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CONTRACTUALISATION OF CIVIL LITIGATION

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CONTRACTUALISATION OF CIVIL LITIGATION IN THE NETHERLANDS

The Freedom of Contract and its Limitations

Remme Verkerk and Denise Walta-Jansen

1. INTRODUCTION

Parties often make agreements on the manner in which they will resolve disputes between them. It is generally accepted that such agreements can promote the

satisfactory and efficient resolution of disputes.[1] Against that background, courts are generally willing to uphold dispute resolution clauses and agreements. The basic starting point is that parties are free to conclude contracts that deviate from default statutory rules. The parties' freedom of contract is, however, not without limits. This report discusses the general tenets of the legal framework in the Netherlands. It also discusses various specific agreements on dispute resolution and civil procedure.

2. THE FREEDOM TO CONCLUDE PROCEDURAL AGREEMENTS AND ITS LIMITATIONS

2.1. THE STARTING POINT: FREEDOM OF CONTRACT AND PARTY AUTONOMY

Freedom of contract is one of the basic cornerstones of contract law. The starting point is that parties may choose with whom to contract and under which terms to contract. Although the freedom of contract is not explicitly codified, it is clearly recognised as a basic principle of substantive civil law in the Netherlands.[2]

In civil law relations, there are many restrictions to the freedom of parties to conclude binding contracts. In some areas of the law, such restrictions are quite common. Examples that will be discussed in the sections below include family law, company law, bankruptcy law, labour law and consumer law.

Historically, the basic principle of freedom of contract has had a procedural counterpart: the principle of 'party autonomy'.[3] The basic idea was and still is that parties are free to conclude an agreement on the resolution of existing or future disputes. The Dutch Code of Civil Procedure (DCCP) contained few if any exceptions. In fact, the principle of party autonomy was construed so broadly, that it was easy to circumvent substantive rules that limited the freedom of contract.

A telling example concerns the old rule that only allowed a husband and wife to divorce on a limited number of fault grounds. Until 1971, the Dutch Civil

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1 In the Netherlands, paths to justice studies consistently show that individuals that resolve disputes through mutual consent mechanisms, such as mediation, consider the outcomes satisfactory. See e.g., M.J. Ter Voert and H.S. Hoekstra, 'Geschilbeslechtingdsdelta 2019', *WODC* 2020, 18.

2 C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht*, Wolters Kluwer, Deventer 2018, §41.

3 See R.R. Verkerk, 'Powers of the Judge in The Netherlands' in C.H. Van Rhee (ed), *European Traditions in Civil Procedure*, Intersentia, Antwerp 2010, pp. 281–90.

Code (DCC) explicitly stipulated that spouses could not dissolve their marriage by means of a mutual agreement.[4] The more liberal rules on party autonomy in civil litigation, however, made it easy to circumvent this statutory rule. A husband and wife could agree that one of them would file for divorce and allege that there had been a valid statutory ground for divorce, such as adultery or abandonment. The other spouse would acknowledge these facts. The procedural rules on party autonomy required the judge to accept these undisputed facts without any further examination of evidence and to then dissolve the marriage.[5] The circumvention of the rules on at-fault divorce through procedural trickery was common and led to a practice often referred to as the 'Big Lie' ('*Grote Leugen*').

The Dutch 1988 Evidence Act aimed to put an end to such practices. It sought to align the Dutch Civil Code and the Dutch Code of Civil Procedure.[6] It introduced a number of provisions that effectively dictate that the principle of party autonomy in civil procedure only prevails in matters that the parties can 'freely dispose of'. Many of these statutory provisions will be discussed below.[7]

The end result was and is that substantive and procedural rules are more or less aligned. Where freedom of contract prevails, parties will also have broad powers to make procedural arrangements on the resolution of existing or future disputes. Similarly, where freedom of contract is restricted, the procedural autonomy of the parties will also be limited.

2.2. RIGHTS OF THIRD PARTIES LIMIT THE PARTIES' PROCEDURAL AUTONOMY

As a rule, a court judgement only has *res judicata* effect between the parties to those proceedings. The interests of third parties will therefore not always be affected by litigation. Consequently, the parties to the lawsuit generally have great freedom to resolve 'their' (own) dispute according to their own wishes. There are plenty of cases, however, where the interests of one or more third parties are at stake.[8] These are issues the parties cannot 'freely dispose of'.

In family law matters, judges have the important role of looking after the interests of young children. The parents of a child may well agree on numerous issues, such as parental responsibility or alimony. However, the parents are not

4 Article 263 of the Dutch Civil Code (old).

5 Dutch Supreme Court 23 June 1883, W. 4924 (*Grote Leugen*).

6 See Parliamentary History Evidence Act (*Parl. Gesch. Bewijsrecht*), p. 16.

7 Articles 8, 96, 109, 149, 153, 329, 333 and 1020 of the Dutch Code of Civil Procedure.

8 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, pp. 96–97.

always 'free to dispose of' such issues without oversight or approval. As a result, their ability to make binding procedural agreements on procedural matters such as evidence are also limited.[9]

In bankruptcy cases, a decision of a court to declare a company bankrupt will potentially affect the rights of a large number of stakeholders, including, for example, the company's directors, shareholders and numerous creditors. As a result, a decision to declare a company bankrupt is not an issue that can be 'freely disposed of'. In such cases, procedural agreements are unlikely to have any effect. By way of example: a contractual clause between two parties that an arbitral tribunal will have exclusive jurisdiction to declare a company bankrupt will not be legally valid.[10]

The same holds true for the validity of agreements on corporate decision-making, such as the decision to dismiss or replace a director. Such questions are not merely an internal affair between the shareholders and directors involved. The validity of such decisions may have implications for third parties as well, including, for example, trading partners that ordinarily conclude business transactions with the company.[11] As a result, parties cannot freely conclude agreements on the resolution of disputes on the validity of such corporate decision-making.

2.3. IMBALANCE OF POWER LIMITS THE PARTIES' PROCEDURAL AUTONOMY

Additional restrictions may be applicable when there is a certain imbalance of bargaining power between the parties. There is a risk that a strong party will impose an unfair procedural agreement upon a weaker party.[12] There are numerous examples of cases in which the law limits the freedom of contract to protect the weaker party. Examples include legislation that protects employees, tenants and consumers.

Labour law was historically one of the first areas of law where freedom of contract was severely limited.[13] An example of a procedural rule that protects the employee can be found in Article 7:658(2) of the Dutch Civil Code. Further to

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9 Dutch Supreme Court 15 February 2008, ECLI:NL:HR:2008:BC1860, *NJ* 2008/106.

10 See Article 1020 of the Dutch Code of Civil Procedure. This is not merely a matter of domestic arbitration or insolvency law. The EU Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015], OJ L141/19) seeks to set binding rules that seek to limit 'forum shopping'.

11 Dutch Supreme Court 10 November 2006, ECLI:NL:HR:2006:AY4033, *JOR* 2007/5.

12 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, pp. 95–96.

13 C.J.H. Jansen, *De wetenschappelijke beoefening van het burgerlijk recht in de lange 19e eeuw (Onderneming en recht nr. 87)*, Wolters Kluwer, Deventer 2015, §4.4.2.

this provision, the employer shall be liable for (personal injury) damage suffered by the employee in the performance of his or her duties, unless the employer proves that it has fulfilled its (safety) obligations or that the damage is largely due to the intent or deliberate recklessness of the employee. This rule in essence is a procedural rule on the burden of proof.[14] Article 7:658(3) of the Dutch Civil Code prohibits the parties from concluding an agreement that deviates from this statutory rule to the detriment of an employee.

In recent decades, there have been many developments in the area of consumer protection laws. Examples include domestic case law and legislation based on the European Economic Community (EEC) Unfair Terms in Consumer Contracts Directive and EU Unfair Commercial Practices Directive.[15] Articles 6:233 and 6:236 of the Dutch Civil Code stipulate that unreasonably onerous clauses in general terms and conditions of traders are voidable. Examples include terms and conditions that would hamper procedural rights, such as the right of access to court or the right to furnish evidence.[16] The European Court of Justice (ECJ) has ruled in a series of judgments that national courts must assist the 'weak' consumer and assess ex officio whether clauses in general terms and conditions are unreasonably burdensome or onerous.[17]

Another example concerns the EU Directive on Alternative Dispute Resolution of Consumer Disputes.[18] This Directive limits the freedom of contract in cross-border disputes between traders and consumers. It determines that an agreement concluded before a dispute materialises that deprives a consumer of access to court is not binding for a consumer. Moreover, it clarifies

14 A.E.B. Ter Heide, 'Commentary on Article 7:758 DCC' in R.J.B. Boonekamp and W.L. Valk (eds), *Stelplicht & Bewijslast*, Wolters Kluwer, Deventer 2017.

15 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005], OJ L 149/22 and Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019], OJ L 328/7.

16 See Article 6:236(k) of the Dutch Civil Code. See also G.R. Rutgers and H.B. Krans, *Bewijs*, Wolters Kluwer, Deventer 2014, pp. 92–93.

17 These cases have been discussed and followed by Dutch Courts. See Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/273 (*Heesakkers/Voets*) and Dutch Supreme Court 12 February 2016, ECLI:NL:HR:2016:236, *NJ* 2017/282 (*Telefoon II*). See also Dutch Supreme Court 12 November 2021, ECLI:NL:HR:2021:1677, *NJ* 2022/89.

18 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013], OJ L 165/63.

that alternative dispute resolution mechanisms cannot lead to an outcome that deprives consumers of the protection of statutory provisions that cannot be derogated from by agreement.[19]

2.4. COURT POLICIES LIMIT PARTIES' PROCEDURAL AUTONOMY

Other restrictions come into play when a procedural agreement between the parties would directly and negatively affect other actors in the proceedings, such as the judge, the clerk or a witness.

In commercial contract cases, parties have a great deal of freedom to determine the ordinary course of litigation.[20] At the same time, these arrangements cannot and should not overly interfere with the courts' normal routines and practices. The parties may well be of the view that they believe it would be desirable if the court would apply a completely different set of procedural rules, such as the UNCITRAL Arbitration Rules or the U.S. Federal Rules of Civil Procedure. However reasonable and fair these procedural rules may be in the abstract, judges are not fully acquainted with these rules and the court management systems are not designed to accommodate for such radical changes to the procedural regime. It would require a great deal of effort from the court to accommodate for such a joint request of the parties.

The basic problem is that the parties cannot freely dispose of the time and resources of the court. The courts have at least some degree of freedom to manage their own caseload and to allocate their scarce resources fairly and efficiently. For example: an agreement between the parties that an oral hearing at first instance will take two full hearing days and will be attended by a panel of three judges and two clerks is in principle not binding upon the court.[21] Because judicial resources are finite, the problem is not a single such joint request, but the aggregate of all such requests if they were permitted. It is a slippery slope. The same is true for other agreements that would overwhelm judicial resources or unduly disturb the ordinary routines of the court.[22]

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19 See Articles 10 and 11 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013], OJ L 165/63. These provisions have been implemented in domestic legislation: *implementatiewet buitengerechtelijke geschillenbeslechting consumenten 2015*.

20 See e.g., Article 96 of the Dutch Civil Code of Procedure.

21 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, p. 97.

22 See T. Veling, 'De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven', *MvV* 2015, pp. 17–22.

Procedural agreements may also have implications for other participants in the proceedings, such as witnesses. Dutch law, for instance, stipulates that the minimum period to be taken into account when summoning a witness to give testimony is one week.[23] This time limit cannot be shortened by a procedural agreement between the parties since it protects the interests of witnesses.[24]

2.5. OTHER LEGAL IMPEDIMENTS

A procedural agreement is an agreement that is subject to the ordinary rules of contract law under the Dutch Civil Code. There can be many instances in which a contract cannot and will not be enforced under the ordinary rules in the Dutch Civil Code. If a contract violates public policy or specific binding statutory rules, the rules on contract law may cause a procedural contract to be void.[25] Additionally, if the procedural contract is concluded under duress, fraud or the abuse of circumstances, it is voidable.[26] There may also be circumstances under which it would be contrary to principles of reasonableness and fairness to demand performance of certain procedural contracts.[27]

3. AGREEMENTS ON FORUM SELECTION

3.1. THE STARTING POINT: ACCESS TO COURTS DESIGNATED BY LAW

Access to justice is one of the inherent characteristics of a fair trial under Article 6 of the European Convention on Human Rights (ECHR).[28] Similarly, Article 17 of the Dutch Constitution stipulates that 'no one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.'

As indicated above, consumer protection laws restrict the possibilities of traders to require consumers to waive this fundamental right of access to the courts. Despite such restrictions, it is generally accepted that a party can

23 Article 170 of the Dutch Code of Civil Procedure. The Proposed Law on the Simplification and Modernisation of Evidence Law (Parliamentary Papers *II* 2019/20, 35498, no. 2) changes that term of one week to ten days.

24 G. De Groot, *Getuigenbewijs in civiele zaken (Burgerlijk Proces & Praktijk nr. 15)*, Wolters Kluwer, Deventer 2015, §98.

25 Article 3:40 of the Dutch Civil Code.

26 Article 3:44 of the Dutch Civil Code.

27 Article 6:248(2) of the Dutch Civil Code.

28 See e.g., *Golder v. United Kingdom*, no. 4451/70, §§34–35, ECHR 1975.

ultimately waive at least certain aspects of its right of access to court.[29] Such a waiver of fundamental rights must however satisfy certain formal conditions. At the very least, a party involved must waive its right of access to a court out of its free will and in an unequivocal manner.[30] Thereto, the Dutch Code of Civil Procedure often requires that such a free and unequivocal waiver is proven by written evidence (i.e., evidenced in writing).

The appointment of a suitable adjudicator is key to settling a dispute as well and efficiently as possible. In the Netherlands, it is quite common for the parties to include an arbitration clause or a forum clause in their commercial contracts. In cases where parties can 'freely dispose of' their rights and obligations, such clauses are respected, and the parties have ample opportunity to decide who will adjudicate existing or future disputes.

3.2. AGREEMENTS ON ALTERNATIVE DISPUTE RESOLUTION

First, the parties may decide whether their dispute will be brought before a state court or whether it will be resolved by means of alternative dispute resolution. Examples include mediation, arbitration, or a binding advice procedure.

In the Netherlands, the legislator has consistently promoted mediation as a preferred means of dispute resolution.[31] It is questionable however whether agreements to resolve disputes through mediation are binding upon the parties. Various Dutch legal scholars argue that agreements to mediate may be binding in the sense that parties must at least make a good faith effort to mediate, for example by attending at least one or two mediation sessions before commencing

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29 Some scholars argue that the derogation from the legal competence of the state courts is merely allowed if provided for by a statutory provision. W. Heemskerk et al., (eds), *Een goede procesorde. Opstellen aangeboden aan Mr. W.L. Haardt*, Kluwer, Deventer 1983, pp. 229–30; E.A. Alkema, 'Contractvrijheid als grondrecht; de vrijheid om over grond- en mensenrechten te contracteren of er afstand van te doen' in T. Hartlief and C.J.J.M Stolker (eds), *Contractvrijheid*, Kluwer, Deventer 1999, p. 43. Other academics believe that an express statutory basis is required. M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, pp. 119–21. See also H.J. Snijders, *Inleiding Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2002, pp. 492–93. The latter view finds support in case law, such as e.g., Dutch Supreme Court 24 September 1964, ECLI:NL:HR:1964:AC4487, *NJ* 1965/359 (*De Rooy c.s./Hillen c.s.*) and Dutch Supreme Court 28 October 1988, ECLI:NL:HR:1988:AD0496, *NJ* 1989/765 (*Harvest Trader*), §§3.1–3.2.

30 See e.g., *Deweer v. Belgium*, no. 6903/75, §49, ECHR 1980, *Håkansson & Sturesson v. Sweden*, no. 11855/85, §66, Series A no. 171-A, *Tabbane v. Switzerland*, no. 41069/12, ECHR 2016, and *Mutu and Pechstein cases*, nos. 40575/10 and 67474/10, ECHR 2018.

31 See E. Bauw and J. Roos, 'De rechter in civiele handelszaken in het domein van conflictoplossing: een nulmeting' in M. Dubbelaar et al. (eds), *Conflictoplossing: het domein van rechters?*, Wolters Kluwer, Deventer 2021, pp. 99–125.

litigation.[32] Dutch courts, however, have ruled that they have jurisdiction over cases in which a party agreed to mediation. The reason for this is that mediation is a form of dispute settlement that is based on the consent and cooperation of both parties. Both parties participate voluntarily and are free to end the mediation process at any time. They cannot be forced to negotiate against their will.[33] As a result, the enforcement of mediation agreements is problematic.

Parties can make binding agreements to submit an existing or future dispute to arbitration. The starting point is that all civil law disputes are arbitrable with one important exception. Article 1020 of the Dutch Code of Civil Procedure stipulates that an arbitration agreement cannot 'serve to determine legal consequences that may not be freely determined by the parties' (also see sections 2.1 and 2.2 above).

An agreement to arbitrate is binding upon the court. If a party in litigation rightly argues that a valid arbitration agreement has been concluded, the court shall declare that it has no jurisdiction to hear the dispute.[34] As a result, a valid arbitration agreement almost always constitutes a waiver of the parties' fundamental right of access to court. This requires free and unequivocal consent[35] and the existence of a valid arbitration agreement must be proven by written evidence.[36]

It must be noted that an agreement to arbitrate does not imply that the right of access to court has been waived in its entirety. Parties can – once an arbitral award has been rendered – file remedies to set aside or revoke the award. A Court of Appeal can only set aside an arbitral award on a limited number of grounds, for example if there was no valid arbitration agreement or if the arbitral procedure or award violated public policy.[37] The Dutch Arbitration Act contains no provisions that allow parties to waive in advance their right to challenge arbitral awards before the competent Court of Appeal.[38] The Dutch Arbitration

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32 See e.g., F. Schonewille, 'De handhaafbare mediationclausule ten behoeve van een echtscheidingsconvenant (I)', *WPNR* 6826, 2010, pp. 43–44. Mandatory mediation procedures that take limited time do not necessarily infringe a party's right of access to justice. See Case C-317/08, *Alassini c.s./Telecom Italia SpA c.s.*, ECLI:EU:C:2010:146, §50. See also P. Boshouwers, H. Uhlenbroek and N. Van Thiel-Wortmann, 'Kroniek Mediation', *TCR* 2020, pp. 15–23.

33 See Dutch Supreme Court 20 January 2006, ECLI:NL:HR:2006:AU3724, §3.4. See also Case C-75/16, *Livio Menini and Maria Antonia Rampanelli/Banco Popolare – Società Cooperativa*, ECLI:EU:C:2017:457, *NJ* 2018/247, with annotation by C.J.M. Klaassen, nos. 45, 48, 50 and 66.

34 Article 1022 of the Dutch Code of Civil Procedure.

35 See H.J. Snijders, *Nederlands arbitragerecht*, Wolters Kluwer, Deventer 2018, p. 94; Dutch Supreme Court 17 January 2003, ECLI:NL:HR:2003:AF0136, *NJ* 2004/280 (*ABN Amro v. Teisman*).

36 Article 1021 of the Dutch Code of Civil Procedure.

37 Article 1065 of the Dutch Code of Civil Procedure.

38 The Parliamentary History suggests that parties *cannot* waive the right to commence setting aside proceedings before the Court of Appeal (*Parl. Gesch. Arbitragewet*, I.17.5 (*Nota*)).

Act does specify, however, that parties can make a binding agreement to waive the right in setting aside proceedings to make an appeal to the Dutch Supreme Court.[39]

3.3. CHOICE-OF-COURT AGREEMENTS

In the Netherlands, choice-of-court agreements are generally accepted. This implies that parties can in principle make a binding agreement to submit a dispute before the court they deem most suitable to resolve their dispute. If one of the parties nevertheless refers the dispute to a different court than the one agreed upon, the defendant can object thereto before raising all defences on the merits.[40]

Article 25 of the Brussels I bis Regulation[41] states as a starting point that 'if the parties (...) have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction (...)'. The Regulation itself however contains many provisions that limit the freedom to enter into choice-of-court contracts, for instance in cases concerning labour law and consumer contracts.[42]

The Dutch Code of Civil Procedure generally accepts choice-of-court agreements. Article 8 of the Dutch Code of Civil Procedure allows the parties in matters they can 'freely dispose of' to conclude an agreement to submit disputes to a court in the Netherlands. The same statutory provision also stipulates that Dutch courts will decline jurisdiction if an agreement has been concluded to submit the dispute to a court of a foreign state.[43]

In the Netherlands, there are 11 different District Courts. Article 108 of the Dutch Code of Civil Procedure stipulates that parties can conclude a binding

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This is possible in other jurisdictions, such as Switzerland. See also in this regard Dutch Supreme Court 1 May 2015, ECLI:NL:HR:2015:1194 and M.W. Knigge and P.L.F. Ribbers, 'Arbitrage, afstand van recht en artikel 6 EVRM', *TvA* 2017, 20.

39 Article 1064a of the Dutch Code of Civil Procedure.

40 There ordinarily is no duty for judges to examine this ex officio. Parliamentary papers *II*, 26 855, no. 3, p. 95. See also R.H de Bock, 'Forumkeuzebeding (lid 1)' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 108 DCCP, §1.

41 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

42 See e.g., Articles 15, 19, 23, 24 and 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. There is an abundance of case law on each of these provisions.

43 Derogation of jurisdiction has long been accepted, see e.g., Dutch Supreme Court 28 October 1988, ECLI:NL:HR:1988:AD0496, *NJ* 1989/765 (*Harvest Trader*).

agreement to grant exclusive jurisdiction to any one of these courts. They can thus deviate from the ordinary rules on venue (*relatieve competentie*). This rule yet again only applies to cases parties can 'freely dispose of', which results in many exceptions. Article 108 further stipulates that the agreement should be evidenced in writing (e.g., in general terms and conditions).[44]

Dutch District Courts have different departments. The commercial civil department handles most cases where the value of the claim exceeds EUR 25,000. In procedures pending before this department, parties are, *inter alia*, required to engage a lawyer. The parties may, however, agree to bring such cases before the small claims department (*kantonrechter*).[45] The parties are in that case provided with a simple, inexpensive and informal judicial process. In order for this provision to apply, it is necessary that the parties conclude an agreement *after* the dispute has arisen.[46]

The parties are also allowed to agree in advance that they will bring a dispute on matters they can 'freely dispose of' directly before the competent Court of Appeal. This agreement – which seeks to skip the court at first instance altogether – is referred to as a 'prorogation agreement' (Article 329 of the Dutch Code of Civil Procedure).[47]

Parties can also mutually agree in matters they can 'freely dispose of' to waive their right to appeal a judgment of a District Court (Article 333 of the Dutch Code of Civil Procedure). As a result, they cannot file an ordinary appeal to the Court of Appeal. The agreement does not automatically extend to the exclusion of an appeal to the Dutch Supreme Court.[48] Parties are however permitted to also waive this right to appeal to the Dutch Supreme Court.[49]

Parties sometimes conclude a so-called leapfrogging agreement (*sprongcassatie*). This is an agreement whereby the parties waive the right to an

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44 R.H. De Bock, 'Bewijs forumkeuzebeding door geschrift (lid 3)' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 108 DCCP, §4.

45 Article 96 of the Dutch Code of Civil Procedure.

46 R.H. De Bock, 'Kantonrechter naar keuze: gezamenlijk of eenzijdig verzoek' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 96 DCCP, §1. The procedure is not used very often, see Raad voor de Rechtspraak, *Research Memorandum 2018/4*, §2.2.1.

47 E.D. Van Geuns, 'Voorwaarden prorogatie' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 329 DCCP, §2; H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2017, pp. 130–31; W. Heemskerk and K. Teuben, *Hoofdlijnen van Nederlands burgerlijk procesrecht*, Convoy, Dordrecht 2018, p. 54–55.

48 See Dutch Supreme Court 4 June 2010, ECLI:NL:2010:BL9546, *NJ* 2010/312 (*Euroland c.s./Gilde c.s.*), §3.6; R.H. De Bock, 'Appelgrens: tijdstip' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 333 DCCP, §4.

49 See Dutch Supreme Court 3 December 1954, ECLI:NL:HR:1954:AG2010, *NJ* 1955/56 (*Ooms/Douma*). See also Dutch Supreme Court 4 June 2010, ECLI:NL:HR:2010:BL9546, *NJ* 2010/312 (*Euroland c.s./Gilde c.s.*).

appeal and at the same time jointly agree to bring the case to the attention of the Dutch Supreme Court.[50] Such agreements are sometimes used in satellite litigation that serves to answer pivotal legal questions.

4. AGREEMENTS ON THE COURSE OF LITIGATION

Traditionally, parties have had a great degree of freedom to reach joint agreements on the course of litigation. The most important examples will be discussed below.

4.1. AGREEMENTS ON TIME LIMITS

The default rules on regular time limits for written submissions are set out in the national court rules.[51] In complex cases, however, the default rules are not always suitable.[52] Parties can conclude an agreement on the time limits for the filing of written submissions.[53] The Dutch Code of Civil Procedure and the court rules determine whether the judge will accept a joint request of the parties for an extension of time.[54]

Parties can request the adjournment of a case for an unknown period of time. In such instances, the case is taken off the ordinary docket list (*parkeerrol*).[55] The parties may have a legitimate interest for making such requests. They could, for instance, be engaged in settlement negotiations. A request for a long

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50 Article 398 of the Dutch Code of Civil Procedure. This only makes sense if the case is suitable for cassation proceedings. H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2017, p. 382. See also B.T.M. Van der Wiel et al., *Cassatie*, Wolters Kluwer, Deventer 2019, p. 150. If the time limit for cassation proceedings is longer than the time limit for lodging an appeal (see Article 402(2) of the Dutch Code of Civil Procedure), the parties must reach a leapfrogging agreement appeal before the expiry of the appeal period. Once the parties have agreed on leapfrogging, the regular cassation period is decisive for the timeliness of the appeal in cassation. Dutch Supreme Court 20 December 2002, ECLI:NL:HR:2002:AE9391, *NJ* 2003/164 (*Juresta Card/Orde van Advocaten Zutphen*).

51 Dutch national rules of procedure for civil summons cases before the district courts (*Landelijk procesreglement voor civiele dagvaardingszaken bij de rechtbanken*); Dutch national rules of procedure for civil summons cases before the courts of appeal (*Landelijk procesreglement voor civiele dagvaardingszaken bij de gerechtshoven*).

52 See Parliamentary Papers *II* 2014/15, 34 059, no. 3, p. 68.

53 Article 133 of the Dutch Code of Civil Procedure. M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, p. 169.

54 Article 133 of the Dutch Code of Civil Procedure.

55 See Article 246 of the Dutch Code of Civil Procedure. Article 8.3 of the Dutch national rules of procedure for civil summons cases before the district courts (*Landelijk procesreglement voor civiele dagvaardingszaken bij de rechtbanken*).

adjournment of the case should be made jointly.[56] If a case is put on hold for an extended period of time, the parties are required to provide an update twice a year. If they wish to further adjourn the case, they must provide reasons.[57]

The parties' freedom to agree on time limits is restricted. The courts have a responsibility to ensure ex officio that proceedings take place within a reasonable time. This obligation follows from Article 6 ECHR[58] as well as Article 20 of the Dutch Code of Civil Procedure. In line with these general principles, Article of the 133 Dutch Code of Civil Procedure stipulates that the judge will abide by a joint request for the extension of time, unless this would lead to unreasonable delay.[59] The court rules dictate that the judge agrees to a first extension of time but will only allow further extensions if such is indeed justified.[60] Moreover, extensions can only be granted in a manner that is compatible with the ordinary conduct of the court. Courts usually have a docket date on a Tuesday. Parties cannot change or amend such practices by mutual agreement.[61]

4.2. AGREEMENTS ON WRITTEN SUBMISSIONS AND THE ORAL HEARING

In principle, parties are entitled to one round of written submissions.[62] Subsequently, the court will normally conduct an oral hearing. In cases in which an oral hearing is scheduled, parties are not entitled to a second round of

56 Article 246 of the Dutch Code of Civil Procedure. See H.J. Snijders, 'Betekenis en gevallen' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 246 DCCP, §2.

57 Article 8.5 of the Dutch national rules of procedure for civil summons cases before the district courts (*Landelijk procesreglement voor civiele dagvaardingszaken bij de rechtbanken*). See also A.I.M. Van Mierlo and J.H. Van Dam-Lely, *Procederen bij dagvaarding in eerste aanleg (Burgerlijk Proces & Praktijk nr. 1)*, Kluwer, Deventer 2011, p. 134.

58 See e.g., *A. and Others v. Denmark*, no. 20826/92, ECHR 1996. For example, the case *X v. France* concerned compensation for a citizen who had received blood transfusion with blood contaminated with HIV. His health deteriorated significantly during the proceedings. In such a case, the judiciary may be expected to act ex officio with particular diligence. See *X. v. France*, no. 18020/91, ECHR 1992. See also, P. Smits, *Article 6 EVRM en de civiele procedure*, Kluwer, Deventer 2008, pp. 227–28.

59 See A.I.M. Van Mierlo, 'Onredelijke vertraging' in A.I.M. Van Mierlo and C.J.J.C. Van Nispen (eds), *Tekst & Commentaar Burgerlijke Rechtsvordering*, Article 20 DCCP; M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, pp. 169–70.

60 See e.g., Article 2.12 of the Dutch national rules of procedure for civil summons cases before the district courts (*Landelijk procesreglement voor civiele dagvaardingszaken bij de rechtbanken*).

61 I.e., the parties cannot agree to a deadline on a Wednesday. M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, p. 3.

62 See Articles 111, 128 and 132 of the Dutch Code of Civil Procedure. Article 347 of the Dutch Code of Civil Procedure stipulates that there is one round of written submissions on appeal.

written submissions: a reply and a rejoinder.[63] They are only allowed to submit further written submissions if the judge considers this necessary in view of the adversarial principle or in view of a proper instruction of the case.[64] The parties could make a joint request to file an additional written submission. The judge may well grant such a request but is under no obligation to do so.

Over the course of the last years, there has been a fierce debate on new court rules imposing page limits in appellate proceedings. These court rules dictate that appellate briefs in principle cannot be longer than 25 pages. Nothing in these rules suggests that parties could jointly amend the page limits.[65] They certainly could make a joint request, but the judge may determine otherwise.

Parties are free to waive procedural rights, such as the right to file a written submission. In summary proceedings, parties may even decide not to submit a writ of summons at all.[66] Such an agreement is only allowed when both parties voluntarily appear at the court session. No written agreement is necessary in this regard; the parties' appearance in practice suffices.[67]

The above discussion shows that there are restrictions on party autonomy if they seek to file more or longer written submissions. These restrictions promote the efficiency of the judicial process and seek to avoid that judges over-invest their time on individual cases (see section 2.4 above).

Parties are entitled to an oral hearing. However, they may jointly waive their right to an oral hearing and request for proceedings fully in writing.[68] A waiver of fundamental rights – such as the right to an oral hearing – must be made freely and unequivocally.[69] If the right to an oral hearing is waived, however, the parties are in principle entitled to file a written reply and rejoinder.[70]

Freedom of contract can always be limited, in the sense that one cannot always conclude binding agreements to deviate from fundamental principles of justice. One example concerns the right to a public hearing. Parties can waive their right to a public hearing. Such waivers are, however, not binding upon the court. After all, public hearings do not only serve to protect the interests

63 See Article 132(1) of the Dutch Code of Civil Procedure. See also, M. Van de Hel-Koedoot, 'Recht op re- en dupliek (lid 1)' in A.I.M. Van Mierlo and C.J.J.C. Van Nispen (eds), *Tekst & Commentaar Burgerlijke Rechtsvordering*, commentary on Article 132 DCCP, §3. If there will be no oral hearing in a particular case, the court will allow both parties to file an additional written submission.

64 See Article 132(3) of the Dutch Code of Civil Procedure.

65 Article 2.11 of the Dutch national rules of procedure for civil summons cases before the courts of appeal (*Landelijk procesreglement voor civiele dagvaardingszaken bij de gerechtshoven*).

66 See Article 255(2) of the Dutch Code of Civil Procedure.

67 H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2017, p. 450.

68 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, p. 139.

69 With regard to an oral hearing, see *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, March 2014.

70 Article 132 of the Dutch Code of Civil Procedure.

of individual litigants. Public hearings are important for the trust the general public has in the justice system as a whole. As a result, parties cannot make binding agreements that court hearings will, at all times, remain secret.[71]

As a result of the recent pandemic, courts have faced real challenges conducting in-person hearings. Some courtrooms were not sufficiently safe, and the maximum capacity of others were reduced as a result of rules on social distancing. Temporary rules have granted courts a wide discretion to determine whether hearings will be conducted online or in a hybrid form. The rules allow judges to prioritise certain categories of cases over others.[72] Although we are not aware of any case law on the matter, we believe that the present system would not allow parties to make a binding contractual agreement for an in-person hearing. After all, it is not for them to determine what cases are prioritised.

4.3. AGREEMENTS THAT AFFECT THE COURT'S DUTY TO ENSURE A FAIR TRIAL

Many agreements could directly or indirectly affect fundamental procedural rights, such as the right to a fair trial by an impartial judge. Parties may be able to waive certain rights, but that does not imply that an agreement between them would be binding for a judge.

The right to a fair trial is a comprehensive procedural right.[73] Although the right can be waived at least to a certain extent,[74] it is doubtful whether parties can completely set aside their right to a fair and equal treatment. For example, they cannot exclude just one party's right to present evidence by means of witnesses, since that would result in the absence of a level playing field.[75] Similarly, parties in arbitration are free to make agreements pertaining to the conduct of arbitration proceedings, but they cannot deviate from the

71 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, p. 382.

72 Article 2 of the Temporary Law Covid 19 Justice and Security, Litigation Regulations Temporary Regulation Canton and Commerce (*Tijdelijke Wet COVID-19 Justitie en Veiligheid, Procesreglement Tijdelijke Regeling Kanton en Handel*).

73 European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)* (last updated on 31 August 2021); P. Smits, *Artikel 6 EVRM en de civiele procedure (Burgerlijk Proces & Praktijk nr. 10)*, Kluwer, Deventer 2008, p. 102.

74 *Scoppola/Italy*, no. 10249/03, §§134–36, ECHR 2009. See also *Hermi/Italy*, no. 18114/02, §§78 et seq., ECHR 2006. See e.g., Dutch Supreme Court 9 September 2005, ECLI:NL:HR:2005:AT4039, *NJ 2007, 140* (*Wenckebach/NOB*), §3.3 with regards to a waiver of the right to a fair hearing.

75 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, p. 166.

fundamental rule that dictates that the tribunal must treat parties equally and grant them an opportunity to be heard.[76]

The European Court for Human Rights (ECtHR) allows parties to waive their rights to challenge a judge, in so far as this waiver is unambiguous.[77] Still, parties to a procedural agreement are not fully at liberty to make binding agreements to waive the right to be heard by an independent and impartial court. It is for example not possible to refer a dispute to a particular judge who is related to one of the parties. Nor can they agree in advance that the rules to challenge judges are inapplicable.[78] After all, this is not a matter that solely concerns the parties but is also a matter that concerns the legitimacy of the judiciary. Under the Dutch Code of Civil Procedure, judges must withdraw from a case if they deem themselves insufficiently impartial. The parties' non-objection or agreement does not and cannot change this.[79]

5. AGREEMENTS ON EVIDENCE

5.1. UNCONTESTED FACTS

Traditionally, the principle of party autonomy extends to the fact-finding process. The Dutch Code of Civil Procedure provides for a basic division of labour between the parties and the judge. Parties must furnish facts, whereas the court will apply the correct legal standard (*dabo mihi factum, dabo tibi ius*).[80]

The judge may only base his or her decision on facts that have been adduced by the parties or that have been established in the course of the proceedings.[81] Article 149 of the Dutch Code of Civil Procedure dictates that the court is bound to accept facts that have been adduced by one party and that have

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76 Article 1036(2) of the Dutch Code of Civil Procedure. See H.J. Snijders, *Nederlands arbitragerecht*, Wolters Kluwer, Deventer 2018, pp. 287–88. See also G.J. Meijer, *Overeenkomst tot arbitrage. Bezien in het licht van het bewijsvoorschrift van artikel 1021 Rv (Burgerlijk Proces & Praktijk nr. 13) (diss. Rotterdam)*, Kluwer, Deventer 2011, pp. 163–64.

77 See *Pfeifer and Plankl v. Austria*, no. 10802/84, 25 February 1992. See also P. Smits, *Artikel 6 EVRM en de civiele procedure (Burgerlijk Proces & Praktijk nr. 10)*, Kluwer, Deventer 2008, pp. 322–23 for a more detailed overview on the possibility of waiving the right to an independent and impartial judge.

78 M.W. Knigge, *De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven (Burgerlijk Proces & Praktijk nr. XIII) (diss. Leiden)*, Kluwer, Deventer 2012, pp. 163–64.

79 A. Hammerstein, 'Procedure en gronden' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 40 DCCP, §2; I. Giesen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 1. Beginselen van burgerlijk procesrecht*, Wolters Kluwer, Deventer 2015, §284.

80 See Articles 23, 24 and 25 of the Dutch Code of Civil Procedure.

81 Article 149 of the Dutch Code of Civil Procedure.

not been contested by the opposing party. Unless it concerns an issue parties cannot 'freely dispose of', the judge may not deviate from or conduct further investigation into uncontested facts.

5.2. RULES ON EVIDENCE

The Dutch Code of Civil Procedure contains detailed rules on evidence.[82] As a general rule, parties may conclude an agreement on evidence.[83] Such an agreement could contain provisions that deviate from statutory provisions or standing case law. Article 153 of the Dutch Code of Civil Procedure, however, dictates that '[t]he court disregards agreements that derogate from the statutory law of evidence where the agreements relate to proof of facts to which the law attaches consequences that the parties cannot freely dispose of.' It further stipulates that this is without prejudice to the grounds for disregarding agreements pursuant to the ordinary rules on the validity of agreements in the Dutch Civil Code.

Parties can make binding agreements on the burden of proof. The statutory default rule determines that the party that invokes legal consequences of facts or rights that it has asserted, bears the burden of proving those facts or rights.[84] The parties are free to decide otherwise and to determine which one of them will have the burden of proof with regards to specific facts or rights.

Another example concerns the evaluation of evidence. The basic rule is that the court will consider all evidence and has a wide discretion in the assessment and valuation thereof.[85] It is up to the judge to assess the relevance, credibility and weight of the evidence. If the judge establishes that there is a reasonable degree of certainty, a fact can be regarded as proven.[86] The parties may agree to limit the court's powers to freely evaluate all evidence in advance or once a dispute arises.[87] Once one of the parties invokes a valid agreement on the exclusion of

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82 See in particular, Articles 149–207 of the Dutch Code of Civil Procedure.

83 See e.g., Dutch Supreme Court 26 November 1954, ECLI:NL:HR:1954:16, *NJ* 1955/681; B.T.M. Van der Wiel, 'De bewijsovereenkomst', *WPNR* 02, 6480, p. 223; W.D.H. Asser, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 3. Bewijs*, Wolters Kluwer, Deventer 2017, §105.

84 Article 150 of the Dutch Code of Civil Procedure. See e.g., in this regard, W.D.H. Asser, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 3. Bewijs*, Wolters Kluwer, Deventer 2017, §287.

85 Article 152(2) of the Dutch Code of Civil Procedure; H.J. Snijders and C.J.M. Klaassen, *Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2017, §230; G. De Groot, 'Hoofdregel en uitzondering' in P. Vlas and T.F.E. Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering*, Wolters Kluwer, Deventer, Article 152 DCCP, §2.1.

86 See I. Giesen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 1. Beginselen van burgerlijk procesrecht*, Wolters Kluwer, Deventer 2015, §459.

87 A.W. Jongbloed and A.L.H. Ernes, *Burgerlijk procesrecht praktisch belicht*, Kluwer, Deventer 2011, pp. 230–31; A.G. Castermans, 'De bewijsovereenkomst in het komend recht', *BW-krant Jaarboek* 1986, p. 117.

certain means of evidence or the prima facie value of written evidence,[88] the judge will, in principle, be bound by such an agreement.[89]

For example, many commercial contracts contain a so-called '*entire agreement clause*'. Such clauses generally indicate that a written agreement supersedes all previous agreements and that no changes to the agreement will be accepted unless they are made in writing. Some of these clauses contain additional language which indicates that parties will not rely on earlier drafts of the agreement or on witness evidence in case there would ever be a dispute about the obligations arising under the contract. If the language is sufficiently clear, such clauses may in essence constitute a waiver of the parties' rights to provide certain documents or witness testimony as evidence.[90]

Another example concerns a mediation agreement in which the parties agree that mediation is confidential and in which the parties specify that they will not summon the mediator as a witness. Such agreements are common as mediators – unlike lawyers, priests or doctors – do not enjoy a legal privilege.[91]

Yet another example concerns the so-called 'book clause' used by banks in their general terms and conditions.[92] A book clause stipulates that an extract from the bank's administrative records serves as prima facie evidence vis-à-vis the customer, subject to rebuttal evidence to be furnished by the customer. Article 18 of the 2017 Dutch General Banking Conditions states: '(...) Our records serve as conclusive evidence in our relationship with you; however, you may, of course, provide evidence to the contrary (...)'.

There are exceptions to the rule that parties can freely contract with regard to matters of evidence. These are fully in line with the general restrictions on procedural contracts discussed above. One example concerns the statutory rule that invalidates unreasonably onerous or burdensome provisions in general terms and conditions in consumer contracts. Article 6:236(k) of the Dutch Civil Code clarifies that general terms that limit the possibilities of consumers to furnish evidence as well as those that change the burden of proof to their detriment are unreasonable and thus voidable.[93]

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88 J.G. Gräler, *Schriftelijk bewijs*, Wolters Kluwer, Deventer 2020, p. 38 with reference to Dutch Supreme Court 10 April 2009, ECLI:NL:HR:2009:BG9470, *NJ* 2010/471.

89 G.R. Rutgers and H.B. Krans, *Het Nederlands burgerlijk recht. Deel 7. Bewijs*, Deventer, Wolters Kluwer 2014, p. 91.

90 There are many different entire agreement clauses and/or related contractual boiler plate templates. See e.g., M. Uijen, 'Boilerplates, Münchhausen revisited: de bewijsovereenkomst als instrument voor contractenmakers', *Contracteren*, 2017, 1.

91 Dutch Supreme Court 10 April 2009, ECLI:NL:HR:2009:BG9470, *NJ* 2010/471. This is even the case if the mediator also practices a profession under which he has a right to legal privilege.

92 J.G. Gräler, *Schriftelijk bewijs*, Wolters Kluwer, Deventer 2020, pp. 39–40. The validity of such terms has been confirmed by the Dutch Supreme Court in its judgment of 1 June 1923 (*Graafland/ Handels- en Landbouwbank*), *NJ* 1923/947, *W* 11 109.

93 It is generally believed that the aforementioned book clauses are acceptable as long as these do not contain language that violates Article 6:236 of the Dutch Civil Code. See Parliamentary

Another example concerns the rules on expert evidence. In the Netherlands, parties have a great deal of freedom to contract experts and to submit their findings as written evidence. Parties may each appoint their own expert or jointly appoint a single expert. At the same time, the court has broad powers and a wide discretion to appoint an expert ex officio.[94] The parties' agreement cannot limit the courts' power to seek assistance from an independent expert. The court may decide to appoint such an expert even against the will of one or both parties.[95] The court, however, must first hear and consult the parties about the appointment of an expert and the questions that a court-appointed expert should address.[96] In practice, the court almost always follows the parties' unanimous proposal.[97]

6. AGREEMENTS ON COSTS

The main rule with regard to the costs of court proceedings is that the judge decides on the allocation of costs.[98] The 'winner' usually receives a modest compensation for costs under Article 237 of the Dutch Code of Civil Procedure. The compensation is calculated on the basis of a set of simple rules and generally leads to a figure that in reality represents only a fraction of the real litigation costs. If the court deems both parties to be partially in the wrong, it may rule that each party bears its own costs.[99]

The parties may reach an agreement on costs that deviates from the statutory rules. Such an agreement could, for example, be included in general terms and

History Book 3 DCC, p. 1351; Parliamentary History Book 6 DCC, pp. 1708 and 1711. See also G.R. Rutgers and H.B. Krans, *Het Nederlands burgerlijk recht. Deel 7. Bewijs*, Deventer, Wolters Kluwer 2014, pp. 91–92.

94 Article 194 of the Dutch Code of Civil Procedure. G. De Groot, *Monografieën Burgerlijke Procesrecht deel 5. Civiel deskundigenbewijs*, SDU, Den Haag 2019, pp. 13–14.

95 W.D.H. Asser, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 3. Bewijs*, Wolters Kluwer, Deventer 2017, §232, who explains that the broad discretionary powers in the legal system have been criticised.

96 See Opinion A-G Huydecoper before Dutch Supreme Court 1 February 2008, ECLI:NL:HR: 2008:BB5923.

97 G. De Groot, *Het deskundigenadvies in de civiele procedure*, Kluwer, Deventer 2014, p. 132.

98 This is provided for in Book 1, Title 2, Section 12, Paragraph 2 of the Dutch Code of Civil Procedure. This section contains 9 provisions (Article 237 of the Dutch Code of Civil Procedure up to and including Article 245 of the Dutch Code of Civil Procedure).

99 A.C. Van Schaick, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 2. Eerste aanleg*, Deventer: Wolters Kluwer 2022, §125; H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2017, pp. 155–56; P. Sluijter, *Sturen met proceskosten. Wie betaalt de prijs van verstorend procesgedrag?*, Kluwer, Deventer 2011, pp. 48–49.

conditions.[100] Parties could, for instance, agree that one of the parties will bear the costs of litigation. They can agree that the court should award the winner the real costs, rather than a fixed fee that only covers a small portion thereof. The parties can also agree that they will each bear their own costs.

A judge should in principle respect an agreement on costs. This may be considered problematic if the agreement endorses a compensation that could be considered as excessive or that covers unnecessary costs. In the Netherlands, the judge does have broad ex officio powers to reduce the costs.[101] In consumer cases, the judge must of their own motion determine whether a contractual agreement on costs is not unreasonable vis-à-vis the consumer.[102]

Parties may also want to make specific agreements with regards to the costs of a court-appointed expert. They can make an agreement on who should reimburse the expert's final costs.[103] As for the total amount of fees, the court will ask the relevant expert to prepare an estimate of costs, on the basis of which the amount of the advance payment to be made by one or both parties will be determined.[104] Parties may express their views on the matter and the judge is likely to accommodate the joint views of the parties. Ultimately however, the judge is free in his or her determination of the fees that should be awarded to a court-appointed expert.

7. CONCLUDING REMARKS

In the Netherlands, the starting point is that parties are free to conclude a procedural agreement. Historically, the principle of party autonomy dictates that the dispute is theirs, and it is up to them to determine how it should be resolved. This freedom of contract has, however, always been restricted. In particular, parties cannot conclude valid and binding contractual agreements if these would (i) impede upon the rights of third parties; (ii) violate rules that seek to protect (weaker) parties against unreasonable contractual terms; and (iii) frustrate the ability of courts to manage their case docket properly and to allocate their scarce

100 H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer, Deventer 2017, p. 165. See also Dutch Supreme Court 23 January 1993, ECLI:NL:HR:1993:ZC0836, *NJ* 1993/597 (*The Windward Islands Bank Ltd. N.V./Jongsma*).

101 Article 242 of the Dutch Code of Civil Procedure.

102 Dutch Supreme Court, 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/274 (*Heesakkers/Voets*). This case concerns Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

103 A.W. Jongbloed and A.L.H. Ernes, *Burgerlijk procesrecht praktisch belicht*, Kluwer, Deventer 2011, p. 246.

104 Article 198 of the Dutch Code of Civil Procedure. See G. De Groot, *Monografieën Burgerlijke Procesrecht deel 5. Civiel deskundigenbewijs*, SDU, Den Haag 2019, p. 64.

resources efficiently. In commercial cases in which freedom of contract generally prevails, parties have a great deal of freedom to conclude procedural contracts. The rules of procedure contain far more restrictions in matters that parties cannot 'freely dispose of'. From a dogmatic and conceptual standpoint, there have not been any major shifts or changes in the basic tenets of the procedural framework over the last decades. Relatively recent developments, such as the rise of consumer protection rules, budget shortages and the pandemic, have made it clear that the parties' procedural autonomy all too often is and must be restricted.