

# Settlement of Civil Disputes: Overview (the Netherlands)

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A Practice Note providing an overview of the key aspects of settling a civil dispute in the Netherlands, including statutory duties to attempt settlement, the form and formalities of settlement, how to ensure confidentiality of the settlement terms, whether negotiations are without prejudice, third-party rights, remedies for breach, enforcement of the settlement terms, and how to set aside a settlement agreement.

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Litigation is expensive and can often take a long time. Courts in many jurisdictions actively encourage settlement, and some jurisdictions require the parties to attempt settlement procedures in certain types of civil litigation. Settlements, which can be reached before or during legal proceedings, can be a cost-effective alternative to engaging in protracted and costly court action.

Settlements are usually considered a form of contract to which general contract law principles apply. However, settlements can also become part of a court report, when litigation is settled and recorded by the courts, typically throughout or following a court hearing. In the context of a civil dispute between two or more parties, a settlement comes about when they reach a mutually acceptable compromise to resolve their dispute. If the settlement covers the parties' entire dispute, the dispute ends, as do any ongoing legal proceedings related to the dispute. Generally, the parties cannot start a new action relating to that dispute, unless they specifically agree that the dispute can be revived in certain circumstances. It is important for parties and practitioners to be aware of the legal framework in which settlements will be negotiated, documented, and enforced and to consider the rights of third parties affected by a settlement agreement.

This Note covers Dutch law-specific information on all aspects of settling a dispute by negotiation, mediation, and other alternative dispute resolution mechanisms, including:

- The legal or statutory duty and obligations, if any, to attempt settlement.
- The form and formalities of settlement, including the different ways the parties can record the settlement terms.
- How to ensure confidentiality of the settlement terms.
- The application of the without-prejudice rule, that is, how parties can ensure that anything said in the settlement negotiations cannot be held against them in any subsequent litigation.
- Whether third parties have any rights under the settlement terms.
- Remedies for breach of settlement terms.
- Enforcement of the settlement terms and how to set aside a settlement.

For information on settlement in a cross-border context, see *Practice Note, Settlement of Civil Disputes: Overview (Cross-Border)*.

## Legal Duty and Obligations

The court has discretion to schedule a hearing at any stage of the proceedings, either at the request of the parties, or of its own

accord (Articles 87 and 131, *Dutch Code of Civil Procedure* (*Wetboek van Burgerlijke Rechtsvordering*) (DCCP)). This applies to court proceedings at first instance and on appeal. Although a court is technically permitted to refrain from scheduling a court hearing altogether, this will be the exception rather than the rule, as “a day in court” is a fundamental right protected under Article 6 of the *European Convention of Human Rights* (ECHR).

However, developments in Dutch civil procedural law now aim to encourage parties to consider the taking of evidence and settlement attempts (if any) at a single hearing.

In virtually every court hearing, the court will encourage parties to try and settle the dispute. It is at the parties’ discretion, however, if and to what extent they are willing to negotiate a settlement during or following the hearing. There are no statutory sanctions if either or both parties choose not to settle or even attempt to settle. Attorneys in the Netherlands, however, are required to attempt a settlement prior to initiating legal proceedings, under their professional *Code of Conduct*. An attorney should keep in mind that a settlement is preferable to litigation (Article 5, Code of Conduct). This, however, does not entail an absolute obligation to reach a settlement.

If parties agree to attempt a settlement discussion, the court hearing is typically adjourned for an hour or so, enabling the parties to make a serious effort.

Courts are permitted to orally render their final ruling at the end or even during the court hearing (Article 30p, DCCP). Courts therefore tend to be more willing to share their provisional findings in the case following the court hearing, as that tends to encourage settlement.

## Form of Settlement

A settlement agreement (*vaststellingsovereenkomst*) serves to (partially) terminate or prevent an imminent dispute and enjoys a legal basis under Article 7:900 of the *Dutch Civil Code* (*Burgerlijk Wetboek*) (DCC).

Parties can memorialise their settlement agreement in several ways:

- Verbally.
- By written agreement.
- Notarial deed.
- Court report.

The settlement agreement can be reached by the parties or stipulated by a third party (as binding advice) (Article 7:900(2), DCC).

Parties commonly try to reach a settlement either during, or shortly following, the provisional ruling rendered at the court hearing. Court hearings are often adjourned at the joint request of parties, these adjournments can range from 30 minutes to several weeks.

Parties may decide to (have their attorneys) draft and execute a settlement agreement. Alternatively, parties may jointly request the court to record their settlement terms instead, this is typically the preferred option for the party on the receiving end, since a settlement agreement laid down in a court record automatically includes an enforcement order, often preventing follow-up litigation upon execution of the settlement agreement (Article 87(3), DCCP).

## Formalities

A settlement agreement is subject to the general statutory contractual regime of the DCC and, when entered into, creates legally binding obligations on the parties against each other. Default under the settlement agreement provides the other party with the statutory remedies under the DCC, such as a performance claim (Articles 3:296 and 7:900 ff, DCC). However, some

specific rules apply to the settlement agreement.

For instance, the DCCP sets out certain requirements applicable to a settlement agreement in the context of a mass claim (or class action claim):

- A description of the event or events to which the agreement relates.
- A description of the group or groups of persons for whose benefit the agreement has been concluded.
- An indication of the number of persons belonging to such group or groups.
- The compensation granted to these persons.
- The conditions these persons must meet to qualify for such compensation.
- How the compensation is determined and can be obtained.
- The name and residence of the person to whom a written notice may be addressed.

(Article 7:907(2), DCCP.)

If the settlement agreement is included in a court record (as is often the case), it includes an executory title (*executoriale titel*) and can typically be enforced without follow-up litigation (see [Form of Settlement](#)).

## Terms of Settlement Not Subject to Court Ratification

In principle, it is at the parties' discretion to agree on the terms and conditions of their settlement agreement. The court's approval is not required. Settlement terms may deviate from an issued court ruling which is effective between the parties. The settlement agreement may even deviate from mandatory law. For instance, the parties may deviate from the mandatory provision in Article 3:322.3, DCC and include in the settlement agreement that an appeal to statutory limitation (*verjaring*) is excluded (Dutch Supreme Court 27 March 2009, [NJ 2009/579](#) (*MSD/Euromedica*)). However, a settlement agreement is null and void if it includes terms that violate public order or morality (*openbare orde en goede zeden*) (Article 7:902, DCC). Consequently, the court will not cooperate in recording a settlement if parties decide to include terms violating the principles of public order or morality. For instance, if the settlement agreement would require either party to commit a tort or crime.

It is not a requirement to file the settlement agreement with the court. Settlement agreements, in principle, are not a matter of public record. The court will generally be informed of a settlement nonetheless, as a settlement tends to finalise the pending court proceedings in the matter.

## Confidentiality

If parties wish to keep their settlement confidential, they must include an explicit obligation to that effect in their settlement agreement, preferably secured by a contractual penalty in the event of violation. If there is no penalty clause, the aggrieved party carries the burden of evidence to demonstrate the nature and amount of damages they suffered due to the violation of the confidentiality requirement.

## Powers of the Parties to Settle Compromise

Statutory limitations may restrict a party's ability to compromise their dispute.

Representing a company, in general, requires a prior internal management decision. The act of representation (signing the settlement agreement) itself must be performed by the director(s) who is (are jointly) authorised to do so. This authorisation can be confirmed in the Trade Register of the Dutch Chamber of Commerce, and may be relied on by third parties ([Netherlands Chamber of Commerce](#) (KVK)).

In the event of settlement of a mass claim, the foundation representing the collective claimants has the power to sign the settlement agreement (Article 7:907.1, DCC).

An attorney is presumed to be duly authorised when it comes to client representation, whether in the context of a court hearing or agreeing to a settlement proposal. Obviously, any client representation by the attorney in the absence of the client requires their prior consent, upon penalty of disciplinary sanctions if the client disputes this representative action.

Children under the age of 18 require parental consent to enter into an agreement (Article 1:234(1), DCCP). Parental consent, however, is presumed if it concerns a legal act that is customarily performed independently by a minor of the same age (Article 1:234(3), DCCP). For instance, if an underage victim of a traffic accident and the insurer of the person responsible for the accident and related injury reach agreement on damages for the victim. Individuals placed under court administration (*onder curatele*) are prevented from entering into (settlement) agreements. They must be represented by a liquidator (*curator*) to sign a settlement agreement.

## Timing of Settlement

Settlement discussions can be conducted at any time during and even following litigation proceedings. Attorneys have an obligation to assess whether the dispute can be settled (see *Legal Duty and Obligations*).

In first instance civil proceedings, the presiding judge typically encourages a settlement discussion during the court hearing following the statement of defence.

In civil proceedings before the court of appeal, settlement discussions are typically encouraged at the hearing following submission of the statement of appeal.

The sooner a settlement is reached, the less the attorney fees for litigation purposes. Court fees, however, remain due if a settlement is reached following submission of the subpoena or statement of appeal to the court of first instance and the court of appeal, respectively.

## Without Prejudice Rule

Attorneys are prohibited from disclosing any content of their settlement discussions without the prior consent of opposing counsel (regulation 13, Code of Conduct).

This is a rule of conduct and not a statutory obligation. There is consistent case law that the Code of Conduct does not apply to the court in any way. Therefore, although a violation of the Code of Conduct, the content of settlement discussions among attorneys could technically be unilaterally shared with the court. Counsel of the party doing so without authorisation is, however, exposed to potential disciplinary sanctions. This rule of conduct tends to be properly observed and well-respected across the board. This confidentiality obligation, however, does not apply to parties.

If settlement negotiations are conducted by the lawyers (in the absence of the clients), the nature and content of these negotiations will remain confidential by definition (unless agreed otherwise). If parties are present during the negotiations, and they wish to keep their settlement discussions confidential, they should agree on a confidentiality clause, sanctioned by a penalty (see *Confidentiality*).

## Terms of Settlement

In principle, there are no limitations on the scope of release clauses. In 1957, the Supreme Court also ruled that release clauses are presumed valid, even if they have a broad scope (*ECLI:NL:HR:1957:139, Hoge Raad, 9014 (rechtspraak.nl)*).

However, according to the same ruling, circumstances may dictate that reliance on a release clause is unacceptable by the standards of reasonableness and fairness (*redelijkheid en billijkheid*). In practice, claims submitted on this basis are rarely

granted.

The Dutch courts will consider *Standard Document, Settlement agreement (civil litigation): Cross-border: 5. RELEASE* as valid.

## Taxes on Settlements

Taxes may be applicable in relation to settlements involving monetary payment (damages, fees, or otherwise). It is therefore advisable to include tax counsel or make arrangements in the settlement agreement regarding taxes payable.

## Severability

If only part of the agreement has been declared void, the agreement will remain unaffected (Article 3:41, DCC). This means that it is not necessary to include a severability clause in an agreement governed by Dutch law, in principle.

Nevertheless, in practice, a severability clause is typically included as a boilerplate clause in settlement agreements, for the avoidance of doubt.

## Third-Party Rights

Parties are entitled to grant rights to third parties in their settlement agreement (Article 6:253, DCC). These third parties may be able to enforce their rights from the settlement agreement by mere reference.

Parties may also choose to explicitly rule out any third-party entitlement or reliance on (individual clauses of) their settlement agreement.

## Resolution of Legal Proceedings

Following a settlement, parties are likely to notify the court to terminate or dismiss their pending court proceedings (see *Terms of Settlement Not Subject to Court Ratification*). However, there is no obligation in this respect, and it typically depends on the settlement if and to what extent the court proceedings should be (dis)continued in their current scope.

Parties jointly requesting the court to strike the matter from its docket constitutes merely an administrative act and, in and of itself, does not preclude or prevent either party from resubmitting the case. If the settlement reached serves to terminate the entire dispute and withdraw or dismiss any proceedings pending before the court, the parties should explicitly state so in their settlement agreement, along with their agreement not to (re)submit or continue the proceedings at a later stage.

## Breach of Settlement Terms

In the event of a breach or default under a settlement agreement, the aggrieved party may claim damages or performance under the settlement agreement. In principle, this requires follow-up litigation against the party in default.

If the settlement agreement is included in a court record, however, the claimant has an executory title (*executoriale title*), enabling them to enforce their claim with the assistance of a process-server, without having to initiate court proceedings (see *Formalities*).

If parties seek annulment (*vernietiging*) or cancellation (*ontbinding*) of a settlement agreement, specific conditions apply.

As a rule, neither of the parties is entitled to cancel a settlement agreement by unilateral declaration (Article 7:905, DCC).

Annulment is only available if, by the standards of reasonableness and fairness (*redelijkheid en billijkheid*), the nature or scope of the agreement prevents a party from remaining bound by the settlement agreement (Article 7:904, DCC).

Parties are free to deviate in their settlement agreement from annulment, or cancellation, provided this does not violate public order or morality. A settlement agreement (particularly if drafted by the court and included in the court record) will, however, not be easily annulled or cancelled.

Parties commonly include an indemnity clause like *Standard Document, Settlement agreement (civil litigation): Cross-border: 9. INDEMNITIES* in their settlement agreement in the event that a party seeks to bring a fresh claim in respect of any of the released claims.

## Enforcement Proceedings

In a default situation, any payment or performance action under a settlement agreement drawn up and executed by the parties only (and therefore not included in a court record), requires the claimant to pursue litigation to enforce the settlement agreement.

However, if the settlement is included in the court record, the parties will have an executory title (*executoriale titel*), allowing enforcement of the settlement without any (further) proceedings. In this situation, execution is typically enforced by a process-server (*deurwaarder*). For instance, in the case of a due and payable monetary claim under the settlement agreement, the process-server may proceed and seize assets or funds from the debtor.

In principle, after signing the settlement agreement, the relationship between the parties is permanently re-established. This means that a settlement cannot be modified or set aside. An exception to this rule applies if the settlement agreement was concluded with vitiated consent (*wilsgebrek*) or in violation of the standards of reasonableness and fairness (Article 7:904, DCCP).

## Legal Costs

The parties have discretion to agree on any desirable distribution of (legal) costs and expenses prior to or following the settlement (for example, for execution purposes). It is common for the parties to agree that each party bears their own costs and expenses (as applicable).

## Settlement Agreements

Some clauses are commonly included in settlement agreements and are typically untenable when tested before the courts. Examples include parties trying to rule out deviation of consequences or dissolution due to unforeseen circumstances, such as the Covid-19 pandemic (Article 6:258, DCC), or the stipulation that contractual penalties cannot be mitigated by the court (Article 6:94(1), DCC). These kinds of clauses cannot be validly included in a settlement agreement (they are null and void and unenforceable in local courts).

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