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# Litigation

Netherlands

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# NETHERLANDS

## Law and Practice

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## 1. General

### 1.1 General Characteristics of the Legal System

The Dutch legal system is based on civil law. The most important rules are laid down in the Dutch Civil Code (DCC). The Dutch Code of Civil Procedure (DCCP) sets out the rules governing civil procedure in the Netherlands.

The Dutch system follows an adversarial model. Typically, each party submits a written document, after which an oral hearing takes place. Subsequently, the court delivers a judgment.

Recent efforts to “digitalise” all civil proceedings have been reversed, except for proceedings before the Supreme Court. Consequently, the courts still require parties to file their court documents in hard copy. A new quality and innovation programme is intended to bring increased efficiency with a stronger case management role for the court and its judge. On 1 October 2019, some revisions of the DCCP came into effect on the basis of which the courts may order parties to be present at an early stage hearing, during which witnesses and experts may be heard.

Belief in the rule of law and trust in legal institutions are robust. International benchmark studies show that the Dutch legal system is generally fast, efficient, accessible and fair.

### 1.2 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. There is no jury system and bench trials are used for both civil and criminal cases.

#### District Courts

In first instance, civil cases are brought before one of the eleven district courts (*rechtbanken*) where they are generally handled by a single judge. More complex cases are often referred to a full-bench panel of three judges. District courts are made up of a maximum of five sectors, including administrative law, civil law, criminal law and a subdistrict law sector. The subdistrict law sector has exclusive jurisdiction over small claims (less than EUR25,000) and matters regarding employment contracts, tenancy, consumer sale agreement, consumer credit agreements up to EUR40,000, lease, and hire-purchase agreements (Section 93 DCCP). Certain district courts accommodate divisions that are specialised in certain areas of law, such as intellectual property (The Hague District Court) and shipping and transport (Rotterdam District Court).

Appeals against judgments rendered by the district court in civil and criminal cases can be lodged at one of the four appellate courts (*gerechtshoven*). Appeal cases are dealt with by a full-

bench panel of three judges. Appeals against administrative law judgments are lodged one of three specialised administrative law tribunals. Administrative and tax procedures provide for a mandatory initial internal complaints procedure prior to court procedures.

#### The Court of Appeal

The Enterprise Court at the Amsterdam Court of Appeal (*Ondernemingskamer*) deserves special mention. This chamber serves 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 Court consists of a panel of five judges which includes three members of the judiciary and two laypersons with specialist expertise.

#### The Supreme Court

The Supreme Court (*Hoge Raad*) is the final court of appeal. The Supreme Court is a cassation court, which only deals with matters of law.

Since 2019, international commercial disputes may be brought before the Netherlands Commercial Court (NCC). The NCC is situated as separate chambers within the Amsterdam District Court and the Amsterdam Court of Appeal. The NCC is designed to meet the need for efficient dispute resolution of (complex) international commercial matters. The entire proceedings, including the judgments, are conducted in English before experienced judges. The NCC may assume jurisdiction regarding:

- civil or commercial cases within the parties’ autonomy;
- concerning an international dispute;
- if the Amsterdam District Court or the Amsterdam Court of Appeal has jurisdiction; and
- the parties have expressly agreed in writing that proceedings shall be conducted in English before the NCC.

### 1.3 Court Filings and Proceedings

In principle, court hearings are public. The court may, under special circumstances, decide to conduct court hearings behind closed doors, for instance when the interest of minors or privacy of parties so requires. Court decisions in adversarial proceedings are, in general, public. Names of private individuals are generally made blank. Many judgments are made available online at the courts’ website ([www.rechtspraak.nl](http://www.rechtspraak.nl)). Court records, exhibits and other documents belonging to the case file are not disclosed to third parties. This is further illuminated in seven Trials and Hearings.

### 1.4 Legal Representation in Court

In civil and commercial cases, parties must generally be represented by a lawyer admitted to the Dutch Bar Association.

Parties may argue their own case in the subdistrict sector and in some other district subject matters. Under EU Law and under specific circumstances, foreign European advocates can conduct cases in Dutch Courts.

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

Litigation funding by third parties is permitted in the Netherlands. Common law obstacles such as “maintenance” and “champerty” do not arise. By means of self-regulation, a so-called “Claim Code” provides for best practices in collective redress actions (including use of third-party funding). In such cases, excessive (cost) compensation charged by the litigation funder and/or lack of transparency can be addressed by the court.

### 2.2 Third-Party Funding: Lawsuits

A variety of commercial claims and disputes with sufficient substantial interest lend themselves to litigation financing, such as collective actions and mass claims settlement, cartel damages, commercial claims and bankruptcy claims from receivers.

### 2.3 Third-Party Funding for Plaintiff and Defendant

Litigation funding is available to both claimants and defending parties. On the defence side there will be need for an “upside” – ie, in the form of a counterclaim. In the case of portfolio funding of litigation, all litigation of the company concerned, whether claimant or defendant, is financed.

### 2.4 Minimum and Maximum Amounts of Third-Party Funding

The minimum for claims/disputes to be financed by litigation funders registered and operating in the Netherlands, varies between EUR150,000 and EUR5 million. As a rule, a litigation funder asks on average 20-40% of the proceeds (with deviations depending on the rigidity of the claim and severity of the risks).

### 2.5 Types of Costs Considered under Third-Party Funding

The costs to be financed by a third-party funder include lawyers’ fees, bailiff fees, court fees, costs of expert witnesses and possible orders for costs.

### 2.6 Contingency Fees

Based on their professional rules, lawyers in the Netherlands are prohibited from providing a “no win, no fee” service. However, alternative fee arrangements dependent on the outcome of the case (such as basic fee plus success fee) are 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 – at the start, halfway through, or on appeal.

## 3. Initiating a Lawsuit

### 3.1 Rules on Pre-action Conduct

There are no procedural prerequisites to filing a lawsuit, except in cases of mismanagement brought before the Enterprise Court (Section 2:349 DCC) and collective actions (Section 3:305a DCC), and administrative and tax cases. When failing to comply with these prerequisites, a claimant may not have cause of action. The court may be reluctant to award costs of litigation if the claimant starts litigation without prior communication setting out its position.

### 3.2 Statutes of Limitations

Unless otherwise provided by law, a claim becomes time-barred after 20 years (Section 3:306 DCC). In many cases, the DCC provides for shorter limitation periods:

- the right to claim specific performance becomes time-barred five years after the claim became exigible (two years in sales agreement);
- the right to claim damages or a contractual penalty is time-barred after five years from the day after the injured person became aware of:
  - (a) the damage inflicted; and
  - (b) the identity and liability of the person liable;
- the right to nullify an agreement in case of deception or error becomes time-barred three years after discovery thereof; and
- the right to demand the annulment of a resolution of a constituent body of a legal entity 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 (“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 Iceland. If no international treaty (including Brussels I Recast) applies, the national rules laid down in the DCCP determine whether the Dutch courts have international jurisdiction. These

rules are very similar to the international jurisdiction rules of Brussels I Recast.

The basic rule is that the Dutch courts have jurisdiction if the defendant is domiciled in the Netherlands (Section 2 DCCP). The 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 DCCP).

Furthermore, if an attachment is levied on assets located in the Netherlands, and there is no other way of obtaining an enforceable title, the Dutch court that granted permission to levy the attachment has jurisdiction over the claim in the principal action (Section 767 DCCP). Section 767 DCCP may not be invoked if the parties have agreed on the exclusive jurisdiction of a foreign court.

Pursuant to the *forum necessitatis* doctrine laid down in Section 9 DCCP, the Dutch courts may assume 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 disasters or discrimination in the foreign country. The *forum non conveniens* doctrine does not apply.

### 3.4 Initial Complaint

There are two main types of civil procedures in the Netherlands: procedures initiated by a summons (*dagvaarding*) and procedures initiated by an application (*verzoekschrift*). Summons are used for claims in ordinary civil suits; applications apply in disputes involving employment, lease, family matters and certain corporate matters. Proceedings initiated by summons are 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.

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 service of the summons. A bailiff serves the summons to the defendant. Subsequently, the claimant must file the summons with the Court Registrar latest on the last business day prior to the date of formal court appearance as stipulated in the summons.

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”).

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 between service of a writ on a defendant and the date of formal court appearance. For defendants residing in other states, a minimum period of three months applies.

### 3.6 Failure to Respond

If the defendant fails to appear in court on the date of formal court appearance, a claimant may obtain a default judgment. In that case, the court first verifies whether the 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).

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 (*claimstichting*), power of attorney to act on behalf of all of them (the injured parties could also assign their claim to one such person, which then brings the claim in its own name); alternatively, they can initiate a collective action based on Section 3:305a DCC.

The Section 3:305a DCC route enables a foundation or association with full legal capacity (representative interest group) 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 representative interest group must furnish proof that it has first attempted – in vain – to achieve its goal through dialogue with the defendant.

On 1 January 2020, the Settlement of Large-scale Losses or Damage Act (WAMCA) came into effect and applies to collective actions regarding events that took place on or after 15 November 2016. The WAMCA amends Section 3:305a DCC and introduces new provisions in the DCCP (Sections 1018b ff). The most important change is that a representative interest group may now claim monetary damages on behalf of the group members.

Previously, representative interest groups could only request a declaratory judgment that the defendant has breached his duties or committed a wrongful act against the injured parties. Once the representative interest group succeeded in obtaining a declaratory judgment, it was up to the individual group members to claim monetary compensation in individual proceedings. However, once a positive judgment has been obtained the representative interest group will typically enter into settlement negotiations with the defendant. Dutch law (also after the introduction of the WAMCA) provides for court certification of damages in mass claim settlements (WCAM), as further illuminated in **8. Settlement**. The above is still applicable law for collective actions that do not fall within the temporal scope of the WAMCA.

### 3.8 Requirements for Cost 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. Estimates are often used for well-defined procedural steps.

## 4. Pre-trial Proceedings

### 4.1 Interim Applications/Motions

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.

Parties are able to gather or secure evidence prior to proceedings by, eg, demanding inspection of documents or copies of documents 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 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.

### 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 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. However, the court 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.

A motion to request the court to allow a joinder or an intervention can be submitted ultimately on the day the last written statement is due to be filed. A joinder or intervention will be allowed when the interested party can demonstrate it has (sufficient) interest to join or intervene (eg, if its position is affected by the main proceedings).

## 4.5 Applications for Security for Defendant's Costs

Defendants against whom a claim is brought by a claimant with no domicile or residence in the Netherlands may request the court to order that the claimant provides security for the litigation costs (Section 224 DCCP). The practical relevance of the obligation to provide security may be limited as a result of exceptions (eg, no such obligation exists when this follows from a treaty or EU regulation).

## 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 losing party is generally 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 any preliminary applications. 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 a submission in a procedural issue, and four weeks for a ruling.

# 5. Discovery

## 5.1 Discovery and Civil Cases

Dutch procedural law does not provide for discovery or disclosure procedures comparable to common law systems. The following instruments are available for obtaining information.

Parties with a legitimate interest may request the production of exhibits (Section 843a DCCP). See **5.3 Discovery in This Jurisdiction**. This request may be made in preliminary relief proceedings as an interim action in ongoing proceedings or in main proceedings. A proposal to amend this current regime for exhibition claims is pending. Reference is made to **14.1 Proposals for Dispute Resolution Reform**.

Interested parties may request the court for a provisional examination of witnesses or order a provisional expert report (Sections 186 and 202 DCCP). These requests can be made prior to or during main proceedings.

The aforementioned ways of acquiring information or gathering evidence are administered by the court.

## 5.2 Discovery and Third Parties

An application for the production of exhibits may, under certain circumstances, be extended to a third party.

## 5.3 Discovery in This Jurisdiction

For the requests for the production of documents (exhibits) to be granted on the basis of Section 843a DCCP, three cumulative conditions must be satisfied:

- the requesting party must have a legitimate interest in obtaining the information;
- it must concern specific documents (this includes pictures, audio and video tapes, computer files, etc), 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 (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 compelling 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 (see **5.1 Discovery and Civil Cases**). 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 a member of the Netherlands Bar Association. Insofar as the law does not provide otherwise, lawyers are obliged to maintain confidentiality regarding everything that comes to their attention by virtue of their professional practice. This obligation also applies (in a derivative form) to their employees and colleagues, as well as to other persons 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 if there are compelling reasons not to provide them (see **5.3 Discovery in This Jurisdiction**), which may apply to trade secrets or certain confidential information. The party that has the documents at its disposal may 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 them 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 may be disclosed, unless the lawyers agree otherwise. Correspondence on settlement negotiations cannot be disclosed without the other party’s consent.

## 6. Injunctive Relief

### 6.1 Circumstances of Injunctive Relief

In urgent matters, a party may request for injunctive relief in summary proceedings (Section 254 DCCP). An injunction for the duration of the dispute may be requested in pending proceedings on the merits (Section 223 DCCP).

Summary proceedings are not aimed at providing a final decision. The injunction applies until a decision is reached in any proceedings on the merits of the case.

The range of possible injunctions is broad. The most common remedies are orders to do something (eg, specific performance), orders to refrain from something and the order to pay a sum of money owed. Available types of injunctions are, eg, lifting of prejudgment attachments (Section 705 DCCP), suspension of the execution of a court ruling, imposing a ban, ordering the performance of an agreement (Section 3:296 DCC), payment of a sum of money.

As regards business law disputes, the Enterprise Court of the Amsterdam Court of Appeal may order far-reaching immediate relief if there are well-founded reasons to doubt a sound policy or a proper course of affairs within a company, or if immediate relief is required in connection thereto (eg, the temporary suspension of directors, appointment of interim directors, transfer of shares).

### 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

Ex parte applications under Dutch law are limited to prejudgment attachments and the 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 (Sections 711-729e DCCP), but also documentary evidence (Section 730 in conjunction with Section 843a DCCP). These applications aim to prevent the removal of assets or documentary evidence.

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 (Section 1019e DCCP).

### 6.4 Liability for Damages for the Applicant

Due to its preliminary character, enforcement of a judgment in preliminary relief proceedings might be unlawful if the executor does not succeed in 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 that has levied a prejudgment attachment. For this reason, the court can allow the enforcement of a judgment or the levy of a prejudgment attachment on the condition that security is furnished (Section 233(3) DCCP and Section 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, under the Brussels I Regulation Recast a party can apply to the Dutch court for a cross-border provisional or protective measure, provided that this measure 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 other EU Member States after the decision has been pronounced. Accordingly, the practical relevance of this possibility is limited.

Additionally, a European prejudgment attachment can be levied on bank accounts pursuant to the European Account Preservation Order (EAPO).

## 6.6 Third Parties and Injunctive Relief

Provisional and protective measures may only be obtained in respect of parties that are involved in proceedings. If they have sufficient interest, third parties who fear the violation of their rights may join or intervene in proceedings between other parties to protect their rights (see **4.4 Requirements for Interested Parties to Join a Lawsuit**).

## 6.7 Consequences of a Respondent's Non-compliance

A respondent that fails to comply with the terms of an injunction may face the same consequences of not complying with a regular judgment. It is common to demand that the requested interim relief is subject to a penalty.

## 7. Trials and Hearings

### 7.1 Trial Proceedings

Legal proceedings in the Netherlands are mainly conducted in writing. The claims brought by the claimant are set out in a writ of summons. The defendant responds in a statement of defence, in which a counterclaim may be lodged. The court will subsequently order an oral hearing (Section 131 DCCP). Alternatively, the court can proceed to a second written round (reply and rejoinder). An oral hearing can then be ordered upon the request of (one of) the parties (Section 87(8) DCCP).

Oral hearings, in which the parties may explain their position and the court may request information, attempt an out-of-court settlement or discuss case management, can be ordered at every stage of the proceedings (Article 87(1) DCCP).

### 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 proceedings on the merits, the court may set a case management hearing (*regiezitting*) at the request of the parties or ex officio. This occurs mainly in complex and extensive civil disputes involving multiple litigants.

### 7.3 Jury Trials in Civil Cases

There are no jury trials in the Netherlands.

### 7.4 Rules That Govern Admission of Evidence

Unless the law provides otherwise, all forms of evidence are admissible in civil lawsuits. Evidence that was obtained unlawfully will typically be admitted. Only under special circumstances may evidentiary material submitted be deemed inadmissible

due to its nature. The court may disregard evidentiary material when it is submitted too late.

The court has great discretionary power in the assessment of evidence. There are some exceptions to this rule. Legally valid deeds and criminal judgments deliver conclusive evidence, subject to evidence to the contrary from the other party.

Parties are allowed to testify on their own behalf. However, such an (oral) witness testimony is only accorded limited evidentiary value; it cannot serve as proof of statements in respect of which the burden of proof lies with that party, unless it supplements incomplete evidence.

Evidence should as much as possible be submitted together with the relevant court document. Parties can, however, submit additional written documentary evidence to the proceedings. Evidence submitted after a certain time prior to the oral hearing will, in principle, not be considered by the court (Section 87(6) DCCP).

Practice is likely to change as a bill proposing the modernisation of law of evidence is pending (see **14.1 Proposals for Dispute Resolution Reform**).

### 7.5 Expert Testimony

Expert evidence is permitted and 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

In principle, court hearings in civil cases are open to the public. Currently, there are some restrictions due to the COVID-19 pandemic (see **14.2 Impact of COVID-19**). Under special circumstances, the court may decide to conduct court hearings behind closed doors.

### 7.7 Level of Intervention by a Judge

In principle, the judge adopts a rather passive approach in civil proceedings: the scope of the dispute is determined by the parties, and in general the judge may not grant or dismiss a claim that is outside of the debate between the parties. During hearings, the judge may 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. There is an increasing degree of management by the judge, which allows a more active approach on the ground of establishing the truth.

In principle, a written judgment is given six weeks after the oral hearing. This date is, often extended repeatedly.

A judge may, in urgent matters, give an oral judgment at the end of a hearing in preliminary relief proceedings or proceedings to obtain immediate relief measures before the Enterprise Court.

## 7.8 General Timeframes for Proceedings

In ordinary commercial disputes, it may take 12 to 18 months from the moment a writ of summons is issued to obtain a final judgment. This period may be considerably longer in complex cases, if motions or procedural issues are raised, or if further evidence must be taken.

A judgment in preliminary relief proceedings may be obtained immediately at the hearing, within a day (both in case of extreme urgency) or within a few weeks.

## 8. Settlement

### 8.1 Court Approval

In general, settlements agreed between parties to a lawsuit do not require court approval. Settlements are generally incorporated in a settlement agreement (*vaststellingsovereenkomst*) (Section 7:900 DCC). A settlement reached during a hearing may be recorded in an enforceable court record. The court facilitates this but does not grant approval.

Court approval is required for a specific collective arrangement for the settlement of large-scale loss in accordance with the Collective Mass Claims Settlement Act (WCAM), contained in Sections 7:907-910 DCC and Sections 1013-1018 DCCP. The WCAM enables parties to mass claims settlements to jointly request the Amsterdam Court of Appeal to declare the settlement agreement generally binding. Such declaration binds all persons covered by the terms of the agreement (known and unknown, both in the Netherlands and abroad), unless such person opts-out by written declaration within a court-determined period. WCAM proceedings can be, and have been, also used for global settlements with relatively little connection to the Netherlands. Reference is made to the recent WAMCA legislation, which aims to facilitate out-of-court settlements (**3.7 Representative or Collective Actions**).

### 8.2 Settlement of Lawsuits and Confidentiality

Settlement agreements often contain confidentiality clauses. Parties may nevertheless be obliged to disclose the contents of the agreement by law, or court order.

A collective WCAM settlement qualifies as a court judgment and is, accordingly, public. The parties involved, and any other

interested party may inspect it and obtain a transcript thereof (Section 29(2) DCCP). This right may be restricted in view of certain interests of the parties (eg, privacy, company secrets).

### 8.3 Enforcement of Settlement Agreements

If the obligations ensuing from the settlement agreement or the legal validity thereof is not disputed, a title to enforce can be obtained fairly swiftly by the party who requires performance. A settlement recorded in a court record generally includes an enforcement order. Such settlement can be enforced immediately.

### 8.4 Setting Aside Settlement Agreements

In a settlement agreement, parties undertake to end or prevent uncertainties or disputes in respect of their legal relationship, which may deviate from the previously existing legal situation. Such agreement is, in principle, valid even if it breaches mandatory law. The objective is to provide legal certainty. Therefore, more stringent demands apply to the setting aside or annulment of a settlement agreement than to regular agreements. A settlement recorded in a court record can only be reviewed under special circumstances, such as blatant errors, deception or fraud.

## 9. Damages and Judgment

### 9.1 Awards Available to the Successful Litigant Order for Specific Performance

Pursuant to Section 3:296 DCC, a court can order a party to fulfil its legal obligations (contractual or non-contractual) towards another party.

#### Damages

The court may order a party to pay damages to another party if it has breached a contractual obligation towards the other party or if it has acted unlawfully.

#### Declaratory Decision

The court may render a declaratory decision of a certain legal situation or right.

#### Application for an Order or Injunction

The court can order a party that acts unlawful, or who is likely to act unlawfully, to perform certain actions (order) or to refrain from performing such actions (injunction). Most of these awards can be reinforced by penalty payments.

#### Setting Aside (Ontbinding)

The court may order the setting aside (partial or complete) of an agreement and award damages. The setting aside has no retroactive effect.

## Amendment

In the event of unforeseen circumstances, the court can partially or completely set aside or amend an agreement.

## Annulment (Vernietiging)

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

## 9.2 Rules Regarding Damages

Damages are awarded to compensate a party in full; the aggrieved party must be brought in a position in which he would have been had the event that caused the damage not taken place. Dutch law does not provide for punitive damages.

In principle, damages are paid with money. At the request of the aggrieved party, the court may rule that compensation must take place in another form (Section 6:130 DCC), eg, by restoration (*restitutio in integrum*) or rectification (Section 6:167(1) DCC and 6:196(1) DCC).

Collateral benefits are deducted from the awarded damages (Section 6:100 DCC). If the liable party has derived profit from an unlawful act or a violation of a contractual obligation, the court may determine the compensation to be paid to the aggrieved party on the basis of its entire or partial profit (Section 6:104 DCC).

If a penalty clause applies, the agreed penalty replaces a claim for damages, unless the parties agreed that both a penalty and damages may be claimed simultaneously.

The court may, under certain circumstances, reduce a legal obligation to pay damages (Section 6:109 DCC).

## 9.3 Pre and Post-Judgment Interest

In principle, interest is owed as per the date the legal obligation ought to have been fulfilled, even if that date was long before the judgment of the court and until the payment obligation has been fulfilled. The rate of statutory interest for both commercial and non-commercial transactions is determined by the Minister of Justice. The parties may agree on a different rate of interest.

## 9.4 Enforcement Mechanisms of a Domestic Judgment

Final judgments (with the force of *res judicata*) or judgments with immediate effect may be enforced after being served by the bailiff. If a prejudgment attachment was imposed against the obligor to secure compliance, this becomes an attachment in execution. If payment is not forthcoming, recovery may take place on the assets of the debtor.

Specific rules may 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 opposite party. 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

### Recognition and Enforcement of Judgments from Non-EU Member States

Pursuant to Section 431(1) DCCP, decisions from a foreign country cannot be enforced in the Netherlands, unless a law or convention determines otherwise.

Section 431(2) DCCP provides that, without a law or convention determining otherwise, new proceedings have to be initiated before a Dutch court to obtain a judgment that is eligible for enforcement in the Netherlands. In practice, however, most cases are not reviewed on the merits again. If the foreign decision meets certain recognition conditions developed in Dutch case law, and the decision is still enforceable in the country of origin, the Dutch court will award a claim corresponding with the foreign decision.

If there is a law or convention pursuant to which the foreign decision qualifies for enforcement in the Netherlands, permission of the court to enforce the decision in the Netherlands must be obtained. This permission, or warrant to enforce, is known as an “*exequatur*” (Sections 985–994 DCCP). Upon the *exequatur* application, the Dutch court verifies whether all formalities – including but not limited to the review criteria of the applicable convention regulations – have been observed. The *exequatur* proceedings of Sections 985–994 DCCP may be overruled by special convention or statutory regulations.

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

In civil and commercial matters, the recognition and enforcement of judgments from EU member states (except Denmark) is provided for by the recast of the Brussels I Regulation and some other EU regulations.

The Brussels I Recast provides for enforcement of judgments rendered in another Member State – which is enforceable in that state – without any special procedure being required. The relevant party may apply to the enforcing authority in the country of enforcement directly; in the Netherlands, the bailiff.

The party against whom enforcement is requested may oppose enforcement in the Netherlands by invoking the grounds for refusal under Section 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). A decision upon such application is subject to appeal and appeal in cassation.

## 10. Appeal

### 10.1 Levels of Appeal or Review to a Litigation

It is possible to lodge an appeal against almost all final judgments of a district court at the courts of appeal. Objections against interim judgments that do not contain final decisions must be included in the appeal against the final judgment, unless the court grants permission to lodge an interim appeal. Most decisions of the court of appeal can be appealed to the Supreme Court. Decisions of the Enterprise Court can only be appealed to the Supreme Court.

### 10.2 Rules Concerning Appeals of Judgments

The court of appeal may consider the case in full. The court of appeal is not bound by the facts established by the court of first instance. On the basis of the acknowledged facts and of ascertained new facts, it will decide if the judgment of the court of first instance is correct or incorrect. If the court of first instance misinterpreted the rules of law and/or the facts, the court of appeal may reverse the decision and provide judgement itself, covering all elements of the dispute.

The grounds for appeal in cassation are limited to questions regarding the application of the law and legal reasoning behind the appealed judgment. The Supreme Court does not (re)examine the facts.

### 10.3 Procedure for Taking an Appeal

Appeals are lodged by serving a notice of appeal to the other party within three months, calculated from the day the decision was rendered. The appeal period in preliminary relief proceedings is four weeks. The notice of appeal can be filed pro-forma. The grounds for appeal may be submitted in a separate statement of appeal. The defendants may lodge a cross-appeal, irrespective of whether the appeal period has already lapsed.

Appeal in cassation must be filed within three months from the day the decision was rendered. It is required to include the reasons and arguments regarding the judgment of the court of appeal against which the objections are raised in the notice of appeal in cassation.

### 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 district court, and to correct errors made by the parties. It is possible to limit the appeal to complaints regarding specific, limited parts of the judgment by the district court or to request the court of appeal to review the entire scope of the case on the basis of the objections put forward. In principle, both parties may put forward new facts and new arguments in appeal. Upon request of one of the parties, an oral re-hearing will be ordered.

The Supreme Court only deals with matters of law; the type of complaints that can be raised in appeal in cassation is that the court of appeal has incorrectly interpreted or applied the rules of law, or that the judgment of the court of appeal is incomprehensible in view of what the parties have advanced. There is no opportunity for new arguments or a discussion on the facts in cassation. Oral hearings are an exception. After cassation, the Supreme Court may refer the case to a court of appeal to deal with the case further.

### 10.5 Court-Imposed Conditions on Granting an Appeal

The courts may not impose conditions on granting an appeal (other than standard DCCP regulations on admissibility of the appeal).

### 10.6 Powers of the Appellate Court after an Appeal Hearing

The court of appeal should assess 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 also has to decide on all arguments that the other party has raised on that issue in the proceeding at the district court. 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. The losing party is usually ordered to cover the litigation costs of the prevailing party. This includes court fees and witness and expert fees. The awarded legal fees are based on fixed amounts for certain standard activities (eg, submission of 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. 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. The costs of litigation awarded can be challenged in ordinary appeal proceedings.

## 11.2 Factors Considered When Awarding Costs

See **11.1 Responsibility for Paying the Costs of Litigation**.

## 11.3 Interest Awarded on Costs

Statutory interest on costs should be explicitly claimed by the other party. Statutory interest is calculated as a compound interest from the day the party is in default and is determined periodically by the Dutch government.

## 12. Alternative Dispute Resolution

### 12.1 Views of Alternative Dispute Resolution within the Country

There is an increased interest among litigants for alternative dispute resolution (ADR), primarily in the form of arbitration, but also mediation and adjudication (expert determination or binding advice). The main reasons for this increased interest are speed, expertise and confidentiality. Compared to the governmental judicial system, the parties have more influence on the structure and processing 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 hearings and the findings or awards are, in principle, not public. Arbitration institutes and expert arbitrators in the Netherlands are frequently used, both nationally and internationally.

The process of mediation, whereby the parties attempt to resolve a conflict assisted by a mediator who acts as an independent process manager, is beginning to gain traction as a form of ADR. Not all business disputes are suitable for mediation. The Mediation Directive (European Directive 2008/52/EC), implemented in the Netherlands in 2012, inter alia entails that enforcement is facilitated, limitation periods can be interrupted with mediation and mediators are granted a legal privilege. The implementation act only applies to cross-border cases, for the time being.

### 12.2 ADR within the Legal System

As a general rule, if arbitration has been agreed between the parties, the state court will not hear the case. This does not apply

when mediation has been agreed; mediation takes place on a voluntary basis. Courts encourage mediation and may ask the parties whether they agree to refer a pending case to mediation. There is no sanction for refusing such a mediation.

### 12.3 ADR Institutions

Most arbitration cases are administered and facilitated by well-organised arbitration institutes, such as the Netherlands Arbitration Institute (NAI), one of the specialised arbitration institutes or those aimed at certain market segments such as the Arbitration board for the building industry (RvA), the metal industry and trade, transport and maritime cases (UNUM), for complex financial disputes (PRIME Finance), and for technology disputes (TAMI). These institutes apply regulations and generally advocate contract clauses to be used by the parties.

The aforementioned institutions often facilitate binding advice proceedings. In addition, there are registers of advisers charged with giving binding opinions with a specific background and expertise such as, for example, the Register Valuators (affiliated with NiVR).

The NAI can further be requested by the parties to administer and facilitate mediation proceedings. In the area of business mediation, two associations have been established to promote the use of mediation for the settlement of business and commercial disputes. In business dispute resolution, accredited (certified) mediators are used, such as mediators registered with the Mediators Federation Netherlands, who meet certain training requirements.

## 13. Arbitration

### 13.1 Laws Regarding the Conduct of Arbitration

Every arbitration with its place of arbitration in the Netherlands is subject to the Dutch Arbitration Act (DAA), which is laid down in book four of the DCCP (Sections 1020-1077 DCCP). The DAA contains mandatory and non-mandatory provisions.

### 13.2 Subject Matters Not Referred to Arbitration

Pursuant to Section 1020(3) DCCP, the arbitration agreement may not serve to determine legal consequences that cannot be freely determined by the parties. Matters of public policy, and other matters reserved by law to the civil courts, cannot be referred to arbitration, including aspects of family law (divorce or adoption), intellectual property law, criminal law, insolvency law and corporate law (eg, the status of a limited liability company, right of investigation, liquidation proceedings or the validity of corporate decision making).

## 13.3 Circumstances to Challenge an Arbitral Award

Arbitral awards may be set aside (*vernietigen*) or revoked (*herroepen*) by the court of appeal (Sections 1064a(1) and 1068 DCCP).

### Revocation

An award can be revoked in specific cases of fraud, if the award is based on forged documents or if documents that would have had an influence on the decision were withheld by the other party (Section 1068 DCCP).

A request for revocation must be filed within three months after the date the ground for revocation was discovered.

### Setting Aside

There are five grounds for setting aside an arbitral award (Section 1065 DCCP):

- absence of a valid arbitration agreement;
- the tribunal was composed in violation of the applicable rules;
- breach of mandate by the arbitral tribunal;
- lack of signature and/or reasoning; and
- the award, or the manner in which it was made, violates public policy.

A request for setting aside an award must be filed within three months of the date the arbitral award was sent to the parties (first period) or within three months after the arbitral award was served to the party against whom judgments has been given (second period). If the parties agreed to deposit the award, the request to set an award aside must be filed within three months after the deposit at the district court.

The court of appeal may, at the request of a party or of its own motion, suspend setting aside proceedings, to put the arbitral tribunal in a position to reverse the ground for setting aside (Section 1065a DCC).

## 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

### Enforcement of Domestic Arbitral Awards

Domestic arbitral awards require leave for enforcement (*exequatur*) from the provisional relief judge of the competent district court before they can be enforced (Section 1062 DCCP). An *exequatur* is granted upon a request by one of the parties.

Enforcement of an arbitral award may only be refused if, after summary investigation, it seems likely that the award will be set aside or revoked, or if the enforcement concerns a penalty for

non-compliance which has been imposed contrary to Section 1056 DCCP (Section 1063 DCCP).

The possibility to appeal is asymmetric; it is possible to appeal against a refusal of leave for enforcement, but it is not possible to appeal a decision granting leave for enforcement (Sections 1063(4) and (5) DCCP).

### Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards may be recognised and enforced in the Netherlands upon the request of a party on the basis of a convention (Section 1075 DCCP) or Dutch law (Section 1076 DCCP). Requests for an *exequatur* with regard to foreign arbitral awards are submitted to the court of appeal.

#### Treaty-based

If a convention or treaty for the recognition and enforcement of the arbitral award applies, leave for enforcement of a foreign arbitral award may be requested with the court of appeal on the basis of Section 1075 DCCP. The *exequatur* proceedings laid down in Sections 985-991 DCCP apply, in so far as the applicable convention does not contain provision in derogation thereof. The court of appeal verifies whether all formalities, including those of the applicable convention, have been observed.

The appeal possibilities are similar to those described for the enforcement of Dutch arbitral awards. This includes the asymmetric appeal rule, unless this rule leads to a violation of the rights of the defendant ex Article 6 ECHR.

The Netherlands is a party to the New York Convention and the ICSID Convention. Whereas the New York Convention prescribes a similar route as provided above, the ICSID Convention provides for a slightly different procedure.

#### Non-treaty-based

If no convention or treaty for the recognition and enforcement of the arbitral award applies, or if the party does not base its request upon an applicable treaty or convention, a request for leave of enforcement may be based on Section 1076 DCCP, to be submitted to the competent court of appeal.

## 14. Recent Developments

### 14.1 Proposals for Dispute Resolution Reform

There are two noteworthy legislative proposals for the reform of dispute resolution pending in the Netherlands:

- a proposal for the modernisation and simplification of the law of evidence; and

- a proposal for the Act on the adjustment of the dispute settlement proceedings and clarification of admissibility requirements for inquiry proceedings.

## Modernisation and Simplification of the Law of Evidence

On 18 June 2020 a(n improved) legislative proposal for the modernisation of the law of evidence was submitted to the House of Representatives (*Tweede Kamer*). The most important proposals/proposed changes are:

- parties will be obliged to collect and gather information and evidence as much as possible prior to initiating a lawsuit;
- filing separate applications for preliminary evidence (*voorlopige bewijsverrichtingen*) (eg, provisional examination of witnesses, provisional expert opinion, provisional judicial site visit or inspection and inspection prior to proceedings) will no longer be allowed - these requests should be bundled and filed in a single request;
- the rules regarding the right of inspection (*inzagerecht*) will be amended;
- codification of the possibility to seize evidence in non-IP cases; and
- the proposal was met with criticism from practitioners and academics. It remains unclear if, and if so, in what form, the proposal will be adopted.

## Act on the Adjustment of the Dispute Settlement Proceedings and Clarification of Admissibility Requirements for Inquiry Proceedings

The preliminary bill aims:

- to improve the effectiveness of dispute settlement proceedings regarding shareholder disputes by relaxing the thresholds on which forced exit (*uitstootregeling*) or forced buy-out (*uittreedregeling*) claims can be granted; and
- to clarify the conditions of access to the inquiry proceedings for shareholders (and holders of depositary receipts for shares) of listed companies, in particular for shareholders (and depositary receipt holders) of listed companies with a subscribed capital of less than EUR22.5 million.

The initial draft law is still in the preparatory phase. It is not clear when the bill will be submitted to the House of Representatives.

## Recently Revised Law Governing Attachments and Enforcement

On 1 October 2020 amendments of the law governing attachment and enforcement entered into force which aim:

- to secure the minimum subsistence of debtors in the event of attachment and execution;
- to ensure that attachments and enforcements take place efficiently; and
- to prevent that attachments are used solely as a coercive measure.

Two more amendments are scheduled to enter into force on 1 January 2021 and 1 April 2021.

## 14.2 Impact of COVID-19

From mid-March to early April 2020 physical court hearings only took place in (very) urgent summary proceedings in which the court deemed the physical presence of the parties necessary. In other (very) urgent summary proceedings, courts also held hearings through video or telephone conference. All other court hearings were postponed, with delays as a result. In some cases, court hearings were replaced by written statements (reply and rejoinder). At all times submissions of written statements was possible and judgments were delivered (with delay).

From early April 2020 onwards, courts have restarted planning court hearings in all cases. In principle these hearings take place through video or telephone conference, unless the court deems physical presence necessary. This depends on the type of the case, the court's capacity and the availability of technical resources.

As of 17 August 2020, court hearings are accessible to the public again, provided a reservation is made in advance.

No substantive rules have changed or suspended, and limitations period still apply.

# NETHERLANDS LAW AND PRACTICE

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**Florent B.V.** is a leading corporate boutique in the Netherlands and works for national and international clients, including corporates, banks, investors and governments. Dispute resolution is one of the main practice areas of the firm; the team comprises four partners and 12 lawyers and handles high-value, complex corporate and commercial litigation, particularly in the financial sector, semi-public organisations, real estate and industrial engineering – matters including Rabobank, StandardAero, Mosadex, Volkswagen, Steinhoff, Imtech, TradeWork and Hema. Many cases, such as major class-action litigation,

gain (international) press attention. The fraud team is specialised in cases of cross-border asset recovery, fraud litigation (prosecuting civil claims) and investigations, representing trustees in fraud-related bankruptcies and victims of boiler room frauds. Florent's lawyers enjoy excellent reputations with the courts and among top-tier law firms. Based in Amsterdam, the firm is actively involved in cross-border matters and organisations such as IBA Committees, ICC's FraudNet, INSOL and INSOL Europe, and Lexwork.

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