

# The Netherlands – a hotspot for provisional and conservatory measures

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## Introduction

Ports in the Amsterdam, Rotterdam and Antwerp region are historically known as ship arrest paradises. Parties that wish to secure a claim, irrespective of where in the world it is litigated or arbitrated, have for decades taken advantage of the vast number of ships calling at and passing through the Netherlands. Ship arrests are generally available for claims against shipowners. Bunker arrests are available for claims against charterers, whereas claims against other parties can often be secured by a third party attachment which freezes assets or credit in the hands of third parties. Leave for arrest is commonly granted in *ex parte* proceedings within a few hours, even during weekend and evening hours, allowing for arrests to be executed around the clock.

None of the above is new to those who have been involved in the shipping industry for some time. However, there are developments in connection with conservatory measures which are less well known and that have not been extensively reported on. These developments concern securing evidence – again in connection with litigation or arbitration wherever in the world – following a landmark Supreme Court ruling in 2013, which has served as a starting point for several cases.

## Securing evidence

Imagine the following scenario. A ship is involved in a collision in international waters and heads for Rotterdam. On arrival, the master is notified that there are three people at the gangway. One identifies himself as a bailiff and the others as IT specialists. The bailiff presents leave issued by the Rotterdam Court to copy all evidence in connection with the collision detailing all possible sources of information available on board. The master is advised that the owners will be liable for a €1 million penalty for any form of obstruction. One of the IT specialists connects to the on-board computer system and takes an image scan which allows them to verify that no evidence has been deleted from the server by crew members. The bailiff and the IT specialists then copy the voyage data recorder, logbooks, maintenance records, certificates and email correspondence. The entire exercise can take approximately six to 12 hours, after which the ship is free to leave. Such a scenario is not fiction – it has been a reality for various masters.

This procedure is *ex parte* and that is why such events have attracted little media attention. One of the few reported cases was *Belo Horizonte*, which had experienced main engine problems during the carriage of soya beans from Argentina to England. The owners reportedly did not allow for any meaningful investigations by cargo interests on board the ship at the port of discharge. The cargo interests, exposed to claims for general average contribution, therefore applied for an attachment of evidence on board the ship in connection with the main engine failure when the vessel called at Rotterdam. This case and subsequent cases have proven that the Rotterdam Court is available to actively direct matters and dispense orders and guidelines as needed and as matters develop.

Applicants do not obtain immediate access to evidence once it has been gathered. Rather, they make a further disclosure application either locally, where the requirements for disclosure are liberal, or abroad if the applicable jurisdiction provisions or arbitration clauses so dictate.

Once a ship is confronted with an attachment of evidence, it is essential that immediate legal assistance is provided to guide the master. The collection of evidence should stay within the court-approved boundaries, but parties should also make sure not to obstruct any legitimate part of the evidence collection, as this could lead to penalties.

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A recent study by Dr Stevens of the Erasmus University Rotterdam examined not only these evidence attachments but also other means to secure evidence on board ships. Dr Stevens concluded that the Rotterdam Court is now at liberty to take a liberal approach to hearing witnesses and to appointing court experts whether in support of domestic or foreign proceedings. The earlier hesitancy to accept jurisdiction where a ship and its crew spend only a few hours in port would appear to be gone. Parties should now expect the Rotterdam Court to accept jurisdiction more easily and allow applicants to secure evidence through expedited interviews of crew members present in the jurisdiction. Dr Stevens's study further highlights that applying for expedited court expert investigations is an alternative for parties seeking to secure evidence. Such investigations can cover any subject and include investigations on the cause and extent of any type of damage.

A report published in 2019 on provisional and conservatory measures commissioned by the Rotterdam Court, the Dutch Transport Law Association and the Erasmus University Rotterdam also mentions a willingness expressed by various judges to accept jurisdiction in cases, as described by Dr Stevens.

### **Comment**

Shipowners and managers, as well as their insurers and lawyers, should be aware of the changing legal landscape and avoid being taken by surprise. For those on the offensive, it will no doubt be helpful to keep new evidence collection tools readily available alongside more traditional and widely known tools for securing claims.

The Netherlands, including the ports of Rotterdam and Amsterdam, but also the River Scheldt leading to Antwerp, looks set to become a hotspot of more provisional and conservatory measures.

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