Effectieve toegang tot het civiele geding. Een onderzoek naar de rechtsingang van de civiele procedure ten overstaan van de Nederlandse rechter en naar het ius standi in iudicio

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The questions I am concerned with in this book are: (1) who should be allowed to participate in civil proceedings before the Dutch courts and (2) what are the means by which one can enter into such proceedings? These are questions I have examined in the light of Article 6 of the European Convention on Human Rights.

Article 6 entitles everyone within the jurisdiction of the Dutch authorities, to effective access to the courts and to a fair trial. In Chapter 2 I look at the significance of this right in relation to the above questions. I focus on the right to effective access to the courts as established by the European Court, the right to a fair hearing: "equality of arms", and the right to a decision within a reasonable time. Because these rights are directly binding upon the courts, the courts play an essential role in guaranteeing these rights.

The right of access means access in fact as well as in law. Therefore it not only imposes the obligation on the authorities to abstain from any breach, but it also imposes positive obligations to guarantee this right. Under certain circumstances the authorities will have to take affirmative measures such as providing legal aid or simplifying the rules of civil procedure. However, the right of access is not an absolute one. By its very nature it calls for regulation which restricts this access. By the term of this restriction, the authorities are allowed a certain "margin of appreciation" as long as those restrictions do not impair the very essence of the right. By this "margin of appreciation", the national authorities are allowed a certain freedom in regulating access. Any such restrictions should have a legitimate aim and comply with the principle of proportionality. These criteria are also binding upon the courts. The interpretation and application of the rules of civil procedure by the courts, like the requirements that must be met at the initiation of the procedure, should comply with these criteria also.

Second, I look at the right to a fair hearing. For the defendant this includes the guarantee to a reasonable opportunity to present his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent. In relation to the commencement of the proceedings, this right implies that the defendant has to be adequately informed about the following matters: when, how, where, against whom, and against what he needs to defend himself.

Third, I look at the right to a decision within a reasonable time and the obligations that are imposed by virtue of this right regarding the commencement of proceedings.

One has access to the courts by commencing civil proceedings. The law of civil procedure contains rules on who is entitled to become a party in such proceedings and how this is to be done. In Chapters 3 to 5 I discuss who is entitled to stand in civil proceedings and act as a party before the Dutch courts. Chapters 6 to 9 relate to how one can become a party in civil proceedings.

According to Dutch law, the right to stand before a court contains two different aspects: does the party wishing to commence proceeding have a legal identity recognised by the courts and does this party have the capacity to commence these proceedings.
The main rule is that only persons and entities with legal personality can be parties in civil proceedings. However, the law contains some statutory exceptions. Furthermore, case law shows that the courts are willing to make exceptions if there would otherwise be a lack of legal protection. The courts allow entities without legal identity to act as parties in the proceedings. These exceptions are justified by the right of effective access to the courts. Each time a party is improperly denied the right to stand before a Dutch court, the court should grant the right to be a party to the proceedings, regardless of whether one is claimant or defendant.

Under Dutch law one can have the right to be a party to civil proceedings without having the capacity to act as a party. This is the case with minors and persons under legal restraint. In these cases a legal guardian must act in his own name on behalf of the minor or the person under legal restraint. The aim of this rule is to protect these persons. However, under certain circumstances this rule can result in a breach of the right to effective access to the courts. In some cases the law provides a solution to this problem by entitling the minor or the person under legal restraint the option of requesting the appointment of a provisional legal guardian. In cases in which this solution is not adequate, the courts allow minors and persons under legal restraint to act as parties if there is urgent need for an injunction or specific performance and the minor or person under legal restraint is capable of understanding what the proceedings are about. Although under certain circumstances case law fills in this gap in legal protection, it is my opinion that the law should provide a more effective and simple way to appoint a provisional guardian.

In Chapter 5 I look at the question of which law governs the right of foreigners and foreign entities such as companies, foreign states and international organisations for purposes of standing before a Dutch civil court. I also pay attention to related matters like: (a) cautio iudicatum solvi (the rule that requires foreign claimants to give security for costs before they stand before the court) and; (b) immunity of jurisdiction. I argue that some of these restrictions can result in a breach of the right to effective access to the courts.

The law of civil procedure also provides rules for how one can become a party in civil proceedings before the court. These rules and the courts' interpretation and application of them, determine the legal position of parties at the beginning of the proceedings. The position of the claimant is especially determined by: (a) the complexity of the rules and formal requirements relating to the writ of summons; (b) the service of the writ of summons and the way the action can be made pending and the court is seised of it; (c) the penalty arising out of a breach of these rules and requirements and the way this affects or interrupts the proceedings; (d) the possibilities of obtaining a judgement in default. The position of the defendant is determined by: (a) the rules and formal requirements relating to the writ of summons; (b) the guarantee that the defendant will be informed by the service of the writ of summons and will have effective opportunity to defend himself; (c) the way in which the courts judge the non-observance of these rules by the claimant; (d) the remedies available to the defendant when there is a default of appearance.
In Dutch procedural law one can distinguish two methods of proceeding: the dagvaardingsprocedure, proceedings commenced by a writ of summons and the verzoekschriftprocedure, proceedings commenced by a petition to the court. These procedures exist for different kinds of cases. The dagvaardingsprocedure is based on the adversarial system and is designed to decide on a dispute. The verzoekschriftprocedure is more inquisitorial and is designed for the intervention of the courts in matters such as non-dispute matters or family matters. I look at the initiation phase in both kinds of proceedings and pay special attention to the abovementioned criteria that determine the legal position of parties. These proceedings are each initiated differently and as a consequence, the legal position of the parties at this phase of proceedings, differs.

De dagvaardingsprocedure is initiated through the service of a writ of summons by a sheriff (deurwaarder). The main rule applicable here is that the claimant cannot enter the proceedings without serving the summons in compliance with all the formal requirements. The aim of these requirements is to guarantee the defendant the right to a fair hearing and to offer him an effective chance to defend himself. As a consequence, the defendant is held to have had an effective chance to defend himself if he is served in compliance with the legal requirements, even if the proceedings ultimately take place in default of appearance. The claimant can be awarded a judgment in default without breaching the defendant's right to a fair hearing.

It follows from the above, that the legal positions of the claimant and the defendant largely depend on the court's interpretation and application of the legal requirements and its determination of whether there has been compliance with these requirements. On the one hand, the requirements and the court's judgment on non-compliance should not be so strict as to deny the claimant effective access to the court. On the other hand, the defendant's right to a fair hearing must, in the vast majority of cases be guaranteed by a strict application of those requirements. These legal requirements and the solutions for the conflict of interests of claimant and defendant are discussed in chapter 6. I also look at the way the courts rule on the observance of these requirements. However, not every breach of the formal requirements has to result in a setting aside of the writ. Besides the legal options that are offered to the claimant to repair invalidities and nullities, the court may only set aside the summons if it is tainted by invalidities so as to prevent it from achieving its intended purpose, which is to guarantee the defendant's right to a fair hearing.

The legal position of the defendant is also determined by the remedies available to him against a judgment in default. These remedies are also discussed and criticized in the light of the defendant's right to a fair hearing as guaranteed in article 6 of the convention. I show that, on the one hand, it is very easy for the claimant to get a judgment in default but, on the other hand, the defendant has a broad and well protected opportunity to oppose a judgment in default.

The verzoekschriftprocedure is initiated by the filing of the petition to the court (verzoekschrift) by the petitioning party. This filing initiates the proceedings. The duty of notification of interested parties to the proceedings, rests with the court and thus the legislators did not think it was necessary to give precise rules for notification. Instead it gave the court broad powers. As a consequence, the requesting party has to meet less formal requirements in order to obtain access to the court. However,
case law shows that courts consider themselves bound by the duty to conduct a fair hearing. In the exercise of their discretionary powers they comply with this duty. Although this often in practice leads to some guarantees for the other parties concerned, without clearly specified legal guarantees being laid down, I consider the position of the other interested parties as more uncertain than the position of a defendant in a *dagvaardingsprocedure*.

Besides this uncertain position, the other parties concerned have less recourse to a remedy in cases of a judgement in 'default'. By definition, there is no opposition against a judgment in 'default' and the guarantees that are offered for an effective opportunity to oppose are less than in a *dagvaardingsprocedure*.

Chapter 8 deals with the legal position of third parties during the proceedings. I look at the chances third parties have to become a party in a *dagvaardingsprocedure* during the proceedings. This opportunity is required in cases in which interests are affected by the proceedings, especially when there has been a transition of rights from a party to an third party during the proceedings. The opportunity to enter the proceedings is relatively broad and, where necessary, case law has filled the gaps. However, the opportunity for the claimant and the defendant in the *dagvaardingsprocedure* to involve third parties in the proceedings has to be considered as too restricted.

In the *verzoekingschriftprocedure* there are much less restrictions on third parties becoming a party in the proceedings and on the parties getting third parties involved in the proceedings. Besides this, the court has broad powers by which it can notify any other party concerned to enter the proceedings.

Finally, in Chapter 9 of this book I look at the legal position of parties when proceedings have to be initiated against a party living or staying abroad. In these cases it is almost impossible to find a justifiable balance between the interests of the initiating party and those of the defendant. By opting for a system of fictitious notification, the Dutch legislators have clearly given priority to the interest of the initiating party. One can seriously doubt if this system is in compliance with the defendant's right to a fair hearing.

Under treaty law, however, the scales have tipped towards the interests of the defendant. The Hague Convention on service of process abroad contains a more balanced system. Under this treaty, the defendant's rights to a fair hearing are better protected, without breaching the claimant's right to effective access to the court. But application of these treaty rules under the European Treaty on Civil Jurisdiction and Enforcement of Foreign Judgements leads to a system in which under certain circumstances it will be impossible for the claimant to get a judgment that can be executed in other states that are a signatory to the Convention. Even the new European Convention on service of process will not lead to a significant improvement in this situation.

The above arguments clearly show the great significance of fundamental procedural rights for the legal position of parties at the commencement of civil proceedings. Although we may reach the overall conclusion that the rules of Dutch civil procedure concerning the initiation of proceedings mainly comply with those fundamental procedural rights, the law and as a consequence, the legal position of the parties
needs improvement in several significant respects. However we should realistically bear in mind that the balance between the interests of the claimant and those of the defendant will probably never be ideal.