

# MEMORANDUM



TO CMI  
New York conference 2016

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DATE 25 April 2016  
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SUBJECT Obtaining evidence in the Netherlands

## Obtaining evidence in the Netherlands

One of the standard works in the Netherlands legal literature on disclosure in Netherlands proceedings starts with an interesting example derived from a legal book of 1888:<sup>1</sup>

*An ordinary seaman tells the following story. While the vessel was on the high seas, he got injured due to an unfortunate fall. As a consequence of this fall, he became ill and deaf. Subsequently he held the owner of the vessel liable for the damage and losses caused by his personal injury. The owner, however, denies the alleged facts of the incident. Therefore the ordinary seaman requests the owner to disclose the master's logbook which confirms the facts as outlined by the ordinary seaman. It is 1869. The court dismissed the ordinary seaman's claim for disclosure of the logbook. The outcome is obvious: the ordinary seaman was not able to prove the owner's liability for his loss and damage.*

The outcome is obviously very unfortunate for the ordinary seaman, but, in a nutshell, it provides a clear insight how one was looking at disclosure at that time. Since then the Netherlands has often been recognized as a jurisdiction where it is difficult to obtain evidence from opponent parties in legal proceedings and/or third parties. Furthermore, parties have lots of freedom to decide which information is disclosed in the proceedings and which information is held back. Documents supporting the case are usually submitted where information affecting the case negatively is withheld.

Much, however, have been changed over the years and it is fair to say that, to a certain extent, Netherlands courts have moved towards the American and UK system. And although

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<sup>1</sup> J. Ekelmans, *De exhibitieplicht*, Kluwer, Deventer 2010, p. 1.



DATE 25 April 2016  
OUR REFERENCE CMI New York 2016  
PAGE 2 of 5

the Netherlands is still not a jurisdiction with extensive discovery and disclosure proceedings, there are various means to obtain evidence. Subject to the particular circumstances, one could apply for preliminary witness hearings<sup>2</sup>, preliminary court survey<sup>3</sup> and disclosure of documents and other information<sup>4</sup>. In this memorandum the focus will be on the disclosure of documents and other information through legal proceedings in the Netherlands.

### **Disclosure proceedings**

#### *Article 843a Code of Civil Procedure*

The general rule under Netherlands law is that a party is not obliged and cannot be compelled to disclose documents at its disposal to any other party. This was held by the Supreme Court in *HBU/Groendijk c.s.*<sup>5</sup> The exception to this rule is included in article 843a Code of Civil Procedure (CCP) which provides for a possibility to obtain information if certain conditions are met. Article 843a CCP provides:

- "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 it may reasonably be assumed that the proper administration of justice is safeguarded even if the information requested is not provided."*

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<sup>2</sup> Articles 186 – 193 Code of Civil Procedure.

<sup>3</sup> Articles 202 – 207 Code of Civil Procedure.

<sup>4</sup> Article 843a Code of Civil Procedure.

<sup>5</sup> Supreme Court, 29 June 2007, NJ 2007/639.



DATE 25 April 2016  
OUR REFERENCE CMI New York 2016  
PAGE 3 of 5

Basically, there are three cumulative conditions:

- a. A party must have a legitimate interest in obtaining disclosure of documents;
- b. A party must specify the documents and/or information to be disclosed – one cannot use article 843a CCP for fishing expedition purposes;
- c. The application for disclosure of documents must relate to a legal relationship (contract, tort) a party is entered into.

In practical terms there is actually another condition to be met pursuant to article 843a (4) CCP. A party is only obliged to disclose documents and/or information if it would be possible to obtain the information through other means, for instance through witness hearings.

In order to apply for disclosure pursuant to article 843a CCP a party can either initiate legal proceedings in the Netherlands – through summary proceedings or substantial proceedings – or apply for disclosure in pending proceedings in the Netherlands.<sup>6</sup>

The possibility to apply for disclosure can be used for different reasons. Sometimes a party would like to have certain documents to prepare for potential settlement negotiations. It could equally be used for producing evidence, either to build a case or to undermine opponent's position in proceedings. This was held by the Supreme Court in *Abu Dhabi Islamic Bank/ABN AMRO*<sup>7</sup>, *Snuut c.s./Optiver*<sup>8</sup> and *ABN AMRO/X c.s.*<sup>9</sup>. As pointed out above, there is no general obligation for a party to disclose documents and information – article 843a CCP cannot be used for so-called *fishing expeditions*. If one is not able to specify the documents to be disclosed, an application for disclosure is likely to be dismissed.

The scope of potential disclosure is no doubt narrower than under USA and English law, but for Netherlands standards it is a significant change to what was usual. This is further confirmed by the increasing amount of case law with regard to article 843a CCP (please find some case law below).

#### *Case law*

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<sup>6</sup> Supreme Court, 6 October 2006, NJ 2006/547 (*Meijer/Cornelis c.s.*).

<sup>7</sup> Supreme Court, 8 June 2012, NJ 2013/286.

<sup>8</sup> Supreme Court, 13 July 2012, NJ 2013/288.

<sup>9</sup> Supreme Court, 13 July 2012, NJ 2013/287.

DATE 25 April 2016  
OUR REFERENCE CMI New York 2016  
PAGE 4 of 5

- The Hague Appeal Court in *PACELLI* relates to the successful disclosure of the construction insurance policy which enables a yacht owner and its insurers to establish their recovery position under the yard's insurance policy.<sup>10</sup>
- Court of Rotterdam in *National Union Fire Insurance Company c.s./Geodis Global Solutions Netherlands BV* it was attempted to, amongst others, obtain disclosure of survey reports and underlying draft reports.<sup>11</sup>
- Court of Rotterdam in *MARIANNE SCHULTE*, a recent decision of the Rotterdam Court, relates to an application of cargo interests to obtain disclosure of all sorts of information from the Dutch agent and daughter company of the French carrier CMA-CGM SA.<sup>12</sup> Although the application did not succeed, it was confirmed by the court that it is permitted to request third parties for disclosure of documents, provided that the conditions of article 843a CCP are met. This was determined by the Supreme Court.<sup>13</sup>

### **Attachment of evidence**

Netherlands law provides for the option to, prior to an application for disclosure, attach evidence available in the Netherlands. This is particularly interesting in shipping cases where a vessel is calling at a Netherlands port and relevant evidence is available on board. One could quite easily obtain leave for such an attachment and it is a strong tool to secure evidence.

The attachment of evidence has no literal basis under Netherlands law, but the possibility to attach evidence is based upon several provisions in the CCP and was confirmed by the Supreme Court in *Molenbeek/Begeer c.s.*<sup>14</sup>

Leave for attachment can be requested by means of an application and should meet the requirements of article 843a CCP, so:

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<sup>10</sup> *The Hague Appeal Court, 20 May 2003, S&S 2004/59 (PACELLI).*

<sup>11</sup> *Court of Rotterdam, 13 February 2013, S&S 2013/94.*

<sup>12</sup> *Court of Rotterdam, 23 July 2015, S&S 2016/8 (MARIANNE SCHULTE).*

<sup>13</sup> *Supreme Court, 10 July 2015, RvdW 2015/861.*

<sup>14</sup> *Supreme Court, 13 September 2013, ECLI:NL:HR:2013:BZ9958.*



DATE 25 April 2016  
OUR REFERENCE CMI New York 2016  
PAGE 5 of 5

- a. A party must have a legitimate interest in obtaining disclosure of documents;
- b. A party must specify the documents and/or information to be disclosed – one cannot use article 843a CCP for fishing expedition purposes;
- c. The application for disclosure of documents must relate to a legal relationship (contract, tort) a party is entered into.

In addition, the applicant must demonstrate the necessity of the attachment (subsidiarity). An obvious reason could be that there is a serious risk that evidence will be lost if it is not secured. Finally, the attachment needs to be proportional; the interests of both parties are to be taken into account. The attachment may not be too burdensome in view of the various interests at stake. Relevant factors to determine whether the attachment is proportional are the nature and severity of the reproaches against the defendant, the financial interest, the interest by securing the evidence, the impact of the seizure, the likelihood of damage to the defendant and the potential interest to preserve confidentiality of the documents.

Once leave for attachment is obtained, the documents can be attached by a bailiff. The attachment does not permit the applicant to receive copy of the documents. In order to obtain disclosure the applicant should bring a claim for disclosure on the basis of 843a CCP.

Except for disclosure of insurance policies or (draft) survey reports, an attachment of evidence and subsequent disclosure proceedings could be of particular interest in shipping cases where evidence is available on board a vessel. One could think of logbooks, crew lists, all kind of certificates, VDR, etcetera.

Once leave is obtained, a bailiff is assigned to conduct the actual attachment of the evidence. In order to be able to properly fulfill his task, he is allowed to have access to any place. Attachment could also include digital information available on computers. If needed, a bailiff could be accompanied by an expert to read out for instance the VDR on board a vessel.

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