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LITIGATION IN THE NETHERLANDS
A Practitioner’s Guide

2013 Edition

By
Tom Claassens
PREFACE

The objective of this booklet is to provide foreign investors and their advisors with a basic understanding of litigation in The Netherlands. It deals with the judicial structure in the Netherlands and summarizes the most important features of legal proceedings. The information given is limited to civil proceedings (Chapters 1 through 20), and arbitration (Chapter 21). The rules of criminal procedures, administrative procedures and tax procedures are not covered. Special attention is given to proceedings before Enterprise Chamber of the Amsterdam Court of Appeal.

I would like to thank Tom Claassens, Erik Koster and Andi Bimo for putting together this booklet. Their knowledge and experience is reflected in many sections.

Maarten van der Weijden
Managing Partner Loyens & Loeff N.V.
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Abbreviation/definitions


**AFCN**  The Agreement between the United States of America and the Netherlands Concerning Friendship, Commerce and Navigation of March 27, 1956

**Answer**  Defined in paragraph 7.2

**AoJ**  The Act on the Judiciary

**Arbitration Act**  The Netherlands Arbitration Act


**CSQN**  Defined in paragraph 15.1

**DCC**  The Dutch Civil Code

**DCCP**  The Dutch Code of Civil Procedure

**Member State(s)**  All the member states of the European Union (except Denmark)

**NAI**  The Netherlands Arbitration Institute

**Petition**  Defined in paragraph 7.1

**Post defense Hearing**  Defined in paragraph 7.3
**Regulation 44/2001**

**Regulation 1206/2001**
Regulation (EC) Nº 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters

**Regulation 1393/2007**

**Rejoinder**
Defined in paragraph 7.4.1

**Reply**
Defined in paragraph 7.4.1

**Rome I Regulation**
EU Regulation 593/2008 on the law applicable to contractual obligations

**Summons**
Defined in paragraph 2.3

**UNCITRAL**
United Nations Commission on International Trade Law
1. Overview of the Key Distinguishing Issues in the Netherlands

1.1 Introduction

One of the main distinctive features of civil law proceedings in the Netherlands is that the Dutch courts depend on the claims, legal theories, and statements as they are advanced by the parties. They are the ones who determine the scope of the proceedings, not the courts. The court usually cannot add any facts to those presented by the parties (see paragraph 13). It must consider undisputed facts as established and it cannot rule outside the scope of the demand for relief, or refuse entirely to deliver a judgment (Article 23 of the Dutch Code of Civil Procedure - Wetboek van burgerlijke rechtsvordering or Rv) (hereafter referred to as: the “DCCP”). In this regard it is often referred to as the passiveness of the courts (lijdelijkheid). In other respects, however, the court may very well steer the proceedings. It is the court that decides, for example, that a court hearing of parties (see paragraph 7.3) should be held or that evidence should be presented by expert witnesses.

Moreover, it is noted that there are no jury trials in the Netherlands. The courts rule on all aspects of the case. Legal proceedings may be protracted, sometimes lasting several years. Ancillary proceedings (see paragraph 7.5) may slow down the proceedings considerably, and the court almost invariably needs several months to reach a decision. Appeals also take considerable time. The relatively slow pace of regular proceedings is one reason for the popularity of preliminary relief proceedings (see paragraph 8.1).

Among the more fundamental albeit less distinctive principles of civil law proceedings in the Netherlands are the fact that proceedings are generally open to the public, and that parties in principle always have the opportunity to have their case heard in at least two instances during which a full review of all the relevant facts and circumstances is done.

1.2 Basics and Characteristics of Dutch Civil Procedural Law

Readers who are familiar with a foreign legal system, especially the Anglo-American system, may be struck by a number of differences with the Dutch legal system.

Courts in the Netherlands consist solely of appointed, rather than elected, judges. Judges are civil servants, but act in their judicial capacity with complete independence from the government. Judges are appointed for life.
Furthermore, there are, as discussed, no juries. Legal proceedings are basically conducted in writing. Oral pleadings are optional and certainly not the focal point of the proceedings. If held, they essentially serve to amplify the points laid down in the written pleadings. Parties do, however, always have the right to at least one oral hearing. There is no discovery, at least not in the manner as it is known in the American system. The same is true for depositions and interrogatories or document requests. It is mainly up to the parties to determine the information, documents, or witnesses they wish to present. As a result, there is also no established theory of privilege for an attorney’s work product.

The Dutch legal system does not provide for the possibility of filing class action lawsuits in the same way the American system does. The DCCP does, however, provide for a mechanism for filing group claims and for a mechanism for having group settlements declared binding by a judge (see paragraph 16). Claiming punitive damages is not possible under Dutch law.

Statutes of limitation are considered part of substantive law. It may therefore be that a foreign statute of limitation determines whether a claim is time-barred, if that foreign law is the applicable substantive law. There are no summary proceedings such as those in the United States (see paragraph 7.6). Instead, Dutch law features the so-called preliminary relief proceedings (see paragraph 8.1).

Courts consisting of more than one judge decide by majority vote. There are no dissenting opinions. The Dutch courts render judgments on all aspects of the case. Court judgments must always contain the reasons for the decision. This is an important principle of Dutch procedural law.

Finally, court decisions, even decisions by the Supreme Court, are not binding on courts in deciding future cases. There is no rule of precedent. Supreme Court decisions, however, are held in particularly high esteem and are usually followed by the lower courts. The Supreme Court itself is also not bound by its own decisions and from time to time amends its earlier opinions and judgments.
2. Structure of the Courts

2.1 General Structure

As per January 1st 2013 the territory of the Netherlands is divided into ten judicial districts (arrondissementen) each of which has one district court (rechtbank). The district courts serve as the courts of first instance “in all civil matters, save for the exceptions provided for by law” (Article 42 of the Act on the Judiciary - hereafter referred to as: the “AoJ”). Usually, three judges preside over a district court.

Each district court also has a cantonal sector. The cantonal sector of a district court has jurisdiction over (i) all matters where the monetary value of the claim does not exceed EUR 25,000, (ii) all matters where the monetary value of the claim is undetermined but where there are clear indications that that value does not exceed EUR 25,000, and (iii) all matters regarding employment contracts, collective bargaining agreements, commercial agency agreements, rental agreements, sale agreements with consumers and lease-purchase agreements (Article 93 DCCP). In addition, the cantonal sectors will hear all civil matters where the parties involved voluntarily decide to bring the dispute before the cantonal sector of the district court of their choice, provided that it involves a matter where the parties are free to make such choice (Article 96 DCCP). In these cases of voluntary submission the jurisdiction of the cantonal sector is not limited by the nature or the monetary value of the claim(s) involved. Furthermore it is noted that in the cantonal sector cases are heard by a single judge.

Each of the ten district courts comes under a particular court of appeal (gerechtshof), of which there are four (The Hague, Amsterdam, Den Bosch and Arnhem - Leeuwarden). The courts of appeal adjudicate appeals from decisions in first instance of the district courts (Article 60 AoJ) (see also paragraph 14). The so-called Enterprise Chamber (Ondernemingskamer) of the court of appeal in Amsterdam is the court of first instance for all disputes concerning the management of corporate bodies, all disputes concerning the financial statements of corporate bodies and some disputes regarding co-determination rights between corporate bodies and their employees councils (Article 66 AoJ). Contrary to the district court judges (including their cantonal sectors), the judges at the courts of appeal are not called ‘judges’ but ‘justices’ (raadsheer). Appeal Cases are heard by three judges.

At the top of the hierarchy is the Supreme Court of the Netherlands (Hoge Raad der Nederlanden), referred to in short as the Supreme Court. Similar to the judges at the
courts of appeal, the judges of the Supreme Court are known as ‘justices’. The Supreme Court is divided into various divisions. ‘Division 1’, for example, deals with civil actions. Civil actions are adjudicated by three or five justices, depending on the degree of difficulty and the importance of the case to society. So, unlike district courts and courts of appeal it can happen that a case before the Supreme Court is adjudicated by five justices instead of three. The Supreme Court reviews judgments of the lower courts, but only with regard to matters of law (Article 79 AoJ). The factual matters of a case are irrevocably established by the lower courts and can therefore not be disputed or argued before the Supreme Court. Furthermore it is noted that contrary to, for example, the US Supreme Court, the Dutch Supreme Court is obliged to review all decisions presented to it. The Supreme Court may, however, deem a complaint manifestly ill-founded and dismiss it without giving any substantiation (Article 81 AoJ).

2.2 Rights of Audience and the Role of Foreign Co-counsel

All lawyers in the Netherlands are admitted to one of the ten Dutch regional bars but may represent their clients in each of the districts.

In preliminary relief proceedings (kort geding) (see paragraph 8.1) legal representation by an attorney is only mandatory for the claimant. The defendant is free to appear by himself, if he so wishes (Article 255 DCCP). As far as proceedings before the cantonal sector of a district court are concerned, both the claimant(s) and the defendant(s) are allowed to represent themselves (Article 79 DCCP).

Access to the profession of attorney is strictly regulated. The right to carry the title ‘advocaat’ is limited to persons who are registered as such within the Netherlands and persons who are authorized to use a corresponding title abroad (Article 9a Attorneys Act). In order to become registered as an attorney one has to be in the possession of a masters’ degree in law from one of the various Dutch law schools or have obtained the right to carry the title ‘master’ (meester) (Article 2 Attorneys Act). Furthermore, legal practitioners from other EU countries can benefit from Directive 2005/36 and Directive 98/5. Under certain circumstances these persons may exercise the legal profession without having a Dutch degree.

2.3 Time Horizons for Adjudications and Influencing Factors

As is the case in many other European countries one of the main problems the Dutch judicial system faces is the amount of time involved in hearing cases, especially civil cases.
Since the year 2000, the Dutch government has taken a number of measures to shorten the duration of civil proceedings, most notably the introduction on January 1st, 2002 of a number of changes to the DCCP.

As a result, the written phase of civil proceedings has become shorter. This was mainly achieved by requiring that claimant and defendant present all their arguments in respectively the Summons (dagvaarding) (hereafter referred to as: “Summons”) (see paragraph 7.1) and the Answer (see paragraph 7.2). The parties must also describe what evidence they have at their disposal if they wish to present that evidence to the court at a later stage.

The procedure before the district courts and the courts of appeal is also governed by the National Docket Regulations. One of the main features is that the courts are required to guard against unnecessary delays. Before January 1st, 2002 it was mainly left up to the attorneys of the parties involved to determine the pace of the procedures.

In all matters in which an immediate injunction, measure, or decision is required, the parties may address themselves to the so-called relief judge of the competent district court (voorzieningenrechter) (see paragraph 8.1). As discussed, the hearing before the relief judge is referred to as preliminary relief proceedings and sometimes - erroneously however - as summary proceedings.
3. Obtaining Jurisdiction and Choice of Forum

3.1 Statutory and Other Bases for Acceptance of Subject Matter and Venue

3.1.1 Introduction

The powers of the Dutch courts to adjudicate an international claim are to be distinguished from the powers that the courts of other countries might have in relation to such claim. In Dutch literature these powers of the Dutch courts to adjudicate an international claim are usually referred to as the “international jurisdiction” (international rechtsmacht) of the Dutch courts.

Once the international jurisdiction of the Dutch courts has been established, it will have to be determined which specific Dutch court has jurisdiction over the matter at hand. This will be dealt with in paragraph 3.1.3 below. First, however, we will deal with the powers of the Dutch courts to adjudicate an international claim.

3.1.2 The Powers of the Dutch Courts to Adjudicate an International Claim

The international jurisdiction of the Dutch courts is embedded in various treaties, an EU Regulation and Dutch domestic law.

The most important set of rules pertaining to international jurisdiction is to be found in the Regulation 44/2001. Also, the Lugano Convention is still relevant with regard to certain states (see below under b.). Only in the event neither of these rules (or any other international (bilateral) treaty on jurisdiction) is applicable, will the DCCP determine whether the Dutch courts have international jurisdiction with regard to a certain matter.

a. Regulation 44/2001

On March 1st, 2002 Regulation 44/2001 came into effect. It replaced the 1968 Brussels Convention 1968 for all EU Member States (i.e. France, Germany, Italy, Belgium, Netherlands, Luxembourg, UK, Ireland, Denmark, Greece, Spain, Portugal, Austria,

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1 Regulation 44/2001 will in due time be replaced by Regulation (EC) Nº 1215/2012 of 20 December 2012. However, since this new regulation will only apply as of 20 January 2015 and given that the changes are relatively minor, we will continue to refer to Regulation 44/2001.
Finland, Sweden, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovak Republic, Bulgaria and Romania).

The principal rule of Regulation 44/2001 – set forth in Article 2 thereof – is that defendants domiciled within the territory of a Member State shall, regardless of their nationality, be sued before the courts of the country where they have their domicile. Domicile is determined in accordance with the domestic law of the Member State where the court has been seized. In the case of legal persons or legal entities without legal personality, their domicile is determined by the country where they have their statutory seat, central administration or principal place of business, depending on that country’s rules of private international law. In the Netherlands, the domicile is determined by the place of the statutory seat.

Article 5 of Regulation 44/2001 provides for specific jurisdiction rules with respect to, amongst others: (i) matters relating to a contract (excluding contracts of employment), (ii) matters relating to maintenance, (iii) matters relating to tort, delict or quasi-delict, (iv) civil claims for damages or restitution which are based on an act giving rise to criminal proceedings, (v) disputes arising out of the operations of a branch, agency or other establishment, and (vi) disputes concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight.

Similarly, Article 6 contains rules regarding co-defendants, actions on a warranty or guarantee or other third party proceedings (vrijwaring, voeging), counterclaims and matters relating to a contract if the action may be combined with an action relating to rights in rem in immovable property.

Furthermore, Regulation 44/2001 contains special rules for jurisdiction on (i) matters relating to insurance (Articles 8 up to and including 14), (ii) consumer contracts (Articles 15, 16 and 17), and (iii) individual contracts of employment (Articles 18 up to and including 21).

Article 22 of Regulation 44/2001 lists certain courts, which shall have exclusive jurisdiction regardless of domicile (e.g., disputes regarding rights in rem in immovable property shall be exclusively dealt with by the courts of the Member State in which the immovable property is located).

Finally, Regulation 44/2001 contains rules regarding such matters as prorogation of jurisdiction (forum choice) (Articles 23 and 24); examination as to jurisdiction and admissibility (Articles 25 and 26); lis pendens – related actions (Articles 27 up to and including 30); and provisional and protective measures (Article 31).
b. The Lugano Convention
The European Free Trade Association countries (Iceland, Norway and Switzerland) continue to apply the rules of the Lugano Convention. The rules and principles embedded in the Lugano Convention are *grosso modo* the same as those of Regulation 44/2001. We will therefore not discuss those in further detail.

c. Provisions of Dutch Law regarding International Jurisdiction
As previously mentioned, the provisions of the DCCP regarding international jurisdiction are only applicable to the extent that there is no applicable treaty or EU directive based on which a Dutch court can determine whether or not it has jurisdiction. The relevant rules can be found in Articles 2 up to 9 of the DCCP.

By and large the system provided for in the DCCP resembles the system set out in Regulation 44/2001. Article 2 DCCP, for example, provides that the Dutch courts have international jurisdiction in all cases where the defendant is domiciled within the Netherlands (cf. Article 2 of Regulation 44/2001).

3.1.3 Internal Jurisdiction of the Dutch Courts that have International Jurisdiction
As discussed, once the international jurisdiction of the Dutch courts has been established, it will have to be determined which specific Dutch court has jurisdiction over the matter at hand.

As in most legal systems, Dutch law makes a distinction between subject-matter jurisdiction and venue. In Dutch procedural law, subject-matter jurisdiction is referred to as ‘absolute jurisdiction’ (*absolute bevoegdheid*) whilst venue is referred to as ‘relative jurisdiction’ (*relatieve bevoegdheid*). Contrary to most common law countries, the Netherlands does not have a (separate) doctrine of personal jurisdiction. Questions relating to personal jurisdiction are resolved within the framework of absolute or relative jurisdiction. Once absolute jurisdiction is established (see paragraph 2.1) it has to be determined which court has relative jurisdiction.

The rules pertaining to relative jurisdiction are set out in Articles 99 up to and including 110 of the DCCP. The basic rule is that an action is to be brought before the court of the place of the defendant’s domicile (Article 99 DCCP). If there are several defendants, the action may be brought before the competent court of the place of domicile of any one of them, at the discretion of the claimant, provided that there is sufficient interconnectivity between the various claims against the defendants (Article 107 DCCP).

In certain cases Dutch law provides for alternative venues (so-called shared or concurrent jurisdiction). With regard to certain insolvency related claims (e.g. fraudulent conveyance
actions), for example, the court that declared the bankruptcy also has jurisdiction to hear the matter (Article 106 DCCP). In matters concerning the validity, the nullity or dissolution of partnerships and legal entities and of certain related matters, the action may also be brought before the court of the place in which the partnership or the corporation has its statutory seat (Article 105 DCCP). Actions based on a tortuous act (onrechtmatige daad) may also be filed with the court in whose district such tortuous act took place or with the court of the place where the resulting damage was sustained (Article 102 DCCP). Disputes related to immovable property can also be brought before the court in whose district such immovable property is located (Article 103 DCCP). In matters regarding employment contracts, commercial agency contracts and collective bargaining agreements the action may also be filed before the court in whose district the work is usually performed (Article 100 DCCP).

If parties have contractually appointed a particular court to hear disputes regarding certain legal relationships with regard to which parties are free to make a forum choice, the action is, of course, to be brought before that court (Article 108 section 1 DCCP). It is noted, however, that parties are not free to make such choice of relative jurisdiction in regard to individual contracts of employment, consumer contracts, claims under EUR 25,000 rent of living accommodation or rent of commercial space unless the forum choice is made after the dispute has arisen or it is the employee, the party not acting in the exercise of a business or profession or the tenant that seeks redress (Article 108 section 2 DCCP).

Finally, if a competent court with regard to a certain matter cannot be found by applying Articles 99 up to and including 108 of the DCCP the claimant may sue before the court of the district in which he has his domicile (Article 109 DCCP).

3.2 Property as a Jurisdictional Basis

Similar to Regulation 44/2001 the DCCP contains certain jurisdictional rules with respect to immovable property that apply irrespective of the defendant’s domicile. The Dutch courts have jurisdiction over matters concerning in rem rights in immoveable property located in the Netherlands (Article 6 DCCP). However, unlike the relevant provision of Regulation 44/2001, Article 6 DCCP does not provide for exclusive jurisdiction: in matters concerning immovable property, the claimant can either bring the action before the court of the situs of the immovable property (Article 103 DCCP) or before the court of the domicile of the defendant (Article 99 DCCP). Nevertheless, in cases regarding lease of housing accommodation or commercial space in the sense of Article 7:290 DCC the court of the situs of the rented space has exclusive jurisdiction. Furthermore, an attachment on assets located in the Netherlands generally establishes jurisdiction over the cause of action for which the attachment is made. This holds true
even if neither of the parties involved are domiciled in the Netherlands, provided that there is no other way through which a foreign judgment can be obtained that is enforceable against the attached assets (Article 767 DCCP). In such cases the district court which granted leave to the claimant to make the attachment is competent to hear the claim (Article 767 DCCP). This means, for example, that where a U.S. creditor, who has a claim against a U.S. debtor with assets located in the Netherlands, attaches those assets, the Dutch courts will automatically have international jurisdiction over the underlying claim. After all, since there is no treaty between the United States and the Netherlands (except the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) or Dutch legislation pursuant to which a U.S. judgment (not being an arbitral award) can be recognized and enforced in the Netherlands, there would be no other way through which a foreign judgment could be obtained that is enforceable against the attached assets in the Netherlands.

3.3 Role of Party Autonomy and Choice of Forum Clauses

Pursuant to Article 23 of Regulation 44/2001 and of the Lugano Convention parties can explicitly agree that a particular court has jurisdiction to settle any disputes regarding certain legal relationships between them, provided that the agreement is (i) in writing or evidenced in writing, (ii) in a form which accords with practices which the parties have established between themselves, or (iii) in international or commercial trade, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

If and to the extent that Regulation 44/2001 and the Lugano Convention are not applicable, the provisions of Article 8 section 1 DCCP apply. Pursuant to these provisions the Dutch courts have jurisdiction if the parties involved have agreed that Dutch courts have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship. A forum choice as described here is only permissible provided that the ramifications of that legal relationship are fully to the discretion of the parties involved, meaning that parties may not make a forum choice with regard to cases which have public order ramifications (e.g. divorce). A forum choice will be set aside by a court if it judges that the parties had no reasonable interest therein. According to the relevant Explanatory Memorandum from the legislator, the parties are fairly quickly deemed to have such ‘reasonable interest’, for example, in the event they made their choice with a view to seeking neutrality or certain expertise.

If parties have agreed in respect of a certain legal relationship that the courts of another country shall have exclusive jurisdiction over any disputes that result from such legal
relationship, the Dutch courts shall not have jurisdiction over such disputes (Article 8 section 2 DCCP).

Similar to Regulation 44/2001 and the Lugano Convention (see, for example, Article 23 under 5 of Regulation 44/2001), the DCCP contains a provision (viz. Article 8 section 3 DCCP) pursuant to which agreements concerning jurisdiction are not valid where it concerns certain types of contracts (most notably: employment contracts and contracts with consumers).

Article 24 of Regulation 44/2001 and of the Lugano Convention and Article 9 sub a DCCP provide that a court may establish jurisdiction based on tacit prorogation. Pursuant to these provisions the Dutch courts have jurisdiction in the event the defendant or an interested party enters an appearance, save for cases where such appearance was only entered to contest the court’s jurisdiction. It is noted, however, that in such cases the Dutch courts can nevertheless deny jurisdiction for lack of reasonable interest (Article 9 sub a DCCP).

3.4 Challenges to Jurisdiction: Forum Non Conveniens and Equivalent Notions

The doctrine of forum non conveniens has a very limited significance in the Netherlands: as long as a venue is proper according to the applicable rules, the defendant cannot argue that another venue would be more convenient or appropriate. This doctrine is only ever applied (scarcely) in the areas of family and real estate law.

3.5 Objection to Jurisdiction (Ab Initio) and Relevance to Later Efforts to Recognize and Enforce

Pursuant to Article 11 DCCP, in proceedings that are to be initiated by a Summons, the defense that the Dutch courts do not have international jurisdiction has to be raised before all principal defenses, failing which the right to raise such defense at a later stage will be forfeited. According to the Supreme Court, Article 11 DCCP does, however, not imply that an objection as to the jurisdiction is to be put aside simply because the defendant chose to combine this objection with defenses on the merits. It is furthermore not necessary for the defendant to put his jurisdictional defense at the beginning of his first written submission or – in the event of an oral reply – to start with the same. It is sufficient if the defendant does so somewhere in his first written submission or – in the event of an oral reply – at some stage during his first oral reply.

As discussed in paragraph 3.1.3, as far as internal jurisdiction of the Dutch courts is concerned, a distinction is to be made between absolute jurisdiction and relative
jurisdiction. A Dutch court will always automatically determine whether it has absolute jurisdiction over a certain matter. In those cases where it has not, the court shall – and in some cases may – refer the matter to the correct court (Articles 69 up to and including 76 DCCP).

Contrary to absolute jurisdiction, in the event of a relative jurisdiction issue the court will not automatically decide upon its jurisdiction to hear the matter. Only if the defendant contests this will the court take action in this regard. In other words: if the claimant brings an action before a court which does not have venue according to Dutch procedural law and if the defendant subsequently does not raise any jurisdictional defense, the court will hear the case and decide the same on the merits. It is noted that, similar to Article 11 DCCP, the defense that a court does not have relative jurisdiction has to be raised before all principal defenses, failing which the right to raise such defense at a later stage will be forfeited (Article 110 DCCP). If the court honors such defense, it will automatically refer the matter to the court that has relative jurisdiction.

Finally, it is noted that in preliminary relief proceedings (see paragraph 8.1) the rules for jurisdiction are very loose and a court will only rarely hold that it has no jurisdiction over the matter at hand.

### 3.6 Parallel Proceedings

Pursuant to Article 27 of Regulation 44/2001, in the event of 'lis pendens' – i.e. where proceedings involving the same cause of action and between the same parties are brought before the courts of different Member States – any court other than the court first seized must at its own initiative stay its proceedings until such time as the issue whether the first court seized has jurisdiction has been resolved.

Where ‘related actions’ are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings (Article 28 of Regulation 44/2001). In regard to the foregoing it is noted that actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

With regard to the foregoing it is noted that a court shall be deemed to be seized (a) at the time when the document instituting the proceedings (for example a Summons or petition) is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or (b) if the document has to be served before being lodged with the court, at the time when it is
received by the authority responsible for service (for example a court bailiff), provided that
the claimant has not subsequently failed to take the steps he was required to take to have
the document lodged with the court (Article 30 of Regulation 44/2001).

Pursuant to Dutch procedural law a claimant must first have the Summons served upon
the defendant by a court bailiff (gerechtsdeurwaarder) and then have the Summons
lodged with the relevant court (aanbrengen). This means that for purposes of Articles 27
and 28 of Regulation 44/2001 the Dutch courts are deemed to be seized at the time the
Summons has been received by the court bailiff.

The Lugano Convention contains rules that are identical to Articles 27 and 28 of

Article 12 DCCP contains a rule which is similar but not identical to that of Article 27 of
Regulation 44/2001: unlike Article 27 of Regulation 44/2001, Article 12 DCCP allows the
court the freedom to decide whether or not it shall motion to stay its proceedings until the
foreign court has reached a decision (in other words: “may” instead of “must”).
4. Choice of Law

4.1 Statutory and Other Bases of Application of Foreign Substantive Law


Nevertheless there is also national legislation which deals with this issue. Book 10 of the Dutch Civil Code (hereafter referred to as the “DCC”), on International Private Law, prescribes in which cases Dutch courts must apply the substantive law of a foreign state. This part of the DCC contains provisions with regard to the law applicable to, amongst others, legal entities, representation, property law and trusts. Book 10 of the DCC is, however, not exhaustive and there are other applicable laws that impose foreign substantive law on Dutch courts as well.

If and to the extent that there is no applicable treaty or legislation on the subject at hand, the Dutch courts must pursuant to Article 25 DCCP – which gives a very general instruction to Dutch courts to add/complete ex officio any legal grounds that the parties might have failed to mention – investigate whether any foreign substantive law might be applicable and, if so, apply that law to the matter at hand.

4.2 Role of Party Autonomy and Choice-of-Law Clauses

As an initial remark it is noted that the Dutch courts will, in order to determine which substantive law applies to contractual obligations, always follow the provisions of EU Regulation 593/2008 on the law applicable to contractual obligations (hereafter referred to as: the “Rome I Regulation”). The Rome I Regulation entered into force on 17 December

“Always”, because, pursuant to Article 2 thereof, the Dutch courts will follow the provisions of the Rome I Regulation, regardless of the law that is ultimately to be applied. For example, if application of the provisions of the Rome I Regulation results in the laws of, say, the State of New York being applicable to a certain contract, the Dutch courts must apply these laws even though the Rome I Regulation is not binding on the State of New York.

The principal rule of the Rome I Regulation is freedom of choice: Article 3 section 1 explicitly stipulates that a contract shall be governed by the law chosen by the parties thereto. This choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable either to the whole contract or only to a part thereof.

It is noted, however, that Article 3 section 3 contains an important exception to this rule. It provides that the choice for the law of a foreign state (whether or not accompanied by the choice of a foreign tribunal) shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of any mandatory rules of that particular country.

The Rome I Regulation contains more limitations with regard to the freedom of choice. Article 8, for example, deals with individual employment contracts and provides that, notwithstanding Article 3, a choice of law made by the parties to an employment contract shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under Article 8 section 2 in the absence of a choice of law (see below).

So for example, if a Dutch employer enters into an employment contract with a Dutch employee regarding work that is to be performed solely within the Netherlands, he cannot simply set aside any mandatory provisions of Dutch labor law that are meant to protect the employee by putting a choice of, say, the laws of the State of Georgia in the employment contract.

In the absence of a choice of law, the contract will be governed by the law of the country with which it is “most closely connected” (Article 4 of the Rome I Regulation). A contract shall be presumed to be most closely connected with the country where the party who is to effect the performance which is “characteristic of the contract” has, at the time of conclusion of the contract, his regular residence. In case of a legal entity this will be
the country where its central administration is located. For example, in the event of a commercial agency contract the performance which is “characteristic of the contract” will no doubt be that of the commercial agent. After all, the principal’s contractual obligations will in most cases not comprise of much more than the payment of the agreed upon commission to the agent. Hence, with regard to a commercial agency contract that lacks a choice of law the Dutch courts will, on the basis of Article 4 of the Rome I Regulation, apply the laws of the country where the commercial agent has his habitual residence.

There are certain exceptions, however. For example, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property, it is presumed that the contract is most closely connected with the country where such immovable property is located (Article 4 under c of the Rome I Regulation).

Furthermore, pursuant to Article 8 section 2 an employment contract shall, in the absence of a choice of law, be governed by the law of the country in which the employee normally carries out his work (even if he is temporarily employed in another country). If the employee does not normally carry out his work in any one country, his contract shall be governed by the law of the country in which the place of business through which he was engaged is located (unless it appears from the circumstances as a whole that the employment contract is more closely connected with another country, in which case the contract shall be governed by the law of such country).

In the rare case where the characteristic performance cannot be determined or where it appears from the circumstances as a whole that the contract is more closely connected with another country, then the previously described presumptions are to be disregarded and the laws of that other country are to be applied (Article 4 section 4 of the Rome I Regulation).

Finally, it is noted that the Rome I Regulation contains specific provisions on mandatory rules. Pursuant to Article 9, when applying the law of a country on the basis of the Rome I Regulation, a court may give effect to the mandatory rules of the law of another country with which the situation has a close connection, if and as far as, under the law of the latter country, those rules must be applied regardless of the law applicable to the contract. In considering whether to give effect to these mandatory rules, the court will have to take into account their nature and purpose as well as the consequences of their application or non-application. Furthermore, it is noted that nothing in the Rome I Regulation prevents a court from applying its own laws where these are mandatory irrespective of the law otherwise applicable to the contract (Article 9 section 2).
4.3 Relevance of Choice of Law to Later Efforts to Recognize and Enforce

As has already been discussed above, the guiding principle under Dutch private international law is that parties are free to make their own choice of law. This means that in general the Dutch courts will respect such choice of law.

The Dutch courts will, however, regardless of the choice of law made by the parties, always verify whether it will not in one way or the other result in a violation of Dutch public order.

The standards of how Dutch courts apply the principle of public order have been developed in case law. In this regard two issues are important. First, the Dutch courts will have to determine whether the foreign law *itself* is in conflict with Dutch public order. If that is not the case, the second question is whether the consequences of applying the foreign law will result in a violation of Dutch public order. Punitive damages, for example, as such do not automatically have to be in conflict with Dutch public order, however awarding them might well be. This decision is left to the discretion of the court and is therefore determined on a case-by-case basis.

So, for example, if a party to a certain contract, that contains a choice for, say, New York law, files a claim for damages including punitive damages before the Dutch courts, the latter will most likely respect the choice for New York law as such. However, they might very well at the same time come to the conclusion that the enforcement in the Netherlands of an award for punitive damages results in a violation of Dutch public order.

Apart from the above, there also is the situation where a foreign judgment has to be enforced against assets located in the Netherlands. This subject will be dealt with more extensively in paragraph 17. What can be said here, however, is that whenever the Dutch courts are sought to recognize a foreign judgment with a view to enforcing it in the Netherlands, they always have the latitude to check for possible violations of Dutch public order. For example, Article 34 of Regulation 44/2001 explicitly stipulates that a judgment shall not be recognized in another Member State “if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought”.

Considering this, parties may want to seek advice regarding Dutch public order before choosing to subject their contract to the laws of another state considering that the contract eventually might be put to the test before a Dutch court either directly or indirectly (meaning in the process of seeking recognition of a foreign judgment by a Dutch court).
4.4 Limits of the Use of Foreign Law

As discussed above under paragraph 4.2, the parties’ freedom to choose a foreign governing law is not absolute and is first of all limited in Article 9 section 2 of the Rome I Regulation. This provision gives Dutch courts the freedom to always apply those rules of Dutch substantive law that are mandatory irrespective of the law otherwise applicable to the contract. Secondly, Dutch courts will, as discussed, not apply any foreign law chosen by the parties to the extent that it is in conflict with Dutch public order.
5. **Service of Process Domestically to Commence Foreign Action**

5.1 **Introduction**


In addition, the Netherlands has concluded various bilateral treaties regarding the transnational service of judicial documents, most notably with Belgium, Germany and Great-Britain. However, as the provisions of Regulation 1393/2007 prevail over the provisions of these bilateral treaties in the event of any inconsistencies, the latter have lost most of their significance and we will therefore not elaborate on them.

5.2 **The 1965 Hague Convention**

The 1965 Hague Convention entered into force in the Netherlands on 8 January 1975. Most of the Netherlands important trading partners – including the EU countries, the United States, Canada, China, Japan, Hong Kong, Korea, Mexico, Switzerland and the Russian Federation – are signatory to this convention.

Article 2 of the 1965 Hague Convention requires each Contracting State to designate a specific body, referred to as a “Central Authority”, to receive and execute requests for service on persons domiciled in that state coming from other contracting states. For the Netherlands the Central Authority is the public prosecutor with the district court in The Hague (Article 2 section 1 of the Implementation Act of the 1965 Hague Convention).

In the United States, the Office of International Judicial Assistance of the Department of Justice in Washington D.C. is the appointed Central Authority.

Article 3 of the 1965 Hague Convention provides that the Central Authority of the originating state – for the Netherlands this also is the public prosecutor with the district court in The Hague (Article 2 section 2 of the Implementation Act of the 1965 Hague Convention) – has to forward the legal document that needs to be served abroad to the Central Authority of the state of destination, without any requirement of legalization or other equivalent formality. This has to be done with a covering request, which has to be in conformity with the model annexed to the 1965 Hague Convention.
The Central Authority of the state of destination has the task to subsequently ensure that the legal document reaches the defendant in a manner that is deemed sufficient for service of such documents in that country (Article 5).

5.3 Regulation 1393/2007

Regulation 1393/2007 applies in all civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there (Article 1).

It is noted that Regulation 1393/2007 prevails over the provisions contained in bilateral or multilateral treaties or arrangements with the same scope, concluded by the Member States, and in particular the 1965 Hague Convention in relations between the Member States party thereto. At the same time Regulation 1393/2007 does not preclude Member States from maintaining or concluding other treaties or arrangements to expedite or simplify the transmission of documents, provided that they are compatible with Regulation 1393/2007.

The system of Regulation 1393/2007 is quite similar to that of the 1965 Hague Convention: each Member State must designate (i) the public officers, authorities or other persons or transmitting agencies, who are competent for the transmission of judicial or extrajudicial documents to be served in another Member State, and (ii) the public officers, authorities or other persons – referred to as receiving agencies – who are competent for the receipt of judicial or extrajudicial documents from another Member State (Article 2).

The document to be served in another Member State has to be accompanied by a request drawn up using a standard form, which must be completed in the official language of the state of destination or in one or more of the official languages of the European Union other than that of the state of destination (Article 4). Such documents and papers are exempted from legalization or any equivalent formality.

Upon receipt of a document, a receiving agency must, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission also using a standard form (annexed to Regulation 1393/2007).

The receiving agency must then either serve the document itself or have it served as soon as possible, either in accordance with the law of the state of destination or by a particular form requested by the transmitting agency, unless such a method is incompatible with the law of the state of destination. If it has not been possible to effect service within one month
of receipt, the receiving agency has to inform the transmitting agency accordingly (also with a standard form).

It is noted that Regulation 1393/2007 provides for certain alternative means of cross border service. These are the following:

- Each Member State can, in exceptional circumstances, use consular or diplomatic channels to forward judicial documents, for the purpose of service, to receiving agencies of another Member State (Article 12),

- Each Member State can effect service of judicial documents on persons residing in another Member State directly through its diplomatic or consular agents, unless the relevant state of destination has objected to such service within its territory (Article 13),

- Each Member State can effect service of judicial documents directly by mail to persons residing in another Member State (Article 14), and

- Each interested person in a judicial proceeding has the freedom to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination (Article 15).
6. Service of Process Abroad to Commence Domestic Action

6.1 Community Law and Conventions

In most cases service of process abroad with a view to commencing legal proceedings in the Netherlands will be done either via the route described in the 1965 Hague Convention or via that of Regulation 1393/2007. In this regard we suffice by referring to paragraph 5.2 and 5.3 above.

6.2 Other Means and Absence of Convention

In matters where one wants to start legal proceedings that are to be initiated through service of a Summons, but where no treaties or Regulation 1393/2007 apply, one will have to follow the route described in Article 55 DCCP. Pursuant to Article 55 DCCP persons who have no known domicile in the Netherlands but who do have a known domicile in another country are to be served by the court bailiff handing the Summons over to the public prosecutor’s office with the district court competent according to the rules regarding subject matter and venue jurisdiction (see paragraph 3.1.3). The public prosecutor’s office will then send a copy of the Summons to the Dutch Ministry of Foreign Affairs, which will subsequently notify the foreign defendant through consular channels. In addition, the court bailiff will send a second copy of the Summons by registered mail directly to the defendant’s foreign address.

6.3 Local Procedural Requirements at Place of Action

In the Netherlands all Summonses are to be served by a court bailiff upon the defendant(s). The Summons itself is prepared by the attorney (advocaat) (see again paragraph 2.2 above) who represents the claimant(s). The Summons is sent to the court bailiff, who then fills out the blank parts (such as the date on which the Summons was served) and signs the Summons. In this regard it is noted that the Summons reads as a statement of the court bailiff (“Today, the __ of 20_, at the request of claimant X, have I, court bailiff Y, summoned defendant Z to appear (…)”).

The court bailiff visits the defendant at his domicile and serves the Summons on the defendant by giving him a copy of the Summons (Article 46 DCCP). Should the defendant not be present, the bailiff may give a copy of the Summons to a cohabitant or any other person he encounters at the defendant’s domicile if it is likely that such person will assure
that the defendant receives the Summons. Should the defendant refuse to accept the Summons or should service in person be impossible the bailiff may leave the Summons in a sealed envelope at the domicile or send the Summons to the defendant by mail (Article 47 DCCP).

If the defendant is a corporation, the Summons may be served personally on any of its directors or at a director’s domicile or at the offices of the corporation. If nobody is present at the corporate offices, the Summons may be left behind. If this is not possible, the Summons is mailed to the defendant corporation (Articles 49 and 50 DCCP).

The Summons must state on which day (always a Wednesday) and before which court the defendant must appear. It is noted, however, that on this date the defendant will not actually have to physically appear in court. Rather, on this date the matter is formally introduced with the court. With a view thereto, the claimant has to file the Summons with the Registry (griffie) of the relevant district court on the last business day prior to the date of court appearance mentioned in the Summons at the latest (Article 111 section 2 sub e and f DCCP). On the date of court appearance the defendant’s attorney notifies the court that he will represent the defendant and usually requests an extension before having to file his Answer (as defined in paragraph 7.2 below). This phase of the proceedings takes place entirely in writing and neither the parties nor their attorneys are required (or expected) to physically appear for the administrative hearings (rolzitting).

If the defendant does not formally appear in court despite valid service of process the court may render a default judgment. Legal representation is mandatory (save for cases before a court’s cantonal sector) which means that the defendant can only formally appear in court if he is represented by an attorney. Before rendering a default judgment the court can (and almost always will) adjourn the proceedings for a maximum period of four weeks in order to verify whether all legal formalities have been fulfilled with respect to the Summons and the service of process. If it appears that the Summons was not validly served, the court will have to set a new date, the Summons will have to be amended by the claimant and all related costs have to be borne by the claimant (Article 121 section 2 DCCP).

Pursuant to Regulation 1393/2007 a default judgment may not be rendered if the defendant has not entered an appearance until it is established that the Summons was properly served according to Dutch law or in accordance with a method provided for in Regulation 1393/2007 (Article 19). In this regard it is noted that under Dutch law, the court bailiff’s statement on the Summons that it was validly served is sufficient proof of valid service.
6.4 Practical Problems and Time Factors

Under normal circumstances service of the Summons must take place ultimately on the eighth day, prior to the Wednesday (not counting the Wednesday) on which the defendant must formally enter his initial appearance before the court according to the Summons (Article 114 DCCP). At the oral or written request of the claimant the court may, if special conditions so require, shorten this period (Article 117 DCCP). In urgent matters to be decided in preliminary relief proceedings (see below paragraph 7.6), the period between service and first court appearance may be reduced to an absolute minimum.

In case of service abroad a much longer period between service and initial hearing must be observed. If the defendant has his domicile either in an EU country (in which case Regulation 1393/20072 applies) or in a country that is located in Europe and is a signatory to the 1965 Hague Convention, this period is at least four weeks (Article 115 section 1 DCCP). For all other countries the minimum period to be observed between service and first court appearance is at least three months (Article 115 section 2 DCCP). At the oral or written request of the claimant the court may also shorten these periods (Article 117 DCCP).

2 This regulation does not apply to Denmark. However, the provisions of this regulation have been extended to Denmark by a separate agreement between the EU and Denmark.
7. Commencement of Suit

7.1 Writ of Summons

Most Dutch legal proceedings are initiated by a Summons, containing the complaint. Not all proceedings, however, are initiated in this manner. Some, including bankruptcy proceedings and most types of labor disputes, must be initiated by a petition (verzoekschrift) to be filed with the competent court (hereafter referred to as: a "Petition"). Proceedings initiated by a Petition differ from those initiated by a Summons with regard to subject matter and a number of procedural issues.

A Summons must comply with a number of formalities. It must state, amongst other things, the names and addresses of the parties involved, the court before which the defendant must appear, the day on which the defendant must enter his appearance and – most importantly - the relief sought (Article 45 section 2 and Article 111 DCCP). A Summons must describe the nature of the dispute, state all facts, the legal grounds on which the demand is based and must also state (and refute) all defenses raised by the defendant against the claim, the latter of course only to the extent that these are known to the claimant (for example through correspondence, conversations or meetings prior to the proceedings). Furthermore, with regard to each fact described and claim made the claimant must indicate what evidence is available to support such facts and claims; in other words, the claimant has to "substantiate" (Article 111 section 3 DCCP). Also, as previously mentioned, the Summons must specify the relief sought if only in order to enable the court to render a default judgment. This is also crucial because the court may not (even in a defended action) award more than what is sought. In this regard, it is advisable to include alternative pleadings.

The significance of the Summons can hardly be overestimated. Procedural rules give preference to a single round of written comments followed by an oral hearing of the parties (as opposed to two rounds of written comments under the old regime). Therefore, as the claimant will not always have a chance to hand in further written comments, it is essential that all claims are made and substantiated to the greatest extent possible in the Summons. In addition, the description of the nature of the dispute is a decisive factor in establishing jurisdiction. Also, service of a Summons stops any running statute of limitation.

Finally, contrary to what is the case under Articles 27 and 28 of Regulation 44/2001 (see paragraph 3.6 above) under Dutch procedural law a legal procedure is deemed to be
initiated on the date on which the Summons is served upon the defendant(s), provided that the Summons is subsequently registered with the court’s Registry (griffie) ultimately on the last business day prior to the date of the first court appearance as mentioned in the Summons (Article 125 in combination with Article 114 DCCP).

7.2 The Answer or Statement of Defense

As discussed, the claimant has to state his claim in the Summons. The defendant can subsequently submit his (written) reply (conclusie van antwoord) (hereafter referred to as: the “Answer”). The Answer must contain all formal defenses that the defendant wishes to raise – in Dutch usually referred to as ‘excepties’ – on penalty of forfeiting the right to raise such defenses at a later stage in the proceedings (Article 128 section 3 DCCP). The most commonly raised formal defense is challenging the jurisdiction of the court. Furthermore, the defendant will have to raise at least some of his substantive defenses – commonly referred to as ‘principaal verweer’ – failing which he forfeits the right to raise any substantive defenses at a later stage in the proceedings (also Article 128 section 3 DCCP). As described above, the standard procedure provides for one written round, – Summons and Answer – and one oral round. Considering that the Answer thus might very likely be the only written document which the defendant may submit, it is generally not recommended to hold back any defenses for a later stage. In exactly the same manner as the claimant, the defendant has to substantiate all facts and defenses stated respectively raised by him in his Answer (Article 128 section 5 DCCP).

7.3 Post-defense Hearing

No later than two weeks after the defendant has filed his Answer the court will usually order the parties to appear in court on a certain date, unless it determines that such court appearance – in Dutch referred to as the ‘comparitie na antwoord’ (hereafter referred to as: the “Post-defense Hearing”) – is not appropriate given the circumstances and the nature of the case (Article 131 DCCP and Chapter 5 of the National Docket Regulation for District Courts). A Post-defense Hearing is held in order for the court to determine whether a settlement is possible (Article 87 DCCP) or whether any additional information from the parties can/needs to be obtained (Article 88 DCCP). Whether or not a case is suited for a Post-defense Hearing is left to the discretion of the court. Prior to such appearance, parties can submit supporting documents. In principle, they must do so ultimately two weeks prior to the Post-defense Hearing. However, in many cases the court will accept supporting documents that are filed on a later date (Articles 22, 85 and 89 DCCP).

Pursuant to Articles 87 and 88 DCCP the court may also hold an oral hearing at any stage of the proceedings, again either to investigate whether a settlement is possible or to obtain
additional information from the parties. The court may do so either at its own initiative or at the request of one or more of the parties.

If the court hearing is called for the purpose of giving information, a party’s refusal to give information or failure to appear may prejudice that party’s position. At the same time, any information given at such a hearing may be used against the party giving it.

The hearings described in this paragraph are presided over by just one judge.

### 7.4 Further Exchange of Briefs, Further Proceedings, Counterclaims

#### 7.4.1 Reply and Rejoinder

When the court does not order a Post-defense Hearing it will allow the claimant to submit a written response to the answer (*conclusie van repliek*) (hereafter referred to as: the “Reply”) (Article 132 DCCP). If the claimant exercises this right, the defendant will automatically be allowed to file a rejoinder (*conclusie van dupliek*) (hereafter referred to as: the “Rejoinder”) (also Article 132 DCCP).

If the court did hold a Post-defense Hearing it will only allow the claimant and the defendant to submit a Reply and Rejoinder respectively, to the extent it deems this necessary with a view to the proper application of the right of either party to be heard and/or the proper conduct of the proceedings (Article 132 section 2 DCCP and Article 19 DCCP). In addition, the court may, for the same reasons, allow the parties to submit further briefs (Article 132 section 3 DCCP). These decisions of the court are final, i.e. they are not open to any appeal (Article 132 section 4 DCCP).

#### 7.4.2 Oral Pleadings

Before rendering a decision on the matter the court will furthermore, at the request of either party, schedule oral pleadings. However, in case the court already ordered a Post-defense Hearing and if the parties already had the opportunity to sufficiently plead their matter during such hearing, the court may at its discretion deny a request for oral pleadings (Article 134 DCCP).

Article 134 section 3 DCCP gives parties the right to plead their own case. However, in practice parties seldom make use of this right. Instead, they usually let their attorneys plead their case.

As is clear from the foregoing, oral pleadings do – contrary to proceedings in, for example, the U.S. – not form the centerpiece of Dutch civil proceedings. In fact, in most
civil proceedings in the Netherlands no oral pleading takes place. This is not to say that oral pleadings are irrelevant or not to be taken seriously. On the contrary, oral pleadings usually are the only time when the judge(s) listens to what the parties have to say (note that oral hearings in the Netherlands such as the Post-defense Hearing are mostly presided over by one judge). Afterwards, they usually retreat to their deliberation room (raadkamer) in order to discuss the matter and to try to reach common ground with regard to their judgment. The oral pleadings are also an excellent opportunity to surprise the other side with, for example, jurisprudence relevant to the case. After all, unlike before submitting the Summons, Answer, Reply and Rejoinder, the counterparty will not have multiple weeks to research and deliberate before having to reply: the counterparty must retort on the spot.

This all makes oral pleadings a unique opportunity for either party to try to tip the balance in its favor. Having said this, one is generally best advised not to request the court to schedule oral pleadings in the event one wishes to obtain a judgment as quickly as possible as oral pleadings tend to be scheduled on a long notice (several months is not exceptional). Also it is recommended that one refrains from requesting oral pleadings if one has nothing new to add, but only wishes to repeat that which has already been put forward in the written submissions as this runs the risk of antagonizing the court if it feels that the oral pleadings are a waste of time. Of course the court must not allow for any resentment arising from this “waste of time” to influence its judgment. However, the possibility that (perhaps merely on a subconscious level) this tactical blunder can influence the court’s decision cannot be excluded.

7.4.3 Counterclaim

Pursuant to Article 136 DCCP in proceedings that are to be initiated by a Summons the defendant can file a counterclaim (in Dutch usually referred to as: ‘eis in reconventie’). The principal advantage of filing a counterclaim is often that connected claims can be adjudicated at more or less the same time by the same judge(s). It is, however, noted that there is no legal requirement for a counterclaim to be connected in a material sense to the principal claim in order for such counterclaim to be admissible. The only requirement is that the claimant and the defendant are each other’s creditor and debtor (reciprocity). Furthermore, Article 137 DCCP stipulates that Article 111 section 3 DCCP also applies to the counterclaim, which means that the party filing the counterclaim must state the grounds on which the counterclaim is based, possible defenses against the counterclaim (and a refutation thereof) and the evidence available to support the facts and circumstances on which the counterclaim is based. A counterclaim must be initiated at the latest simultaneously with the Answer (Article 137 DCCP).

In proceedings initiated by a Petition a counterclaim must be related to the original petition (Article 282 DCCP).
7.5 Ancillary Proceedings

7.5.1 General
The term ancillary proceedings (incident) refers to a mechanism for processing a number of diverse procedural issues either within the framework of the main proceedings or separately.

The most common ancillary proceedings include the request for joinder of parties, the request for joinder of claims, and the request for obtaining security for costs. These will be briefly discussed below.

7.5.2 Joinder of Parties
With respect to Joinder of Parties two types of situations can be distinguished. On the one hand the impleader of a third party by the defendant or one of the defendants (vrijwaring).
On the other hand the request for joinder by a third party, either on the side of one of the parties (voeging) or as an intervening party (tussenkomst).

The first situation is referred to as an impleader. Should the defendant wish to initiate ancillary proceedings in order to request an impleader he must file a motion to that effect before presenting any of his substantive arguments and defenses (Articles 210-216 DCCP). The motion must establish that the claim against the third party is dependent on the claim in the main proceedings and that the legal relationship between the defendant and the third party is such that the impleaded party has a duty to hold harmless and indemnify the original defendant in the event the latter is unsuccessful in the proceedings against the claimant. The claimant in the main proceedings has an opportunity to object to the impleader, while the third party has no such opportunity. The third party becomes a party to the proceedings only after the court allows the impleader, and eventually has ample opportunity to contest both the principal claim and the defendant’s claim for indemnification. The court will deny the request for impleader if it has, according to the rules of absolute jurisdiction, no jurisdiction to hear the defendant’s claim against the third party.

In the second situation, the joining or intervening party does so voluntarily, not forced by either the claimant or the defendant. These proceedings are initiated by the third party by means of a motion before or on the day that the last written statement is due to be submitted (Article 218 DCCP). By the motion the third party requests the court to allow the joinder or intervention. The original parties may contest such request. If the third party can demonstrate that it has an interest that might be affected by the decision in the main proceedings, it will be permitted to join or intervene (Article 217 DCCP). The final decision is made by the court in an interim judgment.
7.5.3  Joinder of Claims

A party may request that the court refer the case to another court, if an action is already pending before the other court between the same parties in respect of the same subject matter, or if such action is closely connected to the action sought to be referred (Article 220 DCCP). The purpose of a motion for Joinder of Claims is to prevent two different courts from reaching different or potentially contradictory decisions in related matters. The defendant must request the Joinder of Claims by means of a motion for ancillary proceedings before raising any other defenses. The claimant may request the joinder of claims either in his Summons or by means of a motion for ancillary proceedings provided that the defendant has not yet filed his Answer. In either case, the opposing party has the opportunity to reply.

Joinder of Claims is not possible if it would have the effect of violating the rules of absolute jurisdiction governing the cause of action that is sought to be removed.

If two cases are pending before the same court between the same parties in respect of the same subject matter, or if two closely connected actions are pending before the same court, they can be joined (Article 222 DCCP). The procedure resembles the one set out above.

7.5.4  Security for Costs

Pursuant to Article 224 section 1 DCCP all claimants who are not residents of the Netherlands who bring a claim before a Dutch court will, at the request of the defendant(s), have to provide security for the trial costs and/or damages which they might have to pay in the event the court awards those costs to the defendant(s).

This obligation to provide security does not exist (section 2) when:

(a) This follows from a treaty or EU regulation (section 2(a)),
(b) A cost and/or damage award against the claimant can be enforced in the country where the claimant has his residence, either on the basis of the Statute of the Kingdom of the Netherlands (relevant when the defendant has his residence in the Netherlands Antilles), on the basis of a treaty or on the basis of an EU regulation (section 2(b)),
(c) It can be reasonably expected that recourse for a cost and/or damage award against the claimant payment will be possible within the Netherlands (for example, when the claimant has assets in the Netherlands) (section 2(c)), or
(d) This rule would effectively render it impossible for the foreign claimant to get access to the Dutch court (section 2(d)).

Especially in view of the provisions of Article 224 section 2(a) DCCP in combination with the applicability of Regulation 44/2001 and of most of the significant treaties in this field
(most notably the Hague Treaty), it will seldom be possible for a defendant to successfully invoke Article 224 section 1 DCCP.

The same is true for proceedings where the claimant is from the United States even though the United States are not a signatory to any multi – or bilateral recognition and enforcement treaty with the Netherlands (or any treaty on this subject whatsoever for that matter). In this regard it is noted that the Agreement between the United States of America and the Netherlands Concerning Friendship, Commerce and Navigation of March 27, 1956 (hereafter referred to as: “AFCN”) stipulates that nationals and companies of either party are accorded “national treatment” with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. This follows directly from Article V, which reads as follows:

“Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.”

The full language of the treaty can be found on: (http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005868.asp).

In view of this Article V, American claimants who initiate legal proceedings before a Dutch court cannot be requested to provide security for legal costs and damages (see for example: Rotterdam District Court, December 13th, 2001, published in NIPR 2002/132).

Ancillary proceedings almost always tend to slow down the main proceedings considerably. Anticipating, initiating or avoiding them therefore constitutes an important element of the procedural tactics of the claimant’s attorney. For the same reason they are often used by defendant’s attorney to slow down the proceedings.

7.6 Summary Judgments and Equivalent Proceedings

In the Netherlands the legal system does not recognize “pretrial” motions or proceedings as such. Nevertheless, some of the pretrial motions, particularly the motion to dismiss or demur on grounds of jurisdiction, can be submitted, but remain ancillary to the main proceedings (see paragraph 7.5).
8. Interim and Conservatory Relief, Injunctions and Similar Emergency Measures

8.1 Preliminary Relief Proceedings

Pursuant to Article 254 section 1 DCCP “in all cases of an urgent nature in which, in view of the interests of the parties, an immediate measure is required” the parties may address themselves to the so-called relief judge (voorzieningenrechter) of the district court, which has jurisdiction over the matter. Although sometimes erroneously referred to as ‘summary proceedings’, the hearing before a relief judge is usually – and best – referred to as ‘preliminary relief proceedings’.

The rules on international jurisdictional regarding such preliminary relief proceedings are very broad. For example, pursuant to Article 31 of Regulation 44/2001 the Dutch relief judge may be addressed even in cases where the courts of another Member State have jurisdiction as to the substance of the matter (see paragraph 3.1.2). This might for example be the case where parties have explicitly agreed that the courts of another member states will have jurisdiction over the matter pursuant to Article 23 of Regulation 44/2001.

The relief judge also has jurisdiction when the parties have agreed to refer all disputes arising between them to an arbitral tribunal (Article 1022 section 2 DCCP). In this regard it is, however, noted that under Dutch arbitration law the parties may agree to subject a request for interim relief to the judgment of the arbitral tribunal or its chairman. The tribunal or its chairman may then render a decision in preliminary relief proceedings. If a party nevertheless brings the matter before the relief judge of the district court in preliminary relief proceedings and the defendant invokes the existence of the agreement for arbitral preliminary relief proceedings, the relief judge may (not: must) declare the case inadmissible for lack of jurisdiction and refer it to the agreed arbitral preliminary relief proceedings (Article 1051 section 2 DCCP).

When determining which relief judge has relative jurisdiction the same rules apply as with respect to district courts (see paragraph 3.1.3). However, the Supreme Court has broadened these rules by deciding that the relief judge within whose district the immediate measure is to take effect, also has (relative) jurisdiction.
Furthermore, it is noted that the normal rules regarding the period to be observed between service of a summons and the first formal hearing (see paragraph 6.4 above) do not apply. Instead, the relief judge may, at the claimant’s request, allow the claimant to observe a very short period between service of the preliminary relief summons and the court hearing (Article 254 section 2 DCCP). In extremely urgent cases the notice period may even be reduced to just a couple of hours. Legal representation by an attorney is mandatory for the claimant (Article 255 DCCP) and voluntary for the defendant.

The main characteristic of preliminary relief proceedings is that any measure ordered by the judge must be of a provisional nature. This principle is embodied in Article 257 DCCP, which expressly states that a court decision in preliminary relief proceedings will not prejudice the rights of parties in regular proceedings (bodemgeschil) that are pending at the time of the judgment or that are initiated thereafter (Article 257 DCCP).

In practice, however, an injunction or provisional measure can and according to case law of the Supreme Court may have irreversible consequences. For example, at the request of the claimant, the judge may stipulate in his order that the defendant shall forfeit a penalty (dwangsom) for each day, or other time period, that the defendant fails to comply with the ordered measure or injunction, or for as long as the defendant acts in contravention of the decision. It is noted that any penalties so forfeited by the defendant are not set aside by any judgment to the contrary rendered in the regular proceedings. In such case the defendant’s only option is to appeal the injunction.

Such an appeal is to be lodged not later than four weeks from the date of judgment (Article 339 section 2 DCCP). In the appeal proceedings, both parties must be represented by an attorney (Article 353 DCCP).

Preliminary relief proceedings are very popular in the Netherlands and are initiated in a wide variety of matters, including disputes concerning attachments or enforcement of judgments and infringement of intellectual property rights.

8.2 Attachment; Garnishment; Arrest

There are several kinds of attachment. A fundamental distinction exists between an attachment made to enforce a judgment and an attachment to freeze assets until there is a judgment. The former – usually referred to as “enforcing attachment” – will be discussed later in paragraph 17.2 below. The latter, referred to as “prejudgment attachment” (conservatoir beslag), will be discussed here.
A prejudgment attachment serves the purpose of preventing a prospective debtor from frustrating recovery by his prospective creditor, for example, by alienating, removing, or hiding assets. A direct result of the attachment, and quite often an end in itself, is the pressure it exerts on the debtor. He is not allowed to dispose of any attached property and may not move or transfer it. Although he may be hindered in his business or personal life, and may suffer damages, this does not, in general, constitute a compelling reason for denying or lifting the attachment.

Among the different types of prejudgment attachment are the attachment of assets of the debtor in the possession of the debtor, the garnishment of assets that are owned by the debtor but that are held by a third party (usually referred to as "third party attachment"), the attachment of shares in a company, the arrest of vessels, the arrest of airplanes, the attachment of real estate, and the attachment of property alleged to belong to the creditor. The specific rules governing these types of attachment are to be found primarily in the DCCP (Articles 700-770c DCCP). Statutory law relevant to the arrest of vessels is also found in the Commercial Code (Wetboek van Koophandel).

In a number of cases the (prospective) creditor must show that there is a justified fear that the debtor will embezzle the assets which the (prospective) creditor seeks to attach. A justified fear of embezzlement must be shown, amongst others, if the (prospective) creditor seeks the attachment of movable or immovable property, intellectual property rights or shares in a corporation.

Any party with an apparently justified claim may request the relief judge of the competent district court to give permission for the attachment, garnishment, or arrest of the assets described in the request (Article 700 DCCP). The jurisdiction of the district court may be based on either the location of the assets, the debtor’s domicile, or, in the case of a garnishment, the domicile of the third party.

A request for permission to make an attachment is made through a petition. The petition must contain a summary description of the facts of the case and the legal basis of the claim (tort, contract or other basis); the possible defense that may be brought forward (including a refutation thereof) and (albeit not a requirement) copies of documents or other evidence. Furthermore, the petition must address whether the requested attachment is the least burdening measure for the debtor which nevertheless provides sufficient security for the creditor and whether it is in proportion to the interest of the creditor (Article 700 section 2 DCCP).

The relief judge decides on an ex parte basis after marginal review of the petition, usually without hearing the debtor. In the event the relief judge decides to grant permission to
make the requested attachment, the claimant/petitioner must initiate main proceedings against the defendant/debtor within a certain period of time. This period is determined by the judge, unless such proceedings have already been initiated at the time of the attachment (Article 700 section 3 DCCP). This period shall be at least eight days. However, in some cases – for example if the matter is to be decided by a foreign court or by arbitration in another country – Dutch courts tend to allow for a slightly longer period than eight days between the attachment and the initiation of the main proceedings (a period of 30 days has become more or less the standard in this regard). If necessary, this period may be extended by the relief judge upon a well-motivated request by the claimant. It is noted that a failure to initiate the main proceedings within the set time period automatically renders the permission granted by the judge to make the attachment void. Sometimes, a relief judge will furthermore decide that the claimant can only make the requested attachment under the condition that he provides the debtor with security up to a certain amount (usually in the form of a bank guarantee) with a view to a possible (counter)claim by the debtor for damages in the event it is later determined that the attachment was unlawful or wrongful (Article 702 section 1 DCCP).

After the judge’s permission has been obtained, the creditor instructs a court bailiff to make the attachment. The court bailiff’s official report, one copy of which is left behind at the place of the attachment and one of which is sent to the creditor, serves as proof of the attachment.

As already discussed in paragraph 3.2 above, an attachment on assets located in the Netherlands generally establishes jurisdiction over the cause of action for which the attachment is made, even if neither of the parties involved are domiciled in the Netherlands, provided, however, that there is no other way through which a judgment can be obtained that can be enforced against the attached assets (Article 767 DCCP). In such cases the proper court to hear the claim is the district court in whose district the attachment was made (Article 700 DCCP).

An attachment must be lifted if the debtor provides alternative security for the creditor’s alleged claim (Article 705 section 2 DCCP). The most common way for a debtor to provide alternative security to the (prospective) creditor is through a surety bond issued by a bank or other financial institution. A dispute concerning the sufficiency of the collateral offered may be presented to the authorized relief judge.

If the debtor is not willing or able to offer alternative security, he may nevertheless initiate proceedings aimed at lifting the attachment (see paragraph 8.1). In either case a hearing can take place at a very short notice; in some cases, if there is a compelling reason for such urgency, even immediately after attachment of the assets. If the relief judge holds
that the claim underlying the attachment is *prima facie* without merit or that the attachment is unnecessary (for example, if in all reasonableness the creditor does not need to fear that there will be no or insufficient assets remaining by the time he has obtained an enforceable judgment or award against the debtor), he may order the attachment to be lifted. As already discussed under paragraph 8.1, the decision of the relief judge in these preliminary relief proceedings does not prejudice the decision in the main proceedings.

Finally, it is noted that on April 15th, 1965 the Supreme Court ruled (HR 15 April 1965, *NJ* 1965, 331) that the arresting party is strictly liable for all damages resulting from a wrongful attachment. This general principle has applied ever since. From a decision of the Rotterdam district court on July 9th, 1993 (Rb. Rotterdam 9 July 1993, *Schip & Schade* 1994, 4) it can be derived that the strict liability for a wrongful attachment may cover the loss of demurrage, fuel consumption, port dues, all legal expenses and costs connected to maintaining a surety bond, if any. Although this case revolved around the attachment of a sea-going vessel, this principle also applies to other types of attachment.

Only if the party making a wrongful arrest can demonstrate to the satisfaction of the relevant court that the attachment was made under “special circumstances” will he have a chance of avoiding such liability. Whether or not such “special circumstances” apply, always depends on the particular facts and circumstances of a case and is left to the discretion of the courts.

It is noted, however, that a claim for damages resulting from a wrongful attachment will be awarded, even if the arresting party acted with due care and diligence when making the attachment and, for example, the negative outcome (for the arresting party, that is) of the court proceedings following the attachment was by no means predictable or foreseeable. One example of this is a decision rendered by the Hague Court of Appeal on January 21st, 1992 (Hof ’s-Gravenhage 21 January 1992, *Schip & Schade* 1993, 61).

The party against whom the attachment was made is obliged to limit its damage as much as reasonably possible, for instance, by providing proper security (usually in the form of a bank guarantee). However, if the debtor is not in a financial position to provide such security, the creditor/arresting party will remain liable for all costs and damages if the attachment turns out to be wrongful. Moreover, the obligation to limit the damage as much as possible does not include the obligation to initiate preliminary relief proceedings for the lifting of an attachment.

9.1 General

The general rules of evidence set forth in the DCCP contain provisions concerning, among other things, the need for evidence, the burden of proof, and the sufficiency of evidence.

The court may base its decision only on facts that are undisputed by the parties or proven (made plausible) in the course of the proceedings, or on facts or circumstances that are generally known and require no evidence (Article 149 DCCP). Facts alleged by one party and not (sufficiently) disputed by another party are regarded as established. The court may base its decision on generally known facts or circumstances, even if these are not put forward by any of the parties.

The general rule with respect to the burden of proof is as follows: The party invoking a certain legal consequence must prove the requisite facts and circumstances unless pursuant to a special rule or the requirements of reasonableness and fairness the burden of proof must be divided differently between the parties (Article 150 DCCP). Parties are, in most cases, free to deviate contractually from this general rule. There are a number of special rules with regard to the burden of proof that apply either with respect to certain rights or certain parties. This is common in the fields of labor law and consumer protection law. Some of these specific provisions prohibit the parties from contractually shifting the burden of proof.

The determination whether the evidence presented is sufficient or not is, with some exceptions, left to the discretion of the court (Article 152 DCCP). Parties are, in general, free to stipulate contractually as to what constitutes sufficient evidence.

9.2 Documents

Evidence may be presented through documents. Certain documents, such as notarial deeds (documents drawn up and signed by a civil law notary), furnish conclusive evidence (dwingend bewijs) of their contents (Article 157 DCCP). This means that the court must accept the contents of the act or deed as true (Article 151 DCCP). Parties are, however, free to offer counter evidence even against conclusive evidence unless such possibility is excluded by law (Article 151 section 2 DCCP).
A party that bases its claim or defense on a particular document is obliged to give a copy thereof to the opposing party (Article 85 DCCP). It is also advisable to file a copy with the court. There is no discovery in the strict sense in Dutch procedural law and the parties are in principle free to determine which documents they want to use in support of their claims and defenses, and which documents they prefer to keep to themselves.

The DCCP does, however, contain a number of provisions which can be used to demand documents from the other party. The most important provisions in this respect are Articles 843a and 843b of the DCCP. Article 843a DCCP provides that a party to a legal relationship may request that the other party thereto provides copies of documents pertaining to such legal relationship. Article 843b DCCP can be used if a party had an item of evidence but has lost it. Pursuant to this Article a party may demand copies of documents, which can serve as evidence of facts to which the lost item of evidence pertained, from any person which has such documents at their disposal. Article 843a DCCP is limited because it can only be used where there is a prior legal relationship between parties. It cannot, for example, be used in tort cases. Article 843b DCCP is limited because it can only be used to recover lost evidence. Also, “fishing expeditions” are not allowed.

9.3 Witnesses

The examination of witnesses may be ordered by the court at the request of one of the parties if the facts sought to be proven are material to the case. The court may also order the examination of witnesses on its own initiative (Article 166 DCCP).

Any person may appear as a witness (Article 165 section 1 DCCP). Certain persons may excuse themselves from the obligation to testify. These persons are the spouse or former spouse of one of the parties and certain other close relatives, as well as persons in possession of privileged material or information acquired in their professional capacity (Article 165 section 2 DCCP). Physicians, attorneys at law, civil law notaries and members of the clergy may refuse to testify with respect to what is communicated to them in their professional capacity due to their professional obligation to maintain confidentiality. Accountants and tax consultants who are not attorneys may not excuse themselves (HR 14 June 1985, NJ 1985, 175, and HR 21 November 1986, NJ 1987, 318). Attorneys and civil law notaries may also refuse access to their files to third persons with investigative powers, while accountants and tax consultants must allow full access. This distinction can be crucial in tax matters. The tax authorities are, however, in practice instructed not to request access to professional communications between accountants or tax consultants and their clients. Persons who risk incriminating themselves or close
relatives by answering certain questions may excuse themselves from testifying, but only with respect to those questions.

Witnesses are called by registered letter sent by the party requesting them, or by summons served by a court bailiff. The period between transmittal of the registered letter or summons and the date of the hearing must be at least seven days. The names and the addresses of the witnesses must be communicated to the other party and to the court at least seven days before the date of the hearing (Article 170 DCCP).

Specific provisions apply to recalcitrant or incapacitated witness. An incapacitated witness may be visited by the court (Article 175 DCCP). A recalcitrant witness may be ordered to reimburse expenses resulting from his failure to appear and might be liable for damages (Article 178 DCCP).

The parties and their attorneys may examine the witnesses directly. The court may, however, prevent a witness from answering certain questions (Article 179 section 2 DCCP). The court may also examine the witnesses itself and, at the same time, hear the parties, if the testimony gives the court cause to do so (Article 179 section 3 DCCP). In practice, the court first examines the witnesses itself and then invites the parties to pose their questions. If one of the parties wishes that the questioning be conducted in a different order it should specifically request this at the start of the hearing.

A witness domiciled in a foreign country may, at the request of the court, be examined by the competent authority of that country, or by a Dutch consular official at the domicile of the witness. A treaty with the other country may provide for alternative means of hearing witnesses.

Although witnesses are most commonly heard during legal proceedings, they may be heard before (Articles 186-193 DCCP). The preliminary hearing of witnesses is not an ancillary procedure. It is, rather, a special procedure created to avoid unnecessary proceedings or proceedings based on a mistaken legal assumption or mistaken identity. Furthermore, such preliminary hearing is a safeguard against the possible loss of evidence in the course of proceedings (especially memory loss).

The request to examine witnesses prior to the proceedings is made to the court of the place where a majority of the witnesses are domiciled, or to the court that would have jurisdiction in the main proceedings (Article 187 DCCP).

A request for a preliminary witness testimony may also be made pending the main proceedings. This can be done in order to have the witnesses heard sooner than
according to the normal procedure. The competent court is the court where the proceedings are pending (Article 186 and 187 DCCP). In both cases, the request to the court must set forth the nature and amount of the claim, the facts sought to be proven, the names and domiciles of the witnesses, and the name and domicile of the opposing party. If the identity of the opposing party is not yet known, this should be explained (Article 187 DCCP). The court hears the opposing party, if identified, with respect to the request. If the court allows the request it orders, among other things, a time and place for the hearing. The decision of the court to sustain the request for preliminary witness testimony cannot be appealed (Article 188 DCCP).

9.4 Foreign Law

Parties are free to prove the contents of the applicable foreign law by all evidentiary means. The court may, however, wish to investigate the contents of the foreign law itself. Article 67 of the DCCP allows the court to request information on foreign law directly from the competent authority in a foreign country in accordance with the 1968 European Convention on Information on Foreign Law. Only Western European countries and Costa Rica are parties to this convention.
10. Taking of Witness Evidence Abroad in Support of Domestic Action

10.1 Introduction

Examination of witnesses abroad is a process governed by international treaties, EU regulations and in the absence thereof by the DCCP.

10.2 International Instruments

10.2.1 Regulation 1206/2001

On January 1st, 2004 Regulation 1206/2001 became applicable in all the member states of the European Union, with the exception of Denmark (hereafter referred to as: "Member State(s)").

Regulation 1206/2001 has simplified and accelerated the process of taking evidence across borders and covers the gamut with regard to the taking of evidence. Accordingly, it covers the hearing of persons and has, pursuant to Article 21 of Regulation 1206/2001, priority over treaties regarding the same subject matter between EU Member States.

Regulation 1206/2001 focuses on the taking of evidence in connection with pending or planned proceedings, and explicitly excludes from its scope so-called "pre-trial discovery", including "fishing expeditions", as understood under common law (Declaration of the Council upon adoption of Regulation 1206/2001 of May 28th, 2001).

Regulation 1206/2001 makes a distinction between:

- The “normal” taking of evidence, whereby a court of another Member State is requested to take evidence, and
- The “direct” taking of evidence, whereby the requesting court itself, after having received permission from the so-called “central body” (see below) in the other Member State, takes evidence in the other Member State.

Article 4 of Regulation 1206/2001 stipulates the form and content of the request, whereas Articles 5 and 6 concern the language and means of communication to be used. Non-compliance with these requirements is unlikely to occur considering that the forms in the annexes of the regulation comply with the aforementioned provisions and use thereof is mandatory. Nevertheless, Article 2 of Regulation 1206/2001 provides for a procedure in case of non-compliance of the request with the formalities as laid down in Articles 4, 5, and 6.
With a view to effective cross-border cooperation, it is imperative that a request for the taking of evidence is executed expeditiously. Therefore, Article 10 of Regulation 1206/2001 stipulates that the requested court shall execute the request at the earliest possible date, no later than 90 days after receipt of the request. If execution is not possible within that time period, the requested court shall inform its counterpart accordingly, stating the grounds for the delay as well as the estimated time that the requested court expects it will need to execute the request (Article 15 of Regulation 1206/2001).

By and large, the requested court shall execute the request in accordance with its (national) laws. However, if so requested, the taking of evidence can be performed in accordance with a special procedure (e.g. cross-examination of witnesses as provided for under UK law) provided for by the laws of the requesting court, unless such procedure is incompatible with the laws of the requested court or by reason of major practical difficulties. In addition, section 4 of Article 10 of Regulation 1206/2001 states that the requesting court may ask the requested court to use communications technology such as videoconferencing or teleconferencing when taking evidence. The requested court shall comply with that request, unless the request is incompatible with the laws of the requested court or by reason of major practical difficulties.

Furthermore, Regulation 1206/2001 provides in Articles 11 and 12 for the presence at and participation in the performance of the taking of evidence by both the parties to the proceedings and representatives of the requesting court. Pursuant to sections 3 and 4 of the these Articles, the participation of the parties and the representatives can be made conditional upon certain stipulations as determined by the requested court.

The direct taking of evidence pursuant to Article 17 of Regulation 1206/2001 may only take place in the event it can be performed on a voluntary basis, which in case of the hearing of persons means that such persons will be informed of the voluntary nature of the procedure. The central body or the competent authority in the Member State in which the taking of evidence will be performed, can make the execution of the request subject to certain conditions. Furthermore, it has the right to assign a court of that Member State to take part in the performance of the taking of evidence in order to ensure proper application of Regulation 1206/2001 and the conditions it has stipulated.

As far as costs are concerned, the principal rule in Article 18 of Regulation 1206/2001 is that the execution of a request shall not give rise to a claim for any reimbursement of taxes or costs. However, if the requested court so desires, the fees paid to experts and interpreters, the costs incurred in connection with the execution in accordance
with a special procedure as well as the costs incurred as a result of the use of certain communication technologies, will be reimbursed.

After execution of the request, the results shall, pursuant to Article 16 of Regulation 1206/2001, be sent by the requested court to the requesting court without delay.

In line with the objectives of the European Union and Regulation 1206/2001 in particular, the possibilities of refusing to execute a request for the taking of evidence should be confined to “strictly limited exceptional situations”.

This principle is reflected in Article 14 of Regulation 1206/2001, which stipulates that the execution of a request for the “normal” taking of evidence may be refused only if:
- With regard to the hearing of a person: that person has rightfully claimed the right to refuse to give evidence or to be prohibited from giving evidence (evidentiary privilege),
- The request does not fall within the scope of the Regulation,
- The requested court is not competent to execute the request, or
- The request does not contain all necessary information and the requesting court subsequently fails to complete the request within a period of 30 days after the requested court has asked it to do so.

Article 14 section 3 of Regulation 1206/2001 explicitly mentions that the requested court may not refuse execution of the request solely on the ground that under its national law another court of that Member State has exclusive jurisdiction over the subject matter or that the law of that Member State would not admit the right of action on that subject matter.

Pursuant to Article 17 section 5 of Regulation 1206/2001, incoming requests for the “direct” taking of evidence may only be denied if:
- The request does not fall within the scope of the Regulation,
- The request does not contain all necessary information,
- The direct taking of evidence requested is contrary to fundamental principles of the law of the Member State (with regard to this exception one could think of requests that infringe upon the sovereignty or security of the Member State).

10.2.2 Other Conventions

The Netherlands (including the Netherlands Antilles and Aruba) is signatory to the Hague Convention of 1 March 1954 on Civil Procedure (Rechtsvorderingenverdrag), which contains certain provisions regarding the taking of evidence in other signatory states.
However, the provisions of this convention no longer apply to those countries that are signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970 (hereafter referred to as: “1970 Hague Convention”). Pursuant to the 1970 Hague Convention contracting states are, likewise, obliged to execute a request for a rogatory commission from other contracting states and its system is quite similar to that of Regulation 1206/2001. The 1970 Hague Convention is the most important multilateral convention in this respect. Contracting states include: Australia, China, France, Germany, Hong Kong, Italy, Mexico, the Netherlands, Spain, the United Kingdom and the United States. The 1970 Hague Convention came into force in The Netherlands on June 7, 1981.

10.3 Other Means and Absence of Convention

To the extent that there is no applicable treaty, Article 176 DCCP expressly grants power to the Dutch courts to request execution of rogatory commissions abroad by a foreign authority of his choosing or a Dutch consular official.

Three types of situations can be distinguished. First, if a witness who is domiciled abroad is willing to come to the Netherlands to testify there is no need to apply Article 176 DCCP. Secondly, if a witness who is domiciled abroad is willing to testify but not willing to come to the Netherlands to do so he or she may be examined by the competent authority of that country, or by a Dutch consular official at his or her domicile, at the request of a Dutch court. Finally, if a witness domiciled in a foreign country is not willing to testify, the Dutch court may request the competent authority of that foreign country to examine the witness after pressing the witness to appear and testify.

In the absence of any international convention, the execution of a request for a rogatory commission issued by a Dutch court is left to the discretion of the judicial authority of the foreign country.

That being said, Regulation 1206/2001 and the 1970 Hague Convention cover most of the more important trading partners of the Netherlands.

Finally it is noted that pursuant to Article 176 section 3 DCCP the probative force of witness testimony taken abroad is equal to the probative force of witness testimony taken domestically. In both cases the court may exercise its own discretion when weighing the evidence (Article 152 section 2 DCCP).
11. Taking of Documentary Evidence
Domestically in Support of Foreign Action

11.1 Documentary Evidence

In the Dutch legal system all writings may be submitted as documentary evidence, ranging from a shred of paper to deeds drawn up by a notaries or court judgments. Deeds, either private or authentic, are written documents that comply with certain formalities.

a. Deeds
Deeds are signed documents drawn up for the purpose to serve as evidence of their contents (Article 156 section 1 DCCP). As previously mentioned, two types of deeds can be distinguished, private deeds and authentic deeds (Article 156 sections 2 and 3 DCCP). An authentic deed is a deed drawn up in the appropriate form by a public official authorized by law to do so. Civil law notaries, court bailiffs and consular agents are examples of public officials authorized to draw up authentic deeds. All deeds that do not qualify as authentic deeds are private deeds (Article 156 section 3 DCCP).

Deeds drawn up abroad by authorized foreign officials will most likely not be considered authentic deeds in the aforementioned sense. Authentic deeds have conclusive probative force (Article 157 DCCP). A writing that on the surface has the appearance of an authentic deed is assumed to be an authentic deed until the contrary is proven. The probative force of writings that do not qualify as authentic or private deeds is up to the appreciation and discretion of the court (Article 152 section 2 DCCP).

Authentic deeds are also directly enforceable in the Netherlands in the same way as a court judgment.

b. Other written documents, signed or not
As discussed above, other writings, which do not qualify as deeds, can likewise be submitted as evidence. Therefore, books and records may also be submitted as documentary evidence. The judge may even order, on request or ex officio, that the books and records are made available for inspection (Article 162 DCCP).

11.2 Community Law

Regulation 1206/2001 improves and accelerates the process of the cross-border taking of evidence between the courts of the Member States.
The Regulation covers the taking of documentary evidence and it prevails over provisions contained in international conventions between Member States. However, the Regulation does not preclude Member States from adopting agreements or arrangements to further facilitate the cross-border taking of evidence (see paragraph 10.2.1).

11.3 Conventions

With regard to judicial assistance, the Netherlands is a signatory to the 1970 Hague Convention.

As prescribed by the 1970 Hague Convention, rogatory commissions should be received by a designated Central Authority of the requested State from a judicial authority of another contracting State. In the Netherlands, the designated Central Authority is the Public Prosecutor of the district court of The Hague.

The Public Prosecutor of the district court of The Hague will examine the legality and authenticity of the foreign request. According to the Dutch Supreme Court (see HR 11 March 1994, NJ 1995, 3) the 1970 Hague Convention also applies to documentary evidence. However, the taking of documentary evidence cannot extend beyond what is possible under national law. As illustrated by the case of the Dutch Supreme Court of February 18, 2000 (HR 18 February 2000, RvdW 2000, 61c), it is an underlying principle of the 1970 Hague Convention that the judicial authority that has been charged with carrying out a rogatory commission will apply its domestic law when doing so. Therefore, it is possible that the Netherlands will not or not fully execute a request from a foreign contracting state if that request requires that the Dutch authority go beyond what is possible under Dutch law.

11.4 Other Means and Absence of Convention

Although the 1970 Hague Convention and Regulation 1206/2001 apply to virtually all of the most important trade relations of the Netherlands, there remain countries that are not party to a convention with the Netherlands. Although it is not certain that a foreign authority cannot request a rogatory commission, in absence of a convention the foreign authority will be dependent on the courtesy of the Dutch authorities. In any event, should the Dutch authorities decide to cooperate, the activities of the rogatory commission will be governed by Dutch law.
12. Taking of Documentary Evidence Abroad in Support of Domestic Action

12.1 Community Law

Regulation 1206/2001, which has already been discussed in detail above (see paragraph 10.2.1), also regulates the cooperation between the courts of the Member States in the taking of documentary evidence in civil or commercial matters abroad in support of domestic action. However, the provisions referring to the hearing of persons do not apply to the taking of documentary evidence. The relevant Articles are:

a. Article 14 section 1 concerning evidentiary privilege, and
b. Article 17 section 2, second sentence, where the direct taking of evidence implies that a person shall be heard, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

12.2 Conventions

As also explained in paragraph 10 above, the Netherlands (including the Netherlands Antilles and Aruba) are a signatory to the 1954 Hague Convention. The Netherlands is also signatory to the 1970 Hague Convention.

12.3 Other Means and Absence of Convention

As has been mentioned in paragraph 11.4 above, the absence of a convention does not exclude the possibility of executing a rogatory commission. Article 176 DCCP expressly grants such a possibility. However, this Article applies specifically to the taking of witness evidence. No Article in the DCCP specifically provides for the taking of documentary evidence abroad in the absence of a convention or other international instrument. Therefore, if a foreign party is not willing to cooperate in delivering the necessary documents, a Dutch court has no official legal basis for requesting assistance from foreign colleagues with respect to this issue.
13. Admissibility and Presentation at Trial of Evidence Taken Domestically or Abroad

13.1 General Requirements and Practices

The rules of evidence are set forth in the Articles 149-207 DCCP and are designed for proceedings that are to be initiated by a Summons. However, they also apply to proceedings that are initiated by a Petition unless the nature of such proceedings requires otherwise (Article 284 DCCP).

Facts and circumstances must be made plausible. In civil cases facts need not be proven beyond a reasonable doubt. Apart from this some facts require no evidence whatsoever, for example facts that have been claimed by one party and that are not or insufficiently denied by the other party as well as facts that are of common knowledge (e.g. if you walk in the rain you will get wet) (Article 149 sections 1 and 2 DCCP).

Furthermore, there is no need for parties to prove the contents of the law; the court is deemed to know the law (ius cura novit). However, this does not mean that the court never needs to be informed on the law. This is of course especially true for foreign law.

The most important issue pertaining to evidence is, without doubt, the division of the burden of proof. Article 150 DCCP provides that the party which invokes a certain legal consequence (rechtsgevolg) bears the burden of proving the underlying facts and circumstances, unless pursuant to a special legal rule – which may be written or unwritten – or the rules of equity and fairness (redelijkheid en billijkheid) a different division of the burden of proof is in order. In this regard it is noted that Dutch law has many rules that provide for a presumption of truth which is derived from other facts and circumstances (wettelijk vermoeden) in regard to particular issues. For example, Articles 2:138 and 2:248 DCC, regarding directors liability for causing the bankruptcy of a public or private company respectively, each provide for a double presumption when the directors of a corporation incorporated under the laws of the Netherlands do not fulfill their obligation to keep books and records properly or to publish annual reports on time. The first presumption is an incontrovertible presumption that the directors mismanaged the company. The second presumption is that the aforementioned mismanagement caused, or was an important factor in causing, the bankruptcy. The second presumption is open to counterevidence; the first is not.
In the Netherlands the determination of the probative force of various items of evidence is in principle left to the appreciation of the court. The individual judges may decide for themselves how compelling they deem evidence to be and whether a fact is plausible or not in light of the evidence presented (Article 152 section 2 DCCP). There are, however, some exceptions to this rule. For example, Dutch law deems some items of evidence to be conclusive (dwingend bewijs). This means that the court has to accept the content of those items of evidence as true unless and until the other party provides evidence to the contrary (Article 151 DCCP). Examples are the aforementioned (see paragraph 11.1) authentic deeds (authentieke akten) (Article 157 DCCP) and final judgments in criminal proceedings (Article 161 DCCP).

In the Netherlands there is no legislation regarding the exclusion of unlawfully or wrongfully obtained evidence in civil matters. The courts have a wide margin of discretion when considering whether or not the use of certain items of evidence must be deemed unlawful or wrongful and thus whether those items of evidence are inadmissible. Unlawfully or wrongfully obtained evidence is admissible as long as the use thereof is not unlawful or wrongful. Lawfully obtained evidence can be inadmissible if the use thereof is wrongful in the circumstances of the case at hand. The courts will very rarely and only under special circumstances exclude evidence.

13.2 Means of Evidence

13.2.1 Introduction
The general principle of Dutch law is that evidence is permitted through all possible means and items.

13.2.2 Witness Evidence
Witness testimony only serves as evidence of the witnesses’ own observations. Parties to the proceedings may themselves testify, however, their testimony cannot serve as evidence in their favor with regard to facts and circumstances that they themselves must prove unless their testimony is intended to supplement other evidence that in itself is insufficient (Article 164 DCCP).

As a general rule, every person summoned in accordance with the requirements of the law is obliged to testify. The witness should be summoned at least one week prior to the hearing. The obligation for witnesses to testify in court is based on the public interest in establishment of the truth. However, exceptions are made for close family and those bound to secrecy by their profession. Spouses (former and present) and relatives up to
the second degree are considered family for the purposes of this rule. These witnesses are still obliged to appear and they are allowed to testify but they do not have to. Some persons may claim an exemption from the duty to testify, due to a professional obligation to maintain confidentiality. Four groups of professionals may claim the aforementioned exemption: Physicians and other medical practitioners, attorneys, notaries and clergymen (Article 165 sections 1 and 2 DCCP).

These professionals may only claim the exemption with regard to information that is entrusted to them in their capacity as professionals. Journalists are entitled to keep their sources secret and may claim an exemption from testifying with respect to facts and circumstances regarding the identity of their sources.

If evidence through witness testimony is permitted by law, the judge will order that witnesses are heard as often as requested by one of the parties and as long as the facts to be proven by that party through the testimony have been contested and those facts are decisive for the case. A judge can do this ex officio as well.

If the summoned witness does not appear, the judge may decide to compel the witness to appear and testify through the use of coercion. A witness who appears but refuses to testify can be jailed (gijzeling) for up to one year. As explained above in paragraph 10 a witness domiciled in a foreign country can testify without having to travel to the Netherlands and physically appear in court.

When the time of the hearing arrives, before being questioned, the witness must take an oath or make a promise to tell the truth, the whole truth and nothing but the truth. Witnesses under the age of sixteen and witnesses who may not fully grasp the meaning of the oath are admonished to tell the truth, the whole truth and nothing but the truth. They are nevertheless allowed to testify. However, if a judge is to base his judgment on such testimony the judgment must state the reasons for this.

13.2.3 Expert Statements
If the judge deems it necessary he can, at the request of one of the parties or on his own initiative, commission an expert opinion or hear an expert witness (Article 194 DCCP). This might be necessary if professional knowledge is required in order to establish or evaluate certain facts, as would be the case, for example, when a person’s physical or psychological condition after an accident has to be determined. It is entirely at the

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3 In the Netherlands, parents and children are considered first degree relatives, siblings and grandparents are considered second degree relatives and aunts and uncles are considered third degree relatives.
judge’s discretion whether an expert opinion is commissioned. A judge’s decision to deny a request for expert witness testimony or the commissioning of an expert opinion cannot be appealed. The primary purpose of expert opinions is to inform the judge. The judge, however, is not bound by the expert’s findings and is free to disregard the information presented to him. Parties are obliged to cooperate with the expert. Should one of the parties refuse to cooperate, then the judge may make any inference that seems appropriate to him. If parties want to hear experts in addition to the one(s) appointed by the judge, then they may submit a request for the hearing of additional experts (Article 200 DCCP).

13.2.4 Site Visits
In certain cases, rather than exclusively relying on drawings and descriptions provided by the parties, it can be useful for the judge to visit a site himself (decente). Accompanied by the registrar, the judge can, at the request of a party or on his own initiative, choose to visit a site and view (personal or immovable) property (Article 201 DCCP). During his visit the judge has access to all areas and he can hear witnesses on-site. Parties are allowed to be present during the judge’s visit and they are free to make comments or submit requests. In order to visit a particular site the judge is allowed to travel outside his jurisdiction. An official report is made of the site visit, which is filed with the Registry.
14. Appeal and Review of Transnational Judgments

14.1 Conclusiveness and Finality of Judgments Generally

Whether or not a judgment rendered by a Dutch court is ready for enforcement can easily be determined on the basis of its header. If a judgment starts with the words: ‘In naam der Koningin’ (‘In name of the Queen’) it can be enforced against the defendant(s) (Article 430 section 2 DCCP). Such judgments may very well be subject to appeal. As a matter of fact, most Dutch judgments that are enforceable can be appealed.

In order for a Dutch judgment to be enforceable, it must first be served upon the defendant in order to enable the defendant to comply voluntarily with the judgment (Article 430 section 3 DCCP). This prior service is done by a court bailiff more or less in the same fashion as the service of a Summons (see paragraphs 5 and 6 above). A failure to comply with the prior service obligation will render the enforcement void and can result in the claimant becoming liable for any damages the defendant suffers as a result of such invalid enforcement.

Judgments rendered by the Dutch courts can be enforced during a period of twenty years following the date of the judgment (Article 3:324 section 1 DCC). However, in some cases – for example where a defendant is ordered to make annual payments – this period is reduced to only five years (Article 3:324 section 3 DCC). The same time periods apply to Dutch arbitral awards (also Article 3:324 section 1 DCC).

The judgment of a first instance court becomes final (kracht van gewijsde) once the appeal period (see paragraph 14.2 below) passes without the defendant having lodged an appeal.

14.2 Various forms of Appeal

14.2.1 Introduction

In principle, three types of ‘regular’ remedies against a judgment (gewone rechtsmiddelen) can be distinguished: (a) opposition to a default judgment (verzet), (b) appeal to a higher court (hoger beroep), and (c) review by the Supreme Court (cassatie).

4 Enforceable judgments rendered after 30 April 2013 will bear the words ‘In naam der Koning’ (‘In the name of the King’) due to the fact that the Queen will be succeeded by her son on that date.
14.2.2 **Opposition to a Default Judgment**

The foremost difference between an appeal and opposition to a default judgment is the fact that the former in essence entails a request directed at a higher court in the judicial hierarchy to review the judgment of a lower court whilst opposition to a default judgment is brought before the court that rendered the original default judgment. In principle, all default judgments can be opposed (Article 143 section 1 DCCP).

The party initiating the opposition – the original defendant – is usually referred to as the ‘opposing party’ (opposant) whilst the defendant – the original claimant – is usually called the ‘opposed party’ (geopposeerde).

Proceedings in opposition are initiated by service of a notice of objection by the opposing party upon the opposed party. This notice of objection (verzetdagvaarding) contains the grounds for the opposition (Article 146 DCCP) and, pursuant to Article 147 DCCP, is, for the purposes of the remainder of the proceedings, deemed to be the Answer (see paragraph 7.2 above). Article 128 section 5 DCCP applies mutatis mutandis and imposes the obligation on the opposing party to substantiate all facts and defenses stated respectively raised by him in the opposition summons. Subsequently the opposition proceedings are conducted in the same manner as ‘regular’ proceedings (see paragraph 7.2 through 7.5 above).

Opposition against a default judgment must be lodged within a period of four weeks by defendants domiciled in the Netherlands and within eight weeks by defendants domiciled abroad. The period within which opposition has to be lodged is triggered by any one of the following three events:

(i) Service of the default judgment on the defendant in person (Article 143 section 2 DCCP),

(ii) Any action by the defendant from which it necessarily follows that the defendant is aware of the existence of (the content of) the default judgment rendered against him (Article 143 section 2 DCCP), or

(iii) Enforcement of the judgment against the defendant (Article 143 section 3 DCCP).

The second ‘triggering event’ is the source of a lot of uncertainty and (thus) many disputes. For example, the defendant’s awareness as such does not trigger the period. This awareness must be derived from an act of the defendant. The defendant mentioning the judgment in a letter would, for example, constitute such an act. Moreover it has to be an act of the defendant himself. So if, for example, the defendant’s attorney writes a letter to the claimant’s attorney confirming receipt of a copy of the default judgment, the opposition period will not be triggered. This can be different in case the attorney confirms having discussed the content of the default judgment with his client.
Article 144 DCCP provides that a default judgment is deemed to have been enforced for the purposes of the third triggering event, amongst others: (i) in case of a judicial sale of the defendant’s assets, after the sale, (ii) in the event of a third party attachment (see paragraph 8.2 above) on one of the defendant’s receivables, after payment thereof by the third party to the claimant, (iii) in the event that the defendant has been ordered to surrender property (not including immovable property) to the claimant, on the day that the property is surrendered, and (iv) in cases where the court has ordered the eviction of a tenant, on the day of the eviction.

14.2.3 Appeal

The judicial hierarchy and the scope of the appellate jurisdiction of the various courts have already been discussed in paragraph 2.1 above.

In principle, appeal is possible against all judgments rendered in first instance as long as the financial interest of the case exceeds EUR 1,750 or, in cases where the financial value is not apparent, it is likely that the financial interest exceeds EUR 1,750 (Article 332 section 1 DCCP). Procedural decisions of the court are usually not subject to appeal. An example hereof is the decision whether or not to allow the parties to submit a Reply and Rejoinder after a Post-defense Hearing. Decisions in ancillary proceedings, on the other hand, generally are subject to appeal. The court may, however, decide that the appeal may be filed only together with the appeal against the decision in the main proceedings (Article 337 DCCP).

The rules regarding evidence in appeal proceedings are the same as those with regard to proceedings in first instance (Article 353 DCCP).

Generally, an appeal must be lodged within three months after the judgment against which it is aimed was rendered (Article 339 section 1 DCCP). However, shorter appeal periods apply in certain cases, including appeal against a judgment in preliminary relief proceedings where the appeal period is only four weeks (Article 339 section 2 DCCP).

Lodging an appeal suspends the contested judgment for the duration of the appeal proceedings unless the first instance judge declares his judgment provisionally enforceable (Article 350 DCCP and mutatis mutandis for Supreme Court review: Article 404 DCCP).

14.2.4 Review by the Supreme Court

Appeal proceedings before a court of appeal differ greatly from review proceedings before the Supreme Court. Pursuant to article 79 of the AoJ, the Supreme Court may only set aside a judgment on one of two grounds: non-compliance with essential procedural rules,
or misapplication of the law by the lower courts. The Supreme Court must accept the facts of the case as established by the lower courts.

A request for review by the Supreme Court must also be filed within three months from the day on which judgment was rendered (Article 402 DCCP). Again, certain exceptions apply. The period for requesting review of a court of appeals decision in preliminary relief proceedings is, for example, eight weeks (Articles 402 section 2 in conjunction with 339 section 2 DCCP). The rules regarding procedures before the Supreme Court are very complicated and a more comprehensive discussion thereof is beyond the ambit of this book.
15. Damages

15.1 Introduction

Under Dutch law, persons and legal entities can be held liable for breach of contract, wrongful acts, and unjust enrichment.

Pursuant to Article 6:74 DCC, a person that fails to perform an obligation under a contract is liable for the damage suffered by the other party/party as a consequence of the non-performance unless the non-performing party is not responsible for the non-performance. The obligation at issue may be an obligation to deliver a specific result or an obligation of best efforts. A default will give rise to an obligation to indemnify the injured party, unless the non-performance was due to circumstances beyond the debtor’s control (force majeure) (Article 6:75 DCC).

Outside of a contract a person may be held liable for wrongful acts or unjust enrichment. A wrongful act can be an act in violation of (i) the law, (ii) another person’s subjective rights (e.g. property), or (iii) societal standards of propriety (e.g. endangerment) (Article 6:162 section 2 DCC). The person responsible for an act in the aforementioned sense is liable to indemnify any damage suffered by an injured party (Article 6:162 section 1 DCC).

If the wrongful act consists of a violation of the law, liability will only arise if the violated norm is intended to protect the injured party from the damage suffered (Article 6:163 DCC). For example, if a medical practitioner were to exercise his profession without a proper license, his competitors could not sue him for damage suffered from unfair competition; only his patients could sue him, because the license requirement was put in place in order to protect patients and not competitors.

A person that receives a payment or any other advantage without a legal basis is liable to return that payment or to compensate the person from which the advantage was received on the basis of unjust enrichment, undue payment or negotiorum gestio (Articles 6:212 DCC and further).

Civil liability arises only where a causal connection (in the sense of condicio sine qua non (hereafter referred to as: “CSQN”)) can be established between the breach of contract or the wrongful act and the damage suffered. A causal connection in the CSQN sense is deemed present where the damage would have not been suffered absent the breach or act. A CSQN causal link is sufficient in order to establish liability, however, the extent of
the liability is dependent on the extent that the damage is attributable to the breach or act (Article 6:98 DCC). The amount of the damage is estimated by the judge in accordance with the nature of the damage (Article 6:97 DCC).

15.2 Acceptable Forms of Damage in Contract

In principle injured parties are entitled to pecuniary compensation for damage suffered. Compensation in kind, however, is also possible (Article 6:103 DCC). Only actually suffered damage can be compensated. Civil liability has a purely compensatory nature and punitive damages are ruled out.

Where there is a breach of contract the injured party can demand supplementary compensation and/or substitutive compensation. When complementary compensation is paid, the original obligation still remains intact and the injured party can demand performance of the original obligation. Supplementary compensation is due, for example, where the non-performance causes consequential damage (e.g. where a faulty product causes damage to other items). Substitutive compensation replaces the original obligation; therefore the injured party cannot demand performance of the original obligation if it has received substitutive compensation.

Damage can consist of financial loss or material damage including suffered losses and missed profits (Article 6:96 DCC). Missed profits are calculated by comparing the financial situation of the injured party as a result of the default with the potential financial situation of the injured party if the default had not occurred. Reasonable costs made for measures taken to limit losses, reasonable costs made in order to establish the liability of the offender and reasonable costs made in order to reach an extrajudicial settlement may also be claimed as financial loss.

Injured parties may also claim compensation for non-financial loss, also referred to as non-material damage (Article 6:106 DCC). Both legal entities and individuals may claim compensation to a reasonable amount for non-material damage. It is also possible to claim compensation for future damage or damage not yet suffered.

15.3 Recovery of Damages in Tort, Product Liability and Other Non-contractual Cases

15.3.1 General

The rules regarding compensation for damage that apply with respect to contractual liability also apply with respect to non-contractual liability (Article 6:95 DCC and further).
Several specific extra-contractual liabilities related to legal entities are laid down in the DCC, including liability for defective products and liability for misleading and comparative advertising.

15.3.2 Liability for Defective Products

The Dutch system of liability for defective products is an implementation of an EU directive on the matter.\(^5\)

Pursuant to Article 6:185 DCC consumers can claim compensation from the producer for damage caused by a faulty product. This does not cover the product itself. Thus a consumer cannot use these provisions in order to hold the producer liable for damage to the product itself. The producer is strictly liable for the damage caused by the faulty product unless the producer can prove one of the limitative exonerating circumstances mentioned in Article 6:185 section 1 sub a-f DCC. Compensation can be claimed for damage to personal property, physical injury and death (Article 6:190 DCC).

The provisions regarding product liability are of a complementary nature, meaning that the consumer’s right to sue on any other legal basis is not prejudiced.

15.3.3 Liability for Misleading and Comparative Advertising

Under the DCC, making an announcement regarding goods or services supplied respectively offered in the course of business or the exercise of a profession is considered advertisement. An announcement in the aforementioned sense will constitute a wrongful act and thus give rise to liability if the announcement is misleading (Article 6:194 DCC).\(^6\)

Article 6:194 DCC also gives a non-exhaustive list of examples of what can constitute a misleading announcement. For example, an announcement can be misleading with regard to the nature, composition, amount, quality, attributes or uses of a product or service.

Article 6:194a DCC provides for liability for comparative advertisement.\(^7\) Comparative advertisement is any advertisement which explicitly or by implication identifies a competitor or goods or services offered by a competitor. Comparative advertising is in principle permitted and does not constitute a wrongful act as long as the conditions set out in Article 6:194a DCC are met.

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15.4 Standards of Proof for Recovery of Damages

In cases of contractual liability, as a general rule, the burden of proof rests on the claimant (in accordance with Article 150 DCCP referred to above (paragraph 9)). The claimant must prove all facts and circumstances needed in order to establish the claim and the extent of the damage, i.e. that there is a breach of contract, that the defendant is responsible for the breach, that the claimant has suffered damage and the extent of that damage and that the damage was caused by the breach.

In cases of extra-contractual liability the burden of proof will also most commonly rest on the claimant.

For product liability the claimant must prove, that the product was faulty, that he/she suffered damage and that the damage was caused by the defect in the product (Article 6:188 DCC).

Pursuant to Article 6:195 DCC, in cases of liability for misleading advertisements the burden of proof is shifted from the claimant to the defendant. This means that if a claimant contends that an advertisement was misleading it is up to the advertiser to prove that the advertisement was not misleading.

15.5 Public Policy Constraints on Damage Recovery

The rules regarding damage recovery are not of public policy and may be deviated from by contract.

15.6 Currency Conversion

An obligation to pay compensation for damage may be paid in Dutch currency (meaning: euro’s) or in foreign currency, notwithstanding certain exceptions (Article 6:121 DCC). When the claim for compensation is paid in another currency, the debt will be converted on the day of payment, based on the exchange rate of that day (Article 6:124 DCC).
16. Class Actions and Settlement of Group Claims

In cases where a large or indeterminate number of persons suffer damage, those persons may seek to recover their damages individually against the responsible party or those persons may seek to file proceedings collectively. There are roughly two ways in which claims can be filed collectively.

First, the injured parties may choose to bundle their claims by giving one person (which can also be an ad hoc foundation or association) a power of attorney to act on behalf of all of them. The result is that one person may file proceedings for monetary damages on behalf of the entire group of persons that bundled their claims. There are, however, at least two disadvantages to bundling claims by using powers of attorney. First, every person that wishes to bundle their claim with the group will have to issue a power of attorney, and second, the court will have to take account of all special circumstances that may be at issue with respect to every individual injured party when reviewing the case. Both these circumstances can lead to extra delays and costs.

Secondly, there is the mechanism of article 3:305a DCC. This provision makes it possible for an association or foundation to file a claim for a declaratory judgment against the responsible party establishing that the responsible party has committed a wrongful act against the injured parties. The association or foundation has standing if the objective of the association or foundation as stated in its articles of association or charter is to promote the interests of the injured parties or similar interests. In order for the claim to be admissible, the association or foundation must also show that it tried, in vein, to achieve its goal through dialogue with the responsible party. This requirement will be considered to have been met if the responsible party does not respond to an offer to enter into negotiations by the association or foundation within two weeks.

In the event that the association or the foundation should succeed in obtaining a declaratory judgment, it will be up to the individual injured parties to claim monetary compensation in individual secondary proceedings. In these individual proceedings the injured party will only have to demonstrate that it suffered damage and that its damage was caused by the now established wrongful act of the responsible party.

It is important to note that an association or foundation does not need to fulfill any criteria with respect to how representative it is of the class of injured parties on behalf of which it is acting and that the individual injured parties retain full standing in court despite the
fact that an association or foundation may have filed proceedings and lost. It is (in theory) possible for a new association to file proceedings anew despite the fact that the same claim made by another association may have already been rejected by a court. A possible defense against such successive claims would be an appeal to Article 3:13 DCC (abuse of rights).

The DCCP and DCC also contain a facility for group settlement of claims for large scale damage (Articles 7:907 DCC and further). The facility makes it possible for parties to request that a judge declare a settlement between a liable party and a foundation or association which represents the interests of the injured parties universally binding. Once declared universally binding, the agreement is binding upon all injured parties. The facility thus makes it possible for a liable party to settle a claim with an undetermined number of injured parties definitely. Once a judge grants the motion, injured parties will have the possibility to opt out of the settlement during a limited period of time. If an injured party opts out it can either litigate itself or try to reach an individual settlement. In any case the liable party will have certainty by the end of the opt-out period. A judge will only do this if a number of conditions are met.

First, there must be a settlement agreement between (one of) the liable parties and an association or foundation acting on behalf of the injured parties. The agreement itself must meet the criteria set out in Article 7:907 section 2 DCC. In accordance with that provision, the agreement must contain (i) a description of the group of persons on behalf of which the agreement was made, (ii) an as precise as possible determination of the number of persons that belong to that group, (iii) the compensation to be paid to these persons, (iv) the conditions that these persons must meet in order to qualify for the compensation, (v) the manner in which the amount of the compensation is to be calculated and obtained, and the name and address of the person to which opt-outs are to be addressed.

After an agreement has been reached that fulfills the aforementioned criteria the parties will have to file a joint request with the Amsterdam Court of Appeal to have the settlement declared universally binding. The parties to the agreement must summon all persons on whose behalf the agreement was made by letter and by placing an advertisement in one or more national newspapers of the judge’s choosing. After hearing the case and any possible defenses, the court will verify if the agreement fulfills the criteria. The court may decide whether or not to declare the agreement universally binding, the court may instruct the parties to amend the agreement or the court may request expert advice.

The court will refuse the request if the agreement does not meet the aforementioned criteria, if the settlement amount is not reasonable, if there is insufficient security for payment of the amount, if the association or foundation are not sufficiently representative,
or if the group of injured parties is too small to justify the declaration of the agreement universally binding.

If the court declares the agreement universally binding, the next stage is entered. All the interested parties will have to be informed of the existence of the settlement and of the universally binding nature thereof in order to enable them to opt out if they so wish (Article 1017 section 3 DCCP). The judge must also determine the period within which it is possible to opt out of the settlement, however, this period must be at least three months.

The facility can be used in order to have settlements declared universally binding in cases concerning damage suffered by investors due to incorrect or misleading information published by a listed company. The Converium case is a good example of the usefulness of this facility. In the Converium case (Hof Amsterdam 17 January 2012, JOR 2012/51) two settlements were reached, one in the United States with respect to the American investors, and one in the Netherlands with respect to all other investors. The American court refused to accept jurisdiction with respect to damage suffered by non-American investors and thus refused to declare the settlement binding upon that class of injured parties. The parties then approached the Amsterdam Court of Appeal and requested that the settlement be declared binding for all other investors. The Amsterdam Court of Appeal assumed jurisdiction based on Article 2 of Regulation 44/2001 (see paragraph 3.1.2) with regard to Dutch investors, Article 5 section 1 of Regulation 44/2001 with regard to other European investors (domiciled in the EU) and Article 3 DCCP with regard to other foreign investors.

The Converium case demonstrates that it is possible to have international settlements declared binding by the Amsterdam Court of Appeal through the facility described in this chapter. The facility thus makes it possible for liable parties to settle large scale international claims with an indeterminate number of injured parties in many different countries, thus making it possible for the liable parties to avoid a lot of uncertainty. It is, however, not clear as to whether the decision of the Dutch court to declare a settlement universally binding will be recognized in all foreign countries. It is likely that the decision will be recognized in EU countries pursuant to Regulation 44/2001. However, it is unclear to what extent the decision will be recognized in the absence of an international instrument.
17. Recognition and Enforcement of Foreign Civil/Commercial Judgments

17.1 Introduction; the Enforcement of a Domestic Judgment

The enforcement of a Dutch judgment in the Netherlands is done by a court bailiff (Article 434 DCCP). The court bailiff can, if necessary, request assistance from the police. Before enforcement can take place, the judgment creditor must have the judgment served upon the judgment debtor by the court bailiff (Article 430 section 3 DCCP).

Commonly judgment debtors will comply with judgments voluntarily, if only to avoid making extra costs. If, however, the judgment debtor does not comply voluntarily, the judgment creditor can request a court bailiff to attach any assets of the debtor under warrant of execution. Such an executory attachment can in principle be made in respect of most of the judgment debtor’s assets, whether in his possession or in the possession of third parties (Article 435 section 1 DCCP). The ultimate purpose of an executory attachment is the public sale of the seized assets and the use of the proceeds to satisfy the creditors claim (Article 469 DCCP). Some assets, however, cannot be attached under Dutch law (examples of such exceptions can be found in Articles 436, 447 and 448 DCCP).

Default judgments are enforceable in the same manner as any other judgment. The defendant may, however, lodge opposition against the default judgment within 14 days after receiving the judgment or within 14 days after the creditor commenced execution of the judgment (see paragraph 14.2.2).

Lodging opposition or appeal against a judgment stays the execution of that judgment for the duration of the proceedings in appeal or opposition unless the judge has declared his judgment “provisionally enforceable” (uitvoerbaar bij voorraad). Claimants will almost always request that the judge declare his judgment “provisionally enforceable” and judges commonly declare their judgments provisionally enforceable (Article 233 and 234 DCCP). A debtor who wishes to prevent the execution of a provisionally enforceable judgment may initiate preliminary relief proceedings. The judgment debtor may succeed in preventing execution if he can show that the opposition or appeal is very likely to succeed. Naturally this is very difficult to demonstrate.

Disputes concerning the enforcement of a judgment are usually dealt with in preliminary relief proceedings by the relief judge of a district court (Article 438 DCCP).
A number of international instruments regarding the recognition and enforcement of foreign judgments are applicable to the Netherlands. The most important of these is Regulation 44/2001 (see paragraph 3.1.2) applicable in all EU countries. On the basis of this regulation, Dutch court judgments are generally enforceable in most Western European countries. There is, however, no treaty providing for enforcement of court decisions between the Netherlands and such countries as Japan and the United States.

17.2 Recognition and Enforcement of Foreign Judgments

Recognition and enforcement are two related but separate issues. Recognition is a precondition for enforcement, but enforcement requires more than just recognition.

Pursuant to Regulation 44/2001 all judgments from EU states must be recognized in the other Member States without any special procedure being required (Article 33 section 1 Regulation 44/2001). For the purposes of the regulation a judgment is any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court (Article 32 of Regulation 44/2001).

Pursuant to Regulation 44/2001 (Article 34) a judgment from another EU country shall not be recognized in the following cases:
(a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought,
(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so,
(c) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, or
(d) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State addressed.

Dutch courts are under no circumstances permitted to review the judgment as to its substance (Article 36 of Regulation 44/2001). In principle the Dutch courts may not review whether the court of another member state assumed jurisdiction on an acceptable ground (HvJ 28 March 2000, zaak C-7/98, NJ 2003, 626). However, if a court assumes jurisdiction in cases regarding contracts with consumers (Articles 8 up to and including 14
of Regulation 44/2001) and insurance (Articles 15 up to and including 17 of Regulation 44/2001) in violation of the regulation, its judgment may not be recognized in other EU countries (Article 35 of Regulation 44/2001). A judgment can only be enforced after being declared enforceable by a Dutch court in accordance with Article 38 of Regulation 44/2001.

In principle, Dutch courts are free to determine to what extent a judgment from a non EU-country must be recognized. Judgments must fulfill three minimum conditions if they are to be recognized in the Netherlands. First, the foreign court must have assumed jurisdiction on an internationally acceptable ground. Secondly, the foreign judgment must be the result of proceedings that meet the generally accepted fair trial standards. Thirdly, the foreign judgment – more specifically the effect of recognizing it in the Netherlands – must not lead to a violation of Dutch public policy.

If a foreign judgment can be recognized in the Netherlands it may only be enforced in the Netherlands after permission for enforcement has been sought from and granted by a Dutch court in accordance with Article 985 DCCP. This Article provides for a simple procedure where no review as to the substance occurs. Generally speaking the court will test whether the judgment must be recognized. The permission must be sought from the court of the domicile of the judgment debtor or from the court of the place where enforcement is sought. The request is made by petition and legal representation is mandatory (Article 986 section 1 DCCP). The court may not give permission for enforcement before hearing the party against whom the judgment shall be enforced (Article 987 section 1 DCCP). Appeal is possible and must be requested within one month after the court has rendered its decision and review by the Supreme Court is also possible (Article 989 DCCP).

Pursuant to EU Regulation 805/2004 it is possible to enforce judgments of courts from other EU countries in the Netherlands without having to go through the aforementioned procedure. This is only possible in regard to cases concerning uncontested claims. The court that rendered the judgment in regard to the uncontested claim can certify its judgment as a European Enforcement Order. This order is then readily enforceable in all EU-countries. Certifying a judgment a European Enforcement Order is subject to a set of complicated conditions set out in Article 6 of this regulation.
18. Settlement and Compromise of Proceedings

18.1 Settlement and Withdrawal

18.1.1 Settlement Agreement
A settlement agreement (vaststellingsovereenkomst) is an agreement through which parties seek to end or avoid uncertainty or a dispute between them regarding their legal relationship. In order to do this parties can bindingly establish the status of their legal relationship in an agreement (Article 7:900 DCC).

Article 7:902 DCC stipulates that a settlement agreement is valid even if its content is contrary to mandatory law (dwingend recht), unless it would also be in violation of good morals (goede zeden) or public policy (openbare orde).

A settlement agreement cannot prejudice the rights of any third parties (Article 7:903 DCC). Furthermore, unlike most other agreements that are subject to Dutch law, a settlement agreement cannot be rescinded upon a mere written notice by one party to the other party (Article 7:905 of the DCC). Instead, the party that wishes to rescind the settlement agreement will have to initiate legal proceedings.

18.1.2 Withdrawal of Claim and Withdrawal from Proceedings
A party that has initiated legal proceedings but for whatever reason(s) wishes to end the proceedings may under certain conditions withdraw from the proceedings (afstand van instantie). The conditions are set forth in Articles 249 and 250 DCCP. The result of a withdrawal from the proceedings is that parties are ipso jure restored to the situation as though the proceedings had never occurred (Article 250 section 2 DCCP).

The (former) claimants right of action is not affected by the withdrawal from the proceedings. After the withdrawal the claimant may again initiate proceedings against the defendant.

As long as the defendant has not submitted his Answer (see paragraph 7.2) the claimant may unilaterally move for withdrawal from the proceedings (Article 249 section 1 DCCP). In such case the claimant will, however, have to compensate the defendant for his/her legal costs as will be discussed in paragraph 20 (Article 249 section 2 DCCP). In view of the fact that defendant has not yet taken any real action in the proceedings, these costs will in principle be limited to the court fees paid by the defendant (griffierecht).
18.1.3 Striking off

In the event parties for whatever reason(s) agree to not continue the proceedings, they can ask the court to strike the case off of the docket (doorhaling or royement) (Articles 246-248 DCCP). In practice, this usually forms part of a settlement (agreement).

Striking a case of the docket is a purely administrative action which has no legal consequences. At the request of the parties the matter can always be re-entered on the docket.

A request for striking off is admissible only if it is done by all parties that have appeared in the proceedings.

18.2 Formalities and Requirements

A settlement agreement does not have to comply with any formalities in order for it to become valid. In other words: it can be concluded both in writing and orally (Article 3:37 DCC). Obviously, it is usually advisable to put a settlement agreement in writing.

To the extent that certain formalities need to be met in order to bring about the agreed upon result, the parties to a settlement agreement are under the obligation to comply with such formalities (Article 7:901 section 2 DCC).

For example, if a dispute arises between two parties, (A and B) as to whether or not they have reached an agreement regarding the sale by A of his house to B, they can even settle their dispute by orally agreeing that A will indeed transfer the ownership of his house to B. However, the house will only be validly transferred (assuming the house is located in the Netherlands) if the parties have a civil law notary draw up a notarial transfer deed and register that deed with the public registry (openbaar register).

Settlement agreements are often reached during the first oral hearing of the case. As discussed above the purpose of an oral hearing is very often to test whether a settlement of the dispute is possible (see paragraph 7.3). Depending on whether the case is heard by a cantonal judge or a district court, legal representation is respectively voluntary or mandatory during the hearing. In cases heard by cantonal judges parties may be accompanied by a representative ad litem (gemachtigde).

The judge has the option to specifically order parties to be present in person. Although no sanction can be given upon non-appearance, parties must realize that not appearing in person after being specifically ordered to may well irritate the judge.
If and when parties have come to a settlement, one of them can request an official report (proces-verbaal) thereof from the judge. This report has to be signed by both parties, the judge and the court’s secretary. This saves the judge from having to produce a formal judgment and makes the settlement agreement readily enforceable.

Of course there is always the possibility of parties reaching a settlement during the proceedings but outside of a court appearance. In that case, likewise, one of the parties can request an official report from the judge.

18.3 Effect on Litigation

A judicial settlement in the Netherlands drawn up in a court report has the same effect as a final judgment and can thus be readily enforced not just in the Netherlands but also abroad pursuant to Article 58 of the Regulation 44/2001 (EU Regulation 44/2001). Furthermore, it goes without saying that the settlement agreement bars any further litigation between the parties with respect to the same matter.

18.4 Revision of a Court Settlement

A Court Settlement may, under very specific circumstances, be revised. It is, however, very unlikely that a court settlement will be revised if there are no apparent mistakes or if there is deceit or fraud by one of the parties.
19. Sovereign immunity

19.1 Service of Process on Foreign Sovereigns

19.1.1 European Convention on State Immunity

Pursuant to article 16 of the 1972 European Convention on State Immunity, the Summons by which proceedings are initiated against a Contracting Party in the court of another Contracting Party has to be forwarded through diplomatic channels to the Ministry of Foreign Affairs of the defendant State. The Ministry of Foreign Affairs can then, where required, transmit the Summons to the competent authority. If necessary, the Summons will be accompanied by a translation into the official language of the defendant State.

The time-limit for appearance begins to run two months after the date on which the Summons has been received by the Ministry of Foreign Affairs. If the defendant State appears before the assigned court it can no longer make any objection to the method of service. If the defendant State does not appear and it is established that the Summons has been properly transmitted and the time-limits have been observed, a judgment by default may be rendered.

19.1.2 Absence of Convention

In the absence of a convention service of process to a foreign state must be done in accordance with the rules regarding service of process to a defendant domiciled abroad (Article 55 DCCP, see paragraph 6). The Supreme Court has determined that a foreign state must be deemed to have its domicile in its own capital (HR 3 October 1997, NJ 1998, 887). Ultimately, the Summons must be delivered to the Ministry of Foreign Affairs of the defendant state. Service to an Embassy or Consulate is not permitted under international law.

19.2 Subject Matter and Personal Jurisdiction

According to the 1972 European Convention on State Immunity to which the Netherlands are a signatory, foreign states are immune to domestic jurisdiction as far as their sovereign activities are concerned (acta iure imperii). However, when a foreign state acts as a private subject (acta iure gestionis) it cannot claim immunity. Also, in the event a foreign state expressly consents to domestic jurisdiction, either in writing in a contract or after a dispute has arisen, it may no longer invoke its sovereign immunity. Furthermore, it is noted that some persons are considered the public representative of their state and that therefore they share its immunity. This is, for example, true for heads of states.
Apart from sovereign immunity there is diplomatic immunity. Both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, to which the Netherlands also is signatory, govern this subject. Diplomatic agents (working at an embassy) and consular officers (working at a consular post) (hereinafter: diplomats) can invoke immunity from the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions. Members of their family forming part of the household and members of the private staff receive the same privileges and immunities.

Furthermore, the authorities of the receiving state are not allowed to enter any diplomatic premises. The same holds true for the residences of diplomats.

However, when the receiving State decides that a diplomat is misbehaving it may at any time notify the sending State that this individual is considered 'persona non grata'. In that event, the sending State must either recall the person concerned or terminate his functions. If the sending State refuses or fails within a reasonable time to carry out this obligation, the receiving State may, as the case may be, cease to consider him as a member of the consular staff (Article 23 of the Vienna Convention on Consular Relations).

Only the sending State may expressly waive any of the privileges and immunities provided for a certain diplomat. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings does not imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver is necessary.

19.3 Taking of Evidence Against Foreign Sovereign Entities

Although he may consent to be a witness, a diplomat is not obliged to give evidence as a witness, especially concerning matters connected with the exercise of his functions, or to produce official correspondence and documents relating thereto.

Diplomatic premises and the private premises of diplomats, diplomatic archives and documents are all inviolable. The receiving State is only allowed to enter inviolable premises when expressly authorized to do so by the head of the post.

19.4 Pre- and Post-Judgment Attachment and Other Injunctive Measures Against Foreign Sovereigns

Aside from immunity from jurisdiction as discussed above, certain assets of foreign States may also be immune from execution. In accordance with Article 703 DCCP, it is prohibited to attach goods that are intended for public service. This provision prohibits the
attachment of goods belonging to the Dutch government. However, it is also applicable with respect to foreign states (See for example Rb 's-Gravenhage 14 February 2008, 228039 HAZA 04-3020).

19.5 Recognition and Enforcement of Judgments Against Foreign Sovereigns

19.5.1 Domestic Enforcement
As pointed out in paragraph 19.2 above the mere subjection to Dutch jurisdiction by a foreign sovereign does not automatically imply subjection to enforcement. A separate waiver for subjection to enforcement is necessary.

19.5.2 Enforcement Abroad
Pursuant to Article 26 of Regulation 44/2001 a judgment is to be recognized in all EU countries regardless of the parties to the judgment.
20. Costs and Fees

20.1 Security for Costs

Pursuant to Article 224 section 1 DCCP all claimants not domiciled in the Netherlands who bring a claim before a Dutch court will, at the request of the defendant(s), have to provide security for the trial costs and/or damages which they might have to pay in the event the court awards compensation to the defendant(s). Exceptions to this rule are listed above (see paragraph 7.5.4)

Currently, a number of international instruments that are relevant in this regard are applicable to the Netherlands. The most important of these is Regulation 44/2001, which explicitly provides (in Article 51) that “no security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought”. Also relevant is the 1970 Hague Convention, which provides for the possibility of enforcing a judgment rendered in a signatory state in another signatory state. Article 17 of the 1970 Hague Convention states that: “no security, bond or deposit, however termed under the law of the State addressed, shall be required by reason of the nationality or domicile of the applicant to guarantee the payment of judicial costs or expenses if the applicant, being a natural person, has his habitual residence in or, not being a natural person, has a place of business in another signatory state”. However, article 17 of the 1970 Hague Convention only applies when parties have a Supplementary Agreement in accordance with Article 21 of the treaty.

As far as the United States is concerned it is noted that they are not signatory to any multi- or bilateral recognition and enforcement treaties with the Netherlands (as a matter of fact, the United States is not a signatory to any such treaty whatsoever). However, based on the AFCN, nationals and companies of either party are accorded “national treatment” with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights (see paragraph 7.5.4).

It can very well be argued that a Dutch defendant who is sued before the Dutch courts by an American claimant cannot request security for legal costs and damages in light of the AFCN. As a matter of fact, at least in some lower court cases this argument has been
successfully raised. Although this defense has been sustained by many lower courts, it remains to be seen whether the Supreme Court will also sanction this reading of the law.

**20.2 Interest and Penalties**

In cases of claims for money, courts will, at the request of the creditor, award interest for a delay in payment. This so-called statutory or legal interest accrues, in case parties have a commercial contract, from the day after the day on which payment was to be made according to the agreement between parties (Article 6:119a DCC). In cases where there is no commercial contract between parties, interest accrues from the day that the debtor is in default (Article 6:119a DCC). At present the statutory interest is 8% per annum with regard to commercial contracts and 5% with regard to other cases. These rates change whenever the overall Dutch interest situation gives cause thereto. A commercial contract is defined in Article 6:119a DCC, and simply put is a contract between parties acting in the exercise of their business or profession.

Pursuant to Article 611a DCCP and further, a Dutch court may impose, on request of one of the parties, periodic penalty payments on the other party for not complying with a court order. The party which is ordered to pay the penalty forfeits a payment per each unit of time (this can be a day, week, month or year) that it does not comply with an order of the court. Periodic penalty payments are often used in preliminary relief proceedings as a way of circumventing the limitations of preliminary relief proceedings. For example, a relief judge cannot deem that an item of property belongs to one party or the other because in so doing he would have rendered a declaratory judgment which is not permitted (see paragraph 8). However, a relief judge may order one of the parties to transfer ownership of an item to the other. In order to force that party to comply with his order he may, at the request of one of the parties, make compliance subject to a periodic penalty. The statute of limitation for such periodic penalties is six months.

**20.3 Attorney’s Fees, Fee Schedule and Contingencies**

The court determines the amount of the costs of the litigation to be borne, in most cases, by the losing party (Article 237 DCCP). These costs seldom compensate the actual costs and attorney’s fees incurred by the other party (which will obviously vary from attorney to attorney). The costs granted by the court are based on certain standard amounts for certain standard activities and on the amount of the claim. There is no possibility of recovering the actual costs of litigation from the unsuccessful party (Article 238 and 239 DCCP) save under certain special conditions in cases regarding intellectual property (Article 1019h DCCP). Nevertheless, in the exceptional event the procedural behavior of
the counterparty could be considered so unreasonable that it amounts to an abuse of right
(Article 3:13 DCC), it may be possible to recover more costs and damages on the basis of
the wrongful acts doctrine (Article 6:162 DCC).
21. International Arbitration

21.1 Introduction

The Netherlands Arbitration Act (hereafter referred to as: “Arbitration Act”) entered into force on December 1, 1986.

The provisions of the Arbitration Act are quite detailed in order to provide adequate procedural rules for ‘ad-hoc’ arbitration, which is based only on an arbitration agreement between parties and any procedural rules agreed on by the parties or set forth under the law applicable to the arbitration procedure.

However, since the majority of arbitrations in the Netherlands are administered by arbitration institutes (‘institutional’ or ‘administered’ arbitration), many of the provisions of the Arbitration Act are not mandatory. The frequently used wording ‘unless the parties have agreed otherwise’ indicates that the parties are given great autonomy to deviate from the Arbitration Act (For more information on arbitration institutes in the Netherlands see paragraph 21.16).

21.2 International Conventions

The main international arbitration conventions to which the Netherlands is signatory are (i) the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “1958 New York Convention”), which has been ratified by more than one hundred countries, and (ii) the 1925 Netherlands-Belgian Execution Convention (This is a bilateral treaty and even though both the Netherlands and Belgium are signatory to the 1958 New York Convention, on rare occasions this treaty has certain advantages).

21.3 The Arbitration Act

The Arbitration Act is incorporated in the DCCP. It consists of two titles and 58 Articles (specifically Articles 1020 up to and including 1077 DCCP). The first title deals with arbitration in the Netherlands, whilst the second title (consisting of only three Articles) concerns arbitration outside the Netherlands. Unlike, for example, the French Arbitration Statute, the Dutch Arbitration Act does not have separate provisions for international arbitration.
21.4 UNCITRAL Model Law

Many provisions of the Arbitration Act are based on the work of the United Nations Commission on International Trade Law (hereafter referred to as: “UNCITRAL”).

The Netherlands Arbitration Institute (hereafter referred to as: “NAI”) is prepared to act as ‘appointing authority’ under the Arbitration Rules of the UNCITRAL when parties have agreed to that beforehand.

21.5 Qualification of Arbitrators

Pursuant to Article 1023 DCCP any natural person of legal capacity may be appointed as arbitrator. The arbitrators are appointed in accordance with the method agreed to by the parties (Article 1027 section 1 DCCP). Unless the parties have agreed otherwise, no person shall be precluded from appointment by reason of his nationality (also Article 1023 DCCP). The number of arbitrators appointed must be uneven. It is therefore permissible to appoint a sole arbitrator (Article 1026 section 1 DCCP).

Obviously an arbitrator must be impartial and independent. If there are circumstances giving rise to justifiable doubts as to the impartiality or independence of an arbitrator, he may be challenged by either party pursuant to Article 1033 section 1 DCCP. A secretary engaged by an arbitral tribunal may be challenged on the same grounds. Furthermore, a prospective arbitrator or secretary who presumes that he could be challenged must disclose in writing the existence of such grounds to the person who has approached him (Article 1034 DCCP).

21.6 Right of Representation

Legal representation is not mandatory in arbitration proceedings, but parties are free to choose a representative if they so wish (Article 1038 section 1 DCCP). The representative may be either an attorney – Dutch or foreign – or a representative ad litem specifically authorized for this task by a written power of attorney. The appropriately authorized attorney or representative has the same rights and duties as he would have before a national court.

Article 1038 section 2 DCCP furthermore stipulates that the parties may be assisted in the arbitral proceedings by any persons of their choosing.
It is noted that, regardless of whether parties choose to be represented during the arbitral proceedings, the arbitral tribunal can, at any stage of the proceedings, order parties to appear in person (Article 1043 DCCP).

### 21.7 Enforcement of Agreement to Arbitration

Arbitration is possible both for disputes that have already arisen and for disputes that may arise in the future (Article 1020 section 1 DCCP). Pursuant to Article 1020 section 5 DCCP the term “arbitration agreement” includes an arbitration clause which is contained in articles of association or rules which bind the parties.

If there is an agreement between parties to submit their disputes to arbitration, the regular courts must, unless the agreement is invalid, deem the claim inadmissible due to lack of jurisdiction, if one of the parties invokes the existence of the arbitration agreement before raising any other defenses (Article 1022 section 1 DCCP). It is important to note, however, that an arbitration agreement does not preclude a party from requesting a court to grant interim measures of protection, such as an attachment or garnishment, or from applying to the relief judge of the district court in preliminary relief proceedings (see paragraph 8) (Article 1022 section 2 DCCP).

### 21.8 Jurisdiction

Pursuant to Article 1052 section 1 DCCP the arbitral tribunal is authorized to determine for itself whether it has jurisdiction.

Jurisdiction may be contested by a party on several grounds, the most important of which are (i) lack of a valid arbitration agreement (Article 1052 section 2 DCCP) or (ii) composition of the arbitral tribunal in violation of the applicable rules (Article 1052 section 3 DCCP). The challenge of the arbitral tribunal’s jurisdiction on the basis of the first ground has to be made before submitting a defense on the merits of the case. Thereafter the relevant party will be barred from raising this plea in the arbitral proceedings or in proceedings before the court. In regard to the second ground it is noted that, once a party has participated in the composition of the arbitral tribunal, it may not - be it in the arbitral proceedings or in proceedings before the court - raise the plea that the arbitral tribunal lacks jurisdiction on the ground that the arbitral tribunal is composed in violation of the applicable rules (Article 1052 section 3 DCCP).

A decision in which the arbitral tribunal declares itself to have jurisdiction may be challenged only by the means of recourse provided in Article 1064 section 1 DCCP (see
below paragraph 21.13) in conjunction with recourse against a final or partial final award (Article 1052 section 4 DCCP).

21.9 Confidentiality

Although generally the same principles and customs apply to arbitration proceedings as to proceedings before a national court with regard to jurisdiction, this does not hold for the principle of confidentiality and disclosure. Arbitral awards are in principle considered confidential unless parties have divulged, or have given permission to disclose the contents to the public.

21.10 Preliminary Relief

Pursuant to Article 1051 section 1 DCCP the parties may agree to authorize the arbitral tribunal or its chairman to render a decision in preliminary relief proceedings in the same way as a relief judge of the district court (see paragraph 8 above). A decision in arbitral preliminary relief proceedings is regarded as an arbitral award to which Articles 1049 through 1068 DCCP are applicable (Article 1051 section 3 DCCP).

In the event that, notwithstanding an agreement as meant in Article 1051 section 1 DCCP, the case is brought before the relief judge of the district court in preliminary relief proceedings, he may (not must), if a party invokes the existence of the said agreement, taking into account all circumstances, declare that he is not authorized due to lack of jurisdiction and refer the case to the agreed arbitral proceedings for preliminary relief, unless the said agreement is invalid (Article 1051 section 2 DCCP).

21.11 Duties and Powers of the Arbitrators

This is a non-exhaustive list of the duties and powers of arbitrators:
(a) The arbitral tribunal must treat the parties with equality and it must give each party an opportunity to substantiate its claims and to present its case (Article 1039 section 1 DCCP),
(b) The arbitral tribunal shall, at the request of either party or on its own initiative, give the parties the opportunity to orally present their cases (Article 1039 section 2 DCCP),
(c) The arbitral tribunal may, at the request of either party, allow a party to hear witnesses or experts. The arbitral tribunal has the power to designate one of its members to examine witnesses or experts (Article 1039 section 3 DCCP),
(d) The arbitral tribunal has the power to order the production of documents (Article 1039 section 4 DCCP),
(e) Unless the parties have agreed otherwise, the arbitral tribunal has discretion in determining the applicable rules of evidence (Article 1039 section 5 DCCP),

(f) The arbitral tribunal may appoint one or more experts to advise it (Article 1042 section 1 DCCP). When doing so the arbitral tribunal shall, upon receipt of the expert’s report, provide a copy of the report to the parties without delay (Article 1042 section 3 DCCP). Furthermore, in that case the experts shall, at the request of either party, be examined at a hearing and the arbitral tribunal must give the parties an opportunity to examine the experts and to supply their own expert testimony (Article 1042 section 4 DCCP),

(g) At any stage of the proceedings, the arbitral tribunal may order the parties to appear in person for the purpose of providing information or attempting to reach a settlement (Article 1043 DCCP),

(h) Pursuant to Article 1044 section 1 DCCP the arbitral tribunal may, through the intervention of the relief judge of the district court of The Hague, ask for information as mentioned in article 3 of the European Convention on Information on Foreign Law, concluded in London, 7 June 1968 (Dutch Treaty Series 1968, 142). In such case the arbitral tribunal may stay the proceedings until the day on which it has received the answer to its request for information (Article 1044 section 2 DCCP),

(i) At the written request of a third party which has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit that party to join the proceedings, or to intervene therein (Article 1045 section 1 DCCP).

Finally it is noted that arbitrators not only have to apply the fundamental principles of justice, but that they are also considered to have an agreement to provide services in the sense of Article 7:400 DCC. Therefore Article 7:401 DCC applies to them, imposing on them a duty of due care.

### 21.12 Time Limit to Issue Award

The arbitral tribunal is free to determine the time and date when the award shall be rendered (Article 1048 DCCP).

At the request of either party and after having heard the other party and the arbitrator or arbitrators, an outside person appointed by the parties or, in the absence thereof, the relief judge of the district court, may, taking into account all circumstances, terminate the mandate of the arbitral tribunal if, despite repeated reminders, the arbitral tribunal carries out its mandate in an unacceptably slow manner. In such case the jurisdiction of the regular courts shall revive, unless the parties have agreed otherwise (Article 1031 section 2 DCCP).
Some authors argue that arbitrators can be even held liable when the unacceptable delay can be attributed to them.

21.13 Appeal of the Arbitrators’ Award

The award may be a final award, a partial final award, or an interim award (Article 1049 DCCP).

An appeal to a second arbitral tribunal is possible only if the parties have expressly agreed thereto (Article 1050 section 1 DCCP). Unless parties have agreed otherwise, partial and interim awards may be appealed only in conjunction with an appeal against the final award (Article 1050 sections 2 and 3 DCCP). Unless the parties have agreed otherwise, an appeal to a second arbitral tribunal must be lodged within three months from the date of deposit of the award with the registry of the district court of the place of arbitration, unless the parties agree to a different period (Article 1050 section 4 DCCP).

Pursuant to Article 1070 DCCP no appeal can be filed against decisions of the relief judge of the district court on the following matters: Article 1026 sections 2 and 4 DCCP (the number of arbitrators and the appointment of an extra arbitrator), Article 1027 section 3 DCCP (appointment of arbitrators), Article 1028 DCCP (privileged position of a party in appointing arbitrators), Article 1029 sections 2 and 4 DCCP (dismissal of arbitrator’s on their own request), Article 1031 DCCP (termination of the arbitral tribunal’s mandate), Article 1035 section 2 DCCP (challenge of an arbitrator), Article 1041 DCCP (the request to appoint an investigative judge for the purpose of the hearing of witnesses), Article 1044 DCCP (request for information on foreign law), Article 1046 section 2 DCCP (order to consolidate arbitral proceedings) and Article 1056 DCCP (lifting, suspending and reducing of periodic penalty payments imposed in an arbitral award).

In cases in which there is a possibility of arbitral appeal, the award is not enforceable until the period for filing the appeal has expired. It is noted, however, that where an appeal from the award to a second arbitral tribunal is provided for, the arbitral tribunal may declare its award provisionally enforceable in the same way as regular courts (see paragraph 14.2.3 above). In such case the arbitral tribunal may determine that provisional enforceability is subject to providing sufficient security in case its award is overturned in appeal (Article 1055 DCCP).

In the event of a manifest computing or clerical error in the award a party may request in writing that the arbitral tribunal rectify the error, provided such request is made no later than thirty days after the date of deposit of the award with the registry of the district court (Article 1060 section 1 DCCP). An arbitral tribunal may also, no later than thirty days
after the date of deposit of the award with the registry of the district court, make such
rectification or correction on its own initiative (Article 1060 section 4 DCCP). It is noted that
such a request for rectification or correction does not suspend the enforcement or setting
aside of the award unless the relief judge of the district court deems that there are serious
reasons for so doing pending the decision on the request (Article 1060 section 7 DCCP).

Furthermore, if the arbitral tribunal has failed to decide on one or more matters which have
been submitted to it, either party may, likewise no later than thirty days after the date of
deposit of the award with the registry of the district court, request the arbitral tribunal to
render an additional award (Article 1061 section 1 DCCP). If parties have agreed to allow
appeal to a second arbitral tribunal, the arbitral award rendered in first instance may only
be supplemented on appeal and in that case any request for such supplementation must
be made within the deadline for appeal (Article 1061 section 6 DCCP).

21.14 Setting Aside and Revocation of Arbitral Awards

21.14.1 General
In most cases leave for enforcement is granted. In that case there are only two remedies
available against the arbitral award: setting aside and revocation.

21.14.2 Setting Aside
An application for setting aside must be made to the district court with the registry of
which the original award is to be deposited pursuant to Article 1058 section 1 DCCP. Such
application can be made as soon as the award has acquired the force of res judicata
(Article 1059 section 1 DCCP). The right to make an application will be extinguished three
months after the date of deposit of the arbitral award with the registry of the district court
(Article 1064 section 3 DCCP). However, if the arbitral award together with the leave for
enforcement is officially served on the other party, that party may make an application
for setting aside within three months after such service, regardless of whether the period
of three months mentioned in the preceding sentence has lapsed (Article 1064 section 3
DCCP).

An application to set aside an interim arbitral award may be made only in conjunction with
an application to set aside a final or partial final award (Article 1064 section 4 DCCP). All
grounds for setting aside must be mentioned in the Summons, failing which the right to
bring forward such grounds shall automatically lapse (Article 1064 section 5 DCCP).

Setting aside of an arbitral award can take place only on one or more of the following
grounds (Article 1065 section 1 DCCP):
(a) The absence of a valid arbitration agreement,
(b) The arbitral tribunal was constituted in violation of the rules applicable thereto,
(c) The arbitral tribunal has not complied with its mandate,
(d) The award is not signed or does not contain reasons as required by Article 1057
    DCCP, or
(e) The award, or the manner in which it was made, violates public policy or good morals.

The failure of the arbitral tribunal to comply with its mandate may be raised as a ground for
setting aside the award only if the interested party invoked this ground during the arbitral
proceedings, unless the non-compliance was not known to him (Article 1065 section 4
DCCP). The non-compliance may relate to procedural matters or matters of substance. If
the tribunal makes an award that exceeds or deviates from the demand for relief, only the
excessive or deviant part of the award will be set aside, to the extent that such separation
from the remaining part of the award is possible (Article 1065 section 5 DCCP). If the
tribunal failed to decide one or more matters submitted to it, the ground that the tribunal
did not comply with its mandate may be raised only if the tribunal was first requested,
but failed or refused, to render an additional award in the sense of Article 1061 DCCP
mentioned above (Article 1065 section 6 DCCP). The judgment of the district court may be
appealed and subsequently reviewed by the Supreme Court.

As far as the consequences of the setting aside of an arbitral are concerned it is noted that
pursuant to Article 1067 DCCP the jurisdiction of the regular courts shall revive as soon
as a decision to set aside the award has become final, unless the parties have agreed
otherwise.

21.14.3 Revocation
Revocation of an arbitral award can only take place on one or more of the following
(exceptional) grounds (Article 1068 section 1 DCCP):
(a) The award is wholly or partially based on fraud which is discovered after the award is
    made and which is committed during the arbitral proceedings by or with the knowledge
    of the other party,
(b) The award is wholly or partially based on documents which, after the award is made,
    are discovered to have been forged,
(c) After the award is made, a party obtains documents which would have had an
    influence on the decision of the arbitral tribunal and which were withheld as a result of
    the actions of the other party.

An application for revocation must be brought before the court of appeal which would
have had jurisdiction to decide on an appeal relating to the application for setting aside
the arbitral award on the basis of Article 1064 DCCP, discussed above (see paragraph
21.14.2) within three months after the fraud or forgery has become known or the party has obtained the new documents (Article 1068 section 2 DCCP).

21.15 Recognition and Enforcements of Awards Made Outside of the Netherlands

A request for recognition and enforcements of awards made outside of the Netherlands can either be based on a convention (Article 1075 DCCP) or can be made under Dutch law (Article 1076 DCCP).

With regard to the former option the 1958 New York Convention is by far the most important treaty (see paragraph 21.2 above).

Article 1075 DCCP confirms once more that an arbitral award made in a foreign State to which a treaty concerning recognition and enforcement is applicable, can be recognized and enforced in the Netherlands. For the avoidance of any doubt: even though according to the text of Article 1075 DCCP an arbitral award can be recognized and enforced in the Netherlands, the Dutch courts are not allowed to refuse recognition and enforcement if this is mandatory pursuant to an international convention. In that case the provisions of Articles 985 up to and including 991 (see paragraph 17.2 above), which deal with the enforcement of foreign judgments in the Netherlands, also apply to the enforcement of foreign arbitral awards in the Netherlands to the extent that the relevant treaty does not contain provisions deviating therefrom and provided that the relief judge of the district court shall substitute for the district court and the time limit for appeal from his decision and for recourse to the Supreme Court shall be two months.

If (i) no treaty concerning recognition and enforcement is applicable, or (ii) if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought, an arbitral award made in a foreign State may be recognized in the Netherlands and its enforcement may be sought in the Netherlands, upon submission of the original or a certified copy of the arbitration agreement and arbitral award, unless (see Article 1076 section 1 DCCP):

I. The party against whom recognition or enforcement is sought, asserts and proves that:
   (a) There is no valid arbitration agreement between the parties in accordance with the applicable law,
   (b) The arbitral tribunal is constituted in violation of the rules applicable thereto,
   (c) The arbitral tribunal has not complied with its mandate,
   (d) The arbitral award is still open to an appeal to a second arbitral tribunal, or to a court in the country in which the award is made, or
(e) The arbitral award has been set aside by a competent authority of the country in which that award is made,

or

II. The court finds that the recognition or enforcement of the arbitral award would be contrary to public policy.

With regard to the question whether the applicable treaty allows parties to rely on the law of the country in which recognition or enforcement is sought (option (ii) above), it is noted that the 1958 New York Convention contains a “more-favorable-right-provision” (Article 7 section 1). Therefore, it is possible to base the request on both articles 1075 and 1076 DCCP.

If the award is in excess of, or different from, what was claimed, partial recognition or enforcement is possible to the extent that the part of the award which is in excess of or different from the claim can be separated from the remaining part of the award (Article 1076 section 5 DCCP).

21.16 Institutional Arbitration Institutions

Many arbitration institutes in the Netherlands have their own arbitration rules which modify the statutory system to some extent, thus creating their own procedural regime. Agreements typically refer to particular arbitration rules when choosing institutional arbitration as the dispute resolution method.

The Netherlands Arbitration Institute (NAI) (see: www.nai-nl.org/english) is the only general arbitration institute in the Netherlands. This Rotterdam-based institute administers a significant number of commercial arbitration cases each year, both domestic and international, in many different fields.

Other arbitration institutes in the Netherlands cover specialized areas of domestic and international trade and industry, including oils, fats and oilseeds, flower-bulbs, grain and feed trade, coffee trade, sports, services, and consumer affairs. The number and variety of arbitral institutes attests to the important role of arbitration in commercial and contractual dispute resolution in the Netherlands.

A number of useful arbitration institutes in the Netherlands are listed below.
GENERAL

Netherlands Arbitration Institute (NAI)
tel. +31 10 281 69 69
www.nai-nl.org

PROFESSIONAL AND SERVICES

Accountants
Netherlands Institute for Chartered Accountants (NBA)
Raad voor Geschillen van de NOvAA / Council for NBA Disputes
tel. +31 20 301 03 02
www.nba.nl

Architects
Stichting Arbitrage-Instituut Bouwkunst / Foundation Arbitration Institute Architecture (AIB)
tel. +31 30 234 32 22
www.arbitrageinstituutbouwkunst.org

CONSTRUCTION

Construction Industries
Raad van Arbitrage voor de Bouw / Council of Arbitration for Construction
tel. +31 30 234 32 22
www.raadvanarbitrage.nl

Construction Materials
Arbitrage-Instituut Bouwstoffen / Arbitration Institute Construction Materials
tel. +31 50 599 79 00
www.nbd-online.nl

TRADE

Flower Bulbs
Koninklijke Algemene vereniging voor Bloembollencultuur
Scheidsgerecht voor de Bloembollenhandel / Court of Arbitration for the Flower Bulb Trade (KAVB)
tel. +31 25 253 69 50
www.kavb.nl
Metal
Stichting Raad van Arbitrage voor Metaalnijverheid en Handel / Foundation Council of Arbitration for Metal Industry
tel. +31 70 363 49 18
www.sramh.nl

Oils, Fats and Oilseeds
NOFOTA Netherlands Oils, Fats and Oilseeds Trade Association
tel. +31 10 443 06 22
www.nofota.nl
Loyens & Loeff N.V. is an independent full-service law firm specialised in providing legal and tax advice to enterprises, financial organisations and governments. The intensive cooperation between attorneys, tax lawyers and civil law notaries places Loyens & Loeff in a unique position in its home market, the Benelux. Internationally, Loyens & Loeff is a reputable adviser on tax law, corporate law, financial and capital markets, cross-border financing, private equity, real estate, the energy sector, European law, regulatory law, VAT and employment law. When providing international advice, Loyens & Loeff maintains close relationships with leading law firms and tax advisers in Europe, the United States and the Far East. Worldwide, Loyens & Loeff has over 1,600 employees, including about 900 legal and tax experts in six of the Benelux offices and eleven branches in the major international financial centres.