PRINCIPLES OF DUTCH CIVIL PROCEDURE

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1. Introduction.

1.1. Introduction to the Netherlands.

The Kingdom of the Netherlands is a small, densely populated (± 16 million) country in the Euro-zone, with an important history of international trade and commerce.
Traditionally, the Dutch have a strong inclination to reach consensus: the so-called "polder model", named after the significant parts of the country situated below sea level, the "polders". It's remarkable economic growth in the nineties and it's relative peaceful labour relations in the past are attributed to this phenomenon.
Although many contend, that the "polder model" is rapidly declining, legal culture is still very much influenced by it. This is demonstrated by the fact that the Netherlands has a relatively low litigation volume and per capita rate of attorneys and judges compared to, for instance, Germany.
As most continental European countries, the Dutch system of civil litigation still shares some common features with its French ancestor. In the past, the German Code of Civil Procedure has sometimes served as model for modernisations. One of the most important revisions is the most recent one (01.01.2002). In five years, another even more fundamental revision is planned. It is to be expected that this time it might be influenced, among others, by the Woolf reforms in the United Kingdom.
Add to this the influences presently effected by the recent EU-Directives on Service of Documents, Jurisdiction and (in the near future) Evidence, and you have another specific trait of Dutch legal culture: it is internationally oriented and open to foreign influences.
This is, for instance, reflected in the fact that documentary evidence may, more often than not, be filed in English, German and sometimes French, without translations.

1.2. Introduction to the Dutch judicial system

Claims up to € 5.000,-- and litigation based on labour - lease and agency contracts are heard by the 61 Subdistrict Courts (*kantongerecht*), which are administratively part of the 19 District Courts (*rechtbank*). All other civil claims are brought directly before the Civil Sections of the District Courts. A Civil Section is subdivided in Divisions, which may, for example, be specialized in certain civil matters. Cases before the District Court are heard by a single judge, but tried by a panel of three.
Appeals may be heard by the five Courts of Appeal (*gerechtshof*), Cassation (review on points of law) is handled by the Supreme Court of the Netherlands in The Hague (*Hoge Raad*).

A new institution since 01.01.2002 is the so-called Council for the Judiciary. It is an intermediary between the Ministry of Justice and the courts of law. It has a coordinating role

in the fields of finance, human resources, ICT and housing of the courts.

2. **Initiating and responding to proceedings.**

Discovery as it is known in the Common Law tradition, does not exist in a civil law system as prevailing in The Netherlands. However, it is possible to apply to the District Court for a provisional examination of witnesses or experts in order to assess the chances for further litigation.
The notion of disclosure is equally unfamiliar in Dutch law, but a new article in the Code of Civil Procedure, obliges parties to disclose all facts, which are important for the decision completely and truthfully. However, there is no such instrument as "contempt of court": the only sanction is that, should this obligation be breached, the judge can draw his conclusions as he sees fit. It is yet to be seen what practical implications this new provision will provide.

Another major difference with, for instance, US-litigation, is the fact that the jury system is absent in Dutch procedure, beit civil, criminal or administrative. However, certain administrative courts count laymen among its judges.

Formally, there is no need to give notice to the defendant of the intention to file suit. In practice, this deprives the defendant of a pre-litigation settlement. It is therefore standing practice for attorneys to summons the other party to fulfil its obligations within a certain time before instituting proceedings. Summons without a previous notice might lead to an adjudication of costs in favour of the defendant, regardless of the outcome.

Except for the Subdistrict Courts, litigation must be conducted through a *procurator litis (procureur)*, an advocate admitted to the bar of the court to which the matter is referred. The *procureur* handles the formal aspects of litigation, the filing of documents and maintains contact with the court registry.
Civil procedure is instituted either by writ of summons or by application. The latter document is sent by a *procureur* to the registry of the proper court; the registrar then sets a date for oral hearings and issues summonses to the petitioner and other parties concerned. The registrar also sets a date before which a party may file a writ of defence. After court session, where all parties are heard by the judge, a court order is given.

Most commercial litigation, however, is instituted by a writ of summons, served by a Process Server, who is instructed by a *procureur*.
The writ of summons must contain the date upon which the case will be submitted to the court and a thorough description of the claim. It must also identify evidence, including prospective witnesses, to substantiate it. A new and interesting feature since 01.01.02 is the fact, that the summons must also contain a description of the defendant's counter-arguments -if known. The reason for this is to concentrate litigation as much as possible.

If, after submission to the court of the initial summons, no *procureur* presents himself to the court on behalf of the defendant, the judge checks whether service has been effected properly. If that is the case, the court enters a default and sets a date for default judgement.
Unless the court considers the claim to be unlawful or unsubstantiated, the court will pass default judgement.The defaulting party may then vacate the default by writ of summons, to be served on the plaintiff within four weeks after the defendant was notified or has become aware by any other means, of the default judgement.

If a *procureur* presents himself as counsel for the defendant, he must file his written defence within six weeks, if desired together with a counter claim. This document must be signed by the *procureur*. This signature suffices: a major difference between the Anglo-Saxon system is, that there is no need for documents to be sworn. Also, a *procureur* does not need to provide a power of attorney.
After defence and counter claim, the court will set a date for oral hearings, unless the judge managing the case finds it necessary that both parties file a reply and rejoinder. This only happens when a matter is exceptionally complicated.
The oral hearing usually takes place within a few weeks after the date has been set. During this hearing, at which parties have to appear in person with counsel, the judge either tries to encourage parties to settle the matter (which happens in approximately 50% of all the cases, the "polder model" also being entrenched in civil litigation) or sets a date for final judgement or an interim judgement requiring further documentary evidence or testimony by witnesses or experts. In exceptional cases the judge may consent to oral pleadings before judgement.

Some remarks concerning the *procureur:* the government wishes to abolish this institution, as it is alleged to be old fashioned. However, the courts are unable to take over all the work done by *procureurs* in well-organized units of the major law firms whilst the Ministry of Justice has announced a stop in personnel. It is therefore to be expected that the institution (to be seen as early privatisation of judicial functions) will be going strong for quite some more time. Moreover, it does not prevent counsel to conduct litigation all over the country. The *procureur* only relieves him/her from local formalities and logistic duties vis à vis the Court, so he/she can concentrate on the more material aspects of litigation.

3. **Capacity.**

Every individual has legal capacity; minors, individuals under tutelage and bankrupts by means of their legal representatives.
Legal entities in general have legal capacity also; an exception is the so-called civil partnership. Nationality of a litigant is, in commercial disputes, irrelevant from a legal point of view.

4. **Jurisdiction**

4.1. Some remarks on EU-law.

For questions of international jurisdiction and enforcement, three international instruments need to be mentioned: the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 27 September 1968, the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 16 September 1988 and the EU Council Regulation number 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (informally called the Brussels I Regulation, contrary to Brussels II, being a Regulation concerning jurisdiction and enforcement in family and marital affairs).

The Brussels Convention was superseded by the Brussels I Convention, except for Denmark (which country opted out of the European Union cooperation on civil and commercial legal projects). The Lugano Convention governs jurisdiction and enforcement in relation with EFTA-countries and Poland.

The Dutch Constitution stipulates, that conventions and treaties take precedence over national law. Moreover, the principles of European law provide, that a Regulation also comes before national law.
The articles in the Dutch Code of Civil Procedure therefore only apply in relation to residents of non-EU and non-EFTA-states, excluding Poland.
As part of the renewal of the Code of Civil Procedure, a new system of jurisdiction was introduced, copied from the Brussels Convention, which at the time of preparation of the changes in the Code, was still in force. This parallel situation, however, only existed for two months, as on March 1st the Brussels Convention was, except for Denmark, replaced by the Brussels I Regulation, and this Regulation differs in quite some aspects with provisions of the Brussels Convention, copied in the brand new Code of Commercial Procedure!
It is beyond the scope of this contribution to go into the details of this problem, but it is clear that this poses a problem in jurisdiction questions regarding for instance US- or Canadian-based parties. Should the provision of the new Civil Code be read literally, and therefore interpreted in conformity with the old Brussels Convention, or should the spirit of its modern successor, the Regulation prevail? This poses practical problems, concerning, for instance, contracts of sale. If a Dutch seller wants to sue an American non-paying purchaser (if the goods were to be delivered in the US), according to the literal interpretation of the Civil Code, he can play a home match. In an interpretation in conformity with the Regulation however, the court in the place of delivery has jurisdiction.

4.2. Jurisdiction in the Code of Civil Procedure.

4.2.1. Choice of Jurisdiction

In international commercial matters, parties are free to attribute jurisdiction to whatever court they might feel fit, unless such choice of court lacks reasonable interest. Also, certain formal and material conditions have to be met, copied from the Brussels Convention.

There is an interesting difference between the wording of the Dutch relevant article and its counter parts in the Regulation and the Conventions: in those instruments, the test of "reasonable interest" does not appear. Therefore, if two parties without domicile in the European Union, the EFTA or Poland, for instance a US and a Canadian party, have a jurisdiction clause in favour of a Dutch court, such court may deny jurisdiction on the grounds of lack of reasonable interest –the only example of *forum non conveniens* in Dutch commercial jurisdiction rules.

4.2.2 Other Contractual Jurisdiction Criteria

If the parties have not made a choice of forum, the Dutch Code of Civil Procedure again follows the rules of the Brussels Convention. The main rule is the place of domicile of the defendant. As mentioned before, the alternative jurisdiction for contracts (the place of performance of the obligation in question) must either be interpreted according to the letter of the Brussels Convention or the spirit of the Brussels I Regulation. The Regulation provides for jurisdiction in contractual relationships which, for contracts of sale, designates the court of the place of delivery as the proper venue. In case of the provision of services, the court of the place in a member state where, under the contract, the services were provided or should have been provided, has jurisdiction.

As simple as these rules may seem, there are so many situations which do not fall under this rule, that the relevant provision in the Brussels I Regulation will remain a lawyer's paradise as it has always been under the Brussels Convention.

In claims based in labour relationships or commercial agency, the court of the employee or the agent has jurisdiction, if the contractual activities have predominantly taken place there; the same goes for consumer claims if the consumer is domiciled in the Netherlands and has performed the necessary action to conclude the agreement there. Again, here is discrepancy between the text of the Civil Code and the Regulation.

4.2.3 Tort

In matters relating to tort, the court for the place where the harmful event occurred or may occur has alternative jurisdiction. Such place of occurrence can be the place where the damaging fact originated as well as the place where the event has actually produced it effects. Here, the plaintiff has the choice between two, sometimes even three forums (if the place of domicile of the defendant is located still somewhere else).

4.2.4 Other criteria

Another ground for jurisdiction in the Netherlands are rights in rem in immovable property or tenancies of such property in the Netherlands.
Furthermore, Dutch courts can be seized in matters relating to insolvency proceedings, when the insolvency has been declared in the Netherlands.

Two further specific cases of jurisdiction must be noted:

- *forum arresti*: attachment of property creates jurisdiction when no other competent court, beit on the basis of the law, the Regulation or any convention, can be found;
- *forum necessitatis*: the Dutch court has jurisdiction when litigation in another country proves to be impossible, or when, in matters with sufficient relation to Dutch legal environment, it is unacceptable to require from plaintiff that he submits the matter to a foreign court.
  This basis for jurisdiction ensues from the principle of article 6 from the European Convention on Human Rights: every person must have access to justice. Access to a competent court is impossible, for instance, in a country without judicial authorities. Acceptability of a forum is to be considered on a case-to-case-basis. For instance countries, were a claimant can be reasonably expected to be prosecuted on the basis of his faith or race or might meet with other serious discriminatory circumstances, can be considered unacceptable and may cause the Dutch court to be *forum necessitatis.*

Finally there is jurisdiction in the Dutch court, when the defendant appears without filing a motion of lack of jurisdiction.

5. **Applications and submissions.**

An application for amending of the claim must be presented in writing and is possible in any phase of the proceedings. However, the other party may object to such amending on the basis that he is seriously prejudiced in his defence.

Motions ("incidenten") challenging the jurisdiction of the court, and to join an indispensable third party ("impleader") must be filed before presenting the defence; a counter claim must be initiated together with the statement of defence, otherwise these rights are barred.
Third parties who can demonstrate sufficient interest, may intervene before the last document is filed.

6. **Evidence.**

The parties initially present their documentary evidence to the court as attachments to their writs. A notable difference between the civil and the common law system of evidence is, that documentary evidence need not be introduced or supported by oral testimony. In less complicated cases documents often present sufficient evidence and judgement is rendered without further oral evidence by witnesses. However, it is always wise for a party to offer evidence by witnesses, otherwise the judge might dismiss the claim or the defence on the grounds, that it has been insufficiently substantiated by documentary evidence and no offer was presented to hear supplementary witnesses. In fact, a party's offer to bring forward specific witnesses, cannot be denied by the court, unless such denial is thoroughly motivated. It is the judge who decides whether further evidence must be produced and upon which party rests the burden of proof. Such a judgement can be decisive for the further outcome of the proceedings.
In order to regulate the allocation of the burden of proof, the Code of Civil Procedure provides the following rules.

- The judge may only base his/her decision on facts or rights, which have come to his/her attention during the procedure and which are established according to the rules of evidence.
- Facts or rights alleged by one party and insufficiently contested by the other, are deemed to be admitted.
- Facts or circumstances of common knowledge and general empirical rules may be utilised to base a decision upon and do not require allegation of proof.
- "He who alleges, must prove": the party relying on the legal consequences of facts or rights brought forward by him, bears the burden of proof of those facts or rights, if contested, unless some specific rule or requirements of fairness provide differently.

Proof can be submitted in all forms. The most important means, however, are documentary proof, proof by witness and expert's opinion.
Documents, drafted by a Civil Law Notary, provide conclusive evidence on certain points.
A special form of documentary evidence is the Court Order to make books, which must be kept as required by law, available for inspection.

If, after the exchange of documents, attached to the written pleadings, the court decides that further proof is necessary, one party or both are ordered to prove certain facts as specifically described in the interim judgement.
If the court orders further evidence by witnesses, it sets a date or dates for the hearing(s) in consultation with counsel, who then invite such witnesses as they deem helpful to support the burden of proof placed upon their respective clients.
Reluctant witnesses may be subpoenaed by the court and if necessary, brought before the court by the police.

Another fundamental difference with common law litigation is the way the civil law judge conducts the hearing of witnesses. As he or she is familiar with the file and himself/herself has decided which facts and points of law are to be proven, he/she is well positioned to interrogate witnesses. Also, judges receive permanent training in interrogation techniques.

After the judge has terminated questioning, counsel for the party bringing forward the witness is invited to pose questions, and after that counsel for he other party. Aggressive techniques by counsel in interrogating are not appreciated.
Testimony is taken under oath. If a witness wishes, oath can be replaced by affirmation. The judge then instructs the witness that statements under oath or affirmation, if false, are punishable by law.
At the end of the hearing the judge dictates a report of the witness' statement to the clerk, in the presents of the witness, the parties and their counsel. The report is then signed by the witness, the judge and the clerk and an authenticated copy is provided to the parties, which will then be part of the process file.
Witnesses are awarded compensation for travel costs and time spent. If the witness is an employee, his employer is bound by law to continue payment of salary, as appearing as a witness is a duty imposed by law.
These costs must be advanced by the party who called the witnesses and will be finally born by the loosing party.
Once subpoenaed, appearing and testifying as a witness is obligatory; only the spouse and close family members and professionals enjoying privilege may refuse to give evidence; a witness may also refuse questions which might lead to answers incriminating himself or close family members.
An unwilling witness who does not qualify for privilege may, in exceptional cases and at the discretion of the court, be detained until he or she complies.
This does not apply to one of the parties, if subpoenaed to appear as a witness. He/she cannot be compelled to testify. However, in such cases the court may draw its conclusion from this behaviour "as it may seem fit".
The testimonial of a party-witness cannot produce conclusive evidence in its own favour, unless this evidence is supportive of other evidence, which in itself is not conclusive.

After one side has presented its witnesses, a further hearing is scheduled, if the other party wishes to bring forward further witnesses to substantiate its views.
In matters where witnesses residing in a foreign country must be heard, the court can issue letters rogatory on the basis of The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil of Commercial Matters, as per 01.01.04 to be replaced for the EU by the Council Regulation on Cooperation between the Courts of the Member States in Taking of Evidence in Civil or Commercial Matters.

Finally, the court may order experts' opinion on specific, decisive points, as put forward in an interim judgement. Often, those points are formulated by the court after having solicited the views of counsel from both sides.

7. **Judgements.**

A judgement must always be in writing and must, a.o., contain a summary of the statements as brought forward by the parties and the points of fact and law on which the decision is based. More often than not, a final judgement is provisionably enforceable. A judgement is open to public inspection, unless in certain specific cases, the court decides otherwise.

A "consent judgement" is not common in the Netherlands, but not impossible. Most of the time, however, parties who have reached agreement see to it, that the terms of such agreement are laid down in the minutes of an oral hearing, presided by the judge. The authenticated minutes of such hearing are then enforceable in the same way as a judgement.

8. **Appeal.**

Appeal proceedings (which do not suspend provisional enforceability) must be brought before the Court of Appeal within three months after judgement. The grounds may be filed later if the respondent agrees to further postponement. The scope of the appeal procedure is dependant on those grounds. Thus, if an appellant objects against all aspects of the judgement, all matters of fact and law are reviewed the novo by the court of appeal.
After the respondent's reply (and possible cross-appeal) parties (in practice: counsel) may plead their case orally, after which judgement is rendered. Appeal in cassation before the Supreme Court must be filed, again, within three months. In cassation the grounds should be included in the writ; cassation procedures are the exclusive domain of advocates admitted to the bar of The Hague.
It is common to obtain learned opinion from such an advocate as to the chances of success before actually lodging a cassation appeal.

9. **Post trial proceedings.**

In case of obvious error the court may provide rectification after consultation with both parties. A judgement, based on fraud by one of the parties, may be revoked by the other party. The same applies when one of the parties has willingly withheld evidence.

10. **Special proceedings.**

There are several courts that hear specialist matters, of which the Court of Appeal of Amsterdam is of importance for our purpose: this court hears specific corporate matters in first instance. An important part of these cases concerns mismanagement; such cases may be filed by trade unions (after having obtained the opinion of the relevant works counsel), shareholders, any natural or legal person who is entitled to do so by statutory provision, or by the public prosecutor.
The Court may appoint a Committee of Inquiry, which is entitled to investigate the matter before the court.
The Court is empowered to take far-reaching measures in cases of mismanagement matters, ranging from annulment of resolutions by the company and dismissal of its officers to dissolution of the company.

11. **Other specific procedures, which need to be mentioned, are:**

11.1. Injunction proceedings (*Kort geding*).

A very popular means of litigation: depending on the urgency of the matter, a judgement can be obtained within a few days or a few weeks. In most cases the judgement (rendered by a judge in the *rechtbank*) ends the case, although formally an action on the merits of the case should follow, by means of regular litigation. In *kort geding*, the strict rules of evidence are mitigated.

11.2. Conservatory measures.

In debt recovery procedures it is interesting to note that protective measures are available in summary ex-parte procedure before judgement. For instance, a pre-judgement garnishment of a debtor's bank account a few days before payments to its employees are set to be made can be a highly effective incentive for the debtor to start fulfilling its obligations towards a creditor.
Whilst granting the provisional or protective measures, the judge always sets a period, in which litigation on the substance of the matter must be instituted. Failure to do so renders the measures null and void. It should therefore be noted that sufficient care should be taken: if such measures turn out to be unfounded or void in the subsequent procedure, this may lead to liability for damages.
The procedure, following protective measures, may take place before another court than the one, which granted leave; it can also be an arbitral court or a foreign court, provided that a judgement, enforceable in the Netherlands, can be obtained through such litigation.
Recently our Supreme Court has held, that *kort geding*-proceedings may also be regarded as an acceptable follow up-procedure.

12. **Enforcement.**

Judgements from the Dutch Antilles and Aruba are not considered foreign. They are directly enforceable in the Netherlands.
Enforcement of judgements from EU-member states, EFTA-states and Poland can be obtained reasonably quickly, sometimes within a few weeks. As far as other states are concerned, the situation is, in theory, more complicated. Although the Code of Civil Procedure contains special provisions to obtain "exequatur", the enforcement order, this section has all but lost its importance for commercial litigation as it only applies to countries with which the Netherlands has bilateral treaties. For the time being that is not the case, but for all practical means, it is not a serious matter. Although in principle a foreign judgement is, absent a treaty, not enforceable in the Netherlands and new proceedings should be started, these proceedings can be practically as efficient as obtaining an exequatur. If the foreign judgement is based on principles of fair trial and on jurisdiction, which is acceptable, the new litigation comes near to a formality. Especially when jurisdiction is based on a valid choice of forum clause, the claimant may suffice with presenting the contract containing the clause and the foreign judgement as evidence, and may claim in conformity with what has been awarded in this judgement. A new judgement can then be easily obtained. However, this is not the case when the judgement is based on notions, alien to fundamental notions of Dutch law, as for instance damages, awarded in access of the amounts, which are common in the Netherlands.

13. **Costs.**

Although litigation in The Netherlands is not as expensive as in the United Kingdom and the US, the following aspect should be discussed with the client.
A Dutch court does not award full compensation for the costs of litigation to the winning party. Usually the costs billed by counsel considerably exceed those awarded by the court. These (additional) costs cannot be recovered unless this had been explicitly agreed upon in a previous contract or by means of applicable general conditions.

In civil cases, fixed court registry charges must be paid up front, depending on the value at stake, to a maximum of € 3.630,-- for the civil court and € 4.536,-- for the Courts of Appeal (situation 2002).

As a final remark: in order to avoid a situation, in which the operation was successful, but the patient has died, it is advisable to investigate the credit worthiness of the debtor before entering into considerable costs of litigation. It is common to obtain a credit report prior to enforcing a claim through litigation by a specialised agency, of which the costs usually will not exceed € 200,--.

14. **Arbitration.**

14.1. General.

Arbitration is widespread and readily accepted in the Netherlands. For instance, the construction industry has a tradition to arbitrate its conflicts for over a hundred years. Many branches of (international) trade, which abound in the Netherlands, hardly ever take their conflicts to the regular civil judiciary, as they all have their own arbitral panels. Their advantage is obvious: specific knowledge concerning the products, the people and the special trade customs. Another great advantage is the fact that, an arbitral award is enforceable in many more countries then its civil counter part, due to the number of countries, which, like the Netherlands, have adopted the New York Convention.

14.2. Arbitral agreements.

Parties are free to submit their case at any time to arbitration, with the exception of rights, which are beyond their free disposition. In commercial matters, this restriction is hardly relevant.
An agreement to arbitrate is valid if it is concluded in conformity with the legal provisions for validity of contracts, according to applicable law. Such agreement, however may only be *proven* by (a) written document(s). Evidence by witness is not admitted.
On the other hand, the formal requirements for the document, proving the arbitration agreement are not as strict as provided for in article II of the New York Convention.

If the defendant appears in the arbitral procedure without instantly contesting the validity of the arbitral agreement, he forfeits the right to do so later on or when contesting the arbitral award in court.

14.3. Enforcement: domestic awards.

After finalizing the arbitral proceedings, arbitrators deposit the original award document with the court of the district where the arbitration took place. Either party may then request the President of his court to issue an enforcement order (exequatur). Such an order may only be denied on very limited grounds (the award, or the way in which it was formed, is contrary to public order or common decency). Within three months after the date of issue of the award, the other party may then initiate proceedings to nullify the award on the following grounds:

- absence of arbitral agreement;
- formation of the arbitral panel against the rules;
- the panel has not adhered to its terms of reference;
- the award is not properly signed or does not state the grounds on which it is based;
- the award or its formation is contrary to public order or common decency.

Another means to challenge an arbitral award is revocation on the grounds of fraud or withholding of essential documents.

An interesting instrument is the so-called Settlement Award. This award can be given when parties reach settlement during an arbitral procedure. Arbitrators may then incorporate the agreement in their award; this document must not only bear the signatures of the arbitrators but also of the parties. It will be then considered a proper arbitral award, except for the fact that it can only be nullified on the grounds that it is contrary to public order or common decency.

14.4. Enforcement: foreign awards.

The Code of Civil Procedure contains provisions for the recognition and enforcement of foreign arbitral awards; the party concerned can choose between those rules and the provisions of the New York Convention. As the Netherlands has opted for reciprocity, awards rendered in a state, which has not ratified the convention, may only be enforced on the basis of the rules of the Dutch Civil Code. As these can be more liberal, especially when it comes to the definition of "arbitral agreement", it is sometimes preferable to rely on the Dutch Code. The New York Convention (Article III) condones such practice.

The procedure of enforcement is relatively fast and uncomplicated, beit on the basis on the basis of the Dutch Civil Code or the New York Convention.

15. **Binding opinion.**

Another means of Alternative Dispute Resolution, often used in the Netherlands, is the situation that parties refer the resolution of their conflict to a neutral "binding advisor". The difference between such a solution and arbitration is, that the procedure is less formal and more expeditious. The opinion itself is not as easily enforceable as an arbitral award. If the party concerned does not comply with the binding opinion, the other party must institute a normal procedure in order to force the other party. However, in such a procedure the judge may only subject the non-complying parties' arguments against enforcement to a restrictive review, for instance: breach of fundamental principles of fair trail, such as the principle of *audi et alteram partem*.

16. **Mediation.**

16.1. Development of mediation.

In the beginning of 2002, 2848 mediators were registered at the Dutch Mediation Institute (see further on). Presently, there is a widespread interest in mediation. The Ministry of Justice is making arrangements to prepare for specific legislation. However, before finalizing such legislation, the Ministry has set up a Project, in which several courts experiment with court annexed mediation. Judges have taken specific training in order to identify such cases, which seem to be fit for mediation and then propose it to parties at the occasion of the oral hearing. If both parties agree, the case is then adjourned and within 14 days a mediation session is organised by the Project's bureau, which is specifically set up for this experiment. One of the Project's court-annexed mediators is then nominated to act as neutral. The experiment lasts for three years; at this moment, after two years, the results are promising: in civil cases the

settlement ratio is ± 50%. This is a significant percentage in view of the fact that these are cases, which parties themselves, their lawyers nor the judges were able to settle.
In administrative cases the score is even higher, ± 65%.
From the courts, which participate in the experiment, the reactions are predominantly favourable.

16.2. Active Mediation Institutions.

The foremost institution in the Netherlands is the Nederlands Mediation Instituut (www.nmi-mediaton.nl/en/index.htm), which keeps a register of mediators. Anyone can call himself a mediator; registration however (which entitles one to call himself NMI-mediator) is only open for mediators, which have successfully completed a training with one of the institutions, which have accreditation with the NMI. NMI is a provider of registered mediators to interested parties. The register with names is published on NMI's website.
Moreover, the NMI has drafted mediation rules, widely used by the profession; it has a disciplinary tribunal where interested parties can lodge complaints against any NMI-mediator. Also, NMI is setting up a program of quality monitoring and professional education for mediators. As from the 1st of January 2003, NMI Mediators must take a minimum quantity of such courses in order to retain their qualification.
Finally, the NMI is partner on behalf of the mediators in discussions with the government. NMI is a private foundation, with a Board in which all strata of the mediation world are represented. The NMI has inaugurated groups of mediators in specific fields of society, for instance the mediation group for labour relationships, transport and logistics, environment, health care, for the construction industry, for education, for administrative law, etc. Also NMI has set up regional groups of mediators. These "children" of NMI have now gained independence; their representatives form an important platform within NMI for brainstorming an informative purposes.
Recently, in close cooperation with NMI, the Dutch Mediation Association was founded; every NMI mediator who wishes to do so, can become a member of this association. Aim of this new body is to represent specific interests of mediators, for instance by providing insurance coverage, advising on setting up a mediation practice, developing PR-instruments etc.

Apart from NMI, the Mediation Association and the training institutions, mention should be made of ACB, the ADR Centre for Business and Industry. ACB is a provider of mediators specifically in the field of commercial disputes. It was jointly founded by the Dutch Employer's Association, a group of multinational companies and a few top law firms (among which CMS Derks Star Busmann).

16.3. Indications for adoption of mediation in the Netherlands.

The Project, mentioned above, is closely monitored by the Scientific Research Institute of the Ministry of Justice; participants have to fill in extensive questionnaires at the end of a mediation (be it successful or not). They fulfil this duty gladly, as it is the only activity, required from them in exchange for the mediation services, as the court-annexed mediators are presently being paid by the Ministry of Justice. After finalisation of this research, the major drivers for ADR will then be well-documented.

For the time being one could identify the following indications: the expense in time and money of litigation; the gradual changing of the attitude of counsel, informing clients about the advantages of mediation; promotion by the government because of the effect mediation has on overburdened court dockets.