

## Summary

### **Appeal in civil law A numerical exploration**

If a party disagrees with the decision of the court of first instance, it is often possible to lodge an appeal against that decision with the court of appeal. To appeal against a decision, is then one of the remedies to dispute a decision. As there are still many questions with regard to the present situation in relation to appeal in civil law, the current research was initiated.

### **Objective, research questions and structure of the research**

#### **Objective and research questions**

The research aims to give numerical insight into the state of affairs in the Netherlands with respect to appeal in civil law.

The research forms an impression of the type of cases in which appeal is lodged and how these are carried out. The research questions are:

#### **Structure of the research**

The research questions are answered by analysis of recorded data from the Council for the Judiciary and by means of case study.

#### **Secondary analysis based on the case files from the Council for the Judiciary**

We made use of two files from the Council for the Judiciary for the research. First, a file at case level including data of all 30,379 civil-law cases entered in the courts of appeal in 2009 and 2010, in which the court ruled as a court of appeal, as well as the outflow data of the period between 2009 and 2011 linked to this. The second file consists of an aggregated classification file into the inflow at the subdistrict court, the district court and the court of appeal in which the processing times are incorporated. All analyses, except for the calculation of processing times and appeal percentages are carried out based upon the case file.

#### **Analysis of court files**

A random sample of 420 cases were drawn from all 14,014 cases processed by the courts of appeal in 2011. These 420 cases were requested from the courts of appeal. The in all 306 cases studied were handled by the courts of appeal in Den Bosch, Arnhem, Amsterdam and Leeuwarden. A questionnaire was used study that coders filled in based on the various documents present in the files. Some information about a case decided upon in first instance was taken from the decision in first instance.

## Results

### *Number of civil cases in appeal and the parties involved*

#### **Number of civil cases in appeal**

In civil cases, appeal was lodged around 15,000 times per year in the years 2009 to 2014 – always nearly 40% family court cases and over 60% commercial court cases; the number of cases declined slightly.

For *family court cases*, the total appeal percentage was 4% in the period between 2009 and 2013. In the period between 2008 and 2011, this percentage fluctuated between 3% in cases relating to family supervision orders or divorce and 8% in cases relating to parental access rights and custody cases, up to 16% in cases relating to contributing to one's living expenses.

The total appeal percentage for *commercial court cases* at the subdistrict courts – excluding default proceedings – was 8 to 9% in the period between 2009 and 2013. For commercial court cases civil-law section, the appeal percentage increased from 18% (three-year average 2009-2011) up to 30% (three-year average 2011-2013), and in interlocutory proceedings the appeal percentage was 17 to 18%.

#### **Parties involved**

Half of all cases in appeal was brought by the claimant / applicant in first instance. In commercial court cases this happened more often than in family court cases: 61% against 35%. In family court cases, the respondent in first instance more often lodged an appeal. In the majority of the commercial court cases, the respondent party therefore was the defendant / respondent in first instance and in the majority of the family court cases the respondent party was then the claimant / applicant in first instance. There was no respondent, or none registered in the file, in 87% of the cases under the Debt Rescheduling Natural Persons Act (DRNP Act). Also in family court cases, there may not always be a respondent, including cases relating to guardianship orders and parental access rights and custody cases.

#### **Grounds for appeal**

Insofar as could be deduced from the documents, most grievances deal with facts (establishments of the facts in first instance), claims / requests (especially with respect to these being granted or rejected in first instance), substantive law (especially the applicability of a rule of law), or substantiation (especially with respect to evidence).

Procedural law and inadmissibility matters were much less often grounds for appeal. It cannot be determined with certainty what the personal considerations have been for the grievances.

#### **Characteristics of cases in appeal**

The largest group of cases in appeal within the *commercial court cases* was the category 'special agreements' (in which employment cases are the most frequent), followed by cases relating to law of obligations (wrongful act amongst others) and insolvency law (the majority of which are cases under the DRNP Act).

The main categories within *family court cases* include parental access rights and custody cases, cases relating to contributing to one's living expenses and family supervision orders. Divorce and guardianship matters were less frequent.

It is not exactly known how often these consisted of requests for amendments, however these were the most frequent in cases relating to contributing to one's living expenses and parental access rights and custody cases.

Withdrawal / cancellation did not often take place and solely in commercial court cases (excluding cases under the DRNP Act).

There is no information available about the detailed characteristics of these cases and the cancellation (administrative removal).

All court cases involved in the case study were dealt with by a three-judge division.

Other characteristics of the cases in appeal:

- In 8% of the court cases, an expert's opinion was given; this more frequent in family court cases as opposed to commercial court cases.
- In 4% of the court cases, a witness statement was given, occasionally a cross examination took place.
- In nearly 75% of the cases there was no mention of further deeds. In 8% of the court cases, there was one, in 9% two and in an equally 9% three or more.
- In 17% of the court cases a case was argued.
- In 23% of the court cases there was one or more interlocutory decisions, relatively more frequent in commercial court cases (excluding the cases under the DRNP Act) than in family court cases or cases under the Debt Rescheduling Natural Persons Act.

### Processing times

The average processing time between inflow at the court of appeal and the decision declined from 52 weeks (of all processed cases in 2010) to 42 weeks (of all processed cases in 2014). The decline was applicable to all types of court cases, with the exception of cases under the DRNP Act. Commercial court cases (excluding cases under the DRNP Act) in general knew a longer processing time than family court cases. Within the different types of family court cases, the processing times varied to a large extent: on average, family supervision cases took much less time than other types of family court cases and divorce cases took (somewhat) longer (data Council for the Judiciary).

In over half the cases, the grievances were submitted together with the appeal. This was in nearly all proceedings that commenced with an application, as opposed to only 20% in proceedings commenced by a summons. There was usually more time in between in the proceedings commenced by a summons.

The processing time partly depends on what is happening in a case. Court cases in which an expert's opinion has been given or a witness has been heard, had a substantially longer processing time, as well as court cases in which corroborative evidence was presented and cases in which one or more interlocutory decisions have been delivered. It does not seem to matter much for the processing time whether or not a session has been held: nearly half of the cases, both settled in writing as well as cases commenced by a summons whereby one session was held, were completed within a year. The cases in which several sessions were held, took, in nearly all cases, longer than one year.

### Outcome of the appeal

#### To uphold and to set aside

The data provided by the Council for the Judiciary shows that in 42% of the cases that were received in the period 2009/2010, the decision in the first instance was upheld on appeal and 38% of the cases was (partly) set aside. The cases under the

DRNP Act were relatively speaking more often upheld on appeal, family court cases relatively speaking less often and commercial court cases excluding the cases under the DRNP Act were on average with respect to the percentage of decisions upheld on appeal. The percentages of decisions (partly) set aside were respectively 24% (cases under the DRNP Act), 49% (family court) and 29% commercial court excluding cases under the DRNP Act).

The analysis of court files revealed similar findings. Commercial court cases resulted in relatively more upheld decisions as opposed to family court cases (41% and 37% respectively), family court cases resulted more frequently in decisions being set aside or partly set aside (44% in family court cases and 35% in commercial court cases). The judgement in cases under the DRNP Act was upheld in 83% of the cases.

A high percentage of decisions that were set aside on appeal was seen in cases relating to contributing to one's living expenses, a low percentage on the other hand was seen in family supervision cases.

With regard to commercial court cases, we noticed some support for the 'differential attitude' hypothesis: the appeal lodged by the party that was the respondent in first instance has a greater chance of success.

### **Amendments**

In half of the court cases, the decision in appeal did not vary at all from the judgement in first instance, in the other half it altered on one note, or on two or (more often) three notes. Most often did the judgement change with respect to the substantiation for granting or rejecting the decision, followed by the assessment of the facts, the decision to grant or reject the decision and the evidence. Relatively least of all, were there any amendments with regard to the assessment of the applicability of the law, the amount of the claim or request, or the application or interpretation of a rule of law.

### **The grounds of the judgement**

In a general sense, the court stated the grounds given in the decision, that the grievances failed, that the judgment of the court was upheld on appeal (sometimes including an improvement of the grounds), that a decision was set aside, that a settlement out of court was reached, or that appellant 'failed to demonstrate sufficiently that..', or that 'could not be demonstrated that..'. The substantive response of the court to the grievance varied greatly depending on the nature and content of the grievances.

### **Cross appeal, side dictums and referral**

The case study showed that in 12% of all cases researched, the respondent also lodged an appeal. The cross appeal was a success in 24% of the cases (in part), failed in 16% of the cases and in the remaining cases, the grievances of the appellant were not dealt with in the cross appeal.

The standard procedure in proceedings commenced by a summons, is for the court of appeal to pronounce side dictums regarding the legal costs plus interest payable by law in addition to the claim.

Also judgments were often declared to be provisionally enforceable.

Not even 1% of the cases have been referred back in 2009 and 2010. Usually the decisions were set aside with referral, less often for decisions that were held up on appeal or partly set aside with referral.

**Legal fees**

In most civil-law commercial court cases the unsuccessful party was ordered to pay the costs in the proceedings. In 38% of the commercial court cases the appellant was ordered to pay the costs and the respondent in 16% of the cases, while in 9% of the cases both parties had to each pay its own legal costs. No order for costs was ruled in 37% of the cases (mainly cases under the DRNP Act).

In the event the decision in first instance was upheld on appeal, the appellant was proportionately more often ordered to pay the legal fees, while the respondent was more often ordered to pay the costs in the proceedings when the decision was set aside. When the decision was partly set aside, it was slightly more often the appellant as opposed to the respondent who was ordered to pay the costs in the proceedings, however, in 40% of those cases it was the respondent, or both parties had to each pay its own legal costs.

There was no order for costs in most cases under DRNP Act and in nearly all family court cases both parties each had to pay its own legal costs.