E-justice: New developments and best practices in the Netherlands

C.H. van Rhee

Introduction
E-justice has been put high on the agenda by the Dutch Ministry of Justice in its program titled ‘Quality & Innovation in the Administration of Justice’ initiated in 2012. This program aims at reforms in both civil and public law litigation, to be introduced in stages from 2015 onwards. Improving access to justice and further reducing the complexity of litigation, especially in order to facilitate the introduction of E-Justice, are some of the aims of the reforms. The government considers the reforms necessary even though it also observes that in the Netherlands access to justice is easy, the quality of the administration of justice is high, and judgments are given within a reasonable time. Nevertheless, it holds that even though the Dutch administration including the administration of justice is of high quality in international comparison and also has a high status internationally (the government refers, amongst other reports, to the Global Competitiveness Reports of the World Economic Forum),¹ this does not mean that reforms are superfluous. In order to remain one of the leading and competitive jurisdictions in the EU, reforms are considered necessary. The legislature also underlines the social and economic functions of the administration of justice and therefore the relevance of efficiency and low costs. Representatives of the bailiffs and legal counsel have been involved and will be involved in the implementation, as well as the court administration, judges and others.

Here I will concentrate on the suggested reforms in civil litigation only.

Main reform issues
In civil matters and in order to facilitate the introduction of E-Justice, a simplified, standard model is proposed for civil litigation in which a judgment is normally given shortly after the submission of a statement of claim, a statement of defense and an oral hearing. The oral hearing is scheduled shortly after the statement of defense has been submitted and can be used for various purposes: 1. An oral explanation by the parties; 2. Hearing witnesses and experts; 3. Attempting an amicable settlement, etc. Traditional oral pleading before judgment is

abolished (although this might in some cases be problematic from the perspective of Article 6(1) of the European Convention of Human Rights and the case law based on it); the reforms introduce a more businesslike handling of civil litigation. The judge is given additional instruments in order to promote celerity, especially due to the early hearing that has to be scheduled in most cases.

The more striking reforms can be summarized in the following manner:

1. The introduction of a duty to ‘digital litigation’ for all litigants, except for natural persons who do not act in a professional capacity and who are not assisted by professional legal counsel (a duty for all litigants is deemed not feasible in light of the right to access to court under Article 6 ECHR; foreign litigants do not have to litigate digitally if they are not obliged to be represented by legal counsel and if they do not have a Dutch digital access code). To this end a digital environment will be created titled ‘My Case’ (‘Mijn Zaak’ in Dutch) and this environment replaces also the traditional cause list hearing (rôle) in which procedural acts may be executed and time limits may be fixed for such acts (all this will now be done digitally);

2. The introduction of a standard initiating document to start civil litigation and, consequently, the abolition of the currently existing differences as regards the introductory document between cases started by way of a summons served by a bailiff (huissier de justice) and those initiated by way of a petition communicated by the court;

3. Continuation of the differences in procedure in contentious and non-contentious cases (currently known as summons cases and petition cases respectively, but in the future denoted as claim and request cases), also in the communication of the initiation of litigation to the opponent party and interested parties. Where a contentious case is concerned, the court issues a document which must be served on the opponent by the initiating party (e.g. by ordinary mail). The initiating party has to request the service of a bailiff, however, in case of a subsequent default of the opponent party. Service by a bailiff is needed in order to make sure that the necessary documents have reached the opponent party since the court may only issue a default judgment under such circumstances. The initiating party may also decide to use the service of the bailiff from the outset, and this will not be to his detriment when the court issues a costs order. Where a non-contentious case is concerned, the court continues to be responsible for the notification of interested parties.
4. An enlargement of the number of statutory time-limits in the Code of Civil Procedure, aiming at the majority of civil cases being decided at first instance within 5 to 6 months after their initiation (measures are taken if the submission of documents is not possible due to a failure of the digital system). The opponent party is given a two weeks period to file his ‘appearance’ in the digital environment ‘My Case’. If this does not happen, an additional term of two weeks is given for summoning him by way of a bailiff. He is given a period of four weeks for filing his statement of defense in cases heard by the small claims division of the civil court, and six weeks in other cases (this time-limit has to be counted from the initiation of the case, and not from the moment the case has been notified to the opponent part; as a result the time-limit from the moment of notification depends on the speed with which the case is notified to the opponent or interested party by the claimant or the court and varies between two and four weeks for cases before the small claims division of the civil court, and four and six weeks for other civil cases). All other relevant documents need to be filed digitally ten days before the oral hearing at latest, whereas the oral hearing itself needs to take place within 15 weeks after the initiation of the case unless the opponent has not made a digital appearance or has not filed a defense. The judgment has to be given within six weeks after the termination of the oral hearing unless the court has serious reasons for postponing the judgment (these reasons and the date of the judgment have to be notified to the parties by the court). In general, the statutory terms may be disregarded if due process so requires, but reasons should be given by the court;

5. More judicial case management due to the allocation of the case to a specific judge in an early stage and the introduction of an early oral hearing after the statement of defense, as well as more cooperation between the judge and the parties in deciding how the case will develop. In general, cooperation is expected from the parties.

The digital highway in the Netherlands

The above reforms and especially the introduction of E-Justice, necessitate the introduction of a great many changes in the existing Dutch Code of Civil Procedure. This Code was amended significantly in 2002, but its provisions still reflect a situation where the procedure is based on paper documents and where the transmission of these documents takes place by way of the postal service or the bailiff. Obviously, this is not in line with everyday reality in other areas in the Netherlands. The use of the Internet is widespread. According to recent research 97% of the Dutch population between 12 and 65 uses the Internet, 74% of the population between 65
and 75, and 34% of the population over 75 years of age. Even for ordinary people, digital communication has become the rule. The government observes that this type of communication is uncomplicated, quick and cheap. Therefore, the present Dutch government has made it one of its goals to make digital communication with the state and state institutions at all levels possible, also in the area of litigation. To make this communication safe, it has issued a uniform personal digital access code (and related codes for e.g. legal persons) for all communications with the state (this code was introduced in 2003). The access code is currently employed for using the digital environment of the tax authorities (tax submissions can be made digitally and the tax authorities have already filled in most of the necessary information derived from other electronic sources such as bank account details, ownership of immovable assets etc.; this linking of systems is also one of the aims of the reforms in civil litigation), the digital environment of pension funds and those of the municipalities. After the introduction of the reforms the access code will also be used for court litigation. Legal persons make use of a different system of digital access codes, but these codes are also unique for every legal person.

**Historical antecedents**

First steps with litigation in a digital manner were taken in the area of public law litigation. However, in practice this possibility is not used very often, most likely since it is relatively unknown. Additionally, such litigation is less interesting since the development of public law lawsuits cannot be followed online until now.

In civil cases, limited progress has been made on the digital highway. Article 33 of the Dutch Code of Civil Procedure needs to be mentioned here. In 2008 this article provided some initial rules for what was called ‘electronic communication’ with the courts. In 2012, Article 125(3) of the Code of Civil Procedure opened the possibility in a limited number of cases to submit an electronic report of the service of the summons to the civil court.²

Since the use of digital means of communication is currently not compulsory, litigation with the use of paper is still the norm in the Netherlands. Information that is submitted digitally is printed out by the court service and added to a paper file. The legislative proposal aims at changing this situation.

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² See also Besluit elektronische indiening dagvaarding (Stb 2012, 292).
A civil lawsuit according to the legislative proposal

A more uniform, standard procedure is necessary for digital litigation. This procedure does not replace the existing summary procedure (in Dutch: kort geding or, in French, référé) because there is a need for a high speed procedure in some cases. This procedure will also become available in the digital environment.

According to the legislative proposal, starting litigation digitally and the submission of digital documents will become compulsory for most litigants. Where one of the parties is exceptionally allowed to litigate on paper, the court will digitize his paper documents in order to allow the opponent party who litigates digitally, to consult the case file online. Digital documents submitted by the opponent of the party who litigates digitally and who litigates on paper have to be printed by the court and provided to the latter litigant. Attempts will be made to encourage those who do not have to litigate digitally to do so anyway, e.g. by way of establishing a helpdesk.

The procedure starts with an initiating digital document. Non-professional litigants fill in this document on the web environment of the court. In this way they initiate the procedure. Part of the data that is currently part of the summons will be submitted through this document, including the grounds of the claim. Forms aimed at specific types of cases will be provided.

All documents will be submitted digitally (uploaded). Measure will be taken to keep confidential information in such documents confidential.

Claimants who have the duty to submit their documents digitally but who submit them on paper will be given the possibility to correct their mistake. In such cases, only documents that have been submitted on paper may be resubmitted digitally. The claim will be declared inadmissible if the claimant does not correct its mistake. However, if the court only notices that documents are not submitted in the right way when the case is well under way, it is up to the judge to decide whether he will allow the parties to continue litigation by means of paper documents. He may decide to disregard paper documents that should have been submitted digitally.
Under discussion is whether a party has to indicate which parts of the submitted documents are relevant for his case. This is urgent since submitting documents digitally allows litigants to submit large numbers of documents without much of an effort. Most likely indicting parts of the relevant documents will be prescribed since the duty to indicate why a paper document is relevant and which parts of it are relevant already exists under current law based on case law of the Dutch Supreme Court. The judge may refuse digitally submitted documents if accepting them would contravene the requirements of due process.

Court fees will also have to be paid digitally.

The progress of the case can be monitored by all those involved through the ‘My Case’ web environment. The parties will be given access to this environment and will receive notification when procedural steps are taken. ‘My Case’ will indicate which party has to perform a certain procedural act. The particular act will be mentioned and the time limits for its execution will also be posted. Access to the case file will be provided through the internet, whereas it is also the place where communication between judge and parties takes place. This communication is important since by way of it the judge can, for example, make known to the parties which issues he wants to deal with during the hearing, allowing the parties to prepare well. Furthermore, the parties may ask the judge whether they may bring witnesses and experts to the oral hearing. The oral hearing has a non-digital character since digital litigation may according to the reforms not result in a decrease in direct contact between the litigants and the judge.

Interlocutory issues have to be decided in the final judgment unless there are reasons for issuing a separate judgment on such issues.

The judgment may be communicated orally at the end of the oral hearing. A report of this oral judgment will be included in ‘My Case’. If an oral judgment is not possible, the judgment will be communicated digitally through ‘My Case’. ‘My Case’ will also be used to provide the litigants with additional information, e.g. alternatives for litigation such as mediation.

Since the aim of the reform is also the reduction of administrative work, technology is used to reduce the workload for the court clerk. The report of a hearing may according to the reforms be a sound recording instead of a written report (this might, however, not be a good idea since
this might create the need for the judge to go through the whole recording and thus merely replace the workload from the clerk to the judge), whereas the case files will be preserved digitally. Where paper documents are produced, these will be scanned in order to be preserved digitally.

Based on the type of case or its complexity, the judge may decide to deviate from the standard procedure (e.g. no oral hearing, extra statements of case, etc.).

**Debt collection procedures**

The reforms will not result in the introduction of a separate, digital debt collection procedure in the Netherlands such as *Mahnverfahren* in Germany. The existing Dutch system of default judgments (which will become available in a digital format when the reforms are introduced), which are issued within a very short time (currently on average 26 days between the summons and the judgment), suffices according to the government and offers more guarantees to debtors. According to comparative research, the Dutch system is in various ways superior to the order for payment procedures in other countries (Germany, Austria, France, Switzerland). There are half a million undefended cases for debt collection before the courts in the Netherlands per year. In these cases the claim will be awarded by the court resulting in an enforceable judgment within a couple of weeks, unless the court establishes that the claim is illegitimate or without grounds in which case it does not award the claim or awards less than claimed. This happens in 25% of all default cases for debt collection. Defendants may file opposition against such default judgments, but this does not postpone their enforceability.

Obviously, the Netherlands knows the EU order for payment procedure in cross border cases but this procedure is also considered inferior to the existing Dutch situation. The debtor is not summoned to court, and there is no judge who considers the case before enforcement, which is especially unfavorable for debtors.

The new digital procedure will allow claimants to indicate in the ‘My Case’ environment that the claim will most likely be undefended. When he does so, a digital form will be provided specifically for undefended debt collection cases. On this form, the amount has to be indicated and the contract, the invoices and the correspondence with debtor can be uploaded. Notification of the debtor will be executed by the bailiff in order to be sure that the debtor has been summoned to court, which is a necessity for a default judgment.
The web environment ‘My Case’ will also be used to provide debtors who are unable to pay with the necessary information on how to act.

**Terminology**

The introduction of digital litigation will necessitate a great many changes in the Dutch Code of Civil Procedure, also as regards terminology. The terminology needs to be neutral, allowing for future developments in technology, and where specific technology is prescribed, this should not be laid down in legislation but the more flexible government decrees should be used.

The current use of the terminology ‘electronic litigation’ should be replaced by the terminology ‘digital litigation’ since part of the processes used are not electronic anymore, e.g. where wireless communication is used.

The use of the verb ‘to write’ does not seem problematic, as long as a dynamic definition of writing is being used. A written document can also be an electronic document, albeit such a document is not written by hand but typed in a word processor.

The verb ‘to send’ is not considered problematic either. Sending documents is not limited to the transfer of documents by ordinary mail, but may also mean sending documents electronically (e.g. ‘send’ button in e-mail programme). Even making documents available in a web environment can be interpreted as sending a document, since by placing them in the web environment they are within reach of the parties having access to this environment, just as putting a letter in a mailbox.

**Identification of sender of documents and Integrity of documents**

In order to be sure about the sender of documents in a digital procedure, the Netherlands will continue using a digital access code that is used for all communications with the state and its organisations (Digid, see above). In this manner, the sender of the document can be identified with sufficient surety, especially when the document is also signed electronically. This signature means that the identity of the sender can be established, that he agrees with the content of the document, that he accepts and understands the legal consequences to which the document gives rise and that he confirms the expression of his will in the document.
Obviously, individuals have to be careful with their access code and passwords, but this is, according to the reform, not an issue that has to be invigilated by the government. In addition, measures need to be taken as regards the integrity of the documents that are submitted in the digital portal. One needs to be sure that documents are not changed without knowledge of those involved in the lawsuit. This may be guaranteed by way of electronic time stamps and hashcodes.\textsuperscript{3}

\textit{Introduction of the reforms}

The reforms will not be introduced at once, but in three tranches over a period of some years, to start with in 2015. Each tranche will not necessarily be executed for each court at the same moment. There will be the necessary training and assistance for all those who have to work with the new system. Cases that have been started on paper will all be finalized in a non-digital manner.

\textsuperscript{3} See also European Commission betreffende elektronische identificatie en vertrouwensdiensten door elektronische transacties in de interne markt. COM (2012) 238].