

REPLY BY THE NEDERLANDSE VERENIGING VOOR VERVOERRECHT (NVV) (DUTCH TRANSPORT LAW ASSOCIATION) TO THE CMI QUESTIONNAIRE OF 1 NOVEMBER 2019 WITH REGARD TO SECURITY INTERESTS OVER SHIPPING CONTAINERS

Introduction

The Kingdom of the Netherlands is made up of four separate countries:

- the Netherlands
- Aruba
- Curaçao
- Sint Maarten.

Each of the countries has its own government that is responsible for the legislation applying in the particular country. However, within the country of the Netherlands there are two separate legal systems operating in:

- the Netherlands in Europe, and
- the Caribbean Netherlands (the islands of Bonaire, Sint Eustatius and Saba)¹, the government of the Netherlands being responsible for the legislation applying in both jurisdictions.

Consequently there are five different legal systems existing within the entire Kingdom. These are all civil law systems, and much of the main statute law applying in the different jurisdictions is identical. Furthermore, Article 39 of the Statuut voor het Koninkrijk der Nederlanden (Charter for the Kingdom of the Netherlands) contains the so-called 'principle of concordance'. It provides (unofficial translation):

1. Civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, industrial property, the notarial profession, and provisions concerning weights and measures shall be regulated as far as possible in a similar manner in the Netherlands, Aruba, Curaçao and Sint Maarten.
2. Any proposal for drastic amendment of the existing legislation in regard to these matters shall not be submitted to or considered by a representative assembly until the Governments in the other countries have had the opportunity to express their views on the matter.

With this principle in mind the courts of the different countries within the Kingdom tend to interpret the law in a manner that unifies the law of the countries and jurisdictions as much as possible ('harmonious' or 'concordant' interpretation).

¹ https://en.wikipedia.org/wiki/Caribbean_Netherlands

This reply is based on the law applying in the Netherlands in Europe. Where relevant we indicate the differences with the law applying in the Dutch Caribbean² (the Caribbean Netherlands, Aruba, Curaçao or Sint Maarten).

An express grant of security is for convenience referred to as a 'mortgage even though in many jurisdictions that is not the concept known to the law.

2 Registration of interests

2.1 In your jurisdiction is it possible to register a property interest of any nature in containers, for example as:

(a) an owner generally;

Netherlands: No.

(b) an owner under a retention of title arrangement.

Netherlands: No.

(c) a mortgagee under a mortgage; and/or

Netherlands: In the Netherlands in Europe, it is possible to register a non-possessory pledge³ on a movable object (not being a 'registered good' such as registered ships or aircraft). Article 237 of Book 3 of the Dutch Civil Code (Burgerlijk Wetboek) provides (unofficial translation):

1. The right of pledge on a movable thing, on a right payable to bearer, or on the usufruct of such a thing or right, can also be established by an authentic instrument or a registered private instrument, without the thing or the paper to bearer being brought under the control of the pledgee or of a third person.
2. The pledgor must declare in the instrument that he is entitled to pledge the property and furthermore that the property is not encumbered with limited rights or, if it is, by which rights it is encumbered.
3. Where the pledgor or the obligor fails to perform his obligations as regards the pledgee, or gives him good cause for concern that there will be such a failure, the pledgee is entitled to demand that the thing or the paper to bearer be brought under his control or that of a third person. Where there are several rights of pledge over the property, each pledgee as regards whom the pledgor or the obligor fails to perform his obligations, can exercise this right, provided that every pledgee, other than the most senior in rank, may only demand surrender to a pledgee or third person agreed upon by the pledgees jointly or appointed by the court.
(...)]

² https://en.wikipedia.org/wiki/Dutch_Caribbean

³ Non-possessory real security is usually named 'hypothec', but the Dutch equivalent 'hypotheek' is only used in Dutch law for real security on registered goods, such as real estate and registered ships and aircraft. This particular real security is called 'bezitloos pandrecht' in Dutch, and pand(recht) is normally translated into English as pledge or pawn.

In the Caribbean Netherlands (Bonaire, Sint Eustatius, Saba), Aruba, Curaçao and Sint Maarten this particular type of pledge (non-possessory pledge) can be established without the need for an authentic (i.e. notarised) instrument or a registered private instrument.

(d) a lessor under a lease.

Netherlands: No.

2.2 Is any register in your jurisdiction specific to the applicable party or is it specific to the type of asset, i.e. containers?

Netherlands: The Kadaster (the Cadastre, Land Registry and Mapping Agency) maintains the so-call 'public registers for registered goods', which includes the register for ships and the register for aircraft.

The Belastingdienst (Tax and Customs Administration) maintains a register for private instruments that by law require registration to have legal effect towards third parties. Relevant within the scope of this questionnaire is the non-possessory pledge of movables (such as containers) which requires registration to be enforceable towards third parties. It should be noted that the register of the Belastingdienst is not a public register and it is used for date stamping purposes only. (The pledgee cannot consult the register to see whether there are more pledges attaching to the particular asset.)

3 Recognition of foreign registered interests

3.1 If an interest in containers is registered as referred to in question 2 in a jurisdiction which is not your jurisdiction, would your jurisdiction recognise that interest (ie in circumstances where a party sought to enforce that registered interest in your jurisdiction)?

Netherlands: Yes.

3.2 If 'yes', on what legal basis?

Netherlands: In the Netherlands in Europe, Article 130 of Book 10 of the Dutch Civil Code provides (unofficial translation):

Rights to a thing acquired or created in accordance with the law applicable pursuant to this Title shall continue to vest therein even if the thing is transferred to another State. No rights may be exercised in a manner incompatible with the law of the State in whose territory the thing is situated at the time such rights are exercised.

The article implements the so-called 'assimilation doctrine' (rights acquired or created in another State continue, but must be exercised in a manner compatible with rights existing in the State of the object's current situs), thereby rejecting the 'transformation doctrine' (rights acquired or created in another State are transformed into rights existing in the State of the object's current situs) and the 'fixation doctrine' (rights acquired or created in another State continue in principle, unless new rights attach to the object in its new situs).

There is no written private international law in the Dutch Caribbean (i.e. the Caribbean Netherlands (Bonaire, Sint Eustatius, Saba), and Aruba, Curaçao and Sint Maarten). The

principle of concordance (see p. 1) would not necessarily lead to the application of the exact same principles as now enacted in the Netherlands in Europe. But it is expected the courts in the Dutch Caribbean would follow the judgment of the Hoge Raad (the Court of Cassation for the entire kingdom) in the *Sisal II* case⁴. In the legislative history of Article 130 of Book 10 of the Dutch Civil Code the judgment is interpreted as an early application of the 'assimilation doctrine', and as a reason for enacting that principle in the Dutch Civil Code⁵.

3.3 If 'no', on what legal basis?

Netherlands: Not applicable.

4 Recognition of chosen law for property matters

4.1 Do the laws of your jurisdiction recognise the law chosen by the parties to govern the property aspects of a transfer of title or grant of mortgage:

(a) if the containers are physically located in your jurisdiction when the transfer or grant takes place; or

Netherlands: For the Netherlands in Europe the answer is in principle, no.

Article 127 of Book 10 Dutch Civil Code provides for the main conflict of law rule for issues of property law (*lex rei sitae*) (unofficial translation):

1. Except as provided otherwise in paragraphs (2) and (3), the property law regime relating to things shall be the law of the State in whose territory the thing is situated.
2. Except as provided in Article 160 of this Book, the property law regime relating to registered vessels shall be governed by the law of the State where the vessel is registered.
3. The property law regime relating to registered aircraft and aircraft exclusively registered in a nationality register as referred to in Article 17 of the International Civil Aviation Convention of Chicago of 7 December 1944 (Staatsblad 1947, H 165) shall be the law of the State of registration of the aircraft or the law of the State of its registration in its Nationality Register.
4. The law referred to in the preceding paragraphs shall determine in particular:
 - a. whether a thing is movable or immovable;
 - b. what forms a component part of the thing;
 - c. whether the thing is transferable or whether a right can be created therein;
 - d. which requirements may be set for a transfer or creation of rights therein;
 - e. which rights may be vested in respect of a thing and the nature and content of such rights;
 - f. the manner in which such rights may arise, be modified, be transmitted and are extinguished, and the relationship between such rights.

⁴ Hoge Raad 14 December 2001, [ECLI:NL:HR:2001:AD4933](#); JOR 2002, 70 (*Sisal II*).

⁵ [Kamerstukken I 2007/08, 30 876, C](#), p. 6-10).

5. For the application of the provisions of the preceding paragraph, as regards the acquisition, the establishment, the transmission, the modification or the extinction of rights in respect of a thing, the time of occurrence of the legal facts required for such purpose shall be conclusive.
6. The provisions of the preceding paragraphs apply, mutatis mutandis, in the case of a transfer or creation of rights in respect of rights in rem.

Article 128 of Book 10 Dutch Civil Code provides as specific conflict of law rule for retention of title (unofficial translation):

1. The property law effects of a reservation of title shall be governed by the law of the State in whose territory the thing is situated at the time of delivery. This shall not affect any obligations which may arise therefrom pursuant to the law applicable to the reservation of title clause.
2. In derogation of the first sentence of paragraph 1, the parties may agree that the property law consequences of a reservation of title in respect of a thing intended for export shall be determined pursuant to the law of the State of destination, if the reservation of title does not cease to be in effect until the price is paid in full on the basis of that law. Such an agreed designation shall have effect only if the thing is actually imported in the designated State of destination.
3. The provisions of the preceding paragraphs apply, mutatis mutandis, to the property law effects of the leasing of things intended for use abroad.

Article 130 of Book 10 Dutch Civil Code gives the so-called 'fixation rule' (unofficial translation):

Rights to a thing acquired or created in accordance with the law applicable pursuant to this Title shall continue to vest therein even if the thing is transferred to another State. No rights may be exercised in a manner incompatible with the law of the State in whose territory the thing is situated at the time such rights are exercised.

Article 133 of Book 10 Dutch Civil Code gives a specific conflict of law rule for transported property (unofficial translation):

1. The property law regime with regard to things carried pursuant to a contract of international carriage shall be determined pursuant to the law of the State of destination.
2. If the carriage referred to in paragraph (1) takes place in the performance of a contract of purchase and sale or of any other contract requiring the transfer of the things carried or in the performance of a contract creating rights in such things, a designation in such contract of the law applicable thereto shall, notwithstanding paragraph (1), also be deemed to relate to the property law regime with regard to the things carried.

Only Articles 128 and 133 contemplate a choice of law and in fact only Article 133 contains the possibility of a real choice of law regarding property law aspects.

As there is no written private international law in the Dutch Caribbean (i.e. the Caribbean Netherlands (Bonaire, Sint Eustatius, Saba), and Aruba, Curaçao and Sint Maarten), the

picture there is less clear. See above under 3.2, particularly in respect of the 'conflict mobile' issue covered by Article 130 of Book 10 of the Dutch Civil Code. Many of the provisions of the Articles cited above are, however, based on rules applied in past court decisions which remain relevant in the Dutch Caribbean⁶. The conflict of law rules with regard to property law will therefore be similar throughout the Kingdom.

(b) if the containers are physically located in another jurisdiction (not being the jurisdiction of the chosen law) when the transfer or grant takes place?

Netherlands: See under (a).

4.2 If the answer to question 4.1(a) and/or (b) is 'no', how would the law of your jurisdiction determine which law does apply?

Netherlands: See under 4.1. (a).

5 Re-characterisation of leases

5.1 Are there circumstances in which your jurisdiction would re-characterise a lease or a retention of title arrangement as a security interest?

Netherlands: See under 4.1. (a).

5.2 If 'yes', briefly, how and when will it do this?

Netherlands: See under 5.1.

5.3 If 'yes', could re-characterisation take place in certain circumstances under the laws of your jurisdiction even where the law chosen by the parties to govern the lease would not re-characterise? If so, please explain.

Netherlands: See under 5.1.

5.4 If 'yes', is it necessary or possible for the lessor to protect its interest by any security registration or filing? (See question 2).

Netherlands: See under 5.1.

6 Enforcement remedies

6.1 Do the laws of your judicial⁷ permit an owner, a mortgagee or a lessor to exercise 'self-help' remedies to enforce and repossess in respect of containers located in your jurisdiction? (Assuming this is permitted by the chosen governing law and the terms of the documents).

Netherlands: If 'self-help' refers to enforcement and repossession without court approval, the

⁶ See for instance the application of the *lex rei sitae* principle by *Gerecht in Eerste Aanleg* (Court of First Instance) of Sint Maarten, 9 February 2016, [ECLI:NL:OGEAM:2016:5](#). In its judgment the court refers to Article 10:127 Dutch Civil Code, does not apply the Article, but does apply the principle embodied in that Article.

⁷ As in 4.1 we read this as 'jurisdiction'.

answer is generally no. Only a pledgee who already has possession of the container may have the container sold in a public auction without prior court approval. Unless achieved amicably, repossession can only (legally) be brought about by court order. But it should be added that there are expeditious court procedures for attachment and for repossession orders available.

With regard to the owner's revindicatio, Article 2 of Book 5 of the respective Civil Codes provides (unofficial translation):

The owner of a thing is entitled to recover it from any person who holds it without right.

With regard to the pledgee who does not have possession (non-possessory pledge), Article 237 of Book 3 of the respective Civil Codes provides (unofficial translation):

- (...)
3. Where the pledgor or the obligor fails to perform his obligations as regards the pledgee, or gives him good cause for concern that there will be such a failure, the pledgee is entitled to demand that the thing or the paper to bearer be brought under his control or that of a third person. Where there are several rights of pledge over the property, each pledgee as regards whom the pledgor or the obligor fails to perform his obligations, can exercise this right, in which case no pledgee, other than the most senior in rank, may demand surrender to a pledgee or to a third person, if so agreed by the pledgees jointly, or to a pledgee or third person to be appointed by the court.
(...)]

With regard to the pledgee in possession, Articles 248, 250 and 251 of Book 3 of the respective Civil Codes provide (unofficial translation):

Article 248

1. Where the obligor is in default of performing that for which the pledge serves as security, the pledgee is entitled to sell the pledged property and to have recourse against the proceeds for what is owed to him.
2. The parties may stipulate that no sale will take place until after the court, upon the demand of the pledgee, has determined that the obligor is in default.
3. A lower ranking pledgee or attachor can only sell the pledged property subject to higher ranking rights of pledge.

Article 250

1. The sale shall take place in public according to local custom and upon the usual conditions.
2. The sale of pledged property which can be traded in a market or on an exchange may take place in the market through an appropriate broker or, on an exchange, through a qualified intermediary, according to rules and usages applicable to an ordinary sale in such market or on such exchange.
3. The pledgee also has the right to bid.

Article 251

1. Unless otherwise stipulated, the interim provisions judge of the district court may determine, at the request of the pledgee or the pledgor, that the pledged

property will be sold in a manner other than that provided in the preceding article; at the request of the pledgee, the interim provisions judge of the district court may also determine that the pledged property will remain with the pledgee as buyer for an amount to be determined by him.

2. A pledgee who has become entitled to proceed to a sale may agree with the pledgor to a manner of sale other than that provided in the preceding article. Where the pledged property is encumbered with a limited right or is subject to attachment, the co-operation of the holder of the limited right or of attachor is also required.

With regard to the lessor the question will be whether the lessor is the owner of the container, of whether he is a sub-lessor. If he is the owner he may start an action for revindicatio. If he is a sub-lessor he will not be considered to have a proprietary interest in the container. He will merely have a contractual claim for redelivery on the basis of the sub-lease agreement. (The sub-lease agreement may of course contain specific provisions regarding repossession.)

6.2 Please outline briefly the judicial process (ie not involving 'self-help') which would be necessary in order to enforce and repossess in respect of containers located in your jurisdiction.

Netherlands: See also under 6.1. For (re)possession a full action on the merits could be started, but in practice claimants will usually start a kort geding (literally: 'brief proceedings', similar to the French référé proceedings). This is a procedure for urgent matters, with fewer formalities and aimed at a speedy interim judgment. The sole judge (referred to above in Article 251 of Book 3 of the respective Civil Codes as interim provisions judge) will not render declaratory judgments, but may give the necessary order for repossession of the containers, and award a penalty for non-compliance with his judgment. If there is a risk of the containers being hidden or moved, they can be attached in the run-up to (or pending) the kort geding or action on the merits.

6.3 In particular, in your jurisdiction what legal steps would need to be taken in order to allow a mortgagee or lessor to take steps to repossess containers:

- (a) located shore-side on property of a third party; or

Netherlands: See under 6.1. and 6.2.

- (b) located on a ship in port owned and/or chartered by a third party?

Netherlands: See under 6.1. and 6.2.

6.4 If a mortgagee or lessor took enforcement or repossession action in respect of a loaded container in your jurisdiction would the mortgagee or lessee⁸ have legal duties or liabilities to cargo consignees and, if so, of what nature?

Netherlands: Assuming there is no contractual relationship between on the one hand the cargo consignees and on the other hand the mortgagee or lessor the legal duties or liabilities

⁸ We read this as 'lessor'.

would be 'principles generally accepted in society' the non-adherence of which could create liability in tort (Article 6:162 of the relevant Civil Codes).

We are not aware of particular cases relating to cargo in containers, but in the *Ionian Sky* (President District Court Rotterdam, 2 April 1996, ECLI:NL:RBROT:1996:AK3608) a mortgagee of a ship it wanted to foreclose on applied for a court order to have the charterers discharge their cargo (so the mortgagee could sell an empty ship). The charterers in turn asked for a court order to have the mortgagees carry their cargo to destination. Both actions were dismissed, leaving both sides in a form of stalemate.

7 Insolvency

7.1 Under the insolvency laws of your jurisdiction can there be any stay or restriction on the right to enforce or repossess if the applicable counterparty enters into insolvency proceedings?

Netherlands: There will not be a stay on the right of the owner to repossess the container as the container is not owned by the counterparty and would therefore not be part of the insolvency estate of that counterparty.

There will not be a stay on the right of the pledgee without possession to repossess the container (under Article 237 of Book 3 of the respective Civil Codes). Article 57 of the Bankruptcy Act (Faillissementswet)⁹ provides (unofficial translation):

1. Pledgees and mortgagees may exercise their rights as if there were no bankruptcy.
(...)

On the basis of that same Article 57 of the Bankruptcy Act there will not be a stay on the right of the pledgee with possession to enforce his claim against the container if the applicable counterparty enters into insolvency proceedings.

With regard to the lessor the question will be whether the lessor is the owner of the container, of whether he is a sub-lessor. If he is the owner there will not be a stay on the right to repossess the container (revindicatio) as the container is not owned by the counterparty and would therefore not be part of the insolvency estate of that counterparty. If, however, the lessor is a mere sub-lessor he will not have a proprietary interest in the container. He will merely have a contractual claim for redelivery on the basis of the sub-lease agreement. In that case the claim will indeed be stayed.

7.2 If the answer is 'yes', please outline briefly.

Netherlands: See under 7.1.

8 Liens

8.1 Please briefly outline the types of non-consensual liens affecting containers which can arise under the law of your jurisdiction.

⁹ In the Caribbean Netherlands: Article 53 of the Bankruptcy Act (Faillissementswet BES), and Article 53 of the respective Bankruptcy Decrees 1931 (Faillissementsbesluit 1931) applying in Aruba, Curaçao, and Sint Maarten.

Netherlands: The laws in the different jurisdictions of the Kingdom recognize the following (civil law) privileges:

- claims for recovery of costs incurred in preserving property (Article 284 of Book 3 of the respective Civil Codes)
- claims for work done on a thing pursuant to a contract for services (Article 285 of Book 3 of the respective Civil Codes)
- claims with respect to salvage and to a contribution of those things to general average (Article 222 of Book 8 of the respective Civil Codes)
- claims resulting from a contract of carriage (or negotiorum gestio) pertaining to things received for carriage (Article 222 of Book 8 of the respective Civil Codes)

9 Problems experienced in practice on enforcement

9.1 Please briefly outline any known problems which have arisen in relation to enforcing against or re-possessing containers in your jurisdiction, including:

(a) problems of identification and tracking containers;

Netherlands: We are not aware of any relevant problems.

(b) establishment and recognition of property rights.

Netherlands: We are not aware of any relevant problems.

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