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THE AFTERMATH OF THE COVID-19 PANDEMIC IN THE NETHERLANDS

Seizing the Digital Gains

Bart Krans*

1 A POSITIVE AFTERMATH OF THE PANDEMIC

Has the Covid-19 pandemic brought something that can be seen as an improvement compared to the pre-Covid-19 situation in civil justice in the Netherlands? Can the pandemic somehow pave the way for improvements in civil justice for life after the pandemic?

In an attempt to answer these questions, I will first consider how civil courts in the Netherlands functioned during the first months of the pandemic and how this has been perceived (Section 2). Subsequently (Section 3, *et seq.*), I will focus on digitization – an area in which serious gains can be made.

2 LEARNING ON THE JOB

In non-pandemic times, i.e., the ‘old normal’, the starting point for civil proceedings in regular commercial cases in first instance was that after a first round of written documents (statement of claims and statement of defence), in principle a hearing (*mondelinge behandeling*) would then take place.¹

Looking at civil courts in first instance during the pandemic, it would appear, at least at first glance, that it is business as usual.² This is partially true – new cases can be brought before the courts, parties can submit documents and courts are deciding cases. Written

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1 Art. 131 Dutch Code of Civil Procedure. Usually such a hearing takes place.

2 To handle civil cases during the pandemic, a Temporary Act Covid-19 Justice and Security was introduced: *Tijdelijke wet COVID-19 Justitie en Veiligheid Act (Stb. 2020/124; amended in November 2020 Stb. 2020/413)*. In addition, for the situation from 7 April onwards, so-called ‘General rules in the administration of justice’ were established (*Algemene regeling zaaksbehandeling Rechtspraak*).

proceedings, or the written part of proceedings in civil cases, are moving forward more or less in the usual way.

Obviously, there were and are differences due to the pandemic. During the first two months of the pandemic, in principle no physical hearings were possible unless the case was considered to be a very urgent matter.³ Some courts decided on their own motion for a second written round (the statements of reply and rejoinder) instead of scheduling a hearing, and ruled on the basis of only a written case file. Approximately 70% of the cases were dealt with.⁴ The reduced number of hearings seemed to provide an opportunity for civil courts, at least some of them, to use the 'extra' time to concentrate on cases where a hearing was no longer needed or required. For example, cases in which a hearing had already taken place and the parties were waiting for a judgement or because the court decided at the request of the parties to deliver the judgement on the basis of a written case file. So, the fewer number of hearings allowed for speeding up decisions in other cases and reducing backlogs. Yet, at the same time, the amount of other cases, and so new backlogs, appeared to be mounting.

The role of the Dutch judiciary in the initial period of the pandemic has been criticized. The President of the Rotterdam District Court has said that the judiciary were absolutely not prepared to deal with the crisis in March 2020.⁵ During the first months the courts learned a great deal, according to Hammerstein.⁶ He refers *inter alia* to the organization of oral hearings and the use of video calls and communication by email.

3 DIGITAL HEARINGS: THE PROS

Throughout the pandemic, both the digital and physical hearings have been possible in Dutch civil courts. Hearings that take place remotely use Skype or a similar platform.⁷ It is not entirely clear under what circumstances the courts schedule a physical hearing and

3 Three phases can be identified for temporary regulations during the pandemic. At the start of the pandemic, the first phase (17 March to 6 April 2020), cases were dealt with, but hearings only took place in very urgent matters, and only by Skype. In the second phase (from 7 April to 10 May 2020), hearings were also conducted in urgent matters (either by Skype or by phone). As of 11 May 2020, the Dutch judiciary are in the third phase when hearings with physical presence are possible again, in addition to online hearings.

4 According to R. de Lange, President of the District Court Rotterdam (interview in *Mr.* December 2020, p. 24).

5 De Lange (*see* footnote 4 above).

6 A. Hammerstein, 'Sneller procederen door de pandemie', *Letsel&Schade* 2020, no. 4, p. 44.

7 Some law firms, perhaps even many, have set up a room at their firm where their lawyers can attend the hearing online.

what the threshold is for permitting this. It appears that differences exist between the various district courts on how this is approached.⁸

Of course, digital hearings can offer several advantages. The first one is obvious: In times of a pandemic, the use of digital technology enables contact between the court and parties, and between the legal representations of the parties. It is even claimed that the use of these platforms can have a positive impact on contact between parties, stakeholders, and lawyers, compared to the situation before the pandemic.⁹

The use of a digital platform can facilitate communication better than voice-only contact via a phone call or a conference call. In some cases early in the pandemic, a court ordered an oral hearing to be held by phone. It has since been questioned whether the right to be heard orally by a judge was thus violated. Arguably, oral contact with the judge comes down to eye-to-eye contact and this relates to the principle of sufficient and equal access to the court.¹⁰ I am not convinced, however, that a right to be heard necessarily includes a right to be seen under the provisions of the European Convention on Human Rights (ECHR).¹¹ Nevertheless, whether the right to be seen is a formal right or not, being actually seen by the judge may contribute to the feeling of at least certain litigating parties that they have sufficient opportunity to influence the decision face-to-face with the judge, albeit online.¹²

In cases with multiple litigants, the advantages of saving time and costs for travel reasons and planning become more prominent, especially when parties or experts from other countries are involved.¹³ That the use of digital hearings in an international context is far from theoretical is also demonstrated by the work of the Netherlands Commercial Court (NCC).¹⁴ Since the outbreak of the pandemic, several NCC hearings have taken place, which, according to the NCC, were ‘successful – allowing interaction, dialogue and argument, just like a courtroom hearing’.¹⁵

8 See J.C. Heuving, ‘Corona, civiele rechtspleging en hoor en wederhoor’, *TvPP* 2020-3, p. 63 (with further reference on this in footnote 8).

9 Hammerstein (*see* footnote 6 above), p. 44.

10 W.D.H. Asser, case note at HR 31 October 2014, *NJ* 2015/181 (*Verhoeven c.s./De Staat*). Heuving (*see* footnote 8 above, p. 64) concludes that hearing a party by phone does not fulfill the requirement of hearing a party in such a way that it can influence the courts in the decision in eye-to-eye contact with the court.

11 For the purpose of this chapter, I suffice with a reference to HR 25 September 2020, ECLI:NL:HR:2020:1509, sub 3.2.1-3.2.5; this decision does not concern a regular civil case.

12 This does not rule out the possibility that in certain cases a hearing by phone can have the same value as a hearing by videoconference, or can perhaps even be the preferred option.

13 S. Boersen has noted that courts have succeeded in conducting more or less flawless digital hearings in cases with an unusually high number of litigants (‘Digitale zittingen, een blijvertje?’, *TvPP* 2020-6, p. 231).

14 On its website, the NCC considers videoconferencing, *inter alia*, stating that ordinary courtroom rules do apply and that all participants must be visible on screen (www.rechtspraak.nl/English/NCC/news/Pages/COVID19-NCC-is-open-for-business-but-restrictions-apply.aspx).

15 See NCC notification dated 27 May 2020 (www.rechtspraak.nl/English/NCC/news/Pages/The-Netherlands-Commercial-Court-and-COVID19-case-management-videoconference-hearings-and-eNCC.aspx).

Digital hearings may also be beneficial in relation to the public nature and public access of dispensation of justice. Between 16 March and 17 August 2020, the public was not allowed to attend physical hearings.¹⁶ This has led to questions about the public nature of justice. In general, an infringement on the public nature of hearings must be justified. There is much to be said for openness, but it does seem to make sense in these difficult times of a pandemic that physical access to court buildings is not allowed.¹⁷ It cannot be ruled out that one result of the pandemic is that more openness has been created or will occur in cases where a digital hearing is held.¹⁸ The use of a livestream in certain cases during the pandemic also contributes to this. It is very likely that the number of people who watched the livestream of the court case involving Shell Nigeria in October 2020 was much higher than the number of people who would otherwise have come to the courthouse.¹⁹

4 DIGITAL HEARINGS: THE CONS

Obviously, there are downsides to digital hearings as well.²⁰ First of all, while a digital hearing can be considered superior to a hearing by phone, at least usually, a physical hearing can easily be considered superior to a digital hearing. There are not only positive sounds about digital hearings. In one survey, the majority of lawyers who took part seem to prefer a physical hearing to a digital hearing²¹ – something that is perhaps not surprising. Online contact with the court is better than no contact at all, but usually it does not match the ‘real thing’. Compared to physical hearings, an important part of non-verbal communication somehow can get lost out in the digital world. It is likely that lawyers, judges and the parties to a case also share that feeling. If this turns out to be true, it would be a serious argument in many cases to return to physical hearings as soon as possible.²²

16 As of 17 August 2020, public can be granted physical access after completing an application process.

17 In a decision on openness in criminal cases, the Dutch Supreme Court has ruled in brief that the requirement for openness in the rulings can be met in more ways than one (HR 15 December 2020, ECLI:NL:HR:2020:2008).

18 It is even stated that the public nature of digital hearings has improved as a result of the pandemic in cases that were already dealt with digitally pre-pandemic (Boersen, *see* footnote 13 above, p. 232).

19 The cases concern claims by *inter alia* four Nigerian farmers who claim to have suffered damage as a result of oil spills from underground pipelines and an oil well in Nigeria.

20 Just as the aforementioned pros (or at least some of them) may also have downsides, the cons may have upsides too.

21 As reported by S. Droogleever Fortuyn, ‘Echt contact met rechter blijft onmisbaar’, *Advocatenblad* 2020-8, pp. 11-16. *See* for an impression of the experiences of lawyers with digital hearings, S. Dunk and S. Droogleever Fortuyn, ‘Virtuele zittingen’, *Advocatenblad* 2020-4, pp. 20-24.

22 *See* J. van Breda, S. Jansen and M. Verhoeven, ‘De ‘coronazaaksbehandeling (CZB)’, *NJB* 2020/1809, pp. 2042-2043.

There are other serious limits to digital hearings. Equality of arms, the right to a fair hearing, the right to be heard and the principle of openness of justice may be at stake if technology fails in some way. Large law firms have more and better equipment than smaller firms. It does not take much imagination to see that it makes a huge difference if you are listening to a lawyer who is clearly visible and has good sound or to a lawyer whose hairline is all that is visible and who is often unintelligible. Another issue in this respect is that some sections of the population might have less access to internet than others, which is particularly worth noting in cases where no legal representation is required. It is to be hoped that courts and complaints boards will deal with such issues appropriately.

An important and fundamental aspect concerns the principle of access to justice. The question can be raised whether a digital hearing fulfils the requirements of the right to an oral hearing, as protected by Article 6 ECHR.²³ It seems very likely that in times of Covid-19, the replacement of a physical hearing by a digital hearing will not constitute a violation of this Article as such.²⁴ Digital hearings are now widespread and apparently few serious objections exist to this in practice.

Digital hearings may also risk a loss of decorum because the expression of traditions, style and perhaps of judicial dignity and neutrality (or independence and impartiality) tend to be much less visible in digital hearings. It is conceivable that at least some participants in the legal system would regret this. On the other hand, other participants might perhaps consider this to be an advantage because less decorum might make them feel more at ease. However, if this were to lead to a loss of authority on the part of the court, this would be problematic.²⁵

Finally, there is one very practical aspect related to digital hearings – the option to use the mute function in a digital hearing.²⁶ This function gives lawyers more opportunity to discuss and consult with their client during the hearing. At physical hearings, conversations with clients in front of the judge are usually more limited to suspensions of the hearing. The mute function may ‘sound’ like a detail, but perhaps it contributes to more adequate reactions by the parties, and therefore to better procedural justice. At the same time, it is possible that courts are less positive about this.

23 See the Guide on Art. 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb) of 31 August 2020, no. 141 and the case law referred to.

24 Compare HR 25 September 2020, ECLI:NL:2020:1509, sub 3.2.1-3.2.5 (although not concerning a regular civil case).

25 Another issue concerns costs. Digital hearings require a solid technical basis, also with a view to minimizing risks of unauthorized infringements.

26 There are more aspects to digital hearings than can be dealt with within the scope of this chapter.

5 DIGITAL HEARINGS: MORE BLENDING AHEAD?

The disadvantages of digital hearings could be viewed as serious arguments to return to physical hearings as soon as possible in many cases. However, after the unplanned option to introduce digital hearings – driven by external factors – the time seems right to start thinking about a more structural embedding of this digital mechanism.²⁷ Digital hearings do seem to have certain benefits, which, now they are here, might be better to retain in certain cases and under certain conditions. Several players on the litigating field could stand to benefit – the parties to a case, lawyers, the courts and probably the judiciary as an institute.

How to move forward? One path could be that digital hearings will only replace physical hearings if all parties involved explicitly give their consent.

Another option, perhaps combined with the consent path, is that the option for a digital hearing will only be used, or play a more prominent role, in certain types of procedures. For example, this could depend on the types of the parties or the nature of a case.²⁸ The option for a digital hearing to replace a physical hearing could in theory also be limited to certain cases with international aspects. It makes plain sense that in cases where parties from several countries are involved, the advantages of digital hearings will be even greater than in national cases.

If differentiation seems advisable, this could be based not only on the types of the parties or the nature of the case, but also on the content or the stage of the proceedings. For example, a first hearing before a district court may provide new and relevant facts rather easily, while opportunities to present such facts are considerably less during a hearing at the end of a trial in appeal. Differentiation by the nature of the case is another option. Perhaps personal injuries cases would require a different regime than cases concerning pure financial losses. The same can be said for cases on labour law and insolvency law, etc.

Pursuing this proposal will obviously require some work and answers to several questions. For courts that are part of the formal judiciary, the legal framework for replacing physical hearings by digital hearings would need to be expanded and enforced. Questions must be answered on the type of hearings this will concern. Does it apply to the *mondelinge behandeling*,²⁹ witness hearings, hearing of experts, formal plea sessions or other sessions, where courts and parties are in contact, or just some of them? And is it also applicable in appeal? And if so, does it make sense to introduce the option that digital hearings in appeal cannot take place if the hearing in first instance was digital? Also, is it sensible to consider hybrid hearings, in some form or other? Many questions therefore lie ahead.

²⁷ See also Boersen (see footnote 13 above), p. 232.

²⁸ It may also be possible to distinguish between, for example, a witness examination and a plea hearing.

²⁹ See the text above at footnote 1.

It is likely that a round of consultation with lawyers or the bar association must be part of the process. If it is clear that lawyers prefer physical sessions for all type of hearings and for all types of cases, this could be seen as an amber or red light. But there is much to be said for not ‘wasting’ this crisis and for exploring the option of whether digital hearings are here to stay in some form. Perhaps it is time to seriously consider taking this one step further and embedding the option of digital hearings more structurally in Dutch civil proceedings.

6 COMPLAINTS BOARDS

The prospect of a blended future does not have to be limited to formal courts. Since the outbreak of Covid-19, the *Geschillencommissie* – an important complaints board for consumers and small businesses – has switched to hearings by Zoom.³⁰ *Kifid* – an important complaints board for financial disputes where consumers and certain other parties can file a claim – states on its website that it will conduct its hearings during the pandemic as much as possible by phone or using videoconferencing.³¹ If the experiences of these types of complaints boards turn out to be positive, or partially positive, it seems worth considering whether this option is here to stay in certain cases. That said, the entire replacement of physical hearings by digital hearings does not seem very likely in the case of complaints boards. It is conceivable that besides legal professionals, at least some consumers will still prefer eye-to-eye contact in a physical room instead of contact in a digital room. On the other hand, other consumers may put more emphasis on the benefits, including savings in time and costs related to travelling involved.

7 DIGITAL: MORE THAN HEARINGS

The benefits of digitization during the pandemic are not only limited to court hearings. One rather specific but very practical ‘quick win’ is the option of secure email communication with the courts, something that became available at the start the pandemic. This should have been a possible option a long time ago and it is to be hoped that the fax

30 The *Geschillencommissie* is a foundation for consumer complaints boards that offers complainants, being consumers or business, alternative dispute schemes to help resolve their dispute out of court (see: www.degeschillencommissie.nl/english/). During the pandemic, they also offer the option of proceedings without a hearing.

31 See www.kifid.nl/kifidcorona-zittingen-zoveel-mogelijk-via-video-of-telefoon/ (last consulted in January 2021). *Kifid* is the Financial Services Complaints Board for financial disputes. *Kifid* offers access and expert advice to consumers, small businesses and self-employed persons without employees (*zpp-ers*) who have a complaint against a financial services provider (see www.kifid.nl/about/).

machine, still currently used in courts in the Netherlands, will at last now find its way to the bin.³² It was recently argued that the use of digital tools in civil cases should be extended, especially for personal injury cases.³³ For example, Hammerstein argues that lawyers in personal injury cases should have the opportunity to put questions to each other via email, which can then be answered during a video call.

Whether you agree with the details or not, the core of the advice does seem to be wise: step up the use of digital tools in civil proceedings, and not only in digital hearings. By blending various mechanisms (physical and digital), several places at the table, so to speak, could be better served.

8 RESETTING A FAILED DIGITIZATION PROJECT

Blending several mechanisms might also help to heal a procedural ‘wound’ in the Netherlands that is still open – the failure of the so-called KEI project. In recent years, an ambitious digitization project concerning, *inter alia*, civil proceedings was set up.³⁴ After extensive preparations, the Act to implement the new rules and options was approved by Parliament. Two district courts of first instance had already started using the system as a pilot. Nevertheless, in 2018 the project was put on hold due to technical issues.³⁵ The Act with new rules, already approved by Parliament and on the verge of being enforced, was overruled and the project was put under review. The two aforementioned district courts were forced to retreat and return to the ‘old’ way of working, including *inter alia* using the fax machine (though they did also introduce email).

When the Ministry of Justice and Security announced the withdrawal of this Act, it also announced that digitization was inevitable. The resetting of the KEI project resulted in a new project called *Digitale Toegankelijkheid* (DT) (digital accessibility). At the heart of this DT project lies the wish to fulfil the societal need for better digital access and to enable the electronic filing of documents and electronic access to case files.

The resetting of the KEI project and the resulting DT project had already been set in motion before the outbreak of the Covid-19 pandemic. With good reason, the *Raad voor de Rechtspraak* (Council for the Judiciary) has stated that this crisis further underlines the need and necessity for such a digital mechanism.³⁶ It is to be hoped that the project on

32 See Hammerstein, *JBPr* 2020/4.

33 See Hammerstein (see footnote 6 above), p. 45.

34 The project was called KEI (an abbreviation of the first letters of the Dutch words for quality and innovation).

35 Initially, the project cost was estimated at 7 million euros. When the plug was pulled on the project, around 220 million had been spent according to Dutch newspaper *NRC* (www.nrc.nl/nieuws/2018/04/10/digitalisering-rechtspraak-moet-opnieuw-a1598839).

36 Letter to the Minister, dated 16 October 2020 (with a reaction to the project on Digital Accessibility), p. 1.

digital accessibility will be more successful than its predecessor, and sooner rather than later. With a view to the previous paragraphs in this chapter, it is also hoped that the judiciary is close to taking the next step in the world of digitization, even though there are still several drawbacks to consider and overcome.

9 SEIZING THE DIGITAL GAINS

In January 2021, for the first time in history, the Netherlands participated in a digital hearing of the European Court of Justice (ECJ).³⁷ Looking at civil proceedings in the Netherlands, it is fair to say that the pandemic has accelerated the slow process of digitization. It is unclear what the aftermath of the pandemic will entail for the future of civil proceedings in the Netherlands. Due to the pandemic, procedural law was more open to innovation. Without an extensive preliminary process, things had to change at once. The experiences gained during the pandemic should not be lost, especially in view of the recent expensive and serious failure of a digitization project. The rapidly developed Covid-19 vaccines will not guard against inefficient and unjust proceedings, but they may contribute to the opportunity to pave the road towards more efficiency, and a blended future, or, to use a word that seems to have made a rapid ‘career’ since the outbreak – a hybrid future. It would be wise to seize this opportunity.

³⁷ Hearing before the Grand Chamber in Case C-564/19.

