Procedural documents, when do they turn from a help to a hindrance?

A discussion of limiting the size of procedural documents from a comparative law perspective. 'Less is more'

Peças processuais, quando passam de ajuda a obstáculo?

Uma discussão sobre a limitação das peças processuais numa perspetiva de direito comprado. "Menos é mais".

Tijn van Osch[1]

Deputy justice at the Arnhem-Leeuwarden Court of Appeal,
Chairman of the International Committee of the Dutch Association for the Judiciary (NVvR),
Vice President of the 2nd Study Commission Civil Law International Association of Judges (IAJ-UIM),
Observer on behalf of IAJ-UIM at the Hague Conference on IPR,
Deputy chairman of the Court of Discipline

Abstract

Expanding procedural documents and their limitation are not a purely Dutch problem.

The International Association of Judges decided to take stock of this issue.

A questionnaire distributed for that purpose received almost 40 responses from foreign judges' associations. The question that was not asked but was apparently taken as a given: 'does your jurisdiction suffer from excessively long and/or unnecessary (text in) procedural documents?' was, implicitly, widely endorsed.

This contribution discusses the most relevant results.

[1] With thanks to Mr A.J. (Anique) van Osch for her comments on an earlier version.

Resumo

A expansão dos documentos processuais e a sua limitação não são um problema exclusivamente holandês.

A Associação Internacional de Juízes decidiu tratar desta questão. Foi distribuído um questionário para o efeito, que recebeu quase 40 respostas de associações estrangeiras de juízes.

A pergunta que não foi feita, mas aparentemente foi dada como certa: "a sua jurisdição sofre de documentos processuais excessivamente longos e/ou desnecessários?" foi, de forma implícita, amplamente respondida.

Esta contribuição discute os resultados mais relevantes.

Keywords: - Procedural documents; Procedural rules; Audi alteram partem; Access to justice; Due process.

Palavras-Chave: - Peças processuais; regras processuais; Contraditório; Acesso à justiça; processo equitativo.

Introduction

Is the issue of expanding procedural documents and the limitation of (the scope of) these procedural documents only a Dutch problem? The International Association of Judges IAJ-UIM addressed this issue at its annual meeting last autumn under the title: 'Written Submissions - when do they turn from a help to a hindrance'.

At this meeting, as Vice President of the 2nd Study Commission, I gave two presentations on the Dutch situation on the one hand and the experiences of colleagues in countries worldwide on the other.

In this contribution, which is an adaptation of my presentations, I discuss the situation in other countries from a comparative law perspective and provide a brief sketch of the

current Dutch situation, and try to identify a pattern.

Lastly, I address the question 'What can we still learn?'.

Comparative law

Is the issue of expanding procedural documents and the limitation of (the scope of) those procedural documents, which I assume to be well known[2] - especially after the Supreme Court's ruling of 3 June 2022, ECLI:NL:HR:2022:824 - purely a Dutch problem? Apparently not, because foreign judges have complained about it before in administrative law cases.[3] And what about in civil cases?

As stated above, this prompted the International Association of Judges IAJ-UIM to take stock of this issue. A questionnaire distributed for that purpose by the 2nd Study Commission (civil law) yielded 40 responses[4] from foreign judges associations from as many countries.

The question that was not asked but was taken as a given, given the responses at the previous year's meeting when this topic was proposed, namely: 'does your jurisdiction suffer from excessively long and/or unnecessary (text in) procedural documents?' was widely endorsed, mostly implicitly.[5] In the following, I discuss the questionnaire questions most relevant to this contribution.[6][7]

---

[2] F.J. de Vries, 'Shortening procedural documents', NTBR 2019/29, vol. 9/10. A.C. Van Schaick: 'Scope and quality of procedural documents on appeal', in the NVP volume Scope and quality of procedural documents; more concise is better?, 2023, pp. 14-15. C. Klaassen, 'Introduction', in: Scope and quality of procedural documents; more concise is better?, 2023.

[3] Annotation R. Stijnen under HR 3 June 2022, AB 2022/239, no. 10, issue 31. F. Clarke, D. Kenny C Á. Ryall, Seminar of ACA Europe and the Supreme Court of Ireland, How our Courts Decide, The Decision-making Processes of Supreme Administrative Courts, Dublin, 25-26 March 2019, General Report, pp. 29-30. M.K.G. Tjepkema C L.A. van Heusden, 'Inspiration through international cooperation in administrative law: on ACA-Europe', NTB 2020/234, issue 9.

[4] iaj-uim.org/iuw/2nd-study-commission/.

[5] Explicitly including Angola, Denmark, Germany (often more than 100 pages instead of 10-20 pages), Panama, Paraguay, Poland, Taiwan.

[6] Nos 1, 4, 5 and 7.

[7] Of the remaining questions, which in themselves are also interesting for further consideration but are

Limits?

When asked whether there are limits in the relevant jurisdiction/country as to the maximum length of written submissions/procedural documents in civil proceedings, about 30 countries answered this question in the negative. Only six countries answered this question in the affirmative, of which for two it applied only in appeal cases.

The actual implementation of such limits was diverse. For example: 5-20 pages, where responses should be shorter (Australia), no more than 5,000 words in the first instance, 5,000/10,000 on appeal/10,000 in cassation (Ireland), in cases with an interest of less than € 500,000: 80,000 characters (+ 40 pages) for a summons, 50,000 (+ 26 pages) for a reply (Italy), from 50 to 25 pages on appeal (UK), only in (federal) appellate cases: a maximum of 5,200 words/20 pages for the appellant and subsequent responses 2,600 words/10 pages (USA)[8], and last but not least our own country: 25 pages on appeal (Netherlands).

Penalties?

When asked whether there are sanctioning rules, including fines or cost implications, 18 countries answered this question in the affirmative. This question referred not only to those countries with limits for procedural documents but also to those that impose sanctions for violating time limits and the admission or non-admission of additional procedural documents. There was great diversity in the responses from the countries

beyond the scope of this contribution, I only briefly present the overall results:
Question 2: Are there deadlines for submitting written comments? 33 countries answered this question in the affirmative and five in the negative.
Question 3: Are there limits in terms of a maximum number of additional submissions in a case? This proved to be a difficult question to answer unequivocally. Overall, thirteen countries answered this question in the affirmative and twenty-five in the negative.
Question 6: What is the effect of written submissions on a subsequent hearing? Again this proved difficult to answer. As with Question 5 the answers were rather diffuse, with seventeen explicit yeses and five noes, but also thirteen of the intermediate category. Illustrative is the Australian reaction: 'It is generally suggested that the ultimate effect of written submissions/procedural submissions at hearings is basically determined by two factors: the quality of the submissions themselves and the abilities of the lawyer putting them forward.'

[8] M.J. Bosselaar C B. Kemp: 'Further rules on procedural documents. What can we learn from the United States?' NTBR 2020/13, issue 4.

that have such rules.

In most cases, the court refused the procedural document[9] and often there was no possibility to correct this error. In a minority of answers, there were fines[10] and sometimes cost implications.

Effectiveness?

The question of whether these limits or requirements are effective in terms of reducing the number and length of written procedural documents proved difficult to answer unequivocally. Overall, 12 countries answered this question in the affirmative and nine in the negative. For example, Paraguay wrote that recent (2019-2022) changes to civil procedural law (not related to limitations) have resulted in significant time savings. The other countries answered that it depended; so sometimes yes and sometimes no.

Looking at the countries that do use limitation we see the following.

In the highest Australian courts, the limitation was considered to be helpful. But to this was added that the legal profession was creative in circumventing those rules by adapting the format of the procedural documents. As Judge Hayne, former judge of the Supreme Court of Australia, explained:

'It is surprising how often parties ignore requirements on the form of presentation of a written procedural document. Too often documents are presented in fonts smaller than the prescribed size with margins that are too small to use for an annotation.'

Ireland also viewed the limitation as useful, with a range of potential penalties.

Italy noted that the limits were only introduced during 2023 and experiences are still unknown. It should be mentioned that Italy has chosen to set up an institute, called the Observatory, which will collect data on the issue, analyse it and monitor developments.

[9] E.g. Angola, Canada, Iceland, Ireland, Italy, Philippines, Slovenia, USA.
[10] E.g. Ireland, Latvia, Morocco (where apparently the courts themselves discipline lawyers), Portugal, UK.

The United States also answered the question in the affirmative and added that limiting the size of procedural documents helps, both when preparing for a hearing and when writing a judgment, and thereby also to the resolution of the underlying dispute.

The Dutch experience will be discussed below.

Suggestions

The open-ended final question on whether people had any comments or suggestions on what else might be effective received a number of responses. Several countries were very clear about the heart of the problem: the lawyers.

The quality of lawyers is more important than the restriction of procedural documents (Japan, Kazakhstan), courts should be able to require lawyers to train in writing skills (Philippines).

Or, a more friendly suggestion: training lawyers can be useful (Morocco/Mexico/Austria), especially in the use of plain language (Paraguay) and we should align with the professional standards of the legal profession itself (UK).

This question further led to a large number of suggestions. At the top of the list: limiting the length of procedural documents.[11] The need to limit the size of procedural documents is therefore endorsed 'worldwide'. Another issue which is widely supported is the approach to practical problems within the judiciary - such as workload[12] but especially problems of a digital nature - that need solving[13], the use of AI[14], Clear Language[15], blocking repetitions in successive procedural documents[16], alternative legal channels[17] or

[11][11] For example, Australia, Bulgaria, Denmark, Germany (with the caveat that a new document is subject to audi alteram partem, which slows the process down), Greece, Iceland, Lithuania, Liberia, Morocco, Mexico, Norway, Portugal, Slovenia, Taiwan.
[12] Romania.
[13] Angola.
[14] Liberia.
[15] Poland.
[16] Austria.
[17] Morocco (more ADR and arbitration, to unburden state courts), Mexico (ditto).

amending the law.[18] Civil procedural law needs to be reformed (Paraguay), the statutory 'unconditional right of reply' leads to much slowness (Switzerland), only one procedural document for each party (France), no new facts in appellate cases (Austria) and something that we would describe as management: preparatory hearings (Morocco).

When asked about possible desirable sanctions, people became very enthused. In countries where such sanctions already existed: more frequent rejection of excessively long procedural documents, more frequent fines and compensation for lost time (Azerbaijan, Morocco).

And where this was not the case, there were calls for the introduction of fines for excessively long procedural documents (Iceland, Taiwan), higher court fees for extra legal documents or documents that were longer than allowed by the rules (Philipines) and no reimbursement of legal costs for non-necessary documents (Liechtenstein).

Meanwhile in the Netherlands: the courts of appeal

The judiciary itself has been working on this.

The National Consultations on Civil-Law Courts of Appeal (LOVCH) has put forward an amendment to the National Rules of Procedure for Civil-Law Summons Cases before Courts of Appeal (LPR). Since 1 April 2021, these Rules of Procedure have included a provision limiting the scope of procedural documents in appeal cases. The rule is that the statement of objections and the statement of reply may not exceed twenty-five pages and that statements in the cross-appeal must be limited to 15 pages (Article 2.13). In addition, margins, line spacing and font size are also regulated (Article 2.11). A similar regulation is contained in the Rules of Procedure for Applications.

If the limit is exceeded, the sanction is refusal and then, if no shorter document is filed, inadmissibility. Unlike in many jurisdictions, where a rule limiting the size of procedural

[18] Angola (more active attitude of judge), Morocco (idem), Panama (now new civil procedure.).

documents often requires a legislative amendment, the judiciary in the Netherlands can adopt such a rule of procedure itself. The proposed regulation led to a flood of criticism from the legal profession and beyond.[19]

Even the spring 2022 meeting of the Dutch Association for Procedural Law was devoted to this topic.[20]

A number of lawyers and the Bar Association challenged the new regulation and tried to stop it in summary proceedings. The president of the court asked the Supreme Court for a preliminary ruling.

Supreme Court ruling

In the aforementioned ruling of 3 June 2022[21], the Supreme Court ruled that the proposed restrictions have a sufficient legal basis and - in short - do not violate the principle of audi alteram partem and the right of access to justice. The Supreme Court thus, in the words of annotator Snijders, safeguards the limits in the Procedural Rules with numerous partly overlapping arguments. The Supreme Court refers to requirements of due process, the need to ensure the smooth conduct of proceedings, guarding against unreasonable delays in proceedings and the need of harmonisation and unification in the interests of justice and legal certainty. But also the need to take into account the limited judicial capacity and thus the monitoring of effective access to justice, which also requires that unnecessarily long procedural documents of the submitting party may be too burdensome for its opposing party.

The Supreme Court is certainly aware of the potential far-reaching consequences of refusing an excessively long procedural document and therefore provides all kinds of safeguards the power of refusal. The possibility of leave for a longer procedural document

[19] A. Hammerstein: 'Please keep it short', JBP 2021/904. F. Hammerstein C J. Vranken: 'Limiting and improving. The courts' 25-page measure' NJB 2022/2174, issue 31.

[20] J. van Mourik C M. van de Ruitenbeek, 'Scope and quality of procedural documents; more concise is better. Report of the spring 2022 meeting of the Dutch Association for Procedural Law', TCR 2022, issue 4.

[21] HR 3 June 2022, ECLI:NL:HR:2022:824.

and the possibility of retrying within two weeks of the refusal in the event of an excessively long procedural document.

The Supreme Court further refers to the possibility for the court to deviate from the provisions of those procedural rules, the need to give reasons for a refusal and the possibility of an appeal in cassation.

There is no mention of the possibility of obtaining permission for a supplementary procedural document after a procedural document has been found to be too short, but,

according to annotator Snijders[22], it can be found in paragraph 3.3.10. The Supreme Court's ruling has once again set many pens in motion.[23]

Evaluation/responses

Advocate General De Bock, when preparing her opinion (dated 24 December 2021) for this ruling, had submitted questions to the courts of appeal on their experience with the rules introduced on 1 April 2021. The response from the President of the The National Consultations on Civil-Law Courts of Appeal (LOVCH) showed that in the first period, in 95% of the cases the courts were satisfied with the submission of a procedural document of a maximum length of the prescribed number of pages and that requests for extensions were almost always granted.[24]

The LOVCH later wrote in a report published on 17 September 2024, 'Evaluation of

[22] NJ 2024/71.

[23] Critical) note Fruytier in JBPr 2022/53. Note R. Steinen in AB 2022/239.
A. Hammerstein, 'Roma locuta! Causa finita? The limitation of procedural documents', BER 2022/97; M. de Boer C J.W. Meijer, 'Chronicle of civil procedural law', NJB 2022/2364, issue 33; F. Mebius: 'Cause list judges, don't be stingy about some extra reading time - Limitation of procedural documents', Advocatenblad 2022, issue 7; A.J.A.M. Ahsman: 'Efficient litigation. An exploration of what regional judges, lawyers and legislators could contribute to an improved arrangement of procedural documents', TvPP 2023,issue 4. Steinen considers the Supreme Court's decision both ECHR- and Union-proof. See note 3. In subsequent case law the Supreme Court's rule was applied flexibly. See Court of Appeal of 's-Hertogenbosch 10 November 2022, ECLI:NL:GHSHE:2022:3904; and Arnhem-Leeuwarden Court of Appeal 18 April 2023, ECLI:NL:GHARL:2023:3337, cf. F.J. Fern-wood in JBPr 2023/44.

[24] ECLI:NL:PHR:2021:1228, paras 3.1 and 2.10-3.11.

limitation of procedural documents in the civil divisions of the courts of appeal',[25] that the agreement of the courts of appeal to no longer accept lengthy procedural documents in civil cases was working well. According to the LOVCH, lawyers now automatically take their length into account while writing procedural documents. Documents are more concise and focus on what the appeal should really be about and still have enough space to substantiate positions properly. Criticism of this evaluation soon arose.[26] But there was also support, even from the lawyers.[27]

One of the lawyers who initiated the interlocutory proceedings at the time also acknowledged that it had not been as bad as expected, that the legal profession can usually cope well with it and that only in two cases a request for a longer procedural document was refused.

Exhibits

Meanwhile, what about exhibits? A limit on these has not (yet?) been set. A citation in the procedural document can be avoided by including the relevant source to the citation in an appendix, making the procedural document itself shorter. A clear and specific reference to those exhibits is then necessary (see further Article 2.10 of the Rules of Procedure).

Throwing unspecified exhibits 'over the fence' at the court will not help a party anyway. It is settled case law that the court can ignore it.

---

[25] The 'Evaluation of limitation of procedural documents in civil divisions of the courts' can be found at rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor- de-rechtspraak/News/Pages/ Regeling-voor-kortere-processtukken-in-hoger-beroep-werkt-goed.aspx.

[26] J.M. Veldhuis, 'Evaluation of the limitation of procedural documents and the gut feeling of the Judiciary', BER 2024/167; M. de Boer C J.W. Meijer, 'Chronicle of Civil Procedure Law', NJB 2024/2124, issue 32; A. Ham- merstein, 'Trust us, we recommend the 25-page measure', Blog VSCC, 4 November 2024, vscc.nl/wij-van-de-wc-eend-en-de-25-bladzijden-maatregel/.

[27] F. Huijting-Mebius: 'Experience with shorter procedural documents predominantly positive', Advocatenblad 2024, issue 8, pp. 12-13. M. Ahsmann: 'Efficient litigation. An exploration of what regulatory judges, lawyers and legislators could contribute to improving the organisation of procedural documents', TvPP 2023, issue 4, pp. 125-129.

And the district courts?

The aforementioned regulations cover civil appeals. Apparently, this has not only inspired the Supreme Court, which now has its own regulation[28], but also the courts of the first instance, because they have now drafted their own regulations, which may be introduced on 1 July 2025. Unlike the courts of appeal, if I understand it correctly, the district courts do not require a fixed maximum number of pages but are free to decide on the specifics. The size of a procedural document excluding exhibits should be in line with the nature, complexity and importance of the case. A procedural document of more than 10 pages starts with a summary and includes subheadings. A procedural document of more than twenty-five pages should briefly explain why that size is necessary. If a procedural document is unnecessarily long, the judge may order that it be replaced. The judge then determines the maximum size and sets a deadline for this.

Apparently, the Dutch Bar Association is not so happy with the concept of "unnecessarily long" and foresees complicated discussions and a considerable time consumption for the judges.

Whether this will lead to an adjustment is unknown. Furthermore, the proposal for the district courts sets detailed rules on format and layout.[29]

Can we learn from other countries?

We now have a limitation of procedural documents. But can we also learn lessons from what our foreign colleagues have proposed? Let me highlight one suggestion. Train lawyers in writing skills. I agree with my colleague Margreet Ahsmann[30] that it would be

[28] Pilot on controlling the volume of procedural documents in cassation, appendix to the Rules of Procedure, effective 1 September 2023. A cassation appeal should be a maximum of 15,000 words and 23,000 in the case of a cross-appeal in cassation. The defence must have the same maximum size. With some details: the first page does not count, footnotes do not count either, and if more text is needed, it must be substantiated.
[29] Procedural documents are in A-4 format, margins are 2.5 cm and in 11-point current font with line spacing of at least 1.
[30] TvPP 2023, issue 4, p. 128.

advisable to include a 'Judgment Writing' course in the professional training of lawyers in order to better understand what a judge requires of the parties. It is not for nothing that judges-in-training often cry out, after completing the 'Judgment Writing' course, that they would have been much better lawyers if they had already taken this course as lawyers. I said the same thing twenty-five years ago after my transfer. An alternative would be to have lawyers do a short apprenticeship as court clerks, during which they could also write judgments. I therefore would like to conclude this brief legal comparison with an appeal for that.

An appeal to the Dutch Bar Association and, to the extent necessary, the judiciary. Under the motto: Think like a Judge, make a justice's internship or a writing course a regular part of the curriculum of the Bar's Professional Education Programme. Not surprising when you consider that traditionally, the then six-year training to become a judge or prosecutor ended with two years of external internship, meaning: mostly the legal profession.

Surely the legal profession[31] can introduce two weeks of judicial internship in return for those two years of legal internship for young judges? It would all be in the interest of quality of service. After all, even as a disciplinary judge, the quality of the legal profession is very close to my heart.

[31] At the time known as the Raio course, now renamed the Rio course but also with at least two years of 'external experience'.