1. Provisional witness hearing in the Netherlands

Oitiva antecipada das testemunhas na Holanda

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Resumo:

O autor escreve criticamente sobre o direito holandês, dizendo que a fase anterior à ação propriamente dita deveria ter sido melhor regulada pelo legislador. Existem, apesar disso, alguns instrumentos úteis a dar às partes uma visão de sua situação real, o que pode levar a um acordo. Neste contexto, o autor trata da oitiva antecipada de testemunhas.
Abstract:

The author writes critically about Dutch law, saying that pre action phase should have been better regulated by statutes. However, some useful devices to give the parties a better idea of their real situations do exist, which can lead to a settlement. In this context, the author deals with provisional witness hearings.

Keywords: Witness hearings - Deals - Dutch law - Pre action phase

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1. Pre-action: a “forgotten” phase?

The civil litigation that takes place prior to formal proceedings has not been an area that the Dutch legislator has approached systematically or consistently. As a result the Dutch Code of Civil Procedure (CCP) does not contain a general set of rules on the preliminary phase that precedes the actual proceedings. There is no separate section in this code that covers all aspects of the pre-action conduct of litigation. This is, in a sense, remarkable as once civil proceedings have started, the conduct of parties is regulated by various sets of rules, both in the CCP and in other Codes. From that point onwards, the procedural clash of arms is supervised by the court. It is clear that the conduct of prospective litigants prior to formal commencement of a civil claim can be a decisive factor in the development of a trial. Nevertheless, there is no systematic approach to this stage of litigation in Dutch law. The preliminary phase of Dutch proceedings has been referred to as being “forgotten”.

Nevertheless, Dutch procedural law offers several separate instruments regulating the pre-action conduct of litigation. These instruments mainly concern the acquisition of information (provisional production of evidence, obligation to produce exhibits, right of inquiry and obligations to inform). The acquired information enables parties to assess their judicial position and can pave the way for an out-of-court settlement.

This contribution deals with only one of the instruments in the Dutch pre-action stage, namely the provisional witness hearing. Prior to the formal commencement of a claim, the court, in response to a party's petition, can appoint a provisional examination of witnesses by a judge (voorlopig getuigenverhoor). This provisional, or preliminary, witness hearing plays a significant role in Dutch practice. Dutch courts can also order a provisional expert report (voorlopig deskundigenbericht) or a provisional court inspection of the premises (voorlopige plaatsopneming and bezichtiging). The aim of this contribution is merely to inform and go into some of the main elements of this instrument.

2. Provisional witness hearing: why?

There are several reasons for the provisional production of evidence in the form of a provisional witness hearing. First, it may prevent evidence being lost. Second, it may help the parties concerned to assess their position in advance, i.e. prior to the formal commencement of civil action. Claimants, defendants and third parties that might have an interest in the claim are offered the opportunity to clarify certain (perhaps unclear) facts. After hearing witnesses in advance or reading an expert report prior to formal action, a claimant can consider whether he will succeed in proving the facts he will have to prove in the main proceedings. The provisional production of evidence can also enable the party involved to see who he will have to file his claim against. In addition, the provisional production of evidence may improve the chances of accomplishing a settlement, even without turning to the court. These objectives make it clear
that the instruments enabling the provisional production of evidence help to avoid formal proceedings.  

The Supreme Court has already had the opportunity to describe what a provisional witness hearing consists of: it aims to provide the party who requested the hearing with evidence of facts and circumstances that this party will have to prove in a formal proceedings (if they do commence) or in formal proceedings that have already begun. The Supreme Court added that a second aim can be attempting to be clearer of the facts that are relevant for the case, and thus to better judge whether it is advisable to commence proceedings or to continue proceedings if they have already started.

3. Provisional: a misleading term

Since 1951, when the provisional examination of witnesses was introduced, the use of this mechanism has been restricted to divorce cases. When the reform of the Dutch CCP came into force in 2002, this restriction, seen as outdated, lapsed. Since 2002 there have been no restrictions on using this instrument as far as the type of civil case is concerned. Witnesses can be heard by a judge on this “provisional” basis, for example, for claims involving personal injury or for pure economic loss. It is not important whether the loss is caused by professional negligence or, for example, by a consumer. The provisional examination of witnesses is only admissible in cases that can be brought before a civil court.

The provisional examination of witnesses takes place in court, in front of a judge. Both parties and the judge can ask the witness questions. A formal written record (proces-verbaal) is made of the examination. The word “provisional” could be, in this context, misleading. When witnesses are examined by a judge in a provisional hearing, their testimonies are usually not provisional. If all parties were present at the examination, their testimonies have the same evidential value as testimonies made in formal proceedings. If all parties were not present, the court may disregard certain elements. But in general, the outcomes from the provisional production of evidence are far from provisional. If all parties were present at the provisional examination and later on formal proceedings are initiated, the testimonies gathered in the provision witness hearing can have the same probative value as testimonies made in formal proceedings.

4. Authorisation by the court required

The provisional production of evidence, either by hearing witnesses or an expert report both require authorisation by the court, for which a petition (verzoekschrift) must be filed. The petition must be directed to the court that will probably have jurisdiction to decide on the formal claim. The petition for the provisional examination of witnesses must contain inter alia the names of the intended witnesses. The petition for the provisional production of expert evidence must state the points the expert has to report on. In principle, the opposing party has the right to be heard on the petition. Case law offers many examples of debates on the question of whether the request for a preliminary witness hearing must be granted. This is understandable, a preliminary witness hearing bears the risk of being a fishing expedition.

The petition for provisional witness hearing has to meet certain requirements. If the petition meets the requirements, in principle the court will have to grant the request. One of these requirements is that authorisation will only be granted if the request is sufficiently concrete and relevant for the intended claim. The request must make clear which facts are involved. Although the provisional production of evidence is meant to clarify which claims can be made, the request will not be granted if the petition simply describes the intended claim or the facts that the petitioner wants to prove in vague terms. On the other hand, it is not necessary for the petition to describe exactly which facts the formal claim will be based on. As stated by a Dutch scholar, this way the Dutch Supreme Court has solved a chicken and egg problem for the requesting party as the requesting party often needs the provisional expert examination to decide which claims he or she can bring forward. This can also apply to a provisional witness
For example, in February 2015 a court of first instance ruled on a request for preliminary witness hearing concerning the bankruptcy of a corporation. Following the bankruptcy the curator sold assets to a new corporation. An association requested a preliminary witness hearing stating that their intention was to start proceedings against the new corporation based on tort. The association stated that there had been an abuse of the bankruptcy and wished to claim damages for former employees and creditors of the bankrupt organisation. It requested a preliminary witness hearing to clarify facts and circumstances concerning the bankruptcy and the restart. The new organisation opposed the request for a preliminary witness hearing, stating, inter alia, that the request is insufficiently concrete and has to be considered as a fishing expedition or abuse of right. The court agreed with new organisation and ruled, with one exception, that the request must be denied because the intended questions are very general and suggest that it was a fishing expedition or abuse of right, underlined by the fact that the request aims to hear 33 witnesses. Only at one point, based on the facts of the case, did the court rule that the request should be considered sufficiently concrete. For that part, the request is granted and only the witnesses for that part will be heard.

Another recent example of a request for a preliminary witness hearing that was granted concerns a closed procurement procedure. In the request the petitioner states that she suffered damage as a result of a tortious act relating to the procurement procedure and wished to hear witnesses on three specific topics. The preliminary witness hearing intended to base its statements on these three topics. The court at first instance denied the request. On appeal the court of appeal ruled on the request with respect to two of the topics mentioned in the request (and a part of the third topic) and stated that it does not meet the legal requirements. The reasons were that the petitioner failed to state the facts and circumstances it wants to prove with sufficient clarity. Although the petitioner stated that she wanted to gain more clarity on the applicable law and conditions, the petition failed to clarify (sufficiently) which tortious act it wants to prove. The court granted the request only with respect to one of the three topics that the petitioner brought forward as only that one was accompanied by sufficient facts. The court, ruling that there was no abuse of right or any other ground for denial, granted the request.

5. The downside of success: remedies for ill-considered petitions

The provisional examination of witnesses is generally accepted in the Netherlands. It is likely that several formal proceedings have been avoided as a result of pre-action settlement being reached on the basis of the outcomes of provisional evidence. However, dissatisfaction arose with regard to the rising numbers of unhelpful provisional examinations of witnesses. In 2004 the Council for the Judiciary (Raad voor de Rechtspraak) stated that the structure of the provisional examination of witnesses prohibits effective use of this mechanism. According to the Council, in a relatively large number of provisional witness examinations, parties call up large numbers of witnesses despite it not being clear to the judge what exactly the provisional examination concerns. This either prevents the efficient examination of witnesses or prevents a possible pre-trial settlement, resulting in a great deal of lost time. In addition, the provisional examination of witnesses might be requested for the wrong reasons. Parties might use the provisional examination of witnesses as a fishing expedition, even if there is no real chance of formal action.

The Council for the Judiciary has suggested limiting the provisional examination of witnesses. The Council proposes three ways of restricting the provisional examinations of witnesses: limiting provisional examination of witnesses to emergency cases, a limitation on the provisional examination of witnesses regarding cases with a high financial value, and increasing the court fees for petitions for the provisional examination of witnesses. The Council also suggests that the courts should be given more right to deny calling up witnesses. The line of reasoning of this latest suggestion may well have paved the road for the Dutch Supreme Court decision in the Frog/Floriade case.
In February 2005 the Supreme Court formulated in Frog/Floriade some grounds for denial of a request for the provisional examination of witnesses. A petition that meets the (other) formal demands can be denied if this mechanism is deemed to have been abused, if it is incompatible with the principles of due process because there is some other grave objection to granting the petition, or if there is no sufficient interest.

A. Deemed to be abused

A request for provisional witness hearing that meets the (other) requirements can be denied if this instrument is being abused. This can, for example, be the case if the requesting party cannot reasonably be allowed to use this mechanism because to do so would be disproportionate to the interests at stake.

The decision in Van de Ven/Pierik is one of the rulings of the Supreme Court where it points to this abuse of the right to use a provisional witness hearing. Car company Van de Ven, whose activities concern the leasing of cars, accused two former members of the supervisory board and two former directors of mismanagement. The company takes the view that its assets have significantly diminished as a result of their mismanagement and is considering starting formal proceedings before a district court. Before doing so, it filed a request for a provisional hearing of the two former members of the supervisory board and the two former directors and six other witnesses. The district court denied the request finding that it concerns a very comprehensive set of facts and circumstances, not found in the request for the provisional witness hearing, and that the question of whether the hearing of witnesses would be an option in this case can be considered during formal proceedings when more facts are clear, but not now. The decision was confirmed on appeal (of the request for provisional witness hearing). The Court of Appeal ruled that the interests of Van de Ven in granting the request are outweighed by the interests of the proposed witness in denying the request but the Supreme Court overruled this decision. In its ruling the Supreme Court found that one of the grounds for denying a provisional witness hearing is that the right to a provisional witness hearing is abused, but that the request cannot be rejected on the grounds of a balancing of interests.

B. No sufficient interest

From Frog/Floriade it also follows that the request can be turned down on the basis of the general rule that a person has no right to action where he lacks sufficient interest. This can be illustrated by a case from the Court of Appeal where the request for a provisional witness hearing was denied. Several graduate pilots requested a provisional witness hearing. The defendant was the bank that had financed their pilot training. The pilots argued that the bank should not have provided them with financing (at least not in the way it did) and that by granting the financing the bank had violated its duty of care towards them. The bank opposed the request for a provisional witness hearing and stated in its defence that the request did not contain sufficiently concrete points that can be clarified by a provisional witness hearing, that the bank has already answered the questions put to it by the pilots and that the pilots are sufficiently able to assess their chances of success throughout the court proceedings. In its decision on the request for the provisional production of witness evidence the court considered, inter alia, that the question of whether the bank should or should not have provided financing for their pilot training is a legal question which will have to be answered by the court. If necessary, the pilots can further justify their statement that the bank failed to fulfil its duty of care in regular proceedings. The request for a provisional witness hearing was denied due to a lack of sufficient interest.

There are more examples of this ground for rejection. An association called Stichting Cartel Compensation (SCC) requested a provisional witness hearing concerning a cartel. The defendants are the airline companies KLM and Martinair. In 2010, the European Commission ruled that a number of airline companies, including Air France-KLM, were part of a cartel concerning airfreight charges. The airline companies lodged an appeal against the Commission's decision. In its decision on the application for a provisional witness hearing, the district court takes as starting point that a request for a provisional
witness hearing must be granted (if it meets the formal requirements), but that the application can be turned down on several grounds, such as a lack of sufficient interest. The district court found that it follows from art. 16 of Regulation 1/2003 that the court is bound on the merits by the outcome of the Commission's decision, even if an appeal is lodged against that decision. This means that the parties in this case had not made sufficiently clear that they had a sufficient interest in the witness hearing. The request was denied.32

C. Incompatible with due process or another grave objection

Incompatibility with the requirements of due process is a ground for denial of the request. During the proceedings on the merits, the witness hearing can in theory take place if necessary. Nevertheless, the stage of the main proceedings can be reason for the denial of the request because allowing a provisional witness hearing at that stage may be in violation of due process.

The Renault/Udo is an example of this.33 After Renault ended a dealership contract with Udo, Udo initiated conventional proceedings against Renault stating that Renault had unlawfully ended the agreement. The district court rejected Udo's claims. On appeal, both Udo and Renault brought their views forward in writing, in several written pleadings. At that point of the proceedings on appeal Udo filed a request for the provisional hearing of witnesses.34 Before the court of appeal gave its final ruling, Udo wanted to hear thirteen witnesses by way of a provisional witness hearing (so not in a “conventional” witness hearing). Renault opposed this request, citing the inefficiency of hearing thirteen witnesses at that stage of the proceedings, also considering the fact that Udo had earlier filed written statements from a number of the proposed witnesses. The Court of Appeal denied the request for a provisional witness hearing, stating that granting the request would be a violation of due process given that if necessary conventional proceedings of bringing forward evidence by witness hearing would be possible.

A request can also be turned down because the legal position of the requesting party is not strong enough to justify a provisional witness hearing.35 On the other hand, a request for a provisional witness hearing was turned down by a district court and a Court of Appeal simply because the requesting party did not make a sufficiently plausible case that she had suffered damages as a result of the events which were the subject of the provisional witness hearing. The Supreme Court overruled this decision because a preliminary witness hearing does not concern the question of whether the claim on the merits will be awarded. A provisional witness hearing in a case like this aims to offer the requesting party an opportunity to clarify facts which are relevant for the case in order to allow him to better assess his legal position. The party who wants a provisional witness hearing may not therefore be required to make a sufficiently plausible case that he has suffered damage.36

The options for the court to turn down petitions for the provisional production of evidence have increased as a result of Supreme Court decisions.37

6. Asymmetric system of appeal

If the request for the provisional examination of witnesses is granted, there are no possibilities for appeal.38 If the request is denied, an appeal is possible. This is the case if the request is denied entirely or just partially. If the request is denied in part the appeal only relates to the part of the request that was denied. The same applies for the provisional expert examination.39 If the request is denied, appeal is possible.40 Legal scholars have stated that if the request is only partially denied, appeal is also possible.41

This system (appeal only if the request is denied) is known as an asymmetric prohibition being appealed. A question that has been raised is whether this asymmetric prohibition is in accordance with art. 6 ECHR and the requirements of due process. The Dutch Supreme Court has ruled that the provisional witness hearing does not concern the determination of civil rights and obligations within the meaning of art. 6 ECHR, neither for the applicant, nor for the defendant.42 The Supreme Court based this on the above-
mentioned rationale of the provisional production of evidence. It is settled case law from the CJEU, so states the Supreme court, that proceedings are only under the scope of art. 6 ECHR if its outcome is immediately decisive for such a right or obligation. This cannot be said for a provisional witness hearing, even though in theory it is possible that in subsequent proceedings the statements made at the provisional witness hearing can have the same probative value as statement made at “conventional” witness hearings. Therefore, concludes the Supreme Court, this system is neither a violation of art. 6 ECHR nor a violation of the requirements of due process.

Despite the statutory prohibition on appealing where the request has been granted, in several exceptional circumstances appeal is nevertheless possible. This is possible if the appeal contains the complaint that the district court has applied this regulation with omission of essential principles.

7. Continuation of proceedings

Once the request for a provisional witness hearing is granted, the regulations concerning the conventional witness hearing are applicable to the provisional witness hearing. This means that, amongst others, rules on the duty to testify and legal privilege are equally applicable. It also means that counterevidence can be provided in the provisional witness hearing.

The court has the right, upon request by the parties or ex officio to order one of the parties to come before the court. This option can be useful, because parties can have the opportunity to discuss with the court the way in which proceedings will continue. This appearance can also be used to explore the options for a settlement.

8. Not necessarily prior to court proceedings

One might expect that a provisional witness hearing is only allowed during the phase prior to the formal proceedings starting. However, this is not necessarily the case. It is not impossible for these types of provisional proceedings to be used when conventional proceedings have already started. This type of provisional production of evidence must also be allowed by the court. A provisional witness hearing can be, for example, requested after the ruling of a court in first instance, but before an appeal is lodged. At that stage, the provisional witness hearing can, if the conditions are met, be used to estimate the chance of success on appeal.

The option of the provisional production of evidence during proceedings has been criticised. Nevertheless, some are in favour of this option. Case law also offers examples of cases where the request for a provisional witness hearing has been approved even when proceedings on the merits have started. It is understandable that courts will take a close look at a request for a provisional witness hearing when proceedings have already started. It is fair to state that the further the proceedings on the merits have progressed, the more likely that the application for a provisional witness hearing will be rejected.

9. Provisional witness hearing and EU legislation

A provisional witness hearing has also led to questions concerning EU legislation. A Dutch court was (in St. Paul Dairy/Unibel) confronted with the question of whether the provisional hearing of a witness that precede formal proceedings are within the scope of the EEX. A Dutch district court granted an application by Unibel for a preliminary hearing of a witness who lives in the Netherlands. St. Paul Dairy appealed the decision claiming that the Dutch court did not have jurisdiction to hear the application made by Unibel. Both parties are established in Belgium and the legal relationship at stake is governed by Belgian law and it is a Belgian court that has the jurisdiction to hear the matter. The Court of Appeal in Amsterdam stayed the proceedings and referred it to the European Court of Justice.
The European Court answered that art. 24 of the Convention must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether or not to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of “provisional”, including protective, measures. So, if the information garnered by the provisional witness hearing is intended to determine whether it might be useful to commence proceedings, the provisional witness hearing does not fall under the scope of the EEX Regulation. Dutch scholars argue that this decision does not concern provisional witness hearing that aims to prevent evidence from being lost.

Provisional witness hearing has also led to European case law concerning the Evidence Regulation. Kortekaas c.s. initiated proceedings on the merits against the Fortis bank and its former directors, claiming damages, stating that the former directors gave misleading statements. To obtain clarification on their legal position these persons filed a request at a Dutch district court for the provisional hearing of the former directors as witnesses. The district court granted the request. The former director requested that the witnesses be heard in Belgium, where he lives, preferably in Brussels by a French court. The Dutch district court denied this request, which was confirmed on appeal. The Supreme Court referred the case to the European Court of Justice by way of a preliminary ruling. The question was whether the Evidence Regulation aims only to facilitate the taking of evidence and does not require the Member States to change the means of taking evidence provided for by their national procedural law. The Supreme Court questioned whether it follows from the decision in St. Paul Dairy/Unibel that Member States are obliged to use that regulation when taking evidence located in another Member State.

The CJEU ruled that the provisions of the Evidence Regulation, in particular art. 1(1) thereof, must be interpreted as meaning that the competent court of a Member State which wishes to hear as a witness a party residing in another Member State has the option, in order to perform such a hearing, to summon that party before it and hear them in accordance with the law of its Member State. In its follow up decision the Dutch Supreme Court ruled that the claim to exclusive effect of the Evidence Regulation fails. The Supreme Court denies the appeal in cassation, and thereby confirms that the Dutch district court is allowed to call the witnesses before it and to hear them according to Dutch law.

10. Provisional expert examination and provisional court inspection of a site

The provisional production of evidence is not limited to a witness hearing. The Dutch Code of Civil Procedure also offers the option of a provisional expert examination (voorlopig deskundigenonderzoek) or a provisional court inspection of a site (voorlopige descente). The provisional expert examination means that a party can request that the court consult experts, prior to the formal commencement of a civil action. The aim of a provisional expert examination is to provide the requesting party with evidence, in the form of an expert report, of the facts that this party will have to prove in formal litigation (if that litigation even starts). Another aim of the provisional expert examination is to provide the possibility of obtaining more security concerning facts and circumstances that might be relevant for the dispute and therefore be better able to judge whether it is advisable to start proceedings (or to continue with proceedings that have already started).

The provisional court inspection of a site consists of the option of asking the court to inspect the site to see for itself, prior to the formal commencement of an action. These forms of provisional production of evidence can be useful in cases concerning perishable goods. The statutory rules on a provisional expert examination and provisional court inspection of a site are linked with the rules on the provisional examination of witnesses.

11. Final remarks

The provisional production of evidence by examination of witnesses is an oft used instrument in Dutch
law. The types of provisional production of evidence that this contribution describes also have disadvantages. One of them is the risk of fishing expeditions or abuse of the instrument for other reasons. The expanding of the grounds to reject the application by the Supreme Court seems to have performed a useful function. It offers lower courts the option of keeping the door shut, particularly in cases where the instrument is being abused. Nevertheless, based on the vast amount of case law it is fair to state that it is still considered a useful instrument in Dutch procedural law.

Pesquisas do Editorial

- A COLHEITA DE DEPOIMENTOS NO PROCESSO CIVIL BRASILEIRO, de Guilherme Luis Quaresma Batista Santos - RePro 213/2012/51
- AÇÕES PROBATÓRIAS AUTÔNOMAS : PRODUÇÃO ANTECIPADA DE PROVA E JUSTIFICAÇÃO, de Paula Sarno Braga - RePro 218/2013/13
- PROVA TESTEMUNHAL, de Luiz Fabiano Corrêa - RT 762/1999/765

FOOTNOTES


2 On Dutch civil procedural law in general (in English) see F.A.M. van Bree, T.A. David, J.P. Heering and M. van Wissen, European Civil Practice, vol. 2, Netherlands (chapter 58), 2004, p 370-400.

3 Eg. the Judiciary Act (Wet op de Rechterlijke organisatie).


5 Another part of the pre-action instruments focusses on topics, such as compulsory measures (provisional attachment).

6 This form of provisional production of evidence is based on the Dutch Code of Civil Procedure (CCP): art. 186 – 193 CCP.

7 There is a vast amount of case law (especially from lower courts) on the topic. The provisional hearing of witnesses has also been the topic of many publications by Dutch legal scholars.
The provisional production of expert evidence and the provisional court inspection of premises are based on the CCP as well (art. 202-207 CCP). Some attention will be given to these two forms of provisional production of evidence in Section 10.

Dutch Supreme Court (SC) 24 March 1995, NJ 1998/414 (Saueressig/Forbo).

Frontloading of costs – costs that would not have been incurred had the preaction instrument in question been avoided – might be considered a disadvantage of preliminary production evidence. Where provisional production prevents proceedings on the merits, it saves costs.

Despite of one might think provision production of evidence can, in certain cases, also be allowed in proceedings that have already started.

SC 16 December 2011, NJ 2012/316 (Boekhoorn/Cyrte).

To illustrate: a question has arisen over why the provisional production of evidence is relatively rare in cases on labour law. M. Westerbeek has written on that question and concludes that several labour law cases offer space for provisional production of evidence (Arbeidsrecht 2013/31); see district court Zeeland-West-Brabant 24 June 2013, ECLI:NL:RBWB:2013:5906.

SC 15 July 1987, NJ 1988/2 (Staat/Koca) and SC 11 February 2000, NJ 2001/137 (A c.s./Staat). An example of denial of an application for provisional witness hearing on this ground is offered by District Court The Hague 12 June 2014, NJF 2014/385. The case concerned the termination of employment at a university. The employee filed an application for a provisional witness hearing to prepare proceedings for an administrative court. The district court denied the claim because the proposed witness hearing did not relate to proceedings on the merits before a civil court (but an administrative court). The court can only appoint a provisional examination of witnesses if it concerns a case where evidence by witnesses is allowed (art. 192 CCP).

So follows from art. 192 CCP. This also applies to the provisional production of expert evidence and the provisional court inspection of premises: if all parties were present, the outcomes of these forms of provisional production of evidence have the same probative value as evidence produced in the main proceedings (art. 207 CCP).

Art. 187 para 1 and art. 202 para 1 CCP.

Art. 187 para 3 CCP.

Art. 203 CCP.

Art. 187 para 4 and 203 para 3 CCP.
The text of the CCP on this point (art. 186 CCP) suggest a discreitional power for courts, but it is settled case law that courts do not have discreitional power when deciding upon the request.

In Section 5 on ill-considered requests grounds for denial of the request will be discussed.


SC 11 February 2005, NJ 2005/442 (Frog/Floriade).

For example: SC 8 February 1987, NJ 1988/1 (Slingerland/Amsterdam).


Provisional witness hearing is not limited to the pre-action phase and is – in principle – also possible during regular proceedings (see hereafter Section 8).

In Frog/Floriade the Supreme Court has also made it clear that the grounds for rejection of a request for a provisional examination of witnesses are the same as the grounds for rejection of a provisional expert examination.

To have the “normal” probative value the requirements of art. 192 CCP must be met.

For example C.J.M. Klaassen, case note ad SC 16 December 2011, NJ 2012/316 (Cyrette/Boekhoorn).

For example District Court Zeeland-West-Brabant 24 June 2013, ECLI:NL:RBZWB:2013:5906.

For example Court of Appeal Arnhem-Leeuwarden denied a request for provisional witness hearing in appeal denied because it was considered in violence with demands of due process (Court of Appeal Arnhem-Leeuwarden 23 December 2014, ECLI:NL:GHARL:2014:10256).

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters from the Gerechtshof te Amsterdam (Netherlands), made by decision of 12 December 2002, received at the Court on 6 March 2003, in the proceedings.

Nowadays art. 31 EEX Regulation.

CJEU 28 April 2005, C-104/03. This was not the first time a Dutch court has asked questions about this provisional witness hearing and the EEX: see SC 24 March 1995, NJ 1998/414 (Saueressig/Torbo). The CJEU did not have to answer the questions in that case, because the case was cancelled.

See on the scope of (now) art. 31 EEX Regulation CJE 26 March 1992, C-261/90, (Reichert en Kockler) and CJE 17 November 1998, C-391/95 (Van Uden).

See P. Vlas, who asks whether art. 31 EEX would be applicable in that case of that the route of the Evidence Regulation needs to be taken (case note ad St. Paul Dairy/Unibel, NJ 2006/636).

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

CJEU 6 September 2012, C-170/11 (Lippens c.s./Kortekaas).

Compared to provisional witness hearing, case law demonstrates (much) less requests for provisional expert examination.
SC 22 February 2008, NJ 2010/542 (Fortis ASR/Y) This is more or less the same as the characteristic the SC has given for the provisional examination of witnesses (see previously Section 2).

Art. 202-207 CCP. This means, inter alia, that provisional expert evidence can also be requested after proceedings have commenced.