

EVIDENCE IN CIVIL LAW – THE NETHERLANDS

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ABSTRACT The present text discusses the current system of civil evidence in the Netherlands. It addresses both practical and more theoretical issues. The current Dutch system of civil evidence underwent major reforms in 1988, but has remained loyal (at least in part) to its 19th century French origins. Since 1988 partial reforms have been introduced in order to deal with the latest developments in law and technology.

KEYWORDS: • Civil Procedure • Evidence • Proof • Netherlands

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Evidence in Civil Procedure in the Netherlands: Tradition and Modernity³

0 Introduction

In order to fully understand the law of evidence in any procedural system, one needs to have knowledge of the wider procedural context in which it is used. Therefore, this contribution on evidence in Dutch civil procedure will start by providing some basic details of the Dutch procedural system.⁴ The discussion will be limited to civil matters, since evidence law in the Netherlands is not generic for all types of litigation. A specific law of evidence for civil matters exists and since 1988 it can be found (for the largest part)⁵ in the Code of Civil Procedure.⁶ It will appear that the Dutch law of evidence in civil matters is still (to a certain extent at least) based on traditions, often derived from its French 19th century model, but that especially since 1988 important innovations have been introduced which have resulted in rules that – when considered within the wider procedural framework – have prepared Dutch civil evidence law well for some of the challenges of the 21st century.

In this contribution I will mainly concentrate on the procedure initiated by writ of summons (contentious litigation). The other type of civil action, i.e. the procedure started by way of a petition (originally only for non-contentious matters, especially family matters) will be addressed incidentally. In the future, the differences between the two types of procedure will remain even though it is the intention of the Dutch

³ The present contribution is based on a national report on Dutch civil evidence law written by the author within the context of the project Dimensions of Evidence in European Civil Procedure, JUST/2011-2012/JCIV/AG/3434. The author would like to thank Dr. F.J. Fernhout for his comments on an earlier version of this contribution.

⁴ See also M. van Hooijdonk & P.V. Eijssvoogel, *Litigation in the Netherlands: Civil procedure, arbitration and administrative litigation*, The Hague: Kluwer Law International, 2012.

⁵ Sometimes we find rules on civil evidence elsewhere. This is for example true for presumptions, rules on which cannot be found in the current Code of Civil Procedure. Examples of specific presumptions can, however, be found elsewhere, for example in Article 7:610a of the Dutch Civil Code (presumption as to the existence of a labour contract).

⁶ For the legislative history of the 1988 Dutch evidence law in civil matters, see G.R. Rutgers, R.J.C. Flach & G.J. Boon (eds.), *Parlementaire geschiedenis van de nieuwe regeling van het bewijsrecht in burgerlijke zaken: Parlementaire stukken systematisch gerangschikt*, Deventer: Kluwer, 1988. Before 1988, the ‘substantive’ aspects of the law of evidence in civil matters could be found in the Dutch Civil Code; this was in line with the 19th century French example of the Dutch law of civil evidence.

Legislature to introduce a single document for bringing a civil court action. The single introductory document is not aimed at removing procedural differences, but is mainly introduced for reasons of simplification and digitalisation of litigation.⁷

Like so many other jurisdictions in Europe, the Netherlands has embraced the concept of judicial case management in civil matters (especially since the reforms of the Code of Civil Procedure in 2002).⁸ This means that the traditional Dutch principle of the ‘passivity of the judge’ (in Dutch: *lijdelijkheid*) in civil matters has faded away to a considerable extent.⁹ The case management powers of the modern Dutch judge concern in the first place procedural issues, but they may to a certain extent also concern the merits of the case. For example, the judge has to guard against undue delay and if necessary take measures to prevent such delay.¹⁰ He makes sure that the proceedings unfold in an orderly manner and may deny further postponements for the submission of statements of case.¹¹ The judge also has extended powers as regards the factual basis of the case and evidence. He may order the parties whenever necessary during the proceedings to provide information, orally or by way of documents.¹² The judge may, *ex officio*, investigate the facts of the case by way of a court hearing at which the parties themselves have to appear.¹³ The judge may also *ex officio* order a party to supply proof by way of witnesses (he may not nominate witnesses though),¹⁴ and he may, *ex officio*, investigate the truth of contested facts by way of a local inspection (*descente sur les lieux*)¹⁵ or an expert report¹⁶ (although for practical reasons this only happens to a limited extent). In cases where the procedure is initiated by way of a petition, the possibilities to collect evidence *ex officio* are more extended in the sense that the judge may also call witnesses selected by himself.¹⁷ The extended powers of the judge as

⁷ See *Voorstel tot Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht* (Legislative proposal for amendment of the Code of Civil Procedure and the General Administrative Law Act in relation to the simplification and digitalisation of the law of procedure) (Kamerstukken 34 059).

⁸ In 2002, the ‘post-defence hearing model’ – an important tool in judicial case management – was formalized in the Code of Civil Procedure. On this model, see below.

⁹ On the principle of ‘passivity’ and its history, see J.M.J. Chorus, *De lijdelijkheid van de rechter: Historie van een begrip*, Deventer: Kluwer, 1987.

¹⁰ Art. 20(1) Dutch Code of Civil Procedure (hereafter CCP).

¹¹ Art. 133 CCP.

¹² Art. 22 CCP. The parties may refuse this for serious reasons to be assessed by the judge. When the judge decides that no serious reasons exist, he may derive the conclusions he deems fit from the party’s refusal to supply information (which conclusions, however, should be related to this information).

¹³ Art. 88 CCP.

¹⁴ Art. 166(1) CCP.

¹⁵ Art. 201 CCP.

¹⁶ Art. 194 CCP.

¹⁷ Art. 284(2) CCP.

regards evidence are in line with the approach in many civil law jurisdictions on the European Continent.¹⁸

Traditionally, and especially before the 2002 reforms,¹⁹ a Dutch civil action unfolded through a series of separate hearings (cause-list sittings) for the performance of the necessary procedural acts. This was in line with the model of civil procedure provided by the Romano-canonical example as it had developed on the European Continent since the medieval period.²⁰ Procedural acts could be performed throughout litigation until final judgment (with some exceptions, such as submitting procedural defences (exceptions) which had (and still have) to be submitted in an early stage, an innovation dating from the 1890s).²¹ The court could (and can), for example, order the submission of additional evidence whenever needed.

Since the start of the third millennium and especially since 2002, the ‘concentration’ of civil litigation has been an issue in Dutch civil proceedings. This has given rise to what may be termed the ‘post-defence hearing model’.²² Although Dutch civil procedure does not know a main hearing as in German civil procedure (*Haupttermin*), this model nevertheless prescribes that in the majority of cases the judge should order an oral hearing after the submission of the statement of defence.²³ This hearing is ordered by an interlocutory judgment that may indicate which issues are on the agenda of the hearing.²⁴ Parties may be ordered to submit supplementary documents and are usually ordered to appear in person. The hearing may be used for various purposes, e.g. for establishing the relevant facts and for attempting an amicable settlement.²⁵ If the judge is satisfied that the case can be decided after this hearing, he may do so without allowing any further statements or procedural acts. If more information is needed, he

¹⁸ See, for example, the contributions of Uzelac and Zoroska in C.H. van Rhee & A. Uzelac (eds.), *Evidence in Contemporary Civil Procedure. Fundamental issues in a Comparative Perspective*, Cambridge etc.: Intersentia, 2015.

¹⁹ On these reforms, see C.H. van Rhee, ‘Dutch Civil Procedural Law in an International Context’, in: M. Deguchi & M. Storme (eds.), *The reception and transmission of civil procedural law in the global society. Legislative and Legal Educational Assistance to Other Countries in Procedural Law*, Antwerp/Apeldoorn: Maklu, 2008, p. 191-212.

²⁰ On the Romano-canonical procedure, see e.g. K.W. Nörr, *Romanisch-kanonisches Prozessrecht. Erkenntnisverfahren erster Instanz in civilibus*, Heidelberg: Springer, 2012.

²¹ Art. 128(3) CCP. See also *Voorstel van wet tot wijziging van het Wetboek van Burgerlijke Regtsvordering van Mr. A.F.K. Hartogh*, The Hague: Belinfante, 1895-1898, and A.F.K. Hartogh & C.A. Cosman, *De wet van 7 Juli 1896 (Stbl. no 103) tot wijziging van het Wetboek van burgerlijke regtsvordering, toegelicht door...*, The Hague: Belinfante, 1897.

²² See also the contribution of Hoogers *et al.* in C.H. van Rhee & A. Uzelac (eds.), *Evidence in Contemporary Civil Procedure. Fundamental issues in a Comparative Perspective*, Cambridge etc.: Intersentia, 2015.

²³ Art. 131 CCP.

²⁴ Art. 4.1 *Landelijk procesreglement voor civiele dagvaardingszaken bij de rechtbanken* (National procedural directions for civil summons cases at the general court of first instance) and Art. 4.3 *Landelijk procesreglement voor de civiele rol van de kantonsectoren* (National procedural directions for the civil cause-list of the cantonal section of the general first instance court).

²⁵ Art. 131 jo. Arts. 87 and 88 CCP.

will issue an interlocutory judgment elaborating on the burden of proof and ordering the submission of witness evidence, the appointment of an expert or announcing a visit to a locality by the court.²⁶ The court cannot go back on its decisions regarding evidence in the interlocutory ruling, unless new circumstances occur after the decision. It may also happen that events after the interlocutory judgment ordering the submission of evidence lead to a new decision on the burden of proof.²⁷

Recent reform plans aim at the introduction of digital litigation²⁸ and these reforms will give rise to further changes in civil procedure. As stated, the present distinction between the introduction of a civil case by way of a writ of summons or a petition will be abolished even though several of the existing differences in procedure will remain, the (currently already digital) general cause-list hearings for scheduling purposes and for the execution of procedural acts will be replaced by a simplified, individual case calendar in an individual digital environment (referred to as ‘Mijn Zaak’, i.e. ‘My Case’), whereas the post-defence hearing will gain in importance as an instrument for the judge to promote celerity.²⁹

At present, procedural acts are, as a rule, rendered in writing.³⁰ Since no audio or video recordings are made of court hearings including the hearing of witnesses, the case file has great significance. Where parties are allowed to submit their statements in oral form,³¹ the records of the hearing will summarize those statements in written form. The current reform plans aim at changing this situation, by facilitating the use of audio and video recordings of hearings, including the administration of witness evidence.³²

²⁶ Art. 232 CCP.

²⁷ HR 20-01-2006, NJ 2006, p. 78.

²⁸ In the legislative proposal, the use of the terminology ‘electronic litigation’ is discouraged, since due to wireless systems of data processing not all digital litigation can be referred to as ‘electronic’ anymore. See *Voorstel tot Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht* (Legislative proposal for amendment of the Code of Civil Procedure and the General Administrative Law Act in relation to the simplification and digitalisation of the law of procedure) (Kamerstukken 34 059).

²⁹ See *Voorstel tot Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht* (Legislative proposal for amendment of the Code of Civil Procedure and the General Administrative Law Act in relation to the simplification and digitalisation of the law of procedure) (Kamerstukken 34 059).

³⁰ With some exceptions, e.g. where witnesses are heard by the court of first instance in cases where no appeal is possible; in these cases the court may decide not to make a written record of the testimonies of witnesses but include a short summary of the testimonies in the judgment only (Art. 181(1) CCP).

³¹ This happens in cases dealt with by the small claims and specialized section of the first instance court (‘cantonal section’ or in Dutch: *Sector Kanton*, Art. 82(2) CCP).

³² See *Voorstel tot Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht* (Legislative proposal for amendment of the Code of Civil Procedure and the General Administrative Law Act in relation to the simplification and digitalisation of the law of procedure) (Kamerstukken 34 059).

Special mention should be made here of proceedings on appeal. Generally speaking, when compared to other European jurisdictions,³³ Dutch law is very liberal as regards what procedural acts may be performed on appeal (in practice, this does not cause significant delays). On appeal, litigants may correct mistakes made at first instance and may introduce new arguments, new facts, new defences and new evidence.³⁴ However, defences that have been expressly abandoned at first instance (in Dutch: *gedekte weren*) cannot be brought forward on appeal.³⁵

Various fundamental principles are observed in Dutch civil litigation. Court hearings are public,³⁶ and this is obviously in line with the requirements of Article 6 of the European Convention of Human Rights. The *Dispositionsmaxime*, which lays down that the parties determine whether or not to bring a court action as well as the content of this action, is observed since the court is not allowed to go beyond the facts stated by the parties to justify their claims and defences.³⁷ The court will not help a party to complete its statements. The same holds for evidence: the court assesses the evidence after it has been submitted. If the evidence is incomplete, the party concerned will learn about this from the judgment. The court is not under an obligation to initiate evidentiary proceedings itself when the evidence is incomplete, even though the court may exercise *ex officio* powers in this respect as indicated above. The principle of equality is also observed, and this entails that both parties should be heard by the judge equally (either orally and/or in writing).³⁸ The judge may not obtain information from a party without allowing the other party to comment on this information,³⁹ and he may only decide the matter on the basis of documents and information of which both parties have been able to obtain knowledge during the proceedings and on which they have been allowed to comment.⁴⁰ Furthermore, it can be claimed that in the Netherlands a principle comparable to the German *Wahrheitspflicht* (duty of truth) exists, codified by Article 21 of the Dutch Code of Civil Procedure. This Article provides that the parties have the duty to provide all facts that are relevant for the decision of the case fully and truthfully. If they do not observe this duty, the judge may draw the conclusions with regard to the facts he deems fit. The relevance of the duty of Article 21 is, however, limited in value since it only aims at preventing deliberate lies, whereas facts that are advanced by one party and that are not disputed by the other party do not have to be proven; the judge may not investigate such facts even though he may feel that there are problems as regards the truth. This is only different if these facts give rise to legal consequences

³³ See, e.g. the contribution of Aras in C.H. van Rhee & A. Uzelac (eds.), *Evidence in Contemporary Civil Procedure. Fundamental issues in a Comparative Perspective*, Cambridge etc.: Intersentia, 2015.

³⁴ Art. 353(1) jo. Art. 130 CCP; HR 16-12-1926, NJ 1927, p. 263, W 11612; HR 03-09-1993, NJ 1993, p. 714; HR 01-03-2002, NJ 2003, p. 355 (HJS).

³⁵ Art. 348 CCP.

³⁶ Art. 27 CCP.

³⁷ Art. 24 CCP.

³⁸ Art. 19 CCP (*audi et alteram partem*). See also W.D.H. Asser, *Salomo's wijsheid. Hoor en wederhoor: een rechterlijk oor voor partijen*, Nijmegen: Gouda Quint, 1992.

³⁹ Art. 19 CCP. See also Art. 12 Act on Judicial Organisation (*Wet op de Rechterlijke Organisatie*, hereafter: RO).

⁴⁰ Cf. Art. 85(4) CCP.

which are not at the free disposition of the parties.⁴¹ In addition, Dutch law recognizes the principle of *ius curia novit*.⁴² The principle means that positive law does not need to be pleaded and proven since the court is supposed to know the law. Even foreign law does not need proof (although the judge may be required to obtain information on foreign law)⁴³ since the court is supposed to know foreign law if the parties state that foreign law applies.⁴⁴ The free assessment of evidence is sometimes also mentioned as a fundamental principle of civil procedure⁴⁵ (see below for further details).

1 Dutch Evidence Law in General

1.1 Facts that Need Proof

As in other modern systems of civil procedure,⁴⁶ not all facts alleged by a party need proof in Dutch civil litigation. This is true for facts that are not disputed or not sufficiently disputed by the opponent party,⁴⁷ and obviously this is different from the approach in socialist systems of civil procedure where the court may establish the truth of uncontested facts if doubts about their truthfulness arise.⁴⁸ No proof is needed either for facts that are expressly recognized by the opponent party.⁴⁹ Notorious facts and general empirical rules (rules of experience) do not need to be put forward by the parties and do not need proof either,⁵⁰ just as procedural facts that are observed by the judge in the court action.⁵¹ The same is true for positive law according to the principle of *ius curia novit* that prevails in Dutch law⁵² (see above).

1.2 Burden of Proof

The parties are in charge of proving contested facts according to the burden of proof as established by the court. The main doctrine on burden of proof in Dutch civil litigation is provided by Article 150 of the Code of Civil Procedure: The party who invokes the

⁴¹ Art. 149(1) CCP.

⁴² Art. 25 CCP.

⁴³ This procedure is regulated in Arts. 67-68 CCP.

⁴⁴ HR 22-02-2002, NJ 2003, p. 483.

⁴⁵ Art. 152(2) CCP.

⁴⁶ H. Nagel & E.M. Bajons (eds.), *Beweis – Preuve – Evidence: Grundzüge des zivilprozessualen Beweisrechts in Europa*, Baden-Baden: Nomos, 2003. For an older but still relevant study see H. Nagel, *Die Grundzüge des Beweisrechts im europäischen Zivilprozess*, Baden-Baden, Nomos, 1967.

⁴⁷ Art. 149(1) CCP.

⁴⁸ See e.g. the contribution of Uzelac in C.H. van Rhee & A. Uzelac (eds.), *Evidence in Contemporary Civil Procedure. Fundamental issues in a Comparative Perspective*, Cambridge etc.: Intersentia, 2015.

⁴⁹ Art. 154 CCP.

⁵⁰ Art. 149(2) CCP.

⁵¹ W. Hugenholtz & W.H. Heemskerk (continued by W. Heemskerk in collaboration with J.M.L. van Duin, R.S.I Lawant and I.C. Blomsma), *Hoofdlijnen van Nederlands burgerlijk procesrecht*, Dordrecht: Convoy Uitgevers, 2015, No. 78.

⁵² Art. 25 CCP.

legal consequences of the facts or rights posed by him has the burden of proof of these facts or rights, unless a specific legal rule or the requirements of equity or fairness require a different distribution of the burden of proof. A party who has the burden of proof and who does not provide the required evidence will suffer the detrimental consequences of not having proven the facts that are relevant for his case since the burden of proof produces what in Dutch is called the ‘evidentiary risk’ (*bewijsrisico*). There is not, however, a duty (in German: *Pflicht*) to submit evidence in the sense that a party can be forced to submit it.

1.3 Evidentiary Agreements

Under certain circumstances, the parties may conclude a so-called ‘evidentiary agreement’ (in Dutch: *bewijsovereenkomst*). In this agreement, they may deviate from the applicable rules of evidence pending litigation or exclude their application in view of future litigation. The agreement may concern issues such as the burden of proof and the exclusion of certain means of proof. The court is bound by this agreement, unless the agreement concerns proof of facts which according to the law give rise to legal consequences that are not at the free disposition of the parties.⁵³ The general rules of contract law of the Civil Code apply to ‘evidentiary agreements’.

1.4 Offers of Proof

The party with the burden of proof has to offer proof of the facts on which the claim or defence is based (apart from some rare exceptions where proof of the contrary has to be provided by the opponent party). Quite often this proof can be found in the documentary evidence or assumptions accepted by the court. In those cases, the opponent party will have to offer counter-proof. The judge may ignore an offer to provide proof if it is, for example, too vague, not serious or irrelevant for the decision of the case.⁵⁴ However, a judge may never deny the administration of evidence based on the chances of whether or not a party will succeed in providing the proof that is required for his case.⁵⁵ An offer to provide counter-proof cannot be rejected.⁵⁶

1.5 Submission of Evidence

As in most other modern European systems, the *Eventualmaxime* does not exist in Dutch civil procedure (this is an example of 19th century French influence; the *Eventualmaxime* was a feature of the German *gemeines Recht*),⁵⁷ and there are no strict rules on when new facts and evidence should be introduced at first instance or on appeal. However, apart from documentary evidence, which may be submitted without a

⁵³ Art. 153 CCP.

⁵⁴ For appeal, see HR 09-07-2004, NJ 2005, p. 270; HR 28-01-2011, NJ 2012, p. 603; HR 27-05-2011, NJ 2011, p. 512; HR 31-10-2014, ECLI 3075.

⁵⁵ See conclusion of Advocate-General Biegman-Hartogh, NJ 1986, p. 766.

⁵⁶ Art. 168 CCP.

⁵⁷ E.g. J. Schulte, *Die Entwicklung der Eventualmaxime*, Cologne etc.: Carl Heymanns, 1980, p. 3 *et seq.*

court order, other evidence can only be introduced when the court issues an interlocutory judgment to this end and therefore the court is in control of evidence taking.⁵⁸ In the Netherlands, it is not exceptional that even appellate courts take evidence. Appeal is a complete rehearing of the aspects of the first instance judgment that are brought before the appellate court. On appeal, the same rules on the introduction of facts and the submission of evidence apply as at first instance. Both at first instance and on appeal a party should not abuse his procedural rights by submitting facts and evidence at a late point in the court action.⁵⁹ Article 133(4) of the Code of Civil Procedure provides that procedural acts (including the submission of evidence) that have not been executed within the period of time fixed for them by the judge (if such time period has indeed been fixed by him) cannot be executed anymore.⁶⁰

Even though the parties have a lot of freedom in determining when they submit documentary evidence, the way in which litigation is framed in the Netherlands results in the parties having an interest in introducing facts and indicating their evidence at an early stage, i.e. in the statement of claim (which is part of the summons)⁶¹ and in the statement of defence,⁶² respectively. After all, the standard procedure requires the judge to order the parties to make an appearance before him after submission of the statement of defence (unless the case is unsuitable for such a hearing).⁶³ At the end of this court hearing, where the parties may introduce additional facts and arguments and where the judge should make sure that the principle of *audi et alteram partem* is sufficiently observed, the judge may decide that he has acquired enough information to decide the matter without giving the parties an opportunity to introduce additional statements of case and evidence.⁶⁴ Since the litigants may not be given an opportunity to submit further statements and evidence after the hearing, they have an incentive to be as complete as possible in their respective statements of claim and defence and at the court hearing.

1.6 Interlocutory Judgments Relating to Information and Proof

If a court thinks that the information given by the parties is lacking clarity, an interlocutory judgment is used to invite the parties to give the clarifications that are needed. The clarification can be given in written form or at an oral hearing following the decision of the court. The interlocutory judgment is also used to order one or both parties to submit proof or counter-proof of facts explicitly described in that judgment.⁶⁵ The actual submission of evidence is entirely up to the parties. The court is not even

⁵⁸ Art. 353(1) jo. Arts. 130 and 149 *et seq.* CCP.

⁵⁹ Art. 353(1) jo. Art. 130 CCP; HR 16-12-1926, NJ 1927, p. 263, W 11612; HR 03-09-1993, NJ 1993, p. 714; HR 01-03-2002, NJ 2003, p. 355 (HJS).

⁶⁰ However, in HR 18-03-2011, NJ 2012, 315 the Dutch Supreme Court states that disregarding the time-limit has to be evaluated in light of the efficient and speedy administration of justice.

⁶¹ Art. 111(3) CCP.

⁶² Art. 128(5) CCP.

⁶³ Art. 131 CCP.

⁶⁴ Art. 132 CCP.

⁶⁵ Art. 232 CCP.

under an obligation to request the deposition of documentary evidence that has been mentioned by a party without actually submitting it (although it may do so; see below).⁶⁶ The parties will not get a second chance if they do not submit evidence following an interlocutory judgment to this extent.

If the court orders the submission of a specific piece of evidence (for instance when a party claims to be in possession of the original contract, but does not produce it), not complying with this order will give the court the power to draw the conclusions regarding this piece of evidence it deems fit.⁶⁷

1.7 Judge in Charge of Taking Evidence

Evidence can only be taken by the judge, a judge-commissioner or a panel of judges (three judges). There are no specific conditions for taking evidence before a judge-commissioner. As a rule, the judge-commissioner hears witnesses if the case is decided by a panel (in that event, the judge-commissioner has to be part of the panel deciding the case, unless serious reasons exist why this cannot be done; these reasons need to be expressed in the judgment).⁶⁸ If the case is decided by a single judge, this single judge will hear the witnesses himself.

1.8 Ex officio Powers of the Judge

Although the collection of evidence is a task of the parties, the judge may (to a certain extent) also *ex officio* be active in this respect (see the introduction above), but he is restricted by the statements put forward by the parties.⁶⁹ Collection of evidence beyond the contested facts submitted by the parties is not allowed. That is why it may be held that in Dutch civil litigation only the formal, not the material truth is relevant, although the duty of truth expressed in the Dutch Code of Civil Procedure may act as a counterbalance in this respect.

1.9 Presence of the Parties During Proof Proceedings

The parties have the right to be present when evidence is taken, and this is in line with fundamental principles of civil procedure. Article 167 of the Code of Civil Procedure determines that the judge can even order parties to be personally present when witnesses are heard. In the case of the appointment of an expert, the expert will be instructed to invite the parties to assist at his activities. The expert also has to give the parties the opportunity to ask questions and to make remarks.⁷⁰

⁶⁶ HR 09-03-2012, LJN BU9204.

⁶⁷ Art. 22 CCP.

⁶⁸ Art. 155 CCP.

⁶⁹ Art. 24 CCP.

⁷⁰ Art. 198(2) CCP.

1.10 No Limitations on the Means of Proof

As in most modern systems of civil procedure, evidence can be administered by all means; there are only a few exceptions. An example of an exception can be found in Article 1:78 of the Dutch Civil Code: a marriage that has been concluded in the Netherlands can in principle only be proven by way of the official certificate of marriage or an official document in which a civil partnership has been commuted into a marriage. Furthermore, in some cases, proof is only possible by producing proof in written form (as is the case with jurisdiction clauses).⁷¹

In some instances the law provides that witness or documentary evidence is only allowed when other types of evidence have been destroyed. This is for instance the case in Article 1:79 of the Dutch Civil Code that allows proof of a marriage by witness evidence if the register of marriages has been destroyed.

There is no mandatory sequence in which evidence has to be taken in the Netherlands. Documentary evidence is submitted before and after the post-defence hearing, whereas witnesses can only be heard after an interlocutory judgment to this end (the latter is also true for hearing experts and a local inspection).

1.11 Counter-proof

Counter-proof is obviously allowed in civil matters. Occasionally, however, counter-proof is excluded by law. Article 8:48 of the Dutch Civil Code, for example, does not allow counter-proof against a signed and dated document specifying the goods that have been received for transportation (“CT document”) issued to the sender of goods by a carrier that uses more than one means of transport, at least if the document has been transferred to a third party who acts in good faith. As regards third parties, further examples can be found in Articles 8:414 and 921 of the Dutch Civil Code, and in the ruling of the Supreme Court that against a third party no counter-proof is allowed where it concerns a document that has been registered in the public register of mortgages.⁷² Moreover, if the facts of the case are such that the law instructs the court to assume a legal fiction (which is *not* the same as a legal presumption), counter-proof is never possible.

1.12 Free Evaluation of Evidence and Limitations

There is no hierarchy of evidence in the Netherlands, with a few exceptions. The judge is free in assessing the evidence, and obviously this means that the Netherlands has broken with the Romano-canonical tradition in this respect.⁷³ This principle is deeply entrenched in Dutch civil procedural law. It can be found in Article 152(2) of the Code

⁷¹ Art. 8(5) CCP.

⁷² HR 22-10-2010, NJ 2011, p. 111.

⁷³ See e.g. J.-Ph. Lévy, ‘La preuve dans les droits savants au Moyen Âge’, in: J.Ph. Lévy, *La Preuve* (Recueils de la Société Jean Bodin pour l’histoire comparative des institutions 17: Moyen âge et temps modernes), Brussels: Editions de la librairie encyclopédique, 1965, p. 137-168.

of Civil Procedure. The exception is where the law provides otherwise, e.g. where the judge has to consider the case proven by a certain means of proof unless counter-proof is produced (i.e. ‘compulsory proof’). Public and private evidentiary documents (these should be distinguished from ordinary documents; see below), for example, provide in principle full proof between the parties and their heirs as regards the statements of the parties recorded in these documents if they are drafted in order to provide proof of these statements.⁷⁴ Counter-proof is allowed.⁷⁵ Perhaps the best definition of the principle of the free assessment of evidence in Dutch civil procedural law is that the judge decides on proof according to his ‘intimate conviction’ (in this – as in other respects – Dutch law follows the French example).

No standards of proof are formulated in Dutch civil procedural law. As just stated, the judge decides the case based on his intimate conviction, but within the boundaries set by the parties in their statements of facts. The judge freely evaluates the evidence and needs to be convinced that the facts have been proven, unless specific proof rules apply such as those concerning ‘compulsory proof’⁷⁶ (see above). The Dutch legal system does not provide methodological guidance for judges on the free assessment of evidence.

Apart from this, it should be pointed out that, although Dutch law does not have a minimum standard of proof, the country does have a minimum standard of counter-proof. This standard depends on the way the facts have been proven by the party with the burden of proof. In case of compulsory proof, for counter-proof what is needed is to ‘knock the bottom out of’ the proof submitted.⁷⁷ This is a rather high standard. In the case of the existence of presumptions, the other party only has to make a reasonable case of his refutations.⁷⁸ In case witnesses are heard on both sides, the judge takes his decision on the basis of his intimate conviction regarding the credibility of the witness testimonies.

1.13 Early Gathering of Evidence

Pre-trial discovery in the technical, common law sense does not exist in the Netherlands. However, there are some means available in the Dutch Code of Civil Procedure to acquire information before the action is brought into court. According to Articles 186 *et seq.* of the Code, a preliminary hearing of witnesses may be ordered by the court at the request of an interested party before an action has been brought. The court cannot order such a hearing *ex officio*, and the request must be submitted by a party who has an interest in the preliminary hearing of witnesses. In the specific case for which the preliminary hearing is asked, the administration of proof by way of witnesses needs to be allowed, otherwise a preliminary hearing of witnesses is not allowed.

⁷⁴ Art. 157(2) CCP.

⁷⁵ Art. 151(2) CCP.

⁷⁶ Art. 152(2) CCP.

⁷⁷ See HR 02-05-2003, NJ 2003, p. 468.

⁷⁸ For instance in HR 23-11-2012, NJ 2012, p. 669.

The aims of a preliminary hearing of witnesses can be manifold. One may think of the need to hear witnesses quickly after the relevant facts have occurred, or to safeguard evidence that may be lost otherwise (witnesses may, for example, die), to allow the parties to evaluate whether bringing a civil action will be appropriate, to prevent litigation by way of a settlement based on the information obtained by way of a preliminary hearing of witnesses,⁷⁹ to determine who should be summoned to court as the defendant, to stimulate a subsequent efficient hearing of the case, and to prevent interlocutory proceedings during the action for the hearing of witnesses (since the necessary witnesses have already been heard before the action was brought).

The judge needs to take care that the preliminary hearing will not be used as a fishing expedition,⁸⁰ or in order to uncover business secrets. He may not deny a preliminary hearing of witnesses based on a prediction of the outcome of the future civil action.⁸¹ In general, a request for a preliminary hearing of witnesses can only be rejected on very limited grounds, which all come down to the lack of sufficient interest on the side of the requesting party.⁸² This could be the case when the evidence has already been produced.⁸³

Since 1988, the Dutch Code of Civil Procedure also allows a preliminary expert report and a preliminary local inspection to be ordered by the court.⁸⁴ The rules applying to a preliminary expert report and local inspection are roughly the same as the rules applying to the preliminary hearing of witnesses.

A preliminary hearing of witnesses to secure evidence can also be ordered when the action has already been commenced.⁸⁵ The same is true for an expert report and a local inspection.⁸⁶

1.14 Illegal Evidence

In the Netherlands, the concept of illegal evidence or illegally obtained evidence is of limited relevance in civil litigation. In 1988, the Legislature decided not to regulate this issue in the Code of Civil Procedure but to leave the development of it to case law.⁸⁷

In Dutch legal literature, we read that the duty to litigate in a fair manner and not with the help of information that has been obtained illegally has to be weighed against the

⁷⁹ Art. 191(1) CCP.

⁸⁰ See Art. 193 CCP.

⁸¹ HR 06-06-2008, NJ 2008, p. 323.

⁸² Art. 189 jo. 166(1) CCP. Criteria have been set in HR 13-09-2002, NJ 2004, p. 18.

⁸³ See HR 22-10-2010, NJB 2010, p. 2000.

⁸⁴ Arts. 202-207 CCP.

⁸⁵ Art. 186(2) CCP.

⁸⁶ Art. 202(2) CCP.

⁸⁷ See G.R. Rutgers, R.J.C. Flach & G.J. Boon (eds.), *Parlementaire geschiedenis van de nieuwe regeling van het bewijsrecht in burgerlijke zaken: Parlementaire stukken systematisch gerangschikt*, Deventer: Kluwer, 1988.

duty of truth of the parties in a civil lawsuit and the interest of finding the truth in civil litigation in general. In the literature, there seems to be consensus about the fact *that* illegally obtained evidence *may* result in the exclusion of this material in civil litigation. There is, however, no agreement about the question of *when* illegally obtained evidence may be excluded (i.e. left out of consideration by the judge).⁸⁸

In practice and as a general rule, the judge may use any means of proof in civil litigation. Unfortunately, relevant case law usually deals with the question *whether* or not evidence has been obtained illegally, and *not* with the question whether it may be excluded.

Examples of cases concerning possibly illegally obtained evidence are:⁸⁹

1. A recording without notification of a business call by telephone *cannot* be qualified as illegally obtained;⁹⁰
2. Camera observations of the house of someone entitled to welfare and made by civil servants in the execution of their legal duty to uncover fraud are *not* illegally obtained;⁹¹
3. Video recordings of the check-out counter of a shop made by an employer without informing his employees indeed causes a breach of the right to privacy but this does *not* hinder the use of these recordings in a civil lawsuit since in the case at hand there existed a presumption of criminal acts being committed which could only be uncovered with video recordings;⁹²
4. Secretly taken pictures and video recordings by an insurer of the victim of a traffic accident in order to uncover whether the victim was limited in his movements due to the whiplash resulting from the accident are in principle illegally obtained (the right to privacy is at stake here). There may be circumstances, however, which justify obtaining the information in the manner mentioned above, but this can only be decided by taking into consideration the circumstances of the case, by weighing the gravity of the contravention of the right to privacy, on the one hand, and the interests that are served by the contravention of this right, on the other (i.e. finding the truth in the civil lawsuit). In the case at hand, the Supreme Court did not answer the question whether indeed there was a justification;⁹³
5. The submission in a civil action of a report made in a criminal lawsuit may be in contravention of the right to privacy of the opponent party, but this is *not* necessarily the case.⁹⁴

A recent case might be of interest too, since in it the use of illegally obtained evidence was refused by the court of appeal.⁹⁵ The Dutch Supreme Court did not quash this

⁸⁸ See Asser Procesrecht/Asser 3 2013, p. 145.

⁸⁹ All mentioned in Asser Procesrecht/Asser 3 2013, p. 146.

⁹⁰ HR 16-10-1987, NJ 1988, p. 850.

⁹¹ HR 11-11-1994, NJ 1995, p. 400.

⁹² HR 27-04-2001, NJ 2001, p. 421.

⁹³ HR 31-05-2002, NJ 2003, p. 589.

⁹⁴ HR 11-09-1998, NJ 1999, p. 664.

decision and thus considered the decision on appeal *not* in contravention of the law. In the case, an insurer had obtained evidence by contravening the right to privacy of the insured (this was concluded by also taking into consideration a Code of Conduct for insurers holding specific rules on the matter). The insurer submitted this illegally obtained evidence in a civil lawsuit. Due to the fact that alternatives were available to obtain the necessary information for the insurer, and due to the fact that there was no reason to assume fraud on the side of the insured person, and since the insured person had not refused to cooperate with the insurer, the court of appeal refused to take into consideration the illegally obtained evidence contravening the right to privacy.

Parties against whom illegally obtained evidence is used may consider whether an action in tort can be brought against the opponent party who makes use of the illegally obtained evidence. Using illegally obtained information in a civil lawsuit may constitute a tort, e.g. due to the contravention of the right to privacy or because the information used had to remain secret for other reasons (e.g. evidentiary privileges).

Perhaps the safest way to express the situation in the Netherlands is that in a civil lawsuit illegally obtained information may be used, unless... The aim of the norm that has been contravened when obtaining the evidence must be weighed against the duty of truth of the parties and the interest of establishing the truth in civil cases. For example, stealing information will not lead to the exclusion of this information as evidence unless the theft also results in the contravention of a norm that excludes the information for publication by all means, e.g. where the evidence is privileged or where the safety of the State is at stake.⁹⁶

2 Types of Evidence

Article 152(1) of the Dutch Code of Civil Procedure provides that proof may be administered by all means unless the law determines otherwise. Accordingly, in most cases there are no limitations as regards the means by way of which evidence may be administered, i.e. Dutch law does not know a *numerus clausus* in this respect.

Some means of proof are specifically regulated by the Code of Civil Procedure: documentary evidence (including proof by way of accounts),⁹⁷ witness testimony (including the testimony of party-witnesses),⁹⁸ expert reports⁹⁹ and a local inspection.¹⁰⁰ An example of a means of proof that is not regulated in the Code of Civil Procedure is presumptions.

⁹⁵ ECLI:NL:HR:2014:942.

⁹⁶ See Asser Procesrecht/Asser 3 2013, p. 143-148.

⁹⁷ Arts. 156 *et seq.*

⁹⁸ Arts. 163 *et seq.*

⁹⁹ Arts. 194 *et seq.*

¹⁰⁰ Arts. 201 *et seq.*

2.1 Documentary Evidence

2.1.1 General

While there is no definition of documents in the Code of Civil Procedure, or elsewhere, a document in Dutch civil procedure is seen as an entity capable of carrying legible characters that express an idea when considered in relation to each other. Electronic documents obviously meet the requirement and are therefore regarded as documents.¹⁰¹

Video or audio recordings, on the other hand, do not meet the requirement, so they cannot be regarded as documents proper. Since there is no *numerus clausus* as regards means of proof, however, they are nevertheless means of proof (although not documents), and no negative consequences result from their not being qualified as documents.

Article 160(1) of the Code of Civil Procedure provides that the force of documentary evidence resides within the original document. Copies may be submitted in court but the opponent party may ask to see the original.¹⁰² Article 160(2) lays down that authenticated and full copies of public evidentiary documents (on these, see below) that need to be archived by the relevant authorities according to the relevant legal rules may also serve as evidence. In this case, the original document does not have to be produced in court.

As a general rule, the parties are free to submit documentary evidence (in the broadest sense of the word) in any stage of the proceedings (see above). Documentary evidence is, as a rule, submitted to the court by the parties and does not have to be read at a court hearing.

Three types of documents are distinguished in Dutch civil procedural law as means of proof: ordinary documents, private evidentiary documents (in Dutch: *onderhandse akten*) and public evidentiary documents (in Dutch: *authentieke akten*).¹⁰³

Ordinary documents, in the sense of documents which cannot be considered as ‘evidentiary documents’ (*akten*), do not have specific evidentiary value. The judge determines whether or not such documents can serve as proof of the facts regarding which a party has the burden of proof. They can be the sole evidentiary basis of a judgment.¹⁰⁴

Article 156(1) of the Code of Civil Procedure defines ‘evidentiary documents’ (*akten*) as signed documents drafted in order to provide proof. Although this is not mentioned in the Code, this should be read as ‘to provide proof in civil matters’. Thus documents governed by public law (like driving licences) are not considered to be ‘evidentiary

¹⁰¹ See e.g. Arts. 843a(1) and 843b(1) CCP. See also Asser Procesrecht/Asser 3 2013, p. 154.

¹⁰² Art. 85 CCP and HR 22-11-2013, ECLI 1384.

¹⁰³ Art. 156 CCP.

¹⁰⁴ Art. 152 CCP.

documents' for the purpose of civil procedure (they can, however, be produced in court as proof; they are classified as 'ordinary documents'). According to Article 156(2), public evidentiary documents are documents that are drafted in the required manner by an official who is competent to do so according to the law, aiming at recording what the official has perceived or what he has executed. Private evidentiary documents are defined as documents which are not public in nature.¹⁰⁵

Private and public evidentiary documents enjoy a specific status in proof-taking since they will be considered to provide full proof ('compulsory proof') when certain requirements are met (see below).

According to Article 159(1) of the Code of Civil Procedure, a document that has the appearance of a public evidentiary documents will be considered as such until it has been proven that it is not a public evidentiary document. There are no limitations as regards the manner in which it can be proven that a document is not a public evidentiary document.

According to Article 157(1) of the Code of Civil Procedure, public evidentiary documents provide full proof as regards the perceptions or acts which the competent official has recorded. Article 157(2) provides in addition that public and private evidentiary documents provide in principle full proof between the parties and their legal successors as regards the statements of the parties recorded in these documents if they are drafted in order to provide proof of these statements.

Article 158 of the Code of Civil Procedure provides specific rules for private evidentiary documents in which the obligation of a party to pay a money debt is recorded without specifying obligations for the other party. In that event, the rule of Article 157(2) (i.e. full proof) only applies if the debtor has written the whole document manually or if he has written his approval on a typed document mentioning the amount in words. This requirement does not need to be met as regards a bond loan or if the debtor acts in the exercise of his profession or in a business context.

If the signature under a private evidentiary document is expressly contested by the party against whom it would serve as full proof, such a private evidentiary document cannot serve as proof unless the origin of the signature under the document can be proven by the party who uses the document as evidence.¹⁰⁶ There are no limitations as regards the manner in which the origin of the signature can be proven.

If the character of a public evidentiary document or the signature under a private evidentiary document is not contested, but the content of these documents is, counter-proof is available without limitations unless excluded by law.¹⁰⁷ However, there is a high minimum standard for this counter-proof.¹⁰⁸

¹⁰⁵ Art. 156(3) CCP.

¹⁰⁶ Art. 159(2) CCP.

¹⁰⁷ Art. 151(2) CCP.

¹⁰⁸ Knocking out the bottom. See HR 02-05-2003, NJ 2003, p. 468.

Judicial decisions in civil disputes have the status of documentary evidence (public evidentiary document), and often result in the judge having to consider certain procedural facts to be proven unless counter-proof is produced ('compulsory proof').¹⁰⁹ If a criminal judgment in which the Dutch judge has decided that it is proven that a person has committed a certain crime is submitted as proof in a civil case, the judge has to consider the crime as proven unless counter-proof is produced (even though the criminal judgment can only be classified as an ordinary document in civil proceedings).¹¹⁰ Administrative decisions, are also mere ordinary documents and do not constitute any form of 'compulsory proof'.

2.1.2 Electronic Documents and Electronic Signature

In the Netherlands, electronic documents may be used for evidentiary purposes. The probative value of electronic documents is, just as the probative value of other means of proof, left to the free evaluation of the judge.¹¹¹ To be considered as a legal instrument with a special evidentiary status, electronic documents have to meet the relevant requirements (i.e. they should qualify as private or public evidentiary documents). In practice, electronic public or private evidentiary documents are non-existent.

Electronic documents can be signed by way of an electronic signature. The electronic signature is regulated by Article 3:15a of the Dutch Civil Code. This article specifies that in order for an electronic signature to have the same value as an ordinary signature, the method of authentication used for the electronic signature should be sufficiently reliable given the specific circumstances of the case at hand. Reliability is presumed if the signature meets the following requirements: a) the signature is exclusively related to the person having signed the document; b) it allows identification of the person having signed; c) the signature has been executed by means which are exclusively available to the person having signed; d) the signature is related in such a manner to the signed document that any later changes in this document can easily be detected; e) it is based on a qualified certificate as regulated in the Dutch Law on Telecommunications (*Telecommunicatiewet*, 1998); and f) it has been generated by way of a safe means for generating electronic signatures as provided by the same Law. The parties may, however, agree to deviate from the above requirements.

2.1.3 Duty to Submit Accounts

Litigating legal persons or non-legal persons being professionals or involved in commercial activities must, at the orders of the court, provide their accounts for consultation in court proceedings to which they are a party.¹¹² If the court's orders are not complied with, the judge may conclude as he deems fit with regard to the facts in

¹⁰⁹ Arts. 156 *et seq.* CCP.

¹¹⁰ Art. 161 CCP. This rule does, however, not apply to any other decision in the criminal judgment than the one concerning the crime itself. See HR 27-03-2015, ECLI 760.

¹¹¹ Art. 152 CCP.

¹¹² Art. 162(1) CCP.

question. In cases concerning annual accounts, the court may *ex officio* fortify its orders by way of *astreinte*.¹¹³

2.1.4 Evidence in Possession of the Opponent or a Third Party

If a party wants to use evidence in the possession of his opponent or a third party, he may ask the judge to order the opponent or the third party to make such evidence available. The evidence must be identified sufficiently and without such identification a party cannot get hold of documents in the possession of an opponent or a third party. The relevant articles in the Dutch Code of Civil Procedure are Articles 843a and 843b.

The first mentioned Article provides that he who has a justifiable interest can ask the court to allow him, at his own expense, to consult or acquire a copy or excerpt of documents (including electronic documents) concerning a legal relationship in which he himself or those to whom he has succeeded are a party. Consultation must be made possible or the copy or excerpt must be provided by the person who has the relevant document at his disposal. The judge determines, if necessary, the manner in which the document can be consulted, or the manner in which a copy or excerpt can be obtained. Those who can claim a privilege do not have to provide the necessary information. Others do not have to cooperate if there are serious reasons for not doing so or if the required information is not necessary for the proper administration of justice.

Article 843b lays down that a party who has lost a certain means of proof can ask the court to order those who have evidentiary material proving the fact concerning which the lost means of proof would have provided proof to allow him to consult this material or to provide a copy or excerpt of it.

An attachment or garnishment order can be issued against the person who is in possession of the necessary documents.¹¹⁴ The only purpose of a subsequent seizure of the documents by a bailiff (who is allowed to access every place, including private residences) is to secure its preservation. To obtain a right to consult the document or a copy of it, the procedure of Article 843a of the Code of Civil Procedure has to be followed.¹¹⁵

A proposal for new, more elaborate legislation is pending in Parliament and, if introduced, will result in new articles in the Code of Civil Procedure.¹¹⁶ However, it seems that the proposal for new legislation will be repealed.

¹¹³ Art. 162(3) CCP.

¹¹⁴ Asser Procesrecht/Asser 3 2013, p. 201.

¹¹⁵ HR 13-09-2013, LJN BZ9958.

¹¹⁶ Proposed Arts. 162a-162c. See *Wetsvoorstel Aanpassing van het Wetboek van Burgerlijke Rechtsvordering in verband met de wijziging van het recht op inzage, afschrift of uittreksel van bescheiden* (33 079). See also Asser Procesrecht/Asser 3 2013/200.

2.2 Witnesses

2.2.1 General

The judge orders the hearing of witnesses when a party offers proof by way of witnesses if this type of proof is allowed in the case at hand and if the court finds that proof of contested facts is indispensable for the final judgment.¹¹⁷ The right to present witness evidence only comes into being after a court decision regarding the burden of proof.

It should also be noted that the court in the summons procedures is not allowed to nominate witnesses of its own motion. Only in petition procedures (originally only meant for non-contentious matters) has this power been attributed to the courts.¹¹⁸

Witnesses have to be called to court by the interested party. In doing so, the party needs to indicate the facts as regards which proof has been ordered by the court and the consequences of failing to appear.¹¹⁹ The interested party may use a registered letter for this purpose, but also the services of a bailiff.¹²⁰ The advantage of summoning a witness to court by way of a bailiff is that witnesses who do not make an appearance after being summoned may be taken to court with the help of the public authorities (i.e. the police) in order to testify if this is ordered by the court.¹²¹ Refusing to appear as a witness is a criminal offence.¹²²

The interested party needs to communicate the names and places of residence of the witnesses he wants to have heard at least one week in advance to the opponent party and to the court.¹²³ If the list of witnesses has not been submitted in time, this may lead to the ordering of a new hearing at the expense of the party concerned.¹²⁴

In principle, witnesses indicated by a party must be heard by the judge if that party has been ordered to provide proof or counter-proof.¹²⁵ The court fixes a date and time for the hearing of witnesses.¹²⁶ Outside of the hearing, no witnesses can be heard, unless a new hearing is ordered.

The interlocutory judgment ordering a witness hearing will include decisions regarding date and place and will set time limits for the specification of the personal details of the witnesses.¹²⁷

¹¹⁷ Art. 166(1) CCP.

¹¹⁸ Art. 284(2) CCP.

¹¹⁹ Art. 170 CCP.

¹²⁰ Art. 170(1) CCP.

¹²¹ Art. 172 CCP.

¹²² Art. 444 Dutch Criminal Code.

¹²³ Art. 170(1) CCP.

¹²⁴ Art. 237(1) CCP.

¹²⁵ Art. 166(1) CCP.

¹²⁶ Art. 166(2) CCP.

¹²⁷ Art. 166(2) CCP.

The general rule applies that witness testimony should be about facts that have been perceived by the witness himself.¹²⁸ Hearsay evidence is allowed.¹²⁹

A statement in writing submitted by a party containing the depositions of a witness cannot be regarded as witness evidence but should be classified as documentary evidence.¹³⁰

2.2.2 Capability to Serve as a Witness

No one is deemed to be unfit to serve as a witness in the Netherlands. Article 177(3) of the Code of Civil Procedure, however, determines that those persons who cannot understand the significance of the oath (or promise) to speak the truth will not be allowed to take the oath. The same is true for witnesses who have not reached the age of 16 years. These witnesses are admonished to tell nothing but the truth. If the judge makes use of the testimony of such witnesses, he has to give reasons for this in the judgment.¹³¹

2.2.3 Duty to Testify

Article 165(1) of the Dutch Code of Civil Procedure provides that everyone who has been summoned to court in the required manner has the duty to testify in court. This duty was introduced as it is a societal interest that in litigation the truth can be uncovered.

A witness who refuses to provide witness testimony is subject to civil imprisonment if such is asked for by the interested party. The expenses of such imprisonment have to be paid by the interested party, and the civil imprisonment may not last longer than 1 year.¹³² The judge will only order civil imprisonment if he is of the opinion that this is justified in light of establishing the truth.¹³³ Civil imprisonment is rarely ordered in the Netherlands. Criminal prosecution¹³⁴ and an *astreinte* are also possible if a witness refuses to testify;¹³⁵ this does not apply to party-witnesses.¹³⁶

2.2.4 Information Provided by the Parties and Party-witnesses

The courts in the Netherlands routinely order a court appearance after the statement of defence has been submitted (unless this is deemed superfluous).¹³⁷ This hearing may be

¹²⁸ Art. 163 CCP.

¹²⁹ Asser Procesrecht/Asser 3 2013, p. 171.

¹³⁰ See Asser.

¹³¹ Art. 177(3) CCP.

¹³² Art. 173(1) CCP.

¹³³ Art. 173(2) CCP.

¹³⁴ Arts. 192 and 444 Dutch Criminal Code.

¹³⁵ HR 18-05-1979, NJ 1980, p. 213.

¹³⁶ HR 06-04-2012, LJN BV3403.

¹³⁷ Art. 131 CCP.

used for several purposes. One of these purposes is to obtain information from the parties.¹³⁸ The judge questions the parties and the parties may also ask each other questions unless the judge rules that a specific question is not allowed. Such a hearing may be ordered later in the proceedings too and is an effective means of obtaining the required information, including an elaboration of the claim and an opinion on any factual or legal matter. When witnesses are heard, the court has the power to ask the parties questions as well.¹³⁹

Parties are also allowed to serve as witnesses in their own case. The testimony of a party may not serve as proof for the facts that that party needs to prove, unless the party's testimony serves to complement incomplete proof.¹⁴⁰ This last provision does not apply in cases where the party-witness is providing counter-proof in a situation where his opponent has the burden of proof and proof has indeed been delivered by this opponent; in that event his testimony may serve as proof for facts advanced by him.¹⁴¹ The same is true for written depositions of party-witnesses.¹⁴² The restriction does, however, apply in case of two party-witnesses whose depositions support each other.¹⁴³

As regards party testimony, part of the general rules relating to witness testimony apply. Article 166(1) of the Code of Civil Procedure provides that witness testimony (and therefore party testimony) can be offered by the parties, but it may also be ordered *ex officio* by the court. Testifying parties are under oath, since the ordinary rules on witnesses apply to them in this respect.¹⁴⁴

A party-witness has a duty to testify, just like other witnesses. He cannot excuse himself from testifying, and this is different from, for example, his spouse or family members (see below). Nevertheless, he may excuse himself if there is a risk of a criminal judgment for felony (in Dutch: *misdrif*) against him if he would testify (*nemo tenetur*).¹⁴⁵ The legality of a refusal of a party-witness to testify is evaluated by the judge. Civil imprisonment is not available if a party-witness refuses to testify (as stated, civil imprisonment is allowed where other witnesses are concerned).¹⁴⁶ However, a refusal to testify allows the judge to draw the conclusions he deems fit as regards the particular facts at stake.¹⁴⁷

¹³⁸ Art. 88 CCP.

¹³⁹ Art. 179(3) CCP.

¹⁴⁰ Art. 164(2) CCP.

¹⁴¹ HR 17-01-2003, NJ 2003, 176; HR 20-01-2009, RvdW 2009, p. 243.

¹⁴² HR 24-01-2003, NJ 2003, p. 166.

¹⁴³ HR 14-04-2005, NJ 2005, p. 272.

¹⁴⁴ Art. 177(2) CCP.

¹⁴⁵ Art. 165(3) CCP.

¹⁴⁶ Art. 173(1) CCP.

¹⁴⁷ Art. 164(3) CCP.

2.2.5 Privileged Witnesses¹⁴⁸

Article 165 of the Dutch Code of Civil Procedure provides that certain groups of witnesses can excuse themselves from providing witness testimony in a court of law. Witnesses who can excuse themselves are certain family members, including previous spouses and registered partners, and those who need to keep information secret as a result of their office or profession (e.g. notaries,¹⁴⁹ lawyers,¹⁵⁰ legal staff of legal aid bureaus,¹⁵¹ medical doctors¹⁵² and priests).¹⁵³ Staff and other persons working for such privileged witnesses may also claim the privilege not to testify derived from the privilege of the originally privileged witness, including secretaries¹⁵⁴ and external experts.¹⁵⁵ The question as to who may claim to be privileged due to his profession has to a large extent been determined in case law.

A privilege against self-incrimination (*nemo tenetur*) is recognized in Dutch civil procedure.¹⁵⁶ A witness may refuse to answer a question if doing so would subject himself or certain family members to the risk of a criminal sentence for felony (in Dutch: *misdrif*).

As a rule, witnesses who claim to be privileged have to appear in court to invoke their privilege orally. The Dutch Supreme Court has accepted an exception in the sense that witnesses may file a petition asking the court to decide in advance on their claim to the privilege not to testify.¹⁵⁷ The judge hearing the witnesses decides on this issue by way of a judgment (in the summons procedure) or a court order (in the petition procedure). The interested party may file an appeal against the decision of the judge that a witness has rightfully claimed to be privileged.¹⁵⁸ The parties cannot appeal against a decision assuming an exception to the privilege or deciding that the privilege does not apply; in that event only the witness himself may file an appeal.¹⁵⁹

Professional witnesses claiming a privilege are only allowed to refuse to testify if it concerns information that is provided to them within the context of their profession. This means that they cannot claim to be privileged in general.¹⁶⁰

¹⁴⁸ On this topic in depth: F.J. Fernhout, *Het verschoningsrecht van getuigen in civiele zaken*, Deventer: Kluwer, 2004.

¹⁴⁹ HR 13-01-2006, NJ 2006, p. 480.

¹⁵⁰ HR 22-06-1984, NJ 1985, p. 188.

¹⁵¹ HR 25-10-1985, NJ 1986, p. 176.

¹⁵² HR 14-12-1948, NJ 1949, p. 95.

¹⁵³ HR 14-12-1948, NJ 1949, p. 95.

¹⁵⁴ BRvC 8 November 1948, NJ 1949, p. 66.

¹⁵⁵ HR 29-03-1994, NJ 1994, p. 552.

¹⁵⁶ Art. 165(3) CCP.

¹⁵⁷ HR 19-09-2003, NJ 2005, p. 454 (although the Supreme Court has not repeated this decision).

¹⁵⁸ HR 17-01-1986, NJ 1987, p. 352.

¹⁵⁹ HR 17-11-1967, NJ 1968, p. 164.

¹⁶⁰ Art. 165(2)b CCP.

In principle, the privilege for witnesses exercising a profession involving confidentiality is absolute. An exception can only be made in ‘extremely exceptional circumstances’. Such circumstances only occur when the privileged witness himself is involved in criminal activities of a severe nature with those who share confidential information with him.¹⁶¹

Let us look at professional privilege and professional secrets in further detail now.

The first category of secrets that are recognized in Dutch law and that can affect the taking of evidence are the professional secrets of those professions for the exercise of which secrecy (confidentiality) is essential. In this category we find doctors, notaries, clergy and advocates (see above).

The second category of secrets depends on specific regulations. State secrets and military secrets can be such that the law specifies that there is no obligation to testify in court. State secrets in general are not recognized as a category of information about which no questions can be asked.¹⁶² If the secret is covered by the Act on the Intelligence and Security Services (*Wet op de inlichtingen- en veiligheidsdiensten*, 2002), Articles 85 and 86 of that Act give a privilege to everyone who is involved in the enforcement of the Act. Members of local boards and Parliament, parties in a procedure, study advisors in certain specified circumstances, the secret services, whistle-blowers, judges in chambers, the King and threatened witnesses in criminal cases are also privileged based on specific regulations.¹⁶³

The third category of secrets is based on the general obligation of the court to balance the interest of finding the truth in civil proceedings against the interest claimed by the witness not to reveal the information concerned. Here the circumstances of the case are decisive. In this way, for instance, the privilege of journalists who do not want to reveal their sources is protected. Only in exceptional circumstances, to be invoked by the party who called the witness, is the journalist under an obligation to answer questions regarding his sources.¹⁶⁴ This happens when the general principle of the interest of finding the material truth outweighs the privilege of journalists regarding their sources. This can be the case when there are no other means of establishing the truth.¹⁶⁵

The Netherlands do not have bank secrecy, whereas business secrets can be protected, but only if they fall within the third category above. When a CEO (or general manager of a juridical person) refuses to testify about a certain fact, claiming that it represents a company’s business secret, the court will not accept this excuse, but the circumstances of the case can be such that specific questions will not have to be answered. When the

¹⁶¹ HR 14-06-2005, NJ 2005, p. 353.

¹⁶² HR 22-12-1989, NJ 1990, p. 779.

¹⁶³ F.J. Fernhout, *Het verschoningsrecht van getuigen in civiele zaken*, Deventer: Kluwer, 2004, p. 241-271.

¹⁶⁴ HR 10-05-1996, NJ 1996, p. 578.

¹⁶⁵ HR 09-11-1999, NJ 2000, p. 461.

company is a public law entity or a holder of concession or public service, this is one of the circumstances that have to be considered by the court.¹⁶⁶

2.2.6 Immediacy

In Dutch civil procedure the principle of immediacy is not strictly observed where it concerns witnesses. The hearing of witnesses is often entrusted to a judge-commissioner, who usually summarises the testimony to a court clerk. This summary is read to, approved by and signed by the witnesses,¹⁶⁷ and it becomes part of the case file. Article 155 of the Code of Civil Procedure states that the main rule is that the judge before whom evidence has been administered should as much as possible be the judge by whom the final judgment is rendered or that he should be a member of the panel entrusted with rendering a final judgment. The reason for not following this rule has to be expressed in the final judgment. No means of recourse are available against the decision not to follow the main rule.¹⁶⁸

2.2.7 Video

The current Code of Civil Procedure clearly assumes that witnesses are heard by the judge in a hearing where both parties are present. The law does not provide for any possibility to hear witnesses at a distance, either by telephone or by videoconferencing. However, when all interested parties, including the witness, agree, ‘teletestimony’ is possible,¹⁶⁹ but the statement of the witness will not be a witness’s testimony as described in the Code of Civil Procedure. This does not matter at all, since there is no *numerus clausus* as regards the means of proof: the court is entirely free to evaluate all evidence provided and therefore ‘teletestimony’ may be taken into consideration by the judge as well. Currently, a legislative proposal has been introduced in Parliament that will regulate this matter in more detail.¹⁷⁰

2.2.8 Oath and Perjury

Witnesses normally take an oath or make a promise to tell nothing but the truth. They themselves choose whether to take an oath or make a promise.¹⁷¹ A witness cannot be forced to take an oath or make a promise. According to Article 178 of the Code of Civil Procedure, a witness who makes an appearance in court and who refuses to take the oath

¹⁶⁶ HR 17-03-1981, NJ 1981, p. 382.

¹⁶⁷ Art. 180 CCP.

¹⁶⁸ However, HR 13-10-2014, NJ 2015, p. 181 seems to indicate that the Dutch Supreme Court has changed its view on this matter, allowing recourse against this decision.

¹⁶⁹ District Court Rotterdam 4 June 2009, LJN BJ8571.

¹⁷⁰ *Voorstel tot Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Algemene wet bestuursrecht in verband met vereenvoudiging en digitalisering van het procesrecht* (Legislative proposal for amendment of the Code of Civil Procedure and the General Administrative Law Act in relation to the simplification and digitalisation of the law of procedure) (Kamerstukken 34 059).

¹⁷¹ Art. 177(2) CCP.

(or make a promise) will be liable for costs, and will also have to pay damages if there are reasons for this. Refusing to take the oath or make a promise is a criminal offence.¹⁷²

Perjury is a criminal offence and can be prosecuted under the Criminal Code.¹⁷³ The maximum penalty is imprisonment for a maximum of six years or a fourth category money penalty (currently €20,250 max.). In practice, perjury is usually punished with a three-month term of imprisonment.

2.2.9 Judge Questions Witnesses

Witnesses are questioned by the court (in the case of a panel, usually before a judge-commissioner).¹⁷⁴ The parties and their counsel are also allowed to ask questions.¹⁷⁵ The judge may determine that a specific question or questions do not have to be answered by the witnesses.¹⁷⁶ It is not necessary for the parties to adduce a witness deposition before the witness provides oral testimony.

Article 179(1) of the Code of Civil Procedure provides that witnesses are heard individually in the sense that witnesses who have not been heard yet should not be present when a fellow witness is being questioned (unless the latter witness is a party-witness; a party-witness may be present, for which reason party-witnesses are always heard first). Witnesses who have already testified may attend the hearing of a later witness, unless the court orders otherwise.

Witness testimony is summarized by the judge, and this written record is read to and if necessary amended and then signed by the witnesses, the judge and the court clerk.¹⁷⁷ This document becomes part of the case file and is used in the decision of the matter. If the case is not subject to appeal, no separate record of the hearing of witnesses needs to be made. In that event, mention of the witness testimony will be made in the judgment.¹⁷⁸

Preparing witnesses before the hearing in the sense of rehearsing their statement at a lawyer's office is considered to be unethical in the Netherlands.

2.2.10 Counter-Proof

After the hearing of witnesses, the judge determines the date and time for what is called a *contra-enquête*, i.e. hearing witnesses for the other party.¹⁷⁹ In the Netherlands, cross-examination in the Anglo-American sense does not occur. The parties (including the

¹⁷² Art. 192 Dutch Criminal Code.

¹⁷³ Art. 207 Dutch Criminal Code.

¹⁷⁴ Art. 155 CCP.

¹⁷⁵ Art. 179(2) CCP.

¹⁷⁶ Art. 179(2) CCP.

¹⁷⁷ Art. 180 CCP.

¹⁷⁸ Art. 181(1) CCP.

¹⁷⁹ Art. 168 CCP.

opponent party) and their counsel may ask the witnesses questions, but the major part of the questioning is done by the judge.

2.3 Experts

2.3.1 General

Expert reports are only ordered when proof by witnesses does not seem to be possible (which is especially the case in disputes of a technical nature, for instance about the proportion of minerals in certain food supplements). The court is not limited to, for example, public interest issues for ordering expert evidence.

2.3.2 Appointment of the Expert and the Expert Report

When the court expresses its intention to appoint an expert, first the parties are asked to make a proposal regarding the number and the person of the experts. If the parties agree on the experts, usually the court follows their choice. Otherwise the expert is (or the experts are) selected from a list of experts informally kept by the court. Recent initiatives from the Ministry of Justice have led to a national registration of experts, but until now the register is only relevant for criminal cases.¹⁸⁰ The parties do not have the right to reject a court appointed expert. However, immediately after the report has been submitted, the parties are allowed to raise objections against the report on the ground that the expert was not impartial.¹⁸¹

The judge appoints the expert.¹⁸² Obviously, the parties may suggest issues that the expert should report on, but the final decision on hearing an expert is the judge's and the parties do not have the possibility to file an appeal against this part of his decision. The interlocutory judgment ordering the taking of expert evidence will include detailed instructions for the procedure to be followed by the expert, including a list of questions that has to be answered in his final report.¹⁸³ This part of the decision is in principle open to appeal. Since 1 January 2002 the Dutch Code of Civil Procedure provides that the judge may also allow a party himself to have experts who are not appointed by the judge heard in court. Whether or not such experts will be heard is decided by the judge.¹⁸⁴ As regards party experts, various articles of the Code of Civil Procedure dealing with hearing witnesses have been declared equally applicable.¹⁸⁵ The Dutch Code of Civil Procedure does not provide for written party expert reports, although it is up to the parties to submit such reports as (ordinary) documents. These reports do not have any special evidentiary status, but will be taken into consideration by the court.

¹⁸⁰ See www.nrgd.nl (last consulted on 18 May 2015).

¹⁸¹ HR 02-05-2014, NJ 2014, p. 310.

¹⁸² Art. 194(2) CCP.

¹⁸³ Art. 194(1) CCP.

¹⁸⁴ Art. 200 CCP.

¹⁸⁵ Art. 200(5) CCP.

Article 197 of the Code of Civil Procedure provides that the judge establishes the time period for the submission of an expert report.

2.3.3 Procedure

To a large extent, the same procedure is followed in hearing witnesses and experts. The judge is in charge of the hearing of experts and may decide – either *ex officio* or at the request of a party – to ask additional questions.¹⁸⁶ If the court wishes, the activities of the expert will be supervised by a judge.¹⁸⁷

The parties have the right to be present when the expert conducts his activities, and then they have the right to ask questions and to make remarks.¹⁸⁸ They have a duty to cooperate with the expert.¹⁸⁹

2.3.4 Written or Oral Report

The expert can be ordered to deliver a written report. He can also be ordered to deliver his report orally, and this will happen during a court hearing.¹⁹⁰ Whether an expert will produce a written or oral opinion is decided by the judge.¹⁹¹ A distinction between the two types of expert evidence from the perspective of their evidentiary value is not made.

Usually, a written report is added to the case file and will be debated by the parties. An oral report has to be presented at a court hearing and is recorded by the court clerk. This document has to be signed by the judge, the clerk and the expert.¹⁹² It has to be mentioned, however, that this is highly exceptional; in practice, all experts are ordered to submit a written report, of which a draft has to be submitted to the parties first.

In the Netherlands, the judge is not bound by written expert opinions.

2.4 Local Inspection

A local inspection (*descente*) can be ordered *ex officio* by the judge by way of an interlocutory judgment. The court determines the place, date and time for a local inspection in the interlocutory judgment. The parties may be present and may make comments and requests. The judge may hear witnesses at the site of the local inspection. A report is made of the inspection. A local inspection is not needed when physical objects can be shown in court during the hearing.¹⁹³

¹⁸⁶ Art. 194(5) CCP.

¹⁸⁷ Art. 198(2) CCP.

¹⁸⁸ Art. 198(2) CCP.

¹⁸⁹ Art. 198(3) CCP.

¹⁹⁰ Art. 197(2) CCP.

¹⁹¹ Art. 194(2) CCP.

¹⁹² Art. 198(5) CCP.

¹⁹³ Art. 201(2) CCP.

2.5 Presumptions

Presumptions are sometimes classified as indirect means of proof. In the Netherlands, presumptions are not dealt with in the Code of Civil Procedure anymore as a separate category of means of proof. As in other European jurisdictions,¹⁹⁴ it has been argued that presumptions are actually not even a means of proof but part of an intellectual exercise by the judge or a particular method of legislation.¹⁹⁵ We encounter presumptions nevertheless at some particular places in legislation outside the Code of Civil Procedure. In practice, presumptions are an important means for the court to shift proof for the party with the burden of proof to counter-proof for the other party. According to the case law of the Dutch Supreme Court, under specified circumstances the causal relationship between damage and either tort or a breach of contract even has to be assumed by means of a presumption.¹⁹⁶ In other cases as well, presumptions may be useful.¹⁹⁷

3 Language

The official languages in Dutch courts are Dutch and Frisian.¹⁹⁸ However, not all documents have to be translated. The court may accept documents in foreign languages. In most cases, English, French and German texts do not have to be translated. If a translation is required, it should be done by a translator who has been sworn in under the Act on sworn interpreters and translators (*Wet beëdigde tolken en vertalers*, 2007). The statements of case themselves, petitions and writs have to be in Dutch.

The court may accept testimony in a foreign language, which is then translated into Dutch by the judge hearing the witness. It is up to the court to decide on this, which is done with caution. The parties producing witnesses do not have a right to interpreter and translation services. If no interpreter has been provided by the party who called the witness and if the court has indicated that translation by an interpreter is needed, the witness is simply not heard.

Interpreters are not mentioned in the Code of Civil Procedure. Accordingly, they are not sworn in by the court, but, as stated, the interpreters used by the court are ‘sworn interpreters’.

¹⁹⁴ H. Nagel, *Die Grundzüge des Beweisrechts im europäischen Zivilprozess*, Baden-Baden: Nomos, 1967, p. 98 *et seq.*

¹⁹⁵ On this topic, see C.H. van Rhee, *Presumptions in Dutch Private Law (19th and 20th Centuries) within a European Context*, in: R.H. Helmholz & W.D.H. Sellar (eds.), *Law of Presumptions. Essays in Comparative Legal History (Comparative Studies in Continental and Anglo-American Legal History, 27)*, Berlin: Duncker & Humblot, 2009, p. 85-101.

¹⁹⁶ HR 19-03-2004, NJ 2004, p. 307.

¹⁹⁷ See e.g. HR 12-09-2003, NJ 2005, p. 268.

¹⁹⁸ Cf. Parliamentary Proceedings I 2007-2008, 31 513, C, p. 2, and see Act on the Use of the Frisian Language (*Wet gebruik Friese taal*) (Stbl. 2013, 382).

4 Costs

In the Netherlands, two types of legal expenses are distinguished. Legal expenses either concern judicial expenses generated by making use of the court system (in Dutch: *proceskosten*) or so-called extra-judicial expenses (in Dutch: *buitengerechtelijke kosten*), e.g. costs for legal advice. The two types of costs have a different legal basis and follow different rules. Again, here we may note French influence.

Judicial expenses are limited to lawyer's fees, court fees, the costs of a bailiff, the costs of experts and the costs of witnesses and interpreters. In cases in which legal representation is not mandatory, the unrepresented party can also claim travel expenses and a compensation for the time lost while attending court hearings.¹⁹⁹

Extra-judicial expenses are the costs made for recovery of the claim and costs made to establish the extent of the damages and liability of the other party.²⁰⁰ Expenses can only be extra-judicial when they have *not* been made for the 'instruction' of the proceedings or the preparation of the pleadings.²⁰¹ These extra-judicial expenses are treated as compensation for damages.

The general rule in the Netherlands is that the loser also pays the full costs of his opponent (except for costs made for legal representation which in practice are only partially recoverable).²⁰²

When evidence by witnesses is ordered, the party who is bringing forward the witness will have to pay the costs of the witness. These costs are determined by the judge at the witness hearing after the witness has been heard.²⁰³ The party's lawyer has to guarantee that these costs will be paid.²⁰⁴ A costs order against the losing party will include the court-determined costs of the witnesses of the winning party.²⁰⁵ There is no obligation for a party to pay the witnesses more than has been determined by the court.

The compensation for the appearance of a witness includes travel expenses and compensation for the time lost.²⁰⁶ Reasonable travel expenses will be included for the full amount. For the time of the witness a fixed tariff is set at a mere €6.81 per hour.²⁰⁷ The court has the freedom to use another tariff when both parties agree (which happens quite often).

¹⁹⁹ Art. 238(1) CCP.

²⁰⁰ Art.6:96 Dutch Civil Code.

²⁰¹ Art. 241 CCP.

²⁰² Art. 237 CCP.

²⁰³ Art. 182 CCP.

²⁰⁴ Art. 32 Code of Conduct for Lawyers (*Gedragsregels voor Advocaten*, 1992).

²⁰⁵ Art. 182 jo. 237 CCP.

²⁰⁶ Art. 182 CCP.

²⁰⁷ Art. 2(1) Decree on Tariffs in Civil Cases (*Besluit tarieven burgerlijke zaken*) in conjunction with Art. 8(1) Decree on Tariffs in Criminal Cases (*Besluit tarieven strafzaken*).

When the costs are contested, the witness needs to submit proof of the costs he has made.²⁰⁸ In practice, however, reasonable costs of the witness are hardly ever contested. Costs of witnesses are paid after they have been heard.

The costs of an expert are determined by the court.²⁰⁹ The main rule is that the claimant has to deposit the expenses for the expert with the court, although the judge may, for specific reasons (usually related to the burden of proof), decide that costs should be deposited by the defendant or by both parties instead (in case of litigants of limited means, no deposit will be ordered, since the costs are covered by the State).²¹⁰ The court is not liable for the costs and does not take any responsibility for them. For that reason, the experts are always instructed only to commence their activities when the court-determined deposit has been paid. A costs order against the losing party will include the court-determined costs of the experts advanced by the winning party.²¹¹ When the expert has submitted his report, he will send in his bill. The court will determine the expert's compensation (which can be less than the bill), which compensation will have to be paid by the party who had to pay the deposit.

When the court orders a local inspection, the costs of the court and the court clerk are fully covered by the State.²¹²

Where the hearing of witnesses is concerned, the costs of interpreter services can be part of a costs order against the losing party. These costs may be awarded if they are considered to be reasonable. Costs of interpreters are paid afterwards, but the costs of the translation of documents cannot be recovered.²¹³

5 Final Remarks

The above discussion of the Dutch law of evidence in civil matters clearly shows that it is based on a tradition dating back to the 19th century and that its roots in French civil procedure (e.g. the proof standard of the 'intimate conviction' of the judge) and, through this procedure, in Romano-canonical law can still be noted. However, since the time of its introduction in 1838 in the Code of Civil Procedure and the Civil Code, various reforms have changed the outlook of Dutch evidence law in civil matters, especially as a result of law reforms in 1988 and 2002.

In 1988, it was decided that the traditional distinction between substantive evidence law, which could be found in the Civil Code, and procedural evidence law, which was part of the Code of Civil Procedure, should be abolished. Since that time, the Dutch law of evidence in civil matters has been firmly based in the Code of Civil Procedure. This reform did not, however, reduce the powers of the judge in the evidentiary proceedings.

²⁰⁸ Art. 150 CCP.

²⁰⁹ Art. 199 CCP.

²¹⁰ Art. 195 CCP.

²¹¹ Art. 244 CCP.

²¹² Art. 201(6) CCP.

²¹³ HR 13-09-2013, LJN BZ5688.

In line with the continental European approach, the Dutch judge has extended powers as regards evidence. The judge may, *ex officio*, order a party to supply proof by way of witnesses although he may not nominate witnesses himself. The same approach is chosen as regards documents: the judge may order the parties to submit documents, but he may not search for relevant documents himself. He may, however, appoint an expert *ex officio* and define the issues on which the expert has to report, and he may investigate the truth of contested facts by way of a local inspection at his own motion (although this does not happen very often in practice). Currently, and this is an innovation dating from 2002, party-appointed experts may also provide expertise, and obviously this is a sign of modernity which brings Dutch civil procedural law in line with other European systems.

It is a matter of debate whether or not the Dutch law of civil evidence aims at establishing the material truth. Some authors hold that only the formal truth is aimed at, since the collection of evidence beyond the contested facts submitted by the parties is not allowed. However, the *ex officio* powers of the judge in the area of evidence as regards contested facts may help to provide a certain balance between the material and formal truth. Obviously, when the parties agree about the facts, the court has no powers to establish whether this agreement is based on true facts. This is only different if these facts give rise to legal consequences which are not at the free disposition of the parties. This is not changed by the rule of Article 21 of the Dutch Code of Civil Procedure that the parties should provide all facts that are relevant for the decision of the case fully and truthfully. The duty of Article 21 is limited in value since it only aims at preventing deliberate lies, whereas facts that are advanced by one party and that are not disputed by the other party do not have to be proven.

The Dutch system also shows its origins in 19th century French law where it is very liberal as regards the moment documentary evidence may be introduced. In principle, the parties may provide documentary evidence throughout the proceedings, and may even do so on appeal. Nevertheless, the ‘post-defence hearing model’ introduced in the Dutch Code of Civil Procedure in 2002 and explained above, results in concentration. So here, without introducing a formalistic and unworkable *Eventualmaxime* or preclusions aimed at concentration, the Dutch Legislature has achieved concentration by framing the civil lawsuit in a specific and innovative manner.

Important reforms in the Dutch Code of Civil Procedure, which are currently being prepared, will result in innovation and bring the text of the law in line with developments in modern technology, and will also extend the use of modern technology in court proceedings. Actually, the planned changes will mean an overhaul of the existing procedural model and will do away with institutions of venerable antiquity such as the ‘cause list hearing’ (rôle). Each case will get its own digital environment accessible by litigants called ‘Mijn Zaak’ (i.e. ‘My Case’). Within this environment, all kinds of evidence may be introduced, ranging from electronic documents to other types of evidence in electronic format. Hearing witnesses through video link, although already possible, will be officially regulated. These and other reforms in the Dutch system of civil evidence lead me to the conclusion that tradition and innovation currently complement each other in providing a modern evidence law that will be able to face

several of the challenges of the 21st century. Whether it is a good decision to abolish the cause-list sitting, replacing it with a 'My Case' environment, is, however, subject to debate. This is due to the fact that the cause-list sitting is public whereas 'My Case' is accessible for a limited group of people only, while it has also been claimed that a central cause-list offers the court better possibilities to monitor and handle its case load.

