

Dutch court lifts pre-judgment attachments after ICC Emergency Arbitrator makes USD 187.5 million escrow order

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In three related judgments (*Cygne v. COFCO*; *ECLI:NL:RBROT:2018:2519*, *COFCO v. Swansea*; *ECLI:NL:RBROT:2018:2515* and *Directors v. COFCO*; *ECLI:NL:RBROT:2018:2522*) the Rotterdam District Court considered whether to lift pre-judgment attachments of Dutch assets, in circumstances where the party requesting the attachments had not made out a prima facie claim for amounts higher than those already deposited in escrow.

Speedread

In three related judgments of 28 March 2018, the Rotterdam District Court lifted pre-judgment attachments obtained by COFCO against the seller of Nidera Capital. According to the court, COFCO had not made out a prima facie claim for an amount exceeding the USD 187.5 million already in escrow following the previous order of an ICC Emergency Arbitrator.

The dispute arises out of the sale of Nidera Capital by Cygne to COFCO. COFCO initiated ICC proceedings against Cygne following discovery of an alleged fraud at Nidera Brazil. COFCO estimated its claim amounted to at least USD 500 million. In early 2017 an ICC Emergency Arbitrator ordered an amount of USD 187.5 million to be held in escrow as security for that claim. Subsequently, on 5 January 2018, COFCO obtained ex parte leave to effect pre-judgment attachments against Cygne and related parties, of assets in the Netherlands to secure alleged claims totalling USD 1.7 billion. Cygne and the related parties then requested that the court lift these attachments.

The court ruled that COFCO had not made out a prima facie claim for more than the amount of USD 187.5 million already in escrow following the order of the ICC Emergency Arbitrator. COFCO did not in any way substantiate the amount of its claims against Cygne and conditional claims against related parties. The court was also critical of the way COFCO had, in its ex parte application to the Dutch court, failed to

properly disclose the consequences of the ICC Emergency Arbitrator's earlier order and the most recent annual accounts of Nidera Capital. Consequently, the court lifted the attachments.

The decision confirms that a pre-judgment attachment of assets will, upon application, be lifted in urgent relief proceedings if no prima facie claim is made out or if adequate security is already in place. Here the applicant failed to apply a deduction in relation to the amount already in escrow and failed to make out a prima facie claim for amounts exceeding the amount of security in place. Although conceivable that the amount of security might need to be increased after the ICC Emergency Arbitrator's 2017 escrow order, COFCO failed to make out its case in this regard. (*Cygne v. COFCO*; *ECLI:NL:RBROT:2018:2519*, *COFCO v. Swansea*; *ECLI:NL:RBROT:2018:2515* and *Directors v. COFCO*; *ECLI:NL:RBROT:2018:2522*, dated 28 March 2018.)

Background

The purpose of this type of Dutch pre-judgment attachment is to ensure that the party requesting the attachment may in future recover a claim which at present may not be certain yet. Pre-judgment attachment requires court leave. Court leave can in most cases be requested *ex parte* on the condition that the requesting party makes full and frank disclosure of the relevant facts.

Article 700 section 2 of the *Dutch Civil Procedural Code* (Wetboek van Burgerlijke Rechtsvordering) (DCCP) provides that the request should state the amount of the claim or, if the amount of the claim is not yet known, a substantiated estimate of the claim. If the court grants leave it will also 'assess' the amount of the claim. It is allowed to attach assets with a value exceeding the assessed amount, especially if those assets are also targeted by competing creditors.

Although often misunderstood, the assessed amount is primarily relevant as the amount for which the party whose assets are being attached may offer alternative security (mostly in the form of a bank guarantee) and then require the attaching party to immediately lift the attachment. The amount assessed is usually the principal amount of the claim increased by a fixed amount to cover costs and interest.

Once the attachment is effected, the counterparty may seek to have it lifted in *inter partes* urgent relief proceedings, for instance, if it turns out that the attaching party has not made out a prima facie claim, if adequate security has already been provided or if alternative security has been offered.

Facts

COFCO is part of a group that owns one of China's largest agribusinesses. COFCO acquired shares in Rotterdam-based international agribusiness company, Nidera Capital, from Cygne for USD 1.8 billion. Swansea is Cygne's sole shareholder.

Part of the acquisition concerned the transfer of a tranche of shares in exchange for payment of USD 448.8 million to Cygne. However, following the discovery of an alleged fraud at Nidera Brazil in 2016, COFCO asserted a claim of at least USD 500 million against Cygne. In early 2017 an ICC Emergency Arbitrator considered the amount COFCO should be entitled to as security for that claim. At that stage COFCO did not elaborate on the calculation of its USD 500 million claim. During the hearing COFCO stated that it was willing to accept security of no less than USD 300 million in escrow while Cygne offered no more than USD 75 million. Despite the "lack of any meaningful indication of the quantum of [COFCO]'s claim" the Emergency Arbitrator ordered an amount of USD 187.5 million to remain in escrow to secure COFCO's claims and allowed the balance of USD 261.3 million to be released to Cygne.

It is understood that following the release of USD 261.3 million to Cygne as ordered by the Emergency Arbitrator, Cygne transferred a similar amount to its shareholder, Swansea, on the basis of a loan.

On 2 January 2018 COFCO made an ex parte application to the Rotterdam District Court to obtain leave for a number of pre-judgment attachments against Cygne, Swansea and its directors. The request against Cygne was to secure the USD 500 million claim in the ICC arbitration. The requests against Swansea and the three directors of Cygne and Swansea were for claims (to be brought in state court litigation) of USD 287.7 million each for alleged dissipation of Cygne's assets. The claims asserted thus totalled USD 1.7 billion. In its request, COFCO:

- Did not provide a calculation of the quantum of its claims.
- Made only a fleeting reference to the 2017 decision of the ICC Emergency Arbitrator.
- Did not refer to or exhibit the most recent annual accounts of Nidera Capital.

On 5 January 2018 leave to attach was granted, following which the attachments against Cygne, Swansea and the directors were effected. In late February 2018 Cygne, Swansea and their directors initiated *inter partes* urgent relief proceedings against COFCO before the Rotterdam District Court seeking to lift these attachments.

Decision

On 28 March 2018 the Rotterdam District Court ruled that while COFCO had made out a prima facie claim against Cygne based on the alleged fraud at Nidera Brazil, it had not established a prima facie case that the quantum of that claim exceeded the amount of USD 187.5 million already in escrow following the 2017 order of the ICC Emergency Arbitrator.

According to the court, COFCO did not in any way substantiate the amount of its claim against Cygne, since it only referred to the Terms of Reference containing an unspecified estimate, and because it did not make an effort to provide a calculation. The court considered that COFCO had therefore acted negligently. The fact that the ICC proceedings had been bifurcated did not detract from COFCO's duty to submit a substantiated estimate of the claim.

The court further considered it objectionable that COFCO had not deducted the escrow amount of USD 187.5 million when assessing the claim for which attachments had been sought. Further, the court found it questionable (in view of the duty to make full and frank disclosure) that COFCO's request for attachment had not referred to and exhibited Nidera Capital's annual accounts, particularly since they could have supported the conclusion that the fraud at Nidera Brazil had an impact on Nidera Capital's equity of at most USD 54.8 million and no effect at all on the financial results for that year. The court therefore lifted the attachments effected against Cygne.

The court also lifted the pre-judgment attachments of assets belonging to Swansea and the directors, as COFCO was held not to have made out a prima facie claim against these parties. The court found that there was no indication that Swansea and the directors had transferred USD 261.3 million from Cygne to Swansea for the purpose of avoiding satisfaction of COFCO's claim. In that context as well, it was deemed relevant that the ICC Emergency Arbitrator had already ruled that no more than USD 187.5 million should remain in escrow to secure COFCO's alleged claims and that USD 261.3 million could be released to Cygne.

Comment

The decision confirms that upon application a pre-judgment attachment of assets in the Netherlands will be lifted in urgent relief proceedings if no prima facie claim is made out or if adequate security is already in place. Here the applicant failed to apply a deduction for security amounts already in escrow and failed to make out a prima facie claim exceeding that amount of security. Although conceivable that the amount of security might need to be increased after the ICC Emergency Arbitrator's 2017 order, COFCO failed to make out such need in this case.

Case

Cygne v. COFCO (ECLI:NL:RBROT:2018:2519), *COFCO v. Swansea (ECLI:NL:RBROT:2018:2515)* and *Directors v. COFCO (ECLI:NL:RBROT:2018:2522)* dated 28 March 2018.

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