NATIONAL REPORT FOR THE NETHERLANDS ON ELECTRONIC EVIDENCE AND VIDEOCONFERENCING

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DIGI-GUARD

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Digital communication and safeguarding the parties' rights: challenges for European civil procedure – DIGI-GUARD

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Questionnaire for national reports

On electronic evidence and videoconferencing

This questionnaire addresses practical and theoretical aspects regarding the taking of (electronic) evidence and videoconferencing in (cross-border) civil litigation. Each partner should provide substantive answers for their respective Member State (or additional Member State, if specifically stipulated by the coordinator). Certain questions require knowledge on instruments of cross-border enforcement in the EU, particularly Regulation (EU) 2020/1783 ("Recast Taking of Evidence Regulation"). The latter questions address the interplay between national law and the EU regime on cross-border enforcement in civil and commercial matters.

For useful information, especially relating to B IA and cross-border enforcement in the EU, please refer, among other sources, to:

- Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783),
- Impact assessment of the Taking of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0285),
- Other *travaux preparatoires* of the Recast Taking of Evidence Regulation (see e.g. https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-ec-no-1206-2001-on-cooperation-between-the-courts-of-the-member-states-in-the-taking-of-evidence-in-civil-or-commercial-matters/)
- Council Guide on videoconferencing in Cross-border proceedings (https://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/)
- The Access to Civil Justice portal hosted by the University of Maribor, Faculty of Law together with the results of our previous projects, especially our previous project Dimensions of Evidence in European Civil Procedure (https://www.pf.um.si/en/acj/projects/pr01/).

The structure of each individual report should follow the list of questions enumerated below, to the utmost extent possible. If authors choose to address certain issues elsewhere within the questionnaire, then they are instructed to make cross-references and specify where they have provided an answer for the respective question (e.g. "answer to this question is already provided in 1.6."). Following the structure of the questionnaire will enable and ease comparisons between the various jurisdictions.

The list of questions is not regarded as a conclusive one. It may well be that we did not foresee certain issues that present important aspects in certain jurisdictions. Please address such issues on your own initiative where appropriate. On the other hand, questions that are of no relevance for your legal system can be left aside. If so, indicate expressly the lack of relevance and consider explaining the reason(s).

Please provide representative references to court decisions and literature. Please try to illustrate important issues by providing examples from court practice. If possible, please include empirical and statistical data. **Where the answer would be "no" or "not applicable", because something is not regulated in your national legal order, please specify how you think it should be regulated**.

Please do not repeat the full questions in your text. There is no limitation as to the length of the reports.

Languages of national reports: English.

Deadline: 31 March 2023.

In case of any questions, remarks or suggestions please contact project coordinators, prof. dr. Vesna Rijavec: vesna.rijavec@um.si and prof. dr. Tjaša Ivanc: tjasa.ivanc@um.si ; or to assist. Denis Baghrizabehi: denis.baghrizabehi@um.si.

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1. General aspects regarding electronic evidence

(Note that the following definitions apply:

- *Authentic evidence: the content of evidence was indeed created or drawn by a person or entity declared to be its creator or author; authenticity refers to the genuine source.*
- *Reliable evidence: the content of evidence is true, accurate and non-compromised; reliability refers to the truth and accuracy of content.)*

1.1. Does the law of your Member State provide any definition of electronic evidence?

(If applicable, cite the definition of electronic evidence.)

The Dutch Code of Civil Procedure (hereinafter referred to as RV) does not provide for a general definition of electronic evidence. In addition to this, the RV also does not provide for a definition of an electronic document. However, article 156a para 1 RV states that a private deed ("*akte*") may be drawn up in another form than the written form providing that it enables the person for whose benefit the instrument constitutes evidence to store the contents of the instrument in a manner which makes those contents accessible for future use for a period of time appropriate to the purpose for which the instrument is intended to be used, and which allows the unaltered reproduction of the contents of the instrument.[1] Another exception is made for an electronic signature. Based on article 3:15a of the Dutch Civil Code, a signature may be made in electronic form. This provision refers to article 3 no. 10 – 12 of the Regulation (EU) No. 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJEU 2014, L257/73. Therefore, the definitions as laid down in article 3 no. 10 – 12 of the Regulation (EU) No. 910/2014 apply in the Dutch internal situation. Besides these two situations, Dutch law does not provide for an additional definition of the term electronic evidence.

1.2. Does the law of your Member State define of what is considered as paper document?

(If yes, please provide the definition. If not, please indicate the relevant case law.)

According to article 156 para 1 RV, a written deed ("*akte*") is a signed written document intended to be used in evidence. Furthermore, article 156 para 2 RV states that an authentic deed ("*authentieke akte*") is a deed that has been drawn up by an official civil servant who has the legal task to draw up such document. In addition to this definition, article 156 para 3 RV states that a written deed that is not an authentic deed is a private deed ("*onderhandse akte*"). Next to these deeds as laid down in article 156 RV, the Dutch accepts any other written document as evidence. There is no legal definition of the term "written document" provided in the RV. However, it is common that written evidence is admitted in the Dutch civil procedure. In the literature, written evidence is defined as evidence by means of a written document.[2]

1.3. How is electronic evidence categorised among means of evidence within the law of your Member State?

[1] The Dutch wording of article 156a para 1 RV is as follows: "*Onderhandse akten kunnen op een andere wijze dan bij geschrift worden opgemaakt op zodanige wijze dat het degene ten behoeve van wie de akte bewijs oplevert, in staat stelt om de inhoud van de akte op te slaan op een wijze die deze inhoud toegankelijk maakt voor toekomstig gebruik gedurende een periode die is afgestemd op het doel waarvoor de akte bestemd is te dienen, en die een ongewijzigde reproductie van de inhoud van de akte mogelijk maakt*."

[2] See W. Hugenholtz, W.H. Heemskerk and, K. Teuben, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht* (Convoy Uitgevers, 2021) p. 221-227.

(In answer to this question, please explain whether electronic evidence is categorised among traditional means of evidence or if electronic evidence forms a new means of evidence. Please cite relevant provisions (esp. if electronic evidence forms a new means of evidence). If electronic evidence is categorised among traditional means of evidence, please explain the reason for this categorisation and elaborate to which category of traditional evidence electronic evidence is assigned (for example, elaborate when electronic evidence is considered a document and when it is an object of inspection). Should electronic evidence be categorised among traditional means of evidence, please also comment on possible problems regarding an analogous application of traditional evidence rules.)

As stated before, electronic evidence as such is not defined in the RV. The only exemption is made by article 156a RV, which states that a private deed may also be drawn up in another form than a written form. Based on article 156a RV, an electronic deed has the same effect as a written deed as long as the requirements of article 156a RV are fulfilled. Therefore, the electronic private deed according to article 156a para 1 RV is not a new form of evidence but has the same effect as a written private deed. The reason for this categorisation is not really given in the documents implementing article 156a RV.[3] The Dutch legislator did not introduce new means of evidence as the civil procedure was and still is a written procedure, during which at the end of the day, even electronic documents are printed and filed as hard copies to the court.

1.4. Does the law of your Member State explicitly regulate that evidence or data in electronic form has evidentiary value?
(If yes, please cite the provision regulating the evidentiary value of electronic evidence (e.g., "electronic data shall not be denied legal effect or considered inadmissible as evidence in the proceedings solely on the grounds that they are in electronic form"). Please also explain if there is any presumption regarding the evidentiary value, admissibility, reliability or authenticity of electronic evidence.)

No, there is not a specific rule regarding the evidentiary value of electronic evidence of electronic data in the RV.

1.5. Does the law of your Member State explicitly differentiate between electronic and physical private documents as evidence?
(Please elaborate on whether the law of your Member State regulates electronic documents and if an electronic document has the same legal effect as a physical document. Please emphasise whether there are any provisions differentiating between electronic and physical documents. If applicable, please cite the provisions regulating electronic documents.)

As shown in the answer to question 1.1, the RV differs between written private deeds (article 156 para 1 and 3 RV) and electronic private deeds (article 156a para 1 RV). Both deeds have the same legal effect regardless of the form.

1.6. Does the law of your Member State recognise the special evidentiary value of public documents, and does this also apply to electronic public documents?
(If yes, please cite the provision regulating public documents in electronic form. Please emphasise whether any provisions differentiate between electronic and physical public documents.)

[3] See Memorie van Toelichting, Tweede Kamer, 2007-2008, 31358, nr. 3.

According to article 156 para 2 RV, an authentic deed ("*authentieke akte*") is a deed that has been drawn up by an official civil servant who has the legal task of drawing up such document. According to article 157 para 1 RV, authentic deed shall constitute conclusive evidence against any person of what the official has stated about his observations and operations within the scope of his competence. This evidentiary value does not apply to electronic documents, as there is no provision that introduces electronic public documents.

1.7. Describe the legal effects of changing the form of electronic evidence to physical.
(In answer to this question, please explain whether it is admissible to change electronic evidence (e.g., websites, social networks, or e-mail) to a physical form and, what legal effect such change has. Please also specify, whether electronic evidence is treated as a copy and whether printouts are necessary when submitting particular types of electronic evidence (e.g., websites, social networks or e-mail). If applicable, please cite the provisions relating to changing the form of electronic evidence.)

As said earlier, it is common that electronic evidence is changed to physical evidence. This is done by printing the electronic evidence, such as websites, e-mails, etc. The printouts are considered to be a copy of the electronic documents. This is however not regulated in a provision within the RV, but generally accepted by the Dutch courts.[4]

1.8. Describe the legal effects of changing the form of physical evidence to electronic.
(In answer to this question, please explain whether it is admissible to change evidence in the physical form to electronic and what legal effect such a change has. If applicable, please cite the provisions relating to changing the form of physical evidence.)

In such a case, the electronic evidence is considered to be a copy of the physical evidence. There are no provisions regulating this in the RV. Here, again, the RV does not contain a specific provision regulating such a transformation of form. However, the Dutch court generally accepted this.[5]

1.9. Explain the rules and what is considered to be an original and what a copy (the concept of original).
(If applicable, please cite relevant provisions.)

There are no rules defining the terms original or copy. However, the RV has rules on the use of copies of documents in the civil procedure. Based on article 85 para 1 RV, the parties have the right to file copies of the original documents, which they filed as evidence in the procedure. According to article 160 para 1 RV, these copies have the same effect as the original document. However, based on article 85 para 2 RV the parties have the right to claim to see the original document and not the copy. In such a case, the party who filed a copy of a document is obliged to show the original document to the court as well as to the other party. In such an event, the court examines whether the original document corresponds with the copy.

1.10. Describe the legal effects of a copy of electronic evidence within the law of your Member State.

[4] See P.G. van der Putt and P. Polter, 'Einde van het papieren plafond?, 34 Nederlands Juristenblad (2020) pp. 2535-2542.
[5] *Ibid.*

(In answer to this question, please explain when electronic evidence is considered a copy. Please also elaborate on the legal effects of a copy of electronic evidence, and, if applicable, cite the relevant provisions. Should the law of your Member State not regulate copies of electronic evidence, please explain how the court perceives a copy of electronic evidence.)

In general, the copy is considered to have the same content and effect as the original document, see article 85 para 1 RV. However, as said in answer to question 1.9, the parties have the right to claim that they wish to see the original document. In such an event, the court will examine based on article 160 para 1 RV whether the copy corresponds with the original document.

2. Authenticity, reliability and unlawfully obtained electronic evidence

2.1. Are there any particular procedure, guidelines, mechanism or protocol on how the parties shall obtain electronic evidence in order to preserve their authenticity and reliability before submitting them to the court?
(If applicable, also comment on possible effects regarding the admissibility of electronic evidence if they are not obtained in accordance with such procedures or technical guidelines.)

No, there are no particular procedures, guidelines, mechanisms or protocols on how the parties shall obtain electronic evidence in order to preserve its authenticity and reliability before submitting it to the court. It depends on the course of the procedure. For example, a party may dispute that an e-mail, which was filed as evidence, had been sent. In such an event, the other party will need to prove that this e-mail was sent. The RV does not have any general rules on this.

2.2. Is there any particular procedure on how the court should identify the source of electronic evidence?
(If any official guidelines, mechanisms or protocols are established within the law of your Member State to identify the source of evidence, by either the expert or the court, please mention those as well (e.g. in the case of evidence derived from cloud computing, blockchain or using AI algorithms).)

No, there is no such procedure. The courts are free to determine the identity of the source of electronic evidence.

2.3. Does the law of your Member State stipulate different rules or provisions for different types of electronic evidence? (*Please explain whether certain types of electronic evidence are presumed authentic and reliable and others inauthentic and unreliable. If applicable, please cite the provisions regarding (in)authenticity and (un)reliability of electronic evidence.)*

No, there is no difference made in the Netherlands.

2.4. Does an unfamiliarity with the technical part and a (high) possibility of manipulation of electronic evidence impact its evidentiary value?
(Please elaborate on whether the technical nature and a [high] possibility of manipulation of electronic evidence have any impact on the court's assessing of the evidentiary value.)

The evidentiary value is determined by the court. The courts have in general a broad discretion in determination of the evidentiary value. It depends therefore on the court to determine the evidentiary value in such a case.

2.5. When should the court appoint experts to process electronic evidence?
(Please enumerate cases in which the court may or must appoint an expert when processing electronic evidence.)

The appointment of an expert depends on the course of the proceedings. If the parties dispute regarding a specific question and wish to appoint an expert, the court can appoint an expert. However, the court will not appoint an expert ex officio, if the parties do not dispute a specific question within the procedure, like the electronic evidence.

2.6. Who bears the costs if an expert needs to be appointed to assess the reliability, authenticity and (un)lawful manner of obtaining electronic evidence?
(Please explain the distribution of costs related to potential expert assessments and opinions on the reliability, authenticity and lawful manner of obtaining electronic evidence.)

First, an advanced payment is due. According to article 195 RV, the claimant has to pay this advanced payment. In case of a winning decision, the costs of the expert shall be borne by the losing party, see article 237, article 244 RV.

2.7. What options are available to a party claiming that electronic evidence has been compromised, tampered with, manipulated or obtained illegally (e.g. by hacking into an IT system)?
(Please explain whether any special procedures are established within the law of your Member State to challenge the reliability, authenticity or manner of obtaining electronic evidence. If no special procedure exists, explain regular remedies that would apply in such a case. If applicable, cite relevant provisions, case law, guidelines or other sources regulating the procedure to challenge the admissibility of compromised electronic evidence.)

The Dutch civil procedure does not have a general rule regarding illegally obtained evidence. The courts have here a wide discretion. Only in cases where additional circumstances appear, it is possible to refuse such evidence.[6] In certain cases, the use of illegally obtained evidence could be considered as an act of tort. As a result, the party that uses such illegally obtained evidence could be liable against the other party or a third person. If this is the case, it must be evaluated based on all the facts of the case.[7]

2.8. How is the admissibility of compromised or illegally obtained electronic evidence regulated within the law of your Member State?
(Is the court bound by any rules regulating the admissibility of compromised or illegally obtained (electronic) evidence (e.g. explicit rules provided under your national legislation, rules developed through case law, etc.)? If the rules regulating the admissibility of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

The court does not have the discretion to challenge the authenticity and reliability of electronic evidence ex officio. Only if additional circumstances appear where electronic evidence has been

[6] See *Hoge Raad*, 7 Februari 1992, NJ 1993/78; *Hoge Raad*, 12 February 1993, NJ 1993/599.
[7] See *Hoge Raad*, 7 Februari 1992, NJ 1993/78.

compromised or illegally obtained, the Dutch courts could refuse such evidence.[8] Furthermore, the use of compromised or illegally obtained electronic evidence could be seen as an act of tort. The party using such kind of evidence could be liable against the other party or third persons.[9]

2.9. Which party carries the burden of proving the (in)authenticity or (un)reliability of electronic evidence?
(Please explain whether the party producing electronic evidence carries the burden of proving such evidence authentic and reliable or whether the party who challenges electronic evidence is charged with proving its inauthenticity and unreliability.)

Based on the general rule, the party has the burden of proof that invokes a certain legal consequence. If a party states that evidence presented by the other party is (in)authentic or (un)reliable, then this party will need to provide facts (as well as evidence) supporting this statement. These facts or evidence could be used as counterevidence. The party presenting the (in)authentic or (un)reliable evidence will then need to show (and if necessary, prove) that the evidence is authentic or reliable. The situation shall be different if the party contesting the evidence wishes to invoke a legal consequence by stating that the evidence is (in)authentic or (un)reliable. In such a situation, the party contesting the evidence will need to prove that this evidence is (in)authentic or (un)reliable. In both cases, the court will decide on the value of the evidence which was claimed to be (in)authentic or (un)reliable. This decision will be made based on the statements and evidence presented by the parties.

2.10. Does the court have the discretion to challenge the authenticity and reliability of electronic evidence even if neither party objects the authenticity and reliability of electronic evidence?
(Please explain if the court can challenge the authenticity and reliability of electronic evidence ex officio, e.g. when there is a high possibility that electronic evidence has been manipulated and neither party objected the authenticity and reliability of electronic evidence.)

The court does not have the discretion to challenge the authenticity and reliability of electronic evidence ex officio. However, the court has the discretion to evaluate the evidence presented by one of the parties. The court could therefore state that based on the evidence presented to the court the court is not convinced and will dismiss the claim.

2.11. How is the manipulation or (un)lawful manner of obtaining electronic evidence assessed by the court in the case of a challenge?
(In answer to this question, please explain whether judges are expected to assess if evidence was compromised or illegally obtained by themselves, whether an expert may or must be appointed, and whether any other rules and requirements have to be complied with.)

The courts have a wide discretion regarding the value of certain evidence. As said before, the judges shall usually not assess if the evidence was compromised or illegally obtained. Only in situations where the evidence is challenged, the court must decide on the value of this evidence. In accordance with article 194 RV, the court has then the option to appoint an expert to evaluate this question. Besides this, the parties have as well the option to file for an expert. The court is, however, not obliged to appoint an expert.

[8] See *Hoge Raad*, 7 Februari 1992, NJ 1993/78; *Hoge Raad*, 12 February 1993, NJ 1993/599.
[9] See *Hoge Raad*, 7 Februari 1992, NJ 1993/78.

2.12. What are the consequences if the court finds that evidence was indeed compromised or obtained illegally?
(The question refers to procedural implications, e.g. the exclusion of evidence or considerations when assessing the weight of such evidence.)

As said earlier, the Dutch courts have a wide discretion. It is up to the deciding court what consequences to draw in such cases. Based on article 21 RV, the parties are required to present the matter truthfully. If this obligation is not complied with, the court may draw the conclusion it deems appropriate. In such a case, the court could therefore draw conclusions to dismiss this evidence. However, this is in full discretion of the court.

2.13. Does the law of your Member State enable for the parties to submit written statements of witnesses?
(*If yes, are pre-recorded oral statements of witnesses admissible as evidence?)*

Yes, it is possible to submit written statements of witnesses.[10] It is also possible to submit pre-recorded oral statements of a witness as evidence.[11] This can be done in two different ways. First, the recording is submitted to the court. Second, a transcript of the recording is made and then this transcript is submitted to the court. However, in such a case the court still have the option to hear the witness again.[12]

3. Duty to disclose electronic evidence

3.1. How is the duty to disclose electronic evidence regulated within the law of your Member State?
(Please explain whether there are any special rules explicitly regulating the disclosure of electronic evidence or if general rules of disclosure apply instead. Should the rules regulating disclosure of particular means of evidence (e.g. documents, physical objects, affidavits) be applied to disclosure of electronic evidence by analogy, please explain which rules are to be used under which circumstances. Include the name of the act and the article(s) containing relevant provisions.)

In the Dutch civil procedure, there are no specific rules on the disclosure of electronic evidence. The general rules apply. In the Netherlands, there are two general rules on the disclosure of documents.

The first rule is article 22 RV. Based on this provision, the court can order the parties to submit documents that support their argumentation. The court can here order if necessary the submission of electronic evidence. If the parties do not fulfil such an order, the court may draw the conclusion it deems appropriate.

The second option is article 843a RV. Based on this provision, the parties may claim the disclosure of certain documents relating to a legal relationship, in which this party or its legal predecessors are a party. This provision requires that the party filing such claim have a legitimate interest to get access to

[10] See *Hoge Raad*, 23 december 2016, NJ 2017/24.
[11] See *Hoge Raad*, 23 december 2016, NJ 2017/24.
[12] See *Hoge Raad*, 23 december 2016, NJ 2017/24.

or obtain copies of these documents. This provision is not only limited to written documents but also applicable to data, which is recorded on a data device.[13]

3.2. What is the scope of the party's duty to disclose electronic evidence within the law of your Member State?
(Please address the circumstances under which the party is required to provide electronic evidence (e.g. the evidence was obtained in a particular manner, the evidence refers to both parties, the parties brought up the evidence when testifying, etc.), the type of evidence they are required to provide (if applicable) and procedural requirements (e.g. does the party in need of evidence have to request particular evidence with an explicit motion, does the court have any discretion when ordering disclosure, are there any time limits, etc). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

As shown in the answer to question 3.1, the Dutch civil procedural law does not have a specific provision regarding electronic evidence. The requirements for a disclosure are based on article 843a RV the following. First, the disclosure must concern certain documents. Second, the documents must relate to a legal relationship between the parties. Third, the party demanding the disclosure must have a legitimate interest. These requirements prevent fishing expeditions.

3.3 Does the duty to disclose electronic evidence apply to third persons?
(Please elaborate on whether persons not directly involved in proceedings must present or disclose electronic evidence under the same conditions as the parties or whether different rules apply. If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

No, the duty only applies between the parties.

3.4. Are there any limits to the duty to disclose electronic evidence specified within the law of your Member State?
(Does your national legislation stipulate reservations and exceptions to the duty of disclosure that would apply to (or also to) electronic evidence? On the one hand, the question refers to the right to refuse disclosure, privileges, the protection of secrecy and similar restrictions. On the other hand, it refers to measures imposed to prevent abuse in the form of fishing expeditions (requesting non-specific or broad information and evidence in the hope of gaining compromising materials) or excessive disclosure (providing an unmanageable volume of information in the hopes of confusing the parties or the court and delaying proceedings). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

In addition to the requirements regarding the disclosure based in article 843a para 1 RV, as shown in answer to question 3.2, article 843a para 4 RV contains a provision according to which a person can

[13] Article 843a para 1 RV has the following wording: "*Hij die daarbij rechtmatig belang heeft, kan op zijn kosten inzage, afschrift of uittreksel vorderen van bepaalde bescheiden aangaande een rechtsbetrekking waarin hij of zijn rechtsvoorgangers partij zijn, van degene die deze bescheiden te zijner beschikking of onder zijn berusting heeft. Onder bescheiden worden mede verstaan: op een gegevensdrager aangebrachte gegevens."* - "Any person having a legitimate interest may, at his own expense, demand to see, take a copy of or obtain an extract from certain documents relating to a legal relationship in which he or his legal predecessors are a party, from the person who has those documents at his disposal or in his custody. Documents shall be understood to include data recorded on a data carrier."

refuse the disclosure of the documents "*if there are compelling reasons for doing so, or if it may reasonably be assumed that the proper administration of justice would also be ensured without the provision of the requested information.*" With this provision, the interest of the person who has to disclose the information is guaranteed.

3.5. What are the consequences of a violation or non-compliance with the duty to disclose electronic evidence?
(Please explain whether any coercive measures or sanctions may be imposed against a party or a third person who unjustifiably refuses to comply with their duty to disclose (electronic) evidence. Does your national legislation provide for any presumptions or fictions regarding the truth of facts to be proved with undisclosed evidence? If the rules for disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

It is very common to combine the claim to disclose the documents with a measure, according to which the party that has to disclose the documents is also obliged to pay a penalty if he/she refuses to comply with the duty to disclose. In such an event, the party claiming the disclosure will get a title with a penalty payment, which the claimant can enforce. In addition, the person demanding the disclosure gets an enforcement title, which he or she can enforce.

3.6. Have there been any problems before the national courts in your Member State arising from differences in national regulations of the duty to disclose electronic evidence, or are such problems to be expected in the future?
(The answer to this question should contain an overview of any case law addressing the duty to disclose electronic evidence (or other evidence, if the same issue could arise concerning electronic evidence) in the context of cross-border proceedings, most notably any cases in which the problems resulted from national differences in the scope of the duty to disclose such evidence (e.g. a broader scope of the duty to disclose evidence in one participating Member State than in the other, privileges or exceptions existing in one Member State but not in the other, etc.). If no such case law exists, please explain any potential problems discussed in legal literature or any problems you expect to arise in practice.)

We are unaware of such problems in the Dutch legal system but we will further explore the literature and report about any relevant issue raised in doctrinal writings.

4. Storage and preservation of electronic evidence
(Storage and preservation of electronic evidence refer to the preservation of electronic evidence in active cases which have not yet been concluded with a final act. For archiving electronic evidence in closed cases, see the next part of the questionnaire.)

4.1. How is the storage and preservation of electronic evidence regulated within the law of your Member State?
(Please list legal acts or other documents establishing rules for the proper storage and preservation of electronic evidence (e.g. including guidelines, protocols and instructions) and shortly indicate their content or purpose. If the relevant solutions have developed in practice, explain these as well.)

There is no regulation or other legislation regarding the storage and preservation of electronic evidence.

4.2. Provide a short overview of requirements, standards, and protocols for properly storing and preserving electronic evidence.
(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of evidence. If there are any special rules regulating the storage of metadata, please describe them.)

There is not any regulation or any legislation with requirements, standards, and protocols for properly storing and preserving electronic evidence.

4.3. Is electronic evidence stored in one central location, or is the storage decentralised?
(Please explain the "physical" location of servers or media where electronic evidence is stored, e.g. each court might be responsible for storing electronic evidence to be used before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to store electronic evidence for all (or several) courts, etc.)

There is not any regulation or any legislation regarding the storage of electronic evidence. It is therefore not clear how the courts store electronic evidence. However, the IT service of the Dutch judiciary is performed by the IVO Rechtspraak, which is the IT provider of the Dutch judiciary.[14] They are responsible for the IT solutions of the Dutch judiciary.

4.4. Who is entitled to carry out the activities related to storing and preserving electronic evidence?
(Please explain any potential requirements or limitations on who may carry out activities related to storing and preserving electronic evidence, e.g. private vs. public entities, certification or qualification requirements, etc.)

The IVO Rechtspraak, which is the IT provider of the Dutch judiciary,[15] is responsible for the IT infrastructure of the Dutch judiciary.

4.5. Who may access electronic evidence in a particular case and how?
(Please explain who has access to electronic evidence, which conditions must be met, and which procedure must be followed.)

As the Dutch civil procedure does not have any specific rules, the general rules apply. Therefore, the court (judge and court register) as well as the parties have access to the electronic evidence. The regulation of the access is done on a case-by-case basis with consultation of the parties and the court.

4.6. How is the accessibility of stored electronic evidence preserved over time?
(Which measures are taken to guarantee the accessibility of stored electronic evidence in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

Regularly, USB-sticks are used.

[14] https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Landelijke-diensten/ivorechtspraak/Paginas/default.aspx
[15] https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Landelijke-diensten/ivorechtspraak/Paginas/default.aspx

4.7. How is the transmission of electronic evidence to other courts (e.g. to an appellate court) carried out in order to preserve the integrity of evidence?
(Please explain whether there are any special procedures to be followed by another court to access the stored electronic evidence and/or protocols for transmitting such evidence intended to preserve the integrity of the evidence and to prevent any manipulation.)

There is an internal mailing system called Zivver. This system can be accessed by the attorneys of the parties and the court. Every attorney has access to this system. More information can be found on www.zivver.com.

4.8. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa?
(Please describe rules regarding the possibility of a conversion from electronic form to physical and from physical form to electronic when storing evidence.)

There are no specific rules regarding the conversion of electronic evidence into physical evidence and vice versa.

5. Archiving of electronic evidence

(Archiving of electronic evidence only refers to the preservation of electronic evidence in closed cases that have already concluded with a final act. Please include all information regarding the storing and preserving of electronic evidence in active cases in the preceding part of the questionnaire.)

5.1. How is the archiving of electronic evidence regulated within the law of your Member State?
(Please list legal acts or other documents establishing rules for the proper archiving of electronic evidence (e.g. including guidelines, protocols, instructions) and shortly indicate their content or purpose. If relevant solutions have developed in practice, explain these as well. If the rules regulating the archiving of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

There are no provisions regarding the archiving of electronic evidence other than the general law on archives (Archiefwet).

5.2. Shortly explain the requirements, standards and protocols for properly archiving electronic evidence.
(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of electronic evidence. If there are any special rules regulating the archiving of metadata, please describe them.)

There are no specific provisions regarding the requirements, standards and protocols for properly archiving electronic evidence. There are also no guidelines set up by the Dutch judiciary regarding this point.

5.3. Is electronic evidence archived in one central location, or is archiving decentralised?
(Please explain the "physical" location of archives, e.g. each court might be responsible for archiving electronic evidence collected before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to archive electronic evidence for all (or several) courts, etc.)

In certain cases, like asylum, the Dutch judiciary started a pilot with a central archive.[16] It does not appear that this central archive applies to cases in civil and commercial matters.

5.4. Who may carry out the archiving of electronic evidence?
(Please explain any potential requirements or limitations on who may carry out the archiving, e.g. private vs. public entities, certification or qualification requirements, etc.)

In the cases regarding asylum the archiving is carried out by Central Digitaal Depot[17] of the Jusitiële Informatiedienst.[18] It is however not clear whether this applies for cases in civil and commercial matters.

5.5. Must electronic evidence be archived indefinitely, or must it be deleted or destroyed after a certain period? How is the accessibility of archived electronic evidence preserved over time?
(As electronic evidence is generally kept in an archive for an extended period of time, which measures are taken to guarantee its accessibility in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

It depends on the information whether it has to be archived or deleted or destroyed after a certain period.

5.6. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa? *(Please describe rules regarding the possibility of conversion from electronic form to physical and from physical form to electronic when archiving evidence.)*

There are no specific rules regarding the conversion of electronic evidence into physical evidence and vice versa.

6. Training on IT development

6.1. Are the judges, court personnel or other legal practitioners required to undergo any training on technological developments relevant to taking, using and assessing electronic evidence?
(Please explain whether there are any official requirements for judges or other professionals to undergo training aimed specifically at improving their skills related to technological aspects of taking evidence, and if any such trainings (voluntary or mandatory) are provided by ministries, state agencies or other entities.)

There are no requirements regarding technological developments. The Dutch judiciary has an internal training organisation (SSR) which provides different legal training programmes. The Dutch lawyers

[16] See https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Omvangrijke-archivering-digitale-asiel--en-bewaringszaken.aspx.
[17] See https://www.justid.nl/producten-en-dienstencatalogus/nieuwbouw-en-onderhoud-systemen/archivering/centraal-digitaal-depot.
[18] See https://www.justid.nl.

are as well obliged to follow training courses each year. However, in both cases (judiciary, lawyers) there are no obligations to follow specific trainings on electronic evidence.

7. Videoconference

7.1. In general, does the law of your Member State provide for videoconference technology to be used in civil proceedings?
(If you answered in the affirmative, please list the legal grounds (e.g. "Art. 100 of the Civil Code"). Please indicate when the legal grounds entered into force (e.g. 01.02.2010) and specify any amendments to the legal grounds. If an online (official or unofficial) English translation of the relevant provisions exists, please provide the URL (link). If there are "soft-law" instruments (e.g. guidelines) that supplement rules on conducting the videoconference, then please specify them.)

There is not a general provision regarding videoconferences laid down in the RV. However, with the pandemic of Covid-19, the Dutch government introduced the option of videoconferences in civil proceedings.[19] Article 2 para 1 COVID Act has the following wording: "If, due to the outbreak of COVID-19 in civil and administrative court proceedings, holding a physical hearing is not possible, oral proceedings may be conducted by a two-way electronic means of communication." There are not any specific guidelines regulating videoconference.

7.2. Does the law allow for videoconference technology to be used solely for the taking of evidence or also for conducting other procedural stages of the hearing? Videoconference in your Member State may be used for:
a) Witness testimony
b) Expert witness testimony
c) Inspection of an object (and/or view of a location)
d) Document (document camera)
e) Party testimony
f) Other means of evidence (please elaborate)
g) Conducting the hearing in broader/general terms (please elaborate)
(Specify whether videoconference technology can be used only for the taking of evidence by highlighting the categories of evidence. Please note that some Member States may not use the same categorisation of evidence or contain all above categories (e.g. party testimony). In such cases, please approximate your answer and provide additional explanation if needed. If the technology can be used in other stages of the procedure, please specify the scope of the technology's use.)

Based on the COVID Act, videoconference technology is allowed in the whole procedure. Therefore, videoconference technology is used not only for the oral hearing, but also within the evidence procedure. The Dutch Supreme Court has confirmed that this method of hearing is in conformity with the requirements of a fair trial.[20]

[19] See Wet van 22 april 2020, houdende tijdelijke voorzieningen op het terrein van het Ministerie van Justitie en Veiligheid in verband met de uitbraak van COVID-19 (Tijdelijke wet COVID-19 Justitie en Veiligheid) – ("*Act of 22 April 2020, containing temporary provisions on the Ministry of Justice and Security in connection with the COVID-19 outbreak (Temporary COVID-19 Justice and Security Act)*"), Staatsblad 2020, 124., hereinafter "**COVID Act**".
[20] See *Hoge Raad*, 25 September 2020, ECLI:HR:2020:1509.

7.2.1. If the law allows for (remote) view of location, how would such a videoconference be practically implemented?
(E.g. does the court appoint a court officer to operate the audiovisual equipment on site? For example, suppose there is a dispute between parties regarding the border/boundary between their immovable properties and the court needs to view the alleged border/boundary. Does a court officer carry the technical equipment to the site and follow instructions from the court, regarding the viewing angles etc.)

The Dutch judiciary uses different systems, such as Teams and Zoom, both of which were used here. The Court of Appeal in Amsterdam developed its own system. However, as said earlier, the Dutch judiciary did not publish any guidelines regarding the use of the different applications.

7.3. Which applications (software) are used for videoconferencing in civil court proceedings?
(Please investigate whether the courts use multiple applications.)

See answer to question 7.2.1.

7.3.1. Are the applications (see Question 7.3.) commercially available?
(If so, specify whether they are specially modified for use in court proceedings.)

Teams and Zoom are commercially available. They were not modified for the use in court proceedings. The system developed by the Court of Appeal in Amsterdam is not commercially available.

7.3.2. Are the applications (see Question 7.3.) interoperable with other applications?
(e.g. can a subject, using application X, join a videoconference, which is conducted via application Y)

No, these applications are not interoperable.

7.3.3. Does the application allow a text-based chat function during the videoconference; does it allow screen sharing and sharing of documents?
(whether and to what extent the court can restrict these functions (e.g., the parties can talk at any time, but only share their screen if permitted by the court.)

The mentioned applications can be used without any limitation. However, the courts ordered that recordings of the hearings be not permitted. This situation is the same in standard court hearings, where recordings are prohibited.

7.4. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when taking evidence?
(E.g. may the court order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; only with the consent of the person providing testimony; at the request of (both) parties; only in exceptional circumstances etc.)

The COVID Act does not provide any guidelines for the use of videoconferencing, but only provides the legal basis of such use. Therefore, there are no guidelines under which a videoconference shall take place. In practice, the courts regularly ordered a videoconference ex officio without consulting the parties. In other cases, the parties were first asked with regard to the hearing. Thus, in consultation with the parties the hearing took place either via video connection or physically. In certain cases, the

hearings were hybrid. The attorneys of the parties attended the hearing physically, whereas the parties and the witnesses attended the hearings through a video connection. The courts had and still have a wide discretion to order a videoconference or not.

7.5. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when conducting hearings?
(E.g. whether the court may order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; at the request of (both) parties; only in exceptional circumstances etc.)

As stated in answer to question 7.4, the courts have a wide discretion to order that an oral hearing take place by using videoconference technology.

7.6. If the court orders the use of the technology, may the parties oppose that decision? If so, how do the parties make their opposition clear (e.g. appeal)?

It is not possible to contest a decision of the court regarding the use of videoconferencing technology. However, parties could ask the court to hold the hearing either via video connection or physically. So, the decisions to hold the hearing in a certain form was sometimes made after consultation with the parties.

7.7. Does the law of your Member State provide that courts can, in civil procedure cases, impose coercive measures against a witness or a party to provide testimony?
(Explain also if the rules differ for videoconference testimony.)

Dutch law has two corrective measures for witnesses that do not appear in court to testify. Based on article 173 para 1 RV, the court can impose imprisonment for a maximum period of one year on a witness that does not want to testify. However, the court has to evaluate if such a measure is justified. This measure cannot however be imposed on a party that does not want to testify in a case. The second measure is a penalty.[21] The witness that does not want to testify can be ordered to pay a penalty. This penalty must be paid to the party that wants to hear the witness. The penalty cannot be imposed on a party who does not want to testify.[22] These rules do not differ for videoconference testimony.

7.7.1. Under which circumstances may a witness refuse testimony?
(Explain also if the rules differ for videoconference testimony.)

A right of refusal to testify as a witness is generally not possible. Based on article 165 para 1 RV every person is obliged to testify if this person is called for such a testimony according to the requirements as laid down in the law. According to article 165 para 2 RV, the following persons have the right to refuse the testimony: the spouse and former spouse or the registered partner and former registered partner of a party, the relatives by blood or marriage of a party or of the spouse or the registered partner of a party, up to the second degree included, all unless the party is acting in capacity, as well as those who are sworn to secrecy by reason of their office, profession or employment in respect of anything entrusted to them in that capacity. The second group of people are attorneys, doctors, priests,

[21] See *Hoge Raad*, 18 May 1979, ECLI:HR:1979:AC6585.
[22] See *Hoge Raad*, 6 April 2012, ECLI:HR:2012:BV3403.

notaries, public officers etc. According to article 165 para 3 RV, a person can refuse to testify if he would thereby expose either himself or one of his relatives by blood or marriage in the direct line or in the collateral line in the second or third degree, or his spouse or former spouse or his registered partner or former registered partner, respectively, to the risk of a criminal conviction for a crime. These rules do not differ for videoconference testimony.

7.7.2 Does the law of your Member State allow for cross-examination?
(Explain also if the rules differ for videoconference testimony.)

In the Dutch civil procedure, the judge is the person who ask the questions to the witnesses, see article 179 para 1 RV. Based on article 179 para 2 RV, the parties as well as the legal representatives of the parties have the option to ask questions to the witnesses. These rules do not differ for videoconference testimony.

7.8. If videoconference technology is used to conduct hearings, how (if at all) can the court and/or parties terminate the use of videoconference technology and revert to regular (on-site) proceedings?
(Please explain the powers of the court and the parties in relation to choosing to conduct regular proceedings after the court has already decided that the hearing will be conducted through videoconference.)

Once a form of a hearing is ordered by the court, it is not possible to change the form of the hearing. Only in exceptional situations, the hearing could be reverted to a regular hearing. This could be possible if the internet connection is not available at the moment the hearing takes place or other technical problems appear at the moment of the hearing which make a video-hearing impossible.

7.9. Does the law (or best practice) provide, that the court should – before ordering the use of videoconference technology – check (please elaborate):
a) the internet connection availability (and/or speed) of the persons involved in the videoconference;
b) the technical equipment of the persons involved in the videoconference;
c) the technical literacy of the persons involved in the videoconference;
d) the physical capacity of the persons involved in the videoconference (e.g. if they are located in the Member State, their health status (hospitalisation; vocalisation, hearing and seeing));
e) other (please specify)?
(In addition, please specify if the court has to conduct a "test" session" before the actual videoconference.)

It was common that the courts ordered a practice test shortly before the hearing. During this test, all the technical were examined. This test took place before the hearing so that possible problems could be solved. At the beginning of the hearing, the persons involved are being asked by the court with regard to their names and state.

7.10. Does the law (or best practice) offer special safeguards for vulnerable persons?
(Please explain whether the use of the videoconferencing technology must follow any special rules for vulnerable partakers (e.g. children; persons with illness; persons located in hospitals; whistle-blowers; elder persons).)

There are no special guidelines for videoconferences. However, in normal proceedings, children (under 18) are heard behind closed doors. In such cases, the public is excluded from the procedure.

Underaged persons can testify in a separate room, where the parties are not. This same applies also in hearings where videoconferencing technology is applied.

7.11. Does the law of your Member State provide:

a) The location of the persons engaged in the videoconference (i.e. where the videoconference must or may be conducted) and the use of virtual filters and backgrounds?
(Member States' laws may allow only for court2court videoconference; other laws may not contain restrictions and the partakers may enter the videoconference from the location of their choice; explain whether, for example, a person may join the videoconference through their mobile device from their domicile or a car etc. Explain whether a person may use filters or change the background/backdrop. If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

There are not specific provisions on the use of filters. Parties can participate in videoconferences from any location of their choice.

aa) How does the law sanction a person who does not conduct the videoconference at the designated location?

This is not applicable, see answer to question 7.11.a.

ab) Are there any rules for the inspection of the location where the person heard is situated and the privacy it offers?
(If the person is situated at a private location, does the person have to "show" the court whether any other person is present at the location and/or – where (professional/business) secrecy is involved – whether the location offers sufficient privacy. Must the location adhere to any form of decency or décor? If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

No. There are no rules regarding the location chosen by the witness.

ac) Suppose a person lives in a one-room apartment with family or a room rented with friends, and cannot find another suitable location. Does the law allow the presence of family members, roommates etc. in such cases? If yes, do these persons have to identify themselves?

There are no restrictions on this matter. However, the courts expect that the witness or the parties choose for a location that allows a normal conduct of the hearing (no interruption, no noisiness). If the location is not suitable, the court will probably stop the hearing and order a new hearing. However, there are no guidelines on this.

b) the time when the videoconference may be conducted?
(Member States' laws may provide that videoconferences should not take place before e.g. 06:00 and no later than e.g. 18:00; does the law provide rules for videoconferencing if the persons are located in different time zones? If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

The time when videoconferences or other hearings take place is during the office hours of the court (9 a.m. until 5 p.m.). Only in exceptional cases (very urgent cases), the hearings can take place at different times.

c) the apparel and conduct of the persons taking part in the videoconference?
(Member States' laws may compel partakers to dress or conduct themselves in a special manner (e.g. toga outfit; standing in attention of the judge); please explain how these rules or traditions are followed if videoconference technology is used. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

This does not apply in the Netherlands.

d) the identification of the persons taking part in the videoconference?
(If the videoconference takes place in a court2court setting, this concern is usually dispelled, since court officials may check the identity; however, checking the identity of a person entering the videoconference from a private location may be troublesome. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

Yes, before the hearing, the parties have to identify themselves.

7.12. Can (or must) a videoconference be recorded?

Recordings by the parties are prohibited. The court can consent to recording by the media.

7.12.1. Does the recording of a videoconference contain video feedback from all cameras in the court or only the camera in focus?
(Many software applications pin or highlight only one of the persons during the videoconference and close or minimize other (usually non-active) persons. A recording might thus capture only the actions of one person at a time.)

Recordings by the parties are prohibited. Only in certain cases, the media is allowed to record the hearings.

7.12.2. Which persons are shown on video during the videoconference?
(I.e. which persons have a camera pointed at them and can be seen on the screen; e.g. judge, party, advocate, expert witness, interpreter, court staff, witness, public.)

If recordings are allowed, then the judges and the attorneys of the parties are shown on the video

7.12.3. How (which medium and format) and where is the footage of the videoconference stored and later archived?
(For example, it may be stored on a local machine or at a remote server.)

This does not apply. The courts shall not record and storage the footage of the videoconference.

7.12.4. Does the footage of the videoconference enter the record of the case?

This does not apply. The courts shall not record and storage the footage of the videoconference.

7.12.5. Who has access to view the footage after it has been recorded?

This does not apply. The courts shall not record and storage the footage of the videoconference.

7.12.6. Presume that the proceedings have concluded at the first instance and an appeal or other recourse has been submitted by the party. May the second instance court access and view the recording of the videoconference?

This does not apply. The courts shall not record and storage the footage of the videoconference.

7.12.7. If the court orders *ex post* transcription of the hearing, does the court reporter write the Minutes of the case by transcribing the footage of the videoconference or is there a separate audio log for transcription?

This does not apply. The courts shall not record and storage the footage of the videoconference.

7.13. Concerning court interpreters – does the law (or best practice) provide for successive or simultaneous interpretation during the videoconference?

A simultaneous interpretation during the hearing is common. There are no guidelines on this.

7.13.1. Where is the interpreter located during the videoconference?
(E.g. in the court room; in the room with the person being heard etc.)

There are no guidelines on this. The interpreter could be physically in the court or at any other location with access to the hearing.

7.14. Immediacy, equality of arms and case management

7.14.1. How does the law of your Member State generally sanction an infringement of the principle of immediacy?

The principle of immediacy is laid down in article 155 para 1 RV. According to this provision, the judge before whom evidence has been introduced in a case shall issue as far as possible (co-)issue the final judgement. In the event that this principle of article 155 para 1 RV cannot be fulfilled, then this and the reason for this have to be named in the final judgment, see article 155 para 2 RV. If however the requirements of article 155 para 2 RV are not fulfilled, then the effect is not that the judgment is void or invalid.[23] In addition, a violation of the requirement in article 155 para 1 RV does not constitute the right for a remedy, like an appeal.[24] As a result, the sanctions of an infringement of the principle of immediacy are very limited. The requirement of article 155 para 1 RV (principle of immediacy) is therefore not seen as a right of the parties, but as a provision for the courts and an elaboration of the principle of due process.[25]

[23] See *Hoge Raad*, 26 January 1996, ECLI:HR:1996:ZC1971; *Hoge Raad*, 12 April 1996, ECLI:HR:1996:ZC2033.
[24] See *Hoge Raad*, 26 January 1996, ECLI:HR:1996:ZC1971.
[25] See *Hoge Raad*, 16 January 2009, ECLI:HR:2009:BG4012.

7.14.2. Does the law of your Member State specify any special aspects regarding the principle of immediacy when using videoconferencing technology?

No, there are not any specific aspects regarding the principle of immediacy and the use of videoconferencing technology in the Dutch civil procedure.

7.14.3. Have your courts dealt with cases alleging an infringement of the principle of immediacy or the impartiality of judges in videoconference proceedings?
(If so, please provide the core of the legal question addressed and the resolution, as well as citations.)

No, such cases cannot be found in the database of the Dutch judiciary.

7.14.4. How do parties (and their advocates) express objections or pose questions during a videoconference?
(This may be especially important when "leading questions" are posed.)

During a hearing, the parties have the opportunity to present their case. Afterwards, the judge is asking questions to the parties and/or the lawyers of the parties. In this process, the parties or their lawyers can express their objection or pose questions. It is also not unusual that the court sets an agenda with the points it wishes to discuss during the hearing. In cases where the hearing takes place via a videoconference, the hearings as well as the option to express objections or ask questions do not differ from the physical hearings.

7.14.5. How does an inspection of an object take place during a videoconference?
(For example, imagine a court has to examine a knife, which was submitted as evidence by a party in physical form to the court.)

In general, there might be two options. First, the parties can choose to send the object to the court, so that the court will be able to inspect the object – also during the hearing. In addition, the parties can present the object to the court using the camera during the videoconference. However, the second option bears the risk that the court will not be able to visualize that object in a proper way. This is the reason why the Dutch judiciary prefers to hold a physical hearing instead of a videoconference.[26]

7.14.6. Can documents only be presented by means of a document camera or also through the use of file/screen sharing in the videoconference application?

During a hearing, all documents that the parties wish to present must be submitted to the court at least 10 days in advance, see article 87 para 6 RV. Therefore, during a hearing all parties as well as the court have these documents. If a party wishes to refer to a document, it will mention this document (for example exhibit x) and will refer to the content of this document.

7.14.7. During the videoconference, does the application (software) highlight only the person actively speaking or are all participants visible at all times (and at the same size)?

[26] See R. Jansen, 'Aandachtspunten bij het gebruik van de videoconferentie in civiele procedures', 34 Nederlands Juristenblad (2020) pp. 2528-2534.

(Often, the application will minimize or close the video of the person who is not active (speaking) during the videoconference.)

This depends on the software being used as well as the settings. It is possible that all the parties and the court are visible at the same time. It is also possible that the party that testifies or speaks is only visible.

7.14.8. Suppose that the connection becomes unstable, and the quality of the audio and/or video feed drops. One of the parties considers that the quality does not allow for correct testimony. Consider also that the video feed breaks down before or in the middle of the videoconference and only the audio feed is available. What options do the court and parties have in regards to the continuation of the videoconference? Can a continuation in such circumstances constitute grounds for appeal?

In such a case, the court could stop the hearing and set up a new hearing later. Another option could be to continue the hearing using a different kind of communication device, such as the telephone. However, it is more common that the hearing will be stopped and will continue at a different time. These circumstances do not constitute grounds for appeal.

7.14.9. If one party enjoys a better audio-visual experience due to better technical equipment and/or internet connection than the other, and the court allows the continuation of the proceedings, can the other party allege a breach of equality of arms?

In such a situation, the parties are responsible for their own technical equipment. Therefore, if the internet connection is not working properly, then this party is responsible for the functioning of the technical equipment. Thus, submitting a complaint based on a breach of equality of arms in such situation will not be very successful. The reason for this is that the parties had the opportunity to select the right equipment and are also responsible for this. However, in such situations the courts will probably suspend the hearing and decide to continue the hearing at a later moment.

7.14.10. During the videoconference, the court suspects that a person being heard is receiving outside help/suggestions or is under duress. Can the court order the person to turn the camera and show the apartment or share their screen? Can the court request the person to shut down other technological devices in their vicinity during the videoconference? Can the court request that other persons be removed from the location of the videoconference?

Yes, the court could give such orders. However, it is not guaranteed whether the person to be heard will obey such orders. This is the reason why preference is giving to physical hearings.[27]

7.15. Does the law (or best practice) provide any special rules for the participation of the party's advocate (e.g. together with the party at the same location, or in separate locations)?

There are no rules on that. However, it is common that the party is at the same location as the advocate of this party. There were situations, where the party and the advocate used different devises during the hearing. There are no guidelines for this.

[27] *Ibid.*

7.16. Are there any special rules pertaining to the distribution of costs in case of videoconferencing?
(Generally, a videoconference will have the effect of reducing the costs of the proceedings; nevertheless, does the law provide special rules on who bears the costs if, for example, one party opposes the videoconference but the court decides on it anyway? Are there special rules regarding the bearing of costs incurred for technical equipment? Are there special rules regarding the bearing of costs for interpreters?)

No, there are no specific rules on this topic. The court fees are the same in cases of physical hearings and videoconferences. As said before, the parties are responsible for the technical equipment to hold a videoconference.

7.17. How does the law guarantee the publicity of videoconference hearings?
(Please also explain legal measures to avoid problems that could arise due to the public nature of the hearing (e.g. too many participants in the video conference).)

This is a complex issue, as the communication during the videoconference must be protected against sabotages or hacks. However, these aspects were not really dealt with during the introduction of the COVID Act. Therefore, a number of solutions is discussed in the Dutch literature. One option is that videoconferences shall only take place in the court buildings. This would however take away all the effects and advantages of videoconferencing. Another option is to always allow the public (in particular the media) to participate in videoconferencing. In this way, the media will get its own access to hear the videoconference without having the option to participate directly.[28]

7.18. The Recast Regulation (EU) 2020/1783 on the taking of evidence in civil or commercial matters provides in Article 20 the primacy of direct taking of evidence through videoconference if the court considers the use of such technology to be "appropriate" in the specific circumstances of the case. What do you consider would fall in the category of "inappropriate"? In addition, should form N in Annex I of said Regulation be supplemented in your opinion (explain how and why)?

In our view, the Dutch courts have as a principle that the hearings should take place in a physical way, whenever possible. Therefore, only in situations where the parties or the witnesses cannot take part in a physical hearing, the videoconference could be a solution. Thus, videoconferences are used in cases where a physical hearing cannot take place. This was the case during the COVID pandemic, when the courts were practically closed. In such moments, the videoconference was a good option. Videoconferences might also be a good option when the parties are located in different countries, and it is not possible to travel, or the travel is difficult. Here again videoconferencing could be a good solution. At the end of the day, physical hearings are the standard in the Dutch civil procedure.

Regarding the form N in Annex I of the Regulation, the information is missing which software shall be used for the videoconference. Especially in cross-border cases, there might be some different software standards in the different Member States. Therefore, it would be helpful if information about the software which is being used for a videoconference would be available. This information could be – in the current form – given under point 5.4 and 6. However, I would recommend emphasising this more in the form.

[28] *Ibid.*

Instructions for contributors

1. References

As a rule, specific references should be avoided in the main text and, preferably, should be placed in the footnotes. Footnote numbers are placed after the final punctuation mark when referring to the sentence and directly after a word when referring to that word only. We humbly invite our authors to examine carefully our sample references which are preceded by [-]. These sample references put the theory of our authors' guidelines into practice and we believe that they may serve to further clarify the preferred style of reference.

1.1. Reference to judicial decisions

When citing national judicial authorities, the national style of reference should be respected. References to decisions of European courts should present the following form:

[Court] [Date], [Case number], [Party 1] [v] [Party 2], [ECLI] (NB: the "v" is not italicised)

- ECJ 9 April 1989, Case C-34/89, Smith v EC Commission, ECLI:EU:C:1990:353.
- ECtHR 4 May 2000, Case No. 51 891/9, Naletilic v Croatia.

1.2. Reference to legislation and treaties

When first referring to legislation or treaties, please include the article to which reference is made as well as the (unabbreviated) official name of the document containing that article. The name of a piece of legislation in a language other than English, French or German should be followed by an italicised English translation between brackets. In combination with an article number, the abbreviations TEU, TFEU, ECHR and UN Charter may always be used instead of the full title of the document to which the abbreviation refers. If the title of a piece of legislation constitutes a noun phrase, it may, after proper introduction, be abbreviated by omission of its complement. Thus:

- Art. 2 Protocol on Environmental Protection to the Antarctic Treaty (henceforth: the Protocol).
- Art. 267 TFEU.
- Art. 5 Uitleveringswet [Extradition Act].

1.3. Reference to literature

1.3.1 First reference

Any first reference to a book should present the following form: [Initial(s) and surname(s) of the author(s)], [Title] [(Publisher Year)] [Page(s) referred to]

- J.E.S. Fawcett, The Law of Nations (Penguin Press 1968) p. 11.

If a book is written by two co-authors, the surname and initials of both authors are given. If a book has been written by three or more co-authors, 'et al.' will follow the name of the first author and the other authors will be omitted. Book titles in a language other than English, French or German are to be followed by an italicised English translation between brackets. Thus:

- L. Erades and W.L. Gould, The Relation Between International Law and Municipal Law in the Netherlands and the United States (Sijthoff 1961) p. 10 – 13.
- D. Chalmers et al., European Union Law: cases and materials (Cambridge University Press 2010) p. 171.

- F.B. Verwayen, Recht en rechtvaardigheid in Japan [Law and Justice in Japan] (Amsterdam University Press 2004) p. 11.

1.3.2 Subsequent references

Any subsequent reference to a book should present the following form (NB: if more than one work by the same author is cited in the same footnote, the name of the author should be followed by the year in which each book was published):

[Surname of the author], [supra] [n.] [Footnote in which first reference is made], [Page(s) referred to] Fawcett, supra n. 16, p. 88.

- Fawcett 1968, supra n. 16, p. 127; Fawcett 1981, supra n. 24, p. 17 – 19.

1.4. Reference to contributions in edited collections

For references to contributions in edited collections please abide by the following form (NB: analogous to the style of reference for books, if a collection is edited by three or more co- editors only the name and initials of the first editor are given, followed by 'et al.'):

[Author's initial(s) and surname(s)], ['Title of contribution'], [in] [Editor's initial(s) and surname(s)] [(ed.) or (eds.)], [Title of the collection] [(Publisher Year)] [Starting page of the article] [at] [Page(s) referred to]

- M. Pollack, 'The Growth and Retreat of Federal Competence in the EU', in R. Howse and K. Nicolaidis (eds.), The Federal Vision (Oxford University Press 2001) p. 40 at p. 46.

Subsequent references follow the rules of 1.3.2 supra.

1.5. Reference to an article in a periodical

References to an article in a periodical should present the following form (NB: titles of well- known journals must be abbreviated according to each journal's preferred style of citation):

[Author's initial(s) and surname(s)], ['Title of article'], [Volume] [Title of periodical] [(Year)] [Starting page of the article] [at] [Page(s) referred to]

- R. Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', 17 Waikato Law Review (2009) p. 74 at p. 80 – 82.
- S. Hagemann and B. Høyland, 'Bicameral Politics in the European Union', 48 JCMS (2010) p. 811 at p. 822.

Subsequent references follow the rules of 1.3.2 supra.

1.6. Reference to an article in a newspaper

When referring to an article in a newspaper, please abide by the following form (NB: if the title of an article is not written in English, French or German, an italicised English translation should be provided between brackets):

- [Author's initial(s) and surname(s)], ['Title of article'], [Title of newspaper], [Date], [Page(s)]: T. Padoa-Schioppa, 'Il carattere dell' Europa' [The Character of Europe], Corriere della Serra, 22 June 2004, p. 1.

1.7. Reference to the internet

Reference to documents published on the internet should present the following form: [Author's initial(s) and surname(s)], ['Title of document'], [<www.example.com/[...]>], [Date of visit]

- M. Benlolo Carabot, 'Les Roms sont aussi des citoyens européens', <www.lemonde.fr/idees/article/2010/09/09/les-roms-sont-aussi-des-citoyens-europeens_1409065_3232.html>, visited 24 October 2010. (NB: 'http://' is always omitted when citing websites)

2. Spelling, style and quotation

In this section of the authors' guidelines sheet, we would like to set out some general principles of spelling, style and quotation. We would like to emphasise that all principles in this section are governed by another principle – the principle of consistency. Authors might, for instance, disagree as to whether a particular Latin abbreviation is to be considered as 'common' and, as a consequence, as to whether or not that abbreviation should be italicised. However, we do humbly ask our authors to apply the principle of consistency, so that the same expression is either always italicised or never italicised throughout the article.

2.1 General principles of spelling

- Aim for consistency in spelling and use of English throughout the article.
- Only the use of British English is allowed.
- If words such as member states, directives, regulations, etc., are used to refer to a concept in general, such words are to be spelled in lower case. If, however, the word is intended to designate a specific entity which is the manifestation of a general concept, the first letter of the word should be capitalised (NB: this rule does not apply to quotations). Thus:
- [...] the Court's case-law concerning direct effect of directives [...]
- The Court ruled on the applicability of Directive 2004/38. The Directive was to be implemented in the national law of the member states by 29 April 2006.
- There is no requirement that the spouse, in the words of the Court, 'has previously been lawfully resident in another Member State before arriving in the host Member State'.
- Avoid the use of contractions.
- Non-English words should be italicised, except for common Latin abbreviations.

2.2. General principles of style

- Subdivisions with headings are required, but these should not be numbered.
- Use abbreviations in footnotes, but avoid abbreviations in the main text as much as possible.
- If abbreviations in the main text improve its legibility, they may, nevertheless, be used. Acronyms are to be avoided as much as possible. Instead, noun phrases are to be reduced to the noun only (e.g., 'the Court' for 'the European Court of Human Rights'). If this should prove to be problematic, for instance because several courts are mentioned in the text (e.g., the Court of Justice and the European Court of Human Rights), we ask our authors to use adjectives to complement the noun in order to render clear the distinction between the designated objects (e.g., the Luxembourg Court/the European Court and the Strasbourg Court/the Human Rights Court). As much will depend on context, we offer considerable liberty to our authors in their use of abbreviations, insofar as these are not confusing and ameliorate the legibility of the article.

- In English titles, use Title Case; in non-English titles, use the national style.

2.3. General principles of quotation

- Quotations are to be placed between single quotation marks, both in the main text and in the footnotes (thus: 'aaaaa').
- When a quotation forms part of another quotation, it is to be placed between double quotation marks (thus: 'aaaaa "bbbbb" aaaaa').
- Should a contributor wish to insert his own words into a quotation, such words are to be placed between square brackets.
- When a quotation includes italics supplied by the contributor, state: [emphasis added].