SECOND EDITION

Litigation in the Netherlands

Civil procedure, Arbitration and Administrative Litigation

By Marieke van Hooijdonk
and Peter Eijsvoogel

Wolters Kluwer
Law & Business

Litigation in the Netherlands

Civil Procedure, Arbitration and Administrative Litigation

By

Marieke van Hooijdonk and Peter Eijsvoogel

Partners at Allen & Overy Amsterdam

Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
P.O. Box 85889
2508 CN The Hague
The Netherlands
E-mail: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
USA
E-mail: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Extenza-Turpin Distribution Services
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
E-mail: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-4143-9

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

Foreword to the First Edition

'Quick', 'informal' and 'affordable' are key words for modern procedural law in the Netherlands, and they reflect not only the character of the Dutch people but also the needs of an urbanised society. To some lawyers, coming from common law jurisdictions and getting in touch with our litigation practice, the Dutch approach can seem hasty and too informal (though remarkably cheap). Such observations may be based on the difference between common law and Continental procedural systems such as ours. Dutch civil and administrative procedural law is part of the Continental tradition in which there is no jury and the position of the court has always been relatively dominant (especially in the fact-finding process). Therefore, proceedings are less 'adversarial' than in the common law tradition and are directed by an active judge. This may explain, for instance, the immense success in our country of the '*kort geding*', civil preliminary relief proceedings. The courts had the opportunity to develop preliminary relief proceedings, originally meant for interim injunctions in the true sense, in such a way that they have become a successful alternative to the lengthy and costly ordinary proceedings on the merits. The success of the *kort geding* partly explains the courts' current preference to apply *kort geding* techniques in ordinary procedures in order to avoid lengthy and irrelevant debates.

Although some aspects of Dutch litigation certainly need upgrading (in particular the fact-finding process), the machinery of justice is in general functioning very well. The attitude of the average lawyer or judge towards procedural matters is open-minded, flexible and pragmatic. The courts are clearly focused on settling disputes at an early stage of the proceedings rather than letting them drag on for years. By issuing detailed procedural regulations which are updated regularly, the judiciary has shown that it is prepared to adapt the rules quickly to changing needs.

An increasing proportion of procedural law is determined by European legislation and by the case-law of the European Court of Justice. The growing influence of the European Convention on Human Rights and the case-law of the European Court of Human Rights is also noticeable. These are developments which will eventually lead to the harmonisation of large parts of the procedural laws of the member states of the European Union. They will also inevitably lead to a better understanding of the legal cultures of other countries.

This book provides a detailed summary of the main features of litigation in the Netherlands, whether in civil or administrative courts, or in arbitration, and will certainly aid the understanding of procedural law in this country as well as its background, traditions and values.

Daan Asser
Judge with the Dutch Supreme Court
Hoge Raad der Nederlanden
September 2008

Preface

'Litigation in the Netherlands' provides a practical and comprehensive guide for all foreign lawyers, businesses and individuals involved in commercial litigation in the Netherlands. Its aim is also to be a resource for Dutch lawyers who wish to advise their English-speaking clients on Dutch litigation.

As in most other Western countries, litigation in the Netherlands has increased over the years. Statistics show that since 2000 the number of commercial cases dealt with by the District Courts increased by 74% to 664,000 in 2010, the vast majority of which relates to claims brought before the cantonal division. Preliminary relief proceedings in the Netherlands are very efficient and thus popular; annually about 15,000 claims are filed in summary proceedings. Whereas litigation was previously dealt with by various departments within a firm, the bigger law firms in the Netherlands now all have specialised litigation departments.

The Global Competitiveness Report 2012-2013 of the World Economic Forum shows that out of 144 countries, the Netherlands ranks eighth as regards the efficiency of its legal framework for settling disputes. Likewise, the Rule of Law Index 2011 of The World Justice Project shows that out of 12 countries investigated in Western Europe and North America, the Netherlands ranks in the top three for access to justice.

Most litigation is still brought in the public courts. Several surveys show that, compared with other Western European countries, the period of time required to settle a case through public court proceedings in the Netherlands is relatively short. The average length of contentious proceedings in a commercial dispute in the District Court (excluding the cantonal division) is about 14 months. More than half of the cases are dealt with within 10 months. Most practitioners and parties are satisfied with the accessibility, speed, quality and consistency of the administration of justice in the Netherlands. Judges are generally viewed as being professional and impartial. The World Economic Forum Report shows that out of 144 countries, the Netherlands ranks third for judicial independence.

Since 2002, the Council for the Judiciary (*Raad voor de Rechtspraak*) has continually been reviewing and promoting the quality of the Dutch judicial system. From 1 January 2013, the number of courts will be reduced significantly; larger-scale courts will be created to enhance the quality of legal decision-making.

Since 1 July 2011, the jurisdiction of the (more informal) cantonal division of the District Courts was increased and, on 1 July 2012, two new laws regarding the functioning of the Supreme Court entered into force. In conjunction with the Ministry of Justice and the courts, the Council is also investigating the use of ICT applications in court proceedings. To date, there are only limited opportunities to submit documents electronically; however the government's aim is that in 2015, it will be possible to communicate electronically with all the courts, i.e. in civil, administrative and criminal cases.

The Code of Civil Procedure itself is also subject to ongoing review. In 2002, important changes were made to the law to improve the efficiency of civil court proceedings, to minimise formal requirements and to modernise the relationship between judges and the parties. However, the Dutch parliament was of the opinion that these reforms were only a starting point and asked for a full review of the basic principles of civil procedure. The Government instituted a special committee (*Commissie Fundamentele herbezinning Nederlands burgerlijk procesrecht*) to carry out this review. One of the results of this study is that a bill is now pending which creates increased opportunities for discovery and disclosure.

In addition to litigation in the courts, arbitration has become increasingly important as a means of dispute resolution and is generally the quickest way of achieving this, especially if the arbitration is conducted under the efficient rules of the Netherlands Arbitration Institute. The advantages of arbitration are the ease of international enforceability under the New York Convention as well as confidentiality and the opportunity to use arbitrators with specific expertise, which avoids the costs and delays that would result from the court having to appoint experts to provide guidance on certain issues. The disadvantages of arbitration, however, are the absence of an appeals mechanism (even though this can be agreed upon) and the higher costs of arbitration in comparison with court proceedings. The Dutch rules on arbitration have not changed much during recent years. In March 2012, however, the Ministry of Justice presented a proposal to amend the Dutch Arbitration Act, mainly to bring it more in line with 'best practices' in (international) arbitration.

The chapter on arbitration in this book also deals briefly with mediation and with expert determination as an alternative means of dispute resolution. Since 1 April 2007, all courts, both in civil and administrative matters, can refer litigant parties to mediation. In practice, mediation is mostly used for specific kinds of dispute that relate to family and employment law. Dispute resolution by means of expert determination is common only within specific industries and is often used for more technical issues.

The rules of procedure relating to administrative disputes in the Netherlands are very different from those for civil disputes, more so than in most common law jurisdictions. Over the last 25 years, the Netherlands has seen an increase in various

types of administrative litigation. In this period, many state-owned enterprises, such as the postal, telecommunications and energy businesses, have been privatised and subjected to competition in liberalised markets. State-owned enterprises that once saw hardly any litigation have now become competitive and highly regulated industries, and the decisions of the sector-specific regulatory authorities which govern many of these markets are generating significant volumes of administrative litigation. The same holds true for the Netherlands Competition Authority, which was created on 1 January 1998 to enforce competition law and merger control at national level. More recently, the banking, securities and insurance industries have been subjected to intense and detailed regulation, to a large extent as a result of European legislation. The Dutch supervisory authorities for the financial markets and industries (the Netherlands Authority for the Financial Markets and the Dutch Central Bank) have become increasingly active and more formal in their approach. This too has led to an increase in the volume of complex administrative litigation.

In practice, civil and administrative litigation are sometimes intertwined. For instance, a hostile takeover battle may well simultaneously involve civil litigation (in the Enterprise Court) as well as administrative litigation (against decisions of the Netherlands Authority for the Financial Markets in connection with its powers to approve a prospectus or to order a party to follow a particular course of action).

In view of the many differences between the procedural rules for each type of dispute resolution, this book is divided into three parts. Civil litigation is dealt with in Chapter 1, with a special section dedicated to corporate litigation in the Enterprise Court. The Enterprise Court has become a highly specialised court in enquiry proceedings, with far-reaching powers of investigation, and has made important contributions to the development of company law and corporate governance in the Netherlands. Arbitration is dealt with in Chapter 2 and administrative litigation in Chapter 3. As this book is intended to be a practical guide to litigation in the Netherlands, we have refrained from making references to textbooks and academic literature.

This work is a joint effort between two partners of the Amsterdam office of Allen & Overy LLP. Marieke van Hooijdonk, a partner specialising in Litigation and Arbitration, is responsible for Chapters 1 and 2, and Peter Eijsvoogel, a partner specialising in Regulated Industries and Economic Administrative Law, is responsible for Chapter 3.

The first edition of this book was published in February 2009. This second edition takes account of the changes in statutory, treaty and case law during the last four years. The authors would like to thank those colleagues who have assisted with the drafting of and commentary on this update. More specifically, they would like to thank Arnold Croiset van Uchelen, Richard de Haan and especially Joanna Jonker Roelants for their help on Chapter 1, Hilde van der Baan for her assistance on Chapter 2 and Jantine Vermont for her help on Chapter 3. The authors have

stated the law as at 1 October 2012, although a limited number of provisions that were not in force at that date are covered.

Marieke van Hooijdonk
marieke.vanhooijdonk@allenovery.com

Peter Eijsvoogel
peter.eijsvoogel@allenovery.com

Table of Contents

Chapter 2
Arbitration **127**