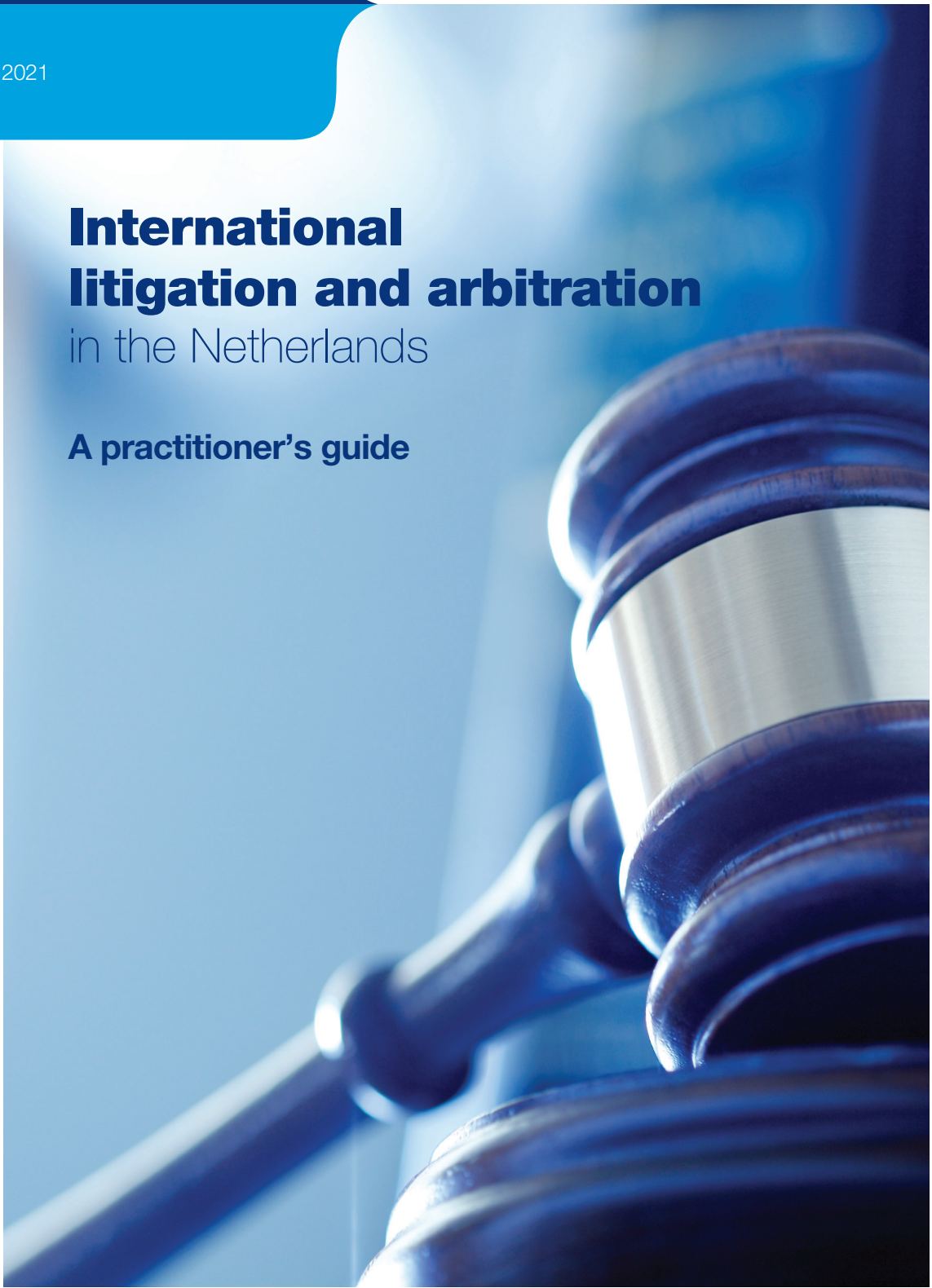


International litigation and arbitration in the Netherlands

A practitioner's guide



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in the Netherlands

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PREFACE

The objective of this booklet is to provide foreign companies and their (legal) advisors with a basic understanding of (international) litigation and arbitration in The Netherlands.

It summarizes the most important features of legal proceedings, whereby the focus is on both civil court proceedings (Chapters 1 through 20) and arbitration proceedings, including enforcement and annulment proceedings (Chapters 21 through 25). Special attention is also given to proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal (such as inquiry and squeeze-out proceedings), the Mass Damages in Class Actions Act (*Wet afwikkeling massaschade in collectieve actie*) that entered into force on 1 January 2020 and the Netherlands Commercial Court that opened its doors on 1 January 2019. The implications of Brexit on the applicability of various European law treaties are also discussed. Where relevant, we also briefly set out pending legislative proposals.

The rules of criminal procedures, administrative procedures and tax procedures are not covered. For the sake of readability, this publication does not contain references to any applicable legal articles, case law or literature.

Although not intended to be exhaustive, we do hope this booklet will (again) spark your attention to several interesting and pertinent issues. Feel free to contact us in case you wish to further discuss certain topics.

On a final note, I would like to thank everyone who contributed to preparing this updated edition. Their knowledge and experience are reflected throughout this booklet. My particular thanks go to Melle Boevink and Barbara Schogt for their editorial efforts.

Rotterdam, December 2021

Tom Claassens

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Litigation



1 Key distinguishing issues: an overview

1.1 Characteristics of the Dutch court system

One of the main distinctive features of civil law proceedings in the Netherlands is that the Dutch courts rely on the claims, legal theories, and statements as they are put forward by the parties during legal proceedings. The parties determine the scope of the proceedings, not the courts. The court usually cannot add any facts to those presented by the parties. It must consider undisputed facts as established and it cannot rule outside the scope of the demand for relief or refuse entirely to deliver a judgment (Section 26 DCCP). This is often referred to as the passiveness of the courts (*lijdelijkheid*).

In other respects, however, the court may very well steer the proceedings. The court, for example, decides that a post-defence hearing of parties should be held or that evidence should be presented by expert witnesses. In addition, several changes to the DCCP have been implemented on 1 October 2019, in an attempt to create a more active role for the courts.

Moreover, there are no jury trials in the Netherlands. The courts rule on all aspects of the case. Legal proceedings may be protracted, sometimes lasting several years. Ancillary proceedings may slow down the proceedings considerably, and the court almost invariably needs several months to reach a decision. Appeals also take considerable time. The relatively slow pace of regular proceedings is one reason for the popularity of preliminary relief or summary proceedings (*kort geding*).

Among the more fundamental albeit less distinctive principles of civil law proceedings in the Netherlands are the fact that proceedings are generally open to the public, and that parties in principle always have the opportunity to have their case heard in two fact-finding instances during which a full review of all the relevant facts and circumstances is done.

1.2 Basics of Dutch civil procedural law

Readers who are familiar with a foreign legal system, especially the Anglo-American system, may be struck by a number of differences with the Dutch legal system. Courts in the Netherlands consist solely of appointed, rather than elected, judges. Judges are civil servants, but act in their judicial capacity with complete independence from the government. Judges are appointed for life. Furthermore, there are no juries. Legal proceedings are to a large extent conducted in writing. The court can, however (on its own initiative or at the request of parties) order an oral hearing at any stage of the proceedings (Section 87 DCCP). There is no discovery, at least not in the manner as it is known in the American system. The same is true for depositions and interrogatories or document requests. It is mainly up to the parties to determine the information, documents, or witnesses they wish to present. As a result, there is also no established theory of privilege for an attorney's work product.

The Netherlands has always been at the forefront of collective redress in Europe. The Dutch legal system however does not provide for the possibility of filing class action lawsuits in the same way the American system does. The DCCP provides for a mechanism for filing group claims and for a mechanism for having group settlements declared binding by a judge. Claiming punitive damages is not possible under Dutch law.

Legal development: Mass Damages in Class Actions Act
(*Wet afwikkeling massaschade in collectieve actie*)



As per 1 January 2020, the Mass Damages in Class Actions Act (*Wet afwikkeling massaschade in collectieve actie* or **WAMCA**) has taken effect. It is now (even) easier to litigate mass damages through the Dutch courts. From now on, a claim organisation can use a class action for monetary damages. This is an important development in the field of class actions that can count on strong interest in the Dutch jurisdiction from throughout Europe. The WAMCA also introduces a lead plaintiff system, which is in some ways comparable to the system used in the US.

As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

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