

DUTCH LAW

Cindy Seinen*

Preliminary Remarks

Sources of Civil Procedural Law

1. The basic rules governing fact-finding in civil procedures are codified in the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering; abbreviation: 'Rv'). Though they all take the form of normal articles of a statute, in terms of content these rules can broadly be divided into three subtypes:

1. **General principles of procedural law**, pertaining to all types of civil procedure;¹
2. **Requirements for submissions by the parties**; for now² these requirements differ slightly, depending on whether the subject matter lies within the parties' autonomy³ or is (in part) of public order;⁴
3. **Rules of evidence**, mostly pertaining to all types of civil procedure.⁵

2. The provisions of the Code of Civil Procedure often contain open norms; the same is true for the procedural provisions in special laws.⁶ An important part of Dutch civil procedural law can therefore be found in case law⁷ – mainly that of the Supreme Court ('*Hoge Raad*') – and in the different sets of "National Proce-

* District Court of The Hague / Vrije Universiteit Amsterdam.

1 Book 1, subsection 1.3 Rv: "*Algemene beginselen voor procedures*", Art. 19-30 Rv.

2 A new, yet to be enacted, subsection of Book 1 Rv will contain general requirements for submissions applicable to all types of civil procedure (Subsection 1.3A: "*Algemene voorschriften voor procedures*", Art. 30a-35 Rv; Law of 13 July 2016, Stb. 2016/288). See *Kamerstukken II* 2014-2015, 34 059, nr. 3, § 6: "*De civiele basisprocedure*". Enactment was delayed because of practical problems with the digitalization of civil procedures the bill also provided for.

3 Book 1, Subsection 2 Rv: "*De dagvaardingsprocedure in eerste aanleg*", Art. 78-260 Rv; these procedures are initiated by a document called 'dagvaarding', which contains claims ('vorderingen').

4 Book 1, Subsection 3 Rv: "*De verzoekschriftprocedure in eerste aanleg*", Art. 261-302 Rv; these procedures are initiated by a document called 'verzoekschrift', which contains requests ('verzoeken').

5 Book 1, Subsection 2.9 Rv; pursuant to Art. 284 Rv, these rules also apply to procedures concerning matters not within the parties' autonomy, unless application of these rules is "inconsistent with the nature of the matter".

6 E.g., the Insolvency Act, Expropriation Act, Act on the Care for and Coercion of Psychogeriatric and Mentally Handicapped Clients.

7 All cited case law (in Dutch) can be found at <https://uitspraken.rechtspraak.nl> by entering the ECLI-number.

dural Rules”.⁸ These more specific procedural rules are conceived by consultative expert bodies of the judiciary; they are adopted by the national council of presidents of the courts, after consulting all the judges in the individual courts in the country.⁹

Normal Course of Events During a Civil Proceeding

3. Dutch civil proceedings are initiated with a document containing a claim or a request and the documents¹⁰ supporting it, after which the party, against whom the claim or request is directed, submits a document containing a reply and documents supporting that reply.¹¹ After the reply, the court orders an oral hearing where the parties must appear in person. The goals of this hearing are (a) to give the parties the opportunity to further present their case to the deciding judge; (b) to give the judge the opportunity to elucidate the relevant facts – if necessary: by ordering more procedural acts; (c) to investigate the possibility of a settlement between the parties; and, finally (d), to discuss what will happen after the hearing.¹² Pursuant to Articles 21, 85 § 3, and 87 § 6 Rv, the parties may submit documents before the hearing. They must send these documents – if necessary with a brief explanation of their relevance – by letter, with a simultaneous copy to the other party’s lawyer, no later than ten days before the date of the hearing. When relevant new information is submitted after the first written submissions by the parties, the court may allow one or both parties to submit an extra written submission on specific topics; if a party uses this extra submission to reopen the debate on other topics, the court will disregard this part of the submission.¹³

4. In the first instance, most cases are heard and decided by a single judge. In appeal, cases are decided by three judges, though, under certain conditions, the oral hearing may be conducted by one member of the panel. In proceedings before a Subdistrict Court (*Kantongerecht*),¹⁴ parties may act without legal representation. In proceedings before a District Court (*Rechtbank*) or Court of Appeal (*Hof*) as well as before the Supreme Court (*Hoge Raad*), legal representation by a member of the Dutch Bar Association is compulsory. The Supreme Court

8 These “Landelijke procesreglementen” are akin to British “practice directions” and can be found on: <https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Paginas/Procesreglement.aspx>.

9 For an extensive description of the development and legal standing of these rules, see the prejudicial decision of Hoge Raad (hereafter: *HR*) 3 June 2022, ECLI:NL:HR:2022:824 and De Bock 2021.

10 The term ‘documents’ includes data on a data carrier.

11 This reply can contain an autonomous claim or request; if it does, the other party may reply to this claim or request in a separate document – in general: before the oral hearing.

12 Art. 87 Rv; *Kamerstukken II* 2014-2015, 34138, nr. 3, § 2.3.2.

13 Rb Noord-Holland (Ktr Haarlem) 1 March 2023, ECLI:NL:RBNHO:2023:2847, § 4.2.

14 Cases concerning matters with a value under € 25,000, and specific matters such as labour law, consumer law and agricultural lease.

does not itself establish facts, as it does not decide on the merits of the case but only on whether the Appellate Court has correctly applied the law in an understandable manner, given the facts sovereignly assessed by that court.

Evidence Law

5. Dutch evidence law centres around ***the principle that judicial decisions should be based on the truth*** as much as possible.¹⁵ More and more, the legislature¹⁶ and the rest of the legal community¹⁷ read into this principle that judges must actively endeavour to discover the truth relevant to their decisions and that parties must actively produce information relevant to their case and cooperate with procedural acts intended to elucidate relevant facts.¹⁸ The extent of these duties is subject to debate and not yet clear, as correlated notions on the parties' autonomy and the judge's activity are still shifting. Since 2002, this shift has tended towards judges taking a more active role in overseeing the fairness and timeliness of proceedings, and towards more stringent requirements for parties (and lawyers) to be both truthful and cooperative within the context of the proceedings.¹⁹ The reason behind this can be summarized by the notion that civil procedures serve to confirm only those material rights that a party really has; in this view, misrepresenting the facts – either by design or by negligence – in essence amounts to disposing of rights one does not have – thereby detracting from the rights of another.²⁰

15 *Handelingen II* 1910/11, p. 2201, column 1; *Kamerstukken II* 1969/70, 10377, nr. 30, p. 10, column 1; *Kamerstukken II* 1984/85, 10377, nr. 13, pp. 13 and 19; *Kamerstukken I* 1986/87, 10377, nr. 61b, p. 9; *Kamerstukken II* 1999-2000, 26 855, nr. 5, pp. 24-25; HR 10 April 2009, ECLI:NL:HR:2009:BG9470, *NJ* 2010/471 with case note by C.J.M. Klaassen, § 3.3; *Kamerstukken II* 2019-2020, 35 498, nr. 3, p. 3.

16 E.g., *Kamerstukken I* 2001-2002, 26 855, nr. 16, pp. 22-23; *Kamerstukken II* 2014-2015, 34 059, nr. 3, pp. 26-27; *Kamerstukken II* 2018-2019, 35 175, nr. 3, p. 2; *Kamerstukken II* 2019-2020, 35 498, nr. 4, pp. 2-3. Parliamentary documents (in Dutch) can be found at <https://zoek.officielebekendmakingen.nl/uitgebreidzoeken/parlementair> by entering the 5-digit file number.

17 For an overview and many more sources, see de Bock 2021, § 4.26-4.34 and De Bock 2011; Gras, Hendrikse & Jongbloed 2024/2.9; De Groot 2012; Seinen 2014; Seinen 2020/1. Critical: van Schaick 2022/92 and 93.

18 The principle has been transposed to other areas of the law, e.g., Hof Arnhem-Leeuwarden (Arnhem) 4 April 2023, ECLI:NL:GHARL:2023:2840, § 4.3.

19 Asser/Vranken/Groen/Tsankova 2003, § 6.3.2 en 13.5; Asser/Vranken/Groen/Tsankova 2006, § 11.5; Lindijer 2006, § 4.3; Hammerstein/De Bock/Asser 2017, § 5.2; *Kamerstukken II* 2019-2020, 35 498, nr. 3, pp. 33-36; Ahsmann 2020, §11.6-11.12; Snijders/Klaassen/Krans/Meijer 2022, § 30, 137, 144 and 203; Tjong Tjin Tai 2022, Art. 21 Rv, comment 4, and Art. 22, comment 1; Beenders 2023, Art. 152, comment 4a; Van Mierlo/Lock 2023, Art. 21 Rv, comments 1a, 2a and 3, and Art. 22. More tentatively: Van der Wiel 2004, § 2.2.7, § 4.4.3, 4.4.4 and § 6; Giesen 2015/79. Critical: Van Schaick 2022/92.

20 C.f. De Groot 2012, § 29; Seinen 2020/1, § 2.3.

6. It is important to note that Dutch civil procedural law has a ***three-step approach to fact-finding***.²¹

The ***first step*** consists of the statement of facts by the parties: in principle, the judge will accept as true all statements that have not been contested. There are exceptions to this rule, the main one being that if the acceptance of an undisputed statement has a legal consequence that is not at the discretion of the parties, the judge may demand evidence (Art. 149 § 2 Rv).

In the ***second step***, the judge determines which statements are relevant to the decision; which of these are adequately substantiated with context and documents, and which have been adequately contested. The judge will ignore assertions²² that have not been adequately substantiated in light of the available information and the party debate: the more exact and substantiated a statement is, the more exact and substantiated the contention must be.²³ In this evaluation, both the duty of parties to submit all information relevant to the decision (Art. 21 Rv) and the question in whose sphere of influence the relevant information lies play an important role. The judge may ask the parties to elucidate assertions (Art. 22 Rv). This second step is also known as the “threshold of article 149 Rv” that a party must pass in order for it to be allowed to provide evidence of disputed facts, which is the ***third step*** in the fact-finding process.

The party that invokes legal consequences of facts that are relevant to the decision bears the burden of proof of those facts, unless a different division of the burden of proof follows from any special rule or from the requirements of reasonableness and fairness (Art. 150 Rv). The sanction attached to Articles 21 and 22 Rv is such a special rule which is used with some regularity.

7. Dutch civil procedural law is ruled by the ***principle of free evidence***: evidence can be provided by any means, and the assessment of the evidence is left to the discretion of the judge, unless otherwise provided by law (Art. 152 Rv). Statutory exceptions to the tenets of Article 152 Rv are rare.²⁴

Case 1: Personal Liability of a Company Director

A creditor of a bankrupt legal entity files proceedings against the sole owner and director of that legal entity. The creditor argues that the director has improperly fulfilled their statutory duties: the creditor alleges the director has squandered the rights of the legal entity vis-à-vis [X] in a letter the director sent to [X]. According to the creditor, the squandering of these rights was an important cause of the bankruptcy of the legal entity. The creditor claims damages.

²¹ Art. 21, 22, 24 and 149 Rv. Cf. De Bock 2011, § 1.5-1.5.3.

²² I use the term ‘assertions’ as an umbrella term for both statements by the party who carries the burden of proof of the fact, and contentions of this fact by the other party.

²³ De Bock 2021, § 4.30-4.33.

²⁴ E.g., see, De Groot 2023, Art. 152 Rv, comment 1.2.

Before the proceedings were filed, the creditor and the director corresponded about the claim. In this correspondence, the director put forward four defences against the claim.

Question 1.a: How detailed must the creditor's statements be in the document initiating the proceedings, for them not to lose the right to further substantiate and/or prove them later in the proceedings?

Answer 1.a: The creditor must state all facts necessary to award their claim, in such a way that it is clear to the director what they must defend themselves against. In principle, each party is allowed to submit only one written document before the oral hearing. All information relevant to the claim that can be stated in or submitted with that document, must be.

8. As a matter of principle, the creditor *must submit all the information relevant to the decision*. Pursuant to Article 21 Rv, a party must do so of its own accord, integrally and truthfully; nor may a party deny any facts they know to be true. In conjunction with Article 20 § 2 Rv, Article 21 Rv also requires all the relevant information to be provided *as soon as possible*.²⁵ For information already in the possession or sphere of influence of the claimant, this means: in the document initiating the proceedings.²⁶ The same rules apply in the Caribbean parts of the Kingdom.²⁷ Though these principles seem straightforward, they leave considerable grey areas: the more complex the law that applies to the case, the less clear-cut it can be which rules apply to the case and, therefore, also, whether a fact is relevant to the decision.²⁸

9. These principles entail that the creditor must state *all the facts necessary to award their claim* in the document initiating the proceedings (Arts. 111 § 2 sub d and 149 Rv) and that *any evidence the creditor refers to* that can be submitted with the document should be (Arts. 85 § 1 and 87 § 6 Rv; see *Answer 1.c*). Read as a whole, the document initiating the claim must make it sufficiently clear to the defendant what is required of them, so that they can properly defend themselves against it. A minimum requirement therefore is that a separate and recognizable claim ('petitum') appears in the document in a sufficiently conspicuous manner.²⁹

²⁵ *Kamerstukken II* 2014-2015, 34 059, nr. 3, p. 26.

²⁶ Snijders/Klaassen/Krans/Meijer 2022, § 137.

²⁷ Art. 18c Rv Aruba/Curaçao/St. Maarten; Handleiding Comparitie na antwoord in AR-zaken (Gerecht in eerste aanleg Curaçao), version June 2017, pp. 4-5.

²⁸ De Groot 2020, § 5.

²⁹ HR 15 November 1991, ECLI:NL:HR:1991:ZC0413, § 3.3.