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Responses submitted by:
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Location: The Netherlands

1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Civil Code Jurisdiction

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Traditionally inquisitorial but with adversarial elements

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

The Netherlands is a civil law jurisdiction and therefore has the system of so called "career judges" (it is possible that a judge has spent his whole professional life on the bench). There are two ways or path to become a member of the judiciary in the Netherlands. Firstly: right after law school, law students have to pass tests and a strict selection is applied to be admitted to the judges training program, which is a 6 year program. Eventually only a few will "survive" the test, interviews and the program. The tests include all types of IQ and personality tests, analytical skills etc. The "judges trainees" will be trained in Criminal, Administrative and Civil Law. By the end of the training they will need to make a choice for the "sitting" or the "standing" bench (judge or public prosecutor). It is also possible to become a member of the bench (judge or public prosecutor) after one have spent a number of years (6) in private practice or in another legal profession (sometimes former law professors or civil servants who have worked for the Ministry of Justice become a judge). Also then one needs to pass certain tests, but those are more like interviews and writing assignments. The judges are formally appointed by the Government/the Crown, as opposed to elected (as in the USA), but in practice the appointment is being prepared by the Dutch Council for the Judiciary which is an administrative body managing the Dutch Judiciary and candidates have to apply, are being screened, interviewed, pass commissions etc, more or less just like any other job.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

Sub district court is competent in cases related to labor law, tenancy law, agricultural tenancy matters, consumers cases and any other claim claims less than €25.000.

The Enterprise Division of the Amsterdam Court of Appeal is competent in cases related to corporate law according to Book 2 of the DCC (law of legal persons). There is a chamber at the Hague District Court specialized in personal injury cases.

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5. Is arbitration an option and when? If so, what rules are typically used?

Arbitration is only an option if agreed between the parties beforehand (in a contract). The contract will then stipulate what kind of arbitration/rules apply. If parties haven't agreed on arbitration beforehand, then arbitration cannot be imposed on them and is an option only on a voluntary basis. In that case parties will need to reach an agreement on which arbitration rules will apply. If there is no agreement on a specific arbitration tribunal and rules, the Dutch statutory rules on arbitration will be applied.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Yes.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

Presently mediation is not mandatory.

8. What is the process for pre-hearing fact discovery (if any)?

There is no US-style discovery. Each party can lodge a request and ask the court to order an examination of witnesses to preserve evidence, a request to appoint an expert for an expert's report, or a request that the other party have to submit copies of documents which relate to the legal relationship with the other party.

(a) Are there provisions for mandatory document disclosures?

During the inquisitorial proceeding, the court can decide at the request of a party or at its own discretion that a party should submit certain documents. The party that is instructed to do so, will have to submit the documents. If it does not, the sanction is not "contempt of court", but the refusing party risks facing a negative inference or verdict.

(b) Is there provision for oral examinations of the parties or others?

Under Dutch law it is possible to let the court hear witnesses prior to any trial and let parties assess the strengths and weaknesses of their case before initiating a suit. Civil law is a system with no culmination at a single trial.

(c) Are there limits on the length of oral examinations?

There are no formal limits, but courts and judges apply informal guidelines and have developed practices. In civil law jurisdictions the judge and not the parties are in charge of the process of hearing witnesses. They plan and schedule the hearings and would not spend days after days on taking depositions.

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(d) Are witness statements or summaries to be provided before the hearing?

Again, under Dutch law it is possible to let the court hear witnesses prior to any trial and let parties assess the strengths and weaknesses of their case before initiating a suit. Civil law is a procedural system with no real culmination at a single trial.

9. What is the process for pre-hearing expert disclosure (if any)?

A judge may call expert evidence on certain specific issues in the form of a hearing or an expert report. The appointment of an expert can take place pre-hearing or in pending proceedings. The judge can appoint an expert ex officio or upon request of a party (194 CCP). The court is not obliged to appoint an expert. The judge will decide which expert is appointed, after this is discussed with the parties. Parties may also bring forward their own experts and request the judge to hear an expert who has not been appointed by the court (Section 200 CCP).

(a) Are expert reports or written summaries required to be exchanged?

The expert reports of experts appointed by the judge are made available to the parties. The parties can comment on these reports. A party can withhold an expert report that was made on an out of court instruction of that party.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

Both parties can comment on the expert report. In case of an examination of the expert, this is done by the judge, after which the parties are allowed to ask questions as well. A party could request for a counter expert to be appointed or a party could bring forward an expert report or expert statement of an expert that was not appointed by the judge. According to Section 200 (3) in conjunction with 179 (2) CCP experts brought forward by one of the parties can be cross-examined directly by each party with permission of the judge.

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

No.

10. Are there other notable discovery rules?

A judge could undertake a site visit at the request of a party or ex officio. The parties can be present during the site visit and give their remarks on the site visit.

The so-called enquiry proceedings are sometimes used to prepare for securities litigation and in relation to directors' and officers' liability. Under Dutch corporate law, shareholders have the right to request the Enterprise Chamber of the Court of Appeal in Amsterdam (Enterprise Court) to order an enquiry into the policy and management of a company. The Enterprise Court will grant the request only if there are sufficient grounds to doubt whether the company is pursuing a proper policy (Article 2:350 DCC) . If the enquiry request is granted, the Enterprise Court will appoint one or more expert investigators, who have far-reaching investigative powers. The report of the investigators will be filed at the office of the clerk of the Enterprise Court and will contain a collection of facts that could be the basis for subsequent litigation.

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11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Dutch law does not provide for a prehearing conference in regular proceedings, but the judge can order a hearing as it sees fit at any stage of the proceedings. During a hearing the judge can investigate a possible settlement and/or hear parties on the merits of the case.

A prehearing conference for settlement purposes is provided for in cases concerning mass damages (1018a CCP). The judge could order a prehearing at the request of a representative entity.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

Apart from judgment on procedural issues (e.g. jurisdiction challenge, indemnification, joinder of cases etc.) Dutch law does not provide for a prehearing motion for judgment.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

Dutch law does not provide for such pre-hearing rulings. However, the interlocutory order in which the judge appoints experts will describe the issues on which the expert evidence is obtained and the instructions given to the experts.

14. What is the standard for admissibility of expert evidence?

All expert evidence is admissible, unless it was illegally obtained. The judge is not bound by the conclusions of the judicial expert opinions. He is free in his assessment of the opinion of the expert appointed ex officio, as well as in his assessment of the opinion of the expert appointed or examined upon request of a party.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

The Court can appoint an expert ex officio and is free to use this power as it sees fit. Before appointing an expert the judge will discuss the person of the expert and the instructions to the expert with the parties.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Privilege is protected in the Netherlands. The (ex)spouse, (ex)registered partner and family members up to the second degree of a party or its (ex)spouse or (ex)registered partner can invoke privilege. A person that is obliged to confidentiality by way of profession, such as attorneys, doctors, clerics, notaries etc., can also invoke privilege as far as it

concerns its legal obligation to confidentiality. Under certain extraordinary circumstances the obligation to confidentiality can be overruled by important interest that justify a breach of the obligation to confidentiality.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

Disclosure of certain documents containing personal data could be subject to the Personal Data Protection Act (Wet bescherming persoonsgegevens). A detailed explanation of the provisions of this Act exceeds the scope of this survey. Main provision is that a party can provide personal data if there is a good reason to (such as a ruling of the Court) and the previous acknowledgement to the involved person(s). Providing personal data of a sensitive nature (such as medical information, information containing details about race, gender etc.) can be subject to more strict rules. The same goes for providing personal data outside the European Union.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

Should a privilege dispute arise, the normal competent Dutch Court has jurisdiction to determine the dispute.

19. Briefly describe the trial process?

In Dutch litigation there is no such thing as a trial (a hearing in which all evidence is presented to the Court, followed by a final decision).

After the filing of the writ of summons and the statement of defense, the Court usually orders the parties to appear in court ('comparitie na antwoord'). The purpose of such appearance is for the Court to investigate whether perhaps a settlement can be reached, to request the parties to provide additional information and/or to provide further directions for the case.

(a) Are there opening submissions, in what form and of what length?

The concept of opening submissions does not exist in Dutch proceedings.

(b) What is the order of presentation of witnesses?

Both parties have the possibility to lead witnesses in order to provide evidence. There is no specific order to present witnesses in Dutch proceedings. Witnesses may be heard prior to initiating the legal proceedings on the merits of the case, but can also be heard during the proceedings (either at the request of one of the parties or at the request of the Court).

(c) Who conducts examination and in what order?

First, the Court first will examine the witness after which the counsels of both parties will be given the opportunity to ask questions. The concept of cross-examination does not exist in the Netherlands.

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(d) What is the process for closing submissions?

The concept of closing submissions does not exist in Dutch proceedings.

20. Please identify any other notable trial procedures.

Since the concept of trial does not exist in the Netherlands (see above), there are no other notable trial procedures.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

The plaintiff bears the burden of proof of liability, causation and damages (Article 150 Dutch Code on Civil Procedure). In order to obtain a judgment in its favour, a plaintiff has to prove that all elements of the statutory provision on which the plaintiff has based its claim are met. For example, if the plaintiff has based its claim on wrongful act (Article 6:162 Dutch Civil Voce "DCC"), the following elements will have to be proven:

(i) The defendant committed a wrongful act. An unlawful act is defined as the 'the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct'.
(ii) The tort committed is attributable to the defendant.
(iii) The plaintiff suffered damages;
(iv) There is a causal relationship between the wrongful act committed and the damages suffered.

With regard to the existence and the extent of the loss, the Dutch Supreme Court has ruled that the standard rules of evidence apply (Supreme Court 27 November 2009, LJN: BH2162, "World Online"). This means that the plaintiff shall have to quantify its damages. Pursuant to art. 6:97 DCC, the Court is entitled to assess the loss if it cannot be accurately determined.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

Under Dutch law only compensatory damages are available, therefore not punitive damages. Allowing damages is based on the principle that the plaintiff should be put in the position in which he would have been - to the extent possible - if the harmful event would not have taken place. In this comparison between the hypothetical situation and the present situation, all circumstances on the part of the injured party should be taken into account in view of the criterion that the actual damage should be compensated.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Under Dutch law punitive damages are not available.

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24. Are there time limits for bringing claims? Responding to claims? Please describe.

Yes, time limits do exist.

Pursuant to Article 3:310 DCC, a claim for damages becomes time barred five years after the date on which the prejudiced party becomes aware of (i) the damages and (ii) the identity of the party responsible for the damages, and, in any event, on the expiry of twenty years following the event which caused the damages. This limitation period applies to claims for damages based on wrongful act as well as based on breach of contract.

If a cause of action is however based on a contract of sale it cannot be brought after two years from the time the buyer has, or reasonably should have, discovered that the product that he had purchased is not in conformity with the contract.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

The jurisdiction of the Dutch Courts in matters with an international aspect is regulated in treaties and European Regulations, such as the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters). EC Regulations and treaties have supremacy over national law. Dutch Courts therefore only have jurisdiction in case legal provisions allow jurisdiction or if the parties have selected the Dutch Courts as having jurisdiction (choice of forum).

If the Dutch Courts have international jurisdiction, it must be established on the rules of absolute jurisdiction which type of Court should hear the case (i.e. a District Court, Court of Appeal or the Supreme Court). In addition, it must be established on the basis of the rules of relative jurisdiction which Court is the proper venue. Although of course subject to exceptions, the primary rule is that an action should be brought before the Court in the place of the defendant's domicile.

In the Netherlands there is no separate doctrine of 'forum non conveniens', so that a defendant cannot argue that a court in another jurisdiction would be more convenient or appropriate.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Defendants have two possibilities to bring third parties into the proceedings. If defendants feel their arguments should be supported by third parties, they could contact these parties and ask them to intervene in the ongoing proceedings. If a defendant feels it should be indemnified for a potential liability by a third party, it has the option to call that third party into the proceedings through a motion to implead.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

The "loser pays principle" applies under Dutch law. However, the legal costs are fixed. As such, the winning party will, in most cases, not be able to reimburse the total legal costs since the fixed fees in general do not cover the costs of legal

representation. On the other hand, the financial risk of litigation is mitigated to a large extent since the losing party does not have to fully reimburse the costs of the (expensive) lawyer of the winning party.

28. Are contingency fees allowed?

No, contingency fees are prohibited by the Dutch Bar rules.

29. Is third party funding of claims permitted? Under what circumstances?

Yes. There are no specific rules for third party funding in the Netherlands. However, the rules of professional conduct provide that the attorney-at-law is not allowed to fund a case. Various models of third party funding would work in the Netherlands. In essence these funding models all function along the same lines where a funder pays the lawyer's fees in exchange for a percentage of the proceeds.

An example is a third party funder which enters into an agreement with a victim whereby the funder agrees to pay the lawyer's fees in exchange for a percentage of the awarded damages. Alternatively, victims could sell (through an assignment) their claims to a funder who then instigates proceedings in its own name. A third option functions through a claims vehicle (mostly a foundation) which is authorized by the victims to institute proceedings on their behalf in exchange for a percentage of the awarded damages, which will be paid to the funder of the claims vehicle.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Yes, there is specific legislation for dealing with class actions and mass settlements. In general, there are three ways to approach mass damages in the Netherlands.

The first option is a collective action pursuant to article 3:305a of the Dutch Civil Code. This provision allows an entity to act on behalf of a class to the extent that its articles of association promote those interests. The 3:305a-entity can (in general) only obtain a declaratory judgment or injunctive relief.

The second option is a group action. In case of mass damages, claimants could choose to use (for instance) an assignment of claims model in which the victims assign the claim to a special purpose vehicle which conducts the actual proceedings..

The third option is a mass settlement through the Wet Collectieve Afwikkeling Massaschade (or 'WCAM-settlement'). Once a mass settlement is reached, this settlement can be declared binding for all victims, save for those who opt-out within a certain period of time determined by the court. The request must be made by a representative entity.

Please note that combinations of the abovementioned possibilities are possible. For instance, a collective action can be followed by a WCAM-settlement.

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31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Yes, the collective action pursuant to article 3:305a of the Dutch Civil Code provides for consumers associations or other representative organizations to initiate proceedings, to the extent that its articles of association promote those interests.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

On average, a Dutch civil suit in first instance takes about one to one and a half year to complete. However, more complex litigation, like multi-party litigation involving large groups of claimants, could take a multitude of that. Furthermore procedural issues, for example regarding jurisdiction, applicable law or exhibits, brought by the parties may in itself take several months to complete. In addition to these procedural issues, it is possible to have witness hearings or expert opinions during the course of proceedings which may increase the total time of litigation.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Yes, appeal of a final judgment is available in the vast majority of civil cases. Appeals are heard by the court of appeal, the Gerechtshof. Judges in the courts of appeal are generally the more experienced judges. Their qualifications differ since they may come from different backgrounds (as is the case with the judges in the district courts). Judges in the courts of appeal generally have a background in the judiciary or as a lawyer.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

The way Dutch civil trials are conducted is in transition. Whilst most hearings are still conducted according to the traditional way, namely paper work and court appearances, a modernisation is on its way. It is increasingly allowed to testify by video conference. Almost all courts now have the possibility to hear witnesses by video conference. However, The Netherlands is a very small jurisdiction.

Witnesses usually appear in person. Video is only used when the witness is abroad or when it is difficult to hear the witness in person. If the witness is a minor, testimony by video conference is not allowed.

Presentation on computer monitors is generally allowed but a request must be made to the court beforehand. Some courts have "digital hearing rooms" in which no paper documents are used. All evidence is presented on computer screens, television screens or iPads.

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35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

It is possible to make these presentations in trials and appeals. However, a request must be made to the court beforehand in order to ensure that the required facilities are available. Although civil cases allow the use of these instruments, they are not frequently used, hence the required request.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

Parties may change, substitute (or add to) their lawyer at any time. Hence, the lawyer at trial does not have to be the same as the lawyer pre-trial. There is no solicitor / barrister distinction in the Netherlands.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Article 6:101 of the Dutch Civil Code prescribes a comparative fault assessment. If a negligent defendant successfully argues that the claimant is at fault too, the total sum which the defendant must pay is determined according to a four-step test: i) causation between the damage and negligence of the claimant; ii) liability of the claimant for this action; iii) proportional deduction of the damage according to the degree in which the claimant was negligent; and iv) an equity correction, if needed, in which all circumstances that would determine a different outcome of the total sum must be taken into account. The proportional deduction means that even if the claimant was negligent, he will still be entitled to receive compensation because the tortfeasor is (always) partly to blame for the damage and must pay accordingly. Due to the equity correction it is, in theory, possible that the claimant receives no damage although this is a rare occurrence.

Joint and several or proportionate liability
Joint and several liability is possible if the damage is the result of a group action as in article 6:166 of the Dutch Civil Code. Even if the other group members did not act negligently they are liable for not preventing the damage caused by a member of their group, but only if they could have foreseen the liable act. For instance, if a group is in a park and all of a sudden one of their members hits a passer-by they cannot be held liable because the action was unforeseen. Proportionate liability exists.

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

The Netherlands is a party to the Regulation (EC) No 1393/2007 on the service of documents, as well as the Hague Convention. A distinction is made in articles 55 and 56 of the Dutch Civil Procedure Code between service in the EU, service in non-EU European states, and service in states outside Europe. Within the EU, Denmark excluded, the Regulation is to be applied. In other cases, where the country in question is party to the Hague Convention, the convention takes effect. Article 55 of the Dutch Civil Procedure Code provides for cases when the service of a complaint is in a state which is neither party to the Regulation nor to the Hague Convention. According to said article diplomatic channels are the primary means of service.

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Article 63 of the Dutch Civil Procedure Code allows for a simplified service of a complaint. This article allows the service of documents at the office of the Netherlands attorney or lawyer in the previous instance pertaining to the objection, appeal and appeal in cassation. Even if Regulation (EC) No 1393/2007 would apply this simplified service of a complaint may be used. This simplified service of complaint also applies in cases where the Hague Convention would otherwise have applied.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Parties may, according to article 843a of the Dutch Civil Procedure Code, request the Court to order the other party to hand over documents. Note that this is not a general requirement of handing over all the documents available to one of the parties (as in discovery and disclosure). Only the specified documents which meet the requirements of article 843a must be handed over. The Dutch Supreme Court ruled in the case Abu Dhabi Islamic Bank/ABN AMRO that article 843a also applies to litigation outside the Netherlands.[1] Privacy rules may exempt documents from such order. For instance, a judge can rule that medical data, corporate secrets or due diligence reports do not have to be made available to the other party.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

Most Appellate Courts have a practice whereby new cases may be selected for an immediate hearing prior to any exchange of argument in appeal. The selection is geared at identifying cases which may settle quickly or cases where it is clear that the appeal will be (un)successful.

Any court or judge may suspend proceedings in order to submit a relevant question of interpretation of the law, pertinent to the case and superseding the case, to the Supreme Court.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

Parties with limited financial means can apply for financial and legal support, but this is not a match against large corporations with big budgets. Plaintiff's legal fees will not be fully covered by the losing party. An exception exists for intellectual property cases.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

There are several legislative efforts under way which are part of the so-called "KEI" program. "KEI" stands for Quality and Innovation. The main aim of this program is the modernisation and digitalisation of court proceedings in an attempt to shorten the time from claim to judgment.

1 HR 8 juni 2012, ECLI:NL:HR:2012:BV8510

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Recently, the "eKantonrechter" was introduced for small claims up to € 25.000. This entails that the entire procedure will be digital: from the moment of submitting a claim to the digital judgment. Furthermore, the modernisation of the courts includes electronic payments of court duties, admitting documents and evidence to a digital space, etc. During the procedure the parties will be able to view updates in a digital environment to which only those privy to the case have access. The target for the implementation of these changes is sometime between 2015 and 2018. At this moment, only the District Courts in Rotterdam and Oost-Brabant have implemented the "eKantonrechter".

The critique on these electronic trials is that the judge can no longer take non-verbal communication at hearings into account. As civil procedures are predominantly written procedures this is less relevant. However, should everything become digital, this can cause issues for those without access to computers. Furthermore, the privacy concerns are not satisfied because of the issues concerning the protection of data.

There is a bill underway legislating mediation and mediators.