Litigation & Dispute Resolution

2019

Eighth Edition

Editor:
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global legal group

Netherlands

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Efficiency of process

The Dutch legal system belongs to the civil law tradition.[1] Already from the early days onward, Karel V (1531) codified natural law in order to facilitate international trade. In 1809, the Code Napoleon was declared applicable in the whole of the (then existing) Netherlands, to be replaced by the French Code Civil in 1811. In 1838, the Dutch Civil Code entered into force.

The Netherlands is judicially divided into 11 districts (*Amsterdam, Den Haag, Gelderland, Limburg, Midden-Nederland, Noord-Holland, Noord-Nederland, Oost-Brabant, Overijssel, Rotterdam, Zeeland West-Brabant*). Each district has its own court (*rechtbank*) and each district court has a civil law sector as well as a number of sub-district venues.

The sub-district venues of a district court (*kanton*) deal exclusively with all cases involving rents, hire, purchase, consumer purchase and consumer credits, employment, and claims that do not exceed the amount of EUR 25,000. For such cases which are handled by a single sub-district judge, parties have the right to argue their own case and they do not need a lawyer to represent them in court. Any other case is in principle handled by the district court. Most of the cases handled by the district court are decided by a single judge, but there are also full-bench panels with three judges to deal with more complex cases.

The competence of the individual district courts is determined by the official seat of the defendant; i.e. when a defendant has its official seat in the district of Amsterdam, the court of Amsterdam is competent. However, there are additional rules that can imply that another district court is (exclusively) competent. For instance, in cases regarding immovable property, the district court within which the immovable property is located, is competent as well. In case of an exclusive jurisdiction clause in a contract, the appointed court is in principle (not in cases regarding consumers) exclusively competent. Cases regarding intellectual property are being handled exclusively by the court of *Den Haag*. There is also a bill proposed which gives the court of Amsterdam in the future exclusive jurisdiction in securities litigation cases.

In some cases that are being handled by either a sub-district judge or the district court, it is also possible to separately commence interim junction proceedings (*kort geding*). The judge can then give a temporary decision, for instance enforce a party to deliver commodities or in some cases even to pay part of the damages in advance.

It is possible to appeal against all the above-mentioned decisions, provided the claim exceeds EUR 1,750. The competence of an individual court of Appeal (*gerechtshof*) is determined by location. The 11 districts are divided into four areas of court of Appeal jurisdiction: *Den Haag* and *Amsterdam* in the west; *Arnhem-Leeuwarden* in the north and east; and *'s-Hertogenbosch*

in the south. The term for appeal is within three months after the decision by the court. In case of interim junction proceedings, the term is four weeks.

Moreover, the Amsterdam court of Appeal has also an exclusive jurisdiction in specific cases regarding corporate law and cases with a social/financial economic impact. These cases are handled by the Enterprise Chamber (*Ondernemingskamer*) which consists of judges specialised in this field. The most important cases relate to the right of investigation (*recht van enquête*). This means that, for instance, shareholders have the right to request an order for an investigation. The Enterprise Chamber only rules that there must be such an investigation in the event that there are "good reasons to doubt that the company is being properly managed" (*gegronde redenen om aan een juist beleid te twijfelen*). The investigation will then be executed by independent experienced businessmen, accountants or lawyers appointed by the Enterprise Chamber. At the same time, the applicants have the right to seek an immediate temporary injunction, such as a blocking decision or agreement and the appointment or dismissal of directors.

The Dutch Supreme Court (*Hoge Raad*) is located in *Den Haag*. It is the highest court in the field of civil law. The Supreme Court is responsible for hearing appeals in cassation and for a number of specific tasks with which it is charged by law. The aim of cassation is to promote legal uniformity and the development of law. The court examines whether the lower court observed properly applied the law in reaching its decision. At this stage, the facts of the case as established by the lower court are no longer subject to discussion.

An Attorney General's office is attached to the Supreme Court. Its members main task is to provide the Supreme Court with independent advice, known as an advisory opinion, on how to rule in a case. In most cases, the Supreme Court follows this advisory opinion.

Not only can judgments of the Courts of Appeal be appealed in cassation, judgments of the Joint Court of Justice of the Netherlands Antilles and Aruba can also be appealed in cassation to the Supreme Court.

Dutch attorneys are both solicitor and barrister, provided they are registered with the Dutch Bar Association. They are allowed to start legal proceedings with all courts, except the Supreme Court. Only attorneys who are registered as attorneys with the Supreme Court can handle civil cassation cases. Specific professional competence requirements are set for these attorneys.

Another difference between cassation cases and cases at the courts and courts of Appeal is that since 1 March 2017, it is mandatory to conduct digital proceedings in civil claims at the Supreme Court. Although there has been a pilot for digital proceedings at two courts (*Gelderland* and *Midden-Nederland*) with the intention to introduce mandatory digital litigation after this first pilot phase for all commercial cases with attorneys, there has been a reset in this legislation. This means that there is currently (June 2019) a bill to be passed in the Dutch Parliament through which it is no longer mandatory to start digital proceedings at the above-mentioned courts. In the meantime, the Council for the Judiciary has adopted a basic plan to shape digitalisation of proceedings in a different way. However, it is uncertain on what term it will be mandatory to start digital proceedings at all courts.

Integrity of process

Already from the early days of trading, in the relatively small country of the Netherlands, Hugo Grotius (1583–1645) advocated natural law. As an actively trading country, dealing mostly internationally, the Netherlands has embraced this to an extent that provisions of

treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents, become binding after they have been published. No national law needs to be passed. Such provisions include provisions made by the EU, but also provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, including, but not limited to the right to a fair trial. Because of this principle of "direct binding", courts may and will apply those rules directly in the cases put before them.

The idea of "*trias politica*" of Montesquieu (1689–1755) has been applied in the Dutch constitution. The executive, legislative and judiciary branch have been separated. In the case of the judiciary, this has been done by appointing judges for life. Judges then judge the cases only based on existing law (including international treaties) and give their judgments which are made public.[2]

As a result, the judiciary of the Netherlands is both independent as well as impartial. Although the Dutch Supreme Court is no constitutional court, and therefore cannot pass judgments on Dutch laws in relation to the Dutch constitution, it will apply international law. This is done in a reserved way, because of the separation of powers. The Supreme Court, however, will give warnings to the Dutch government as to the application of certain laws. It has done so recently on 14 June 2019,[3] where the Dutch Supreme Court warned that a certain fiscal rule might infringe upon article 1 of the Protocol to the Convention for the protection of human rights and fundamental freedoms. Warnings such as this are usually heeded by the Dutch government.

As a result, the Netherlands ranks five out 126 on the World Justice Project Rule of Law Index 2019[4] outranking Germany (6), France (17), the UK (12) and the USA (20). Many international contracts therefore contain a clause that a dispute is to be settled before the applicable Dutch court with the application of Dutch law.

Privilege and disclosure

The word advocate or "*advocaat*" in Dutch, stems from the latin "*ad vocare*" which means to call in. An attorney is therefore, by definition, there to ensure his clients legal protection. To that end, the Dutch Act for attorneys ("*Advocatenwet*") stipulates that the attorney is, in the course of his profession:[5]

a. independent towards his client, third parties and the cases in which he acts in this capacity;
b. partial to looking after the justified interests of his client;
c. competent and able to rely on sufficient knowledge and skills;
d. ethical and he refrains from any acts or omissions that do not befit a respectable; and
e. a person of trust who observes confidentiality within the limits set by law and justice.

Insofar as not stipulated otherwise by law or regulation of the board of representatives, the attorney has a duty of confidentiality with regard to everything he learns, by virtue of practising his profession. He therefore has the right to refuse to give evidence in case he is being heard as a witness. The same duty of confidentiality applies to the employees and staff of the attorney, as well as other persons involved in practising the profession.[6] This includes legal advice as well as documents prepared in respect to litigation and arbitration. However, only when the documents are submitted in the legal procedure, do they of course become known to the other party, but will in principle not be made public. Only the verdict of a court is public.

As a rule, the attorney has an obligation of secrecy. To that end, the Code of Conduct of the Netherlands Bar Association stipulates that if communication between attorneys is confidential, it should be expressly stipulated as such, before making the communication. If such a stipulation is made, such communication cannot be submitted in court, unless with approval of the attorney on the opposite side, or if such approval is not given, approval by the head of the local bar association. Such permission is only given in exceptional circumstances.[7]

Attorneys are not allowed to inform the court regarding negotiations to settle a case, unless they both agree to it.[8] However, should this happen without consent, this has no legal effect in the procedure itself, although it can lead to a disciplinary measure or a liability claim in separate procedures.

In case of a conflict of interest, an attorney is obliged to inform his client and to withdraw from the case.

Evidence

The Dutch civil law system is an adversarial system of justice. The parties to the dispute present the facts and the judge rules on the law to the adage "*da mihi factum, dabo tibi ius*" ("give me the fact[s], I'll give you the law").

The facts presented by the parties need to be proven, if they are contested by the other party. To that end, the Dutch rules of evidence allow almost all evidence admissible. It is then up to the judge to assess the evidence and there are very few rules to which he is bound. However, Dutch law stipulates that parties are obliged to present all facts necessary with regard to the decision to be made relevant facts in full and truthfully. If this obligation is not met, the judge can infer what he thinks expedient. This includes throwing the case out of court.

Dutch law also stipulates that in all instances and in every phase of the proceedings, the judge can order parties to explain certain statements or to submit certain relevant documents. Parties may refuse if there are important reasons to do so. The judge decides whether the refusal is justified and if not, he can infer what he thinks expedient.

Evidence can be gathered beforehand as well as during the legal procedure. It is stimulated to gather evidence beforehand in order to make the legal proceeding more efficient, and weed out proceedings which will never lead to the preferred outcome.

Both witnesses and experts can be questioned beforehand before a judge at the request of one of the parties. Such a request for a hearing before a judge is usually granted, unless it is a fishing expedition or abuse of justice. The request can also be made during the process, in which case it is up to the presiding judge whether or not to allow the request. Questions are asked by both parties as well as the judge.

A relatively new article in Dutch procedural law provides for a duty to exhibit records. If a party has the information, the other party can request to have it exhibited. This can also be done prior to the proceeding as well as during the proceeding. In both cases it is a request put before a judge, who will make sure that it does not become a fishing expedition. Such records can include documents but also includes films, pictures, cd-roms, dvds, sound recordings, computer files, email, USB-sticks and/or tachograph discs, according to the parliamentary explanatory note.

Our firm has been regularly successful in having information disclosed, including documents, audio tapes, etc., especially in relation to banks, who rarely supply all information requested.

Despite current modern possibilities of forwarding such information, it hardly happens; the information can also be deposited at the court in which case both the judge and the opposite party can than look at the information at the courthouse.

Apart from the above, the judge presiding over the proceedings can order one or both of the parties to produce evidence, in order to substantiate a certain claim or statement. Again, almost all evidence is admissible.

Costs and litigation funding

The court fees are fixed and depend on the amount of the claim. At the end of a procedure, the losing party has to pay the court fees to the winning party. The winning party will also receive costs for legal representation which are awarded on the basis of fixed amounts which usually do not cover the real costs. Thus attorney fees, as well as court fees, are maximised and therefore predictable to the losing party. Both parties, however, still bear the aggregate of the real costs of their own attorney.

In family cases it is usually ruled that each party bears his own costs, unless there is some sort of abuse of justice.

Security of the costs can only be demanded of foreigners who start legal proceedings and then only if there is no treaty with the country the foreigner comes from. As the Netherlands has entered into many of such treaties, such a request for security is rarely granted.

Dutch attorneys are not allowed to enter into "no cure no pay" arrangements, except for cases concerning liability for bodily injury. Litigation funding, however, is available, in which case a third party will fund the costs. Usually such third parties have both lawyers and former judges in their employ in order to assess a case. Our firm, where necessary, works together with a reputable litigation funding firm.

Insurance is available, but the maximum amount paid out under the insurance is usually extremely limited, in which case most of the costs must still have to be paid by the party involved. Although the insured are now allowed to choose their own attorney, insurance companies usually need to be reminded of that.

Class actions

Class actions have been possible in the Netherlands since 1994. In 2005 it became possible for settlements to be declared compulsory for all participants by the Amsterdam Appeal Court. Parties are given a certain time to opt-out. Until recently, no claim could be submitted in class actions and individual claimants were forced to start a new procedure when parties did not reach a settlement or the settlement was not to the satisfaction of the individual claimant.

As of 22 March 2019, this has changed. The claim can include a claim for damages as well and these can be awarded by the court. In order to protect the claimants, an interest group has to be either a foundation or a professional organisation with complete legal capacity to submit a claim and not only request a declaratory judgment. In order to make sure claimants are well represented, the interest group is submitted to strict rules, including the obligation to have a supervisory board, as well as to have its finances checked by an external accountant. Even before the act became rule of law, courts have denied claims, as the interest group did not comply with those rules.

Interim relief, enforcement of judgments/awards and cross-border litigation

Under Dutch law, a wide range of interim relief is possible, including various freezing orders, as well as the possibility of having goods transferred out of the hands of the debtor and

sequestered by a bailiff. Although a request for such relief needs to be submitted to the court, such request tends to be allowed fairly easily if a request is reasonably substantiated.

Getting rid of such a freezing order is a different matter. Such a request can be made on short notice (summary proceedings) and in theory, because freezing orders are quite easily given, they should be easily lifted as well. This is, however, in practice not the case. The only thing that will always lift a freezing order is to provide security.

Note should be taken of the fact that if a freezing order is given, but the claim is denied, the claimant is liable for all damage caused. As in the Netherlands a freezing order on a bank account freezes all assets at that moment, damage can be substantial. This is also the case for freezing orders on aircraft and ships.

As of 18 January 2017, the Regulation on establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters,[9] has entered into force for the Netherlands. Instead of going through the local courts of a Member State, a standardised form can be submitted, to allow for an account freezing order. The form is then sent to the competent court of the claim to be submitted or court that has handed down a positive verdict. The court decides within 5–10 days. Thereafter, the freezing order needs to be processed to conform to local law.

Freezing orders from foreign courts within the EU fall within the scope of the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[10] Under this regulation, a claimant within the EU sends the requisite information directly to a Dutch bailiff. If the necessary information is sufficient, the bailiff will execute the freezing order. In all other cases, permission of the competent Dutch court is still needed.

The same goes for the enforcement of court judgments from other countries. Within the EU, Regulation 1215/2012 applies and in other cases permission needs to be requested and granted. This is also the case when there is a treaty on the recognition and enforcement of judgments between the Netherlands and the foreign country. In such cases, the competent Dutch court does not repeat the procedure, but checks whether there is a ground for execution according to Dutch law or a treaty and whether the judgment can be executed in the country of origin. If a judgment has no ground on Dutch law or a treaty, the Dutch court needs to assess what kind of enforcement it gives to the judgment. Whether or not the judgment can be executed in the country of origin is very important in that assessment.

International arbitration, mediation and ADR

In the Netherlands, various arbitration institutions are in place, for instance general institutions such as the ICC court of arbitration and NAI arbitration, as well as more specific arbitration institutions specifically suited for certain sectors of industry. Each institution has its own rules. International judgments are enforceable under the New York Arbitration Convention.

Dutch law only allows for an arbitration declaration declared invalid under specific circumstances, namely: if a valid arbitration contract is lacking; if the arbitration commission is composed in violation of the applicable rules; if the arbitration commission has not complied within its assignment; the arbitration judgment lacks signatures or motivation; or the arbitration judgment or the way in which it came to being is against the public order. Thus, the annulment or revision of an arbitration judgment is rare.

Mediation and ADR are also popular in the Netherlands. Mediation is actively promoted by the Dutch courts; not only in family proceedings, but also in commercial proceedings.

Several mediation organisations exist, usually for a certain professional group. In the case of mediation (as opposed to ADR and arbitration), parties come to a resolution of the dispute themselves. The mediator only guides and does not judge.

Both mediation and ADR have their own set of rules, to which parties have to agree beforehand. The result is in general binding advice, laid down in a settlement agreement. If one of the parties does not comply with the agreement, such an agreement is then submitted to a judge who will – in general – incorporate the agreement into a verdict. The verdict can then be executed. Similar rules for refusal apply as to foreign judgments (see interim relief, enforcement of judgments/awards and cross-border litigation).

On 1 January 2019, the Netherlands Commercial Court ("NCC") was created that provides a new kind of ADR. It allows parties to expressly agree in writing to take a civil or commercial international dispute to the NCC (a chamber within the Amsterdam District Court or the Amsterdam Court of Appeal) and to make English the language of the proceedings. The existing private international law rules apply. The jurisdiction of the Amsterdam District Court or the Amsterdam Court of Appeal may be based on a choice-of-court clause or such other rules as the defendant's domicile.

Proceedings before the NCC are governed by the NCC Rules of Procedure. The court fees are not related to what the case is about or how much money is claimed as is the case in normal proceedings. The court fees are also higher than in normal proceedings and are EUR 15,000 per party at the NCC District Court and EUR 20,000 per party at the NCC Court of Appeal. The losing party will bear the costs of the proceedings. The parties may make agreements they consider appropriate in respect of these costs. Where no agreement is made, the court will, as a rule, apply the rates to assess attorney's fees ranging from EUR 1,000 to EUR 12,000 for each act of process.

Regulatory investigations

Apart from European (EU) as well as International (worldwide) regulatory agencies, the Netherlands has various regulatory agencies in various fields. A few examples are the AFM (Authority Financial Markets), DNB (the Dutch Central Bank), ACM (Authority for Consumers and Markets) as well as various regulatory agencies with regard to specific professional groups (i.e. lawyers, notaries and accountants).

Each has its own set of rules to apply and some sort of punishment. In general, measures taken by such agencies against businesses or even individuals can be contested. First with the agency themselves, thereafter before a court. A court will then assess whether the measure is within the mandate of the agency, whether it complies with its own rules, but also whether it is just. The court will however be reserved and will not make a decision as if it were the agency.

On the reverse side, under exceptional circumstances, regulatory agencies can be held accountable for not investigating sufficiently or even for having caused damage. Again, the courts are extremely cautious in awarding such a claim, because regulators need to have sufficient freedom to their work and not be curtailed by the threat of claims.

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Endnotes

1. As Bos & Partners Advocaten primarily deals with civil law, this chapter is limited to that. If a case is interrelated with either public law, tax law or criminal law, our firm teams up with experts in those fields.

2. Some exceptions are made.
3. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:816.
4. https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced.pdf.
5. Article 10 *Advocaten wet*.
6. Article 11a *Advocaten wet*.
7. Article 26 Code of Conduct 2018.
8. Article 27 Code of Conduct 2018.
9. REGULATION (EU) No 655/2014.
10. REGULATION (EU) No 1215/2012.

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Hendrik Jan Bos first studied economics, before studying law. He specialises in financial litigation and corporate law and has worked for Allianz Versicherung AG in Berlin, Germany for six months. He entered the Bar in 1989. During his three-year obligatory internship, he started a new branch for a law firm. He exited the Bar for two years in order to work for the largest Dutch investment and asset management company (Robeco) in order to learn how financial instruments are made. He then returned to the Bar in order to assist (mostly) companies in their fight against banks, asset managers, insurance companies, etc. as well as assist them on matters of corporate law. He is a member of both the Dutch litigation society as well as the Association on financial law. Hendrik Jan Bos is the name giver and owner of Bos & Partners Advocaten.

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Roger Kroes studied law in Amsterdam as well as at the Nijmegen law school where he obtained a Master's Degree in Business law. He specialises in corporate law as well as liability law with regard to corporations. He entered the Bar in 2002. Roger Kroes has further specialised himself in financial law, assisting a variety of clients (mostly corporate) in their dealings with banks, asset managers and insurance companies. He is a member of both the Dutch litigation society as well as the association for liability and damage compensation.

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Daphne Hulsewé studied both international law and Dutch law in Groningen. Thereafter, she studied air- and space law, as well as maritime law in Montréal, Canada at McGill University. She entered the Bar in 2000. Daphne Hulsewé has specialised in procedural law, litigating in various fields of liability law, mostly financial or corporate related, both national and international. She is a member of both the Dutch litigation society as well as the Association for corporate litigation.

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