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Contents

Florent was founded in 2017 by partners of two Amsterdam-based law firms, who joined their forces (in terms of expertise and solid reputation, their respected clients and distinct multi-disciplinary team orientation). Together with their teams, the corporate boutique firm consists of around 35 lawyers. Florent's experienced lawyers focus on assisting companies during major phases in their life cycle: start and expansion, governance matters, disruptive events (ie, fraud and liability), major disputes, restructuring and insolvency. Dispute resolution is one of the main and most important practice areas of the firm; the Dispute Resuolution team comprises four partners and 12 lawyers.

Authors

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1. General

1.1 General Characteristics of Legal System

As far as the law dealing with natural and legal persons, their property and their relations is concerned, the Dutch legal system is based on civil law. The most important rules are laid down in the Dutch Civil Code (DCC).

In general the density of regulations is high. Belief in the rule of law and trust in legal institutions are relatively robust. International benchmark studies show that the Dutch legal system is generally fast, efficient, accessible and honest. Though the Dutch legal system was known in the recent past for its avoidance of litigation, as in many countries all over the world, that has changed since the 1980s.

The Dutch Code of Civil Procedure (DCCP) sets out the rules governing civil procedure in the Netherlands. The fundamental principles of civil procedure are: independence and impartiality, publicity, party autonomy, hearing of both parties, inquiry into the facts in two instances and supervision of the administration of justice by the Supreme Court (*Hoge Raad*) and mandatory procedural representation of the parties. The Dutch system follows an adversarial model. The legal process is primarily conducted through written submissions, although the parties have the right to request that closing arguments be put forward orally.

All civil proceedings will be conducted digitally in the near future. A new quality and innovation programme is intended to bring increased efficiency with a stronger case management role for the court and its judge.

The relation between the executive branch of government and the public is governed by administrative law. The General Administrative Law Act (*Algemene Wet Bestuursrecht*) regulates both the principles and procedures for decision makers at the level of public administration. Administrative cases are handled by administrative courts.

1.2 Structure of Country's Court System

There are three levels of judicial instances in the Dutch civil court system, all of which are national courts, and all judges are appointees. Nowadays, Dutch courts recruit from professional careers outside the judiciary, as do their Anglo-American counterparts. There is no jury system and bench trials are used for both civil and criminal cases.

Civil cases are brought before one of the 11 district courts in the first instance where they are usually handled by a single judge. However, more complex cases are often referred to a full-bench panel of three judges. District courts also have a cantonal or subdistrict division, with specific jurisdiction on matters involving claims up to EUR25,000 as well as all matters concerning employment and collective bargaining agreements, consumer credit agreements, commercial agency agreements, rental and lease agreements, and consumer purchase agreements. Parties having their case heard in a subdistrict court presided over by a single judge may argue their case in person, and do not need a lawyer to represent them. Certain matters – in particular, family matters (divorce), employment, leases, and bankruptcy – are subject to different civil procedure rules.

A party may file an appeal at one of the four appellate courts if the judgment of the district court proves unfavourable. Appeal cases are always dealt with by a full-bench panel of three judges.

The Enterprise and Business Court of the Amsterdam Court of Appeal, known as the Enterprise Chamber (*Ondernemingskamer*) deserves special mention. This chamber may serve as the court of first instance in matters involving mismanagement and similar corporate issues, or as the appellate court in certain corporate litigation disputes. The Enterprise Chamber consists of a panel of five judges which includes three members of the judiciary and two lay persons with specialist expertise. The Enterprise Chamber is sometimes compared to the Delaware Chancery Court.

In addition, certain district courts accommodate divisions that are specialised in certain areas of law, such as intellectual property (District Court of The Hague) and shipping and transport (District Court of Rotterdam).

The Netherlands Commercial Court (NCC) is expected to open its doors in as early as 2019 and will adjudicate commercial disputes between international (as well as national) companies. The NCC will consist of specialised judges and the proceedings, which are intended to have a quick throughput time, will be conducted in English. The NCC (NCC District Court and NCC Court of Appeal) is being set up in Amsterdam.

The Supreme Court is the highest instance in the Netherlands and reviews the decisions of lower courts, although only on points of law. The Supreme Court is obliged to review all decisions presented to it but it may dismiss complaints without giving reasons if it deems these to be manifestly ill-founded.

Dutch district courts and courts of appeals can pose prejudicial questions to the Supreme Court regarding the interpretation of a legal rule at stake in a concrete case. A court intending to ask a prejudicial question will allow parties to comment on its intention as well as on the exact wording of the question. If the Supreme Court accepts the prejudicial question, it may at its discretion offer parties to the proceeding and even third parties the opportunity to submit written arguments. Administrative procedure provides for three levels: firstly an internal complaints procedure, secondly a court of first instance specialised (chamber of the district court) and thirdly a specialised appellate court (" *Raad van State* ").

1.3 Court Filings and Proceedings
In principle, court sessions and judgments are public, although there are some exceptions. Court hearings may be held behind closed doors, which is highly unusual. Court decisions in adversarial proceedings are in general public. Many judgments are made available online at the courts' website, in anonymised form as regards the names of private individuals mentioned therein (www.rechtspraak.nl). Transcripts of court records, procedural documents and other documents belonging to the case file are not furnished to third parties.

This is further illuminated in **7 Trials and Hearings.**

1.4 Legal Representation in Court
Parties having their case heard in civil court need a lawyer, admitted to the Dutch Bar Association, to represent them. Parties may argue their case in person when their case is heard in a subdistrict court, presided over by a single judge and for some other distinct subject matters. Under EU law, foreign European advocates can conduct cases in the Dutch courts in specific circumstances. After fulfilling certain requirements, foreign European advocates can become members of the Dutch Bar Association.

2. Litigation Funding

2.1 Third-party Litigation Funding
Litigation funding by third parties is permitted in the Netherlands, whereas litigation funding by law firms is not. Common law obstacles such as 'maintenance' and 'champerty' do not arise. Third-party litigation funding is steadily gaining in popularity in the Netherlands; third-party funders (TPFs) have meanwhile set up businesses in the Netherlands in order to offer their services here.

2.2 Third-party Funding of Lawsuits
A variety of commercial claims and disputes with a certain degree of complexity and sufficient substantial interest lend themselves to litigation financing. This can include group claims (collective actions and mass claims settlement (WCAM) – see **3.7 Representative or Collective Actions**); cartel damages; commercial claims; and bankruptcy claims from receivers.

2.3 Third-party Funding for Plaintiffs and Defendants
Litigation funding is available to both claimants and defending parties. In the case of defendants there has to be an 'upside' – for example, in the form of a counterclaim. A defending party or company that is prepared to set aside a certain budget in order to fully settle current and future claims in a case can realise this by means of litigation funding. The risk for the company remains limited to the fixed amount set aside; if the TPF is able to settle the case for a lower amount, the 'profit' goes to the funder. In the case of so-called portfolio funding of litigation, all the litigation of the company concerned, whether claimant or defendant, is financed.

2.4 Minimum and Maximum Amounts of Third-party Funding
As a rule, a TPF asks on average 30-35% of the proceeds (with deviations from this depending on the rigidity of the claim and severity of the risks). The minimum for claims/disputes to be financed by TPFs that are registered and operating in the Netherlands varies between EUR150,000 and EUR5 million. The extent of the costs which the funder is prepared to bear (whether or not in stages) is inextricably dependent on the involved financial interest of the case.

2.5 Third-party Funding of Costs
The costs to be financed by the TPF include lawyers' fees; bailiff fees; court fees; costs of expert witnesses; and possible orders for costs.

2.6 Contingency Fees
Lawyers in the Netherlands are prohibited under the Rules of Conduct of Advocates from providing a 'no win, no fee' service. Alternative fee arrangements that are dependent on the outcome of the case (such as basic fee plus success fee) are, however, permitted.

2.7 Time Limit for Obtaining Third-party Funding
In principle, applications for litigation funding may be submitted at every stage of the legal proceedings – ie, at the start of the proceedings, halfway through, or on appeal.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct
In general there are no procedural prerequisites to filing a lawsuit, except for cases of mismanagement brought before the Enterprise Chamber (Section 2:349 DCC) and collective actions (Section 3:305a DCC). When failing to comply with these prerequisites, a plaintiff may not have cause of action. Besides, a notice of default will often be required in order to enforce one's rights. More generally, it is advisable that a party clearly communicates its position in writing before filing a law suit, as otherwise the court may be reluctant to order the losing party to pay the costs of litigation of the prevailing party.

3.2 Statutes of Limitations
Unless otherwise provided for by law, a claim becomes time-barred after 20 years (Section 3:306 DCC). In most cases, however, claims become time-barred after five years, although even shorter statutes of limitation do exist.

Specific statutes of limitations provided for by law include, inter alia:

- the right to claim specific performance of a contractual obligation becomes time-barred after five years of such a claim becoming due and exigible;
- the right to claim damages becomes time-barred after five years from the day after the injured person became aware of:
  (a) the damage inflicted; and
  (b) the identity of the person liable for this damage. In any event, the claim is time-barred after 20 years following the day on which the event causing the damage occurred;
- the right of a seller to demand payment of the purchase price in the case of a consumer sale agreement, which becomes time-barred after two years of such claim becoming due; and
- the right to demand the annulment of a resolution of a constituent body of a legal entity, which becomes time-barred after one year following the publication or notification thereof.

3.3 Jurisdictional Requirements for a Defendant

Dutch courts have international jurisdiction if there are legal provisions to this effect or if the parties have selected a Dutch court as the forum for hearing any disputes arising between them. The European Council Regulation EU No 1215/2012 of 12 December 2012 (the "Brussels I Recast") contains the most important set of rules regarding international jurisdiction. The Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters is also still in force between EU Member States and Switzerland, Norway and Finland. If no international treaty (including the Brussels I Recast) applies, the national rules laid down in the DCCP determine whether the Dutch courts have international jurisdiction and accordingly, whether a defendant can be made subject to a lawsuit in the Netherlands. These rules are very similar to the international jurisdiction rules of the Brussels I Recast.

The basic rule is that Dutch courts have jurisdiction if the defendant is domiciled in the Netherlands (Section 2 DCCP). Dutch courts also have jurisdiction if the parties have agreed to elect a Dutch court to adjudicate disputes that have arisen or may arise from their legal relationship (Section 8.1 DCCP).

Furthermore, if an attachment is levied on assets located in the Netherlands, and there is no other way of obtaining an enforceable title regarding them, the Dutch court that granted permission to levy the attachment has jurisdiction over the claim in the principal action (Section 767 DCCP). This may apply even if the Dutch courts do not have jurisdiction under the Brussels I Recast or other treaties or under Dutch law when a foreign judgment is not enforceable in the Netherlands. However, Section 767 DCCP may not be invoked if the parties have agreed on the exclusive jurisdiction of a foreign court.

The forum necessitas doctrine as referred to in Section 9 of the DCCP deviates from the Brussels I Regulation and states that Dutch courts also have jurisdiction when legal proceedings outside the Netherlands are impossible or unacceptable for the claimant. This only applies in limited and exceptional circumstances such as war, natural disaster or discrimination in the foreign country. The forum non conveniens doctrine does not apply. As long as the Dutch courts have jurisdiction in line with the applicable rules, the defendant cannot argue that a court in another jurisdiction would be more convenient or appropriate.

3.4 Initial Complaint

There are two main types of civil procedures in the Netherlands. These are respectively the procedures initiated by a summons (*dagvaarding*) and by an application (*verzoekschrift)*, which is less formal. The procedure by summons is used for ordinary civil suits while the procedure by application is used in disputes involving employment; leases; family; and certain corporate matters. The procedure by summons is the most important in terms of numbers of cases and financial interests involved.

The summons must give a detailed description of the nature of the dispute giving all the relevant facts, the legal grounds on which the claim is based and the relief sought, as well as stating and refuting all arguments put forward by the defendant unless these are unknown to the claimant. The claimant must also indicate what evidence is available to support the claim and provide names of witnesses.

The description of the nature of the dispute is a decisive factor in determining whether a court has jurisdiction. Given that the claimant will not always have an opportunity to submit further written comments, it is essential that all claims are made and fully substantiated in the summons. Clearly specifying the relief sought can enable the court to render a default judgment if the defendant does not appear in the proceedings.

Service of a summons interrupts any limitation periods. Procedural errors or omissions in the summons which could lead to it being nullified may be amended by the claimant by issuing a recovery writ prior to the date of the formal court appearance stipulated in the original writ. The claimant can still amend or increase its claim or legal grounds by submitting a written conclusion or statement as long as the court has not rendered its final judgment. The defendant may object to any amendment or increase of claim on the grounds that it is contrary to the requirements of due process.

3.5 Rules of Service

The claimant is responsible for ensuring that service takes place. A bailiff serves the summons on the defendant, thereby formally notifying the defendant of the lawsuit. Subsequently, the claimant must file the summons with the Court Registrar before the last business day prior to the date of formal court appearance as stipulated in the summons.

A party can also be sued outside the jurisdiction of the court. The service of judicial documents across national borders is regulated primarily by the 1965 Hague Convention and the EC Regulation No 1393/2007 (the 'Service Regulation').

The 1965 Hague Service Convention requires each contracting state to designate a specific body, known as the 'Central Authority', to receive and execute requests for service from other contracting states on persons domiciled in that state. The Central Authority in the Netherlands is the public prosecutor at the district court in The Hague. The Central Authority of the originating state forwards the document to be served to the Central Authority of the state of destination, without any requirement of legalisation or other similar formality. The document should be accompanied by a covering request in accordance with the model annexed to the 1965 Hague Convention. The Central Authority of the state of destination then has the responsibility of ensuring that the document to be served reaches the defendant in a manner that is deemed adequate for service of such documents in that country. Most of the Netherlands' important trading partners – including the EU countries; the United States; Canada; China; Japan; Hong Kong; and the Russian Federation – are signatories to the 1965 Hague Convention.

The Service Regulation applies in all civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one EU member state to another for service. The regulation prevails over bilateral or multilateral treaties or arrangements between member states with the same scope. It also prevails over the 1965 Hague Convention, though system applied by the Service Regulation is quite similar. As with the Hague Convention, each member state is also to designate a transmitting and receiving authority in respect of judicial and extrajudicial documents to be served in or received from another member state. Again, the document to be served in another member state should be accompanied by a request drawn up in a standard form, and the receiving authority must then either serve the document itself or have it served as soon as possible, either in accordance with the law of the state of destination or by a particular form requested by the transmitting authority (unless such a method is incompatible with the law of the state of destination). The receiving authority has a duty to inform the transmitting authority if it has not been possible to effect service within one month of receipt of the document.

The minimum period of time between service of a writ on a defendant in the Netherlands and the date of the formal court appearance is one week. If the defendant resides in either an EU member state, subject to the Service Regulation, or a contracting state to the 1965 Hague Convention, a minimum period of four weeks should be observed. For defendants residing in other states, a minimum period of three months between service and formal appearance in court applies. It is possible to request the court to shorten the aforementioned minimum period on the basis of Section 117 DCCP.

3.6 Failure to Respond to a Lawsuit

A claimant may obtain a default judgment if the defendant fails to appear in court on the date of formal court appearance. If this occurs, the court first verifies whether the prescribed terms and formalities of service of process have been fulfilled and whether all requirements regarding the summons have been met. If this is the case, the court grants leave to proceed in default of the defendant's non-appearance and the claim is awarded unless the court considers the claim to be prima facie unlawful or unfounded (Section 139 DCCP). The court must therefore test whether the claim breaches public policy or mandatory law and consider whether the legal and factual grounds invoked can sustain the claim and whether the court has competence to consider the claim.

As long as the final default judgment has not been rendered, the defendant may still appear in court and defend its case. A defendant may apply to set aside a default judgment within four weeks after the judgment has been pronounced (eight weeks if they are domiciled abroad).

3.7 Representative or Collective Actions

Dutch procedural law allows two options for collective and representative actions. Injured parties can bundle their claims by giving one person (which can also be an ad hoc-foundation or association, also called " *Claimstichting* ") a power of attorney to act on behalf of all of them; alternatively, they can initiate a collective action based on Section 3:305a DCC.

A possible disadvantage of bundling claims via power of attorney is that a power of attorney is required from each individual wishing to bundle their claim. Moreover, when reviewing the case, the court will have to consider all specific circumstances relevant to each of these individuals. Both circumstances can lead to extra delays and costs.

The sSction 3:305a DCC route enables a foundation or association with full legal capacity to institute an action aimed at protecting similar interests of other individual persons to the extent that the promotion of these interests is set down in its articles of association. The interests of those – both Dutch and foreign – individuals (group members) should be of such a nature that they are capable of being bundled,

thus expediting the efficient and effective legal protection of the interested parties. As a threshold to bringing such an action, the association or foundation must furnish proof that it has first attempted – in vain – to achieve its goal through dialogue with the defendant.

Current Dutch law – change in the law is pending – does not allow the group members to claim damages in this kind of collective action, only a declaratory judgment that the defendant has breached his duties or committed a wrongful act against the injured parties. Once the association or foundation succeeds in obtaining a declaratory judgment, it is up to the individual injured parties to claim monetary compensation in individual proceedings. However, often the claimant's vehicle will enter into settlement negotiations with the defendant once a positive judgment has been obtained. Dutch law also provides for court certification of damages in mass claim settlements (WCAM), as further illuminated in **8 Settlement**.

Practice is likely to change, with a new bill proposing a collective action for damages on behalf of the group members, to be judged by the Amsterdam Court. If the proposal is enacted in its current form, it is expected to have a significant impact on the litigation climate in the Netherlands (and possibly the rest of Europe). The proposal includes a 'scope rule', a collective action can only be brought before the court if it has a sufficiently close connection to the Dutch jurisdiction. The claims association or foundation need to meet certain criteria before they can bring a collective action. The outcome of the collective action proceeding for damages would only become binding on individuals if they opt-in to the court decision. The proposed regime can be used if there are no other efficient and effective means to obtain redress.

3.8 Requirement for a Costs Estimate

Dutch attorneys are required under the Rules of Professional Conduct of the Dutch Bar Association to discuss the financial consequences of their engagement and of any legal action. Because it is difficult to predict all eventualities, estimates are often used for well-defined procedural steps.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

The concept of pre-trial proceedings in which decisions are made regarding procedural points – as is the case with Anglo-Saxon legal systems – does not exist in the Dutch judicial system. One kind of exception concerns an order by the court for an appearance of the parties before statements for appeal (if the complainant has contented themselves with a pro forma summons to appear in appeal proceedings). The purpose of the court in this is to investigate whether – eg, with the aid of an out-of-court settlement – the parties can be dissuaded from continuing legal proceedings.

Also, defences regarding the invalidity of the writ of summons, the competence of the court or the inadmissibility of evidence from the claimant are not dealt with prior to the proceedings but rather during the course of the proceedings. These preliminary defences ought to be put forward once the dispute is before the court and prior to all other (substantive) defences. There is however the possibility of already gathering or securing evidence prior to a proceedings by for example demanding inspection of documents or copies of documents pursuant to Section 843a DCCP or by submitting a request for a provisional examination of witnesses or an expert report.

Once a dispute is pending before the court, each party has the possibility of initiating an interim action or applying for injunctive relief. In most of the cases, a procedural issue is central to this. Examples of interim actions are: motion contesting jurisdiction, inspection of documents or copies thereof, third-party claims, request for joinder and intervention, referral and consolidation of cases and provision of security for litigation costs. It is also possible to claim interim relief (a measure of a provisional nature) for the duration of the dispute. This requires that there is a relationship with the principal claim.

4.2 Early Judgment Applications

It is not possible to apply for a substantive (partial) ruling prior to the actual proceedings. It is, however, possible to request the court, via an appearance of the parties (which can be ordered at every stage of the proceedings, sections 87 and 88 DCCP) or by a procedural motion, to first render a decision regarding preliminary issues such as the period of prescription, the competence of the court or applicable law. The court, however, is not obliged to do so.

4.3 Dispositive Motions

There are no dispositive motions under Dutch law.

4.4 Requirements for Interested Parties to Join a Lawsuit

Anyone who has an interest in a case before the court that is between other parties may apply for permission to join the lawsuit or to intervene in it (Section 217 DCCP).

In a joinder, the interested third party supports the position of one of the parties. In the case of an intervention, the interested third party takes up its own position in respect of both the claimant and the defendant. Both in the cases of a joinder and an intervention, an interested third party voluntarily intervenes in a dispute which is already pending before the court.

By means of an impleader, a third party can be involuntarily summoned by one of the parties in a separate third-party proceedings which is dealt with, to the extent possible, concurrently with the main proceedings already before the

same courts (Section 210 DCCP). In order to be permitted to implead a third party, it is sufficient that it should be conceivable that there is a legal relationship with this third party based on which said party has a duty to indemnify the impleading party.

4.5 Applications for Security for Defendant's Costs

Anyone who is implicated in proceedings by someone who has no domicile or residence in the Netherlands may bring an action to provide security for litigation costs (also known as providing security, Section 224 DCCP). In this way, it is possible to prevent any potential recovery of litigation costs from being hampered by the fact that the party against whom the order has been given lives in a country where the judgment cannot be enforced.

4.6 Costs of Interim Applications/Motions

In addition to the order to pay costs in the main proceedings, the court pronounces a separate order to pay costs in procedural issues. The party which is ruled against in this instance is ordered to pay the costs (see **11.1 Responsibility for Paying the Costs of Litigation**).

4.7 Application/Motion Timeframe

To the extent deemed required, the court decides first and in advance upon preliminary applications if there are any involved. This is assessed in accordance with the nature and the contents of the claim; the interests of the parties; and the interest of an efficient litigation process. In principle, there is a time-frame of two weeks for an opinion in a procedural issue, and four weeks for a ruling in the procedural issue. However the court has a large degree of discretionary jurisdiction in determining the periods for injunctive relief, depending on the circumstances of the case.

5. Discovery

5.1 Discovery and Civil Cases

There are no discovery or disclosure procedures comparable to common law systems in the Dutch judicial system. However, there are instruments available for obtaining further information aimed at establishing the truth.

Interested parties may pursuant to Section 843a DCCP request inspection of, or copies or extracts from, certain documents from those who have these documents at their disposal ('production of exhibits'). Such documents include movies, pictures, audio tapes, CD-ROMs and computer files. This action may be instituted in preliminary relief proceedings or as an interim action in ongoing proceedings. The application of Section 843a DCCP is not limited to legal relationships which could result in a lawsuit before the Dutch court.

In addition, even if no legal proceedings are pending as yet, a party or interested party may request the court to hold a witness hearing (such hearings may be preliminary if there are no proceedings as yet) or obtain an expert report (sections 186 and 202 DCCP).

The aforesaid ways of acquiring information or gathering evidence take place after the court has granted an application for this purpose and are regulated by the court.

5.2 Discovery and Third Parties

An application for the production of exhibits (aside from discovery) may, as explained above, also be extended to a third party.

5.3 Discovery in this Jurisdiction

For the requests for the production of exhibits to be granted, three cumulative conditions must be satisfied:

- the requesting party must have a legitimate interest in obtaining the information;
- it must concern specific documents, the existence of which has been established to a sufficient extent and which are defined at any rate in terms of subject matter and persons involved (in order to prevent fishing expeditions); and
- these records must concern a legal relationship to which the requesting party or its predecessor is a party.

It is sufficient for this purpose that the documents are relevant for the adjudication of the dispute in the context of which the information was requested. The request for inspection or copies of documents may be refused pursuant to weighty reasons or if a proper administration of justice can be guaranteed without furnishing the requested information.

5.4 Alternatives to Discovery Mechanisms

Under the Dutch judicial system, it is up to the parties to sufficiently substantiate and where necessary prove their positions whereby legal consequences are invoked (Section 150 DCCP). Providing evidence can take place by any legal means, including hearing witnesses; input from expert reports; and the production of documents, whether or not obtained on the basis of an application for the production of exhibits (as described above). The weight and evaluation of evidence is further illuminated in **7 Trials and Hearings**.

5.5 Legal Privilege

Legal professional privilege applies to every lawyer (including lawyers in a relationship of employment) who is enrolled as a member of the Netherlands Bar Association. Insofar as the law does not provide otherwise, a lawyer is obliged to maintain confidentiality regarding everything which comes to their attention by virtue of their professional practice. This obligation also applies (in a derivative form) to employees and colleagues of the lawyer, as well as to other persons who

are involved in the professional practice, such as advisers who are directly instructed by the lawyer. Legal proceedings are regularly conducted with regard to the extent to which the latter may or may not maintain confidentiality.

5.6 Rules Disallowing Disclosure of a Document

The request for inspection or copies of documents may be refused pursuant to weighty reasons, which may apply to trade secrets or certain confidential information. Pragmatically, the party owning the documents can propose to provide the documents to the judge only, to assess the nature of the documents first, or to blackline the sensitive parts in the documents before providing those to the petitioner. The judge will on a case-by-case basis, balance the interests of the claimant against the interests of the refusing party and decide the way in which documents, if any, are to be disclosed. Furthermore a party in a 'functional privileged' position, capacity or relationship bound by confidentiality (ie, medical professionals, religious frontmen, lawyers and civil law notaries) may be discharged to submit documents. Correspondence between lawyers, when with mention on beforehand of the privileged nature, are deemed – as client-attorney privileged – to be excluded from production of exhibits.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

A party with a sufficiently urgent interest in injunctive relief may initiate summary proceedings (254 DCCP). An injunction for the duration of the dispute may be requested in proceedings on the merits already pending (223 DCCP).

The range of possible injunctions is broad. The urgency always implies that a disciplinary measure will be taken, and it must be sufficiently likely that the court, in proceedings on the case's merits, will come to an identical decision, so that this can be anticipated in preliminary relief proceedings. The injunction applies until such time as a decision is reached in any proceedings on the merits of the case.

The court in summary proceedings may lift prejudgment attachments that have been levied (705 DCCP); order the suspension of the execution of a court ruling; or decide that continuation of this is only possible if security is furnished (438 DCCP). It is also possible to impose a ban on: bringing products into circulation that infringe copyrights; uttering unlawful statements; or employees exercising their right to strike. In addition, the court may order the performance of an agreement by a party (3:296 DCC). An injunction to pay a sum of money is possible if it is sufficiently likely that the defendant owes this sum, and that there is no risk that the claimant will not be in a position to make a repayment if the court rules differently in proceedings on the merits of the case.

The Enterprise Chamber of the Amsterdam Court of Appeal has jurisdiction to hear business law disputes (2:349a DCC). This chamber may order immediate relief if there are well-founded reasons to doubt a sound policy or a proper course of affairs within a legal entity, or if immediate relief is required in connection with the state of the legal entity. The Enterprise Chamber may, for example, suspend or dismiss directors and supervisory directors or temporarily appoint them; order shares to be transferred in trust; and allow further deviations from the articles of association. All of this would be at the request of the parties or because the Enterprise Chamber itself deemed these measures to be necessary. The jurisdiction of the Enterprise Chamber can be experienced by foreign parties as remarkable and highly extensive.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

A preliminary injunction hearing can take place every day – including on Sundays – and at any hour, either inside or outside the courthouse. The court in preliminary relief proceedings determines the place, date and time of the hearing. If the urgency of the case so warrants, an oral hearing can take place within a few hours, followed by an oral judgment.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

The possibilities of an ex parte application under Dutch law are limited to prejudgment attachment and enforcement of intellectual property rights.

An ex parte application for prejudgment attachment can result in permission to arrest shares; bank accounts; movable and immovable property; ships; aircraft; and other assets (711-729e DCCP), but also documentary evidence (730 in conjunction with 843a, DCCP). The handling of unilateral applications prevents the removal of assets or documentary evidence. The relative ease with which prejudgment attachment can take place is regarded by foreign parties as strikingly characteristic.

The court may, as immediate relief for the benefit of a holder of intellectual property rights, issue an injunction against an infringing party so that imminent infringement is prevented, or incurred infringement is ended (1019e DCCP).

6.4 Applicant's Liability for Damages

Due to its preliminary character, enforcement of a judgment in preliminary relief proceedings might be unlawful if the executor does not succeed in a proceedings on the merits or on appeal. The executor is liable for the damages suffered by the opposing party as a consequence of the enforcement. The same applies to the party which has levied the prejudgment attachment. The court has the possibility of allowing the enforcement of a judgment, or the levy of prejudgment attachment, on the condition that security is furnished (233(3) DCCP and 701 DCCP respectively).

6.5 Respondent's Worldwide Assets and Injunctive Relief

The Dutch legal system does not as such provide for injunctive relief against worldwide assets of the respondent.

However, it is possible under the Brussels I Regulation Recast to apply to the Dutch court for a cross-border provisional or protective measure, provided that this would also be within the jurisdiction of the proceedings on the merits of the case. If this concerns an ex parte order, this can only be enforced in the other EU Member States after the decision has been pronounced. Accordingly, the practical relevance of this possibility is limited.

As from 18 January 2017, it will be possible via the so-called European Account Preservation Order (EAPO) to levy a European prejudgment attachment on bank accounts.

6.6 Third Parties and Injunctive Relief

Provisional and protective measures may only be obtained in respect of parties which are involved in proceedings. If they have sufficient interest, third parties who fear the violation of their rights may join or intervene in proceedings before the court between other parties (217 DCCP) in order to protect their own rights.

6.7 Consequences of a Respondent's Non-compliance

It is recommended that a penalty be demanded in summary proceedings if the other party fails to comply with an order to do something or to refrain from doing something. Authorisation to perform activities independently (3:299 DCC), or to determine that the judgment has the same force as a legally prepared instrument, (3:300 DCC) may also be claimed. The concept of contempt of court does not exist in the Netherlands.

7. Trials and Hearings

7.1 Trial Proceedings

Legal proceedings in the Netherlands are for the main part conducted in writing. The claims brought by the claimant are set out in a writ of summons. The defendant responds to this in a statement of defence, in which they may also lodge a counterclaim. The court may subsequently order an appearance of the parties (Section 131 DCCP). The objective of such a hearing is to obtain further information from the parties and to attempt to reach an amicable out-of-court settlement.

The parties have the opportunity prior to an appearance (as with oral pleadings) to submit additional written documentary evidence to the proceedings. If the court proceeds to a second written round (reply and rejoinder) without a court appearance having taken place, at the request of (one of) the parties, oral pleadings will be ordered to assure at least one oral hearing.

In an interim judgment, the court may order (one of) the parties to produce evidence, appoint an expert or set a witness hearing or a site visit. If a witness hearing has taken place, then the other party may be given the opportunity to have witnesses heard in a counter-examination.

7.2 Case Management Hearings

In preliminary relief proceedings, the oral hearing is generally the first opportunity for the defendant to set out a rebuttal of the claim brought against it in the preliminary injunction. The defendant may, however, submit exhibits to the proceedings prior to the hearing. There is usually no place in preliminary relief proceedings for hearing witnesses or expert witnesses.

In proceedings on the merits, the court may set a case management hearing (*regie zitting*) at the request of the parties or ex officio. This occurs mainly in complex and extensive civil disputes involving multiple litigants. Issues which may be discussed are, for example, the order of the procedural actions; partial rulings regarding preliminary questions; and continuing legal proceedings on parts of issues where additional investigation/taking of evidence such as witness examinations is desired.

7.3 Jury Trials in Civil Cases

Civil cases in the Netherlands do not employ jury trials.

7.4 Rules That Govern Admission of Evidence

In principle, all forms of evidence are allowable in civil lawsuits, even if these have been obtained unlawfully. Only under special circumstances is evidentiary material submitted deemed inadmissible due to its nature. However, it is possible for the court to disregard evidentiary material because it has been submitted to the proceedings too late. The court has great discretionary power in the assessment of the evidence. There are exceptional statutory rules that apply to some kinds of evidence. Legally valid deeds and criminal judgments in a defended action deliver conclusive evidence. This implies that the court must assume the reliability of the contents of these documents, subject to evidence to the contrary from the other party. An (oral) witness testimony of a party testifying on its own behalf is only accorded very limited evidentiary force; it needs to be substantiated with supplementary evidence. The timing of sufficiently prompt and specific offers of proof (or counter-evidence) is extremely precise in Dutch procedural law, so that this evidence may in fact actually be furnished if it should appear to be necessary.

Practice is likely to change, with a new bill proposing the modernisation of law of evidence with the aim to provide for evidence prior to trial and establish a form of dispute resolution that leads to more effective solutions and earlier

settlement of disputes. If the proposal will enter into effect, all applications for evidence must be bundled together in one set of preliminary proceedings.

7.5 Expert Testimony

Expert evidence may be furnished by submitting written expert evidence by one of the litigants or by having an expert examined as a witness. The court may, at the request of the parties or ex officio, order an (independent) expert to provide an expert report or to be heard.

7.6 Extent to Which Hearings are Open to the Public

Hearings in civil cases are in principle open to the public. However, under special circumstances the court may choose to have court hearings held behind closed doors – for example, if public policy or public morality so demands, or, by way of an exception, if highly confidential company information is under discussion. Anyone may receive a transcript of a court decision in a civil case, unless there are substantial interests of others who oppose this. Transcripts of court decisions in cases which have been held behind closed doors are only provided in anonymised versions. Transcripts of court records, procedural documents and other documents belonging to the case file are not furnished to third parties.

7.7 Level of Intervention by a Judge

In principle, the judge adopts a passive approach in civil proceedings: the scope of the dispute is determined by the parties, and in general the judge may not act outside of the debate between the parties. However, there is an increasing degree of management by the judge, on the grounds of efficiency in establishing the truth. During hearings, the judge is free to play an active role. Some judges leave the debate mostly to the parties, while other judges keep a firm hold on the reins and pose questions during the hearing to the parties present as well.

A judgment is not pronounced immediately at the close of a hearing, but a date, which may be extended, is set for the judgment. In preliminary relief proceedings and immediately enforceable measures of relief at the Enterprise Chamber, the judge may, in matters of urgency, also make an oral judgment at the hearing.

7.8 General Timeframes for Proceedings

For ordinary commercial disputes, it takes on average between one year and 18 months from the moment of issuing a summons until the final judgment. This period can, however, take considerably longer if the litigation is continued in writing (which is virtually standard in complex cases), or if motions or procedural issues are raised (eg, jurisdiction, impleaders, production of exhibits) or further evidence must be taken. A provisional judgment in preliminary relief proceedings is obtained considerably more quickly; the period varies from immediately at the hearing or within one day (in cases of extreme urgency) to a couple of weeks.

8. Settlement

8.1 Court Approval

Generally speaking, settlements agreed on between the parties do not require the approval of the court. As a rule, the agreements between the parties are incorporated in a so-called settlement agreement (*vaststellingsovereenkomst*) (Section 7:900 DCC). Such an arrangement may not prejudice the rights of third parties (Section 7:903). An out-of-court settlement can, incidentally, also be reached before the court, and recorded in an enforceable court record. The court facilitates parties in this, but does not grant any approval.

The Dutch judicial system provides for a specific collective arrangement for the settlement of large-scale loss – which does, however, require approval from the court (in accordance with the Collective Mass Claims Settlement Act, WCAM). The core of the WCAM is contained in sections 7:907–910 DCC and sections 1013-1018 DCCP. The WCAM makes it possible for collective interest groups to have an agreement that was concluded with another party (the party causing the loss), declared generally binding at the Amsterdam Court of Appeal in cases of large-scale loss. This (published) generally binding declaration consequently binds the entire group of injured parties, both in the Netherlands and abroad, and accordingly enables a settlement with an undetermined number of injured parties. Remarkably, there is no requirement that either the party causing the loss or the injured parties must have a tie with the Netherlands. WCAM proceedings thus can be and have been used for global settlements with relatively little connection to the Netherlands.

The procedure of generally binding declaration can also take place without any previous lawsuit between the interest group and the party causing the loss. The Dutch WCAM proceedings are currently the only European collective settlement that provide for a so-called opt-out option. This gives individual injured parties the option to withdraw (by written declaration, within a certain period) from the order declaring a collective agreement binding.

With regard to the settlement agreement, the order declaring a collective agreement binding is dependent on five criteria listed in Section 7:907 (2) DCC. If the court is of the opinion that the agreement does not satisfy the requirements, it can order the parties to amend it. Where necessary, the court will seek expert advice. Reference is made to the **3.7 Representative/Collective Actions**, for pending new legislation regarding a collective action for damages, which is likely to put increased pressure to settlement claims.

8.2 Settlement of Lawsuits and Confidentiality

Generally speaking, settlements between parties can remain within the group of parties involved, and do not need to be made public. As a rule, the settlement agreement contains confidentiality clauses for this purpose, which may or may not include a penalty clause. Parties cannot be bound to secrecy if they are obliged under a court ruling or by order from the relevant authorities to disclose the contents of the agreement.

A collective WCAM settlement qualifies as a court judgment and is, accordingly, public. Both the parties involved and every other interested party may inspect it and obtain a transcript thereof (Section 28(1) DCCP).

The right to a transcript of an order given in open court can be restricted in view of certain interests of the parties (eg, privacy, business secrets). In this case, it is sufficient for the clerk to provide an anonymised transcript or extract of the court order.

8.3 Enforcement of Settlement Agreements

If the contents or legal validity of a settlement between parties is not disputed by the party from whom performance is being sought, an enforceable title can be obtained fairly swiftly in order to proceed with enforcement. A settlement laid down in a court record and signed by the parties before the court can, if so requested, include an enforcement order. Such a settlement can be enforced immediately.

8.4 Setting Aside Settlement Agreements

In a settlement agreement, the parties reach a binding decision in order to end or prevent uncertainty or disputes regarding their legal entitlements. This settlement can deviate from the actual legal relationships between the parties. The objective of such an agreement is to provide those involved with as much legal certainty as is possible. A settlement agreement is also legally valid if the contents are contrary to mandatory law, unless there is also a conflict with public morality or public policy (Section 7:902 DCC).

In contrast to a normal agreement, a settlement agreement cannot be dissolved by means of an extrajudicial declaration (Section 7:905 DC). The settlement agreement is legally voidable in the event that the agreement was effected under duress or by means of deception. It can only be declared void by the court if there are compelling arguments for a false portrayal of the facts (Section 6:228(2) DCC) or misuse of circumstances (Section 3: 44 DCC).

Furthermore, a court settlement can only be reviewed under special circumstances, such as blatant errors, deception or fraud.

9. Damages and Judgment

9.1 Awards Available to a Successful Litigant

Order for Specific Performance of an Agreement

Pursuant to Section 3:296 DCC, the court can order a party to fulfil its legal obligation (eg, a contractual obligation) towards the claimant.

Application for an Order or Injunction

The court can order a party that is acting unlawfully, or which is likely to act unlawfully, to perform certain actions (order) or to refrain from performing them (injunction). Every judicial order can be reinforced by penalty payments, which are forfeited to the claimant if the order is not performed or not performed on time. Irrespective of the penalty payments collected, the claimant reserves the right that the original legal obligation towards the claimant will still be fulfilled and payment made of any compensation by the party against whom the order has been given.

Damages

If a party does not fulfil its legal obligation towards another party, the entitled party may claim damages instead of performance (Section 6:87 DCC). In principle, it is also possible to obtain partial performance and damages for the remainder.

Rescission (*Ontbinding*)

An entitled party that has not received or is in danger of not receiving the performance of the obligation as agreed can, in principle, either completely or partially set aside the contract with that party. The entitled party can demand rescission by court order (or extrajudicially). Rescission lacks retroactive effect. It is possible to seek damages in addition to this.

Amendment

In the event of unforeseen circumstances, the court can likewise partially or completely rescind or amend the contract.

Annulment *(Vernietiging)*

A party that has concluded a contract under duress, error, deception or misuse of circumstances may request the court to annul the contract. Annulment has retroactive effect.

9.2 Rules Regarding Damages

Under Dutch law, only compensatory damages are available; punitive damages are not available. The parties may mutually agree to a penalty clause, which can also be enforced via the court.

It is not possible to cumulatively request both performance of the agreement and the agreed penalty. Nor is it possible to cumulatively request both damages as well as the agreed penalty unless otherwise agreed, or if fairness so requires. The court can reduce an agreed penalty if fairness so requires.

Damages are in the form of money. The court can, at the request of the injured party, rule that compensation in another form must take place (Section 6:103 DCC). This could include restoration ('restitutio in integrum'). In certain cases, it is possible, by way of compensation, to obtain rectification (Section 6:167(1) DCC and 6:196(1) DCC).

Loss does not only include financial loss, but also non-financial loss due to bodily injury or the violation of personality rights and fundamental rights. Loss also includes future loss.

If a party has not only suffered loss but has also benefited as a consequence of the violation of a legal obligation towards it, then this gain is set off when calculating the loss (Section 6:100 DCC)

If a party has profited as a consequence of having violated a legal obligation towards another party, then the compensation which it must pay to the injured party can be determined by the court on the basis of its entire or partial profit (Section 6:104 DCC).

The court can reduce damages if fairness so requires, but never to an amount lower than the amount of insurance coverage of the party against whom the order has been given (Section 6:110 DCC).

9.3 Pre- and Post-judgment Interest

Interest is, generally speaking, owed from the date that the legal obligation ought to have been fulfilled, even if that date was (long) before the judgment of the court. The rate of interest is statutory unless the parties have agreed to a different rate of interest. The interest is owed for the entire period up until the order to pay has been fulfilled.

9.4 Enforcement Mechanisms for a Domestic Judgment

Final judgments (with res judicata force) or judgments with immediate effect may be enforced after being served by the bailiff. If prejudgment attachment was imposed against the obligor in order to secure compliance, this can be converted to cash under execution. The party against whom the order has been given must inform the bailiff regarding the manner in which it will comply with the judgment. If payment is not forthcoming, recovery will take place on the assets of the party against whom the order has been given. Sometimes specific rules apply for other kinds of obligations. The entitled party can be authorised by the court to undertake certain activities itself at the expense of the party against whom the order has been given. In other cases, the court can decide that the judgment will supersede the juridical act that ought to have been performed by the party against whom the order was given.

9.5 Enforcement of a Judgment From a Foreign Country

In civil and commercial matters, the recognition and enforcement of judgments from member states of the EU (except for Denmark) is laid down by the recast of the Brussels I Regulation and some other EU regulations. If it involves the recognition or enforcement of a judicial decision of a non-member state, Dutch general law becomes applicable.

Recognition and Enforcement of Judgments from EU Member States (Except Denmark)

Since the entry into force of the Brussels I Recast, a judgment rendered in a Member State – which is enforceable in that state – is also enforceable in the other Member States, with the need for a declaration of enforceability. A party can apply to the enforcing authority in the country of enforcement. In the Netherlands, this is the bailiff.

The party against whom enforcement is requested is informed of the amount of the enforcement by notice of service of the judgment and/or the certificate which, pursuant to Article 53 Brussels I Recast, is handed over by the original court. This party can subsequently oppose the enforcement in the Netherlands by invoking the grounds for refusal under Article 45(1) Brussels I Recast, as well as the grounds that can be advanced under Dutch law for refusal or suspension of the execution (provided that these grounds are not incompatible with the grounds of Brussels I Recast). In the Netherlands, the court where the application for refusal has been submitted is the competent court, pursuant to Section 438 DCCP, to adjudicate enforcement disputes.

In the Netherlands, a judgment on the application for refusal of the enforcement may be appealed by every party in a higher instance and in cassation (Section 10 Implementation Act).

Recognition and Enforcement of Judgments from Non-EU Member States

Recognition

In principle, the court is free to judge if, and to what extent, authority is assigned to a foreign decision in the Netherlands. Nevertheless, the starting point is that a foreign judgment – regardless of its nature or purpose – can only be recognised in the Netherlands if four minimum requirements have been met:

- the judgment was rendered by a court that has considered itself competent based on an internationally acceptable ground for jurisdiction;
- rules of proper administration of justice have been observed;
- recognition of the judgment would not conflict with Dutch public policy; and
- the foreign decision should not be irreconcilable with an earlier decision of the Dutch courts between the same par-

ties and involving the same cause of action, or with an earlier decision of a foreign court between the same parties and involving the same cause of action, provided that this earlier court decision of a foreign court fulfils the conditions necessary for its recognition in the Netherlands.

Enforcement
It follows from Section 431(1) DCCP that a foreign judgment, without any law or convention determining otherwise, cannot be enforced in the Netherlands, even if the decision is susceptible of being recognised. Pursuant to Section 431(2) DCCP, new proceedings have to be initiated before a Dutch court in order to obtain powers to enforce in the Netherlands. In practice, the case will not have to be reviewed on the merits again. If the foreign decision meets the four recognition requirements mentioned above and is still enforceable in the country of origin, the Dutch court will suffice to award against the defendant to what the defendant had already been awarded against in the foreign decision.

If there is a convention pursuant to which the foreign decision qualifies for enforcement in the Netherlands, permission of the court must be obtained first. This permission, or warrant to enforce, is known as an 'exequatur'. Exequaturproceedings are laid down in sections 985–994 DCCP. The Dutch court that is requested for an exequaturdoes not investigate the case itself, but verifies whether all formalities – including, but not limited to, the review criteria of the applicable convention regulations – have been observed. The exequaturproceedings of sections 985 through 994 DCCP may be overruled by special convention or statutory regulations.

10. Appeal

10.1 Levels of Appeal or Review Available to a Litigant Party
It is possible to lodge an appeal at the Appellate Court against almost all instances of final judgments of a District Court. Objections to interim judgments (which do not contain any final decisions) must be included in the appeal against the final judgment, unless the court honours the application for permission to lodge an interim appeal against the interim judgment. It is possible to bring an appeal to the Supreme Court against final judgments of the Appellate Court in almost all instances. Only cassation is available for decisions of the Enterprise Chamber.

10.2 Rules Concerning Appeals of Judgments
Like the court of first instance, the court of appeal, if necessary, will consider the case in fullness again, and is not bound by the facts established by the court of first instance. On the basis of the acknowledged facts and of possibly ascertained new facts it will decide if the judgment of the court of first instance is (in)correct. The court of first instance may have misinterpreted the rules of law and/or the facts. In that case the court of appeal will reverse the decision and provide judgement itself covering all elements of the dispute. Contrary to the court of first instance and the court of appeal the Supreme Court does not examine the facts, but purely observes if the court of appeal has applied the law correctly. It must ground its judgment on the facts as established or acknowledged by the court of appeal.

10.3 Procedure for Taking an Appeal
Appeals are lodged by the complainant by serving a notice of appeal to the other party within three months, calculated from the date of the judgment against which the complaints have been raised. The appeal period in preliminary relief proceedings is four weeks. The notice of appeal is not required to already contain the reasons for the appeal ('grounds for appeal'); it is sufficient to make it clear that an appeal will be lodged. The notice of appeal in cassation is required to contain the reasons and arguments regarding the parts of the judgment of the appellate court against which the objections are being raised. The defendants may lodge a cross-appeal, irrespective of whether the appeal period has already lapsed.

10.4 Issues Considered by the Appeal Court at an Appeal
The appeal may be used both to complain about inaccuracies in the judgment of the lower court, and to rectify their own failings in the previous legal proceedings. It is therefore possible to limit the appeal to complaints regarding specific, delimited parts of the judgment by the lower court. However, it is also possible to request the appellate court on the basis of the objections put forward to review the entire scope of the case and render a judgment. Both parties may put forward new facts and new arguments on appeal unless this has been explicitly waived in the previous proceedings. Upon request of (one of) the parties, an oral re-hearing will be ordered.

The only complaint that can be raised on appeal in cassation at the Supreme Court is that the appellate court interpreted or applied the rules of law incorrectly in its judgment, or that the judgment of the appellate court is incomprehensible in view of what the parties advanced at this court. There is therefore no place for new arguments or a discussion of the facts in cassation. Oral re-hearings are the exception.

10.5 Court-imposed Conditions on Granting an Appeal
There is no system in the Netherlands for appeals to a higher instance or appeals in cassation.

10.6 Powers of the Appellate Court After an Appeal Hearing
The court of appeal should asses the case and decide on the arguments raised by the party lodging appeal. Decisions of the district court that were not argued by the parties in appeal, should be considered by the court of appeal as facts.

However, if the court of appeal agrees on the arguments of the party lodging the appeal, the court of appeal has also decide on all arguments that the other party raised on that issue in the proceeding at the court of first instance. The court of appeal can reverse the decision and provide judgement itself covering all elements of the dispute.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

Parties are obliged to pay their own litigation costs, although in most cases, the losing party will be ordered to cover the litigation costs of the prevailing party, such as court fees and witness and expert fees. Legal fees are based on fixed amounts for certain standard activities (such as submitting a written statement, attending an oral hearing or imposing a prejudgment attachment), but are also contingent on the value of the claim. The actual costs and attorney fees incurred by the prevailing party are seldom covered by the amount awarded, and recovery of the remaining costs of the losing party is not usually possible except in cases of a frivolous suit and – under certain conditions – in cases concerning intellectual property, where the prevailing party can be awarded full costs, including its attorney's fees.

11.2 Factors Considered When Awarding Costs

Reference is made to **11.1, Responsibility for Paying the Costs of Litigation**, above.

11.3 Interest Awarded on Costs

The party that should pay the awarded costs, can on beforehand be ordered by the court to pay the statutory interest on these costs in case these costs would not be paid in time. Statutory interest should be explicitly claimed by the other party. Statutory interest is calculated as a compound interest from the day the party is in default. The statutory interest is determined periodically by the Dutch Government.

12. Alternative Dispute Resolution

12.1 Views on ADR in this Jurisdiction

There is an increased interest (also internationally) among litigants for Alternative Dispute Resolution (ADR) in the form of arbitration, binding opinions or mediation. The main reasons underlying this are speed, expertise and confidentiality. Compared to the governmental judicial system, the parties have more influence on the structure and throughput time of the dispute resolution, the language and the applicable law, and the appointment of expert arbiters or advisers charged with giving a binding opinion. The hearing of the case and the findings or rulings are not public. There is also the disadvantage of the higher costs involved for arbitrators and advisers charged with giving binding opinions (engaging the civil court only entails payment of a court fee). Arbitration institutes and expert arbitrators in the Netherlands are made frequent use of both nationally and internationally.

The process of mediation, whereby the parties attempt to reach an agreement under the guidance of a mediator who acts as an independent process manager, is beginning to gain traction as form of ADR. Not all business disputes lend themselves for mediation. The Mediation Directive (European Directive 2008/52/EC) was implemented in the Netherlands at the end of 2012. This has meant that enforcement is facilitated, the statute of limitation can be interrupted with mediation, and secrecy/confidentiality can be legally regulated. For the time being, this only applies to cross-border cases; legislative proposals for national application are still awaited. There are currently pilots running at various courts to refer parties to mediation at the start of a pending dispute.

Mediation and adjudication (expert determination or binding advice proceedings) are popular ADR methods in the Netherlands.

12.2 ADR Within the Legal System

As long as there is a legal relationship which can be determined solely by the parties, they are in principle at liberty to opt for a form of extrajudicial (alternative) dispute resolution. In certain branches and in the area of consumer disputes, alternative dispute resolution – eg, via the general terms and conditions – is regularly prescribed. Sector-related complaints boards are regarded as quick and efficient. The ADR route is regularly followed.

If an arbitration clause has been agreed, the civil court declares that it lacks jurisdiction (Section 1020 DCCP). As a rule, the arbitral tribunal also has jurisdiction to deal with urgent relief cases whereby recourse to the civil court of preliminary relief proceedings court is closed. An agreement for arbitration does not prevent access to the civil court in order, for example, to impose a prejudgment attachment or to initiate a provisional hearing of witnesses or experts. It follows from case law that if parties have agreed on binding opinions, the civil court will declare that it lacks jurisdiction. Mediation clauses, however, cannot prevent parties from recourse to the court. The basic principle is that mediation takes place on a voluntary basis whereby the parties subsequently also decide themselves whether they will agree with the outcome. In the business world, contracts regularly include a standard clause stating that mediation must first be sought before proceeding with litigation or arbitration.

Courts encourage mediation in cases that they deem suitable for mediation. They cannot force parties to enter into mediation and the parties must agree to do so.

12.3 ADR Institutions

Most arbitration cases are administered and facilitated by well-organised arbitration institutes, such as the Netherlands Arbitration Institute (NAI) or one of the many specialised arbitration institutes or those aimed at certain market segments such as the Court of Arbitration for the Building Industry (RvA), for the Metal Industry and Trade, for Transport and Maritime cases (TAMARA) and recently, for complex financial disputes (PRIME Finance). These institutes apply regulations, provide options and advocate contract clauses to be used by the parties. In addition, the parties can opt for an international arbitral tribunal.

The procedure of binding opinions is organised in a similar manner and is facilitated by many of the aforesaid institutes. In addition, there are registers of advisers charged with giving a binding opinion with a specific background and expertise, such as, for example, the Register Valuators (affiliated with NIVR).

Various initiatives have been developed to further organise the (unregulated) procedure of mediation and to provide it with quality assurances. The NAI can also be requested by parties to administer and facilitate regulated binding opinions and mediation procedures. In the area of business mediation, two associations have recently been established in order to promote the use of mediation for the settlement of business and commercial disputes. There are various providers of commercial mediation services, including specialised law firms. In business dispute resolution, accredited (certified) mediators are used, such as mediators registered with the Netherlands Mediation Federation, who meet certain training requirements.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitrations

Every arbitration that takes place in the Netherlands is subject to the Dutch Arbitration Act (DAA), which is laid down in book 4 of the DCCP. The revised Dutch Arbitration Act entered into force on 1 January 2015. The provisions of the DAA are mostly of a regulatory and not a mandatory nature.

The part on arbitration in the Netherlands contains fairly standard provisions on – for instance – the arbitration agreement; the appointment of arbitrators; the disclosure and challenge of arbitrators; the arbitration proceedings; the content of the award; and the enforcement of the award. The part on arbitration outside the Netherlands deals with matters such as the competence of Dutch courts, the possibility to request the Dutch court for preliminary or protective measures and the recognition and enforcement of a foreign arbitral award in the Netherlands.

13.2 Subject Matter not Referred to Arbitration

Following Section 1020 DCCP the arbitration agreement must not lead to the establishment of legal consequences that are not at the discretion of the parties. This provision is generally stated and of mandatory law. Subject matters that may not be referred to arbitration include certain aspects of: family law (fieri facias divorce or adoption), intellectual property law, bankruptcy law and corporate law (fieri facias the status of a limited liability company, liquidation proceedings or the validity of corporate decision making).

13.3 Circumstances to Challenge an Arbitral Award

If an award is rendered in an arbitration seated in the Netherlands the Dutch courts have jurisdiction to decide on an application to set aside (*vernietigen*) or revoke (*herroepen*) such award. An appeal is not possible before the Dutch courts unless the parties have expressly provided for this in their arbitration agreement.

Revocation

An award can be revoked in specific cases of fraud, or if, after the award a party obtains documents that would have affected the decision of the arbitral tribunal which were withheld by the other party. In practice, it is seldom used to revoke an arbitral award.

Setting Aside

The grounds for setting aside an arbitral award are limited to the following five grounds:

- absence of a valid arbitration agreement;
- constitution of a tribunal in violation of the rules applicable thereto;
- breach of mandate;
- lack of signature and/or reasoning; and/or
- the award or the manner in which it was made is in violation of public policy.

Limitation periods for challenging awards commence on various moments and may, due to differing moments of commencement, result in potential renewal of an option to challenge (especially in the event of setting aside proceedings).

Challenge proceedings do not stay enforcement proceedings. However, parties may request a stay of enforcement pending challenge proceedings.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Pursuant to Section 1062 DCCP the party seeking enforcement of an arbitral award rendered in the Netherlands will have to obtain a leave for enforcement (exequatur) from the Preliminary Relief Judge of the competent District Court. Such leave has to be requested by submitting an application

(*verzoekschrift*) together with the original or certified copy of the award, translations of the award (if necessary) and a copy of the arbitration agreement.

The grounds for refusal of leave for enforcement of domestic arbitral awards are laid down in Section 1063 DCCP. Pursuant to this provision the enforcement of an arbitral award may be refused only if it seems likely that the award will be

- set aside based on the grounds mentioned in Section 1065(1) DCCP (such as lack of a valid arbitration agreement or the tribunal having exceeded its mandate);
- revoked based on the grounds mentioned in Section 1068(1) DCCP (such as an award that appears to be wholly or partially based on forged records); or
- if a penalty for non-compliance is set contrary to Section 1056 DCCP, in which case the refusal only concerns the enforcement of the penalty.

It is noteworthy that the appeal possibilities are asymmetric. This means that whereas it is possible to appeal against a refusal of leave for enforcement, it is not possible to appeal a decision granting a leave to enforce, either before the Court of Appeal or before the Supreme Court of the Netherlands (Section 1063(4) and (5) DCCP). The only way of challenging the decision granting a leave for enforcement is to bring proceedings for setting aside or revoking the award (Section 1064 DCCP).

Recognition and Enforcement of Foreign Arbitral Awards

Dutch law has a particular regulation for the recognition and enforcement of foreign arbitral awards. A foreign arbitral award may be susceptible to being enforced in the Netherlands pursuant to a convention (Section 1075 DCCP) or pursuant to domestic Dutch law (Section 1076 DCCP).

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Treaty-based

For the cases in which pursuant to a convention – in most cases, the New York Convention of 1958 – the foreign arbitration award is susceptible of being recognised and enforced, Section 1075 DCCP determines that the exequaturproceedings of Sections 985-991 DCCP apply mutatis mutandis for the most part. The Dutch court from whom an exequaturis requested verifies whether all formalities – including, but not limited to, the review criteria of the applicable convention regulations – have been observed. The exequatur proceedings as laid down in Sections 985 through 994 DCCP may be overruled by special convention or statutory regulations.

The appeal possibilities are similar to those described for the enforcement of Dutch arbitral awards. However, if the asymmetric ban on legal remedies leads to a violation of the rights of the defendant ex Article 6 ECHR, he should be able to appeal the leave for enforcement.

Non-treaty-based

Section 1076 DCCP provides the foreign arbitration awards that are not covered by an enforcement convention procedure. After submission of the original or a certified copy of the arbitration agreement and of the arbitration award, a foreign arbitration award will be recognised and enforced in the Netherlands, in principle.

Recognition and enforcement of non-treaty-based awards may be refused if one of the grounds for refusal enumerated comprehensively in Section 1076 DCCP is applicable. The first category refers to grounds for refusal that are not applied by the court ex officio, and on which the party against whom the recognition or enforcement is requested must therefore explicitly rely. One such example would be the tribunal not having been appointed in conformity with the rules, or the award being still open to appeal to a second arbitral tribunal, or to a court in the country in which the award is made. The second category refers to the public policy; the court will have to determine ex officiowhether or not recognition or enforcement must be refused because it is incompatible with the public policy.

For non-treaty-based awards, an appeal can also be lodged against a decision granting (and not only refusing) leave for enforcement. This cause of action should be initiated at the Supreme Court of the Netherlands within a three-month time limit.