complicated (Art. 139 and 358(2) CCP).

<sup>30</sup> HR 1 September 2017, ECLI:NL:HR:2017:2225.

## 1.20

The Dutch system is flexible, fast and relatively cheap. Once the creditor has a right to his claim (proven by the enforceable title) he will have no real difficulties recovering the debt when indeed the debtor's assets are sufficient. Protective measures can be obtained easily. What remains is the general problem that debtors sometimes do not have sufficient assets or succeed in hiding these, despite of their obligation to provide all the necessary information.<sup>31</sup> That is a problem that is not easily solved. Another demerit can be found in the numerous provisions prescribing writs and notifications by writs. Process servers are not cheap and writs are certainly more expensive than a registered letter or an email (varying from EUR 80 to EUR 200). Cheaper means of communication should be explored. Lastly, the rules governing enforcement are notoriously complicated. They first appeared in the code of 1838 and have been heavily amended since. That created an intricate web of cross-references that are very hard to decipher, of which section 4.2 will give a small insight. An entire revision is desirable.

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<sup>31</sup> This obligation can be found in Art. 475g(1) CCP, supplemented by rules given in HR 20 September 1991, ECLI:NL:HR:1991:ZC0338, NJ 1992, 552 (*Tripels/Masson*). The same article provides the process server with a lot of possibilities to require information about the debtor from (semi-)government agencies and private employers.



## 2 National Procedure for Recognition and Enforcement of Foreign Judgments

### 2.1.1

Unless a national or international rule that provides for the recognition and possible enforcement of certain foreign judgments stipulates otherwise, these foreign judgments cannot be invoked in a Dutch context (Article 431(1) CCP) and thus cannot be enforced. This general rule includes judgments of international courts. To recover the claim, the same lawsuit should be initiated again before the Dutch courts (Article 431(2) CCP).<sup>32</sup> However, the Supreme Court case law has mitigated this rule, since it could mean that the same work has to be done all over again. Consequently, a Dutch court is allowed to follow the foreign decision without an examination of the merits of the case when (i) the jurisdiction of the foreign court was acceptable according to international standards;<sup>33</sup> (ii) the proceedings have been fair; (iii) the decision is not contrary to Dutch public policy; (iv) there is no conflict with a

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<sup>32</sup> In the case of judgments covered by Brussels I Recast, this road is not necessary and even forbidden, also in cases in which it is cheaper to start the same procedure again instead of applying for recognition and enforcement (European Court of Justice (hereinafter ECJ) 30 November 1976, 42/76, NJ 1977, 484).

<sup>33</sup> This was for instance not the case in *Rechtbank* (First Instance Court, hereinafter Rb) Arnhem 31 October 2012, ECLI:NL:RBARN:2012:BY4312, where the Chinese court based its jurisdiction on the place where the contract had been concluded.

decision of a Dutch court related to the same subject matter and (v) the foreign title is still intact.<sup>34</sup> In this way (labelled as ‘a masked exequatur procedure’) a review as to the substance of the case can be avoided.

### 2.1.2

When recognition of a judgment of a court of another State is foreseen in a national or international rule, the procedure of Article 985 CCP has to be followed in cases that are not covered by a rule that says otherwise.<sup>35</sup> The following will give more details about this procedure. In some cases a special procedure is foreseen, governed by a separate act.<sup>36</sup>

## 2.2

Recognition as such can be foreseen in international instruments that are binding for the Netherlands or in a rule of Dutch law. The conditions will not be the same in every case and will have to be tested by the court in case an application for enforcement has been submitted. In other procedures, the question whether a foreign decision has to be recognized could arise as well, for instance in cases related to family law. Dutch doctrine does not object to recognition on a case to case basis. There is no general theory related to the recognition of foreign judgments. That is understandable from the fact that Article 431 CCP as cited above draws a sharp line, excluding all foreign judgments from enforcement when this has not been foreseen in a rule of national or international law. From this it is derived that foreign judgments, including judgments with constitutive effects, do not bind the parties under Dutch law. In the past, some exceptions were accepted in matters of family

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<sup>34</sup> HR 26 September 2014, ECLI:NL:HR:2014:2828, *NJ* 2015, 478. This decision is a refinement of the rules already set out in HR 14 November 1924, *NJ* 1925, p. 91.

<sup>35</sup> This procedure does not apply to judgments of international organs, unless a separate rule provides for that (like in Art. 5a of the Act of 16 July 1869, as changed by *DBAOD* 1964, 381, regarding the decisions of the Central Commission for the Navigation of the Rhine).

<sup>36</sup> These acts are: 1) Implementation Act of 24 December 1958, *DBAOD* 1958, 677, implementing the Convention of 1 March 1954 on civil procedure; 2) Implementation Act of 4 May 1972, *DBAOD* 1972, 240, implementing the EEX Convention (still relevant for judgments from the territories mentioned in recital 9 of Regulation (EU) No 1215/2012 (hereafter: Brussels I Recast)); 3) Implementation Act of 26 March 1992, *DBAOD* 1992, 141, implementing the 1988 Lugano Convention, declaring applicable the rules of the Articles 2-10 of the Implementation Act of 4 May 1972, mentioned before; 4) Implementation Act of 2 July 2003, *DBAOD* 2003, 290, as changed by *DBAOD* 2014, 40 and 540, implementing the 2007 Lugano Convention.

law, but this has been solved now by Book 10 of the Civil Code (which entered into force in 2012).

### 2.3

In case recognition is foreseen in national or international law, an application for permission of enforcement may be submitted.<sup>37</sup> The court will not pronounce the recognition of the title explicitly, but will examine this question from the angle whether the title is enforceable.<sup>38</sup> The application for enforcement is denied, when the title is not recognizable under Dutch law. The court does not have the power to retry the case (Article 985(1), second sentence, CCP) and thus has to accept the correctness of the foreign decision. This interdiction of *révision au fond* is stated in the Code of Civil Procedure and thus applies even when the international instrument recognizing the judgment does not provide for it.<sup>39</sup>

#### 2.4.1

The application under the general rule of Article 985 CCP should have the form of a petition. A petition is a document with which a usually non-contentious procedure is started. In these procedures, the court is slightly less passive than in procedures commenced with a writ of summons. The first instance court has substantive jurisdiction. Representation by counsel is mandatory (Article 986(1) CCP). Since no special rules have been enacted, the general rules regarding territorial jurisdiction do apply. This means that the application has to be submitted to the court of the applicant (Article 262 CCP) or to the The Hague court for applicants without domicile or seat in the Netherlands (Article 269 CCP).

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<sup>37</sup> In this respect, there is no difference between the general procedure of Art. 985 CCP and the special procedures cited in footnote 36.

<sup>38</sup> However, in the case of foreign arbitral awards recognition and enforceability are both explicitly pronounced and an application could be limited to recognition only (Art. 1075(1) CCP). See also the final remark made in section 4.5.5.

<sup>39</sup> Parliamentary Proceedings II 1963/64, 7179, 6, p. 2.

### 2.4.2

The petition should be accompanied by a certified copy of the judgment and documents from which may be derived that the judgment is enforceable under the law of the country where the judgment has been given (Article 986(2) CCP). Certified translations may be requested by the court (Article 986(3) CCP). The other parties should be convoked by writ by the applicant in order to be heard (Article 986(3) CCP).

### 2.4.3

For applications emanating from the EEX Convention, the 1988 Lugano Convention and the 2007 Lugano Convention the same rules apply when it comes to the documents in which the permission has to be asked and to the matter of jurisdiction.<sup>40</sup>

## 2.5

The decision is given in the form that is in conformity with the procedure that has to be followed. For these procedures (starting with a petition) the court gives a decision. Decisions have to be distinguished from judgments, with which a procedure starting with a writ of summons is decided.

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<sup>40</sup> This is covered by the acts mentioned in footnote 36. More about these procedures is to be found in sections 4.4.2–4.4.4.



## 3 Recognition and Enforcement in Brussels I Recast

### 3.0

Brussels I Recast has been implemented in the Netherlands by amending the Implementation Act for Brussels I,<sup>41</sup> giving it the new title Implementation Act EU-Execution Regulation and Lugano Convention (hereinafter to be referred to as IAB IA.). Since EU Regulations have direct binding force in the Netherlands (Article 93 and 94 Constitution)<sup>42</sup> only those parts of Brussels I Recast had to be implemented which are in need of specific national rules. This implementation and current practice will be discussed in this chapter, starting with the certificate of enforceability.

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<sup>41</sup> The amendments can be found in *DBAOD* 2014, 40 and 540. A future amendment (*DBAOD* 2016,290) will implement the KEI-project, but the date of entering into force has not been determined yet. This is not to be expected before the end of 2019.

<sup>42</sup> This is slightly controversial, since some scholars base the direct binding force of EU law on the *Van Gend & Loos*-judgment of the European Court of Justice (ECJ 5 February 1963, ECLI:EU:C:1963:1).

### *The Certificate of Enforceability*

#### **3.1.1**

For the certificate or declaration of enforceability as foreseen in Article 53 Brussels I Recast no special rules have been enacted in the Netherlands. Since the article mentioned is unconditional, no special requirements apply. The word ‘request’ in Article 53 cannot be considered to have the technical meaning it has in Dutch law (which would have meant that the application should have the form of a petition).<sup>43</sup> The application could thus probably even be done by telephone or email. In practice, applying for the issuing of the certificate is sometimes already done in the statement of claim as part of the claim in cases where enforcement abroad is foreseen by the claimant.<sup>44</sup>

#### **3.1.2**

Filling out a form does not fall within the scope of judicial activities that are subject to remedies. If mistakes are made, the party concerned should try to convince the court to correct those. In case no agreement can be reached, the act of the court could be considered as unlawful, for which an action based on tort can be brought before the summary proceedings judge under the general provision of Article 254 CCP. The Dutch civil courts have jurisdiction in all matters regarding State organs that are not excluded by some special administrative regulation. In this case, full review would be possible. No such cases have been reported yet.

#### **3.1.3**

For some of the tick boxes in the form (Annex I to Brussel I Recast), the court clerk or judge will depend on information supplied by the requesting party. This is especially the case for the points related to service of the judgment on the debtor. In the Netherlands, service is done by writ, issued by a process server. Article 157(1)

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<sup>43</sup> Rechtbank Rotterdam (summary proceedings) 16 February 2016, ECLI:NL:RBROT:2016:1416.

<sup>44</sup> For the first time and with success in Rechtbank Rotterdam (summary proceedings) 25 March 2015, ECLI:NL:RBROT:2015:2487. In Hof Den Haag 24 November 2015, ECLI:NL:GHDHA:2015:3923, the certificate was refused on the ground that it was not likely that the debtor would not pay voluntarily. The appellate court thus did not comply with its obligations under Brussels I Recast.

in connection with Article 156(2) CCP stipulates that such a writ of service constitutes full proof of what is related by the process server. The courts will therefore have an obligation to consider the contents of the writ as correct. The debtor will have to start an action in case any mistake has been made. In such an action, the burden of proof will be on the debtor.

### **3.1.4**

Once a certificate of enforceability has been issued, Dutch law nor Brussels I Recast provides for any possibility to withdraw a certificate or to issue a subsequent document declaring the certificate to be void. This could easily happen in case a decision will have been quashed in appeal or in cassation, since almost all non final judgments are enforceable under Dutch law. It is not excluded that the courts will solve this issue by giving out a declaration based on analogous application of the procedure for these cases foreseen in Regulation (EC) No 805/2004.

### **3.1.5**

Obviously, in the Netherlands as Member State of origin the certificate itself has no legal effect between the parties at all. Drawing up the certificate is not more than expressing a view on the legal situation between the parties outside the scope of litigation in some form. These views do not bind the parties and do not bind the court. Probably, if asked the Dutch Supreme Court will qualify filling out the form as a purely administrative decision,<sup>45</sup> which means that the normal rules for judgments do not apply. Therefore, for these decisions no grounds have to be given, they do not have to be pronounced in public and no remedies are available. The same holds for withdrawing the certificate, if possible at all.

### **3.1.6**

Treating the certificate in this way, it is clear that corrections can be made without restrictions and that mistakes should be challenged informally. Multiple certificates may be needed (for instance for enforcement in more than one country) and will therefore be issued.

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<sup>45</sup> Like in HR 19 November 2010, ECLI:NL:HR:2010:BN8529, NJ 2011, 403.

Should the court misjudge the applicable rules (for instance when ticking box 4.4.4 regarding the question whether the judgment contains an enforceable obligation), recourse can be had to the general jurisdiction of the summary proceedings judge (*see* section 3.1.2).

### 3.1.7

The certificate is issued without hearing the debtor<sup>46</sup> and there is no reason why the debtor should be informed. No national or international rule provides for notification of the debtor in the Member State of origin outside the scope of Article 43 Brussels I Recast.

### 3.1.8

The problems that arise from Article 43 Brussels I Recast (obligatory notification of the debtor before any measure of enforcement can be taken) are solved in two ways. Firstly, article 40 empowers the creditor to take protective measures after obtaining an enforceable judgment. This means that the creditor with a judgment falling within the scope of said article will have the possibility to seek any protective measure that Dutch law provides without any discretionary powers for the summary proceedings judge of Article 700 CCP (*see* section 1.18.2). The judgment and the certificate will be sufficient and no permission has to be sought, as can be derived from Article 8 IAB IA. Secondly, in principle enforcement is only possible after a period of at least two days during which the debtor has the possibility to comply voluntarily (Article 439(2) CCP, *see* section 1.9.5). Art. 9 IAB IA changes this to one month after service of the certificate for debtors domiciled or seated in the Netherlands and to two months for other debtors. However, both articles give the creditor the possibility to instruct the process server to apply for shortening of this period, which may even be done orally. Possible problems arising from notification of the debtor can thus be prevented and solved. However, it has to be noted that shortening of these periods is not possible in case of certain categories of debtors like consumers and employees (Art. 9(4) IAB IA).

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<sup>46</sup> Rechtbank Rotterdam (summary proceedings) 16 February 2016, ECLI:NL:RBROT:2016:1416.

### 3.1.9

In some respects, the certificate as prescribed by Annex I of Brussels I Recast is not clear. Point 4.4 asks the court to make a declaration about the enforceability. Usually, there are two conditions that have to be met, i.e. service on the debtor and a summons to comply (*see* section 1.9.5). In case this has not been done yet, the court has no possibility to specify that these conditions still apply. The boxes regarding statutory interests are clear, but will probably cause problems for the enforcing authorities. It will not be easy for Hungarian process servers to decipher the Dutch rules on statutory commercial and non-commercial interest, including the rules on capitalization. The best solution would be if all Member States would make a statutory interest tool available on their official website.

### 3.1.10

The certificate asks the court to fill out information about the judgment and the parties as they are mentioned in the judgment. Under Dutch law, titles follow the creditor and can be enforced against the estate of a deceased debtor. These events do not appear from the certificate and it would be incorrect to extend the certificate to these possibilities. The idea behind the certificate is that the court is just providing information about the judgment and about the documents presented to it (like a writ of service). Whether or not a creditor has transferred his claim or whether or not some object is part of the estate of a deceased debtor falls outside the scope of what may still be considered as merely copying information that is already available. These decisions can therefore only be taken in a procedure in which all parties concerned have the possibility to be heard.

## *Automatic Recognition*

### 3.2.1

The most important innovation of Brussels I Recast is the automatic recognition of foreign judgments that are enforceable in the State of origin. Thus enforceability no longer depends on a national court judgment granting permission to enforce the title (Article 41 Brussels I Recast). Under this new rule, the creditor obtained direct access to the Dutch process server. Only the original judgment and the certificate

discussed in the foregoing section are needed (and in the case of decisions allowing protective measures ordered *ex parte* proof of service of the judgment) (Article 9 IAB IA).

### 3.2.2

At the same time, the debtor has the possibility to contest the enforcement on the grounds mentioned in Article 45 Brussels I Recast. In the Dutch perception, these grounds do not really differ from the standards prescribed by Brussels I for the former *exequatur* procedure.<sup>47</sup> This guarantees that the new system will not cause any problems in the Dutch context.

### 3.2.3

According to Article 43 Brussels I Recast, enforcement should start with service of the declaration of enforceability on the debtor. The question is whether this excludes protective measures. Under Dutch law, it is up to the creditor whether or not to seek protective measures before actual enforcement of a title. Since Dutch law is the same for nationals and foreigners, anyone pretending a claim on a debtor with assets in the Netherlands has the right to seek permission for protective measures. In case no foreign judgment has been obtained yet, an application has to be submitted under Article 700 CCP (*see* section 1.18.2). The rules described in section 1.18.3 apply. However, Article 40 Brussels I Recast entails that after obtaining a judgment and a certificate of enforceability, no permission is needed to take any protective measure the creditor deems fit.<sup>48</sup> The system of Brussels I Recast thus fits in smoothly with Dutch national law. That is no surprise, since Dutch law too requires service of the enforceable title before enforcement may be pursued.

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<sup>47</sup> Parliamentary Proceedings II 2012/13, 33676, 3, p. 8.

<sup>48</sup> Art. 8 IAB IA expresses the same rule for foreign titles ordering protective measures. At the same time, it was considered that Art. 40 Brussels I Recast does not need any implementation. It is thus a reasonable assumption that no permission is needed to take protective measures in case of a foreign judgment accompanied by a certificate of enforceability. This is exactly the interpretation that has been defended by the Royal Dutch Organisation of Bailiffs in its advice to the government (Advice of 28 February 2013, p. 15).

### 3.2.4

Whether or not the certificate has been served is up to the creditor to prove. This proof has to be submitted to the Dutch process server charged with enforcement. The organisation of Dutch process servers (*Koninklijke Beroepsorganisatie van Gerechtsdeurwaarders*, Royal Professional Organization of Bailiffs) commented on this system and did not see any difficulty. In case of questions regarding prior service it is simply a matter of gathering information.<sup>49</sup>

### 3.2.5

The new system gave the Dutch legislator the opportunity to synchronize various related procedures. To challenge enforcement, the debtor has to follow the path indicated by Article 438 CCP (*see* sections 1.9.5 and 4.3.1). For this procedure, an application by means of a writ of summons is prescribed. Under Brussels I, the application for an *exequatur* (recognition and permission of enforcement) had to be submitted by means of a petition.<sup>50</sup> Now, an application for refusal of enforcement as meant in Article 47 Brussels I Recast has to be submitted by means of a writ of summons to the court that has jurisdiction according to the rules of Article 438 CCP. Thus, all claims and actions regarding enforcement (and implicitly, recognition) may be submitted to the same court in the same procedure. In this way, the intention of recital 30 of the Regulation, stating that parties should be able to invoke national and international grounds to challenge enforcement to the extent possible in the same procedure, has fully been implemented.<sup>51</sup> As far as can be established, this procedure has not been used yet.<sup>52</sup>

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<sup>49</sup> Advice of the Royal Professional Organization of Bailiffs of 28 February 2013, p. 3.

<sup>50</sup> As stated in the then applicable Art. 2 Implementation Act of 2 July 2003, *DBAOD* 2003, 290.

<sup>51</sup> Parliamentary Proceedings II 2012/13, 33676, 3, p. 13.

<sup>52</sup> The accuracy of this statement is close to 100 %. A large part of all Dutch case law on all levels is published on [www.rechtspraak.nl](http://www.rechtspraak.nl). According to the criteria used, all judgments regarding new regulations will be published. Full text queries are possible.





## 4 Remedies

### 4.1.1

In Dutch civil cases, there is only one first instance court (*Rechtbank*). The judgments regarding monetary claims are subject to appeal to the appellate court (*Gerechtsbof* or in short *Hof*), unless the amount on which the judge had to decide was in total<sup>53</sup> not more than EUR 1,750 (Article 332(1) and (2) CCP).<sup>54</sup> Appeal in the Netherlands amounts to a full review,<sup>55</sup> possibly including a new examination of the facts. First instance judgments that cannot be appealed and judgments in appeal are open to the procedure of cassation at the Supreme Court (*Hoge Raad*). The review in cassation is on the law only, not on the facts. In case of an application for cassation against a first instance judgment the cassation grounds are limited.<sup>56</sup> Against default judgments the remedy of opposition is available, which is brought before the court that issued the judgment.<sup>57</sup> Opposition against judgments in cassation is, apart from some rare exceptions, not possible (Article 425 CCP). All remedies have to be

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<sup>53</sup> A peculiar rule adds that to calculate the total possible counterclaims have to be included (Art. 332(3) CCP).

<sup>54</sup> This section of the report only covers ordinary monetary claims. Claims based on family law (maintenance) follow the rules of petition cases. In those cases appeal is not limited to a certain amount (Art. 358 CCP). In case of a judgment by default, opposition is not possible, only appeal.

<sup>55</sup> The rule *Quantum appellatum, tantum devolutum* applies.

<sup>56</sup> Art. 80(1) Act on the Judiciary. In HR 16 March 2007, ECLI:NL:HR:2007:AZ1490, NJ 2007, 637, violation of art. 6 ECHR was added as an extralegal cassation ground.

<sup>57</sup> Art. 147 CCP for first instance judgments and Art. 353 CCP for judgments in appeal, confirmed by HR 4 October 2013, ECLI:NL:HR:2013:CA3741, NJ 2014, 142.

introduced by a writ of summons, not by a petition.<sup>58</sup> These remedies are all ordinary remedies as defined by EU-law.<sup>59</sup>

#### 4.1.2

Apart from these ordinary remedies, the extraordinary remedies are repeal, third party opposition and cassation in the interest of the law. Extraordinary remedies are only available after the expiration of all delays for ordinary remedies. Repeal is available to the parties in case after the judgment it is discovered that the other party committed some kind of procedural fraud (Article 384 and following CCP). Once this has been established, the case will be retried from the beginning, with possibly the same outcome. Third party opposition is available for third parties who claim that their rights have been violated by the judgment (Article 376 and following CCP). This remedy is hardly ever used. Cassation in the interest of the law is only available to the Procurator-General of the Supreme Court (Article 78 and 111 Act of the Judiciary). It enables the Procurator-General to submit legal questions to the Supreme Court that have not been submitted by parties yet. The Supreme Court decision has no influence on the legal relationship between the parties as established by the lower court (Article 78(7) Act on the Judiciary).

#### 4.1.3

The difference between ordinary and extraordinary remedies lies also in the suspending effect of the ordinary remedies. As long as an ordinary remedy is pending, the judgment is not enforceable.<sup>60</sup> However, in practice this hardly plays any role when we focus on final judgments. Courts have the power to declare their judgments immediately enforceable and this is the rule, not the exception. On the other hand, the debtor always has the possibility to submit an application to lift this immediate enforceability at various stages of the procedure. That means that on a case to case basis will have to be decided whether or not a title that is still under

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<sup>58</sup> It has to be noted that as of March 1, 2017, the new KEI-procedure entered into force for (among others) monetary claims in cassation. The procedure has to be introduced by a digital form, after which a notification sheet will be produced by the digital system provided by the Supreme Court. This notification sheet has to be sent to or served on the other party. Otherwise, the cassation procedure did not change.

<sup>59</sup> ECJ 22 November 1977, ECLI:NL:XX:1977:AC6101.

<sup>60</sup> Art. 145 CCP for opposition, Art. 350 CCP for appeal, Art. 404 CCP for an application for cassation.

review is enforceable. When it comes to interlocutory judgments, mostly no declaration of immediate enforceability is given. Filing a remedy thus suspends the decision.

#### 4.1.4

The remedies of appeal and review in cassation are available against both interlocutory judgments and final judgments. For remedies against interlocutory judgments, in most cases leave to appeal or to commence cassation is needed (Article 337(2) and 401a(2) CCP). The application for this leave has to be submitted to the court that will give or gave the judgment.<sup>61</sup> For many interlocutory judgments and other decisions, a special provision excludes the possibility of appeal, review in cassation or both. These exclusions have to be set aside when the court followed the wrong procedure or the right to a fair trial has been violated.<sup>62</sup> This general exception will not be discussed in the following. Court acts of a mere administrative nature are not subject to remedies (*see* section 3.1.5).

#### 4.2.1

As has been shown in Chapter 1, enforcement in the Netherlands varies to an enormous extent, since the steps to be taken depend on the assets on which the title is being enforced. Various actions are made available to the persons involved during the process of enforcement. These actions constitute separate proceedings, since enforcement in the Netherlands is a process, not a procedure. This means that the general rules for remedies as described above apply. The table below will give a list of all these actions and their context, specifying the procedure to be followed, special requirements when applicable and a possible exclusion of remedies.<sup>63</sup> All references in brackets refer to the Code of Civil Procedure. In section 4.3, the general action of Article 438 CCP that is available to the debtor and third parties will be discussed.

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<sup>61</sup> Asking for leave after the judgment is based on HR 23 January 2004, ECLI:NL:HR:2004:AL7051, NJ 2005, 510.

<sup>62</sup> HR 1 April 2011, ECLI:NL:HR:2011:BP2312, NJ 2011, 220.

<sup>63</sup> The sections that are not relevant to enforcement of monetary claims will be skipped (Art. 491-500 CCP, enforcement of an order to hand over a movable object; Art. 555-558, enforcement of an eviction order; Art. 582 CCP: enforcement of an order to hand over a ship; Art. 584r CCP: enforcement of an order to hand over an aircraft). If a certain category does not apply, this is indicated with NA (not applicable).

Context	Action	Intro-duced by	Requirements	Exclusion of remedies
Enforcement is sought on an asset not belonging to debtor <sup>64</sup>	Letter of third party to process server to notify of opposition (435)	NA	Within eight days after service of attachment <sup>65</sup>	NA
Process server encounters a problem that asks for an interim order	Application of process server to SPJ for interim order (438(4))	Orally <sup>66</sup>	Report of the process server to be submitted; notification of the parties	No remedies excluded
Attachment of movables that are not registered; attachment of immovables	Application to SPJ for shortening of period of summons to comply (439, 502(1))	Orally	Can be done by the process server or the creditor	No remedies available
Movables to be attached are located in a closed place belonging to a third party (e.g. goods in a closed locker)	Application of third party to process server for security before causing damage (444b(2))	Orally	–	NA
Attachment of cattle, agricultural equipment, crops <sup>67</sup>	Application of creditor to cantonal judge for appointment	Petition	Convocation of debtor to be heard	All remedies excluded when the application has been allowed (451(2))

<sup>64</sup> This could happen in case of a claim with a preference on a certain asset, like the craftsman for his remuneration on the object he worked on.

<sup>65</sup> The effect will be that enforcement is only possible after a separate procedure in which it is established that the title can be enforced against this specific asset of the third party

<sup>66</sup> From the wording of Art. 438(4) CCP it can be derived that the decision has to be qualified as a judgment following a procedure that started with a writ of summons.

<sup>67</sup> This article is also applicable in case of crops related to an attached immovable (Art. 507(2) CCP).

	of sequestrator (451(1))			
Public sale of attached not registered movables	Application of third party who claims to be the owner or to have another right that has to be respected (456)	Writ	Application should start before the date and time of the public sale <sup>68</sup>	No remedies excluded
Multiple attachment, where the latter creditor does not have to respect a right that has to be respected by the first creditor	Announcement by latter creditor to first creditor, debtor and third party that the right to enforce is taken over (458)	Writ	After the announcement the right of enforcement is transferred as of right	NA
First creditor does not pursue the enforcement by public sale <sup>69</sup>	Announcement of latter creditor to first creditor and debtor that enforcement will be taken over (459)	Writ	At least four weeks after the minimum period for public sale of Article 462 CCP	NA
Multiple creditors want to take over enforcement by public sale	Application of any creditor to SPJ to change hierarchy of enforcement between creditors (459(3))	Petition <sup>70</sup>	–	All remedies excluded (459(4))
Pledgee wants to take over enforcement on an asset that has been	Announcement of pledgee to creditor (461a)	Writ	Not later than the date and time of public sale;	NA

<sup>68</sup> In fact this application cannot be distinguished from the general action under 438 CCP, to be discussed in section. 4.2.2. The application as such will not suspend the public sale (A.J. Gieske, T&C Rv, annotation 2c to Art. 456). The same author states that the time of the public sale includes the moment on which the good will be transferred to the buyer.

<sup>69</sup> The background of this action is that in case of multiple attachment the first creditor has the right to pursue enforcement; the others will have to wait (Article 458 ss. 1 CCP).

<sup>70</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

given in pawn ( <i>pignus</i> )			pledgee should specify when the sale will take place	
Pledgee does not organize the public sale of 461a	Application of creditor to SPJ to set a final date for public sale (461b)	Petition <sup>71</sup>	–	All remedies excluded (461b(2))
Pledgee wants a public sale of immovable property together with movables given in pawn	Announcement by pledgee to creditor (461c)	Writ	Not later than the date and time of public sale; pledgee should specify when the sale will take place	NA
Date of public sale not before four weeks after service of attachment	Application of creditor or debtor to SPJ to set earlier date (462)	Petition <sup>72</sup>	–	All remedies excluded (463b)
Public sale of bearer shares	Application of creditor or debtor to SPJ to order public sale at stock exchange (463)	Petition <sup>73</sup>	Shares should not be negotiable at stock exchange	All remedies excluded (463b)
Conflict about the terms, date, time or place of the public sale	Application of creditor, debtor or process server to SPJ (463a)	Petition	–	All remedies excluded (463b)

<sup>71</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

<sup>72</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

<sup>73</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

Announcement of the public sale by means of posters <sup>74</sup>	Application of creditor or debtor to SPJ to shorten period of announcement by poster to less than four days (465)	Petition <sup>75</sup>	–	All remedies excluded (465(2))
Enforcement on non-claimable right towards third party	Application of debtor or interested party to SPJ to stop enforcement (474bb(4))	Writ	Unreasonable prejudice	No remedies excluded
Attachment of shares in public and private limited companies	Application of creditor for date from which the shares may be sold and transferred (474g(1))	Petition	Within in one month after attachment; convocation of parties, process server, company and interested parties	No remedies excluded
Attachment of shares in public and private limited companies	Opposition against sale by third party (474g(2))	Petition	The petition should be submitted ‘timely’, i.e. at the latest at the hearing on the petition of 474g(1)	No remedies excluded
Garnishment of periodical payments	Application of debtor to	Petition	Debtor is not	No remedies excluded

<sup>74</sup> The actions in the Articles 439–465 CCP apply to enforcement on movables that are not registered. They equally apply to enforcement on bearer and order shares (Art. 474a(1) CCP), property rights not yet covered by other provisions (Art. 474bb CCP). Apart from this, some of the actions are referred to in the rules governing attachment of other assets (e.g. Art. 474c CCP and 474d CCP, both referring to Art. 444b CCP in case of attachment of shares in a public or private limited company).

<sup>75</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

	cantonal judge for determination of an exempted amount (475e) <sup>76</sup>		domiciled in the Netherlands; his means will otherwise be insufficient for the costs of living; garnishees domiciled in the Netherlands	
Garnishment of periodical payments not mentioned in 475c	Application of debtor to cantonal judge to declare the rules for the exempted amount applicable (475f) <sup>77</sup>	Petition	Debtor's means will otherwise be insufficient for the costs of living	No remedies excluded
Garnishment of periodical payment <sup>78</sup>	Announcement by debtor of opposition against attachment to the garnishee (476(2))	Writ	Opposition writ served not later than 14 days after garnishment; announcement of suspending effect <sup>79</sup>	NA
Garnishment of claim on third party	Application of creditor for order against garnishee to pay the full amount	Writ	Garnishee did not make a declaration after four	No remedies excluded

<sup>76</sup> Also applicable when the garnishee is the creditor himself (Art. 479i(2) CCP).

<sup>77</sup> Also applicable when the garnishee is the creditor himself (Art. 479i(2) CCP).

<sup>78</sup> This possibility of suspending enforcement is also available in case of attachment of immovable property that includes rent or lease to be paid by the tenant or lessee and similar debts towards the debtor (Art. 507(3) and (4) CCP).

<sup>79</sup> In other words, notifying the garnishee of a writ of opposition against the garnishment and announcing the suspending effect in the writ of notification will produce suspending effect.



who did not submit a declaration <sup>80</sup>	enforced (477a(1))		weeks and after being summoned	
Garnishment of claim on third party whose declaration is supposedly inadequate <sup>81</sup>	Application of creditor for order against garnishee to pay the right amount (477a(2))	Writ	Within two months after the declaration of the garnishee	No remedies excluded
Creditor submitted an application against the garnishee because his declaration was supposedly inadequate <sup>82</sup>	Application for security by garnishee against creditor (477a(2) last sentence)	Motion in incident	To be filed before defences on the merits	Appeal and cassation with leave only (337(2))
Garnishee submitted declaration but did not pay or hand over the goods <sup>83</sup>	Application of creditor for order against garnishee to pay or hand over (477a(4)) <sup>84</sup>	Writ	-	No remedies excluded
Procedure about the obligations of the garnishee towards the debtor in a lawsuit between creditor and garnishee <sup>85</sup>	Convocation of debtor by garnishee (477b(3))	Writ (118)	To be issued in a stage of the procedure where the debtor still has the	NA

<sup>80</sup> The application is also applicable when a notary holds the purchase price of an immovable sold after a *Vormerkung* (a registered purchase agreement) and a subsequent attachment of the immovable (Art. 507b(2) CCP).

<sup>81</sup> The application is also applicable when a notary holds the purchase price of an immovable sold after a *Vormerkung* (a registered purchase agreement) and a subsequent attachment of the immovable (Art. 507b(2) CCP).

<sup>82</sup> The application is also applicable when a notary holds the purchase price of an immovable sold after a *Vormerkung* (a registered purchase agreement) and a subsequent attachment of the immovable (Art. 507b(2) CCP).

<sup>83</sup> The application is also applicable when a notary holds the purchase price of an immovable sold after a *Vormerkung* (a registered purchase agreement) and a subsequent attachment of the immovable (Art. 507b(2) CCP).

<sup>84</sup> All applications mentioned in Art. 477a CCP should be brought before the cantonal judge in case the claim against the garnishee does not exceed a value of more than EUR 25,000.

<sup>85</sup> The application is also applicable when a notary holds the purchase price of an immovable sold after a *Vormerkung* (a registered purchase agreement) and a subsequent attachment of the immovable (Art. 507b(2) CCP).

			opportunity to submit his point of view	
Procedure about the obligations of the garnishee towards the debtor in a lawsuit between creditor and garnishee in case of multiple creditors <sup>86</sup>	Application of any other creditor for leave to intervene (478(4)) <sup>88</sup>	Motion in incident	To be filed before or together with the last statement of case of one of the parties (218(2))	Appeal and cassation with leave only for the parties and without leave for the intervener <sup>89</sup>
Garnishee supposedly does not pay what is due to creditor in case of enforcement of maintenance claim	Application of creditor before cantonal judge to order garnishee to pay (479f)	Writ	-	No remedies excluded
Garnishment of life insurance policy	Announcement of creditor to debtor that he wants to convert the policy to surrender value (479n(1))	Writ	Copy of the writ to be sent to insurance company	NA
Garnishment of life insurance policy that creditor wants to convert to surrender value	Announcement of debtor to creditor that he wants to raise a loan on the policy to pay the	Registered letter	Within two weeks after service of the writ of 479n(1)	NA

<sup>86</sup> This application is also available in case of attachment of immovables and a procedure about the obligations of the tenant or lessee or similar third parties towards the debtor in a lawsuit between creditor and tenant or lessee or similar third party in case of multiple creditors (Art. 507(3) and (4) CCP).

<sup>87</sup> The application is also applicable when a notary holds the purchase price of an immovable sold after a *Vormerkung* (a registered purchase agreement) and a subsequent attachment of the immovable (Art. 507b(2) CCP).

<sup>88</sup> Also applicable when the garnishee is the creditor himself (Art. 479k CCP).

<sup>89</sup> This is based on the doctrine of hybrid judgments as explained in F.J. Fernhout, '*Appellabiliteit van beslissingen in dagvaardingsprocedures die geen zuivere eindvonnissen zijn*' (Appealability of judgments that are not pure final judgments'), *Praktisch procederen* 2006, p. 43–52.

	creditor (479n(2))			
Garnishment of life insurance policy that creditor wants to convert to surrender value	Application of debtor or beneficiary to SPJ for injunction (479p(1)) <sup>90</sup>	Writ	Within two weeks after service of the writ of 479n(1) or the writ of 479r(2) <sup>91</sup>	No remedies excluded
Creditors do not agree about the way the money recovered in the process of enforcement has to be divided <sup>92</sup>	Application of any creditor to SPJ to appoint judge of instruction (481(1)) <sup>93</sup>	Petition <sup>94</sup>	Submission of list of all parties having an interest in distribution of proceeds of enforcement	All remedies excluded (481(3))
Judge of instruction published the distribution list <sup>95 96 97</sup>	Opposition by one of the creditors against the distribution list (484(1)) <sup>98</sup>	No form prescribed	At day and time set by the judge of instruction, who – if settlement is not possible – will refer the creditors to the court to get a	No remedies excluded

<sup>90</sup> This application has suspending force (Art. 479p(2) CCP).

<sup>91</sup> Art. 479r CCP deals with the event that the policyholder of life insurance holder dies within two weeks after the announcement that the creditor wants to convert the policy. The beneficiary is protected by various actions and writs. The details are not given in the table.

<sup>92</sup> Also applicable in case of public sale of a ship as meant in Art. 576 CCP (smaller ships) (Art. 580 CCP).

<sup>93</sup> Also applicable with regard to proceeds exceeding the claim of the pledgee who sold the pawn (Art. 490b(2) CCP).

<sup>94</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

<sup>95</sup> In the course of determination of the distribution list, the judge of instruction will have to take many decisions. With regard to these decisions appeal is excluded, but not cassation (Art. 490d CCP).

<sup>96</sup> Also applicable in case of public sale of a ship as meant in Art. 576 CCP (smaller ships) (Art. 580 CCP).

<sup>97</sup> Also applicable in case of public sale of an aircraft (Art. 584i(2) CCP).

<sup>98</sup> Also applicable with regard to proceeds exceeding the claim of the pledgee who sold the pawn (Art. 490b(2) CCP); also applicable with regard to proceeds exceeding the claim of mortgagee after sale of the property (Art. 552(4) CCP).

			decision (486(1))	
Attachment of immovables	Application of creditor to SPJ for appointment of sequestrator (506(2))	Petition <sup>99</sup>	-	All remedies excluded (506(3))
Attachment of immovable that has been mortgaged <sup>100</sup>	Announcement of mortgagee to creditor that the right to enforce is taken over (509(1))	Writ	Writ mentions amount of enforcement and the notary holding the public sale	NA
Attachment of immovable by multiple creditors	Application of any creditor to SPJ to obtain the right to pursue enforcement instead of the first creditor (513(2))	Petition	Granted only in case of conspiracy between first creditor and debtor or negligence of first creditor	All remedies excluded (513(3))
Conflict about conditions, date, time or place of public sale of attached immovable <sup>101</sup>	Application of notary or any party to SPJ to decide on conflict (518(1))	Petition	-	All remedies excluded (518(2))
Attachment of multiple immovables <sup>102</sup>	Application of creditor to SPJ to order sale of immovables in one lot (520(2))	Petition	-	All remedies excluded (520(3))
Buyer of immovable at public sale does	Request of interested party	No form prescribed <sup>105</sup>	-	NA

<sup>99</sup> The petition can be submitted by a process server as well (Art. 438a(2) CCP).

<sup>100</sup> Also applicable in case a ship has been mortgaged (Art. 568 CCP).

<sup>101</sup> Also applicable in case of public sale of a ship (Art. 570(2) CCP).

<sup>102</sup> Also applicable in case the mortgagee took over enforcement (Art. 546 CCP).

<sup>105</sup> The request creates an obligation to resell.

not fulfil his obligations <sup>103 104</sup>	to creditor to sell immovable again at the expense of buyer (527)			
Public sale of immovable suspended by opposition <sup>106</sup>	Application of notary or interested party to SPJ to lift stay of execution (539)	Writ (party); no form prescribed for notary	Notary as applicant will have to invite other parties by letter <sup>107</sup>	No remedies excluded
Mortgagee took over enforcement on immovable but is slow <sup>108</sup>	Application of any creditor or mortgagee to SPJ to fix a term for sale (545(1))	Petition	-	All remedies excluded (545(3))
Mortgagee took over enforcement on immovable	Application by interested party for private sale (548(1))	Petition <sup>109</sup>	Not later than 1 week before public sale; submission of copy of deed of purchase, documents relating to offers to buy (548(2)), list of interested parties (548(3))	No remedies excluded
Mortgagee took over enforcement on immovable	Application of mortgagee to SPJ for permission to invoke clause of eviction against tenants (549(1))	Petition <sup>110</sup>	Submission of writ in which the tenant was informed of the enforcement	

<sup>103</sup> Also applicable in case the mortgagee took over enforcement (Art. 546 CCP).

<sup>104</sup> Also applicable in case of public sale of an aircraft (Art. 584n(2) CCP).

<sup>106</sup> Also applicable in case of public sale of a ship (Art. 570(2) CCP).

<sup>107</sup> Parliamentary History Changes to CCP (Introduction Books 3, 5 and 6), p. 246.

<sup>108</sup> Also applicable in case of a public sale of a ship by a mortgagee (Art. 579 CCP).

<sup>109</sup> Submission of the petition cancels the date set for public sale (Art. 548(4) CCP).

<sup>110</sup> The petition may be filed by a notary as well (Art. 549(1) first sentence CCP).

			by the mortgagee and his intention to invoke the clause (549(1)); convocation of debtor to be heard (549(2))	
Creditors do not agree about the way the money recovered in the process of enforcement on an immovable has to be divided <sup>111</sup>	Application of any creditor to SPJ to appoint a judge of instruction (552(1))	Petition	Submission of all registrations regarding immovable and list of creditors in enforcement made by notary (552(2))	All remedies excluded (552(3))
Planned attachment of a ship	Application of process server to SPJ for permission to attach without prior summons to comply (563(2))	If necessary orally (563(2))	Well-founded fears for immediate departure (563(2))	No remedies available
First creditor does not pursue enforcement on a ship with due despatch	Application of any creditor to SPJ to determine that enforcement will be taken over by that creditor (569(2))	Petition	Lack of due despatch in enforcement	All remedies excluded (569(2))
Public sale of certain categories (most	Application by creditor or notary to SPJ regarding	Petition	-	All remedies excluded (571(5))

<sup>111</sup> Also applicable in case of public sale of a ship (Art. 580 CCP).

foreign) sea-going vessels <sup>112</sup>	announcement of public sale (571(2)-(4))			
Public sale of ship	Application of creditor to court to have the public sale before the court instead of a notary (575(1))	Petition <sup>113</sup>		No remedies available <sup>114</sup>
Planned attachment of an aircraft <sup>115</sup>	Application of process server to SPJ for permission to attach without prior summons to comply (584b(2))	If necessary orally (584b(2))	-	No remedies available
Judge of instruction published the list of rights and claims in case of public sale of an aircraft	Opposition of interested person to judge of instruction against list (584j(2))	No form prescribed	Before date set for public sale; judge of instruction will – if settlement is not possible – refer the interested persons to the court to get a decision (584i jo. 486)	All remedies available against court decision
Creditor with claim higher in list wants to take over enforcement	Announcement of claim-owner to creditor (584l(1))	Registered letter (584l(1))	Not later than 7 days before public sale	NA

<sup>112</sup> Also applicable in case of public sale of a ship by a mortgagee (Art. 579 CCP).

<sup>113</sup> The petition can be submitted to any Dutch court the applicant chooses (T&C art. 575 nt. 1).

<sup>114</sup> As regards the decisions taken by the court in course of the sale, all remedies are excluded (Art. 575(6) CCP).

<sup>115</sup> In case of the public sale of an aircraft, the sale always takes place in front of a court. Requests made to that court cannot be seen as actions made available to the parties and will not be discussed separately.

Enforcement on aircraft did not take place according to provisions of Articles 584a-584r CCP	Application of anyone prejudiced to court to nullify sale and property transfer (584q(1))	Writ	Within 6 months after allotment; writ has to be registered in the aircraft registers within three days (584q)	No remedies excluded
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SPJ= summary proceedings judge; NA=not applicable



### 4.2.2

Some general remarks regarding the foregoing table should be made. For all court procedures mentioned, legal representation by counsel is mandatory, unless the application may be filed with the cantonal judge and unless otherwise indicated.<sup>116</sup> Suspensive force of any action is indicated in the footnotes and is otherwise absent. In all cases, once enforcement started the court where enforcement takes place or will take place is the competent court for all applications (Article 438a(1) CCP). If such a court is absent, for petitions the court of the applicant (Article 262 CCP) and for writs of summons the court of the defendant (Article 99 CCP) is the competent court. In cases commenced with a petition, all convocations are sent out by the court clerk (Article 271 CCP), unless otherwise indicated. In cases commenced with a writ of summons, convocation is part of the writ itself.

### 4.3.1

In addition to the specific actions discussed above, Article 438 CCP gives two general actions for all conflicts that may arise in the course of enforcement of an enforceable title. These actions are open to anyone who claims that his rights in some way have been or will be violated. In both cases, the competent court is the court that would be competent according to the ordinary rules,<sup>117</sup> the court where the attachment occurred, the court where the objects in dispute are located and the court where enforcement will take place. The choice lies with the claimant. Both procedures start with a writ of summons. A third party claimant will have to include both the creditor and the debtor in his lawsuit as defendant (Article 438(5) CCP). Against judgments given in these procedures the ordinary remedies of appeal, cassation and opposition apply.

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<sup>116</sup> In many instances, representation by a process server is allowed (see the footnotes concerned) as a consequence of Art. 438a(2) CCP. This has been done to enable the parties to save costs.

<sup>117</sup> Art. 99–108 CCP. Apart from the general rule (court where defendant is domiciled), there are some additional possibilities like the court where the tort was committed and the court of the domicile of the claimant who is a consumer.

### 4.3.2

The first procedure is the ordinary procedure before the first instance court. The court has the power to stop the execution, to lift attachments, to order specific measures, to rule on costs and to impose security on the creditor in case enforcement will turn out later to be unlawful. Starting this procedure will not suspend enforcement as of right, unless there is a specific provision to that purpose. These provisions are all related to the position of third parties and can be found in Article 456 CCP,<sup>118</sup> Article 479e(2) CCP<sup>119</sup> and Article 538 and 539 CCP.<sup>120</sup> Challenging enforcement cannot be based on the ground that the enforceable title (judgment) is not based on a correct appraisal of facts or law related to the case that was tried. That would introduce a kind of disguised remedy. Nevertheless, there are some possibilities in that direction, as will be explained in section 4.3.2.2. Section 4.3.4 will discuss a special action that is open to the process server only.

#### 4.3.2.1

The first ground to challenge enforcement is that enforcement is unlawful. Obviously, there is a wide variety of possibilities, ranging from the absence of an enforceable title and payment of the debt to the non-compliance with formal rules. The latter are applied in a strict way, which means that either a nullity is already foreseen in the law itself<sup>121</sup> or that the court will order to re-enact the formality concerned, mostly at costs of the party enforcing the title. The latter order may also be issued in cases in which nullity has been foreseen, but no reasonable interest of the debtor has been prejudiced.<sup>122</sup>

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<sup>118</sup> Opposition against public sale of a non-registered movable by a third party who pretends to be the owner. Suspending force is derived from the fact that the provision otherwise would be superfluous, but is not undisputed.

<sup>119</sup> Opposition of the garnishee who has a periodic debt towards the debtor (like the employer) against garnishment.

<sup>120</sup> Opposition against public sale of immovable property by a third party who pretend to be owner or to have a right that is not being respected. The suspending force is to be found in the parliamentary history (Parliamentary History Changes to CCP (Introduction Books 3, 5 and 6), p. 246).

<sup>121</sup> As in Art. 439, 440, 474c, 475, 479i, 479n, 502, 504, 505, 514, 565 and 584c CCP, all regarding the contents of the writs with which attachment is realized or notified to other interested parties.

<sup>122</sup> Unlawfulness is sometimes based on the analogous application of the rules regarding exempted income. The complicated rules of Article 475b-475f CCP describe how to calculate the exempted sum, taking into account the minimum one needs to live on, including housing costs and health insurance. Garnished claims are only attached insofar as these claims exceed the exempted sum. However, these

### 4.3.2.2

The second ground is to allege abuse of the power of enforcement of a title that is enforceable but not final, like a judgment against which appeal is pending. This ground can be used when (a) after the judgment new circumstances created a case of emergency for the debtor to such a degree, that it would be unacceptable to let the creditor continue enforcement; or (b) the judgment apparently is based on a capital factual or legal error.<sup>123</sup> The (b)-ground can also be invoked in the case of a final judgment. This was accepted in a case in which it was clear that an order against defendant to pay a certain sum clearly was in contradiction with the fact that both parties agreed that that sum had already been paid before the judgment.<sup>124</sup> The (b)-ground thus more or less introduces an extra remedy against judgments that are clearly mistaken, even though they are final and binding.

### 4.3.2.3

The third ground is the assertion that the way the title is enforced is vexatious towards the debtor. This ground can be invoked in case of a misbalance between the amount enforced and the assets attached or when the way of enforcement chosen is particularly disadvantageous for the debtor.<sup>125</sup> This is for example the case

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rules only apply to garnishment of periodical payments (Article 475b(1) CCP). This creates the somewhat paradoxical situation that wages can only be attached insofar as they exceed the exempted amount, whereas the same wages, transferred to the bank account of the employee, can be attached without any restriction. This has been confirmed in a decision of the Dutch Supreme Court, from which it can be derived that special rules regarding attachability are only related to claims of the debtor against the government agency or employer but not to the payments that have been made by the employer or the government agency to the bank account of the debtor (HR 21 May 1999, NJ 2001, 630). Nevertheless, recent developments show that there is some discontent with this situation. Some lower courts recently started to apply the exempted sum to garnishment of bank accounts (Rb Amsterdam 13 October 2017, ECLI:NL:RBAMS:2017:7766; Rb Oost-Brabant 7 September 2017, ECLI:NL:RBOBR:2017:4835; Hof Den Bosch 21 April 2015, ECLI:NL:GHSHE:2015:1496; Rb Assen 19 February 2010, ECLI:NL:RBASS:2010:BL4599; Rb Amsterdam 16 November 2009, ECLI:NL:RBAMS:2009:BK3544; Rechtbank 's-Hertogenbosch 10 April 2008, ECLI:NL:RBSHE:2008:BC9363; Hof Amsterdam 24 May 2007, ECLI:NL:GHAMS:2007:BB3135). From these decisions two requirements can be derived, first that the creditor was aware of the situation of the debtor and second that the debtor does not have any income that is outside of the scope of the rules of the exempted sum and rules forbidding attachment in general. The legal ground is abuse of power, which is a tort. In those cases, for each transfer to the account the otherwise applicable rules are applied to calculate what falls outside the scope of garnishment.

<sup>123</sup> HR 22 April 1983, ECLI:NL:HR:1983:AG4575, NJ 1984, 145 (*Ritzgen/Hoekstra*).

<sup>124</sup> HR 22 December 2006, ECLI:NL:HR:2006:AY9224, NJ 2007, 173 (*Schmidt/Thunissen*).

<sup>125</sup> HR 24 November 1995, ECLI:NL:HR:1995:ZC1894, NJ 1996, 161 (*Tromp/Regency*).

when a creditor chooses to enforce his title on the trucks of a transport company (thus making it impossible to continue its business) whilst other assets are available. A vexatious enforcement amounts to a tort and could therefore be the object of an injunction.

### 4.3.3

The second procedure is the procedure before the summary proceedings judge. This procedure is swift (the hearing can be arranged within a few hours if necessary) and has therefore to be followed in cases where an immediate ruling is needed. The grounds to be invoked by the claimant will be the same as in the procedure discussed above, but since here the judge has to decide on an interim measure these grounds will always be complemented by a balancing of the interests of the parties. The summary proceedings judge will not give a final decision on the merits, but only an interim measure based on a summary appraisal of the positions of the parties and their interests regarding that measure. The law specifies which measures can be taken in addition to the normal possibilities of the summary proceedings judge. These measures are suspending enforcement for a certain period or until a decision has been taken in an ordinary procedure; allowing enforcement to continue against security; lifting attachments and garnishments (possibly under the obligation for the debtor to provide security); and deciding that formalities have to be re-enacted (possibly with a costs order regarding these formalities). The summary proceedings judge may also order that a third party, represented within the summary proceedings, will have to tolerate further enforcement and will have to cooperate (possibly under the obligation for the creditor to provide security).

#### 4.3.4

The fourth section of Article 438 CCP opens a special, swift and informal action for a process server who encounters difficulties in the process of enforcement. After describing these possibilities in an official report he is allowed to apply to the summary proceedings judge for a decision on this difficulty. It is up to the summary proceedings judge to decide whether an *ex parte* decision should be given or whether the parties should be convoked first. The process server in this procedure has an independent position and has the right to ask for a decision even without consulting the creditor. However, when the process server acts without consent of the creditor he risks being ordered to pay the costs in case he started this procedure needlessly. To decisions taken in this special procedure the ordinary remedies of appeal, cassation and opposition apply.

#### 4.4

Apart from Brussels I Recast, recognition and enforcement of foreign judgments is only possible when based on an international instrument or a national regulation (*see* section 2). The remedies that can be invoked against these decisions (*see* section 2.5) are discussed in the following subsections. In all cases, the grounds for challenging recognition and enforceability have to be derived from the international instrument or the national regulation.

##### 4.4.1

Decisions based on Article 985 CCP are not open to opposition (Article 989(1) CCP). Appeal has to be submitted within a month to the appellate court (Article 989(2) CCP). The same procedural rules apply as in first instance. Cassation has to be submitted within a month after the judgment in appeal (Article 990 CCP).

##### 4.4.2

Decisions based on the Implementation Act of 24 December 1958, implementing the Convention of 1 March 1954 on civil procedure,<sup>126</sup> are taken by the first instance court of the debtor or the court designated by the Minister of Justice on a case to

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<sup>126</sup> DBAOD 1958, 677. In this section, unless otherwise indicated all references are to this act.

case basis (Article 22). In case the application is rejected, cassation is open to the creditor for a period of two months. A special procedure applies (Article 24). In case the application has been granted, cassation is open to the debtor for a period of fourteen days. Here again, a special procedure applies (Article 25). In each instance, legal representation is not mandatory (Article 26). All costs are paid by the State (Article 27).

#### 4.4.3

Decisions based on the Implementation Act of 4 May 1972, implementing the EEX Convention (still relevant for judgments from the territories mentioned in recital 9 of Regulation (EU) No 1215/2012)<sup>127</sup> are taken by the summary proceedings judge of the first instance court. Opposition after granting the application is possible on the basis of the Articles 36-39 of the Treaty. After the judgment in opposition, cassation has to be submitted within a month (Article 5, implementing Article 37 of the Treaty). Appeal after rejection of the application has to be submitted within a month (Article 6(1)). Parties are heard after having been convoked by the court clerk and have to be represented by counsel (Article 6(3), (5) and (7)). After the decision of the appellate court, cassation is possible within two months (Article 8(1)). The decision in cassation is not open to opposition (Article 8(3)).

#### 4.4.4

Decisions based on the Implementation Act of 26 March 1992<sup>128</sup> implementing the 1988 Lugano Convention follow the rules of the Articles 2-10 of the Implementation Act of 4 May 1972, *see* section 4.4.3.

#### 4.4.5

Decisions based on the Implementation Act of 2 July 2003, implementing the 2007 Lugano Convention,<sup>129</sup> are taken by the summary proceedings judge (as can be derived from Article 3(1)). The appeal meant in Article 43(1) of the treaty against

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<sup>127</sup> *DBAOD* 1972, 240. In this section, unless otherwise indicated all references are to this act.

<sup>128</sup> *DBAOD* 1992, 141.

<sup>129</sup> *DBAOD* 2003, 290, as changed by *DBAOD* 2014, 40 and 540. In this section, unless otherwise indicated all references are to this act.

the decision of the summary proceedings judge has to be brought before the first instance court (Article 4(1)) and is always decided by the non-cantonal judge (Article 4(1), second sentence). The period of appeal is one month after the rejection of the application for the creditor (Article 4(2)). Cassation is open based on Article 44 jo. Annex IV of the Treaty. The ordinary period of cassation of three months applies.<sup>130</sup>

## 4.5

Under Brussels I Recast, enforcement of foreign judgments in the Netherlands is only subject to the provisions discussed in section 3. As regards possible remedies, the following remarks can be made.

### 4.5.1

The application for refusal as meant in Article 47 Brussels I Recast has been implemented in Article 10 IAB IA. This article merely designates the competent courts for the remedies of the Articles 47, 49 and 50 Brussels I Recast. This implies that no other grounds can be invoked than mentioned in Article 45 Brussels I Recast. On the other hand, all remedies available during and against enforcement as discussed in section 4.2 do apply, including the remedies of section 4.3.1.<sup>131</sup> Special circumstances may therefore always be taken into account. Obviously, as regards an appeal in the State of origin, the Dutch courts are restricted by Article 51 Brussels I Recast and the requirement that the power to stay proceedings should only be used in extraordinary circumstances.<sup>132</sup>

### 4.5.2

Article 10(1) IAB IA specifies that the application for refusal has to be submitted by writ of summons to the court designated in Article 438 CCP. This is the court discussed in section 4.3.2. The ordinary procedural rules apply, supplemented by the rules of Article 47 Brussels I Recast.

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<sup>130</sup> HR 12 March 2010, ECLI:NL:HR:2010:BK4932, *NJ* 2010, 156.

<sup>131</sup> Parliamentary Proceedings II 2012/13, 33676, 3, p. 13.

<sup>132</sup> As was the case in *Rb Middelburg* 5 July 2006, ECLI:NL:RBMID:2006:AY5728, where the court refused to stay proceedings in the Netherlands because the appeal in the state of origin was based on arguments that had already been put forward in first instance.

### 4.5.3

Consequently, there are no specifics regarding documents.

### 4.5.4

Service of the writ of summons follows the ordinary rules (*see* section 1.17.2) and the same applies to legal representation. This means that in cases representing a value of less than EUR 25,000, the rules for procedures before the cantonal judge apply, which implies that legal representation is not mandatory (*see* section 1.11.2).

### 4.5.5

The object of the application for refusal can only be the refusal of enforcement of the foreign title. There is no separate procedure foreseen in which recognition can be rejected otherwise than as a ground for the decision to refuse enforcement. However, an applicant who wishes to obtain a declaration of that effect from the court could always request such a declaration as part of the procedure based on Article 438 CCP, as can be derived from Article 302 of Book 3 of the Civil Code.

### 4.5.6

The remedies for both parties are appeal (Article 10(2) IAB IA) and cassation (Article 10(3) IAB IA), as discussed in sections 1.11.1 and 4.1.1. The ordinary rules apply.

### 4.5.7

The application for refusal is regulated by Article 10 IAB IA and this article just refers to Article 47 Brussels I Recast. During parliamentary proceedings, no issue was raised regarding the identity of the party who has the possibility to submit this application. That is understandable, since Dutch law gives access to justice to everyone whose rights may be violated by enforcement. There is no reason to limit this to the parties mentioned in the title or in any other way as long as there is an interest recognized by the law (Art. 303 of Book 3 of the Civil Code).



### 4.5.8

All the protective measures mentioned in section 4.3.3 are available to the parties against whom enforcement is sought. This explains why specific implementation of Article 40 and 44 Brussels I Recast was not needed.<sup>133</sup>

### 4.6.1

When enforcement is disputed, protective measures prior to enforcement may become relevant. The system of protective measures available for the creditor has been discussed in section 1.18. In short, the holder of a title will have the possibility to attach any assets owned by the debtor or other assets that are subject to enforcement. When the title is enforceable under Brussels I Recast, no prior permission has to be asked (*see* section 3.1.8). This system meets the requirements of Article 40 Brussels I Recast. In addition to the sections mentioned, some remarks have to be made about the freezing effect of protective measures under Dutch law.

### 4.6.2

Protective measures do freeze the assets of the debtor, but not in the way that his powers to transfer or mortgage his property are affected.<sup>134</sup> For instance, when the car of the debtor has been attached this debtor still has the power to sell and transfer the car to a buyer. The freezing effect is to be found in the Articles 453a, 505 lid 2, 475h lid 1, 566 lid 2, 567 and 584e CCP, to be summarized in the rule that all types of transfer and mortgage undertaken by the debtor can be ignored by the creditor. In the example of the car the creditor will still have the right to sell the car in public to recover his claim and the buyer will not be able to do anything about it.

### 4.6.3

There are some exceptions. The first is that – in the case of non-registered movables – rights obtained by third parties in good faith and against payment of a reasonable sum will have to be respected (Article 453a(2) CCP). After garnishment of a claim the garnishee is freed of his obligations towards the debtor when payment could not

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<sup>133</sup> Parliamentary Proceedings II 2012/13, 33676, 3, p. 16 (table).

<sup>134</sup> HR 20 February 2009, ECLI:NL:HR:2009:BG7729, NJ 2009, 376 (*Ontvanger/ de Jong qq*).

be prevented despite all efforts (Article 475h(1), second sentence, CCP). After attachment of an aircraft, the third party is protected when the debtor did not know about the attachment (Article 584e, last part, CCP). The protection of third parties in case of attachment of immovable property is complicated. When the notarial deed of conveyance has been passed before the writ of attachment was registered, but is registered itself the first day on which the public registry is opened after the day of registration of the writ, the creditor will lose his rights (Article 505(3) CCP).

#### 4.7

The grounds for refusal of enforcement as stated in Article 45 Brussels I Recast do not differ much from the grounds already mentioned in Brussels I.<sup>135</sup> This did not raise any discussion in the Netherlands. Where in the past an issue has risen regarding the question whether an assessment of the grounds for refusal of enforcement could be combined with national grounds for challenging enforceability (*see* section 4.3.2),<sup>136</sup> this problem has been solved by the integration of the procedure of Article 47 Brussels I Recast into the procedure of Article 438 CCP (*see* section 4.5.1). From the case law under Brussels I, the following can be derived regarding the national interpretation of each of the grounds for refusal.

##### 4.7.1.1

The public policy ground has always been interpreted in a restricted way in accordance with the intention of this clause as already expressed in the Jenard report.<sup>137</sup> This has been expressed in the rule that foreign judgments are only contrary to Dutch public policy when there is a manifest violation of principles of a fair procedure that are recognized as fundamental in the Dutch legal order.<sup>138</sup> When the foreign title for instance does not state its grounds, this may be considered as

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<sup>135</sup> Only the protection of weak parties as foreseen in Art. 45(1)(e)(i) has been extended to employees.

<sup>136</sup> In HR 12 March 2010, ECLI:NL:HR:2010:BK4932, *NJ* 2010, 156, the Supreme Court had to answer the question whether the fact that the debtor had already complied with the title could be included in the public policy ground of Art. 34 Brussels I. A preliminary ruling of the ECJ was asked and the answer was that the grounds of Art. 34 and 35 Brussels I are not to be extended beyond their intended scope (ECJ 13 October 2011, C-139/10, ECLI:EU:C:2011:653).

<sup>137</sup> *Dutch Gazette of Treaties* 1969, 101, p. 122).

<sup>138</sup> HR 2 May 1986, ECLI:NL:HR:1986:AB7998, *NJ* 1987, 481. This is in line with ECJ 28 March 2000, C-7/98, ECLI:EU:C:2000:164, *NJ* 2003, 626.

being manifestly contrary to public policy in the Netherlands, but not in cases where the defendant did recognize the claim.<sup>139</sup>

#### 4.7.1.2

A real problem arose only when enforceability was requested of a Bulgarian decision that was unmistakably deliberately contrary to EU law. The Dutch Supreme Court submitted preliminary questions to the ECJ,<sup>140</sup> but the answer was that even in that case enforceability should be granted.<sup>141</sup> Being faithful to EU law, the Supreme Court followed this preliminary ruling, but from its wordings it transpired that the Dutch justices did not agree.<sup>142</sup> Since the ECJ only allowed an exception in cases where the error on EU law constitutes a manifest breach of a rule of law regarded as essential in the EU legal order, the question is when such a breach occurs. The apparent lack of loyalty to EU law might lead to national judges deliberately disregarding the jurisdiction clauses of Brussels I Recast and thus awarding claims against nationals of other countries outside the scope of their jurisdiction. It will be hard to accept that these decisions are enforceable against these parties in their own state.

#### 4.7.1.3

Another issue relating to public policy came up out of the concurrent applicability of Article 31(2) CMR, which provides for a test of jurisdiction which is incompatible with Article 35(3) Brussels I. The question of priority under Article 71(2) Brussels I was submitted to the ECJ, which stated a rule that gives priority to Brussels I in cases where the principle of *favor executionis* would otherwise be violated.

#### 4.7.2

The default of appearance ground did not provoke any particular issues. The Supreme Court clarified that the rule does not state that the document which institutes proceedings actually reached the defendant.<sup>143</sup> Since the exception at the

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<sup>139</sup> Amongst other decisions HR 18 March 2011, ECLI:NL:HR:2011:BP0002.

<sup>140</sup> HR 20 December 2013, ECLI:NL:HR:2013:2062, *NJ* 2014, 37.

<sup>141</sup> ECJ 16 July 2015, C-681/13, ECLI:EU:C:2015:471.

<sup>142</sup> HR 8 July 2016, ECLI:NL:HR:2016:1431, *NJ* 2017, 33.

<sup>143</sup> HR 11 October 1996, ECLI:NL:HR:1996:ZC2170, *NJ* 1998, 95.

end of the clause almost always applies, applications for refusal of enforceability under this ground are hardly ever successful.<sup>144</sup>

### 4.7.3

The grounds regarding related actions and irreconcilable judgments have not been problematic either. Whether the same parties are involved is decided in accordance with the criteria given by the ECJ.<sup>145</sup> These criteria are sufficiently clear to deal with issues like transfer of rights and other types of legal succession. Moreover, the nature of the decisions have to be taken into account. For instance, interim rulings in one country are not irreconcilable with a ruling on the merits in another country because of their provisional character.<sup>146</sup>

### 4.7.4

Establishing whether the jurisdiction clauses of Article 35 Brussels I (which has the same contents as Article 45(1)(e) Brussels I Recast) were violated has not led to specific problems.

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<sup>144</sup> As in Rb Rotterdam 30 September 2009, ECLI:NL:RBROT:2009:BJ9135, in which case the available procedure in Rumania had not been followed. Rb Rotterdam 2 December 2015, ECLI:NL:RBROT:2015:8701, is one of the rare cases in which the application for refusal was granted, but this was due to the fact that the creditor did not raise any objections to the statements of the debtor. Another decision granting the refusal on this ground (Rb Haarlem 25 April 2008, ECLI:NL:RBHAA:2008:BD0602) has later been quashed by the Supreme Court (HR 11 September 2009, ECLI:NL:HR:2009:BI3436).

<sup>145</sup> ECJ 19 May 1998, C-351/96 (*Drouot/Protea*), NJ 2000, 155.

<sup>146</sup> Rb The Hague 25 Augustus 2011, ECLI:NL:RBSGR:2011:BT2370.

## 5 Final Brief Evaluation of Brussels I Recast

### 5.1

Brussels I Recast simplified the procedure of enforcement of foreign titles to a large extent. The Netherlands did not impose any requirements that could bring about new obstacles. To the contrary, process servers who are supplied with the right documents (the foreign title and the appropriate certificate) are allowed to enforce these titles directly, if needed preceded by protective measures freezing the assets of the debtor. This simplifies, speeds up and eases proceedings and avoids costs like court fees and the otherwise mandatory assistance of counsel.

### 5.2

Without having to speak of a drawback, the new procedure is exclusive in the sense that only the way of direct enforcement can be followed. According to European law, for claims in foreign titles that are enforceable in the Netherlands no new procedure can be started.<sup>147</sup>

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<sup>147</sup> ECJ 30 November 1976, 42/76, *NJ* 1977, 484.

### 5.3

The Netherlands did not allow alternative translations as foreseen in Article 57(2) Brussels I Recast. Therefore, the creditor does not incur other translation costs than already foreseen in this regulation (Article 43). Since the enforcement itself is covered by Dutch law, the creditor will have to choose domicile at the office of his counsel or the process server (Articles 439(3), 475(1)(d), 479i(d) and 502(4) CCP). Thus for the debtor it will always be clear where to address his request for translation.<sup>148</sup>

### 5.4

Dutch national procedure is accessible and flexible and therefore suited to enforcement procedures that may arise from the enforcement of titles under Brussels I Recast. The creditor will have exactly the same position as creditors holding national titles. Since in principle enforcement can be effectuated without having recourse to court procedures, the costs are relatively low. The best illustration of this is probably that until now since Brussels I Recast entered into force no enforcement was disputed on the ground that the foreign title should not be recognized.

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<sup>148</sup> Parliamentary Proceedings II 2012/13, 33676, 3, p. 8.





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