UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-424 Caption [use short title] Kiobel v. Cravath, Swaine & Moore, LLP

Motion for: Judicial Notice Reply

Set forth below precise, complete statement of relief sought:

Judicial notice of the fact of service of a writ of summons in the Netherlands

MOVING PARTY: Esther Kiobel ☐ Plaintiff ☐ Defendant ☐ Appellant/Petitioner ☑ Appellee/Respondent

OPPOSING PARTY: Cravath, Swaine & Moore, LLP

MOVING ATTORNEY: Richard Herz

OPPOSING ATTORNEY: Neal Kumar Katyal

[name of attorney, with firm, address, phone number and e-mail]

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Washington, DC 20006

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Court-Judge/Agency appealed from: Alvin K. Hellerstein/Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): ☑ Yes ☐ No (explain):

Opposing counsel's position on motion: ☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response: ☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: /s/ Richard Herz **Date:** July 24, 2017 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

17-424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL,

Petitioner-Appellee,

-against-

CRAVATH, SWAINE & MOORE, LLP,

Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York, Case No. 1:16-cv-07992 (AKH)

PETITIONER-APPELLEE'S REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

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Respondent-Appellant Cravath, Swaine & Moore LLP ("Cravath") does not oppose Petitioner-Appellee Esther Kiobel's ("Petitioner") motion to take judicial notice of the serving of her Writ of Summons ("Writ") in the Netherlands.[1] Cravath, however, uses its Response to Petitioner's Motion for Judicial Notice ("Resp.") to argue that service of the Writ undermines the district court's reasoning, and Petitioner's arguments on appeal. Cravath is wrong.

Petitioner's Dutch counsel cannot be faulted for moving expeditiously to prosecute her case in the Netherlands. Indeed, her attorneys followed our own ABA Model Rules of Professional Conduct: to "act with reasonable diligence and promptness in representing a client," and "make reasonable efforts to expedite litigation consistent with the interests of the client." Model Rules of Prof'l Conduct R. 1.3, R. 3.2; *see also* Fed. R. Civ. P. 1 (parties should employ the rules to secure a "speedy" determination of an action). Indeed, Cravath previously argued that Petitioner's stated plan to file the Writ was "too speculative to warrant discovery pursuant to Section 1782," A280, and emphasized that it concerned events "more than 20 years ago," A104. Now Cravath argues the opposite: that pursuing her case expeditiously should weigh against discovery as well.

Petitioner has already waited over twenty years for a forum that will hear her

[1] To be clear, Petitioner is not seeking judicial notice of the substance of the Declaration of Channa Samkalden beyond the facts necessary to authenticate the copies of the Writ of Summons submitted. Thus, Petitioner does not understand there to be any actual dispute between the parties regarding judicial notice. The

claims for her husband's execution. At this point, Petitioner's co-plaintiffs in the Dutch litigation face increasingly fragile health, and now fear that "further delaying litigation in the Netherlands might impede their ability to bring their claim in the future." Samkalden Reply Decl. ¶ 2. And although Cravath acts as though the bedrock of the district court's opinion has collapsed, the district court was well aware that Petitioner intended to serve her Writ as soon as possible—originally, by the end of 2016. A86 ¶ 5. Instead of undermining the district court's reasoning, service of the Writ bolsters it—underscoring the urgency, as the district court identified, for Cravath to "pursue its appeal expeditiously." A293. Cravath's contrary arguments are meritless.

First, the need for this evidence—which remains subject to a stay pending outcome of this appeal—is still apparent, and the urgency of that need is more acute. As the Writ notes, "[t]he substantiation of [the] summons is for an important part based on evidence originating from [the U.S.] discovery proceedings." Writ ¶ 128. This includes the protected evidence that the district court ordered produced, evidence that Petitioner does not yet have. And although Petitioner served her Writ "[t]o avoid further delay"—a delay that occurred in part, due to "anticipation of obtaining documents from the United States," Samkalden Decl., Dkt. No. 96-3, ¶ 2—it remains "an established fact that the documents requested were submitted [in the

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remainder of the Samkalden Declaration is properly submitted as evidence of foreign law, which is of course a question of law, *e.g.*, Fed. R. Civ. P. 44.1, not a fact subject to judicial notice under Federal Rule of Evidence 201.

U.S. case] because of their direct relevance to the case." Writ ¶ 130. Those documents are still relevant, and the fact that Petitioner has filed her Writ does not obviate the pressing need for them, or the fact that this Petition is the most efficient way to access them. *See* Samkalden Reply Decl. ¶ 7.

The facts relevant to the district court's reasoning have not changed. Contrary to Cravath's argument that the opinion below was predicated on the assumption "that without this material, Kiobel would not be able to commence proceedings," Resp. at 1, the district court actually noted that Petitioner's "action *may* be foreclosed before there is any opportunity to obtain this discovery directly from Shell in the Dutch proceeding." A284 (emphasis added). This is still the case. Samkalden Reply Decl. ¶ 3.

In particular, evidence is still urgently needed to contest Shell's likely jurisdictional defense. Samkalden Decl., Dkt. No. 96-3, ¶¶ 5-8. Petitioner's Dutch attorneys have reported from the beginning that they need evidence of cooperation between the parent and its Nigerian subsidiary. A86 ¶ 5. And in her Writ, Petitioner noted that the American discovery subject to a confidentiality agreement "presumably concern[s] Shell's internal communication and the relationship with as well as the management by the parent company." Writ ¶ 375. Despite the need for this evidence to overcome a jurisdictional challenge, Dutch procedural law would not generally provide Petitioner a means to obtain this information from Shell prior to a jurisdictional decision—Shell largely remains outside a Dutch court's subpoena powers. Samkalden Decl., Dkt. No. 96-3, ¶ 7; Samkalden Reply Decl. ¶¶ 4-6. Thus,

the only practical—and plainly most efficient—way to obtain this evidence continues to be through Petitioner's Section 1782 action, underscoring the district court's determination that further delay may still "prejudice her ability to bring an action in the Netherlands." A293; Samkalden Reply Decl. ¶¶ 4-7.

Cravath's argument that the Writ states it includes sufficient evidence is pure gamesmanship, because Cravath knows full well that Shell is likely preparing to argue that the evidence is *insufficient* to establish jurisdiction. Shell's attorneys argue here that this Court should deny discovery on the grounds that sufficient evidence has already been presented, so that Shell can turn around and tell the Dutch court that it has not. Unless Shell is willing to waive any arguments against the sufficiency of the evidence in the Netherlands, Cravath's position here should be given no weight.

Second, serving the Writ has done nothing to cut against the district court's reasoning behind its finding that the first *Intel* factor—that some of the evidence sought may be "unobtainable absent 1782 aid"—weighed in Petitioner's favor. A284 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004)). The district court correctly held that the first factor turns on "the foreign tribunal's ability to control the evidence and order production," *id.* (quoting *In re Application of OOO Promnesfstroy*, 2009 WL 3335608, at *5 (S.D.N.Y. Oct. 15, 2009)), and not, necessarily, as Cravath suggests, "whether Shell is 'a participant in the foreign proceeding.'" Resp. at 3 (quoting *Intel*, 542 U.S. at 264). While simultaneously arguing that "nothing in *Intel* turns on the formalities of another country's case-initiation procedures[,]" *id.*, Cravath

ironically attempts to focus attention on the formality of commencing a proceeding in the Netherlands to the exclusion of the district court's actual reasoning. The district court properly considered the ability to access the evidence outside of Section 1782, and a foreign court's control. Nothing in *Intel* suggests that the first factor turns on whether proceedings have initiated, but whether the party that has the documents "may be outside the foreign tribunal's jurisdictional reach[.]" *Intel*, 542 U.S. at 264.

Cravath deeply misrepresents Petitioner's arguments surrounding *Intel's* first factor—suggesting that Petitioner put forward a reductionist black and white analysis of whether the Writ has been filed, and that service of the Writ thus moots her arguments. Resp. at 3. But Petitioner focused on whether Shell was "outside of a Dutch court's subpoena powers," Petitioner Br. at 30, which is still the case. And she argued that *even if* proceedings had already commenced in the Netherlands with Shell as a defendant, Section 1782 discovery may still be warranted where, as here, there remain barriers to otherwise obtaining the evidence. Petitioner Br. at 31.

Third, and as noted above and equally relevant to the District Court's reasoning as to the first factor, it is extremely unlikely that a Dutch court has the power to order production from Shell at this stage. *See* Samkalden Decl. ¶ 4-5. Of course, to protect her rights, Petitioner's Writ asks the Dutch court to order Shell to submit the relevant documents, and also invokes Section 843a of the Dutch Code of Civil Procedure to obtain the documents. Writ ¶ 130. But this no more indicates that she will be able to obtain them than a plea for relief in a civil complaint indicates that such relief will be

ordered. Obtaining documents under Dutch law is difficult at the merits stage, and near impossible at the jurisdictional stage, when they will be first needed.

Even if jurisdiction is ultimately resolved in Petitioner's favor, it will still remain far more challenging and inefficient—perhaps impossible—for her to obtain the documents through a Dutch court. *See* Samkalden Decl. ¶ 4-6. Courts in the Netherlands do not commonly order production of documents, and the Dutch court maintains limited jurisdiction over Cravath, which is not a defendant. As the district court recognized, "even if Kiobel was able to obtain discovery from Shell in the Dutch proceeding, not all of the materials that Kiobel seeks are likely to be in Shell's possession." A284. No doubt, Cravath is making the argument that a Dutch court can order production, while protecting its ability to claim that any documents ordered produced are subject to a confidentiality agreement that only U.S. courts have authority to modify. Furthermore, requesting documents through Section 843a of the Dutch Code of Civil Procedure remains just as difficult as Petitioner's Dutch counsel have said throughout. It requires specific knowledge of the documents requested, and remains subject to the ability of a producing party to claim that it has "serious reasons" against production. *See* A196 ¶ 8; Samkalden Reply Decl. ¶ 6. Cravath has never submitted any evidence to the contrary—again no doubt because its client is preparing to argue to the Dutch court that Petitioner is not entitled to any documents.

Last, Cravath cites no law suggesting that this Court should do anything other than review Judge Hellerstein's order based on the record before him. While

Petitioner believed she had a responsibility to inform the Court of the filing of the Writ, its only impact on this appeal is to underline the need for an expedited decision—indeed, Petitioner is willing to forgo oral argument to speed up the resolution. If Cravath believes that any subsequent developments would change Judge Hellerstein's mind, it is free to pursue this before the district court in a motion for reconsideration or relief from judgment. But service of the Writ does not alter Petitioner's need for the evidence, nor the reasoning of the district court that this evidence may still be unobtainable absent 1782 aid—as well as the other three *Intel* factors that all weighed in Petitioner's favor.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Motion for Judicial Notice.

Dated: July 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Herz hereby certify that on this 24 day of July 2017, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that the Motion was served electronically to all parties by operation of the Court's electronic filing system.

/*s*/Richard Herz
Richard Herz

CERTIFICATE OF COMPLIANCE

1. This document complies with Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

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/*s*/Richard Herz
Richard Herz

Dated: July 24, 2017

Prakken
d'Oliveira

Declaration of Channa Samkalden, Attorney-at-law in The Netherlands

Pursuant to 28 U.S.C. § 1746, I, Channa Samkalden, declare as follows:

1. I am the attorney of Esther Kiobel in litigation arising from human rights violations carried out by Royal Dutch Shell in Nigeria. I refer to my previous declarations of 4 October, 11 November 2016, and 5 July 2017. In this declaration I explain the process of obtaining documents once a writ of summons is served on a defendant.

2. I stated in my previous declarations that I had intended to bring the lawsuit against Shell by the end of 2016. On 28 June 2017 I commenced proceedings by serving a writ of summons on Shell defendants. The need to do so arose because my clients feared that further delaying litigation in the Netherlands might impede their ability to bring their claim in the future. This could be the case for example if one of them dies before the writ is served. In the Netherlands, a case may continue in the name of a complainant if he or she dies after the writ has been served, but normally not before. Some of the plaintiffs are of fragile health. Given the time lapse that already occurred, the then uncertain time path of the current appeal and the fact that we had obtained the larger part of the (non-confidential) evidence, it has been the wish of my clients that the case was filed before the appeal is completed.

3. As explained in our Writ, our clients believe that they have sufficient evidentiary material to substantiate their claims at the outset. This does not, however, mean they have sufficient evidence to maintain their claim, and the evidence stayed pending the current appeal at the Second Circuit remains necessary for a proper administration of justice for the reasons set forth in my last declaration, including that at this stage, there remains little recourse for our clients to obtain these documents.

4. In paragraph 130 of our Writ, we refer to three applicable provisions of the Dutch Code of Civil Procedure: (1) Section 21; (2) Section 22; and (3) Section 843a. There is no guarantee that we will be able to obtain the requested evidence through any of these articles. We assume that Shell will not voluntarily hand over the requested documents under Section 21. It is extremely rare for a court to order the discovery of documents at its own motion under Section 22—I have never witnessed this in my 9 years of practice. Thus, our best chance at receiving the documents through Dutch civil procedure is likely

via Section 843a, which as I have already described in previous declarations, requires specification and identification of the (title, subject, and scope or content of the) requested documents.

5. If a jurisdictional defence is raised, the court will normally deal with this defence before deciding on a request for disclosure under Section 843a. Similarly, if I were to try to obtain the evidence through a separate prior procedure, Shell would likely raise the same jurisdictional defence - which the Court would need to deal with beforehand. Hence there is no way for a party to obtain evidence until after the court has made a decision over jurisdiction if a jurisdictional defence is raised. It is likely that a jurisdictional defence of Shell will centre on the assumed role of the parent company, while at the same time this may be expected to form the subject of at least part of the evidence.

6. Furthermore, a party need not produce requested documents if it has "serious reasons" not to do so—an exception that also applies to Section 22, limiting a court's ability to order production. I attach the English-language text of each article as Exhibit A, and sections of an English-language written authority on Dutch litigation procedure, Marieke van Hooijdonk & Peter Eijsvoogel, *Litigation in the Netherlands: Civil procedure, Arbitration and Administrative Litigation* (2012), as Exhibit B, which summarizes Dutch evidence procedures and confirms that "[a]lthough the ability to request documents and data on the basis of [Section 843a] has been slightly enhanced by the revision of the CCP in 2002, it is still difficult, and often impossible, to obtain copies of documents or data which are in the possession of opponents who are unwilling to submit them." *Id.* at 30. This text also highlights that Dutch courts have limited ability to compel disclosure: "The court on its own initiative can also order a party to submit certain documents. However, if a party does not obey that order, the only thing the court can do is to draw its own conclusions. It cannot compel disclosure." *Id.* at 24.

7. For these reasons, and the reasons stated in previous declarations, there is no doubt that it is more efficient to obtain these documents from a U.S. court, and that it would be useful to do so. We expect to be able to submit additional evidence obtained—including any evidence Ms. Kiobel obtains through this Petition—until February or after to respond to any jurisdictional defence that Shell may raise, and over the course of one to several years for a main case.

Prakken
d'Oliveira

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed in Amsterdam, the Netherlands.

Channa Samkalden 24 July 2017

EXHIBIT A

Article 22
The parties are obliged to fully and truthfully present the facts that are relevant to the decision. The judge can draw the conclusion that he deems fit from the circumstance that this obligation is not met.

Article 22
In all phases of the procedure, the judge can order parties, or one of the parties, to explain certain assertions or to produce certain documents related to the case. The parties can refuse to do this if there are important reasons for them to do so. The judge decides whether the refusal is justified, in the absence of which he can draw the conclusion from it that he deems fit.

Article 843a
1. Anyone who has records at his disposal or in his custody must allow a person with a legitimate interest in doing so to inspect, to have a copy of, or to have an extract from, those records that pertain to a legal relationship to which he or his legal predecessors are party. "Records" includes information recorded on a data medium.
2. If necessary, the court may determine how an inspection is to be conducted or how a copy or extract is to be produced.
3. Anyone who by virtue of his office, his profession or his relationship has a duty of confidentiality need not comply with this request if the records are at his disposal or in his custody only for that reason.
4. Anyone who has the records at his disposal or in his custody need not comply with this request if there are serious reasons for not doing so and if it may reasonably be assumed that the proper administration of justice is safeguarded even if the information requested is not provided.

EXHIBIT B

Litigation in the Netherlands

Civil Procedure, Arbitration and Administrative Litigation

By

Marieke van Hooijdonk and Peter Eijsvoogel

Partners at Allen & Overy Amsterdam

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Law & Business

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5. EVIDENCE

5.1 Rules of Evidence

5.1.1 General

The rules of evidence are laid down in the CCP. They deviate substantially from the way evidence is dealt with in common law systems such as those in the United States and the United Kingdom. Not only are there generally no restrictions on the admissibility of evidence but the concept of discovery or disclosure is also largely unknown. It used to be the case that parties could limit themselves to submitting only evidence that was favourable to them. The CCP restricts this by introducing the duty honestly to provide a full set of the facts. However, it is recognised that this duty is not as far-reaching as the concept of discovery and disclosure in the United States and the United Kingdom.

The court may base its decision only on facts that are not disputed by the parties or that are proven in the course of the proceedings. Furthermore it may use facts or circumstances that are generally known (such as the exchange rate of the pound for the euro on a specific day), even if these are not put forward by the parties.[83] Facts that are not disputed do not have to be proven and the court must accept them without question. Facts that are disputed need to be proven, either by documents or by witnesses. The court is not allowed to add facts on its own initiative.

In general, it is up to the court to assess the evidence presented to it, unless the CCP stipulates otherwise (see §§ 5.2.1.1 and 5.2.2.2).[84]

5.1.2 Range of Application

The rules of evidence are applicable to all proceedings initiated by a writ of summons, both at first instance and in appeals proceedings. They are also applicable to petition proceedings, unless the nature of the matter prevents this.[85] An example of the nature of the matter preventing the applicability of the rules of evidence is the second stage of enquiry proceedings (see § 7.2.7.2). Theoretically, the rules of evidence do not apply in preliminary relief proceedings, but in practice, the preliminary relief judge often applies these. The rules of evidence in principle also do not apply in arbitration proceedings. In the event that the rules of evidence do not apply, the court is free to make decisions on the admissibility of evidence and on the burden of proof as it deems fit, provided however that the principles of due process are taken into account (see § 3.4).

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83. Art. 149 Rv.
84. Art. 152(2) Rv.
85. Art. 284(1) Rv.

5.1.3 Burden of Proof

The burden of proof is, in principle, on the party relying on the legal consequences of certain facts, unless specifically provided otherwise, or unless the requirement for such proof would be contrary to the principles of reasonableness and fairness.[86] The main rule entails that a claimant who claims damages from the other party on the basis of an alleged breach of contract will have to furnish the facts (*stelplicht*) and, if denied by the defendant, will have the burden of proof as regards both the breach and the causal connection between the breach and the damage suffered. If the defendant merely denies the breach or the causal connection, the burden of proof remains with the claimant. But if, for example, the defendant claims he is not liable for the damages due to force majeure, he will have the burden of proof for such force majeure.

Parties are, in most cases, free to deviate from the main evidence principle by contract, by excluding certain evidence or shifting the burden of proof.[87] Examples of specific legal provisions which deviate from the main principle can be found in the fields of employment law and consumer protection.

The risk of not providing sufficient evidence is on the party with the burden of proof. Once the claimant presents sufficient evidence, the defendant is allowed to provide counter-evidence.[88] The submission of counter-evidence should be distinguished from a situation in which the burden of proof is actually shifted to the other party, in deviation of the ground rule: in the first case, the defendant can limit himself to submitting sufficient evidence which contradicts the evidence put forward by the claimant while, in the latter case, to prevent the claimant's statements from being established as true, he will need to submit sufficient evidence himself for the facts he is relying on. Another device to lighten the burden of proof for the claimant is the so-called 'reversal rule', which applies in liability cases to the causal connection between the tort or breach of contract and the damages claimed. If damages are claimed as a result of actions which are in breach of a contractual or statutory provision that was drawn up to prevent the occurrence of a specific harm (e.g. traffic rules designed to prevent road accidents), if the violation of the norm largely increases such risk and the specific risk subsequently materialises, the causal link between the action and the damage suffered is presumed. In this case it is up to the defendant to submit counter-evidence that the damage would have occurred even without such action.[89]

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86. Art. 150 Rv.
87. Art. 153 Rv.
88. Art. 151(2) Rv. Unlike the offer for evidence, the offer for counter-evidence need not be specified (Supreme Court 29 Apr. 2011, NJ 2011, 189, LJN: BP9860).
89. The 'reversal rule' started with Supreme Court 26 Jan. 1996, NJ 1996, 607, LJN: ZC1976 (*Dicky Trading II*) and is clarified in Supreme Court 29 Nov. 2002, NJ 2004, 304, LJN: AE7345 (*TFS/Nederlandse Spoorwegen*), Supreme Court 29 Nov. 2002, NJ 2004, 305, LJN: AE7351 (*Kastelijn/Gemeente*

In short, the above means that in one and the same case the burden of proof can for certain issues be on the claimant and for other issues on the defendant and can actually shift between them with respect to a single issue during the proceedings. This is different from most countries with an Anglo-Saxon legal system where the burden of proof for a specific issue remains with one party throughout the trial.

5.1.4 Admissibility of Evidence

Evidence may be presented in any form, unless stipulated otherwise by law.[90] The most common forms of evidence are documents and witness and expert testimonies (see § 5.2). There is in principle no limitation on the kinds of evidence which can be submitted. Even evidence which has been unlawfully obtained can often (though not always) be admissible as evidence in civil proceedings. Evidence which has been unlawfully obtained may for instance consist of recordings of private telephone conversations or video recordings of intimate situations, as these recordings will often be contrary to the right of respect for private and family life as stipulated in Article 8 ECHR. Recordings of telephone conversations made in the course of business or video recordings of employees suspected of fraudulent actions will not generally be seen as unlawful.[91] If the evidence submitted to the court is considered to have been unlawfully obtained, in reaching a decision on admissibility the courts will balance the interest of arriving at the truth, on the one hand, against the interest of protection of the other party, on the other hand. The relative importance of these competing interests is, however, still unclear under current case law.

On the other hand, evidence may sometimes be considered inadmissible, even if it has been lawfully obtained. This may be the case if submission of the evidence would violate the other party's right to a private life.[92]

Achtkarspelen) and Supreme Court 7 Apr. 2006, NJ 2006, 244, LJN: AU6934 (*Bildtpollen/Miedema*); Supreme Court 7 Dec. 2007, NJ 2007, 644, LJN: BB3670 (*Stichting Medisch Centrum Leeuwarden*). In literature there has been much criticism of this doctrine as many scholars believe it is an unnecessary and complicated rule that relates to issues which are better resolved by a factual appraisal of the evidence.

90. Art. 152(1) Rv. For example, an arbitration agreement can only be proven by a written document (Art. 1021 Rv). The same goes for a jurisdiction clause agreed by the parties (Art. 8(5) Rv).
91. Supreme Court 16 Oct. 1987, NJ 1988, 850, LJN: AC9997 (*Driessen/Van Gelder*) and Supreme Court 27 Apr. 2001, NJ 2001, 421, LJN: AB1347 (*L./Wennekes*).
92. See e.g. Supreme Court 22 Jan. 1999, NJ 1999, 715, LJN: ZC2831 (*F./S.*).

5.2 Types of Evidence

5.2.1 Documents

5.2.1.1 Value as Evidence

In principle, all documents may be presented as evidence and it is up to the court to decide the value of each document. An exception to this principle is that the contents of 'authentic deeds', i.e. documents drawn up by a public official acting within his official power (such as a civil law notary (*notaris*) drawing up the (mandatory) notarial deed on the transfer of shares) are presumed to be correct as regards the observations and declaration of the official, unless sufficient counter-evidence is presented.[93] Another exception is that the contents of authentic deeds constitute proof vis-à-vis the parties to the document (however, not vis-à-vis third parties). In fact, this latter rule also applies to the contents of written documents which are signed and drawn up for purposes of evidence, but which are not 'authentic deeds' since they are not drawn up by public officials (for example, a contract). However, if a document is not drawn up by a public official, a party may dispute the signatures on the document, in which case the party that relies on the document must prove that they are authentic.[94] The rule that the contents of a deed constitute proof between the parties does not apply to a deed of acknowledgement of indebtedness, unless the deed is written by hand or bears the approval of the debtor, including the amount being written fully in letters (not in numerals).[95]

5.2.1.2 Submission

The party relying on a document is required to submit a copy of it as an exhibit.[96] If a copy is not submitted on a party's own initiative, it runs the risk that the document will not be taken into account by the court. The court is not compelled to request the submission of documents, even if these documents would be relevant for its decision.[97] In contrast to common law jurisdictions, where the concepts of discovery or disclosure exist, parties are to a large extent free to submit or withhold documents. In 2002, however, the duty for both parties to provide a full and truthful account of the facts was introduced in the CCP.[98] The Explanatory Memorandum to

93. Art. 157(1) Rv.
94. Art. 159(2) Rv.
95. Art. 158(1) Rv.
96. Art. 85(1) Rv. In principle, a copy of the document will be sufficient. If the other party disputes the authenticity of the document, he can ask to inspect the original document.
97. Supreme Court 19 Mar. 1999, NJ 1999, 496, LJN: ZC2874 (*Tankink/Hartman*); Supreme Court 9 Mar. 2012, NJ 2012, 174, LJN: BU9204.
98. Art. 21 Rv.

the CCP states that this rule is designed to avoid the intentional misrepresentation of facts.[99] If the parties do not fulfil their duty to give a full account of the facts, the court is free to draw whatever conclusions from this it deems fit, also on its own initiative.[100] It could, for example, reverse the burden of proof on a specific issue. Only with respect to the submission of certain specific documents can this duty be enforced (see § 5.4).[101] Although it is not yet clear how far the obligation to disclose under the CCP extends, it should not be considered obligatory to submit all evidence which both supports and adversely affects a case. The parties can still provide a biased picture of the facts, as long as they do not intentionally misrepresent them.

The court on its own initiative can also order a party to submit certain documents.[102] However, if a party does not obey that order, the only thing the court can do is to draw its own conclusions. It cannot compel disclosure. Only in proceedings concerning annual accounts may a court order disclosure of books and documents the company is obliged to keep, on pain of a penalty (see § 7.5.2).[103]

There is no rule of law stating that all documents submitted as evidence must be in the Dutch language. In practice, since English is widely spoken in the Netherlands, English documentary evidence will usually be accepted in court proceedings. If counsel for one of the parties objects to the use of English documents or the court so requests, a Dutch translation will need to be submitted.

5.2.2 Witnesses

5.2.2.1 General

Witness evidence can be submitted in two forms: by means of a written declaration of a witness or by witness examination.

Parties may testify on their own behalf, although such testimony can never lead to conclusive evidence at their advantage, if it is not corroborated by other evidence.[104] When a company is one of the litigating parties, the statements of its managing directors (holding this position at the date of the witness hearing) are considered as statements on behalf of the company.[105] Certain persons, however, have the absolute right to decline to give evidence (*verschoningsrecht*) once they

99. MvT, TK 26 855, No. 3, Art. 1.3.3.
100. Supreme Court 25 Mar. 2011, RvdW 2011, 418, LJN: BO9675.
101. Art. 843a Rv.
102. Arts 22 and 162(1) Rv.
103. Art. 162(3) Rv.
104. Art. 164(1) and (2) Rv.
105. Supreme Court 22 Dec. 1995, NJ 1997, 22, LJN: ZC1928 (*Reprotechniek/Traugott*); Supreme Court 22 Dec. 1995, NJ 1997, 23, LJN: ZC1932 (*Masteco/Top-Pharm*); Supreme Court 23 May 2008, JBPr 2008, 41, LJN: BB3733 (*E&T/Milieutechniek*).

appear in court.[106] These include attorneys (see § 5.3), civil law notaries, doctors and clergymen. Accountants, bankers and tax advisers do not have the right to invoke such a privilege. Certain family members of the litigating parties and persons who could criminally implicate themselves or their close family members by their testimony also have the right to refuse to give evidence.

Unlike documentary evidence (including written witness statements) which can be submitted to a court on a party's own initiative, witness examinations can only be held on the basis of a court order. If a party offers to produce evidence by witnesses, the court must allow this, provided that the offer concerns challenged facts which may be decisive to the case and has been specified sufficiently.[107] Especially in appeal an offer for evidence must specify the arguments to which it relates, and, if possible, the name(s) of the witnesses. The court cannot refuse to hear witnesses on the basis of a prediction of what a witness will testify. A court order will usually take the form of an interim judgment. In this judgment, the court will determine which facts one or each of the parties should prove and on which day the witness examinations should take place.[108]

5.2.2.2 *Value as Evidence*

Witness testimonies do not have special value as evidence. Consequently, the general rule, that it is up to the court to decide the value of each statement (see § 5.2.1.1), applies.

An exception applies to statements of the parties made on their own behalf in witness hearings. Such statements can only be considered as corroborative evidence. The rule that a statement on a party's own behalf can only be considered as corroborative evidence only applies if the statement is used as evidence for a fact in relation to which that party has the burden of proof. It does not apply if the statement is used to contradict the evidence of another party bearing the burden of proof.[109] This exception does not apply to written declarations from a party although in practice, in deciding the value of the statement, the court will certainly take into account that it is a party statement.[110]

5.2.2.3 *Written Witness Declarations*

It is for the parties to decide whether they wish to submit a written witness declaration. There is no obligation to submit such statement, not even prior to a witness

106. Arts 165(2) and 165(3) Rv.
107. Art. 166(1) Rv.
108. Art. 166(2) Rv.
109. Supreme Court 17 Jan. 2003, NJ 2003, 176, LJN: AF0159 (*Durinck/Pavema*).
110. Supreme Court 24 Jan. 2003, NJ 2003, 166, LJN: AE9384 (*Adrichem/Reek*).

hearing. However, written witness declarations, usually drawn up with the help of counsel of the party who relies on the witness, are quite often submitted. Such statements must be considered as regular documentary evidence for which it is up to the court to decide their value.

Witness statements may be submitted to the Rotterdam District Court pursuant to the Office Statement Regulation (*Regeling inzake kantoorverklaringen*) of the Supervisory Board of the Rotterdam Bar Association. This regulation allows parties to hear witnesses in their counsel's offices rather than during a formal court hearing, if they both consent to such proceedings. As with regular documentary evidence, it is up to the court to decide the value of a statement drawn up in accordance with this procedure. However, the fact that counsel for both sides have the opportunity to question the witness may lend more weight to a statement drawn up in this way than to a written statement drawn up by one party only.[111]

5.2.2.4 Witness Hearings

The party which is ordered in an interim judgment to give evidence is responsible for calling the witnesses. This is usually done through a letter served by a bailiff. Each person who is called as a witness is obliged to appear in court on the date set by the court and to give testimony.[112] If a witness does not adhere to this request, he could ultimately be committed to prison for failure to comply with a judicial order.[113] Parties to the proceedings who refuse to testify on their own behalf can, however, not be committed for failure to do so.

A witness who does not appear may be ordered to reimburse the expenses of a party connected with the calling of the witness and may also be liable for damages.[114] A more effective way to induce a witness to appear is to request his appearance in preliminary relief proceedings on pain of a penalty.[115] Penalties cannot be imposed on a witness who refuses to testify on his own behalf.[116]

The witness hearing takes place before one judge. This is usually the judge who was involved in delivering the interim judgment, and as far as possible, this judge will also be involved in delivering the final judgment.[117] Except for witnesses testifying on their own behalf, a witness cannot attend other witness hearings prior

111. This regulation was introduced in 2004 mainly in an attempt to eliminate the Rotterdam Court's backlog, and is now mainly used in shipping cases. Counsel for both parties are present at the 'hearing' and can question the witnesses. Witnesses are requested by counsel to confirm that they are telling the truth, but they are not officially sworn in. At the end of the hearing a written statement is prepared and signed by the witness.
112. Art. 165(1) Rv.
113. Art. 173 Rv.
114. Art. 178 Rv.
115. Supreme Court 18 May 1979, NJ 1980, 213, LJN: AC6585 (*Hulskorte/Van der Lek*).
116. Supreme Court 6 Apr. 2012, NJ 2012/363, LJN BV3403 (*Claimants/Karadzic*).
117. Art. 155(1) Rv.

to being heard himself. After the witness has taken the oath (*eed*) or made a solemn affirmation (*belofte*), it is the judge who asks the witness questions. Counsel for each party can then ask additional questions.[118] The court may decide that questions do not have to be answered, for example when they are irrelevant for the issue in respect of which the order to produce evidence was given. Officially, the hearing is conducted in the Dutch language. If a witness speaks a foreign language, the party calling the witness should have an interpreter present. In practice, if the witness speaks English, the judge speaks English as well and if none of the parties objects to the use of the English language, the judge may decide to question the witness in English.

The Dutch courts do not use or allow court reporters to report literally what each witness says. The witness's answers are summarised by the judge and set out in a report (which will always be in Dutch). The report will be read to the witness and (through his counsel) he can then make changes to the report.[119] Finally, the report will be signed by the witness, the judge and the court clerk. A witness who intentionally gives a false declaration commits perjury and can be prosecuted.[120]

In general, the whole setting in which Dutch witness hearings are conducted is less adversary than is often seen in courts in the United States or the United Kingdom.

5.2.2.5 *Preliminary Witness Hearing*

Parties may request a court to order that witnesses are heard prior to or at any stage during the proceedings.[121] Preliminary witness hearings (*voorlopig getuigenverhoor*) should be distinguished from depositions under US law, as they are conducted before the court. These hearings are especially helpful in cases where the claimant is not yet sure whether he has enough evidence to initiate proceedings against a potential defendant. However, such hearings can also be used to hear witnesses soon after the disputed facts to avoid evidence from getting lost. The request should be filed by a petition to the court in the place where the majority of the witnesses are domiciled, or to the court which would be competent to hear the case if proceedings were initiated. The petition should list the nature of the claim, the facts to be proven and the names of the potential witnesses and defendant.[122] Although the (potential) defendant can object to such a request, the court usually

118. Art. 179 Rv.
119. Art. 180 Rv. If the changes deviate materially from what the witness testified before, the judge may be asked to make a note of this in the report.
120. Art. 207 Penal Code (*Wetboek van Strafrecht*).
121. Art. 186 Rv.
122. Art. 187 Rv.

grants a hearing[123] and there is no right of appeal against this.[124] The provisions regarding standard witness hearings also apply to preliminary witness hearings.[125]

Against the background of the purpose of preliminary witness hearings, the Supreme Court has decided that in principle no restrictions can be imposed by the court on the number of witnesses to be heard or the questions posed to the witnesses. The defendant has the right to submit counter-evidence, not only to support his position on the merits of the case, but also to discredit the witnesses already heard.[126]

5.2.3 Experts

5.2.3.1 General

If there are issues in dispute on which a court would like to get an expert opinion, it can order that an expert be appointed to produce a report on the specific issues it has identified or order that an expert should be heard. Such an order can also be issued at the request of one of the parties,[127] but unlike in the case of a request for a witness hearing, a court is under no obligation to grant a request for an expert's report or for a hearing of experts.

It is the court that decides who shall be appointed as expert(s). However, it must first discuss this with the parties. The expert who is finally appointed by the court is obliged to fulfil his obligations impartially. If necessary, the parties must cooperate with the expert, who is required to allow the parties to comment and make requests during the investigation. The parties are usually asked to provide written comments on the draft report. The final expert's report must be duly reasoned and indicate that the parties have had a reasonable opportunity to give their views.[128]

The court is not bound by the expert's report, which has no specific value as evidence. However, in practice, it will rely heavily on this report in rendering its judgment. If the court does not follow the expert's advice, the required extent of the reasoning of its decision will depend on the nature and extent of the parties' objections to the report.[129]

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123. Compared to ten years ago, there is some more room for courts to deny a request; Supreme Court 11 Feb. 2005, NJ 2005, 442, LJN: AR6809 (*Frog People Mover/Stichting Floriade*); Supreme Court 21 Nov. 2008, NJ 2008, 608, LJN: BF3938 (*Udo/Renault Nissan*).
124. Art. 188(2) Rv.
125. Art. 189 Rv.
126. Supreme Court 16 Dec. 2011, NJ 2012, 316, LJN: BU3922 (*Boekhoorn/Cyrte Investments*).
127. Art. 194 Rv.
128. Arts 198(1) and 198(2) Rv.
129. Supreme Court 5 Dec. 2003, NJ 2004, 74, LJN: AN8478 (*Stichting Nieuw Vredenburgh/Nieuwe Hollandsche Lloyd Schadeverzekering*).