



# EFFECTIVE USE OF DISCOVERY OBTAINED PURSUANT TO 28 U.S.C. § 1782 IN PROCEEDINGS BEFORE DUTCH COURTS

This *Commentary* is the latest in a Jones Day series that explores the availability of discovery mechanisms for obtaining evidence located within the United States for use in proceedings outside of the United States. In this *Commentary*, the issue is discussed from the Dutch perspective.<sup>1</sup>

## U.S. DISCOVERY MECHANISMS AVAILABLE IN DUTCH COURT AND ARBITRATION PROCEEDINGS

Compulsory document production is available to parties involved in proceedings before Dutch courts, but its scope is quite limited compared to discovery procedures in the United States. A party in litigation in the Netherlands can, however, use American discovery procedures to obtain evidence located in the United States for use in the Dutch proceedings. For example, a party may petition a Dutch court to issue a letter of request pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

(the “Hague Convention”). In most cases, however, it will be more efficient to directly apply to the U.S. courts for discovery pursuant to an American statute, 28 U.S.C. § 1782 (“§ 1782”). The Dutch Supreme Court (*Hoge Raad*) has held that evidence so obtained may be used in proceedings before the national courts.<sup>2</sup> This *Commentary* briefly reviews the general rules governing document production in Dutch courts and then describes how evidence obtained in the United States through § 1782 can be used in Dutch court or arbitration proceedings.

## DOCUMENT PRODUCTION IN DUTCH COURT PROCEEDINGS

Pursuant to Dutch rules of civil procedure, it is up to each party to gather and submit the evidence supporting its position. Evidence in any form may be submitted, unless provided otherwise by law (Article 152 of the Dutch Code of Civil Procedure (“DCCP”)),<sup>3</sup> Although establishing the truth is a purpose of civil

proceedings, a party is not required to disclose, on its own initiative, facts that would undermine its claims. The only exception to this rule is where not disclosing the information would mislead the court.

Parties may request an order for the production of documents: Pursuant to Article 843a DCCP, a court may order the production of documents if (i) the party requesting the order has a legitimate interest in obtaining the requested documents; (ii) the request relates to certain identified documents; and (iii) the applicant is a party to the legal relationship to which the documents relate. The party requested to produce the documents must have possession, custody, or control of them. “Documents” is considered to include data stored on any medium.

There is an extensive body of case law in which the Dutch courts have further refined the requirements for document production. For example, the courts will not order the production of documents that are irrelevant to the outcome of the proceedings for lack of legitimate interest.<sup>4</sup> In addition, to have a legitimate interest, the applicant’s claim must be sufficiently reasoned, or at least not be obviously without merit.<sup>5</sup>

It is not required that the applicant know the precise contents of the requested documents.<sup>6</sup> If it is not certain that the requested documents exist, however, the courts will not order their production.<sup>7</sup> Within these limits, much depends on the factual circumstances of the case. For example, the Amsterdam District Court (*Rechtbank*) accepted an application requiring the opposing party to produce all bank statements relating to an account for a period stretching several years.<sup>8</sup> Yet in another matter, the Arnhem District Court rejected an application demanding the opposing party to produce all documents included in the opposing party’s criminal file as being overly broad.<sup>9</sup>

The requirement that the applicant be a party to the legal relationship to which the documents relate, while narrowly interpreted in the past, has recently been applied more liberally by the lower courts.<sup>10</sup> Pursuant to the narrow interpretation, the applicant may obtain only documents to which it is a party, e.g., contracts it signed or correspondence it sent or received. Under the more liberal interpretation, the applicant may also obtain documents to which it is not a party,

but that have a bearing on the legal relationship between the disputing parties. For example, the Amsterdam District Court ordered the buyer of a company to produce the due diligence report prepared for it by a third party at the time of the acquisition, even though the seller had not instructed the third party that prepared the report.<sup>11</sup> In another matter, the Den Bosch District Court ordered a party to provide a copy of the completion report to an insurance company although the insurance company had no legal relationship with the third party that prepared the completion report.<sup>12</sup>

## USE OF EVIDENCE OBTAINED PURSUANT TO § 1782 IN DUTCH COURT PROCEEDINGS

Section 1782 permits a party to a “proceeding in a foreign or international tribunal” to apply directly to a U.S. court to obtain evidence located in the United States for use in that proceeding.<sup>13</sup> Dutch courts have, on occasion, been called upon to rule on the issue of whether evidence obtained in the United States pursuant to § 1782 may be used in civil proceedings. For example, in *Convex cs. v. Duizendstraat cs.*, Convex objected to Duizendstraat’s use of § 1782 in Dutch court proceedings that Convex had commenced against Duizendstraat for alleged mismanagement of Convex.<sup>14</sup> Pursuant to § 1782, Duizendstraat had obtained an order from the District Court of the Northern District of Texas requesting that Convex’s parent company produce certain documents and its American CEO provide a deposition.

Convex requested an order from the Utrecht District Court prohibiting Duizendstraat from continuing discovery in the United States or using the proceeds of the discovery in the pending Dutch court proceeding. According to Convex, using the documents and deposition obtained in the United States would be unlawful because it violated general principles of Dutch civil procedure.

The District Court, however, rejected Convex’s request and held that while the parties may obtain the assistance of the Dutch courts to gather evidence, they are free to use an “informal judicial method.” Section 1782 is such a method, which may be invoked by a party without the intervention of a Dutch court.

The court did not consider the Netherlands' reservation under Article 23 of the Hague Convention a reason to bar a party from using § 1782 in the United States. This reservation, pursuant to which the Netherlands will not accept discovery requests from foreign authorities, was made for practical reasons rather than because of fundamental objections to discovery.

In addition, the fact that Dutch law does not provide for extensive U.S.-style discovery does not mean that such discovery violates fundamental rules of Dutch civil procedure. The evidence obtained pursuant to § 1782 was admissible in the pending Dutch court proceeding since it was not unlawfully obtained.

With respect to the deposition of the American CEO of Convex's parent company, the District Court held that the transcripts of the deposition could be submitted in the Dutch proceedings as written evidence. Convex's objection to the manner in which depositions are taken in the United States (*i.e.*, direct and cross-examination of the witness by the parties' counsel instead of questioning by a judge) was rejected. Indeed, had Duizendstraal obtained the deposition of the CEO pursuant to the Hague Convention, U.S. procedure would also have applied. The court therefore concluded that the taking of a deposition in accordance with U.S. procedural rules does not violate fundamental principles of Dutch civil procedure.

The decision of the Utrecht District Court was upheld by the Amsterdam Court of Appeals (*Hof*).<sup>15</sup>

In another matter, *Alfred Mol v. Kinetics Technology International B.V.*, Mr. Mol ("Mol") and Kinetics had obtained documents from each other and a third party pursuant to discovery proceedings in the United States.<sup>16</sup> In particular, Kinetics obtained the source code of Mol's computer program "Phenics," whereas Mol obtained a copy of Kinetics' computer program "Spyro." The third party had produced certain manuals related to Phenics. The material disclosed pursuant to the discovery proceedings was subject to a protective order.

The U.S. court subsequently lifted the protective order and allowed a limited number of representatives of Kinetics access to the Phenics source code and manual. A similar application from Mol that the protective order with respect to the Spyro program be lifted was rejected by the U.S. court. Kinetics subsequently used the evidence obtained in copyright infringement proceedings that it commenced against Mol before the Dutch courts.

According to Mol, this resulted in a violation of the principles of fair trial and equal treatment under Article 6 of the European Convention on Human Rights ("ECHR"), as Kinetics could freely select the evidence supporting its claim from the evidence obtained during discovery, whereas Mol could respond only to the evidence selected by Kinetics.<sup>17</sup> In particular, Mol alleged that he was unable to verify the authenticity of the version of Spyro that Kinetics provided to the court-appointed expert. The Dutch Supreme Court, however, rejected Mol's arguments.

It is established case law that a trial is considered fair within the meaning of Article 6 ECHR if the overall proceedings are fair.<sup>18</sup> The parties are considered to have been treated equally if both parties have had the opportunity to present their case without one party being in a significantly worse position than the other. Article 6 ECHR does not determine which evidence may be accepted by national courts.<sup>19</sup> This is primarily a matter of national law. The fact that evidence was obtained in a foreign proceeding through procedural means unknown to Dutch law does not in itself render the evidence inadmissible.

The overall proceedings in the case were considered fair because Mol had not been limited in his procedural opportunities before the courts. Indeed, Mol could have requested the specific evidence that he would have liked to obtain from Kinetics at an earlier stage of the proceedings before the Dutch courts. Had Kinetics refused to provide the requested evidence, the Dutch courts would have taken this into account. Mol could also have requested the assistance of the Dutch courts to obtain evidence from third parties.

The Supreme Court also considered whether Mol had suffered unequal treatment. As Mol had access to all the information provided by Kinetics in the Dutch proceedings, including the data regarding the Spyro program necessary for his defense, the Supreme Court held that Court of Appeal could reasonably conclude that Mol had not been in a disadvantaged position.

Thus, § 1782 offers a party to proceedings before the Dutch courts the possibility of obtaining evidence located in the United States through discovery procedures that are much broader in scope than those available in the Netherlands. As a result, an opposing party that does not have the possibility of using U.S. discovery proceedings may find itself in a procedurally unequal position. Such party would be well advised to raise the issue early, indicating the specific evidence it would like to obtain, and to use all procedural opportunities to overcome the inequality.

## **USE OF EVIDENCE OBTAINED PURSUANT TO § 1782 IN DUTCH ARBITRATION PROCEEDINGS**

Parties are free to use evidence obtained pursuant to § 1782 in arbitration proceedings in the Netherlands. This may, however, give rise to issues of fair trial and equal treatment as in the Dutch court cases discussed above.

Pursuant to Article 1039 § 1 DCCP, it is the responsibility of the arbitral tribunal to treat the parties equally. This principle being of public order, unequal treatment of the parties may lead to the annulment of the arbitral award under Article 1065 § 1 (e) DCCP.<sup>20</sup>

Article 1039 § 5 DCCP determines that the arbitral tribunal decides which evidence may be admitted. In light of the arbitral tribunal's responsibility to ensure that the parties are treated equally, there may be instances where it refuses to accept evidence obtained pursuant to § 1782—for example, if accepting the evidence would result in unequal treatment of the parties. The arbitral tribunal may also decide to admit the evidence subject to certain conditions, such as the condition that the party that obtained discovery in the United States must, in its turn, disclose certain evidence requested by the opposing party.

In the meantime, a party to arbitration proceedings in the Netherlands that considers that it is not treated equally should raise the issue with the arbitral tribunal as early as possible during the proceedings. While the Dutch courts examine very carefully whether the parties to the arbitral proceedings have been treated equally, the remedy that they provide, *i.e.*, the annulment of the arbitral award, comes only at the end of the proceedings when the parties have already invested a lot of their time and money. Prevention simply remains better than cure.

## **LAWYER CONTACT**

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## ENDNOTES

1. See related *Commentary* entitled “Developments in U.S. Law Regarding a More Liberal Approach to Discovery Requests Made by Foreign Litigants Under 28 U.S.C. § 1782,” by Robert W. Gaffey and Bridget A. Crawford, discussing the issue from the American perspective, available at [http://www.jonesday.com/pubs/pubs\\_detail.aspx?pubID=S6174](http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6174).
2. *Alfred Mol v. Kinetics Technology International B.V.*, Supreme Court [*Hoge Raad*], February 6, 1998, NJ 1999, 479.
3. There are few instances where the law provides otherwise. A good example is Article 1022 DCCP, which determines that an agreement to arbitrate may be evidenced only in writing.
4. District Court [*Rechtbank*] Maastricht, March 7, 2002, LJN AE 0630.
5. *Modern Sign Solutions PTY Ltd. v. Ad-Board B.V.*, District Court Zwolle, May 15, 2006, LJN AY 5717. *AMP Logistics B.V. v. Traders cs.*, District Court Utrecht, March 18, 2009, LJN BH 6556.
6. *Honeywell Intellectual Properties Inc. cs. v. Apollo Scientific Ltd.*, District Court Den Haag, July 27, 2005, LJN AU 5178.
7. District Court Middelburg, April 5, 2006, LJN AZ 0931.
8. District Court Amsterdam, August 24, 2005, LJN AU 4935.
9. District Court Arnhem, April 12, 2006, LJN AY 0152.
10. The more liberal approach is not consistently followed by all district courts.
11. *MPR Communicatie Beheer B.V. v. Boschlust Beheer B.V.*, District Court Amsterdam, January 24, 2007, LJN AZ 7862.
12. *Allianz cs. v. Aannemings—en bemiddelingsbedrijf “De Langstraat Verhuur” B.V.*, District Court Den Bosch, April 16, 2008, NJF 2008, 228.
13. The statute provides, in relevant part, as follows:

“The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.”

For a description of U.S. law and procedure regarding § 1782, see the *Commentary* by Mr. Gaffey and Ms. Crawford, *supra*, n. 1.
14. *Convex cs. v. Duizendstraat cs.*, President District Court Utrecht, April 9, 1996, KG 1996/158.
15. *Convex cs. v. Duizendstraat cs.*, Court of Appeals [*Hof*] Amsterdam, October 24, 1996, NIPR 1997/120.
16. *Alfred Mol v. Kinetics Technology International B.V.*, *supra*, n. 2.
17. Until 2002, the principles of fair trial and equal treatment were not explicitly stated in the DCCP. Before 2002, any party invoking a violation of these principles would therefore rely on Article 6 ECHR, which applies directly in the Netherlands.
18. *Dombo Beheer B.V. v. The Netherlands*, ECHR, October 27, 1993, application no. 14448/88.
19. *Schenk v. Switzerland*, ECHR, July 12, 1988, application no. 10862/84.
20. See, e.g. *Spaanderman v. Anova Food B.V.*, Supreme Court, May 25, 2007, LJN BA 2495.

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