Complex Commercial Litigation 2022

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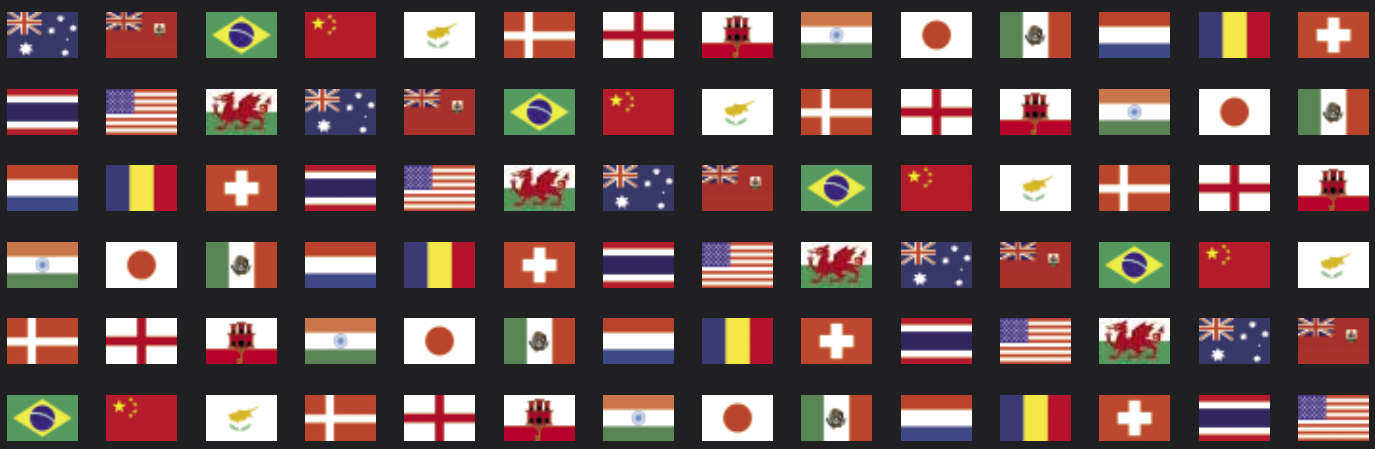
Simon Bushell



LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, India and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

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Netherlands

Guillaume Creijghton, Jessica de Rooij and Ellen Soerjatin

Evers Soerjatin NV

BACKGROUND

Frequency of use

1 | How common is commercial litigation as a method of resolving high-value, complex disputes?

While there is a tendency to use alternatives such as arbitration and mediation for dispute resolution, commercial litigation remains a common method in the Netherlands to resolve disputes. Of the 1.39 million newly filed cases in 2020, 350,330 were registered as commercial cases. A distinction must be made between the district courts (29,980 new commercial cases) and the subdistrict courts (289,760 new commercial cases). The latter courts have exclusive jurisdiction over matters with a quantum of maximum €25,000 and in certain subject matters (eg, employment law and tenancy law). There were 24,480 summary proceedings and 6,330 appellate commercial proceedings. The numbers show a downward trend compared to previous years.

Litigation market

2 | Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The Dutch civil legal system is among the highest ranked of all civil justice systems in the world in the rankings of the World Justice Project based on criteria such as cost-effectiveness, efficiency, impartiality and independence.

The Dutch courts rank third in terms of estimated time needed to resolve litigious civil and commercial cases at first instance, according to the EU Justice Scoreboard.

The Dutch litigation market increasingly attracts international parties to initiate proceedings before the Dutch courts. Several legislative initiatives have contributed to this development: the Dutch Collective Settlement of Mass Claims Act is a proven success, with a number of international mass claims settlements having been declared binding on an entire group of injured parties. To increase the effectiveness of the existing collective action, new legislation recently introduced the possibility to claim monetary compensation by way of a representative action. The Netherlands Commercial Court (NCC) opened its doors in 2019, a chamber within the Amsterdam District Court and the Amsterdam Court of Appeal specialised in hearing complex (international) commercial cases, with the possibility to conduct the entire proceedings both in first instance and in appeal (including the judgments) in the English language.

Finally, for a long time many foreign parties have opted to set up a corporate structure with a Dutch holding company or incorporate a Dutch joint venture for tax reasons or structure their collaboration in a neutral jurisdiction. The mismanagement proceedings before the Dutch Enterprise Chamber of the Amsterdam Court of Appeal (specialised in complex corporate matters) offer these foreign shareholders a useful litigation tool to intervene within the Dutch company or can be used as a tool to reach or force a solution in the event of a dispute or deadlock.

Legal framework

3 | What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

The Dutch law jurisdiction is subject to civil code. Commercial litigation is regulated in the Netherlands by the Code of Civil Procedure (DCCP, procedural aspects), the Law on Judicial Organisation (subject-matter competence of the courts), and the Dutch Civil Code (DCC), mainly book 2 on corporate law and book 6 on contract law. The main source of law is the DCC. Although case law is an important source of law, it has a secondary function. Furthermore, jury trials do not exist under Dutch law, and the scope of the dispute is determined by the parties. In civil code jurisdictions, the judge is somewhat less active than in common law jurisdictions.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

4 | What key issues should a party consider before bringing a claim?

A claimant may consider a prejudgment attachment on the defendant's assets to secure the execution of a successful judgment. Although the means for discovery under Dutch law are less far reaching than in the US and the UK, Dutch law provides for the possibility of a pretrial witness hearing in order to verify the facts in anticipation of initiating litigation. On the basis of the witness statements, the potential claimant can decide whether or not to pursue the claim. On a final note: the party found to be in the wrong by the court is usually ordered to pay the adverse costs (court registry fee and attorney's fees). However, such order does not cover the actual costs. In civil cases the attorney's fees are calculated on the basis of a court-approved scale of costs, which covers only a fraction of the actual attorney's fees incurred.

Establishing jurisdiction

5 | How is jurisdiction established?

The jurisdiction of first instance courts over commercial disputes is mainly divided between the district courts and the subdistrict courts. The latter have exclusive jurisdiction over matters with a quantum of maximum €25,000 and in certain subject matters such as employment law and tenancy law (without maximum as to quantum). The Enterprise Chamber of the Amsterdam Court of Appeal, a chamber specialising in corporate law disputes, has first instance jurisdiction (and some exclusive competences) to intervene in specific corporate law matters. The Court of

the Hague has a chamber specialised in intellectual property matters and has exclusive jurisdiction on some intellectual property topics.

Parties can agree to take their international (complex) commercial disputes before the Netherlands Commercial Court (NCC), which is a chamber within the Amsterdam District Court and the Amsterdam Court of Appeal. The language of the entire proceedings (first instance and appeal) before the NCC (including the judgments) is in English. The Court of Rotterdam has a chamber specialised in trade and shipping disputes that offers the parties the possibility to conduct the proceedings (partially) in English.

Jurisdiction over foreign parties is established by the Dutch courts on the basis of European regulations and international conventions or treaties. If these do not apply, the Dutch court must apply the Dutch rules of international private law laid down in the Code of Civil Procedure (DCCP) to establish whether it has jurisdiction.

The most important EU regulation on jurisdiction in civil and commercial cases is Regulation (EU) No. 1215/2012, which applies in the event that a defendant is domiciled in an EU member state or if one of the exclusive grounds of jurisdiction applies. The most common exclusive ground of jurisdiction is a choice-of-court agreement between the parties for a court in an EU member state. In absence of any exclusive grounds of jurisdiction, the key principle is the 'home court' rule: the defendant shall be sued before the court of the jurisdiction of his domicile. This principle also applies under the Dutch rules of private international law. Both EU and Dutch law furthermore contain alternative competence rules, for instance in contractual matters on the basis of the place of performance of the obligation in question or in matters of tort on the basis of the place of the harmful event or the place of the damage. An important rule under both EU and Dutch international private law in the event of multiple defendants is that once a court has established jurisdiction over one defendant, this court also has jurisdiction over the other defendants in the same proceedings, provided that the claims against the various defendants are connected in such a way that this justifies a joint hearing before the same court for efficiency reasons.

If proceedings involving the same cause of action and between the same parties are brought in the courts of different EU member states, any court other than the court first seised must stay its proceedings until such time as the jurisdiction of the court first seised is established. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised must decline jurisdiction in favour of that court. The same principle applies under the Dutch rules of international private law. The Dutch court must decline jurisdiction if the case is already pending before a court in a non-EU jurisdiction whose judgment can be recognised and enforced in the Netherlands.

Preclusion

6 | Res judicata: is preclusion applicable, and if so how?

Preclusion applies under Dutch law to the extent that judicial findings contained in a judgment have a binding effect in other proceedings before Dutch courts. The preclusive effect is that the judicial findings with regard to a certain claim are to be considered as a fact in a second suit between the same parties regarding the same claim, and the preclusive effect may lead to a dismissal of such new action.

Applicability of foreign laws

7 | In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Whether foreign laws apply is determined by the court on the basis of rules of international private law, as laid down in the Dutch Civil Code (DCC) and EC Regulations. A contractual choice of law in agreements between the parties or the application of international law on contracts (for instance Regulation (EC) No. 593/2008) or extra-contractual liability (for instance Regulation (EC) No. 864/2007) may for example result in the Dutch courts having to apply foreign law to determine issues being litigated before them. This only relates to the merits of the case; procedural issues are governed by Dutch law at all times. The parties must provide the Dutch court with information on the applicable law (usually by submitting written legal opinions on foreign law aspects, by introducing experts on foreign law to the oral hearing, or to request the court to appoint an expert to advise the court on foreign law aspects). The Dutch courts can also request information on applicable foreign laws from the competent authority in the jurisdiction concerned. In 2019, the Netherlands Commercial Court (NCC) was created as part of the Dutch court system. The key principle of the NCC is that proceedings are conducted in English and that judgments are rendered in English. A matter may be submitted to the NCC if the Amsterdam District Court or Amsterdam Court of Appeal has jurisdiction (or on the basis of a choice of forum), if the parties have expressly agreed in writing that proceedings will be in English before the NCC, if the action is a civil or commercial matter within the parties' autonomy, and if the matter concerns an international dispute (being that foreign law applies or one or more parties are domiciled outside the Netherlands). If the case may be, the NCC may also apply foreign law.

Initial steps

8 | What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A claimant may consider a prejudgment attachment to secure the execution of a successful court decision. Under certain circumstances a defendant may claim security for costs.

Freezing assets

9 | When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

The request for a prejudgment attachment will be judged by the president of the competent court, in most cases in ex parte proceedings. The test for awarding such request is relatively low, applying a marginal test. The requirements as to the request for an attachment may vary depending on the nature of the assets subject to such request. The request must in any event contain the nature and object of the attachment, the nature and quantum of the claim and its legal basis. If proceedings have not been initiated, the claimant is obliged to initiate the proceedings within a certain period of time after the prejudgment attachment is executed, usually within 14 days (although the court may extend this term upon the claimant's request). If the claimant fails to timely initiate the proceedings, the attachment will be lifted automatically. If the outcome of the proceedings is unsuccessful for the claimant (the court denies the claim), the attachment will also be lifted upon expiration of the term to lodge an appeal against the court decision.

The Review of Attachment and Enforcement Law Act, which entered into force in three stages (1 October 2020, 1 January 2021 and 1 April 2021), provides extra protection for impecunious debtors in order to guarantee a subsistence minimum. For creditors with an enforceable judgment it is now possible to have the bailiff request banks to provide bank account information on the debtor. This was already possible in the case of a European Account Preservation Order on the basis of Regulation (EU) No. 655/2014.

Since 1 April 2021, pre-judgment attachment on vehicles can be done by the bailiff, without seeing the vehicle, by an entry in the registry of the Netherlands Vehicle Authority.

Pre-action conduct requirements

10 | Are there requirements for pre-action conduct and what are the consequences of non-compliance?

There are no requirements for pre-action conduct before commencing civil proceedings in the Netherlands, such as, for instance, a 'letter before action', except when so called mismanagement proceedings are initiated against a Dutch company before the Enterprise Chamber of the Amsterdam Court of Appeal, a court specialising in corporate law disputes. Such proceedings require a letter before action addressed to the company's management detailing the objections against the company's policy and affairs.

Other interim relief

11 | What other forms of interim relief can be sought?

Interim relief is usually sought by means of summary proceedings heard by the president of the competent court. Such proceedings can be initiated in urgent matters. As long as the measure is of a provisional nature, various remedies are available. The most frequently requested remedies are of a monetary nature (debt payment or advance payment of damages, provided that the monetary claim is undisputed or easy to establish), or injunctions (for instance, to comply with a contractual obligation), or an order to desist from making certain statements or performing certain acts. Non-monetary injunctions can be enforced with a penalty. Although decisions in summary proceedings are strictly provisional, and can generally be overturned in proceedings on the merits on the same matter, in practice the outcome of summary proceedings can be of a final nature. With some exceptions (eg, in intellectual property cases), the parties to summary proceedings are not obligated to initiate proceedings on the merits after a summary judgment is rendered.

Other examples of interim relief are the seizure of evidence (through the same route as described for a (prejudgment) attachment), and the pretrial witness hearing.

Alternative dispute resolution

12 | Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

There are no pre-action requirements to engage in mediation as a form of alternative dispute resolution (except when the parties have contractually agreed thereto). During the course of the proceedings, Dutch courts frequently actively encourage mediation, however, the parties are free to choose whether or not to engage in mediation, and there are no legal consequences for failing to do so.

Claims against natural persons versus corporations

13 | Are there different considerations for claims against natural persons as opposed to corporations?

The court registry fees to be paid by a natural person being a defendant are of a lower amount than the court registry fees to be paid by a corporation being a defendant.

Class actions

14 | Are any of the considerations different for class actions, multiparty or group litigations?

Yes, there are certain additional considerations that apply in case of collective actions. The entity bringing a collective action must be sufficiently representative. A court will also assess whether the entity is capable of properly safeguarding the interests it represents and whether the interests of the persons that are being represented in the action are sufficiently similar. A representative entity will not be able to bring a collective action unless the representative entity has reached out to the defendant and made a reasonable attempt to settle the case.

On 1 January 2020, the Mass Claims Settlement Act in Collective Action (WAMCA) entered into force. The provisions of the WAMCA apply to collective actions regarding events that took place on or after 15 November 2016 and that have been initiated on or after 1 January 2020. The WAMCA introduces additional requirements with respect to representative entities bringing a claim. The representative entity must:

- have a non-commercial objective,
- meet certain governance requirements,
- have sufficient resources to conduct the proceedings,
- have sufficient control over the legal action;
- have an accessible internet page with information about its governance and the collective action; and
- have sufficient experience and expertise to conduct the proceedings.

A representative entity can only bring a collective action if the claim has a sufficiently close relationship with the Netherlands.The representative must register the legal action in a central register within two days of filing the writ of summons.

A draft bill amending the WAMCA to transpose Directive (EU) 2020/1828 on Representative Actions for Consumers into Dutch law is currently being considered by the legislator. The WAMCA already provides for a representative action. Therefore a very limited adaption is needed. The Directive imposes some more substantive requirements and conditions on this action, such as the financing of the action. The Directive also stipulates that each member state must draw up a list of organisations that can initiate collective actions in another member state. Those organisations must have been involved in consumer protection activities for at least 12 months. This is not a requirement under the WAMCA, which allows setting up an ad hoc entity for the purpose of the class action.

Third-party funding

15 | What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

There are no rules preventing third parties from funding the cost of litigation or agreeing to pay adverse costs. In case of a collective action, the court will review the third-party funding arrangements when determining whether the interests of the persons being represented are sufficiently safeguarded. Under the WAMCA, a representative entity must have sufficient control over the legal action. This requirement will limit the influence the third-party funder can have on the legal action. A draft bill amending the WAMCA to transpose Directive (EU) 2020/1828 on Representative Actions for Consumers into Dutch law is currently being considered by the legislator. The Directive imposes extra requirements with regard to the financing of the collective action to avoid a conflict of interest between the third-party funder and the persons being represented. For example, third-party funding is prohibited in a collective action against a competitor of the third party or against someone on whom the third party depends.

The Dutch Claim Code 2019 includes a principle on the relationship between a representative entity and a third-party funder that provides that the representative entity should operate independently from the third-party funder and that the funding conditions should not conflict with the collective interest of the persons that are being represented by the representative entity.

Contingency fee arrangements

16 | Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

Pursuant to the rules of the Dutch Bar Association, Dutch lawyers are not allowed to work on the basis of contingency fees that depend entirely on the outcome of the case. Lawyers are allowed to enter into a fee arrangement that provides that the fees will be increased in the case of a successful outcome as long as the standard hourly rates charged during the case cover the actual costs incurred and provide a modest compensation to the lawyer instructed.

THE CLAIM

Launching claims

17 | How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Legislation introduced in 2017 to obligate the parties to conduct civil proceedings electronically before certain courts was withdrawn in 2019. Consequently, civil proceedings initiated prior to 1 October 2019 before certain courts will continue to be conducted electronically. Civil proceedings initiated thereafter are launched by a writ of summons (to be served by a bailiff to the defendant) or a petition (to be submitted to the competent court). Since most civil proceedings relating to commercial matters are launched by a writ of summons, the explanation in this questionnaire is limited to this category of proceedings only. The writ of summons includes all formalities (competent court, details of the parties, court date), the facts of the case, the cause of action (including the legal basis), the known arguments of the defendant, and the evidence on which the claimant relies (exhibits and names of potential witnesses). The length of the writ of summons depends on the nature and complexity of the claim. In straightforward matters, the document may be limited to a small number of pages, while very complex litigation may require more than 50 or 100 pages. There is no statutory limit as to the length of a writ of summons and other written pleadings in first instance proceedings. Since April 2021 there is a maximum length to pleadings in appellate proceedings of 25 pages for the statement of grounds for appeal and the statement of defence on appeal, and 15 pages for other pleadings. This is to keep the proceedings manageable in terms of length and costs in the interest of all parties involved. In complex cases the parties may request the court to allow submission of larger documents. The appellate courts reserve one and a half or two hours for oral hearings. During oral hearings both sides usually have only 10 minutes to plead on the basis of written notes. Historically the debate was determined by the parties, but the trend now is that the judge assumes a more active role and puts the questions to the parties in order to gather the information he or she needs to resolve the dispute. In complex cases the parties may request extra time for the oral hearings and speaking times. The maximum length of submissions in appellate proceedings has met fierce protest by members of the Dutch Bar and the Dutch Bar Association, and at the time of writing the measure is still under review by the Dutch court.

Serving claims on foreign parties

18 | How are claims served on foreign parties?

Different rules apply depending on where the foreign party is located. Pursuant to the Code of Civil Procedure (DCCP), to serve a writ of summons on a foreign party the bailiff must serve the writ of summons at the office of the public prosecutor of the competent court and at the same time send a copy of the writ of summons to the defendant via mail. The public prosecutor will send the writ of summons to the Dutch Ministry of Foreign Affairs. The Ministry of Foreign Affairs will then notify the foreign party through diplomatic or consular channels.

If the foreign party resides in a state that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 or the Hague Convention on Civil Procedures of 1954, additional requirements as set out in these conventions apply on top of the requirements as set out in the DCCP.

The service of a judicial document on a party located in a foreign jurisdiction is exclusively regulated by the Regulation (EC) No. 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters, if the foreign party resides in a state to which the Regulation applies and the matter falls within the scope of the Regulation.

Key causes of action

19 | What are the key causes of action that typically arise in commercial litigation?

Commercial disputes typically arise from breach of contract, tort and negotiations having been broken off by one of the parties.

Claim amendments

20 | Under what circumstances can amendments to claims be made?

It is permissible to make amendments to claims until the date for the court decision has been set. A defendant objecting to an amendment of claims may only be successful if the amendment increases the claim and:

- violates the requirements of due process;
- would unduly delay the proceedings; or
- would unreasonably harm the defendant in its defence.

Remedies

21 | What remedies are available to a claimant in your jurisdiction?

In commercial disputes a variety of remedies is available, for instance the right:

- to claim compliance with the contractual obligations (if desired to be enforced with a penalty imposed by the court);
- to rescind the contract due to the other party's non compliance with its contractual obligations;
- to (partially) rescind or amend the contract due to unforeseen circumstances;
- to declare a certain contractual obligation non applicable for being in violation with the principles of reasonableness and fairness;
- to annul the contract due to duress, fraud, undue influence, misrepresentation or error; or
- to claim damages (or penalties if the contract provides for those). Damages can be claimed in addition to or instead of claiming compliance with or rescindment of the contract.

The claimant can also request a declaratory decision from the court establishing a legal fact, for instance, that a contract is null and void, or that a party is liable for damages towards the claimant. Another remedy, in breach of contract or tort matters, is an injunction ordering a defendant to desist from making certain statements or performing certain acts.

Recoverable damages

22 | What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

All damages consisting of material loss are recoverable and, to the extent provided for by law, a claim for compensation of other losses or harm inflicted can also be made. Monetary damages include both losses and foregone profits. Dutch law does not allow claims for punitive damages, unless there is a contractual basis. The court determines (or estimates) the quantum of the damages, if necessary on the basis of a report submitted by an expert appointed by the court.

RESPONDING TO THE CLAIM

Early steps available

23 | What steps are open to a defendant in the early part of a case?

A counterclaim can be submitted by the defendant in its statement of defence. By means of filing motions the defendant can also challenge the court's jurisdiction or request the court to summon a third party in indemnification proceedings, which party, in the defendant's view is liable in whole or in part for the claim. Such motions must be filed prior to presenting the defence on the merits. The defendant can choose either to file the motions in a separate written statement prior to filing the statement of the defence on the merits, or to include both the motions and the defence on the merits in the same written statement.

Defence structure

24 | How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

The deadline for filing the statement of defence is usually six weeks after the court date on which the proceedings are introduced to the court. This term can be extended by the court with another six to 12 weeks upon request by the defendant (having to demonstrate that there are compelling reasons for an extension), or upon a joint request by the parties. There is no obligatory structure for the defence (with the exception of certain motions to be presented prior to the substantive defences). A defence usually includes the evidence on which the defendant relies (documents or the details of witnesses).

Changing defence

25 | Under what circumstances may a defendant change a defence at a later stage in the proceedings?

It is generally allowed to supplement or to change a defence in the course of the proceedings. Given the fact that there is usually one round of written statements, the opportunities to do so may be rather limited. If the case goes to appeal, the defendant (but also the claimant) is, in principle, allowed to supplement or correct any statements made (or failed to be made) in the first instance, but new arguments must be presented at the earliest opportunity in the appeal. Generally, new arguments brought forward during the oral hearing of the appeal will be ignored by the appellate court.

Sharing liability

26 | How can a defendant establish the passing on or sharing of liability?

A defendant has the opportunity to initiate a third-party action to call a third party into indemnity proceedings to pass on or share liability. The defendant must file a motion thereto before presenting the defence on the merits, establishing and substantiating that the third party has an obligation to hold harmless and indemnify the defendant in the event that the original claimant's claim against the defendant is awarded. The claimant will have the opportunity to respond to the motion, after which the court will decide. If the motion is granted, the defendant must serve a writ of summons to the third party calling it into the indemnity proceedings, which are formally separate proceedings but can be treated jointly with the main proceedings.

Avoiding trial

27 | How can a defendant avoid trial?

The Dutch concept of trial differs from the UK or US concept thereof. The term 'trial' in common law jurisdictions relates to the phase after the hearing of motions, while the term trial is used under Dutch law to indicate the court proceedings in their entirety, which start on the date of their introduction to the court. A defendant having been served a writ of summons to appear before a Dutch court (or having been threatened with the initiation of proceedings before a Dutch court) may avoid court proceedings by agreeing on an amicable settlement or another method of resolving the dispute, for instance, mediation or binding advice. Since mediation is voluntary, the parties must agree to engage into mediation. The same goes for the option of binding advice. This option requires an agreement between the parties on the scope of the binding advice and on the binding advisers (or experts) to be appointed. The key principle of binding advice is that the parties agree in advance to be bound by the decision (binding advice) given by the binding advisers. An agreement to adjudicate the matter to a binding adviser precludes the parties from bringing the matter before a state court or in arbitral proceedings.

If court proceedings have been initiated, the defendant may try to avoid the dispute on the merits by raising formal defences by way of filing a motion, most commonly to dismiss the case for lack of jurisdiction.

Case of no defence

28 | What happens in the case of a no-show or if no defence is offered?

In the case of a no-show on the day of appearance or if no defence is offered, the claimant will be provided with a default judgment awarding the claim, provided certain conditions are met. Before rendering a default judgment, the court will need to verify whether the writ of summons has been properly served on the defendant and whether the writ of summons meets all formal requirements. No default judgment awarding the claim will be rendered if the claim is considered prima facie unfounded or unlawful. A default judgment may be opposed by the defendant before the same court.

If there are multiple defendants, and one or more of the defendants appear and the others do not, the court proceedings will proceed and no default judgment will be rendered. The defendants who did not appear are allowed to appear throughout the proceedings. Because no default judgment will be rendered, the judgment cannot be opposed. The defendants (including defendants that did not appear) can only file an appeal against the judgment.

Claiming security

29 | Can a defendant claim security for costs? If so, what form of security can be provided?

If the claimant resides outside the Netherlands, the defendant can request the court to oblige the claimant to provide security for trial costs and the damages that it might be ordered by the court to pay to the defendant. No obligation to provide security for costs exists if the

claimant resides in a jurisdiction in which an enforcement treaty with the Netherlands is in force, or if it can be reasonably established that the defendant can recover these costs and damages in the Netherlands. Especially the fact that a large number of countries have an enforcement treaty with the Netherlands in place, limits the possibility to claim security for costs and damages.

PROGRESSING THE CASE

Typical procedural steps

30 | What is the typical sequence of procedural steps in commercial litigation in this country?

The usual procedural steps in civil proceedings in the first instance are:

1 service of the writ of summons to the defendant;
2 introduction of the proceedings to the court;
3 potential motions reflecting formal defences and/or third party actions;
4 statement of defence (and filing of counterclaim, if any, which will be dealt with by the court together with the original claim);
5 personal appearance of the parties in court to provide further information and to explore the possibilities of an amicable settlement;
6 judgment: interim (hearing witnesses and/or experts) or final (awarding or dismissing the claim); and
7 instead of rendering (an interim) judgment, the court may grant the parties a second round of written statements, and thereafter order an additional oral hearing, followed by and interim or final judgment (see item 6).

The final judgment is subject to appeal, which needs to be lodged within three months after the date thereof. An interim judgment may only be appealed together with the final judgment, unless the court has granted permission to lodge an appeal against the interim judgment earlier (with a deadline of three months after the date of the interim judgment).

Bringing in additional parties

31 | Can additional parties be brought into a case after commencement?

The defendant can try to redirect liability to a third party by calling this party into indemnity proceedings. A third party voluntarily wishing to be involved may file a motion to join or intervene as party. This motion must be filed before or on the day that the last written statement is due to be submitted. In the event of a motion to join as party, the third party must request to join the side of either the claimant or the defendant. This is allowed if the third party demonstrates that an outcome that is unfavourable to the party joined by the third party may also negatively impact the latter's position. With an intervention, the third party institutes a claim of its own against both the claimant and the defendant. Such intervention is allowed if the third party demonstrates that it has a sufficient interest in connection with the potential adverse consequences of a judgment in the main proceedings.

Consolidating proceedings

32 | Can proceedings be consolidated or split?

Before raising any other (substantial) defences, parties may request the court to refer a case to another court if an action is already pending before the other court between the same parties with regard to the same matter, or if such action is closely connected to the action sought to be referred. If the case is referred to the other court, this case will then be consolidated with the case already pending before this other court. The consolidation process is similar for two cases pending before the same court between the same parties on the same subject. Although proceedings can also be split, this rarely occurs.

Court decision making

33 | How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The determination of the evidentiary value of the evidence presented is at the court's discretion. Claims or statements are considered to be proven if they are based on facts:

- having been established or made plausible in the course of the proceeding (for instance, through witness statements or other evidence);
- that have not (sufficiently) been disputed by the parties; or
- that are generally known and do not require evidence.

The burden of proof generally lies with the party making an allegation with a certain legal consequence. Under certain circumstances (required by the principle of reasonableness and fairness) or if a special rule applies, the burden of proof may shift (partially or entirely) to the counterparty.

34 | How does a court decide what judgments, remedies and orders it will issue?

The scope of the proceedings is determined by the parties. The court is therefore bound by the (wording of the) claim of the claimant (and the counterclaim of the defendant, if any), and is not allowed to render a judgment or allow remedies that go beyond the remedies sought by the parties.

Evidence

35 | How is witness, documentary and expert evidence dealt with?

Parties may submit any type of document as evidence and the court will decide on the evidentiary value of the documentation submitted. Deeds that are drawn up by civil law notaries or other public officials, are presumed accurate, unless counter-evidence is submitted by the other party. Dutch law does not provide for full discovery of documents. Pursuant to article 843a Code of Civil Procedure (DCCP), a party considered to have a legitimate interest may demand a copy of specified documentation that relates to a legal relationship to which it is a party.

Witness evidence can be submitted by way of a witness examination or by submitting a written declaration. The evidentiary value of a witness statement is also decided upon by the court. Witness statements that are made by the parties themselves with respect to matters regarding which that party has the burden of proof can only be considered corroborative evidence. To obtain evidence prior to initiating legal proceedings, a party may request the court to schedule a preliminary witness hearing. Such a hearing can be helpful to determine whether sufficient evidence can be obtained to start legal proceedings.

The court can decide to appoint an (independent) expert to either produce a written report or to be heard during the proceedings. Parties may also request the court to appoint an expert. The court will decide upon the evidentiary value of a report or statements provided by a court-appointed expert. Generally, the court will rely on the report or statements of a court appointed expert when rendering a judgment.

A draft bill to modernise and simplify the laws regarding the possibilities to obtain evidence within Dutch civil procedures (Simplification and Modernisation of Evidence Act) is currently being considered by the legislator. The draft legislation is aimed at harmonising the procedures in respect of different possibilities to obtain evidence in a pre-trial stage,

including witness hearings, expert opinions and on-site inspections and disclosure of relevant documents. Also, more emphasis will be put on disclosure of relevant information and documents at the beginning of the proceedings. The judge may also assume a more active role with regard to the gathering of information and alert the parties to opportunities to supplement the grounds of their claims. Although this was already allowed by the courts, the bill also gives a legal basis for pre-trial attachment for the purpose of preserving evidence outside intellectual property cases for which a legal basis already existed.

36 | How does the court deal with large volumes of commercial or technical evidence?

There is no specific procedure for the courts to deal with large volumes of commercial or technical evidence. Dutch courts are capable to deal with such volumes.

37 | Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Whether a witness in the Netherlands can be compelled to give evidence in or to a foreign court or whether a Dutch court can compel a foreign witness to give evidence depends on whether a relevant treaty is in force between the Netherlands and the other country. The most relevant regulation and treaty are Regulation (EC) No. 1206/2001 and the Hague Evidence Convention 1970, covering the most important Dutch trade relations. Under Regulation (EC) No. 1206/2001 courts of (most) EU member states (including the Netherlands) can request assistance directly from other EU member states. The requesting court can request the other EU member states' courts to take evidence on their behalf (applying the procedural rules of the other EU member state) or that the requesting court be permitted to take evidence themselves (applying the procedural rules of the requesting member state). The Hague Evidence Convention 1970, to which the Netherlands is a party, provides for several methods of obtaining evidence abroad, such as letters of request and the taking of evidence by diplomatic employees.

38 | How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Testing witness and documentary evidence is considered to be predominantly the task of the court. The court will decide on the evidentiary value of the evidence. The judge will ask the questions to the witness. The counsel of the opposing party will have the right to pose additional questions to the witness. The court may decide whether these questions need to be answered.

Time frame

39 | How long do the proceedings typically last, and in what circumstances can they be expedited?

Adversarial civil proceedings on the merits in commercial cases in the first instance completed with a final judgment typically last one to two years. The progress of the case is determined by the court on the basis of its availability and the nationwide rules of procedure containing, among others, time frames for the filing of written statements and other procedural aspects. The possibilities for the parties to expedite a case are very limited.

Gaining an advantage

40 | What other steps can a party take during proceedings to achieve tactical advantage in a case?

A party can obtain a summary judgment (if the matter is sufficiently urgent to be heard pending the proceedings on the merits), but such judgment is of a provisional nature and can be overturned in proceedings on the merits. Also, the parties can request the court to decide first on certain preliminary aspects of the matter or render a partial judgment, but it is at the court's discretion to honour or dismiss such a request.

Impact of third-party funding

41 | If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

The influence that third party funders have on a case generally depends on the type of action that is being initiated and the agreements that are made between the claimant and the third-party funder. Third party funders may, for example, have a (decisive) vote in relation to the legal counsel being appointed, the type of actions being initiated, the procedural steps that are being taken and settlements being entered into.

It should be noted that in the case of collective actions certain restrictions apply.

Impact of technology

42 | What impact is technology having on complex commercial litigation in your jurisdiction?

Although, between 2014 and 2018, steps were taken to fully digitalise the court proceedings, the focus has since then shifted to facilitate digital access to the courts to promote paperless proceedings. This process is still in progress.

Parallel proceedings

43 | How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Parallel proceedings take their own course in conformity with the applicable procedural rules. They cannot be combined or consolidated with civil proceedings in commercial cases. The concept of private prosecution does not exist under Dutch law. Criminal prosecution can only be brought by the Public Prosecutor's Office. A private party can only influence a decision by the public prosecutor not to prosecute by filing a complaint with the appellate court. A private party can join criminal proceedings as 'injured party' and claim damages which are determined according to the Dutch Civil Code (DCC).

TRIAL

Trial conduct

44 | How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The usual procedural steps in civil proceedings in the first instance are:

1 service of the writ of summons to the defendant;
2 introduction of the proceedings to the court;
3 potential motions reflecting formal defences and/or third party actions;
4 statement of defence (and filing of counterclaim, if any, which will be dealt with by the court together with the original claim);
5 personal appearance of the parties in court to provide further information and to explore the possibilities of an amicable settlement;

6 judgment: interim (hearing witnesses and/or experts) or final (awarding or dismissing the claim); and
7 instead of rendering (an interim) judgment, the court may grant the parties a second round of written statements, and thereafter order an additional oral hearing, followed by and interim or final judgment (see item 6).

Adversarial civil proceedings on the merits in commercial cases in the first instance completed with a final judgment typically last one to two years.

Use of juries

45 | Are jury trials the norm, and can they be denied?

The Dutch jurisdiction is a civil code system, so jury trials do not exist under Dutch law.

Confidentiality

46 | How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Court documents (including exhibits) that have been submitted in court proceedings are not publicly accessible, so evidence is not publicly accessible either. The court may issue a specific order to the parties to keep certain documents or information exchanged in the proceedings confidential. Court hearings are generally open to the public, unless the court decides to conduct the court hearing in a closed session (only accessible to the parties). The grounds for such decision are limited to the following circumstances:

- the interests of public policy;
- the interests of state security;
- the interests of minors; or
- public access would seriously harm the privacy of the parties or the proper administration of justice.

The parties are not allowed to disclose the contents of what was discussed during a court hearing conducted in a closed session.

Media interest

47 | How is media interest dealt with? Is the media ever ordered not to report on certain information?

Court hearings are generally open to the public (the media included), unless the court decides to conduct the court hearing in a closed session (only accessible to the parties). The media is generally allowed to (visually) record the court hearing, unless the court decides otherwise in exceptional cases. Specific press guidelines are available on the website of the judiciary.

Proving claims

48 | How are monetary claims valued and proved?

All damages consisting of material loss are recoverable and, to the extent provided for by law, a claim for compensation of other losses or harm inflicted can also be made. The court calculates (or, if exact calculation is impossible, estimates) the quantum of the damages, if necessary on the basis of a report submitted by an expert appointed by the court. The key principle is that the aggrieved party must be placed in a (financial) situation similar to the situation in which it would have been if the action that caused the damages had not occurred. The nature of the damages determines the way in which the court calculates the damages. Generally, the assessment of damages takes place in the principal proceedings on the merits, but on the request of the claimant or on its own initiative the court may refer the determination or estimation of the damages to follow-up proceedings. This is usually the case in very complex matters.

POST-TRIAL

Costs

49 | How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Court registry fees must be paid upfront to the court by both the claimant and the defendant. The amount thereof depends on the value of the claim. The party found to be in the wrong by the court is usually ordered to pay the adverse costs (court registry fee and attorney's fees). However, such an order does not cover the actual costs. In civil cases the attorney's fees are calculated on the basis of a court-approved scale of costs, which covers only a fraction of the actual attorney's fees incurred. Under exceptional circumstances (for instance, 'bad faith litigation'), the court may award a full compensation for the costs of litigation, but this rarely occurs.

A judgment typically includes the following paragraphs:

- description of the procedural course;
- the facts;
- the dispute;
- the assessment of the (counter)claim; and
- the ruling.

The court hearings in which judgments are rendered are generally publicly accessible, but usually the judgments are sent to the parties (by email or mail) without a separate court hearing. The majority of the judgments are (in anonymous form) published on the website of the judiciary. Also, there is a wide variety of Dutch legal journals that publish court judgments (often peer reviewed). The judgments rendered by the Netherlands Commercial Court are also published on both its LinkedIn page and a dedicated NCC judgments webpage.

Appeals

50 | When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

All final judgments rendered in the first instance relating to matters with a financial interests exceeding €1,750 can be appealed within three months after the date of the final judgment. Any preceding interim judgment rendered in the same proceedings can only be appealed together with an appeal against the final judgment, unless the court grants leave for interim appeal. The average duration of appeal proceedings before the appellate court varies between one and two years. The appeal proceedings are usually limited to one round of written statements, followed by a personal appearance of the parties in court to provide further information and to examine the possibilities of an amicable settlement, and concluded by a (final or interim) judgment.

Appeals against appellate judgments may be lodged with the Supreme Court without the appellate court's leave being required. A Supreme Court appeal ('cassation') must be filed within three months after the date of the judgment of the appellate court. The Supreme Court must accept the facts of the case established by the lower court, and may only reverse a judgment on two grounds: misapplication of the law or non-compliance with essential procedural requirements. The average duration of Supreme Court appeals varies between one and a half to two years. The Supreme Court appeal proceedings are almost entirely conducted in writing, and the parties require legal representation of

specialist attorneys-at-law who are admitted to the Supreme Court Bar. After the written statements are submitted by the parties, the Advocate-General will deliver an independent advice ('advisory opinion') to the Supreme Court on how to rule in the Supreme Court appeal.The parties may provide their (limited) comments to this opinion, after which the Supreme Court will render its judgment of cassation. After cassation (if the Supreme Court appeal is successful), the Supreme Court usually refers the case to an appellate court in order to deal with the case further. The Supreme Court only passes final judgment itself if no significant questions of fact remain to be decided.

Enforceability

51 How enforceable internationally are judgments from the courts in your jurisdiction?

All judgments issued by Dutch courts are enforceable in the European Union (on the basis of Regulation (EC) No. 1215/2012) and the Kingdom of the Netherlands (the Netherlands, Aruba, Bonaire, Curacao, St Martin, St Eustace and Saba) without any declaration of enforceability being required. This means that the judgment is immediately enforceable by the competent enforcement authority (which is, in the Netherlands, the bailiff). The international enforceability of Dutch court judgments in jurisdictions outside the EU depends on the international private laws applicable in the other jurisdictions and whether such jurisdiction has entered into a treaty with the Netherlands on the recognition and enforcement of judgments. In general, these treaties require a declaration of enforceability by the court in that jurisdiction. On 2 July 2019, the Hague Conference on Private International Law announced the conclusion of a new international convention, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Judgments Convention). The new Convention requires contracting states to recognise and enforce judgments given in civil or commercial matters in other contracting states. It provides a simple route to recognition and enforcement without a merits review and subject to only limited grounds for refusal. This new Convention is not yet in force.

52 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

Foreign judgments are enforceable in the Netherlands under Regulation (EC) No. 1215/2012, a treaty or convention that allows enforcement, or principles of comity.

Under Regulation (EC) No. 1215/2012, judgments issued by a court in an EU jurisdiction may be enforced in the Netherlands without any declaration of enforceability being required.

To enforce judgments issued by a court in a non-EU jurisdiction in the Netherlands, a declaration of enforceability is required under most applicable treaties and conventions. The declaration may be obtained by submitting an application to the Dutch district court in the district where the enforcement is to take place or where the judgment debtor is domiciled. A judgment on the application is usually given within a few weeks.

In the absence of a treaty or convention, the party wishing to enforce a foreign judgment in the Netherlands, may bring an action before the Dutch competent court seeking relief in accordance with the foreign judgment. A full retrial will generally not be necessary if:

- the foreign court had jurisdiction under generally accepted rules;
- the foreign trial was fair;
- the foreign judgment is final and does not violate Dutch public policy;
- there is no irreconcilably conflicting other judgment regarding the same cause of action and the same parties; and
- the foreign judgment is enforceable in the jurisdiction where it was given.

If these conditions are met, the Dutch court will, in general, render a judgment along the lines of the reasoning and the decision of the foreign judgment. This Dutch judgment may then be enforced in the Netherlands.

OTHER CONSIDERATIONS

Interesting features

53 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Besides the commercial litigation options, Dutch law provides for another interesting litigation tool, which is the proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal, a court specialised in corporate disputes (also called 'mismanagement proceedings'). These proceedings do not have an equivalent in other jurisdictions (although there are some similarities with the United States' Delaware Chancery Court). Pending the proceedings this specialised Dutch court may intervene within the company's management and internal relations by issuing interim relief injunctions such as freezing certain decisions, suspension of (supervisory) directors, temporary transfer of shares to an independent administrator. If besides the commercial conflict well-founded doubts exist as to the company's policy and affairs, these proceedings may offer shareholders a useful opportunity to intervene within the Dutch company or as a tool to reach a solution in the event of a dispute or a deadlock.

Special considerations

54 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

On its own initiative or upon request of a party, the court of the first instance (or, if the case may be, the appellate court) may request the Supreme Court for a prejudicial ruling with regard to certain questions of law if a ruling is required to render a judgment, and if such ruling has direct importance for (1) a multiplicity of claims based on similar facts and originating from similar causes, or (2) the resolution or settlement of numerous similar disputes relating to similar questions of law. In the event of such request the court of the first instance (or, as the case may be, the appellate court) will defer its judgment until receipt of the Supreme Court's ruling. The prejudicial rulings are published on www.hogeraad.nl/prejudiciele-vragen.

Jurisdictional disadvantages

55 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Although the Dutch civil legal system is among the highest ranked of all civil justice systems in the world in the rankings of the World Justice Project based on criteria such as cost-effectiveness, efficiency, impartiality and independence, adversarial proceedings on the merits in the Netherlands may experience some delay due to the high-volume caseload, and consequently, such proceedings may take up more time than necessary (up to six months longer).

UPDATE AND TRENDS

Key developments of the past year

56 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 1 January 2020, the Mass Claims Settlement Act in Collective Action (WAMCA) entered into force. The provisions of the WAMCA

apply to collective actions that are initiated on or after 1 January 2020 and regard events that took place on or after 15 November 2016. The WAMCA enables representative entities to claim collective damages. Previously, representative entities were only able to initiate proceedings to obtain a declaratory judgment and could not file a claim for damages. Individual claimants had to subsequently start court proceedings to obtain compensation.

A draft bill amending the WAMCA to transpose Directive (EU) 2020/1828 on Representative Actions for Consumers into Dutch law is currently being considered by the legislator. Because the WAMCA already provides for an effective system of collective redress, limited adaption is needed. The Directive imposes certain additional restrictions in respect of the funding of collective actions. The Directive also stipulates that each member state must draw up a list of organisations that can initiate collective actions in another member state. Those organisations must have been involved in consumer protection activities for at least 12 months. This is not a requirement under the WAMCA, which allows setting up an ad hoc entity for the purpose of the class action.

On 1 January 2021, the Act on the confirmation of private restructuring plans (WHOA) entered into force. The WHOA entails a framework that allows debtors to restructure their debts outside formal insolvency proceedings. The first restructuring plan under the WHOA was approved by a court in February 2021. The first refusal by a court to approve a restructuring plan was in March 2021.

A draft bill to modernise and simplify the laws regarding the possibilities to obtain evidence within Dutch civil procedures (Simplification and Modernisation of Evidence Act) is currently being considered by the legislator. The draft legislation is aimed at harmonising the procedures in respect of different possibilities to obtain evidence in a pre-trial stage, including witness hearings, expert opinions and on-site inspections and disclosure of relevant documents. Also, more emphasis will be put on disclosure of relevant information and documents at the beginning of the proceedings. The judge may also assume a more active role with regard to the gathering of information and alert the parties to opportunities to supplement the grounds of their claims. Although this was already allowed by the courts, the bill also gives a legal basis for pre-trial attachment for the purpose of preserving evidence outside intellectual property cases for which a legal basis already existed.

Since April 2020, several Dutch judgments dealing with the covid-19 pandemic and its impact on commercial contracts have been rendered. Several Dutch courts held that covid-19 qualifies as an 'unforeseen circumstance' (article 6:258 Dutch Civil Code) and could lead to alteration of a contract, depending on the circumstances of the specific case. In the decision of 29 April 2020 (ECLI:NL:RBAMS:2020:2406 (Claimant/Tennor)) the Netherlands Commercial Court ruled that, in principle, the burden of the consequences of covid-19 should be shared between both contract parties (the 'share the pain' principle).

The Netherlands leads the way in climate change litigation. After a landmark Supreme Court decision of 20 December 2019 (ECLI:NL:HR:2019:2007 (Stichting Urgenda/Dutch State)) against the Dutch state (available in English), in which the Dutch state was ordered to reduce greenhouse gas emissions by at least 25 per cent as of late 2020 relative to 1990, the Hague District Court, in a judgment of 26 May 2021 (ECLI:NL:RBDHA:2021:5339), ordered Shell to reduce CO2 emissions of the Shell group by net 45 per cent by 2030 compared to 2019 levels, through the Shell group's corporate policy. The judgment, which can be appealed, is available in English.

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