Recourse against Judgments in the Netherlands

C.H. van Rhee, 'Recourse against Judgments in the Netherlands', in: J.A. Jolowicz, C.H. van Rhee (eds.), *Recourse against Judgments in the European Union*, The Hague, 1999, p. 239-260.

RECOURSE AGAINST JUDGMENTS IN THE NETHERLANDS

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Abbreviations

HR: Court of Cassation/Supreme Court (*Hoge Raad der Nederlanden*)
NJ: Dutch Law Reports (*Nederlandse Jurisprudentie*)
NRv: Proposed changes in the Code of Civil Procedure (Bill 24 651)
par.: paragraph (*lid*)
Rb: Court of First Instance/Trial Court (*Arrondissementsrechtbank*)
RO: Code on Judicial Organisation (*Wet op de Rechterlijke Organisatie*)
Rv: Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*)
TK: Bill introduced at the Lower House of Parliament.
W: Weekly Law Reports (*Weekblad van het Recht*)

1 INTRODUCTION

1.1 Courts in the Netherlands

The main courts of first instance (Trial Courts) in the Netherlands are the *Kantongerecht* and the *Arrondissementsrechtbank*. In civil cases, the *Kantongerecht* has jurisdiction over (a) claims of 5000 guilders or less and (b) specific types of action, such as those concerning labour contracts and the lease of property.[2] The *Arrondissementsrechtbank* takes cognizance of, *inter alia*, all civil actions at first-instance, i.e. at the trial level, which by law have not been assigned to another court.[3] Additionally, the *Arrondissementsrechtbank* is a court of appeal for cases judged at first instance by the *Kantongerecht*.[4]

The *Gerechtshof* is mainly a court of appeal for cases tried before the *Arrondissementsrechtbank*[5] and for those adjudicated in summary proceedings (*kort geding*) before the President of the *Arrondissementsrechtbank*.[6] The *Hoge Raad der Nederlanden* ('Supreme Court of the Netherlands') is the court of cassation.[7]

1.2 Reforms in the fields of judicial organisation and procedure

In the 80s, the Netherlands witnessed the start of a comprehensive programme of reform in the fields of judicial organisation and procedure. The reform programme consists of three stages, of which the first has now been completed. This has, amongst other things, resulted in the consolidation of several administrative procedures which were formerly adjudicated by different judicial bodies, in the *Arrondissementsrechtbank*. Consequently, the *Arrondissementsrechtbank*

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1. The author would like to thank Professor William Burnham, Wayne State University Law School (Detroit), for reviewing the English of the final draft of this report.

2. Arts. 38 *et seq.* RO.
3. Arts. 53 and 55a RO.
4. Art. 54 sub 2° RO.
5. Art. 69 RO.
6. Art. 295 par. 2 Rv.
7. Art. 95 RO.

has obtained extensive administrative jurisdiction together with its jurisdiction in civil and criminal cases.

As part of the reforms in the second stage, a bill has been submitted to Parliament which contains changes in the court structure. It is proposed to abolish the *Kantongerecht* and to reallocate its jurisdiction to the *Arrondissementsrechtbank*, transforming the latter court into a general first-instance court. In addition, the bill contains changes in the Code of Civil Procedure. It is unlikely that all of the proposed changes will be enacted due to opposition from various persons and bodies. The *Kantongerecht* will most likely be maintained.

In the present report the current situation (January 1998) will be discussed. The proposed changes of the second stage will be mentioned as far as they concern the means of recourse in civil cases. These references, however, will not be numerous, since it has been the aim of the legislature to reform the regulations concerning recourse in a separate bill. This bill is currently being prepared. It will be introduced as part of the third stage of reform.

1.3 Types of recourse

Means of recourse are available either in the very court in which the challenged decision was rendered or in higher courts. 'Opposition' (*verzet*), 'revision' (*revisie*), 'third-party opposition' (*derdenverzet*) and 'requête civile' (*request civiel*) are available in the same court, whereas appeal (*appel*) and cassation (*cassatie*) are means of recourse in a higher court. Leave to file these types of recourse is not required. 'Cassation in the interest of the law' (*cassatie in het belang der wet*) is a form of recourse which is not available to the original litigants but only to the Procurator-General in the cassation court. 'Cassation in the interest of the law' does not affect the rights of the original parties to the suit, but is only in the interest of the development of the law.

The distinction between ordinary and extra-ordinary means of recourse is important, since only the former means result in a stay of execution (unless the challenged decision contains a clause declaring the judgment immediately enforceable, i.e. *uitvoerbaar bij voorraad*[8]; this clause cannot be included by the judge on his own motion, but has to be requested by a party).

The ordinary means of recourse are opposition, appeal, cassation and revision, and the extraordinary ones are third-party opposition and 'requête civile'. 'Cassation in the interest of the law' is occasionally classified as extraordinary, although due to its unique character it seems better not to classify it under the heading of 'ordinary' or 'extra-ordinary'. 'Cassation in the interest of the law' and revision will not be discussed here, since they are of limited importance to the legal practictioner.[9] (Revision will be abolished as a result of the proposed reforms in the Code of Civil Procedure.[10])

1.4 Two types of civil proceedings

The two principal ways to commence a civil action under Dutch law are by way of summonses and by way of petition. This results in two different types of procedure, known as the 'procedure on summonses' (*dagvaardingsprocedure*) and the 'petition procedure' (*verzoekschriftprocedure*). Both at first instance (i.e. at the trial level) and on appeal, the manner of proceeding is affected by this distinction. The existence of the two procedures is related to the fact that two categories of civil cases may be distinguished: those in which the legal consequences may be determined by the parties (e.g. cases concerning contracts) and those in

8. Art. 52 Rv.

9. For an extensive study on 'cassation in the interest of the law', see W.H.B. den Hartog Jager, *Cassatie in het belang der wet: een buitengewoon rechtsmiddel*, Arnhem 1994.

10. TK 1995-1996, 24 651, no. 1, p. 73.

which they may not (e.g. cases for appointment of a guardian). In principle, the former type of cases, which are usually contentious, should be commenced by summonses and the latter, which are usually non-contentious, by petition, although this distinction is not strictly adhered to.

Terminology in the Code of Civil Procedure often indicates when an action should be commenced by summonses or petition. In the former case, the word *vordering* is used, whereas in the latter case the terms *verzoek* or *verzoekschrift* appear. Where necessary, differences in the procedure on recourse resulting from the manner in which an action is commenced will be mentioned below.

2 APPEAL

2.1 Jurisdiction on appeal

Kantongerecht

In actions commenced by summonses before the *Kantongerecht*, the right of appeal is precluded where the claim does not exceed 2,500 guilders.[11] This amount will become 5000 guilders if the *Kantongerecht* becomes part of the *Arrondissementsrechtbank* as a result of the programme of reform discussed above.[12] Proceedings commenced by petition do not contain a similar limitation of appeal.

Where a single plaintiff brings several claims against the same defendant in a single case, the possibility of appeal is determined by the aggregate value of the individual claims, even where they are not related.[13] Appeal is also possible if the plaintiff wishes to challenge a judgment because part of his claims have been denied, even though the value of this part is 2,500 guilders or less. This is due to the fact that the value of the entire *claim* at first instance determines the possibility of appeal.[14] Claims and counter-claims may be aggregated in order to determine whether appeal is available.[15]

Where several plaintiffs bring an action in a single case or where an action is brought against several defendants, the value of the claims may not be aggregated; under such circumstances each claim must be evaluated individually in order to determine whether or not appeal is allowed.[16]

If during proceedings before the *Kantongerecht* the claim is reduced to 2,500 guilders or less, appeal is not allowed, since the elegibility for appeal is determined by the amount of the claim which has been the subject of the judgment.[17] The same rule makes it possible to appeal of a judgment concerning a claim which has been increased during the proceedings before the *Kantongerecht*, resulting in its value becoming more than 2,500 guilders.[18]

The ancillary claims for costs, interest and *astreinte* (a penalty imposed on a daily basis in case of non-compliance or a fine imposed per contravening act) do not affect the value of the claim as far as appeal is concerned. An exception to this rule is interest which became due before the action was brought; such interest is taken into account in determining the value of the

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11. Arts. 38 and 39 RO.
12. Art. 332 NRv.
13. HR 17-05-1946, NJ 1946, 433.
14. HR 21-12-1933, NJ 1934, 1025 and W 12782.
15. Art. 253 par. 1 Rv.
16. HR 12-06-1953, NJ 1954, 61.
17. HR 24-04-1987, NJ 1988, 133.
18. W. Hugenholtz, W.H. Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, Utrecht 1996, no. 25.

claim.[19] The latter rule, which currently cannot be found in the Code of Civil Procedure, will be codified by new legislation.[20]

The parties may agree to waive the right of appeal.[21]

Arrondissementsrechtbank

The value of the claim is of no importance for the right to appeal judgments of the *Arrondissementsrechtbank*. Unless forbidden by law, the first-instance judgments of this court are subject to appeal.[22] An example where appeal is excluded are actions adjudicated by the *Arrondissementsrechtbank* because the defendant did not seek removal of the case to the *Kantongerecht* even though this was the proper court competent to hear the action.[23] Accordingly, in such a case the omission to seek removal results in a loss of the right to appeal. It should, however, be remembered that the cassation court has decided that even where by statute appeal (and cassation) of particular types of decision has been excluded, appeal (and cassation) is nevertheless allowed where it is claimed that the provision prohibitting recourse:

1. has been applied unjustly;
2. has been applied in contravention of essential formalities;
3. has been ignored unjustly.[24]

As in cases before the *Kantongerecht*, parties may agree to waive their right of appeal.[25]

2.2 Procedure, scope and consequences of appeal

Appeal can be filed by litigants who have lost their case at first instance in whole or in part, and only one appeal may be brought. The litigant seeking the appeal is termed *appellant*, whereas his opponent is known as *geïntimeerde*. The procedure on appeal is essentially a 'second first instance'.[26] An important difference between the first-instance procedure and the procedure on appeal is, however, the number of pleadings (*conclusions*) each party may submit in actions commenced by summonses. While in first-instance proceedings before the *Arrondissementsrechtbank* the claim and the defence are followed by a replication and a rejoinder, on appeal only a complaint (known as *conclusie van eis* or *memorie van grieven*) and an answer (termed *conclusie van antwoord* or *memorie van antwoord*) are allowed.[27]

The appellate court has all the power and jurisdiction of the court from which the appeal was brought. In Dutch law, this is styled the *devolutive effect* of appeal. As a result, both errors of fact and of law may be corrected on appeal. All aspects of the challenged part of the first-instance judgment are considered by the appellate court (*tantum devolutum quantum appellatum*).[28] As a result, this court may also deal with questions raised during litigation at first instance that have not been decided by the court of first instance.[29]

On appeal, the appellant may not only submit his objections to the first-instance

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19. W. Hugenholtz, W.H. Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, Utrecht 1996, no. 26.
20. Art. 332 NRv.
21. HR 14-05-1925, NJ 1925, 1032 and W 11441.
22. HR 13-04-1984, NJ 1984, 566 (WHH).
23. Art. 157 Rv.
24. HR 29-03-1985, NJ 1986, 242.
25. Art. 55 RO.
26. See Arts. 347 par. 1 and 353 Rv for proceedings commenced by summonses, and Art. 429q par. 6 Rv for proceedings resulting from a petition.
27. Art. 347 par. 1 Rv.
28. HR 16-12-1926, NJ 1927, p. 263 and W. 11612.
29. HR 16-11-1951, NJ 1952, 62.

judgment, but he may also correct his own acts or ommissions in conducting the case before the lower court.[30]

In actions commenced by summonses, the appellant who acted as plaintiff at first instance may change his original claim. The adverse party may oppose the change on the grounds that it would unreasonably hinder his defence or delay the proceedings.[31] The opponent cannot oppose a reduction of the claim.[32] In default cases only a reduction of the claim is allowed.[33] A change of the claim on appeal, however, may not result in the *Arrondissementsrechtbank* adjudicating an appeal case which cannot be judged at first instance by the *Kantonrechter*.[34] In actions commenced by petition, the claim may only be changed with the court's consent.[35]

In principle, the adverse party may introduce a new defence on the merits in proceedings on appeal.[36]

As a result of the above regulations, the appellate court will sometimes entertain questions which were not raised during litigation at first instance.

A litigant who failed to produce witnesses at first instance, can do this on appeal, with the exception of those witnesses whom at first instance he formally declared he would not produce.[37]

The appellate court may either receive evidence at the request of a party or on its own motion.[38] This subject is mainly governed by the rules laid down for the procedure at first instance.[39]

The scope of an appeal is determined by the summons on appeal or the petition and the writings filed by the litigants. It should be noted that unlike the summons at first instance, the summons served on appeal does not have to contain the grounds on which the appeal is based.[40] In practice, grounds are not included in summonses on appeal. A petition invoking appeal proceedings should, however, contain grounds.[41]

The introduction of an appeal results in a stay of execution, unless the first-instance court, on a motion of one of the parties, has declared its judgment enforceable even if it is challenged in a manner which would otherwise result in a stay of execution (*uitvoerbaar bij voorraad*).[42]

Even after expiration of the term allowed for filing an appeal, the opponent of the original appellant may bring a cross-appeal. This should be done in answer to the claim on appeal and is only possible if the challenged judgment is (partly) against him.[43]

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30. HR 17-02-1978, NJ 1978, 623.

31. Art. 347 par. 1 j^{o} 134 Rv. Cf. Art. 2.4.6 NRv. For proceedings before the *Kantonrechter*, see Art. 112 par. 2 Rv.

32. Cf. Art. 2.4.5 NRv. For proceedings before the *Kantonrechter*, see Art. 112 par. 1 Rv.

33. Art. 347 par. 1 j^{o} 134 par. 4 Rv.

34. HR 29-01-1993, NJ 1993, 220.

35. Art. 429q par. 6 j^{o} Art. 429i Rv.

36. Art. 348 Rv.

37. Hugenholtz/Heemskerk, no. 173.

38. Art. 353 Rv j^{o} 192 par. 1 Rv. For actions commenced by petition, see Arts. 429q par. 6 j^{o} 429j Rv.

39. Art. 353 Rv. For actions commenced by petition, see Arts. 182 and 429q par. 6 Rv.

40. Art. 343 par. 1 Rv.

41. Art. 429o j^{o} 429d Rv.

42. Art. 350 par. 1 Rv. For proceedings commenced by petition, see Art. 429p Rv.

43. Art. 339 par. 2 Rv. For actions commenced by petition, see Art. 429n par. 4 Rv.

A cross-appeal on grounds not raised at first instance is not allowed.[44]

Appeal may not result in a *reformatio in peius*, that is to say, it may not lead to a less favourable decision than that pronounced at first instance.[45]

2.3 Appeal of interlocutory judgments in actions commenced by summonses

Types of interlocutory rulings

Dutch law distinguishes various types of 'interlocutory decisions': 'preparatory judgments', 'provisional judgments', 'incidental judgments' and 'interlocutory judgments *sensu stricto*'. These distinctions will be abolished by future legislation, which only provides for provisional and other interlocutory decisions (see below).

A preparatory judgment is a ruling affecting the manner of proceeding in a particular case. This ruling does not, in principle, affect the way in which the case will be decided.[46] An example of a preparatory judgment is where a joinder of cases is allowed or refused.[47] A decision postponing final judgment is also a preparatory judgment, unless the postponement is necessary to await the judgment in another lawsuit which may affect the decision in the postponed proceedings.[48] In the latter case, the judgment is 'interlocutory *sensu stricto*'.

An 'interlocutory judgment *sensu stricto*' regulates the nature of proceedings in a case in such a manner that it may affect the final decision of the court.[49] Examples are where the court orders (1) the hearing of witnesses or experts, (2) a judicial inspection of premises, or (3) an appearance of the parties in order to inform the court on particular issues.

Provisional judgments contain provisional measures.[50] These measures no longer apply once the last judgment in the case on the merits has obtained force of *res judicata* (a decision obtains *res judicata*-force when no ordinary means of recourse can be brought against it or if the period for bringing such means has expired[51]).

Incidental judgments are all interlocutory rulings (*sensu lato*) other than those above.[52] Examples of claims resulting in an 'incidental judgment' are prayers for (1) the service of third party notices (*vrijwaring*), (2) security, and (3) *désaveu* (a disclaimer for acts performed by legal counsel).

Rules for appeal of interlocutory rulings

Preparatory judgments may only be appealed after final judgment has been entered. This appeal should be combined with appeal of the final judgment; that is to say, when the final judgment is not challenged, appeal of a preparatory judgment is not allowed.[53]

Appeal of a provisional judgment is possible before final judgment has been pronounced. If an appeal has not been filed before final judgment, however, this is again possible together with an appeal of the final judgment.[54]

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44. Art. 250 par. 2 Rv.
45. HR 14-10-1988, NJ 1989, 78.
46. Art. 46 par. 3 Rv. Cf. HR 03-01-1975, NJ 1975, 455.
47. HR 12-11-1920, NJ 1921, 85 and W 10667.
48. HR 18-05-1962, NJ 1965, 115.
49. Art. 46 par. 4 Rv.
50. Cf. Art. 51 Rv.
51. Cf. Y.E.M. Beukers, *Eenmaal andermaal? Beschouwingen over gezag van gewijsde en ne bis in idem in het burgerlijk procesrecht*, Zwolle 1994.
52. Incidental rulings are mentioned in Arts. 337 and 401a Rv.
53. Art. 336 par. 1 Rv.
54. Art. 337 par. 1 Rv is usually interpreted in this way.

The same possibilities exist regarding incidental and interlocutory judgments (*sensu stricto*), unless these rulings contain a clause which stipulates that appeal is only possible together with an appeal of the final judgment.[55]

Despite the above rules, all types of interlocutory judgments (*sensu lato*) may be challenged before final judgment if this is done simultaneously with an appeal of a later interlocutory judgment (*sensu lato*) which may immediately be appealed of.[56]

If the appellate court approves an incidental, provisional or an interlocutory judgment (*sensu stricto*), it has to remand the case on the merits to the original court of first instance. On request of the parties, however, the appellate court itself may decide the case on the merits. The court may also do this of its own motion if it finds that the case is sufficiently prepared for final judgment (*évocation*).[57]

If the appellate court reverses an 'interlocutory judgment *sensu stricto*' of a court of first instance, it may decide the case on the merits as well,[58] but it can also, in its discretion, remand the case to the original first-instance court.[59] If the court decides to adjudicate the case on the merits itself, it deprives the litigants of the possibility of appeal of its judgment, which nevertheless under such circumstances is a first-instance judgment.

Where the appellate court reverses an incidental or provisional ruling, it is only allowed to adjudicate the case on the merits where the parties so wish. This is different if the case is sufficiently prepared for final judgment, because then the court may decide to adjudicate the case on the merits on its own motion.[60]

From the above examples it appears that an appellate court, handling an 'interlocutory appeal' (*sensu lato*), can under certain circumstances decide points of substance between the parties.

Appeal of interlocutory or incidental judgments results in a stay of the case on the merits. If the judge in the case on the merits nevertheless pronounces judgment, this judgment may only be annulled on appeal.[61]

As mentioned above, the proposed new legislation only distinguishes between 'provisional' and other interlocutory decisions. Under the new law, provisional judgments may be appealed of before final judgment. The same rule applies to the other interlocutory judgments, unless the court rules that an appeal is only allowed together with an appeal of the final judgment.[62]

2.4 Appeal of interlocutory judgments (*sensu lato*) in actions commenced by petition

Appeal is not allowed, unless the court has decided otherwise in its interlocutory decision.[63]

2.5 Interlocutory judgments containing final decisions

The above rules regarding appeals of interlocutory judgments (*sensu lato*) do not apply when these judgments also contain final decisions (*deelvonnissen*). In that case the final part of the judgment should immediately be appealed, even if the lower judge has excluded an intermediate

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55. Art. 337 par. 2 Rv.
56. HR 30-06-1967, NJ 1968, 43.
57. Art. 355 Rv.
58. Art. 356 par. 1 Rv.
59. HR 02-01-1942, NJ 1942, 294.
60. Art. 356 par. 2 Rv.
61. HR 27-11-1981, NJ 1983, 738.
62. Art. 337 NRv.
63. Art. 429n par. 3 Rv.

appeal.[64] The litigants or their counsel should, therefore, review interlocutory judgments with care.

2.6 Appeal of a final judgment does not necessarily imply appeal of preceding interlocutory decisions

Where an appeal has been filed against a final judgment and not against a preceding interlocutory judgment (*sensu lato*) and where no complaints against the interlocutory judgment are made, the appellate judge is (in principle) bound by the interlocutory decision.[65]

3 CASSATION

3.1 General observations

The basis of the jurisdiction of the court of cassation can be found in the Constititution.[66]

Cassation can be brought against (1) first-instance judgments which are not subject to appeal and (2) appellate judgments.[67] The same rule applies to interlocutory judgments. Cassation is not allowed where another type of recourse is or has been available, unless after the disputed judgment has been entered, the parties agree to forego proceedings on appeal in order to commence the cassation proceeding immediately (*sprongcassatie*).[68] Even after expiration of the time period allowed for cassation, the opponent of the litigant having commenced cassation proceedings may file a cross-cassation.[69] This should be done in the response to the cassation complaint[70] and is only possible if the challenged judgment is (partly) against the opponent. In proceedings commenced by petition, cross-cassation is also possible.[71] Cassation results in a stay of execution, unless the lower court, on a motion of a party, has declared that its judgment is enforceable even if it is challenged in a manner which would otherwise result in a stay of execution (*uitvoerbaar bij voorraad*).[72]

The cassation court is bound by the facts which have been established by the lower court.[73] These facts appear from the challenged judgment and the other documents included in the case-file.[74]

Cassation proceedings may be commenced whenever:
(1) the lower court has not observed formalities which must be observed on penalty of nullity of its decision; and
(2) errors of law, both procedural and substantive, with the exception of the law of foreign states, have been made.[75]

Ad 1. The most important example of a deficiency in the observance of formalities is where the

64. See Art. 337 par. 2 Rv. Cf. HR 08-12-1972, NJ 1973, 155.
65. HR 05-03-1948, NJ 1948, 180.
66. Art. 118 par. 2 Rv.
67. Art. 398, 1° Rv.
68. Art. 96 par. 1 RO j° 398, 2° Rv.
69. Art. 410 par 2 Rv.
70. Art. 410 par. 1 Rv.
71. Art. 427 Rv.
72. Art. 404 Rv.
73. Art. 419 par. 3 Rv. For proceedings commenced by petition, see Art. 429 par. 2 j° 419 par. 3 Rv.
74. Art. 419 par. 2 Rv. For proceedings commenced by petition, see Art. 429 par. 3 j° 419 par. 2 Rv.
75. Art. 99 par. 1 RO.

court below fails to adequately explain its decision. This occurs not only where an explanation is absent, but also where the explanation is incomprehensible or contradictory.[76] A deficiency in the explanation is also present where the judgment appears to be the result of a mistake.[77]

Ad 2. The ground 'errors of law' also comprises errors in the interpretation of unwritten law, such as customary law and the unwritten rules of private international law.[78]

These grounds do not apply to cassation proceedings brought against first-instance judgments of the *Kantongerecht* against which appeal is not allowed. These judgments may only be challenged by way of cassation if:
(a) the challenged judgment does not state the grounds on which it is based;
(b) the challenged judgment was not pronounced in public (this cassation ground is not applicable to judgments passed in actions commenced by petition[79]);
(c) the *Kantongerecht* lacked jurisdiction in the particular case;
(d) the *Kantongerecht* has exceeded its jurisdiction[80].

The interpretation of 'declarations of will' such as contracts has long been regarded as factual and, therefore, outside the scope of cassation. However, this approach has changed. The interpretation of 'declarations of will' is currently regarded as not only consisting of the determination of the subjective will of the persons involved, but also of the objective meaning of their declaration. Therefore, the interpretation of declarations of will is brought within the scope of cassation.[81] It seems, however, that the cassation court limits itself to phrasing general rules regarding interpretation. It does not determine the consequences of these rules for the particular case under consideration, but leaves this decision to the lower court where the case is remanded after cassation.[82]

As mentioned above, the application of foreign law by the lower court is outside the scope of cassation. Nevertheless, if the lower judge has clearly erred in interpreting foreign law, the cassation court may reverse a judgment on the basis of deficiencies in the justification for the decision, for example where the decision is evidently in contravention to the statutory law of the foreign country concerned.[83]

In many cases the cassation court abstains from examining whether the legal characterisation of particular facts by the lower court is correct. This occurs most frequently where the lower court has applied vague legal concepts. These concepts have in common that they cannot be precisely defined, leaving it, within certain limits, to the lower judge to determine whether the rule containing the concept should be applied in the particular case (*ius in causa positum*).

Cases where inferences of fact by the lower court are found insufficient, resulting in the

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76. HR 13-11-1964, NJ 1966, 318.

77. HR 15-04-1966, NJ 1966, 321.

78. W. Hugenholtz, W.H. Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, Utrecht 1996, no. 187.

79. Art. 100 lid 2 RO.

80. 100 lid 1 RO.

81. Examples of judgments in which this new approach is apparent are: HR 15-04-1983, NJ 1983, 458; HR 18-11-1983, NJ 1984, 272.

82. *Losbladige Burgerlijke Rechtsvordering*, "Cassatie", Art. 99 RO, aant. 11 (E. Korthals Altes).

83. HR 13-03-1987, NJ 1987, 679.

judgment being reversed, are few.[84]

The sufficiency of the proofs accepted by the lower court is regarded as factual and, therefore, not subject to cassation.

Occasionally, complaints in cassation do not lead to the challenged decision being reversed even though the complaint is justified. This occurs where the litigant seeking reversal lacks interest in cassation. The most important examples are where the cassation court decides that:

- the decision of the lower court is correct on legal grounds other than the ones advanced in the judgment;[85]
- the court to which the case would be remanded after cassation would reach the same decision as the challenged one on the basis of the facts of the case;[86]
- certain grounds of the challenged judgment have not been challenged adequately, even though they are sufficient grounds for this judgment.[87]

Where the cassation court vacates the decision of the lower court, it should, in principle, decide the case under consideration itself.[88] This rule was adopted at the introduction of cassation in the 19th-century Netherlands. It resulted in Dutch cassation differing from its French example.

The cassation court, however, may not decide the case itself where a supplementary examination of the facts is deemed necessary, unless the point at issue is of minor importance and can be established on the basis of the case-file.[89] Where points of law remain to be decided, the court can adjudicate the action itself or remand the case to a lower court.[90] Where a case is remanded, the court whose judgment has been reversed takes cognisance of the action.[91] The lower court is bound by the decision of the cassation court.[92]

The following goals of cassation are generally accepted in the Netherlands:

- promotion of unity in (the application of) the law and of legal security;
- promotion of development in the law;
- supervision of the quality of the administration of justice.

3.2 Cassation against interlocutory judgments

The rules for cassation against interlocutory judgments (*sensu lato*) in actions commenced by either summonses or petition are equal to those of appeal of interlocutory judgments in actions commenced by summonses (see above).[93] Where an interlocutory judgment is reversed, the cassation court may decide to remand the case to the court of first instance instead of to the appellate court whose decision on appeal of an interlocutory judgment has been reversed.[94]

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84. An example is HR 25-09-1981, NJ 1982, 254.

85. *Losbladige Burgerlijke Rechtsvordering*, "Cassatie", Art. 398 Rv, aant. 6 (E. Korthals Altes).

86. HR 06-10-1989, NJ 1990, 323.

87. HR 18-06-1971, NJ 1971, 454.

88. Art. 420 Rv. For actions commenced by petition, Art. 429 par. 2 j° 420 Rv.

89. Art. 421 Rv. For actions commenced by petition, Art. 429 par. 2 j° 421 Rv.

90. Art. 422 Rv. For actions commenced by petition, Art. 429 par. 2 j° 422 Rv.

91. Art. 422a Rv. For actions commenced by petition, Art. 429 par. 2 j° 422a Rv.

92. Art. 424 Rv. For actions commenced by petition, see Art. 429 par. 2 j° 424 Rv.

93. Arts. 401 and 401a Rv. For actions commenced by petition, see Arts. 426 par. 4 jis. 401 and 401a Rv.

94. Art. 422a jis. 355-358 Rv.

Default judgments may be challenged by way of appeal or cassation by the plaintiff if (1) the defendant has defaulted and (2) the judgment was wholy or in part against the plaintiff. The defaulting defendant, however, does not have appeal or cassation at his disposal. He must bring a motion to set aside the judgment (*verzet/oppositie*) if the default judgment is wholy or in part against him. These proceedings are commenced in the court which has entered the judgment.[95] A motion to set aside a judgment in summary proceedings before the President of the *Arrondissementsrecht*, however, may not be brought before the President, but should be brought before the *Arrondissementsrechtbank*.[96] Unless allowed by statute, setting aside is not possible in proceedings commenced by petition. This is not detrimental to litigants who have been absent, since these litigants may file an appeal.[97]

In cases concerning several defendants, it may happen that some of them do not appear. If this occurs, the proceedings against the defendants who have appeared in court are postponed, whereas the remaining defendants are declared defaulters. Subsequently, the defendants who have made their appearance may have the defaulters summoned to court on the day scheduled for the continuation of the proceedings. Litigants who remain defaulters may not bring a motion to set aside the final judgment. They may, however, file an appeal after they have complied with this judgment. Their opponent should pledge security for repaying the defaulters if on appeal the ruling of the lower court is reversed. If the opponent refuses to pledge security, the defaulters may file an appeal without complying with the judgment.[98]

Judgments on appeal may also be set aside.[99] This motion is only possible against a judgment of the cassation court where the complaints allege the nullity of the summons served in the case below or where they allege that the lower court has allowed appeal even though the term for appeal had expired.[100]

From the above rules it is apparent that default judgments can be challenged in different ways. It should be remembered, however, that where an appeal has been filed by the plaintiff, the defendant loses the right to bring a motion to set aside. The defendant may, however, file his own complaint in the appeal proceedings.[101]

Where the plaintiff challenges a default judgment by way of cassation, the defaulter may raise a defence in the proceedings before the cassation court.[102] The filing of such a defence results in the loss of the right to bring a motion to set aside.[103] Should the defaulter chose to bring such a motion after his opponent has initiated cassation proceedings, the proceedings before the cassation court are discontinued.[104]

In cases where the defaulter neither brings a motion to set aside nor files his defence in cassation proceedings, he retains the right to bring a motion to set aside after the cassation court has passed judgment, unless the term for this motion has expired.[105]

The litigant who has brought a motion to set aside is not required to explain the reasons for his default in the previous instance.

Setting aside results in the continuation of the case which ended with a default judgment.

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95. Art. 81 Rv.
96. Art. 294 Rv.
97. Arts. 429n and 345 Rv.
98. Arts. 79 and 335 par. 2 Rv.
99. HR 03-12-1971, NJ 1972, 69.
100. Art. 425 Rv.
101. Art. 335 par. 1 Rv.
102. Art. 401b par. 2 Rv.
103. Art. 401c par. 1 Rv.
104. Art. 401c par. 2 Rv.
105. Art. 401c par. 3 Rv.

As such, setting aside adheres to the 'audite-rule'.[106] This procedure results in a stay of execution, unless the court, on a motion of a party, has declared that its judgment is enforceable even when it is challenged in a manner which would otherwise have resulted in a stay of execution (*uitvoerbaarheid bij voorraad*).[107]

Setting aside is even possible where the applicable statute only allows cassation against a decision.[108]

As regards appeal and cassation against a judgment obtained as a result of setting aside, the ordinary rules of procedure apply.

5 RECOURSE AGAINST JUDGMENTS OBTAINED BY FRAUD

A special procedure known as *request civiel* exists for complaints against judgments in proceedings commenced by summonses. It has long been held that this means of recourse is not allowed in proceedings commenced by petition,[109] but recently the cassation court, anticipating new legislation, has changed its opinion.[110]

Request civiel is available against decisions at last 'factual' resort as well as against default judgments against which a motion to set aside can no longer be brought. This procedure is brought before the court which pronounced the disputed judgment.[111]

The Code of Civil Procedure enumerates a series of complaints for which *request civiel* may be brought. These complaints concern either the conduct of the opposing party in the preceding case[112] or faults and omissions of the court which heard this case.[113] The most important complaint of the first category is 'fraud' by the opponent having resulted in the challenged judgment.

The grounds for bringing a *request civiel* against judgments of the *Kantongerecht* are more restricted then the grounds for judgments pronounced by other courts. They solely concern the conduct of the opposing party in the proceedings before the lower court.[114]

Request civiel is not allowed against cassation judgments.[115]

A succesful *request civiel* results in the annulment of the previous judgment and in a new case before the same court, either at first instance or on appeal. The filing of this means of recourse does not give rise to a stay of execution.[116]

Request civiel is problematic for a variety of reasons. Regarding complaints about faults and omissions of the court, *request civiel* and cassation overlap. Furthermore, it seems unjustified that complaints about the conduct of the opponent can only be brought after a judgment at last 'factual' resort has been passed. It may, for example, happen that originally an appeal against a particular judgment did not seem necessary, whereas after the expiration of the term allowed for its introduction the procedural misbehaviour of the opponent came to light.

These and other peculiarities,[117] have resulted in proposed legislation on the *request*

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106. HR 23-06-1993, 559.
107. Art. 82 par. 2 Rv.
108. HR 23-06-1993, NJ 1993, 559.
109. HR 09-12-1983, NJ 1984, 384.
110. HR 04-10-1996, RvdW 1996, 194.
111. Art. 389 par. 1 Rv.
112. Art. 382 sub 1, 7 and 8 Rv.
113. Art. 382 sub 2 to 6 Rv.
114. Art. 397 Rv j^{o} 382 Rv.
115. HR 30-06-1989, NJ 1989, 769.
116. Art. 392 Rv.
117. Cf. TK 1995-1996, 24 651, no. 3, p. 174-175.

civiel.[118] The name of this means of recourse will be changed in *herroeping* (revocation); the rule that the judgment against which it is brought must be pronounced at last factual resort will be abolished and the new type of *request civiel* will also be available against judgments in proceedings commenced by petition.

Herroeping against judgments in actions commenced by summonses is only possible where these judgments have obtained the force of *res judicata*.[119] This condition does not apply to judgments obtained in proceedings commenced by petition since it is unclear whether such judgments formally acquire such force.[120] The grounds for bringing *herroeping* only address the procedural behaviour of the opponent in the proceedings that resulted in the disputed judgment or the fact that this judgment is based on false documents.[121]

According to the proposed legislation, *herroeping* does not necessarily lead to annulment of the contested judgment. In principle, it only results in a reopening of the case, wholy or in part.[122] This reopening may of course lead to the conclusion that the challenged judgment should be annulled, but this is not necessarily so.

Reopening a case results in a stay of execution. Where a case is only partly reopened, the stay of execution only affects that part of the challenged decision.[123]

6 THIRD PARTY OPPOSITION

It may happen that a judgment is detrimental to the rights of persons who have not been parties to the suit. These persons may challenge such a judgment by way of third party opposition in the court which entered the judgment.[124] This means of recourse is even available after the judgment has obtained the force of *res judicata*. It does not automatically result in a stay of execution, although the court hearing the third party opposition may order a stay of execution.[125] Where third party opposition has been successful, the challenged judgment will only be corrected as far as the rights of third parties are concerned, unless this is not possible, in which case the whole judgment will be annulled.[126] Third party opposition is not available in proceedings which have been commenced by petition instead of summonses.[127]

7 TIME-LIMITS FOR INTRODUCING MEANS OF RECOURSE

7.1 Appeal[128]

Ordinary proceedings commenced by summonses

Art. 339 par. 1 Rv: within 3 months after the judgment

Proceedings commenced by petition

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118. Arts. 382-391 NRv.
119. Art. 382 NRv.
120. H.J. Snijders et al., *Nederlands Burgerlijk Procesrecht*, Deventer 1997, p. 52.
121. Arts. 382 and 390 NRv.
122. Art. (391 NRv j^{o}) 387 NRv.
123. Art. (391 NRv j^{o}) 388 par. 1 NRv.
124. Arts. 376-377 Rv.
125. Art. 379 Rv.
126. Art. 380 Rv.
127. HR 26-11-1982, NJ 1983, 123.
128. The time-limits for appeal of interlocutory judgments (*sensu lato*), which are not mentioned below, may be found in Arts. 336-337 Rv and in 337 and 339 NRv.

Plaintiff and litigants having made their appearance
Art. 429n par. 2 Rv: within 2 months after the date of the judgment
Art. 358 par. 2 NRv: within 3 months after the day of public pronunciation of the judgment

Other litigants[129]
Art. 429n par. 2 Rv: within 2 months after the judgment has officially been notified to them or after it has become known to them in another manner
Art. 358 par. 2 NRv: within 3 months after the judgment has officially been notified to them or after it has become known to them in another manner

Summary proceedings (*kort geding*)

Art. 295 Rv par. 3: within 2 weeks after the judgment
Art. 339 par. 2 NRv: within 4 weeks after the judgment

Nota bene:
Where cassation has been commenced within the term for both appeal and cassation and where it is decided that cassation is not possible, a new term for appeal commences on the day of the decision of the cassation court.[130] This second term does not result in a stay of execution.[131]

7.2 Cassation

Ordinary proceedings commenced by summonses

Art. 402 par. 1 Rv: within 3 months from the date of pronunciation of the judgment

Nota bene:
Art. 402 par. 2 Rv: Where the term for appeal is shorter than the ordinary term for cassation, the term for cassation is double the term for appeal.

Proceedings commenced by petition

Litigants who have made their appearance in the previous instance(s):
Art. 426 par. 1 Rv: within 2 months from the date of the judgment
Art. 426 par. 1 NRv: within 3 months from the date of the judgment

Litigants who have not made their appearance:
Art. 426 par. 1 Rv (*a contrario*): cassation not possible

Nota bene:
Art. 426 par. 2 Rv: Where the term for appeal is shorter than the ordinary term for cassation, the term for cassation is double the term for appeal.
Art. 426 par. 3 Rv: Where statute determines a moment from which the term for appeal starts to run other than the date of the judgment, the term for cassation also starts at that other moment.

129. See also Art. 345 Rv.
130. Art. 340 Rv.
131. Art. 350 par. 2 Rv.

Summary proceedings (*kort geding*)

Art. 295 par. 4: within 6 weeks after the date of pronunciation of the challenged judgment

7.3 Setting aside

Ordinary proceedings commenced by summonses

Art. 81 par. 1 Rv: within 14 days after the official notification of the judgment or a related instrument to the defaulter in person, or within 14 days after the performance of acts which necessarily imply that the defaulter has gained knowledge of the default judgment

Art. 2.7.1 NRv: the term has been extended to 4 weeks (8 weeks for defaulters without a known place of residence within the Netherlands and whose place of residence outside the Netherlands is known)

Nota bene:
Art. 81 par. 2 Rv: after the judgment has been enforced, setting aside is not possible anymore.
Art. 2.7.1 par. 3 NRv: where the term for setting aside has not commenced by any other act, it starts on the day of enforcement of the judgment.

7.4 *Request civiel*

Art. 385 par. 1 Rv: within 3 months after the contested judgment has been pronounced, or, if it concerns a default judgment, 3 months after the term for setting aside has expired

Nota bene:
In several cases the term of three months starts at a different moment. See Arts. 385-388 Rv.

7.5 Third party opposition

No term has been prescribed by law. The ordinary terms of prescription and limitation of rights and actions apply.

8 STATISTICS

Number of civil judgments in adversary proceedings (1995):[132]
Kantongerecht: 215.700
Arrondissementsrechtbank: 34.800
Gerechtshof: 3.400
Cassation court: 300

Number of judges necessary to adjudicate appeal cases:
Arrondissementsrechtbank: 3
Gerechtshof: 3

132. More recent figures are not yet available.

Required number of judges in cassation: 5 (in uncomplicated cases 3)

Number of courts:
Kantongerecht: 61
Arrondissementsrechtbank: 19
Gerechtshof: 5
Cassation court: 1

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Further literature and relevant case-law may be found in *Losbladige Burgerlijke Rechtsvordering* (Kluwer-Deventer), a loose-leaf commentary per Article on the Dutch Code of Civil Procedure.