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A Dutch View on Discovery: Short and Sweet

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THE United States is internationally known as a jurisdiction with broad discovery rules that pose extensive costs on defendants.¹ Like many other continental European jurisdictions, the Netherlands does not have U.S. style discovery. Nevertheless, there are more fact-finding options available under Dutch law

during and before civil proceedings than one would expect at first glance. Those options are available even when the proceedings have been or will be commenced before a foreign (non-Dutch) court. A complicating factor, however, is the fact that the available options are spread out in statutory regimes of varying nature or have been developed in the case law of the Dutch Supreme Court, the highest civil court in the Netherlands, with its seat in The Hague. The result is a patchwork of fact-finding options.

The most-used “evidentiary patches” will be briefly discussed below, including their potential cross-border implications. We will discuss the relevant provisions relating to the production of documents, the pre-trial

¹ See *Litigation Cost Survey of Major Companies*, Statement Submitted by Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, 2010 Conference on Civil Litigation, available at: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf> (last visited on April 3, 2014).

hearing of witnesses, and the Dutch so-called "inquiry proceedings," which are widely used in shareholder disputes. Those fact-finding options could be a useful tool for companies that are involved in commercial disputes and want to strengthen their settlement negotiation position, but don't want to get involved in lengthy and costly discovery proceedings. The fact-finding instruments discussed below can also be used as part of a sophisticated commercial dispute-resolution strategy.

Before we zoom into three fact-finding mechanisms, a brief overview of some relevant features of the Dutch legal system will follow.

I. General

The Netherlands is a civil-law jurisdiction, which means that there are no jury trials, no contingency fees and no punitive damages. The Dutch judiciary is known for its competent and independent approach, a combination of common-law pragmatism with German "Grundlichkeit". Moreover, the Dutch judiciary is internationally oriented and has vast experience with complex high-profile litigation and international disputes. It is accustomed to handling disputes with cross-border implications and involving foreign parties. Although the language of the court is Dutch, the judiciary doesn't feel uncomfortable when parties submit or present documents written in English. The internationalization of the Dutch judicial system was the subject of the Dutch Supreme Court's annual report for 2009–2010.² Also in 2011, the President of the

² Available at <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/jaarverslag%202009%202010.pdf> (last visited on April 4, 2014).

Supreme Court expressed in a speech that Dutch judges must take into account the international dimensions of the cases with which they are confronted.³

The Netherlands has cost-shifting rules under which the loser pays the winner's legal fees, but the loser never fully pays the winner's real costs. The legal fees that the losing party must pay are capped and are related to the amount in dispute and the number of motions or pleadings that parties filed, rather than to the winner's actual expenditures. Furthermore, court fees for individuals and for companies differ. For example, if an amount of EUR 1,5 million is in dispute, District Court fees would be EUR 3,829 for companies and EUR 1,519 for individuals. Court of Appeal fees would be EUR 5,114 for companies and EUR 1,601 for individuals. Supreme Court fees would be EUR 6,396 for companies and EUR 1,920 for individuals.⁴ The winning party will receive a cost recovery dependent on the number of procedural acts, be it motions or hearings, it performed before the court. Depending on the number of motions the parties filed, the winning party before the District Court or the Court of Appeal will receive a in a case with a value of EUR 1,5 million a cost recovery of EUR 3,211 per motion or a hearing attendance.⁵ The rules in the

³ Available at <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/OpeningbijeenkomsmetNederlandserechtersininternationalegerechten.aspx> (last visited on April 4, 2014).

⁴ Available at <http://www.rechtspraak.nl/procedures/tarieven-griffierecht/pages/default.aspx> (last visited on April 4, 2014).

⁵ Available at <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Pages/Liquidatietarief-rechtbanken-en-gerechtshoven.aspx> (last visited on April 4, 2014).

Supreme Court are slightly different: if the ruling is quashed, the party that appealed the ruling will receive EUR 2,600. If the ruling is confirmed, the opposing party will receive EUR 2,200.

The order in which evidence is assembled and in which the case is argued is different from that in most common-law jurisdictions. In most cases, the parties first argue their positions in court, whereupon the court decides which issues need to be sustained further by evidence.⁶

The general rule is that evidence may be presented in any form. Even evidence that has been unlawfully obtained may be admissible as evidence in civil proceedings. The court has discretionary power to evaluate the evidence presented at the time it renders its decision.⁷

II. Collective Action

Under Dutch law, a foundation or association established for the purpose of protecting the interests of a certain group can institute an action in court for the protection of the group's interests, if those interests are of a similar nature ("305a-entity").⁸ This entity could be an existing organization or a special-purpose vehicle ("SPV"). The organization must establish that the legal interests of the persons for whose benefit the action is brought are sufficiently protected. This is a fairly new requirement that was recently introduced to the existing provisions.⁹

⁶ See also MARIEKE VAN HOOIJDONK AND PETER EIJSVOOGEL, *LITIGATION IN THE NETHERLANDS, CIVIL PROCEDURE, ARBITRATION AND ADMINISTRATIVE LITIGATION*, 2-3 (Wolters Kluwer, 2nd ed. 2009).

⁷ *Id.* at 3.

⁸ Pursuant to article 3:305a of the Dutch Civil Code.

⁹ *Staatsblad* at 255.

Usually, the 305a-entity will seek a declaratory judgment that the defendant(s) acted wrongfully against the members of the group that the entity represents. Current statutory provisions assume that, if the action is successful, individual members will still need to litigate causation and damages (as a follow-on action), unless the dispute is settled. Legislative proposals under consideration would allow the 305a-entity to sue for damages on behalf of the group, so that causation and damages could be determined in the collective action itself. If the action is not successful, the group member is not bound by the outcome and is free to start an individual action. The ruling in a collective action doesn't have *res judicata* effect.

Practice has shown that defendants are often prepared to settle with group members when liability has been established in the 305a-action. To meet this need, Dutch law provides for a collective settlement mechanism that offers closure for defendants. Currently the Netherlands is the only European jurisdiction that has a settlement mechanism that assists defendants in closing the books in a dispute that involves multi-party.

III. Act on the Collective Settlement of Mass Damages ("WCAM")

WCAM was introduced at the request of the insurance industry¹⁰ and allows a sufficiently representative 305a-entity and a defendant or prospective defendant to

¹⁰ See also Ianika N. Tzankova and Deborah R. Hensler, *Collective Settlements in the Netherlands: Some Empirical Observations*, in A. STADLER AND CH. HODGES, *RESOLVING MASS DISPUTES*, 91-105 (Edward Elgar, 2013).

reach a settlement on behalf of the entire group and to have the settlement approved and declared binding by the Amsterdam Court of Appeal. The settling parties (the foundation and the actual or prospective defendant) must jointly submit a request to the Court of Appeal to authorize notice to group members who are known to be potentially affected by the proposed agreement and then to approve after the group members have had a chance to present their views and objections (if any) at an oral hearing. If the Court of Appeal declares the settlement binding, it will grant group members a period of at least three months to opt out of the settlement. Group members that do not timely opt out are bound to the collective settlement.

The cases to date, particularly *Converium*, show that the Court of Appeal is prepared to accept jurisdiction over proposed settlements that have only limited, specific connections with the Netherlands, thereby extending this settlement mechanism to a wide range of international disputes. WCAM is regarded as a cost-efficient instrument for resolving mass disputes. Because the approval of a settlement is a judgment of a Dutch court, the Brussels I Regulation ensures its recognition in all member states of the European Union and other countries associated by separate treaty. Experience so far indicates that such international settlements are hardly ever contested or challenged and that the number of opt-outs is very limited. This is explained in part by that fact that the Court of Appeal, in deciding whether or not to approve the settlement, must assess whether the terms of the settlement are reasonable, considering the interests of the group members, and whether the group members have been sufficiently notified of the settlement and the opportunity to opt out.

Finally, as of July 1, 2013, a new provision was introduced in the Dutch Code of Civil Procedure—Article 1018a—allowing for a pre-trial conference in case of a mass infringement or an infringement involving a vast number of parties. When a group suffers damages as a result of an event or series of events, it may, before a claim has been filed, request the District Court to explore—together with the requesting parties and/or the parties summoned to appear before the court—a potential settlement of the dispute. The court might decide to appoint a mediator or a special master to assist the parties and the court. The request to the District Court to hold such a pre-trial conference should be filed by a 305a-entity that is sufficiently representative and/or by the parties who might potentially be held liable. The request can be filed jointly or separately, meaning that a 305a-entity can force an “unwilling to settle” defendant (or prospective defendant) to appear before the court. The parties need to appear before the court, or they could face cost orders. The request includes (at least):

- (a) The name and domicile of the petitioning parties;
- (b) The name and domicile of the parties that are requested to appear before the court;
- (c) A description of the harmful event;
- (d) A description of the allegations or the dispute; and
- (e) A description of the request to the court.

This provision has not been tested yet, but it offers potentially various strategic dispute-resolution options in sophisticated complex matters.

IV. Assignment Model

Given the fact that the 305a-action at present does not allow the 305a-entity to

sue for damages and have the court determine causation between wrongdoing and damages suffered, mass litigation is often structured in a different model based on assignment of claims or, to a lesser degree, mandates. Group members opt-in by assigning their claims to a SPV that will act as plaintiff in the proceedings. Usually a claims funder will finance the proceedings and control the SPV. Assignors will receive compensation in case of a settlement or judgment, minus a percentage agreed with the claims funder. The procedural advantage of this model is that it allows for a collective determination of damages, which is particularly helpful in circumstances where the defendants may not want to settle. Parties in antitrust and securities litigation currently favor this model.

For defendants, this model had the advantage that only the claims brought by the SPV are protected against the statute of limitations, whereas the claims of all other potential plaintiffs could expire. However, uncertainty existed about whether a 305a-action had the effect of suspending the limitations period on the group members' underlying claims. The risk for defendants was that the statute of limitations would be tolled for claims of the entire group represented by the 305a-entity; the risk for plaintiffs was that the statute would not be tolled for all group members' claims. The Supreme Court resolved these questions by ruling on March 28, 2014¹¹ that the 305a-entity's action suspends the limitations period for all group members' claims – including claims for damages – as long as the Articles of Incorporation of the 305a-entity state that the 305a-entity looks after

those interests. However, this ruling may apply only to claims that are governed by Dutch law, unless the Dutch statute of limitation provisions are viewed as rules of civil procedure, in which case the Dutch court that has jurisdiction might be able to apply those provisions to actions that the 305a-entity initiates based on foreign law. This question is debatable and will need to be further explored and developed in case law.

The three fact-finding instruments discussed below all share that they can be invoked not only during trial, but also before trial and even before any official document marking the start of formal legal proceedings has been filed. The rationale for this rule is that parties should have the opportunity to evaluate the strengths and weaknesses of their case before they commence any legal proceedings and explore the options of out-of-court settlements. Indeed, especially when the amounts in dispute are not too high, parties often settle after pre-trial hearing of witnesses or after production of documents under Article 843a.¹² These fact-finding provisions are atypical for most jurisdictions and certainly for common-law jurisdictions.

V. Article 843a-Production of Documents

Article 843a of the Dutch Code of Civil Procedure provides the possibility to request specific documents from another party. The requesting party must have a legitimate interest and – in order to avoid fishing expeditions – must sufficiently specify the documents concerned. The provision reads as follows:

¹¹ Supreme Court, March 28, 2014, ECLI:NL:HR:2014:766.

¹² See *infra*.

“Everyone who has a legitimate interest is able, at his own cost, to demand a copy of certain documents regarding a legal relationship in which the party or its legal predecessor is a party, from the party who has these documents in its possession.”¹³

For such a motion to be granted, the claimant must meet three cumulative requirements: (i) the claimant must have a legitimate interest, (ii) the claim must specify “certain documents,” and (iii) the claimant must have some kind of a legal relationship regarding the documents.

The claimant needs to present facts and circumstances that show his legitimate interest in obtaining the documents. The documents might relate to a claim based on either contract or tort. The claimant does not need to prove that the documents would be decisive for the outcome of the proceedings. However, **if the claim on the merits is considered to have no possibility of succeeding, the court will reject the existence of a legitimate interest regarding the claimed documents.**

The claimant also needs to specify and properly substantiate which documents he would like to obtain. This requirement seeks to prevent fishing expeditions. However, the claimant need not provide a precise description of the documents. The documents are properly substantiated by, for example, a request for written correspondence between certain parties during a certain period with regard to a certain topic. The provision applies also to audiotapes, films, photographs, and all kinds of electronic documents.

The documents need to be relevant to a legal relationship in which the claimant is a party. This requirement was initially

interpreted in a strict sense: it was understood to require a legal relationship between the claimant and the party in charge of the document – for example, an investor and his bank. In recent years, the Supreme Court interpreted Article 843a-motions in an increasingly broader sense. In one example,¹⁴ a former employee requested a copy of all correspondence that had been exchanged between his former employer and the Dutch Financial Markets Authority (“AFM”) in a certain matter. The employee had acted as a whistle-blower to the AFM and had been dismissed from his job. The Supreme Court decided that the correspondence could be of assistance to the employee when challenging his dismissal, and it sustained the claim that the employer produce the documents.

Another example is the Supreme Court ruling of June 8, 2012, in which the Supreme Court ruled in final instance that ABN Amro Bank N.V. (ABN Amro) was obliged to produce documents to Abu Dhabi Islamic Bank (ADIB) on the basis of Article 843a of the Dutch Code of Civil Procedure. The Amsterdam Court of Appeal had earlier denied the request, because it had considered relevant whether subsequent proceedings were to be expected against ABN Amro in the Netherlands. **Not only were ABN Amro and ADIB already involved in proceedings in the U.S., but all other parties in those proceedings were domiciled outside the Netherlands, according to the Court of Appeal.** The Supreme Court reversed the decision of the Court of Appeal and ruled that the decision to grant or deny such a request for the production of documents should be assessed solely on the basis of Article 843a. If the requirements of that article are met, then the request should be

¹³ Informal office translation BarentsKrans.

¹⁴ Supreme Court, October 26, 2012, LJN: BW9244, NJ 2013, 220.

granted. This ruling indicates that the Dutch provisions for production of documents may be invoked even when it is clear from the outset that the specified documents will not be used in subsequent litigation in the Netherlands. The only relevant criterion is whether the requirements set out in Article 843a are met.

If these three statutory requirements are met, the claim to obtain documents will generally be granted. The claim can then be denied only if there are "serious grounds" for the party holding the documents to secure their contents. "Serious grounds" must be extensively examined, because courts are reluctant to permit withholding of information.

One noteworthy development is a draft to revise the 843a provision that was presented before Parliament on November 7, 2011. Under the proposed revision, a **petitioning party would no longer need to prove a legitimate interest and could file a claim to produce documents against any party that holds those materials, including third parties who do not have any contractual relationship with the petitioner.** A new element in this draft is a jurisdictional provision determining the court that would hear such requests: requests would go either to the court that would hear the case if one were to be filed or to the court where the **party or one of the parties** that need to provide the documents are domiciled. Currently Article 843a does not contain a jurisdictional provision. Therefore, standard procedural provisions apply – and would generally lead to the court where the party (or one of the parties) that needs to provide the documents is domiciled.

VI. Pre-Trial Hearing of Witnesses

Article 186 of the Dutch Code of Civil Procedure, which governs the pre-trial

hearing of witnesses, may also be invoked before any civil proceedings have been commenced. As already stated, a pre-trial witness hearing is usually used to gain insight into the facts related to a dispute, so that the parties or prospective parties can make informed decisions about the subsequent litigation. The witness hearing could also be used to get clarification regarding the **question against whom (which counter-party) litigation should be started or for strategic purposes, especially when the matter involves high-placed individuals or officials.**

Either the court that will have jurisdiction in the subsequent proceedings or the court where the witness or the majority of witnesses live will conduct the pre-trial witness hearing. A party generally has the right to hear witnesses before the commencement of any proceedings, but the court may deny the request if the request violates principles of due process. A forum choice for arbitration could also be a reason to deny the request. The request needs to describe the grounds for the potential claim, the amount of damages, and the facts and circumstances the petitioner would like to establish. **A pre-trial witness hearing may be rejected if the claim seems too weak to justify the hearing, but, generally speaking, a request for a preliminary hearing of witnesses would be sustained.**

The witness is interrogated by the court, and there is no U.S.-style cross-examination, although lawyers also have the opportunity to question witnesses. A pre-trial witness hearing is also used to gain information about the existence of documents and can lead to a subsequent request for the 843a-production of those documents (as discussed above). A party who suspects that it will be the target of a lawsuit in the foreseeable future can also file such a request. Doing so could be a

delaying strategy, but often a claim can be quickly settled and protracted litigation avoided.

VII. Enquiry Proceedings

So-called enquiry proceedings are sometimes used to prepare for securities litigation and in relation to directors' and officers' liability. Under Dutch corporate law, shareholders¹⁵ 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. This is potentially a powerful tool given the fact that many international companies have a holding company based in the Netherlands for tax purposes. The Enterprise Chamber acts as a Dutch court of first instance with respect to the policy or conduct of business of legal entities (usually public or limited companies). The Enterprise Court will grant the request only if there are sufficient grounds to doubt whether the company is pursuing a proper policy.¹⁶ In other words, facts and circumstances must exist to justify the expectation of mismanagement within the company. Examples of justified grounds have been: deadlock situations, conflicts of interest, failure to provide information to shareholders, inadequate administration and - indeed - squeeze outs. At any stage of the enquiry procedure, the Enterprise Chamber may grant temporary injunctions if immediate action is required in relation to the company. The Enterprise Chamber has far-reaching powers, which it can exercise

at its sole discretion. Examples of injunctions granted include the suspension of (certain) resolutions and the temporary appointment of (replacing) directors and/or officers with deciding votes. This process can be fairly expedient. The Dutch Enterprise Chamber is well known for being expedient and effective.

The enquiry can directly relate to the affairs of a Dutch company in which the applicants hold shares, but also to a 100% subsidiary of that company,¹⁷ even if the subsidiary is domiciled outside the Netherlands. Requests are not limited only to shareholders. Holders of certificates of shares also have standing to file requests if they meet the aforementioned threshold requirements.¹⁸ Moreover, in the last decade, the Supreme Court has developed case law in relation to requests for enquiries filed by "indirect" shareholders. The Supreme Court ruled a petitioner admissible in his enquiry request related to a Dutch company, even though the petitioner held 25% of the shares of a Chinese holding company, which held 100% of the shares of the Dutch subsidiary. The petitioner was therefore an "indirect shareholder" of the Dutch subsidiary. The petitioner's request was admissible because the Chinese holding's sole activity was to hold the shares in the Dutch corporation. Because all business activities took place in the Netherlands, the Supreme Court ruled that the Enterprise Court should assess the matter as if the Chinese holding company did not exist. Furthermore, on December 6, 2013, the Supreme Court ruled that a 305-entity (as described above) could appear as an "interested party" in enquiry proceedings

¹⁵ The group of shareholders needs to represent at least either 10% of the issued capital or a nominal value of EUR 225,000 or less if the articles of association provide so.

¹⁶ Article 2:350 DCCP. See M. van Hooijdonk and P. Eijssvoegel, *supra* note 10.

¹⁷ Supreme Court, February 4, 2005, NJ 2005, 127(Landis Group).

¹⁸ See *supra* note 11.

started by others and share its views with the Enterprise Court, even if it did not meet the threshold requirements and its main purpose for getting involved in the enquiry proceedings was to initiate subsequent civil actions for damages.

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. The costs of the enquiry proceedings and the experts are normally paid by the company.¹⁹ It is possible to file enquiry proceedings even after a company has filed for bankruptcy or has been declared bankrupt. In 2012, the Enterprise Chamber concluded²⁰ from an enquiry investigation at the Dutch corporation Fortis N.V. that misconduct had occurred between September 2007 and September 2008. The misconduct related to the solvency planning, the information regarding the issuance of shares on September 20, 2007, and the internal policy regarding communication.

The information obtained in the enquiry proceedings will be a key element in a subsequent civil claim for damages against not only Fortis and its directors, but also the consortium of banks that had provided advice regarding the share issuance. It is important to acknowledge the impact of enquiry proceedings in the overall litigation and fact-finding strategy.

VIII. Conclusion

In the Netherlands, a civil-law jurisdiction, the option of full pre-trial discovery does not exist. However, a patchwork of fact-finding options of varying nature and scope can be used subsequently or simultaneously in an international setting. Fact-finding in the Netherlands takes place in stages. Staging the process enables companies and their legal advisors to develop sophisticated strategies for the proper resolution of a particular dispute in or out of court in a cost-efficient way. At the same time, counterparties can also use the available tools strategically—a prospect that requires a careful analysis of the risks involved and opportunities.

¹⁹ If the Enterprise Chamber concludes after examination that the request was on unreasonable grounds, the court can require the petitioner to pay the costs.

²⁰ Enterprise Chamber of the Court of Appeal Amsterdam, April 5, 2012, LJN: BW0991.