SUMMARY ADJUDICATION

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Introduction[1]

The 1987 World Congress on Procedural Law had as its main theme: 'Justice and Efficiency'. One of the general reports was entitled: 'Use and Abuse of Summary Proceedings'.[2]

Today, 10 years later, the scholarly attention to the subject of accelerated or expedited proceedings is still as important as at that time. Dutch legal practice shows an increase in the use of this kind of proceedings while the number of ordinary procedures on the merits which last longer and longer, decreases.[3] In Dutch law judicial procedures are characterised by their adversarial nature and written form. If the debtor defends the case a usually time-consuming procedure follows. Accelerated proceedings, if available, offer a well-accepted alternative to the ordinary procedures on the merits. One can even speak of a development in which some procedures for provisional measures, like interim injunction procedures: *kort geding* at the *rechtbank* (district court) and *voorlopige voorzieningen* at the *kantongerecht* (subdistrict court), are increasingly adopting the characteristics of an accelerated procedure; these provisional proceedings are *de facto* final since they are no longer followed by a procedure on the merits. These interim procedures are frequently used as a placebo for accelerated proceedings.

Accelerated proceedings in the proper sense of this term are hardly known in the Dutch law of civil procedure and are rarely used in practice.

Before discussing the very subject of this contribution on provisional measures and accelerated proceedings some general informative remarks on the Dutch law of civil procedure may be of value.

1. In this article the following abbrevations will be used:
   Rv = Wetboek van Burgerlijke Rechtsvordering (Code of civil procedure)
   BW = Burgerlijk Wetboek (Civil Code)
   HR = Hoge Raad (Dutch Supreme Court)
2. Eighth World Congress on Procedural Law, Utrecht, the Netherlands. P.A.M. Meijknecht, R. Ch. Verschuur, Voorlopige Voorzieningen, in: Eenvormig en vergelijkend privaatrecht, Molengrafica 1988, Eds. D. Kokkini-Iatridou, F.J.A. van der Velden.
3. M. Freudenthal, Incassoprocedures, Deventer 1996, pp. 115, 123.

The first remark is on absolute jurisdiction. As a rule proceedings commence at a district court (*rechtbank),* but cases involving no more than Dfl. 5,000 (approximately 2,500 US$), disputes between landlord and tenant and concerning agricultural tenancies, and labour disputes are heard by the subdistrict courts (*kantongerechten*).[4] Interim injunction proceedings can be lodged with the President of the district court (the so-called '*kort geding*') if the case urgently requires an interim decision in a short term, independent of whether the competence to hear the case lies with the district court or with the subdistrict court (Art. 289 Rv). The President of the district court is also competent to hear applications for an attachment order (Art. 700 Rv). Since 1992 a subdistrict court procedure for interim measures has been introduced in cases that fall within the jurisdiction of the subdistrict court (Art. 116 Rv). This 'voorlopige voorzienigen' procedure in many aspects resembles the procedure of *kort geding*.[5]

Until 30 December 1991 the Dutch law of civil procedure had a special procedure for the collection of small monetary debts: the judicial order for payment, '*betalingsbevel*'. This procedure was for a long time an inexpensive and quick and fast method for the collection of debts of a limited sum of money. Legal practice still disagrees as to the need for the abrogation of this summary procedure.

Dutch law does not include a procedure that enables a defendant, who is of the opinion that the plaintiff can show no case against him, to have the plaintiff's action summarily dismissed.

The second observation is that according to Dutch rules of civil procedure court proceedings start with a petition or a writ of summons. The petition procedure is obligatory in all family cases and in a restricted number of other matters; the summons procedure is used in all other civil cases. Therefore the provisional matters connected with divorce start with a petition and other interim injunction procedures start with a writ.

The next remark should be made on the recodification of the Dutch civil law and of the law of procedure, placed in a bill before Parliament.[6] An important modification provided here is the integration of the *kantongerechten* and the *rechtbanken*. If this proposal is accepted the proceedings before

4. Within short the jurisdiction of the subdistrict court will be extended to a maximum of Dfl. 10,000 (approximately 5,000 US$), at a later time the maximum will be set at Dfl. 25,000 (approximately 12,000 US$).
5. Act revising the rules of procedure at the subdistrict courts, entered into force on 30 December 1991: Voorlopige voorzieningen Art. 116 BRv.
6. Wetsontwerp (bill) 24 651, April 1996. However, in Spring 1997 Parliament expressed its doubts as to the need for such a far-reaching revision. The introduction of the integration of the two instances is therefore doubtful.

the *kantongerecht* will disappear as separate procedures. As a consequence the provisional proceedings of Article 116 Rv, mentioned above, will be replaced by the *kort geding*.

A final remark concerns terminology. We will use the names already mentioned of *kort geding* and *voorlopige voorziening* for the two provisional procedures, that are quantitatively the most important ones. Provisional measures – including provisional injunctions – will be sought when commencing a proceeding or during a proceeding on the main issue of the dispute. The proceeding on the main issue will be called the *proceeding on the merits*, in which the substance of the case is determined (‘*bodemgeschil*’). The decision in a proceeding on the merits will be called the *judgment on the merits* (‘*vonnis in het bodemgeschil*’). Judgments will become *res judicata* on the day the time limit for entering an appeal has elapsed (‘*kracht van gewijsde*’). From that day on the claimant may execute the judgment. However, on request the court may give leave already to execute the judgment before that day, which is called *anticipatory execution* (‘*uitvoerbaarheid bij voorraad*’).

The main objective of this contribution is to provide a description of the procedures for provisional measures already cited: the *kort geding*, which is an interim injunction procedure before the President of the disctrict court and the voorlopige voorziening, which is an interim measure before the subdistrict court; their description will be the central theme.

Next to the provisional measures the Dutch law of civil procedure offers several other kinds of provisional measures: in divorce cases provisional measures may be requested, in claims before the district courts provisional measures may be claimed but only if related to a claim in an ordinary district court proceeding on the merits. In arbitration cases an arbitration interim injunction may be requested from the arbitrators or their President, if the parties are so convened, or in any case to the President of the district court.

A special kind of provisional measure lies within account proceedings at the request of the interested party: in this case two subsequent procedures are at stake. In a first procedure the court will decide the duty to account, in a second procedure the account has to be given. If before this second procedure it is clear that there will be a benefit for the claimant, he can ask the investigating judge to order as an interim injunction that he be credited with this benefit. This order, too, is considered to be a provisional measure.

Attachment orders are also provisional measures. Special kinds of provisional attachment are provided for in matrimonial property cases, in which,

alongside matrimonial property attachment, measures placing the property under seal, of an inventory of it and of its valuation may be requested.

In the law of evidence different options of provisional measures to secure evidence also exist, some to be requested prior to the introduction of the claim, some parallel to the proceedings, like the provisional examination of witnesses and of expert witnesses, and the provisional court inspection of the property or goods. In the law of evidence the word 'provisional' means: prior to the regular time of delivery of the evidence at the hearing.

The Dutch law of procedure includes only one kind of accelerated proceedings, the accelerated civil procedure of Articles 7 and 145 Rv, which is often called the '*bref délai*' procedure and will be described below.

1 Characteristics of the provisional measures

The Dutch law of civil procedure includes procedures for provisional measures as well as an accelerated procedure. The procedures for provisional measures are aimed at obtaining temporary instructions by the court, not at receiving a final decision in the case.

The provisional measure procedures are marked by their more or less summary character and their relatively short duration. There is a clear relationship with the procedure on the merits, which always may be instituted and sometimes even must be followed. Provisional measures may be executed without delay and will as a rule end with the decision in the procedure on the merits, if such procedure will be instituted and will become *res judicata*.

Provisional procedures are also characterized by their mainly oral presentation. Parties are summoned for an oral session, after which a judgment will be given within a short period of time. In consideration of its character as a provisional measure legal doctrine is of the opinion that in principle courts may only render condemnatory judgments, not declaratory ones; in its opinion only in specific cases may constitutive decisions be given.

In daily practice the interim injunction proceedings with the President of the district court are the most important provisional measure. Not only in strictly domestic cases, but also in international cases, interim injunctions are requested from the President of the district court. The question whether the Dutch President can found his international jurisdiction on Article 24 of the 1968 Brussels Convention is not easy to answer. To date, Dutch court

practice and legal doctrine have been of the opinion that interim measures are provisional measures as referred to in Article 24.[7]

2 The effect of the provisional measures and the connection with the procedure on the merits

With regard to the effects of the provisional measures a distinction has to be drawn between the protective measures by way of attachment orders (see no. 5) and other provisional measures, which aim to secure the object of the claim or to receive an injunction.

Procedures for provisional measures are of two kinds. First there are those provisional measures that aim at only constituting a temporary status quo, like the provisional measure in divorce proceedings and the provisional measure of the district court of Article 51 Rv. Secondly, there are those provisional measures that aim at securing the execution of the judgment on the merits, like the *kort geding* before the district court President and the *voorlopige voorzieningen* procedure at the subdistrict court (Art. 116 Rv).

In practice this latter kind of measures are the most important and the most interesting, since the court has few restrictions when applying these measures.

2.1 Preservation of the status quo

The provisional measures in divorce proceedings may be requested before, during or after the divorce proceeding until the divorce decision is registered in the register of marriages and divorces (in Dutch law this registration is required in order to render the divorce decision absolute) (Art. 821 Rv).

If provisional measures are requested before the introduction of the petition for divorce, the divorce proceedings must start within four weeks after the granting of these measures; if not, the measures will expire. In theory the measures do not influence the decision in the proceeding on the

7. In its decision of 8 December 1995, RvdW 1995, 262, the Hoge Raad formulated preliminary questions to be presented to the Court of Justice of the European Community. The object of these questions was the status of a decision given in kort geding, ordering the performance of the obligation to pay a sum of money. The Hoge Raad requested, among other things, whether, within the meaning of Article 24 of the Brussels Convention 1968, the kort geding procedure may be considered as a provisional or conservative measure and if so, if this is also the case for an order in kort geding to perform an obligation to pay.

merits. In practice, however, the provisional measures, especially the decision on the provisional custody of children is of an almost definitive kind since the court is often of the opinion that a change in the factual situation of the children in the final decision on the divorce is not in the best interest of the children.

The Civil Code defines the provisional measures that may be requested in divorce proceedings. Next to the provisional custody the petitioner may request measures concerning the exclusive use of the marital home by one of the spouses, the duty to hand over goods for personal use, maintenance for the requesting spouse or the children, provisional rights of access and the suspension of the parental responsibility of the other spouse.

In cases other than divorce provisional measures may be requested by introducing an accessory provisional claim with the claim in the proceedings on the merits (Art. 51 Rv); they cannot be obtained independently of the proceedings on the merits, however. There is a substantial relationship between the provisional measure and the proceeding on the merits; the request for a provisional measure may even have in part or completely the same content as the claim in the proceedings on the merits. However, in deciding on the merits the court is not bound by its provisional decision. In a recent decision the *Hoge Raad* considered that Article 51 Rv does not restrict the competence of the court to decide on provisional measures on all or parts of the claims under consideration in the proceedings on the merits. Reasons of efficiency may even indicate the acceptance of this kind of jurisdiction.[8]

The Article 51 procedure is a *bref délai* procedure (see above, under no. 1).

The Article 51 provisional measures maintain their effect until the decision on the merits has become *res judicata*. If the decision on the merits may be executed by anticipation the provisonal measure expires with this decision. As a consequence of the option of a procedure in *kort geding* with the President of the district court, the district court is seldom asked for a provisional measure based on Article 51 Rv.[9]

8. HR 14 November 1997, RvdW 1997, 226. The Hoge Raad referred to considerations of efficiency since proceedings on the merits have been pending for more than ten years and will certainly last some further time.

9. Quantitatively as well as qualitatively the kort geding is the most important kind of a provisional measure. Therefore our exposé is for a major part restricted to the procedure of the kort geding. Only where relevant will a reference to provisional attachment or the procedure of the voorlopige voorziening with the district court be made.

2.2 Securing the execution of the judgement on the merits

The *kort geding* before the district court President may be entered independently of the claim on the merits. There is a relationship with the procedure on the merits: a *kort geding* procedure may always be followed by a procedure on the merits. In this sense the *kort geding* anticipates the jugdment in the procedure on the merits.

In *kort geding* the President of the district court has jurisdiction. Jurisdiction in the procedure on the merits – if such procedure will follow – may be within the jurisdiction of the same district court, another district court or the subdistrict court, as indicated by the ordinary rules of jurisdiction. Often the President of the district court will have to decide on questions which will be re-examined in the procedure on the merits. In the procedure on the merits the court is not bound by this decision in *kort geding*.

The *voorlopige voorzieningen* procedure at the subdistrict court may be requested during the procedure on the merits, or parallel to this procedure or even independently of that procedure. Especially this last option – the independent procedure – has increased the attention of the practitioners for this provisional procedure.[10] Even in the case of an independent procedure a relationship with the procedure on the merits remains, because the merits-procedure remains available for use. In this procedure on the merits the subdistrict court is not bound by a decision in an 'unlinked' voorlopige *voorzieningen procedure*, that is this last procedure does not influence the decision on the merits in a negative or positive way. If *voorlopige voorzieningen* are requested during the procedure on the merits a genuine link to this merits procedure is necessary.

Theoretically, judgments in proceedings of *kort geding* or for *voorlopige voorzieningen* are interim measures not meant to be definitive decisions in the legal battle. However, since in most cases – about 95% – no regular procedure on the merits will follow, the interim decisions in both procedures will in fact be final. Whether a proceeding on the merits will follow, will merely depend on the parties.

The *kort geding* and voorlopige voorziening of Article 116 Rv are intended to safeguard the object of the dispute or to force the defendant to conform to a certain behaviour by a court injunction.

10. Prior to 1991 the voorlopige voorzieningen procedure could only be used during a proceeding on the merits; in practice this barred the use of such procedure.

A measure can also be given to maintain the legal relationship between the parties until a final decision in the proceeding on the merits has been given.

The main advantage of the *kort geding* is that the claimant will obtain a judgment within a short period of time, be this decision positive or negative. In the ordinary merits procedure in the district court such a decision may take years.

This time criterium is the most important reason to start a *kort geding* procedure instead of an ordinary procedure. In practice the *kort geding* and the *voorlopige voorzieningen* procedure serve another important and very effective role, they are means of pressure to stimulate debtors to perform their obligations. The threat of a *kort geding* proceeding or of a voorlopige voorziening often suffices to convince an extensive number of debtors to perform, mostly to pay. In particular the *voorlopige voorzieningen* procedure is used with success to convince tenants to pay their delayed rent instalments, especially if eviction threatens. If the debtor subsequently performs his obligations, the case will be withdrawn and no procedure will follow.

3 Conditions for awarding an interim judgment

In civil cases the provisional measure in *kort geding* by the President of the district court may always be given if the claim meets the following three conditions (Art. 289 Rv):

1. there is an urgent interest at stake
2. the interests of both parties have to be balanced
3. the balancing of interests justifies the decision in *kort geding*.

The fact that the President of the district court is formally competent to render a decision does not imply that he will accept the claim or will decide in favour of it. The nature of the *kort geding* procedure implies that the case not only needs an urgent decision, but is also of such a kind that it may be dealt with summarily. The President of the district court has a wide latitude in deciding on the need to allow a proceeding in *kort geding*. It is witin his competence to decide whether the case needs an urgent decision and is suited to a summary proceeding.

The condition of urgency implies the question whether waiting for a judgment in a procedure on the merits may cause great or irreparable damage to the claimant. In general the court will take into account the detriment which the claimant will suffer if he has to wait too long for a judgment in a procedure on the merits. In monetary claims in *kort geding* in general the condition of urgency is not very stringent. If the monetary claim is not

contested or is reasonably not contestable the condition of urgency is easily met. The claimant does not need to be in a state of financial need as a consequence of the debtor's non-payment for proof of urgency.

The President of the district court needs to balance the interests of the claimant and of the defendant. In practice this balancing of interests plays an important role in the procedure. The President may dismiss a claim in *kort geding* if the consequences for the defendant would be too drastic. An important factor will be the probability of a postive or negative decision on the merits. If the claimant is unable to sufficiently prove his claim or the case itself is a complicated one in which the demonstration of proof is necessary, the President of the court will refuse to reach a decision in *kort geding*.

The possibility that a decision on the application may lead to an early settlement of the action does not play a role. However, the President will instruct the parties – if the case so allows – to consider an out of court settlement in view of the alternative of time-consuming and costly proceedings. In practice many cases are finally settled in this way.

To enter a claim for *voorlopige voorzieningen* in the subdistrict court an urgent interest is needed too.

The competence of the district court's President to decide in *kort geding* is not only restricted to cases that take place within the absolute/material jurisdiction of the district courts, but encompasses all cases, like those that are materially within the jurisdiction of the subdistrict courts.

Exceptions to the rule that a decision in *kort geding* may be requested in all cases are the provisional measures in a divorce case as well as the arbitral *kort geding*. Exceptions may also be provided in special statutes, like in administrative and criminal law.

The *voorlopige voorzieningen* at the subdistrict court may only be requested in those cases in which the subdistrict court is competent; the existence of a claim in *kort geding* at the district court bars the voorlopige voorziening in the subdistrict court.

The President in *kort geding* and the judge in the subdistrict court are not bound to apply the ordinary rules of the administration of proof. The court, e.g., is not obliged to permit a party to prove the facts relevant to the dispute. The parties shall therefore have to explain their opinion by documents added to their statements. Of course the courts are free to apply the ordinary rules of proof. If the court allows a party to prove his right in a certain way this does not include that such proof has to be provided in the manner prescribed

for a interlocutory procedure. Such analogy would contradict the speedy character of the *kort geding*.

4 Subjects open to interim measures

The Dutch *kort geding* is of French origin and remained almost identical to the original ruling codified in the Dutch Code of Civil Procedure in 1830.[11]

For a very long time the application of the *kort geding* was inspired by French legal practice. Until the Second World War the *kort geding* did not play a role of any importance. After that its use increased, but it took until the 1970s and 1980s before an explosive growth occurred in relationship with developments in society for which appropriate legal rules did not exist.[12] The causes for the increase of the use of the *kort geding* were namely the *kort geding* proceedings against the workers' unions in cases of industrial action. Since then the *kort geding* has become the outstanding remedy for all kinds of subjects, like in the law of employment, in landlord and tenant law and in immigration law. After the recent introduction of the *voorlopige voorzieningen* procedure in the subdistrict court rent disputes are mostly proceeded with via this procedure. Even more recent are the *kort geding* procedures related to infringements of privacy or intrusion into private life like tortious press reports, or for an injunction forbidding the harassment of the ex-spouse. Of increasing importance too is the *kort geding* against the government for tortious behaviour. The *kort geding*, which is a civil law remedy may also be used in adminitrative or criminal law cases, if administrative law or criminal law lacks an adequate procedure against the authorities with sufficient guarantee for a speedy decision. Some of these subjects will be discussed more extensively below.

4.1 Monetary claims

Of all cases proceeded with in *kort geding*, monetary claims are the most controversial. Opponents are of the opinion that the character of the *kort geding* as being a provisional measure is unfit for the adjudication of monetary claims since the decision in *kort geding* is only an interim measure,

11. After many amendments of the Frech Code, in 1838 the Netherlands Code of Civil Procedure entered into force, and in principle still remains so.

12. The figures for kort geding proceedings are: 1900: 19, 1941: 380, 1975: 3,412, 1993: 16,400 and 1996: 14,774. The decrease between 1993 and 1996 was caused by the fact that immigration cases are no longer dealt with in kort geding.

not a final judgment. Therefore a court decision in *kort geding* ordering the payment of a sum of money has in their view only the character of a prepayment.

In 1980 the first monetary claims in *kort geding* were served in the Amsterdam district court. Inspired, in my opinion, by the French procedure of the référé-provision, the President of the Amsterdam district court accepted his competence to decide in *kort geding* over uncontested or not seriously contested monetary claims. This new practice of deciding on monetary claims in *kort geding* was the incentive for dogmatic discussion on the character of the *kort geding* in general, a discussion which has not yet ended.

In its judgment of 29 March 1985 the *Hoge Raad* accepted the adjudication in *kort geding* of a monetary claim if three conditions are fulfilled.[13] They are, that the existence of the claim is sufficiently certain, that a speedy decision is needed, and that in balancing the interests of both parties the risk of an impossibility to refund the payment after a judgment on the merits is not prohibitive.

Despite this decision by the *Hoge Raad*, the Presidents of the different district courts remain of differing opinions as to the possibility to adjudicate monetary claims in *kort geding*. Especially the need for a speedy decision is often interpreted very differently, and is thereby in some courts a barrier to deciding in *kort geding*.

In 1987 the Amsterdam district court introduced new court rules on the *kort geding*, allowing institutional creditors like social housing agencies and credit card companies to enter their at first sight incontestable claims in *kort geding* on a fixed session day, without beforehand needing the normally required President's permission. In this way the President is able to hear over 40 cases in one hour. If the defendant enters an appearance, which seldom occurs, only a few minutes are spent for oral explanation (sometimes ending the case in a referral to the regular court procedure). This special kind of *kort geding* is called the *kort geding* for debt collection; it is hardly accepted in the other district courts and then only in a very restricted way. The Amsterdam district court too accepts that monetary claims are entered in the *voorlopige voorzieningen* procedure. These are mostly claims for non-payment of rent, with a subsidiary claim for eviction from the dwelling.

These two Amsterdam procedures at the district and the subdistrict court are of importance not least as a means of pressure and are often used in comparison with the ordinary procedure on the merits.

13. HR 29 March 1985 (M'Barek/van der Vloodt), NJ 1986, 84, nt. WLH.

The introduction of a monetary claim in *kort geding* or in a proceeding on the merits is not barred by any provisional or conservatory attachment to secure that claim (see no. 5).

4.2 Delivery of movables or immovables

A claim for the delivery of movables may be entered in *kort geding*. So, e.g., a claim for the execution of a contractual obligation to deliver goods is quite usual. Preceding such *kort geding* the claimant may have had the goods conservatorily attached (Art. 730 Rv).

On the basis of this same Article 730 Rv an immovable may be attached to secure a claim for its transfer in a regular proceeding. The attachment obliges the claimant to introduce an action for the transfer of that immovable, be it in *kort geding* or in a procedure on the merits. The district court's or the district court President's judgment may replace the notary's affidavit of transfer of an immovable and may be registered in the public records of immovables, such registration being a condition for a valid transfer (Art. 3:300, ss. 1 BW)

4.3 Injunction to do or not to do

In *kort geding* the request for an injunction to do or not to do is quite usual. As a rule these injunctions do include an '*astreinte*'.[14] These astreintes are most effective in forcing the defendant to obey the injunction. If the defendant is unwilling to perform the act which is the subject of the injunction the claimant may request, e.g. in *kort geding*, that he be authorized to perform the act himself, the so-called execution in rem (Art. 3:299, ss 1 BW). Execution in rem is most helpful in claims for the rectification of press articles or advertisements.

The injunction to transfer an immovable and the execution in rem of an injunction are governed by Articles 3:300 and 3:301 BW (see also no. 4.2)

14. The 'astreinte' is a special court order in the law of procedure of the Dutch civil law system. On the application of a party to civil proceedings the court may order the other party to pay to the former a sum of money if the principal order made by the court – not consisting in the payment of a sum of money – is not or has not been complied with, without prejudice to the right to damages.

Also in cases of injunctions not to do, the claimant may request in *kort geding* an authorization to undo what has been done in conflict with an obligation not to do (Art. 3:299 ss 2 BW). The right to request an authorization for the execution of an obligation not performed depends on the kind of self-execution requested; this right does not exist if the obligation is of a strictly personal character.

4.4 Rights in rem

Rights in rem like ownership and easements and other real servitudes are often the object in a *kort geding*.

As a consequence of the housing shortage in the 1970s – still very relevant today – dwellings that had been empty for some time became the target of squatters who occupied the buildings against the owner's will. Owners tried to obtain eviction orders from the courts by means of *kort geding* proceedings which were indeed granted. A recent amendment of the Code of Civil Procedure allows the district court to grant an eviction order with an operational period of e.g. one year, which can be used against all persons who try to occupy the building during that year (Art. 557a Rv).

4.5 Contracts and torts

Conflicts over the performance of a contractual obligation may be decided in *kort geding*. This is fairly often the case in building activities, in the installation of automatisation systems or the development of software.

Especially in tort cases the claimant will ask for provisional measures in *kort geding*. In most cases is claimed an injunction forbidding any repeat of the tortious act in the future or an order to repair damaged goods.

Not only disputes over tortious acts but also disputes over quasi-contractual obligations like *negotiorum gestio*, payment without cause and unjust enrichment, may be the object of a *kort geding*.

A special field in which the district court President has accepted competence in *kort geding* are tortious acts by the government. By accepting his competence the President has become able to protect citizens' rights and interests against the government. A citizen may always summon the government in *kort geding* if his claim is based on a tortious act by the governement.

4.6 Labour disputes

In labour disputes especially cases of dismissal (in individual labour conflicts) and strikes (in collective labour conflicts) are dealt with in *kort geding*. Strikes are dealt with in *kort geding* because of the lack of a statutory regulation for such conflicts. However, since the introduction of the *voorlopige voorzieningen* procedure in the subdistrict courts this procedure has frequently be used in labour cases, especially in cases of dismissal and of contractual provisions of restraint of trade.

4.7 Trade and competition

The *kort geding* plays an important role in the protection of rights in intellectual and industrial property, as well as in the protection of the rules of fair competition between businessmen in general.

Unfair competition, including misleading advertisements and interference with intellectual property are often the subjects of a *kort geding*, Especially the EC legislation on unlawful competition is an important source of claims in *kort geding*.

Trade disputes are all disputes between the members, between the board of directors and its members, shareholders, participants or the labour force. They are often the subject of the *kort geding*. The same is true for disputes between shareholders or partners.

If an alternative dispute regulation exists, this regulation has priority.

4.8 Other kinds of claims in kort geding

Kort geding is important too in family law and the law of persons. During divorce proceedings each party may not only request the interim measures provided for in Articles 822 and 823 Rv, but also other interim measures. In *kort geding* the family dwelling may be granted in favour of one of the spouses. Neighbourhood restrictions are often requested in *kort geding*, if the wife and/or the children are seriously harassed by the ex-husband. In special cases minors too may act as petitioners without being represented by their legal representatives. This is the case, e.g., where the minor and his legal representative have conflicting interests, as well as in the case of a neighbourhood restriction order.

An important group of *kort geding* procedures are execution conflicts (Art. 438 Rv). If the executing party abuses his right of execution, as e.g. in the case of execution of a clearly ill-founded judgment declared to be executable

by anticipation the court may order the execution to be halted. An execution conflict may also be entered if important changes in circumstances have taken place after the judgment has been rendered, which lead the defendant to the opinion that there are well-based reasons to request an injunction to halt the execution of the decision.

5 Provisional attachment orders

A provisional attachment order is a provisional measure which aims at securing the rights of the claimant as well as the execution of the judgment. Attachments may be used to recover a monetary debt from all the assets of the debtor. Attachments related to the handing over and the delivery of goods, real property included, aim at securing the object of the case. Attachments may be requested by anyone who has a real or personal interest in the handing over or delivery of land or goods, as, e.g., the buyer of real or personal property.

Conservatory measures may be requested by the plaintiff before or during the procedure on the merites. This is to stop the defendant from withdrawing his assets from the attachment and may be compared to the Mareva injunction under English law. The provisional attachment will be served after having obtained an injunction from the President of the district court. The venue can only be that of the court in who's district the goods are located. The President will only marginally examine the merits of the claim. The defendant will only be heard in a restricted number of cases.

In all provisional attachments the court President allowing the attachment will determine a period of time within which the proceeding on the merits has to be commenced, if such proceeding has not yet begun. Although the claim on the merits will often be introduced in a civil procedure, this may also be done in arbitration, or in an interim injunction proceeding or any other procedure. If no proceeding on the merits will follow in time, the provisional attachment will lose effect. The strictly protective measure of the provisional attachment has no prejudicial effect on the proceeding on the merits.

Although in general the proceeding on the merits needs to be persued to obtain an executable title, an investigation of legal practice offers a different view. Especially the provisional attachment to secure the payment of a monetary debt may be seen as an effective means of pressure to induce the defendant to pay. A provisional attachment, especially a provisional

garnishment e.g. on the monthly salary with the debtor's employer or on the debtor's bankaccounts, can be very annoying for the debtor. Often the debtor will pay within a short period of time; if so, the attachment is levied and no procedure on the merits will follow.[15]

6 Content of the provisional measure

Statutory provisions determine the content of the several kinds of attachments available as provisional attachments. The district court President's leave has to be obtained when an attachment is requested. In case of an attachment of third party goods this leave for attachment includes that the third party is ordered to retain the goods attached and that any payment or transfer of the goods in contravention of this leave is legally invalid.

In *kort geding* the content of the measure is decided by the district court President in consideration of the requested provisions and of the circumstances. In view of the charateristics of the provisional measure as a interim measure the *kort geding* decision is often an injunction to do or not to do, but it may also consist of an order for the prepayment of damages resulting from the non-performance of a contractual obligation or of tortious behaviour, or in an order to provide an advancement in the case of a monetary obligation. The defendant's incapacity to pay does not play a role in these cases. Damages in tort will be awarded. A decision on the prepayment of immaterial damages is possible in *kort geding*, but the courts are reluctant to do this, however. The sums awarded are not high. So, e.g. victims of incest will not receive more than Dfl. 5,000 (2,500 US$). An exception is the award of Dfl. 300,000 (150,000 US$) for immaterial damages to an AIDS-patient to be paid by the hospital in which he was infected by the HIV virus. The award was justified by the short life-expectancy of the victim and by the victim's wish to make use of the damages during his remaining lifetime, not after a time-consuming proceeding on the merits.

In considering the award of damages the courts may take into account the defendant's payment problems.

In *kort geding* the President may give a provisional decision on the merits of the case. He can also decide to award a measure altering the legal relationship between the parties e.g. by ordering that the detriment sustained be immediately rectified. He can even give an order the consequences of which

15. M. Freudenthal, o.c., pp 125, 126.

are in fact irreparable resulting in only a claim for damages if the court decides otherwise in a procedure on the merits.

In *kort geding* the claimant may even request and obtain a provisional measure ordering the defendant to perform the same acts as is or may be claimed in the procedure on the merits. The accessory character of the *kort geding* is visible in the case of a monetary claim, where in *kort geding* an advance payment of the whole monetary debt is requested. If the decision in the procedure on the merits is different to that in *kort geding*, the prepayment loses its legal basis and having been unduly paid has to be refunded to the other party. In practice the prepayment requested and ordered is equal to the sum of money due. Now that the parties only seldomly enter into a procedure on the merits, a positive *kort geding* decision in fact works as a decision adjudicating the whole debt.

As far as the form and the content of the decision in *kort geding* is concerned, the President has great latitude in reaching a decision. A guiding principle for the President will always be that he will not in his policy go beyond what might be necessary or well-balanced in view of the decision in the procedure on the merits. In principle, however, the President may order measures not open to the district court in a procedure on the merits provided that the measures serve to safeguard a right or legally recognized interest.

Legal literature is of the opinion that in *kort geding* only condemnatory judgments are allowed, since these judgments can be executed in all cases.

It is generally accepted that a merely declaratory judgment – in which execution is not at stake – may not be delivered in *kort geding*; in a few cases, however, Presidents have not hesitated in reaching such a decision.

Constitutive judgments, like a judgment to avoid a contract or to nullify a will, are considered incompatible with the *kort geding*. The President may not alter the legal relationship between the parties in a definitive way. He may, however, decide to suspend the rights and duties deriving from the legal relationship of the parties or order the lifting of an attachment.

7 The principle of ‘audite et alteram partem’

The procedure of *kort geding* and the procedure for *voorlopige voorzieningen* are contentious procedures. These procedures are only summarily regulated. However, the rules of fair hearing must be obeyed. This includes that in the *kort geding* procedure at the district court and *voorlopige voorzieningen* at the subdistrict court the rule of ‘*audite et alteram partem*’, the hearing of

both sides, has to be followed, especially since the court's decisions in these procedures may have far-reaching consequences for the defendant. The principle of '*audite et alteram partem*' is given substance at the hearing, where both parties are heard.

If the defendant in *kort geding* appears in court a contradictory proceeding will take place during an oral session with the President. Apart from his defence the defendant may introduce a reconventional claim. In the case of a defence the President will investigate the validity of the claim. The President has to check the existence and veracity of the facts and legal relationship, and to decide if the data justify ordering provisional measures against the defendant. It is our impression that the President in *kort geding* analyses in depth the legal relationship of the parties. In fact this analysis gives a prognosis of the decision that may be expected if the case will be decided in a procedure on the merits. If the case as such is too complicated to be dealt with in a proceeding in *kort geding* the President will refer the case to the court. Very complicated cases, in which extensive proof or a report from expert-witnesses is needed, are not susceptible to be dealt with in the summary and expeditious way of the *kort geding* procedure. The President of the district court is entitled to refuse *ex-officio* to deal with the case in a *kort geding* proceeding.

If the defendant does not contest the claim or is in default because his obligation is clear and not executed the President will in general adjudicate the claim without any contradictory session. The general rules as to the procedure on the merits regarding default are applicable in the *kort geding* procedure too. Article 75 Rv rules that the court may adjudicate the claim if the compulsory formalities are observed and the claim does not seem to be tortious or ill-founded. If the claim is not seriously contested during the oral session it will be adjudicated.

In general the protective measures of attachment are not contradictory; the element of surprise is decisive. To protect his rights the defendant may request in *kort geding* or in another procedure the lifting of the attachment. Only in the case of attachment on wages not yet paid does the debtor need to be heard by the court, since this kind of attachment is considered to be very detrimental to the debtor.

8 Execution of the decision and sanctions in case of non-compliance

After a positive decision, the claimant will ask the defendant to execute the court's decision. If the defendant does not react by voluntarily obeying, the claimant may authorize a bailiff to execute the judgment. Even in that case there is no certainty that a positive result will be obtained. The means of execution available for the bailiff are the same for all judgments; these are the statutory means of execution and attachment. Which of these means may be applied depends on the decision. All real and personal property of the debtor are subject to the execution of a final or interim decision.

Dutch law also gives the option of an execution in rem. This is so when the court in its judgment entitles the claimant to execute the decision himself or by himself to end a situation that is declared illegal.

The claimant may also use one of the indirect means of execution, which act as a stimulus for the defendant to obey the court's decision voluntarily. A very important indirect means of execution in case of a *kort geding* decision is certainly the '*astreinte*' (Art. 611a-i Rv).[16] The court may only order an astreinte on the request of the claimant, not on its own motion. It can only be ordered collaterally to reach a decision ordering the defendant to perform an act other than the payment of a sum of money. If the defendant does not perform the principal decision of the court, he will forfeit the astreinte to the claimant.

In a number of cases the defendant may be committed to prison until he fulfils his obligation under the court's decision. However, committal to prison is considered to be a very severe means of indirect execution and is therefore seldom resorted to.

9 Liability for the execution of an interim measure that is nullified in a procedure on the merits

The question of liability for the execution of an interim measure that is later on nullified in a procedure on the merits is a widely discussed subject. The reason therefor has been the judgment of the *Hoge Raad* of 16 November 1984.[17] A claimant in *kort geding* (Voorbraak) was ordered not to interfere in the patents of the other party under penalty of an '*astreinte*'. For four

16. See note 14.

17. HR 16-11-1984, NJ 1985, 547, Ciba Geigy/Voorbraak (WHH/LWH).

years he acted accordingly. He did not appeal the *kort geding* decision. After four years, however, he started a proceeding on the merits, which he won. As a result of the judgment on the merits the *kort geding* decision lost its force as *res judicata*.

The judgment on the merits is not retroactive, its operates ex nunc. In the period of time between the decision in *kort geding* and the judgment on the merits the first decision has to be obeyed. If not, the defendant would be liable for a penalty for non-compliance, which he has to pay independently of the judgment on the merits.

The defendant who in such a case obeys the decision in *kort geding* will thereby suffer damage. The *Hoge Raad* decided that that party could claim damages. The counterparty who, under the threat of executing the '*astreinte*' forces the other party to obey the decision in *kort geding* is acting in an unjustified manner, if the decision on the merits shows that he has no right to urge the other party not to act against the decision in *kort geding*. The reason behind this rule is that a party who executes a *kort geding* decision is aware of the interim character of the *kort geding* decision and of the only summary examination of the case by the President of the district court, therefore there is fault on his side as well as a causal link between his acting upon the decision and the damage.

A similar problem may arise with the transfer of registered goods or land. As already pointed out in no. 4.2 the court decision ordering the transfer of registered goods or land may be entered in the public register, which effects the transfer. If the court decision registered is one taken by the President in *kort geding*, this decision may be subject to annulment by a judgment on the merits. Thereby the transfer of the registered goods or land loses its force and is null and void, and the party who received ownership by registration of the decision, then loses this ownership by the judgment.

10 Early discovery

The Dutch law of civil procedure does not contain a general rule, like the discovery rule in English law, which obliges the parties to pass to the court and to each other all relevant items of proof. The principle of party-autonomy restricts the judge in his options to order discovery. This restriction also includes the fact that a party may decide which evidentiary material will be produced, if evidence is needed. However, the law of civil procedure offers some special ways for the court to obtain information, such as the procedure of appearances.

The duty to disclose evidence enables a party to claim from the other party the delivery of documents which may be of evidentiary value. But the

duty to disclose evidence is restricted to the handing over of a non-authentic instrument and this only if the other party has a clear interest in it. Before the handing over, an attachment of the goods may be ordered. This means of proceeding may be of interest in copyright cases.

As a guarantee against frivolous claims for discovery the claimant has to indicate in a reasonable way that proof will be lost if not conserved by attachment.

Another guarantee may be the decision by the court that the bailiff should photocopy the attached documents. The documents will then be produced in court only if this is necessary as proof of the infringement of the copyright.[18]

11 The acceleration of civil procedure

Dutch civil procedure has only one accelerated procedure, which is hardly used. This is the '*bref délai*' procedure. It is an ordinary summons procedure on the merits and it ends in a final judgment. The acceleration is achieved by curtailing the period of time of summoning (Art. 7 Rv), or by deleting the reply and rejoinder in the pleadings (Art. 145 Rv). In contrast to the provisional measure proceedings this accelerated procedure works with written statements.

This '*bref délai*' procedure does not accelerate the proceedings in a substantial way. Therefore, in January 1996 an experiment commenced within seven district courts with an accelerated regime for smaller and rather factual cases. This experimental procedure is characterized by a concentration, consisting of a short period of pleadings, of eight weeks, followed by a day of oral arguments in court. Appeal on the interim decision may only be instituted in combination with an appeal on the judgment. The judgment will be given within six weeks after its request by one of the parties. In the accelerated regime a definitive judgment may be obtained within six to eight months. The experiments in some courts have been a success. This is primarily the consequence of the courts being willing to cooperate with the bar in this experiment. By fixing time limits the courts realized that the claimant will obtain a judgment within six to eight months. This accelerated regime is not based on a statutory source of law. To date, the consequences of the experiment are unknown. The courts in which the experiment has been

18. A.B.E. dos Santos Gil, Bewarende 'interim'-maatregelen met betrekking tot inbreukmakende goederen en documenten in auteursrechtzaken, in: Molengrafica 1996, Europees Privaatrecht – Opstellen over Internationale transactiesen Intellectuele eigendom, p. 199-256.

most succesful are prepared to continue this practice even after the end of the period of experiment.

The absence of an easily accessible accelerated procedure has caused an explosive development in the *kort geding* procedure. Since the procedure contains only a few formal rules of procedure, the court Presidents have a great deal of freedom in its application. The *kort geding* is, in fact, an accelerated procedure par excellence, since, in practice parties do not commence proceedings on the merits subsequently and therefore – as a result – the provisional decision acquires the status of a final judgment.