

GETTING THE DEAL THROUGH

Dispute Resolution

in 50 jurisdictions worldwide

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Netherlands

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Litigation

1 Court system

What is the structure of the civil court system?

The Dutch civil court system consists of three instances. The District Courts, each located in one of the 19 districts in the Netherlands, are the courts of first instance. District Courts have jurisdiction to hear any disputes of a civil law nature. In addition to the civil chamber, District Courts also comprise a criminal chamber and an administrative chamber.

For monetary claims up to €5,000, or specific types of cases such as employment disputes, agency, lease related disputes, a separate (cantonal) division within the District Court has jurisdiction. The cantonal judge used to reside in a separate court, the cantonal court. As of 1 January 2002, these courts have been merged into the District Courts as a separate division. Unlike civil cases before the District Court, there is no obligation for a party to retain the representation of legal counsel in cases before the cantonal division.

The second instance consists of five courts of appeal, who have jurisdiction over appeals against judgments of the courts of first instance. Such appeals are heard *de novo*, allowing new evidence, fact finding and legal argumentation. The Enterprise Chamber of the Court of Appeal in Amsterdam, however, acts as a court of first instance with respect to the policy or conduct of business of a legal entity. The Enterprise Chamber also has jurisdiction to deal in first instance with matters concerning company annual accounts.

The Supreme Court is at the top of the judicial hierarchy. It hears appeals against judgments of the courts of appeals as a court of cassation. If the lower court judgment violates the law procedurally or materially (substantively), the Supreme Court can annul that judgment. It does, however, not rule on the facts and bases its decision on the facts as found by the courts in first or second instance.

In addition to the above-mentioned courts, the Netherlands has a number of specialised courts: the Central Board of Appeal and the Board of Appeal for Trade and Industry. The Central Board of Appeal deals with appeals in cases involving the civil service and social security issues. The Board of Appeal for Trade and Industry deals with cases in the area of social-economic administrative law such as certain antitrust issues.

2 Judges and juries

What is the role of the judge and (where applicable) the jury in civil proceedings?

The size and scope of the dispute that the parties submit to the judge are determined by the parties and not the judge. However,

the Dutch Code of Civil Procedure (DCCP) stipulates that the judge has the authority (and the obligation) to supplement the legal grounds. The judge will independently of the parties' arguments and statements assess whether and which legal basis in combination with the facts support the claim or the defence. The judge will do so regardless of whether the parties have raised the correct rules of law. During a proceeding a judge can be quite active. He or she can order the parties to appear before the court and also order the submission of documents. Moreover, the judge can also appoint expert witnesses, order the hearing of witnesses to fact, pose questions and thus play an active investigative role in the procedure.

The Netherlands does not have a jury system.

3 Limitation issues

What are the time limits for bringing civil claims?

Under Dutch, law civil claims are subject to time limitations, and also expiration. Time limitations can be (repeatedly) extended rather easily. This can be achieved by either starting a law suit or sending a written notice in which the claimant unequivocally reserves its right to pursue his claim. The effect of an extension is that the time limitation period starts anew. With respect to expiration of a right, extension is not possible. If an expiration period passes, the possibility to pursue the claim expires. Extension is in principle not possible. Under Dutch law there are some exceptions to this rule.

The general rule under Dutch law is that claims are time barred after 20 years from the time they arise. However, the law contains specific provisions for several situations with different (generally shorter) time periods.

Claims regarding performance of a contractual obligation must be brought within five years after these claims fell due. That same five-year limitation period applies to claims regarding (tort) compensation of damage or payment of a penalty, which starts running the day following the day on which the injured party becomes aware of the damage or the penalty accruing. In any event, a claim for compensation of damages is time barred after 20 years following the occurrence that caused the damage or led to the penalty becoming due. In case of damages due to environmental pollution, the limitations period is 30 years.

Claims with regard to rescission or specific performance of a contract have a five-year time limitation from the moment the creditor becomes aware of the default, or in any event 20 years following the default. Other periods of limitation apply to causes of action regarding cultural heritage claims, ranging from one to 75 years depending on the type of claim.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Depending on the type of case, there can be legal requirements to take specific steps before instituting proceedings. Generally, if a proceeding is started without prior notice, the court can take this into account when awarding legal fees and court costs. In particular, if it becomes clear that the other party was willing to comply with the claim, starting a procedure without warning will be considered to have been avoidable and therefore causing unnecessary costs.

Dutch procedural law requires each claimant to mention in the writ of summons the evidence that it has at its disposal, as well as mention the witnesses that can be heard to testify and confirm the facts of the case. Further, the writ of summons must mention the defendant's known defences and their legal basis. This requires the claimant to prepare its claim properly and fully.

Before starting a law suit, one can obtain (additional) evidence by means of filing a petition with the court to conduct a provisional witness hearing, a provisional expert report or a provisional judicial visit to observe the state of a particular location or the state of particular goods. If such a petition is granted, evidence can thus be obtained through these means before the law suit is commenced. If denied, the requesting party can appeal that decision. However, it is not possible to appeal a court's decision granting the petition. There is no obligation for a party to file such a petition.

Dutch procedural law also allows a party to obtain a pre-judgment attachment order from a court. This can be used in an effort to, for example, freeze assets against which the claimant can later execute a judgment that the claimant will be seeking in a law suit. It can also be used to prevent the transfer, (further) encumbrance or absconding of assets. It is, however, required that a party, after having effectuated an attachment, initiate legal proceedings within a specific period. The court typically fixes a period of at least eight days within which the legal proceedings have to be initiated. An attachment can be obtained on very request to the court on an ex parte basis in very urgent matters within hours.

Even though it is relatively easy to obtain permission for a pre-judgment attachment – it is, in principle, an ex parte procedure where the court merely checks whether the formal legal requirements have been met, and a viable claim has been alleged – if it later turns out that the underlying claim was groundless, the party whose assets have been attached may seek to recover any damages he or she suffers as a result of the attachment.

5 Starting proceedings

How are civil proceedings commenced?

Depending on the type of claim, civil proceedings are commenced by either having a bailiff serving a writ of summons to the other party, or by a party the filing of a petition with the court. The law specifies which type of case requires the filing of a petition. In areas where the law is silent, the case will have to be brought by means of a writ of summons. Examples of procedures that have to be commenced through a petition are family-related disputes (with the exception of divorce cases) and the rescission of a labour agreement.

However, if a party makes the wrong choice when filing its case, article 69 of the DCCP allows the court to permit the party to correct such mistake.

A writ of summons has to be served by a bailiff on the other party. A petition, however, is filed directly with the court.

The procedure is considered to be pending as of the moment the bailiff served the writ of summons, or in the event of a petition, the moment the petition is received by the court. In order for the case to be pending, the writ of summons must also be filed with the court's registry prior to the appearance date stated in the writ. In the event that a party forgets to do so, it can rectify this by serving a new writ stating a new court date.

6 Timetable

What is the typical procedure and timetable for a civil claim?

The course of the procedure in first instance, including the applicable time limits, possibilities to receive an extension and the order of proceedings are governed by the National Regulation for the Docket of 1 March 2007.

In a straightforward procedure, after the claimant's serving and filing of the writ of summons and paying the court fees, the defendant typically submits an answer. The judge may thereafter order both parties to appear for a hearing. The purpose of this hearing is to either assess whether a settlement between the parties can be reached or provide information to the judge. After that hearing, the judge can allow the parties to further submit written pleadings (reply followed by rejoinder), or instruct a party to provide evidence to support or refute certain allegations. A party has in principle six weeks to submit its answer to a writ of summons, or another statement. This can be less for incidental issues (eg, jurisdictional issues) or simple legal briefs. In principle no extension of time is granted, except with both parties' agreement, or in the event of force majeure or compelling reasons.

A straightforward procedure, without any incidents (such as jurisdictional or evidentiary issues), could last one year. However, if the procedure becomes more complex it is not uncommon for it to last two, three or even five years or more.

7 Case management

Can the parties control the procedure and the timetable?

The parties have little control over the procedure and the timetable. The course of the procedure is largely determined by the court's procedural decisions. If a hearing is ordered, the judge presiding over that hearing plays an important role in the further course of the procedure. He or she can decide whether the parties are allowed to submit further statements or request a party to provide evidence or order expert witness testimony. Courts can pose strict deadlines, which in principle cannot be extended unless both parties agree.

If the parties are in agreement, they can request the judge to conduct the procedure in a particular manner. The judge will follow the parties' proposal, unless it violates the law, good procedural order or causes unreasonable delay of the procedure.

8 Evidence

What is the extent of pre-trial exchange of evidence? Is there a duty to preserve documents and other evidence pending trial?

Are any documents privileged? Would advice from an in-house lawyer also be privileged? How is evidence presented at trial? Do witnesses and experts give oral evidence?

Unlike common law jurisdictions, Dutch procedural law does not provide for a mandatory pre-trial exchange of evidence between the parties.

All forms of evidence are allowed, including those which are not mentioned in the DCCP.

The DCCP does not contain a duty to preserve documents and other evidence pending trial. A party has no duty to disclose all the documents in its possession related to the dispute to the other party. However, a party may request the court to order any person possessing it to turn over a copy of a specific document related to a legal relationship to which it or its predecessors were a party. This allows a party to obtain documents such as copies of contracts, correspondence, reports, etc, provided that these documents are connected to said legal relationship.

Some documents are protected by privilege, such as attorney–client, priest–penitent and physician–patient privilege. In addition, the Rules of Conduct of the Dutch Bar do not allow attorneys to submit correspondence with opposing counsel without the other attorney’s permission. Furthermore, attorneys are likewise not allowed to inform the judge of the contents of settlement negotiations conducted between them.

Furthermore, the DCCP poses a duty on the parties to provide truthfully all the facts relevant for a decision in the case. In the event this duty is breached, the court can draw the conclusions it sees fit. The latter provision is rather vague, the law does not specify what this means. However, it is likely the court will explain this to the detriment of the non-complying party.

The law requires the claimant to mention in the writ of summons the evidence he or she can provide to support his or her case. The defendant has also to meet with this requirement with respect to its statements when answering to the claim, or submitting his counterclaim.

Witnesses are heard during a hearing before an examining magistrate (judge). Written witness statements can be submitted in a procedure, but usually carry less evidentiary value than witness testimony provided before the judge. Live witness testimony is not recorded in a verbatim report, but in a summary drafted by the examining magistrate which is signed by the witness. Experts provide written expert reports of their findings.

9 Interim remedies

What interim remedies are available?

There is a wide range of interim remedies available. As described in question 4, pre-trial attachment of assets is possible. Furthermore, prior or parallel to the main procedure, it is possible in urgent matters to file for a summary proceeding in which a provisional measure is requested, such as for example an advance payment of the amounts due. In very urgent matters, this may be the most sensible thing to do. It is also possible to request provisional measures during the main procedure itself.

Provisional measures can also be requested in support of foreign proceedings.

10 Remedies

What substantive remedies are available?

Dutch law allows for a party to claim compensatory damages, but not punitive damages. Furthermore, a claimant can also claim specific performance of, for example, a contractual obligation. In the latter case, claimant can also request the court to impose monetary penalties on a party in the event of non-compliance with the judgment. Moreover, a party can also request a declaratory judgment or the rescission of an agreement.

Interest starts running from the date the damages occurred,

or the claim became due. Interest calculation is compounded annually (interest on interest is allowed).

11 Enforcement

What means of enforcement are available?

If a party does not voluntarily comply with a judgment, the prevailing party can instruct a bailiff to execute the judgment (in the event of a monetary claim) against the judgment debtor’s assets. The bailiff can seize the assets and auction them in order to satisfy the judgment. If the judgment provides for the forfeiture of penalties, the bailiff can execute the forfeited penalties.

12 Public access to court records

Are court hearings held in public? Are court documents available to the public?

Court hearings are open to the public. The law stipulates that the judgment is pronounced in public. In practice, however, the parties’ representatives receive the judgment from the court. Judgments are frequently published on the internet. Due to privacy regulations the judgments may be anonymised. The parties’ filings to the court are not available to the public.

On the grounds mentioned in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the press or the public may be excluded from all or part of the trial. This is also the case if parties have specifically so requested, and in so doing waived their right to a public hearing.

13 Inter partes costs

Does the court have power to order costs?

The court can order a party to pay the other party’s costs. The costs are calculated on the basis of a standard compensation structure. Generally the compensation calculated will not fully cover a party’s actual costs. Costs of witnesses and experts are included fully in the calculation. If costs have been caused unnecessarily by one party, that party may be ordered to pay these costs in full.

14 Fee arrangements

Are ‘no win, no fee’ agreements or other types of contingency or conditional fee arrangements available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a defendant share its risk with a third party?

‘No cure, no pay’ contingency fee arrangements are prohibited under the rules of the Dutch Bar Association. Furthermore, a lawyer is in principle also not allowed to agree that his remuneration will be based on the value of the results of the law suit. Fixed fee arrangements are allowed. Third-party funding of litigation expenses is allowed. A defendant may share its risk with a third party. A claimant may also agree to share any proceeds of the claim.

15 Class action

May litigants with similar claims bring a class action or other form of collective redress? In what circumstances is this permitted?

Dutch law allows claimants to unite by means of a foundation or an association in order to litigate together against liable parties. The aggrieved parties can seek a declaratory judgement regarding the defendant’s liability. However, the object of such litigation

may not be to seek monetary compensation. Separated litigation is necessary to have any monetary liability determined, that is, the compensable damage to an individual injured party.

On 27 July 2005 the Law on Collective Settlement of Mass Injury Damages came into force. This law offers the possibility of efficiently settling 'mass damages'. The law had immediate effect and is also applicable on collective mass damages originating prior to 27 July 2005.

16 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The general rule is that an appeal is always allowed, unless the law specifically provides otherwise. An appeal against a judgment of the District Court is brought before the Court of Appeals. The latter can be appealed before the Supreme Court. As mentioned in question 1, the Supreme Court does not reconsider the findings of fact made by the lower courts. The Supreme Court only deals with issues of the law.

17 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The recognition and enforcement of foreign judgments is obtained through a declaration of enforceability by the preliminary measures judge of the District Court. The preliminary measures judge will allow the execution of that judgment by issuing an *exequatur* (enforcement order). An *exequatur* will not be issued if the foreign judgment is contrary to Dutch public order or the principles of due process were not observed in the foreign litigation.

A foreign judgment need not be recognised and enforced unless there is either a special regulation or bilateral treaty allowing this. Within the EU, Regulation (EC) No. 44/2001 on Jurisdiction and the Enforcement and Recognition of Judgments in Civil and Commercial Matters allows for the enforcement of judgments issued in the EU member states.

If a foreign judgment's recognition and enforcement is not secured by any international agreement, it cannot be enforced in the Netherlands. Formally, a retrial will be necessary, in which the foreign judgment can be introduced as evidence. Often, the court will essentially accept the foreign courts' decision, except where the foreign court had no proper jurisdiction, the underlying procedure respected the principles of due process, and the decision does not contravene Dutch public policy. Other judges may, however, wish to rehear (portions) of the case.

18 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Within the EU, the common procedure is to apply Regulation (EC) No. 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. The court in need of evidence, a witness testimony or documents or other objects that need to be investigated, directs its request within the Netherlands directly to the court that has jurisdiction on the witness or where the documents or objects are being held.

Furthermore, the Hague Convention of 18 March 1970 on the Taking of Evidence can apply, providing for the assistance

of Dutch courts. Bilateral treaties can also provide access to the Netherlands courts' assistance.

Arbitration

19 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The UNCITRAL Model Law (on International Commercial Arbitration) has not been adopted in the Netherlands; however, the Netherlands law of arbitration does have some similarities to it. The legislation regarding arbitration is set forth in book four of the DCCP and is commonly referred to as the Netherlands Arbitration Act of 1986. Conversely, the Netherlands Antilles and Aruba, territories which make up autonomous regions within the Kingdom of the Netherlands, have in fact adopted the UNCITRAL model law.

The Netherlands Arbitration Act is currently under review. Amendments to the Act have been proposed for consideration by the legislature. A new version of the Act is expected to be adopted in the near future.

20 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The DCCP does not provide for any specific requirements as to the form of an arbitration agreement. It is possible for parties to reach an oral arbitration agreement. This flexibility, however, should be balanced against the fact that if a party does dispute the validity or existence of an arbitration agreement, proof of the agreement's existence must be provided in the form of documentary evidence. No other type of evidence is admissible.

Arbitration agreements may be contained in general terms and conditions or as a clause of a contract. An arbitration agreement may also be contained in the binding articles or regulations of trade associations. In these instances, it is of course required that the parties either expressly or impliedly consented to the arbitration agreement in order for it to be binding.

21 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If parties to an arbitration have failed to agree beforehand on a method for selecting an arbitrator, or on the number of arbitrators to be appointed, the DCCP allows them to attempt to reach a consensus on these issues. If the parties cannot agree on the number of arbitrators to be appointed, the DCCP provides that a party may approach the competent District Court to have the number of arbitrators determined.

The DCCP allows parties time to try and reach consensus on a method for appointing the arbitrators if they have not previously provided for one. This period lasts for two months (or three months if one of the parties is domiciled outside the Netherlands) starting from the date on which the arbitral proceedings have been commenced, or from the date on which a District Court has determined the number of arbitrators to be appointed.

If a party becomes aware of circumstances that give reason to question an arbitrator's impartiality or independence, it may lodge a challenge to the arbitrator's continued involvement in the arbitration. In order to be able to raise a challenge, a party

must have become aware of those circumstances upon which it bases its challenge after the appointment of an arbitrator. Arbitrators have a duty to disclose information that may give rise to a challenge of their impartiality and independence prior to their appointment.

22 Procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

The DCCP supports the rights of the parties to agree on their own set of procedural rules for arbitrations taking place within the Netherlands. There are general rules within Dutch law that require that basic norms of fairness, due process and the equal treatment of the parties be respected during the arbitral proceedings. Aspects of procedure not dealt with in the DCCP or in the applicable rules shall be left to the parties to agree on, or to the discretion of the tribunal.

23 Court intervention

On what grounds can the court intervene during an arbitration?

Dutch courts are generally not allowed to intervene in an arbitral procedure if the parties have validly agreed to submit the dispute to arbitration. In certain limited circumstances, the District Court of Amsterdam is empowered to order the consolidation of separate arbitrations. In addition to that, a district court in the Netherlands may act in a support capacity whereby they may assist the arbitral proceedings by performing such acts as determining the number of arbitrators to be in a tribunal, or selecting arbitrators where an agreement between the parties does not exist or has not been adhered to. Furthermore, Dutch courts may also give preliminary or injunctive relief to parties involved in arbitrations prior to the commencement of an arbitration, or parallel to the arbitral proceedings.

24 Interim relief

Do arbitrators have powers to grant interim or conservatory relief?

Parties have the ability to empower the arbitral tribunal or its chairman to grant an award in summary proceedings. It is, however, still possible for the parties to initiate summary proceedings before the preliminary measures judge.

It is also the case that parties may empower an arbitral tribunal to render conservatory or injunctive relief.

25 Award

When and in what form must the award be delivered?

The DCCP contemplates different types of awards which may be rendered by a tribunal. A tribunal may render a final award, a partial final award, an interim award, an award correcting an error in a previous award and an additional award if a tribunal feels that it has failed to decide a matter in the final award.

In rendering an award, there are several requirements as to the form that must be met. The award must, unless otherwise agreed upon, be based on a majority decision of the tribunal. An award has to be in writing and signed by the arbitrators. The names and addresses of the arbitrators must be mentioned, as well as the names and addresses of all the parties involved. The date on which the award is made as well as the place thereof must be mentioned. Probably the most important requirement is that the arbitral award has to have a reasoned decision.

There are no time limits imposed on when a final award must be rendered.

26 Appeal

On what grounds can an award be appealed to the court?

In so much as the DCCP allows parties to appeal to a court in regard to an arbitral award, it does so on the basis of allowing a party to seek to set aside an award or have it revoked for a specific reason.

A party may seek to set aside an arbitral award if it is able to demonstrate that it has met one of the grounds set forth in the DCCP. The absence of a valid arbitration agreement, the constitution of an arbitral tribunal in violation of the applicable rules, breach by the tribunal of its mandate, failure to sign an award or provide a reasoned basis for award, and an award which violates public policy are all grounds for setting aside an arbitral award.

An award may be revoked by the competent Court of Appeals if it was rendered on fraudulent grounds. Also, parties may seek to revoke an award where it is shown that the documentary evidence upon which the award is based (partially or wholly) is later discovered to have been forged, or if documents come to light after the award that would have had an influence on the final award, and those documents were withheld due to acts of the opposing party.

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27 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Parties seeking to enforce arbitral awards must seek the permission of the district court which has jurisdiction over the opposing party. The DCCP distinguishes between awards that are rendered in countries that are members of the New York Convention or parties to other treaties with the Netherlands, and those that are not. In practice, the grounds upon which a court may refuse enforcement are largely the same for those awards rendered outside the New York Convention system as those where no treaty is applicable.

28 Costs

Can a successful party recover its costs?

An explicit article does not exist within Netherlands arbitration law concerning the recovery of the costs of the arbitral proceedings. The tribunal is free to award a party its costs unless the parties have agreed otherwise.

Alternative dispute resolution**29 Obligatory ADR**

Is there a requirement for the parties to litigation or arbitration to consider alternative dispute resolution before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process? What types of ADR processes are commonly used? Is a particular ADR process popular?

There is no requirement to consider ADR. However, there is a nationwide court-annexed mediation programme attached to all of the district courts and Courts of Appeal, through which judges may invite the parties to consider the alternative of mediation. Mediation is commonly used.

Miscellaneous**30 Are there any specific features of the dispute resolution system not addressed in any of the previous questions?**

Court proceedings are conducted in Dutch. However, in the province of Friesland a party can submit its filings in the Fries language. The court may order a translation into Dutch. This does not apply to the writ of summons.