HOUTHOFF

RESPONSE TO THE CONSULTATION PROPOSAL ON THE AMENDMENT TO THE DUTCH CODE OF CIVIL PROCEDURE AIMING TO SIMPLIFY AND MODERNISE THE LAW OF EVIDENCE

HOUTHOFF
Yuri Wehrmeijer
Elselique Hoogervorst
Remme Verkerk

27 July 2018

1. Introduction

1.1. We have noted the draft bill to modernise the law of evidence with interest. The bill is based[1] to a large extent on the Advisory Report produced in 2017 by an expert group led by A. Hammerstein.[2] In line with that Advisory Report, the aim of the bill is to simplify and modernise the law of evidence in civil proceedings by improving the collection of information and evidence prior to and during the proceedings. It comprises a number of specific amendments to that end.

1.2. We would like to make use of this consultation to comment on a number of those proposed amendments. We will deal with the codification of existing case law (Section 2), the pre-action information obligation (Section 3), the overall steering function of the court (Section 4), the simplification and standardisation of provisional evidence-taking (Section 5), the right to inspection (Section 6), and evidence from witnesses (Section 7), after which we will provide a conclusion (Section 8).

2. Codification of existing case law

2.1. The bill aims to codify existing case law. This relates particularly to Article 22 of the Dutch Code of Civil Procedure [*Rv*] (new) regarding the assessment of an invocation of compelling grounds after a court order and Article 206-207 Rv (new) regarding the seizure of evidence. The proposed codification will improve the accessibility and clarity of procedural law.

2.2. Paragraphs 4 to 8 of Article 22 Rv (new) enshrine the case law developed in the *Lightning Casino*[3] and *De Telegraaf/Staat*[4] judgments in legislation. This concerns the procedure for the court to examine and review data that a party does not wish to simply submit, despite a court order, because of compelling reasons. The aforementioned case law assumes that the court that has taken cognisance of the confidential information and concludes that it does not need to be disclosed should refrain from further involvement in the case. The bill provides that assessment of the invocation of compelling reasons will be dealt with by a different chamber, after which the court can continue hearing the case. This seems to us to be a useful and

---

1 See Explanatory Memorandum, p. 1

2 A. Hammerstein, R.H. de Bock, W.D.H. Asser, M*odernisering burgerlijk bewijsrecht, Advies van de expertgroep Modernisering Burgerlijk Bewijsrecht uitgebracht aan de Minister van Veiligheid en Justitie op 10 april 2017*, Boom Juridisch, The Hague, 2017, referred to hereinafter as the "**Advisory Report**".

3 Supreme Court 20 December 2002, ECLI:NL:HR:2002:AE3350, *NJ* 2004/4, with note by J.B.M. Vranken (*Lightning Casino*).

4 Supreme Court 11 July 2008, ECLI:NL:HR:2008:BC8421, *NJ* 2009/451 with note by E.J. Dommering (*De Telegraaf/Staat*).

practical approach, so that a court that is familiar with the case will not have to withdraw. In our view, it would be advisable for each judicial instance to designate a permanent chamber with judges who will decide on such an invocation expeditiously and in accordance with a detailed procedure. This would promote legal uniformity and would prevent uncertainty and unnecessary delays in proceedings.

2.3. Articles 206 and 207 Rv (new) provide for more detailed regulation of the seizure of evidence in non-intellectual property cases. This means of regulation is in line with the existing case law and guidelines.[5] Under the proposed inspection arrangement in Article 149b Rv (new), it provides for a useful extension to the effect that – just as in intellectual property law – every conceivable piece of evidence can be seized. What should probably have received greater attention is the cost aspect of seizing evidence, particularly in the case of garnishment. With regard to the right of inspection, the Explanatory Memorandum notes that inspection takes place at the expense of the party that requests it, but also that only the costs necessary to allow inspection are eligible for reimbursement. According to the Explanatory Memorandum, that includes the costs incurred to locate the information requested and to allow inspection or provide a copy or an extract, but not the cost of legal assistance. The costs to be reimbursed may be accounted for as a financial loss within the meaning of Article 6:96(2)(b) and (c) of the Dutch Civil Code [*BW*] or, if proceedings have been instituted, may be included in the order to pay the costs of the proceedings.[6]

2.4. The question then is how reasonable this approach will be in practice, particularly for third parties. The bill does not deal with the potentially substantial costs for third parties in the event of a seizure of evidence, meaning that an “obligation to collect” may arise for third parties who wish to have the costs reimbursed. It might be possible, in certain circumstances, to seek alignment with the proposed system for exercising the right of inspection. The explanation of Article 194 Rv (new) states that the court may rule that inspection need not be granted until an advance payment has been made against the costs to be incurred. The court that grants leave to seize could impose a similar condition and stipulate that the party levying the seizure must first deposit an advance payment from which the third party’s costs can be paid. That advance payment could be for reasonably incurred administration costs and also reasonably incurred legal costs. Such paid costs can then be claimed – just like “ordinary” seizure costs – by the party levying the seizure in the proceedings for which the seizure has been implemented.

---

[5] See Supreme Court 13 September 2013, ECLI:HR:2013:BZ9958, *NJ* 2014/455, with note by H.B. Krans (*Molenbeek Invest/Begeer en Marijnissen*) and the Seizure Syllabus [*Beslagsyllabus*].

[6] See Explanatory Memorandum, p. 29.

2.5. Finally, it would perhaps be better to systematically include the seizure of evidence in a different section to Section 8, where provisional evidence-taking is regulated.[7] The seizure of evidence is not, strictly speaking, provisional evidence-taking but only a protective measure. The seizure of evidence itself does not yet provide access to the data seized.

3. Pre-action information obligation

3.1. In its Advisory Report, the expert group formulated the basic principle that parties are obliged to collect as much information as possible prior to the proceedings. The bill incorporates this obligation into the act. Article 149a of the bill reads as follows:

> *"Before the case is brought to court, each party shall collect such information as it may reasonably obtain and which, in the given circumstances, can reasonably be expected to be relevant to assessment of the facts or rights invoked by that party in support of its claim or defence. If a party fails to submit such information, within the meaning of the previous sentence, then, during the proceedings, the court may draw such conclusion as it deems fit."*

3.2. Since the procedural law revision in 2002, parties are expected to put their cards on the table immediately. This general obligation to provide information at an early stage is tightened up further in the bill to make the proceedings even more efficient and effective. Submitting written witness statements is encouraged, provisional evidence-taking ceases to be available during the proceedings, and the right to examine witnesses during the proceedings is abolished.[8]

3.3. We naturally support the idea that unnecessary delays in the proceedings – because the parties withhold essential information and only submit it at a late stage – should be avoided. We also endorse the idea that parties have an important role to play in gathering information and evidence prior to the proceedings. We have doubts, however, about the possible sanctions. If parties have not made efforts to collect information, then the court may draw such conclusion as it deems fit. That means, for example, that during the proceedings the court will be able to refrain from taking further evidence from witnesses or experts. Our doubts about the introduction of a pre-action information obligation as laid down in Article 149a Rv (new) are based on two points: a lack of empirical substantiation and the risk of "front loading".

3.4. Neither the Advisory Report nor the Explanatory Memorandum show the empirical data justifying the need to introduce a pre-action information obligation. The problem identified by the legislature is the length and complexity of proceedings. The

---

[7] For example, in a new section in Book 1, Title 2, Section 9 (§ 9), Book 1, Title 4, or in Book 3, Title 4.

[8] See Articles 30a, 30i, 166 and 196 Rv of this bill.

question, however, is whether the introduction of a pre-action information obligation in fact solves that problem. Or will it only lead to a shift in costs or even an increase (see below)? Perhaps comparative law research can provide some pointers for formulating answers. One can refer, for example, to the operation of "pre-action protocols" in England and Wales.[9] Experience with those protocols is not entirely positive, particularly as regards the general rules applicable to all proceedings.[10] However, rules determining the precise information to be submitted and exchanged for specific categories of cases appear to be working well.

3.5. The Advisory Report by the expert group refers (rightly in our opinion) to the risk of front loading. It is possible that the obligation to provide pre-action information will fail to have the intended effect. After all, collecting information and evidence in advance may lead to costs that later turn out to have been incurred unnecessarily. The bill does not deal with the risk of front loading in any detail.[11] A prudent lawyer will not wish, however, to be dependent on the court's subsequent judgment as to whether he has violated his pre-action obligation to provide information. Moreover, he will not know in advance what sanctions he will be subject to. The high workload within the judiciary could mean that courts are inclined to reject requests for further evidence to be taken on the basis of Article 149a Rv (new). After all, there are already indications that too many cases are being settled on the basis of the obligation to furnish facts [*stelplicht*].[12] A system that is too nuanced and offers scope for customisation is uncertain and requires lawyers to prepare the case too thoroughly. This will lead to increased costs for the parties to the proceedings. It will also lead to increased costs for the judiciary, which could be confronted with unnecessarily long case documents and too many exhibits.

3.6. Here is an example to clarify things. Suppose that a total of ten arguments are advanced in support of a claim. Will information need to be exchanged, written witness statements drawn up, and (further) evidence collected in respect of all those

---

[9] See also the Advisory Report, note 26.

[10] See in this connection *Review of Civil Litigation Costs: Final Report,* The Stationary Office 2010, p. xxii: "*6.1 Pre-action protocols (chapter 35).There are ten pre-action protocols for specific types of litigation. By-and-large they perform a useful function, by encouraging the early settlement of disputes, which thereby leads (in such cases) to the costs of litigation being avoided. I recommend that these specific protocols be retained, albeit with certain amendments to improve their operation (and to keep pre-action costs proportionate). 6.2 On the other hand, the Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation, is unsuitable as it adopts a 'one size fits all' approach, often leading to pre-action costs being incurred unnecessarily (and wastefully). I recommend that substantial parts of this practice direction be repealed. …".*

[11] However, the Explanatory Memorandum does point to the possibility that the court may take account of the costs that have to be incurred in the pre-action phase when applying Article 149a Rv.

[12] See for example K. van der Kraats, "De stelplicht: geen kraaienpoot maar een 'sinkhole'", *AA* 2018, p. 262-266.

arguments? It is common for the opposing party not to contest a large number of the arguments, so that – precisely with a view to efficient proceedings – one should wait before determining which of them require further evidence in substantiation.

3.7. Here is a second example: in some commercial cases, cartel damages cases or collective actions, a management hearing is first scheduled at which the court and the parties agree as to which points of law – such as jurisdiction, admissibility, time limits, or the validity of exoneration clauses – will be dealt with in advance before going any further into the substantive dispute. Conducting the case in this way improves the efficiency and effectiveness of the proceedings. This approach would be thwarted by obliging the parties to collect all information in advance that may be relevant but which is not certain to be so.

3.8. To summarise: as regards this point, the bill does not provide any empirical substantiation. As a result, it is, at the very least, unclear whether the intended results will be achieved. We have serious doubts about this because we consider that there is a real risk that the proposed regulation will lead to an increase in costs ("front loading"). We therefore wonder whether it is prudent to introduce such a large-scale change in procedural law at this time: the previous change in the system – which was intended to enable digital litigation – is still far from having been implemented. Perhaps other less intrusive solutions can be found to address the perceived problems, such as stricter enforcement of existing standards.

4. Overall steering function of the court

4.1. The bill emphasises the responsibility of the court as regards establishing the truth during the proceedings. We agree that the court can and should also play an active role in establishing the truth. The fact that the court has an overall steering function [*regiefunctie*] and must monitor the orderly course of the proceedings is a matter of law.[13] In addition, the court has traditionally had the ex officio power to request clarification of a party's point of view, to call up documents, and to examine witnesses or appoint an expert on its own initiative.[14] The court is also required ex officio to supplement the legal grounds.[15] In exceptional cases, the court can – or must – even go beyond the boundaries of the debate between the parties, for example when reviewing general terms and conditions in consumer cases. The main rule, however, is that even an active court must respect the autonomy of the parties.

[13] See *inter alia* Article 20 Rv.

[14] See *inter alia* Article 22, 166, 194 Rv.

[15] See Article 25 Rv.

4.2. The bill goes a step further than the existing law. Article 24(2) Rv (new) empowers the court, ex officio, to draw the attention of the parties to the possibility of supplementing the basis for their claim:

> *"The court can draw the attention of parties, ex officio, to the possibility of supplementing the basis for their claim, request, or defence."*

4.3. The Explanatory Memorandum refers to the Supreme Court's reticence in a case where it ruled that "*the court would never be free to raise the own fault question ex officio.*" According to the Supreme Court, if the court does so, it should allow the parties to debate the matter and should refrain from pronouncing a ruling if parties do not wish to debate it.[16] According to the Explanatory Memorandum, Article 24(2) Rv (new) does not jeopardise party autonomy but merely allows the court to actively seek out the truth. The court may ask a party whether an "own fault" defence is being conducted if that is evident from the documents, or what the circumstances were under which a particular arrangement was made. The party concerned may take up a suggestion from the court and supplement its factual grounds. Of course, the principle of hearing both sides must be applied here, according to the Explanatory Memorandum.

4.4. We consider that Article 24(2) Rv (new) offers the court a broader statutory possibility for intervening than under existing law.[17] Based on the text of this provision, the court can suggest new facts or legal arguments, even if these are not an extension of the debate between parties. We have reservations about the court having too wide a general power to make suggestions. We assume that a court will not simply make suggestions "just like that". It will only do so if it considers that there is some point in its doing so. In fact, too broad an interpretation of Article 24(2) Rv (new) provides a legal basis for offering a helping hand – in the form of a winning argument – to one of the parties. In such a case, the court must still hear both parties. However, the principle of party autonomy cannot be reduced to the application of the principle of hearing both parties. Party autonomy is also closely linked to the principle that parties are basically operating on a level playing field and that the court should not create the assumption that it is helping one of them to present its case. After all, part of a fair trial is that the court is impartial.

---

[16] Supreme Court 26 September 2003, ECLI:NL:HR:2003:AF9414, *NJ* 2004/460, with note by J.B.M. Vranken (*Regiopolitie/Hovax*).

[17] For the current situation, see for example *Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4* 2018/263.

5. Simplifying the taking of evidence and making it uniform

5.1. In accordance with the Advisory Report, the bill proposes (1) harmonising the criteria for dealing with provisional evidence-taking and (2) making it possible to combine several examples of provisional evidence-taking in a single application.[18] This uniformity and simplification is to be welcomed. In this way, the criteria for assessing provisional evidence-taking are aligned as much as possible in terms of actual content. This means that the principle becomes “grant, unless one of the five grounds for refusal arises”. Briefly put, these grounds are: (1) the information required is not sufficiently defined, (2) insufficient interest, (3) contrary to due process, (4) misuse of powers, and (5) compelling reasons.[19] This is an important simplification, particularly with regard to the right of inspection. Combining provisional evidence-taking within a single application followed by an appearance of parties may be effective for obtaining relevant evidence.

6. Right to inspection

6.1. The right to inspection (disclosure) is transferred from Article 843a Rv to Article 149b Rv (new) and Articles 194, 195 and 204 Rv (new). There are a number of substantive changes. The most striking of these are the replacement of the required “legitimate interest” [*rechtmatig belang*] by “sufficient interest” [*voldoende belang*] and the term “documents” [*bescheiden*] by “data” [*gegevens*]. The concept of a “legal relationship” [*rechtsbetrekking*] is clarified. In addition, a new provision has been introduced allowing data to be requested from third parties. Finally, subsection 4 (the conclusion) of the existing Article 843a Rv has been dropped.

6.2. The proposed amendments comprise improvements and clarify the rules governing the right of inspection.

6.3. That applies, first of all, to the introduction of the term “sufficient interest”. That term is in line with the required interest in the other preliminary evidence-taking and therefore seems “lighter” than the term “legitimate interest”. The wording makes clearer what this requirement is about, namely that a party must have a sufficient interest, within the meaning of Article 3:303 BW, in inspecting the required information.[20]

---

[18] See Explanatory Memorandum, p. 36-37.

[19] See Article 196 Rv (new), Explanatory Memorandum, p. 44. Article 149b Rv (new) also foresees material grounds that release a possessor of information from his/her obligation to provide information. See Explanatory Memorandum, p. 29.

[20] See Explanatory Memorandum, p. 28.

6.4. Secondly, the term “data” is more in line with the broad interpretation that is already given to the term “documents” in case law. It should also be noted that the “best efforts obligation” in respect of a party which is the object of an application to inspect has been harmonised. The Explanatory Memorandum regarding this point states:

> *“Possession of data is in any case deemed to exist if a party physically holds the data in respect of which inspection is requested. It may also be that the party addressed does not have the data physically at its disposal, but can easily obtain it from a third party.”*[21]

In this way, the bill aims at further streamlining with other preliminary evidence-taking.

6.5. Thirdly, the bill rightly assumes a broad interpretation of “legal relationship”. The remark in the Explanatory Memorandum to the effect that the legal relationship does not yet have to have been established in law raises the question as to what degree of plausibility applies with regard to the legal relationship.[22] The Explanatory Memorandum makes clear that the threshold for provisional evidence-taking to be allowed is a low one.[23] The threshold for the “plausibility” of the legal relationship at issue here is probably lower than that which applies to the plausibility of an infringement in the intellectual property inspection variant of Article 1019a Rv. As regards actual practice, it is advisable for the legislature to define an even clearer position on this point.

6.6. Fourthly, harmonisation with the criteria for other preliminary evidence-taking means that an application for inspection must be granted unless one of the grounds for refusal applies that are applicable to all provisional evidence-taking. The exception in Article 843a(4) (conclusion) Rv – which provides that the party from whom/which inspection is required is not obliged to comply with that request if it can be assumed that the proper administration of justice is guaranteed even without the requested information being provided – thus lapses. This choice is justified by the fact that, in practice, inspection of data is an important, simple, reliable, and cost-effective way of gathering evidence.

6.7. As regards the right of inspection, however, we wish to refer to a fundamental point in procedural law, namely the question of the extent to which the right of inspection can be effectuated by means of preliminary relief proceedings [*kort geding*]. The bill recognises the right of inspection in Article 149b Rv (new). The bill assumes two variant means of enforcing that right at law: the request route prior to proceedings

---

[21] See Explanatory Memorandum, p. 28.

[22] See Explanatory Memorandum, p. 26-27.

[23] See Explanatory Memorandum, p. 45.

pursuant to Article 204 Rv (new) or the request route during proceedings pursuant to Articles 194-195 Rv (new). The Explanatory Memorandum states:

> *"If the opposing party or the third party refuses to provide the data that is still lacking, a party may enforce provision of the data in court, both by means of the application for provisional evidence-taking (Articles 196 (new) and 201 (new)) or in the proceedings (Articles 194 (new) and 195 (new)).*"[24]

As a condition for this, the Explanatory Memorandum states in the context of Article 207 Rv (new):

> *"that the seizure of evidence must be carried out within the framework of ongoing proceedings or, if no proceedings have yet been initiated, must be followed by an application for provisional evidence-taking*".[25]

6.8. These passages say nothing about the route via preliminary relief proceedings. If that is a deliberate choice, then it amounts to a major change of direction compared to the current practice in which inspection claims are often brought in preliminary relief proceedings (also in a counterclaim if the lifting of a seizure of evidence is requested in preliminary relief proceedings).[26] There are also various objections to such a change of direction, including time (preliminary relief proceedings take considerably less time than an application for provisional evidence-taking) and the fact that an appeal is unconditionally available against a judgment in preliminary relief proceedings, which is not the case with an interim decision in proceedings on the merits or in the case of a ruling on the planned provisional evidence-taking (see Article 200 Rv (new)). It would be advisable for the legislature to make it explicit that preliminary relief proceedings for the production of exhibits are still possible in the proposed new situation. That would at least provide for the need in practice to settle inspection requests within a short (preliminary relief proceedings) period with the unconditional possibility of lodging an appeal against an order to produce exhibits.

---

[24] See Explanatory Memorandum, p. 26.

[25] See Explanatory Memorandum, p. 60.

[26] Incidentally, the question arises as to how, under the new procedural law (KEI), preliminary relief proceedings should deal with a combination of claims and requests regarding the claim and counterclaim. It follows from the Explanatory Memorandum to Article 30b KEI (*Parliamentary Papers II*, 2014/15, 34059, no. 3, p. 17) that a combination of a claim and a request is possible and also that a counterclaim can be made in claim proceedings, but the question is whether this is also possible and desirable in preliminary relief proceedings. In any event, Article 30b(1) and (4) Rv KEI provide that there must be sufficient connection between the claim and the application and that the court must split the case if the claim and the application do not lend themselves to joint treatment.

7. Evidence from witnesses

7.1. The bill has far-reaching consequences for the examination of witnesses which are partly related to the more general principles of assigning an overall steering function to the court and encouraging parties to collect evidence prior to the proceedings (see Sections 3 and 4). In this way, the obligation to submit evidence has been tightened up. Parties are expected not only to state in the document initiating the proceedings and in the statement of defence who they can examine as witnesses, but also to submit written witness statements or explain why these have not been obtained (Articles 30a and 30i Rv (new)).

7.2. What is particularly far-reaching is that the right of parties to examine witnesses has been abolished. The current Article 166 Rv stipulates that the judge must order an examination of witnesses "*as often as one of the parties so requests.*" That means, briefly speaking, that it is up to the parties "*to determine who is to be examined as witnesses and how many witnesses are to be examined*".[27] In the bill, the text of Article 166 has been altered and now gives the court the discretionary power to examine witnesses. This gives the court scope to waive the examination of witnesses on the basis of efficiency considerations. We believe that there are, in themselves, good grounds for restricting parties' right to examine witnesses. It is not efficient to spend an afternoon examining witnesses in a relatively insignificant debt collection case involving an interest of only EUR 200. On the other hand, we have our doubts about the wide margin of discretion that the bill grants to the court. In current practice, the right to examine witnesses is already under pressure. The proposed system does not provide sufficient guarantees for parties to be able to furnish evidence to substantiate their arguments. There is a danger that courts will refrain from examining witnesses on improper grounds, such as excessive workload.[28]

7.3. Another intended change in the law, which could have major consequences for legal practice, concerns the way in which the examination of witnesses is embedded in the proceedings. Article 166 Rv (new) provides that consent may be granted "*for the examination of witnesses during the oral hearing*". The bill is in line with Article 30k Rv (Quality and Innovation Programme [*KEI-regime*]), as well as with the internationally accepted procedural model. In most jurisdictions, evidence is furnished and closing arguments take place, where possible, in a single concentrated

---

[27] Supreme Court 26 February 2016, ECLI:NL:HR:2016:344, *NJ* 2017/350, with note by H.B. Krans (*Lidl/Achmea*), Ground 3.4.3.

[28] For example, the (then) President of the Supreme Court pointed out that "*there would be incentives to refrain from examining witnesses, not because it is unnecessary, but because otherwise the quantitative objectives would not be achieved*". G. Corstens, "Doe iets voordat het te laat is", *NRC Next*, Monday, February 4, 2013, p. 4.

hearing.[29] We believe that the bill can bring about improvements in existing practice. The existing Dutch procedural model means that – if witnesses are to be examined – numerous different sessions will need to be scheduled: the personal appearance of parties, the examination of witnesses, the cross-examination and then perhaps closing arguments. The existing model can lead to unnecessary delays and costs. In that respect, the bill offers the prospect of significant improvements.

8. Conclusion

8.1. We believe that the bill offers a number of interesting changes that will benefit legal practice. We have reservations, however, regarding, in particular, the principle of pre-action gathering of information and the associated sanctions, the extensive options for the court to play an active role in establishing the truth, the role of preliminary relief proceedings with a view to inspection alongside the request for inspection and the abolition of the right to examine witnesses. We would be only too happy to explain the above in greater detail.

[29] See for example American Law Institute and UNIDROIT, *Principles of Transnational Civil Procedure,* Cambridge University Press 2005, Principle 9.