

## Dutch Civil Procedure and the Pandemic: Some Remarks

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As a result of the pandemic the judiciary in the Netherlands have adjusted their working method, as they state themselves.<sup>1</sup> Access to court buildings is very limited. This does not mean, of course, that courts are not handling cases. Dutch courts are doing as much as possible, so they state, to continue handling cases.

### Temporarily Regulations: General and More Specific

In April 2020 an Urgent Act containing temporarily regulations on the field of the legislative process, the judiciary and public administration was brought before Parliament.<sup>2</sup> In addition, for the situation from 7 April and on, so called 'General rules on dealing with cases Judiciary' were made up.<sup>3</sup> This set of general rules is not a formal Act, but a set of general rules made up by the board of the council of Presidents of courts. These general rules contain provisions on presence in court rooms, safe mailing and closed hearings.<sup>4</sup>

Starting point of these 'General rules' is that courts will keep dealing with all 'very urgent' cases. A case is defined as very urgent if an early judicial decision cannot be omitted.<sup>5</sup> The set of regulations contains a general overview of cases per area of law that can be considered as very urgent. For civil law it concerns, inter alia, certain summary proceedings, certain so called 'partial dispute proceedings' for personal injury cases, emergency requests for seizure of evidence and certain types of insolvency cases. It is left up to the court to decide if a case is considered very urgent, if a hearing takes place and if so, in which way that hearing will take place. In principle no oral hearings with physical presence of the parties take place. Courts are also trying to deal, as much as possible, with cases that are qualified as 'urgent'.<sup>6</sup>

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<sup>1</sup> This is stated on the formal website of the Dutch judiciary ([www.rechtspraak.nl](http://www.rechtspraak.nl)). This website also provides updates.

<sup>2</sup> *Tijdelijke wet COVID-19 Justitie en Veiligheid*. On 16 April 2020 the second chamber of the Parliament approved this Act.

<sup>3</sup> In Dutch: *Algemene regeling zaaksbehandeling Rechtspraak*. For the 'pandemic-situation' before 7 April 2020, previous special 'Covid-19 rules' applied. This regulation can be found on [www.rechtspraak.nl](http://www.rechtspraak.nl) (consulted in April 2020).

<sup>4</sup> Just to give an idea: this set of rules consists of 6 paragraphs. Each paragraph contains several 'rules' or starting points'

<sup>5</sup> The 'very urgent' cases can be found on the so called, 'list 1' and are dealt with in paragraph two of the before mentioned general rules.

<sup>6</sup> The 'urgent' cases can be found on the so called 'list 2'.

In addition to these general rules for the judiciary for certain areas of law specific temporarily rules for these pandemic times are drafted and made public.<sup>7</sup> There are temporary rules for, inter alia, civil law, penal law, tax law and for courts of appeal.

### Civil Courts in Practice

For civil courts in first instance it may look, at least at first glance, business as usual, in spite of Covid-19. This is partially true. Courts are in function and producing. New cases can be brought before the courts, parties can submit documents and judges are deciding on civil cases. Written proceedings, or the written part of proceedings, in civil cases, are moving forward.<sup>8</sup> So the machinery of civil courts has far from stopped.

What is different for civil cases these days of the pandemic? Of course, several things are. Let me mention just two different elements. The first is rather practical. For documents submitted by parties, the option of 'safe mailing' with courts is used, in contrast to non-pandemic times.

A second difference concerns hearings. One of the elements of the temporary regulations for civil cases in first instance is that as a starting point there will be no hearing in Covid-19 times.<sup>9</sup> This deviates from the starting point for civil proceedings in regular commercial cases in first instance in non-pandemic times. In normal times, after a first round in writing (statement of claims and of statement of defense) in principle a hearing takes place.<sup>10</sup> According to the temporarily regulations concerning Covid-19 times in principle a hearing does not take place in regular commercial civil cases.<sup>11</sup> Courts in first instance are in these Covid-19 days handling civil cases without a hearing, at least as a starting point. In urgent cases a hearing can take place if the courts allow so. If the court allows it, the hearing will be done remote (as much as possible).<sup>12</sup>

As a result, there is reduced number of hearings in these Covid-19 times. The postponed cases will have to be dealt with at a later stage and are therefore increasing backlogs. At the same time civil courts in first instance, at least some of them, can spend more time on cases without a hearing or cases in which a hearing already took place before the outbreak but were pending for a ruling.<sup>13</sup> So, in that respect, the current situation may provide an option to eliminate backlogs for certain cases. Those are not necessarily the most urgent cases.

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<sup>7</sup> These are the *Tijdelijke regelingen vanuit Landelijk Overleg Vakinhoud*; this can translated more or less as 'Temporary arrangements from the National Platform on the subject matter'. These regulations can be found on [www.rechtspraak.nl](http://www.rechtspraak.nl) (consulted in April 2020).

<sup>8</sup> There will probably be differences between various types of civil cases.

<sup>9</sup> For commercial civil disputes law this regulations is called *Tijdelijk afwijkende regeling voor civiele dagvaardingszaken bij de rechtbanken vanwege de bijzondere omstandigheden door de Corona-crisis*; this means something like 'Temporary derogation for civil cases to the courts due to the special circumstances of the Corona crisis'.

<sup>10</sup> Art. 131 Dutch Code of Civil Procedure.

<sup>11</sup> *Tijdelijke regeling Civiele dagvaardingszaken rechtbanken i.v.m. Corona*, version 2 april 2020.

<sup>12</sup> There may be differences between district courts.

<sup>13</sup> I have not found any formal numbers on this point. In an interview published in a Dutch newspaper the President of the District Court of Rotterdam has stated that the good news is that backlogs in certain civil cases

What is the situation for civil cases in appeal? In ‘non-pandemic times’ civil cases that are brought before a court of appeal a hearing (in some form) can take place, but not in every case. As a starting point cases in appeal are in Covid-19 times dealt with without hearing.<sup>14</sup> Nevertheless, if for example, parties persist on an oral hearing, the case will be postponed. So, courts of appeal in these Covid-19 days are handling cases without a hearing. Those cases are not necessarily the most urgent cases.

Proceedings before the Dutch Supreme court are still in progress and being handled. That is not surprising because in the vast majority of the cases handled by the Dutch Supreme Court there is no hearing. Civil cases before the Dutch Supreme Court are digitized. Since March 2017 lawyers are obliged to use a digitized system for proceedings at the Supreme Court. That system can also be used during the pandemic.

#### Four More General Observations

Zooming out this brings me to four more general observations

*More and less backlogs?* Civil cases in which no hearing takes place are being handled in Covid-19 times, at least that is the starting point. In these cases the decisions of the courts are based on the documents provided by parties. During the pandemic (digital) hearings only take place in so called urgent cases, at least as a starting point, and only if the court allows. The definition of urgent cases is not based on the pre-existing procedural structure nor on the question whether the pre-existing nature of the proceedings (mainly written or less written) was suitable for remote handling or not, but on the content of the issue. That is an obvious choice. So it is clear that there are less hearings in Covid-19 days. That will lead to backlogs. As stated, for certain types of civil cases it may very well be that several courts in first instance can reduce certain backlogs for other types of cases. Once the Covid-19 measures will be lifted there will be questions concerning priorities.

*Written proceedings.* My third remark concerns an obvious matter: written proceedings do certainly have benefits these days. One can understand that judges do take the opportunity, if time and circumstances allow, to proceed with written proceedings, or written parts of proceedings. That makes sense. At the same time there is a limit to handle cases only based on documents: the right to fair trial, inter alia concerning an oral hearing.

*First instance and appeal.* Secondly, it is likely that the temporary rules for Covid-19 times do have more impact on cases in first instance than for cases in appeal. Whether this observation is in line with what happens in practice is not entirely sure,<sup>15</sup> but if so, that may very well be the consequence of the pre-existing structure of these respective proceedings.

*Digitization.* A fourth more general topic concerns another obvious aspect: digitization. In recent years in the Netherlands an ambitious project on digitization of inter alia civil cases was set up.<sup>16</sup> A serious amount of money was invested, the Act on that project was approved by Parliament and two courts of first instance were already using the system as a

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are diminishing (in April 2020 consulted on <https://www.ad.nl/rotterdam/zo-werken-rechters-tijdens-de-coronacrisis-we-blijven-urgente-zaken-behandelen~aa11c3fb/>).

<sup>14</sup> This is only a starting point.

<sup>15</sup> I have not found any numbers.

<sup>16</sup> The project was called KEI (the first letters of the Dutch words for Quality And Innovation).

pilot. Nevertheless, in 2018 the project was put on a serious hold, due to technical reasons. Perhaps it will turn out that the pandemic will reinforce that project on digitization, or parts of it, or some of its ideas. In fact, at least some courts of appeal were on a voluntarily basis already working digitized, in the run-up to the enforcement of that project on digitization. Although that project was put on hold, in these Covid-19 times it can very well be that these courts may benefit from the way they had adjusted their working methods in the run up to it. Perhaps the current situation will serve to enhance digitization in a practical way that seems to work for parties and courts in civil cases.

#### It Is Not Over, Yet

Hopefully some of the actual measures will prove to be valuable and develop in a way that they are more or less fit for use in the upcoming years. If in some way the experiences that are gained now in Covid-19 times, are useful for the future some of the actual measures and are perhaps more permanent than we now expect. Will the crisis enhance digitization of civil proceedings? Will it put more emphasis on the written elements of proceedings? It remains to be seen. At this point it is unclear what the status of the measures in a couple of months (or years?) will be.<sup>17</sup> Of course it is to be hoped that hearings in civil cases which are now being postponed can take place as soon as reasonably possible.

For justice systems globally several questions will arise once the situation comes back to normal, for example concerning prioritization of handling postponed cases and hearings. In addition, it can be expected that civil courts will have to deal with several types of new civil cases that result from this pandemic (contract cases, liability case, insolvencies, evacuation from houses etc.). It is undeniable that economically hard times are in front of us. From a procedural point of view one can only hope that courts will be ready to deal with them in an adequate way.

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<sup>17</sup> The before mentioned Urgent Act is, at least for now, applicable until 1 September 2020.