

# Supreme Court further clarifies scope of 'main proceedings' for pre-judgment attachments in cross-border disputes

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### Introduction

The Dutch legal system generally takes a liberal approach to granting requests for pre-judgment attachments. Foreign creditors therefore regularly explore this opportunity to freeze debtors' assets that are located in the Netherlands. Once such a request is granted, the debtors are prohibited to dispose, move or transfer any of their attached assets pending the outcome of the main proceedings.

A preliminary relief judge will decide on a request for pre-judgment attachment *ex parte*, after marginal review of the petition. The granted permission is conditional on the commencement of main proceedings, which should ultimately result in an enforceable judgment. These main proceedings must be commenced within a specific period, which should be at least eight days in length and will usually be 14 days. If no main proceedings are commenced within this period, the pre-judgment attachment will lapse.<sup>(1)</sup> This hard-and-fast rule prevents creditors from using the attachment as a sole means of putting pressure on their debtor.<sup>(2)</sup>

In order to comply with the abovementioned criteria, it is important to determine:

- which (foreign) court actions can be considered 'main proceedings' within the meaning of Article 700(3) of the Code of Civil Procedure; and
- at what time the creditor must be deemed to have instituted these main proceedings.

In *Avonwick Holdings v VI Holding*, the Supreme Court provided further guidance on these questions.<sup>(3)</sup>

### Facts

Avonwick Holdings Ltd (British Virgin Islands) filed a request for pre-judgment attachment on assets of VI Holding NV (Curacao) that were located in the Netherlands. The preliminary relief judge granted the request and determined a period of 14 days in which the main proceedings had to be instituted.

However, before requesting the attachment, Avonwick Holdings filed a motion to join in an ongoing English procedure and submitted an amended claim form in order to bring VI Holding to court in the United Kingdom. The amended claim form was served on VI Holding only after the 14-day term for the initiation of main proceedings had passed. VI Holding therefore demanded that the attachment be lifted.

### Decisions

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The Court of Appeal granted VI Holding's motion. It considered that – given the *ex parte* character of the motion to join and the subsequent submission of the amended claim form – these court actions could not be seen as preparatory and thus could not be regarded as main proceedings in the context of Article 700(3) of the Civil Code of Procedure.

Avonwick Holdings contested this judgment, arguing that the *ex parte* character of these actions did not alter the fact that main proceedings had been instituted. It thereby referred to other possibilities under Dutch law to institute main proceedings even if the other party becomes aware of such proceedings only after being approached by the court.

The Supreme Court followed the argument of Avonwick Holdings. It considered that the scope of 'main proceedings' must be interpreted broadly.<sup>(4)</sup> The Supreme Court also stipulated that it is not the moment that the counterparty becomes aware of the main proceedings that is relevant, but rather the moment that the main proceedings were actually initiated. These moments can vary in time if the initiated proceedings have an *ex parte* character.

If main proceedings are instituted abroad, the court must assess, on the basis of the law of the relevant foreign jurisdiction, whether they are considered to be pending.

As a last point, the Supreme Court noted that an attaching creditor is prohibited from unreasonably delaying the procedure after the main proceedings have commenced. The creditor must, with reasonable urgency, take any necessary steps, such as the service of relevant court documents to the debtor.

## Comment

The Dutch courts have jurisdiction to grant permission for pre-judgment attachment on assets that are located in the Netherlands, even if the debtor is foreign and the Dutch courts have no jurisdiction in the main proceedings.

The Dutch legal system is familiar with a wide range of possibilities to commence main proceedings after a request for attachment has been granted, such as:

- the filing of a counterclaim;
- a request for arbitration;
- the amendment or increase of a claim;
- a request for intervention; or
- a joinder in a criminal case.

*Avonwick Holdings v VI Holding* provides additional clarity in cross-border cases, where pre-judgment attachment in the Netherlands plays a part. Evidently, Dutch provisional judges will have to investigate whether:

- a creditor's (foreign) court actions could be considered to be main proceedings pursuant to Article 700(3) of the Code of Civil Procedure; and
- these proceedings were pending in time in accordance with the law of the foreign jurisdiction.

The broad range of (foreign) actions that could serve as main proceedings further increases the attractiveness of the Netherlands as a venue for seeking pre-judgment attachment in aid of foreign proceedings.

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## Endnotes

(1) Article 700(3) of the Code of Civil Procedure.

(2) See also *Ontvanger v Heemhorst* (ECLI:NL:HR:2003:AI0347) and *HCb v DHV*

(ECLI:NL:HR:2010:BM6082).

(3) Supreme Court, 25 May 2018 (ECLI:NL:HR:2018:773).

(4) See also *Ajax v Reule* (ECLI:NL:HR:1999:ZC2861).

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