

Confidential Information in Dutch IP Proceedings: From “Don’t Ask, Don’t Tell” to “Show and Tell”

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The article discusses the possibilities for protecting confidential information on the one hand and access to information on the other hand in civil proceedings in the Netherlands. The authors, having regard for IP proceedings in particular, elaborate on recent developments in civil proceedings, explain how the adjustments to the Dutch Code of Civil Procedure makes a Dutch version of a “confidentiality ring” possible and what the newly implemented act for the protection of trade secrets holds for the future.

Introduction

The protection of competitively sensitive and otherwise confidential information in IP proceedings has always been a difficult issue. In the US, the discovery process allows parties in litigation to request and obtain from opposing parties information and documents relevant to the issues in a lawsuit. In Anglo-American proceedings, confidential information can, to a certain extent, be protected by means of privileged documents or a protective order (which both exempt some type of information from discovery). Traditionally, Dutch civil law did not consider it necessary to have such systems in place. The reason for this is twofold: it was first believed that a party was not held to submit evidence which it does not wish to disclose, and second that a party could not forcibly obtain evidence from opposing parties. Therefore, Dutch measures to ensure confidentiality of information were neither well known nor developed. On the one hand, parties involved in litigation did not have any genuine possibilities to “ask” the opposing party to submit (confidential) information in that other party’s possession and, on the other hand, if a party did not wish

to submit certain information, there was no obligation whatsoever on that party to “tell” or disclose such information to the court.

Over the last few years, however, there have been substantial developments in Dutch (procedural) law, indicating a change of attitude in this respect. The possibilities for courts and parties to obtain information (written or otherwise) from a party in suit have increased, and so has each party’s general obligation to submit information relevant to the proceedings. Such an increase of possibilities and obligations goes hand in hand with the increased risk that confidential information will be disclosed to parties and/or the public, which may damage the disclosing party and give an unfair advantage to the other side in the proceedings.

In this article, we will set out the present rules on disclosing information in Dutch civil proceedings and explain how confidential treatment of information is safeguarded by Dutch law and court practice. We will focus on IP and trade secrets litigation. Although trade secrets are not considered IP rights in the Netherlands, they have been recognised as being, in some aspects, similar to IP rights. Therefore, recent legal developments regarding trade secrets have an impact on IP litigation and vice versa.

Three subjects will be discussed in particular. First, we will discuss the general obligation to disclose facts in litigation wholly and truthfully. Secondly, we will explain what possibilities a party in suit has to request a court to order an opposing party to disclose certain information. Finally, we will briefly address the additional rules for the confidential treatment of trade secrets that were recently added to the Dutch Code of Civil Procedure when the European Trade Secrets Directive was implemented in November 2018.

Disclosure and protection in IP suits—how does it work?

Confidential information in light of a general obligation to disclose all relevant facts

In the Netherlands, a general obligation to disclose certain facts in civil proceedings was included in art.21 of the Dutch Code of Civil Procedure (the DCCP) in 2002. This article stipulates that parties “are obligated to disclose all facts that are relevant to the case at hand fully and truthfully”.

Other than a US-style pre-trial discovery or a UK-style initial disclosure, this obligation leaves room for a party to determine on its own initiative and at its own discretion what information it considers relevant to the matter at hand and to (only) disclose that information. Article 21 DCCP thereby provides parties with the opportunity, similar to that in Germany and China, for instance, to be selective in presenting its facts and evidence in court

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proceedings. It is then up to the opposing side to rebut what is argued with evidence of its own. Nevertheless, submissions by a plaintiff must be sufficiently detailed and should be submitted to the court at the earliest possible moment, preferably with the initial claim (for infringement or nullity). In this regard, it follows from art.21 DCCP that parties are, at all times, obligated to tell the truth in court and that they may not misdirect the court, for instance by submitting documents of which they have knowledge to contain false information. Failure to comply with this obligation may result in any adverse measure the court considers appropriate.

While art.21 DCCP does not confer the right on a party to demand disclosure of relevant information from another party, art.22 DCCP does provide the court with some tools to obtain further information from a party if it detects an omission in the facts or simply wishes to have more information about a certain subject. In those situations the court has a discretionary power, in all stages of the proceedings, to order a party to further clarify certain statements or submit certain information it considers relevant.

A party thus requested must provide such information and may only refuse if there is “serious cause” to do so. Recent changes to art.22 DCCP allow for a “full” or “limited” refusal to disclose information. A full refusal means that a party refuses to disclose the information to the court and the other parties in suit. The newly introduced limited form of refusal (which is a codification of several decisions of the Supreme Court)¹ means that a party may request that only the court takes notice of the information and that it is not shared with the other parties. In essence, a party asks for a “for the eyes of the court only” approach.

If so requested, the court will decide whether there is sufficient serious cause to justify a full or limited refusal. In its assessment, the court will take into account the statement thereto of the refusing party, all further relevant facts of the case and, in the case of a “for the eyes of the court only” request, the information itself. If a full refusal is justified, the refusing party will be dismissed from its obligation to provide further clarification.

If the court finds a limited refusal justified, this means that, although the court considers the information relevant for its decision in the matter at hand, the court also acknowledges that sharing such (confidential) information with the opposing side may be disproportionately detrimental to the disclosing party. It is clear that if the court takes notice of this information, while it is withheld

from the opposing side, this can lead to an infringement of the right to a fair trial, in particular the adversarial principle.²

To prevent such potential breach, art.22 DCCP stipulates that a court may rely on the information provided “for the eyes of the court”, but only if all parties in suit explicitly agree to such. To this end, parties may make an evidentiary agreement on access to confidential documents. For example, such an agreement may establish a confidentiality ring, permitting review of certain materials only by the parties’ lawyers.³

If such an agreement is not reached, the information provided “for the eyes of the court only” cannot be used for judgment purposes. Because, as the well-known saying goes “what has been seen cannot be unseen”, art.22 DCCP stipulates that the case is then referred to another chamber of the court containing judges with no knowledge of the information. It is interesting to note that the recently established English-speaking Netherlands Commercial Court, a separate chamber of the District Court of Amsterdam,⁴ has a somewhat different approach. When faced with a limited refusal to disclose certain information, it refers the specific decision on this refusal to another chamber.⁵ That way, if an agreement is not reached, the case can be referred back to the chamber handling the main case without the mind of the judges being “tainted”.

The court ultimately decides whether or not the general disclosure obligation of art.21 has been breached or a serious cause is lacking to refuse a court request for additional information (fully or in limited form) and, as a consequence thereof, whether or not a party has breached its obligation set out in art.22 DCCP. The consequence of either breach is that the court may take “any adverse measure the court considers appropriate” to the non-disclosure of information. The scope of what might be viewed as vague wording is intentional. It gives the court complete discretion⁶ in determining, if necessary *ex officio*, the consequences on a case-by-case basis, taking into account the specific nature of the case, the severity of the offence and the parties involved. For instance, evidence which is not disclosed may lead to the court ignoring arguments based on that evidence. If such non-disclosure leads to not, or not sufficiently, disputing an argument made by an opposing party, the court may follow the arguments of the opposing party and decide accordingly. A court may also be compelled to take a highly critical approach towards the other statements, arguments and evidence submitted by a party, which may

¹ Supreme Court of The Netherlands, 20 December 2002 (*Lightning Casino v The Netherlands Antilles*), NL:HR:2002:AE3350; and Supreme Court, 11 July 2008 (*Telegraaf v The Netherlands*), NL:HR:2008:BC8421.

² Compare also for instance the Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), in which the option for a confidentiality ring is explicitly mentioned as a possible agreement parties can enter into. The rules are available in English at <https://www.rechtspraak.nl/English/NCC/Pages/rules.aspx> [Accessed 4 July 2019].

³ This appears to be a stricter regime than that set out in the case before the European Court of Justice of *Varec v Belgium* (C-450/06) EU:C:2008:91; [2008] 2 C.M.L.R. 24, where it was found that as long as a court ensures that the proceedings as a whole accord with the right to a fair trial, it may, in exceptional circumstances, apprise itself of such information and take it into consideration without the opposing party having access to it.

⁴ The Netherlands Commercial Court (NCC), established on 1 January 2019, is part of the official Dutch court system. Both the proceedings and judgments are, however, in the English language rather than in Dutch. For more information on the NCC, see <http://www.ncc.gov.nl> [Accessed 26 May 2019].

⁵ Compare also art.8.4.2 of the Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal).

⁶ Supreme Court 18 November 2011 (*ISG Holding v Cornefruit Holding*), NL:HR:2011:BS1706.

even lead to shifting or reversing the burden of proof relating to certain facts. Failure to submit certain information may thus ultimately result in a party losing its credibility and a court assuming the position and the statements of the opposing party to be true. This may eventually also have consequences for the cost awards for the losing party, which in IP cases can be substantial. Although not stipulated by arts 21 and 22 DCCP, it has been suggested in the literature⁷ that the court may even impose penalty payments on a refusing party.

In conclusion, within the boundaries of arts 21 and 22 DCCP, a party to Dutch litigation may make its own selection as to what information it wishes to submit in accordance with what it considers relevant and advantageous to its case. Historically, notwithstanding the obligation of art.21 DCCP, the information submitted in suit was considered to be very much the decision of parties. In other words, parties could, to a large extent and quite selectively, choose which information to submit. Although the recently revised art.22 DCCP allows for a more active role of the court, it must be borne in mind that arts 21 and 22 DCCP do not in any way confer a right to a “discovery-type” pre-trial, which does not exist in the Netherlands. The DCCP only provides a limited form of discovery, as will be explained below. But, first, we will focus on the protection of confidential information in light of the obligations previously discussed.

Protecting confidential information in litigation—what to do after disclosure?

As elaborated above, a full or limited refusal to explain certain assertions or to disclose documents may have serious consequences. The question arises whether there are ways to protect confidential information, other than by not sharing it with the court or another party.

The short answer to this question is a recently developed “yes”. Specifically, Dutch civil procedural law now provides for three measures, which are quite often applied simultaneously.

First, it is important to know that the Dutch legal system is based on the principle that justice is public. The Dutch Constitution sets out that court proceedings shall be held in public and that judgments shall specify the grounds on which they are based. Court hearings in the Netherlands are publicly accessible and parties in proceedings (i.e. the plaintiff and defendant) may use information disclosed during proceedings as they see fit. Furthermore, judgments are pronounced in public and are often published on the Dutch judiciary website. If not published, copies of judgments are made available upon request (whereby the names of the parties may be anonymised). However, although a hearing may be attended by any member of the public, court briefs and their exhibits are not publicly available, meaning that third parties will not have access to the records of the case as submitted with the court.

In practice, this means that once information is disclosed, it is deemed disclosed to all parties in suit without restriction, and such information may become known to third parties when it is discussed during a hearing or because it is mentioned in a judgment. There are ways to restrict this unwanted and often unnecessary dissemination of information to other parties or the public. These are formulated as exceptions to the general rule of public justice and therefore only apply if specifically ordered by the court.

First, although art.27 DCCP stipulates that a hearing is public, it may also be held fully or partially “behind closed doors” or in the presence of a select group only. If access is only partially restricted, parties can indicate in advance which subjects they would like to discuss in private. The audience present in the court room will then be requested to leave while those subjects are being discussed. This measure can be requested by parties or applied by the court *ex officio* in the situations set out in art.27 DCCP. One of these situations concerns the obligation to protect the privacy of both natural persons and legal entities, including the protection of confidential information such as competitively sensitive information and trade secrets.

Secondly, art.28 DCCP stipulates that, if a hearing has taken place behind closed doors, a protective order is issued, prohibiting parties to issue any statement, notification or other communication whatsoever relating to a subject that was discussed during that hearing. This includes any information on a subject that was discussed under restriction (i.e. also what is included in the court briefs on that subject) and applies both during and after court proceedings. A protective order can also be issued (upon request by a party or *ex officio*) for information disclosed in suit but not discussed during the hearing, for instance information submitted following a court request under art.22 DCCP, discussed above. Article 28 DCCP is directed at the parties; however, there are cases in which a court has issued a protective order against others, such as experts or witnesses.⁸ Violation of a protective order is a criminal offence which will be prosecuted upon complaint. In addition, a protective order may be combined with an incremental penalty if requested by a party.

The third measure is that the public version of a judgment, which is often published online or may be acquired upon request, may be redacted with respect to the information discussed behind closed doors and/or under a protective order. This is, for instance, done in cases where confidential information on production methods is necessary for assessing infringement, but may also be applied to cases concerning standard essential patents where licensing terms of competitors have to be discussed.

⁷ P. Smits, “Comment on article 22 DCCP”, *SDU Commentaar Burgerlijk Procesrecht*, 2017 (in Dutch).

⁸ These are discussed further on in this article.

Disclosure of information—limited discovery

As set out above, when a party wishes to introduce (its own) confidential information into legal proceedings to support its case, Dutch procedural rules offer certain means to prevent this information from becoming available to opposing and/or third parties. But what if a party wishes to access information that it does not have, for using it in the trial? How can a party gain such access, and how is the confidential nature of that information then protected?

The answer to the first part of this question can be found in art.843a DCCP, which stipulates that a party, upon request, may obtain permission from the court to access specific records (in Dutch: *bescheiden*) that are in the possession of another party. For IP cases, art.843a DCCP is applied in conjunction with art.1019a DCCP, which contains specific rules and requirements in addition to art.843a DCCP. One important addition is that art.1019a DCCP extends the scope of art.843a DCCP from access to only “records” (a term that should already be interpreted broadly, covering documents, CDs, server space, etc.) to “other evidence” containing information. This is meant to include (allegedly) infringing products and items related thereto, such as machines and raw materials intended for manufacture purposes.

A request for this limited form of discovery may be filed in the form of a stand-alone court procedure or as part of an ongoing procedure.⁹ In IP-related matters, a party may for instance submit such a request to obtain access to further evidence of infringement or further information relating to the infringement (such as the scope of the sales of an allegedly infringing product) before or during infringement proceedings. Furthermore, limited discovery also plays a crucial role when records or products have been seized in order to preserve evidence. The only way to gain access to this evidence in the Netherlands is through an additional request based on art.843a DCCP.

For obtaining an order for this limited form of discovery, three requirements have to be met.

First, a party must have a *legitimate interest* (i.e. direct and concrete) to obtain access to a certain record or product. The access to certain information must be directly relevant, relating to facts or circumstances for which the burden of proof lies with the applicant. Mere speculation will generally not suffice.¹⁰ For instance, access to documentation of which a party only *suspects* that it might be relevant will be denied,¹¹ as well as access to documentation that may *possibly* support an argument.¹²

The second requirement reflects the lack in Dutch law of a general discovery/disclosure obligation and the intention of the legislator to prevent interpreting art.843a DCCP in a way that, in practice, would result in such. A request for limited discovery should *specify* the records or other products containing the needed information. The objective of the limited discovery provisions is to allow a party that knows of the existence and the general content of certain evidence, to gain access to that evidence. Knowledge of the exact content is not required, but it should be sufficiently clear which records, products or other sources of information are requested.¹³ A request for discovery of “all documents relating to a takeover over a period of two years” has been deemed insufficiently specified.¹⁴ On the other hand, a request for access to invoices relating to seized products, a request for documents relating to import in and export from the EU, and documents relating to the customs status of seized products, were all considered sufficiently specified.¹⁵ In a recent case, the court granted a request for limited discovery with respect to

“all documents (in written or electronic form, locally stored or on external (network) computers, in the cloud or on other data carriers), among which correspondence, emails, invoices, order forms, deliveries, order lists, orders and invitations to make an offer ... relating to ... listed hash codes ... listed identification numbers of construction drawings and listed names of the names of the draftsmen of the construction drawings”.¹⁶

This shows, that, although any sort of fishing expedition is expressly excluded from Dutch court practice, an order for limited discovery can nonetheless stretch out to a large amount of documents, as long as they are sufficiently specified in the request.

The third and final requirement is that the requested documentation should relate to a *legal relationship* to which the requesting side or a predecessor thereof is party. The relationship meant here is the relationship in suit. This includes actions arising from tort, such as IP right infringement.

In infringement cases, this can lead to the somewhat complex issue that an infringement (i.e. the legal relationship) first has to be made sufficiently plausible¹⁷ in order to gain access to further evidence to prove that same infringement (i.e. the issue in suit for which further evidence is sought through limited discovery). In this regard, the Supreme Court has held that the threshold for plausibility of this legal relationship can generally be assumed to be lower compared with the evidence threshold required for obtaining an injunction in

⁹ Supreme Court, 6 October 2006 (*Meijer v Cornelis*), NL:HR:2006:AX7774.

¹⁰ Court of Appeal 's-Hertogenbosch, 12 May 2015, NL:GHSHE:2015:1668.

¹¹ Court of Appeal Arnhem-Leeuwarden, 16 December 2014 (*Ecovert v Voith*), NL:GHARL:2014:9850.

¹² Court of Appeal Arnhem-Leeuwarden, 26 August 2014, NL:GHARL:2014:6633.

¹³ Court of Appeal Arnhem-Leeuwarden, 16 December 2014 (*Ecovert v Voith*), NL:GHARL:2014:9850.

¹⁴ Supreme Court, 18 November 2011 (*ISG v Cornefruit*), NL:HR:2011:BS1706.

¹⁵ District Court, The Hague 7 July 2017 (*Henessy v LB11*), NL:RBDHA:2017:7541.

¹⁶ District Court Midden-Nederland, 8 August 2018 (*Wärtsilä v various anonymous*), NL:RBMNE:2018:3715.

¹⁷ Supreme Court, 13 November 2015 (*AIB v Novisem*), NL:HR:2015:3304, confirmed by Supreme Court, 28 September 2018 (*Dow Chemical v Organik*), NL:HR:2018:1775.

preliminary relief proceedings, but higher than the evidence required for a pre-judgment seizure for evidence. To establish the existence of the legal relationship, the applicant should provide facts and circumstances, and substantiate with evidence already available, that it is sufficiently plausible that an intellectual property right is or will be infringed. Just asserting a (threatened) infringement will not suffice. In other words, although a (very) low threshold applies for obtaining permission for a pre-judgment seizure of evidence, a somewhat higher threshold applies when access to that evidence is requested.

In this respect it may finally be noted that if the legal relationship is an alleged IP infringement, a common defence against a request for limited discovery is that the asserted IP right is invalid and therefore a legal relationship (i.e. the tort) is lacking. Questions from the Dutch Supreme Court to the European Court of Justice on which threshold of proof should apply when the validity of the invoked IP right is contested, were unfortunately left unanswered, owing to a settlement in that case.¹⁸ Although this is not (yet) settled case law, the Dutch courts have urged to apply a high threshold for proving invalidity in cases where access is requested to information not related to technical evidence of infringement (for instance information about suppliers or purchasers).¹⁹

Confidential information in limited discovery—how is it safeguarded?

If an applicant succeeds in adhering to the requirements just discussed, a court will grant the request for inspection of the specified records or products or for obtaining a copy, transcript or extract of such. A fair number of these records or other materials will, however, contain confidential information, such as confidential client correspondence (for instance regarding sales or negotiations), confidential know-how, trade secrets or other (competitively) sensitive information. How is this information safeguarded in the Netherlands?

First, persons who are bound by virtue of their administrative position, profession or employment may refuse to comply with a request for disclosure. This also applies to competitively sensitive information.²⁰ It is interesting to note that, in a recent case, the Dutch Supreme Court held that communications between a party in suit and its lawyers were held to be confidential and did not have to be disclosed; however, communications between that party and other external advisers (relating to technical advice on the spreading of a plant virus) had instead to be disclosed.²¹

Apart from this, the general rule of art.1019a DCCP is that the court denies a request for limited discovery insofar the protection of confidential information is not guaranteed. However, a court will often refrain from applying this extreme measure and instead use the possibility conferred on it by art.843a(2) DCCP. This article allows the court to decide exactly how access to records or other evidence may be provided. Case practice has shown that courts (with or without being prompted by parties) may devise quite sophisticated constructions, on the one hand to ensure access by the applicant to information considered essential for the case at hand while, on the other hand, restricting access to all irrelevant and/or confidential information as much as possible.

One measure often ordered when limited discovery is granted, is that the party ordered to provide access to its information may redact the parts that contain confidential information and do not relate to the subject of the case at hand (i.e. the reason limited disclosure was requested in the first place). In *Hennessy v LB11*,²² to ensure that the records that LB11 was ordered to submit were correct and complete, the court appointed an expert in the matter at hand (who could reliably study the records that the trade mark proprietor Hennessy had requested access to) to review the seized records. This expert could be chosen by Hennessy, but had to be independent (thus excluding, one can assume, anyone with direct ties to Hennessy, such as an employee). Furthermore, this expert was ordered to maintain overall and complete confidentiality towards any third party (by mean of a protective order) on any information gathered from reviewing the records and, towards Hennessy specifically, maintain confidentiality on any information not linked to the trade mark infringement claim in the main case. By introducing the expert as a “middle man”, disclosure of confidential information that served no use to the main case could be limited to an absolute minimum.

Another example of a “confidentiality construction” is shown in the *Wärtsilä v various anonymous* case.²³ In order to substantiate an alleged copyright infringement, Wärtsilä had seized records belonging to a defendant for evidence and requested access thereto. The court granted Wärtsilä’s request, but allowed the defendant to redact parts in the records that did not relate to the alleged infringement. Again, the court ordered that an expert, appointed by the plaintiff Wärtsilä, would review the seized records. The expert was to verify two things: that the blackened parts had been justly redacted by the defendant (i.e. that they related to confidential information which was not relevant for the alleged copyright infringement) and that the copies of the records that the defendant was ordered to provide were correct and

¹⁸ Supreme Court, 18 November 2016 (*Synthon v Astellas*), NL:HR:2016:2834. Also see the order of the European Court of Justice of 23 January 2018, *Synthon BV v Astellas Pharma Inc* (C-644/16), EU:C:2018:61.

¹⁹ Court of Appeal of The Hague, 28 June 2016 (*Plantlab v Certhon*), NL:GHDHA:2016:1734; District Court Midden-Nederland, 2 November 2018 (*Tomra v Kiremko*), NL:RBMNE:2018:5609; and District Court The Hague, 1 February 2019 (*AB Inbev v Heineken*), NL:RBDHA:2019:853.

²⁰ Parliamentary history, MvT, Kamerstukken II 2005/06, 30392, p.19.

²¹ Supreme Court, 25 October 2018 (*Syngenta v A*), NL:HR:2018:1985

²² District Court, The Hague, 7 July 2017 (*Hennessy v LB11*), NL:RBDHA:2017:7541.

²³ District Court Midden-Nederland, 8 August 2018 (*Wärtsilä v various anonymous*), NL:RBMNE:2018:3715.

complete. Interestingly, the duty to review also the redacted parts was explicitly included in the order. Another remarkable point was that the court elaborated that, if the expert concluded that the defendant had not adhered to the aforementioned orders, Wärtsilä could ask the court to decide on this issue, whereby the court would assess the opinion of the expert in light of the full and uncensored records, thus including the redacted information. It is unknown what the court would do in the case where it concludes that the expert was wrong and the defendant had indeed the right to redact parts of the records. It is not unthinkable that, if the court were to be of the same composition as the court in the main proceedings, it would have to refer the case to another chamber of the court consisting of judges without knowledge of the confidential parts, i.e. apply the measure set out in art.22 DCCP.

A last and recent, noteworthy example in this context is the case of *Tomra v Kiremko*.²⁴ The patent proprietor Tomra requested access to records relating to an allegedly infringing machine that was seized for evidence. Kiremko argued that the seized records contained competitively confidential information. Also in this case, the court adopted a construction to safeguard the confidentiality of the seized records and regulate the information that would ultimately be shared with Tomra. However, the primary selection (i.e. supplying redacted records) was not left to the defendant Kiremko this time. Instead, the court instructed one of Tomra's lawyers and Tomra's patent attorney to select, from the seized record, the documents that (1) had relevance to the alleged patent infringement and (2) did not contain any of Kiremko's confidential information. During this process, the lawyer and the patent attorney were "sealed off" from their client: the court ordered them to maintain full confidentiality against any third party, including their client Tomra, with respect to all information they would gather during the selection process. Kiremko was then allowed a period of 15 working days to evaluate the selection made by the aforementioned persons and, if necessary, advance a motivated objection against (part of) this selection on grounds of confidentiality. The lawyers of both parties would then discuss the objections of Kiremko and, if necessary, present a dispute relating to such to the court, who would ultimately decide. Only after the lawyers of both parties reached an agreement (or the court decided) on the final selection of documentation to be disclosed would the protective order be lifted, but only with respect to Tomra (i.e. not to third parties) and only for the information contained in the agreed selection.

Furthermore, Tomra would be under a protective order not to disclose anything from the selection of information to any third party and to only use the information for evidence in court proceedings against Kiremko for patent infringement. In order to ensure the protective orders were effective, a hefty incremental penalty of €100,000 for any violation was imposed as well.²⁵

These cases, all quite recent, show that the Dutch courts have become willing to allow the selection and redaction of documentation prior to granting limited discovery. One might even spot certain similarities with the British instrument of the confidentiality club. However, it is important to note that the ultimate result of the selection by the disclosing party and, possibly, experts, lawyers and/or patent attorneys, is still submitted in proceedings for use by all parties in suit, thereby adhering to the right to a fair trial as established in art.6 ECHR.

Trade secrets—new legislation

As briefly referred to in the introduction of this article, the protection of trade secrets has seen some interesting developments in Dutch (case) law. Although not recognised as an IP right in the Netherlands,²⁶ the Supreme Court has ruled that some legal means to secure evidence originally meant for IP rights (in particular, the provisional seizure of goods or other materials to obtain and/or secure evidence²⁷ and the detailed description, with or without the taking of samples, of such) may also be used in non-IP-related proceedings, inter alia in the case of suspected infringement of trade secrets. The recent case of *Dow Chemical v Organik*²⁸ shows a scheme similar to the ones discussed above. Here, the Court of Appeal granted Dow access to specific information relating to trade secrets allegedly stolen by Organik. The court ordered that a selection of information should be made by an impartial expert, who had to maintain confidentiality towards both parties. The parties were encouraged to first agree on which expert they would find suitable. Naturally, the specific issue at hand in this case was that the expert would have access to both the (allegedly infringed) confidential trade secrets of Dow and the (also confidential) information on methods of manufacture of polymers of the alleged infringer Organik in order to make a proper selection and thus, in contrast to the cases discussed above, the expert was handling confidential information from both sides. Although IP rights are not confidential and thus generally this issue will not come up, this scheme could also be useful for "mixed" cases, involving both IP rights and trade secrets.²⁹ It is interesting to note that, because the selection had to

²⁴ District Court Midden-Nederland, 2 November 2018 (*Tomra v Kiremko*), NL:RBMNE:2018:5609.

²⁵ Also see the judgment of the Court of Appeal of The Hague of 30 April 2019, case no. 200.222.235/01, *LB11 v Hennessy*, where the Court of Appeal imposed an incremental penalty of €300,000 (with a maximum of €3,000,000) per violation of the protective order in accordance with art.1019ib DCCP.

²⁶ Compare also Recital 16 of Directive 2016/943, which could be constructed as meaning such. For dissenting views, compare also W.E. Pors, "Nieuwe bescherming van bedrijfsgeheimen in Nederland", TOP 2018/4, p.21.

²⁷ Compare also Supreme Court, 13 September 2013 (*Molenbeek Invest v Begeer*), NL:HR:2013:BZ9958.

²⁸ Supreme Court, 28 September 2018 (*Dow Chemical v Organik*), NL:HR:2018:1775.

²⁹ Of course, also in IP cases confidentiality issues may work both ways with respect to evidence of infringement. In the case of *Converse v Alpi International*, the authentic features used by Converse to detect counterfeited shoes were, for obvious reasons, confidential and could therefore not be provided to the alleged infringer Alpi. The court thereupon appointed an independent expert who was provided with information about these features (coupled with a protective order not to share this information with Alpi).

be executed in a strictly impartial manner, required specific (technical) expertise and implied knowledge of confidential information of Organik, the court explicitly denied the selection of evidence by Dow’s legal team.

In addition to the case law set out above, by means of the Dutch Act for the Protection of Trade Secrets (DAPT), which entered into effect on 23 October 2018,³⁰ The Netherlands implemented EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The Netherlands also added two articles to the DCCP which deal specifically with confidential information relating to trade secrets in a civil suit.

A new art.1019ib DCCP aims to safeguard the confidential treatment of trade secrets that are the subject of a legal dispute during proceedings. First, it codifies a specific protective order for trade secrets for parties, their lawyers or other representatives, witnesses, experts and other persons who participate in legal proceedings concerning the unlawful acquisition, use or disclosure of a trade secret, or who have access to the documents that are part of these legal proceedings. All these persons are prohibited from using or disclosing any (alleged) trade secrets that are marked as confidential by the court, and which trade secrets have come to their attention as a result of (1) the participation in legal proceedings or (2) access to documents as part of legal proceedings. The court may declare trade secrets to be confidential upon the request of a party. The protective injunction stays in place after the conclusion of proceedings, unless the information becomes generally known to the public or becomes otherwise easily accessible for parties that are engaged in the use of such.

Furthermore, the court may decide to restrict access to documents or hearings that disclose the trade secrets in suit to a limited group of persons. The size of this group should not be larger than necessary to ensure a fair trial, and should at least consist of one natural person from each party as well as the lawyers (or other representatives). Furthermore, the public version of the judgment may be redacted so as to remove the parts that relate to the trade secrets in suit.

Article 1019ib DCCP only safeguards the protection of trade secrets that are the subject of the dispute. It is, however, possible that parties must disclose trade secrets to the court (e.g. as evidence), but that these trade secrets are not in themselves subject of the dispute. For instance, a party may need to disclose a secret manufacturing method to defend itself against an alleged patent infringement. To protect trade secrets in these kinds of situations, a new art.22a(3) DCCP was added.³¹ This article stipulates that the court may decide to grant access to documents *solely* to a lawyer from an opposing party

or another party’s representative that receives special permission thereto from the court, if access to those documents by the opposing party itself would harm the protection of trade secrets *disproportionately*.

These possibilities of maintaining confidentiality of information qualified as trade secrets appear to be substantially further-reaching than other confidentiality options provided by Dutch law. In theory, this legislation creates the possibility of deciding a case on the basis of information known only to the court, the disclosing party and the lawyers involved in a case, but not by an opposing party itself (at least, in cases where the trade secret is not the subject of the proceedings) and, as it appears now, *without that party agreeing to such* (unlike the system set out earlier). It will be interesting to see how this will further develop in practice, in particular regarding the questions of what the threshold will be for secret know-how to be considered a “trade secret” in the sense of the DAPT (a set of specific requirements relating to the treatment and the content of the know-how apply), when harming the protection of the said trade secrets will be considered disproportionate, and how often a court will apply this instrument.

Conclusion

Although the Dutch system is still quite far away from discovery or disclosure as known in the US or UK respectively, over the last few years there have been substantial developments in Dutch civil procedural law. There are many (new) tools that the courts may use to acquire additional information and to grant parties access to (seized) information that is relevant for the case at hand.

The possibilities for a court and/or a party to “ask” for information, and to put pressure on a party to “tell”, i.e. to disclose certain information, have increased, and with that has come also the need for protection of confidential information. As discussed, courts have made use of the possibilities provided by law to devise schemes in which a shift is made in information to be ultimately submitted into proceedings. The Dutch courts are still vigilant in avoiding fishing expeditions, and ultimately, after the strict selection procedures, information is still made accessible to all parties in proceedings, guaranteeing adherence to the important principle of a fair trial, in particular the adversarial principle. However, a clear development towards more discovery of information, and together with that an eye for the need of safeguarding confidential information, is undeniable.

and asked to set out his findings in a report without disclosing the features of authenticity. The court judged that, by being able to effectively comment on the expert’s opinion, Alpi’s right to be heard and right to a fair trial were guaranteed (compare also The Hague District Court 6 April 2016 (*Converse v Alpi International*), NL:RBDHA:2016:4697).

³⁰ In Dutch: Wet bescherming bedrijfsgeheimen (Stb. 2018, 369, i.w.tr. Stb. 2018, 370), which is the implementation of Directive) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

³¹ Parliamentary history, Kamerstukken II 2017–18, no. 34 821, 10 1.

And there might be more to come. A new Dutch draft legislative proposal was published on 31 May 2018 for consultation purposes.³² The legislative proposal concerns new rules for civil procedure, with the objective to simplify and modernise the rules on gathering information and evidence prior to and during a civil procedure. Among other things, the draft proposal contains a new version of

art.843a DCCP, with a lower threshold for obtaining access to information than the threshold that presently applies. It will be interesting to see how this will further develop. However, the present situation already shows an unprecedented possibility in the Netherlands to obtain information and, at the same time, protect confidential information in ongoing (IP and trade secrets) proceedings.

³² The draft legislation originates from advice from an expert group presented to the Ministry on 10 April 2017, showing that this concerns a very recent development that nonetheless appears to be moving with some speed. The consultation opportunity ended on 29 July 2018, after numerous comments from practitioners on the draft proposal were received.