

Obtaining an enforceable title in debt collection cases

Summary

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Executive summary

1. Context and background

If a creditor does not succeed in the extrajudicial collection of his money claim, in the Netherlands the debt is normally recovered by initiating ordinary court proceedings. This is necessary in order to obtain an enforceable title, which enables a creditor to enforce his claim. Research has shown that many judgments rendered by the court of first instance are default judgments. In 2011, 84% of the judgments rendered by the sub-district court (*sector kanton rechtbank*) were rendered in default of appearance. In the civil division of the district court (*sector civiel rechtbank*) this percentage was 41%. This implies that a significant portion of these court judgments relate to claims in which no defence was presented, and are thereby uncontested. Although an enforceable title can be obtained relatively quickly in a default procedure, all formalities of the summons procedure have to be fulfilled. Additionally, the party initiating the procedure incurs costs, including court fees, bailiff's fees and, where necessary, lawyer's fees and other legal costs.

2. Research question and sub-questions

The central research question is whether there are *other ways to collect a debt that also result in an enforceable title, other than by means of a summons procedure resulting in a default judgment*. This research question is divided into the following sub-questions:

- 1) What other possibilities are there for the judicial processing of debt collection cases?
- 2) To what extent is it possible to make the European order for payment procedure available in domestic cases?
- 3) What are the possibilities for extrajudicial debt collection and to obtain an enforceable title in such an extrajudicial scheme?
- 4) What are the characteristics of a debt collection case in the debt collection process?
- 5) What are the costs and benefits of debt collection cases in the default procedure for the judiciary, the creditor and the debtor, as compared with possible alternatives?

In this study, the following terminology is used. A 'default procedure' (*verstekprocedure*) is a summons procedure in which the defendant did not enter an appearance, and which, in due form, results in a default judgment. A 'debt collection case' (*incassozaak*) for the purpose of this research is a case in which a debt is recovered, either judicially or extrajudicially. A 'debt collection claim' (*incassovordering*) means *a claim of a civil law nature that will probably be uncontested in judicial proceedings*. Another term that is important in the context of this research is the 'order for payment procedure' (*betalingsbevelprocedure*). This procedure has different manifestations in different countries and in the EU context, but generally concerns a specific, unilateral procedure for obtaining an enforceable title in debt collection cases. Only when the payment order is challenged (or – where applicable – the invitation to pay) will ordinary proceedings ensue. The term 'enforceable title' (*executoriale titel*) means the transcript of a legal fact that entitles a person to collect his claim, if necessary by means of enforcement measures.

3. Research structure and methods

To answer the research questions, three sub-studies have been conducted with corresponding methodology, *i.e.* a *legal-normative*, an *empirical* and a *comparative law* study.

The *legal-normative part* of the research on the recovery of debt collection claims in the Netherlands discusses the existing enforceable titles and the ways in which these can be obtained, particularly in the common default procedure. Furthermore, alternative procedures and ways to obtain an enforceable title are deliberated. Particular attention is paid to the

possibility to make the European order for payment procedure (Regulation No. 1896/2006) available in domestic cases. This part of the research consists of a desk and literature study.

The *empirical part* of the research on the recovery of debt collection cases in the Netherlands consists of two sections. The *first section* seeks to map the role of the various players, the course of judicial and extrajudicial debt collection tracks, as well as the different types of debt collection cases. To this end, interviews were held with representative organisations, the Royal Professional Organisation of Judicial Officers (*Koninklijke Beroepsorganisatie van Gerechtsdeurwaarders*, abbreviated: KBvG) and the Dutch Association of Debt Collection Agencies (*Nederlandse Vereniging van Incasso-ondernemingen*, abbreviated: NVI), as well as a number of individual actors in the field. Furthermore, case file studies were conducted in a large, a medium and a small sub-district court (*sector kanton rechtbank*) and in a large, a medium and a small judicial officer's office (*gerechtsdeurwaarderskantoren*; also translated as bailiff's office). Only cases of the sub-district court have been concluded, in view of its wide competence as of 1 July 2011. It should be pointed out that since judicial officer offices have specific portfolios in their function as debt collectors, the data on the judicial officer's case files are not necessarily representative for all judicial officers. A total of 450 files were examined; 100 files at each court, and 50 in each judicial officer's office. These files were selected on the basis of a (random) sample of default judgments rendered in the three selected sub-district court divisions and cases at three judicial officer's offices, completed in the period September 2011-December 2011. A set of variables was recorded for each file, and categorised under the following criteria: (1) case characteristics, (2) duration of the procedure, (3) costs, and (4) legal protection.

The *second section* of the empirical research concerns the functioning of the European order for payment procedure in Dutch practice. To this end, semi-structured interviews were conducted. These were conducted at the competent court for this procedure, the District Court in The Hague, and the judicial officer's office that the court engages for the service of payment orders. On the basis of the interview at the district court, some quantitative data were provided, which were supplemented by the Council for the Judiciary.

The *comparative law part* of the research contains a description of the recovery of debt collection claims in Germany, France, England and Wales, Austria and Switzerland, as well as comparative observations. This study identifies the available alternatives for obtaining an enforceable title in these types of claims in the selected countries compared with the Netherlands. It is a legal-normative research on the basis of relevant legislation and literature. Where relevant and available, empirical data available from public reports are included. Furthermore, where necessary, procedural law experts from these jurisdictions were consulted.

4. Most important findings

4.1 Some empirical findings on the Dutch debt collection market

The most important conclusions of the examination of the case files in the sub-district court and the judicial officer's offices regarding the *case characteristics*, *duration of the procedure*, *costs* and *legal protection* are indicated below.

Case characteristics

The research on the case characteristics of default judgments at the courts indicates that in the case files examined, 97% of the cases concern a contractual claim; in the bailiff offices this is 91%. In 14% of these default judgments case files, an ancillary claim was also present that was often not a monetary claim, such as a claim for the termination of the contract or for an eviction notice. Health insurance cases account for the largest portion of the default cases (34%), followed by telecommunication cases (11%), gas/water/electricity (10%), rent (9%) and health care (9%). As regards the amount of the claim, it is apparent that a large number of debt collection cases only involve relatively small amounts of money. In those court cases

examined, 73% relate to sums less than €1,000, and in 89% the amount is less than €2,500. At the offices of the judicial officers these percentages are lower (49% and 72% respectively). In the court cases examined, in almost all cases the claimant is a legal entity or entity without legal personality (98%), and the defendant a natural person (96%). This largely corresponds to the findings for the offices of the judicial officers. In those cases examined, in all cases the creditor was a legal person or entity without legal personality and the debtor usually a natural person (91%). In 23% of the examined cases in the judicial officer's offices, a debt counsellor had contacted the offices in relation to a problematic debt situation.

Duration

Regarding the duration of the default procedure, it can be concluded that an enforceable title can be obtained within a short time. The study shows that in the examined files this takes on average 26 days, calculated from the date of summons to the day on which the default judgment is rendered. The major part consists of the time period for appearance associated with the summons, which on average takes 22 days. The period from the first day of the hearing (*roldag*) until the judgment is 4 days. National data obtained from the Council for the Judiciary concerning the research period indicate that in 50% of the cases this last term is longer than one week. In 2011, the average turnaround is 2 weeks. Therefore, in this respect the sample turned out not to be representative. In those cases examined at the judicial officer's offices, the amicable process (calculated up to the date of the summons) is on average 180 days. This long pre-judicial phase is probably partly caused by the desire to reduce the costs of debt collection, by avoiding judicial proceedings, as long as there is no certainty of redress in view of the financial situation of the debtor. In those circumstances, it is conceivable that the creditor does not want to incur the high costs related to the default procedure. Once the creditor has obtained an enforceable title (by a default judgment), the execution phase also takes a long time. In the cases examined at the judicial officer's offices, on average the execution phase takes 960 days. The long duration of the execution phase is probably caused by the lack of (known) recourse possibilities against the debtor. Furthermore, a debt is often collected in small portions. In 52% of the case files examined, recourse against the debtor is difficult, if not even impossible, and the case is closed without the claim being collected.

Costs

As regards the costs, the research shows that in the court cases examined the amount of awarded legal costs is € 476 on average. The extrajudicial costs of debt collection are € 173 on average. Within the largest group of claims (up to € 2,500), litigation costs result in the final cost being 151% of the principal sum. With respect to extrajudicial costs in this group, the increase amounts to 38% of the principal sum.

Legal protection

As concerns the legal protection of the defendant, the case file study at the courts shows that in 31% of the cases, the motivation of the default judgment contains more than the usual standard clause that 'the claim appears not to be unlawful or unfounded'. It concerns, *inter alia*, *ex officio* review of an unreasonable provision in a contract, and the review of interest and extrajudicial costs of debt collection. In 25% of the cases examined, this results in a partial rejection of the claim (particularly regarding interest).

4.2 Some empirical findings regarding the European order for payment procedure

In the second section of the empirical research, the use and functioning of the European order for payment procedure in Dutch practice is explored, with a view to the possibility of making this procedure available in purely domestic cases. The data are not all representative for the application in domestic cases, since the current scope is limited to cross-border cases. In the Netherlands, only 337 requests for a European order for payment are submitted annually on average (period 2009-2011). However, there is an increase over the years (from 295 in 2009 to 372 in 2011). The procedure has a relatively long duration of on average 152 days,

calculated from the moment of submitting the request (claim form A), to issuing the order (using form E). In 24% of the cases, the order for payment is opposed (opposition form F). From the interview with the competent District Court it is clear that no review of the contents of the claim takes place, and neither are, for example, extrajudicial costs of debt collection mitigated. According to the court, there were no major problems in handling the procedure or using the forms, though it occurs very frequently that data contained in the forms need to be completed or corrected. The court and the judicial officer's office involved in the service of the payment order consider the service to be problematic, and note that this causes delays. However, these problems occur mainly in cross-border service cases and either do not or seldom occur in situations where service has to take place in the Netherlands.

4.3 Alternative to the default procedure: the introduction of a specific debt collection procedure

In the normative study on the recovery of debts in The Netherlands, and in the comparative law study, possible alternatives to the existing collection proceedings and in particular the default procedure are elaborated. In the Netherlands, the introduction of a specific debt collection procedure was advocated, among others, by the Committee Asser/Groen/Vranken (Final Report 2006). Comparative law research shows that the Netherlands is one of the few countries that does not have a specific debt collection procedure. An order for payment procedure, in different procedural variants, exists in four of the five countries included in the present research, namely in Germany (*Mahnverfahren*), France (*injonction de payer*), Austria (*Mahnverfahren*) and Switzerland (*Zahlungsbefehl*). In these countries, the order for payment procedure is widely used for the recovery of debts and it is generally regarded as successful in the sense that it is a fast and accessible procedure, that is often processed electronically. England and Wales do not have a similar procedure; summary proceedings and default judgments are the main routes for uncontested debts in this jurisdiction. Specific money claims can be recovered using the electronic Money Claim Online system.

It is concluded that if the legislature wishes to introduce an alternative for the default procedure, a specific debt collection procedure is the only real option. This is subject to improvements that may be made within the existing default procedure, such as the reduction of court fees, which would be cost effective for the creditor. The legislature could consider to make the European order for payment procedure available in domestic cases, or to introduce a variation of this procedure, for which the comparative law study offers several different models. The use of the European order for payment procedure would enhance uniformity of procedures. This European procedure is in principle limited to contractual claims, which is consistent with the finding that 97% of the default cases concern contractual claims. However, it should be noted that, as was mentioned, in 14% of these cases an ancillary claim is also included that is not always a monetary value claim. Non-monetary claims cannot be processed in an order for payment procedure.

4.4 Possible implications of introducing a specific debt collection procedure (payment procedure)

It is questionable whether and to what extent the introduction of an order for payment procedure would solve the problems, insofar as there any within the default procedure. Below, several possible consequences of the introduction of such a procedure are presented, concerning the *duration of the procedure*, *costs* and *legal protection*.

Duration

As mentioned above, the duration of the default procedure was 26 days in the case study, calculated from the moment of issuing of the summons to the rendering of the default judgment. On the other hand, the duration of a national order for payment procedure in the Netherlands cannot be calculated. As was mentioned, the duration of the European order for payment procedure is 152 days, but because this procedure only applies in cross-border

cases, which have inherent complications (such as language differences) this period is not representative for purely domestic cases. In some of the other jurisdictions in the study, a national payment order can usually be issued within a very short time (1 or 2 days). However, it should be noted that the order itself does not at that moment constitute an enforceable title. The order must first be served upon the debtor, and from the date of service a time period for lodging a statement of opposition commences. In the European model, this period is 30 days. In some of the national procedures, this term is shorter (in Switzerland 10 days, in Germany two weeks, in Austria four weeks and in France one month). After everything is taken into account, it can be concluded that the time involved in obtaining an enforceable title will not be (much) shorter in an order for payment procedure than in the existing default procedure.

It is possible that the introduction of a payment procedure will have an effect on the relatively long pre-judicial phase (in the cases examined at the judicial officer's offices this was 180 days), because it may be that a creditor will more readily initiate a low-threshold order for payment procedure than a default procedure. It is unknown what the effect would be on the long execution phase after obtaining a judgment or on the compliance rate.

Costs

As far as the costs are concerned, the introduction of an order for payment procedure would not be cost effective if the court fees remain the same. In Germany, the legislature chose to half the court fees of the order for payment procedure. Moreover, the costs of the order for payment procedure are deducted from the costs of a possible subsequent ordinary procedure if the debtor opposes the order. In a payment procedure, the costs for serving the summons (through a judicial officer) are saved, but of course the order itself needs to be served, as does the enforceable title. This does not, therefore, save on costs. In the order for payment procedure, both in the European and the national models, no legal representation is required, regardless of the value of the claim. This may reduce costs in cases that do not fall within the (wide) competency of the sub-district court.

It is questionable whether an order for payment procedure would be cost effective for the judiciary. Research shows that the costs of a default procedure for the sub-district court are €11, and €67 for the civil division of the district court. In almost all cases, the court fees are (much) higher than the costs, and therefore serve as a source of income for the judiciary. It is doubtful whether the handling of an order for payment procedure would be less costly. Perhaps a more extensive use of ICT in the Dutch courts would enable a reduction in costs. Also concentrating the order for payment procedure at one court in the Netherlands could maybe result in increased cost efficiency.

Legal protection

In relation to legal protection, it is important that, at least in the European model and in most national procedures, the debtor only has one opportunity to oppose the claim, namely after the order has been issued. In the default procedure, the debtor has two possibilities; he can enter an appearance in the procedure after being summoned, and he has the possibility of opposition (*verzet*) against the default judgment. However, statistics from the Council for the Judiciary show that the possibility of opposition is only used in 0,01% of the default cases. Furthermore, it is important that the case file research at the courts indicated that in 31% of the default judgments, the judge reviews more than the mere formalities of the case, which in 25% of the cases led to a partial rejection of the claim. In the order for payment procedure, at least in the European and most national models, no evidence for the claim is required and no review of the merits of the claim occurs. The question is whether the absence of any form of review, except to the extent required by the Regulation itself, is not at odds with the case law of the Court of Justice of the European Union on consumer law. At any rate, the legal protection offered in the default procedure is better than in the (European) order for payment procedure.

4.5 Extrajudicial settlement

The extrajudicial debt collection process plays an important role in the Netherlands, especially when compared with some neighbouring countries, such as Germany. The case file study at the judicial officer's offices shows that 36% of the cases examined are brought to court. The representative organisations KBvG and NVI also remarked in the interviews that the majority of the cases are resolved amicably.

In the study, no relevant options were found to obtain an enforceable title in the extrajudicial process. The problem is that in debt collection cases the debtor remains passive. For this reason, it would for example not be useful for the present purpose to make a settlement agreement more easily enforceable, since such an agreement requires an active debtor (willing to settle). In the extrajudicial stage efforts should be on reaching and activating the debtor, where necessary in consultation with debt counsellors. When amicable debt collection does not succeed, the creditor remains dependent upon obtaining an enforceable title through judicial proceedings.