Taking of evidence

Netherlands

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European Judicial Network (in civil and commercial matters)

1 The burden of proof

The Dutch law of procedure is based on the principle that 'whoever asserts a fact must prove it'. In other words, the party relying on the facts or rights it alleges for legal purposes will bear the burden of proving those facts or rights. However, the burden of proof may shift as a result of a specific legal rule or the principles of reasonableness and fairness.

1.1 What are the rules concerning the burden of proof?

The statutory rules of evidence in the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) apply in proceedings initiated by writ of summons and in proceedings initiated by application, unless the nature of the case is such as to preclude this. They are not mandatory in interlocutory proceedings and do not automatically apply in arbitration cases either. However, in arbitration cases the parties may agree to apply those rules.

The statutory rules of evidence can be found in Articles 149 to 207 of the Code of Civil Procedure.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

Facts that are alleged by one of the parties and not (sufficiently) disproved by the opposing party must be treated by the court as proved. However, there is an exception, namely situations where accepting this would entail legal consequences that are not freely available to the parties. In that event the court can demand evidence.

Evidence is not required of facts or circumstances that are deemed to be universally known or of rules of general experience. These may be used by the court whether or not they are alleged by the parties. 'Facts or circumstances that are deemed to be universally known' means facts or circumstances that any normal person knows or can know. 'Rules of general experience' means the knowledge and experience that every citizen in Dutch society has. Likewise, there is no need to prove facts of which the court itself acquires knowledge during the proceedings (trial facts).

Sometimes a presumption is provided for by law. Certain facts or circumstances are regarded as being so probable that a party pleading them does not need to provide (further) proof of them. The court can also use rules of general experience to arrive at a presumption on the basis of certain facts that are pleaded before it. In that case, the opposing party does have the possibility of rebutting the presumption. A number of special cases also apply. Two examples would be: under road traffic law, a motorist who runs over a cyclist or pedestrian must compensate for injury, unless it can be proved that the accident was due to force majeure. Another example would be a case in which a worker claims compensation for an injury suffered at work. In that case, the employer will be obliged to compensate the worker for such injury unless evidence can be adduced that there was no deficiency in the required care or that the worker was guilty of deliberate action or wilful recklessness.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

The court is free to evaluate the evidence unless the law provides otherwise. This exception concerns rules about the conclusive evidential value of evidence. In cases of conclusive evidence the court is under an obligation to accept as true certain forms of evidence, or at least acknowledge their value. But here again there is a possibility of rebuttal.

The courts can base their decisions only on facts that adequately comply with the rules of evidence.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

In certain cases (inspection of accounts, witness testimony), at the request of one of the parties, the court places the duty to provide evidence on the other party. The court may also do so of its own motion, i.e. on its own initiative.

Likewise, at the request of one of the parties or of the court's own motion, the court can order an expert report or a visit to or inspection of premises. It is the court that appoints the expert, with the expert reporting to the court, and it is the court that undertakes visits to premises. The parties are under a duty to assist with expert reports.

The parties are entitled to make their views known and to present requests in the case both of an expert report and of a visit to premises.

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

The party allowed by the court to provide evidence or which bears the burden of proof has the duty to provide evidence of the alleged facts and/or circumstances. The opposing party may always provide evidence to the contrary, unless the law precludes this.

2.3 In which cases can the court reject an application by a party to obtain evidence?

The court declines to admit evidence if this evidence is not relevant to the case, is not sufficiently specified (too vague), is out of time (too late) or is frivolous. Evidence submitted may not be disregarded on the grounds of the presumed result thereof.

2.4 What different means of proof are there?

In the Netherlands the freedom-of-evidence rule applies, that is to say that in principle evidence may be supplied in any appropriate form, unless the law provides otherwise. The law also specifies a number of forms of evidence (non-exhaustive): They are:

- deeds and judgments;
- inspection of accounts, records and documents;
- witness testimony;
- formal or oral reports by experts and
- inspections of and visits to premises.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

Witness evidence must be allowed by the law and is given at the request of one of the parties or is imposed on one of the parties of the court's own motion. The parties can also give evidence as witnesses (see point 3 below). Where witness evidence is to be given, it is the parties who call the witnesses.

Witness evidence is given in the form of testimony. It is taken when the court is in session in the form of oral testimony. A witness statement is admissible as evidence only if it relates to facts of which the witness has personal knowledge. A party who asks to be allowed to present witness evidence will be allowed to do so if the facts to be proved are in dispute and can help to resolve the case.

At the request of one of the parties or of the court's own motion, experts can present written or oral reports (Article 194 of the Code of Civil Procedure). In the event of a written report, the court sets a deadline for presentation. In the event of an oral report, the expert gives evidence on the date set for the trial.

2.6 Are certain methods of proof stronger than others?

There is a distinction between conclusive and non-conclusive evidence. In the event of conclusive evidence, the court is required to accept the content of the evidence as true or to recognise the strength of that form of evidence as determined by the law. Counter-evidence may also be offered in the event of conclusive evidence, unless the law precludes it. Authentic deeds and judgments by the criminal courts are examples of conclusive evidence. The court is free to determine the evidential value of non-conclusive evidence.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

In certain circumstances a document constitutes perfect proof. In certain circumstances the document is also essential for a specific right to come into being. An example of this might be a prenuptial agreement or a will. Evidence of the existence of a prenuptial agreement or a will drawn up by a notary is provided by submitting a notarial act. A codicil may also serve as proof. A codicil is a handwritten, dated and signed document setting out the wishes of the testator. These wishes may relate to the bequeathing of, inter alia, clothing, jewellery and specified household effects and specified books. A codicil does not require validation by notarial act.

2.8 Are witnesses obliged by law to testify?

The basic principle is that anybody who is called on by law to give evidence is under a duty to do so. The duty is to appear at the trial and make the required statements truthfully in court.

2.9 In which cases can they refuse to give evidence?

In certain circumstances it is possible to be released from the duty to testify.

Individuals who have a close personal relationship with one of the parties may claim exemption from the duty to testify. These include (ex-)spouses or (ex-)registered partners of the party, relations by blood or marriage of a party or that person's spouse or registered partner up to and including the second degree – e.g. parents, children, grandparents, grandchildren, brothers and sisters.

Witnesses can also invoke the exemption when answering specific questions if the answer would expose the witness or a relative by blood or marriage in the ascending or descending line or a collateral relative in the second or third degree, or that person's (ex-)spouse or (ex-)registered partner to the risk of criminal prosecution (Article 165(3) Code of Civil Procedure).

There is also an exemption on a functional basis. This is available to people who, by virtue of a privileged relationship on account of their profession, occupation or other status (such as clergy, doctors, advocates and notaries), have a duty of secrecy.

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

If a witness has been summoned to appear by registered letter and fails to appear at the trial, the court may set a date at the request of the party concerned on which the witness may be summoned by writ (service by bailiff). If the witness still fails to appear, the court may order him/her to be brought to court by the police. If a witness appears but refuses to make a statement, the relevant party may ask the court to remand him/her in custody for contempt of court. The requesting party will then have to pay the costs of the remand in custody. The court will make a custody order only if it believes that this is justified with a view to ascertaining the truth.

2.11 Are there persons from whom evidence cannot be obtained?

In principle, everybody is under the duty to give evidence, except for those who are entitled to the exemption (see point 2.9).

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

Witnesses are heard and questioned by the court. Parties and their lawyers can also put questions to the witnesses. The court, of its own motion or at the request of one of the parties, may confront witnesses with each other and with the parties. After the witness has testified, the court may put questions to the parties and the parties may put questions to each other.

The Dutch rules of evidence contain no specific provisions on videoconferencing. Dutch law does not exclude this procedure and there are no practical difficulties in carrying out videoconferencing. It is for the court to decide on this matter.

3 The evaluation of the evidence

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

Illegal evidence can be subdivided into evidence illegally obtained and evidence illegally used. If evidence has been obtained illegally, this does not mean that its use is always illegal. It is always at the discretion of the court whether or not the evidence should be regarded as illegal.

3.2 As a party to the case, will my own statement count as evidence?

Parties can be heard as parties in the case, but then the statements they make will not be treated as evidence in favour of the party heard as a witness, unless the testimony serves to clarify other inadequate evidence (Article 164(2) of the Code of Civil Procedure).

Last update: 10/05/2024