The Rotterdam Guarantee Form

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1. The history

In March 1970, there has been formed in Rotterdam a Guarantee Committee, which still exists. It is an old-fashioned Committee, since it has not been instituted in a formal way by any institution. It consists of Rotterdam advocates, who sat together informally with the aim to create a standard Rotterdam Guarantee Form, which would be acceptable for all Rotterdam advocates. The problem was in 1970 and before that the various law offices in Rotterdam each had their own standard form, which led to a battle of forms in court when an arrest had to be lifted against security. Each time the same arguments were repeated, much time was lost, whilst the arrested asset, usually a vessel, remained idle. Last, but not least, the legal costs for the parties were increased each time by the same discussion.

In principle, the President of the Rotterdam court should decide about security in arrest cases, but the mentioned advocates, who formed the Rotterdam Guarantee Committee, felt that the drafting of an acceptable guarantee text was the task of the Rotterdam advocates rather than of the President of the court. The problem for this President was that he heard each time a part of the arguments, but never all the arguments, whilst the discussion was each time about another standard guarantee form of one of the Rotterdam law offices. Furthermore, a hearing in summary proceedings is not entirely suitable to create a complete new standard guarantee text, which needs a lot of consideration and time.

2. The various texts of the Rotterdam Guarantee Form in the past and now

The first text was published by the Commission in 1972. The goal was achieved. The text was accepted by all Rotterdam advocates and also by the Rotterdam court. Moreover, advocates in other parts of the Netherlands also started to use this form which brought about national unification, although there were and are still advocates in the Netherlands who have their own form. But the Rotterdam Guarantee Form is the one, which is the best known now in the Netherlands and which is considered to be reasonable, also by most judges in summary proceedings.

However, when using the new guarantee form, some advocates discovered that it had to be improved here and there. There were also remarks from for instance P&I Clubs, which issued as guarantor frequently guarantees on the

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Rotterdam form. Finally, there were changes of the law now and then. All this led to alterations of the form, so that the form 1972 was succeeded by the form 1978, which was succeeded by the form 1985, which was succeeded by the form 1992 which is still in force. The text of the form 1992 is the following:

Rotterdam Guarantee Form 1992

We the undersigned (A) waiving and renouncing all benefits and exceptions, conferred on guarantors, and the provisions of art. 7:855 Civil Code hereby declare to bind ourselves as surety to and in favour of (B) ("the Creditor") by way of security for the true and proper discharge by (C) ("the Principal Debtor") of whatever the Principal Debtor may be found to be indebted to the Creditor by virtue of a Judgement (which is not or no longer subject to appeal) rendered against the Principal Debtor by a competent Court of Law having jurisdiction in the matter hereinafter mentioned, or by virtue of a valid Arbitration Award or by virtue of an amicable settlement between the parties, in respect of the principal amount, interest and costs of suit relating to a claim at present estimated by the Creditor at (D) for (E).

The expression "a Judgement (which is not or no longer subject to appeal)" shall also include a Judgement by default rendered against the Principal Debtor, provided that such Judgement has been served upon the undersigned and provided that no appeal has been entered against such Judgement within six weeks after that service.

If the Principal Debtor is declared bankrupt or granted a suspension of payment, the Creditor is entitled to bring legal proceedings against the undersigned in order to have the indebtedness of the Principal Debtor ascertained by the Court. In that event, the undersigned undertakes to pay the Creditor the entire indebtedness of the Principal Debtor as established by a Judgement (which is not or no longer subject to appeal) rendered in those proceedings.

This guarantee is hereby given without any prejudice whatever to the question of liability or to the amount involved or to any other matter in issue (including any question as to statutory limitation of liability), and for a maximum amount of (F) for the purpose of the release from and/or the prevention of a conservatory attachment of (G) on account of the above mentioned claim(s).

This guarantee shall be governed by the law of the Netherlands. The undersigned and the Creditor submit to the jurisdiction of the competent Court of Law in Rotterdam/Amsterdam for any disputes and claims hereunder.

This guarantee shall expire unless before or within (H) months from the date of signing hereof legal proceedings have been instituted with relation to the aforesaid issue in a competent Court of Law having jurisdiction in the matter, or against the undersigned, as provided in the third paragraph above, or a Deed of Compromise has been signed or an appointment of one or more

Arbitrators has been notified or requested or proposed under an arbitration clause, or an amicable settlement has been concluded between the parties.

3. Discussion of the present form

a. Guarantor waives benefits and exceptions

In the first paragraph, the guarantor waives and renounces all benefits and exceptions, conferred on guarantors, and the provisions of art. 7:855 Civil Code. The purpose of this paragraph is to ascertain that the guarantor is obliged to pay forthwith if he has to pay pursuant to the Rotterdam Guarantee Form. Art. 7:855 Dutch Civil Code provides that the guarantor is not obliged to pay before the principal debtor is in default. Furthermore it provides that if the creditor puts the principal debtor on notice, the creditor is obliged to send a copy of this notice to the guarantor. A guarantor has still other rights in Dutch law. It would go too far to mention all those. However, those benefits and exceptions have generally the purpose that the guarantor is not obliged to do more than the principal debtor. In itself, this is also the basis of the Rotterdam Guarantee Form, which even gives the guarantor a farther reaching right: the guarantor can wait and see till the creditor will have obtained an arbitration award or an irrevocable court decision against the principal debtor or until there is a settlement between the creditor and the principal debtor. However, the Rotterdam Guarantee Form wishes to prevent each and any discussion between a guarantor and a creditor about possible rights which the guarantor still might have after there is such arbitration award, irrevocable judgement or settlement. The guarantor could for instance submit that the creditor should first try to enforce the judgement against assets of the principal debtor and that it would not be reasonable to go immediately against the guarantor. All this type of "defences" of the guarantor fails and any discussion of this type is prevented by the second paragraph of the Rotterdam form. If there is an arbitration award, an irrevocable judgement of a competent court or a settlement, the guarantor has to pay forthwith and without any discussion. The element "competent court" has to be decided by that court itself during the legal proceedings before that court between the creditor and the principal debtor. It is up to the principal debtor to raise a defence on this point. It is not up to the guarantor to argue this point afterwards, once there is an irrevocable judgement.

In this paragraph, the obligation of the guarantor to pay is defined. The guarantor has to pay when there is an amicable settlement between the parties. That is clear. Furthermore the guarantor has to pay if there has been given a valid arbitration award. Here the Rotterdam form does not say an irrevocable arbitration award, like it says regarding judgements. The reason therefore is that in Dutch law there can be instituted an action before the court to have set aside an arbitration award. However, that normally does not suspend the enforcement of the arbitration award, although the court can decide otherwise. However, in Dutch law the court cannot go into the mer-

its of the case, decided by arbitrators. An arbitration award can only be set aside on limited formal grounds. But it could well be that the arbitration award in a case, wherefore a guarantee has been issued on the Rotterdam form, is given in another country than the Netherlands. In maritime cases, the parties have frequently agreed on arbitration London. Each country has its own special legislation regarding the possibility to have set aside an arbitration award by the court. It is impossible to catch all those situations in one word in the Rotterdam Guarantee Form. Therefore this form uses the word "valid" and in the Dutch text "wettige" which literally means "in accordance with statutory law". Both terms are necessarily a little bit vague. Therefore it may be that there will arise a dispute on this point. That will have to be decided by the Dutch court then which will have to go into points of law of the country, where the arbitration award has been given. However, in practice I have never seen any court decision on this point, although I have heard sometimes of discussions, for instance about London interim awards. In practice, the disputes about this point have been settled and in theory I would not know how this point could be covered better by the Rotterdam Guarantee Form, although it is slightly unsatisfactory that no firmer language can be used on this point.

The guarantor also has to pay when there is an irrevocable judgement of the competent court. Of course, the guarantee text does not say which court is competent to decide the dispute between the creditor and the principal debtor and which law applies to that dispute. This is a point, to be decided later (if it is in dispute) between the creditor and the principal debtor. This is no point with which the guarantor is concerned. Moreover, on formal grounds, it would be impossible that the guarantor, by signing the guarantee (which is not signed by the principal debtor and the guarantor) could change the competent court and the applicable law between the creditor and the principal debtor regarding that dispute. So, the Rotterdam Guarantee Form explicitly leaves open the competent court and the applicable law in the original dispute. Sometimes, the parties nevertheless replace the expression "a competent Court of Law" by for instance: "the District Court of Rotterdam". This should not be done in the Rotterdam Guarantee Form. In the first place since, as set out above, the guarantor cannot change this point in a document, which is signed only by it. This point should be dealt with in an agreement between the creditor and the principal debtor, separate from the guarantee document. Moreover, it is not wise as creditor to limit the guarantee to a judgement of for instance the Rotterdam Court. This restricts the rights of the creditor. Under the Rotterdam Guarantee Form, a judgement of any competent court will be sufficient. A practical point is furthermore that filling in for instance "the District Court of Rotterdam" is wrong, since it may be that there will be an appeal after this court has rejected the claim of the creditor, whereafter the Court of Appeal in The Hague gives judgement in favour of the creditor as yet. Very strictly speaking, there is no obligation of the guarantor to pay then, although I would not know whether this formal stand would be honoured by the court, but it creates a very unde-

sirable dispute in any case with at least delay and possibly extra costs for further legal proceedings.

Another point is whether the Rotterdam Guarantee Form should not oblige the guarantor to pay also in case there has been given a judgement against the principal debtor which is not yet irrevocable, but which has been declared provisionally enforceable, what is usually done by the Dutch Courts. The Rotterdam Guarantee Form has chosen on purpose not to do that. The status quo is changed by the lifting of an arrest against a guarantee on the Rotterdam form. This is to the advantage of both the creditor and the principal debtor. The advantage for the principal debtor is that it can use its assets again, for instance sail with its vessel. If a vessel would be detained till the case would be decided by the court, the shipowner would go bankrupt, since that can take years. However, the lifting of an arrest against a guarantee is also to the advantage of the creditor. In Dutch law, a creditor is liable for wrongful arrest and the damage, arising therefrom, if his claim will not be awarded by arbitrators or the court at the end of the day for whatsoever reason. This is a strict liability. If an arrest would lie for years, the damage is usually very great and the creditor would run the risk that it should indemnify the principal debtor for a very great amount. On the other hand, the arrestee has the obligation to minimize its damage, what is possible by putting up a guarantee. If a guarantee is put up, only the costs of the guarantee are incurred. In case a bank guarantee is put up, the costs are usually 1% per year, although in maritime matters usually a foreign bank is involved, which charges 1% per year and a correspondent Dutch bank, which also charges 1% per year. However, those costs are very small compared to the damage, caused by an arrest, which would be maintained for years. If a P&I Club guarantee is put up, the costs are usually nihil, although a large outstanding guarantee can influence the insurance record of the shipowner, which may result into a higher premium (call) to the Club.

Another advantage for the creditor is that it receives 100% security in the form of a guarantee. An arrest does not give 100% security. If other creditors will arrest the same asset later, the creditors have to share the proceeds of a sale of that asset. Preferred creditors are paid first then. Unsecured creditors may receive little or nothing. It is not so that an earlier arrest creates preference. If the principal debtor is declared bankrupt, all arrests lose their effect and the official receiver will sell the assets, whilst in Dutch bankruptcies unsecured creditors usually receive no dividend.

So, the risk for the creditor is reduced considerably by the lifting of an arrest against a guarantee. Both parties benefit and probably the creditor benefits more than the principal debtor, so that it is reasonable that the creditor waits till there is an irrevocable judgement. The principal debtor has then the chance to appeal. If the guarantor has to pay after one round before the District Court already, when the judgement is declared provisionally enforceable, the principal debtor may be faced with a Pyrrhus victory before the Court of Appeal, if the principal debtor is not able thereafter to recover the

amounts, paid unjustifiedly to the creditor under a judgement of the District Court, which is set aside by the Court of Appeal. The same applies if the case is taken to the Supreme Court in a further appeal, of course.

b. Quantum of the principal claim

After (D) there should be filled in the amount of the principal claim. Originally this was not so in the Guarantee Form, where simply the maximum amount of the guarantee was expressed, which was calculated on the basis of the principal claim + a surcharge (usually of 30%) for costs and future interest. However, the following discussion arose. In the paragraph with (G) the guarantee stipulates that the creditor accepts the guarantee to prevent a future conservatory attachment of the assets of the principal debtor for the claim, mentioned in the guarantee. Sometimes, a claim is underestimated in the beginning. This may happen for instance with cargo damage claims. The vessel, from which the damaged cargo has been discharged in Rotterdam, is arrested and a preliminary figure for the claim must be given. Security is put up and the vessel sails. Later, it is found out that the damage to the cargo is greater than estimated originally by the surveyors. In a court case in summary proceedings before the President of the Rotterdam Court, it was decided that also in that case, the creditor had waived his right to seek additional security, so that the creditor was estopped from making an additional conservatory attachment to obtain additional security. That was not really the intention of the Guarantee Form. Therefore, the claim, for which security is put up, is now quantified sub (D) and described sub (E). This means that if it later turns out that the claim is higher than anticipated earlier, the creditor can make another attachment with the purpose to obtain additional security for the unsecured part of its claim.

c. The default judgement problem

The next (2nd) paragraph has been entered later into the Rotterdam Guarantee Form to cope with the following problem. The guarantor is only obliged to pay if the creditor has obtained an irrevocable judgement against the principal debtor. However, the principal debtor can choose to let the case go by default and then the court will render a default judgement. The problem in Dutch law is that such a default judgement becomes irrevocable only if it has been served on the defendant in person, if the defendant is domiciled or established in the Netherlands, or if the defendant has committed an act, which shows that it was aware of the contents of the judgement. Then the appeal period of 14 days starts to run. According to case law of the Dutch Supreme Court, the serving of a Dutch default judgement through diplomatic or other official channels to a foreign defendant, which did not appear before the Dutch Court, does not make run the 14 days appeal period, even if the judgement is handed out to the managing director of the defendant company and even if a translation in the local language is added. The reason is probably that the Dutch Supreme Court finds it necessary to protect foreigners, who have not appeared before the Dutch court, also in view of the fact that

the appeal period of 14 days is very short (in case of defended judgements the appeal period is 3 months). In practice, it is difficult for a foreign defendant to organise that an appeal will be lodged within 14 days after the documents have been handed out to him. Moreover, the claimant is not obliged to mention this appeal period of 14 days in his documents. For this reason, the foreign defendant to the default judgement is usually not aware of that short appeal period.

However, this created the problem that, if the defendant allowed the case to go by default, the creditor had in his hands a default judgement which usually did not become irrevocable, so that the creditor could never obtain payment from the guarantor under the guarantee. The exception would be that the foreign defendant committed an act which shows that it is aware of the contents of the judgement. That is rare and difficult to prove anyhow. Colloquially, this gap was called the "default gap" in the Rotterdam Guarantee Form. This has been remedied by the 2nd paragraph.

d. The problem of the bankrupt debtor

A similar problem arose when the principal debtor was declared bankrupt. In Dutch law, when a Dutch defendant is declared bankrupt, the court suspends the legal proceedings. The idea is that all claims should then be lodged with the official receiver in the bankruptcy, who has been appointed by the court. If there is a dispute between the official receiver and the creditor about a claim, that should be dealt with in bankruptcy proceedings, which would result into a judgement. If the claim is accepted by the official receiver in the meeting of creditors, this is laid down by the court in minutes of this meeting, which are issued in the same form as a judgement and which are equal to a judgement. However, in practice, almost all Dutch bankruptcy proceedings are terminated by lack of assets, after which the assets, available, are paid out to the official receiver for his costs and if there is a balance then to the tax receiver and the social security fund, which have priority over the other creditors. Then the unsecured creditors receive no dividend and then it is not interesting at all to hold a meeting of creditors and to commence bankruptcy proceedings regarding the validity of unsecured claims. However, for the purposes of the Rotterdam Guarantee Form, the creditor was then stuck. The creditor could not pursue the original legal proceedings against the debtor, since those proceedings were stayed by the court. The creditor could not obtain an irrevocable judgement in the bankruptcy proceedings either. After the bankruptcy proceedings were terminated by lack of assets, the creditor could try to continue the original legal proceedings. However, some courts would not allow that. Moreover, it can take many years before a bankruptcy is finalized, so that the creditor was faced anyhow with a delay of many years.

This was not really the purpose of the Rotterdam Guarantee Form, of course, which was also meant to give the creditor security in case the principal debtor would go bankrupt. This problem was called colloquially the

"bankruptcy gap" in the Guarantee Form. This has been remedied now in the 3rd paragraph. This allows the creditor to bring legal proceedings against the guarantor if the principal debtor is declared bankrupt. Then the court has to decide in the fresh proceedings between the creditor and the guarantor what amount was due by the principal debtor to the creditor. The guarantor then has to pay that amount, once the judgement in those fresh proceedings has become irrevocable.

4. Applicable law and jurisdiction under the guarantee

The penultimate paragraph of the Rotterdam Guarantee Form provides that the guarantee shall be governed by the law of the Netherlands. This more or less speaks for itself, since it is issued in the Netherlands to lift an arrest, made there. Moreover the guarantee refers in the second paragraph to art. 7:855 of the Dutch Civil Code. However, sometimes foreign guarantors, like P&I Clubs, sign this guarantee and then it is not entirely certain anymore what law system governs the guarantee. Therefore this has been dealt with now explicitly in the present form.

This paragraph in the guarantee also provides that the competent court in Rotterdam or Amsterdam (one of which should be deleted, although this is often overlooked, in which case both courts are competent) are to decide any disputes and claims under the guarantee. If a Dutch guarantor issues a guarantee on the Rotterdam form (that will usually be a guarantor in Rotterdam or Amsterdam), there is automatic jurisdiction before the Dutch courts. However, sometimes that guarantor is a foreign company, like a P&I Club or a bank. In that case, it may be that there is no jurisdiction before the Dutch courts. To protect the creditor, the Rotterdam form now gives jurisdiction of the competent court of law in Rotterdam or Amsterdam anyhow. The guarantee does not say the District Court in Rotterdam or Amsterdam, since it may also be the Cantonal Court, which is competent to decide claims up to NLG 5,000.00.

This paragraph does not provide for exclusive jurisdiction of the court in Rotterdam or Amsterdam. The intention is to give the creditor an extra jurisdiction, not to restrain him from suing, for instance, before the competent court in the place of establishment of the guarantor. If the guarantor is a foreign company, it may be that it is established in a country with which the Netherlands have no convention on the enforcement of judgements. Then a judgement of the Dutch Courts would not be enforceable in the country where the guarantor is established and then it would not help the creditor to start proceedings in the Netherlands (unless the guarantor has assets in the Netherlands or in other countries, where a Dutch judgement can be enforced). In that case, the creditor should have the possibility, of course, to go to the court in the country of establishment of the guarantor and the creditor should not be restrained from doing so by an exclusive Dutch jurisdiction clause.